International Centre for Settlement of Investment Disputes
(ICSID)

Worth Capital Holdings 27 LLC,
Claimant

v.

Republic of Peru,
Respondent

ICSID Case No. ARB/20/51

Republic of Peru's Memorial on Jurisdiction and Counter-Memorial on Merits

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3 October 2022

Arnold & Porter

TABLE OF CONTENTS

GLOSSARY

Term	Description
Aguaytía Energy	Aguaytía Energy del Peru S.R.L., a supplier of natural gas feedstock
AlixPartners Report	Expert report of AlixPartners, a financial advisory and global consulting firm, regarding the quantum issues in relation to Claimant's claim (**RER-02**)
Block 31 Fields	Fields in Block 31 for which Maple Gas held a license (viz., Blocks 31-B, 31-D, and 31-E)
Block 31 License Agreements	Two license agreements between PERUPETRO and Maple Gas granting the latter the rights to explore and exploit the Block 31 Fields (**Exhibits R-0011 and R-0053**)
Block 126 Application Damages Claim	Claimant's damages claim in this arbitration, seeking the alleged fair market value of Block 126
Block 126 Fields	Fields in Block 126 for which Frontera held a license until December 2017
Block 126 License	License agreement between PERUPETRO and Frontera granting the latter the rights to explore and exploit the Block 126 fields (**Exhibit R-0131**)
Blue Oil	Blue Oil Trading Ltd.
CEPSA	CEPSA Perú S.A., a subsidiary of Spanish multinational oil and gas company Compañía Española de Petróleos, S.A.U., and a supplier of crude feedstock
Claimant or **Worth Capital**	Worth Capital Holdings 27 LLC
Compass Lexecon Report	Report submitted by Claimant's expert, Compass Lexecon, dated 25 March 2022
Creditor Banks	Banco Itau BBA S.A., Banco Internacional del Perú S.A.A., Bancolombia Puerto Rico International Inc., and Corporación Financiera de Desarrollo S.A., the banks that took operational control of Maple Gas in 2014

Term	Description
Critical Date	24 November 2017, three years before Claimant initiated this arbitration, which serves as the cut-off date for the purpose of the Treaty's Temporal Limitations Provision
Date of Investment	15 June 2017, the date on which Claimant Worth Capital effectively acquired shares in Jancell
DCF	Discounted Cash Flow
Draft License Amendment	The draft contract that reflected the proposed modifications of Maple Gas and Frontera to the Block 126 License (**Exhibit R-0133**)
Exploitation Phase	The second of two phases for the Block 126 License, during which resources are to be exploited
Exploration Phase	The first of two phases for the Block 126 License, during which exploratory activities are to take place
Expropriation Provision	Article 10.7 of the Treaty
feedstock	Raw materials (e.g., crude oil and natural gas) that are fed into a refinery to produced processed products
FET	Fair and equitable treatment
Frontera	Frontera Energy Corporation, formerly, Pacific Stratus Energy del Perú S.R.L., which held the Block 126 License until December 2017
General Administrative Procedure Law	*Ley del Procedimiento Administrativo General*, Peruvian Law No. 27444, 22 January 2019 (**Exhibit R-0150**)
Guarantee	The guarantee provided by Frontera on 18 December 2014 in order to secure the Block 126 License (**Exhibit R-0131**)
Hidro-Carburos Report	Report submitted by Claimant's expert, Hidro-Carburos Consulting, dated 25 March 2022
Hydrocarbons Law	*Ley Orgánica de Hidrocarburos*, Peruvian Law No. 26221, 19 August 1993 (**Exhibit R-0139**)

Term	Description
ICC Arbitration	*Aguaytia Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK
ICC Award	Award issued in the ICC Arbitration (**Exhibit R-0001**)
ICC Tribunal	Tribunal constituted in the ICC Arbitration
ILC Articles	International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (**Exhibit CL-0005)**
INDECOPI	National Institute for the Defense of Competition and the Protection of Intellectual Property (*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual*), Peru's antitrust and bankruptcy authority
Iquitos Refinery	Refinery owned by Petroperú in Iquitos, Peru
Jancell	Jancell Corporation, a Panamanian holding company, which came to hold shares in Maple Gas
Lima Arbitration	*Petróleos del Perú v. Maple Gas Corporation del Perú S.R.L.*, Caso Arbitral No. 258-2018-CCL (Lima Chamber of Commerce, Arbitration Centre)
Lima Award	Award issued in the Lima Arbitration (**Exhibit R-0002**)
Lima Tribunal	Tribunal constituted in the Lima Arbitration
Maple Biocombustibles	Maple Biocombustibles S.R.L., a company affiliated with Maple Gas, which defaulted on loans to the Creditor Banks
Maple Etanol	Maple Etanol S.R.L., a company affiliated with Maple Gas, which defaulted on loans to the Creditor Banks
Maple Gas	Maple Gas Corporation Del Peru S.R.L.
Maple Gas-Aguaytía Energy Exclusive Supply Agreement	Agreement dated 24 July 1996 between Maple Gas and Aguaytía Energy for the exclusive supply of feedstock by Aguaytía Energy to Maple Gas

Term	Description
Maple Gas' Application	Maple Gas' application to PERUPETRO, dated 5 June 2017, for qualification to obtain the Block 126 License (**Exhibit C-0037**)
MB	Million barrels of crude oil
MEF	Peru's Ministry of Economy and Finance (*Ministerio de Economía y Finanzas*)
Memorial	Claimant's Memorial dated 25 March 2022
MINEM	Peru's Ministry of Energy and Mines (*Ministerio de Energía y Minas*)
Minimum Contracting Capacity	Amount of money that would be required to perform the expected work on a relevant block, which PERUPETRO uses to determine whether a company is qualified to obtain a license for that block
MSTB	Thousands of stock tank barrels
Minimum Standard of Treatment Provision	Article 10.5 of the Treaty
MST	Minimum standard of treatment under customary international law
OEFA	Agency for Environmental Assessment and Enforcement (*Organismo de Evaluación y Fiscalización Ambiental*), Peru's environmental regulator
Office of the Comptroller General	Peru's Office of the Comptroller General (*Contraloría General de la República del Perú*), an independent State agency charged with supervising and monitoring the application of public policies and the use of State resources
Parsdome	Parsdome Holdings Ltd., a holding company registered in the British Virgin Islands that was involved in the acquisition of Maple Gas' debt in October 2015
Peru	Republic of Peru (*República del Perú*)

Term	Description
PERUPETRO	PERUPETRO S.A., Peruvian State-owned oil company that grants licenses for the exploration and exploitation of oil and gas fields
Petroperú	Petróleos del Perú - Petroperú S.A., Peruvian State-owned oil company that engages in commercial activities
Pucallpa Refinery	The oil and gas refinery in Pucallpa, Peru, which Petroperú leased to Maple Gas
Qualification Commission	PERUPETRO's permanent commission charged with determining whether applicant companies are qualified to acquire licenses
Qualification Regulations	Supreme Decree No. 030-2004-EM dated 18 August 2004, codifying the regulations that require all oil companies to be qualified by PERUPETRO in order to acquire a license to explore and exploit natural resource fields
RAD Services	Services for the reception, storage, and dispatch (*recepción, almacenamiento y despacho*) of material (e.g., crude oil)
Rectification Decision	Letter dated 27 November 2017 through which PERUPETRO rectified its error in the initial review of Maple Gas' application for qualification to acquire the Block 126 License (**Exhibit C-0044**)
Reconsideration Rejection	Letter dated 4 January 2018 from PERUPETRO to Maple Gas, rejecting Maple Gas' Request for Reconsideration (**Exhibit C-0046**)
Refinery Damages Claim	Claimant's damages claim in this arbitration, seeking the alleged fair market value of the Pucallpa Refinery
Refinery Lease Agreement	The lease agreement between Petroperú and Maple Gas for the Pucallpa Refinery (**Exhibit R-0038**)
Request for Reconsideration	Letter dated 13 December 2017 through which Maple Gas requested that PERUPETRO reconsider the Rectification Decision (**Exhibit C-0045**)

Term	Description
Retention Period	A period that may take place after the Exploration Phase during which a licensee may develop transportation infrastructure
Sheshea Field	A field in Block 126 in which Frontera had drilled and abandoned an exploratory well
Stage 5 Work	The work that Frontera was required to complete during the fifth and final stage of the Exploration Phase
Tank No. 1	The tank in the Pucallpa Refinery referred to in the Refinery Lease Agreement that Petroperú would use for RAD Services
Temporal Limitations Provision	Article 10.18.1 of the Treaty, which precludes claims for alleged breaches and alleged loss in respect of which Claimant had actual or constructive knowledge more than three years before it initiated this arbitration
Trailon	Trailon Enterprises S.A., a Panamanian holding company which was involved in the acquisition of Maple Gas' debt in October 2015
Treaty	United States-Peru Free Trade Agreement, which entered into force of 1 February 2009 (**RL-0001**)
Ucayali	Department of Ucayali, an inland region of Peru
USD	US dollar, official currency of the United States of America
Working Group	The internal working group within Contract Management Department of PERUPETRO, established to negotiate the proposed modification of the Block 126 License
2010 Guidelines	The objective criteria applied by PERUPETRO to determine whether companies were qualified to acquire licenses to operate oil and gas fields, as codified by PERUPETRO's Board of Directors' Decree No. 048-2010, which were in force when Maple Gas submitted its Application on 5 June 2017 (**Exhibit R-0072**)

Term	Description
2017 Guidelines	The objective criteria applied by PERUPETRO to determine whether companies were qualified to acquire licenses to operate oil and gas fields, as codified by PERUPETRO's Board of Directors' Decree No. 049-2017, which replaced the 2010 Guidelines (**Exhibit R-0073**)

I. INTRODUCTION

1. This arbitration arises out of an ill-advised investment made by Claimant Worth Capital Holdings 27 LLC ("**Claimant**") in Maple Gas Corporation Del Perú S.R.L. ("**Maple Gas**"), a failing oil and gas company in the Republic of Peru ("**Peru**"). Not long after Claimant made its purported investment, Maple Gas ceased all operations, defaulted on its contractual obligations, and was declared insolvent, facing mountains of debt—including two arbitral awards totalling more than USD 29.3 million resulting from contractual breaches and other misconduct by Maple Gas. Unsurprisingly, Claimant and its sole owner, Mr. Charles Holzer, now rue having carelessly invested millions of US dollars ("**USD**") into an enterprise that was teetering on the edge of collapse. Although they bear sole responsibility, they have initiated this arbitration in an attempt to shift responsibility to Peru, in the misguided hope that the United State-Peru Trade Promotion Agreement (the "**Treaty**") will serve as an insurance policy against their poor business judgment.

2. For the reasons expounded in this Counter-Memorial, all of Claimant's claims should be rejected, for several reasons: they fall outside the jurisdiction *ratione temporis* and *ratione materiae* of this Tribunal; they rest almost entirely on a manifestly nonsensical conspiracy theory, for which there is not a shred of evidence; and they fail to meet the two most basic elements of an internationally wrongful act of a State under customary international law: attribution and the breach of an international obligation of a State.

A. Summary of key facts

3. Since 1994, Maple Gas had operated an oil and gas project in the Department of Ucayali ("**Ucayali**"), a remote inland region located in the Amazon rainforest within Peru. The project consisted of two licenses to exploit oil fields ("**Block 31 License Agreements**") and a leasehold over a refinery ("**Pucallpa Refinery**") owned by a State-owned enterprise, Petróleos del Perú - Petroperú S.A. ("**Petroperú**"). Natural gas and crude oil (referred to as "**feedstock**") are processed at the Pucallpa Refinery to produce refined oil products.

4. By 2015, even before Claimant acquired Maple Gas, the latter was in serious financial trouble: it had over time depleted the crude oil reserves in its licensed oil fields; its production from the Pucallpa Refinery was in decline; it had become crippled by debt, to the point where creditors seized operational control of the company in 2014; it was unable to pay Aguaytía Energy, its primary supplier of feedstock; and it faced sanctions for violations of environmental and other regulations at the leased Pucallpa Refinery. Given Maple Gas' decline, Petroperú purchased feedstock and produced refined products to supply the local market. As Claimant concedes, Petroperú was engaging in these commercial activities in its capacity as a supplier of last resort.

5. Nevertheless, in the fall of 2015, prior to Mr. Holzer's and Claimant's involvement, a group of investors decided to acquire Maple Gas. The initiative was led by two former employees of Maple Gas' parent company, Messrs. Jack Hanks and Nabil Katabi, who recruited Mr. Matias Rojas. Although Claimant's Memorial dated 25 March 2022 ("**Memorial**") paints an incomplete and self-serving picture of Maple Gas' finances and contentious commercial relationships at the time, this group of investors was aware of Maple Gas' serious financial and commercial difficulties, including its mounting debts, an outstanding claim for millions of USD in unpaid invoices from Aguaytía Energy, and the desperate need to secure a new source of feedstock for the Pucallpa Refinery. Even though they did not succeed in securing an agreement to purchase feedstock from a new targeted supplier (namely, CEPSA Peru S.A. ("**CEPSA**")), those investors decided to go ahead and invest in Maple Gas. They did so by acquiring Maple Gas' millions of dollars of USD of debt, rather than an equity interest in the company.

6. In late 2015 and early 2016, Maple Gas' situation continued its downward spiral. Under its new management, Maple Gas continued to pursue a feedstock supply agreement with CEPSA, to no avail. CEPSA, however, had been delivering and storing its crude at the port facilities controlled by Maple Gas pursuant to an earlier agreement with Maple Gas. In January 2016, Maple Gas—apparently trying to force CEPSA into a feedstock supply agreement—abruptly refused to allow CEPSA to deliver its crude to the port facilities controlled by Maple Gas. This belligerent tactic

backfired, as it further antagonized CEPSA and made it even more reluctant to enter into a long-term supply agreement with Maple Gas.

7. Without a new supplier of feedstock, Maple Gas remained reliant upon Aguaytía Energy for feedstock to operate the Pucallpa Refinery. Yet Maple Gas managed to ruin that relationship as well: in early 2016, Maple Gas ended negotiations concerning the terms of its long-term, exclusive supply agreement with Aguaytía Energy, which led to the termination of such agreement. Maple Gas, which owed Aguaytía Energy approximately USD 5 million for unpaid feedstock supply in 2014, ceased paying for the feedstock supplied by Aguaytía Energy, accruing an additional USD 13 million in debt. As a result of Maple Gas' actions, Aguaytía Energy initiated an arbitration administered by the International Chamber of Commerce ("**ICC Arbitration**"). The tribunal in that arbitration ("**ICC Tribunal**") issued an award on 21 December 2018, ordering Maple Gas to pay more than USD 21.6 million in compensation to Aguaytía Energy for the unpaid supply.

8. In short, by the end of 2016, Maple Gas had destroyed its commercial relationship with Aguaytía Energy, had alienated potential new supplier CEPSA, had substantially depleted its own licensed oil fields, and was reporting significant losses year over year. It was at this point—when matters could hardly be worse for Maple Gas—that Mr. Holzer entered the picture.

9. Mr. Holzer manages his family's fortune, and resides in Florida. By his own admission, he "focus[es] on real estate."[1] Even in his chosen area of "focus," however, Mr. Holzer has a history of rashness and lack of business judgment: in 2013, a U.S. court adjudicating claims submitted by Mr. Holzer found that he and his mother had *each* paid USD 1 million dollars for luxury apartments in a building in Dubai that simply did not exist. The court dismissed Mr. Holzer's claims, observing that in his "haste to latch onto a 'riskless', overseas real estate investment . . . [he] threw caution to the wind and wired $2 million **before conducting the most basic of inquiries that**

[1] Holzer Witness Statement, ¶ 5.

would have revealed that the Building was just a hole in the ground"[2] (emphasis added).

10. Evidently having failed to learn anything from that prior experience, Mr. Holzer once again threw caution to the wind with a purported investment in Peru, when he decided to acquire Maple Gas. Mr. Holzer had no experience investing in Peru, or in its highly-regulated oil and gas sector. Nevertheless, in 2016, Mr. Holzer was persuaded by his college friend, Mr. Rojas, to invest in Maple Gas. Mr. Holzer explains in his witness statement that his basis for investing was that "the Maple Gas opportunity sounded interesting."[3] But rather than "interesting," the proposed investment in Maple Gas was downright perilous; even the most basic due diligence would have revealed that the company was facing claims from its ex-supplier, was experiencing a prolonged supply shortage, was millions of USD in debt, and was on the brink of collapse.

11. Either oblivious to the calamitous state of Maple Gas, or simply undeterred by it, Mr. Holzer forged ahead. Accordingly, by Mr. Holzer's own account, he created Worth Capital, purchased indirect ownership interest in nearly all of Maple Gas' shares for USD 15 million, and entered into an agreement to guarantee USD 47 million of Maple Gas' debt. The predecessor investors in Maple Gas, including Mr. Holzer's college friend, seized the opportunity and quickly exited the "interesting" investment.

12. Mr. Holzer seems not to even have a clear understanding of when exactly he made his multi-million USD investment. He alleges in his witness statement that his investment vehicle, Worth Capital, acquired indirect ownership over nearly all of Maple Gas' shares on *27* November 2016, whereas Claimant in the Memorial alleges that the investment took place on *24* November. In any event, neither date is correct: as a legal

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[2] *See* **Ex. R-0003**, *Holzer v. Mondadori*, 40 Misc. 3d 1233(A), 980 N.Y.S.2d 276 (Sup. Ct. 2013), pp. 1, 4 (explaining that Rusty Holzer and his mother, Jane Holzer, were "duped . . . into buying luxury apartments in a building in Dubai that did not and does not exist" and finding that "in their haste to latch onto a 'riskless', overseas real estate investment with the supposed potential for imminent lucrative returns, **[Rusty and Jane] threw caution to the wind and wired [USD] $2 million before conducting the most basic of inquires that would have revealed that the Building was just a hole in the ground**") (emphasis added).

[3] Holzer Witness Statement, ¶ 6.

matter, the shares were not transferred formally until 15 June 2017—more than six months later. As explained in **Section III** below, this fact—which Claimant either inadvertently ignored or deliberately avoided in the Memorial—limits this Tribunal's jurisdiction *ratione temporis*.

13. According to his witness statement, Mr. Holzer knew just enough to appreciate that Maple Gas' survival depended on its ability to secure a new source of feedstock to run the Pucallpa Refinery. He alleges that he believed that such source could potentially be found in "Block 126," a group of oil fields in Ucayali. At the time, a Canadian oil and gas company, Frontera Energy Corporation ("**Frontera**"), held the exploration and exploitation rights to Block 126 ("**Block 126 License**"). Mr. Holzer's—and thus Claimant's—entire investment strategy consisted in acquiring the Block 126 License from Frontera.

14. Frontera was eager to oblige, as its efforts to exploit the Block 126 fields ("**Block 126 Fields**") had been fruitless. Indeed, having found less-than-expected exploitable crude oil reserves, Frontera had abandoned its exploratory wells and stopped work in Block 126, which meant that at least USD 79 million would be required to even begin effective exploitation of that Block.[4] Also, time had run out on Frontera: the Block 126 License was due to expire in December 2017.

15. Despite these daunting odds, Maple Gas agreed to purchase the soon-to-expire Block 126 License from Frontera. In the Memorial, Claimant tells its own story of the process by which it sought to acquire the Block 126 License from Frontera—a story replete with misrepresentations, material omissions, and even conspiracies. As shown herein, such story is disproved by the evidence.

16. As Maple Gas knew—and as Mr. Holzer and Claimant should have known—the oil and gas sector is highly regulated in Peru. Licenses to explore and exploit oil and natural gas fields are granted by the State-owned company PERUPETRO S.A. ("**PERUPETRO**"). Pursuant to Peruvian law and regulations, a company seeking to obtain such a license must apply and be pre-qualified by PERUPETRO as an oil and

[4] *See* **Ex. C-0196**, Letter from Frontera to PERUPETRO, 27 September 2017, pp. 2–4.

gas company capable of exploring and exploiting a specific field. Specifically, qualification is obtained by satisfying certain objective criteria of general application which are designed to ascertain whether the company has the financial and technical capacity to explore and exploit the country's natural resources. If an applicant company was able to satisfy those objective criteria, PERUPETRO would issue a qualification certificate to the company. At the time that Maple Gas submitted its application for qualification on 5 June 2017, the relevant objective qualification criteria were codified in PERUPETRO's Board of Directors' Decree No. 048-2010 ("**2010 Guidelines**"). The 2010 Guidelines required PERUPETRO to assess the applicant company's financial capacity based upon the latter's audited financial statements for the two years immediately preceding the date of application.

17. With its application, Maple Gas had initially submitted *unaudited* pro forma financial statements, rather than audited ones as was required. In response to a request from PERUPETRO, Maple Gas then submitted audited statements, as required by regulation. Thereafter, during its initial review of Maple Gas' application, PERUPETRO's employees erroneously used as the basis for their review the *un*audited pro forma statements that had been submitted originally by Maple Gas, rather than the *audited* financial statements that the company had subsequently presented. As was eventually discovered, there were material and significant differences between the unaudited pro forma and audited statements—in particular, the former had reflected more than USD 47 million in accounts receivable, thereby artificially inflating the strength of Maple Gas' financial position.

18. On the basis of the incorrect financial statements, on 11 August 2017, PERUPETRO deemed Maple Gas qualified to hold the Block 126 License, and thus issued it a qualification certificate. Two months later, however, on 4 October 2017, Peru's *Contraloría General* ("**Office of the Comptroller General**"), an independent State agency, discovered that PERUPETRO had committed an error in the qualification process for another oil and gas company. Such company had applied to obtain a license for a different block (Block 192). The Office of the Comptroller General instructed PERUPETRO to re-review the corresponding application and to take

appropriate action. Pursuant to that instruction, PERUPETRO then ordered an internal review of other recent qualification determinations—including that of Maple Gas.

19. Through this review, PERUPETRO identified the mistake that had been made during the review of Maple Gas' application. PERUPETRO thus re-reviewed the application, using the correct information (i.e., Maple Gas' audited statements), as required by the 2010 Guidelines. Upon completion of such review, PERUPETRO determined that Maple Gas did *not* meet the objective criteria under the 2010 Guidelines, because it did not have the requisite financial capacity to explore and exploit Block 126. Accordingly, on 27 November 2017, PERUPETRO sent a letter to Maple Gas, identifying the error, and revoking the previously-issued qualification decision ("**Rectification Decision**").

20. Both Maple Gas and Claimant have submitted complaints about the Rectification Decision, including to PERUPETRO, to Peruvian courts, and to this Tribunal. However, at no point has either of them ever argued—let alone demonstrated—that Maple Gas satisfied the objective criteria under the 2010 Guidelines. *Both Maple Gas and Claimant have thus implicitly conceded that Maple Gas was not qualified to hold the Block 126 License under Peruvian law*. This is fatal to Claimant's claims in this arbitration, for reasons that will be discussed in detail in **Sections II.H** and **IV** below.

21. Lacking any viable argument that Maple Gas was eligible under Peruvian law to obtain the Block 126 License, Maple Gas and Claimant have resorted to procedural complaints about the Rectification Decision, none of which have merit under Peruvian law—and which, in any event, do not raise to the level of an internationally wrongful act. For example, Claimant argues in the Memorial that PERUPETRO failed to provide an explanation for its Rectification Decision. To the contrary, however, PERUPETRO did provide a reasoned and sound explanation, in its letter dated 27 November 2017, which is in the record as Exhibit C-0044.

22. Claimant also suggests in the Memorial that rather than the 2010 Guidelines, PERUPETRO should have applied the subsequent iteration of the guidelines, adopted in Decree No. 049-2017 ("**2017 Guidelines**"), *after* Maple Gas had submitted its application for qualification on 5 June 2017. Notably, this argument was never raised

by Maple Gas at the domestic level, for good reason: Claimant's newfangled argument ignores key facts. These include: (i) that the 2010 Guidelines were undeniably still in force when Maple Gas submitted its application on 5 June 2017; (ii) Maple Gas' own application had been submitted on the basis of the 2010 Guidelines; and (iii) in any event, even if the 2017 Guidelines *had* indeed been applicable (quod non), Maple Gas did not satisfy the objective criteria under those guidelines to qualify for the Block 126 License.

23. Claimant's mischaracterizations are not limited to the qualification process, however. Under Peruvian law, a company that is qualified to hold a license must also negotiate the terms of the license contract and complete a mandatory review and approval process requiring review by multiple governmental bodies, including PERUPETRO, the Ministry of Energy and Mines ("**MINEM**"), the Ministry of Economy and Finance ("**MEF**"), and the President of the Republic. Claimant recognizes that these approvals were required by Peruvian law, but alleges that the government made a "political decision to block the transfer of the Block 126 License to Maple Gas."[5] That is manifestly false, however. At the time of the Rectification Decision, Maple Gas was in the process of negotiating with PERUPETRO proposed changes to the license contract, but had not yet received the necessary approvals. The Rectification Decision clarified that Maple Gas was not qualified to obtain the Block 126 License; there was no decision—either from PERUPETRO or any State organ—to "block" Maple Gas from obtaining the Block 126 License.

24. In sum, Maple Gas was not—based on objective legal standards—eligible under Peruvian law to obtain the Block 126 License to explore and exploit the oil fields therein. It was for *that* reason—not the purported but baseless conspiracy theory concocted by Claimant—that Maple Gas did not obtain the Block 126 License.

25. Subsequent events confirmed that Maple Gas, far from being in a position to invest the millions of USD and years required to explore new oil fields in Block 126, had been on the brink of collapse. In December 2017, mere months after Claimant's investment,

[5] Memorial, ¶ 177.

Maple Gas shut down its operations at the Pucallpa Refinery. Shortly thereafter, in May 2018, Maple Gas refused to pay its rent under its lease agreement for the Pucallpa Refinery ("**Refinery Lease Agreement**"). Accordingly, in August 2018, Petroperú notified Maple Gas of the termination of the Refinery Lease Agreement based upon the company's failure to pay rent. Petroperú also initiated an arbitration against Maple Gas ("**Lima Arbitration**") under the dispute resolution provisions of the Refinery Lease Agreement, seeking inter alia the unpaid rent. In October 2020, the tribunal in the Lima Arbitration issued an award ordering Maple Gas to pay USD 7.7 million to Petroperú as compensation for the former's breach of its obligations under the Refinery Lease Agreement.

26. In the meantime, Maple Gas' freefall had continued. In August 2018, Maple Gas' creditors initiated bankruptcy proceedings and Maple Gas was declared insolvent in January 2019. In February and March 2019, Maple Gas' Block 31 License Agreements were terminated due to the company's failure to maintain contractually-mandated insurance coverage and also due to its insolvency.

27. In his witness statement in this arbitration, Mr. Holzer expresses the view that Maple Gas was "a good investment destroyed for no apparent reason."[6] But that statement is utterly detached from reality: Maple Gas was under no conception a "good investment." To the contrary, it was an enterprise on the brink of financial and commercial ruin when Claimant acquired an indirect interest in it in June 2017. Moreover, such investment was not "destroyed" by any conduct attributable to Petroperú, PERUPETRO, or any Peruvian State organ; rather, it fell under the weight of Maple Gas' own poor financial condition and mismanagement.

B. Claimant's claims should be dismissed

28. For the reasons summarized below, and elaborated in this submission, Claimant's claims must be dismissed.

[6] Holzer Witness Statement, ¶ 19.

1. The Tribunal lacks jurisdiction over Claimant's claims

29. As a threshold matter, the Tribunal lacks jurisdiction over Claimant's claims. The Treaty includes a temporal limitations clause (Article 10.18.1), which precludes a claimant from submitting claims more than three years after it first acquired or should have first acquired knowledge of the alleged breach(es) and alleged loss or damage. Claimant initiated this arbitration on 24 November 2020 but it first knew of the alleged breaches and alleged loss more than three years before that date, for which reason the Tribunal lacks jurisdiction *ratione temporis* over Claimant's claims (see **Section III.A** below).

30. This Tribunal's jurisdiction *ratione temporis* is also limited by the date on which Claimant made its investment. Because Claimant's claims are based on measures that took place *before* Claimant made its investment, its claims must be dismissed for lack of jurisdiction *ratione temporis* on that basis as well (see **Section III.B** below).

31. Claimant's claims also fall outside of the jurisdiction *ratione materiae* of the Tribunal. As Claimant acknowledges, both the Treaty and the ICSID Convention require Claimant to establish the existence of a protected investment. However, Claimant has provided a confused, imprecise, and unsubstantiated account of its purported acquisition of indirect shareholding in Maple Gas, which is insufficient to satisfy Claimant's burden of proving the facts required to establish juridiction (see **Section III.C** below).

32. Finally, Article 10.1.2 of the Treaty provides that the obligations of the investment chapter will apply to state enterprises—such as Petroperú—only when they are exercising delegated governmental authority. Several claims raised by Claimant in this arbitration are based on conduct that it attributes to Petroperú, but it has not demonstrated that Petroperú was exercising governmental authority. Such claims with respect to Petroperú must therefore be dismissed for lack of jurisdiction *ratione materiae* (see **Section III.D** below).

33. The actions of Petroperú are also not attributable to Peru under the customary international law principles of attribution codified in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful

Acts ("**ILC Articles**"). As a result, Peru cannot be held liable for Petroperú's alleged conduct.

2. Claimant's claims rely on a conspiracy theory that is unsubstantiated and baseless

34. Claimant has submitted two claims under the Treaty: an alleged breach of Article 10.5 ("**Minimum Standard of Treatment Provision**") and an alleged breach of Article 10.7 ("**Expropriation Provision**"). For each claim, Claimant argues a composite breach, consisting of an alleged "series of measures" by PERUPETRO, Petroperú, and the MINEM.[7] Under international law, a composite breach only occurs "where the actions in question disclose[] some link of underlying pattern or purpose between them."[8] In an attempt to cobble together its disparate complaints into a composite breach, Claimant has concocted a conspiracy theory according to which PERUPETRO, Petroperú, and the entire Peruvian State maliciously colluded to interfere with Maple Gas' business, with the intent to harm Blue Oil Trading Ltd. ("**Blue Oil**") (which was one of the companies that allegedly invested in Maple Gas in 2015, i.e., before Claimant acquired Maple Gas). This fanciful conspiracy theory forms the foundation of Claimant's composite breach claims.

35. Such conspiracy theory is merely the most recent version of events spun by Maple Gas and its investors to excuse its conduct and ultimate collapse. As noted above, Maple Gas was involved in two previous arbitrations related to the present dispute. In the ICC Arbitration, Maple Gas pointed the finger at *Aguaytía Energy*, accusing it of contractual breaches and of colluding with Petroperú. In that proceeding, Maple Gas sought more than USD 47 million in damages from Aguaytía Energy. However, the ICC Tribunal rejected all of Maple Gas' claims.

36. Having completely failed before the ICC Tribunal, Maple Gas switched tactics. In the Lima Arbitration, it abandoned its complaints against Aguaytía Energy, and instead

[7] Memorial, ¶ 475. *See also* Memorial, ¶ 488.

[8] **RL-0050**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271. *See also* **CL-0006**, ILC, *Yearbook of International Law Commission*, 2001, vol. II, Part Two, Art. 15, comment 5.

argued that *Petroperú* had engaged in a "concerted" effort to prevent Maple Gas from obtaining feedstock.[9] Maple Gas claims were again rejected, as the Lima Tribunal found no evidence of wrongdoing by Petroperú:

> In the present case, MAPLE has provided **no evidence** that [Petroperú's] such agreements [with Aguaytia Energy and CEPSA] are the result of concerted action or a top-down restrictive agreement that prevents suppliers from selling to buyers other than PETROPERU.[10] (Emphasis added)

37. In fact, the Lima Tribunal found that the evidence showed rather that *Maple Gas itself was to blame:*

> On the contrary, it is apparent from the evidence submitted that **MAPLE lost access to its natural crude oil suppliers as a result of its commercial disputes**.[11] (Emphasis added)

38. In the present ICSID arbitration, Maple Gas has changed tack yet again. Claimant and Mr. Holzer—aided by his friend Mr. Rojas and by Mr. Katabi—continue to blame Petroperú. This time, however, Claimant alleges that Petroperú attempted to interfere with Maple Gas' supply of feedstock as part of a government-wide conspiracy. Specifically, it claims that a commercial dispute between Pure Biofuels and Blue Oil in 2012 created animus between, on the one hand, Mr. Pedro Pablo Kuczynski (a Pure Biofuels director), and on the other hand, Mr. Rojas (founder of Blue Oil). Claimant's theory is thus that "[a]fter the Blue Oil Investment Group acquired Maple Gas, the government—through PERUPETRO and Petroperú—began a campaign to destroy Maple Gas's business."[12] However, there is simply not a scintilla of truth or evidence behind Claimant's theory, which fails for at least the following reasons.

39. *First*, the conspiracy theory is a fiction invented for the purpose of this arbitration. As noted above, this arbitration represents the *third* time that Maple Gas and its various investors have sought to blame others for Maple Gas' collapse. This time, Mr. Rojas

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[9] **Ex. R-0002**, *Petróleos Del Perú S.A. v. Maple Gas Corporation Del Perú S.R.L.*, Lima Arbitration No. 258-2018-CCL, Award, 8 October 2020 (Eyzaguirre, Berckemeyer, Ferrando) ("**Lima Arbitration (Award)**") ¶ 189.

[10] **Ex. R-0002**, Lima Arbitration (Award), ¶ 189.

[11] **Ex. R-0002**, Lima Arbitration (Award), ¶ 190.

[12] Memorial, ¶ 66.

alleges that he knew "[b]y the end of June 2016" that Maple Gas was being targeted because of Blue Oil's involvement.[13] However, not once in the two previous arbitrations had he or Maple Gas argued that the State-owned enterprises, Petroperú and PERUPETRO, had conspired with State organs to interfere with Maple Gas' operations as a form of retribution against Blue Oil. Indeed, when Mr. Rojas described his involvement in Maple Gas in his witness statement in the ICC Arbitration (which he submitted in April 2018), he made no mention whatsoever of any alleged government campaign to harm Blue Oil.[14] Similarly, in the Lima Arbitration, Maple Gas did not allege any conspiracy by Petroperú or any other company or State organ against Blue Oil; in fact, the latter was not mentioned. In this ICSID arbitration, however, the conspiracy against Blue Oil and Maple Gas takes center stage. Claimant introduces the conspiracy theory in the fifth paragraph of the Memorial, fashions the moniker "Blue Oil Investment Group"[15] (a name never previously used to describe the investors who acquired Maple Gas' debt in 2015), and then proceeds to make reference to "Blue Oil" no less than *eighty-four* times in the Memorial.

40. *Second*, there is no evidence to support this conspiracy theory. The premises of the conspiracy theory are that (i) Petroperú, PERUPETRO, and the MINEM were all engaged in a campaign directed by the Government, (ii) with the deliberate intent of harming Blue Oil. Yet Claimant has provided no evidence to support either premise. There is no evidence at all that then-President Kuczynski instructed Petroperú, PERUPETRO, or the MINEM—or anyone else, for that matter—to target Blue Oil. In any event, Mr. Guzmán, the former General Manager of PERUPETRO, confirms that he never received any such instruction.

41. Furthermore, there is no evidence that Blue Oil was identified to Petroperú, PERUPETRO, or the MINEM as an investor in Maple Gas or that these entities were instructed to harm Blue Oil through Maple Gas. In fact, as will be described in detail

[13] Rojas Witness Statement, ¶ 46.

[14] *See generally* **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018.

[15] *Compare* Memorial, ¶ 5 *with* **Ex. R-0002**, Lima Arbitration (Award), ¶ 126.

in **Section II.C** below, when the group of investors led by Messrs. Hanks and Katabi chose to acquire Maple Gas' debt in October 2015, they did so through a complex series of transactions using shell companies; a result, it was unclear then—and remains unclear now—exactly who or what was funding the shell companies acquiring Maple Gas' debt. In sum, the conspiracy theory has no legs.

42. *Third*, Claimant itself concedes that its conspiracy theory is no more than sheer speculation; in Claimant's words, the alleged government-wide conspiracy is "the most plausible explanation" for Maple Gas' predictable collapse.[16] Thus, the conspiracy theory is no more than supposition—and thus utterly insufficient to satisfy Claimant's burden of proving bad faith on the part of the State.

43. *Fourth*, Claimant's conspiracy theory is inconsistent with Claimant's own factual narrative. Under Claimant's account of the facts, there would have been no reason for any government entity to interfere with Maple Gas after Blue Oil divested its interest in Maple Gas in November 2016. This is conceded even by Claimant's own witnesses. For example, Mr. Rojas, the founder Blue Oil, claims that he decided to divest his interest in Maple Gas in November 2016 because "[b]y the end of June 2016" Maple Gas allegedly was being targeted due to Blue Oil's involvement.[17] As Mr. Holzer himself explains, the divestment by Blue Oil meant that "there would be **no reason** for Petroperú or others in the government to interfere with Maple Gas' business"[18] (emphasis added). Yet Claimant complains of alleged interference by Petroperú, PERUPETRO, and the MINEM that allegedly continued months and even years *after* Blue Oil ceased to have an interest in Maple Gas, which is illogical and belies Claimant's theory. For instance, Claimant complains of PERUPETRO's determination that Maple Gas was not qualified to obtain the Block 126 License (in November 2017), Petroperú's termination of the Lease Agreement (in August 2018), Maple Gas' declaration of insolvency (in January 2019), and the termination of Maple Gas'

[16] Memorial, ¶ 375. *See also* Memorial, ¶ 372 ("the most plausible conclusion"), ¶ 394 ("the most plausible explanation"), ¶ 448 ("the more obvious explanation").

[17] Rojas Witness Statement, ¶ 46; *see also* Rojas Witness Statement, ¶¶ 59, 64.

[18] Holzer Witness Statement, ¶ 10.

Block 31 License Agreements (in February and March 2019). But *all* of these events *post-dated* Blue Oil's divestment. Claimant provides no explanation for this gaping hole in its conspiracy theory.

44. Moreover, Claimant speculates that President Kuczynski used his office to direct Petroperú, PERUPETRO, and the MINEM to interfere with Maple Gas' business, in retaliation against Blue Oil. Yet in Claimant's account of the facts, the alleged interference began in 2014—i.e., long *before* President Kuczynski took office in July 2016—and continued through 2019—long *after* President Kuczynski resigned in March 2018. Claimant provides no explanation as to why Petroperú, PERUPETRO, and the MINEM (both individually and collectively) would have targeted Maple Gas *before* and *after* President Kuczynski took office.

45. In short, the conspiracy theory that forms the very foundation of Claimant's case is pure fiction and should be dismissed as such by the Tribunal.

3. In any event, Claimant's claims fail on the merits

46. Claimant bears the burden of proving, with evidence, each element of its claims that Peru committed composite breaches of the Minimum Standard of Treatment and Expropriation Provisions of the Treaty. However, as explained in greater detail in **Section IV** below, Peru did not breach the Treaty.

47. *First*, Claimant has not substantiated its Minimum Standard of Treatment claim. There is a high threshold for finding a breach of the minimum standard of treatment under customary international law ("**MST**"). Claimant appears to acknowledge this, but fails to show that the conduct of which it complains even approaches that threshold. In particular, Claimant relies heavily on its complaint that Petroperú interfered with Maple Gas' supply of feedstock. However, the evidence shows—and the tribunal in the Lima Arbitration formally determined—that there had been no such interference by Petroperú; rather, it was Maple Gas itself that had alienated both Aguaytía Energy (its primary supplier of feedstock) and CEPSA.

48. Claimant further complains that PERUPETRO prevented Maple Gas from obtaining the Block 126 License, alleging—based on misrepresentations of the facts—that

PERUPETRO's conduct "made no sense."[19] Notably absent from Claimant's hyperbolic criticism of PERUPETRO is any affirmative assertion that Maple Gas was in fact eligible under Peruvian law to hold the Block 126 License. Tellingly, neither Claimant nor Maple Gas has ever even alleged that Maple Gas qualified under either the 2010 or 2017 Guidelines. That is so for the simple reason that Maple Gas did *not* qualify. Far from violating the Minimum Standard of Treatment Provision, PERUPETRO acted reasonably and in accordance with Peruvian law.

49. *Second*, Claimant has not substantiated its claim of indirect expropriation. The Treaty establishes the requisite elements of an unlawful expropriation, including the total or near total deprivation of value of Claimant's investment; interference with reasonable, investment-backed expectations; and expropriatory conduct. For its Expropriation claim, Claimant repeats its complaints about Petroperú's alleged interference, which as noted is something that never occurred. Claimant also relies heavily on its complaint that Maple Gas did not obtain the Block 126 License, but this aspect of the claim fails at the threshold: in order to constitute an expropriation, the alleged conduct must interfere with a property *right* held by Claimant, but here *neither Claimant nor Maple Gas ever held any property right at all with respect to Block 126*.

50. For these reasons, as well as those explained in greater detail below, Claimant's claims fail on the merits, and should be dismissed.

4. Claimant is not entitled to any compensation

51. Even if Peru were liable for any breaches of the Treaty (quod non), Claimant would not be entitled to any compensation (see **Section V** below). Under the Treaty, Claimant is required to demonstrate that it incurred loss in its capacity as an investor. Here, Claimant identifies as its investment its indirect shareholding in Maple Gas, but makes no effort to show any alleged loss in the value of such indirect shareholding. Instead, Claimant contents itself with the bald assertion that it should be compensated for (i) the value of Block 126, a set of oil and gas fields over which neither Claimant nor Maple Gas ever had any right, and (ii) the value of the Pucallpa Refinery, over

[19] Memorial, ¶ 458.

which Maple Gas had a leasehold due to expire in 2024. These damages claims are divorced from Claimant's rights as an indirect shareholder in Maple Gas, and accordingly Claimant does not make out a damages theory upon which the Tribunal could base an award of damages in Claimant's favor.

52. In any event, Claimant utterly fails to demonstrate that the alleged loss that it claims was proximately caused by Peru's alleged conduct (as opposed to other factors), and ignores the evidence demonstrating that Maple Gas itself was to blame. Furthermore, Claimant has failed to substantiate the quantum of its alleged loss, relying on estimates that are unsubstantiated, speculative, and inaccurate.

* * *

53. For the reasons identified above and elaborated further in this submission, Peru respectfully submits that the Tribunal should (i) dismiss Claimant's claims in their entirety, either for lack of jurisdiction or on the merits, or (ii) in the alternative, deny any and all compensation to Claimant.

54. This Counter-Memorial is accompanied by the following supporting evidence:

a. The witness statement of **Mr. Roberto Carlos Guzmán Oliver**, the Secretary of the Board of Directors and former General Manager of PERUPETRO. Mr. Guzmán, who began working for PERUPETRO in January 2010, is intimately familiar with its internal procedures;

b. The expert report of **Dr. Carlos Javier Monteza Palacios**, one of the preeminent practitioners in the field of Peruvian administrative and antitrust law. Dr. Monteza's expert opinion addresses the legal regime of PERUPETRO's acts under Peruvian law, including the qualification of oil companies carried out by PERUPETRO in relation to the assignment of a license contract, the legality of PERUPETRO's actions regarding the qualification of Maple Gas and the rectification decision, Petroperú's legal regime, the principle of subsidiarity of the State's business activity under the Constitution, and the alleged interference by Petroperú. Dr. Monteza's report is accompanied by 27 exhibits;

c. The expert report of **AlixPartners**, a financial advisory and global consulting firm, regarding the quantum issues in relation to Claimant's claim ("**AlixPartners Report**"). The AlixPartners Report is accompanied by 46 exhibits;

d. 158 factual exhibits, numbered Ex. R-0001 to Ex. R-0158; and

e. 123 legal authorities, numbered RL-0001 to RL-0123.

55. The remainder of this Counter-Memorial is structured as follows:

a. **Section II** describes the facts giving rise to the present dispute;

b. **Section III** explains why the Tribunal lacks jurisdiction;

c. **Section IV** explains why all of Claimant's claims fail on the merits;

d. **Section V** demonstrates that Claimant is not entitled to compensation; and

e. **Section VI** contains Peru's request for relief.

II. FACTS

A. Maple Gas began operating the Aguaytía Integrated Project in 1994

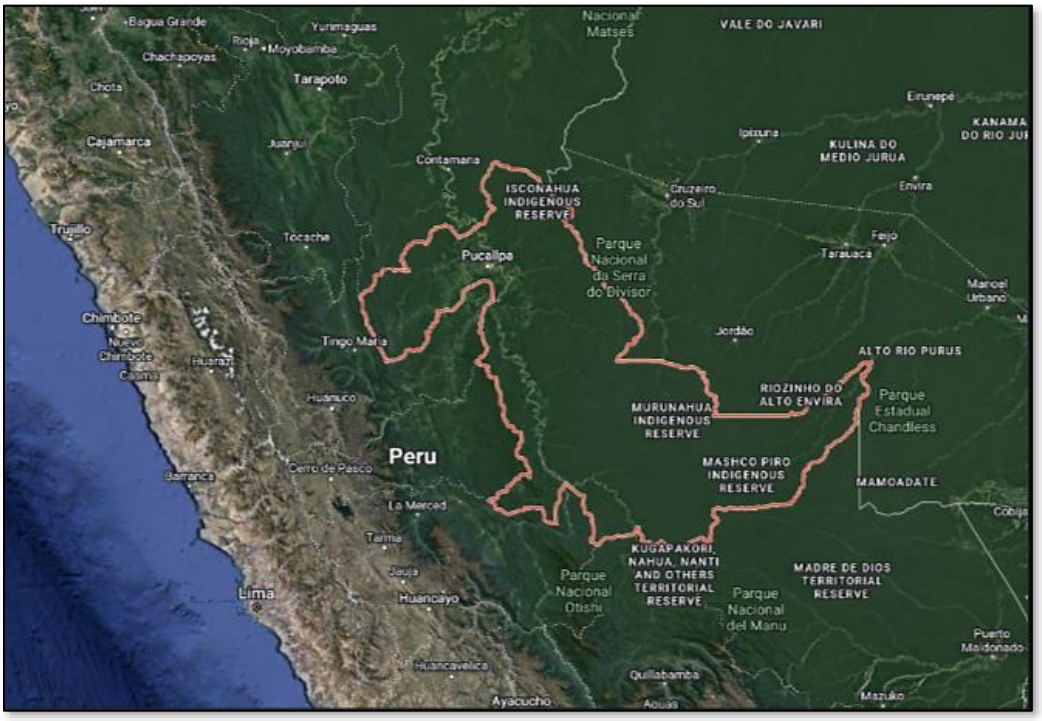
56. Maple Gas[20] is a company incorporated in Peru that engages in the exploration, exploitation, processing, and commercialization of hydrocarbons.[21] In March 1994, Maple Gas began operating the Aguaytía Integrated Project,[22] an oil and natural gas project in Ucayali (*see* Figure 1 below).

[20] At the time that it first contracted for the Block 31 licenses, Maple Gas Corporation del Perú S.R.L. was called "The Maple Gas Corporation del Perú Sucursal Peruana." *See* **Ex. R-0105**, Hydrocarbon Exploration and Exploitation License Agreement of Lot 31-C between PERUPETRO and Maple Gas, 30 March 1994, p. 4; **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, p. 3. Maple Gas later restructured to become "Maple Gas Corporation del Perú S.R.L."

[21] *See* **Ex. R-0107**, Compilation of Public Record Documents related to Maple Gas, 13 November 2020, Art. 2. *See also* **Ex. R-0105**, Hydrocarbon Exploration and Exploitation License Agreement of Lot 31-C between PERUPETRO and Maple Gas, 30 March 1994, p. 4; **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, p. 3.

[22] **Ex. R-0104**, Pucallpa Lease Agreement between Maple Gas and Petroperú, 29 March 1994, pp. 6–7.

Figure 1, Department of Ucayali[23] (boundaries delineated with red border)



57. The Aguaytía Integrated Project was designed to supply natural gas and refined fuels to Pucallpa,[24] which is the most populous city in Ucayali. The project included licenses to explore, operate, and extract petroleum and natural gas from three fields in Peru's Block 31 ("**Block 31 Fields**"), and the Refinery Lease Agreement, through which Maple Gas leases the Pucallpa Refinery.[25]

58. The Pucallpa Refinery processes natural gas and crude oil feedstock to produce and commercialize refined fuels, such as gasoline, diesel, kerosene, and other derivatives.[26] As the only refinery in Ucayali, the Pucallpa Refinery serves a critical

[23] **Ex. R-0077**, Google Maps, Ucayali, Peru, undated (accessed 1 September 2022).

[24] **Ex. R-0103**, Letter No. GGRL-048-93 from Petroperú (A. Cueto) to Maple Gas (J. Abramovitz), 11 March 1993, pp. 19–21.

[25] **Ex. R-0103**, Letter No. GGRL-048-93 from Petroperú (A. Cueto) to Maple Gas (J. Abramovitz), 11 March 1993, pp. 19–20, 34–36; **Ex. R-0105**, Hydrocarbon Exploration and Exploitation License Agreement of Lot 31-C between PERUPETRO and Maple Gas, 30 March 1994, pp. 10–11; **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, p. 11; **Ex. R-0104**, Pucallpa Lease Agreement between Maple Gas and Petroperú, 29 March 1994, p. 5.

[26] **Ex. R-0103**, Letter No. GGRL-048-93 from Petroperú (A. Cueto) to Maple Gas (J. Abramovitz), 11 March 1993, pp. 19–20, 22, 24, 34–36.

role in the local economy by producing and storing the fuel that is consumed in the region. Historically, the Pucallpa Refinery used feedstock from Block 31-C;[27] crude oil from Block 31-B,[28] Block 31-D,[29] and Block 8;[30] and reconstituted crude from the crude refinery in Iquitos, Peru ("**Iquitos Refinery**").[31]

59. In July 1996, Maple Gas assigned 99% of its rights in the Block 31-C license to an associated company, Aguaytía Energy del Peru S.R.L. ("**Aguaytía Energy**"),[32] which extracts hydrocarbons from Block 31-C to produce (fractionate) natural gas and other similar byproducts.[33] After the assignment, Maple Gas continued to extract crude from the Block 31-B and 31-D fields, and to operate the Pucallpa Refinery under the Refinery Lease Agreement.[34] Maple Gas also entered into an agreement to purchase all of the natural gasoline (for use as feedstock) that Aguaytía Energy produced.[35]

60. In 2001, Maple Gas obtained a license to explore and exploit crude from Block 31-E, which would serve as an additional source of feedstock for Maple Gas to refine in the Pucallpa Refinery.[36]

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[27] **Ex. R-0103**, Letter No. GGRL-048-93 from Petroperú (A. Cueto) to Maple Gas (J. Abramovitz), 11 March 1993, pp. 25–26, 37. *See also* **Ex. R-0105**, Hydrocarbon Exploration and Exploitation License Agreement of Lot 31-C between PERUPETRO and Maple Gas, 30 March 1994, Art. 1.3.

[28] **Ex. R-0103**, Letter No. GGRL-048-93 from Petroperú (A. Cueto) to Maple Gas (J. Abramovitz), 11 March 1993, pp. 30, 37. *See also* **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, Art. 1.3.

[29] **Ex. R-0103**, Letter No. GGRL-048-93 from Petroperú (A. Cueto) to Maple Gas (J. Abramovitz), 11 March 1993, pp. 32, 37. *See also* **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, Art. 1.3.

[30] **Ex. R-0103**, Letter No. GGRL-048-93 from Petroperú (A. Cueto) to Maple Gas (J. Abramovitz), 11 March 1993, p. 34.

[31] **Ex. R-0103**, Letter No. GGRL-048-93 from Petroperú (A. Cueto) to Maple Gas (J. Abramovitz), 11 March 1993, p. 34.

[32] **Ex. R-0025**, Modification of the License Contract for the Exploitation of Hydrocarbons in Block 31-C between PERUPETRO, Maple Gas, and Aguaytía Energy, 25 July 1996, Art. 2.1.

[33] **Ex. R-0001**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Final Award, 21 December 2018 (Casey, Blackaby, McGuire) ("**ICC Arbitration (Award)**"), ¶ 38. *See also* Memorial, ¶ 73.

[34] *See generally* **Ex. R-0111**, Modification of the License Contract for the Exploitation of Hydrocarbons in Blocks 31-B and D, 30 March 2014, p. 2.

[35] **Ex. C-0095**, Natural Gasoline Purchase Agreement between Maple Gas and Aguaytia Energy, 24 July 1996, p. 4.

[36] **Ex. R-0053**, Hydrocarbon Exploration and Exploitation License Agreement of Lot 31-E between PERUPETRO and Maple Gas, 6 March 2001, Arts. 1.3, 3.1.

61. In June 2009, Aguaytía Energy and Maple Gas ceased to be under common ownership.[37]

62. Between 1996 and 2014, Maple Gas continued to operate the Pucallpa Refinery using feedstock from Aguaytía Energy and its Block 31-B and 31-D fields, as well as, between 2001 and 2014, feedstock from Block 31-E.

63. On 29 March 2014, Maple Gas and Petroperú renewed the Refinery Lease Agreement.[38] On the following day, Maple Gas renewed its license to operate Blocks 31-B and 31-D.[39]

64. However, as explained below, production from the Block 31 Fields decreased over time, leaving Maple Gas with dwindling supply and increasing financial troubles.

B. By 2014, Maple Gas was in a steep downward spiral, defaulted on a multi-million USD loan, and was seized by its creditors

65. Over time, Maple Gas began to experience various commercial, regulatory, and financial troubles that drove the company into a steady decline. As discussed below, by 2014 Maple Gas (i) was reporting serious financial losses; (ii) had been sanctioned for violating environmental and other regulations; (iii) was experiencing dwindling supply from its depleted Block 31 oil fields; (iv) failed to pay its supplier, Aguaytía Energy, for the feedstock upon which Maple Gas depended; and (v) defaulted on a multi-million dollar loan.

1. By 2014 Maple Gas had already begun reporting significant net financial losses

66. Claimant claims in the Memorial that Maple Gas was "consistently profitable" between 2009 and 2013.[40] However, that misrepresents the true financial situation of Maple Gas. Maple Gas' audited financial statements reveal that, in reality, it had

[37] **Ex. R-0001**, ICC Arbitration (Award), ¶ 42.

[38] **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, p. 1.

[39] *See generally* **Ex. R-0110**, Supreme Decree No. 011-2014-EM, 29 March 2014, Art. 1; **Ex. R-0111**, Modification of the License Contract for the Exploitation of Hydrocarbons in Blocks 31-B and D, 30 March 2014, p. 1. At the time, the license agreement for Block 31-E was still in force and did not need to be renewed.

[40] *See* Memorial, ¶ 78.

reported *net losses* of approximately USD 9.5 million in 2009[41] and USD 22.7 million in 2012.[42]

67. Claimant seeks to elide these extraordinary losses by focusing on the "average operating profit" of the company over time.[43] But even using Claimant's self-serving metric of "operating profit," it is readily apparent that by 2014 the company was already in serious financial trouble: Maple Gas reported a net operating loss of USD 25.5 million in 2012[44]—a figure approximately twice as much as Maple Gas' highest recorded operating profit between 2008 and 2013.[45] (As discussed in greater detail below, Maple Gas continued to report net losses for several years, until it was declared insolvent.[46])

68. Claimant's witnesses have their own version of events. Matías Rojas—who eventually invested in Maple Gas in 2015—alluded to Maple Gas' financial troubles in his witness statement, where he admits that prior to 2015 "Maple Gas faced some challenges with respect to its cash flows."[47] That is a gross understatement, and an attempt to whitewash the multi-million dollar losses that Maple Gas had reported prior to 2015.

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[41] **Ex. R-0109**, Maple Gas, Audited Financial Statements, 2009–2013, p. 6. Due to a change in national accounting policy by the Peruvian Accounting Standards Council ("*Consejo Normativo de Contabilidad*" or ("**CNC**," per its Spanish abbreviation)), Maple Gas modified its 2009 net loss from approximately USD 9.5 million to approximately USD 7.8 million in its 2010 Financial Statements. *Compare* **Ex. R-0109**, Maple Gas, Audited Financial Statements, 2009–2013, p. 6 (recording a net loss of USD 9,497,865), *with* p. 64 (recording a net loss of USD 7,770,388).

[42] **Ex. R-0109**, Maple Gas, Audited Financial Statements, 2009–2013, p. 217.

[43] Memorial, ¶ 78.

[44] **Ex. R-0109**, Maple Gas, Audited Financial Statements, 2009–2013, pp. 167, 217. This amount represents the operating profit ("*utilidad de operación*"), which is Claimant's chosen metric of profitability. *See* Memorial, ¶ 78. By using operating profit as the metric—that is, gross profit less operating expenses, *but before* deduction of interest and taxes—Claimant ignores certain liabilities to obscure Maple Gas' high debt load/obligations.

[45] *Compare* **Ex. R-0109**, Maple Gas, Audited Financial Statements, 2009–2013, p. 167 (2012: USD -25,501,302), *and* p. 217 (2012: USD - 25,517,176), *with* p. 117 (2011: USD 13,959,951).

[46] *See* **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, pp. 7, 60 (enclosing Maple Gas 2014–2016 Audited Financial Statements and reporting net losses of USD -6,522,802 in 2014; USD -3,649,306 in 2015; and USD -6,034,968 in 2016); **Ex. R-0006**, Letter No. MG-LEGA-L-050-2018 from Maple Gas (J. Bonilla) to PERUPETRO (R. Guzmán), 9 March 2018, pp. 3–4 (enclosing Maple Gas 2017 Unaudited Financial Statements and reporting net loss of USD -4,431,647). *See also* **Ex. R-0107**, Compilation of Public Record Documents related to Maple Gas, 13 November 2020, p. 92; **Ex. R-0096**, INDECOPI, Resolution No. 0142-2019/CCO-INDECOPI, 7 January 2019, pp. 2–3.

[47] Rojas Witness Statement, ¶ 13.

For his part, Mr. Holzer alleges that Maple Gas generally "had a history of steady cash flows."[48] However, the evidence demonstrates that this is false.

2. Maple Gas was violating environmental and other regulations

69. Routine inspections of the Pucallpa Refinery by Peru's Agency for Environmental Assessment and Enforcement ("**OEFA**")[49] also revealed that Maple Gas' refining operations were failing to meet acceptable regulatory standards. For instance, in 2014, the OEFA identified dozens of violations of environmental regulations by Maple Gas—including environmental contamination, delayed repairs, improper chemical monitoring or storage, and improper equipment usage and/or maintenance.[50] Following administrative review, these findings were upheld, and Maple Gas was formally sanctioned.[51]

3. Maple Gas depleted its Block 31 oil fields

70. Maple Gas admitted that by 2014 its Block 13 fields were "in a natural and predictable decline."[52] In particular:

a. The proven reserves, or quantities that were reasonably expected to be commercially extractable, in Blocks 31-B and 31-D declined from 2,460 thousands of stock tank barrels ("**MSTB**") in 2013 to 2,005 MSTB in 2014;[53] and

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[48] Holzer Witness Statement, ¶ 9.

[49] The acronym "OEFA" derives from the Spanish name of the agency: "*Organismo de Evaluación y Fiscalización Ambiental*."

[50] *See, e.g.*, **Ex. R-0058**, Peru's Ministry of the Environment, Directorate Resolution No. 220-2015-OEFA/DFSAI, 13 March 2015, pp. 7–15; **Ex. R-0059**, Peru's Ministry of the Environment, Resolution No. 033-2015-OEFA/TFA-SEE, 7 August 2015, pp. 117–18 (affirming virtually all sanctions in Directorate Resolution No. 220-2015-OEFA/DFSAI); **Ex. R-0060**, Peru's Ministry of the Environment, Directorate Resolution No. 958-2015-OEFA/DFSAI, 26 October 2015, pp. 1–5, 41–43; **Ex. R-0061**, Peru's Ministry of the Environment, Resolution No. 015-2015-OEFA/TFA-SEE, 29 February 2016, pp. 33–34 (affirming Directorate Resolution No. 958-2015-OEFA/DFSAI); **Ex. R-0062**, Peru's Ministry of the Environment, Directorate Resolution No. 1205-2015-OEFA/DFSAI, 18 December 2015, pp. 2–4.

[51] *See, e.g.*, **Ex. R-0058**, Peru's Ministry of the Environment, Directorate Resolution No. 220-2015-OEFA/DFSAI, 13 March 2015, pp. 7–15.

[52] **Ex. R-0004**, *Petróleos Del Perú S.A. v. Maple Gas Corporation Del Perú S.R.L.*, Lima Arbitration No. 258-2018-CCL, Submission of Maple Gas, 8 March 2019, p. 39.

[53] **Ex. R-0040**, Book of Annual Hydrocarbon Reserves, 31 December 2015, p. 105.

b. The proven reserves in Block 31-E declined by two thirds: from 688 MSTB in 2013 to 204 MSTB in 2014.[54]

71. Maple Gas also experienced difficulties with its Block 31-E license; by December 2010, the company had spent approximately USD 32 million in exploration efforts.[55] Maple Gas unsuccessfully sought but failed to create a joint venture to provide financial and technical assistance for the development of a shale gas project in Block 31-E.[56] Three years later, in August 2013, the geographic scope of Maple Gas' Block 31-E License was reduced due to its decision to abandon part of its exploration activities in that block.[57]

72. The dwindling supply of feedstock meant that the Pucallpa Refinery was operating significantly below capacity. As Claimant admits, "[b]y 2014, declining production from Maple Gas' oil fields and declining supply from Aguaytía Energy meant that the Pucallpa Refinery was refining significantly less feedstock than it had in the past."[58] Although Claimant declines to provide specific information about the Pucallpa Refinery's output during the relevant time period, Claimant's own reports demonstrate a steep decline—nearly 25%—in production at the Refinery: from 520 average bpd in 2000 to 228 average bpd in 2014.[59] As Mr. Rojas admits, the "Pucallpa Refinery had been unable to operate at full capacity for years."[60]

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[54] **Ex. R-0040**, Book of Annual Hydrocarbon Reserves, 31 December 2015, p. 107.

[55] *See* **RER-02**, Expert Report of Alix Partners, 3 October 2022 ("**RER-02, Alix Damages Expert Report**"), ¶ 124 (*citing* **Ex. AP-0024**, Maple Energy plc 2008 Annual Report, p. 6).

[56] *See* **RER-02**, Alix Damages Expert Report, ¶ 125 (*citing* **Ex. AP-0024**, Maple Energy plc 2008 Annual Report, p. 6).

[57] *See* **RER-02**, Alix Damages Expert Report, ¶ 125 (*citing* **Ex. AP-0045**, Maple Gas Corporation del Perú S.R.L. Audited Financial Statements as of December 31, 2016 and 2015, p. 18).

[58] Memorial, ¶ 84.

[59] *See* **Ex. CLEX-0001**, Compass Lexecon Valuation Model, 25 March 2022, tab "Historical Feedstock."

[60] Rojas Witness Statement, ¶ 15.

4. Maple Gas did not pay its only external supplier of feedstock, Aguaytía Energy, and was unable to secure a new supplier

73. By 2014, the Block 31 Fields were in a "predictable decline,"[61] and the company had not invested in any new source of feedstock. Instead, Maple Gas relied heavily on Aguaytía Energy to supply feedstock for refining in the Pucallpa Refinery: from 2000 to 2016 Aguaytía Energy supplied an average of 82% of Maple Gas' total feedstock,[62] pursuant to an exclusive supply agreement concluded in 1996 ("**Maple Gas-Aguaytía Energy Exclusive Supply Agreement**").[63]

74. Maple Gas, however, breached its obligations under that agreement by failing to pay invoices issued to it by Aguaytía Energy from October to December 2014.[64] By the end of 2014, Maple Gas owed USD 5.285 million (plus interest) to Aguaytía Energy.[65] That debt continued to grow thereafter, as Maple Gas continued to default on its obligations to Aguaytía Energy.[66]

75. With its own Block 31 Fields running dry, and having defaulted on payments to Aguaytía Energy (which at the time was its exclusive external supplier of feedstock), Maple Gas desperately needed a new source of feedstock to resume operating the Pucallpa Refinery at full capacity. CEPSA—which was a subsidiary of Spanish multinational oil and gas company Compañía Española de Petróleos, S.A.U.—offered

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[61] **Ex. R-0004**, *Petróleos Del Perú S.A. v. Maple Gas Corporation Del Perú S.R.L.*, Lima Arbitration No. 258-2018-CCL, Submission of Maple Gas, 8 March 2019, p. 30.

[62] *See* **RER-02**, Alix Damages Expert Report, ¶ 109 (*citing* **Ex. CLEX-0001**, Compass Lexecon Valuation Model, 25 March 2022, tab "Historical Feedstock").

[63] **Ex. CLEX-0025**, Natural Gasoline Purchase Agreement between Aguaytía Energy del Peru S.R.L. and The Maple Gas Corporation del Peru S.R.L. 24 July 1996, Art. 1. *See also* **Ex. R-0063**, Orazul Energy, Offering Memorandum, 25 April 2017, pp. 135–36 ("Our only supply contract for the natural gasoline produced by Aguaytía is with Maple Gas, which refines the natural gasoline and produces a variety of products, including gasoline. . . . Pursuant to our natural gasoline purchase agreement with Maple Gas, we deliver all of the natural gasoline owned or held by us.").

[64] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 43.

[65] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 195(a) (i).

[66] By 2016, Maple Gas would be indebted by another approximate USD 13.46 million for gas sold and delivered to it after March 1, 2016 plus over USD 2.9 million in accrued interest (in addition to the USD 5.285 million from 2014). *See* **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 195(a) (ii)–(iii).

a potential new source of crude feedstock from its Block 131 fields.[67] However, Claimant admits that Maple Gas was unable to enter into a supply contract with CEPSA in 2014 because "Maple Gas's owners were not prepared to make additional investments in the Pucallpa Refinery,"[68] which investments would have been necessary for Maple Gas to receive and refine crude feedstock from CEPSA. In a 2016 press interview, Mr. Katabi confirmed that in 2014 Maple Gas was unable to refine the crude produced by CEPSA due to "the problems we had at that time."[69] Given the unwillingness on the part of Maple Gas to make the necessary investment to process CEPSA feedstock, (i) CEPSA entered into a short-term, non-exclusive contract to sell its feedstock to Petroperú,[70] and (ii) CEPSA entered into a contract with Maple Gas whereby the latter agreed to provide services for the reception, storage, and dispatch of materials ("**RAD Services**")[71] for CEPSA at the Pucallpa Refinery's storage terminal.[72]

5. By 2014, Maple Gas had defaulted on a multi-million dollar loan, and it was seized by creditor banks

76. In addition to Maple Gas' serious supply and financial problems discussed above, by the end of 2014, Maple Gas also incurred dozens of millions of dollars of debt, which it failed to pay.

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[67] Notably, CEPSA had only begun its initial production trials at the end of 2013, and was still in the early stages of production. **Ex. R-0007**, CEPSA, Annual and Corporate Responsibility Report, 2014, p. 34 ("Following the initial production trials at the end of 2013, the results of which were positive, finding oil with one of the highest levels of quality seen in recent years in Peru[.]"). Thus, contrary to Claimant's claim that CEPSA was in 2014 "a significant new source of feedstock" (Memorial, ¶ 85), a 2016 press statement from Mr. Katabi confirms that CEPSA only began producing in September 2014, through a test well. **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, p. 2.

[68] Memorial, ¶ 86.

[69] **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, p. 2.

[70] *See* **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, p. 1.

[71] The acronym "RAD" is based on the Spanish term: "*recepción, almacenamiento y despacho*" ("reception, storage, and dispatch").

[72] **Ex. R-0112**, Contract for the Provision of Reception Services between CEPSA and Maple Gas, 9 September 2014, Arts. 2–3.

77. In July 2013, two Maple Gas affiliates—Maple Etanol S.R.L. ("**Maple Etanol**") and Maple Biocombustibles S.R.L. ("**Maple Biocombustibles**")—obtained a secured term loan for USD 160 million with several banks: Banco Itau BBA S.A., Banco Internacional del Perú S.A.A., Bancolombia Puerto Rico International Inc., and Corporación Financiera de Desarrollo S.A. (collectively, "**Creditor Banks**").[73] The term loan was secured by (i) a guarantee of payment obligations by Maple Gas, and (ii) a trust arrangement over Maple Etanol and Maple Biocombustibles's assets and financial interests.[74] As Mr. Rojas admits, a mere 15 months later—in October 2014—Maple Etanol defaulted on the USD 160 million loan.[75] The Maple group of companies resolved to sell Maple Gas to try to save Maple Etanol and Maple Biocombustibles, and accepted a preliminary offer to sell Maple Gas to a Peruvian engineering company for USD 31 million;[76] however, the sale fell through in November 2014.[77]

78. In December 2014,[78] following Maple Gas' default in October of that year, the Creditor Banks called Maple Gas' guarantee, and seized control of Maple Gas, Maple Etanol, and Maple Biocombustibles.[79] The Creditor Banks then sold Maple Etanol and Maple Biocombustibles to a third party.[80] Thereafter, according to Claimant, Maple Gas remained indebted to the Creditor Banks for approximately USD 62 million.[81]

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[73] **Ex. C-0116**, Maple Energy plc 2013 Annual Report, p. 89.

[74] **Ex. C-0116**, Maple Energy plc 2013 Annual Report, p. 89.

[75] Rojas Witness Statement, ¶ 11.

[76] **Ex. R-0011**, Graña y Montero S.A.A., Form 6-K, U.S. Securities and Exchange Commission, October 2014, p. 2; **Ex. R-0012**, "*Graña y Montero to Purchase Stake in The Maple Companies Limited*," BUSINESS WIRE, 16 October 2014 (accessed 22 July 2022), p. 1; **Ex. R-0013**, "*Graña y Montero hizo oferta a norteamericana Maple para comprar negocio de gas en Perú*," GESTIÓN, 16 October 2014 (accessed 22 July 2022), p. 2. .

[77] **Ex. R-0014**, "*Graña y Montero retiró oferta de compra de Maple Companies*," EL COMERCIO, 17 November 2014 (accessed 22 July 2022), p. 2; **Ex. R-0015**, "*Maple Energy - Graña y Montero: no hay acuerdo. Desplome de acciones*," MINING PRESS, 18 November 2014 (accessed 22 July 2022), p. 3.

[78] **Ex. R-0016**, "*Maple Energy suspendió negociación de sus acciones tras default*," EL COMERCIO, 9 December 2014 (accessed 22 July 2022), p. 1.

[79] **Ex. R-0017**, "*Maple Energy PLC: Ethanol Business Update*," MARKETSCREENER, 22 December 2014 (accessed 22 July 2022), p. 1; *see also* Memorial, ¶ 80.

[80] **Ex. R-0018**, "*Maple Energy PLC Ethanol Business Update*," MARKETSCREENER, 1 April 2015 (accessed 22 July 2022), p. 1.

[81] Memorial, ¶¶ 79–80; Katabi Witness Statement, ¶¶ 16–17.

79. In sum, by the end of 2014, Maple Gas (i) had no reliable source of feedstock to operate the Pucallpa Refinery at maximum capacity, (ii) lacked any realistic opportunities for securing external feedstock, (iii) was indebted for dozens of millions of USD, and (iv) had been seized by the Creditor Banks.

C. In 2015, certain investors acquired Maple Gas' debt from the Creditor Banks

80. In 2015, while Maple Gas was still under the control of the Creditor Banks, two individuals—Mr. Nabil Katabi (Maple Gas' former Project Development Manager) and Mr. Jack Hanks (formerly affiliated with Maple Gas' parent company[82])—developed an interest in investing in Maple Gas. As discussed below, at the time Messrs. Katabi and Hanks were well aware of Maple Gas' serious—and mounting—financial, regulatory, and commercial problems (see **subsection 1** below). They even tried—but failed—to secure a new source of feedstock for the starving Refinery (see **subsection 2** below). Despite the company's dismal prospects, in October 2015, a series of holding companies were created to acquire Maple Gas' millions of USD of debt (see **subsection 3** below).

81. The acquisition of Maple Gas' debt by these investors plays a foundational role in Claimant's case: according to Claimant's narrative (spun for the first time in this arbitration), the acquisition of debt triggered a government-wide conspiracy designed to harm one of the entities involved. However, this newly-minted conspiracy theory does not withstand scrutiny (see **subsection 4** below).

1. At the time they were considering investing in Maple Gas in 2015, Messrs. Katabi and Hanks were aware of that company's serious problems

82. Messrs. Katabi and Hanks assert that they developed an interest in the company notwithstanding Maple Gas' declining production and dismal prospects of recovery.[83] It is not apparent why these investors were interested in the failing company; in his witness statement, Mr. Katabi vaguely describes that upon learning that the Creditor Banks were "looking to sell Maple Gas," he and Mr. Hanks "decided to partner in

[82] Katabi Witness Statement, ¶ 18.

[83] Katabi Witness Statement, ¶ 18.

trying to acquire it."[84] Mr. Katabi alleges that in the spring of 2015, they approached several other potential investors, including Mr. Rojas[85] (who alleges that he invested in Maple Gas via Blue Oil[86]).

83. As described in **Section II.B** above, there was objective evidence—including in the company's annual financial statements—that Maple Gas was failing. Further, by their own admissions in this arbitration and in the ICC Arbitration, Messrs. Katabi, Rojas, and Hanks were aware through the "financial and legal due diligence"[87] that they conducted that Maple Gas was in trouble, due inter alia to:

a. Dwindling supply from Maple Gas' Block 31 crude oil fields. As conceded by Mr. Katabi, he was aware "[f]rom the start . . . that Maple Gas's supply from both the Block 31 Fields . . . had been in decline."[88] Mr. Rojas similarly admits that he was aware that "[t]he sources of feedstock for [the] Pucallpa Refinery that Maple had relied on historically had been decreasing."[89]

b. Maple Gas' tense relationship with its primary supplier, Aguaytía Energy. Mr. Rojas admitted in the ICC Arbitration that he (i) knew that that "Aguaytia [Energy] had historically been Maple Gas's primary (and near exclusive) supplier of certain liquid byproducts,"[90] (ii) understood that "tension that had developed between the two entities [(i.e., Maple Gas and Aguaytía Energy)],"[91] and (iii) was aware of the need to "improve our relationship with Aguaytia [Energy]."[92]

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[84] Katabi Witness Statement, ¶ 18.

[85] Katabi Witness Statement, ¶ 19; Rojas Witness Statement, ¶¶ 9, 12.

[86] Rojas Witness Statement, ¶ 12.

[87] **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶ 18.

[88] Katabi Witness Statement, ¶ 20.

[89] Rojas Witness Statement, ¶ 13.

[90] **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶ 19.

[91] **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶ 31.

[92] **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶ 26.

c. Maple Gas' mounting debt to Aguaytía Energy. Messrs. Rojas and Mr. Hanks have both affirmed that they were aware "[p]rior to closing the acquisition of Maple Gas" that "Aguaytía Energy believed that it had a claim against Maple Gas for unpaid natural gasoline invoices from October, November, and December 2014 in the approximate amount of $5.5 million."[93] Moreover, Aguaytía Energy was apparently extremely focused on the securing the payment of this debt.[94] (Ultimately, Aguaytía Energy's "belie[f]"[95] that it had a claim against Maple Gas was vindicated: it initiated an arbitration against Maple Gas in 2017 and obtained an award ordering Maple Gas to pay more than USD 21.6 million plus interest to Aguaytía Energy.[96])

d. Dwindling supply from Aguaytía Energy's Block 31 natural gas field. Mr. Katabi likewise admits that he was aware that supply from "Aguaytía Energy had been in decline."[97]

e. Maple Gas' finances. Mr. Rojas has admitted that he "understood that Maple Gas had faced some challenges with respect to its cash flows."[98] Mr. Hanks also

[93] Rojas Witness Statement, ¶ 26. *See also* **Ex. R-0156**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Jack W. Hanks, 16 April 2018, ¶ 44 ("Before purchasing this bank debt, we learned through our due diligence that Aguaytia believed it had a claim against Maple Gas for unpaid invoices from October, November, and December 2014 in the approximate amount of $5.5 million concerning deliveries of its liquid byproducts.").

[94] *See* **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶ 32 ("[T]he Investment Group hoped to use the October 30 meeting to smooth over any potential issues and modify the parties' relationship in mutually beneficial ways. During that meeting, Aguaytia expressed no interest in a forward-looking discussion. The only topic that Aguaytia would discuss was the debt it claimed Maple Gas owed to it. Aguaytia refused to discuss any other issue, including Maple Gas's claims against Aguaytia, until the purported debt was repaid."); **Ex. R-0156**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Jack W. Hanks, 16 April 2018, ¶ 49 ("[I]n an October 30, 2015 meeting with representatives of Aguaytia and Duke Energy, they made clear to us that they were not interested in discussing any other business issues until this alleged debt was repaid.").

[95] Rojas Witness Statement, ¶ 26.

[96] **Ex. R-0001**, ICC Arbitration (Award), ¶ 195 (awarding USD 21,776,525.40 plus post-award interest).

[97] Katabi Witness Statement, ¶ 20.

[98] **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶ 17.

affirmed that he had "learned through the due diligence process that Maple Gas' equity lacked sufficient value for our group."[99]

f. The Creditor Banks managing Maple Gas had no interest in restoring its viability. As conceded by Messrs. Katabi and Rojas, the Creditor Banks had stopped injecting new working capital into Maple Gas,[100] such that Maple Gas "was in involuntary standby mode"[101] and was "unable to operate at full capacity."[102]

g. The desperate need to find a new source of feedstock, which was not readily available. As Mr. Katabi admits, he understood in 2015 that his potential investment in Maple Gas would be worthwhile only if it "could count on new feedstock supplies."[103] The only potential source of supply was CEPSA, but—as Mr. Katabi knew—CEPSA had only been willing to contract with Maple Gas for RAD Services,[104] rather than for feedstock supply.

84. Despite these existential threats to Maple Gas, Messrs. Katabi and Hanks doggedly pressed forward and allegedly invested in Maple Gas in October 2015.

2. Messrs. Katabi and Hanks tried, but failed, to secure an agreement for crude feedstock from CEPSA

85. Aware of Maple Gas' desperate need for a new source of crude feedstock, Messrs. Katabi and Hanks contacted and met with CEPSA representatives in the summer of 2015.[105] In his witness statement, Mr. Katabi asserts that "CEPSA . . . seemed enthusiastic about the fact that we would be the new owners of Maple Gas."[106] However, the evidence demonstrates that Messrs. Katabi and Hanks did not make any progress with CEPSA in securing a stable source of feedstock with which to

[99] **Ex. R-0156**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Jack W. Hanks, 16 April 2018, ¶ 43.

[100] Memorial, ¶ 86; Rojas Witness Statement, ¶ 19; Katabi Witness Statement, ¶ 21.

[101] Rojas Witness Statement, ¶ 19.

[102] Rojas Witness Statement, ¶ 13.

[103] Katabi Witness Statement, ¶ 18.

[104] *See* Rojas Witness Statement, ¶ 22.

[105] **Ex. C-0132**, Email from A. Masias to J. Hanks, 21 May 2015, p. 1.

[106] Katabi Witness Statement, ¶ 23. *See also* Rojas Witness Statement, ¶ 23.

operate the Pucallpa Refinery. On 14 October 2015, a CEPSA representative sent the following email to Mr. Hanks:

> In recent weeks we have been visited by two groups of investors interested in our Block 131 oil production and recently I read some news about the liquidation process that the creditor banks are following to MAPLE [Gas]. But, **we have not hear[d] anything from you and your plans for the Pucallpa refinery project**. . . . [107] (Emphasis added)

86. Thus, as of 14 October 2015—i.e., *after* Messrs. Katabi and Hanks had decided to acquire Maple Gas but *before* the acquisition had been completed[108]—Maple Gas had still not managed to secure any commitment or agreement for the supply of the feedstock that Maple Gas so desperately needed. Indeed, on 20 October 2015, a mere six days after receiving the above-mentioned email from CEPSA, Messrs. Katabi and Mr. Hanks (and allegedly Blue Oil) acquired Maple Gas' debt. This acquisition was effected through a series of holding companies, as explained in the following sub-section.[109]

3. In October 2015, various holding companies were created and used to acquire Maple Gas' debt

87. Claimant's own meager evidentiary record and publicly-available information reveal that the acquisition of Maple Gas' debt in October 2015 was carried out through a series of holding companies constituted in tax havens:

a. Parsdome Holdings Ltd. ("**Parsdome**") is a holding company registered in the British Virgin Islands.[110] Claimant makes no mention of Parsdome, and provides no information about any investors in Parsdome.

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[107] **Ex. C-0135**, Email from J. Hanks to A. Masias, 14 October 2015, p. 1.

[108] Rojas Witness Statement, ¶ 12 ("By June 2015, Blue Oil decided to join Hanks and Katabi (who I will refer to as the "Blue Oil Investment Group") in acquiring Maple Gas.").

[109] Memorial, ¶ 82.

[110] **C-0033**, Agreement between Parsdome Holdings Ltd. and Worth Capital titled "Agreement relating to the sale and purchase of the whole of the issued outstanding share capital of Jancell Corporation," 24 November 2016, p. 3 (1).

b. On 12 August 2015, according to publicly available information, Jancell Corporation ("**Jancell**"), a Panamanian holding company, was formed.[111] Claimant provided no information about any investors in Jancell.

c. On 14 October 2015, Parsdome acquired 100 shares in Jancell.[112]

d. Claimant asserts that Jancell purchased the USD 15 million debt owed by Maple Gas to one of the Creditor Banks.[113] Claimant failed to provide documentary evidence of this alleged transaction.

e. On 2 November 2015, Parsdome transferred its shares in Jancell to another holding company, Parsdome (Cayman) Limited.[114] Claimant made no mention of Parsdome (Cayman) Limited and provided no information about any investors in Parsdome (Cayman) Limited.

f. On 12 August 2015, according to publicly available information, Trailon Enterprises S.A. ("**Trailon**"), another Panamanian holding company, was formed.[115] Again, Claimant provided no information about any investors in Trailon.

g. Claimant asserts that Trailon purchased the USD 47 million debt owed by Maple Gas to the other Creditor Banks.[116] Claimant failed to provide documentary evidence of this alleged transaction.

88. The documentary evidence does not reveals which individuals or entities were behind these shell companies and actually invested funds into acquiring Maple Gas' debt.

4. The acquisition of Maple Gas' debt did not trigger a government-wide conspiracy

89. Even though Claimant has not introduced documentary evidence to show what individuals or entities were behind the shell companies that acquired Maple Gas' debt,

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[111] **Ex. R-0020**, Bylaws of Jancell Corporation, 12 August 2015, p. 2 (enclosing Jancell Corp. Certificate of Incorporation).

[112] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

[113] Memorial, ¶ 82, fn. 98.

[114] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

[115] **Ex. R-0021**, Trailon Enterprises S.A., OPENCORPORATES, 12 August 2015, p. 1.

[116] Memorial, ¶ 82, fn. 98.

Claimant seeks to frame this acquisition as a triggering event for a supposed government-wide conspiracy against Maple Gas. Specifically, Claimant introduces at the very outset of its brief, and repeats throughout, the theory that Petroperú, PERUPETRO, and the MINEM all interfered with Maple Gas' business in order to harm Mr. Rojas and his investment company, Blue Oil.[117] However, the facts do not support Claimant's narrative, including for the following reasons:

a. To prop up its conspiracy theory, Claimant labels the group of investors who acquired Maple Gas' debt the "Blue Oil Investment Group."[118] But the "Blue Oil Investment Group" is not a formal entity. Importantly, while Mr. Rojas alleges that Blue Oil was involved in acquiring Maple Gas' debt,[119] the documentary record is limited to information about various shell companies and does not show that Blue Oil actually invested.

b. In a separate arbitration initiated by Aguaytía Energy (discussed in greater detail in **Section II.D.2** below), neither Maple Gas, nor Mr. Rojas, nor Mr. Hanks described the group of investors who acquired Maple Gas' debt in October 2015 as the "Blue Oil Investment Group."[120] Nor did Maple Gas, Mr. Rojas, or Mr. Hanks ever allege in that arbitration that Maple Gas was targeted in order to harm Blue Oil.[121]

c. In yet another arbitration against Maple Gas, this one initiated by Petroperú, Maple Gas again did not refer to any "Blue Oil Investment Group;" they simply note that "[i]n October 2015, MAPLE's creditor banks sold control of the

[117] *See* Memorial, ¶ 5.

[118] Memorial, ¶ 5.

[119] *See* Rojas Witness Statement, ¶ 14.

[120] *See generally, e.g.*, **Ex. R-0156**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Jack W. Hanks, 16 April 2018 (never mentioning "Blue Oil").

[121] *See generally* **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018; **Ex. R-0156**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Jack W. Hanks, 16 April 2018.

company to an investment group."[122] Even though Maple Gas sought to blame Petroperú for Maple Gas' own commercial problems, it again made no mention of Blue Oil, nor of any animus or conspiracy against Blue Oil.[123]

d. There is no evidence that in October 2015 Blue Oil was identified as an investor in Maple Gas to Petroperú, PERUPETRO, or the MINEM.

e. There is no evidence that Petroperú, PERUPETRO, or the MINEM were instructed to harm Blue Oil or Maple Gas.

90. For these and other reasons, discussed in greater detail in **Section IV.A** below, Claimant's conspiracy theory is both unsubstantiated and false.

D. Maple Gas' financial, regulatory, and commercial problems worsened in late 2015 and 2016

91. Following the acquisition of Maple Gas' debt in October 2015, Maple Gas' situation continued to deteriorate—but not as a result of any conspiracy. As discussed below, in late 2015 and 2016 Maple Gas again reported significant losses, faced sanctions for environmental infractions, and curtailed its production from the Pucallpa Refinery. To make matters worse, Maple Gas' new management destroyed its relationships with both Aguaytía Energy and CEPSA.

1. Maple Gas continued in 2015 and 2016 to report significant losses, face sanctions, and deplete the Block 31 oil fields

92. Maple Gas reported a net loss of approximately USD 3.65 million for 2015,[124] and of USD 6.03 million for 2016.[125]

93. Under its new owners, Maple Gas continued to be sanctioned and fined by OEFA for regulatory violations at the Pucallpa Refinery—including for environmental

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[122] **Ex. R-0004**, *Petróleos Del Perú S.A. v. Maple Gas Corporation Del Perú S.R.L.*, Lima Arbitration No. 258-2018-CCL, Submission of Maple Gas, 8 March 2019, p. 39. *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 126 (restating Maple Gas' position).

[123] *See generally* **Ex. R-0002**, Lima Arbitration (Award).

[124] **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, p. 7 (reporting net loss of USD -3,649,306 in 2015).

[125] **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, p. 60 (reporting net loss of USD -6,034,968 in 2016).

contamination, failure to properly store hazardous solid waste, failure to conduct integrity tests of its wells, and failure to construct grease and oil recovery systems.[126] Maple Gas was also ordered by OEFA to comply with corrective plans to rectify its violations.[127]

94. Production from Maple Gas' Block 31 Fields and from the Pucallpa Refinery continued on a downward trajectory. Specifically, production of crude from each of Maple Gas' Block 31 Fields decreased in 2015 and 2016—to less than a quarter of the already low 2014 production level, in the case of Block 31-B, and to less than half of such level, in the case of Blocks 31-D and -E:

Figure 2: Block 31 Crude Production* (2014–2016)[128]

	2014	2015	2016
Block 31-B	201	193	48
Block 31-D	109	96	50
Block 31-E	90	78	42

* Figures represent average bpd (barrels per day)

95. In fact, in 2015, Maple Gas stopped reporting on "proven reserves" from the Block 31 Fields; instead, the company began reporting only on "contingent resources"[129]—i.e.,

[126] *See, e.g.*, **Ex. R-0065**, Peru's Ministry of the Environment, Directorate Resolution No. 002-2016-OEFA/DFSAI, 4 January 2016, pp. 3, 27–29; **Ex. R-0066**, Peru's Ministry of the Environment, Resolution No. 031-2016-OEFA /TFA-SEE, 6 May 2016, p. 27 (affirming Directorate Resolution No. 002-2016-OEFA/DFSAI); **Ex. R-0049**, Peru's Ministry of the Environment, Resolution No. 042-2016-OEFA/TFA-SEE, 3 June 2016, pp. 27–30 (affirming Directorate Resolution No. 124-2016-OEFA/DFSAI).

[127] *See, e.g.*, **Ex. R-0049**, Peru's Ministry of the Environment, Resolution No. 042-2016-OEFA/TFA-SEE, 3 June 2016, pp. 27–30 (affirming Directorate Resolution No. 124-2016-OEFA/DFSAI).

[128] **Ex. R-0026**, Letter No. MGP-GM-L-0009-16 from Maple Gas (K. Neuman) to PERUPETRO (R. Guzmán), 17 April 2018, p. 2.

[129] *See* **Ex. R-0041**, CONEX S.A.C., Maple Gas Estimates of Crude Contingent Reserves and Cashflows for Lots 31-B and 31-D as of 31 December 2015, pp. 39, 70; **Ex. R-0042**, CONEX S.A.C., Maple Gas Estimates of Crude Contingent Reserves and Cashflows for Lot 31-E as of 31 December 2015, p. 32.

volumes of crude that are not commercially recoverable within the term of the contract.[130]

96. During 2015 and 2016, overall production from the Pucallpa Refinery production also continued to plummet. According to Maple Gas, the average output of the Refinery decreased by 65%, going from 400 bpd in 2014, to 368 bpd in 2015, and only 140 bpd in 2016.[131]

2. Maple Gas destroyed its relationship with Aguaytía Energy

97. Given its dwindling supply of feedstock,[132] Maple Gas relied on Aguaytía Energy to keep the Pucallpa Refinery running.[133] However, under its new owners, Maple Gas proceeded to destroy its already fragile relationship with Aguaytía Energy.

98. Rather than admit its failure and responsibility in that regard, Claimant attempts to blame Petroperú,[134] deliberately distorting and concealing relevant facts. For example, Claimant inexcusably elides the fact that the ICC Arbitration initiated by Aguaytía Energy against Maple Gas in 2017 resulted in a USD 21.6 million award against Maple Gas.[135]

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[130] *See* **Ex. R-0041**, CONEX S.A.C., Maple Gas Estimates of Crude Contingent Reserves and Cashflows for Lots 31-B and 31-D as of 31 December 2015, p. 70 ("Contingent resources are quantities of oil that are estimated as of a given date, and are potentially recoverable, but. . . are not yet considered sufficiently mature for commercial development due to one or more contingencies. As requested, the contingent resource estimates in this report refer to volumes that are currently not economic but that are technically recoverable before the end of the agreement. In order for these contingent resources to become economically viable, major changes in economic conditions are necessary. These changes could include royalty rate reductions, oil price increases, and operating expense reductions. If this contingency is successfully addressed, a portion of the contingent resources estimated in this report may be reclassified as reserves.").

[131] **Ex. R-0026**, Letter No. MGP-GM-L-0009-16 from Maple Gas (K. Neuman) to PERUPETRO (R. Guzmán), 17 April 2018, p. 2.

[132] Memorial, ¶ 128 (discussing the "renegotiation of its contract with Aguaytía Energy, which Maple Gas depended on for feedstock").

[133] *See* Memorial, ¶ 128 (discussing the "renegotiation of its contract with Aguaytía Energy, which Maple Gas depended on for feedstock"); **Ex. R-0001**, ICC Arbitration (Award), ¶ 97 ("In its letter to Petroperu of May 30, 2016, Maple made it clear that it depended on the supply of Gasoline from Agyuaytia for all of its refining.").

[134] *See* Memorial, ¶ 165 (insisting that Petroperú "intervened" in Maple Gas' relationship with Aguaytía Energy).

[135] *See generally* **Ex. R-0001**, ICC Arbitration (Award), ¶ 195.

99. As discussed in detail below, the evidence demonstrates that under its new owners, Maple Gas (i) refused to repay its approximately USD 5.2 million debt to Aguaytía Energy for unpaid invoices in 2014; (ii) unilaterally decided to treat its contract with Aguaytía Energy as terminated; (iii) accepted continued deliveries of feedstock from Aguaytía Energy yet refused to pay the relevant invoices in 2016 and 2017, thereby accruing an additional USD 13.4 million in debt, and (iv) forced Aguaytía Energy to initiate an arbitration against Maple Gas. It is therefore unsurprising that Aguaytía Energy decided to cease supplying feedstock to Maple Gas.

a. Maple Gas never paid Aguaytía Energy for the unpaid 2014 invoices, and unilaterally deemed the Maple Gas-Aguaytía Energy Exclusive Supply Agreement as terminated

100. After the new owners took control of Maple Gas in October 2015, they sought to renegotiate the company's debt and the terms of its commercial relationship with Aguaytía Energy. In November 2015, Aguaytía Energy and Maple Gas entered into negotiations on (i) the payment of the 2014 invoices that Maple Gas still owed Aguaytía Energy, (ii) a price redetermination for feedstock under the Maple Gas-Aguaytía Energy Exclusive Supply Agreement, and (iii) possible amendments to that agreement.[136]

101. In his witness statement in the ICC Arbitration, Mr. Rojas described these discussions between Aguaytía Energy and Maple Gas, blaming Aguaytía Energy for "stonewall[ing] any commercial proposals, only wishing to discuss Maple Gas's alleged debt [to Aguaytía Energy]."[137] In fact, Mr. Rojas expressed his belief that Aguaytía Energy's position *was a product of the commercial strategy of its parent*, Duke Energy, which wanted to sell Aguaytía Energy.[138] He even conceded that "[t]he

[136] **Ex. R-0001**, ICC Arbitration (Award), ¶ 46.

[137] **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶ 35.

[138] *See* **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶ 35 ("[W]ith the benefit of hindsight I can see that expanding or changing Aguaytia's existing commercial arrangements was not Duke Energy's primary focus. Rather, it was strategizing to dispose of Aguaytia as profitably as possible."). *See also id*. at ¶ 49.

Investment Group was hesitant to enter into any long-term commitment with Aguaytía whose future ownership status was uncertain."[139] In other words, Aguaytía Energy and Maple Gas were embroiled in a commercial dispute, and Maple Gas was itself dragging its feet.[140] These assertions by Mr. Rojas directly contradict Claimant's speculation—for there is no supporting evidence—in this arbitration that Petroperú was somehow to blame for the deterioration of the relationship between Maple Gas and Aguaytía Energy.[141]

102. What is an established fact—rather than any speculation by Claimant—is that the negotiations between Maple Gas and Aguaytía Energy did not resolve the parties' deteriorating relationship.[142] On 29 January 2016, after months of negotiations and meetings, Maple Gas abruptly ended the negotiations on the contractual price redetermination;[143] however, Aguaytía Energy wanted to continue discussions regarding the payment of Maple Gas' debt.[144]

103. Shortly after ending the price redetermination negotiation, Maple Gas took the unilateral position that the supply contract with Aguaytía Energy was terminated and that Maple Gas did not have to pay for the feedstock supply that Aguaytía Energy had already delivered.[145]

b. Maple Gas incurred more debt by refusing to pay Aguaytía Energy for supply of feedstock

104. Despite Maple Gas' increasingly obdurate conduct (e.g., its refusal to pay the outstanding 2014 invoices), Aguaytía Energy continued supplying Maple Gas with

[139] **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶ 61.

[140] *See* **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶ 62 (describing Maple Gas' strategy as follows: "Maple Gas's negotiations with Aguaytia became more limited, with less flexibility as to potential outcomes.").

[141] *See, e.g.*, Memorial, ¶ 128.

[142] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 46 (m).

[143] **Ex. R-0001**, ICC Arbitration (Award), ¶ 46 (m).

[144] **Ex. R-0001**, ICC Arbitration (Award), ¶ 47.

[145] **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 57–61.

feedstock. Aguaytía Energy's only means of offloading the natural gas that it produced at its fractionalization plant was through "natural gasoline pipeline that connect[ed] the Aguaytía fractionalization plant with the Pucallpa refinery."[146] Thus, Aguaytía Energy had no choice but to continue supplying natural gas to Maple Gas, at least until it could find another customer and invest in new infrastructure.[147]

105. Maple Gas—aware of Aguaytía Energy's predicament[148]—exploited the latter's lack of options and continued to accept the feedstock.[149] From March 2016 to August 2017, Maple Gas refused to pay additional invoices, amounting to approximately USD 13.4 million.[150]

c. Aguaytía Energy initiated the ICC Arbitration and secured a USD 21.6 million award against Maple Gas

106. Maple Gas stretched Aguaytía Energy's tolerance and patience to its breaking point; by mid-2017, Maple Gas had destroyed its relationship with Aguaytía Energy. To recall, Maple Gas had refused to repay millions of dollars for unpaid 2014 invoices, had ceased negotiating and then simply declared the contract terminated, had continued to freeload on Aguaytía Energy by accepting feedstock for which it ultimately did not pay.

107. Unsurprisingly in light of the foregoing, on 14 July 2017 Aguaytía Energy sent a notice of termination under the Maple Gas-Aguaytía Energy Exclusive Supply Agreement,

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[146] **Ex. R-0063**, Orazul Energy, Offering Memorandum, 25 April 2017, p. 136.

[147] *See* **Ex. R-0063**, Orazul Energy, Offering Memorandum, 25 April 2017, p. 136. ("We continue to make these deliveries to Maple Gas because the natural gasoline we produce is the natural by-product of the fractionation of the NGLs into LPG. If we discontinue production of natural gasoline, we would no longer be able to produce LPG, which would result in a loss in revenue and a shortage of LPG in the region.").

[148] Mr. Rojas conceded in his witness statement in the ICC Arbitration that he knew that Aguaytia Energy needed to offload its natural gas in order to operate. *See* **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶¶ 21–22 ("Aguaytia's sales to Maple Gas were by necessity rather than choice").

[149] *See* **Ex. R-0156**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Jack W. Hanks, 16 April 2018, ¶¶ 65–66 ("Aguaytia continued to deliver liquid byproducts to Maple Gas and send invoices. With the Agreement no longer in effect, however, Maple Gas did not pay those invoices."); **Ex. R-0001**, ICC Arbitration (Award), ¶ 95.

[150] **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 118, 195.

providing Maple Gas with 30 days within which to pay all outstanding invoices.[151] Maple Gas failed to do so, and defiantly disputed the notice of termination.[152] On 10 October 2017, Aguaytía Energy initiated the ICC Arbitration pursuant to the dispute settlement clause of the Maple Gas-Aguaytía Energy Exclusive Supply Agreement.[153]

108. At this point Aguaytía Energy was rightly concerned that the seemingly impecunious Maple Gas would be unable to satisfy any monetary award issued by the ICC Tribunal. In its 4 February 2018 request for interim relief, Aguaytía Energy observed that "Maple is presently 'in a dire economic situation' and 'on the brink of insolvency' which has resulted in it substantially curtailing its operation and recently closing its refinery."[154] The ICC Tribunal acknowledged Maple Gas' serious financial difficulties, and "prohibited [Maple Gas] from conveying, concealing, assigning, encumbrancing, transferring or in any way dealing with its assets except in the ordinary course of its business."[155]

109. On 21 December 2018, the ICC Tribunal issued its award, finding Maple Gas liable for no less than USD 21.64 million. Specifically, the ICC Tribunal found that:

a. Maple Gas owed Aguaytía Energy USD 5,286,116.70 for unpaid invoices issued in 2014;[156]

b. Maple Gas had unjustly enriched itself by continuing to accept and use deliveries of feedstock, yet refusing to pay Aguaytía Energy for those deliveries;[157]

c. Maple Gas owed Aguaytía Energy USD 13,458,181.98 for feedstock sold and delivered after 1 March 2016;[158]

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[151] **Ex. R-0001**, ICC Arbitration (Award), ¶ 63.

[152] **Ex. R-0001**, ICC Arbitration (Award), ¶ 65.

[153] **Ex. R-0001**, ICC Arbitration (Award), ¶ 22.

[154] **Ex. R-0024**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Decision on Interim Measures, 6 March 2018 (Casey, Blackaby, McGuire), ¶ 7.

[155] **Ex. R-0024**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Decision on Interim Measures, 6 March 2018 (Casey, Blackaby, McGuire), ¶ 25.

[156] **Ex. R-0001**, ICC Arbitration (Award), ¶ 195 (a)(i).

[157] **Ex. R-0001**, ICC Arbitration (Award), ¶ 106.

[158] **Ex. R-0001**, ICC Arbitration (Award), ¶ 195 (a)(ii).

d. Maple Gas owed Aguaytía Energy USD 2,897,926.72 in interest;[159] and

e. Maple Gas should pay 70% of the costs of the arbitration.[160]

d. As a result of Maple Gas' conduct, Aguaytía Energy sought a more stable buyer

110. Maple Gas' recalcitrance and "'dire economic situation,'"[161] not only drove Aguaytía Energy to initiate the (ultimately successful) ICC arbitration, but also caused Aguaytía Energy to "redirect sales to financially stronger clients."[162] In April 2017, Fitch Ratings noted that

> [i]n the last several years, Aquaytia's sole off-taker for natural gas, Maple Gas, has struggled to keep its accounts up-to-date. Consequently, in 2016, Aguaytia wrote off USD 9 million of unpaid invoices to Maple Gas. It is expected to take an additional USD$6 million of impairments in 2017 before **improved distribution infrastructure allows the company to redirect sales to financially stronger clients**.[163] (Emphasis added)

111. Accordingly, it became Aguaytía Energy's goal to invest in infrastructure, and to diversify its revenue streams so that it could break all commercial ties to Maple Gas. Consistent with such goal, in 2017 Aguaytía Energy "contracted SNC Lavalin Perú S.A. to build a new storage and loading plant that will allow it to store the natural gasoline in barrels and sell it directly to third parties."[164] According to Aguaytía Energy's parent company, "the addition of this natural gasoline storage and loading

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[159] **Ex. R-0001**, ICC Arbitration (Award), ¶ 195 (a) (iii).

[160] **Ex. R-0001**, ICC Arbitration (Award), ¶ 195 (e).

[161] **Ex. R-0024**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Decision on Interim Measures, 6 March 2018 (Casey, Blackaby, McGuire), ¶ 7 (*quoting* Aguaytía Energy's submission to the ICC tribunal).

[162] **Ex. R-0022**, "*Fitch Rates Orazul Energy Egenor's Proposed Senior Notes 'BB(EXP)'*," FITCHRATING, 17 April 2017 (accessed 22 July 2022), p. 2.

[163] **Ex. R-0022**, "*Fitch Rates Orazul Energy Egenor's Proposed Senior Notes 'BB(EXP)'*," FITCHRATING, 17 April 2017 (accessed 22 July 2022), pp. 1–2. *See also* **Ex. R-0063**, Orazul Energy, Offering Memorandum, 25 April 2017, p. 136 ("Aguaytía currently has no method of storing the natural gasoline produced as the natural by-product of the LPG that the company sells to bottlers and gas stations. However, Aguaytía has contracted SNC Lavalin Perú S.A. to build a new storage and loading plant that will allow it to store the natural gasoline in barrels and sell it directly to third parties.").

[164] **Ex. R-0063**, Orazul Energy, Offering Memorandum, 25 April 2017, p. 136.

plant will allow us diversify our revenue streams, eliminate our dependence on Maple Gas for revenues associated with our natural gasoline sales and reduce our counterparty risk."[165]

112. Thus, by 2017, Maple Gas had through its own conduct destroyed its commercial relationship with Aguaytía Energy, which for years had been its primary supplier of feedstock.

3. Maple Gas also alienated CEPSA

113. As mentioned above, in mid-2015, Messrs. Katabi and Hanks had sought to secure an agreement with CEPSA for the supply of feedstock. Notwithstanding the fact that such effort failed, those two gentlemen allegedly sank millions of USD into the acquisition of Maple Gas' debt in the fall of 2015. As explained in the following sections, Maple Gas' new owners then tried to force CEPSA into selling feedstock to Maple Gas. Such efforts ultimately had the effect of alienating this potential supplier, as had occurred with Aguaytía Energy.

a. <u>Maple Gas tried to force a reluctant CEPSA to sell feedstock to Maple Gas</u>

114. In an attempt to address their feedstock supply problems, starting in late 2015 and through early 2016, Maple Gas' new owners sought to enter into a supply agreement with CEPSA. As Claimant concedes, such efforts did not succeed.[166]

115. At the time, CEPSA had good reasons to be circumspect about entering into a supply contract with Maple Gas, as "it was widely known in the sector"[167] that Maple Gas had a history of not paying its supplier of feedstock (i.e., Aguaytía Energy). Also, CEPSA was well aware that Maple Gas had been in serious financial trouble and had

[165] **Ex. R-0063**, Orazul Energy, Offering Memorandum, 25 April 2017, p. 9.

[166] *See* Memorial, ¶¶ 111–13.

[167] **Ex. R-0002**, Lima Arbitration (Award), ¶ 75 (noting that "CEPSA's decision could have been influenced by the fact that MAPLE had stopped paying AGUAYTÍA for an entire year for the supply of hydrocarbons; a situation that was widely known in the sector and that led to arbitration between those parties").

been seized by the Creditor Banks in December 2014 for failure to honor its multi-million dollar debt.[168]

116. As noted above, CEPSA had begun selling crude oil to Petroperú under a short-term, non-exclusive agreement in March 2014.[169] CEPSA had continued to conclude short-term, non-exclusive contracts with Petroperú thereafter.[170] CEPSA had delivered its crude for Petroperú at the Port of Pucallpa terminal (which was controlled by Maple Gas, and connected to the Pucallpa Refinery) and paid Maple Gas for RAD Services.[171] However, in January 2016, Maple Gas abruptly refused to allow CEPSA to deliver at the Port of Pucallpa the crude oil that was intended for Petroperú.[172] On 12 January 2016, CEPSA wrote to Maple Gas and described the immediate and grave impact of Maple Gas' actions:

> On the date and time noted above [(i.e., 12 January 2016)], we were verbally informed by the supervision of the MAPLE Refinery that they would no longer attend to the unloading of tankers in said facilities; and therefore, we do not have empty tankers to transfer the production . . . . For this reason beyond our control, we have been forced to temporarily stop our crude oil production . . . .
>
> This production stoppage means that we will not be able to attend to the scheduled shipments as of January 17 until the current situation with the MAPLE Refinery is resolved or other alternatives are found for the shipment of crude oil.[173]

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[168] **Ex. C-0135**, Email from J. Hanks to A. Masias, 14 October 2015, p. 1.

[169] *See* **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, p. 1.

[170] *See generally, e.g.*, **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, p. 1; **Ex. R-0023**, Petroperú-CEPSA Agreement for 305,000 barrels of crude, 11 September 2014, p. 1; **Ex. R-0124**, Petroperú-CEPSA Agreement for 230,000 barrels of crude, 28 January 2015; **Ex. R-0125**, Petroperú-CEPSA Agreement for 1.22 million barrels of crude, 5 May 2015.

[171] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 71 (recalling Petroperú's submission that "before 2016, CEPSA supplied PETROPERÚ with its hydrocarbons at the Pucallpa terminal (in possession of MAPLE), without MAPLE's questioning that supply"); **Ex. R-0023**, Petroperú-CEPSA Agreement for 305,000 barrels of crude, 11 September 2014, Clause 6.

[172] *See* **Ex. R-0128**, Letter No. CEPSA-GG-00005/16 from CEPSA (M. Ángel) to Petroperú (G. Velasquez), 12 January 2016, p. 1. *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 71 ("This situation changed in January 2016, when CEPSA and PETROPERÚ experienced problems in executing their supply agreement.").

[173] **Ex. R-0128**, Letter No. CEPSA-GG-00005/16 from CEPSA (M. Ángel) to Petroperú (G. Velasquez), 12 January 2016, p. 1.

117. In other words, Maple Gas' actions had forced CEPSA to halt all production of crude oil from Block 131.[174] As later observed by a Petroperú manager, "[T]he relationship between the two companies –CEPSA and Maple– deteriorated to the point that Maple closed the doors and didn't allow the tankers that were arriving with crude to unload, and thus CEPSA fell into crisis."[175]

118. The circumstances suggest that Maple Gas took this course of action to extort more favorable commercial terms from CEPSA going forward. Mr. Katabi, who at the time was Maple Gas' Executive President, betrayed precisely that goal: when asked in a press interview why CEPSA had halted production in January 2016, Mr. Katabi evaded the question and instead revealed Maple Gas' hand:

> **But Cepsa has stopped producing since January, what happened?**
>
> The contract with them expired on December 31, 2015, but we are willing to renew it on two conditions. The first is that they sell us the amount we need to fill the Pucallpa refinery (we only need half of Cepsa's production). And second, that they offer us a price similar to the one paid by Petro-Peru.[176]

Thus, according to Mr. Katabi's own contemporaneous statements, made on behalf of Maple Gas, the latter was effectively holding CEPSA hostage by refusing to provide storage services to it unless it agreed to sell half of its production to Maple Gas.

119. Naturally, Claimant and Mr. Katabi would rather avoid any reference to the above unflattering facts, and so in his witness statement in this arbitration Mr. Katabi tells a different story. He alleges that it was CEPSA that had held Maple Gas hostage, and not the other way around, by making "the supply agreement contingent on the

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[174] *See* **Ex. R-0128**, Letter No. CEPSA-GG-00005/16 from CEPSA (M. Ángel) to Petroperú (G. Velasquez), 12 January 2016, p. 1. *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 71 ("This situation, caused by MAPLE's refusal to provide services at the Port of Pucallpa, led CEPSA to temporarily suspend all of its production of crude oil from Block 131 and, as a result, impacted the supply to PETROPERÚ's benefit. That situation was reported by CEPSA through Letter No. CEPSA-GG-00005/16 of January 12, 2016.").

[175] **Ex. C-0219**, "*Gerente de Petroperú explicó situación del combustible en Ucayali*," Impetu Perú, 22 February 2018, p. 1.

[176] **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, p. 2 (emphasis in original).

renewal of a contract [CEPSA] had with us for . . . RAD Services."[177] Mr. Katabi says nothing at all about the above-referenced unilateral actions and demands by Maple Gas on CEPSA.

b. CEPSA suspended its discussions with Maple Gas

120. Maple Gas' confrontational strategy backfired. In his February 2016 press statements, Mr. Katabi conceded that CEPSA had walked away from negotiations:

> We sent them a letter, but they inexplicably refused to negotiate, until we understood their strategy.[178]
>
> **Which strategy?**
>
> To complain to the Government that they cannot produce because of us when what they are looking for is an excuse not to continue producing. That is why we are visiting the authorities, to explain this message and to make it clear that we are not responsible.
>
> **But are you still negotiating with Cepsa?**
>
> There has been no communication lately . . . .[179]

121. Instead of securing a vital source of feedstock, which it desperately needed after it had burned all bridges with Aguaytía Energy, Maple Gas thus drove away the only other producer that could have supplied it with feedstock to process at the Pucallpa Refinery and to meet the demand in Ucayali.

c. Petroperú did not prevent CEPSA from selling feedstock to Maple Gas

122. The evidence on the record directly contradicts the suggestion, peddled by Claimant in this arbitration, that Petroperú interfered with Maple Gas' relationship with

[177] Katabi Witness Statement, ¶ 27.

[178] **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, p. 2.

[179] **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, pp. 2–3.

CEPSA. The truth is far simpler: CEPSA did not appreciate Maple Gas' underhanded tactics, and refused to accept Maple Gas' coercive commercial terms.

123. Further, Claimant's allegation in the Memorial that Petroperú "contracted to purchase all of CEPSA's production, depriving Maple Gas of a critical source of feedstock"[180] is patently untrue. As Claimant well knows, CEPSA and Petroperú had entered into non-exclusive supply agreements, which left CEPSA free to sell to Maple Gas.[181] As Claimant also knows, CEPSA in fact *did* sell to Maple Gas: CEPSA entered into short-term supply contracts with and sold feedstock to Maple Gas in May and October 2017.[182] Notably, such contracts were introduced into the record of this arbitration not by Claimant but rather by its damages experts.[183]

124. It is an established fact, therefore, that Petroperú did not purchase "all" of CEPSA's feedstock or prevent Maple Gas from entering into agreements with CEPSA, as Claimant falsely claims. CEPSA, having witnessed and also experienced first-hand the perils of conducting business with Maple Gas, was rightly reluctant to commit half of its production to that company. Instead, CEPSA reasonably opted to diversify its customer base, and entered only into short-term contracts with Maple Gas, thereby limiting its exposure and risk.

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[180] Memorial, Title 1, p. 35.

[181] **Ex. R-0002**, Lima Arbitration (Award), ¶¶ 187–88 ("In that regard, the Tribunal appreciates that PETROPERÚ, in submission No. 31 filed on October 24, 2019, complied with disclosure of the agreements it had entered into with CEPSA and AGUAYTÍA between March 2014 and December 2018, which appear in the file as Annexes A-118 to A-127. **In evaluating each one of the supply agreements, it is evident that they do not stipulate any exclusivity in favor of PETROPERÚ; nor can it be argued that there is disguised exclusivity**. Under those contractual arrangements, it cannot be validly concluded that the Petitioner has monopolized the purchase of the product, preventing Maple from accessing suppliers such as CEPSA and AGUAYTÍA, in order to displace it [MAPLE] from the market.") (emphasis added).

[182] **Ex. CLEX-0036**, Maple – CEPSA Contract. May 24, 2017, p. 1; **Ex. CLEX-0037**, Maple – CEPSA Contract. October 30, 2017, p. 1. *See also* **RER-02**, Alix Damages Expert Report, ¶ 128.

[183] **Ex. CLEX-0036**, Maple – CEPSA Contract. May 24, 2017, p. 1; **Ex. CLEX-0037**, Maple – CEPSA Contract. October 30, 2017, p. 1.

E. As a result of Maple Gas' underutilization of the Pucallpa Refinery, Petroperú stepped in to ensure continued supply of fuel products to the Ucayali region

125. Maple Gas' behavior had important consequences for the Ucayali region: (i) Maple Gas did not have enough feedstock to produce enough refined oil products to meet demand in such region; and (ii) Aguaytía Energy and CEPSA needed a stable buyer for their feedstock. As a result, and as conceded by Claimant's witnesses,[184] Petroperú justifiably stepped in to stabilize the market and ensure sufficient supply in the Ucayali region.[185]

126. Peru is a social market economy.[186] The Peruvian Constitution enshrines and protects the fundamental right to freedom of enterprise,[187] but also authorizes the State to carry out "business activity" for the public interest.[188] As discussed in detail in Dr. Monteza's expert report, this is known as the "principle of subsidiarity": State organs and State-owned entities act in the public interest when the private sector is unable or unwilling to do so.[189] In the words of the Constitutional Court, the State is expected to act "as the final guarantor of the general interest."[190] Application of the principle of subsidiarity does not entail the exercise of governmental or sovereign authority; instead, State entities acting in a role of subsidiarity carry out only business or

[184] *See* Katabi Witness Statement, ¶ 21 ("Because the refinery was operating at significantly less than capacity, it was not supplying the Ucayali market with sufficient refined products. Accordingly, Petroperú was acting in its role as supplier of last resort"); Neumman Witness Statement, ¶ 8.

[185] *See* **Ex. C-0220**, "*Comunicado a la Opinión Pública de Ucayali*," El Choche, 23 February 2018 ("PETROPERÚ guarantees and always has guaranteed the supply of fuel in the Ucayali region, renewing its commitment with respect to consistency, quantity and quality, and competitive prices."); **Ex. C-0219**, "*Gerente de Petroperú explicó situación del combustible en Ucayali*," Impetu Perú, 22 February 2018 ("'We've helped to ensure that production does not stop.'").

[186] **RER-01**, Expert Report of Carlos Javier Monteza Palacios, 3 October 2022 ("**RER-01, Monteza Expert Report**"), ¶ 265.

[187] **Ex. R-0039**, Political Constitution of Peru, 29 December 1993 ("**Peru's Constitution**"), Arts. 58, 59.

[188] **Ex. R-0039**, Peru's Constitution, Art. 60 ("[T]he State may subsidiarily carry out business activity, directly or indirectly, for reasons of high public interest or manifest national convenience").

[189] **RER-01**, Monteza Expert Report, ¶ 271.

[190] **Ex. R-0154**, Judgment of the Constitutional Court contained in Case File No. 0008-2003-AI/T, 11 November 2003, ¶ 21. *See also* **RER-01**, Monteza Expert Report, ¶ 270.

commercial activities.[191] Such activities are regulated by the National Institute for the Defense of Competition and Protection of Intellectual Property ("**INDECOPI**").[192] INDECOPI is the regulator vested with the authority to determine whether State-owned enterprises (such as Petroperú) have properly acted in accordance with the principle of subsidiarity.

127. Petroperú is a State-owned entity established to serve as a subsidiary in the hydrocarbon sector.[193] Specifically, pursuant to Legislative Decree 043, Petroperú was created to carry out hydrocarbon-related activities.[194] For example, Petroperú negotiates and enters into contracts for the exploration and exploitation of hydrocarbons in Peru, and also produces and sells refined oil products.[195] However, Petroperú is not authorized to carry out any governmental functions.[196] Rather, it is required by law to "act with full economic, financial and administrative autonomy,"[197] and its employees are not deemed public officials.[198]

128. Claimant concedes that beginning in 2014, Petroperú stepped in to fill the gap in the market by supplying refined products to the Ucayali region, in its capacity as the supplier of last resort:

> Because of the resulting decline in refined products supplied to the region by the [Pucallpa] Refinery, **Petroperú gradually had**

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[191] **RER-01**, Monteza Expert Report, ¶¶ 278-79. *See also* Quiñones Report, ¶ 240 ("In the precedent, the INDECOPI Court states that no activity carried out by a public company or an entity of the Administration that qualifies as the exercise of a public power or of *ius imperium* derived from the sovereign power of the State shall constitute business activity, nor therefore shall the principle of subsidiarity be applicable. Nor shall any welfare activity carried out by constitutional mandate as part of the obligations of the State be regarded as business activity").

[192] **Ex. R-0064**, Legislative Decree No. 1044, 25 June 2008, Art. 24.

[193] **RER-01**, Monteza Expert Report, ¶242.

[194] **Ex. R-0032**, Legislative Decree No. 43, 4 March 1981, Art. 3.

[195] **RER-01**, Monteza Expert Report, ¶ 243. *See also* Quiñones Report, ¶ 221, fn. 195 (*citing* **Ex. MTQ-0026**, Estatuto Social de Petróleos del Perú – PETROPERÚ, aprobado por la Junta General de Accionistas, 18 October 2010).

[196] **RER-01**, Monteza Expert Report, ¶ 251.

[197] **Ex. R-0032**, Legislative Decree No. 43, 4 March 1981, Art. 3 as modified by Article 1 of Law No. 26224 published on 08-24-1993. *See also* **Ex. R-0145**, Law No. 28840, 19 July 2006, Art. 2; **RER-01**, Monteza Expert Report, ¶¶ 243, 253.

[198] **RER-01**, Monteza Expert Report, ¶ 252.

> **begun to supply refined products to the region in its capacity as the supplier of last resort**.[199] (Emphasis added)

129. The foregoing is also confirmed by Claimant's own witnesses. Thus, Mr. Neuman notes in his witness statement that

> the Block 31 Fields were at the end of their life cycle and the feedstock from Aguaytía Energy had been declining for several years. Thus, the Pucallpa Refinery had not been operating at full capacity. During this period, Petroperú had been providing refined products to the Ucayali region in its regulatory role as the oil supplier of last resort.[200]

And the witness Mr. Katabi, for his part, similarly concedes that the Pucallpa Refinery was "not supplying the Ucayali market with sufficient refined products. Accordingly, Petroperú was acting in its role as supplier of last resort."[201]

130. To be able to supply refined products to the Ucayali region, Petroperú needed to obtain and refine feedstock. As discussed in **Section II.B.4** above, Maple Gas did not have the financial or operational capacity to purchase feedstock from CEPSA.[202] Thus, in March 2014 Petroperú entered into a non-exclusive, short-term supply agreement with CEPSA for the purchase of crude feedstock.[203] Under such agreement, CEPSA agreed to supply crude feedstock for sixty days or up to 60,000 barrels of crude, whichever occurred first.[204] CEPSA remained free, however, to sell feedstock to other

[199] Memorial, ¶ 84.

[200] Neumman Witness Statement, ¶ 8.

[201] Katabi Witness Statement, ¶ 21.

[202] Memorial, ¶¶ 86–87.

[203] **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, Clause 4.

[204] **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, Clause 4.

producers.[205] Thereafter, CEPSA and Petroperú continued for several years to enter into other non-exclusive supply agreements.[206]

131. Claimant deliberately mischaracterizes these supply agreements, attempting to make it seem as though Petroperú was preventing CEPSA from selling to Maple Gas.[207] That is inaccurate. As noted above, the relevant contracts—to which Maple Gas has long had access[208]—are short-term, non-exclusive agreements through which Petroperú agreed to purchase certain maximum volumes of feedstock; the amounts actually supplied was to be determined by CEPSA.[209] In entering into these agreements, Petroperú was continuing to purchase crude feedstock from CEPSA, as it had since March 2014[210] in order to ensure continued supply to the Ucayali region.[211]

132. In addition to mischaracterizing Petroperú's commercial relationship with CEPSA, Claimant also alleges that Petroperú "intervened in Maple Gas's relationship with Aguaytía Energy in 2017."[212] However, as Claimant is aware, Petroperú did not

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[205] *See* **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, Clause 3; **Ex. R-0002**, Lima Arbitration (Award), ¶ 188 ("In evaluating each one of the supply agreements, it is evident that they do not stipulate any exclusivity in favor of PETROPERÚ; nor can it be argued that there is disguised exclusivity. Under those contractual arrangements, it cannot be validly concluded that the Petitioner has monopolized the purchase of the product, preventing Maple from accessing suppliers such as CEPSA and AGUAYTÍA, in order to displace it [MAPLE] from the market.").

[206] *See generally, e.g.*, **Ex. R-0023**, Petroperú-CEPSA Agreement for 305,000 barrels of crude, 11 September 2014; **Ex. R-0114**, Oil Purchase Agreement between CEPSA and Petroperú, 8 April 2016.

[207] Memorial, ¶ 115.

[208] In the Lima Arbitration between Petroperú and Maple Gas, the tribunal specifically noted that Petroperú had submitted into the record of the arbitration all of its contracts with CEPSA. **Ex. R-0002**, Lima Arbitration (Award), ¶ 187 ("[T]he Tribunal appreciates that PETROPERÚ, in submission No. 31 filed on October 24, 2019, complied with disclosure of the agreements it had entered into with CEPSA and AGUAYTÍA between March 2014 and December 2018, which appear in the file as Annexes A-118 to A-127.").

[209] **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, Clauses 3–4; **Ex. R-0023**, Petroperú-CEPSA Agreement for 305,000 barrels of crude, 11 September 2014, Clause 3; **Ex. R-0124**, Petroperú-CEPSA Agreement for 230,000 barrels of crude, 28 January 2015, Clauses 2–3; **Ex. R-0125**, Petroperú-CEPSA Agreement for 1.22 million barrels of crude, 5 May 2015, Clauses 2–3; **Ex. R-0126**, Petroperú-CEPSA Agreement for 1.08 million barrels of crude, 8 April 2016, Clause 2–3; **Ex. R-0114**, Oil Purchase Agreement between CEPSA and Petroperú, 8 April 2016, Clauses 2–3; **Ex. C-0201**, Oil Purchase Agreement between CEPSA and Petroperú, 31 October 2017, Clauses 2–3.

[210] **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, p. 1.

[211] **Ex. C-0217**, "*Petro-Perú entablará arbitraje contra Maple por refinería*," El Comercio Perú, 15 February 2018, p. 3.

[212] Memorial, ¶ 165.

intervene: As described in detail in **Section II.D.2** above, Maple Gas destroyed its relationship with Aguaytía Energy by refusing to pay for the feedstock supplied by Aguaytía Energy to Maple Gas. Accordingly, Aguaytía Energy, made capital investments in infrastructure[213] and entered into a supply contract with Petroperú on 28 September 2017.[214] While Claimant's witness Mr. Neumann attempts to mischaracterize this agreement as exclusive,[215] the September 2017 contract between Petroperú and Aguaytía Energy was a non-exclusive agreement that specified a *maximum* amount of feedstock, such that Aguaytía Energy was free to determine how much crude feedstock to sell to Petroperú.[216] Given that Maple Gas had access to this September 2017 contract, Claimant's blatant mischaracterization of the contract is inexcusable.[217]

133. Thus, instead of accepting the sole responsibility of Maple Gas for the alienation of its two suppliers, Claimant seeks to shift the blame, falsely accusing Petroperú of interfering to prevent Maple Gas from obtaining feedstock. That narrative is baseless and inconsistent with the facts and the relevant documentary evidence (including contemporaneous evidence). As Petroperú explained in public statements at the time, "[Petroperú's] decision to buy crude corresponded to its subsidiary role, since, if it hadn't, Pucallpa would have been left without fuel."[218]

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[213] **Ex. R-0001**, ICC Arbitration (Award), ¶ 119 ("Aguaytía needed to ensure transportation facilities to third parties to maintain its operations.").

[214] **Ex. R-0127**, Petroperú-Aguaytía Energy Agreement for 365,000 barrels of Natural Gas, 28 September 2017, pp. 5–6 (Agreement Arts. 2–3).

[215] Memorial, ¶ 168.

[216] **Ex. R-0127**, Petroperú-Aguaytía Energy Agreement for 365,000 barrels of Natural Gas, 28 September 2017, pp. 5–6 (Agreement Arts. 2–3). *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 80 ("[T]he parties agreed only on a maximum volume, with Aguaytía being free to enter into other agreements for the sale of fuel.").

[217] In the Lima Arbitration between Petroperú and Maple Gas, the tribunal specifically noted that Petroperú had submitted onto the record of the arbitration all of its contracts with Aguaytía Energy. **Ex. R-0002**, Lima Arbitration (Award), ¶ 187 ("In that regard, the Tribunal appreciates that PETROPERÚ, in submission No. 31 filed on October 24, 2019, complied with disclosure of the agreements it had entered into with CEPSA and AGUAYTÍA between March 2014 and December 2018, which appear in the file as Annexes A-118 to A-127.").

[218] **Ex. C-0217**, "*Petro-Perú entablará arbitraje contra Maple por refinería*," El Comercio Perú, 15 February 2018, p. 3.

134. In order to supply refined products to the Ucayali region, Petroperú not only needed to obtain feedstock, but also needed to process the feedstock at one of its refineries. Petroperú owns a number of refineries, including the Pucallpa Refinery and others in different regions (namely, in Conchán, Talara, and Iquitos).[219] Because Maple Gas had leased the Pucallpa Refinery,[220] Petroperú needed to transport the feedstock that it had purchased to its other refineries for processing,[221] and then transport the refined oil products back into Ucayali. In the Memorial, Claimant repeatedly criticizes Petroperú for refining products in the Iquitos Refinery, even going so far as to call Petroperú's conduct "inexplicable."[222] Such criticisms are baseless: Petroperú took that course of action in order to supply the Ucayali region at a time when Maple Gas had a lease on the Pucallpa Refinery but was unwilling or unable to produce refined products.

F. Maple Gas refused to make necessary updates to the Refinery or to provide RAD Services to Petroperú

135. Beginning in 2014, Maple Gas and Petroperú had entered into discussions about Maple Gas' provision of RAD Services at the Pucallpa Refinery. Article 12.1 of the Refinery Lease Agreement provided that "[a]t the request of PETROPERÚ, MAPLE [Gas] will be required to provide [RAD Services] storage, reception and dispatch of the products described below under the operating conditions agreed upon by the parties, as appropriate."[223] Article 12.1 further specified that Petroperú could request a tank with a capacity of 30 million barrels of crude oil ("**MB**") within six months of signing the Refinery Lease Agreement.[224] The parties were also required to agree on operating procedures for RAD Services.[225]

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[219] *See* **Ex. R-0034**, "*Operational Units: Conchán Refinery*," PETROPERÚ, undated (accessed 25 July 2022), p. 2; **Ex. R-0035**, "*Operational Units: Talara Refinery*," PETROPERÚ, undated (accessed 25 July 2022), p. 3; **Ex. R-0036**, "*Operational Units: Iquitos Refinery*," PETROPERÚ, undated (accessed 25 July 2022), p. 2.

[220] *See generally* **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, p. 1.

[221] *See, e.g.*, **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, title, Clauses 6–7 (specifying that CEPSA would deliver crude feedstock to the Port of Pucallpa, and that Petroperu would transport and refine the feedstock at its Iquitos Refinery).

[222] Memorial, ¶ 9. *See also, e.g.*, Memorial, ¶¶ 88, 117.

[223] **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Clause 12.1.

[224] **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Clause 12.1.

[225] **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Clause 12.1.

136. In the Memorial, Claimant complains that Petroperú began aggressively demanding RAD Services in December 2015, allegedly *after* the "Blue Oil Investment Group" had invested in Maple Gas.[226] That is inaccurate. In fact, Petroperú had formally requested RAD services as early as July 2014. Specifically, on 24 July 2014 Petroperú sent a letter to Maple Gas to arrange for the provision of RAD Services.[227] Petroperú further requested that Maple Gas supply the proposed operating procedures for its provision of RAD Services.[228] Upon Maple Gas' request, Petroperú then sent to Maple Gas the sample operating procedure that Petroperú had used with other entities.[229] On 23 September 2014, Maple Gas confirmed that it would make the 30 MB tank ("**Tank No. 1**") available for the storage of oil to be provided by Petroperú,[230] and Maple Gas subsequently sent its proposed operating procedures.[231]

137. However, Petroperú notified Maple Gas of problems following its inspection of Maple Gas' facilities and Tank No. 1.[232] In particular, Petroperú noted that a single pipeline was available for use, but that the single pipeline could not be used for the transport of both crude oil and refined oil products[233]—which risked contaminating the refined oil products with crude oil, in contravention of existing regulations.[234] Maple Gas responded by demanding that Petroperú begin paying a storage fee for Tank No. 1,

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[226] *See* Memorial, ¶ 99.

[227] *See generally* **Ex. R-0121**, Letter No. COSE-AA-639-2014 from Petroperú (J. Estrada) to Maple Gas (C. Valderrama), 24 July 2014.

[228] *See* **Ex. R-0121**, Letter No. COSE-AA-639-2014 from Petroperú (J. Estrada) to Maple Gas (C. Valderrama), 24 July 2014.

[229] *See* **Ex. R-0123**, Letter No. COSE-AA-749-2014 from Petroperú (J. Delgado) to Maple Gas (M. Galup), 8 September 2014, p. 1.

[230] **Ex. R-0027**, Letter No. MGP-OPM-L-0256-2014 from Maple Gas (C. Valderrama) to Petroperú (J. Delgado), 23 September 2014, p. 1.

[231] **Ex. R-0028**, Letter No. MGP-GM-L-0265-2014 from Maple Gas (C. Valderrama) to Petroperú (J. Delgado), 3 October 2014, p. 1.

[232] **Ex. R-0029**, Letter No. COSE-AA-866-2014 from Petroperú (J. Delgado) to Maple Gas (C. Valderrama), 6 October 2014, p. 1.

[233] **Ex. R-0029**, Letter No. COSE-AA-866-2014 from Petroperú (J. Delgado) to Maple Gas (C. Valderrama), 6 October 2014, p. 1.

[234] **Ex. R-0002**, Lima Arbitration (Award), ¶ 286 (restating Petroperú's position and *citing* Supreme Decree No. 045-2001-EM).

and by indicating that it would not make any of the requisite updates to its facilities.[235] On 14 November 2014, Petroperú restated its concerns and noted that absent repairs, Tank No. 1 would remain unusable.[236] Petroperú followed up by requesting a meeting to discuss these issues.[237]

138. Petroperú reached out multiple times in the fall of 2015,[238] but Maple Gas failed to respond. Following months of silence, Petroperú again contacted Maple Gas in December 2015. By letter dated 1 December 2015, Petroperú's Manager for Contracts and Services requested that Maple Gas (i) make Tank No. 1 available, and (ii) sign the proposed RAD Services operating procedure.[239] By letter of the same date, Petroperú's Manager for Refining and Pipelines noted that "[d]espite the time that has elapsed and the communications we have sent you, your company is not complying with what has been agreed [i]n Clause Twelve of the Agreement."[240] Petroperú emphasized that it needed access to Tank No. 1 "for operational reasons, given that it would enable us to confront the effects of the El Niño phenomenon in Pucallpa."[241]

139. On 6 December 2015, Maple Gas responded by arguing that Tank No. 1 was already available to Petroperú, and by rejecting calls for any repairs or updates to Maple Gas' facilities.[242] On 18 December 2015, Maple Gas sent another letter to Petroperú, noting that it would provide comments on the proposed RAD Services operating procedure at a later date.[243] On 29 January 2016—after a delay of five (5) months—Maple Gas

[235] **Ex. R-0030**, Letter No. MGP-OPM-L-Q309-2014 from Maple Gas (C. Valderrama) to Petroperú (J. Delgado), 13 November 2014, p. 1.

[236] **Ex. R-0031**, Letter No. COSE-AA-1018-2014 from Petroperú (J. Delgado) to Maple Gas (C. Valderrama), 14 November 2014, p. 1.

[237] **Ex. C-0123**, Letter from Petroperú to Maple Gas, 22 December 2014, p. 1.

[238] *See* **Ex. C-0143**, Letter from Maple Gas to Petroperú, 29 January 2016, p. 1 (noting that Petroperú had sent three letters from September to November 2015).

[239] *See* **Ex. C-0140**, Letter from Petroperú (J. Delgado) to Maple Gas, 1 December 2015, p. 1.

[240] **Ex. C-0139**, Letter from Petroperú (G. León) to Maple Gas, 1 December 2015, p. 1.

[241] **Ex. C-0139**, Letter from Petroperú (G. León) to Maple Gas, 1 December 2015, p. 1.

[242] *See* **Ex. R-0113**, Letter No. MGP-OPM-L-010-2015 from Maple Gas (C. Valderrama) to Petroperú (J. Delgado), 6 December 2015, pp. 1–2.

[243] *See* **Ex. C-0141**, Letter from Maple Gas to Petroperú, 18 December 2015 p. 1.

finally sent its response to Petroperú's proposed operating conditions.[244] Maple Gas continued to insist that no changes would be made to its facilities.[245]

140. Article 12.1 of the Lease Agreement provided that—in addition to a 30 MB storage tank—Maple Gas would make available additional tanks within three (3) years of signature.[246] With nearly two years elapsed, on 3 February 2016, Petroperú contacted Maple Gas to ask about the status of the other tanks.[247] Maple Gas responded by noting that the use of these tanks would be subject to the RAD Services operating procedure[248]—to which Maple Gas had not agreed.

141. Shortly thereafter, on 30 March 2016, Maple Gas sent a letter abruptly terminating the negotiations over RAD Services.[249] Maple Gas thus decided that it would not provide RAD Services to Petroperú.[250]

142. Throughout the Memorial, Claimant mischaracterizes the discussions between Maple Gas and Petroperú concerning RAD Services, seeking to create support for its narrative that Petroperú was somehow targeting Maple Gas. As demonstrated above, however, the documents themselves disprove this narrative. The following are examples of Claimant's tactics:

    a. Claimant alleges that "[i]n December 2015, . . . Petroperú suddenly changed its approach"[251]—an allegation crafted to fit neatly with Claimant's baseless conspiracy theory that Peru, Petroperú and PERUPETRO targeted Maple Gas after the investors acquired Maple Gas' debt in October 2015. In fact, Petroperú was merely following up on its previous requests, which had been met by months of silence from Maple Gas. Furthermore, there was no change in the

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[244] *See generally* **Ex. C-0143**, Letter from Maple Gas to Petroperú, 29 January 2016, p. 1.

[245] **Ex. C-0143**, Letter from Maple Gas to Petroperú, 29 January 2016, p. 3.

[246] **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Clause 12.1.

[247] *See* **Ex. C-0144**, Letter from Petroperú to Maple Gas, 3 February 2016, p. 1.

[248] *See* **Ex. C-0145**, Letter from Maple Gas to Petroperú, 22 February 2016, p. 1.

[249] *See* **Ex. R-0037**, Letter No. MGP-LEGA-L-0027-2016 from Maple Gas (A. Eyzaguirre) to Petroperú (G. Velásquez), 30 March 2016, p. 1.

[250] *See* **Ex. R-0037**, Letter No. MGP-LEGA-L-0027-2016 from Maple Gas (A. Eyzaguirre) to Petroperú (G. Velásquez), 30 March 2016, p. 1.

[251] Memorial, ¶ 99.

tone of Petroperú's letters; it was simply trying to reach an agreement on RAD Services.[252]

b. Claimant accuses Petroperú of being "demanding" and "threatening,"[253] but does not cite to the actual letters from Petroperú. Instead, it cites to letters *sent by Maple Gas*. For example, Claimant asserts in the Memorial that "Petroperú again threatened to take back the Pucallpa Refinery if Maple Gas did not agree to continue to provide RAD Services to CEPSA, which enabled Petroperú to purchase CEPSA's crude,"[254] but in support of this accusation it cites exclusively to (i) two letters from Maple Gas itself,[255] and (ii) the witness statement of Mr. Rojas.[256] Another illustration of this tactic is the assertion in the Memorial that "[e]ven though Maple Gas had offered to share the cost of this infrastructure, Petroperú had demanded that Maple Gas pay for all of it."[257] In support of this assertion, Claimant cites to Exhibit C-0124, which is yet another letter from Maple Gas itself to Petroperú.[258]

143. Claimant's narrative in the Memorial regarding the issue of RAD Services is thus inconsistent with the documentary evidence. Pursuant to the terms of the Refinery Lease Agreement, Petroperú had initiated discussions for the provision of RAD Services in 2014. Maple Gas refused to update its facilities, to agree to a RAD Services operating procedure, and ultimately terminated negotiations on the subject—effectively ensuring that Petroperú would never use and pay for RAD Services at the Refinery.

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[252] *See generally* **Ex. C-0140**, Letter from Petroperú (J. Delgado) to Maple Gas, 1 December 2015, p. 1; **Ex. C-0139**, Letter from Petroperú (G. León) to Maple Gas, 1 December 2015, p. 1.

[253] Memorial, ¶¶ 106–07.

[254] Memorial, ¶ 107.

[255] Memorial, ¶ 107, fn. 137 (*citing* "Letter from Maple Gas to Petroperú, dated 30 May 2016, Ex. C-0026; Letter from Maple Gas to Petroperú, dated 31 August 2016, at p. 3, Ex. C-0029.").

[256] Memorial, ¶ 107, fn. 137 (*citing* "Rojas Witness Statement, ¶ 37; Letter from Maple Gas to Petroperú, dated 30 May 2016, Ex. C-0026; Letter from Maple Gas to Petroperú, dated 31 August 2016, at p. 3, Ex. C-0029.").

[257] Memorial, ¶ 103.

[258] Memorial, ¶ 103, fn. 129.

G. In June 2017, Mr. Holzer decided to invest in Maple Gas, even though it was already in a downward spiral

144. Despite Maple Gas' troubled history and clear downward trajectory, Charles Holzer was induced by his college friend, Mr. Rojas, to acquire Maple Gas. Mr. Holzer is the founder and sole owner of Worth Capital (the Claimant in this arbitration).[259] The latter is a shell company that was created shortly before—and for the sole purpose of—serving as a vehicle for an indirect investment by Mr. Holzer in Maple Gas.[260] As discussed below, Mr. Holzer has a history of making poor investments—and his investment in Maple Gas was no exception. Through Worth Capital, he invested in a failing company that was reporting millions of USD in net losses each year, that had wrecked critical commercial relationships with its suppliers, and which had no steady source of feedstock. What's more, he was investing in a country and economic sector with which he had no experience.

1. Mr. Holzer is not a qualified or experienced investor in the oil and gas sector

145. By Mr. Holzer's own admission, he "manage[s] a private investment portfolio for [his] family,"[261] and "focus[es] on real estate."[262] He is therefore not an experienced investor in the oil and gas sector—let alone in the *Peruvian* oil and gas sector. Yet even in his purported area of "focus," Mr. Holzer has made imprudent—if not downright reckless—investments. By way of example only, in December 2007, Mr. Holzer and his mother paid USD 1 million dollars each for luxury apartments in a building that did not exist and was never built.[263] Upon realizing that he had spent a million on air, Mr. Holzer filed suit before a court in New York, alleging fraud and other claims.[264] The court dismissed Holzer's claims, however, concluding as follows:

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[259] **Ex. C-0031**, Worth Capital Certificate of Formation, 22 November 2016, p. 3.

[260] *See* Holzer Witness Statement, ¶ 15.

[261] Holzer Witness Statement, ¶ 5.

[262] Holzer Witness Statement, ¶ 5.

[263] In May 2008, Jane Holzer, Mr. Holzer's mother, wired a second USD 1 million for a second apartment that did not exist. *See* **Ex. R-0003**, *Holzer v. Mondadori*, 40 Misc. 3d 1233(A), 980 N.Y.S.2d 276 (Sup. Ct. 2013), p. 2.

[264] *See* **Ex. R-0003**, *Holzer v. Mondadori*, 40 Misc. 3d 1233(A), 980 N.Y.S.2d 276 (Sup. Ct. 2013), p. 1.

> [I]n their haste to latch onto a "riskless", overseas real estate investment with the supposed potential for imminent lucrative returns, plaintiffs [Charles and Jane Holzer] threw caution to the wind and wired $2 million **before conducting the most basic of inquiries that would have revealed that the Building was just a hole in the ground**.[265] (Emphasis added)

146. That episode of utter failure in conducting due diligence would not be the last time that Mr. Holzer would make a foolhardy investment; in his decision to invest in Maple Gas, Mr. Holzer similarly "threw caution to the wind," lured into the investment by a college friend.

2. Mr. Holzer decided to invest in Maple Gas, a company on the brink of financial ruin

147. In the present case, Mr. Holzer strayed outside of his purported area of "focus"—i.e., real estate—into a new economic sector, region, and country. Indeed, by his own account, Mr. Holzer had zero experience with investments in Peru, and zero history with, or knowledge of, oil and natural gas production or transmission.[266] The only allegedly relevant experience that Mr. Holzer invokes—for which he provides no documentary support—is an alleged investment "in an energy project in Brazil."[267]

148. In his witness statement, Mr. Holzer explains that he decided to invest in Mable Gas because—in his own words—the project "sounded interesting."[268] He asserts that he "often invest[s] in projects which have been introduced to [him] by trusted partners."[269] In this case, that "trusted partner" was his college friend Mr. Rojas. Mr. Holzer readily acknowledges that, in 2015, Mr. Rojas had advised him *not* to invest in Maple Gas.[270] A year later, however, in April 2016,—at a time when Maple Gas' financial, regulatory, and supply problems had become even more acute—Mr. Rojas decided that he wanted to exit Maple Gas. He therefore called up his friend Mr.

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[265] *See* **Ex. R-0003**, *Holzer v. Mondadori*, 40 Misc. 3d 1233(A), 980 N.Y.S.2d 276 (Sup. Ct. 2013), p. 4.

[266] Holzer Witness Statement, ¶ 6.

[267] Holzer Witness Statement, ¶ 6.

[268] Holzer Witness Statement, ¶ 6.

[269] Holzer Witness Statement, ¶ 5.

[270] Holzer Witness Statement, ¶ 5.

Holzer, and succeeded in persuading him to acquire Maple Gas notwithstanding the company's grave problems and dire financial situation.[271]

149. Mr. Holzer testifies that he decided to invest in Maple Gas because he believed that it would be similar to his investment in the unspecified project in Brazil.[272] He also testifies that Mr. Rojas told him "that Maple Gas had identified the possibility of acquiring the license to a nearby oil concession, Block 126, which was near the Pucallpa Refinery. Acquiring Block 126 would provide synergies for Maple Gas that would increase its value."[273] Lastly, Mr. Holzer claims that he was persuaded by Mr. Rojas' argument that if Blue Oil was removed from the equation, Petroperú would not "create difficulties for Maple Gas."[274] It seems therefore that Mr. Holzer bought into his friend's conspiracy theory; in Mr. Holzer's words: "If I acquired Maple Gas, there would be no reason for Petroperú or others in the government to interfere with Maple Gas's business. I am an international investor with no previous involvement in Peru, and there was no reason for Mr. Kuczynski or anyone else in the Peruvian government to have any animosity toward me."[275]

150. In reality, and leaving aside for now the unfounded conspiracy theories involving Blue Oil, even the most basic due diligence would have revealed to Mr. Holzer that Maple Gas would be nothing short of a *disastrous* investment. In short, and as discussed above:

    a. Maple Gas had been reporting substantial losses year over year (approximately USD 3.65 million in 2015[276] and USD 6.03 million in 2017).[277]

    b. Maple Gas had significantly depleted its supply of feedstock from the Block 31 Fields for which it held operating licenses. By May 2016, Maple Gas was—by

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[271] *See* Holzer Witness Statement, ¶ 10; Rojas Witness Statement, ¶ 61; Memorial, ¶¶ 152–55.

[272] *See* Holzer Witness Statement, ¶ 9.

[273] Holzer Witness Statement, ¶ 8.

[274] Holzer Witness Statement, ¶ 10.

[275] Holzer Witness Statement, ¶ 10.

[276] **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, p. 7 (reporting net loss of USD -3,649,306 in 2015).

[277] **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, p. 60 (reporting net loss of USD -6,034,968 in 2016).

its own account—entirely dependent on Aguaytía Energy for production from the Refinery.[278]

c. Maple Gas had incurred—and had failed to pay—USD 5.2 million in debt to Aguaytía Energy for unpaid invoices in 2014.[279]

d. Maple Gas had begun in March 2016 to refuse to pay invoices from Aguaytía Energy, incurring more and more debt. (Maple Gas claimed that the supply contract had been terminated, which meant that Maple Gas could not legally rely on *continued* supply from Aguaytía Energy.)

e. Maple Gas had failed to negotiate an agreement with CEPSA for a new supply channel.

f. Production from Maple Gas' Pucallpa Refinery had been steadily decreasing for years. According to an email sent by Mr. Katabi on 20 June 2016, "the situation is critical."[280]

g. Maple Gas had no right to the Block 126 License, and no well-founded expectation of obtaining such right.

151. Notwithstanding the various foregoing facts—which would have given significant pause to any reasonable investor—the incautious Mr. Holzer rashly proceeded to sink millions of USD into Maple Gas.

3. In June 2017, Mr. Holzer allegedly invested in Maple Gas through Jancell

152. Mr. Holzer alleges that he made his investment in Maple Gas using Worth Capital (Claimant herein) as a vehicle for the acquisition of shares in Maple Gas.[281] Specifically, according to Mr. Holzer, "[o]n 27 November 2016, Worth Capital acquired all but one of the shares in Maple Gas held by Jancell Corporation for $15 million and issued a

[278] **Ex. R-0001**, ICC Arbitration (Award), ¶ 97 ("In its letter to Petroperu of May 30, 2016, Maple made it clear that it depended on the supply of Gasoline from Agyuaytia for all of its refining.").

[279] **Ex. R-0001**, ICC Arbitration (Award), ¶ 195 (a) (i) (ordering Maple Gas to pay "US$5,286,116.70 for unpaid 2014 Invoices").

[280] **Ex. R-0001**, ICC Arbitration (Award), ¶ 55 (noting that "On June 20, 2016, Mr. Katabi sends an email to Mr. Espinosa stating the situation is critical and appends an internal email indicating the refinery cannot start unless and until shipments reach 2,000 barrels per day").

[281] *See* Holzer Witness Statement, ¶ 15.

$47 million parent guarantee for Maple Gas's debt held by Trailon Enterprises S.A."[282] However, the documentary evidence tells a different story, including with respect to the following facts.

153. *First*, the evidence with respect to the creation of shares in Maple Gas is not consistent with Claimant's account. In 2015, the Creditor Banks had transferred Maple Gas' debt to Jancell and Trailon.[283] Thereafter, Jancell Corporation capitalized that debt, becoming Maple Gas' majority shareholder.[284] However, the capitalization and issuance of Maple Gas' shares was not recorded on the public register until 29 November 2016[285]—i.e., after Mr. Holzer says he had already acquired the shares.[286] This makes no sense, as Mr. Holzer could not have acquired shares that did not exist.

154. *Second*, Claimant has not substantiated its claim that it purchased indirect ownership interest in Maple Gas, and the evidence is inconsistent with Claimant's account. On 22 November 2016, Mr. Holzer created Worth Capital (incorporated in Delaware).[287] On 24 November 2016, Worth Capital executed a share purchase agreement with Parsdome, whereby Worth Capital agreed to purchase Parsdome's shares in Jancell for USD 15,010,000.[288] Claimant has provided no evidence to show that any funds were transferred pursuant to this agreement.

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[282] Holzer Witness Statement, ¶ 15.

[283] **Ex. R-0129**, INDECOPI, Loan Assignment Agreement between Interbank *et al*., Trailon Enterprises S.A., and Jancell Corporation, 21 October 2015, Art. 2.1. While Claimant alleges that Jancell paid USD 15 million to acquire some of the debt held by Maple Gas (Memorial, ¶ 82, fn. 98), Claimant's documentary record does not support Claimant's allegation as to the amount.

[284] Jancell Corporation held 14,999,999 of 15,000,000 shares in Maple Gas. The remaining share was held by Inversiones Transtop S.A.C., a Peruvian company. *See* **Ex. C-0032**, Parent Company Guarantee issued by Worth Capital for the benefit of Trailon Enterprises S.A., 23 November 2016, preamble. *See also* **Ex. R-0106**, Sunarp, Filing of Capital Increase Registration and Bylaw Modification, 6 October 2016, p. 3. On 7 December 2016, Inversiones Transtop S.A.C. transferred its sole share of Jancell Corp. to Mario Fernando Kholer Abad. **Ex. R-0107**, Compilation of Public Record Documents related to Maple Gas, 13 November 2020, p. 83; **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, fn. 16 (a).

[285] **Ex. R-0107**, Compilation of Public Record Documents related to Maple Gas, 13 November 2020, p. 81.

[286] Holzer Witness Statement, ¶ 15.

[287] **Ex. C-0081**, Worth Capital Certificate of Good Standing, 10 November 2020, p. 1.

[288] *See generally* **Ex. C-0033**, Agreement between Parsdome Holdings Ltd. and Worth Capital titled "Agreement relating to the sale and purchase of the whole of the issued outstanding share capital of Jancell Corporation," 24 November 2016, Clauses 2, 4.

155. Moreover, the evidence that is on the record is internally inconsistent. The share purchase agreement dated 24 November 2016 included the following requirement:

> 9.2 The Seller [Parsdome] shall execute and perform all such further acts, deeds or assurances as may be required for effectually vesting the Shares [of Jancell] in the Buyer [Worth Capital] and otherwise for fulfilling the provisions of this agreement.[289]

156. According to Jancell's bylaws, shares must be transferred through an endorsement of the corresponding share certificate and the recording of the transfer in the register of shares.[290] Panama's corporate law likewise provides that a share transfer is effective from the date that the transfer is recorded in the company's register of shares.[291]

157. Jancell's register of shares thus accurately reflects the dates on which transfers of shares were effected. Such register, which is on the record as Exhibit C-0038, provides as follows:

a. On 2 February 2015, Parsdome transferred its 100 Jancell shares to Parsdome (Cayman) Limited. A certificate of shares was issued.[292]

b. On *12 January 2017*, Parsdome (Cayman) Limited transferred its 100 shares back to Parsdome. A certificate of shares was issued.[293]

c. On *15 June 2017*, Worth Capital was issued 150,100 shares with a corresponding certificate of shares. On that date, Worth Capital thus became the 100% owner of Jancell.[294]

158. Thus, (i) Parsdome did not hold shares in Jancell at the time that it signed the share purchase agreement with Worth Capital on 24 November 2016, (ii) there is no evidence that Worth Capital actually paid USD 15 million to Parsdome for the Jancell

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[289] **Ex. C-0033**, Agreement between Parsdome Holdings Ltd. and Worth Capital titled "Agreement relating to the sale and purchase of the whole of the issued outstanding share capital of Jancell Corporation," 24 November 2016, Clause 9.2.

[290] **Ex. R-0020**, Bylaws of Jancell Corporation, 12 August 2015, Third point, p. 5.

[291] **RL-0026**, Law 32 of 1927 on Corporations in Panama, 24 May 2018, Art. 29.

[292] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

[293] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

[294] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

shares (which Parsdome apparently did not own at the time), and (iii) in any event, Worth Capital did not acquire its shares in Jancell until 15 June 2017.

159. *Third*, Claimant relies on a "parent guarantee" that does not support its claim of an investment in Maple Gas. As noted above, Mr. Holzer also alleges that he "issued a $47 million parent guarantee for Maple Gas's debt held by Trailon Enterprises S.A."[295] This allegation is the basis for Claimant's assertion that it "acquired Maple Gas for consideration of $62 million"[296] (i.e., USD 15 million for the shares, plus USD 47 million for the guarantee). To support this proposition, Claimant submitted onto the record a "parent guarantee" dated 23 November 2016 and signed by Mr. Holzer—but no one else.

160. The "parent guarantee" expressly affirms and represents that "[Worth Capital] is the parent company of Maple."[297] This representation is not accurate: (i) Mr. Holzer himself alleges that he did not acquire shares in Maple Gas until 27 November 2017;[298] and (ii) the documentary evidence (discussed above) demonstrates that Worth Capital did not legally own indirect ownership in Maple Gas until 15 June 2017.[299] In any event, through this "parent guarantee" document, Claimant purported to guarantee the repayment of at least USD 47 million to Trailon.[300] However, Claimant did not inject the guaranteed USD 47 million into Maple Gas, nor did Claimant acquire any ownership (indirect or direct) or any additional shares or interests in Maple Gas through such guarantee.

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161. In sum, Claimant's narrative of its purported investment is unsubstantiated and rife with inconsistencies. What is clear, though, is that by the time of the alleged

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[295] Holzer Witness Statement, ¶ 15.

[296] Memorial, ¶ 156. *See also* Holzer Witness Statement, ¶ 15.

[297] *See* **Ex. C-0032**, Parent Company Guarantee issued by Worth Capital for the benefit of Trailon Enterprises S.A., 23 November 2016, p. 2.

[298] Holzer Witness Statement, ¶ 15.

[299] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

[300] **Ex. C-0032**, Parent Company Guarantee issued by Worth Capital for the benefit of Trailon Enterprises S.A., 23 November 2016, p. 1; *see also* Memorial, ¶ 82, fn. 98.

investment, Maple Gas was a failing company: it was reporting significant losses; it faced sanctions for violations of environmental regulations in its refining operations; its production from its oil fields and Refinery continued to plummet; it had destroyed essential relationships with its key feedstock suppliers, Aguaytía Energy and CEPSA; and it had rejected Petroperú's attempts to use and pay for RAD Services at the Refinery. Although he knew—or should have known—of these facts, Mr. Holzer (through Worth Capital) decided to invest USD 15 million into Maple Gas.

H. In 2017, Maple Gas was on the brink of financial ruin, failed to meet the objective criteria to obtain a license for Block 126, and failed to obtain the requisite Government approvals

162. As described above, when Claimant finally acquired its indirect shareholding in Maple Gas on 15 June 2017, the latter was in a steep financial decline and lacked a reliable source of feedstock. Instead of a serious business plan to turn Maple Gas around and save it from a complete and certain economic ruin, Claimant's investment strategy rested entirely on "the possibility of acquiring the license to a nearby oil concession, Block 126, which was near the Pucallpa Refinery."[301] This short-sighted strategy meant that, as Mr. Holzer himself acknowledges, "[n]ot being able to acquire the concession for Block 126 [would be] devastating for Maple Gas's business."[302]

163. Maple Gas ultimately did not obtain the Block 126 License because it was ineligible to do so under Peruvian law. However, in the Memorial, Claimant misrepresents Peruvian law and the facts, seeking to castigate PERUPETRO and to portray the Block 126 License as a panacea to Maple Gas' financial freefall. In the following sections, Peru will correct Claimant's misrepresentation of certain key facts.

164. The Block 126 License was held by Frontera, which had fallen behind schedule—meaning that a new licensee would have been required to devote millions of USD and years of work in order to exploit the oil fields (see **Section II.H.1** below). Peruvian law requires any company seeking to obtain a such license to prove that it is "qualified"—i.e., that it has the financial and technical capacity to explore and exploit the natural

[301] Witness Statement Holzer, ¶ 8.

[302] Witness Statement Holzer, ¶ 19.

resources. Maple Gas did not satisfy the objective criteria for qualification and did not obtain the Block 126 License for that reason (see **Section II.H.2** below). Furthermore, Peruvian law requires a company seeking a license to negotiate the license contract and secure multiple levels of governmental approval, which Maple Gas did not do (see **Section II.H.3** below). Thus, the Block 126 License was neither a realistic option for Maple Gas nor a quick and simple fix for its mounting financial woes (see **subsection 4** below).

1. The existing licensee of Block 126 had fallen behind schedule

165. At the time that Claimant invested in Maple Gas, Frontera—the then-owner of the Block 126 License—had fallen behind the work schedule that had been agreed with PERUPETRO for the development of Block 126. Specifically, the development of that block had been divided into two phases (the "**Exploration Phase**" and the "**Exploitation Phase**"). The Exploration Phase was to be completed within ten (10) years,[303] and was in turn sub-divided into five stages.[304] Each of those stages featured a specific work schedule, which—as required by the *Ley Orgánica de Hidrocarburos* ("**Hydrocarbons Law**")—was backed up by a guarantee of USD 2,787,500 provided by Frontera (the "**Guarantee**").[305]

166. Frontera was in the fifth and final stage of the Exploration Phase (which Claimant refers to in the Memorial as "**Stage 5 Work**") for Block 126, and faced a mandatory

[303] **Ex. R-0131**, Modification of the License Contract for the Exploitation of Hydrocarbons in Block 126 between Petroperú and Veraz Petroleum Perú, Petrominerales Perú, 18 December 2014, Clause 3.3. Pursuant to the Hydrocarbons Law, the Exploration phase can last up to 7 years from the date on which a contract is executed. This period can be extended up to three years to a maximum of 10 years if certain requirements are met. *See* **Ex. R-0139**, Law No. 26221, 19 August 1993 ("**Hydrocarbons Law**"), Art. 22.a.

[304] **Ex. R-0069**, Block 126 License Agreement between PERUPETRO and Frontera (*previously* True Energy Peru), 23 October 2007, Clause 3.2; **Ex. R-0131**, Modification of the License Contract for the Exploitation of Hydrocarbons in Block 126 between Petroperú and Veraz Petroleum Perú, Petrominerales Perú, 18 December 2014, Clause 1.5.

[305] Pursuant to the Hydrocarbons Law, failure to meet the work schedule would result in the execution of a mandatory guarantee. *See* **Ex. R-0139**, Hydrocarbons Law, Art 21. *See also* **Ex. R-0069**, Block 126 License Agreement between PERUPETRO and Frontera (*previously* True Energy Peru), 23 October 2007, Clause 4.2; **Ex. R-0131**, Modification of the License Contract for the Exploitation of Hydrocarbons in Block 126 between Petroperú and Veraz Petroleum Perú, Petrominerales Perú, 18 December 2014, Clause 3.6.

deadline to complete that stage by 20 December 2017.[306] However, Frontera lacked the wherewithal to complete such stage, as it had already abandoned all five of the exploratory wells that it had drilled in Block 126.[307] All of its exploratory drilling had been unsuccessful, except for that of a well in the Sheshea field ("**Sheshea Field**"), and the latter could only be classified as contingent—i.e., it had *potentially* recoverable resources, but the project was not considered commercially viable at the time.[308]

167. Claimant expressly admits that neither Frontera nor Maple Gas was in a position to complete the Stage 5 Work by the 20 December 2017 deadline.[309] Pursuant to the Hydrocarbons Law and the terms of the existing Block 126 License, should Frontera fail—as seemed inevitable in June 2017—to complete the required works by 20 December 2017, PERUPETRO would be required to execute the Guarantee, and Frontera would be required to relinquish the Block 126 License.[310]

2. Maple Gas was ineligible for the Block 126 License because it did not satisfy the relevant objective criteria under Peruvian law

168. In the Memorial, Claimant admits that in order to obtain the Block 126 License, Maple Gas would have had to secure multiple approvals under Peruvian law.[311] While Claimant is correct that Maple Gas had to secure certain key approvals, it oversimplifies certain requirements under Peruvian law, and glosses over others. As explained below, Maple Gas needed to (i) demonstrate that it was capable of exploring and exploiting the Block 126 License by satisfying certain objective criteria under Peruvian law, and (ii) negotiate modifications to the existing license contract and obtain a series of approvals for those proposed modifications.

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[306] **Ex. R-0131**, Modification of the License Contract for the Exploitation of Hydrocarbons in Block 126 between Petroperú and Veraz Petroleum Perú, Petrominerales Perú, 18 December 2014, Clause 1.5.

[307] *See* **RER-02**, Alix Damages Expert Report, ¶ 132; Hidrocarburos Report, ¶¶ 44–49.

[308] *See* **RER-02**, Alix Damages Expert Report, ¶¶ 134–35; **Ex. AP-0007**, Petroleum Resources Management System, June 2018, p. 3.

[309] Memorial, ¶ 185 ("Frontera had not, however, undertaken any of the Stage 5 Work by the time the Farmout Agreement with Maple Gas was agreed in May 2017. Given the short time available before December 2017, it would not be possible for Maple Gas to complete the Stage 5 Work before the deadline.").

[310] *See* Memorial, ¶ 222.

[311] Memorial, ¶ 189

169. *First and foremost*, as Claimant concedes, Maple Gas needed approval by PERUPETRO that Maple Gas was "qualified"[312]—i.e., that it was "capable of operating Block 126."[313] More specifically, Peruvian law and regulations required that Maple Gas demonstrate that Maple Gas possessed the financial capacity to explore and exploit Block 126.[314] However, for the reasons explained below, Maple Gas did not satisfy the objective criteria for qualification.

a. Peruvian law requires that a company satisfy certain objective criteria to qualify for an oil and gas license

170. Pursuant to Supreme Decree No. 030-2004-EM ("**Qualification Regulations**"), "[e]very Oil Company must be duly qualified, by PERUPETRO, to initiate the negotiation of a Contract."[315] This qualification requirement applies to the negotiation with PERUPETRO of any new oil exploration and exploitation contract, as well as to the transfer or modification of any existing contract.[316] The qualification process is designed to ensure that the company that requests qualification (i.e., the applicant) has the requisite "legal, technical, economic, and financial capacity of an Oil Company to comply with all of its contractual obligations" in the specific block that it seeks to exploit.[317] In this respect, the fact that an applicant may be qualified by PERUPETRO to operate one block does not necessarily mean that it will be qualified to operate some other block.[318]

171. The Classification Regulations mandate that PERUPETRO consider the following objective criteria during the qualification process:

a. the location, extension and qualification of the requested area;

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[312] Memorial, ¶ 199.

[313] Memorial, ¶ 189.

[314] **Ex. R-0074**, Supreme Decree No. 030-2004-EM, 18 August 2004 ("**Qualification Regulations**"), Art. 2.

[315] **Ex. R-0074**, Qualification Regulations, Art. 2.

[316] **Ex. R-0074**, Qualification Regulations, Art. 9.

[317] **Ex. R-0074**, Qualification Regulations, Art. 1 (a).

[318] *See* **Ex. R-0074**, Qualification Regulations, Art. 1 (a) (" . . . depending on the characteristics of the area requested").

> b. the participation in the work schedule and the required investments.
>
> On the basis of the above criteria PERUPETRO S.A. will assess, pursuant to the information received, if the Oil Company has the necessary legal, technical, economic and financial capacity, with the understanding that:
>
> Legal capacity refers to its legal existence and its capacity to enter into a contract and to assume obligations arising from a Contract.
>
> Technical capacity refers to the necessary experience and means to carry out oil activities in accordance with the practices and techniques used by the international hydrocarbons industry and with strict compliance with environmental protection regulations.[319]

172. PERUPETRO has an established, objective, and uniform procedure—articulated in the Qualification Regulations—for assessing the qualifications of applicants and rendering decisions on applications. The applicant must submit to PERUPETRO a request for qualification with supporting documentation,[320] including information regarding its hydrocarbon exploration and exploitation activities, as well as its *audited* financial statements from preceding years.[321]

173. PERUPETRO has a permanent commission ("**Qualification Commission**")[322] that determines whether an applicant meets the requirements under the applicable regulations. Such determinations are based on the information submitted by the applicant,[323] and objective criteria contained in regulations of general application.[324]

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[319] **Ex. R-0074**, Qualification Regulations, Art. 11.

[320] **Ex. R-0074**, Qualification Regulations, Art. 4; **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Art. 3.1.

[321] **Ex. R-0074**, Qualification Regulations, Art. 5; **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Art. 2.6; **Ex. R-0073**, PERUPETRO, Directorate Resolution No. 049-2017, 6 July 2017, Art. 2.4.

[322] **Ex. R-0075**, PERUPETRO, Procedure GFCN-006, Qualification of Oil Companies, Version 4, 30 May 2017, Point 7.1.

[323] **Ex. R-0075**, PERUPETRO, Procedure GFCN-006, Qualification of Oil Companies, Version 4, 30 May 2017, Point 8; **Ex. R-0074**, Qualification Regulations, Art. 11 (b).

[324] *See* **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, p. 2.

174. On 5 June 2017, which is when Maple Gas submitted its application, PERUPETRO's Board of Directors' Decree No. 048-2010 was in effect.[325] The 2010 Guidelines required that the applicant attest that it had the financial wherewithal to operate the specific block in respect of which it sought exploration and/or exploitation rights.[326] In particular, PERUPETRO began by evaluating the financial resources that would be required to perform the expected work on the relevant block ("**Minimum Contracting Capacity**").[327] An applicant would then submit financial information, which would allow PERUPETRO to assess its financial capacity using the following three financial indicators:

a. 50% of the average net worth of the last two years;

b. average current assets for the last two years; or

c. average operating cash flow for the last two years.[328]

175. An applicant was eligible to be granted exploration and/or exploitation rights over the relevant block, if the *highest* of the foregoing financial indicators was *equal to or higher* than the Minimum Contracting Capacity.[329]

176. As explained by Mr. Guzmán, the Qualification Commission performed this objective assessment independently—without the involvement of any other bodies within PERUPETRO or of the Peruvian government.[330]

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[325] **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, p. 2.

[326] Perupetro establishes the minimum amount required based upon the works that will be performed in the relevant block. **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, 15 April 2010, Points 2.8–2.9, 4.1.2.c.

[327] **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Art. 4.1.2 by reference to Arts. 2.8–2.9; **Ex. R-0073**, PERUPETRO, Directorate Resolution No. 049-2017, 6 July 2017, Arts. 4.1.1–4.1.2.

[328] **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Point 4.1.2.

[329] *See* **Ex. R-0072,** PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Point 4.1.2.

[330] **RER-01**, Witness Statement of Roberto Guzmán, 29 September 2022 ("**RWS-01, Guzmán Witness Statement**"), ¶ 27. The applicable regulations do not provide a role to the Directory in the assessment of a company. *See* **Ex. R-0075**, PERUPETRO, Procedure GFCN-006, Qualification of Oil Companies, Version 4, 30 May 2017, Points 8 (11)–(12).

177. Following its review, the practice of the Qualification Commission was to prepare an evaluation report that reflected the analysis and the results of its assessment.[331] The Commission would send to PERUPETRO's Management (*Gerencia General*)[332] the application, the evaluation report, and—if the applicant satisfied the objective criteria—a draft "qualification certificate."[333] Within five working days, PERUPETRO's Management either approved and issued a qualification certificate, or notified the company that its application had not been approved.[334] Importantly, the Qualification Regulations expressly provided that the qualification certificate did not in and of itself generate any rights over the block in question: "[t]he granting of the Qualification **will not generate any rights** over the contract area."[335] (emphasis added).

178. If PERUPETRO's Management did not approve the application, the applicant had five (5) business days to submit to PERUPETRO's Board of Directors a request for reconsideration. Thereafter, the Board of Directors had 20 days to review such request and issue a decision,[336] which was final and could not be challenged.[337]

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[331] **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Art. 5.1.3; **Ex. R-0075**, PERUPETRO, Procedure GFCN-006, Qualification of Oil Companies, Version 4, 30 May 2017, Points 8 (11)–(12).

[332] **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Art. 5.1.3; **Ex. R-0075**, PERUPETRO, Procedure GFCN-006, Qualification of Oil Companies, Version 4, 30 May 2017, Points 8 (13) (15)–(16). The Qualification Commission will also notify its decision to MINEM's General Directorate of Hydrocarbons. **Ex. R-0074**, Qualification Regulations, Art. 16.

[333] If an applicant qualified as an oil company, PERUPETRO would issue a qualification certificate to the applicant attesting to the applicant's qualification.

[334] **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Arts. 2.7, 5.1.4; **Ex. R-0074**, Qualification Regulations, Arts. 13, 16; **Ex. R-0073**, PERUPETRO, Directorate Resolution No. 049-2017, 6 July 2017, Art. 2.5; **Ex. R-0075**, PERUPETRO, Procedure GFCN-006, Qualification of Oil Companies, Version 4, 30 May 2017, Points 8 (17)–(18).

[335] **Ex. R-0074**, Qualification Regulations, Art. 2 ("The granting of the Qualification will not generate any rights over the contract area.").

[336] **Ex. R-0074**, Qualification Regulations, Art. 15.

[337] **Ex. R-0074**, Qualification Regulations, Art. 15.

b. Maple Gas did not qualify to obtain the Block 126 License because it did not satisfy the objective criteria

179. On 5 June 2017, Maple Gas submitted to PERUPETRO its application ("**Maple Gas' Application**") for the Block 126 License.[338] However, as explained below, Maple Gas did not satisfy the requirements under the 2010 Guidelines (which, as noted, were the guidelines in force at the time).

180. The Minimum Contracting Capacity for Block 126 was **USD 25.5 million**.[339] This amount was calculated by PERUPETRO by reference to the outstanding Stage 5 Work due to be completed by 21 December 2017.[340] The following chart, which is based on Maple Gas' audited financial statements from the preceding two (2) years, shows that all three of the indicators of Maple Gas' financial capacity were far *lower* than the Minimum Contracting Capacity:[341]

Figure 3: Maple Gas' Financial Capacity under the 2010 Guidelines[342]

Financial Indicator under 2010 Guidelines	Maple Gas's assets/cash flow
Net Assets	*Negative* USD 25.1 million
Current Assets	USD 11.8 million
Cash Flow	USD 1.4 million

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Minimum Contracting Capacity
USD 25.5 million

181. The foregoing means that according to its own audited financial statements, Maple Gas lacked the requisite financial resources to invest in and operate Block 126, and therefore did not meet the requirements imposed by the 2010 Guidelines.

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[338] **Ex. C-0037**, Letter from Frontera and Maple Gas to PERUPETRO, 7 June 2017, p. 2.

[339] *See* **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.1; **RER-02**, Alix Damages Expert Report, ¶ 331.

[340] **Ex. R-0084**, PERUPETRO, Legal Technical Report No. GFCN-0270-2017, 11 August 2017, Point 2.3.

[341] **RER-02**, Alix Damages Expert Report, ¶¶ 330–31.

[342] **RER-02**, Alix Damages Expert Report, ¶ 330, Figure 47.

c. PERUPETRO had initially reviewed the incorrect documents, and as a result erroneously qualified Maple Gas

182. The 2010 Guidelines required that the Qualification Commission review and use the applicant company's *audited* financial statements.[343] However, in the first instance Maple Gas had mistakenly submitted with its Application its *unaudited* pro forma financial statements for 2015 and 2016.[344] PERUPETRO noticed that mistake and brought it to Maple Gas' attention, requesting that it instead provide *audited* financial statements.[345] Maple Gas subsequently complied, submitting its audited financial statements for 2014, 2015, and 2016.[346]

183. Thereafter however, in assessing Maple Gas' Application, the Qualification Commission inadvertently relied on the *unaudited* pro forma financial statements that Maple Gas had submitted originally with its application.[347] This erroneous reliance on the unaudited pro forma financial statements ended up having a major impact on the outcome of the assessment. As highlighted in **Figure 4** below, that was attributable in particular to the fact that Maple Gas' 2015 unaudited pro forma statements contained inaccurate information that made the company's current assets appear much higher than they actually were; more specifically, the 2015 unaudited pro forma statement reflected significant accounts receivable that did not appear in the audited statement for that year:[348]

[343] **Ex. R-0074**, Qualification Regulations, Art. 5. d; **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Art. 2.6.

[344] **Ex. R-0071**, Letter No. MGP-GM-L-0011-2017 from Maple Gas (K. Neumann) to PERUPETRO (M. Rodriguez), 5 June 2017, pp. 1, 7–16.

[345] *See* **Ex. C-0187**, Letter from PERUPETRO to Maple Gas, 3 July 2017, p. 1.

[346] *See generally* **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, p. 1.

[347] **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.1.

[348] **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2.

Figure 4: The Material Differences in Maple Gas' *Unaudited* Proforma and *Audited* Financial Statements for 2015[349]

Category	Maple Gas' 2015 Proforma *Unaudited* Financial Statement[350]	Category	Maple Gas' 2015 *Audited* Financial Statement[351]
Cash and banks	77,513	Cash and equivalent in cash	77,513
Restricted Fund	1,344,085	Restricted fund	1,344,085
Commercial and diverse accounts receivable, net	1,773,882	Commercial and Diverse account receivables, net	1,773,882
Related accounts receivable	47,015,946	-	-
Inventory	7,628,896	Inventory, net	7,628,896
Expenses paid in advance and other assets	851,649	Taxes and expenses paid in advance	1,316,730
Income tax credit	465,081		
Current assets	59,157,052[352]	**Current assets**	12,141,106[353]

[349] **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2.

[350] **Ex. R-0092**, Letter No. MGP-VIFI-L-0100-16 from Maple Gas (K. Neuman) to PERUPETRO (M. Rordiguez), 9 June 2016, p. 12.

[351] **Ex. R-0093**, Letter No. MGP-GM-L-0014-2017 from Maple Gas (K. Neumann) to PERUPETRO (M. Rodriguez), 11 July 2017, p. 7.

[352] **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2.

[353] **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2.

184. On the basis of the inaccurate *unaudited* information initially submitted by Maple Gas, the Qualification Commission wrongly concluded that Maple Gas' financial capacity (USD 35.3 million) was greater than the Minimum Contracting Capacity (USD 25.5 million),[354] when in fact it was significantly *lower* than that.

185. On the basis of the foregoing erroneous conclusion, on 11 August 2017, PERUPETRO sent a letter to Maple Gas wrongly stating that Maple Gas met the requirements under the 2010 Guidelines to operate the Block 126 License.[355] However, as noted above and pursuant to Article 2 of the Qualification Regulations, this qualification did not vest Maple Gas with *any* rights to Block 126,[356] because the Qualification Certificate was a necessary but by itself an insufficient step in the approval process for the Block 126 License. For the various reasons detailed below, and despite Claimant's and its witnesses' baseless and incorrect assertions, it is an incontrovertible fact that Maple Gas did not secure the requisite approvals to obtain the Block 126 License. This fact is fatal to Claimant's claims, as explained in **Sections IV.C and IV.D** below.

d. Following a mandated internal review of all qualifications, PERUPETRO identified and rectified the error in the qualification of Maple Gas

186. In the Peruvian legal system, the Office of the Comptroller General (*Contraloría General*) is an independent State agency charged with supervising and monitoring the application of public policies and the use of State resources.[357] As part of its responsibilities, that office performs "Simultaneous Control Services," during which it reviews procedures conducted by public and certain other entities to ensure compliance with applicable regulations.[358] If applicable, the Office of the Comptroller

[354] **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2.

[355] **Ex. C-0042**, Letter from PERUPETRO to Maple Gas, 11 August 2017, pp. 1–2; *see also* **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1.

[356] **Ex. R-0074**, Qualification Regulations, Art. 2.

[357] *See* **Ex. R-0122**, Office of the Comptroller, Institutional Information, undated (accessed 1 October 2022).

[358] **Ex. R-0155**, Office of the Comptroller, Resolution No. 432-2016-CG, Simultaneous Control, 4 October 2016, Point 6.3.

General notifies the entity of any issues, so that the entity can correct them and prevent future similar ones.[359]

187. On 4 October 2017, PERUPETRO received an instruction ("*oficio*") from the Office of the Comptroller General identifying a number of errors in PERUPETRO's rejection of the qualification of another company, Petroperú, to operate a license for Block 192.[360] Among others, the Office of the Comptroller General noted that the Qualification Commission had made mistakes in applying the 2017 Guidelines to determine Petroperú's economic and financial capacity.[361] The Office of the Comptroller General deemed that these mistakes evinced a lack of diligence by the personnel that had conducted the assessment of Petroperú's qualification,[362] and recommended that PERUPETRO take appropriate action to address the issue.[363]

188. Pursuant to this instruction, PERUPETRO's Contract Management Department instructed the Qualification Commission to conduct a review of other qualifications that had been issued by the Qualification Commission, so as to identify and rectify any other errors.[364] The Qualification Commission thus reviewed the qualification decisions with respect to other companies, including Maple Gas.[365]

189. In conducting this review, the Qualification Commission realized that Maple Gas had been qualified based upon the information that was contained in the *unaudited* financial statements that were originally submitted by Maple Gas—rather than the

[359] **RWS-01**, Guzmán Witness Statement, ¶ 99.

[360] **Ex. R-0089**, Letter No. 00040-2017-CG/OPER from Contraloría General (G. Salazar) to PERUPETRO (F. Calderón), 4 October 2017, p. 1.

[361] **Ex. R-0089**, Letter No. 00040-2017-CG/OPER from Contraloría General (G. Salazar) to PERUPETRO (F. Calderón), 4 October 2017, p. 3.

[362] **Ex. R-0089**, Letter No. 00040-2017-CG/OPER from Contraloría General (G. Salazar) to PERUPETRO (F. Calderón), 4 October 2017, pp. 2–3.

[363] **Ex. R-0089**, Letter No. 00040-2017-CG/OPER from Contraloría General (G. Salazar) to PERUPETRO (F. Calderón), 4 October 2017, p. 1.

[364] **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2.

[365] **Ex. R-0090**, Email from PERUPETRO (G. Vásquez) to PERUPETRO (L. Pérez), 1 November 2017, p. 1.

audited financial statements that Maple Gas subsequently presented (which is what was required by the 2010 Guidelines).[366]

190. In light of that mistake, the Qualification Commission proceeded to reassess Maple Gas' financial capacity, this time using its *audited* financial statements. As demonstrated above, and as explained in the Alix Damages Report, the information contained in the audited financial statements revealed that Maple Gas was *not* qualified to operate Block 126 under the 2010 Guidelines.[367] Specifically, Maple Gas' highest financial indicator under the 2010 Guidelines (viz., its average current assets for the last two years), amounted to USD 11.84 million, whereas the Minimum Contracting Capacity for Block 126 was USD 25.5 million.[368] In other words, Maple Gas' financial capacity was *less than half* the amount required under the regulations to be eligible to obtain the Block 126 License. Accordingly, the Qualification Commission concluded that, contrary to its earlier conclusion, Maple Gas was in fact *not* eligible to acquire the Block 126 License.[369]

191. The Qualification Commission provided its findings in a technical report, which the Commission sent to PERUPETRO's Management. Mr. Guzmán, who was serving as PERUPETRO's General Manager at the time, instructed the Contracting Management Department to conduct a thorough review of the Commission's technical report.[370] That Department's staff endorsed the findings of the Qualification Commission. Accordingly, on 27 November 2017, Mr. Guzmán on behalf of PERUPETRO sent a letter to Maple Gas to inform the latter of the error and of the corresponding rectification.[371]

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[366] *See* **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, dated 27 November 2017, p. 1.

[367] *See* **RER-02**, Alix Damages Expert Report, ¶ 331; **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1.

[368] **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1.

[369] **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1.

[370] **RWS-01**, Guzmán Witness Statement, ¶ 102.

[371] *See generally* **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017.

192. Contrary to Claimant's assertion in its Memorial that "PERUPETRO never provided a clear explanation to Maple Gas"[372] for the Rectification Decision, PERUPETRO had in fact provided a clear and detailed explanation:

> [T]he assessment of MAPLE's contracting capacity was made by erroneously taking the information contained in the Unaudited Financial Statements for the years 2015 and 2014 . . . instead of the information contained in the Audited Financial Statements . . . .
>
> [U]sing the information contained in the above-referenced Audited Financial Statements, MAPLE's capacity to contract, based on the indicator of Current Assets, is USD 11.84 million, a capacity that is insufficient to meet the minimum contracting capacity to take over 100% of the participation in the License Agreement for the Exploration and Exploitation of Hydrocarbons in Block 126, which is estimated at USD 25 million . . . .[373]

193. PERUPETRO therefore indicated that it was "leav[ing] without effect the Qualification Certificate," but expressly noted that Maple Gas retained its right to submit a new application.[374] However, Maple Gas chose not to reapply; instead, as explained below, it opted to submit a request for reconsideration.

e. PERUPETRO properly rejected Maple Gas' request for reconsideration

194. On 13 December 2017, Maple Gas sent a letter to PERUPETRO's Board of Directors requesting reconsideration of the Rectification Decision ("**Request for Reconsideration**").[375] In that communication, Maple Gas raised two main arguments, both purportedly based on the *Ley del Procedimiento Administrativo General* ("**General Administrative Procedure Law**"). *First*, it alleged that it had been improper for PERUPETRO's Management to issue the Rectification Decision because under the

[372] Memorial, ¶ 177.

[373] **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1.

[374] **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1.

[375] *See generally* **Ex. C-0045**, Letter from Maple Gas to PERUPETRO, 13 December 2017.

General Administrative Procedure Law, a body cannot annul its own act.[376] *Second*, Maple Gas argued that pursuant to the General Administrative Procedure Law, PERUPETRO should have notified Maple Gas in advance of its intention to invalidate the Qualification Certificate, and should have given Maple Gas at least five (5) business days to respond.[377]

195. Tellingly, in its Request for Reconsideration, Maple Gas did not even argue—let alone demonstrate—that it met the objective requirements under the 2010 Guidelines. It also did not challenge the applicability of the 2010 Guidelines (either to its qualification as a petroleum company, or to the Rectification Decision).

196. On 4 January 2018, PERUPETRO's Management responded to Maple Gas' Request for Reconsideration. In its response, PERUPETRO rejected Maple Gas' arguments based upon the General Administrative Procedure Law ("**Reconsideration Rejection**"). PERUPETRO noted (i) that the Rectification Decision had been issued in accordance with the terms of the Block 126 License, which regulates the transfer of the License to a third party;[378] (ii) that PERUPETRO's decisions in that regard therefore "were not issued in the exercise of [governmental] authority delegated to PERUPETRO to issue administrative acts;"[379] and (iii) that, accordingly, the General Administrative Procedure Law cited by Maple Gas did not apply.[380]

197. PERUPETRO has consistently held this position—namely, that its qualification decisions are not administrative acts—including in connection with cases unrelated to Claimant and Maple Gas.[381] For example, upon rejection of its qualification application with respect to Block 192, the above-mentioned Petroperú had submitted a request for reconsideration. In rejecting such request, PERUPETRO had underscored that the qualification process was not subject to the General Administrative Procedure

[376] **Ex. C-0045**, Letter from Maple Gas to PERUPETRO, 13 December 2017, pp. 3–4.

[377] **Ex. C-0045**, Letter from Maple Gas to PERUPETRO, 13 December 2017, p. 5; Memorial, ¶ 242.

[378] **Ex. C-0046**, Letter from PERUPETRO to Maple Gas, 4 January 2018. *See also* **RER-01,** Monteza Expert Report, ¶ 162.

[379] **Ex. C-0046**, Letter from PERUPETRO to Maple Gas, 4 January 2018, p. 2.

[380] **Ex. C-0046**, Letter from PERUPETRO to Maple Gas, 4 January 2018, p. 2.

[381] **Ex. R-0094**, PERUPETRO, Board of Directors Session No. 25-2017, 11 August 2017, p. 2.

Law because the qualification process is "a pre-contractual activity whose purpose is to determine whether an Oil Company has sufficient legal, technical, economic and financial capacity to meet the obligations arising from an oil contract.''[382]

198. In his expert report, Dr. Monteza confirms the soundness of PERUPETRO's position in this respect.[383] As Dr. Monteza explains, Article 16.1 of the Block 126 License requires that PERUPETRO confirm that a company seeking to assume the License is duly qualified. Accordingly, PERUPETRO's qualification is an act carried out pursuant to the contract—i.e., the Block 126 License—and not an administrative act.[384]

199. In its communication to Maple Gas rejecting its request for reconsideration, PERUPETRO further noted that Frontera had already relinquished its rights over Block 126.[385] As a result, the Block 126 License had been terminated as a matter of law, and there was therefore no longer any Block 126 License that Frontera could assign to Maple Gas.[386] As a consequence, Maple Gas' request for the reconsideration of its qualification to operate the Block 126 License was moot (in addition to unmeritorious).[387]

f. <u>In any event, Maple Gas would not have qualified under the 2017 Guidelines, either</u>

200. Claimant also argues in the Memorial that PERUPETRO should have applied the 2017 Guidelines, instead of the 2010 Guidelines.[388] As explained in **Section IV.C.3** below, the issue of the 2017 Guidelines is a red herring for at least the following five reasons: (i) there is no dispute that the 2010 Guidelines were in force when Maple Gas

[382] **Ex. R-0094**, PERUPETRO, Board of Directors Session No. 25-2017, 11 August 2017, p. 2.

[383] **RER-01,** Monteza Expert Report, ¶¶ 161–62.

[384] **RER-01,** Monteza Expert Report, ¶¶ 160–61.

[385] **Ex. C-0046**, Letter from PERUPETRO to Maple Gas, 4 January 2918, p. 2.

[386] **Ex. C-0046**, Letter from PERUPETRO to Maple Gas, 4 January 2918, p. 2 ("[T]he company Pacific Stratus requested, by means of Letter S22017001587, received on December 7, 2017, the total release of the area of Block 126, which is provided for in paragraph 4.2 of the Block 126 Agreement and which in turn is identified as grounds for the automatic termination of the referenced agreement by operation of law in accordance with the provisions of subsection 22.3.3").

[387] **Ex. C-0046**, Letter from PERUPETRO to Maple Gas, 4 January 2918, p. 2.

[388] Memorial, ¶¶ 234–35.

submitted its Application on 5 June 2017;[389] (ii) Maple Gas itself submitted its Application on the basis of the 2010 Guidelines;[390] (iii) as explained by Dr. Monteza, the 2017 Guidelines could not have applied retroactively to Maple Gas' application;[391] (iv) at no time did Maple Gas itself ever taken the position that the 2017 Guidelines should have been applied (and the latter is thus a made-for-arbitration argument invented by Claimant);[392] and (v) Maple Gas' Application would also have failed to meet the objective criteria under the 2017 Guidelines,[393] such that the application of those guidelines would not have assisted Maple Gas' cause in any event.

3. Maple Gas also failed to secure the requisite approvals to obtain the Block 126 License

201. Claimant and its sole owner Mr. Holzer acknowledge that to obtain the Block 126 License, in addition to being qualified as a suitable oil company, Maple Gas would have needed to secure certain additional "key approvals."[394] In particular, Maple Gas would have needed to negotiate its proposed modifications to the license contract, and to secure the approval of (i) multiple bureaucratic levels within PERUPETRO[395]

[389] **RER-01,** Monteza Expert Report, ¶ 103.

[390] *See* **Ex. C-0037,** Letter from Maple Gas to PERUPETRO, dated 5 June 2017, p. 2. As reflected in point 1 of its Letter, Maple Gas submitted financial statements for the preceding two years (2015 and 2016), which are the ones to be assessed by PERUPETRO pursuant to the 2010 Guidelines. The 2017 considered the oil company's financial statements for the past three years instead.

[391] **RER-01,** Monteza Expert Report, ¶ 103.

[392] **RER-01,** Monteza Expert Report, ¶¶ 111, 179.

[393] *See* **RER-02**, Alix Damages Expert Report, ¶ 47 ("Our analysis indicates that Maple Gas would not have met these requirements under either set of Guidelines — and therefore would not have been eligible to acquire the Block 126 License.").

[394] *See* Memorial, ¶ 189. *See also* Holzer Witness Statement, ¶ 12 ("I was further reassured by the fact that Maple Gas had discussed the possibility of a new investor acquiring Maple Gas with both the Ministry of Energy and Mines and with PERUPETRO. Those two government entities would be required to approve Maple Gas's acquisition of the license for Block 126.").

[395] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Points 9(8)–(9), (P4), (10).

(including its Board of Directors);[396] (ii) the MINEM, (iii) the MEF, and (iv) the President of Peru.[397]

202. Claimant argues—inaccurately—that all requisite steps were either completed or were merely meaningless formalities.[398] These mischaracterizations by Claimant, significant as they are, are immaterial to the outcome, given that Maple Gas did not satisfy the objective criteria under the 2010 Guidelines. In any event, as shown below, Maple Gas had in fact not secured the requisite government approvals to obtain the Block 126 License, which is a separate reason for which Maple Gas was not entitled to the rights to such license.

a. By the time of the Rectification Decision, PERUPETRO had *not* approved the complex, unprecedented, and controversial changes to the Block 126 License proposed by Maple Gas

203. Maple Gas and Frontera had applied for the modification and transfer of the Block 126 License on 22 June 2017, *before* Maple Gas had obtained its qualification.[399] Consistent with the Classification Regulations, the negotiations could not begin until Maple Gas received its qualification certificate.[400] After the qualification had been granted, and in accordance with internal PERUPETRO procedures,[401] the Contract Management Department of PERUPETRO established an internal working group ("**Working Group**") to negotiate with Maple Gas and Frontera the modification of the Block 126 License.[402]

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[396] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9(26).

[397] **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Arts. 2.1–2.2, 4–5.

[398] *See, e.g.*, Memorial, ¶ 214. *See also* Neumann Witness Statement, ¶ 52.

[399] *See generally* **Ex. C-0184**, Letter from Frontera to PERUPETRO, 22 June 2017, pp. 1–2.

[400] **Ex. R-0074**, Qualification Regulations, Art. 2.

[401] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9 (5).

[402] The Working Group was comprised of a member of the Exploration Department (Ms. Isabel Calderón), a member of the Legal Department (Ms. Maylie Gutiérrez), a member of the Contract Management Department (Mr. Pantigoso), and three deputy members (all from PERUPETRO). *See* **Ex. R-0070**, PERUPETRO, Memorandum No. CONT-GFCN-0317-2017, 25 August 2017, p. 1.

(i) Maple Gas and Frontera proposed significant modifications to the Block 126 License

204. As Claimant concedes, neither Maple Gas nor Frontera were in a position to complete the work of the Exploration Phase by the mandatory deadline of 20 December 2017 as required in the Block 126 License.[403] Maple Gas and Frontera therefore requested significant modifications to the Block 126 License. However, as explained by Mr. Guzmán, these requests could raise certain concerns under Peruvian law, as follows.[404]

205. *First*, Article 17 of the Hydrocarbons Law provided that the transfer of a contract could not entail the modification of the obligations therein.[405] However, Maple Gas and Frontera had requested certain material modifications to the work schedule for the Stage 5 Work. For example, Maple Gas and Frontera proposed to change the obligation to drill an exploratory well[406] to a requirement that Maple Gas carry out a technical and economic assessment.[407] They also requested an extension of the deadline to complete all of the Stage 5 Work,[408] and the waiver by PERUPETRO of its right to execute Frontera's Guarantee which could have been questioned by the Office of the Comptroller.[409]

206. *Second*, Maple Gas and Frontera requested the creation of a new work schedule that Maple Gas would execute if it assumed the Block 126 License from Frontera.[410] However, because the Exploration Phase of the Block 126 was due to expire,[411] Maple Gas and Fronter had to request the creation of a five-year retention period ("**Retention**

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[403] *See* Memorial, ¶ 185.

[404] **RWS-01**, Guzmán Witness Statement, ¶¶ 49–54.

[405] **Ex. R-0139**, Hydrocarbons Law, Art. 17.

[406] **Ex. C-0184**, Letter from Frontera to PERUPETRO, dated 22 June 2017, Point 1.1.

[407] **Ex. C-0184**, Letter from Frontera to PERUPETRO, dated 22 June 2017, Point 1.2.

[408] **Ex. R-0069**, Block 126 License Agreement between PERUPETRO and Frontera (*previously* True Energy Peru), 23 October 2007, Clause 3.9. **Ex. R-0131**, Modification of the License Contract for the Exploitation of Hydrocarbons in Block 126 between Petroperú and Veraz Petroleum Perú, Petrominerales Perú, 18 December 2014, Clauses 3.2–3.4; **RWS-01**, Guzmán Witness Statement, ¶ 43. We have amended the exhibit title to avoid confusion as discussed.

[409] **RWS-01**, Guzmán Witness Statement, ¶ 50.

[410] *See* **Ex. C-0192**, Letter from Frontera to PERUPETRO, 28 August 2017, pp. 1, 17.

[411] **RWS-01**, Guzmán Witness Statement, ¶ 46.

Period") during which the new work schedule would take place.[412] In order to substantiate the request for the Retention Period, Frontera and Maple Gas would have needed to demonstrate that whatever crude had already been discovered in Block 126 met certain stringent requirements under Article 23 of the Hydrocarbons Law and Clause 3.6 of the Block 126 License.[413]

207. *Third*, Maple Gas and Frontera also requested that PERUPETRO authorize Maple Gas to perform certain *exploratory* activities during the Retention Period, even though the applicable regulations and contract provisions (e.g., Article 23 of the Hydrocarbons Law[414] and Clause 3.6 of the Block 126 License[415]) provided that during a retention period a licensee could only develop infrastructure to transport crude out of the block once the *exploration* phase had already concluded.[416]

208. Despite the foregoing concerns, the Working Group—which was interested in preserving the Block 126 License—engaged in good faith with Maple Gas and Frontera regarding the proposed Modifications. On 12 September 2017, the Working Group informed Frontera that the negotiations would proceed on two tracks: (i) Frontera needed to submit to PERUPETRO's Management a formal request for the Retention Period, supported by a technical report, pursuant to Clause 3.6 of the Block

[412] *See* **Ex. C-0192**, Letter from Frontera to PERUPETRO, attached Frontera Technical Report, dated August 2017, 28 August 2017, p. 1.

[413] *See* **Ex. R-0139**, Hydrocarbons Law, Art. 23; **Ex. R-0069**, Block 126 License Agreement between PERUPETRO and Frontera (*previously* True Energy Peru), 23 October 2007, Clause 3.6. *See also* **RWS-01**, Guzmán Witness Statement, ¶ 47.

[414] **Ex. R-0139**, Hydrocarbons Law, Art. 23.

[415] **Ex. R-0069**, Block 126 License Agreement between PERUPETRO and Frontera (*previously* True Energy Peru), 23 October 2007, Clause 3.6.

[416] **Ex. R-0139**, Hydrocarbons Law, Art. 23; **Ex. R-0069**, Block 126 License Agreement between PERUPETRO and Frontera (*previously* True Energy Peru), 23 October 2007, Clause 3.6. **RWS-01**, Guzmán's Witness Statement, ¶¶ 46–47.

126 License;[417] and (ii) Frontera and Maple Gas needed to negotiate with the Working Group on the modification of the Block 126 License.[418]

(ii) In its request for a Retention Period, Frontera conceded that it would need an additional five years and approximately USD 40 million to begin exploiting the resources in Block 126

209. In its request for the five-year Retention Period, Frontera explained that the Block 126 crude could not be commercialized for "transportation reasons," and that it would take five years to develop the infrastructure needed to transport the crude from Block 126 to the Pucallpa Refinery and carry out other activities necessary to start producing crude oil.[419] In support of its analysis, Frontera submitted a technical report, which concluded that the contemplated work would have a cost at least USD 40 million.[420] In light of these additional costs, Frontera determined that it would lose at least USD 12–15 per barrel on the oil that it would produce and sell.[421] It also recognized that ultimate profitability was uncertain: "The retention period **should** make it possible to prove a level of resources higher than the current level and to generate positive cash flows"[422] (emphasis added).

210. PERUPETRO's Management worked collaboratively with Frontera on its request for the Retention Period, including by reminding Frontera on at least three separate occasions of the documentation that Frontera needed to submit.[423] Once the request was complete, on 26 October 2017, PERUPETRO's Management informed Frontera that, after examining its request and the accompanying technical report, it had

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[417] **Ex. C-0195**, Email from PERUPETRO to Frontera and Maple Gas, PERUPETRO, 12 September 2017, pp. 3–4. *See also* **Ex. R-0132**, Letter from Frontera (M. Silva) to PERUPETRO (M. Rodriguez), 23 October 2017, p. 1.

[418] **Ex. R-0132**, Letter from Frontera (M. Silva) to PERUPETRO (M. Rodriguez), 23 October 2017, p. 1; **Ex. C-0199**, Letter from PERUPETRO to Frontera, 26 October 2017, p. 1.

[419] **Ex. C-0192**, Letter from Frontera to PERUPETRO, 28 August 2017, pp. 1, 17.

[420] *See* **Ex. C-0196**, Letter from Frontera to PERUPETRO, 27 September 2017, p. 4 (attaching the technical report, and including within this estimate the USD 8 to 10 million required to construct a road or pipeline).

[421] *See* E**x. C-0196**, Letter from Frontera to PERUPETRO, 27 September 2017, p. 4.

[422] *See* **Ex. C-0196,** Letter from Frontera to PERUPETRO, 27 September 2017, p. 4.

[423] *See* **Ex. C-0195**, Email from PERUPETRO to Frontera and Maple Gas, PERUPETRO, 12 September 2017, pp. 3–4.; *See also* **Ex. R-0132**, Letter from Frontera (M. Silva) to PERUPETRO (M. Rodriguez), 23 October 2017, p. 1.

decided to grant Frontera a *three-year* retention period (rather than the five-year one that had been requested).[424] Contrary to Claimant's unsupported assertion, approval of the Retention Period was not "a formality;"[425] had it been so, PERUPETRO would have simply acceded to the request for a *five-year* period. In issuing its approval, PERUPETRO's Management emphasized that—in accordance with the Block 126 License—the three-year retention period could only begin if the work for the Stage 5 Work was completed within the statutory 10-year maximum period, i.e., by 20 December 2017.[426]

(iii) By the time the Rectification Decision was issued on 27 November 2017, Maple Gas had not yet secured PERUPETRO's approval of the modification of the Block 126 License

211. Frontera and Maple Gas separately engaged with PERUPETRO in discussions on the modification of the Block 126 License.[427] Claimant suggests in the Memorial that PERUPETRO had already approved the modification and transfer of the Block 126 License before the Rectification Decision.[428] Furthermore, Mr. Holzer asserts (without evidence) that "[b]y the end of October 2017, PERUPETRO had agreed to everything needed for the approval of the transfer of the concession to Maple Gas."[429] That is manifestly false.

212. To obtain PERUPETRO's approval of the proposed contract modifications, Maple Gas would have had to achieve the following:

a. Completion of contract negotiations with the Working Group. PERUPETRO internal procedures dictated that, during such negotiations, the Working Group was required to prepare and endorse four documents: 1)) a draft version

[424] **Ex. C-0199**, Letter from PERUPETRO to Frontera, 26 October 2017, p. 2.

[425] Memorial, ¶ 213.

[426] **Ex. C-0199**, Letter from PERUPETRO to Frontera, 26 October 2017, p. 2.

[427] **Ex. R-0070**, PERUPETRO, Memorandum No. CONT-GFCN-0317-2017, 25 August 2017. **RWS-01**, Guzmán Witness Statement, ¶ 72.

[428] Memorial, ¶¶ 212–14.

[429] Holzer Witness Statement, ¶ 17.

of the amended license contract;[430] (2) a technical, legal and economic report signed by the various members of the working group;[431] (3) a draft decree to be issued by PERUPETRO's Board of Directors;[432] and (4) a draft supreme decree to be issued by the President of Peru.[433]

b. Endorsement of PERUPETRO's Department Managers. Next, the draft version of the amended license contract and accompanying technical report would have been sent to the managers of the different PERUPETRO departments represented in the Working Group.[434] These department managers would have given their endorsement, returned the draft license contract or the technical report to the Working Group with comments and/or proposed changes, or rejected the draft license contract.[435]

c. Endorsement of PERUPETRO's Management. Thereafter, the Contract Management Department would have drafted and sent a memorandum to PERUPETRO's Management, accompanied by the four documents prepared by the Working Group and the qualification certificate.[436] PERUPETRO's

[430] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Points 9 (9), 9 (P4), 9 (10). **RWS-01**, Guzmán Witness Statement, ¶ 34.

[431] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9 (8). **RWS-01**, Guzmán Witness Statement, ¶ 34.

[432] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9 (9). **RWS-01**, Guzmán Witness Statement, ¶ 34.

[433] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9 (9). **RWS-01**, Guzmán Witness Statement, ¶ 34.

[434] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Points 9 (8)–(9).

[435] **RWS-01**, Guzmán Witness Statement, ¶¶ 37, 59.

[436] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Points 9 (18)–(19).

Management, too, would have had the opportunity to either endorse, provide comments and/or proposed changes to, or reject the draft license contract.[437]

d. Approval by PERUPETRO's Board of Directors. If and when PERUPETRO's Management had approved the proposed changes, the Contract Management Department would have submitted the documents for the approval of PERUPETRO's Board of Directors.[438] As in the prior stages, the Board of Directors was likewise authorized to provide comments, request changes, or reject the draft license contract.[439]

e. Importantly for present purposes, this was not merely a rubberstamping exercise, but rather an active function for the Board of Directors. To provide but two illustrative examples: (i) Board of Directors Minute No. 31-2019 dated 24 December 2021 shows that the Board of Directors requested the addition of a clause to a project for the modification of the License for Block XIII submitted to their approval[440]; and (ii) Board of Directors Minute No. 02-2020 dated 16 January 2020 shows that the Board of Directors requested the review of one of the clauses and the deletion of another clause of a project for the modification of the License for Block XIII.[441]

f. Aside from having the authority to approve or to propose revisions, the Board of Directors was also empowered ultimately to reject altogether the proposed transfer and modification of the contract.[442]

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[437] **RWS-01**, Guzmán Witness Statement, ¶¶ 37, 61.

[438] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9 (23). **RWS-01**, Guzmán Witness Statement, ¶ 61.

[439] **RWS-01**, Guzmán Witness Statement, ¶ 63; *see also* **Ex. R-0095**, PERUPETRO, Meeting Minutes No. 35-2018, 17 December 2018. *See also* **Ex. R-0079**, PERUPETRO, Meeting Minutes No. 31-2019, 24 December 2019; **Ex. R-0080**, PERUPETRO, Meeting Minutes No. 02-2020, 16 January 2020, p. 1.

[440] **Ex. R-0079**, PERUPETRO, Meeting Minutes No. 31-2019, 24 December 2019, p. 1. *See also* **RWS-01**, Guzmán Witness Statement, ¶ 63.

[441] **Ex. R-0080**, PERUPETRO, Meeting Minutes No. 02-2020, 16 January 2020, p. 1.

[442] **RWS-01**, Guzmán Witness Statement, ¶ 63.

213. Maple Gas was fully aware of PERUPETRO's approval process. Thus, for example, in an internal aide memoire dated 21 November 2017, Maple Gas expressly acknowledged that "PERUPETRO, according to its procedure, stated that [the signature by the Working Group of the draft amended license contract] was the **first** step towards obtaining the approval of the Directorate and subsequent issuance of the Supreme Decree, which authorizes PERUPETRO to sign the Amendment to the Block 126 Agreement with Frontera and Maple"[443] (emphasis added).

214. In sum, contrary to the assertions by Claimant and Mr. Holzer that the approval process had already been completed by November 2017, the evidence demonstrates that Maple Gas had not even completed such process by the time that the Rectification Decision was issued on 27 November 2017. In particular:

a. The negotiations with the Working Group had not yet concluded. During its negotiations with Frontera and Maple Gas, the Working Group prepared a proposed draft that reflected the modifications to the Block 126 License requested by Frontera and Maple Gas ("**Draft License Amendment**"), which was signed by the members of the Working Group and representatives of both companies on 18 October 2017[444]—but which remained subject to review and approval by other entities within PERUPETRO. The Working Group also prepared initial drafts of the other required documents—including draft versions of the PERUPETRO's Board of Directors decree,[445] the draft supreme decree to be issued by the President of Peru,[446] and the technical, legal, and economic report.[447] These draft documents confirm that the Working Group was working collaboratively with Maple Gas to agree on modifications to Block 126 License, including by attempting to resolve potential legal issues

[443] **Ex. C-0204**, Email from Maple Gas to MINEM, attaching Summary of Block 126 Negotiations with PERUPETRO, 22 November 2017, p. 2.

[444] **Ex. R-0132**, Letter from Frontera (M. Silva) to PERUPETRO (M. Rodriguez), 23 October 2017, p. 1.

[445] **Ex. R-0120**, PERUPETRO, Draft Decree of the Board of Directors, October 2017, p. 1.

[446] **Ex. R-0137**, PERUPETRO, Draft Supreme Decree regarding Block 126, 2017, p. 1.

[447] **Ex. R-0136**, PERUPETRO, Draft Technical Legal and Economic Report No. GFCN-0407-2017, 30 October 2017, p. 1.

with the proposed modifications.[448] However, these draft documents were not finalized or signed by the Working Group because Maple Gas ultimately was found to be ineligible to acquire the Block 126 License.[449]

b. PERUPETRO's Management had not yet provided its endorsement. Mr. Guzmán, then General Manager of PERUPETRO, confirms that he never received the Draft License Amendment reviewed and signed by the relevant Managers nor the other supporting set documents that would have been prepared by the Working Group, nor did he approve the modification of the Contract.[450] Without his approval, the Draft License Amendment could not be submitted to or approved by the Board of Directors.[451] This means that even before the Rectification Decision had been issued, PERUPETRO had *not* "agreed to everything needed for the approval of the transfer of the concession to Maple Gas," as Mr. Holzer submits.[452]

c. PERUPETRO's Board of Directors had not issued its approval. In the aforementioned aide memoire dated 21 November 2017, Maple Gas expressly conceded that it had not yet obtained the requisite approval by PERUPETRO's Board of Directors:

> The above confirms that as of September 2017, the Draft Amendment to the Block 126 Agreement was on its way to the Directorate of PERUPETRO, in accordance with its internal procedures.
>
> The deadline for finalizing the Amendment to the Block 126 Agreement is 12.20.2017, and therefore it is extremely important to secure the approval of the Directorate of PERUPETRO as soon

[448] **Ex. R-0136**, PERUPETRO, Draft Technical Legal and Economic Report No. GFCN-0407-2017, 30 October 2017, Points 3.1., 4.1–4.2.

[449] *See generally, e.g.,* **Ex. R-0136**, PERUPETRO, Draft Technical Legal and Economic Report No. GFCN-0407-2017, 30 October 2017, p. 1.

[450] **RWS-01**, Guzmán Witness Statement, ¶¶ 62, 86.

[451] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9 (23).

[452] Holzer Witness Statement, ¶ 17.

> as possible, in order to move forward with the procedures to obtain the respective Supreme Decree.[453]

215. Thus, as Maple Gas conceded in late November 2017, PERUPETRO had not issued its approval of the transfer of the Block 126 License by the time that the Rectification Decision was issued on 27 November 2017.

b. Maple Gas failed to complete the remaining review and approval process required to acquire the Block 126 License

216. Even if PERUPETRO's Board of Directors had issued its approval, Peruvian law mandated additional review.

217. *First, review and endorsement of the MINEM*. Mr. Holzer acknowledges in his witness statement that review and agreement by the MINEM was required.[454] PERUPETRO's Management would have sent the Draft License Agreement and supporting documents to the MINEM, [455] which would have had 22 working days to review the file and submit a signed decree to the MEF.[456]

218. *Second*, *review and endorsement of the MEF*. The Draft License Agreement and supporting documents would have then been sent to the MEF, which would have had 22 working days to review, sign, and return the documents to the MINEM.[457]

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[453] **Ex. C-0204**, Email from Maple Gas to MINEM, attaching Summary of Block 126 Negotiations with PERUPETRO, 22 November 2017, p. 3. *See also* **Ex. C-0204**, Email from Maple Gas to MINEM, attaching Summary of Block 126 Negotiations with PERUPETRO, 22 November 2017, p. 2 ("The text of the Amendment to the Block 126 Agreement includes all the observations and suggestions made by PERUPETRO over the course of several meetings. PERUPETRO, according to its procedure, stated that it was the first step towards obtaining the approval of the Directorate and subsequent issuance of the Supreme Decree, which authorizes PERUPETRO to sign the Amendment to the Block 126 Agreement with Frontera and Maple.").

[454] Holzer Witness Statement, ¶ 12.

[455] *See* **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 2.2; **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Points 9 (31)–(32).

[456] *See* **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 3.

[457] *See* **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 4.

219. *Third, and finally, approval of the President of the Republic*. The materials would then have been submitted to the President,[458] for issuance of a Supreme Decree approving the Draft License Contract.

220. As Claimant concedes, Maple Gas would have needed to complete all of the foregoing steps by 20 December 2017, at which point the Block 126 License would have been relinquished by Frontera.[459] Yet it is undisputed that by the end of November 2017, Maple Gas had not completed *any* of these necessary steps. In other words, even if Maple Gas had secured PERUPETRO's approval—which it did not—Maple Gas would have had less than a month to secure the agreement of the MINEM, the MEF, and the President of the Republic. That would have been virtually impossible in the time available, including due to the bureaucratic process it would have involved, as well as significant and unprecedented nature of the proposed changes to the license (which would have taken some time to assess by the relevant State entities).

221. In an attempt to minimize the significance of the foregoing review and approval requirements and create the impression that Maple Gas was in fact close to obtaining the Block 126 License, Claimant repeats its tired refrain that these steps—like those within PERUPETRO—were mere "formalit[ies]."[460] However, they were anything but. In these circumstances, when the MINEM, the MEF, and/or President have substantive comments to a draft license contract or its supporting documents (as often occurs), the relevant documents are returned to PERUPETRO so that its Board of Directors can address such comments,[461] after which the process begins anew.[462] A few illustrative examples of the foregoing with respect to the MINEM's review of proposed license revisions/transfers:

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[458] *See* **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 5.

[459] *See* Memorial, ¶ 16 ("The timing was particularly important because the existing license-holder would be forced to relinquish the Block 126 License by 20 December 2017 if the transfer were not approved.").

[460] Memorial, ¶ 214.

[461] **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 6. *See also* **RWS-01**, Guzmán Witness Statement, ¶ 63.

[462] **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 6.

a. After PERUPETRO's Board of Directors approved the proposed modification of the license contract for the exploration and exploitation of Block 39 on 4 November 2011, the MINEM returned the draft license contract to PERUPETRO with substantive changes.[463] As a result, the Board of Directors had to review and approve an amended version of the draft license contract and resubmit to the MINEM on 3 February 2016.[464]

b. Following approval by PERUPETRO'S Board of Directors on 27 April 2020 of the proposed transfer of the license for the exploitation of Block 88, [465] the MINEM submitted substantive comments that had to be resolved by PERUPETRO.[466]

c. The MINEM similarly had substantive comments to the proposed transfer of the license for the exploitation of Block 56, which had been approved by PERUPETRO's Board of Directors on 29 April 2020.[467]

d. The approval by the President of the Republic is likewise not automatic. To illustrate, the proposed transfer of the license for the exploration and exploitation of Block Z-1 was submitted to the MINEM on 1 July 2021, and subsequently endorsed by both the MINEM and the MEF, but the President of the Republic has yet to issue a Supreme Decree approving the project, pending substantive review at the Presidency.[468]

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[463] **Ex. R-0146**, PERUPETRO, Meeting Minutes No. 03-2016, 29 January 2016, p. 1.

[464] **Ex. R-0147**, Letter No. PRES-GGRL-CONT-020-2016 from PERUPETRO (R. Zoeger) to MINEM (R.M. Ortiz), 3 February 2016, p. 1.

[465] **Ex. R-0082**, PERUPETRO, Monitoring of the assignment process of the contracts for Blocks Z-1, 56 and 88, May 2021–July 2022. *See also* **RWS-01**, Guzmán Witness Statement, ¶ 93.

[466] **Ex. R-0135**, Letter No. 389 - 2020-MINEM/DGH from MINEM (E. Garcia) to PERUPETRO (D. Hokama), 11 May 2020, p. 1.

[467] **Ex. R-0082**, PERUPETRO, Monitoring of the assignment process of the contracts for Blocks Z-1, 56 and 88, May 2021–July 2022, p. 1. *See also* **RWS-01**, Guzmán Witness Statement, ¶ 93; **Ex. R-0134**, Letter No. 388-2020-MINEM/DGH from MINEM (E. Garcia) to PERUPETRO (D. Hokama), 11 May 2020, p. 1.

[468] **Ex. R-0082**, PERUPETRO, Monitoring of the assignment process of the contracts for Blocks Z-1, 56 and 88, May 2021–July 2022, p. 1; s*ee also* **RWS-01**, Guzmán Witness Statement, ¶ 94.

222. These mandatory review steps—which Maple Gas had not completed—were therefore not mere formalities.

4. Block 126 was not a realistic option for Maple Gas

223. Block 126 was not the quick, easy and certain solution to Maple Gas' financial and commercial problems that Claimant portrays it to be. To the contrary, as expressly conceded by the former licensee of Block 126, the Block was well behind schedule in terms of development.[469] As a result, Maple Gas would have needed to invest approximately USD 79 million on the project before it could have begun to commercialize any crude from that Block.[470]

224. However, Maple Gas—a company in steep financial decline—was far from able at the time to satisfy the objective financial requirements to be able to operate the Block. Furthermore, and crucially, Maple Gas was not eligible to acquire the Block 126 License, a fact that was not disputed by Maple Gas then and is not disputed by Claimant now. Notably, neither Maple Gas nor Claimant have argued, let alone demonstrated, that the Qualification Certificate was correct, or that the Rectification Decision was wrong (under either the 2010 or 2017 Guidelines). Instead, Claimant asserts procedural complaints about the qualification process, which complaints have no merit.

225. Aside from the fact that Maple Gas lacked the financial wherewithal to develop Block 126 and was therefore ineligible to obtain the license, it failed to complete the requisite review and approval process prior to the expiration of Frontera's license, and for that reason, too, it had no rights to the Block 126 License.

226. For all the foregoing reasons, Maple Gas never acquired any right at all in connection with the Block 126 License. Claimant's relevant BIT claims are therefore based on non-existent rights, and must be dismissed.

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[469] *See* **Ex. C-0196**, Letter from Frontera to PERUPETRO, 27 September 2017, pp. 5-8.

[470] *See* Hidro-Carburos Report, ¶¶ 15, 160.

I. In December 2017, Maple Gas shut down its refining operations

227. As of December 2017, Maple Gas was still insisting that it was financially capable and thus qualified to make investments in, and to operate, the Block 126 fields. In reality, however, Maple Gas did not have the financial wherewithal to make any new investments; to the contrary, Claimant admits that mere days after filing its Request for Reconsideration, Maple Gas' financial situation was so dire that it was forced to shut down all refining operations at the Pucallpa Refinery.[471]

1. Maple Gas' decision to cease operations generated anxiety in the local community

228. Claimant correctly notes that Maple Gas' collapse created anxiety and uncertainty in the local community, including because of the resulting loss of jobs and potential fuel shortages.[472] To make matters worse, Maple Gas inflamed tensions through its own public comments concerning its animosity towards Petroperú. For instance, Mr. Neumann publicly blamed Petroperú, asserting that

> the refinery will again process crude when Petroperú stops buying up all the raw material in the region and when Aguaytía (Orazul Energy) complies with the provisional remedy ordering it to hand over its production to Petróleos de la Selva [(i.e., Maple Gas)].[473]

229. In additional public statements, Mr. Neuman further accused Petroperú of "gross commercial interference," blaming it for "cost overruns in the transfer of crude oil along with fuel shortages and speculation."[474]

230. Intent as he was to hurl public accusations against Petroperú, Mr. Neumann conveniently diverted attention from the fact that Maple Gas had refused to pay

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[471] Memorial, ¶ 246 (admitting that "on 24 December 2017, Maple Gas was forced to suspend refining operations at the Pucallpa Refinery").

[472] Memorial, ¶ 247. *See also*, *e.g.*, **Ex. C-0207**, "*Refinería de Pucallpa dejaría de operar*," Impetu Journal, 9 January 2018.

[473] *See* **Ex. C-0214**, "*Refinería de Pucallpa cierra operaciones,"* Diario Impetu, 9 February 2018, p. 2.

[474] **Ex. R-0043**, "*Controversia entre Maple y Petroperú en Pucallpa*," LA REPÚBLICA, 26 February 2018, p. 3.

millions of USD to Aguaytía Energy for delivery of feedstock,[475] which drove Aguaytía Energy to search for another buyer.[476]

2. Petroperú sought to reassure the local population that it would not face a shortage

231. Given Maple Gas' incendiary rhetoric and the concerns that it generated in the local population, Petroperú sought to assuage such concerns and correct Maple Gas' misrepresentations. To this end, in statements made in February 2018, Petroperú provided the following clarifications:

a. "PETROPERÚ's mission is to supply fuel to the country and the Ucayali region. Though it competes in the market, the main function of the company is to guarantee the provision of fuel especially when private operators cannot do so."[477]

b. "PETROPERÚ guarantees and always has guaranteed the supply of fuel in the Ucayali region, renewing its commitment with respect to consistency, quantity and quality, and competitive prices."[478]

c. "[Petroperú's] decision to buy crude corresponded to its subsidiary role, since, if it hadn't, Pucallpa would have been left without fuel."[479]

d. Petroperú had not raised prices for consumers.[480] "The PETROPERÚ fuel price, here in Pucallpa, does not go up a penny even if we bring it from Iquitos or Conchán."[481]

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[475] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 195 (a).

[476] *See* **Ex. R-0022**, "*Fitch Rates Orazul Energy Egenor's Proposed Senior Notes 'BB(EXP)'*," FITCHRATING, 17 April 2017 (accessed 22 July 2022) pp. 1–2 ("[I]n 2016, Aguaytia wrote off USD9 million of unpaid invoices to Maple Gas. It is expected to take an additional USD$6 million of impairments in 2017 before improved distribution infrastructure allows the company to redirect sales to financially stronger clients.").

[477] **Ex. C-0222**, Petroperú News Release, "*Petroperú aclara que no tiene injerencia en disputas entre privados en Pucallpa*," 26 February 2018, p. 1.

[478] **Ex. C-0220**, "*Comunicado a la Opinión Pública de Ucayali*," El Choche, 23 February 2018, p. 1.

[479] **Ex. C-0217**, "*Petro-Perú entablará arbitraje contra Maple por refinería*," El Comercio Perú, 15 February 2018, p. 3.

[480] **Ex. C-0219**, "*Gerente de PetroPerú explicó situación del combustible en Ucayali*," Impetu Perú, 22 February 2018, p. 2.

[481] **Ex. C-0212**, "*En 5 días podríamos estar desabastecidos de gasolina de 90 octanos*," Impetu Perú, 1 February 2018, p. 3.

e. Petroperú "has no involvement in the corporate situation between Petróleos de la Selva [(i.e., Maple Gas)] and the companies CEPSA and Aguaytia Energy."[482]

f. Aguaytía Energy had decided to stop selling to Maple Gas due to the latter's failure to pay for deliveries.[483] (This fact was confirmed by the ICC tribunal.[484])

g. "PETROPERÚ's contract with CEPSA for crude oil purchases is not exclusive, meaning that the company is free to sell its product to other operators."[485]

h. "Because the Pucallpa refinery is exclusively under Maple's management pursuant to a lease agreement, it is solely up to that company to resolve any business or labor problem."[486] Nevertheless, Petroperú had offered to use the Refinery for RAD Services, which might "allow[] us to avoid harm to the families, to the workers."[487]

i. Also, with respect to ongoing civil unrest, "[Petroperú] is doing everything possible so that the diesel supply is not affected by external elements, such as road closures or blockades."[488]

232. Contrary to Claimant's repeated allegations that Petroperú made many "false and misleading statements,"[489] Petroperú's statements are amply supported by the factual record. Moreover, on one occasion in which a press article had mistakenly attributed

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[482] **Ex. C-0222**, Petroperú News Release, "*Petroperú aclara que no tiene injerencia en disputas entre privados en Pucallpa,*" 26 February 2018, p. 1.

[483] **Ex. C-0219**, "*Gerente de PetroPerú explicó situación del combustible en Ucayali*," Impetu Perú, 22 February 2018 p. 1 (Petroperú's manager explained that "[w]e recently learned through the media that for 20 months, Orazul had been supplying natural gas liquids to the company that is now managing the Maple refinery and wasn't receiving any payment; for that reason, Orazul has suspended delivery to Maple, and Maple doesn't pay it.").

[484] **Ex. R-0001**, ICC Arbitration (Award), ¶ 195.

[485] **Ex. C-0220**, "*Comunicado a la Opinión Pública de Ucayali*," El Choche, 23 February 2018, p. 1. *See also* **Ex. C-0222**, Petroperú News Release, "*Petroperú aclara que no tiene injerencia en disputas entre privados en Pucallpa*," 26 February 2018, p. 1.

[486] **Ex. C-0220**, "*Comunicado a la Opinión Pública de Ucayali*," El Choche, 23 February 2018, p. 1.

[487] **Ex. C-0219**, "*Gerente de PetroPerú explicó situación del combustible en Ucayali*," Impetu Perú, 22 February 2018, p. 2.

[488] **Ex. C-0212**, "*En 5 días podríamos estar desabastecidos de gasolina de 90 octanos*," Impetu Perú, 1 February 2018, p. 3.

[489] Memorial, ¶ 247.

to Petroperú the assertion that Maple Gas owed money to CEPSA,[490] and in response to a request by Maple Gas,[491] Petroperú sent a letter and email to the newspaper to correct the record.[492] Claimant itself acknowledges the foregoing.[493] This incident directly contradicts Claimant's narrative of a smear campaign by Petroperú against Maple Gas.

233. Further, contemporaneous statements by non-Petroperú individuals corroborated Petroperú's above-listed statements to the media. For example:

a. An Aguaytía Energy representative stated that "Petróleos de la Selva [(i.e., Maple Gas)] was paying us properly until late 2014. As of that time they began to be late on payments. For a year and a half we delivered gasoline without receiving payment. Now we are in arbitration [with Maple Gas]."[494]

b. "[T]he president of the Chamber of Commerce of Ucayali, Jose Luis Llontop, highlighted the measure taken [by Petroperú] that—he said—will help the situation in Ucayali progress normally."[495]

c. "As a corollary, Elio Campos, head of the Regional Office of Osinergmin [the Peruvian oil and gas regulator], said that the quality of PETROPERÚ products

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[490] **Ex. C-0217**, "*Petro-Perú entablará arbitraje contra Maple por refinería*," El Comercio Perú, 15 February 2018.

[491] In its letter, Maple Gas alleged that it had not received any formal communications about any breach of the Refinery Lease Agreement. **Ex. R-0115**, Letter No. MG-LEGA-L-032-2018 from Maple Gas (K. Neumann) to Petroperú (E. Bertarelli), 19 February 2018, p. 1. In response, Petroperú listed the *eight* (8) previous letters in which it had addressed Maple Gas's non-compliance with Article 12 of the Refinery Lease Agreement, concerning the provision of RAD Services. **Ex. C-0053**, Letter from PETROPERÚ to Maple, 1 March 2018, p. 1.

[492] **Ex. C-0053**, Letter from PETROPERÚ to Maple Gas, 1 March 2018, pp.1–2. Maple Gas also complains of alleged statements by a local MINEM official in a newspaper press Report. *See* Memorial, ¶¶ 251–52. The report simply states: [Mr. López] explained that because these are situations concerning commercialization, buying and selling of crude oil, and debts, which is inherently private business management, the State cannot cut into that." **Ex. C-0210**, "*Director de Energía y Minas descarta desabastecimiento de gasolina, por el cierre de ex Maple,*" Diario Impetu, 19 January 2018, p. 1. Maple Gas sent a complaint letter, but did not ask or demand a correction. *See* **Ex. C-0211**, Letter from Maple Gas to the Ucayali Regional Directorate of the Ministry of Energy, 22 January 2018, p. 1 (*attaching* a Letter from CEPSA to Maple Gas, dated 17 January 2018, p. 2).

[493] *See* Memorial, ¶ 261.

[494] **Ex. C-0217**, "*Petro-Perú entablará arbitraje contra Maple por refinería*," El Comercio Perú, 15 February 2018, p. 3.

[495] **Ex. C-0212**, "*En 5 días podríamos estar desabastecidos de gasolina de 90 octanos*," Impetu Perú, 1 February 2018, p. 3.

in the area meets the most demanding standards, with the highest quality and with additional characteristics unique in the market."[496]

d. A regional MINEM official was quoted as saying that Maple Gas had been producing very little for the local market, that Petroperú had already increased its supply to fill that gap, and that there was no reason to fear any gasoline shortages in the region.[497]

234. Finally, while Claimant alleges in passing that Petroperú's public statements caused other companies to "cut off negotiations with Maple Gas [for the supply of feedstock],"[498] such allegation is unsupported. Claimant has provided no documentary evidence to show that Maple Gas was in negotiations with any company in February 2018, let alone that any such company decided not to contract with Maple Gas due to Petroperú's statements.[499]

J. In 2018, Maple Gas ceased paying rent for the Pucallpa Refinery, and Petroperú terminated the Refinery Lease Agreement for cause

235. Shortly after shutting down its refining operations, Maple Gas failed to make its contractually-mandated rent payment to Petroperú for its lease of the Pucallpa Refinery. In the months that followed, Maple Gas' behavior was erratic: first it decided to unilaterally suspend its payment of rent; it insisted at the same time that PERUPETRO grant it temporary authorization to operate a new oil field (viz., Sheshea field); it eventually decided to pay the overdue rent; but then promptly refused to make the next rent payment. Ultimately, Petroperú terminated the Refinery Lease Agreement for cause, and an independent arbitral tribunal found Maple Gas liable and ordered it to pay Petroperú more than USD 7.7 million for unpaid rent and associated damages.

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[496] **Ex. C-0212**, "*En 5 días podríamos estar desabastecidos de gasolina de 90 octanos*," Impetu Perú, 1 February 2018, p. 3.

[497] **Ex. C-0210**, "*Director de Energía y Minas descarta desabastecimiento de gasolina, por el cierre de ex Maple,*" Diario Impetu, 19 January 2018.

[498] Memorial, ¶ 265.

[499] Claimant relies exclusively on unsubstantiated assertions from its witness, Mr. Neumann. *See* Memorial, ¶¶ 265–67 (*citing* only to Mr. Neumann's witness statement, ¶¶ 80–81).

1. In May 2018, Maple Gas unilaterally suspended its payment of rent

236. On 16 March 2018, Petroperú sent to Maple Gas an invoice for USD 361,594.95, corresponding to the latter's rent payment for the second quarter of 2018, pursuant to Article 5 of the Refinery Lease Agreement.[500] Since Maple Gas did not respond, by letter dated 31 April 2018, Petroperú requested that Maple Gas pay the rent.[501] Maple Gas responded by letter dated 14 May 2018, acknowledging that it was experiencing difficulties in making the rent payment, but observing that it had until 18 May 2018 to pay the invoice.[502] A mere four days later, however, Maple Gas shifted its position: on 16 May 2018, it sent a letter notifying Petroperú that it had decided to "SUSPEND the performance of our obligation to make the quarterly rent payments for the property that is subject to the Lease Agreement."[503] On 22 May 2018, Petroperú responded by emphasizing that Maple Gas was under a contractual obligation to pay rent.[504]

2. In that same month of May 2018, and despite having refused to pay rent on the Refinery, Maple Gas made an extraordinary request for access to the Sheshea oil field

237. By May 2018, Maple Gas had ceased all refining operations and had refused to comply with its contractual obligations under the Refinery Lease Agreement. Nevertheless, Maple Gas insisted that it be given temporary authorization to exploit Block 126. On 25 May 2018, Maple Gas sent a letter to PERUPETRO, boldly stating that Maple Gas was "pleased to . . . inform you . . . of our intention to enter into a Temporary Service Agreement for the Experimental Production of the Sheshea Field that was part of the former Block 126."[505]

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[500] **Ex R-0044**, Letter No. GCT-133-2018 from Petroperú (F. Zevallos) to Maple Gas (J. Bernui), 16 March 2018, p. 1.

[501] **Ex. R-0116**, Letter No. GCT-186-2018 from Petroperú (F. Zevallos) to Maple Gas (K. Neumann), 30 April 2018, p. 1.

[502] *See* **Ex. R-0117**, Letter No. MG-LEGA-L-089-18 from Maple Gas (K. Neumann) to Petroperú (F. Zevallos) , 14 May 2018, p. 1.

[503] **Ex. R-0045**, Letter No. MG-LEGA-L-0090-18 from Maple Gas to Petroperú, 16 May 2018, p. 1.

[504] **Ex. C-0231**, Letter from Petroperú to Maple Gas, 22 May 2018, p. 3.

[505] **Ex. C-0064**, Letter from Maple to PERUPETRO, 24 May 2018, p. 1.

238. Claimant complains about PERUPETRO's failure to approve Maple Gas' demand for temporary use of the Sheshea field.[506] Such complaint is entirely unfounded, however, for at least three reasons. *First*, as explained by Dr. Monteza, Maple Gas' demand was not consistent with Peruvian law.[507] Article 10 of the Hydrocarbons Law provides that exploration and exploitation activities must be carried out under one of three arrangements: (i) a license contract, through which PERUPETRO authorizes the licensee to conduct certain activities in exchange for royalties; (ii) a service contract, through which PERUPETRO pays a fee to a contractor for specified work; or (iii) "other contracting modalities authorized by the [MINEM]."[508] Maple Gas' demand was confusing: it sought one of the "other contracting modalities," but insisted that it be granted the same terms included in the Block 126 License with Frontera (i.e., a license contract), and sought to temporarily extract crude oil that would be delivered to PERUPETRO (i.e., terms of a service contract).[509] As Dr. Monteza observes, there is no basis under Peruvian law for this type of compound arrangement demanded by Maple Gas.[510]

239. *Second*, even if Maple Gas had requested a short-term arrangement contemplated under Peruvian law (e.g., a short-term license contract), PERUPETRO was not authorized to issue such a license simply based upon Maple Gas' demand. Peruvian law imposes certain requirements for both short-term or long-term license contracts.[511] Maple Gas would have needed to meet these legal requirements merely to be eligible to obtain a new license contract. For instance, Maple Gas would have had to satisfy the applicable objective criteria to demonstrate that it was financially and technically

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[506] Memorial, ¶ 276.

[507] **RER-01**, Monteza Expert Report, ¶¶ 200-01.

[508] **Ex. R-0139**, Hydrocarbons Law, Art. 10.

[509] **RER-01**, Monteza Expert Report, ¶ 201.

[510] **RER-01**, Monteza Expert Report, ¶ 201.

[511] **Ex. R-0139**, Hydrocarbons Law, Art. 10. Notably, PERUPETRO has only entered into short-term license contracts under exceptional circumstances that are not present here. In particular, PERUPETRO has entered into short-term contracts for blocks that were in the *Exploitation*—rather than Exploration—Phase, in order to prevent any disruption in the production process. *See, e.g.*, **Ex. R-0140**, PERUPETRO, Directorate Resolution No. 034-2014, 20 March 2014, p. 1 (approving a 12-month license for the *exploitation* of Block III).

qualified to explore and exploit the Sheshea field.[512] To sign a new contract, PERUPETRO also would have been required to complete assessments of the potential social, economic, environmental, and cultural impacts of the proposed activities.[513] Furthermore, and as explained in **Section II.H.3**, any proposed contract would have been subject to the review of PERUPETRO's Board of Directors and of the MINEM, the MEF, and the approval of the President of the Republic (through a Supreme Decree).[514]

240. *Third*, and in any event, Maple Gas was not in a position to successfully exploit the Sheshea field. As described in the Hidrocarburos Consulting Report, the Sheshea 1X well was one of five exploratory wells drilled by Frontera in the Block 126 field, and it was the only well to have yielded oil without water.[515] That well had been abandoned by Frontera. Claimant asserts that "minor additional investments" would have been required to render that well functional,[516] but the required investment would have been significant. In particular, as confirmed by Hidrocarburos Consulting in its contemporaneous evaluation, Maple Gas would have needed not only to rehabilitate the original well but also to drill between one and five additional wells.[517] Moreover, in submissions to PERUPETRO in 2017, Maple Gas itself confirmed that the following would be required: (i) rehabilitating the original Sheshea 1X confirmatory well; (ii) drilling two additional confirmatory wells; (iii) rehabilitating

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[512] **Ex. R-0158**, PERUPETRO, Directorate Resolution No. 029-2017, 10 April 2017, Annex I, Art. 1.1. *See also, e.g.*, **Ex. R-0143**, PERUPETRO, Technical, Legal and Economic Report No.GFCN-050-2014, 19 March 2014, Point 7.3 (confirming that the licensee had been qualified under the objective criteria under Peruvian law).

[513] **Ex. R-0142**, Supreme Decree No. 012-2008-EM, 25 October 2016, Title II; **Ex. R-0141**, Law No. 29785, 6 September 2011. *See, e.g.*, **Ex. R-0143**, PERUPETRO, Technical, Legal and Economic Report No.GFCN-050-2014, 19 March 2014, Points 7.4–7.5 (confirming that the licensee had completed the requisite social and environmental assessments).

[514] *See* **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Arts. 2.1–2.2, 4–5.

[515] Hidrocarburos Report, ¶ 49. *See also* **RER-02**, Alix Damages Expert Report, ¶ 134.

[516] Memorial, ¶ 186 ("During its diligence, Maple Gas had concluded that the existing Sheshea 126-17-1X ("Sheshea 1X") well could become commercially viable with **relatively minor additional investments** in infrastructure") (emphasis added).

[517] *See* **Ex. R-0181**, Hidro-Carburos Consulting, Sheshea Structure Evaluation of Lot 126, 24 April 2017, p. 21.

access roads, and (iv) installing tanks and surface equipment for production.[518] Furthermore, the estimated crude oil reserves had been adjudged insufficient to justify construction of a pipeline to transport and commercialize the crude from such field,[519] which would have cost approximately USD 8–10 million, and would have required 15–18 months of construction.[520]

241. Thus, even if Maple Gas had been capable of satisfying the legal requirements to obtain a temporary arrangement to exploit the Sheshea field, the field would have required significant investments of money, which Maple Gas lacked. The evidence thus demonstrates that the Sheshea field was not the panacea or deliverance that Claimant portrays it to be.

3. In August 2018, Petroperú terminated the Refinery Lease Agreement for cause

242. Given Maple Gas' refusal to pay rent and thus comply with its contractual obligations under the Refinery Lease Agreement, Petroperú initiated the Lima Arbitration pursuant to the dispute resolution clause under such Agreement. On 28 May 2018, Petroperú filed its request for arbitration, seeking an award affirming the termination of the Refinery Lease Agreement for cause.[521] Thereafter, on 6 June 2018, Maple Gas wrote to Petroperú informing that its "shareholders ha[d] agreed to make the payment [for the overdue, second quarter rent]."[522]

243. In the meantime, the third quarter rent payment had fallen due. On 30 July 2018, Petroperú sent a letter noting that Maple Gas had not paid the relevant invoice (sent on 13 June 2018) nor the interest due for its late payment of the second quarter rent. Petroperú notified Maple Gas that it had 15 days within which to make the overdue

[518] *See* **Ex. C-0184**, Letter from Maple Gas and Frontera to PERUPETRO, 22 June 2017, p. 2; *see also* **Ex. C-0192**, Letter from Frontera Energy to PERUPETRO attaching Frontera Technical Report, 28 August 2017, p. 2.

[519] **Ex. C-0199**, Letter from PERUPETRO to Frontera, 26 October 2017, p. 2.

[520] *See* **Ex. C-0196**, Letter from Frontera to PERUPETRO, 27 September 2017, p. 3 ("Option 3").

[521] *See generally* **Ex. R-0118**, Letter from Peru's Arbitration Center (F. Casaverde) to Maple Gas regarding Petroperú's Request for Arbitration, 29 May 2018, p. 3.

[522] **Ex. C-0233**, Letter from Maple Gas to Petroperú, 6 June 2018, p. 2.

rent payment.[523] Absent payment, the Refinery Lease Agreement would terminate automatically pursuant to Article 14.2 therein.[524]

244. On 16 August 2018 (after the 15-day period had already elapsed) Maple Gas sent a letter to Petroperú, blaming the latter for the former's "economic and financial drowning" and declaring (once again) that it was suspending its rent payments.[525] Accordingly, on 17 August 2018, Petroperú confirmed that the Refinery Lease Agreement had terminated by its terms.[526]

4. An independent arbitral tribunal subsequently confirmed that the Refinery Lease Agreement had terminated due to Maple Gas' breach thereof

245. On 8 October 2020, the tribunal in the Lima Arbitration ("**Lima Tribunal**") issued its award ("**Lima Award**"). The Lima Tribunal rejected Maple Gas' arguments that it was not required to pay rent under the Refinery Lease Agreement. The Lima Tribunal therefore concluded that "[the] termination of the Lease Agreement already applied as a result of MAPLE's breach of its obligation to pay the rent,"[527] and ordered Maple Gas to pay:

a. USD 369.033.13, plus interest, for the unpaid third quarter rent, and

b. USD 7,380,662.60, plus interest, in damages.[528]

246. The Lima Tribunal also adjudicated Petroperú's claim that Maple Gas had violated Article 12 of the Refinery Lease Agreement by failing to provide RAD Services.[529] The Lima Tribunal determined in that regard that Maple Gas' obligation to provide RAD

[523] **Ex. R-0099**, Letter No. GCLG-1669-2018 from Petroperú (C. Beltrán) to Maple Gas (K. Neumann), 30 July 2018, p. 2.

[524] **Ex. R-0099**, Letter No. GCLG-1669-2018 from Petroperú (C. Beltrán) to Maple Gas (K. Neumann), 30 July 2018, p. 2. *See also* **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Art. 14.2.1 ("In case of non-payment of the rent referred to in numeral 4.2 of the fourth clause of this agreement after 15 (fifteen) calendar days have elapsed from notification of breach without it being remedied.").

[525] **Ex. R-0100**, Letter No. MG-LEGA-L-150-2018 from Maple Gas (K. Neumann) to Petroperú (C. Beltrán), 16 August 2018, p. 1.

[526] **Ex. C-0069**, Letter from PETROPERÚ to Maple, 17 August 2018, p. 1.

[527] **Ex. R-0002**, Lima Arbitration (Award), ¶ 206.

[528] **Ex. R-0002**, Lima Arbitration (Award), p. 85.

[529] **Ex. R-0002**, Lima Arbitration (Award), ¶ 381.

Services was subject to the parties' agreement on operating procedures,[530] and that because no such agreement had been concluded by the parties, Maple Gas had not breached Article 12.[531]

247. Claimant discussed the Lima Arbitration in the Memorial, but attached only a partial translation of the Lima Award and self-servingly omitted to mention that Maple Gas had been ordered therein to pay approximately USD 7.7 million to Petroperú. Importantly, as discussed in detail in **Section II.N** below, Claimant sought to conceal from this Tribunal the fact that the Lima Tribunal expressly rejected Maple Gas' allegation that Petroperú had interfered with its commercial relationships.[532]

K. In August 2018, Maple Gas entered into bankruptcy proceedings and was subsequently declared insolvent

248. Shortly before Maple Gas refused—for a second time—to pay the rent due under the Refinery Lease Agreement, Maple Gas entered into bankruptcy proceedings. Specifically, on 7 August 2018, Trailon (one of the shell companies that had acquired Maple Gas' debt) initiated bankruptcy proceedings against Maple Gas.[533] On 13 December 2018, Maple Gas made a written submission in the bankruptcy proceeding, acknowledging its obligations to Trailon and proposing a payment schedule.[534] On 27 December 2018, Trailon rejected the proposed schedule.[535] Thereafter, on 7 January 2019, Maple Gas was declared insolvent.[536]

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[530] **Ex. R-0002**, Lima Arbitration (Award), ¶ 386.

[531] **Ex. R-0002**, Lima Arbitration (Award), ¶ 411.

[532] **Ex. R-0002**, Lima Arbitration (Award), ¶ 196 ("In this sense, in the view of the Tribunal, the conduct displayed by PETROPERÚ when contracting with suppliers CEPSA and AGUAYTÍA, as well as the conduct of not refining at the facilities leased by MAPLE, cannot be considered as irregular or abusive, because it corresponds to a legitimate and serious interest that is valid.").

[533] **Ex. R-0096**, INDECOPI, Resolution No. 0142-2019/CCO-INDECOPI, 7 January 2019, p. 1; **Ex. R-0009**, Trailon Enterprises S.A. Request for Initiation of Bankruptcy Proceeding against Maple Gas, 7 August 2018.

[534] **Ex. R-0096**, INDECOPI, Resolution No. 0142-2019/CCO-INDECOPI, 7 January 2019, p. 1; **Ex. R-0010**, Maple Gas' Submission in Bankruptcy Proceeding, 13 December 2018.

[535] **Ex. R-0096**, INDECOPI, Resolution No. 0142-2019/CCO-INDECOPI, 7 January 2019, p. 1; **Ex. R-0054**, Trailon Enterprises S.A.'s Submission in Maple Gas' Bankruptcy Proceeding, 27 December 2018.

[536] **Ex. R-0096**, INDECOPI, Resolution No. 0142-2019/CCO-INDECOPI, 7 January 2019, p. 1.

L. In early 2019, the License Agreements for Blocks 31-B, 31-D, and 31-E terminated due to Maple Gas' breach thereof

249. Due to Maple Gas' breach of its obligations under its License Agreements, PERUPETRO informed Maple Gas in early 2019 of the termination of the License Agreements.

1. Maple Gas failed to comply with Article 18 of the Blocks 31-B and 31-D License Agreement

250. Article 18.9 of the Blocks 31-B and 31-D License Agreement between PERUPETRO and Maple Gas required that Maple Gas maintain and provide proof of insurance:

> The Contractor shall maintain insurance coverage in all cases required by law and specifically for damages to third parties related to the operation of the assets owned by PERUPETRO.
>
> Copies of the insurance policies referred to in the previous paragraph will be submitted to PERUPETRO for its information. As well as copies of any modification, endorsement or extension of said policies, and of any occurrence, loss or claim in relation to the aforementioned policies.[537]

251. On 5 December 2018, PERUPETRO put Maple Gas on notice of the latter's breach of Article 18.3, noting that PERUPETRO had made "repeated requests . . . at Supervisory Committee meetings and by email" for copies of Maple Gas' current insurance policies.[538] PERUPETRO invoked Article 22.1 of the License Agreement, which required that Maple Gas comply within 60 days:

> [W]hen one of the parties causes a breach of any of the obligations stipulated in the Agreement for reasons other than force majeure or fortuitous event, the other Party may notify said Party, informing it of the breach and its intention to terminate the Agreement at the end of the sixty (60) day period, unless the aforementioned breach is remedied within this period.[539]

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[537] **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, Art. 18.9.

[538] **Ex. C-0271**, Letter from PERUPETRO to Maple Gas, 5 December 2018, p. 1.

[539] **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, Art. 22.1.

252. That 60-day period under Article 22.1 elapsed on 4 February 2019.[540] Shortly thereafter, on 6 February 2019, PERUPETRO confirmed in a letter to Maple Gas that because the latter had failed to remedy its non-performance, the License Agreement had been terminated.[541]

253. On 12 March 2019—more than a month after the termination—Maple Gas sent a letter to PERUPETRO, arguing that it was not required to maintain insurance coverage under Article 18.9.[542] According to Maple Gas, that obligation was impossible to fulfill due to its bankruptcy proceeding, which according to Maple Gas constituted a *force majeure* event.[543] PERUPETRO responded by letter dated 15 March 2019, noting that the License Agreement had already been terminated, effective 4 February 2019.[544] PERUPETRO further observed that, in any event, Maple Gas' bankruptcy proceedings and insolvency did not qualify as a *force majeure* event—as those circumstances were neither "beyond its [Maple Gas'] reasonable control" nor unforeseeable.[545] In his expert report, Dr. Monteza confirms that Maple Gas' entry into bankruptcy proceedings was not a *force majeure* event that would have excused Maple Gas from performance of its obligation to provide proof of insurance.[546]

254. Maple Gas, however, continued to display obduracy. For instance, on 2 May 2019, Maple Gas wrote once again purporting to reject the termination of the Blocks 31-B and 31-D License Agreement, repeating its claim of *force majeure* and this time boldly demanding that PERUPETRO pay USD 5 million to Maple Gas within five (5) business days.[547] PERUPETRO responded on 16 May 2019, recalling that (i) Maple Gas had been provided with appropriate notice and had enjoyed a 60-day period within which

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[540] PERUPETRO calculated the 60-day period from the date on which its notification letter had been received (i.e., on 6 December 2019).

[541] **Ex. C-0072**, Letter from PERUPETRO to Maple dated February 6, 2019 titled "*Terminación del Contrato por Incumplimiento Contractual – Lotes 31-B y 31-D*," p. 1.

[542] *See* **Ex. C-0240**, Letter from Maple Gas to PERUPETRO, 12 March 2019, p. 3.

[543] **Ex. C-0240**, Letter from Maple Gas to PERUPETRO, 12 March 2019, p. 3.

[544] **Ex. C-0241**, Letter from PERUPETRO to Maple Gas, 15 March 2019, p 1.

[545] **Ex. C-0241**, Letter from PERUPETRO to Maple Gas, 15 March 2019, p. 1.

[546] **RER-01**, Monteza Expert Report, ¶ 209.

[547] **Ex. C-0245**, Letter from Maple Gas to PERUPETRO, 2 May 2019, p. 1.

to remedy its breach, after the expiry of which period the License Agreement had terminated, and (ii) in any event, Maple Gas' insolvency was neither unforeseeable nor beyond its reasonable control.[548] Maple Gas wrote to PERUPETRO again on 4 June 2019, repeating the same unfounded arguments mentioned above.[549] PERUPETRO responded on 21 June, again affirming the termination.[550]

255. Despite Maple Gas' dogged refusal to accept the legal consequences of its own conduct, the License Agreement for Blocks 31-B and 31-D was properly terminated for cause and in accordance with terms thereof.

2. In any event, by February 2019 Maple Gas had already lost its qualification to maintain the Blocks 31-B and 31-D License Agreement

256. The Block 31-B and 31-D License Agreement required Maple Gas' parent company to act as corporate guarantor for Maple Gas.[551] Specifically, Article 3.5 of that agreement provides that the guarantee "shall subsist as long as the corporate guarantee remains valid and corresponds to the Contractor's parent company; otherwise, subsection 22.3.4 [automatic termination of the Agreement] shall apply."[552] However, as shown below, Maple Gas did not maintain the requisite corporate guarantee.

257. In 2007, The Maple Companies Limited became the corporate guarantor of Maple Gas under the Blocks 31-B and 31-D License Agreement, at the request of Maple Resources Corporation.[553] The Maple Companies Limited remained Maple Gas' contractual

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[548] **Ex. R-0047**, Letter No. GGRL-LEGL-0176-2019 from PERUPETRO (D. Hokama) to Maple Gas (E. Utor), 16 May 2019, pp. 1–2.

[549] **Ex. C-0247**, Letter from Maple Gas to PERUPETRO, 4 June 2019, p. 1.

[550] *See* **Ex. R-0102**, Letter No. GGRL-LEGL-0213-2019 from PERUPETRO (K. Hokama) to Maple Gas (E. Utor), 21 June 2019, p. 1 ("In this regard, we reject each of the statements contained in your letter, reiterating that the License Agreements have been validly terminated, having respected at all times the terms of the License Agreements and the current legal framework.").

[551] **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, Art. 3.5. *See also* **Ex. R-0074**, Qualification Regulations, p. 4. *See also* **RER-01**, Monteza Expert Report, ¶¶ 212-13.

[552] **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, Art. 3.5.

[553] **Ex. CM-0002**, Modification of license contract for exploration and exploitation of hydrocarbons in blocks 31-B and 31-D between PERUPETRO S.A., Maple Gas Corporation del Peru S.R.L. and The Maple Companies Limited, 2 January 2008. *See also* **RER-01**, Monteza Expert Report, ¶ 216.

corporate guarantor thereafter. But The Maple Companies Limited did not remain Maple Gas' parent company. As discussed in **Section II.C** above, a group of investors allegedly acquired control of Maple Gas in October 2015 through a set of transactions effected by various shell companies, which subsequently capitalized the debt to take ownership interest in Maple Gas.[554]

258. Even though its corporate ownership had changed, Maple Gas did not request authorization of a new corporate guarantor in accordance with Article 3.5 of the lock 31-B and 31-D License Agreement. Instead, more than a year later, on 29 November 2016, Maple Gas abruptly informed PERUPETRO that a company called Jancell (registered in Panama) had become its new parent company, and requested that PERUPETRO modify the Block 31-B and 31-D License Agreement to identify Jancell as the corporate guarantor.[555] When PERUPETRO requested that Maple Gas provide the necessary documentation (e.g., financial statements and corporate registration documents) for Jancell to assume the status of corporate guarantor,[556] Maple Gas suddenly changed tack.[557] By letter dated 17 May 2017, Maple Gas asserted that it no longer needed a corporate guarantor.[558] PERUPETRO then requested that Maple Gas submit the documentation required by law to prove that Maple Gas had the requisite economic and financial capacity to operate without a corporate guarantor.[559] Maple Gas complied only partially with PERUPETRO's request; it provided some but not all of the relevant documentation.[560]

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[554] *See supra* **Section II.C**.

[555] **Ex. R-0048**, Letter No. MG-LEGA-L-0107-2016 from Maple Gas (K. Neumann) to PERUPETRO, 29 November 2016, p. 1.

[556] **Ex. R-0055**, Letter No. GGRL-CONT-GFCN-012-2017 from PERUPETRO (M. Rodriguez) to Maple Gas (K. Neumann), 9 January 2017, p. 1.

[557] **Ex. R-0050**, Letter from Maple Gas (K. Neumann) to PERUPETRO (M. Rodriguez), 17 May 2017, p. 2.

[558] **Ex. R-0050**, Letter from Maple Gas (K. Neumann) to PERUPETRO (M. Rodriguez), 17 May 2017, p. 1.

[559] **Ex. R-0051**, Letter No. GGRL-PRCO-GFCN-075-2018 from PERUPETRO (R. Guzmán) to Maple Gas (K. Neumann), 9 February 2018, pp. 1-2.

[560] *See generally* **Ex. R-0006**, Letter No. MG-LEGA-L-050-2018 from Maple Gas (J. Bonilla) to PERUPETRO (R. Guzmán), 9 March 2018; **Ex. R-0052**, Letter No. GGRL-PRCO-GFCN-0190-2018 from PERUPETRO (D. Mogollón) to Maple Gas (K. Neumann), 18 June 2018, p. 1.

259. As explained by Dr. Monteza in his expert report, the fact that Maple Gas was operating under a corporate guarantee that did not correspond to its parent company was grounds for automatic termination of the Blocks 31-B and 31-D License Agreement pursuant to Articles 3.5 and 22.3.4 thereof.[561]

3. Maple Gas' insolvency triggered the termination of the Block 31-E License Agreement

260. Maple Gas' self-admitted insolvency was grounds for the termination of the Block 31-E License Agreement pursuant to Article 22.3.4 of that Agreement, which provided as follows:

> The Agreement will be terminated by operation of law and without prior notice in the following cases: . . . In the event that the Contractor has been declared insolvent, unless the provisions of section 22.4 apply.[562]

261. Accordingly, PERUPETRO sent a letter to Maple Gas on 25 March 2019 confirming the termination of the Block 31-E License Agreement.[563]

262. Maple Gas, however, insisted that the Agreement remained in force. In a letter dated 2 May 2019, Maple Gas (i) purported to reject the termination of the Block 31-E License Agreement, (ii) conceded that Maple Gas had been declared bankrupt, but argued that it was not insolvent;[564] and (iii) inexplicably demanded immediate payment to it of USD 5 million.[565] On 16 May 2019, PERUPETRO responded by rejecting Maple Gas' argument. PERUPETRO recalled that at the time that the parties had concluded the Block 31-E License Agreement, Peruvian law used the term "insolvency," but that recent updates to the legal regime used the word "bankruptcy" as the equivalent to

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[561] *See* **RER-01**, Monteza Expert Report, ¶ 225.

[562] **Ex. R-0053**, Hydrocarbon Exploration and Exploitation License Agreement of Lot 31-E between PERUPETRO and Maple Gas, 6 March 2001, Art. 22.3.4. Article 22.4 of the 31-E License Agreement provides that PERUPETRO may terminate the Contract when, at the request of third parties, the Contractor or the entity that has granted the corporate guarantee, are in insolvency proceedings, provided that the obligations established in the Contract are not fulfilled.

[563] **Ex. C-0073**, Letter from PERUPETRO to Maple dated March 25, 2019 titled "*Terminación del Contrato de pleno derecho – Lote 31-E*," p. 1.

[564] **Ex. C-0245**, Letter from Maple Gas to PERUPETRO, 2 May 2019, p. 3.

[565] **Ex. C-0245**, Letter from Maple Gas to PERUPETRO, 2 May 2019, p. 1.

"insolvency."[566] Thus, Maple Gas had in fact been declared insolvent via Resolution No. 0142-2019/CCO-INDECOPI (dated 7 January 2019), such that the License Agreement had been terminated.[567] On 4 June 2019, Maple Gas again insisted that the Block 31-E License Agreement had not been validly terminated.[568] On 21 June 2019, PERUPETRO confirmed the termination in accordance with its prior communications.[569]

263. In his expert report, Dr. Monteza confirms that Maple Gas' arguments with respect to the termination of the Block 31-E License Agreement were meritless.[570] As Dr. Monteza explains, Maple Gas' facile attempts to distinguish between "bankruptcy" and "insolvency" fell flat, because—as PERUPETRO noted—the Peruvian law had used the terms "insolvency" and "bankruptcy" to refer to the same procedure.[571]

264. In sum, PERUPETRO properly terminated the Block 31-E License Agreement for cause and in accordance the contractual terms thereof.

M. In August 2019, following an inspection authorized by the Lima Tribunal, and finding the Pucallpa Refinery abandoned and in disrepair, Petroperú assumed possession thereof

265. In this section Peru explains that Petroperú conducted an inspection of the Pucallpa Refinery in August 2019, in accordance with the instructions of the Lima Tribunal.[572] In the course of such inspection, Petroperú found that the Refinery—which it owns—had been abandoned by Maple Gas and left in disrepair. Petroperú therefore retook

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[566] **Ex. R-0047**, Letter No. GGRL-LEGL-0176-2019 from PERUPETRO (D. Hokama) to Maple Gas (E. Utor), 16 May 2019, p. 2.

[567] **Ex. R-0047**, Letter No. GGRL-LEGL-0176-2019 from PERUPETRO (D. Hokama) to Maple Gas (E. Utor), 16 May 2019, p. 2. *See also generally* **Ex. R-0096**, INDECOPI, Resolution No. 0142-2019/CCO-INDECOPI, 7 January 2019.

[568] **Ex. C-0247**, Letter from Maple Gas to PERUPETRO, 4 June 2019, pp. 1–2.

[569] **Ex. R-0102**, Letter No. GGRL-LEGL-0213-2019 from PERUPETRO (K. Hokama) to Maple Gas (E. Utor), 21 June 2019, p. 1.

[570] **RER-01**, Monteza Expert Report, ¶¶ 229–30.

[571] **RER-01**, Monteza Expert Report, ¶¶ 231–36.

[572] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 210. *See also* **Ex. R-0097**, Letter from Petroperú (J. Chang, et al.) to the Lima Tribunal (Case No. 0258-2018-CCL), 23 July 2019, pp. 1–2.

formal possession of the Pucallpa Refinery on 21 August 2019—a fact acknowledged by Claimant.[573]

266. Pursuant to Article 5.2.3 of the Refinery Lease Agreement, in the event of termination, Maple Gas was required (i) to return the leased property to Petroperú in the condition in which it was received,[574] and (ii) to provide an inventory of the property.[575] Accordingly, following termination of the Refinery Lease Agreement, Petroperú requested access to the Refinery; however, Maple Gas refused.[576]

267. Concerned about the state of its property, Petroperú requested as a provisional measure that the Lima Tribunal grant Petroperú access to the property for the purpose of conducting an inspection.[577] The Lima Tribunal granted Petroperú's request.[578] Maple Gas proposed that the inspection take place on 1-3 August 2019,[579] and Petroperú proceeded to schedule the inspection for those days.[580] Petroperú hired a notary public to accompany its representatives on the inspection and to certify its findings.[581]

268. On the first day of the scheduled inspection, 1 August 2019, Maple Gas sent a bizarre letter to Petroperú, accusing it of arriving at the Refinery "under the pretext" of an inspection and of using "pressure and intimidation tactics."[582] Maple Gas asserted that

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[573] Memorial, ¶ 291.

[574] **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Art. 5.2.3 ("At the end of the Agreement, MAPLE is required to return the ASSETS to PETROPERÚ in the state in which they were received with no more deterioration than that of their normal use and/or operation in accordance with the provisions of the Ninth Clause."). *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 248.

[575] **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Art. 10.

[576] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 210.

[577] **Ex. R-0097**, Letter from Petroperú (J. Chang, *et al.*) to the Lima Tribunal (Case No. 0258-2018-CCL), 23 July 2019, p. 1.

[578] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 213; **Ex. R-0097**, Letter from Petroperú (J. Chang, *et al.*) to the Lima Tribunal (Case No. 0258-2018-CCL), 23 July 2019, pp. 1–2.

[579] **Ex. R-0108**, Letter from Maple Gas (A. Silva) to the Lima Tribunal (Case No. 0258-2018), 12 July 2019, p. 1.

[580] *See* **Ex. R-0097**, Letter from Petroperú (J. Chang, *et al.*) to the Lima Tribunal (Case No. 0258-2018-CCL), 23 July 2019, p. 5 (providing a proposed schedule and list of attendees).

[581] *See* **Ex. R-0097**, Letter from Petroperú (J. Chang, *et al.*) to the Lima Tribunal (Case No. 0258-2018-CCL), 23 July 2019, p. 2. *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 250.

[582] **Ex. C-0075**, Letter from Maple to PETROPERÚ, 1 August 2019, p. 1.

it had "decided" to allow Petroperú to enter and to "[w]ithdraw from the refinery, leaving Petroperú's personnel responsible for its safekeeping."[583]

269. On 12 August 2019, following the inspection, Petroperú responded to Maple Gas' odd communication, noting that:

a. Petroperú had carried out an inspection in accordance with the Lima Tribunal's instructions;[584]

b. the inspection revealed that the Refinery had not been in operation and was in a state of disrepair;[585]

c. Petroperú had placed security personnel at the Refinery after realizing that the equipment had been abandoned;[586]

d. Maple Gas personnel continued to reside in the housing section of the property.[587]

270. In light of the above, Petroperú invited Maple Gas to attend a meeting on 21 August 2019 so that Maple Gas could formally transfer possession of the Refinery to

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[583] **Ex. C-0075**, Letter from Maple to PETROPERÚ, 1 August 2019, p. 1.

[584] **Ex. R-0057**, Letter from Petroperú (C. Beltrán) to Maple Gas (R. López), 12 August 2019, p. 2 ("By means of Precautionary Procedural Order No. 2 issued by the Arbitration Court of the Lima Chamber of Commerce, Exp. N°. 0258.2018-CCL, and having notified your client, MAPLE is expressly ordered to grant PETROPERU access to the Refinery. . . [i]n accordance with the procedural order. . . PETROPERU entered the facility to perform the inspection in accordance with Precautionary Procedural Order No. 2 and not as an attempt to pressure your client or engage in constant bullying.").

[585] **Ex. R-0057**, Letter from Petroperú (C. Beltrán) to Maple Gas (R. López), 12 August 2019, p. 3 ("As you know and as has been accredited in the Notarized Document, the Refinery assets are in a state of abandonment and deterioration and are inoperative. MAPLE has not operated the plant for several months. This has not prevented it from continuing to use the Pucallpa Refinery in a precarious manner and with the evident intention of damaging the property, facilities and equipment owned by our company and contributing to its total deterioration.").

[586] **Ex. R-0057**, Letter from Petroperú (C. Beltrán) to Maple Gas (R. López), 12 August 2019, p. 1 ("In order to safeguard its interests and protect its assets, PETROPERU has decided to place security personnel outside the Pucallpa Refinery, since the plant has been completely abandoned along with its facilities and equipment. Said abandonment has led to the inevitable deterioration of the machinery, tanks, equipment, etc.").

[587] **Ex. R-0057**, Letter from Petroperú (C. Beltrán) to Maple Gas (R. López), 12 August 2019, p. 3 ("Furthermore, it has been confirmed that the housing area of the plant is inhabited, since MAPLE workers and their families reside there, including the head of security, who, acting on behalf of your client, allowed our specialized personnel to carry out the inspection ordered by the Arbitral Court. Based on to these proven facts, one cannot state, as you do in the reference letter, that you have given us the custody of and responsibility for the refinery.").

Petroperú.[588] On 19 August 2019, Maple Gas responded by alleging that a formal meeting *in situ* was not necessary, as Petroperú was already in possession of the Refinery.[589] On 21 August 2021, as confirmed by the notary public[590] and the Lima Tribunal,[591] Maple Gas representatives handed over to Petroperú the keys to the Refinery.

N. Two independent arbitral tribunals rejected Maple Gas' claims that Petroperú interfered with Maple Gas' business, commercial relationship with other suppliers, and operation of the Pucallpa Refinery

271. As discussed in the preceding sections, Maple Gas has twice faced legal proceedings against it in connection with its Pucallpa Refinery operations: (i) Aguaytía Energy initiated the ICC Arbitration under its supply agreement with Maple Gas; and (ii) Petroperú initiated the Lima Arbitration under the Refinery Lease Agreement.

272. The ICC Award ordered Maple Gas to pay approximately USD 21.6 million to Aguaytía Energy[592]—a debt that, as far as Peru is aware, remains outstanding.[593] In the Memorial, Claimant did not even mention the ICC Award.

273. Claimant does mention the Lima Award in the Memorial, but provides only a partial translation thereof and omits to mention that the Lima Tribunal had ordered Maple Gas to pay approximately USD 7.7 million to Petroperú.[594] Maple Gas has not complied with that award.[595]

274. Importantly, Claimant has concealed from this Tribunal the fact that in both arbitrations Maple Gas claimed—unsuccessfully—that Petroperú had intervened and

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[588] **Ex. R-0057**, Letter from Petroperú (C. Beltrán) to Maple Gas (R. López), 12 August 2019, p. 3.

[589] **Ex. C-0077**, Letter from Maple to PETROPERÚ, 19 August 2019, p. 1.

[590] *See generally* **Ex. R-0067**, Certificate of Notorial Verification by Rubén Vargas Ugarte, 21 August 2019. *See also* **Ex. R-0130**, Letter from Petroperú (R. Lopez) to Notary Public of the District Of Yarinacocha, 21 August 2019, p. 1. While Claimant incorrectly characterizes this as a letter from Petroperú, the letter plainly states that it is sent by Mr. Rujo Lopez Calero "in my capacity as representative of Maple Gas Corporation del Peru S.R.L." **Ex. R-0130**, Letter from Petroperú (R. Lopez) to Notary Public of the District Of Yarinacocha, 21 August 2019, p. 1.

[591] **Ex. R-0002**, Lima Arbitration (Award), ¶ 249.

[592] **Ex. R-0001**, ICC Arbitration (Award), ¶ 195.

[593] *See* E**x. R-0008**, Partial List of Maple Gas' Creditors in Bankruptcy Proceeding, 30 September 2022.

[594] **Ex. R-0002**, Lima Arbitration (Award), p. 85.

[595] *See* E**x. R-0008**, Partial List of Maple Gas' Creditors in Bankruptcy Proceeding, 30 September 2022.

prevented Maple Gas from purchasing feedstock. That is the same theory of misconduct by Petroperú on which Claimant bases its claims in this arbitration.[596] Yet, as detailed below, both the ICC Tribunal and the Lima Tribunal expressly rejected that theory as meritless.

1. The ICC Tribunal considered and expressly rejected Maple Gas' claim that Aguaytía Energy had colluded with Petroperú to interfere with Maple Gas' business

275. In the ICC Arbitration, claimant Aguaytía Energy sought compensation from Maple Gas for the latter's failure to pay amounts due under their supply agreement.[597] The ICC Tribunal issued its Award on 21 December 2018, ordering Maple Gas to pay Aguaytía Energy approximately USD 21.6 million dollars, plus interest, and 70% of the costs of the arbitration.[598]

276. In that arbitration Maple Gas submitted a variety of counterclaims—none of which were upheld—including the claim that "Aguaytía ha[d] tortiously interfered with its business **and colluded or conspired with Petroperu to harm Maple**"[599] (emphasis added). In its analysis in the Award, the ICC tribunal highlighted the fact that, to support such claim, Maple Gas had primarily relied on witness testimony[600]—much as Claimant in this arbitration relies almost exclusively on the testimony of Messrs. Rojas and Katabi. Specifically, the ICC tribunal found that

> **[t]here is no evidence of collusion or a conspiracy between Petroperu and Aguaytía to starve Maple of supplies and drive it out of business.**
>
> After the Agreement ended, as of March 1, 2016 Aguaytía was free to sell all or part of its Gasoline production to whomever it wished. . . .

[596] Memorial, ¶ 8.

[597] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 66.

[598] **Ex. R-0001**, ICC Arbitration (Award), ¶ 195.

[599] **Ex. R-0001**, ICC Arbitration (Award), ¶ 161.

[600] **Ex. R-0001**, ICC Arbitration (Award), ¶ 161.

> The claims of tortious interference and conspiracy are therefore dismissed.[601] (Emphasis added)

277. The ICC Tribunal thus expressly rejected the conspiracy theory that Petroperú interfered with Maple Gas' relationship with Aguaytía Energy.

2. The Lima Tribunal considered and expressly rejected Maple Gas' claim that Petroperú had interfered with Maple Gas' business and had prevented Maple Gas from paying rent on the Pucallpa Refinery

278. In the Lima Arbitration, Petroperú's primary claim was for a declaration that the Refinery Lease Agreement had been properly terminated based on Maple Gas' refusal to pay rent.[602] In its Award dated 8 October 2020, the Lima Tribunal held that the Refinery Lease Agreement had indeed been properly terminated, and ordered Maple Gas to pay Petroperú approximately USD 7.7 million in rent and associated damages.[603]

279. The Lima Tribunal rejected Maple Gas' argument that Petroperú was not entitled to invoke the termination mechanism of the Refinery Lease Agreement[604] because Petroperú had allegedly acted in bad faith by "interfering" in Maple Gas' ability to obtain feedstock and produce refined products.[605] Maple Gas' arguments in the Lima Arbitration are strikingly familiar to those raised in the instant arbitration. For example, there as here, it was argued that:

a. "PETROPERU has abused its dominant position in the hydrocarbon market to unduly and unjustifiably obstruct MAPLE by preventing it from purchasing the product from its natural suppliers."[606]

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[601] **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 165–68.

[602] **Ex. R-0002**, Lima Arbitration (Award), ¶ 11.

[603] **Ex. R-0002**, Lima Arbitration (Award), p. 85.

[604] **Ex. R-0002**, Lima Arbitration (Award), ¶ 118.

[605] **Ex. R-0002**, Lima Arbitration (Award), ¶ 146.

[606] **Ex. R-0002**, Lima Arbitration (Award), ¶ 155 (summarizing Maple Gas's argument). *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 129 ("PETROPERU chose, without any economic justification or strategy, to buy all the product and refine it outside Pucallpa").

b. "PETROPERU seriously harmed the company, drowning it financially, and preventing it from having sufficient liquidity to pay the agreed rent."[607]

280. The Lima Tribunal considered those allegations by Maple Gas, including by analyzing all of the supply agreements that Petroperú had entered into with Aguaytía Energy and CEPSA,[608] and concluded that:

a. contrary to Maple Gas' allegations, Petroperú had *not* monopolized the market or entered into exclusive supply arrangements;[609]

b. there was no evidence that Petroperú sought to interfere in Maple Gas' business:

> "In the present case, MAPLE has provided no evidence that such agreements are the result of concerted action or a top-down restrictive agreement that prevents suppliers from selling to buyers other than PETROPERU;"[610]

c. to the contrary, the evidence showed that *Maple Gas itself was to blame*;[611]

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[607] **Ex. R-0004**, *Petróleos Del Perú S.A. v. Maple Gas Corporation Del Perú S.R.L.*, Lima Arbitration No. 258-2018-CCL, Submission of Maple Gas, 8 March 2019, p. 17.

[608] **Ex. R-0002**, Lima Arbitration (Award), ¶ 187 ("[T]he Tribunal appreciates that PETROPERÚ, in submission No. 31 filed on October 24, 2019, complied with disclosure of the agreements it had entered into with CEPSA and AGUAYTÍA between March 2014 and December 2018, which appear in the file as Annexes A-118 to A-127.").

[609] **Ex. R-0002**, Lima Arbitration (Award), ¶ 188 ("In evaluating each one of the supply agreements, it is evident that they do not stipulate any exclusivity in favor of PETROPERÚ; nor can it be argued that there is disguised exclusivity. Under those contractual arrangements, it cannot be validly concluded that the Petitioner has monopolized the purchase of the product, preventing Maple from accessing suppliers such as CEPSA and AGUAYTÍA, in order to displace it [MAPLE] from the market.").

[610] **Ex. R-0002**, Lima Arbitration (Award), ¶ 189.

[611] **Ex. R-0002**, Lima Arbitration (Award), ¶ 191 ("In fact, MAPLE had an exclusive supply agreement with AGUAYTÍA for a period of 30 years, which it [MAPLE] breached, leading to the AWARD of December 21, 2018, in ICC [International Chamber of Commerce] CASE No. 23137/MK"), ¶ 193 ("In this scenario of conflict with the natural suppliers, it is logical that the cause of the lack of access for the purchase of crude oil or the refusal of the suppliers to contract with MAPLE is the latter's own commercial conduct and not the concerted conduct by PETROPERU to displace the Respondent.").

d. Petroperú was not required to sell feedstock to Maple Gas for processing at the Pucallpa Refinery, and that in fact Petroperú had good reason not to do so.[612]

281. The Lima Tribunal thus concluded that there was no evidence of any irregular or abusive conduct by Petroperú vis-á-vis Maple Gas.[613]

3. In this arbitration, Claimant is repeating the claims that the ICC and Lima Tribunals already expressly rejected

282. In both the ICC Arbitration and Lima Arbitration, Maple Gas thus sought to blame Petroperú for Maple Gas' own financial, commercial, and regulatory failures. Then, as now, Maple Gas and Claimant have no basis or support whatsoever for their claims of allegedly abusive conduct, bad faith, and conspiracy by Petroperú. Claimant has nevertheless resubmitted herein the same arguments, this time under the guise of treaty claims. As illustrated in the table below, the ICC and Lima Tribunals roundly rejected the very same claims that Claimant is advancing—in a repackaged and repurposed format—in this arbitration.

Figure 5: The Rulings of the ICC and Lima Tribunals

Argument in this Arbitration	Ruling of Previous Tribunal
"Petroperú . . . abused [its] authority by wrongfully intervening in Maple Gas's efforts to obtain feedstock for the Pucallpa Refinery."[614]	Argument REJECTED. "the conduct displayed by PETROPERÚ when contracting with suppliers CEPSA and AGUAYTÍA, as well as the conduct of not refining at the facilities leased by MAPLE, cannot be considered as irregular or abusive because it corresponds to a legitimate and serious interest that is valid. Nor can such

[612] **Ex. R-0002**, Lima Arbitration (Award), ¶ 194 ("As for PETROPERU's conduct of not refining hydrocarbons at the Refinery leased by MAPLE, it must be noted that the Agreement does not contain any provision that requires PETROPERU to contract with MAPLE."), ¶ 195 ("In addition, the Claimant has demonstrated a legitimate and serious interest in not contracting with MAPLE, such as the fact that by not complying with the activities required by Supreme Decree No. 017-2013-EM in the 2016-2017 period, that is, the current regulatory regulations, MAPLE's refining facilities did not offer the assurance of compliance with the minimum service standards required by the regulation.").

[613] **Ex. R-0002**, Lima Arbitration (Award), ¶ 196.

[614] Memorial, ¶ 424.

Argument in this Arbitration	Ruling of Previous Tribunal
	conduct be regarded as a breach of the obligation to guarantee right of use by MAPLE over the leased property."[615]
"Petroperú . . . targeted Maple Gas and ultimately drove it out of business. In doing so, Peru acted . . . in bad faith and for improper reasons."[616]	Argument REJECTED. "PETROPERÚ cannot be held liable for breach of its duty to perform the Agreement in good faith . . . ."[617]
"Petroperú launched a campaign against Maple Gas, which it justified as part of its mandate under Peruvian law as the supplier of last resort, seeking to block Maple Gas's access to feedstock for the Pucallpa Refinery."[618]	Argument REJECTED. "MAPLE has provided no evidence that such agreements are the result of concerted action or a top-down restrictive agreement that prevents suppliers from selling to buyers other than PETROPERU."[619]
"As a result of Petroperú's . . . conduct, Maple Gas was left without sufficient feedstock"[620]	Argument REJECTED. "[I]t is apparent from the evidence submitted that MAPLE lost access to its natural crude oil suppliers as a result of its commercial disputes. . . . In this scenario of conflict with the natural suppliers, it is logical that the cause of the lack of access for the purchase of crude oil or the refusal of the suppliers to contract with MAPLE is the latter's own commercial conduct and not the concerted conduct by PETROPERU to displace the Respondent."[621]
"Petroperú then intervened and offered to purchase all of Aguaytía Energy's natural gasoline . . . . Petroperú's	Argument REJECTED.

[615] **Ex. R-0002**, Lima Arbitration (Award), ¶ 196.

[616] Memorial, ¶ 474.

[617] **Ex. R-0002**, Lima Arbitration (Award), ¶ 197.

[618] Memorial, ¶ 47.

[619] **Ex. R-0002**, Lima Arbitration (Award), ¶ 189.

[620] Memorial, ¶ 23.

[621] **Ex. R-0002**, Lima Arbitration (Award), ¶¶ 190, 193.

Argument in this Arbitration	Ruling of Previous Tribunal
arrangement with Aguaytía Energy made no commercial sense."[622]	"There is no evidence of collusion or a conspiracy between Petroperu and Aguaytía to starve Maple of supplies and drive it out of business."[623]

283. The ICC and Lima Tribunals thus rejected Claimant's unsubstantiated complaints and arguments. Those arguments—which Claimant has recycled and reframed—should again be rejected.

III. JURISDICTIONAL OBJECTIONS

284. This Tribunal lacks jurisdiction in respect of each and every one of Claimant's claims, for the following reasons: (i) the claims were asserted beyond the Treaty's three-year limitations period because Claimant knew—or should have known—of the alleged breaches and corresponding alleged loss more than three years before it submitted its Request for Arbitration; as a result, the claims fall outside of the jurisidiction *ratione temporis* of the Treaty (**Section III.A**); (ii) Claimant's claims also fall outside of the jurisdiction *ratione temporis* of the Treaty because they are based on alleged measures that took place *before* Claimant ever made the investment on which it bases its claims (**Section III.B**); (iii) the Tribunal lacks jurisdiction *ratione materiae* over Claimant's claims because it has not established the existence of a protected investment (**Section III.C**); and (iv) the Tribunal lacks jurisdiction *ratione materiae* over Claimant's claims against Petroperú because the relevant jurisdictional requirements under Article 10.1.2 of the Treaty have not been met (**Section III.D**).

285. Before addressing each of these jurisdictional objections, Peru recalls that it is Claimant that bears the burden of proving the facts necessary to establish jurisdiction. International tribunals have consistently applied in this specific context the well-established principle of *actori incumbit onus probandi*, according to which the party who

[622] Memorial, ¶¶ 168–69.

[623] **Ex. R-0001**, ICC Arbitration (Award), ¶ 165.

makes an assertion must prove it.[624] For example, the *Blue Bank v. Venezuela* tribunal explained that this general principle means that

> [a]ll facts that are dispositive for purposes of jurisdiction must be proven at the jurisdictional stage. In this regard, the Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent.[625]

286. As explained below, Claimant has failed to satisfy its burden of proof with respect to the jurisdictional basis for its claims, and such claims must therefore be dismissed.

A. Claimant did not comply with the three-year limitations period established in Article 10.18.1 of the Treaty

287. Treaty Article 10.18.1 establishes a period of limitations for the assertion of claims pursuant to the Treaty ("**Temporal Limitations Provision**"):

> No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and

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[624] *See, e.g.*, **RL-0009**, *Case Concerning Pulp Mills on the River Uruguay*, ICJ, Judgment, 20 April 2010 (Tomka, Korona, *et al.*), ¶ 162 ("[T]he Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle . . . has been consistently upheld by the Court . . ."); **RL-0041**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004 (Fortier, Schwebel, El Kholy), ¶ 58 ("In accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts."); **RL-0003**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (Cremades, Runeland, Söderlund), ¶ 64 ("The burden of proof of an allegation in international arbitration rests on the party advancing the allegation, in accordance with the maxim *onus probandi actori incumbit*.").

[625] **RL-0004**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017 (Söderlund, Bermann, Malintoppi), ¶ 66. *See also* **RL-0005**, *Abaclat, et al., v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 (Tercier, Abi-Saab, van den Berg), ¶ 678 ("[I]t is Claimants who bear the burden to prove that all conditions for the Tribunal's jurisdiction and for the granting of the substantive claims are met."); **RL-0006**, *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (Dupuy, Torres Bernárdez, Lalonde), ¶ 280 ("Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined"); **RL-0007**, *Cortec Mining Kenya Ltd., Cortec (Pty) Ltd. and Stirling Capital Ltd. v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018 (Binnie, Dharmananda, Stern), ¶ 245; **RL-0003**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (Cremades, Runeland, Söderlund), ¶ 64.

> knowledge that the claimant (for claims brought under Article 10.16.1(a)) . . . has incurred loss or damage.[626]

288. In the present case, Claimant submitted its claims *more* than three years after it first acquired knowledge—or should have acquired knowledge—of the alleged breach and corresponding alleged loss. This Tribunal thus lacks jurisdiction *ratione temporis* over Claimant's claims.

1. *Article 10.18.1 of the Treaty precludes claims for alleged breaches and alleged loss in respect of which Claimant had actual or constructive knowledge before 24 November 2017*

289. Tribunals have affirmed that limitations clauses, such as the Temporal Limitations Provision in this case, constitute express limits on the States Parties' consent to arbitration.[627] As such, these provisions are jurisdictional in nature and must accordingly be observed and given full effect.[628] Where a claimant's claims do not fall

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[626] **RL-0001**, Treaty, Art. 10.18.1.

[627] *See, e.g.*, **RL-0010**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021 (Kaufmann-Kohler, Fernández Arroyo, Söderlund), ¶ 193 ("Article 10.18.1 . . . is incorporated by reference as a limitation to the Contracting States' consent to arbitration"); **RL-0011**, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019 (Kalicki, Hobér, Khehar), ¶ 323 ("The Tribunal accepts that Article 96(9) of the CEPA acts as a limitation on Contracting Parties' consent to arbitration, and not simply as a potential merits defense to any particular claim"); **RL-0012**, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, U.S. Submission on Jurisdiction, 14 June 2017, ¶ 2 ("[A] tribunal must find that a claim satisfies the requirements of Articles 1116 and/or 1117 [(i.e., the temporal limitations provision of NAFTA)] in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) the claim.").

[628] *See, e.g.*, **RL-0016**, *Grand River Enterprises Six Nations, Ltd., et al., v. United States of America*, ICSID Case No. UNCT/14/2, Decision on Objections to Jurisdiction, 20 July 2006 (Nariman, Anaya, Crook), ¶ 29 (the provision "introduce[s] a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification."); **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 298 ("[W]hile international law may eschew undue formalism, giving effect to a limitation clause is not undue formalism; it is what is required by way of the proper interpretation and application of the treaty. The Tribunal agrees with the Respondent that the three-year limitation period 'is not an estimate.'"); **RL-0013**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional, 6 December 2000 (Kerameus, Covarrubias Bravo, Gantz), ¶¶ 62–63; **RL-0014**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (Stephen, Crawford, Schwebel), ¶ 70.

within the relevant temporal limitations period, they must be dismissed on jurisdictional grounds.[629]

290. Investment arbitration tribunals have developed a clear methodology for applying temporal limitations provisions. For example, the tribunal in *Infinito v. Costa Rica* adopted the following three-step analysis:

> [T]o decide this objection the Tribunal must answer three questions: (i) first, it must identify the cut-off date for the three-year limitation period; (ii) second, it must determine whether the Claimant knew or should have known of the alleged breach or breaches before that cut-off date; and (iii) third, it must determine whether the Claimant knew or should have known that it had incurred loss or damage before that date.[630]

2. The Critical Date is 24 November 2017

291. Applying the *first step* of this analysis in the present case, Claimant submitted its Notice of Arbitration on 24 November 2020. Subtracting three (3) years from that date yields the cut-off date for purposes of the Temporal Limitations Provision, which is *24 November 2017* ("**the Critical Date**").

3. Claimant first knew of the alleged breaches prior to the Critical Date

292. The *second step* of the analysis consists of determining whether Claimant first knew or should have known of the alleged breach(es) before the Critical Date.

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[629] *See, e.g.*, **RL-0010**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021 (Kaufmann-Kohler, Fernández Arroyo, Söderlund), ¶ 194 ("The Claimant commenced this arbitration on 24 January 2018, that is more than three years after she first acquired knowledge of the alleged breach of the Treaty. It follows that, by the time the Claimant sought to accept Colombia's offer to arbitrate under the Treaty, that offer had been extinguished by operation of the limitation period set out in Article 10.18.1 of the Treaty. The consequence of this finding is that the disputing Parties have not agreed to arbitrate the claims that form part of the present dispute."); **RL-0019**, *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (Reed, van den Berg, Pryles), ¶ 122 ("Consequently, Ansung submitted its dispute to ICSID and made its claim for purposes of Article 9(3) and (7) of the Treaty after more than three years had elapsed from the date on which Ansung first acquired knowledge of loss or damage. The claim is time-barred and, as such, is manifestly without legal merit").

[630] **RL-0021**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017 (Kaufmann-Kohler, Hanotiau, Stern), ¶ 330. *See also* **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, (Kaufmann-Kohler, Garibaldi, Stern), ¶ 177.

293. As a preliminary matter, the Temporal Limitations Provision addresses the claimant's knowledge of "the breach **alleged** under Article 10.16.1"[631] (emphasis added). In interpreting a similar temporal limitations clause, the *Eli Lilly v. Canada* tribunal explained that "as Claimant is the Party asserting the Tribunal's jurisdiction to decide its substantive claim, the 'alleged breach' must, in the first instance, be identified by reference to Claimant's submissions."[632] Accordingly, Peru's objection under the Temporal Limitations Provision is that Claimant knew or should have known, before the Critical Date, of the alleged breaches *as they are described by Claimant*. However, in doing so, Peru is not acknowledging or agreeing that a claimant's characterization of the alleged breaches must always be accepted for purposes of the jurisdictional analysis; nor is Peru accepting that the relevant claims are otherwise within the scope of the Treaty. To the contrary, in **Sections II.B**, **II.C**, and **II.D** below, Peru demonstrates that the claims fall outside of the jurisdiction of this Tribunal on different bases.

294. Tribunals interpreting similar temporal limitations clauses have clarified that the claimant's knowledge of the relevant alleged breach is "a question of fact,"[633] such that claimants must "establish, to an objective standard, that they first acquired knowledge of the breaches and losses that they allege in the period after [the cut-off date]."[634] However, "it is not necessary that a claimant be in a position to fully

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[631] **RL-0001**, Treaty, Art. 10.18.1.

[632] **RL-0022**, *Eli Lilly and Co. v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017 (van den Berg, Bethlehem, Born), ¶ 163. *See also* **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, (Kaufmann-Kohler, Garibaldi, Stern), ¶ 172 ("The qualifier 'alleged' in Article 9.18.1 [similar to the Treaty's Temporal Limitations Provision] indicates that at this stage the breach must be identified on the basis of the assumptions made by the Claimants. This does not imply, however, that the Tribunal is obliged to accept the Claimants' argument in its entirety. The Tribunal may, for example, review Claimants' characterization of the single, composite, or continuing nature of the alleged violations and the effects of this characterization on the statute of limitations. Otherwise, a Claimant could characterize its claim in such a way that the jurisdictional requirements of the Treaty would be obviated.").

[633] **RL-0016**, *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (Nariman, Anaya, Crook), ¶ 54.

[634] **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 163. *See also* **RL-**

particularize its legal claims (in that they can be subsequently elaborated with more specificity)."[635]

295. A claimant's knowledge may be actual (i.e., the claimant "acquired . . . knowledge") *or* constructive (i.e., the claimant "should have . . . acquired[] knowledge").[636] The tribunal in *Rios v. Chile* explained that tribunals can impute constructive knowledge ("*conocimiento presunto*") to a claimant if, after exercise of due care, such claimant would have learned of or known about the alleged breach or loss.[637] Similarly, the tribunal in *Grand River Enterprises Six Nations, Ltd. v. United States* explained that "'[c]onstructive knowledge' of a fact is imputed to [a] person if by exercise of reasonable care or diligence, the person would have known of that fact."[638] Accordingly, a limitations period may be triggered by "constructive, or deemed, knowledge, i.e., what, as an objective matter, having regard to all the circumstances,

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0012, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, U.S. Submission on Jurisdiction, 14 June 2017 (Crawford, Cass, Lévesque), ¶ 5 ("[A] claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period"); **RL-0024**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Mexico's Submission on Jurisdiction, 14 June 2017 (Crawford, Cass, Lévesque), ¶ 2 ("When an investor brings a claim under NAFTA Chapter Eleven, it 'bears the burden of proving that the respondent has consented to arbitration and that the tribunal has jurisdiction over the dispute.'"); **RL-0025**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States as Non-Disputing Party, 17 April 2015 (Bethlehem, Kantor, Vinuesa), ¶ 10 ("[T]he claimant bears the burden to establish jurisdiction under [the investment] Chapter . . . including with respect to Article 10.18.1").

[635] **RL-0020**, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent Expedited Preliminary Objections in Accordance with Article 10.20(5) of the DR-CAFTA, 31 May 2016 (Dupuy, Mantilla-Serrano, Thomas), ¶ 194.

[636] **RL-0001**, Treaty, Art. 10.18.1. *See also* **RL-0087**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (Crawford, Cass, Lévesque), ¶ 153 ("The triggering event [in a NAFTA three-year limitation period] is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result.").

[637] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, (Kaufmann-Kohler, Garibaldi, Stern), ¶ 174 ("Presumed knowledge is attributable to Claimants if, in the exercise of due care, they should have known of the alleged violation and resulting damages.").

[638] **RL-0016**, *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, (Nariman, Anaya, Crook), ¶ 59. *See also* **RL-0087**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (Crawford, Cass, Lévesque), ¶ 153 ("The triggering event [in a NAFTA three-year limitation period] is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result.").

the Tribunal considers that the [c]laimant[] *ought to have known*"[639] (emphasis in original).

296. Here, Claimant's own submissions and other evidence (including testimony from its own fact witnesses) confirm that Claimant first knew or should have known of the alleged breaches prior to 24 November 2017 (i.e., prior to the Critical Date).

297. Claimant has submitted two claims of breach: one of the Minimum Standard of Treatment, and the other of the Expropriation Provision.[640] Claimant's theory of liability for both these alleged composite breaches is that "Petroperú and MINEM targeted Maple Gas and, combined with PERUPETRO's unjustified failure to approve the Block 126 License transfer, ultimately succeeded in cutting off its access to sufficient feedstock to continue to operate the Pucallpa Refinery."[641] Such claims are barred, however, because Claimant first knew—or certainly should have known—*before* the Critical Date of this alleged interference with Maple Gas' feedstock supply.

a. Claimant concedes that it knew of the alleged breaches prior to the Critical Date

298. Claimant's own founder, sole owner, and witness in the present arbitration—Mr. Charles Holzer—admits that he was aware, before the Critical Date, of the alleged interference by Petroperú and other Peruvian entities. Mr. Holzer alleges that he had discussed with Mr. Rojas a potential investment in Maple Gas as early as 2015.[642] Mr. Holzer asserts that at some point in 2016, "Mr. Rojas explained that Petroperú had been making it difficult for Maple [G]as to access sufficient feedstock to operate the

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[639] **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, (Bethlehem, Vinuesa, Kantor), ¶ 170.

[640] Memorial, ¶¶ 25, 27.

[641] Memorial, ¶ 26. *See also id*. at ¶ 422 (describing Claimant's MST claim), ¶ 512 (describing Claimant's expropriation claim).

[642] *See* Holzer Witness Statement, ¶ 6 ("In 2015, Matias Rojas and I discussed the possibility that I would invest, along with Mr. Rojas's company, Blue Oil Trading Ltd. ('Blue Oil'), in its acquisition of Maple Gas."); Rojas Witness Statement, ¶ 61 ("He [Charles Holzer] had already been interested in co-investing in maple Gas with Blue oil when we acquired the bank debt [in 2015], but at that time we did not need the capital and so we decided together that he would get involved when an opportunity arose that could use his capital to better effect.").

Pucallpa Refinery"[643] and claimed to be "concerned that Petroperú would continue to create difficulties for Maple Gas unless Blue Oil and Mr. Rojas were no longer investors."[644] In Mr. Holzer's words, "[i]f [he] acquired Maple Gas, there would be no reason for Petroperú or others in the government to interfere with Maple Gas's business."[645] Thus, by his own account, Mr. Holzer was fully *aware*, more than a year before the Critical Date of 24 November 2017, of the alleged interference by the government in Maple Gas' supply of feedstock—indeed, part of the reason that he invested in Maple Gas was precisely *because* of such alleged interference.

299. Further, Mr. Holzer concedes that he became aware in early November 2017—i.e., also prior to the Critical Date—of PERUPETRO's alleged interference. Specifically, he alleges that he learned on *7 November 2017* that "[t]he transfer [of the Block 126 License] had not been approved [by PERUPETRO]."[646] Mr. Holzer explicitly affirms that this "was bad news" because "[n]ot being able to acquire the concession for Block 126 [would be] devastating for Maple Gas's business."[647] Claimant's submissions in the Memorial,[648] the testimony of Claimant's other witnesses,[649] and contemporaneous evidence[650] likewise confirm awareness by Claimant and Maple Gas, before 24

[643] Holzer Witness Statement, ¶ 10.

[644] Holzer Witness Statement, ¶ 10.

[645] Holzer Witness Statement, ¶ 10. *See also* Holzer Witness Statement, ¶ 10 ("[Mr. Rojas] was concerned that [Petroperú's acts were] happening because of a previous conflict that he and Blue Oil had with Pedro Pablo Kuczynski, who had been elected President of Peru. Mr. Rojas was concerned that Petroperú would continue to create difficulties for Maple Gas unless Blue Oil and Mr. Rojas were no longer investors."); Rojas Witness Statement, ¶ 61 ("However, as Petroperú's animosity toward Blue Oil became increasingly apparent, I offered him [Charles Holzer] the opportunity to take over the entire project."); Memorial, ¶ 154.

[646] Holzer Witness Statement, ¶ 18. *See also* Memorial, ¶ 219 (specifying the date of 7 November 2017); Coz Witness Statement, ¶ 41 ("During the first days of November [2017], there were signs indicating that PERUPETRO was not going to approve the amendment of the Block 126 Agreement").

[647] Holzer Witness Statement, ¶¶ 18–19.

[648] *See* Memorial, ¶¶ 217–22.

[649] *See, e.g.*, Neumann Witness Statement, ¶ 57 (alleging that he found out on 7 November 2017 that the transfer of the Block 126 License had not been approved); Coz Witness Statement, ¶ 41 ("During the first days of November, there were signs indicating that PERUPETRO was not going to approve the amendment of the Block 126 Agreement").

[650] Mr. Neumann confirmed in an email dated *22 November 2017* his understanding "that they [(i.e., PERUPETRO)] were not going to approve." **Ex. C-204**, Email from Maple Gas to MINEM, attaching Summary of Block 126 Negotiations with PERUPETRO, 22 November 2017, p. 1.

November 2017, of PERUPETRO's alleged interference with Maple Gas' potential source of feedstock.

300. Because Claimant was thus aware of the alleged breaches prior to the Critical Date of 24 November 2017, the relevant claims were asserted too late, and are thus barred by the three-year statute of limitations contained in Article 10.18.1 of the Treaty.

b. In any event, Claimant **should have** known of the alleged breaches prior to the Critical Date

301. Even if Claimant did not have *actual* knowledge before the Critical Date of the alleged interference (quod non), it seems evident that, under its own theory, Claimant must have had at least *constructive* knowledge. To recall, the Temporal Limitations Provision inquires when "the claimant first acquired, or **should have first acquired**, knowledge of the [alleged] breach"[651] (emphasis added). "'Constructive knowledge' of a fact is imputed to person if by exercise of reasonable care or diligence, the person would have known of that fact."[652]

302. Such constructive knowledge in this case is demonstrated by Claimant's own allegations. It is Claimant's submission that "on 24 November 2016 . . . [i]t acquired Maple Gas for consideration of $62 million."[653] Peru has demonstrated, however, that Claimant did not formally acquire its indirect shareholding until *15 June 2017*.[654] Regardless as to when Claimant legally acquired the indirect shareholding, Mr. Holzer alleges that he was considering investing in April 2016 and that he made his investment by November 2016, which means that he should have conducted his due

[651] **RL-0001**, Treaty, Art. 10.18.1.

[652] **RL-0016**, *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (Nariman, Anaya, Crook), ¶ 59. *See also* **RL-0087**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (Crawford, Cass, Lévesque), ¶ 153 ("The triggering event [in a NAFTA three-year limitation period] is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result.").

[653] Memorial, ¶ 156. Mr. Holzer, the sole owner of Worth Capital, identifies a different date: he alleges that Worth Capital made its investment "[o]n **27** November 2016" (emphasis added). Holzer Witness Statement, ¶ 15.

[654] *See infra* **Section III.B.2**.

diligence (at the latest) by November 2016.[655] Such due diligence easily would have revealed that, at the time of the investment (i.e., well before the Critical Date), Maple Gas had already expressly identified and complained of Petroperú's alleged interference with the sourcing of its feedstock.[656] For example:

a. Claimant has submitted as an exhibit a letter from Maple Gas to Petroperú dated *22 May 2016*, in which Maple Gas complained of the "negotiations to receive from Aguaytia Energy the hydrocarbons that are currently being processed by Maple," which Maple Gas characterized as "**intervention by PETROPERÚ**" as well as "a violation of the duty to act in good faith"[657] (emphasis added). Claimant cited this letter in its 18 May 2018 Notice of Intent, characterizing the letter as follows: "Maple [Gas] warned Petroperú that its behavior violated its obligation of good faith **and might constitute tortious interference**"[658] (emphasis added).

b. In another letter from Maple Gas to Petroperú, dated *30 May 2016*, Maple Gas asserted that

> MAPLE has learned that PETROPERÚ has been signing agreements with third parties that make it impossible for our company to acquire the volume of barrels of crude that it requires to develop its refining and marketing business at a level that would allow for sustainability of the business.[659]

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[655] *See* **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, (Kaufmann-Kohler, Garibaldi, Stern), ¶ 174 ("Presumed knowledge is attributable to Claimants if, **in the exercise of due care**, they should have known of the alleged violation and resulting damages" (emphasis added)).

[656] By way of contrast, Messrs. Hanks and Rojas have been clear about the "financial and legal due diligence" that they conducted before allegedly investing in Maple Gas in October 2015. That diligence revealed inter alia that Maple Gas had a tense relationship with Aguaytía Energy and that the latter had claims against Maple Gas. *See* **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018, ¶¶ 18, 24; **Ex. R-0156**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Jack W. Hanks, 16 April 2018, ¶¶ 43–44.

[657] **Ex. C-0025**, Letter from Maple to PETROPERÚ, 22 May 2016, p. 2.

[658] Notice of Intent, ¶ 31 (*citing* **Ex. C-0025**, Letter from Maple to PETROPERÚ, 22 May 2016).

[659] **Ex. C-0026**, Letter from Maple to PETROPERÚ, 30 May 2016, pp. 2–3.

c. Maple Gas characterized this as "**interference by Petroperú**" and "reserve[ed] the right to act based on the damages incurred"[660] (emphasis added).

d. Maple Gas followed up in a letter to Petroperú dated *13 June 2016*, again complaining of the relationship between the latter and CEPSA.[661]

e. Yet again, on *31 August 2016*, Maple Gas sent a letter complaining that Petroperú was "**interfering with our commercial activities**"[662] (emphasis added). Maple Gas included in that letter a list of its specific grievances, including Petroperú's purchase of crude feedstock from CEPSA.[663]

303. Maple Gas thus complained—repeatedly, in writing, and before the Critical Date—of the alleged conduct that forms the basis for the alleged breaches of which Claimant complains in this arbitration: that Petroperú was allegedly preventing Maple Gas from obtaining feedstock. Basic due diligence would have thus made Mr. Holzer and Claimant aware, at the time of investment, of these written communications between Maple Gas and Petroperú. Claimant thus must be deemed to have had constructive knowledge of these alleged breaches before making its alleged investment.

304. Claimant's constructive knowledge before the Critical Date (24 November 2017) of these alleged breaches is also confirmed by Claimant's own submissions in this arbitration. Specifically, Claimant asserts as *a matter of fact* that there were acts of interference in late 2016 and during 2017—of which it must be presumed that Claimant was aware at the time, given that, according to Claimant, it had made the investment in November 2016. For example:

a. Claimant alleges that Maple Gas was prevented from obtaining feedstock from its potential suppliers on dates that post-dated its investment but pre-dated the Critical Date: "[Petroperú] began its practice of acquiring 100% of CEPSA's

[660] **Ex. C-0026**, Letter from Maple to PETROPERÚ, 30 May 2016, pp. 2–3.

[661] *See generally* **Ex. R-0138**, Letter No. MG-LEGA-L-0059-2016 from Maple Gas (C. Valderrama) to Petroperú (G. Villar), 13 June 2016.

[662] **Ex. C-0029**, Letter from Maple to PETROPERÚ, 31 August 2016, p. 3.

[663] *See* **Ex. C-0029**, Letter from Maple to PETROPERÚ, 31 August 2016, p. 1.

crude **in 2016**"[664] (emphasis added). Claimant alleges that "Petroperú's actions effectively prevented Maple Gas from obtaining any crude from CEPSA **for the remainder of 2016**, which meant that the Pucallpa Refinery did not have sufficient feedstock to operate at capacity"[665] (emphasis added). Claimant also complains that CEPSA and Petroperú entered into a new contract "in October 2017."[666]

b. Further, according to Claimant, "Petroperú also intervened in Maple Gas's relationship with Aguaytía Energy **in 2017**"[667] (emphasis added). It also complains that "**[i]n July 2017**, Aguaytía Energy cut off supplies to Maple Gas and began selling all of its natural gasoline to Petroperú"[668] (emphasis added).

305. The dates of the various incidents of alleged interference mentioned above were *after* Claimant's alleged date of investment (November 2016) but *before* the Critical Date (24 November 2017), as a result of which knowledge of such alleged interference must be imputed to Claimant. That means that at a minimum, Claimant had constructive knowledge, prior to the Critical Date, of those alleged breaches.

306. In sum, Claimant's admissions, allegations, and evidence all confirm that Claimant had both actual and constructive knowledge of the alleged breaches prior to the Critical Date, and therefore the claims were not submitted within the three-year limitations period contained in Article 10.18.1 of the Treaty.

4. Claimant first knew of the alleged loss or damage prior to the Critical Date

307. The *third step* of the analysis calls for a determination of whether Claimant knew or should have known that it had incurred alleged loss or damage before the Critical Date. Such was indeed the case.

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[664] Notice of Intent, ¶ 33. *See also* Memorial, ¶¶ 114, 116 ("[I]n March 2016, when Maple Gas told CEPSA that it would agree to its price, CEPSA suddenly demanded an even higher price . . . . Shortly afterwards, Maple Gas learned that Petroperú had entered into a new supply contract with CEPSA. . . . Petroperú's actions effectively prevented Maple Gas from obtaining any crude from CEPSA for the remainder of 2016").

[665] Memorial, ¶ 116.

[666] Memorial, ¶ 163.

[667] Memorial, ¶ 165.

[668] Memorial, ¶ 173.

308. Importantly, "[t]he limitation period begins with an investor's *first* knowledge of the *fact* that it has incurred loss or damage, not with the date on which it gains knowledge of the *quantum* of that loss or damage"[669] (emphases in original). Tribunals have thus clarified that a claimant need not have known the *exact amount* of its loss or damage by the Critical Date: "A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."[670] The foregoing

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[669] **RL-0019**, *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (Reed, van den Berg, Pryles), ¶110. *See also* **RL-0024**, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Mexico's Submission on Jurisdiction, 14 June 2017 (Crawford, Cass, Lévesque), ¶ 6 ("Mexico agrees that 'the plain language of Articles 1116(2) and 1117(2) does not require a claimant to acquire knowledge of the full extent of the loss or damage resulting from the alleged breaches in order to start the time limitation to submit a claim to arbitration'.").

[670] **RL-0014**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (Stephen, Crawford, Schwebel), ¶ 87. *See also* **RL-0015**, *Grand River Enterprises Six Nations, Ltd., et al., v. United States of America*, ICSID Case No. UNCT/14/2, Objections to Jurisdiction of Respondent United States of America, 5 December 2005 (Nariman, Anaya, Crook), p. 36 ("Articles 1116(2) and 1117(2) provide that the limitations period begins at the time claimants '*first* acquired, or should have *first* acquired' knowledge of any alleged breach and loss or damage. In construing these articles, the NAFTA Chapter Eleven tribunal in *Mondev Int'l Ltd. v. United States of America* properly concluded that '[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.' Article 14 of the International Law Commission's Articles on State Responsibility is in accord. That Article provides that a breach such as that alleged by claimants occurs "at the moment when the act is performed, even if its effects continue."); **RL-0024**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Mexico's Submission on Jurisdiction, 14 June 2017 (Crawford, Cass, Lévesque), ¶ 6; **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, (Kaufmann-Kohler, Garibaldi, Stern), ¶ 175 ("It is not necessary to have knowledge of the exact amount of loss or damage. In the words of the Mondev court, 'a claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.' Knowledge is then acquired with the 'first appreciation' of the harm."); **RL-0020**, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, (Dupuy, Mantilla-Serrano, Thomas), 31 May 2016, ¶ 194 ("[I]n order for the limitation period to begin to run, it is not necessary that a claimant be in a position to fully particularize its legal claims (in that they can be subsequently elaborated with more specificity); nor must the amount of loss or damage suffered be precisely determined."); **RL-0014**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2022 (Stephen, Crawford, Schwebel), ¶ 87 ("A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."); **RL-0087**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (Crawford, Cass, Lévesque), ¶ 165 ("On this issue the Disputing Parties agreed that it is not necessary for this purpose that the full extent of losses incurred be known."); **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 213 ("On the issue of whether loss or damage must be crystallised, and whether the claimant must have a concrete appreciation of the quantum of that loss or damage, the Tribunal agrees with the approach adopted in *Mondev*, *Grand River*, *Clayton* and *Corona Materials* that the limitation clause does not require full or precise knowledge of the loss or damage.").

makes sense from a logical and conceptual standpoint, because, as observed by the *Bilcon v. Canada* tribunal, "[t]o require a reasonably specific knowledge of the amount of loss would . . . involve reading into [the temporal limitations clause] a requirement that might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue."[671] Thus, the limitation period "neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result."[672]

309. In the present arbitration, Claimant identifies as its injury the loss of the value of its investment—i.e., its "indirect shareholding in Maple Gas."[673] However, Claimant first knew—or should have known—before the Critical Date of the alleged loss of value of its investment, for the following reasons.

310. *First*, Mr. Holzer—sole owner of Claimant—expressly concedes that he was aware by November 2016 of the alleged damage caused by Petroperú's alleged interference with Maple Gas' supply of feedstock. According to Mr. Holzer, he was told in 2016 that "Petroperu had been making it difficult for Maple Gas to access sufficient feedstock to operate the Pucallpa Refinery."[674] Mr. Holzer knew of the alleged impact of this supposed interference: he indicates that Petroperú was preventing Maple Gas from operating at full capacity, and that Mr. Rojas was choosing to divest out of a concern that "Petroperú would continue to create difficulties for Maple Gas."[675] Claimant thus knew of the alleged loss or damage caused by Petroperú by the time of the alleged investment in November 2016.

311. *Second*, Claimant knew before the Critical Date of the alleged loss or damage caused by PERUPETRO before the Critical Date. As discussed above, Mr. Holzer concedes that he knew by early November 2017 that PERUPETRO would not approve the

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[671] **RL-0018**, *William Ralph Clayton, et al., v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (Simma, McRae, Schwartz), ¶ 275.

[672] **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 213.

[673] Memorial, ¶ 314. *See also* Memorial, ¶¶ 316, 543.

[674] Holzer Witness Statement, ¶ 10.

[675] *See* Holzer Witness Statement, ¶ 10.

transfer of the Block 126 License,[676] and he further alleges that this "was devastating for Maple Gas's business."[677]

312. *Third*, by November 2016 (i.e., a year before the Critical Date), Claimant *should have known* of the alleged damage caused to Maple Gas. As demonstrated above, a claimant has constructive knowledge of a fact if "by exercise of reasonable care or diligence, the person would have known of that fact."[678] Claimant alleges that it "acquired Maple Gas for consideration of $62 million" in November 2016.[679] Before investing tens of millions of dollars, Claimant would—or should—have conducted basic due diligence. Such due diligence would have revealed that:

a. By May 2016, Maple Gas had already alleged "substantial damages" from Petroperú's alleged interference with the supply of feedstock. For example, in a letter to Petroperú dated *22 May 2016*, Maple Gas had claimed that "[s]uch intervention by Petroperú . . . would generate **substantial damages** for us, in addition to the **damages that we have already incurred** due to your actions of March 2016"[680] (emphasis added).

b. In a subsequent letter dated *30 May 2016*, Maple Gas again "reserve[d] the right to act based on the **damages incurred**, [and] demand[ed] that PETROPERÚ rectify the situation of breach by immediately ceasing its interference in the activities of our company"[681] (emphasis added).

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[676] *See* Holzer Witness Statement, ¶ 18 ("However, in November 2017, there suddenly was bad news, which surprised everyone at Maple Gas. The transfer had not been approved and Maple Gas could not find out why."); Memorial, ¶ 219 ("When Mr. Neumann met with PERUPETRO on 7 November, Mr. Guzmán told him that PERUPETRO's Directorate had not approved the Block 126 License modification.").

[677] Holzer Witness Statement, ¶ 19.

[678] **RL-0016**, *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, (Nariman, Anaya, Crook), ¶ 59. *See also* **RL-0087**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (Crawford, Cass, Lévesque), ¶ 153 ("The triggering event [in a NAFTA three-year limitation period] is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result.").

[679] Memorial, ¶ 156.

[680] **Ex. C-0025**, Letter from Maple to PETROPERÚ, 22 May 2016, p. 3.

[681] **Ex. C-0026**, Letter from Maple to PETROPERÚ, 30 May 2016, p. 3.

c. Subsequently, on *31 August 2016*, Maple Gas sent a letter to Petroperú describing the alleged wrongdoing as well as "**the damages that this irregular conduct caused**," and again "reserve[ed] the right to file action for **damages caused** and being caused to us"[682] (emphasis added).

313. *Fourth*, and finally, *subsequent* events confirm that Claimant knew or should have known by the Critical Date of the alleged loss or damage. Claimant claims that the alleged breaches "destroyed Maple Gas's business."[683] Yet Claimant admits that the ongoing decline of Maple Gas was so advanced that "[b]y December 2017, the Refinery had exhausted its crude inventories and had no choice but to cease operations."[684] The suspension of all operations by December 2017, which is just a few days after the Critical Date of 24 November 2017, confirms that Claimant must have known by the Critical Date of the alleged destruction of Maple Gas' business, "even if the extent or quantification of the loss or damage [wa]s still unclear."[685]

* * *

314. In sum, the evidence and Claimant's own submissions confirm that Claimant first knew of the alleged breaches and alleged loss more than three years before it commenced this arbitration. Consequently, Claimant's claims must be dismissed pursuant to the Temporal Limitations Period in Article 10.18.1 of the Treaty.

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[682] **Ex. C-0029**, Letter from Maple to PETROPERÚ, 31 August 2016, p. 3.

[683] Memorial, ¶ 30.

[684] Notice of Arbitration, ¶ 42.

[685] **RL-0014**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (Stephen, Crawford, Schwebel), ¶ 87. *See also* **RL-0015**, *Grand River Enterprises Six Nations, Ltd., et al., v. United States of America*, ICSID Case No. UNCT/14/2, Objections to Jurisdiction of Respondent United States of America, 5 December 2005 (Nariman, Anaya, Crook), p. 36 ("Articles 1116(2) and 1117(2) provide that the limitations period begins at the time claimants "first acquired, or should have first acquired" knowledge of any alleged breach and loss or damage. In construing these articles, the NAFTA Chapter Eleven tribunal in *Mondev Int'l Ltd. v. United States of America* properly concluded that "[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear." Article 14 of the International Law Commission's Articles on State Responsibility is in accord. That Article provides that a breach such as that alleged by claimants occurs "at the moment when the act is performed, even if its effects continue."); **RL-0024**, *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Mexico's Submission on Jurisdiction, 14 June 2017 (Crawford, Cass, Lévesque), ¶ 6.

B. The claims based on measures that took place before Claimant made its investment fall outside of this Tribunal's jurisdiction *ratione temporis*

315. Pursuant to the Treaty's text and customary international law, this Tribunal also lacks jurisdiction *ratione temporis* over claims based on measures that took place before Claimant made its investment. Although as noted above Claimant argues that it made its investment in Maple Gas in November 2016, in reality the investment was not made until *15 June 2017* ("**Date of Investment**"),[686] for the reasons explained below. Claimant's claims in this arbitration are based directly on alleged conduct that pre-dates 15 June 2017, and Claimant's other claims are likewise deeply rooted in that same alleged pre-investment conduct. Accordingly, Claimant's claims fall outside of the Tribunal's jurisdiction *ratione temporis*.

1. *The Treaty's temporal reach does not extend to measures that occurred prior to the Date of Investment*

316. A State cannot breach an international obligation that was not in force at the time of the allegedly wrongful conduct. This basic principle of customary international law is codified by Article 13 of the ILC Articles:

> An act of a State does not constitute a breach of an international obligation **unless the State is bound by the obligation in question at the time the act occurs**.[687] (Emphasis added)

317. Article 10.1 of the Treaty, which defines the "Scope and Coverage" of Chapter Ten, provides that the substantive obligations therein apply to "(a) investors of another Party; [and] (b) covered investments."[688] Here, Claimant alleges breaches of Treaty Articles 10.5 (Minimum Standard of Treatment Provision) and 10.7 (Expropriation Provision). Pursuant to Article 13 of the ILC Articles and Treaty Article 10.1, those two substantive provisions establish obligations that apply only in respect of "covered

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[686] Peru's reference to the Date of Investment, and other arguments herein, are without prejudice to its position in **Section III.C** that Claimant has not demonstrated the existence of a protected investment.

[687] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States forInternationally Wrongful Acts*, 2001, Art. 13.

[688] **RL-0001**, Treaty, Art. 10.1.1. Article 10.1.1 also states that Articles 10.9 and 10.11 apply to "all investments in the territory of the Party," but these articles are not relevant to Claimant's claims.

investments."[689] Conversely, such obligations do not bind the State in respect of conduct that occurred prior to the date on which the covered investment was made. Accordingly, the Tribunal lacks jurisdiction *ratione temporis* over any claims relating to conduct by Peru that took place prior to the Date of Investment.

318. As noted by the *Gallo v. Canada* tribunal, there is a well-established and consistent line of jurisprudence that has recognized and respected this temporal limitation on a tribunal's jurisdiction: "Investment arbitration tribunals have **unanimously** found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted"[690] (emphasis added). Accordingly, and as held by the *Phoenix Action v. Czech*

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[689] **RL-0001**,Treaty, Art. 10.5 ("Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. . . "); **RL-0001**, Treaty, 10.7 ("No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization . . . ").

[690] **RL-0027**, *Vito G. Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Award, 15 September 2011 (Fernandez-Armesto, Castel, Lévy), ¶ 328. *See also* **RL-0028**, *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016 (Kaufmann-Kohler, Brower, Landau), ¶ 326 ("[I]nvestment arbitration tribunals have repeatedly found that they do not have jurisdiction ratione temporis unless the claimant can establish that it had an investment at the time the challenged measure was adopted."); **RL-0029**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (Stern, Bucher, Fernández-Armesto), ¶ 67 ("It does not need extended explanation to assert that the Tribunal has no jurisdiction ratione temporis to consider Phoenix's claims arising prior to December 26, 2002, the date of Phoenix's alleged investment, because the BIT did not become applicable to Phoenix for acts committed by the Czech Republic until Phoenix 'invested' in the Czech Republic."); **RL-0030**, *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (Stern, Klein, Thomas), ¶ 300 ("It is an uncontested principle that a tribunal has no jurisdiction ratione temporis to consider claims arising prior to the date of the alleged investment, since a BIT cannot be applied to acts committed by a State before the claimant invested in the host country."); **RL-0031**, *B-Mex, LLC, et al., v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019 (Verhoosel, Born, Vinuesa), ¶ 145 ("The parties agree that the Claimants must establish that they owned or controlled the Mexican Companies at the time of the treaty breaches. At least one other NAFTA tribunal to have confronted this issue has so held, and this Tribunal agrees"); **RL-0032**, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009 (Tercier, Lalonde, Thomas), ¶¶ 112–13 ("It is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred . . . The Claimant was thus put on notice by the Respondent and in turn by the Tribunal that it bore the burden of proving that it owned or controlled the CEAS and Kepez shares at all relevant times"); **RL-0033**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015 (Kaufmann-Kohler, Vinuesa, Zuleta), ¶¶ 146–48 ("It is clear to the Tribunal that, where the claim is founded upon an alleged breach of the Treaty's substantive standards, a tribunal's jurisdiction is limited to a dispute between the host state and a national or company

Republic tribunal, "[t]he Tribunal is limited *ratione temporis* to judging only those acts and omissions occurring after the date of the investor's purported investment."[691]

2. Claimant made its investment on 15 June 2017

319. The Treaty defines an investment as "every asset that an investor owns or controls, directly or indirectly . . . ."[692] Claimant identifies as its covered investment in the present case its "indirect shareholding in Maple Gas."[693] According to Claimant, it acquired such shareholding when it acquired the Panamanian company Jancell, which in turn owned all but one share in Maple Gas.[694] In support of its ownership title to Jancell—and in turn to Maple Gas—Claimant cites a share purchase agreement dated

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which has acquired its protected Investment before the alleged breach occurred. In other words, the Treaty must be In force and the national or company must have already made its Investment when the alleged breach occurs, for the Tribunal to have jurisdiction over a breach of that Treaty's substantive standards affecting that Investment . . . . A claimant bringing a claim based on a Treaty obligation must have owned or controlled the Investment when that obligation was allegedly breached…Consequently, the BIT'S substantive protection which Ms. Levy invokes started applying to her when she made an investment and not before. She must therefore prove that she had already acquired her investment at the time of the impugned conduct."); **RL-0034**, *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 (Hwang, Álvarez, Berman), ¶ 128 ("In order to establish jurisdiction, the Claimant must prove that it owned ÇEAŞ and Kepez shares during the time at which it claims the acts constituting a violation of the ECT were committed by the Respondent"); **RL-0035**, *Société Générale in respect of DR Energy Holdings Ltd. and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008 (Orrego Vicuña, Bishop, Cremades), ¶ 107 ("[T]he Tribunal lacks jurisdiction over acts and events that took place before the Claimant acquired the investment . . . "); **RL-0036**, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011 (van den Berg, Landau, Stern), ¶ 170 ("The Tribunal agrees with Ukraine that in order for the Tribunal to hear the Claimant's claims, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed. Contrary to the Claimant's assertions, the Tribunal's analysis cannot hinge on whether the Claimant knew of Ukraine's purported treaty violations. The principle put forth by Ukraine has been consistently applied in investment arbitrations, and has been articulated by Zachary Douglas in his treatise as follows: Rule 32. The claimant must have had control over the investment in the host contracting state party at the time of the alleged breach of the obligation forming the basis of its claim"); **RL-0037**, *Philip Morris Asia Ltd. v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 (Böckstiegel, Kaufmann-Kohler, McRae), ¶ 529 (Böckstiegel, Kaufmann-Kohler, McRae) ("The Tribunal . . . considers that, whenever the cause of action is based on a treaty breach, the test for a *ratione temporis* objection is whether a claimant made a protected investment before the moment when the alleged breach occurred. Investor-State jurisprudence is in accord with this approach").

[691] **RL-0029**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (Stern, Bucher, Fernández-Armesto), ¶ 68.

[692] **RL-0001**, Treaty, Art. 10.28.

[693] Memorial, ¶ 314.

[694] Memorial, fn. 211.

24 November 2016, through which Worth Capital agreed to purchase Jancell from Parsdome.[695]

320. Notwithstanding its assertion that the purchase was made in November 2016, Worth Capital actually acquired ownership or control of Jancell no earlier than *15 June 2017*, for the reasons that follow. The share purchase agreement dated 24 November 2016, on which Claimant relies, required Parsdome (the seller) to take certain action to transfer the Jancell shares to Worth Capital (the buyer).[696] According to Jancell's bylaws, the shares could only be transferred through endorsement of the share certificate and recording in the share registry.[697] Furthermore, Jancell was incorporated in Panama, and under Panamanian law applicable at the time, share transfers needed to be recorded in the share registry in order to for the transfer to take effect.[698]

321. Pursuant to Panamanian law, Jancell maintains an official register of shares, which Claimant has submitted onto the record of this arbitration.[699] The register is excerpted below, and shows 15 June 2017 as the "Date of Issue"—i.e., the date on which Jancell's shares were transferred from Parsdome to Claimant:[700]

[695] Memorial, fn. 210 (*citing* **Ex. C-0033**, Letter from PETROPERÚ to Maple, 1 March 2018).

[696] **Ex. C-0033**, Agreement between Parsdome Holdings Ltd. and Worth Capital titled "Agreement relating to the sale and purchase of the whole of the issued outstanding share capital of Jancell Corporation," 24 November 2016, § 9.2 ("The Seller shall execute and perform all such further acts, deeds or assurances as may be required for effectually vesting the Shares in the Buyer and otherwise for fulfilling the provisions of this agreement.").

[697] **Ex. R-0020**, Bylaws of Jancell Corporation, 12 August 2015, p. 5 ("The registered shares will be transferred by endorsement of the corresponding share certificate(s) and the entry thereof in the Share Book.").

[698] **RL-0026**, Law 32 of 1927 on Corporations in Panama, 24 May 2018, Art. 29. Nominative shares ("*acciones nominativas*") shall be transferable in the books of the corporation in the manner provided by its articles of incorporation or by-laws. Transfers shall be binding on the corporation only from the time of their recording in the Share Registry Book.

[699] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

[700] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

Figure 6: Jancell's Register of Shares

Cert. No.	Name of Shareholder	Address of Shareholder	No. of Share	Date of Issue
1	PARSDOME HOLDINGS LTD.	BVI	***100***	14/10/2015
2	PARSDOME (CAYMAN) LIMITED	CAYMAN	***100***	02/11/2015
3	PARSDOME HOLDINGS LTD.	BVI	***100***	12/01/2017
4	WORTH CAPITAL HOLDINGS 27 LLC	DELAWARE	***150,100***	15/06/2017

322. The register of shares further attests that:

a. On 2 November 2015, Jancell shares were transferred from Parsdome to Parsdome (Cayman) Limited, with a corresponding share certificate (certificate number 2);

b. On 12 January 2017, Jancell shares were transferred from Parsdome (Cayman) Limited back to Parsdome, with a corresponding share certificate (certificate number 3); and

c. On *15 June 2017*, Jancell shares were issued to Worth Capital, with a corresponding share certificate (certificate number 4).

323. Consequently, as a matter of law, the transfer of shares to Worth Capital was *not* effected until the transfer was recorded in Jancell's register of shares, which happened on 15 June 2017. The foregoing means that Worth Capital did *not* exercise any ownership or control over Jancell (and therefore indirectly over Maple Gas) until that date. It was therefore on 15 June 2017 (and not 24 November 2016) that Worth Capital made its investment in Maple Gas.

324. This is important for purposes of the Tribunal's jurisdiction *ratione temporis* because, as explained below, Claimant's claims are based on conduct that occurred *prior to* 15 June 2017 (i.e., prior to the Date of Investment), and therefore lie beyond the temporal scope of the Treaty.

3. *The Tribunal lacks jurisdiction* ratione temporis *over Claimant's claims concerning Petroperú and the Pucallpa Refinery*

325. Claimant argues that Peru violated the Minimum Standard of Treatment and Expropriation Provision because, according to Claimant, Petroperú "abused its role as supplier of last resort."[701] Claimant bases that argument on a series of alleged acts that took place *prior* to the Date of Investment. Specifically, it alleges that Petroperú "abused that authority by wrongfully intervening in Maple Gas's efforts to obtain feedstock for the Pucallpa Refinery."[702] The supposed interference is in turn comprised of the following alleged conduct, all of which pre-dates the Date of Investment (15 June 2017):

Figure 7: Claimant's Claims Are Based on Alleged Acts that Pre-Date the Date of Investment

Date	Alleged Act or Omission
March, September 2014	Petroperú made "arrangements to buy feedstock from CEPSA"[703]
October 2015	"[A]fter the Blue Oil Investment Group acquired Maple Gas, Petroperú launched a campaign against Maple Gas, which it justified as part of its mandate under Peruvian law as the supplier of last resort, seeking to block Maple Gas's access to feedstock for the Pucallpa Refinery. Petroperú also repeatedly threatened to take the Refinery from Maple Gas, and undercut Maple Gas's prices for refined products."[704]

[701] Memorial, ¶ 423 (articulating Claimant's minimum standard of treatment claim). *See also id*. at ¶ 514 (Claimant describes its expropriation claim as follows: "Peru's actions substantially deprived Worth Capital of the value of its investment in Maple Gas. By December 2017, Petroperú had obstructed the Pucallpa Refinery's access to feedstock, preventing it from returning to full capacity . . . .").

[702] Memorial, ¶ 424.

[703] Memorial, ¶ 87.

[704] Memorial, ¶ 47.

Date	Alleged Act or Omission
1 December 2015	"In December 2015, after the Blue Oil Investment Group acquired Maple Gas, Petroperú suddenly changed its approach. Petroperú sent Maple Gas two different letters demanding that Maple Gas provide RAD Services pursuant to Clause 12.1 in the Pucallpa Refinery Lease Agreement"[705]
February 2016	"Petroperú repeatedly rebuffed Maple Gas's requests in February 2016 to be allowed to acquire supply from CEPSA so that it could increase production at the Pucallpa Refinery"[706]
2 February 2016	Petroperú's alleged threat to "'take back the Refinery'"[707]
8 April 2016	"Petroperú had entered into a new supply contract with CEPSA. . . . Petroperú's actions effectively prevented Maple Gas from obtaining any crude from CEPSA for the remainder of 2016"[708]
10 May 2016	"Petroperú sent a letter threatening to declare that Maple Gas had breached the Pucallpa Refinery Lease Agreement if it refused to resume negotiations within 15 days"[709]
May 2016	"Maple Gas objected to Petroperú's public statements that it intended to terminate the Pucallpa Refinery Lease Agreement and take over its operation"[710]
2016	"Petroperú was therefore both making it harder for Maple Gas to obtain feedstock and forcing Maple Gas to lower the prices of its products, and Petroperú's strategy appeared to be to turn the Pucallpa Refinery into a terminal and storage facility for its own use"[711]

[705] Memorial, ¶ 99.

[706] Memorial, ¶ 119.

[707] Memorial, ¶ 105 (emphasis omitted).

[708] Memorial, ¶ 116.

[709] Memorial, ¶ 123.

[710] Memorial, ¶ 127.

[711] Memorial, ¶ 133.

Date	Alleged Act or Omission
May 2017	"Petroperú again had contracted with CEPSA to purchase nearly all of CEPSA's production"[712]

326. Because these alleged acts all took place *before* the Date of Investment, the Tribunal has no jurisdiction *ratione temporis* over Claimant's claim that "Petroperú abused its role as supplier of last resort."[713]

4. The Tribunal also lacks jurisdiction ratione temporis *over Claimant's remaining claims*

327. Although Claimant's central claim in respect of Petroperú is based on alleged acts that pre-date the Date of Investment, Claimant also complains of alleged conduct that *post-dated* such date. Specifically, Claimant complains of (i) "PERUPETRO'S failure to approve the transfer of the Block 126 License,"[714] and (ii) various other acts, including the termination of the Refinery Lease Agreement and the Block 31 License Agreements.[715] However, as discussed below, the alleged post-Date of Investment conduct is "deeply rooted" in the pre-investment conduct, such that evaluating Claimant's claims would require that this Tribunal issue findings and decisions concerning conformity with the Treaty of measures that *pre*-date the Date of Investment. Claimant's claims with respect to such post-investment conduct therefore also fall outside of this Tribunal's jurisdiction *ratione temporis*.

328. Previous tribunals considering the scope of their jurisdiction *ratione temporis* have considered whether the conduct that occurred *after* the critical date was nevertheless beyond the temporal scope of the relevant treaty, on account of the fact that such conduct was "deeply rooted" in pre-critical date conduct. For instance, the *Carrizosa v. Colombia* tribunal was asked to adjudicate claims of composite breach based on conduct that pre- and post-dated the entry into force of the treaty (which was the

[712] Memorial, ¶ 161. *See also* **Ex. CLEX-0036**, Maple – CEPSA Contract. May 24, 2017, p. 1.

[713] Memorial, ¶ 423.

[714] Memorial, ¶ 423.

[715] Memorial, ¶ 518.

critical date in that case for *ratione temporis* purposes). The tribunal emphasized that it had "no jurisdiction to assess the lawfulness of the Respondent's pre-treaty conduct,"[716] and explained that "unless the post-treaty conduct (i.e. the 2014 Order) is itself capable of constituting a breach of the Treaty, independently from the question of (un)lawfulness of the pre-treaty conduct, claims arising out of such post-treaty conduct would also fall outside the Tribunal's jurisdiction."[717] The tribunal "f[ound] support for its reasoning in multiple investment treaty awards."[718] For example, the *Spence v. Costa Rica* tribunal affirmed that "in order for the post-treaty conduct to come under the tribunal's jurisdiction, it needed to 'constitute an actionable breach in its own right.'"[719] In that case, the tribunal found that "the core of every allegation that the [c]laimants advance can be traced back to pre-[relevant date] conduct."[720] Because the alleged post-treaty conduct was so "deeply rooted" in the pre-treaty conduct, the tribunal found that it could not evaluate the claim of breach "without requiring a finding going to the lawfulness of pre-[relevant date] conduct."[721] Similarly, the *Corona v. Dominican Republic* tribunal affirmed the State's argument that because "the alleged breaches relate[d] to the same theory of liability," there was "no valid basis for treating the [pre-relevant-date conduct] as distinct from the [post-relevant-date conduct]."[722]

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[716] **RL-0010**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021 (Kaufmann-Kohler, Fernández Arroyo, Söderlund), ¶ 153.

[717] **RL-0010**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021 (Kaufmann-Kohler, Fernández Arroyo, Söderlund), ¶ 153.

[718] **RL-0010**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021 (Kaufmann-Kohler, Fernández Arroyo, Söderlund), ¶ 154.

[719] **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 217. *See also* **RL-0010**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021 (Kaufmann-Kohler, Fernández Arroyo, Söderlund), ¶ 155.

[720] **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 245.

[721] **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 246.

[722] **RL-0020**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (Dupuy, Thomas, Mantilla-Serrano), ¶¶ 210, 214.

329. Here, Claimant's claims related to the alleged conduct that occurred after the Date of Investment are "deeply rooted" in the pre-investment conduct. In that respect, Claimant asserts that the alleged Treaty breaches are comprised of a series of actions, rather than a single event. Importantly for the present analysis, Claimant does *not* appear to argue that such post-Date of Investment acts separately and independently constituted breaches of the Treaty; rather, they are only relevant insofar as they form part of a *combination* of acts alleged to be wrongful.[723] In other words, and as discussed in detail in **Section IV.A** below, Claimant is thus alleging a composite breach, which requires a showing that "the actions in question disclosed some link of underlying pattern or purpose between them."[724] Establishing the existence of such a pattern of wrongful conduct in the present case requires the evaluation of measures that straddle the Date of Investment, and such evaluation reveals that the conduct that post-dates the Date of Investment is deeply rooted in conduct that pre-dates it.

330. For instance, Claimant's claim with respect to the Block 126 License is deeply rooted in the alleged pre-investment conduct and cannot be adjudicated "without requiring a finding going to the lawfulness of pre-[relevant date] conduct."[725] To recall, Claimant claims that Peru violated the Treaty through "PERUPETRO's failure to approve the Block 126 License."[726] Claimant alleges that such decision was "arbitrary, pretextual and abusive" because it was part of "a campaign to starve the Pucallpa Refinery of feedstock."[727] According to Claimant, Peru had launched that campaign "[a]fter the Blue Oil Investment Group acquired Maple Gas [in 2015]," due to a

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[723] *See, e.g.*, Memorial, ¶ 25 ("Through this series of actions, Peru has breached its obligations under the United States-Peru Free Trade Agreement"), ¶ 316 ("Worth Capital claims that Peru has breached the Treaty through a series of actions that have destroyed its investment in Maple Gas.").

[724] **RL-0050**,*The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 271.

[725] **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 246.

[726] Memorial, ¶ 423 (articulating its minimum standard of treatment claim). *See also id.* at ¶ 514 (describing its expropriation claim).

[727] Memorial, ¶ 528. *See also id.* at ¶ 47 ("As described below, after the Blue Oil Investment Group acquired Maple Gas, Petroperú launched a campaign against Maple Gas, which it justified as part of its mandate under Peruvian law as the supplier of last resort, seeking to block Maple Gas's access to feedstock for the Pucallpa Refinery.").

previous dispute between Blue Oil and Mr. Kuczynski.[728] Claimant argues that the alleged campaign was carried out through then President Kuczynski's alleged "inappropriate governmental influence over decisions by Petroperú and PERUPETRO."[729] By Claimant's account, the campaign proceeded as follows:

> Petroperú abused its role as supplier of last resort in its campaign to starve the Pucallpa Refinery of feedstock. PERUPETRO then failed to approve the transfer of the Block 126 License, **the final step** in starving the Pucallpa Refinery of feedstock and turning it into a storage terminal for Petroperú.[730] (Emphasis added)

Thus—on Claimant's own case—its claim regarding the Block 126 License is *inseparable* from its claim that Petroperú began targeting Maple Gas in 2015, which is before Claimant made its investment in Maple Gas.

331. As a result, the Tribunal cannot evaluate whether the alleged PERUPETRO conduct with respect to the Block 126 License was "arbitrary, pretextual and abusive" without evaluating the alleged pre-investment conduct—e.g., whether Peru "launched a campaign against Maple Gas [in 2015],"[731] "in December 2015, "made aggressive demands [for] RAD Services,"[732] "prevented Maple Gas from obtaining any crude from CEPSA [in 2015 and] for the remainder of 2016,"[733] and "threaten[ed] to take the Pucallpa Refinery."[734] However, such determinations with respect to pre-investment conduct cannot constitute the basis of a finding of liability under international law and the Treaty because it lies outside the Tribunal's jurisdiction *ratione temporis*.

332. Claimant's other claims against Peru are likewise deeply rooted in conduct that pre-dates the Date of Investment. Subsidiary to its claims about Petroperú's alleged interference with feedstock supply and PERUPETRO's alleged conduct with respect

[728] Memorial, ¶¶ 45–47.
[729] Memorial, ¶ 6.
[730] Memorial, ¶ 528.
[731] Memorial, ¶ 47.
[732] Memorial, ¶ 96.
[733] Memorial, ¶ 116.
[734] Memorial, ¶ 96.

to the Block 126 License,[735] Claimant complains of certain public statements by Petroperú, the termination of the Refinery Lease Agreement, the initiation of arbitration under the Refinery Lease Agreement by Petroperú, and the termination of the Block 31 License Agreements.[736] Although such conduct post-dates Claimant's investment, Claimant itself draws a link between that conduct and the alleged wrongfulness of the prior conduct:

> These actions by various supposedly independent Peruvian government entities show their animus towards Maple Gas and **confirm** that Peru was in fact engaged in a concerted effort to drive Maple Gas out of business.[737] (Emphasis added)

Put differently, according to Claimant, these later events were "[t]he inevitable **result** of Petroperú's and PERUPETRO's prior wrongful conduct," through which "Petroperú and PERUPETRO then **completed** the destruction of Maple Gas"[738] (emphasis added). Thus, by Claimant's own account, these subsidiary claims are inseparable from the claims about the pre-investment (i.e., pre 15 June 2017) conduct, and therefore also fall outside of this Tribunal's jurisdiction *ratione temporis*.

333. In sum, Claimant's primary claim is based upon alleged conduct that pre-dates its investment on 15 June 2017. While Claimant also complains of alleged conduct following that date, "the core of every allegation that the [Claimant] advance[s] can be traced back to pre-[investment] conduct."[739] This Tribunal therefore would be unable to evaluate Claimant's composite breach claims based on conduct that post-dates the Date of Investment "without requiring a finding going to the lawfulness of pre-[critical date] conduct."[740] As a result, pursuant to the Treaty and Article 13 of the

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[735] *See* Memorial, ¶ 423 (listing these as its first and second claims).

[736] *See* Memorial, ¶¶ 482–84, 518.

[737] Memorial, ¶ 485.

[738] Memorial, ¶ 518.

[739] **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 245.

[740] **RL-0008**, *Spence International Investments, LLC, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Bethlehem, Vinuesa, Kantor), ¶ 246.

ILC Articles, all of Claimant's claims fall outside of the jurisdiction *ratione temporis* of this Tribunal.

* * *

334. Finally, even if the Tribunal were to accept Claimant's asserted investment date of 24 November 2016, the relevant acts invoked as the basis for Claimant's claims would lie outside the Tribunal's *ratione temporis* jurisdiction, for the same reasons articulated above. That is so because (i) as shown in Figure 7 above, many of the alleged acts invoked by Claimant as the basis for its claims were prior even to Claimant's proposed critical date of 24 November 2016; and (ii) the alleged conduct that *post*-dated 24 November 2016 was deeply rooted in pre-Date of Investment conduct, such that a Tribunal determination on the lawfulness of such later conduct would require assessing that of acts that occurred before the obligations under the Treaty were yet in force for Peru.

C. The Tribunal lacks jurisdiction *ratione materiae* because Claimant has failed to establish the existence of a protected investment

335. Claimant bears the burden of proving, with evidence, the existence of a protected investment[741] within the meaning of both the Treaty and the ICSID Convention.[742] Article 10.28 of the Treaty defines an "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[743] Thus, as confirmed by tribunals interpreting identically-worded provisions, Claimant must demonstrate

[741] References elsewhere in this submission to Claimant's investment are without prejudice to the argument in this section that Claimant has not established the existence of a protected investment within the meaning of the Treaty and the ICSID Convention.

[742] *See* Memorial, ¶¶ 304–16.

[743] **RL-0001**, Treaty, Art. 10.28.

that its alleged investment satisfies at least these listed characteristics, including by showing that it "commit[ted] capital or other resources."[744]

336. Claimant must also establish the existence of an "investment" within the meaning of the ICSID Convention. Arbitral jurisprudence has confirmed that an "investment" is an objective and autonomous concept[745] and that an "investment" requires a contribution having an economic value.[746] Even though it acknowledges these fundamental jurisdictional requirements, Claimant has not demonstrated with evidence that it "commit[ted] capital or other resources."[747]

337. Claimant identifies as its qualifying investment under the Treaty and the ICSID Convention its "indirect shareholding in Maple Gas."[748] Claimant then argues that "[it] made a substantial commitment of $62 million to purchase Maple Gas."[749] However, Claimant relegates its actual description of its investment to a single footnote, where it alleges that it "acquired all but one of the shares in Maple Gas for $15 million from Jancell Corporation [and] issued a $47 million parent guarantee for Maple Gas's debt."[750] Claimant's claim should be rejected for the following reasons.

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[744] *See* **RL-0112**, *Amec Foster Wheeler USA Corp., et al., v. Republic of Colombia*, ICSID Case No. ARB/19/34, Submission of the United States of America, 4 April 2022 (Nunes Pinto, Beechey, Kohen), ¶ 30 ("The enumeration of a type of an asset in Article 10.28 is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment"); **RL-0113**, *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, Submission of the United States of America, 19 June 2019 (Simma, Lo, McRae), ¶ 15; **RL-0114**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Submission of the United States, 28 August 2017 (Phillips, Naón, Thomas), ¶ 14; **RL-0115**, *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019 (Simma, Lo, McRae), ¶ 89 ("[T]he definition makes clear that not every such asset qualifies. Instead, it must have *'the characteristics of an investment'*.").

[745] *See* **RL-0116**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (Orrego Vicuña, Craig, Weeramantry), ¶ 50; **RL-0102**, *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (Kaufmann-Kohler, Naón, Blanco), ¶ 187 ("A majority of ICSID tribunals hold that the term 'investment' in Article 25 of the ICSID Convention has an independent meaning.").

[746] *See, e.g.*, **RL-0117**, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (Zuleta, Townsend, Stern), ¶ 361.

[747] **RL-0001**, Treaty, Art. 10.28.

[748] Memorial, ¶ 314. *See also* Memorial, ¶ 315.

[749] Memorial, ¶ 314.

[750] Memorial, ¶ 211.

338. *First*, Claimant has not substantiated its assertion that it contributed USD 15 million to a qualifying investment. Specifically, Claimant has not provided *any* evidence of an actual transfer of funds from itself to another entity in order to obtain indirect shareholding in Maple Gas.

339. *Second*, lacking evidence of an actual transfer of funds, Claimant relies on two documents that contradict each other and Claimant's narrative: (i) a share purchase agreement dated 24 November 2016,[751] and (ii) Jancell's register of shares. Through the share purchase agreement, Claimant agreed to pay USD 15,010,000 to Parsdome Holdings, Ltd. for shares in Jancell. However, at the time that the share purchase agreement was signed on 24 November 2016, it does not appear that Parsdome Holdings, Ltd. owned shares in Jancell. Specifically, Jancell's register of shares shows that Parsdome (Cayman) Limited—a different entity—owned shares in Jancell until 12 January 2017, at which point the shares were then transferred to Parsdome Holdings, Ltd.[752] Jancell's share register thus suggests that (i) Parsdome Holdings Ltd. agreed to sell shares that it did not own, and (ii) Claimant did not acquire Jancell shares in November 2016 or immediately thereafter.[753] To the extent that Claimant acquired any shares in Jancell, it appears to have done so on 15 June 2017.[754] Thus, the two documents on which Claimant relies are in conflict—both with each other and with Claimant's narrative that it bought its indirect shareholding for USD 15 million in November 2016.

340. *Third*, Claimant has not substantiated its assertion that it also contributed USD 47 million to a qualifying investment. As noted above, Claimant alleges that it "issued a

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[751] Claimant itself appears confused about what this share purchase agreement shows. Claimant alleges in the Memorial that "Worth Capital acquired all but one of the shares in Maple Gas . . . **from** Jancell" (emphasis added). Memorial, fn. 211. The share purchase agreement that Claimant put on the record indicates that it agreed to purchase shares *in* Jancell from another holding company. *See generally* **Ex. C-0033**, Agreement between Parsdome Holdings Ltd. and Worth Capital titled "Agreement relating to the sale and purchase of the whole of the issued outstanding share capital of Jancell Corporation," 24 November 2016.

[752] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

[753] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

[754] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

$47 million parent guarantee for Maple Gas's debt."[755] In support of that claim, Claimant placed on the record a "parent guarantee" dated 23 November 2016, which bears the signature of Mr. Charles Holzer, but is not signed by any other individual or entity.[756] Furthermore, the guarantee expressly affirms and represents that "[Worth Capital] is the parent company of Maple,"[757] even though (i) Mr. Holzer himself alleges that he did not acquire shares in Maple Gas until 27 November 2017, and (ii) the documentary evidence (discussed above) demonstrates that Worth Capital did not legally own, directly or indirectly, shares in Maple Gas as of 23 November 2016.[758] Thus, the "parent guarantee" document is based on a representation that is inaccurate. To the extent that such document is an enforceable guarantee (which it may not be), by its terms the guarantee (i) did not constitute a purchase of indirect shareholding in Maple Gas, and (ii) did not involve the contribution of capital.

341. Claimant has thus not demonstrated that it made a "commitment of capital or other resources"[759] to its alleged investment of indirect shareholding in Maple Gas. Claimant has therefore not satisfied the jurisdictional requirements of the Treaty or the ICSID Convention, and its claims must be dismissed.

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[755] Memorial, ¶ 211.

[756] *See generally* **Ex. C-0032**, Parent Company Guarantee issued by Worth Capital for the benefit of Trailon Enterprises S.A., 23 November 2016.

[757] *See* **Ex. C-0032**, Parent Company Guarantee issued by Worth Capital for the benefit of Trailon Enterprises S.A., 23 November 2016, p. 2.

[758] **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1.

[759] *See* **RL-0112**, *Amec Foster Wheeler USA Corp., et al., v. Republic of Colombia*, ICSID Case No. ARB/19/34, Submission of the United States of America, 4 April 2022 (Nunes Pinto, Beechey, Kohen), ¶ 30 ("The enumeration of a type of an asset in Article 10.28 is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment"); **RL-0113**, *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, Submission of the United States of America, 19 June 2019 (Simma, Lo, McRae), ¶ 15; **RL-0114**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Submission of the United States, 28 August 2017 (Phillips, Naón, Thomas), ¶ 14; **RL-0115**, *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019 (Simma, Lo, McRae), ¶ 89 ("[T]he definition makes clear that not every such asset qualifies. Instead, it must have *'the characteristics of an investment'*.").

D. The Tribunal lacks jurisdiction *ratione materiae* over Claimant's claims relating to Petroperú

342. Claimant's claims under the Minimum Standard of Treatment and Expropriation Provisions are based in part on alleged conduct by Petroperú. Such claims fall outside of the jurisdiction *ratione materiae* of this Tribunal because even though Petroperú is a State-owned enterprise, Claimant has not demonstrated that the alleged conduct was adopted by Petroperú in the exercise of any regulatory, administrative, or other governmental authority delegated to it by Peru. As a result, the Tribunal lacks jurisdiction over any claims relating to Petroperú, as the relevant jurisdictional requirements under Article 10.1.2 of the Treaty have not been met.[760] Claimant's claims with respect to Petroperú must be dismissed on this basis.

343. In any event, as will be discussed in **Section IV.B** below, even if jurisdiction did exist over Claimant's claims with respect to Petroperú (quod non), Petroperú's conduct is not attributable to Peru under customary principles of attribution codified by the ILC Articles, and therefore cannot constitute a breach of Peru's international obligations under the Treaty. Claimant's claims with respect to Petroperú must be rejected.

1. *Treaty Article 10.1.2 limits the scope* ratione materiae *of the Treaty's investment chapter*

344. Article 10.1 of the Treaty defines the "Scope and Coverage" of the investment chapter. Tribunals applying the analogous (and substantively similar) "scope and coverage" provision of the NAFTA investment chapter have affirmed that such provision "is the gateway leading to the dispute resolution provisions," such that "the powers of the Tribunal can only come into legal existence if the requirements of [the scope and

[760] **RL-0001**, Treaty, Art. 10.1.2 ("A Party's obligations under this Section [Ten] shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.").

coverage provision] are met."[761] Treaty Article 10.1 thus delimits the scope *ratione materiae* of this Tribunal's jurisdiction.

345. Treaty Article 10.1.1 provides that the investment chapter applies only to "measures adopted or maintained by a [State] Party,"[762] and Article 10.1.2 clarifies that the obligations contained therein will apply to State enterprises only in certain specified circumstances:

> A Party's obligations under this Section shall apply to a state enterprise or other person **when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party**, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.[763] (Emphasis added)

346. Treaty Article 1.3 in turn defines a State enterprise as "an enterprise that is owned, or controlled through ownership interests, by a Party."[764] Petroperú is a State-owned enterprise established in 1969 to carry out hydrocarbon activities,[765] and thus qualifies as a "state enterprise" under the Treaty.[766]

347. The *Al Tamimi v. Oman* tribunal, which interpreted a treaty provision similar to Treaty Article 10.1.2,[767] affirmed that States may create *lex specialis* with respect to attribution:

> [C]ontracting parties to a treaty may, by specific provision (lex specialis), limit the circumstances under which the acts of an entity will be attributed to the State. To the extent that the parties have elected to do so, any broader principles of State

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[761] **RL-0106**, *Methanex Corp. v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (Veeder, Reisman, Rowley), ¶ 106. *See also* **RL-0107**, *Grand River Enterprises Six Nations, Ltd., et al., v. United States of America*, ICSID Case No. UNCT/14/2, Award, 12 January 2011 (Nariman, Anaya, Crook), ¶ 76 ("As other NAFTA tribunals have noted, NAFTA's Article 1101 defines the field of application of NAFTA's Chapter 11, and operates as 'gateway' to NAFTA arbitration.").

[762] **RL-0001**, Treaty, Art. 10.1.1.

[763] **RL-0001**, Treaty, Art. 10.1.2.

[764] **RL-0001**, Treaty, Art. 1.3.

[765] **Ex. R-0032**, Legislative Decree No. 43, 4 March 1981, Art. 3. *See also* **RER-01**, Monteza Expert Report, ¶ 242.

[766] **RL-0001**, Treaty, Art. 1.3.

[767] **RL-0038**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 27 October 2015 (Williams, Brower, Thomas), ¶ 318 (quoting Article 10.1.2 of the United States-Oman Free Trade Agreement: "A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party").

> responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant.[768]

348. The *Al Tamimi* tribunal determined that the treaty provision in question was "narrower than the several grounds of attribution provided under the ILC [Articles], which also include situations where, for instance, the relevant entity merely acts under the control or direction of the State [(i.e., ILC Article 8)]."[769] Thus, the tribunal rejected the claimant's attribution arguments under ILC Article 8.

349. Here, Claimant seeks to attribute Petroperú's alleged conduct to Peru on the basis of ILC Articles 5 and 8,[770] but those residual rules, in the words of the *Al Tamimi* tribunal "are not directly applicable to the present case."[771] Instead, the "narrower test" in Treaty Article 10.1.2 serves as *lex specialis* on the subject, and thus applies in lieu of the broader customary principles.[772] Claimant must therefore demonstrate two separate factors: (1) that Peru has "delegated" to Petroperú "regulatory, administrative, or other governmental authority;" *and* (2) that Petroperú was in fact *exercising* such delegated "regulatory, administrative, or other governmental authority" in each instance of conduct of which Claimant complains.[773] As shown below, Claimant has not satisfied either of these requirements, as a result of which its claims against Petroperú fall outside of the "Scope and Coverage" of the Treaty.

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[768] **RL-0038**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 27 October 2015 (Williams, Brower, Thomas), ¶ 321.

[769] **RL-0038**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 27 October 2015 (Williams, Brower, Thomas), fn. 675. *See also id.* at ¶ 322.

[770] Memorial, ¶ 376.

[771] **RL-0038**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 27 October 2015 (Williams, Brower, Thomas), ¶ 324.

[772] **RL-0038**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 27 October 2015 (Williams, Brower, Thomas), fn. 675. In any event, as explained in **Section IV.B** below, even if the rule of attribution under Treaty Article 10.1.2 were not materially different from, and did not take precedence over, the general rule under ILC Articles 5 and 8, Petroperú's conduct in this case is in any event not attributable to Peru even pursuant to those general rules of attribution under customary international law.

[773] **RL-0001**, Treaty, Art. 10.1.2.

2. Claimant has not demonstrated that Peru delegated governmental authority to Petroperú

350. The first requirement of Treaty Article 10.1.2 is that a claimant must demonstrate that the State has delegated "regulatory, administrative, or other governmental authority" to the relevant state enterprise. The Treaty provides specific examples of such "governmental authority," including "the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges."[774] Tribunals interpreting similar treaty provisions have distinguished between such acts of governmental authority (*acta iure imperii*), on the one hand, and commercial activities (*acta iure gestionis*), on the other hand. For instance, the *UPS v. Canada* tribunal interpreted NAFTA's requirement that an entity exercise "regulatory, administrative, or other governmental authority"[775] to exclude activities that "have a commercial character."[776] That tribunal contrasted the exercise of governmental authority with

> the use by a monopoly or State enterprise of those rights and powers which it shares with other businesses competing in the relevant market and undertaking commercial activities. Those rights and powers include the rights to enter into contracts for purchase or sale and to arrange and manage their own commercial activities.[777]

351. The *UPS v. Canada* tribunal held that, even though (i) "in collecting customs duties Canada Post is exercising delegated governmental authority," (ii) Canada Post was *not* exercising governmental authority "in the course of the establishment, expansion, management, conduct and operation of its overall business."[778] On that basis, it

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[774] **RL-0001**, Treaty, Art. 10.1.2.

[775] **RL-0039**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on the Merits, 24 May 2007 (Keith, Cass, Fortier), ¶ 73.

[776] **RL-0039**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on the Merits, 24 May 2007 (Keith, Cass, Fortier), ¶ 73.

[777] **RL-0039**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on the Merits, 24 May 2007 (Keith, Cass, Fortier), ¶ 74.

[778] **RL-0039**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on the Merits, 24 May 2007 (Keith, Cass, Fortier) ¶ 77.

dismissed the claims related to Canada Post's management of its business, including those "relating to the use of its infrastructure."[779]

352. Claimant's Memorial features only a cursory discussion of this subject. Claimant's argument that Petroperú exercises governmental functions fails, however, for the following four reasons. *First*, as Claimant's own legal expert concedes, Petroperú's functions have "a commercial character."[780] Dra. Quiñones observes in her expert report that "[p]ursuant to article 4 of the Bylaws of PETROPERÚ, the functions accorded that state-owned company are linked to the pursuit of **commercial and industrial activities** in the hydrocarbons sector"[781] (emphasis added). The legal expert offered by Peru, Dr. Monteza, concurs with this analysis:

> As can be seen [from PETROPERÚ's bylaws], the main functions of PETROPERÚ are of a commercial and contractual nature, which is consistent with its corporate purpose and the purposes for which it was created. The company cannot and could not exercise regulatory, administrative or governmental powers, since its actions are strictly subject to what is stated in its bylaws.[782]

353. Indeed, such bylaws list *only* inherently *commercial* functions, including "[n]egotiat[ing] oil exploration and/or exploitation operations contracts" and "[e]xport[ing] and/or import[ing] crude oil, its derivatives, and chemical products."[783] Thus, Petroperú engages in *commercial* activities.[784]

354. *Second*, Claimant has not identified any function performed by Petroperú that represents the exercise of delegated governmental authority. As noted above, Treaty Article 10.1.2 provides an illustrative list of such functions, namely, the powers to

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[779] **RL-0039**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on the Merits, 24 May 2007 (Keith, Cass, Fortier) ¶ 78.

[780] **RL-0039**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on the Merits, 24 May 2007 (Keith, Cass, Fortier), ¶ 73.

[781] Quiñones Report, ¶ 221.

[782] **RER-01,** Monteza Expert Report, ¶ 250.

[783] Quiñones Report, ¶ 221 (*citing* **Ex. MTQ-0026**, Estatuto Social de Petróleos del Perú – PETROPERÚ, aprobado por la Junta General de Accionistas, 18 October 2010, Art. 4).

[784] **RER-01**, Monteza Expert Report, ¶ 250.

"expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges."[785] Yet neither Claimant nor its expert even attempts to argue—let alone demonstrates—that Petroperú can perform *any* functions of that nature. The simple fact, as Dr. Monteza emphasizes, is that Petroperú "does not exercise regulatory, administrative or governmental authority" and "cannot issue administrative acts."[786]

355. *Third*, Claimant's argument about Petroperú's alleged governmental authority is self-contradictory and fatally flawed. Its primary argument in this regard—contained in a single paragraph in the Memorial—is that "Petroperú acts as the supplier of last resort."[787] Claimant is referring to the general principle of "subsidiarity" under Peruvian law, pursuant to which State-owned entities are required to act in the public interest whenever private sector actors are unable or unwilling to do so.[788] In those circumstances, State-owned entities act "as the final guarantor of the general interest," as noted by the Peruvian Constitutional Court in a 2003 judgment.[789]

356. The following fact is fatal for Claimant's attribution argument: when an entity like Petroperú acts pursuant to the principle of subsidiarity, it is *by definition* carrying out commercial—and not governmental—activity.[790] In particular:

a. Article 60 of the Peruvian Constitution authorizes the State and State-owned entities to carry out "**business activity**" in the public interest[791] (emphasis added).

b. The activities carried out by State organs or State-owned entities when acting in the role of subsidiarity are strictly regulated by INDECOPI. In evaluating such activities, INDECOPI considers "first, whether the challenged conduct by

[785] **RL-0001**, Treaty, Art. 10.1.2.

[786] **RER-01**, Monteza Expert Report, ¶ 251.

[787] Memorial, ¶ 378.

[788] **RER-01**, Monteza Expert Report, ¶ 271.

[789] **Ex. R-0154**, Judgment of the Constitutional Court contained in Case File No. 0008-2003-AI/TC, 11 November 2003, ¶ 21.

[790] **RER-01**, Monteza Expert Report, ¶ 308.

[791] **Ex. R-0039**, Peru's Constitution, Art. 60. *See also* **RER-01**, Monteza Expert Report, ¶ 268.

the State, either through a public company or a State entity, involves activity of a **business nature**"[792] (emphasis added).

c. According to the governing INDECOPI regulation, "[i]f the State's conduct involves activities of a different nature, it will not be subject to the subsidiarity limitations set forth in the Constitution."[793]

d. Indeed, Claimant's own legal expert, Dra. Quiñones, admits—as she must—that the principle of subsidiarity does *not* include or apply to "the exercise of a public power or of *ius imperium* derived from the sovereign power of the State."[794]

357. Thus, it is contradictory for Claimant to (i) on the one hand, complain about Petroperú's conduct acting in its subsidiary role (i.e., in its *commercial* capacity in the market), and yet (ii) on the other hand, assert that this very same conduct by Petroperú is an exercise of delegated governmental functions, and therefore attributable to Peru under the Treaty (or customary international law). Claimant's argument that Peru has delegated governmental authority to Petroperú in its role as subsidiary is plainly wrong.

358. *Fourth*, and finally, Claimant makes in passing several other, secondary arguments in an attempt to support its claim that Petroperú exercises governmental authority, all of which are meritless. For instance, Claimant points out that Petroperú submits "annual and five-year plans . . . reflecting Petroperú's purpose to achieve State objectives."[795] The plans to which Claimant adverts are a list of five high-level goals, including to "[s]upply the market efficiently" and "[o]perate efficiently, safely, preserving the

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[792] **Ex. R-0144**, INDECOPI, Resolution No. 3134-2010/SC1/INDECOPI, 29 November 2010, ¶ 32. *See also* **RER-01**, Monteza Expert Report, ¶ 277.

[793] **Ex. R-0144**, INDECOPI, Resolution No. 3134-2010/SC1/INDECOPI, 29 November 2010, ¶ 32. *See also* **RER-01**, Monteza Expert Report, ¶ 277.

[794] Quiñones Report, ¶ 240 (stating that "[i]n the precedent, the INDECOPI Court states that no activity carried out by a public company or an entity of the Administration that qualifies as the exercise of a public power or of *ius imperium* derived from the sovereign power of the State shall constitute business activity, nor therefore shall the principle of subsidiarity be applicable. Nor shall any welfare activity carried out by constitutional mandate as part of the obligations of the State be regarded as business activity . . . ").

[795] Memorial, ¶ 379.

environment and producing high-quality products and services."[796] Such plans confirm the commercial nature of that State-owned enterprise. The mere fact that Petroperú's plan seek to render its commercial activity *consistent with* State objectives does not render the activity itself any less commercial in nature.

359. Claimant also invokes a 2014 bond offering prospectus issued by Petroperú,[797] but again Claimant is unable to identify any specific governmental authority delegated by Peru to Petroperú in that context. To the contrary, and once again, if anything the bond offerings submitted and cited by Claimant actually *undermine* its claim that Petroperú exercises governmental authority. For instance, in those documents, Petroperú uses language that is typically used in similar contexts by purely commercial entities, for example confirming that it is a *sociedad anónima*, that it undertakes commercial activity, and that it operates at arms' length from State organs:

a. "We are a corporation (*sociedad anónima*) existing under the laws of Peru."[798]

b. "During 2019 and 2020, our company has been executing corporate action plans to achieve the economic and financial objectives of our company, whose main measures are aimed at optimizing the cost structure in the purchase of raw materials and products, strategies in commercial management, operational management, inventory management and budget optimization plan of operating expenses and prioritization of investments."[799]

c. "We operate in a highly regulated environment and our operating results could be adversely affected by actions by governmental entities or changes to regulations and legislation."[800]

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[796] **Ex. R-0056**, PETROPERU, Strategic Objectives, undated (accessed 30 September 2022).

[797] *See* Memorial, ¶ 380 (mentioning that "[i]n 2014, Peru issued a prospectus for a bond offering, in which it provided that 'Peru's non-financial public sector consists of 'the government,' 'the government's various decentralized administrative and regulatory agencies,' 'the local government,' and 'non-financial state-owned enterprises, such as Petroperu.'").

[798] **Ex. C-0261**, Petroperú, Offering Memorandum, 4 February 2021, p. 9.

[799] **Ex. C-0261**, Petroperú, Offering Memorandum, 4 February 2021, p. 34.

[800] **Ex. C-0261**, Petroperú, Offering Memorandum, 4 February 2021, p. 61.

d. "[T]he performance of our operating activities may be adversely affected by the decisions of the MEM, OSINERGMIN, OEFA or any other competent regional or local government, such as denials of permits and licenses, as well as amendments to applicable laws and regulations. Any additional regulatory requirements could significantly increase our expenditures or require us to operate our business in a substantially different manner. We cannot predict future actions of our regulators or any other competent regional or local government, and we can make no assurances about how such actions may affect our business . . . ."[801]

360. Claimant also states that Petroperú in its 2021 public bond offering included a general reservation of right to plead sovereign immunity under the U.S. Foreign Sovereign Immunities Act.[802] Such legislation authorizes entities that are majority-owned by a State to plead immunity under the statute.[803] However, a general reservation of rights to plead sovereign immunity in specific instances does not *ipso facto* demonstrate that Peru delegated to Petroperú sovereign or governmental authority in respect of a specific conduct.

361. Claimant has thus failed to demonstrate that Peru *delegated* to Petroperú any governmental authority, as required by Treaty Article 10.1.2.

3. Claimant has not demonstrated that Petroperú was exercising delegated governmental authority in this case

362. As noted above, Treaty Article 10.1.2 includes a second requirement: that the alleged conduct of which the claimant complains must have been adopted by the relevant entity in the *exercise* of delegated government authority. Claimant has also failed to satisfy this requirement. In fact, Claimant did not even purport to identify the

[801] **Ex. C-0261**, Petroperú, Offering Memorandum, 4 February 2021, p. 61.

[802] Memorial, ¶ 380.

[803] *See* **RL-0040**, Immunity of a foreign state from Jurisdiction, 28 U.S. Code, 21 October 1976, § 1604 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter"). *See also* **RL-0040**, Immunity of a foreign state from Jurisdiction, 28 U.S. Code, 21 October 1976, § 1603 (defining a "foreign state" to include an entity (i) that is a separate legal person, and (ii) majority-owned by a State).

individual acts of which it complains, much less show that Petroperú was exercising a delegated governmental authority in each instance. Claimant contented itself with the assertion that "Petroperú acts as the supplier of last resort."[804] But this generic and non-controversial assertion does not assist Claimant's case. Claimant has therefore grossly failed to satisfy its burden of proof with respect to Article 10.1.2.

363. The fact is that Petroperú was *not* exercising governmental authority in any of the instances of conduct of which Claimant complains in this arbitration. Scattered throughout the Memorial are Claimant's complaints of the relevant alleged acts. Specifically, the Memorial alleges that Petroperú:

a. entered into commercial contracts with CEPSA for the purchase of feedstock;[805]

b. entered into a commercial contract with Aguaytía Energy for the purchase of feedstock;[806]

c. processed the feedstock and produced refined oil products at Petroperú's refineries;[807]

d. sold such refined products on the markets;[808] and

e. terminated the Refinery Lease Agreement when Maple Gas refused to make its contractual rent payments.[809]

None of these alleged actions constitute, or even resemble, an exercise of delegated governmental authority; they are all measures that are routinely adopted by companies in the normal course of business and contractual relations. The simple fact is that the Petroperú conduct of which Claimant complains did *not* involve the exercise of any governmental authority whatsoever.

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[804] Memorial, ¶ 378.

[805] *See, e.g.*, Memorial, ¶¶ 428, 430.

[806] *See, e.g.*, Memorial, ¶¶ 428.

[807] *See, e.g.*, Memorial, ¶ 437.

[808] *See, e.g.*, Memorial, ¶ 431.

[809] *See, e.g.*, Memorial, ¶ 484.

364. Pursuant to Treaty Article 10.1.2, therefore, the provisions of Chapter Ten do not apply to Petroperú's alleged conduct, and this Tribunal lacks jurisdiction *ratione materiae* over Claimant's claims with respect to Petroperú.

* * *

365. For all of the foregoing reasons, the Tribunal lacks jurisdiction over Claimant's claims.

IV. MERITS

366. Claimant claims that Peru breached the Treaty's Minimum Standard of Treatment Provision (Article 10.5) and the Expropriation Provision (Article 10.7). Claimant bears the burden of proof with respect to each of those claims.[810] However, Claimant has failed to satisfy that burden. As shown in the sections that follow,[811] (i) Claimant has failed to demonstrate that Peru committed a composite breach (**Section IV.A**); Claimant's claims relating to Petroperú must be rejected because Petroperú's conduct is not attributable to Peru (**Section IV.B**); and (ii) Claimant's minimum standard of treatment claim (**Section IV.C**) and expropriation claim (**Section IV.D**) are meritless.

A. Claimant has not substantiated its claim of composite breach

367. Claimant alleges that Peru breached the Minimum Standard of Treatment and the Expropriation Provisions through a series of actions that together constitute a

[810] *See, e.g.*, **RL-0049**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (Feliciano, de Mestral, Lamm), ¶ 185 ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here"). **RL-0028**, *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016 (Kaufmann-Kohler, Brower, Landau), ¶ 538 ("The Tribunal recalls that the Claimant bears the burden of establishing a violation of Article 1105(1) of the NAFTA"); **RL-0017**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 (Veeder, Rowley, Crook), ¶ 9.6 ("The Tribunal considers that Apotex-Holdings, as the party alleging a breach of NAFTA Article 1105(1) and Article II of the BIT, bears the legal burden of proving its case.").

[811] The arguments enunciated in the remainder of the Counter-Memorial are without prejudice to Peru's position that the conduct of Petroperú is not attributable to Peru. *See supra* **Sections III.D** and **IV.B**. Furthermore, Claimant's claims of Treaty breach are based on the cumulative effect of a series of measures, many—if not most—of which were allegedly undertaken by Petroperú. To the extent that the Tribunal were to find that Petroperú's conduct is not attributable to Peru, such conduct could not form the basis under public international law for a finding of liability with respect to Claimant's claims.

breach[812]—i.e., through a composite act.[813] However, Claimant fails to engage with or even acknowledge—much less satisfy—the requisite elements for a composite breach under international law (discussed below). Claimant's claims of composite breaches should therefore be dismissed.

1. To substantiate its composite breach claims, Claimant must demonstrate the existence of an underlying pattern or purpose

368. Article 15 of the ILC Articles ("Breach consisting of a composite act") provides that

> [t]he breach of an international obligation by a State through a **series of actions or omissions defined in aggregate as wrongful** occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.[814] (Emphasis added)

369. The authoritative commentary to the ILC Articles clarifies that the measures that comprise a composite act must be "**sufficiently numerous and inter-connected** to amount not merely to isolated incidents or exceptions but to a **pattern or system**"[815] (emphases added). Consistent with the foregoing, the *Rompetrol v. Romania* tribunal underscored that "a mere scattered collection of disjointed harms would not be enough,"[816] and that instead, a composite breach only occurs "where the actions in

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[812] *See* Memorial, ¶¶ 410, 488, 493. Claimant mentions a single time, in passing, that the acts "taken either separately or together, constitute a breach of the MST." Memorial, ¶ 410. To the extent that Claimant alleges that each of the alleged measures of which it complains constitute a separate and individual breach of the Treaty (which is not clear from Claimant's submissions), Peru rejects that argument. Whether taken "separately or together," the conduct of which Claimant complains does not show a violation of the Treaty, for the reasons shown in **Sections IV.B–D** herein.

[813] Claimant alleges that Peru breached Treaty Article 10.7 through a creeping expropriation. *See* Memorial, ¶¶ 493–94. A creeping expropriation is by its very nature a composite breach. *See, e.g.*, **CL-0080**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (Sureda, Brower, Janeiro), ¶¶ 263–64 ("By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. . . . We are dealing here with a composite act in the terminology of the [ILC Commentary].")

[814] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 15.

[815] **CL-0006**, ILC, *Yearbook of International Law Commission*, 2001, Vol. II, Part Two, Art. 15, comment 5 (*quoting Ireland v. United Kingdom,* ECHR, Application No. 5310/71, Award, 18 January 1978 (Pallieri, *et al.*), ¶ 159).

[816] **RL-0050**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271.

question disclosed some **link of underlying pattern or purpose** between them"[817] (emphasis added). Moreover, the same tribunal added that "the pattern must be sufficiently serious and persistent."[818]

370. Consequently, in order to substantiate its composite breach claims, Claimant must demonstrate that the alleged measures of which it complains share a common pattern or purpose. Absent such a showing, those claims must be dismissed.[819]

2. Claimant invents a baseless theory in an attempt to connect the State acts of which it complains

371. The alleged conduct of which Claimant complains consists of a hodgepodge of generalized demeanor (e.g., non-specific "interference" over years), non-existent decisions (e.g., an alleged "decision" to prevent Maple Gas from obtaining the Block 126 License), and certain specific acts by State-owned companies (viz., Petroperú, PERUPETRO) and the MINEM. In an attempt to connect the dots between these disparate alleged measures, Claimant has invented a government-wide conspiracy, pursuant to which various government authorities and State-owned companies acted in concert to target Maple Gas, an already-failing company. In Claimant's words, its theory is that "[a]fter the Blue Oil Investment Group acquired Maple Gas, the government—through PERUPETRO and Petroperú—began a campaign to destroy Maple Gas's business."[820]

372. Such thesis is wholly unsubstantiated and nonsensical. In particular, as shown in the subsections that follow, (i) it was invented for the purpose of this arbitration, (ii) it is not supported by any evidence, and (iii) it is inconsistent with Claimant's own factual narrative.

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[817] **RL-0050**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271.

[818] **RL-0050**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 278.

[819] **RL-0051**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (Kaufmann-Kohler, Hanotiau, Stern), ¶ 230 ("The Tribunal agrees with the Respondent that the Claimant has not properly substantiated its composite breach argument.").

[820] Memorial, ¶ 66.

a. Claimant's conspiracy theory was invented for the purpose of this arbitration

373. As described in **Section II.N** above, this arbitration represents the *third* time that Maple Gas and its various investors have sought to blame other parties for Maple Gas' collapse. First, in the ICC Arbitration, Maple Gas unsuccessfully accused Aguaytía Energy of colluding with Petroperú to interfere with Maple Gas' business.[821] Then, in the Lima Arbitration, Maple Gas accused Petroperú of interfering in its business, alleging that Petroperú wanted to monopolize the Ucayali market.[822] Notably, Maple Gas never claimed in either of those previous arbitrations that Petroperú was engaged in any broader "campaign"[823] to harm Blue Oil.

374. Yet in this ICSID arbitration, Claimant's case theory is completely different: Maple Gas' misfortunes are now the product—not merely of alleged commercial interference—but of a government-wide "campaign to destroy Maple Gas's business"[824] as a form of retribution against Blue Oil. In other words, the never-before-heard conspiracy theory now takes center stage. The contrast is striking, and it reveals that the theory is pure fiction. This is demonstrated inter alia by the following:

a. "Blue Oil" was *never* mentioned—not even in passing—by Maple Gas in its written submission in the Lima Arbitration.[825] In the Memorial in this ICSID arbitration, however, "Blue Oil" appears no less than eighty-four times.[826]

b. In his witness statement in the ICC Arbitration, which was submitted in April 2018, Claimant's witness Mr. Rojas made no mention whatsoever of any government campaign to harm Blue Oil.[827] In his witness statement in this

[821] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 161.

[822] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 155 (summarizing Maple Gas's argument). *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 129 ("PETROPERU chose, without any economic justification or strategy, to buy all the product and refine it outside Pucallpa").

[823] Memorial, ¶ 66.

[824] Memorial, ¶ 66.

[825] *See generally* **Ex. R-0004**, *Petróleos Del Perú S.A. v. Maple Gas Corporation Del Perú S.R.L.*, Lima Arbitration No. 258-2018-CCL, Submission of Maple Gas, 8 March 2019.

[826] *See, e.g.*, Memorial, ¶¶ 5, 7, 10, 12.

[827] *See generally* **Ex. R-0033**, *Aguaytía Energy del Peru S.R.L. v. Maple Gas Corporation del Peru S.R.L.*, ICC Case No. 23137/MK, Witness Statement of Matias Rojas, 16 April 2018.

arbitration, by contrast, Mr. Rojas alleges not only that he knew "[b]y the end of June 2016" (i.e., years before he submitted his witness statement in the ICC Arbitration) that Maple Gas was being targeted because of Blue Oil's involvement[828]—but moreover that he divested for that very reason.[829]

c. In the ICC and Lima Arbitrations, the group of investors that acquired Maple Gas' debt were referred to simply as the "investment group."[830] Here, however, Claimant and Mr. Rojas refer—over and over again—to the "Blue Oil Investment Group."[831] Importantly for present purposes, "Blue Oil Investment Group" is not a formal entity; rather, it is merely a moniker invented by Claimant for this arbitration and used to lend color to its conspiracy theory.

375. Had Maple Gas or Mr. Rojas been aware of—let alone had evidence of—a government-wide "campaign" against Maple Gas, surely they would have made that argument in the previous arbitrations. They did not do so for one simple reason: there was no such campaign.

b. <u>The conspiracy theory is unsupported by any evidence</u>

376. Claimant's theory appears to rest on the premise that Petroperú, PERUPETRO, and the MINEM interfered with Maple Gas' business (i) at the instruction of then-President Kuczynski (who prior to being elected had been involved in a company that had a commercial dispute with Blue Oil in 2012),[832] and (ii) as part of a broader government campaign to harm Blue Oil.[833] However, there is not a shred of evidence to support either prong of that premise.

377. *First*, Claimant has produced *zero* evidence of any instruction or direction by President Kuczynski to Petroperú, PERUPETRO, the MINEM, or any other government agency

[828] Rojas Witness Statement, ¶ 46.

[829] Rojas Witness Statement, ¶ 59.

[830] *See, e.g.*, **Ex. R-0004**, *Petróleos Del Perú S.A. v. Maple Gas Corporation Del Perú S.R.L.*, Lima Arbitration No. 258-2018-CCL, Submission of Maple Gas, 8 March 2019, p. 39. *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 126 (restating Maple Gas' position).

[831] *See, e.g.*, Memorial, ¶¶ 5, 7, 10, 12, 31.

[832] *See, e.g.*, Memorial, ¶¶ 12, 485.

[833] *See, e.g.*, Memorial, ¶¶ 30, 48.

or entity, to "destroy Maple Gas's business."[834] Instead, Claimant relies on the unsupported allegation by one of its own witnesses—Mr. Neumann (the former General Manager of Maple Gas)—that Mr. Guzmán (the former General Manager of PERUPETRO) had told him that the decision that Maple Gas was not qualified to obtain the Block 126 License "was a top-down directive."[835] However, Mr. Guzmán himself confirms, in a witness statement presented in this arbitration, that he never received any such instruction.[836] As demonstrated in **Section II.H.2** above, Maple Gas was deemed not qualified to obtain the Block 126 License simply because the company had failed to satisfy the objective criteria for qualification under Peruvian law.[837] In any event, Mr. Neumann's allegation does not substantiate the claim that President Kuczynski was directing a government-wide "campaign" against Blue Oil.

378. *Second*, Claimant has produced no evidence that Blue Oil was ever identified to Petroperú, PERUPETRO, or the MINEM as an investor in Maple Gas. In fact, as described in **Section II.C.3** above, the group of investors that acquired Maple Gas' debt in October 2015 did so through a complex series of transactions using shell companies.[838] As a result, it was not obvious then—and is not all that clear even now—which particular individuals and/or entities were behind the shell companies involved in those transactions. Therefore, absent an evident connection between Blue Oil and Maple Gas, there would have been no reason for Petroperú, PERUPETRO, or the MINEM to interfere with Maple Gas' business as a means to retaliate against Blue Oil.

379. Thus, even on Claimant's own record, there is no evidence to substantiate the conspiracy theory.

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[834] Memorial, ¶ 66.

[835] Neumann Witness Statement, ¶ 70. Mr. Neumann does not purport to quote Mr. Guzmán, but rather appears to summarize an alleged conversation with him.

[836] **RWS-01**, Guzmán Witness Statement, ¶¶ 103–04.

[837] *See* **RER-02**, Alix Damages Expert Report, ¶¶ 330–31; **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2.

[838] *See generally* **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017. *See also* Memorial, ¶ 82, fn. 98.

c. The conspiracy theory is not consistent with Claimant's own factual narrative

380. Finally, Claimant's theory that then-President Kuczynski orchestrated a campaign against Maple Gas in order to harm Blue Oil is inconsistent even with Claimant's own factual narrative, in at least three principal ways.

381. *First,* Claimant complains of conduct that occurred *before* Blue Oil had ever made its alleged investment in Maple Gas. Under Claimant's account of the facts, the alleged "campaign to destroy Maple Gas" began "[a]fter the Blue Oil Investment Group acquired Maple Gas,"[839] which according to Claimant was in October 2015.[840] Yet Claimant complains that Petroperú began interfering with Maple Gas' business by purchasing feedstock from CEPSA in *2014*—i.e., long before Blue Oil's alleged investment.[841] Under Claimant's theory, Petroperú would have had no reason at all to interfere with Maple Gas before October 2015.

382. *Second*, Claimant also complains of conduct that occurred *after* Blue Oil had already fully divested from Maple Gas. Under Claimant's account of the facts, Mr. Rojas, the founder of Blue Oil, decided to divest his interest in Maple Gas in November 2016 precisely because "[b]y the end of June 2016" Maple Gas was being targeted by the government and Petroperú due to Blue Oil's involvement in Maple Gas.[842] As Mr. Holzer confirms, Blue Oil's divestment meant that "there would be **no reason** for Petroperú or others in the government to interfere with Maple Gas' business"[843] (emphasis added). Yet Claimant complains of alleged interference by Petroperú, PERUPETRO, and the MINEM that allegedly occurred months and even years *after* Blue Oil ceased to have an interest in Maple Gas. Such alleged interference includes, in particular, (i) PERUPETRO's determination in November 2017 that Maple Gas failed to meet the objective eligibility criteria under the 2010 Guidelines to hold the

[839] Memorial, ¶ 66.

[840] Memorial, ¶ 82.

[841] *See* Memorial, ¶ 430 (complaining of Petroperú's contracts with CEPSA, which date to 2014). *See also generally* **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, p. 1.

[842] Rojas Witness Statement, ¶ 46. *See also* Rojas Witness Statement, ¶¶ 59, 64.

[843] Holzer Witness Statement, ¶ 10.

Block 126 License;[844] (ii) Petroperú's purchase of feedstock from Aguaytía Energy in 2017;[845] (iii) Petroperú's termination of the Refinery Lease Agreement in 2018;[846] and (iv) PERUPETRO's termination of the Block 31 License Agreements in early 2019.[847] All of these key allegations relate to actions that took place in 2017 or later—long after Blue Oil's involvement in Maple Gas had ceased entirely. Yet on Claimant's case, there would have been no reason for the government to interfere with Maple Gas after Blue Oil divested its interest in Maple Gas. Claimant provides no explanation for this gaping hole in the fabric of its conspiracy theory.

383. *Third*, Claimant complains of conduct that both pre- and post-dated President Kuczynski's presidency. According to Claimant, the alleged "campaign to destroy Maple Gas" was based upon then-President Kuczynski's animosity towards Blue Oil.[848] However, Claimant complains of alleged interference that occurred both (i) long *before* President Kuczynski took office in July 2016 (e.g., Petroperú's interference with Maple Gas' relationship with CEPSA in 2014, 2015, and 2016[849]); and (ii) long *after* President Kuczynski resigned in March 2018 (e.g., Petroperú's termination of the Refinery Lease Agreement in August 2018,[850] and PERUPETRO's termination of the Block 31 License Agreements in early 2019[851]). Claimant provides no explanation as to why Petroperú, PERUPETRO, and the MINEM would individually and collectively have targeted Maple Gas even before Mr. Kuczynski had taken office, or why they would have continued to do so after his resignation.

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[844] *See* Memorial, ¶ 451. *See also generally* **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017.

[845] *See* Memorial, ¶ 436. *See also generally* **Ex. R-0127**, Petroperú-Aguaytía Energy Agreement for 365,000 barrels of Natural Gas, 28 September 2017.

[846] *See* Memorial, ¶ 484. *See also generally* **Ex. R-0099**, Letter No. GCLG-1669-2018 from Petroperú (C. Beltrán) to Maple Gas (K. Neumann), 30 July 2018, p. 2.

[847] *See* Memorial, ¶ 518. *See also generally* **Ex. C-0072**, Letter from PERUPETRO to Maple dated February 6, 2019 titled "*Terminación del Contrato por Incumplimiento Contractual – Lotes 31-B y 31-D*," p. 1.

[848] *See, e.g.*, Memorial, ¶¶ 30, 48, 49.

[849] *See* Memorial, ¶¶ 87, 108.

[850] *See* Memorial, ¶ 484. *See also generally* **Ex. R-0099**, Letter No. GCLG-1669-2018 from Petroperú (C. Beltrán) to Maple Gas (K. Neumann), 30 July 2018, p. 2.

[851] *See* Memorial, ¶ 518. *See also generally* **Ex. C-0072**, Letter from PERUPETRO to Maple dated February 6, 2019 titled "*Terminación del Contrato por Incumplimiento Contractual – Lotes 31-B y 31-D*," p. 1.

3. Claimant's composite breach claims should be dismissed

384. As explained above, a treaty violation may result from "the cumulative effect of a succession of impugned actions . . . [b]ut this would only be so where the actions in question disclosed some link of underlying pattern or purpose between them."[852] For the purpose of this arbitration, Claimant has contrived a far-fetched theory to support its composite breach claim. However, the theory is baseless, speculative, and insufficient to discharge Claimant's burden of proving that the conduct of which it complains is sufficiently inter-connected to be assessed as a single, composite act. Claimant has provided no evidence of any underlying pattern between the disparate conduct of which it complains (ranging from routine commercial activities of Petroperú to the licensing procedures of PERUPETRO), nor any evidence of any coordination between these different entities (Petroperú, PERUPETRO, or the MINEM). Claimant's claims of composite breach should therefore be dismissed.

B. Claimant's claims relating to Petroperú should be rejected because the latter's conduct is not attributable to Peru under international law

385. As demonstrated in **Section III.D** above, the Tribunal lacks jurisdiction *ratione materiae* over Claimant's claims against Petroperú because the jurisdictional requirements of Treaty Article 10.1.2 are not met. However, even if the Tribunal had jurisdiction (quod non), such claims would need to be rejected because it is a well-established principle of customary international law that in order for a State to be held liable for an internationally wrongful act, the conduct in question must be "attributable to the State under international law."[853] Here, however, Petroperú's alleged conduct is *not* attributable to Peru under customary international rules of attribution, and therefore cannot be the source of State responsibility with respect to the conduct alleged by Claimant. The latter's claims against Petroperú must therefore be rejected.

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[852] **RL-0050**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271.

[853] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 2(a).

1. Petroperú's conduct is not attributable to Peru under Article 5 of the ILC Articles

386. Claimant asserts that Petroperú's conduct is attributable to Peru under Article 5 of the ILC Articles, which provides as follows:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is **empowered by the law** of that State to **exercise elements of the governmental authority** shall be considered an act of the State under international law, provided the person or entity is **acting in that capacity** in the particular instance.[854] (Emphasis added)

387. The tribunal in *Jan de Nul v. Egypt* noted that, for conduct to be attributable to a State under Article 5, "two cumulative conditions have to be fulfilled: - first, the act must be performed by an entity empowered to exercise elements of governmental authority (i); - second, the act itself must be performed in the exercise of governmental authority (ii)."[855]

388. This *first requirement*—that the entity whose actions are allegedly attributable to the State must be "empowered . . . to exercise elements of governmental authority"[856]—is commonly referred to as the "functional" test for attribution. It focuses on the functions carried out by the entity in question, rather than on its structural status within the State apparatus.[857]

389. In its Memorial, Claimant cites case law providing examples of functions that previous tribunals determined had involved the exercise of governmental authority under ILC Article 5[858]—e.g., when internal law authorized the relevant entity: to

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[854] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 5.

[855] **RL-0042**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 163.

[856] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 5.

[857] *See* **RL-0108**, James Crawford, STATE RESPONSIBILITY: THE GENERAL PART (2014), p. 127.

[858] *See* Memorial, ¶ 335 & fn. 449–54.

represent the State;[859] to grant concessions for infrastructure projects;[860] to grant licenses for regulated activity;[861] to approve the tariffs that applied to regulated activities;[862] or to carry out functions "within the domain of public defence."[863] By contrast, previous tribunals have confirmed that commercial activities "are not attributable"[864] to the State, and have deemed the following types of activity to be commercial (rather than governmental) in nature: negotiation of a contract;[865] "conduct in the course of the performance of the [c]ontract";[866] and termination of a lease agreement.[867]

390. As explained in **Section III.D** above in relation to Treaty Article 10.1.2, Petroperú is *not* "empowered by [Peruvian] law to exercise elements of governmental authority."[868] Claimant contends that Petroperú exercises governmental authority because it "acts as the supplier of last resort."[869] As explained below, however, such role is *not* a

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[859] **CL-0050**, *Ioannis Kardassopoulos v. Republic of Georgia,* ICSID Case No. ARB/05/18, Award, 3 March 2010 (Fortier, Orrego Vicuña, Lowe), ¶ 276.

[860] **CL-0050**, *Ioannis Kardassopoulos v. Republic of Georgia,* ICSID Case No. ARB/05/18, Award (Fortier, Orrego Vicuña, Lowe), 3 March 2010, ¶ 277.

[861] **CL-0089**, *UAB Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal (Patocchi, Reinisch, Wordsworth), 22 December 2017, ¶ 809.

[862] **CL-0089**, *UAB Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal, 22 December 2017 (Patocchi, Reinisch, Wordsworth), ¶ 809.

[863] **CL-0041**, *Flemingo DutyFree Shop Private Limited v. Republic of Poland,* PCA Case No. 2014-11, Award, 12 August 2016 (Kühn, Townsend, van Houtte), ¶ 442.

[864] **RL-0044**, *InterTrade Holding GmbH v. Czech Republic*, PCA Case No. 2009-12, Final Award, 28 May 2012 (Fortier, Alvarez, Stern), ¶ 183.

[865] *See, e.g.*, **RL-0042**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 169 (emphasizing that "during the tender process, the SCA acted like any contractor trying to achieve the best price for the services it was seeking").

[866] *See, e.g.*, **RL-0042**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 169.

[867] *See, e.g.*, **RL-0085**, *Kristian Almås and Geir Almås v. Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016 (Crawford, Mestad, Reinisch), ¶¶ 214–267 ("[T]ermination was not an exercise of public power but of a purported contractual right. The management of real property, including the exercise of the contractual right to terminate a lease, derives from the general law; it is a capacity of any entity that holds and rents out land.").

[868] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 5. *See also* **RER-01**, Monteza Expert Report, ¶ 251.

[869] Memorial, ¶ 378.

governmental function; and Claimant has not identified any other function that Petroperú was empowered by Peruvian law to perform that in fact involved the exercise of governmental authority.

391. As conceded by Claimant[870] and affirmed by Dr. Monteza,[871] Petroperú is authorized to carry out "**business** activit[ies]"[872] (emphasis added). Unlike the examples of governmental functions cited by Claimant, Petroperú's activities are purely commercial in nature and could be carried out by any private entity. In particular, Petroperú's main functions include the negotiation of contracts for the exploration and exploitation of oil and gas resources, and the purchase and sale of crude oil and crude oil products.[873]

392. Claimant's main argument under ILC Article 5 appears to be that Petroperú's role as supplier of last resort is designed to serve the public interest.[874] However, the fact that an activity serves the "public interest" in some fashion does not *ipso facto* render it a "governmental" activity: that is insufficient to meet the functional test of attribution under customary international law. As explained by the *Hamester v. Ghana* tribunal:

> It is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act. In this regard, the Tribunal shares the view expressed by the tribunal in *Jan de Nul*, when it stated that: "(w)hat matters is not the '*service public*' element, but the use of '*prérogatives de puissance publique*' or governmental authority."[875]

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[870] Memorial, ¶ 378.

[871] **RER-01**, Monteza Expert Report, ¶ 304.

[872] **Ex. R-0039**, Peru's Constitution, Art. 60.

[873] *See* **Ex. MTQ-0026**, Estatuto Social de Petróleos del Perú – PETROPERÚ, aprobado por la Junta General de Accionistas, 18 October 2010, Art. 4.

[874] *See* Memorial, ¶ 378.

[875] **RL-0043**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (Stern, Cremades, Landau), ¶ 202. *See also* **CL-0006**, ILC, *Yearbook of International Law Commission*, 2001, vol. II, Part Two, Art. 5, comment 7 ("[T]he internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category."); **RL-0044**, *InterTrade Holding GmbH v. Czech Republic*, PCA Case No. 2009-12, Final Award, 28 May 2012 (Fortier,

393. Although the Peruvian law principle of subsidiarity is admittedly designed to serve the public interest, "what matters" here (to borrow the phrase of the *Jan de Nul v. Egypt* tribunal quoted above) is that Petroperú is authorized to carry out *business* activities[876] rather than "*prérogatives de puissance publique*."[877] There is no exercise of governmental authority in Petroperú's role as "supplier of last resort," and Claimant has therefore failed to satisfy the first requirement of the attribution test under Article 5 of the ILC Articles.

394. The *second* requirement under ILC Article 5 is that the entity was "acting in [a governmental] capacity **in the particular instance**"[878] (emphasis added). In this respect, it is not sufficient for a claimant seeking to attribute actions to a State to establish that the relevant person or entity was exercising governmental functions *as a general matter*. Rather, such claimant must establish that the relevant person or entity was *actually* exercising those functions "in the particular instance," i.e., when carrying out the allegedly unlawful act that forms the basis for the claimant's claims.[879]

395. The fact that Claimant failed to satisfy the *first* requirement (i.e., proving that Petroperú was empowered to exercise governmental authority) means *a fortiori* that Claimant has fails to satisfy the *second* requirement (i.e., showing that Petroperú was

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Alvarez, Stern), ¶¶ 181–83 ("State entities are always deemed to act in the public interest, but this, in and by itself, is not sufficient under Article 5 to attribute all their acts to the State. In some of its activities, a state enterprise might exercise elements of governmental authority, in others it might not. The specific activities need to be scrutinized.").

[876] *See* **Ex. R-0039**, Peru's Constitution, Art. 60; **Ex. R-0144**, INDECOPI, Resolution No. 3134-2010/SC1/INDECOPI, 29 November 2010, ¶ 24; **RER-01**, Monteza Expert Report, ¶¶ 250, 279, 304. *See also* Quiñones Report, ¶ 240 ("In the precedent, the INDECOPI Court states that no activity carried out by a public company or an entity of the Administration that qualifies as the exercise of a public power or of ius imperium derived from the sovereign power of the State shall constitute business activity, nor therefore shall the principle of subsidiarity be applicable. Nor shall any welfare activity carried out by constitutional mandate as part of the obligations of the State be regarded as business activity . . . ").

[877] **RL-0043**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (Stern, Cremades, Landau), ¶ 202.

[878] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 5.

[879] **CL-0006**, ILC, *Yearbook of International Law Commission*, 2001, vol. II, Part Two, Art. 5, comment 5 ("If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage").

actually exercising governmental authority in carrying out the specific conduct of which Claimant complains).[880] Indeed, in its arguments on attribution, Claimant does not even identify—let alone analyze—the precise conduct by Petroperú that it alleges involved the exercise of governmental authority in the particular instance.[881] Such failure to meet its burden of proof is fatal to Claimant's attribution claim.[882]

396. In any event, the facts show that the conduct by Petroperú of which Claimant complains elsewhere in the Memorial in fact did *not* constitute any exercise of governmental authority. Specifically, and as noted above, Claimant complains at various points in the Memorial that Petroperú (i) entered into commercial contracts with CEPSA for the purchase of feedstock,[883] (ii) entered into a commercial contract with Aguaytía Energy for the purchase of feedstock,[884] (iii) processed the feedstock and produced refined oil products at Petroperú's refineries,[885] (iv) sold such refined products on the markets,[886] and (v) terminated the Refinery Lease Agreement when Maple Gas refused to make its contractual rent payments.[887] These are *precisely* the types of activities that previous tribunals have characterized as "commercial": the negotiation of contracts,[888] "conduct in the course of the performance of [a]

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[880] **RL-0045**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 (Griffith, Evan Jaffe, Knieper), ¶ 296 ("Since Emlak did not exercise any governmental authority *per se*, it cannot be the case that it exercised specific governmental authority with respect to the acts that the Claimant asserted constituted violations of the BIT").

[881] *See* Memorial, ¶¶ 377–78 (only stating that "Petroperú is [] equivalent to "the State" for purposes of Article 60 [of the Peruvian Constitution]").

[882] *See* **RL-0045**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 (Griffith, Evan Jaffe, Knieper), ¶ 299 ("[T]he Claimant did not explain precisely how the relevant elements of governmental authority were exercised in Emlak's administration of the Contract for the purposes of attribution of those acts to the State under Art 5 ILC Articles").

[883] *See, e.g.*, Memorial, ¶¶ 428, 430.

[884] *See, e.g.*, Memorial, ¶¶ 428, 436.

[885] *See, e.g.*, Memorial, ¶ 437.

[886] *See, e.g.*, Memorial, ¶ 431.

[887] *See, e.g.*, Memorial, ¶ 484.

[888] *See, e.g.*, **RL-0042**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 169 (emphasizing that "during the tender process, the SCA acted like any contractor trying to achieve the best price for the services it was seeking").

[c]ontract,"[889] and the termination of a lease agreement.[890] Thus, Petroperú's "acts were connected only to commercial activities and not to the exercise of its governmental powers."[891]

397. For the foregoing reasons, Petroperú's conduct is not attributable to Peru under customary international law pursuant to Article 5 of the ILC Articles, and therefore cannot constitute a breach of Peru's international obligations under the Treaty.

2. Petroperú's conduct is also not attributable to Peru under Article 8 of the ILC Articles

398. Claimant also asserts that Petroperú's conduct is attributable to Peru under Article 8 of the ILC Articles,[892] which provides as follows:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[893]

399. In interpreting whether particular conduct has met the standard under ILC Article 8, tribunals have applied the "'effective control' test . . . which requires both a general control of the State over the person or entity and a specific control of the State over the act of attribution which is at stake."[894] In this respect, "[i]nternational jurisprudence is very demanding;"[895] "tribunals assessing the applicability of [A]rticle 8 [of the ILC

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[889] *See, e.g.*, **RL-0042**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 169.

[890] *See, e.g.*, **RL-0085**, *Kristian Almås and Geir Almås v. Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016 (Crawford, Mestad, Reinisch), ¶¶ 214–67 ("[T]ermination was not an exercise of public power but of a purported contractual right. The management of real property, including the exercise of the contractual right to terminate a lease, derives from the general law; it is a capacity of any entity that holds and rents out land.").

[891] **RL-0044**, *InterTrade Holding GmbH v. Czech Republic*, PCA Case No. 2009-12, Final Award, 28 May 2012 (Fortier, Alvarez, Stern), ¶ 183.

[892] Memorial, ¶ 382. As noted in **Section III.D.1** above, ILC Article 8 is not applicable based upon Treaty Article 10.1.2.

[893] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 8.

[894] **RL-0046**, *Georg Gavrilović and Gavrilović D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 (Pryles, Alexandrov, Thomas), ¶ 828.

[895] **RL-0042**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 173.

Articles] in investment treaty claims between 2010 and 2020 have invariably endorsed the high threshold of 'effective control'."[896]

400. In accordance with this high threshold, the mere fact that a State owns an entity is not a sufficient basis for attribution.[897] The ICJ affirmed that a party asserting attribution under Article 8 must instead

> show[] that this "effective control" was exercised, or that the State's instructions were given, in respect of **each operation in which the alleged violations occurred**, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.[898] (Emphasis added)

401. Accordingly, in the case concerning *Military and Paramilitary Activities in Nicaragua (Nicaragua v. United States)*, the ICJ emphasized that "even the general control by the respondent State over a force with a high degree of dependence on it" was not sufficient; rather, the Court required evidence "that the [State] directed or enforced the perpetration of the [wrongful] acts."[899]

402. Here, Claimant has offered no evidence that Peru exercised "specific control . . . over the act of attribution which is at stake."[900] Instead, Claimant baldly asserts that

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[896] **RL-0109**, Esmé Shirlow and Kabir Duggal, "*SPECIAL ISSUE ON 20TH ANNIVERSARY OF ARSIWA: The ILC Articles on State Responsibility in Investment Treaty Arbitration*," ICSID REVIEW (2022), p. 384.

[897] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 5. *See also* **RL-0045**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 (Griffith, Evan Jaffe, Knieper), ¶ 309 ("[T]he relevant enquiry remains whether Emlak was being directed, instructed or controlled by TOKI with respect to the specific activity of administering the Contract with Tulip JV in the sense of sovereign direction, instruction or control rather than the ordinary control exercised by a majority shareholder acting in the company's perceived commercial best interests").

[898] **RL-0048**, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment, 26 February 2007, § 400. *See also* **RL-0047**, *Marfin Investment Group Holdings S.A., et al., v. Republic of Cyprus,* ICSID Case No. ARB/13/27, Award (Redacted), 26 July 2018 (Hanotiau, Edward, Price), ¶ 679 ("However, Claimants have not demonstrated with evidence that these *specific* acts that they challenge were directed or controlled by Respondent. The evidence put forward by Claimants attempts to show Respondent's overall control over Laiki").

[899] **RL-0110**, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ, Judgment, 27 June 1986, ¶ 114.

[900] **RL-0046**, *Georg Gavrilović and Gavrilović D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 (Pryles, Alexandrov, Thomas), ¶ 828.

"Petroperú was . . . acting under the instructions of the government with respect to the conduct at issue here."[901] Critically, Claimant concedes that it has no evidence to support its argument that Peru directed or controlled Petroperú's specific conduct at issue, and that it is merely *speculating* about such direction or control:

> In these circumstances, the **most plausible explanation** for Petroperú's ongoing conduct was that it was at the instructions of the executive branch.[902] (Emphasis added)

403. In other words, Claimant's attribution argument rests solely on its belief that the "the most plausible explanation" of the Petroperú conduct it alleges is that the State directed or controlled such conduct. However, a party's own subjective belief, and/or self-serving characterization, is self-evidently insufficient to satisfy the "high threshold of 'effective control'" under customary international law.[903] Petroperú's conduct cannot be attributed to Peru under Article 8 of the ILC Articles, and therefore cannot constitute a breach of Peru's international obligations under the Treaty.

C. Claimant's claim that Peru violated the Minimum Standard of Treatment Provision is meritless and should be rejected

404. In addition to the fact that Claimant's composite breach claim fails at the threshold (because there is no underlying pattern or purpose that links the various measures invoked by Claimant as the basis of its composite act theory), Claimant's claim under the Minimum Standard of Treatment Provision (Treaty Article 10.5) is in any event meritless, and should be rejected for that reason as well.

405. The threshold under customary international law, and under investment treaty law, for a breach of the minimum standard of treatment obligation is high. The customary international law minimum standard of treatment establishes "a floor, an absolute bottom, below which conduct is not accepted."[904] None of the acts attributable to

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[901] Memorial, ¶ 391.

[902] Memorial, ¶ 394.

[903] **RL-0109**, Esmé Shirlow and Kabir Duggal, "*SPECIAL ISSUE ON 20TH ANNIVERSARY OF ARSIWA: The ILC Articles on State Responsibility in Investment Treaty Arbitration*," ICSID REVIEW (2022), p. 384.

[904] **RL-0053**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 616.

PERUPETRO, Petroperú, the MINEM or any other State organ—whether assessed together or separately—can reasonably be characterized as falling below such a "floor, or absolute bottom."[905] Peru has complied with its obligation to accord minimum standard of treatment to Claimant's investment.

1. The Treaty expressly prescribes the customary international law minimum standard of treatment

406. The Minimum Standard of Treatment Provision (Treaty Article 10.5) articulates the States Parties' obligation to "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment."[906] Article 10.5 explicitly clarifies that this standard does not require treatment more favorable to the investor than that owed under the customary international law minimum standard of treatment:

> 2. **For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens** as the minimum standard of treatment to be afforded to covered investments. **The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard**, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world . . . ."[907] (Emphases added)

[905] As noted above, Claimant appears to allege that the conduct of which it complains "taken either separately or together, constitute a breach of the MST." Memorial, ¶ 410. Peru reiterates that, whether taken "separately or together," the conduct of which Claimant complains does not amount to a violation of the Treaty, for the reasons shown in **Sections IV.B–D** herein.

[906] **RL-0001**, Treaty, Art. 10.5.1.

[907] **RL-0001**, Treaty, Art. 10.5.2.

407. Further, Treaty Annex 10-A confirms that "'customary international law' generally, and also "as specifically referenced in Article 10.5," results from a general and consistent practice of States that they follow from a sense of legal obligation."[908]

408. Claimant's submissions with respect to the MST are somewhat confusing. Claimant begins by acknowledging that Article 10.5 prescribes the customary international law MST,[909] and quotes the *Waste Management v. Mexico (II)* tribunal's reasoned analysis of the MST (discussed below).[910] But Claimant then changes course, arguing that "the MST and the autonomous fair and equitable treatment ("**FET**") standard . . . have converged over time."[911]

409. However, Claimant's attempt to render the MST standard less stringent must be rejected. It is a well-established canon of treaty interpretation that a clause must be interpreted so as to give meaning to its terms.[912] Claimant's proposed interpretation of Treaty Article 10.5 fails to give any *effet utile* to its terms, and specifically to the

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[908] **RL-0001**, Treaty, Annex 10-A.

[909] *See* Memorial, ¶ 400.

[910] Memorial, ¶ 405.

[911] Memorial, ¶ 407.

[912] *See, e.g.*, **RL-0118**, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (Nariman, Bernardini, Torres Bernárdez), ¶ 165 ("Nothing is better settled as a common canon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. This is simply an application of the wider legal principle of effectiveness which requires favouring an interpretation that gives to every treaty provision an '*effet utile*.'"); **RL-0119**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999 (Buergenthal, Bernardini, Bucher), ¶ 39 (stating that an investment treaty provision "must be deemed to have some meaning as required under the principle of effectiveness (*effet utile*)."); **RL-0120**, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award, 21 August 2007 (von Wobeser, Zalduendo, Reisman), ¶ 240 ("Based on the principle of . . . effet utile, all provisions of a treaty should be interpreted in a manner that gives them full effect, with the understanding that they were introduced into the text for a specific reason."); **RL-0121**, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, WTO AB-1996-1, 22 April 1996, p. 23 ("One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.") (*citing Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania)*, 1949 I.C.J. Reports, p. 24); **RL-0122**, *Case concerning the Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, ICJ, Judgment, 3 February 1994, p. 23; **RL-0123**, United Nations, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1966), p. 219.

express reference therein to "the customary international law minimum standard of treatment."[913] If the MST had not been construed by the Treaty Parties as being different from the autonomous FET standard, they would not have needed to refer in this clause to anything other than FET (as has been done in hundreds of treaties). Instead, the Treaty Parties used the formula "treatment in accordance with customary international law, including fair and equitable treatment,"[914] which was intended to signal a reference to fair and equitable treatment as construed under customary international law, rather than the modern autonomous standard. Consistent with the principle of effectiveness, previous tribunals have distinguished between the MST under customary international law and the autonomous FET standard.[915] For example, the *Cairn Energy v. India* tribunal emphasized that

> a difference must be drawn between treaties that expressly refer to the MST under customary international law (such as NAFTA), and those (such as this one) which refer only to "fair and equitable treatment". In accordance with the principle of *effet utile*, the use of this different wording must have some meaning.[916]

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[913] **RL-0001**, Treaty, Art. 10.5.2.

[914] **RL-0001**, Treaty, Art. 10.5.1.

[915] *See, e.g.*, **RL-0111**, *Global Telecom Holding S.A.E. v. Government of Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020 (Affaki, Born, Lowe), ¶ 484 ("Dealing first with Canada's argument that the fair and equitable treatment standard set out in the BIT is limited to the minimum standard of treatment under customary international law, the Tribunal concludes that there is no basis for such an interpretation. Any such limitation runs counter to the explicit terms used in Article II(2)(a) and to the ordinary meaning to be given to those terms in their context and in the light of the BIT's object and purpose."); **CL-0064**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 247 ("The Tribunal does not accept the interpretation of Respondent, which reduces the FET clause of Article 2(1) of the 1980 BIT to minimum standard of treatment or to prohibit denial of justice. Respondent's arguments find no basis in Article 2(1) of the 1980 BIT nor in the object and purpose of the 1980 BIT. Respondent can also not rely on jurisprudence."); **RL-0023**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019 (Böckstiegel, Reinisch, Sands), ¶ 425 ("The 'commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment' (FET) is mentioned expressly as a separate obligation, as is indicated by the word 'also' introducing the obligation that follows. The express inclusion of this commitment in Article 10 also clarifies that its standard is autonomous, and beyond the MST.").

[916] **RL-0059**, *Cairn Energy PLC and Cairn UK Holdings Ltd. v. Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020 (Lévy, Alexandrov, Thomas), ¶ 1702.

410. Although the *Cairn Energy* tribunal expressed the view that there has been a certain degree of convergence between the minimum standard of treatment and the autonomous FET standard, it noted "with confidence" that "as a matter of pure treaty interpretation, 'fair and equitable treatment', unlinked to the minimum standard of treatment or customary international law, is a more capacious formulation."[917]

411. In attempting to broaden the scope of the obligation contained in Article 10.5, Claimant relies only on three awards.[918] One of those—the *Eco Oro v. Colombia* award—directly contradicts Claimant's stated position. Specifically, the tribunal in that case stated that it

> accept[ed] that Colombia is under no obligation to exceed this standard and, as it is not considering an autonomous treaty standard of FET but a "minimum" standard . . . .[919]

412. The other two cases—*Merrill & Ring v. Canada* (2002) and *Pope & Talbot v. Canada* (2010)—concerned the interpretation of NAFTA, and neither tribunal held that the autonomous FET and customary international law MST had converged. To the contrary, the *Merrill & Ring v. Canada* tribunal specifically noted that the Free Trade Commission had issued an interpretation that ensured that the relevant provision was linked "with customary law **only**"[920] (emphasis added).

413. Claimant's attempt to loosen the MST standard by reference to the autonomous FET standard thus runs contrary to the text of the Treaty and the weight of the relevant jurisprudence (including even the case law on which Claimant relies).

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[917] **RL-0059**, *Cairn Energy PLC and Cairn UK Holdings Ltd. v. Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020 (Lévy, Alexandrov, Thomas), fn. 2146.

[918] Memorial, ¶ 407, fn. 542.

[919] **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 745.

[920] **CL-0060**, *Merrill and Ring Forestry L.P. v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010 (Orrego Vicuña, Dam, Rowley), ¶ 189.

2. The threshold for breach of the customary international law minimum standard of treatment is high

414. As recognized by other tribunals,[921] the legal standard articulated by the tribunal in *Waste Management v. Mexico (II)* reflects contemporary State practice and *opinio juris*. In a passage partially quoted by Claimant, that tribunal emphasized the high threshold for a breach of MST:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant **if the conduct 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. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[922] (Emphasis added)

415. In other words, the conduct "must be sufficiently **egregious and shocking**—a **gross** denial of justice, **manifest** arbitrariness, **blatant** unfairness, a **complete lack** of due process, **evident** discrimination, or a **manifest** lack of reasons—so as to fall below accepted international standards"[923] (emphases added). In this respect, the MST is, as its name suggests, "a floor, or absolute bottom, below which conduct is not accepted."[924]

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[921] *See, e.g.*, **RL-0028**, *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016 (Kaufmann-Kohler, Brower, Landau), ¶ 501 ("Having considered the Parties' positions and the authorities cited by them, the Tribunal is of the opinion that the decision in Waste Management II correctly identifies the content of the customary international law minimum standard of treatment found in Article 1105.").

[922] **CL-0092**, *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98.

[923] **RL-0053**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 616.

[924] **RL-0053**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 615.

416. One implication of the *Waste Management (II)* tribunal's analysis, quoted above, is that a "failure to satisfy requirements of national law does not necessarily violate international law."[925] Accordingly, as affirmed by the *Eco Oro Minerals Corp. v. Republic of Colombia* tribunal (cited by Claimant[926]),

> The treatment complained of must therefore be **unacceptable from an international perspective** whilst set against the **high measure of deference that international law extends to States** to regulate matters within their own borders.[927]

417. Claimant alleges that the customary international law MST protects against (i) "arbitrary conduct," (ii) "conduct that lacks due process," and (iii) "bad faith conduct."[928] While MST may in certain circumstances protect against these types of conduct, as shown below Claimant seeks to dilute the applicable standard for each element of MST.

418. Arbitrariness (or gross unreasonableness or unfairness). Claimant refers to various purported definitions of "arbitrariness," but carefully omits reference to "the most authoritative interpretation of international law [on arbitrariness]"[929]—namely, that articulated by the International Court of Justice in *Elettronica Sicula S.p.A.* (*United States of America v. Italy)*:

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful

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[925] **RL-0052**, *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004 (Reisman, Lacarte Muró, Paulsson), ¶ 97 (referring to the *Waste Management* award, at ¶ 98).

[926] *See, e.g.*, Memorial, ¶ 412, fn. 548.

[927] **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 755. *See also* **CL-0074**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (1976), Partial Award, 13 November 2000, ¶ 263 ("[The] determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.").

[928] Memorial, Titles 1, 2, 3, pp. 86–88.

[929] **CL-0080**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 318. Claimant cites an excerpt of the *Eco Oro* case (Memorial, ¶ 412, fn. 548), but fails to mention that the tribunal in that case identified the *ELSI* decision as "[t]he starting point for this analysis." **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 758.

> disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.[930]

419. Arbitral tribunals have overwhelmingly adopted and applied the ICJ's definition of arbitrariness when adjudicating MST claims,[931] including in at least one case cited by Claimant.[932] Among these tribunals are many that applied NAFTA, which contains an MST obligation.[933]

420. Amongst the latter is that in *Joshua Dean Nelson v. Mexico*, which explained that "[t]he implication of the ELSI standard is that arbitrariness requires more than a showing of illegality under domestic law. Besides illegality, arbitrariness also demands a showing that the challenged State measure "manifest[ly] lack[s] of reasons" or seeks an "ulterior motive."[934]

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[930] **RL-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), ICJ, Judgment, 20 July 1989, ¶ 128.

[931] *See, e.g.*, **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 758; **RL-0055**, *Philip Morris Brand SÀRL, et al., v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (Bernardini, Born, Crawford), ¶ 390 ("As noted by the Respondent, the ELSI judgment is most commonly referred to by investment tribunals' decisions as the standard definition of 'arbitrariness' under international law. Based on this definition, the Tribunal concludes that the Challenged Measures are not 'arbitrary,' for the following reasons"); **RL-0057**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (Böckstiegel, Lever, Dupuy), ¶ 176; **RL-0058**, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L., et al., v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, 14 December 2017 (McLachlan, Fortier, Kohen), ¶ 308; **CL-0036**, *El Paso Energy International Co. v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 319; **RL-0002**, *Mobil Exploration and Development Inc., et al., v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013 (Möller, Bernardini, Brotóns), ¶ 873; **RL-0059**, *Cairn Energy PLC and Cairn UK Holdings Ltd. v. Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020 (Lévy, Alexandrov, Thomas), ¶ 1741.

[932] **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 758 ("The starting point for this analysis is the decision of the International Court of Justice in Elettronica Sicula S.p.A. ('ELSI')").

[933] **CL-0022**, *Cargill, Incorporated v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 291; **RL-0053**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 625, fn. 1276.

[934] **CL-0052**, *Joshua Dean Nelson and Jorge Blanco v. United Mexican States,* ICSID Case No. UNCT/17/1, Award, 5 June 2020, ¶ 324. *See also* **RL-0053**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 803; **CL-0022**, *Cargill, Incorporated v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 293.

421. Other tribunals have affirmed that "arbitrariness requires a qualitatively significant breach, an abuse of power,"[935] as evidenced by a measure manifestly without reason[936]—based on caprice[937] or bad faith.[938] For instance, in the *Eco Oro* case cited by Claimant, the tribunal found that the State had acted arbitrarily by (i) defying an order of the Constitutional Court in "a wilful neglect of Colombia's statutory duty,"[939] (ii) thus leaving claimant "in limbo . . . with no certainty" about its investment,[940] (iii)

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[935] **RL-0060**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/14/32, Award, 5 November 2021 (van Houtte, Schill, Bernárdez), ¶ 348. *See also* **RL-0061**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 (van den Berg, Wälde, Ariosa), ¶ 194 (requiring conduct that "that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards").

[936] *See* **RL-0053**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 763 (holding that the M-Opinion was not arbitrary because "it was thought by the government that litigation was likely"), ¶¶ 804–05 (stating that "[t]he fact that [the bill] mitigates some, but not all, harm does not mean that it is manifestly without reason or arbitrary"), ¶¶ 817–18 (holding that the fact that the SMGB Regulations excluded non-metallic mines from regulation "does not appear to be manifestly without reason" and that the inquiries behind these regulations were "sufficient to achieve the stated goal of the board: 'to ensure that there would be no future mines that would be left in an unreclaimed condition'").

[937] **RL-0062**, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (Mourre, Ramírez, Jana), ¶ 527 ("As noted above, the Arbitral Tribunal considers that, effectively, arbitrary conduct as a violation of the fair and equitable treatment standard under the APPRI is that which is not in accordance with the law, justice or reason, but rather is **based on whim**. In this sense, it is not enough to allege that the State erroneously applied the national regulatory framework or that its authorities made questionable decisions under local law, but rather **it must be established that there has been a deliberate repudiation of the aims and objectives of a government policy. This is what differentiates arbitrary conduct from merely illegal conduct**. The Arbitral Tribunal also considers that the actions of the State must be analyzed in a global manner and, therefore, it must take into account the resources that the State has made available to the investors and the use that the latter have made of them to try to correct any objectionable application of the regulatory framework" (emphases added)).

[938] *See* **RL-0060**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/14/32, Award, 5 November 2021 (van Houtte, Schill, Bernárdez), ¶ 348 ("Indicators for arbitrariness in this sense can be, for example, a **manifest lack of competence** of the host State's authority for taking the measure in question, **bad faith** applications of domestic law, or decisions that appear so manifestly incorrect that they must be deemed to constitute an a**buse of power**" (emphases added)); **RL-0062**, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (Mourre, Ramírez, Jana), ¶ 527 ("In this sense, it is not enough to allege that the State erroneously applied the national regulatory framework or that its authorities made questionable decisions under local law, but rather it must be established that there has been a deliberate repudiation of the aims and objectives of a government policy.").

[939] **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 820.

[940] **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 806.

"with no reason given by Colombia,"[941] and (iv) "without serving any apparent purpose."[942]

422. Due process. The *Waste Management (II)* tribunal held that establishing a violation of MST requires showing a violation of due process that is so extreme that it "offends judicial propriety":

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct . . . 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.[943] (Emphasis added)

423. Importantly in this regard, as the tribunal in *International Thunderbird Gaming v. Mexico* underscored, "[t]he administrative due process requirement is lower than that of a judicial process."[944] More specifically, as stated in *Joshua Dean Nelson v. Canada* (another case on which Claimant relies[945]):

> Lack of due process may occur in the context of judicial and administrative proceedings. However, the standard is different in each scenario. The lack of due process has to lead: (i) "to an outcome which offends judicial propriety […] in judicial proceedings" or "to […] a **complete lack of transparency and candour in an administrative process**."[946] (Emphasis added)

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[941] **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 810.

[942] **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 820.

[943] **CL-0092**, *Waste Management, Inc. v. United Mexican States ("Number 2"),* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98.

[944] **RL-0061**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 (van den Berg, Wälde, Ariosa), ¶ 200.

[945] Memorial, ¶ 415, fn. 552.

[946] **CL-0052**, *Joshua Dean Nelson and Jorge Blanco v. United Mexican States,* ICSID Case No. UNCT/17/1, Award, 5 June 2020, ¶ 358.

424. Thus, a mere "administrative irregularity . . . does not attain the minimum level of gravity required under [the MST obligation]."[947]

425. Relying on the *Gold Reserve v. Venezuela* award, Claimant seeks to lower the threshold for finding a violation of the Treaty, by arguing that notice and an opportunity to be heard are required.[948] Claimant's reliance on that case is misplaced, however. The *Gold Reserve* tribunal was interpreting a free-standing FET obligation under a bilateral investment treaty, and thus was applying the broader, *autonomous* FET standard.[949] In doing so, the *Gold Reserve* tribunal relied on the allegedly "central role of an investor's legitimate expectations."[950] The tribunal emphasized that the abrupt termination of the claimant's concession without a rational basis following Venezuela's "repeated and consistent certifications of Claimant's compliance with its obligations under the concessions" had constituted a "breach of legitimate expectations,"[951] and thus of FET.

426. Here, by contrast, the Treaty explicitly prescribes the MST. The ICJ[952] and previous tribunals, including "the majority of NAFTA tribunals,"[953] have concluded that the

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[947] *See, e.g.*, **RL-0061**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 (van den Berg, Wälde, Ariosa), ¶ 200 ("Hence, for instance, even if one views the absence of Lic. Aguilar Coronado (who signed the Administrative Order) at the 10 July hearing as an administrative irregularity, it does not attain the minimum level of gravity required under Article 1105 of the Nafta under the circumstances.").

[948] *See* Memorial, ¶ 16.

[949] The *Gold Reserve* tribunal made—without explanation—a single passing reference to MST. *See* **CL-0046**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 573.

[950] **CL-0046**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 570.

[951] **CL-0046**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 605–06. *See also id.* at ¶ 600 (relying on the fact that "MinAmb's conduct was determined by the change of State's policy inaugurated by President Chávez.").

[952] **RL-0063**, *Obligation to Negotiate Access to the Pacific Ocean*, ICJ, Award, 1 October 2018, ¶ 162 ("The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained").

[953] **RL-0028**, *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016 (Kaufmann-Kohler, Brower, Landau), ¶ 502 ("[T]he Tribunal shares the view held by a majority of NAFTA tribunals that the failure to respect an investor's legitimate expectations in and of itself

customary international law MST does not include any legal obligation to protect or act in accordance with an investor's legitimate expectations. Moreover, and in any event, Claimant has *not* alleged any breach of legitimate expectations in this case. Thus, the *Gold Reserve* decision cited by Claimant does not support the latter's submission. To establish a breach of MST, Claimant must demonstrate an outcome that offends judicial propriety (in a judicial proceeding), or a complete lack of transparency and candor in an administrative process[954]—neither of which occurred in this case.

427. Bad faith. Claimant alleges that bad faith on the part of the State "will suffice for a finding of breach of the MST."[955] Claimant adopts a strikingly casual approach to the notion of bad faith, asserting that it must automatically be deemed to exist "[w]here a State fails to give the true reasons for its decisions."[956] International tribunals considering claims of bad faith begin, however, with the presumption that the State has acted in good faith.[957] The claimant must therefore produce evidence to overcome this presumption. The standard of proof by which this evidence is assessed is a uniquely "high"[958] and "demanding one;"[959] "there is no showing of bad faith absent

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does not constitute a breach of [the obligation of fair and equitable treatment]"). *See also* **RL-0053**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 620 ("Merely not living [up] to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA."); **RL-0056**, *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012 (Sureda, Eizenstat, Crawford), ¶ 219 (expressly adopting the Waste Management II articulation of MST).

954 **CL-0052**, *Joshua Dean Nelson and Jorge Blanco v. United Mexican States,* ICSID Case No. UNCT/17/1, Award, 5 June 2020, ¶ 358.

955 Memorial, ¶ 418.

956 Memorial, ¶ 420.

957 **RL-0064**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011 (Kessler, Otero, Fernández-Armesto), ¶ 95 ("As the Respondent has indicated, the exercise of the regulatory and administrative power of the State carries with it a presumption of legitimacy.").

958 **RL-0065**, *Conocophillips Petrozuata B.V., et al., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013 (Keith, Fortier, Abi-Saab), ¶ 275.

959 **RL-0066**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (I), ICSID Case No. ARB/03/29, Award, 27 August 2009 (Kaufmann-Kohler, Berman, Böckstiegel), ¶ 376. *See also* **RL-0067**, *Chemtura (formerly Crompton) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010 (Kaufmann-Kohler, Brower, Crawford), ¶ 137 ("The burden of proving these facts rests on the Claimant, in accordance with well established principles on the allocation of the burden of proof, and **the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one**" (emphasis added)).

egregious intent."[960] For example, the *Cargill v. Mexico* tribunal was able to conclude that Mexico's action was "akin to an action in bad faith" only on the basis of evidence that "the [measure] was put into effect by Mexico with the **express intention** of damaging Claimant's HFCS investment to the greatest extent possible"[961] (emphasis added).

3. The evidence shows that Peru did not violate the Minimum Standard of Treatment Provision

428. As demonstrated in **Section IV.A** above, Claimant has failed to demonstrate that the conduct of which it complains shared the requisite "underlying pattern or purpose" to qualify as a composite breach under international law.[962] In any event, in addition to failing to meet that threshold requirement, Claimant's claim of composite breach of the Minimum Standard of Treatment Provision is meritless, and must therefore be dismissed for that reason as well.[963]

429. Claimant's claim proceeds in three parts. *First*, it complains that Petroperú acted arbitrarily and abused its role of supplier of last resort by preventing Maple Gas from acquiring feedstock. This claim fails inter alia because the vaguely described conduct of which Claimant complains in fact did *not* occur: as explained below, Petroperú did not prevent Maple Gas from obtaining feedstock. *Second*, Claimant complains of measures taken by PERUPETRO in relation to Maple Gas' attempt to acquire the Block 126 License. However, as shown below, PERUPETRO's conduct was reasonable and fully consistent with Peruvian law; Maple Gas did not acquire the Block 126 License simply because it was ineligible to do so under Peruvian law. *Third*, and finally, Claimant identifies—but does not analyze—other alleged misconduct that it alleges

[960] **RL-0068**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 (Pryles, Thomas, Bernardini), ¶ 430.

[961] **CL-0022**, *Cargill, Incorporated v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 298.

[962] **RL-0050**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271.

[963] Claimant also mentions once that the measures "taken either separately or together, constitute a breach of the MST." Memorial, ¶ 410. Peru rejects both versions of Claimant's claim, and shows in this section that there was no breach of the Minimum Standard of Treatment.

constitutes bad faith. Claimant gives short shrift to that argument for a reason, and that is that there is no evidence to support its claim.

430. Each of these three strands is now discussed in turn.

a. Petroperú did not interfere in Maple Gas' business or operation of the Pucallpa Refinery

431. Claimant's claim that Peru breached its Minimum Standard of Treatment Provision is based in large part on its generalized complaint that Petroperú "wrongfully intervening in Maple Gas's efforts to obtain feedstock for the Pucallpa Refinery."[964] This substantial component of Claimant's MST claim fails for at least the following three reasons.

(i) Claimant's claim rests on a factual premise that it not accurate

432. *First*, Claimant's argument that Petroperú "interven[ed] in Maple Gas's efforts to obtain feedstock for the Pucallpa Refinery" is false.[965] Specifically, Maple Gas argues that although it was "willing and able to purchase feedstock, Petroperú actively worked to undermine Maple Gas's efforts through its interventions to purchase feedstock from CEPSA and Aguaytía Energy."[966] However, the evidence directly contradicts Claimant's narrative, and instead shows Petroperú did *not* interfere in Maple Gas' business or operation of the Pucallpa Refinery.

433. For example, contrary to Claimant's assertion,[967] it is *not* true that Maple Gas was able or willing to purchase feedstock from Aguaytía Energy. In 2014, Maple Gas failed to pay 14 invoices issued by Aguaytía Energy totaling more than USD 5.2 million.[968] Thereafter, Maple Gas (i) refused to repay its debt to Aguaytía Energy of approximately USD 5.2 million;[969] (ii) decided to treat its contract with Aguaytía Energy as terminated;[970] but (iii) nevertheless continued to accept significant

[964] Memorial, ¶ 424.

[965] Memorial, ¶ 424.

[966] Memorial, ¶ 429.

[967] Memorial, ¶ 429.

[968] **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 43, 195(i). *See also supra* **Section II.B.4**.

[969] **Ex. R-0001**, ICC Arbitration (Award), ¶ 46. *See also supra* **Section II.D.2**.

[970] **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 57–61. *See also supra* **Section II.D.2**.

deliveries of feedstock from Aguaytía Energy. Maple Gas' breach of its contractual obligations with Aguaytía Energy continued in subsequent years. For example, it refused to pay invoices in 2016 and 2017 corresponding to the additional feedstock deliveries, thereby accruing an additional USD 13.4 million in debt to Aguaytía Energy.[971] As a result, the latter initiated the ICC Arbitration against Maple Gas, obtaining an award that ordered Maple Gas to pay it more than USD 21.6 million.[972] Understandably, Aguaytía Energy thereafter no longer wished to do business with Maple Gas, and even invested in infrastructure to be able to "redirect sales to financially stronger clients."[973] Ultimately, in 2017, Aguaytía Energy entered into a non-exclusive supply agreement with Petroperú.[974]

434. Maple Gas also managed to alienate CEPSA, its other potential long-term supplier of feedstock. By Claimant's own admission, Maple Gas was unable and/or unwilling to purchase feedstock from CEPSA in 2014. CEPSA therefore sold its feedstock to Petroperú instead,[975] and entered into a RAD services agreement with Maple Gas, pursuant to which Maple Gas was to receive and store CEPSA's feedstock.[976] After a group of investors—labelled by Claimant as the "Blue Oil Investment Group"—acquired control of Maple Gas in October 2015, they set their sights on securing a long-term feedstock supply agreement with CEPSA. However, unable to impose its commercial terms on CEPSA, Maple Gas decided to try to bully CEPSA into selling to Maple Gas.[977] It did so by abruptly ceasing its provision of RAD services to CEPSA in January 2016, and informing CEPSA that it would only resume such services if CEPSA

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[971] **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 118, 195. *See also supra* **Section II.D.2**.

[972] **Ex. R-0001**, ICC Arbitration (Award), ¶ 195. *See also supra* **Section II.D.2**.

[973] **Ex. R-0022**, "*Fitch Rates Orazul Energy Egenor's Proposed Senior Notes 'BB(EXP)'*," FITCHRATING, 17 April 2017 (accessed 22 July 2022), p. 2.

[974] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 188.

[975] *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 75 (noting that "CEPSA's decision could have been influenced by the fact that MAPLE had stopped paying AGUAYTÍA for an entire year for the supply of hydrocarbons; a situation that was widely known in the sector and that led to arbitration between those parties").

[976] *See* Memorial, ¶ 85; Rojas Witness Statement, ¶¶ 16–17; Neumann Witness Statement, ¶ 9; Katabi Witness Statement, ¶¶ 20–21. *See also supra* **Section II.B.4**.

[977] *See supra* **Section II.D.3**.

agreed to sell a large portion of its feedstock to Maple Gas.[978] This deliberate move by Maple Gas meant that CEPSA had no place to store its feedstock. But Maple Gas miscalculated, and its aggressive tactic backfired spectacularly: rather than accept Maple Gas' terms, CEPSA decided simply to suspend its production altogether,[979] and withdrew from discussions with Maple Gas concerning a long-term supply agreement.[980]

435. Furthermore, the evidence also shows—contrary to Claimant's claims—that Petroperú did *not* prevent either CEPSA or Aguaytía Energy from selling to Maple Gas. CEPSA sold its feedstock to Petroperú pursuant to short-term, *non-exclusive* supply agreements,[981] which left CEPSA free to sell its feedstock to Maple Gas. The foregoing is confirmed by the fact that CEPSA did in fact sell feedstock to Maple Gas: CEPSA entered into two short-term supply agreements with Maple Gas in 2017.[982] Similarly, after Maple Gas had destroyed its relationship with Aguaytía Energy, the latter entered into a non-exclusive agreement to supply feedstock to Petroperú.[983]

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[978] **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, p. 2. *See also supra* **Section II.D.3**.

[979] *See* **Ex. R-0128**, Letter No. CEPSA-GG-00005/16 from CEPSA (M. Ángel) to Petroperú (G. Velasquez), 12 January 2016, p. 1 ("On the date and time noted above [(i.e., 12 January 2016)], we were verbally informed by the supervision of the MAPLE Refinery that they would no longer attend to the unloading of tankers in said facilities; and therefore, we do not have empty tankers to transfer the production . . . . For this reason beyond our control, we have been forced to temporarily stop our crude oil production."). *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 71.

[980] **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016. *See also supra* **Section II.D.3**.

[981] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶¶ 187–88 ("In that regard, the Tribunal appreciates that PETROPERÚ, in submission No. 31 filed on October 24, 2019, complied with disclosure of the agreements it had entered into with CEPSA and AGUAYTÍA between March 2014 and December 2018, which appear in the file as Annexes A-118 to A-127. **In evaluating each one of the supply agreements, it is evident that they do not stipulate any exclusivity in favor of PETROPERÚ; nor can it be argued that there is disguised exclusivity**. Under those contractual arrangements, it cannot be validly concluded that the Petitioner has monopolized the purchase of the product, preventing Maple from accessing suppliers such as CEPSA and AGUAYTÍA, in order to displace it [MAPLE] from the market" (emphasis added)). *See also generally, e.g.*, **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, p. 1; **Ex. R-0023**, Petroperú-CEPSA Agreement for 305,000 barrels of crude, 11 September 2014, p. 1; **Ex. R-0114**, Oil Purchase Agreement between CEPSA and Petroperú, 8 April 2016, p. 1.

[982] *See* **Ex. CLEX-0036**, Maple – CEPSA Contract. May 24, 2017; **Ex. CLEX-0037**, Maple – CEPSA Contract. September 1, 2017. *See also* **RER-02**, Alix Damages Expert Report, ¶ 128.

[983] *See generally* **Ex. R-0127**, Petroperú-Aguaytía Energy Agreement for 365,000 barrels of Natural Gas, 28 September 2017, p. 5.

Under that agreement, Aguaytía Energy was free to determine how much crude feedstock to sell to Petroperú.[984]

436. Importantly, the fact that Petroperú did *not* intervene to prevent Maple Gas from obtaining feedstock from CEPSA or Aguaytía Energy has also been confirmed by two independent arbitral tribunals.[985] The ICC Tribunal found that there was no evidence of any efforts by Petroperú or Aguaytía Energy to interfere in Maple Gas' business.[986] The Lima Tribunal, for its part, concluded not only that there was no evidence of any attempt by Petroperú to prevent Maple Gas from obtaining feedstock,[987] but that Maple Gas had itself to blame for its commercial difficulties.[988]

437. The evidence thus disproves the core factual premise upon which Claimant's MST claim is built.[989] Accordingly, Claimant's claim that Petroperú's conduct fell below the MST must be rejected.

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[984] **Ex. R-0127**, Petroperú-Aguaytía Energy Agreement for 365,000 barrels of Natural Gas, 28 September 2017, pp. 5–6 (Agreement Arts. 2–3). *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 80 ("[T]he parties agreed only on a maximum volume, with Aguaytía being free to enter into other agreements for the sale of fuel").

[985] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 193 ("In this scenario of conflict with the natural suppliers, it is logical that the cause of the lack of access for the purchase of crude oil or the refusal of the suppliers to contract with MAPLE is the latter's own commercial conduct and not the concerted conduct by PETROPERU to displace the Respondent [Petroperú]."), ¶ 189 ("MAPLE has provided no evidence that such agreements are the result of concerted action or a top-down restrictive agreement that prevents suppliers from selling to buyers other than PETROPERU."); **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 165–68 ("There is no evidence of collusion or a conspiracy between Petroperu and Aguaytía to starve Maple of supplies and drive it out of business. . . . After the Agreement ended, as of March 1, 2016 Aguaytía was free to sell all or part of its Gasoline production to whomever it wished. . . . The claims of tortious interference and conspiracy are therefore dismissed.").

[986] **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 165–68. *See also supra* **Section II.N**.

[987] **Ex. R-0002**, Lima Arbitration (Award), ¶ 189. *See also supra* **Section II.N**.

[988] **Ex. R-0002**, Lima Arbitration (Award), ¶ 191 ("In fact, MAPLE had an exclusive supply agreement with AGUAYTÍA for a period of 30 years, which it [MAPLE] breached, leading to the AWARD of December 21, 2018, in ICC [International Chamber of Commerce] CASE No. 23137/MK"), ¶ 193 ("In this scenario of conflict with the natural suppliers, it is logical that the cause of the lack of access for the purchase of crude oil or the refusal of the suppliers to contract with MAPLE is the latter's own commercial conduct and not the concerted conduct by PETROPERU to displace the Respondent.").

[989] Claimant asserts in passing that "Petroperú was undercutting Maple Gas' prices." *See, e.g.*, Memorial, ¶¶ 132, 424. However, Claimant has provided no documentary evidence to support its claim of price-cutting, relying solely on commentary from its own witness Mr. Rojas. *See* Memorial, fn. 174. However, a bald and unsupported assertion by a witness, who neither discusses specific prices nor cites any evidence, is insufficient to substantiate a claim of price undercutting. *See* Rojas Witness Statement, ¶ 42.

(ii) Claimant bases its claims on actual or alleged conduct of Petruperú that took place before it made its investment

438. *Second*, Claimant's claim against Petroperú also fails because it appears to rest entirely on alleged conduct by Petroperú that occurred *before* Claimant's investment had even been made, and therefore cannot form the basis of a MST claim under the Treaty. The Minimum Standard of Treatment Provision requires the States Parties to accord fair and equitable treatment in accordance with the MST "to covered investments."[990] Claimant asserts that its covered investment consisted of the acquisition of indirect shareholding in Maple Gas,[991] which occurred on 15 June 2017.[992] Yet, in support of its MST claim, Claimant relies on and complains of alleged conduct that took place *before* that date (i.e., alleged interference with feedstock supply in 2015, 2016, and early 2017[993]). Under the general principle of intertemporal law, codified in ILC Article 13, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[994] As the Commentary to the ILC Articles explains,

> Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute … unless …") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.[995]

439. It stands to reason that a State measure cannot violate a Treaty with respect to an investment that has not happened yet; such a violation amounts to a chronological

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[990] **RL-0001**, Treaty, Art. 10.5.1.

[991] Memorial, ¶ 314.

[992] *See supra* **Section III.B.2**. *See also* **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017, p. 1 (showing that Jancell shares were issued to Worth Capital, with a corresponding share certificate, on 15 June 2017).

[993] In the section of its Memorial dedicated to its MST claim, Claimant carefully avoids identifying the dates on which the alleged conduct by Petroperú took place, preferring to provide general characterizations. In referring to Claimant's footnotes, it becomes clear that Claimant is discussing pre-investment events. *See, e.g.*, Memorial, ¶ 424, fn. 560 (cross-referencing paragraphs 109–17 and 124–43 of the Memorial, where Claimant describes the events of 2015 and 2016).

[994] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 13.

[995] **CL-0006**, ILC, *Yearbook of International Law Commission*, 2001, vol. II, Part Two, Art. 13, comment 1.

impossibility. Consequently, any measure invoked by Claimant that pre-dates 15 June 2017 (the effective date of Claimant's investment) cannot be the source of liability under the Treaty or customary international law.

(iii) In any event, Petroperú´s conduct did not fall below the minimum standard of treatment under customary international law

440. *Third*, even if the conduct by Petroperú of which Claimant complains could be attributed to Peru under the Treaty or customary international law (quod non), such conduct in fact did *not* fall below the MST under customary international law. Specifically, Claimant's claim that Petroperú acted arbitrarily or in bad faith is baseless.

441. As noted in **Section IV.C.2** above, arbitrary conduct is "not so much something opposed to a rule of law, as something opposed to the rule of law," as evidenced by "an act which shocks, or at least surprises, a sense of juridical propriety."[996] In attacking Petroperú's conduct, Claimant makes *no effort* to engage with this high threshold, and fails to identify any conduct "opposed to the rule of law" that would "shock . . . . a sense of juridical propriety."[997]

442. In any event, Claimant has failed to support even those arguments that it does make in support of its vague assertion of arbitrary conduct. Claimant variously alleges that Petroperú acted "contrary to Petroperú's role as the supplier of last resort," "abused" its role, and/or had "no legitimate reason" to purchase feedstock from Aguaytía Energy and CEPSA.[998]

443. Yet Claimant has not demonstrated that Petroperú acted contrary to its role as subsidiary or supplier of last resort. Claimant and its legal expert both concede that Peruvian law incorporates the principle of subsidiarity, which requires State-owned entities like Petroperú to engage in commercial activities to protect the public interest

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[996] **RL-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), ICJ, Judgment, 20 July 1989, ¶ 128.

[997] **RL-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), ICJ, Judgment, 20 July 1989, ¶ 128.

[998] Memorial, ¶¶ 424, 429.

when private companies are unable or unwilling to do so.[999] Claimant and its legal expert also correctly note that the activities of entities like Petroperú are regulated, to ensure that they are acting in the public interest and not blocking private investment.[1000] However, Claimant's legal expert makes no attempt to analyze whether or not Petroperú in fact satisfied these regulatory requirements. Indeed, in her expert report, Dra. Quiñones expressly recognizes that she did not carry out any analysis of Petroperu's conduct in the light of the subsidiary principle of Peruvian law:

> With respect to compliance with the third requirement, **it goes beyond the scope of the present report to perform a subsidiarity analysis of the activities carried out by PETROPERÚ**, since that would require the preparation of an economic study on the relevant markets in which it operates, the existence of significant barriers and the number of players competing in those markets, which lies beyond the scope of my specialization.[1001] (Emphasis added)

444. Having failed to provide an analysis of Petroperú's subsidiary conduct under Peruvian law, Claimant's claim that Petroperú acted inconsistently with its role as supplier of last resort is utterly unsubstantiated, and must accordingly be dismissed.

445. Claimant also takes issue with Petroperú's alleged pricing, complaining that (i) on the one hand, the price at which Petroperú purchased feedstock from CEPSA was too *low*,[1002] and (ii) on the other hand, that the price at which Petroperú purchased feedstock from Aguaytía Energy was too *high*.[1003] These complaints are based not on any documentary evidence or an economic analysis of the value of feedstock at the time, but rather simply on the subjective beliefs of Claimant's witnesses that Petroperú was both under- and over-paying for feedstock. The "right" price according to Maple

[999] *See* Quiñones Report, ¶ 231. *See also* **RER-01**, Monteza Expert Report, ¶ 278.

[1000] Quiñones Report, ¶ 233. *See also* **RER-01**, Monteza Expert Report, ¶¶ 281, 300.

[1001] Quiñones Report, ¶ 246.

[1002] Memorial, ¶ 430.

[1003] Memorial, ¶ 436.

Gas—not too low, not too high—apparently would have been whatever Maple Gas itself was willing to pay.

446. Claimant also adds to this complaint that Petroperú sold refined products "at lower prices than it had previously,"[1004] again providing no documentary evidence, and instead relying merely on the unsubstantiated and self-serving opinion of one of its witnesses.[1005]

447. Contrary to Claimant's claim, the evidence shows that Petroperú was in fact acting in accordance with its role as subsidiary. As described in more detail in **Section II.E** above, Petroperú was required in such role to step in to create supply where private companies were unable or unwilling to do so.[1006] Maple Gas had been producing increasingly lower volumes of refined products over time, due to (i) its dwindling supply from the Block 31 Fields,[1007] (ii) the destruction of its relationships with potential suppliers Aguaytía Energy and CEPSA,[1008] and (iii) its paralyzing debts and financial woes.[1009] Even Claimant's witnesses admit this; for example, Mr. Katabi recognizes that "[b]ecause the refinery was operating at significantly less than capacity, it was not supplying the Ucayali market with sufficient refined products."[1010]

[1004] Memorial, ¶ 424.

[1005] *See* Memorial, ¶ 132, fn. 174 (*citing* to the witness statement of Mr. Rojas). Mr. Rojas provides neither specific pricing information nor citations to evidence. *See* Rojas Witness Statement, ¶ 42 ("It was also selling refined products in the Ucayali market at prices that were lower, in terms of the difference with the benchmark price in Lima, than it had sold them for previously.").

[1006] **RER-01**, Monteza Expert Report, ¶ 242.

[1007] *See* **Ex. R-0026**, Letter No. MGP-GM-L-0009-16 from Maple Gas (K. Neuman) to PERUPETRO (R. Guzmán), 17 April 2018, p. 4 (reporting 2014 production metrics); Memorial, ¶ 84 ("By 2014, declining production from Maple Gas's oil fields and declining supply from Aguaytía Energy meant that the Pucallpa Refinery was refining significantly less feedstock than it had in the past."). *See also supra* **Sections II.B, II.D, II.E**.

[1008] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 193 ("In this scenario of conflict with the natural suppliers, it is logical that the cause of the lack of access for the purchase of crude oil or the refusal of the suppliers to contract with MAPLE is the latter's own commercial conduct and not the concerted conduct by PETROPERU to displace the Respondent [Petroperú]."). *See also supra* **Section II.D**.

[1009] *See* **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, p. 7 (reporting net loss of USD 3,649,306 in 2015), p. 60 (reporting net loss of USD 6,034,968 in 2016). *See also supra* **Section II.B.1, II.D.1**.

[1010] Katabi Witness Statement, ¶ 21 ("Because the refinery was operating at significantly less than capacity, it was not supplying the Ucayali market with sufficient refined products. Accordingly, Petroperú was acting in its role as supplier of last resort"). *See also* Neumman Witness Statement, ¶ 8.

448. Faced with this supply shortage, Petroperú did exactly what it was supposed to do: it purchased feedstock, produced refined products, and sold those refined products in the market. Critically, both Claimant and its witnesses admit that Petroperú was fulfilling this purpose of addressing the supply shortage:

> Because of the resulting decline in refined products supplied to the region by the [Pucallpa] Refinery, Petroperú gradually had begun to supply refined products to the region in its capacity as the supplier of last resort.[1011]

449. Having conceded that Petroperú had a duty to supply the market, Claimant is only able to take issue with Petroperú's *methods*, claiming that Petroperú was preventing Maple Gas from obtaining feedstock. However, the evidence shows—and the Lima Tribunal formally determined—that Petroperú had entered merely into *non-exclusive* supply agreements, which left the suppliers free to sell to Maple Gas.[1012]

450. Claimant also takes issue with Petroperú's decision to transport the feedstock to its other refineries.[1013] The argument is not clear, but the implication seems to be that Petroperú should have refined the feedstock at the Pucallpa Refinery or sold the feedstock to Maple Gas. Such argument makes no sense, because (i) Petroperú could not use the Pucallpa Refinery, which was being leased by Maple Gas;[1014] (ii) Petroperú was concerned that, under Maple Gas' operation, the Pucallpa Refinery had been the source of several sanctions by Peruvian regulator OEFA for violation of

[1011] Memorial, ¶ 84. *See also* Neumman Witness Statement, ¶ 8.

[1012] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 188 ("In evaluating each one of the supply agreements, it is evident that they do not stipulate any exclusivity in favor of PETROPERÚ; nor can it be argued that there is disguised exclusivity. Under those contractual arrangements, it cannot be validly concluded that the Petitioner has monopolized the purchase of the product, preventing Maple from accessing suppliers such as CEPSA and AGUAYTÍA, in order to displace it [MAPLE] from the market.").

[1013] *See* Memorial, ¶ 394.

[1014] *See generally* **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014.

environmental and other regulations;[1015] and (iii) in any event, Petroperú had no obligation to use the Pucallpa Refinery or to sell feedstock to Maple Gas.[1016]

451. In conclusion, there is no evidence to support Claimant's claim that Petroperú acted arbitrarily. To the contrary, the evidence shows that Petroperú acted reasonably and consistently with its purposes.

452. Claimant's accusation that Petroperú acted in bad faith likewise fails.[1017] As noted above, the State must be presumed in the first instance to have acted in good faith,[1018] and it is up to Claimant to satisfy the "demanding" standard of proof that is required to overcome that presumption.[1019] Yet Claimant's argument consists of the unsubstantiated assertion—twice repeated—that "Petroperú's conduct **appears** to have been intended to deprive the Pucallpa Refinery of the feedstock it required to operate as a refinery"[1020] (emphasis added). Thus, by its own admission, Claimant has *no* actual evidence of bad faith by Petroperú, and is relying instead on mere perceptions and speculation. Claimant therefore fails to satisfy its heavy burden of proving malintent by Petroperú.

453. As it happens, what the evidence shows is that Petroperú acted in good faith—i.e., the precise *opposite* of what Claimant asserts. As explained in **Sections II.B** and **II.D**

[1015] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 195 ("In addition, the Claimant has demonstrated a legitimate and serious interest in not contracting with MAPLE, such as the fact that by not complying with the activities required by Supreme Decree No. 017-2013-EM in the 2016-2017 period, that is, the current regulatory regulations, MAPLE's refining facilities did not offer the assurance of compliance with the minimum service standards required by the regulation.").

[1016] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 194 ("As for PETROPERU's conduct of not refining hydrocarbons at the Refinery leased by MAPLE, it must be noted that the Agreement does not contain any provision that requires PETROPERU to contract with MAPLE.").

[1017] *See* Memorial, ¶¶ 438, 478–79.

[1018] **RL-0064**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011 (Kessler, Otero, Fernández-Armesto), ¶ 95 ("As the Respondent has indicated, the exercise of the regulatory and administrative power of the State carries with it a presumption of legitimacy.").

[1019] **RL-0066**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (I), ICSID Case No. ARB/03/29, Award, 27 August 2009 (Kaufmann-Kohler, Berman, Böckstiegel), ¶ 376. *See also* **RL-0067**, *Chemtura (formerly Crompton) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010 (Kaufmann-Kohler, Brower, Crawford), ¶ 137 ("The burden of proving these facts rests on the Claimant, in accordance with well established principles on the allocation of the burden of proof, and the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one.").

[1020] Memorial, ¶ 438. *See also id*. at ¶ 478.

above, Maple Gas' depleted reserves, financial straits, regulatory sanctions, and alienation of potential suppliers led to a steep decline in Maple Gas' production of refined products.[1021] It was for this reason that Petroperú was compelled to purchase feedstock from the available suppliers and produced refined products, to fill the gap in the market.[1022]

454. Claimant further complains that Petroperú engaged in bad faith through alleged "public[] and false[] attack[s] on Maple Gas" in January and February 2018.[1023] This aspect of Claimant's claim fails for at least the following three reasons. *First*, press statements like those complained of by Claimant cannot be deemed to constitute "measures" that can give rise to liability under the Treaty. Article 10.1.1 thereof specifies that the obligations contained therein "appl[y] to **measures** adopted or maintained by a Party"[1024] (emphasis added). Previous tribunals have determined that media statements by individual officials[1025]—which are "neither legislative nor executive act[s]"—do not constitute "measures" that can violate a State's treaty obligations.[1026] For example, the *Lauder v. Czech Republic* tribunal reasoned that a letter that "expresse[d] the general opinion of a regulatory body . . . was not aimed at having, and could not have, any legal effect."[1027] Similarly, in the present case, statements attributed by the press to various Petroperú and MINEM individuals did not have, and could not have had, any legal effect. Accordingly, they are not "measures" that can give rise to liability under the Treaty.

[1021] *See* **Ex. R-0026**, Letter No. MGP-GM-L-0009-16 from Maple Gas (K. Neuman) to PERUPETRO (R. Guzmán), 17 April 2018, p. 4 (reporting a significant decline in production from 2014 to 2016).

[1022] *See* **Ex. R-0039**, Peru's Constitution, Art. 60; **RER-01**, Monteza Expert Report, ¶¶ 293–95. *See also supra* **Section II.E**.

[1023] Memorial, ¶ 482.

[1024] **RL-0001**, Treaty, Art. 10.1.1.

[1025] As stated above, Peru's arguments in **Section IV** are without prejudice to its position that the conduct of Petroperú is not attributable to Peru. For the reasons explained in **Section IV.B**, and because Petroperú employees are not government officials, their alleged statements are also not attributable to Peru.

[1026] **RL-0069**, *Tradex Hellas S.A. (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999 (Böckstiegel, Fielding, Giardina), ¶ 156. *See also* **CL-0092**, *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶¶ 161–62.

[1027] **RL-0070**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein), ¶¶ 282–83.

455. *Second*, and in any event, the reported statements do not demonstrate any bad faith at all on the part of Petroperú or the MINEM. Claimant makes three sub-arguments on this point, each of which fails:

a. Claimant alleges that a statement attributed to a Petroperú employee inaccurately represented that Maple Gas had outstanding debts with CEPSA.[1028] However, to the extent that a public statement could indeed in and of itself qualify as a "measure" under the Treaty (quod non), the *Díaz Gaspar v. Costa Rica* tribunal confirmed that "a simple inaccuracy in a public statement" will not be sufficient to violate the MST.[1029] Thus, Claimant's allegation—even if true—cannot rise to the level of a violation of MST. Furthermore, and in any event, the Petroperú's employees statements were misrepresented: as Claimant's own documents show, Petroperú sent a letter dated 16 February 2018 to the newspaper to clarify that the employee had referred only to Maple Gas' debts *with Aguaytía Energy* and had not alleged that Maple Gas owed money to CEPSA.[1030] Such clarification directly undermines Claimant's claim of bad faith. Claimant also discusses an article that purported to report on a conversation with a regional MINEM official, which indicated that the official had referred generally to "debts" by Maple Gas.[1031] However, to the extent such statement was made, there was no inaccuracy whatsoever: it was known that Maple Gas owed millions of USD to its supplier, Aguaytía Energy.[1032] Moreover, when Maple Gas sent a letter to the MINEM official about the article, it did not ask for a correction or retraction, but rather simply

[1028] *See* Memorial, ¶ 482(a).

[1029] **RL-0071**, *Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award, 29 June 2022 (Mourre, García, Jiménez), ¶ 466.

[1030] **Ex. C-0053**, Letter from PETROPERÚ to Maple, 1 March 2018, p. 3.

[1031] **Ex. C-0210**, "*Director de Energía y Minas descarta desabastecimiento de gasolina, por el cierre de ex Maple,*" Diario Impetu, 19 January 2018, p. 1.

[1032] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 195.

complained about it.[1033] It is therefore disingenuous for Claimant to allege bad faith on this basis.

b. Further, Petroperú's conduct was not pretextual. Claimant claims that Petroperú's press statements (affirming that it was acting as subsidiary to ensure continued supply) were "plainly wrong and a pretext for its abusive conduct."[1034] However, there was no pretext: Petroperú was in fact performing its role as subsidiary (as Claimant and its witnesses conceded elsewhere in their submissions[1035]), and was not acting in bad faith by informing the public of that.

c. Claimant also alleges that Petroperú acted in bad faith when it publicly stated that it would seek to arbitrate the issue of RAD Services.[1036] Such statement does not constitute or reflect any bad faith, however. Petroperú was simply noting that it planned to exercise its rights by submitting an arbitral claim concerning RAD Services, which in fact it did. Although the Lima Tribunal ultimately did not uphold Petroperú's claim, it made no suggestion or finding that Petroperú had pursued its claim in bad faith.[1037]

456. Claimant's claim of bad faith is thus baseless.

* * *

457. For all of the foregoing reasons, Claimant's claim that Petroperú's alleged conduct violated the MST must be rejected.

b. <u>PERUPETRO acted reasonably and in accordance with Peruvian laws and regulations</u>

458. Aside from its allegations about Petroperú, Claimant also claims that PERUPETRO's conduct—which it similarly attributes to Peru—fell below the MST under customary

[1033] **Ex. C-0211**, Letter from Maple Gas to the Ucayali Regional Directorate of the Ministry of Energy, attaching a Letter from CEPSA to Maple Gas, dated 17 January 2018, 22 January 2018.

[1034] Memorial, ¶ 482(b).

[1035] *See, e.g.*, Katabi Witness Statement, ¶ 21.

[1036] Memorial, ¶ 482(c).

[1037] *See generally* **Ex. R-0002**, Lima Arbitration (Award), ¶¶ 243–420.

international law. Specifically, Claimant complains of the following actions by PERUPETRO: (i) its Rectification Decision; (ii) its Reconsideration Rejection; and (iii) its alleged decision to block the transfer of the Block 126 License.[1038]

459. As shown below, the alleged actions and omissions by PERUPETRO, whether considered separately or as a composite act, do not fall below the floor or absolute bottom required by the MST under customary international law. To the contrary, PERUPETRO acted reasonably and in accordance with Peruvian law and regulations. Rather, the issue is simply that Maple Gas was not eligible, under objective Peruvian law regulations, to obtain the Block 126 License.

(i) The Rectification Decision did not violate the MST

460. As discussed in detail in **Section II.H**, and as explained by Dr. Monteza in his expert report,[1039] Maple Gas did not have any right to, or vested interests in, Block 126 under Peruvian law. Rather, as Mr. Holzer concedes, Maple Gas—in a desperate bid to save itself from financial ruin—sought to secure the transfer of the Block 126 License from Frontera, hoping that it would become a source of feedstock for the Pucallpa Refinery.[1040]

461. To be eligible to acquire the Block 126 License from Frontera, Maple Gas was required to demonstrate that it satisfied certain objective criteria contained in Peruvian regulations.[1041] To recall, those objective criteria, which were contained in the 2010 Guidelines at the time of Maple Gas' Application, required that Maple Gas show that it had the financial wherewithal (based on its audited financial statements) to explore

[1038] Memorial, ¶ 439.

[1039] **RER-01**, Monteza Expert Report, ¶ 18.

[1040] Holzer Witness Statement, ¶ 19. *See also* Holzer Witness Statement, ¶ 8.

[1041] *See supra* **Section II.H.2**; **Ex. R-0074**, Qualification Regulations, Art. 2. *See also generally* **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010. *See also* **RER-01**, Monteza Expert Report, ¶ 36.

and exploit Block 126.[1042] However, Maple Gas did not satisfy those objective criteria.[1043]

462. As discussed in **Section II.H.2** above and recalled below, Maple Gas had initially committed a mistake by presenting with its application the wrong supporting documentation (viz., unaudited pro forma financial statements, rather than audited financial statements).[1044] Then PERUPETRO, for its part, also initially made a mistake, by reviewing the incorrect financial information originally presented by Maple Gas.[1045] On the basis of the latter documentation (which differed substantially from the audited financial statements[1046]), PERUPETRO determined that Maple Gas was indeed qualified for the Block 126 License.[1047] Following an internal review of its qualification decisions, however, PERUPETRO's Qualification Commission detected the error in its original assessment concerning Maple Gas.[1048] The Qualification Commission corrected the mistake, determining—this time on the basis of Maple Gas' *audited* financial statements—that Maple Gas in fact did *not* satisfy the objective criteria under the 2010 Guidelines.[1049] In light of that conclusion, and by means of its Rectification Decision, PERUPETRO then revoked Maple Gas' qualification to hold the Block 126 License.[1050]

463. In the Memorial, Claimant complains about the Rectification Decision, but, tellingly, *makes no effort to demonstrate or even argue that Maple Gas actually satisfied the objective*

[1042] *See generally* **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010. *See also* **RER-01**, Monteza Expert Report, ¶¶ 103-05.

[1043] **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2.

[1044] *See* **Ex. C-0187**, Letter from PERUPETRO to Maple Gas, 3 July 2017, p. 1 (identifying this mistake).

[1045] **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1. *See also* **RWS-01**, Guzmán Witness Statement, ¶ 107; **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2.

[1046] *See* **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2.

[1047] *See generally* **Ex. C-0042**, Letter from PERUPETRO to Maple Gas, 11 August 2017.

[1048] *See* **RWS-01**, Guzmán Witness Statement, ¶ 108. *See also* **Ex. R-0089**, Letter No. 00040-2017-CG/OPER from Contraloría General (G. Salazar) to PERUPETRO (F. Calderón), 4 October 2017, p. 1.

[1049] *See* **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2. *See also* **RWS-01**, Guzmán Witness Statement, ¶ 108.

[1050] **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1.

criteria for qualification under Peruvian law. In other words, Claimant does not dispute the correctness of PERUPETRO's ultimate determination that Maple Gas was not eligible under Peruvian regulations to acquire the Block 126 License from Frontera. Rather, the thrust of Claimant's argument is instead that even though an applicant for a license must indeed meet objective criteria to be qualified, and even though Maple Gas did *not* meet such criteria, Maple Gas nevertheless should have been deemed qualified. This is nonsensical and contrary to Peruvian law, as explained by Dr. Monteza in his expert report.[1051]

464. Claimant's various complaints—each of which is addressed *seriatim* below—are baseless and do not come even close to satisfy the high threshold for violation of the MST.

(a) The Rectification Decision was reasoned and based upon objective criteria under Peruvian law

465. *First*, Claimant complains that the Rectification Decision "made no sense."[1052] Claimant does not purport to connect this criticism to the MST obligation, and thus utterly fails to substantiate its claim under the Treaty. In any event, contrary to Claimant's assertion, the Rectification Decision was a reasoned decision, in accordance with Peruvian law, and made perfect sense in the context and the circumstances.

466. As explained in detail in **Section II.H.2** above, (i) Peru's Office of the Comptroller General had identified an error in an unrelated qualification decision (concerning Petroperú's application for Block 192);[1053] (ii) PERUPETRO was ordered to take appropriate action;[1054] (iii) its Qualification Commission accordingly reviewed a number of its recent qualification decisions.[1055]

[1051] *See* **RER-01**, Monteza Expert Report, ¶¶ 101, 188-89.

[1052] Memorial, ¶ 458.

[1053] **Ex. R-0089**, Letter No. 00040-2017-CG/OPER from Contraloría General (G. Salazar) to PERUPETRO (F. Calderón), 4 October 2017, p. 1.

[1054] **Ex. R-0089**, Letter No. 00040-2017-CG/OPER from Contraloría General (G. Salazar) to PERUPETRO (F. Calderón), 4 October 2017, p. 1.

[1055] *See* **RWS-01**, Guzmán Witness Statement, ¶ 100.

467. Under the 2010 Guidelines, which were in force at the time that Maple Gas submitted its Application on 5 June 2017, the Qualification determination required that the Qualification Commission compare (i) the Minimum Contracting Capacity—i.e., the financial resources that would be required for the applicant company to perform the expected work on the relevant block—with (ii) a set of financial indicators (e.g., average current assets for the last two years) calculated based on the company's audited financial statements.[1056] An applicant would be deemed eligible to be granted exploration and/or exploitation rights over the relevant block, if the *highest* of its financial indicators was *equal to or higher* than the Minimum Contracting Capacity.[1057]

468. As explained above, during its review of a number of then-recent qualification determinations, PERUPETRO's Qualification Commission identified the error in its earlier assessment of the Maple Gas application.[1058] PERUPETRO explained the error to Maple Gas in the Rectification Decision:

> [U]sing the information contained in the above-referenced Audited Financial Statements, MAPLE's capacity to contract, based on the indicator of Current Assets, is USD 11.84 million, a capacity that is insufficient to meet the minimum contracting capacity to take over 100% of the participation in the License Agreement for the Exploration and Exploitation of Hydrocarbons in Block 126, which is estimated at USD 25 million . . . .[1059]

469. Neither Claimant nor Maple Gas has disputed that Maple Gas in fact did not qualify under the objective criteria imposed by the 2010 Guidelines. Thus, by their implicit admission, the decision did make sense.

[1056] **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Art. 4.1.2 by reference to Arts. 2.8–2.9; **Ex. R-0073**, PERUPETRO, Directorate Resolution No. 049-2017, 6 July 2017, Arts. 4.1.1–4.1.2.

[1057] *See* **Ex. R-0072,** PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010, Point 4.1.2.

[1058] *See* **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.2. *See also* **RWS-01**, Guzmán Witness Statement, ¶ 101.

[1059] **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1.

470. Claimant also alleges that it "made no sense" for PERUPETRO to apply the 2010—rather than the 2017—Guidelines.[1060] This criticism also fails, for at least the following five reasons.

a. There is no dispute that the 2010 Guidelines were in force at the time that Maple Gas submitted its Application (5 June 2017).[1061]

b. Maple Gas submitted its Application pursuant to the terms of the 2010 Guidelines.[1062]

c. The 2017 Guidelines could not have applied retroactively to Maple Gas' Application.[1063] As explained by Dr. Monteza, the 2017 Guidelines represent substantive rules, and as such cannot be applied retroactively—e.g., to an application (like that of Maple Gas) that was submitted *before* the entry into force of the 2017 Guidelines.[1064]

d. The argument that the 2017 Guidelines should have applied, rather than the 2010 ones, was not raised at any time by Maple Gas (whether during the qualification process, in the Request for Reconsideration, or in a subsequent judicial proceeding commenced by Maple Gas itself).[1065] Rather, it is *Claimant* that is now raising this argument for the very first time, in this arbitration.

e. Even if the 2017 Guidelines had applied—which they did not—Claimant has not alleged, let alone demonstrated, that Maple Gas satisfied the objective criteria for qualification under the 2017 Guidelines. And Claimant has not made that argument for the simple reason that Maple Gas in fact did *not* satisfy the objective criteria in the 2017 Guidelines. Under the latter, Maple Gas would have had to demonstrate that at least 50% of its average residual net worth for the preceding three years was equal to or greater than the Minimum

[1060] Memorial, ¶ 459.

[1061] *See* Memorial, ¶ 234 (asserting that the 2017 Guidelines entered into force in July 2017).

[1062] *See* **Ex. C-0037**, Letter from Frontera and Maple Gas to PERUPETRO, 7 June 2017, p. 2.

[1063] *See* Memorial, ¶ 234.

[1064] **RER-01**, Monteza Expert Report, ¶ 103.

[1065] *See:* **Ex. C-0045**, Letter from Maple to PERUPETRO, 13 December 2017, pp. 1–6; **Ex. R-0098**, Maple Gas' Request for Reconsideration of 4 January 2018 Decision, 12 April 2018, pp. 4–18.

Contracting Capacity of USD 17 million.[1066] However, Maple Gas did not meet that threshold; in fact, Maple Gas' equity balance was *negative* for each of the previous three years:

Figure 8: Maple Gas' Financial Capacity under the 2017 Guidelines[1067]

Financial Indicator under 2017 Guidelines	2014	2015	2016	Average
Equity Balance at 31 December	*Negative* USD -51.5 million	*Negative* USD -54.7 million	*Negative* USD -45.8 million	*Negative* USD -50.7 million

471. A company could qualify under the 2017 Guidelines through alternative means—e.g., if it submitted a sworn statement committing to establish an escrow account or a bank trust for an amount equal to the Minimum Contracting Capacity.[1068] Maple Gas, however, did not submit either a sworn statement or establish an escrow account, and thus did not satisfy any of these alternative criteria under the 2017 Guidelines.[1069]

472. In sum, the Rectification Decision does not even approach the threshold for arbitrariness. The reality is that a simple bureaucratic mistake was made during the Qualification Commission's initial review of Maple Gas' Application—and a mistake of that nature does not amount to arbitrariness.[1070] PERUPETRO thereafter corrected the error through the Rectification Decision, which confirmed that Maple Gas was not

[1066] **Ex. R-0073**, PERUPETRO, Directorate Resolution No. 049-2017, 6 July 2017, Art. 4.1.1. *See also* **RER-01**, Monteza Expert Report, ¶ 96; **RER-02**, Alix Damages Expert Report, ¶ 325.

[1067] **RER-02**, Alix Damages Expert Report, ¶ 326.

[1068] **Ex. R-0073**, PERUPETRO, Directorate Resolution No. 049-2017, 6 July 2017, Art. 4.1.3.

[1069] **RER-02**, Alix Damages Expert Report, ¶ 328.

[1070] **RL-0062**, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (Mourre, Ramírez, Jana), ¶ 527 ("[I]t is not enough to allege that the State erroneously applied the national regulatory framework or that its authorities made questionable decisions under local law, but rather it must be established that there has been a deliberate repudiation of the aims and objectives of a government policy. This is what differentiates arbitrary conduct from merely illegal conduct.").

eligible to acquire the Block 126 License from Frontera. Far from "an act which shocks, or at least surprises, a sense of juridical propriety,"[1071] the Rectification Decision was reasonable, reasoned, and consistent with Peruvian law.

(b) PERUPETRO did not violate due process

473. Claimant also complains that PERUPETRO should have provided Maple Gas with notice and an opportunity to be heard before PERUPETRO issued the Rectification Decision.[1072] This argument fails for at least two reasons.

474. *First*, even if PERUPETRO had been required to provide notice under Peruvian law (quod non), this alleged irregularity would not rise to the level of a breach of the MST. As affirmed by the tribunal in *Thunderbird v. Mexico*, a mere "administrative irregularity . . . does not attain the minimum level of gravity required under [the MST obligation]."[1073] As discussed above, in order to violate the MST, the conduct must rather "involve[] a lack of due process leading to an outcome which offends judicial propriety — as might be the case with . . . a complete lack of transparency and candour in an administrative process."[1074] There is no such complete lack of transparency and candour here; to the contrary, PERUPETRO provided a detailed explanation of its reasoning in the Rectification Decision.[1075] Moreover, Claimant has failed to even allege—let alone prove—that providing Maple Gas with an opportunity to be heard before issuing the Rectification Decision would have changed the outcome in any way. To the contrary, as Claimant implicitly concedes, PERUPETRO was *correct* in determining that Maple Gas did not satisfy the objective criteria for qualification. Thus, the outcome of the Rectification Decision—far from "offend[ing] judicial

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[1071] **RL-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), ICJ, Judgment, 20 July 1989, ¶ 128.

[1072] *See* Memorial, ¶ 455.

[1073] *See, e.g.*, **RL-0061**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 (van den Berg, Wälde, Ariosa), ¶ 200 ("Hence, for instance, even if one views the absence of Lic. Aguilar Coronado (who signed the Administrative Order) at the 10 July hearing as an administrative irregularity, it does not attain the minimum level of gravity required under Article 1105 of the Nafta under the circumstances.").

[1074] **CL-0092**, *Waste Management, Inc. v. United Mexican States (II),* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98.

[1075] **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1.

propriety"[1076]—was appropriate and consistent with Peruvian law, and providing Maple Gas with an opportunity to be heard could not/would not have yielded a different outcome.

475. *Second*, and in any event, Claimant's argument fails as a matter of Peruvian law. Claimant asserts that the General Administrative Procedure Law required that Maple Gas be given notice of the Rectification Decision, but the General Administrative Procedure Law did not apply to the Rectification Decision.[1077]

476. As explained by Dr. Monteza in his expert report, PERUPETRO performs functions under contractual regimes as a contractual party.[1078] In doing so, its actions are governed by the terms of the contract at issue, rather than the General Administrative Procedure Law.[1079] In the context of the process of qualifying an oil company to acquire an existing license contract, the qualification will be governed by the applicable contract.[1080]

477. Here, there was an existing contract (i.e., the Block 126 License) between PERUPETRO and Frontera, and Maple Gas was applying to obtain the transfer of that contract. Furthermore, in its Application, Maple Gas expressly invoked Clause 16 of the Block 126 License,[1081] which provides that

> [i]n case any of the companies comprising the Contractor reaches an agreement **to assign its <u>contractual</u> position** . . . it shall notify PERUPETRO of such agreement. The notice shall be accompanied by the request for qualification . . . .[1082] (Emphasis added)

[1076] **CL-0092**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98. *See also* **CL-0052**, *Joshua Dean Nelson and Jorge Blanco v. United Mexican States,* ICSID Case No. UNCT/17/1, Award, 5 June 2020, ¶ 358.

[1077] *See* **Ex. C-0046**, Letter from PERUPETRO to Maple Gas, 4 January 2018, p. 2. *See also* **RER-01**, Monteza Expert Report, ¶¶ 161–62.

[1078] **RER-01**, Monteza Expert Report, ¶ 10.

[1079] **RER-01**, Monteza Expert Report, ¶ 11.

[1080] **RER-01**, Monteza Expert Report, ¶ 12.

[1081] **Ex. C-0037**, Letter from Frontera and Maple to PERUPETRO, 7 June 2017, p. 1.

[1082] **Ex. R-0069**, Block 126 License Agreement between PERUPETRO and Frontera (*previously* True Energy Peru), 23 October 2007, Clause 16.

478. Accordingly, the General Administrative Procedure Law did not apply to Maple Gas' Application, and consequently, there was no requirement for notice or for an opportunity for Maple Gas to be heard.

479. For the aforementioned reasons, Claimant's due process argument must be dismissed.

480. Claimant also makes in passing two arguments challenging PERUPETRO's authority to issue the Rectification Decision, neither of which have merit. *First*, Claimant argues that PERUPETRO's General Manager, Mr. Guzmán, was not authorized to issue the Rectification Decision.[1083] The argument relies on the false premise that the General Administrative Procedure Law applied to the Rectification Decision, which—as explained above and by Dr. Monteza, it did not.[1084] Accordingly, this argument does not come even close to the high threshold for a breach of the MST.

481. *Second*, Claimant asserts that PERUPETRO more broadly lacked the legal authority to revoke the qualification of Maple Gas. As Dr. Monteza explains, that is inaccurate; a qualification decision merely declares that a company satisfies the objective criteria under the guidelines, but does not create *rights* over the area to which the contract relates.[1085] Claimant's argument—that PERUPETRO lacked the power to correct an earlier decision of its own that had been inconsistent with Peruvian law—is both illogical and baseless.

(c) The Rectification Decision was not pretextual

482. *Third*, despite the objective and unequivocal reasons given for the Rectification Decision, Claimant characterizes such decision as "plainly pretextual"[1086] on the asserted basis that it must have been part of the alleged conspiracy against Blue Oil.[1087] As discussed above, a State is presumed to have acted in good faith,[1088] and the burden

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[1083] Memorial, ¶ 457.

[1084] **RER-01**, Monteza Expert Report, ¶¶ 161–62.

[1085] **RER-01**, Monteza Expert Report, ¶¶ 18, 44, 189.

[1086] Memorial, ¶ 458.

[1087] *See* Memorial, ¶ 461.

[1088] **RL-0064**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011 (Kessler, Otero, Fernández-Armesto), ¶ 95 ("As the Respondent has indicated, the exercise of the regulatory and administrative power of the State carries with it a presumption of legitimacy.").

rests with the claimant to produce evidence sufficient to satisfy the uniquely "high"[1089] and "demanding"[1090] standard of proof for bad faith claims. As stressed by the *Invesmart v. Czech Republic* tribunal, "there is no showing of bad faith absent egregious intent."[1091]

483. Here, Claimant alleges that the Rectification Decision was part of a government conspiracy against Maple Gas. As noted above, however, Claimant has not submitted a shred of evidence to support its conspiracy theory. Instead, Claimant relies on an unsupported assertion by its own witness Mr. Neumann, according to whom Mr. Guzmán had stated in a meeting that the Rectification Decision had been "a top-down directive."[1092] In his witness statement in this arbitration, however, Mr. Guzmán himself categorically denies ever having made such a statement.[1093] To the contrary, Mr. Guzmán (i) ratifies the substance of the Rectification Decision, and (ii) confirms that Maple Gas' disqualification was not preordained, as he had not received any instruction or suggestion from any member of the Peruvian Government to disqualify Maple Gas.[1094] Rather, the Qualification Commission conducted an objective review of the information that had been submitted by Maple Gas; identified a material error in the analysis that had led to the previous qualification; corrected that error; and shared its conclusion with PERUPETRO's Management.[1095] The Contracting Management Department then reviewed the conclusion and agreed with the analysis of the

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[1089] **RL-0065**, *Conocophillips Petrozuata B.V., et al., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013 (Keith, Fortier, Abi-Saab), ¶ 275.

[1090] **RL-0066**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (I), ICSID Case No. ARB/03/29, Award, 27 August 2009 (Kaufmann-Kohler, Berman, Böckstiegel), ¶ 376. *See also* **RL-0067**, *Chemtura (formerly Crompton) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010 (Kaufmann-Kohler, Brower, Crawford), ¶ 137 ("The burden of proving these facts rests on the Claimant, in accordance with well established principles on the allocation of the burden of proof, and the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one.").

[1091] **RL-0068**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 (Pryles, Thomas, Bernardini), ¶ 430.

[1092] Neumann Witness Statement, ¶ 70.

[1093] **RWS-01**, Guzmán Witness Statement, ¶ 104.

[1094] **RWS-01**, Guzmán Witness Statement, ¶¶ 104–05.

[1095] **RWS-01**, Guzmán Witness Statement, ¶¶ 101, 104, 106.

Qualification Commission, and PERUPETRO'S Management properly issued the Rectification Decision.[1096]

484. Claimant has thus failed to substantiate its conspiracy theory or its claim that PERUPETRO's Rectification Decision was pretextual or made in bad faith. In any event, the conspiracy theory itself does not make any sense, even on its own terms: on Claimant's own case, Blue Oil had allegedly divested in November 2016,[1097] more than a year before the Rectification Decision. In other words, the alleged motivation to target Maple Gas—i.e., to retaliate against Blue Oil—had already long disappeared by the time of the Rectification Decision (November 2017).

485. In sum, Claimant's complaints about the Rectification Decision are illogical and utterly unfounded, and provide no evidence of conduct by PERUPETRO or the Peruvian State that was "arbitrary, grossly unfair, unjust or idiosyncratic."[1098] The reality—as Claimant well knows, and as the Rectification Decision explains—is that Maple Gas did not satisfy the objective criteria under Peruvian law to be eligible to acquire the Block 126 License.[1099] That was the one and only reason for which Maple Gas was denied such license.

(ii) The Reconsideration Rejection also did not violate the MST

486. Claimant likewise complains about PERUPETRO's Reconsideration Rejection.[1100] As discussed in **Section II.H.2**, Maple Gas submitted its Request for Reconsideration on 13 December 2017.[1101] Importantly, in that document, Maple Gas *did not argue that it was qualified—whether under the 2010 or the 2017 Guidelines—to acquire the Block 126 License*.[1102] Instead, it contented itself with the presentation of two purely procedural arguments, concerning the Law on the General Administrative Procedure.[1103] On 4

[1096] **RWS-01**, Guzmán Witness Statement, ¶ 102.

[1097] Memorial, ¶ 156.

[1098] **CL-0092**, *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98.

[1099] *See supra* **Section II.H.2**; **RER-02**, Alix Damages Expert Report, ¶ 326.

[1100] *See* Memorial, ¶ 464.

[1101] *See* **Ex. C-0045**, Letter from Maple Gas to PERUPETRO, 13 December 2017.

[1102] *See generally* **Ex. C-0045**, Letter from Maple Gas to PERUPETRO, 13 December 2017, pp. 2–6.

[1103] *See generally* **Ex. C-0045**, Letter from Maple Gas to PERUPETRO, 13 December 2017, pp. 2–6.

January 2018, PERUPETRO responded with its Reconsideration Rejection, in which it explained that the Law on the General Administrative Procedure did not apply.[1104] Claimant now submits three complaints about the Reconsideration Rejection, none of which establish a violation of the MST under the Treaty, and each of which is addressed sequentially below.

487. *First*, Claimant argues that the Reconsideration Rejection "violated due process."[1105] Here, Claimant repurposes its argument from its Request for Reconsideration (discussed above), alleging that PERUPETRO's Board of Directors, rather than its General Manager, should have issued the Reconsideration Rejection.[1106] This argument rests on the premise—already disproven above[1107]—that the General Administrative Procedure Law applied to the Reconsideration Rejection. However, as explained by Dr. Monteza in his expert report, such was not the case, because Maple Gas' Application for qualification was based on the contractual provisions of the Block 126 License, and the qualification was ancillary to the contract.[1108] The fact that Maple Gas was not a party to the contract is irrelevant, since the assignment of a contract is a contractual act.[1109] It is also irrelevant that the Qualification Certificate stated that it had been issued "in conformity with the terms of Article 5 of the Regulation on the Qualification of Oil Companies approved by Supreme Decree No 030-2004-EM;"[1110] this reference to Supreme Decree No 030-2004-EM is consistent with the requirement in Clause 16 of the contract that the prospective "assignee" must apply for qualification in accordance with Peruvian law.[1111]

[1104] **Ex. C-0046**, Letter from PERUPETRO to Maple Gas, 4 January 2018, pp. 1–2.

[1105] Memorial, ¶ 465.

[1106] Memorial, ¶ 466.

[1107] *See supra* **Sections II.H.2**, **IV.C.3.b**.

[1108] **RER-01**, Monteza Expert Report, ¶¶ 161–62.

[1109] **RER-01**, Monteza Expert Report, ¶¶ 48–51.

[1110] **C-0042**, Letter from PERUPETRO to Maple Gas, dated 11 August 2017, p. 1.

[1111] **Ex. R-0069**, Block 126 License Agreement between PERUPETRO and Frontera (*previously* True Energy Peru), 23 October 2007, Clause 16 ("The notice shall be accompanied by the request for qualification of the assignee or third party and shall enclose such additional information as may be necessary for its qualification as an oil company, in accordance with the law.").

488. *Second*, Claimant complains that the Reconsideration Rejection was incorrect, arguing that PERUPETRO was wrong to when it determined that the General Administrative Procedure Law did not apply to, or prohibit, the Rectification Decision.[1112] This argument fails on its face because Claimant is unable to show that even if the Reconsideration Rejection was incorrect (which it was not), such error decision would not suffice to overcome the high threshold to establish a violation of the MST.

489. To recall, Claimant must demonstrate that Reconsideration Request arises to level "unacceptable from an international perspective"[1113]—i.e., that it is "sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—such that it falls below accepted international standards."[1114] Thus, even if an administrative decision is inconsistent with domestic law, it will not violate the MST absent a showing of egregious misconduct.[1115] Here, Claimant's complaint is simply that the PERUPETRO decision was wrong, which—even if true—would not breach the Treaty.

490. In any event, Claimant's argument is without merit because the Reconsideration Rejection *properly* rejected Maple Gas' argument that the General Administrative Procedure Law applied: as described above and by Dr. Monteza in his expert report, PERUPETRO issued the Rectification Decision as a contracting party to the Block 126 License, and not in the exercise of administrative authority.[1116]

[1112] Memorial, ¶ 467.

[1113] **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 755. *See also* **CL-0074**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (1976), Partial Award, 13 November 2000, ¶ 263 ("[The] determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.").

[1114] **RL-0053**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 616.

[1115] **CL-0052**, *Joshua Dean Nelson and Jorge Blanco v. United Mexican States,* ICSID Case No. UNCT/17/1, Award, 5 June 2020, ¶ 324, fn. 361–62 (*quoting* **RL-0053**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 803; **CL-0022**, *Cargill, Incorporated v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 293).

[1116] **RER-01**, Monteza Expert Report, ¶ 162.

491. *Third*, Claimant alleges that the Reconsideration Rejection "did not even purport to address the grounds that Maple Gas had raised in its appeal."[1117] This is patently false. The Reconsideration Rejection first explains that Maple Gas' Request for Reconsideration had been rendered moot by the expiration of the term of the Block 126 License,[1118] but then proceeds expressly to address the arguments raised by Maple Gas:

> [T]he pronouncements issued to your company have been formulated on the basis of assumptions provided in the voided Block 126 Agreement, specifically, in paragraph 16.1, as cited above. In this sense, these pronouncements were not issued in the exercise of authority delegated to PERUPETRO to issue administrative acts; therefore, the regime set forth in Law No. 27444, General Administrative Procedure Law, is not applicable, either for the issuance of our statements or to evaluate alleged nullifications via appeal proceedings.[1119]

492. In asserting that PERUPETRO "refused to even consider the substance of Maple Gas's complaints,"[1120] Claimant is thus directly—and inexcusably—misrepresenting the contents of the Reconsideration Rejection (which Claimant itself put on the record of this arbitration). A simple review of that document, which is at Exhibit C-0046, easily reveals the foregoing.

493. In sum, Claimant's complaints are contrived and baseless. The Reconsideration Rejection was a reasoned and substantively correct decision, and as such does not fall below the MST. Even assuming, for the sake of argument, that it had been an incorrect decision, it would still not fall below the "absolute bottom, below which conduct is not accepted"[1121] by the MST under customary international law; rather, it would simply have qualified as a substantive error in the application of local law, and nothing more than that.

[1117] Memorial, ¶ 470.

[1118] **Ex. C-0046**, PERUPETRO Appeal Decision, 4 January 2018, p. 2.

[1119] **Ex. C-0046**, PERUPETRO Appeal Decision, 4 January 2018, p. 2.

[1120] Memorial, ¶ 473.

[1121] **RL-0053**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 616.

(iii) The fact that PERUPETRO did not approve Maple Gas' proposed modifications to the Block 126 License also did not violate the MST

494. Claimant's final complaint about PERUPETRO's alleged conduct is that its "decision not to approve the transfer of the Block 126 License to Maple Gas" was "arbitrary."[1122] However, this claim fails for at least the following three reasons.

495. *First*, and foremost, PERUPETRO never *adopted* a decision, as such, not to approve the transfer of the Block 126 License to Maple Gas. As explained in Mr. Guzmán's witness statement and in **Section II.H.3** above**,** and as summarized below, PERUEPTRO had a multi-step, mandatory internal procedure for the approval of the transfer of a license, upon receipt of an application for such a transfer. Those steps had not yet been completed at the time that Maple Gas was deemed ineligible to hold the Block 126 License on 27 November. To recall:

a. Pursuant to PERUPETRO's prescribed internal procedure, an applicant company was required to (i) propose and negotiate all proposed contractual modifications with a working group within PERUPETRO's Contract Management Department;[1123] (ii) secure the agreement of the working group, which would then draft a technical report and other documents;[1124] (iii) secure the approval of PERUPETRO's Department Managers;[1125] (iv) secure the

[1122] Memorial, ¶¶ 439, 448.

[1123] The Working Group was comprised of a member of the Exploration Department (Ms. Isabel Calderón), a member of the Legal Department (Ms. Maylie Gutiérrez), a member of the Contract Management Department (Mr. Pantigoso) and three deputy members. *See* **Ex. R-0070**, PERUPETRO, Memorandum No. CONT-GFCN-0317-2017, 25 August 2017. *See also* **RWS-01**, Guzmán Witness Statement, ¶ 33.

[1124] *See* **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9; **RWS-01**, Guzmán Witness Statement, ¶ 34.

[1125] *See* **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Points 9(8)–(9); **RWS-01**, Guzmán Witness Statement, ¶¶ 57–59.

approval of PERUPETRO's Management;[1126] and, finally, (v) secure the approval of PERUPETRO's Board of Directors.[1127]

b. As shown by contemporaneous correspondence, Maple Gas was fully aware of all of these requirements when it was working through the approval process.[1128]

c. As Claimant recognizes, PERUPETRO's Working Group "worked cooperatively" with Maple Gas and Frontera to negotiate Maple Gas' proposed changes to the Block 126 License.[1129] As Claimant further admits, the parties in fact made progress in negotiating the highly complex and controversial changes that had been requested by Maple Gas.[1130]

d. However, on 27 November 2017, PERUPETRO's General Manager issued the Rectification Decision, through which Maple Gas was found—based on objective criteria—not to be eligible to acquire the Block 126 License after all, because it lacked the financial backing to fulfill the obligations contained in the Block 126 License.[1131]

e. At the time that the Rectification Decision was issued (27 November 2017), the Working Group had not yet completed its work, and the requisite documents had not yet been sent to PERUPETRO's Management for review and approval.[1132]

[1126] *See* **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Points 9(18)–(19); **RWS-01**, Guzmán Witness Statement, ¶¶ 60–61.

[1127] *See* **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9(23); **RWS-01**, Guzmán Witness Statement, ¶¶ 63–64.

[1128] *See* **Ex. C-0204**, Email from Maple Gas to MINEM, attaching Summary of Block 126 Negotiations with PERUPETRO, 22 November 2017.

[1129] Memorial, ¶ 441.

[1130] *See* Memorial, ¶ 211.

[1131] *See generally* **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1. *See also* **RER-01**, Monteza Expert Report, ¶¶ 75, 106. **RWS-01**, Guzmán Witness Statement, ¶ 102.

[1132] *See supra* **Section II.H.3**; **RWS-01**, Guzmán Witness Statement, ¶¶ 62, 86.

496. Thus, there was no "decision not to approve the transfer of the Block 126 License to Maple Gas,"[1133] as Claimant misguidedly (and misleadingly) asserts.

497. In light of the above, it is not surprising that Claimant is unable to identify the date of this non-existent decision, or even the person or entity within PERUPETRO that made it. Instead, Claimant relies on the unsupported[1134] testimony of its own witness Mr. Neumann, who alleges that Mr. Guzmán had told him on 7 November 2017 that PERUPETRO's Board of Directors "had not yet approved the modified Block 126 License" because "the Comptroller General might criticize PERUPETRO if it did not [call Frontera's performance bond]."[1135] However, in his own witness statement, Mr. Guzmán denies ever having told Mr. Neumann that the Board of Directors had decided not to approve the license modifications due to concerns about the Comptroller General.[1136] Nor would it have made sense for him to do so. In order for the Board of Directors to take a decision, Mr. Guzmán would have had to review and approve the modified agreement and the requisite accompanying documents, including a technical report prepared by the Working Group.[1137] However, Mr. Guzmán confirms that he did not receive or review the finalized documents signed by the Working Group and approved by the Department Managers, which means that the matter was not yet ripe for review by the Board of Directors.[1138] In sum, PERUPETRO never made a "decision" not to approve the transfer of the Block 126 License, and Claimant's claim fails on this basis.

[1133] Memorial, ¶ 439.

[1134] Mr. Neumann provides no documentary evidence whatsoever to support his allegation. Moreover, while he alleges that Mr. Coz also attended this meeting with Mr. Guzmán (Neumann Witness Statement, ¶ 57), Mr. Coz in his own witness statement did not address—and thus declined to confirm—Mr. Neumann's account of this alleged meeting with Mr. Guzmán. *See generally* Coz Witness Statement.

[1135] Memorial, ¶ 219 (*citing* Neumann Witness Statement, ¶¶ 57–58).

[1136] **RWS-01**, Guzmán Witness Statement, ¶¶ 82–83.

[1137] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9(23).

[1138] **RWS-01**, Guzmán Witness Statement, ¶¶ 62, 86.

498. *Second*, even if some person or entity within PERUPETRO had affirmatively taken a "decision" not to approve the transfer of the Block 126 License[1139] (quod non), Claimant has failed to demonstrate that such alleged decision would have been "opposed to the rule of law," "a wilful disregard of due process of law," or "an act which shocks, or at least surprises, a sense of juridical propriety."[1140] As shown above, Maple Gas had no right or vested interest in the Block 126 License;[1141] it had requested extraordinary and controversial modifications to the Block 126 license;[1142] PERUPETRO had reviewed Maple Gas' application in accordance with Peruvian law and internal procedures;[1143] and PERUPETRO was under no obligation to approve the proposed changes.[1144] Thus, the alleged conduct by PERUPETRO, even if true, simply does not meet the threshold necessary to establish a breach of the Minimum Standard of Treatment Provision.

499. *Third*, and in any event, Claimant omits to mention that even if Maple Gas had successfully completed the internal procedures within PERUPETRO, it was extremely unlikely that Maple Gas would have (i) satisfied the other outstanding requirements to acquire the Block 126 License under Peruvian law (discussed below),[1145] or (ii) actually been capable of completing the extraordinary work and high-dollar investments that would have been required to develop and commercialize the oil fields.[1146] In particular:

    a. Even if Maple Gas had completed the review process within PERUPETRO (including by securing the review and agreement of PERUPETRO's

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[1139] Memorial, p. 94.

[1140] **RL-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), ICJ, Judgment, 20 July 1989, ¶ 128.

[1141] **RER-01**, Monteza Expert Report, ¶ 18.

[1142] *See supra* **Section II.H.3**.

[1143] *See supra* **Section II.H.3**.

[1144] *See* **RER-01**, Monteza Expert Report, ¶ 67.

[1145] *See* **Ex. R-0074**, Qualification Regulations, Art. 1 (a) (noting that the applicant company must have the requisite "legal, technical, economic, and financial capacity of an Oil Company to comply with all of its contractual obligations" in the specific block that it seeks to exploit). *See also supra* **Section II.H.3**.

[1146] *See supra* **Section II.H.1**.

Department Managers,[1147] Management,[1148] and Board of Directors[1149]), Maple Gas would have then needed to complete secure three separate and *additional* steps: namely, the endorsements of the MINEM[1150] and the MEF,[1151] and the final approval of the President of the Republic.[1152]

b. As Claimant concedes, these steps needed to be completed by 20 December 2017.[1153] But it is highly unlikely that Maple Gas would have achieved that in time; while Claimant—without support—characterizes these steps as mere "formalit[ies]," [1154] Peru has shown in **Section II.H.3** above that they were *not* simply meaningless formalities. The MINEM and the MEF, which conduct successive reviews of license applications, are given 22 working days each within which to review and issue a decision.[1155] The MINEM, the MEF, and the President are all authorized to provide—and in recent years, have in fact provided—substantive comments and questions, all of which require additional time before the approval process can be completed.[1156]

c. Claimant does not dispute that Maple Gas did not have the financial capacity under objective criteria to fulfill its obligations under the Block 126 License. To

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[1147] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Points 9(8)–(9).

[1148] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Points 9 (18)–(19).

[1149] **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9(23).

[1150] *See* **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 3; **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Points 9(31)–(32).

[1151] **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 4.

[1152] **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 5.

[1153] Memorial, ¶ 16.

[1154] Memorial, ¶ 214.

[1155] *See* **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 3–4.

[1156] **Ex. R-0082**, PERUPETRO, Monitoring of the assignment process of the contracts for Blocks Z-1, 56 and 88, undated. *See also* **RWS-01**, Guzmán Witness Statement, ¶¶ 93–94.

recall, Frontera had abandoned its exploratory drilling in Block 126, and Frontera expressly conceded that at least USD 40 million would have been required to begin commercializing crude oil from Block 126.[1157] Peruvian law mandates that an applicant company satisfy objective criteria to show that it can take on the requisite work and investment,[1158] and Maple Gas—which had been in a downward financial spiral for years—was clearly incapable of doing so.[1159]

500. Claimant's purported indignation that PERUPETRO never reached the stage of finally approving the transfer of the Block 126 License rings hollow, or at best reflects a misunderstanding of the internal approval process within PERUPETRO and the relevant regulatory requirements. Claimant cannot seriously contest that Maple Gas was *not* even close to satisfying all requirements under Peruvian law to secure the license. In any event, the evidence strongly suggests that Maple Gas would have been incapable of fulfilling its obligations thereunder.

501. For the foregoing reasons, Claimant's claim that PERUPETRO adopted a "decision [that] was arbitrary"[1160] is unfounded and must be dismissed.

502. In its discussion of the negotiations for the transfer of the Block 126 License, Claimant as an afterthought regurgitates its allegation that PERUPETRO was acting in bad faith and as part of a government conspiracy against Maple Gas.[1161] As usual, Claimant provides no evidence for this, but relies instead on the unsupported contention that its conspiracy theory is "the more obvious explanation" for PERUPETRO's behavior.[1162] This casual accusation—hurled in a desperate attempt to distract from the incontrovertible reasons for which Maple Gas was objectively not qualified to hold

[1157] **Ex. C-0196**, Letter from Frontera to PERUPETRO, 27 September 2017, pp. 2–4.

[1158] *See* **Ex. R-0074**, Qualification Regulations, Art. 1 (a).

[1159] *See* **Ex. C-0196**, Letter from Frontera to PERUPETRO, 27 September 2017, p. 4.

[1160] Memorial, ¶ 448.

[1161] Memorial, ¶¶ 448, 479.

[1162] Memorial, ¶ 448.

the Block 126 License—is nowhere near sufficient to satisfy Claimant's "high"[1163] burden of proving malicious intent on the part of PERUPETRO[1164] (of which there was none).

503. In sum, Maple Gas, which was on the brink of financial ruin, did not acquire the Block 126 License simply because it was—by *objective* standards—financially incapable of fulfilling its obligations and devoting the necessary (and significant) resources that would have been required to explore and exploit Block 126. In PERUPETRO's interactions with Maple Gas, PERUPETRO acted fully in accordance with Peruvian law, regulations, and its internal procedures. Claimant's claim that PERUPETRO's conduct violated the MST is therefore manifestly meritless and must be dismissed.

c. <u>The other alleged conduct that Claimant attributes to PERUPETRO and mentions in passing also did not violate the MST</u>

504. At the end of its MST claim, Claimant throws in, almost as an afterthought, a paragraph that purports to identify—but does not analyze—other alleged conduct that Claimant argues showed bad faith by Petroperú and/or PERUPETRO.[1165] No doubt aware that it cannot adduce evidence of the kind required to satisfy the "high" standard of proof for bad faith[1166]—because none existed—Claimants asks that the Tribunal simply assume that "[t]hese actions by various supposedly independent Peruvian government entities show their animus towards Maple Gas."[1167] However, by merely identifying certain actions or omissions, with "no showing of bad faith absent egregious intent,"[1168] Claimant has not shown that PERUPETRO, Petroperú, or Peru acted in bad faith.

[1163] **RL-0065**, *Conocophillips Petrozuata B.V., et al., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013 (Keith, Fortier, Abi-Saab), ¶ 275.

[1164] *See* **RL-0068**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 (Pryles, Thomas, Bernardini), ¶ 430.

[1165] *See* Memorial, ¶ 485.

[1166] **RL-0065**, *Conocophillips Petrozuata B.V., et al., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013 (Keith, Fortier, Abi-Saab), ¶ 275.

[1167] Memorial, ¶ 485.

[1168] **RL-0068**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 (Pryles, Thomas, Bernardini), ¶ 430.

505. Contrary to Claimant's frivolous claim of bad faith, the facts and evidence show that, in each instance, the conduct of both PERUPETRO and Petroperú had a legal and rational basis:

a. Claimant complains that PERUPETRO did not approve Maple Gas' demand in May 2018 for temporary access to the Sheshea Field.[1169] As explained in **Section II.J.2** above and in Dr. Monteza's expert report, however, Maple Gas' demand was not consistent with Peruvian law, which regulates the types of contractual arrangements into which PERUPETRO can enter.[1170] PERUPETRO therefore could not have granted Maple Gas' request without violating Peruvian law. And even if Maple Gas had requested a contractual arrangement consistent with Peruvian law, it still would have had to complete the requirements for obtaining a license, including by applying for qualification to hold a short-term license,[1171] which as shown Maple Gas did not (and could not) do.

b. Claimant also complains that Petroperú declared the termination of the Refinery Lease Agreement.[1172] Claimant deliberately neglects to mention that Petroperú did so in accordance with the contract's terms, based upon Maple Gas' refusal to pay its contractually-mandated rent.[1173] Indeed, the Lima Tribunal affirmed the lawful termination of the Agreement—yet another fact that Claimant has attempted to conceal from this Tribunal.[1174]

c. Claimant also complains that Petroperú initiated the Lima Arbitration against Maple Gas under the Refinery Lease Agreement.[1175] Claimant does not deny, however, that Petroperú had the express right to do so under the dispute

[1169] *See* Memorial, ¶ 484.

[1170] *See* **Ex. R-0139**, Hydrocarbons Law, Art. 10; **RER-01**, Monteza Expert Report, ¶¶ 200–01.

[1171] **Ex. R-0158**, Directorate Resolution No. 029-2017, 10 April 2017, Annex I, Art. 1.1.

[1172] Memorial, ¶ 484.

[1173] **Ex. C-0069**, Letter from PETROPERÚ to Maple, 17 August 2018.

[1174] **Ex. R-0002**, Lima Arbitration (Award), ¶ 206 ("[T]he termination of the Lease Agreement already applied as a result of MAPLE's breach of its obligation to pay the rent.").

[1175] Memorial, ¶ 484.

resolution clause of the Refinery Lease Agreement.[1176] Furthermore, the Lima Tribunal—far from finding any evidence of bad faith—upheld Petroperú's claim of breach, ordering Maple Gas to pay Petroperú more than USD 7.7 million.[1177]

d. Finally, Claimant complains that Petroperú retook possession of the Pucallpa Refinery.[1178] However, Claimant omits to mention several key facts, including (i) that Petroperú had been authorized by the Lima Tribunal to inspect the Refinery;[1179] (ii) that Petroperú found that the Refinery had been abandoned, and was in a state of disrepair; and (iii) that Maple Gas had formally relinquished control of the abandoned property.[1180]

506. Claimant's unsupported argument that the aforementioned conduct shows bad faith thus fails.

* * *

507. For all of the foregoing reasons, Claimant has failed to establish that Peru violated the Minimum Standard of Treatment Provision under the Treaty. Claimant cannot do so for the simple and incontrovertible reason that neither Petroperú, PERUPETRO, nor any State organ acted in a way that is even remotely inconsistent with the MST under customary international law. Indeed, Claimant has failed to identify even a single instance of conduct that was arbitrary, violated due process, or was made in bad faith. Claimant's MST claim must therefore be rejected.

[1176] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 6 (*citing* the arbitration agreement in the Refinery Lease Agreement as the basis of the Lima Tribunal's jurisdiction).

[1177] *See generally* **Ex. R-0002**, Lima Arbitration (Award).

[1178] Memorial, ¶ 484.

[1179] *See* **Ex. R-0097**, Letter from Petroperú (J. Chang, *et al*.) to the Lima Tribunal (Case No. 0258-2018-CCL), 23 July 2019, pp. 1–2.

[1180] *See supra* **Section II.M**. *See also* **Ex. R-0067**, Certificate of Notorial Verification by Rubén Vargas Ugarte, 21 August 2019; **Ex. R-0130**, Letter from Petroperú (R. Lopez) to Notary Public of the District Of Yarinacocha, 21 August 2019; **Ex. R-0057**, Letter from Petroperú (C. Beltrán) to Maple Gas (R. López), 12 August 2019.

D. Claimant's claim that Peru violated the Expropriation Provision is meritless and should be rejected

508. Claimant also submits a claim of indirect expropriation under the Expropriation Provision (Treaty Article 10.7).[1181] For this claim, Claimant regurgitates and refers back to the same unsupported accusations and generalized complaints that it had submitted under its MST claim. Such complaints include the allegation—unsupported by any evidence—that a government conspiracy prompted PERUPETRO, Petroperú, and the Peruvian State to target Maple Gas for destruction.

509. The reality—as shown by the evidence on the record—is far simpler: Claimant made an ill-advised investment in a failing oil and gas company, and the eventual failure of the investment was solely a result of Claimant's and Maple Gas' own business decisions and mismanagement. Before Claimant became involved, Maple Gas' own conduct and mismanagement had led the enterprise to the brink of disaster: Maple Gas was in millions of USD of debt; had over time depleted the reserves in its Block 31 Fields; had destroyed its relationship with its primary supplier, Aguaytía Energy, and with a potential alternative supplier, CEPSA; had proved unable to secure a new source of feedstock from local suppliers; and was producing less and less refined oil products from the Refinery. Claimant had no viable plan to turn Maple Gas around, and instead led Maple Gas to a predictable insolvency, including by shutting down its Refinery operations and refusing to pay rent on the Refinery. None of these circumstances are attributable to Petroperú, PERUPETRO, or the Peruvian State. In short, there was no expropriation of Claimant's investment in Maple Gas.

1. The Treaty and general international law establish the requisite elements of an indirect expropriation

510. Article 10.7.1 of the Treaty prohibits unlawful expropriation, as follows: "No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization . . . ."[1182] The footnote to Article 10.7 clarifies that "Article 10.7 shall be interpreted in accordance with Annex

[1181] *See* Memorial, ¶¶ 511–13.

[1182] **RL-0001**, Treaty, Art. 10.7.1.

10-B."[1183] Annex 10-B, in turn, codifies Peru and the United States' "shared understanding" of what constitutes indirect expropriation for the purpose of Article 10.7, in the following terms:

> 1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment. . . .
>
> 3. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.[1184]

511. As Claimant concedes,[1185] Annex 10-B also identifies certain essential factors that must be considered in assessing an indirect expropriation claim:

> The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.[1186]

512. As discussed below, Claimant bears the burden of proving facts sufficient to satisfy the different components of an unlawful expropriation under the Expropriation Provision and Annex 10-B.

[1183] **RL-0001**, Treaty, Art. 10.7, fn. 4.

[1184] **RL-0001**, Treaty, Annex 10-B, § 3.

[1185] *See* Memorial, ¶ 495.

[1186] **RL-0001**, Treaty, Annex 10-B, § 3.

a. The claimant must show interference with an existing property right

513. Annex 10-B of the Treaty makes clear that any alleged government action "cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment."[1187] This threshold requirement is also required under international investment law. For example, the *Emmis v. Hungary* tribunal observed that, to assert an indirect expropriation claim,

> **Claimants must have held a property right of which they have been deprived**. . . . The Tribunal in *Waste Management II* made the same point when it held that the object of expropriation is the property of the claimant . . . . In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law.[1188] (Emphasis added)

514. The *Almasryia v. Kuwait* tribunal likewise recognized "the existence of rights under the relevant domestic law within the context of expropriation claims" as "an essential element"[1189] and "essential starting point" for the expropriation analysis.[1190] In that case, the claimant had argued that the State had prevented it from taking ownership of certain land,[1191] but had failed to demonstrate that it in fact held title to such land

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[1187] **RL-0001**, Treaty, Annex 10-B, § 1. *See also* **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 245 ("The Tribunal finds that, according to the terms in the Treaty, only an act or a series of acts that 'interfere with a tangible or intangible right or with the property rights or interests in an investment' shall constitute an expropriation, whether direct or indirect").

[1188] **RL-0073**, *Emmis International Holding, B.V., et al., v. Republic of Hungary*, ICSID Case No. ARB/12/2, 16 April 2014 (McLachlan, Thomas, Lalonde), ¶¶ 159–162. *See also* **RL-0074**, *Quiborax S.A., et al., v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (Kaufmann-Kohler, Lalonde, Stern), ¶ 135 ("[I]n order for a right to be expropriated, it must first exist under the relevant domestic law (in this case, Bolivian law).").

[1189] **RL-0075**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (Hernández, Dévaud, Knieper), ¶ 58.

[1190] **RL-0075**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (Hernández, Dévaud, Knieper), ¶ 53.

[1191] **RL-0075**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (Hernández, Dévaud, Knieper), ¶ 55.

under domestic law.[1192] On this basis, the *Almasryia v. Kuwait* tribunal held that the expropriation claim was manifestly without legal merit:

> [I]t is obvious that an essential element for the Claimant's expropriation claim is missing, i.e. the existence of property rights in accordance with the laws of Kuwait.[1193]

515. Consistent with the above, Claimant must therefore show that the alleged measures interfered with a property right that it had under Peruvian law in connection with the subject matter of its claims. As explained below, it has failed to make such a showing.

b. <u>The claimant must demonstrate that measures attributable to Peru caused a total or near total deprivation of value of its investment</u>

516. Under Annex 10-B, in assessing whether an indirect expropriation occurred, the first of three factors that a tribunal needs to consider is "the economic impact of the government action."[1194] As stated by the *Archer Daniels v. Mexico* tribunal, "the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place."[1195]

517. In order to satisfy this "decisive criterion," a claimant must show more than simply some type of adverse impact on its investment. Indeed, Annex 10-B expressly cautions that "the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect

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[1192] **RL-0075**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (Hernández, Dévaud, Knieper), ¶ 56 ("With regard to the private joint venture agreement, the Tribunal considers that a promise between two private parties contained in a private instrument, which has not been sanctioned or recognized by the host state, cannot be the basis of a property title.").

[1193] **RL-0075**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (Hernández, Dévaud, Knieper), ¶ 58.

[1194] **RL-0001**, Treaty, Annex 10-B, § 3.

[1195] **CL-0014**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, ¶ 240 ("Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place.").

expropriation has occurred."[1196] Similarly, the *Vivendi II v. Argentina* tribunal noted that the weight of authority "draw[s] a distinction between only a partial deprivation of value (not an expropriation) and a complete or near complete deprivation of value (expropriation)."[1197]

518. A claimant must therefore demonstrate that an investment has been "deprived of virtually all value"[1198] or has been "effectively neutralized" by a measure or series of measures.[1199] Only by showing that its investment was deprived of virtually all value can a claimant satisfy the requirement under the Treaty that the alleged measures "ha[ve] an effect equivalent to direct expropriation"[1200]—i.e., in the words of the *Gami v. Mexico* tribunal, that "the affected property [was] impaired to such an extent that it must be seen as 'taken.'"[1201]

519. This high threshold is likewise required under international law. The decision on jurisdiction in *Electrabel v. Hungary*, which has been cited approvingly by various other tribunals,[1202] summarized the applicable standard as follows:

> [T]he accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe **for both direct and indirect expropriation**, consistently albeit in different terms, the **requirement under international law for the investor to establish the substantial, radical, severe,**

[1196] **RL-0001**, Treaty, Annex 10-B, § 3(b)(ii).

[1197] **CL-0030**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 7.5.11.

[1198] Memorial, ¶ 491 (*quoting* **CL-0068**, *PL Holdings S.a.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award, 28 June 2017, ¶ 320).

[1199] **CL-0029**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (Vicuña, Lalonde, Rezek), ¶ 261 (*citing* **RL-0070**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein), ¶ 200).

[1200] **RL-0001**, Treaty, Annex 10-B, § 3.

[1201] **RL-0052**, *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004 (Reisman, Lacarte Muró, Paulsson) ¶ 126.

[1202] *See, e.g.*, **RL-0076**, *BayWa r.e. Renewable Energy GmbH, et al., v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (Crawford, Naón, Malintoppi), ¶ 423, fn. 554; **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), fn. 480; **RL-0077**, *InfraRed Environmental Infrastructure GP Ltd., et al., v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019 (Drymer, Dupuy, Park), ¶ 505; **RL-0078**, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (Simma, Thomas, Cremades), ¶ 608.

> **devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralization or factual destruction of its investment**, its value or enjoyment.[1203] (Emphasis added)

520. Thus, Claimant must show that its investment was deprived of virtually all value or effectively neutralized by conduct attributable to Peru under the Treaty and customary international law.[1204]

521. Proving that a measure or series of measures has deprived an investment of virtually all value, or has effectively neutralized the investment, is inherently subject to another essential requirement: establishing a *causal nexus* between the State measure(s) invoked and the adverse economic effect alleged. Merely invoking a State measure and establishing that there has been a virtual total loss to an investment are, on their own, insufficient to establish the existence of an expropriation; rather, a claimant must prove that the State measure was what caused the loss of value of the investment.

522. Arbitral jurisprudence has recognized "proximate causation" as the applicable standard for causation in the context of State responsibility for internationally wrongful acts, such as an alleged treaty breach.[1205] In the specific context of an indirect expropriation claim, in which a measure or series of measures must "have an effect equivalent to direct expropriation,"[1206] the tribunal in *El Paso v. Argentina* specified that establishing causation requires determining whether an alleged loss "was or was not the **automatic consequence**, i.e., the **only and unavoidable consequence**, of the

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[1203] **RL-0086**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (Veeder, Kaufmann-Kohler, Stern), ¶ 6.62.

[1204] For the analysis on attribution, *see supra* **Sections III.D** and **IV.B**.

[1205] *See, e.g.*, **RL-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), ICJ, Judgment, 20 July 1989, ¶ 101; **CL-0036**, *El Paso Energy International Co. v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 682; **RL-0079**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Award, 27 September 2019 (Tomka, Kaplan, Thomas), ¶ 74; **CL-0018**, *Biwater Gauff (Tanzania) Ltd. v.* United *Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 785–87; **RL-0081**, *BG Group Plc v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007 (Aguilar Alvarez, van den Berg, Garro), ¶ 428; *see also* **RL-0082**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (Kaufmann-Kohler, Wladimiroff, Trapl), ¶ 319 (*quoting Azinian v. Mexico*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 90).

[1206] **RL-0001**, Treaty, Annex 10-B, § 3.

measures"[1207] (emphasis added). On the facts of the case, the *El Paso v. Argentina* tribunal concluded that although the investor had experienced a "quasi-total loss of [its] investment," this loss "was not an **unavoidable** and **direct consequence** of [the State's] measures, and cannot be the basis of a claim for expropriation"[1208] (emphasis added).

523. In addition, proximate causation between a State measure or measures and the destruction of an investment cannot be established if such destruction resulted from actions or omissions by the investor itself or by third parties, rather than by the State. This principle was stated and applied by the ICJ in *ELSI*.[1209] In that case, the ICJ held that, although the alleged measure was *one* of the causes that had resulted in the alleged harm to the investment, other intervening factors also were responsible:

> There were several causes acting together that led to the disaster to ELSI. No doubt the effects of the requisition might have been one of the factors involved. But the underlying cause was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition.[1210]

c. <u>The claimant must show that measures attributable to Peru interfered with objectively reasonable expectations based upon explicit commitments—also by Peru or attributable to it—that drove it to invest</u>

524. The second factor under Treaty Annex 10-B requires consideration, in the context of an indirect expropriation claim, of "the extent to which the government action interferes with distinct, reasonable investment-backed expectations."[1211] Claimant acknowledges this factor, but fails to engage with—much less establish—the requisite

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[1207] **CL-0036**, *El Paso Energy International Co. v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 270. *See also id*. at ¶ 272 ("Only if the [alleged loss] was the **only possible consequence** of the [State] measures could one consider that these measures were expropriatory . . . ." (emphasis added)).

[1208] **CL-0036**, *El Paso Energy International Co. v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 279.

[1209] **RL-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), ICJ, Judgment, 20 July 1989.

[1210] **RL-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), ICJ, Judgment, 20 July 1989, ¶ 101.

[1211] **RL-0001**, Treaty, Annex 10-B, § 3.

elements that it must satisfy to demonstrate the existence of, and interference with, any reasonable, investment-backed expectations.[1212]

525. In its award of early 2021, the tribunal in the *Ríos v. Chile* ICSID arbitration interpreted a treaty provision that is substantively identical[1213] to the version of this provision of Treaty Annex 10-B.[1214] In its award, the *Ríos* tribunal explained each of the three terms that describes the type of expectations that are relevant to determining an indirect expropriation.

526. *First*, an expectation must be "distinct."[1215] More specifically, a State must violate an expectation that arises from obligations, commitments, or declarations that leave no doubt and no room for error.[1216] Accordingly, "the obligation, undertaking or declaration must be express or, if it is implicit, that no doubt may exist over its existence or scope."[1217]

527. *Second*, an investor's expectation must be "reasonable."[1218] The *Ríos* tribunal underscored that merely subjective expectations are insufficient;[1219] rather, the reasonableness of an expectation is objective and is a question of fact that must be determined on a case-by-case basis, taking into account the underlying State

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[1212] Memorial, ¶ 503.

[1213] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 243 (*quoting* Annex 9-C of the Chile-Colombia Free Trade Agreement) (". . . (ii) the degree to which the government action interferes with unequivocal and reasonable investment expectations").

[1214] **RL-0001**, Treaty, Annex 10-B, § 3(a)(ii) ("the extent to which the government action interferes with distinct, **reasonable** investment-backed expectations . . ." (emphasis added)).

[1215] The equivalent of which in the treaty at issue in *Rios* was "*inequívoca*" (unequivocal).

[1216] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 254 ("In the Tribunal's opinion, an expectation is unequivocal when its grounds are unequivocal. In other words, only if the State violates expectations arising from obligations, undertakings or declarations that do not allow any doubt or misunderstanding can expropriation exist under the Treaty. That implies that the obligation, undertaking or declaration must be express or, if it is implicit, that no doubt may exist over its existence or scope and, in both cases, it must refer to specific parameters related to the investment.").

[1217] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 254.

[1218] **RL-0001**, Treaty, Annex 10-B, §3.

[1219] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 255.

obligation, commitment, or declaration that generated the expectation, along with all relevant facts.[1220]

528. *Third*, an expectation must be "investment-backed."[1221] That means that the expectation must have served as a basis for the investment; i.e., the investment must have been induced by, or at least made in reliance upon, the State representation or commitment, such that, in the absence of such expectation, the investment would not have been made.[1222] It bears clarifying that the concept of "investment-backed expectations" is materially different from the concept of "legitimate expectations" that may arise in other contexts, such as that of autonomous FET provisions.[1223]

d. The claimant must show that the *character* of the relevant governmental measures was expropriatory

529. The third and final factor under Treaty Annex 10-B requires the consideration of "the character of the governmental action."[1224] Given that the analysis must be "case-by-case" and "fact-based,"[1225] the Tribunal's assessment of the "character" of a measure or measures may take into account a variety of elements, including the following.

530. The commercial character of the measure. In interpreting the requirement that the tribunal consider the nature of the government measure at issue, the *Ríos* tribunal observed that whether the measure was sovereign or commercial in character will be

[1220] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 255. *See also* **RL-0083**, *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (Kerameus, Bravo, Gantz), ¶ 148 ("The facts, and the reasonableness of the Claimant's reliance in Metalclad, are thus quite different from the instant case. The assurances received by the investor from the Mexican government in Metalclad were definitive, unambiguous and repeated").

[1221] **RL-0001**, Treaty, Annex 10-B, § 3.

[1222] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 256.

[1223] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 258. *See also* **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 681 ("A distinct reasonable investment-backed expectation cannot be the same as a legitimate expectation . . . .").

[1224] **RL-0001**, Treaty, Annex 10-B, § 3(a)(iii).

[1225] **RL-0001**, Treaty, Annex 10-B, § 3(a).

relevant.[1226] Specifically, "the Tribunal understands that the measure must be a sovereign measure and not merely contractual."[1227] The *Muhammet Cap v. Turkmeninstan* tribunal likewise confirmed that

> it must be proved that the acts complained of were exercised by the State in its sovereign capacity (its *puissance publique*), not in the State's capacity as a contractual party.[1228]

531. The State's exercise of regulatory powers. Annex 10-B expressly states an exemption for non-discriminatory regulatory actions:

> Except in rare circumstances, **non-discriminatory regulatory actions by a Party** that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, **do not constitute indirect expropriations**.[1229] (Emphases added)

532. Interpreting nearly identical treaty language, the *Ríos* tribunal stressed that "in the case of regulatory actions, the Tribunal cannot qualify them as expropriatory if these are not discriminatory and if they were intended or applied to protect legitimate objectives of public wellness."[1230] This is consistent with the finding by the *Saluka v. Czech Republic* tribunal that

> it is now established in international law that States are not liable to pay compensation to a foreign investment when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.[1231]

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[1226] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 259.

[1227] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 259.

[1228] **RL-0084**, *Muhammet Çap Bankrupt Sehil Inşaat Endustri Ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (Lew, de Chazournes, Hanotiau), ¶ 809.

[1229] **RL-0001**, Treaty, Annex 10-B, § 3(b).

[1230] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 476.

[1231] **CL-0076**, *Saluka Investments B.V. v. Czech Republic,* UNCITRAL, Partial Award, 17 March 2006, ¶ 55.

533. Claimant thus bears the burden of proving facts sufficient to satisfy the various elements of an indirect expropriation, delineated above; failure to meet that burden demands the dismissal of Claimant's claim of expropriation.

534. In accordance with the principle *actori incumbit onus probandi*,[1232] Claimant also bears the burden of proving that Peru acted in bad faith because it has argued—as part of its expropriation claim—that PERUPETRO and Petroperú acted in bad faith.[1233] Claimant asserts that "where there is evidence of the State's intention to take the investment, tribunals have held that this is a relevant factor."[1234] Apparently conscious of the shortcomings in its claim, however, Claimant also argues that in instances where evidence of the State's intention is not available, tribunals can make a finding on the State's intention even without such evidence.[1235]

535. This argument is a self-serving attempt by Claimant to evade its burden of proving bad faith through evidence,[1236] and the attempt fails. Tribunals have held that "the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one."[1237] For instance, in *Crystallex v. Venezuela*—the case cited by Claimant in support of its argument that evidence of malintent is not required—the tribunal relied on evidence that the President of Venezuela had expressly declared in a public address his intention to "take back"—i.e., nationalize—mines, including the mine in which the claimant had invested.[1238] Thus, contrary to Claimant's argument, Claimant *does* have a burden to substantiate its claim of bad faith with evidence, and the Tribunal cannot simply declare the existence of bad faith on the basis of nothing

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[1232] *See* **RL-0041**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004 (Fortier, Schwebel, El Kholy), ¶ 58; **RL-0181**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (Cremades, Runeland, Söderlund), ¶ 64.

[1233] *See, e.g.*, Memorial, ¶¶ 515, 529.

[1234] Memorial, ¶ 507.

[1235] Memorial, ¶ 508.

[1236] *See, e.g.*, **RL-0066**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (Kaufmann-Kohler, Berman, Böckstiegel), ¶ 376.

[1237] **RL-0067**, *Chemtura (formerly Crompton) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010 (Kaufmann-Kohler, Brower, Crawford), ¶ 137.

[1238] **CL-0032**, *Crystallex International Corp. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 676, 702.

more than Claimant's own allegations. As demonstrated in this section and in previous sections, Claimant cannot meet its burden of proof for the obvious reason that there was no bad faith on the part of PERUPETRO, Petroperú, or any State organ.

2. There was no indirect expropriation of Claimant's investment in Maple Gas

536. Claimant bases its expropriation claim in large part upon measures by PERUPETRO related to Block 126. That claim fails for various reasons, including the fact that neither Claimant nor Maple Gas ever actually held any property right to, or vested interest in, Block 126 (see **subsection a** below).

537. Claimant also bases its expropriation claim on the alleged conduct of the State-owned private company Petroperú. **Subsection b** below shows, however, that the actions of Petroperú were not in any way expropriatory.

538. Claimant is also unable to identify any other alleged conduct attributable to Peru that constitutes an unlaw expropriation requiring compensation (see **subsection c** below). In short, Peru did not expropriate Claimant's investment.

a. <u>PERUPETRO did not expropriate any right or property owned by either Claimant or Maple Gas</u>

539. Claimant's indirect expropriation claim is predicated on its allegation that PERUPETRO "blocked the transfer of the Block 126 License to Maple Gas."[1239] As established in **Section IV.D.1.a** above, under the Treaty and international law, an alleged measure "cannot constitute an expropriation unless it interferes with a tangible or intangible property right . . . in [Claimant's] investment."[1240] Neither Claimant nor Maple Gas held any property right in Block 126 under Peruvian law.[1241] As Claimant concedes, the Block 126 License was held *by Frontera*—not by Maple Gas

[1239] Memorial, ¶ 514.

[1240] **RL-0001**, Treaty, Annex 10-B, § 1. *See also* **RL-0075**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (Hernández, Dévaud, Knieper), ¶ 58; **RL-0073**, *Emmis International Holding, B.V., et al., v. Republic of Hungary*, ICSID Case No. ARB/12/2, 16 April 2014 (McLachlan, Thomas, Lalonde), ¶ 162. *See also* **RL-0074**, *Quiborax S.A., et al., v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (Kaufmann-Kohler, Lalonde, Stern), ¶ 135.

[1241] **RER-01**, Monteza Expert Report, ¶ 18.

or by Claimant.[1242] Maple Gas was attempting to acquire the Block 126 License *from* Frontera, which *a fortiori* meant that Maple Gas did not yet have any rights in such license. For the requisite rights to have vested in Maple Gas, the following needed to happen (but did not): (i) Maple Gas needed to be deemed qualified to acquire the Block 126 License, based on certain specified objective criteria under Peruvian law,[1243] and (ii) Maple Gas needed to complete a mandatory review and approval process for its proposed modifications to the Block 126 License contract.[1244] Maple Gas was initially deemed qualified in error,[1245] but that erroneous qualification never conferred upon Maple Gas any property right over Block 126.[1246] Subsequently, PERUPETRO determined that Maple Gas in fact did *not* satisfy the objective criteria for qualification under Peruvian law, and had been qualified in error to acquire the Block 126 License.[1247] Critically, neither Claimant nor Maple Gas has *ever* argued (i) that Maple Gas was actually qualified (under either the 2010 or 2017 Guidelines), or (ii) that Maple Gas had a right to the Block 126 License.

540. Thus, in the words of the *Almasryia v. Kuwait* tribunal, "an essential element for the Claimant's expropriation claim is missing, i.e., the existence of property rights in accordance with the laws of [the State]."[1248] The Tribunal must therefore dismiss Claimant's claim that PERUPETRO's alleged conduct formed part of an indirect expropriation.

[1242] *See* Memorial, ¶ 141. *See also supra* **Section II.H.1**.

[1243] *See* **Ex. R-0074**, Qualification Regulations, Art. 2; **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010. *See also supra* **Section II.H.2**.

[1244] *See, e.g.*, **Ex. R-0076**, PERUPETRO, Procedure GFCN-009, Modification of Hydrocarbon Contracts due to Assignment of Contractual Position and other causes that do not imply variation in the Royalty or Remuneration, Version 2, 2 July 2013, Point 9; **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Arts. 2.1–2.2, 4–5. *See also supra* **Section II.H.3**.

[1245] *See* **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.1; **RER-02**, Alix Damages Expert Report, ¶¶ 330–31.

[1246] **Ex. R-0074**, Qualification Regulations, Art. 2 ("The granting of the Qualification will not generate any rights over the contract area.").

[1247] *See generally* **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017; **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017.

[1248] **RL-0075**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (Hernández, Dévaud, Knieper), ¶ 58.

541. In any event, the acts on which Claimant relies do not satisfy any of the other requirements for an indirect expropriation, as discussed below.

(i) PERUPETRO did not cause a total or near total deprivation of the value of Claimant's investment

542. Claimant recognizes that it must show that PERUPETRO's alleged conduct "deprived [Claimant as] the shareholder-investor of [its] investment in the shareholding in [Maple Gas] and effectively destroy[ed] the value of those shares."[1249] Claimant, however, has failed to establish any of the constituting elements of its expropriation claim. Specifically, it has not demonstrated the existence of "some form of deprivation of [Claimant] in the control of [Maple Gas], the management of day-to-day operations of [Maple Gas], interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving [Maple Gas] of its property or control in total or in part."[1250]

543. Claimant has also failed to prove causation. To recall, Annex 10-B of the Treaty emphasizes that "the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred."[1251] In this respect, the *El Paso v. Argentina* tribunal emphasized that the alleged loss must be "the **automatic consequence**, i.e., the **only and unavoidable consequence**, of the measures"[1252] (emphasis added). Yet Claimant has failed to prove that the alleged conduct of which it complains (mainly, the Rectification Decision in November 2017 and the Reconsideration Rejection in January 2018) destroyed its investment, or radically deprived it of value. Indeed, Claimant's claim rests solely on the vague and unsubstantiated comment that "PERUPETRO's last-minute reversal had catastrophic consequences for Maple Gas's business."[1253] That, however, is manifestly insufficient to prove a Treaty violation.

[1249] Memorial, ¶ 499.

[1250] Memorial, ¶ 500.

[1251] **RL-0001**, Treaty, Annex 10-B, § 3(a)(i).

[1252] **CL-0036**, *El Paso Energy International Co. v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 270.

[1253] Memorial, ¶ 527.

544. In any event, the evidence contradicts any assertion that the alleged conduct caused the alleged harm to the investment, for at least two reasons. *First*, far from the *cause* of Maple Gas' financial decline, the Rectification Decision was merely an ascertainment and acknowledgement of that ongoing decline. As discussed in **Section II.H.2**, Peruvian law required Maple Gas to prove that it was qualified to acquire the Block 126 License—i.e., that it satisfied objective criteria showing that it had the technical and financial capacity to complete the required work.[1254] Through the Rectification Decision, PERUPETRO merely confirmed that Maple Gas did not satisfy these objective criteria (including due to lack of financial wherewithal).[1255]

545. *Second*, the evidence disproves any notion that Maple Gas' financial troubles were the "automatic consequence"[1256] of PERUPETRO's conduct. To recall, Maple Gas was in serious financial decline well before it even applied for the Block 126 License:

a. in 2010, Maple Gas had sunk USD 32 million into unsuccessful exploration efforts in Block 31-E;[1257]

b. in 2014, Maple Gas had defaulted on loans and guarantees amounting to USD 62 million;[1258]

c. over time, Maple Gas had depleted supply from its Blocks 31-B and 31-D fields, leading to decreased production from the Pucallpa Refinery in 2014, 2015, and 2016;[1259]

[1254] *See* **Ex. R-0074**, Qualification Regulations, Art. 2; **Ex. R-0072**, PERUPETRO, Directorate Resolution No. 048-2010, 15 April 2010.

[1255] *See* **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1. *See also* **Ex. R-0078**, PERUPETRO, Legal Technical Report No. LEGL-PRO0GFCN-0489-2017, 6 November 2017, Point 2.1; **RER-02**, Alix Damages Expert Report, ¶¶ 330–31.

[1256] **CL-0036**, *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 270.

[1257] *See* **RER-02**, Alix Damages Expert Report, ¶ 124 (*citing* **Ex. AP-0023**, Maple Energy plc 2010 Annual Report, p. 13). *See also supra* **Section II.B.3**.

[1258] *See supra* **Section II.B.5**.

[1259] **Ex. R-0026**, Letter No. MGP-GM-L-0009-16 from Maple Gas (K. Neuman) to PERUPETRO (R. Guzmán), 17 April 2018, p. 4 (reporting declining production from both fields; for example, the crude production from Block 31-B dropped from 201 bpd in 2014 to 48 bpd in 2016). *See also supra* **Section II.B.3**.

d. in 2014, 2015, and 2016, Maple Gas destroyed its relationship with Aguaytía Energy—its primary supplier of feedstock—through repeated failure and refusal to pay invoices for millions of dollars' worth of supply;[1260]

e. in early 2016, Maple Gas' alienated CEPSA by cutting off RAD Services and forcing CEPSA to suspend production, which led CEPSA to suspend discussions with Maple Gas for any long-term supply agreement;[1261]

f. as conceded by Mr. Holzer, the mere "**possibility** of acquiring the [Block 126] license" was Maple Gas' only hope to avert financial ruin (emphasis added).[1262]

546. Maple Gas' own conduct after PERUPETRO's Rectification Decision and Reconsideration Rejection propelled the company's continued decline:

a. In December 2017, Maple Gas shut down all refining operations.[1263]

b. At some point thereafter, Maple Gas abandoned the Refinery facilities, which fell into disrepair.[1264]

c. In 2018, Maple Gas ceased paying contractually-mandated rent under the Refinery Lease Agreement.[1265]

d. In 2019, Maple Gas' failed to maintain contractually-mandated insurance coverage, and accordingly lost the Blocks 31-B and 31-D License.[1266]

547. In short, PERUPETRO did not cause any deprivation of the value of Claimant's investment in Maple Gas. Rather, the decline and loss of value of Maple Gas was the result of its own and Claimant's actions.

[1260] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 43. *See also supra* **Section II.D.2**.

[1261] *See See* **Ex. R-0128**, Letter No. CEPSA-GG-00005/16 from CEPSA (M. Ángel) to Petroperú (G. Velasquez), 12 January 2016, p. 1; **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, p. 2. *See also supra* **Section II.D.3**.

[1262] Holzer Witness Statement, ¶ 8.

[1263] Memorial, ¶ 246 (admitting that "on 24 December 2017, Maple Gas was forced to suspend refining operations at the Pucallpa Refinery").

[1264] **Ex. R-0057**, Letter from Petroperú (C. Beltrán) to Maple Gas (R. López), 12 August 2019, p. 3.

[1265] **Ex. R-0100**, Letter No. MG-LEGA-L-150-2018 from Maple Gas (K. Neumann) to Petroperú (C. Beltrán), 16 August 2018.

[1266] **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, Art. 22.1.

(ii) The Block 126 measures did not interfere with any reasonable, investment-backed expectations

548. To prove an indirect expropriation, Claimant is also required to show that PERUPETRO interfered with expectations that were based on express commitments by (or attributable to) Peru, were objectively reasonable, and were relied on by Claimant in making its investment.[1267]

549. *First*, Claimant has failed to show that its alleged expectation was "unequivocal"—i.e., "arising from obligations, undertakings or declarations that d[id] not allow any doubt or misunderstanding."[1268] According to Claimant, its alleged expectation arose from various "meetings with the MINEM and PERUPETRO."[1269] Claimant relies solely on the self-serving assertions by Mr. Neumann,[1270] and does not provide any documentary evidence of commitments or declarations that were actually communicated to Claimant or Maple Gas. Moreover, Mr. Neumann does not even allege that specific commitments or declarations were made; he simply recalls that "[t]he Peruvian officials I talked to were pleased," that they "responded very favorably to Maple Gas' plans," and that PERUPETRO was "supportive."[1271] As affirmed by the *Eco Oro v. Colombia* tribunal, such "general expressions of support for [a] project" are not specific commitments.[1272] Thus, on Claimant's own case, there was no promise "that d[id] not allow any doubt or misunderstanding"[1273] that Maple Gas would receive the Block 126 License.

[1267] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶¶ 254–55.

[1268] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 254. *See also* **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 681 ("[D]id the State give specific commitments that it would refrain from the acts complained of[?]").

[1269] Memorial, ¶ 520.

[1270] *See* Memorial, ¶¶ 520–21.

[1271] Neumann Witness Statement, ¶¶ 19, 49; Memorial, ¶ 521.

[1272] **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶ 682, 694.

[1273] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 254.

550. *Second*, Claimant's alleged expectation that Maple Gas would be given such license was not objectively reasonable. In *Eco Oro v. Colombia*, the tribunal found that the claimant did not have reasonable expectations that it would be able to exploit a concession when due diligence by the claimant would have revealed that the concession contained an environmental ecosystem that was subject to special protection by the State.[1274] Here, Claimant (as indirect majority shareholder) would have had access to Maple Gas' financial statements, and could easily have determined (i) that Maple Gas was not in a position to invest millions of USD and years of work into Block 126, and (ii) that Maple Gas' audited financial statements did not reach the threshold under the objective criteria in either the 2010 or the 2017 Guidelines. It was therefore not reasonable for Claimant to blindly expect—as it apparently did—that Maple Gas would simply be handed the Block 126 License.

551. In sum, Claimant did not have any distinct, reasonable, investment-backed expectations that Maple Gas would obtain the Block 126 License.

(iii) PERUPETRO did not engage in expropriatory conduct

552. Finally, Claimant's argument with respect to the "character" of PERUPETRO's alleged conduct is baseless and should be rejected.[1275] Claimant asserts that "[t]he analysis of Peru's conduct under the MST applies equally here."[1276] Claimant thus relies on its assertions, in the MST context, that PERUPETRO's conduct was "arbitrary, pretextual and abusive."[1277] This misguided attempt to base an expropriation claim on the MST standard must be rejected; the MST is a different and inapplicable legal standard in the context of an expropriation claim.

553. In any event, even if the MST standard were indeed relevant in this context (quod non), Claimant's allegation that PERUPETRO committed an expropriation must be dismissed for the same reasons that as its MST claim: PERUPETRO's conduct was in

[1274] **CL-0034**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 694.

[1275] **RL-0001**, Treaty, Annex 10-B, § (3)(a)(iii).

[1276] Memorial, ¶ 528.

[1277] Memorial, ¶ 528.

fact *not* arbitrary, pretextual, or abusive all, but rather was reasonable and justified. As demonstrated in **Section II.H** above, PERUPETRO assessed Maple Gas' financial capacity to fulfill obligations under the Block 126 License on the basis of objective criteria under Peruvian regulations.[1278] Maple Gas did not satisfy those criteria—whether under the 2010 or 2017 Guidelines[1279]—and, tellingly, neither Claimant nor Maple Gas has ever argued otherwise.

554. Claimant also appears to take issue with the following alleged conduct by the MINEM: (i) that after an alleged meeting between Maple Gas and the Ministry, the Minister did not respond to an email from Maple Gas asking about the status of the Block 126 License,[1280] and (ii) that a subsequent meeting was not attended by the Minister but rather by a different MINEM official.[1281] Even if true, these allegations are not supported by any actual evidence of expropriatory conduct; there is simply no evidence at all that the MINEM took any executive or regulatory action that had any improper impact on Claimant's investment, nor is there evidence of bad faith.

555. Claimant's complaints concerning its application to obtain the Block 126 License thus do not support its claim of indirect expropriation.

b. Petroperú did not expropriate Claimant's investment

556. In describing its indirect expropriation claim, Claimant also generally complains about Petroperú.

557. As a threshold matter, Claimant does not purport to identify or analyze any specific "series of actions" by Petroperú that supposedly formed part of the alleged expropriation. Instead, Claimant merely asserts that "Petroperú had obstructed the Pucallpa Refinery's access to feedstock."[1282] That bald and in any event false assertion

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[1278] *See generally* **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017. *See also supra* **Sections II.H.2**, **IV.C.3.b**.

[1279] *See* **RER-02**, Alix Damages Expert Report, ¶ 47 ("Our analysis indicates that Maple Gas would not have met these requirements under either set of Guidelines — and therefore would not have been eligible to acquire the Block 126 License."). *See also supra* **Sections II.H.2**, **IV.C.3.b**.

[1280] *See* Memorial, fn. 608.

[1281] *See* Memorial, ¶ 238 (noting that the meeting was attended by another MINEM official), fn. 608. *See also* Neumann Witness Statement, ¶ 70.

[1282] Memorial, ¶ 514.

is glaringly insufficient to meet the requisite evidentiary threshold under the Expropriation Provision and Annex 10-B.

(i) Claimant's expropriation claim concerning Petroperú is based on a false factual premise

558. Claimant's claim that Petroperú's alleged "obstruct[ion]"[1283] forms part of an indirect expropriation also fails because Petroperú did not in fact engage in any obstruction. As demonstrated through the evidence, discussed in detail in **Sections II.B** and **II.D**, Maple Gas' depleted reserves, financial decline, regulatory sanctions, and alienation of potential suppliers all led to a steep decline in Maple Gas' production of refined products over time, and to the absence of feedstock to process at the Pucallpa Refinery.[1284] Petroperú filled the gap in the market by purchasing feedstock from Aguaytía Energy and CEPSA to produce refined products and thus supply the Pucallpa region.[1285] Contrary to Claimant's baseless submission, however, Petroperú did not prevent Maple Gas from obtaining feedstock. In fact, Petroperú's supply contracts with Aguaytía Energy and CEPSA were non-exclusive,[1286] such that these suppliers *could* have sold to Maple Gas; indeed, the evidence shows that Maple Gas in fact purchased feedstock from CEPSA in May 2017.[1287]

[1283] Memorial, ¶ 514.

[1284] *See* **Ex. R-0026**, Letter No. MGP-GM-L-0009-16 from Maple Gas (K. Neuman) to PERUPETRO (R. Guzmán), 17 April 2018, p. 4 (reporting a significant decline in production from 2014 and 2016).

[1285] **RER-01**, Monteza Expert Report, ¶¶ 293, 295.

[1286] *See, e.g.*, **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014. *See also* **Ex. R-0002**, Lima Arbitration (Award), ¶ 188 ("In evaluating each one of the supply agreements, it is evident that they do not stipulate any exclusivity in favor of PETROPERÚ; nor can it be argued that there is disguised exclusivity. Under those contractual arrangements, it cannot be validly concluded that the Petitioner has monopolized the purchase of the product, preventing Maple from accessing suppliers such as CEPSA and AGUAYTÍA, in order to displace it [MAPLE] from the market.").

[1287] **Ex. CLEX-0036**, Maple – CEPSA Contract. May 24, 2017. *See also* **RER-02**, Alix Damages Expert Report, ¶ 128.

559. Consistent with these facts, two previous arbitral tribunals expressly rejected Maple Gas' claims that Petroperú interfered with the supply of feedstock available to Maple Gas.[1288]

(ii) The alleged conduct took place before Claimant made its investment

560. *Second*, Petroperú's alleged conduct cannot form the basis of an expropriation claim under the Treaty because it is based in substantial part on conduct that, on Claimant's own case, occurred prior to Claimant's acquisition of its investment.

561. The Expropriation Provision prohibits the States Parties from "expropriat[ing] or nationaliz[ing] a covered investment either directly or indirectly."[1289] Claimant made its purported investment by acquiring an indirect shareholding in Maple Gas on 15 June 2017.[1290] Pursuant to the Expropriation Provision as well as the intertemporal rule of customary international law codified in ILC Article 13,[1291] actions preceding 15 June 2017 cannot constitute an expropriation.

562. Tellingly, in the context of its expropriation claim, Claimant does not even attempt to identify the specific actions by Petroperú of which it complains. Other sections of Claimant's submission reveal that Claimant apparently takes issue with Petroperú's purchase of feedstock from Aguaytia and CEPSA in 2015, 2016, and early 2017[1292]— i.e., conduct that occurred *before* Claimant made its alleged covered investment. Such

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[1288] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 189 ("In the present case, MAPLE has provided no evidence that such agreements are the result of concerted action or a top-down restrictive agreement that prevents suppliers from selling to buyers other than PETROPERU"); **Ex. R-0001**, ICC Arbitration (Award), ¶ 165 ("There is no evidence of collusion or a conspiracy between Petroperu and Aguaytía to starve Maple of supplies and drive it out of business.").

[1289] **RL-0001**, Treaty, Art. 10.7.1.

[1290] *See supra* **Section III.B.2**. *See also* **Ex. C-0038**, Jancell Corporation Register of Shares, 15 June 2017 (showing that Jancell shares were issued to Worth Capital, with a corresponding share certificate, on 15 June 2017).

[1291] *See* **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States forInternationally Wrongful Acts*, 2001, Art. 13.

[1292] In the section of its Memorial dedicated to its indirect expropriation claim, Claimant declines to specify the specific conduct of which it complains, instead referring generally to its MST claim. *See* Memorial, ¶ 528, fn. 696. As demonstrated in **Section IV.C.3.a** above, Claimant's MST claim is based on alleged conduct by Petroperú that preceded Claimant's investment.

pre-investment conduct cannot serve as a basis for liability under the Treaty or customary international law.

*(iii) The character of Petroperú's conduct was commercial in nature (*acta jure gestionis*) and therefore not expropriatory*

563. *Third*, the "character of the government action" at issue here, which is one of the factors identified in Treaty Annex 10-B, was commercial in nature. It therefore is not capable of generating liability under the Expropriation Provision. As discussed in **Section IV.D.1.d** above, tribunals assessing the character or nature of the relevant alleged State action have observed that "the measure must be a sovereign measure and not merely contractual."[1293] Here, Claimant complains about Petroperú's conduct in its role as subsidiary, and specifically its entry into supply agreements with Aguaytía Energy and CEPSA.[1294] However, conduct of that type is inherently commercial in nature: an entity acting as a subsidiary is—by definition, as that concept is understood under Peruvian law[1295]—carrying out only business or commercial activities.[1296] Indeed, the complained-of conduct is commercial in nature: Petroperú was entering into commercial contracts for the purchase of a product, which does not involve the exercise of the State's sovereign power.[1297] Accordingly, the conduct of which Claimant complains cannot support its claim of indirect expropriation.

[1293] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 259. *See also* **RL-0084**, *Muhammet Çap Bankrupt Sehil Inşaat Endustri Ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (Lew, de Chazournes, Hanotiau), ¶ 809.

[1294] *See* Memorial, ¶¶ 514–15.

[1295] *See* **Ex. R-0039**, Peru's Constitution, Art. 60 ("[T]he State may subsidiarily carry out **business activity**, directly or indirectly, for reasons of high public interest or manifest national convenience" (emphasis added)).

[1296] **RER-01**, Monteza Expert Report, ¶¶ 278–79. *See also* Quiñones Report, ¶ 240 ("In the precedent, the INDECOPI Court states that no activity carried out by a public company or an entity of the Administration that qualifies as the exercise of a public power or of *ius imperium* derived from the sovereign power of the State shall constitute business activity, nor therefore shall the principle of subsidiarity be applicable. Nor shall any welfare activity carried out by constitutional mandate as part of the obligations of the State be regarded as business activity").

[1297] *See* **RL-0039**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on the Merits, 24 May 2007 (Keith, Cass, Fortier), ¶ 74 (characterizing as commercial, rather than sovereign, an entity's "rights to enter into contracts for purchase or sale and to arrange and manage their own commercial activities").

(iv) Petroperú's alleged conduct did not interfere with any reasonable, investment-backed expectations

564. *Fourth*, as noted above the Treaty requires consideration of "the extent to which the government action interferes with distinct, reasonable investment-backed expectations"[1298]—i.e., express commitments upon which the investor relied in making its investment.[1299] Claimant does not argue—let alone prove—that Petroperú's alleged conduct interfered with any such expectations. To the contrary, Mr. Holzer expressly states that, even *before* his investment in Maple Gas,

> Mr. Rojas explained that Petroperu had been making it difficult for Maple Gas to access sufficient feedstock to operate the Pucallpa Refinery.[1300]

565. Mr. Rojas also expressly asserts that the interference was ongoing before Claimant made its investment:

> By the end of June 2016, it was very clear to me that contrary to its stated mission, Petroperú intended to continue interfering with the crude market in the Ucayali region as well as elsewhere in the Amazon region to the detriment of Maple Gas.[1301]

566. Since on Mr. Holzer's own account of the facts, the alleged interference by Petroperú was ongoing even *before* Claimant made its investment, the latter cannot now claim that it formed any expectation at the time of its investment that there would be no interference of the sort Claimant alleges. That is so because, at a minimum, Claimant would have known—again, accepting *arguendo* its own narrative—that any commitments or representations in that regard by State authorities would have been inconsistent with what was happening on the ground, and therefore, could not reasonably have been relied upon by Claimant as an inducement for its investment.

567. Moreover, Claimant also cannot have formed any reasonable expectations that Petroperú would refrain from participating in the feedstock market, given that the

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[1298] **RL-0001**, Treaty, Annex 10-B, § 3(a)(ii).

[1299] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern),¶ 256.

[1300] Holzer Witness Statement, ¶ 10.

[1301] Rojas Witness Statement, ¶ 46.

principle of subsidiarity is enshrined in the Peruvian Constitution.[1302] Claimant thus could not have formed a distinct, reasonable investment-backed expectation that Petroperú would not step in to fill any gaps left by Maple Gas or other suppliers of refined fuel in the region.

(v) Petroperú's alleged conduct did not cause a total or near total deprivation of value of Claimant's investment

568. *Fifth*, and finally, Claimant has also failed to demonstrate that Petroperú's conduct caused the requisite economic impact to configure an expropriation. In particular, having failed to even identify the specific actions by Petroperú that supposedly support its expropriation claim, Claimant (i) does not purport to identify the specific impact of Petroperú's alleged conduct on Claimant's indirect shareholding in Maple Gas (e.g., a loss of control over Maple Gas, or a decrease in the value of its shares), and (ii) does not purport to show that its loss was "the automatic consequence, i.e., the only and unavoidable consequence"[1303] of Petroperú's purchase of feedstock from Aguaytía Energy and CEPSA.

569. In any event, the evidence directly contradicts any claim that Petroperú's conduct proximately caused any of the alleged loss in value in Claimant's shareholding. Rather, the evidence shows intervening and superseding causes, some of which relate to Maple Gas' own conduct, including the following:

a. Maple Gas' own default on loans and guarantees amounting to USD 62 million in 2014;[1304]

[1302] **Ex. R-0039**, Peru's Constitution, Art. 60 ("[T]he State may subsidiarily carry out business activity, directly or indirectly, for reasons of high public interest or manifest national convenience").

[1303] **CL-0036**, *El Paso Energy International Co. v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 270. *See also* **CL-0036**, *El Paso Energy International Co. v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 272 ("Only if the [alleged loss] was the only possible consequence of the [State] measures could one consider that these measures were expropriatory . . . .").

[1304] *See* Memorial, ¶¶ 79–80; Katabi Witness Statement, ¶¶ 16–17.

b. Maple Gas' own dwindling supply from its Blocks 31-B and 31-D fields over time, leading to decreases in production from the Refinery in 2014, 2015, and 2016;[1305]

c. Maple Gas' own destruction of its relationship with Aguaytía Energy—its primary supplier of feedstock—through Maple Gas' repeated failure and refusal to pay invoices for millions of dollars' worth of supply;[1306]

d. Maple Gas' own alienation of CEPSA, which led CEPSA to suspend production and to cease negotiating with Maple Gas to sell its feedstock to Maple Gas.[1307]

570. Furthermore, any economic impact allegedly caused by Petroperú's commercial purchases of feedstock in 2015, 2016, and early 2017 should have been reflected in the price that Claimant paid when it acquired its indirect interest in Maple Gas on 15 June 2017. Claimant fails to address this fatal flaw in its claim.

571. Thus, Claimant's complaints about Petroperú's conduct in purchasing feedstock from third-party suppliers do not support its claim of indirect expropriation.

c. <u>The other alleged conduct that Claimant mentions in passing also does not amount to an indirect expropriation</u>

572. In asserting that an indirect expropriation occurred, Claimant also lists—in a single paragraph in the Memorial—certain other events that occurred in 2018 and 2019, *after* the alleged date of expropriation.[1308] As explained below, Claimant's argument that the expropriation took place on 31 December 2017 renders any subsequent events irrelevant to its indirect expropriation claim. In any event, none of the events identified by Claimant substantiate its indirect expropriation claim.

[1305] **Ex. R-0026**, Letter No. MGP-GM-L-0009-16 from Maple Gas (K. Neuman) to PERUPETRO (R. Guzmán), 17 April 2018, p. 4 (reporting declining production from both fields; for example, the crude production from Block 31-B dropped from 201 bpd in 2014 to 48 bpd in 2016). *See also supra* **Section II.B.3**, **II.D.1**.

[1306] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 43. *See also supra* **Section II.D.2**.

[1307] *See* **Ex. R-0128**, Letter No. CEPSA-GG-00005/16 from CEPSA (M. Ángel) to Petroperú (G. Velasquez), 12 January 2016, p. 1; **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, p. 2. *See also supra* **Section II.D.3**.

[1308] *See* Memorial, ¶ 518.

(i) Having identified the valuation date as 31 December 2017, Claimant cannot argue that subsequent events formed part of the expropriation

573. Article 10.7.1 of the Treaty provides that an expropriation will be lawful if compensation is made, and Article 10.7.2 specifies that the compensation must "be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation')."[1309] The method for identifying the date of expropriation depends on the nature of the claim. Here, Claimant claims only that there was a creeping expropriation (i.e., composite breach of the Expropriation Provision).[1310] Thus, its argument is that an indirect expropriation was effected through a series of measures that had an effect equivalent to a direct expropriation.[1311]

574. Pursuant to the ILC Articles, a composite breach "occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."[1312] Thus, the date on which the breach occurred, or the date of expropriation, will be the date of the action that effected the total or near total deprivation in the value of Claimant's investment.

575. Claimant asserts that the appropriate valuation date in this case is 31 December 2017.[1313] Since by the terms of the Treaty the date of expropriation is on or "immediately" after that date, that means that, on Claimant's own case, the total or near total deprivation in the value of its indirect shareholding in Maple Gas took place on 31 December 2017. However, in ostensible support of its indirect expropriation claim, Claimant invokes a series of events and measures—discussed in the following subsections—that *post-date* 31 December 2017. This is a fundamental contradiction in

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[1309] **RL-0001**, Treaty, Art. 10.7.

[1310] *See* Memorial, ¶ 511.

[1311] *See* **RL-0001**, Treaty, Annex 10-B, § 3 ("The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.").

[1312] **CL-0005**, U.N. International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Art. 15(1).

[1313] Memorial, ¶¶ 28, 553.

Claimant's claim. If, as Claimant suggests, the expropriation occurred on 31 December 2017, that means necessarily that the relevant total or near-total deprivation of value would have occurred on or immediately before that date.[1314] Measures *after* that date therefore cannot be said to have caused any destruction of the value of Claimant's investment; the post-2017 events invoked by Claimant are therefore irrelevant.

576. In any event, the post-31 December 2017 events and measures listed—but not analyzed—by Claimant do not actually help substantiate its indirect expropriation claim in any way. Peru briefly addresses each such event below.

(ii) The public statements by Petroperú about which Claimant complaints were not expropriatory

577. First, Claimant complains about "Petroperú's and the MINEM's [allegedly] false and misleading public allegations about Maple Gas in February 2018."[1315] Claimant devotes *a single sentence* to this part of its expropriation claim. As discussed in **Section II.I.1** above, Petroperú had issued public statements to assuage public concerns about fuel shortages in the region, confirming that Petroperú was acting in its role as subsidiary to ensure continued supply.[1316] Claimant offers no analysis or evidence to show that such public statements (i) proximately caused (ii) any loss of control over or value of Claimant's indirect shareholding in Maple Gas, or (iii) interfered with any "distinct, reasonable investment-backed expectations" by Claimant.[1317]

578. Furthermore, the "character" of the referenced statements is not expropriatory. Claimant misleadingly cites the *Biwater Gauff v. Tanzania* award for the proposition that public statements can be expropriatory, but the facts of that case are conspicuously different from that those in the present case. In the *Biwater Gauff* case, the tribunal was assessing "a press release in which [a Cabinet Minister] announced

[1314] *See* **RL-0001**, Treaty, Art. 10.7.

[1315] Memorial, ¶ 515.

[1316] *See, e.g.*, **Ex. C-0217**, "*Petro-Perú entablará arbitraje contra Maple por refinería*," El Comercio Perú, 15 February 2018 ("[Petroperú's] decision to buy crude corresponded to its subsidiary role, since, if it hadn't, Pucallpa would have been left without fuel.").

[1317] **RL-0001**, Treaty, Annex 10-B, § 3(a)(ii).

the termination of the Lease Contract[, which] was followed by a similar declaration on television."[1318] The *Biwater Gauff* tribunal determined that such public announcement of the termination of a contract had been "an exercise of executive authority" that effected a legal change in the investment.[1319] By contrast, the public statements made by Petroperú employees to reassure the public that there would not be a fuel shortage were not executive branch actions (see attribution discussion above), and in any event had no legal effect on Claimant's indirect shareholding in Maple Gas, or on Claimant's rights more generally.

579. Claimant has thus failed to demonstrate that Petroperú's public statements in February 2018 were measures forming part of an expropriation.

(iii) PERUPETRO's non-granting to Maple Gas of an extraordinary temporary license for the Sheshea field was not expropriatory

580. Claimant also complains that PERUPETRO "never responded to Maple Gas's May 2018 proposal regarding the Sheshea field."[1320] Again, this passing remark is plainly insufficient to demonstrate an indirect expropriation within the meaning of the Expropriation Provision. The facts concerning Maple Gas' wish to obtain rights to the Sheshea field demonstrate that there has been no expropriation:

a. In May 2018, Maple Gas—which had ceased all refining operations[1321] and suspended its payment of rent on the Pucallpa Refinery[1322]—sent a letter to PERUPETRO stating that Maple Gas was "pleased to . . . inform you . . . of our

[1318] **CL-0018**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 497.

[1319] **CL-0018**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 498. *See also* **RL-0069**, *Tradex Hellas S.A.(Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999 (Böckstiegel, Fielding, Giardina), ¶ 156 (finding that a speech "was neither a legislative or executive act nor did it change the situation found above . . . created by Decision. Therefore, the Berisha speech cannot be considered to be an expropriation, by itself or together with Decision").

[1320] Memorial, ¶ 517.

[1321] *See* Memorial, ¶ 246.

[1322] *See* **Ex. R-0045**, Letter No. MG-LEGA-L-0090-18 from Maple Gas to Petroperú, 16 May 2018, p. 1.

intention to enter into a Temporary Service Agreement for the Experimental Production of the Sheshea Field that was part of the former Block 126."[1323]

b. "An action . . . cannot constitute an expropriation unless it interferes with a tangible or intangible property right."[1324] Neither Claimant nor Maple Gas even argue—let alone prove—that Maple Gas had any property right in the Sheshea Field.

c. The fact that PERUPETRO did not accede to Maple Gas' demand was not expropriatory: As explained in **Section II.J.2** above, and in Dr. Monteza's expert report, Maple Gas' demand was not consistent with Peruvian law, which regulates the types of contractual arrangements into which PERUPETRO can enter.[1325] More specifically, Maple Gas confusingly demanded a short-term license, but also requested terms that reflected a service contract—i.e., a completely different type of arrangement.[1326] Furthermore, had Maple Gas wanted to acquire a short-term license to exploit the Sheshea Field, it would have had to obtain a qualification certificate and obtain all other necessary approvals under Peruvian law.[1327] PERUPETRO could not have acceded to Maple Gas' request without violating Peruvian law.

d. PERUPETRO's conduct did not "interfere[] with distinct, reasonable investment-backed expectations."[1328] Claimant does not even allege that PERUPETRO made any assurances about temporary access to the Sheshea field. Furthermore, Claimant had no reasonable basis to demand or expect such a license; as explained by Dr. Monteza, Maple Gas' demand was not consistent with Peruvian law.[1329]

[1323] **Ex. C-0064**, Letter from Maple to PERUPETRO, 24 May 2018, p. 1.

[1324] **RL-0001**, Treaty, Annex 10-B, § 1.

[1325] *See* **Ex. R-0139**, Hydrocarbons Law, Art. 10; **RER-01**, Monteza Expert Report, ¶¶ 22, 200-01.

[1326] *See* **RER-01**, Monteza Expert Report, ¶ 201.

[1327] **Ex. R-0139**, Hydrocarbons Law, Art. 10.

[1328] **RL-0001**, Treaty, Annex 10-B, § 3(a)(ii).

[1329] *See* **Ex. R-0139**, Hydrocarbons Law, Art. 10; **RER-01**, Monteza Expert Report, ¶¶ 22, 200-01.

e. Claimant has not even attempted to demonstrate that PERUPETRO caused any adverse economic impact on Claimant's indirect shareholding in Maple Gas. The evidence contradicts any such argument: both prior to and after Maple Gas made this unjustified demand, Maple Gas had no license or right to operate the Sheshea Field.

(iv) Petroperú's initiation of arbitration under the Refinery Lease Agreement was not expropriatory

581. Claimant also complains that Petroperú "commenced its arbitration against Maple Gas, seeking to terminate the Pucallpa Refinery Agreement."[1330] Again, this assertion by Claimant falls woefully short of the threshold for establishing an indirect expropriation. *First*, the "character" of the action was not expropriatory.[1331] The mere act of commencing an arbitration pursuant to the dispute settlement provision of a lease agreement does not constitute an exercise of sovereign power, but is instead "merely contractual."[1332] *Second*, the initiation of the arbitration did not "interfere[] with distinct, reasonable investment-backed expectations."[1333] The dispute settlement provision of the Refinery Lease Agreement—signed by Maple Gas—expressly provided for arbitration in the event of a dispute.[1334] *Third*, the Lima Tribunal (i) confirmed that Petroperú was properly exercising and enforcing its rights under the Pucallpa Refinery Agreement;[1335] (ii) found that Maple Gas had failed to pay rent as required under the contract;[1336] and (iii) thus ordered Maple Gas to pay more than USD 7.7 million to Petroperú in compensation.[1337]

[1330] Memorial, ¶ 517.

[1331] **RL-0001**, Treaty, Annex 10-B, § 3(a)(iii).

[1332] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 259.

[1333] **RL-0001**, Treaty, Annex 10-B, § 3(a)(ii).

[1334] *See* **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Art. 15.

[1335] **Ex. R-0002**, Lima Arbitration (Award), ¶ 206.

[1336] **Ex. R-0002**, Lima Arbitration (Award), ¶ 206.

[1337] **Ex. R-0002**, Lima Arbitration (Award), p. 84.

(v) Petroperú's termination of the Refinery Lease Agreement and Block 31 License Agreements was for cause and in accordance with the terms of such agreements, and did not constitute an indirect expropriation

582. Claimant also includes in its laundry list of grievances "the termination of Maple Gas's lease and licenses."[1338] Again, however, Claimant provides no analysis or evidence to support its claim, and indeed nothing that Claimant could have said, or provided by way of purported evidence, would have demonstrated that the Refinery Lease Agreement is an action tantamount to expropriation.

583. As explained in **Section II.J** above, termination by Petroperú of the Refinery Lease Agreement was justified and lawful because Claimant had failed to comply with the terms of its commercial lease contract. As demonstrated by the evidence, and as expressly affirmed by the independent arbitral tribunal in the Lima arbitration, Maple Gas had failed to pay rent as required under the Refinery Lease Agreement.[1339] After Petroperú provided Maple Gas with notice and an opportunity to cure—which Maple Gas did not do—the Lease Agreement terminated by its terms.[1340]

584. It is incontrovertible that the "character" of this act by Petroperú, pursuant to the terms of the Lease Agreement, is not expropriatory.[1341] The termination of a lease agreement by its terms based on one party's failure to pay rent is not an exercise of sovereign power, but instead "merely contractual."[1342]

585. Further, Claimant does not—and cannot—argue that it had any reasonable expectation that Petroperú would not terminate the Lease Agreement if Maple Gas failed to pay rent.

[1338] Memorial, ¶ 518.

[1339] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶ 206 ("[I]t is appropriate to declare that termination of the Lease Agreement already applied as a result of MAPLE's breach of its obligation to pay the rent, in application of the provisions of Clause 14.2.1 of the Lease Agreement and/or Article 1429 of the Civil Code.").

[1340] **Ex. R-0002**, Lima Arbitration (Award), ¶ 206.

[1341] **RL-0001**, Treaty, Annex 10-B, § 3(a)(iii).

[1342] **RL-0072**, *Carlos Ríos and Francisco Javier Ríos s v. Republic of Chile,* ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 259.

586. Any alleged impact on the value of Claimant's indirect shareholding was not caused by Petroperú's termination of the Lease Agreement. By the time of termination in August 2018, Maple Gas was already worthless; it was unable to pay rent; and bankruptcy proceedings were filed that same month. Petroperú's termination of the Lease Agreement was therefore the *result*—rather than the cause—of Maple Gas' implosion.

587. For similar reasons, Claimant's passing reference to the termination of the Block 31 License Agreements[1343] does not meet Claimant's burden of proof or the threshold for finding a violation of the Expropriation Provision. Neither Claimant nor Maple Gas denies that the Blocks 31-B and 31-D License Agreement required Maple Gas to maintain insurance,[1344] or that Maple Gas did not have proof of the requisite insurance.[1345] Further, the Block 31-E License Agreement provided for termination on the basis of insolvency, and INDECOPI had issued a "declaration of insolvency status" against Maple Gas on 7 January 2019.[1346] The termination of these contracts pursuant to their terms is not expropriatory.

588. As with the termination of the Refinery Lease Agreement, the "character" of the termination by PERUPETRO of Blocks 31-B and 31-D License Agreement was purely commercial rather than sovereign in nature, and therefore cannot be considered expropriatory.[1347] By invoking grounds for termination that are expressly identified in the contract, PERUPETRO was acting in its "capacity as a contractual party,"[1348] and was not exercising sovereign authority.

[1343] Memorial, ¶ 518.

[1344] **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 1994, Art. 18.9.

[1345] *See* **Ex. C-0240**, Letter from Maple Gas to PERUPETRO, 12 March 2019 (In its letter to PERUPETRO, Maple Gas did not deny that it did not have insurance).

[1346] *See generally* **Ex. R-0096**, INDECOPI, Resolution No. 0142-2019/CCO-INDECOPI, 7 January 2019.

[1347] **RL-0001**, Treaty, Annex 10-B, § 3(a)(iii).

[1348] **RL-0084**, *Muhammet Çap Bankrupt Sehil Inşaat Endustri Ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (Lew, de Chazournes, Hanotiau), ¶ 809.

589. Also, Claimant cannot have had a reasonable expectation that PERUPETRO would not terminate the Block 31 License Agreements when Maple Gas was unable to comply with its contractual obligations.[1349]

590. In any event, the License Agreements were terminated in February and March 2019, by which time Maple Gas had already been declared insolvent. The termination of these contracts by their terms was therefore a consequence of Maple Gas' financial demise, rather than the cause thereof.

(vi) Petroperú's retaking of possession of the Pucallpa Refinery did not constitute an expropriation

591. Claimant also includes in its laundry list of complaints "the physical occupation of the Pucallpa Refinery."[1350] Claimant neglects to provide any explanation or evidence to support its claim that this alleged action was expropriatory, and indeed it was not.

592. Claimant has entirely mischaracterized the facts on this issue. Importantly, Petroperú owns the Refinery, and had leased the Refinery to Maple Gas.[1351] As discussed in **Section II.M** above, in August 2019—one year after the termination of the Lease Agreement for cause—the Lima Tribunal authorized a scheduled inspection by Petroperú of the Refinery.[1352] In carrying out this scheduled inspection, Petroperú discovered that the Refinery had been abandoned by Maple Gas, and was in a state of disrepair.[1353] Petroperú invited Maple Gas to a meeting at which Petroperú could take formal possession of the Refinery, but Maple Gas declined to attend.[1354]

[1349] *See* **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Art. 14.2.1 ("In case of non-payment of the rent referred to in numeral 4.2 of the fourth clause of this agreement after 15 (fifteen) calendar days have elapsed from notification of breach without it being remedied.").

[1350] Memorial, ¶ 518.

[1351] *See generally* **Ex. R-0104**, Pucallpa Lease Agreement between Maple Gas and Petroperú, 29 March 1994.

[1352] *See* **Ex. R-0097**, Letter from Petroperú (J. Chang, *et al*.) to the Lima Tribunal (Case No. 0258-2018-CCL), 23 July 2019, p. 1.

[1353] *See* **Ex. R-0057**, Letter from Petroperú (C. Beltrán) to Maple Gas (R. López), 12 August 2019, p. 3 ("As you know and as has been accredited in the Notarized Document, the Refinery assets are in a state of abandonment and deterioration and are inoperative. MAPLE has not operated the plant for several months. This has not prevented it from continuing to use the Pucallpa Refinery in a precarious manner and with the evident intention of damaging the property, facilities and equipment owned by our company and contributing to its total deterioration.").

[1354] *See* **Ex. R-0057**, Letter from Petroperú (C. Beltrán) to Maple Gas (R. López), 12 August 2019, p. 3; **Ex. C-0077**, Letter from Maple to PETROPERÚ, 19 August 2019; **Ex. R-0002**, Lima Arbitration (Award), ¶ 249.

593. The "character" of the conduct that Claimant attributes to Petroperú was thus not expropriatory,[1355] insofar as Petroperú was merely carrying out an inspection in accordance with the order of the Lima Tribunal, which was adjudicating the commercial dispute, and which had authorized the inspection so that Petroperú could protect its property rights.[1356]

594. Claimant could not have had a reasonable expectation that Maple Gas would retain formal possession of the Pucallpa Refinery forever, even after termination of the Lease Agreement and after its abandonment of the facility.

595. By August 2019, Maple Gas had defaulted on its obligations under the Lease Agreement and License Agreements, and had been declared insolvent. Yet again, Petroperú's action in securing the facility was a direct consequence—and certainly not a cause—of Maple Gas' implosion.

(vii) The initiation of bankruptcy proceedings by a third party is not evidence of any expropriation by Peru

596. Claimant's final passing note in its list of complaints is that "Maple Gas ultimately entered into bankruptcy on 7 January 2019."[1357] This is a statement of fact, rather than a substantiated argument in support of a Treaty claim. In any event, the statement is inaccurate: Trailon, a creditor of Maple Gas, initiated bankruptcy proceedings against Maple Gas on *7 August 2018*. After Maple Gas proved unable to propose a satisfactory payment schedule for its debts, it was declared insolvent on 7 January 2019. Claimant has not identified any government measure in connection with the foregoing that would have caused any substantial deprivation of Claimant's investment in Maple Gas, nor satisfied any of the other requisite elements of an indirect expropriation.

* * *

597. In sum, Claimant has utterly failed to substantiate its claim of an indirect expropriation. Its argument consists of a list of grievances, unaccompanied by analysis

[1355] **RL-0001**, Treaty, Annex 10-B.

[1356] *See* **Ex. R-0002**, Lima Arbitration (Award), ¶¶ 210, 213.

[1357] Memorial, ¶ 518.

or evidence of an actual economic impact on Claimant's indirect shareholding in Maple Gas. The reality—as the evidence shows—is that Maple Gas had been in a downward spiral for years, and its decline was the product of its own financial mismanagement, commercial disputes with suppliers, and defaults on contractual obligations, combined with Claimant's own business decisions once it assumed control of the company. Nothing that Claimant asserts or argues in the Memorial, and certainly nothing in the evidentiary record, could possibly lead to the conclusion that any actions attributable to Petroperú, PERUPETRO, or any State organ of the Republic of Peru constituted an indirect and compensable expropriation under the Treaty. Claimant's expropriation claim must accordingly be dismissed.

V. DAMAGES

598. Even if Peru had breached the Treaty (quod non), Claimant would not be entitled to any damages at all. Claimant seeks a total of USD 136.3 million, plus interest, in damages, comprised of (i) USD 99 million for the alleged fair market value of Block 126 ("**Block 126 Application Damages Claim**"),[1358] and (ii) USD 37.3 million for the alleged fair market value of the Pucallpa Refinery ("**Refinery Damages Claim**").[1359]

599. In the sections that follow, Peru will demonstrate that Claimant has not substantiated either of its two damages claims. Claimant bears the burden of proving each element of such claims (**Section V.A**). However, Claimant has failed at the very first hurdle: it has not demonstrated that it incurred any loss in its capacity as an indirect shareholder in Maple Gas (**Section V.B**). Furthermore, Claimant has failed to prove that the alleged Treaty breaches—rather than other factors, including Maple Gas' own imprudent conduct—were the cause of the alleged loss (**Section V.C**). Claimant has also failed to prove the quantum of damages, as it relies on calculations in an appraisal and a damages report that are speculative, incomplete, and inaccurate (**Section V.D**). In any event, even if Claimant were entitled to damages, such amount would need to

[1358] *See* Memorial, ¶¶ 560, 577.

[1359] *See* Memorial, ¶¶ 560, 583.

be reduced based upon Claimant's contributory fault (**Section V.E**). Finally, Claimant applies an incorrect interest rate to its claims (**Section V.F**).

A. Claimant bears the burden of proof with respect to each element of its damages claims

600. Article 10.16.1(a) of the Treaty provides that

> the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, and . . . that **the claimant has incurred loss or damage by reason of, or arising out of, that breach**.[1360] (Emphasis added)

601. Claimant bears the burden of proving—with "reasonable certainty"[1361]—each element of its damages claims.[1362] Claimant therefore bears the burden of demonstrating: (i) that Claimant itself "has incurred loss or damage;"[1363] (ii) that such alleged loss was caused by—i.e., occurred "by reason of, or arising out of"—the alleged breach(es);[1364]

[1360] **RL-0001**, Treaty, Art. 10.16.1 (a)(ii).

[1361] **RL-0098**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Fernández-Armesto, Paulsson, Voss), ¶ 246 ("The Tribunal agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty"). *See also* **RL-0088**, *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Final Award, 27 May 2020 (Kaufmann-Kohler, Price, Stern), ¶ 121; **RL-0089**, *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015 (Williams, Paulsson, Brower), ¶ 175.

[1362] *See, e.g.*, **RL-0090**, *Pawlowski AG and Projekt Sever S.R.O. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (Fernández-Armesto, Beechey, Lowe), ¶ 728 ("The duty to make reparation extends only to those damages which have been proven by the injured party and which are legally regarded as the consequence of the wrongful act. It is a general principle of international law that injured claimants bear the burden of demonstrating: - That the claimed quantum of damage was actually suffered, and - that such damages flowed from the host State's conduct, and that the causal relationship was sufficiently close (i.e., not "too remote")"); **RL-0098**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Fernández Armesto, Paulsson, Voss), ¶ 155; **RL-0050**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 190 ("[I]t must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach").

[1363] **RL-0001**, Treaty, Art. 10.16.1 (a)(ii).

[1364] **RL-0001**, Treaty, Art. 10.16.1 (a)(ii). *See also* **CL-0074**, *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL (1976), Partial Award, 13 November 2000, ¶ 316 ("[T]he economic losses claimed by [the claimant] must be proved to be those that have arisen from a breach of the [treaty], and not from other causes").

and (iii) the quantum of its loss.[1365] If Claimant fails to establish any of these elements, no damages may be awarded.[1366]

B. Claimant has failed to prove that it incurred loss or damage

602. Claimant's damages claim fails at the threshold, as Claimant has failed to prove that it has incurred any loss or damage.

1. The Treaty requires that Claimant show that it incurred loss in its capacity as an investor

603. Article 10.16 of the Treaty provides Peru's consent to the submission of an arbitral claim (i) by a claimant "on its own behalf,"[1367] and (ii) by a claimant "on behalf of an enterprise . . . that the claimant owns or controls."[1368] While Claimant stated in its Notice of Intent that it intended to submit claims both on its own behalf and on behalf of Maple Gas,[1369] it ultimately submitted claims only on its own behalf.[1370] Accordingly, Claimant must prove that it—Worth Capital itself—sustained loss or damage that was caused by the alleged breach(es) of the Treaty.

604. In interpreting the nearly identical provision of NAFTA, the United States emphasized that the claimant must establish that it suffered direct damage to its investment:

[1365] *See* **CL-0074**, *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL (1976), Partial Award, 13 November 2000, ¶ 316 ("[T]he burden is on [the claimant] to prove the quantum of the losses in respect of which it puts forward its claims."). *See also* **RL-0090**, *Pawlowski AG and Projekt Sever S.R.O. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (Fernández-Armesto, Beechey, Lowe), ¶ 728; **RL-0050**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 190; **RL-0062**, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (Mourre, Ramírez, Jana), ¶ 699; **RL-0088**, *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Final Award, 27 May 2020 (Kaufmann-Kohler, Price, Stern), ¶ 119.

[1366] **RL-0091**, *Gemplus S.A., et al., v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010 (Veeder, Magallón Gómez, Fortier), ¶¶ 12–56 ("If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent").

[1367] **RL-0001**, Treaty, Art. 10.16.1 (a).

[1368] **RL-0001**, Treaty, Art. 10.16.1 (b).

[1369] Notice of Intent, p. 1.

[1370] *See, e.g.*, Memorial, ¶ 303 (invoking Treaty Article Art. 10.16.1 (a)); Notice of Arbitration, p. 1 (same). Peru does not here address the lack of validity of any potential claims made on behalf of Maple Gas.

> When the investor files a claim under Article 1116 for direct losses suffered by it, **only those losses that were sustained by that investor in its capacity as an investor are recoverable**. Examples of direct losses sustained by an investor in its capacity as an investor that would give rise to a claim under Article 1116 are, for example, losses suffered as a result of an investor's stockholder shares having been expropriated.[1371] (Emphasis added)

2. Claimant does not even claim, let alone establish, that it sustained losses in its capacity as an indirect shareholder in Maple Gas

605. Claimant's damages claims fail at the "loss or damages" hurdle because Claimant does not demonstrate that it (i.e., Worth Capital) sustained losses "in its capacity as an investor." Claimant identified as its investment its indirect shareholding in Maple Gas.[1372] Yet Claimant does not seek to establish or quantify any losses that it sustained as an indirect shareholder—e.g., a possible loss in value of its indirect shares in Maple Gas. Instead, Claimant claims for "the fair market value of Block 126" and "the fair market value of the Pucallpa Refinery."[1373] In other words, Claimant claims as its own loss as an indirect shareholder the alleged value of (i) an oil and gas block over which Maple Gas had sought (unsuccessfully) to acquire license rights, and (ii) a property interest (leasehold) held by Maple Gas.[1374]

606. Claimant makes no effort, however, to explain how the alleged values of Block 126 and of the Refinery relate to any loss in value of Claimant's indirect shareholding in Maple Gas. Indeed, as confirmed by AlixPartners, the sum invoked by Claimant as the combined value of Block 126 and the Pucallpa Refinery cannot represent the value or loss thereto of Claimant's indirect shareholding[1375] because it does not reflect other

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[1371] **RL-0092**, *Pope & Talbot, Inc. v. Government of Canada*, UNCITRAL, Seventh Submission of the United States of America, 6 November 2001 (Dervaird, Greenberg, Belman), ¶¶ 5–6.

[1372] *See* Memorial, ¶ 314.

[1373] Memorial, ¶ 563.

[1374] To the extent that the alleged damages were suffered by Maple Gas (rather than Worth Capital), Claimant cannot claim such damages because Claimant has not submitted any claim under Treaty Article 10.16.1(b).

[1375] *See* **RER-02**, Alix Damages Expert Report, ¶ 13 ("Worth Capital's indirect shareholding of Maple Gas cannot be equal to the sum of the alleged values of Block 126 and the Pucallpa Refinery Claimant.").

factors that are relevant to the value assessment. For example, the sum fails to take into account the more that USD 70.0 million in debt owed by Maple Gas,[1376] which debt inevitably would have reduced the value of Worth Capital's indirect shareholding.

607. Since Claimant has not even claimed (let alone proven) any adverse impact on its indirect shareholding in Maple Gas as a result of the alleged Treaty breaches, it cannot be deemed to have suffered loss or damage, as required by the Treaty.[1377] Claimant's damages claims must therefore be rejected in their entirety.

3. Claimant cannot claim for loss or harm to an asset over which Claimant never had any rights

608. In any event, Claimant cannot claim as damages the value of Block 126 because Claimant did not own any rights or interests with respect to such block—and nor, for that matter, did Maple Gas. Claimant thus could not have suffered any loss or damage that would be actionable under the Treaty.

609. In addition to the Treaty's clear requirements, arbitral case law has established that a claimant cannot be awarded damages for loss to rights that the claimant does not have. For instance, in *Merrill & Ring Forestry L.P. v. Canada*, the claimant had argued that, by imposing certain export restrictions, Canada had expropriated the claimant's right to sell logs into foreign markets. The tribunal rejected that claim, however, noting that the alleged right invoked by the claimant in fact amounted "only [to] a **potential** interest that may or not materialize under contracts the [i]nvestor **might** enter into with its foreign customers"[1378] (emphasis added). The tribunal stressed in its analysis that "an investor cannot recover damages for the expropriation of a right it never had."[1379] Similarly, in *Gold Reserve v. Venezuela*, the claimant had claimed loss

[1376] **RER-02**, Alix Damages Expert Report, ¶ 103.

[1377] **RL-0001**, Treaty, Art. 10.16.1 (a)(ii).

[1378] **CL-0060**, *Merrill and Ring Forestry L.P. v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010, ¶ 140.

[1379] **CL-0060**, *Merrill and Ring Forestry L.P. v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010, ¶ 142.

to certain property rights that "would be acquired in the future."[1380] The tribunal roundly rejected this argument, reasoning that it would be inappropriate to "compensate Claimant for the deprivation of a right that it never possessed."[1381]

610. Much like the claimants in *Merrill & Ring Forestry L.P. v. Canada* and *Gold Reserve v. Venezuela*, and as discussed in **Section IV.D.2** above, in the present case, Claimant is seeking damages "for the deprivation of a right that it never possessed."[1382] Neither Claimant nor Maple Gas ever held any property right or interest in Block 126; rather, Maple Gas merely *hoped* to obtain a license to explore and exploit the oil fields in that block. However, following a formal application process, it was deemed not financially qualified to do so under objective standards of Peruvian law.[1383] Accordingly, Claimant's claim for the fair market value of the Block 126 oil fields is not a claim for loss incurred by Claimant, and the claim must be rejected.

611. With respect to the claim for the alleged value of the Pucallpa Refinery, although that refinery was an asset leased by Maple Gas (and leaving aside whether any harm was actually caused to the Refinery by any State measure, which is a subject that is addressed further below), Claimant itself did not have any right or interest in such asset. Importantly, Claimant's indirect shareholding in Maple Gas did not generate, or otherwise amount to, a right or interest in the Refinery itself. Thus, Claimant's claim for the fair market value of the Refinery is not a claim for loss incurred by Claimant, for which reason that claim, too, must be dismissed.

[1380] **CL-0046**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 819.

[1381] **CL-0046**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 829.

[1382] *See* **CL-0046**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 829.

[1383] *See* **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1. Even PERUPETRO's prior qualification based on the incorrect financial information did not grant Maple Gas any rights: "The granting of the Qualification will not generate any rights over the contract area." **Ex. R-0074**, Qualification Regulations, Art. 2.

C. Claimant has failed to prove causation

612. Even if Claimant had in fact established that it incurred some type of loss or damage in its capacity as an investor in Maple Gas (quod non), Claimant has failed to show that such alleged loss was *caused by* the alleged Treaty breaches.

1. The Treaty requires the claimant to prove causation

613. Article 10.16.1(a)(ii) requires that the claimant demonstrate that it "has incurred loss or damage **by reason of, or arising out of**, th[e] breach"[1384] (emphasis added). Causation is likewise a requisite element of compensatory damages under customary international law. For example, Article 31(1) of the ILC Articles provides that a claimant may recover only for "[i]njury **caused by** the internationally wrongful act [of a State]"[1385] (emphasis added). Moreover, not any causal link will suffice; rather, such link must be sufficiently direct. In this respect, the commentary to Article 31(1) cautioned that

> [t]he allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable to [the wrongful] act as a **proximate cause**", or to damage which is "too indirect, remote, and uncertain to be appraised" . . . . Thus, **causality in fact is a necessary but not a sufficient condition for reparation**. There is a further element associated with the **exclusion of injury that is too "remote" or "consequential"** to be the subject of reparation. (Emphasis added)[1386]

614. Similarly, the tribunal in *Lemire v. Ukraine* emphasized the requirement of a sufficient direct causal link:

> [I]t is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed

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[1384] **RL-0001**, Treaty, Art. 10.16.1 (a)(ii).

[1385] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 31 (1).

[1386] **CL-0006**, ILC, *Yearbook of International Law Commission*, 2001, Vol. II, Part Two, Art. 31, comment 10.

> quantum of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (i.e. not 'too remote').[1387]

615. Consistent with the foregoing, the *S.D. Myers v. Canada* tribunal confirmed that "compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached."[1388] The tribunal continued by emphasizing that for the casual link to be sufficiently close, the claimed damages "must be proved to be those that have arisen from a breach of the [treaty], and **not from other causes**"[1389] (emphasis added). In this respect, as observed by the *Lauder v. Czech Republic* tribunal, there cannot be an intervening or superseding cause:

> Even if the breach [] constitutes one of several 'sine qua non' acts, this alone is not sufficient. In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage. In our case the [c]laimant therefore has to show that [a circumstance other than the treaty breach] did not become a superseding cause and thereby the proximate cause.[1390]

2. Claimant has made no effort to establish through evidence the requisite causal link

616. In its Memorial, Claimant fails to even acknowledge the fundamental requirement that it must prove that its alleged damages were proximately caused by the alleged Treaty breaches. Nor does Claimant make any attempt to establish the requisite causal link through evidence. The closest that Claimant comes to engaging with the requirement of causation is a self-serving, one-sentence assertion in the Memorial that "[a]s a result of Peru's actions, Maple Gas had to suspend operations at the Pucallpa

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[1387] **RL-0098**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Fernández-Armesto, Paulsson, Voss), ¶ 155.

[1388] **CL-0074**, *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL (1976), Partial Award, 13 November 2000, ¶ 316.

[1389] **CL-0074**, *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL (1976), Partial Award, 13 November 2000, ¶ 316.

[1390] **RL-0070**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein), ¶ 234.

Refinery in December 2017, and subsequently never managed to recover the business."[1391] Claimant does not purport to identify the alleged link between each of the specific alleged Treaty breaches and the corresponding alleged harm. This is utterly insufficient to show the requisite causal link.

617. Having failed to prove causation, Claimant's damages claims must be rejected.

3. In any event, the alleged conduct of which Claimant complains did not cause the alleged harm

618. In any event, the evidence directly contradicts Claimant's unsupported assertion that Peru's conduct caused the "suspen[sion] [of] operations at the Pucallpa Refinery in December 2017, and . . . the termination of its Lease and License Agreements in 2019."[1392] To the contrary, the evidence shows the following.

619. *First*, the evidence shows that the suspension of operations at the Pucallpa Refinery was caused by Maple Gas' own conduct, in a series of dubious acts.

a. Maple Gas itself unilaterally destroyed its relationship with Aguaytía Energy,[1393] its primary supplier of feedstock.[1394] In particular, Maple Gas (i) refused to pay approximately USD 5.3 million that it owed to Aguaytía Energy for the latter's supply of feedstock in 2014;[1395] (ii) abruptly terminated price renegotiations with Aguaytía Energy, thereby terminating its long-term, exclusive supply agreement;[1396] (iii) continued to accept, yet refused to pay for, additional supplies of Aguaytía Energy feedstock, the value of which was USD 13.4 million;[1397] (iv) forced Aguaytía Energy to initiate an ICC arbitration against Maple Energy to recover the amounts owed;[1398] and (v) as publicly

[1391] Memorial, ¶ 559.

[1392] Memorial, ¶ 559.

[1393] *See supra* **Section II.D.2**.

[1394] **RER-02**, Alix Damages Expert Report, ¶ 109 (noting that the feedstock that Maple Gas purchased from Aguaytía Energy represented an average of 82% of Maple Gas' total feedstock from 2000 to 2016) (*citing* **Ex. CLEX-0001**, Compass Lexecon Valuation Model, 25 March 2022, tab "Historical Feedstock").

[1395] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 195 (i).

[1396] **Ex. R-0001**, ICC Arbitration (Award), ¶ 46 (m).

[1397] **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 118, 195 (ii).

[1398] **Ex. R-0001**, ICC Arbitration (Award), ¶ 22.

stated by Aguaytía Energy's parent company, drove Aguaytía Energy to find a new buyer for its feedstock.[1399] As Maple Gas is aware, the tribunal in the above-mentioned ICC arbitration ordered Maple Gas to pay more than USD 21.6 million to Aguaytía Energy, and that tribunal expressly rejected Maple Gas' claim that Petroperú had been complicit in, or was to blame for, Maple Gas' troubles.[1400]

b. Maple Gas relied on its Block 31 Fields to supply feedstock, even though—as Maple Gas knew—its existing investments in exploration were yielding dwindling reserves of feedstock.[1401] Indeed, Maple Gas even abandoned exploration efforts in part of Block 31-E.[1402]

c. Maple Gas alienated CEPSA, thus frustrating the main opportunity it had to secure a new source of feedstock. In 2014, Maple Gas had been unwilling to purchase feedstock from CEPSA.[1403] Subsequently, Maple Gas tried to force CEPSA into selling it feedstock by ceasing all RAD Services unless and until CEPSA sold to Maple Gas.[1404]

[1399] *See* **Ex. R-0022**, "*Fitch Rates Orazul Energy Egenor's Proposed Senior Notes 'BB(EXP)'*," FITCHRATING, 17 April 2017 (accessed 22 July 2022), p. 2 ("It is expected to take an additional USD$6 million of impairments in 2017 before improved distribution infrastructure allows the company to redirect sales to financially stronger clients."). *See also* **Ex. R-0063**, Orazul Energy Egenor S. en C. por A. 5.6256% Senior Notes due 2027, Offering Memorandum, 25 April 2017, p. 136 ("Aguaytía currently has no method of storing the natural gasoline produced as the natural by-product of the LPG that the company sells to bottlers and gas stations. However, Aguaytía has contracted SNC Lavalin Perú S.A. to build a new storage and loading plant that will allow it to store the natural gasoline in barrels and sell it directly to third parties").

[1400] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 165.

[1401] *See* **Ex. R-0026**, Letter No. MGP-GM-L-0009-16 from Maple Gas (K. Neuman) to PERUPETRO (R. Guzmán), 17 April 2018, p. 4. *See also supra* **Section II.B.2**.

[1402] *See* **RER-02**, Alix Damages Expert Report, ¶ 125 (*citing* **Ex. AP-0045**, Maple Gas Corporation del Perú S.R.L. Audited Financial Statements as of December 31, 2016 and 2015, p. 18).

[1403] *See* **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, p. 2 (Mr. Katabi confirmed that in 2014, Maple Gas was unable to refine the crude produced by CEPSA due to "the problems we had at that time"). *See also supra* **Section II.B.4**.

[1404] *See* **Ex. R-0128**, Letter No. CEPSA-GG-00005/16 from CEPSA (M. Ángel) to Petroperú (G. Velasquez), 12 January 2016, p. 1; **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, p. 2. *See also* **Ex. C-0219**, "*Gerente de Petroperú explicó situación del combustible en Ucayali*," Impetu Perú, 22 February 2018, p. 1 ("[T]he relationship between the two companies–CEPSA and Maple–deteriorated to the point that Maple closed the doors and didn't allow the tankers that were arriving with crude to unload, and thus CEPSA fell into crisis."). *See also supra* **Section II.D.3**.

d. Maple Gas had serious financial problems, reporting net losses in the millions of dollars in 2012, 2014, 2015, and 2016.[1405] Further, in 2014, Maple Gas defaulted on its guarantee of a secured term loan, became indebted for USD 62 million, and was ultimately seized by the Creditor Banks.[1406]

e. Maple Gas was unable to secure a license to explore and exploit the Block 126 fields because Maple Gas did not meet the objective criteria (under either the 2010 or 2017 Guidelines) to hold the Block 126 License—i.e., Maple Gas did not have the financial capacity to make the necessary investments and operate the fields.[1407] Claimant does not deny that Maple Gas was not financially qualified to obtain the Block 126 License.

f. In 2014, 2015, and 2016, Maple Gas had been repeatedly sanctioned for violations of environmental and other regulations at the Refinery.[1408]

g. Moreover, Maple Gas refused to make the necessary updates to its facilities to be able to enter into an arrangement to provide RAD Services to Petroperú.[1409]

620. In this respect, the ICC Tribunal adjudicating Aguaytía Energy's claims against Maple Gas aptly summarized the cause of Maple Gas' difficulties:

[1405] *See* **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, p. 7 (reporting net loss of USD 3,649,306 in 2015); **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, p. 60 (reporting net loss of USD 6,034,968 in 2016); **Ex. R-0109**, Maple Gas, Audited Financial Statements, 2009–2013, p. 6.

[1406] **Ex. R-0017**, "*Maple Energy PLC: Ethanol Business Update*," MARKETSCREENER, 22 December 2014 (accessed 22 July 2022), p. 1. *See also* Memorial, ¶ 80.

[1407] *See* **RER-02**, Alix Damages Expert Report, ¶ 47.

[1408] *See, e.g.*, **Ex. R-0065**, Ministry of the Environment, Directorate Resolution No. 002-2016-OEFA/DFSAI, 4 January 2016, pp. 3, 27–29; **Ex. R-0066**, Ministry of the Environment, Resolution No. 031-2016-OEFA/TFA-SEE, 6 May 2016, p. 27 (affirming Directorate Resolution No. 002-2016-OEFA/DFSAI); **Ex. R-0049**, Ministry of the Environment, Resolution No. 042-2016-OEFA/TFA-SEE, 3 June 2016, p. 27 (affirming Directorate Resolution No. 124-2016-OEFA/DFSAI); **Ex. R-0058**, Ministry of the Environment, Directorate Resolution No. 220-2015-OEFA/DFSAI, 13 March 2015, pp. 7–15; **Ex. R-0059**, Ministry of the Environment, Resolution No. 033-2015-OEFA/TFA-SEE, 7 August 2015, pp. 117–18 (affirming virtually all sanctions in Directorate Resolution No. 220-2015-OEFA/DFSAI).

[1409] *See* **Ex. R-0029**, Letter No. COSE-AA-866-2014 from Petroperú (J. Delgado) to Maple Gas (C. Valderrama), 6 October 2014, p. 1. *See also supra* **Section II.F**.

> [I]t is apparent from the evidence submitted that MAPLE lost access to its natural crude oil suppliers as a result of its commercial disputes. . . .
>
> In this scenario of conflict with the natural suppliers, it is logical that **the cause of the lack of access for the purchase of crude oil** or the refusal of the suppliers to contract with MAPLE is the latter's own **commercial conduct and not the concerted conduct by PETROPERU to displace the Respondent**.[1410] (Emphasis added)

621. *Second*, the evidence shows that Maple Gas directly caused the termination of the Refinery Lease Agreement and the termination of its Block 31 License Agreements.

a. Claimant does not deny (i) that the Refinery Lease Agreement required the payment by Maple Gas of quarterly rent to Petroperú,[1411] or (ii) that Maple Gas refused to pay its quarterly rent under the Lease Agreement.[1412]

b. Claimant also does not deny (i) that the Blocks 31-B and 31-D License Agreement required that Maple Gas maintain and provide proof of insurance,[1413] or (ii) that Maple Gas in fact did *not* comply with that obligation.[1414]

c. Claimant similarly does not deny (i) that the Block 31-E License Agreement included the insolvency of Maple Gas as a grounds for termination, or (ii) that Maple Gas was in fact declared insolvent.[1415]

[1410] **Ex. R-0002**, *Petróleos Del Perú S.A. v. Maple Gas Corp. Del Perú S.R.L.*, Lima Arbitration No. 258-2018-CCL, Award, 8 October 2020 (Eyzaguirre, Berckemeyer, Ferrando), ¶¶ 190, 193.

[1411] *See* **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Art. 5.2.1.

[1412] **Ex. R-0100**, Letter No. MG-LEGA-L-150-2018 from Maple Gas (K. Neumann) to Petroperú (C. Beltrán), 16 August 2018, p. 1.

[1413] Nor did Maple Gas deny this fact in its contemporaneous correspondence. *See* **Ex. R-0046**, Hydrocarbon Exploitation License Agreement of Lots 31-B and D between PERUPETRO and Maple Gas, 30 March 2014, Art. 18.9.

[1414] Nor did Maple Gas deny this fact in its contemporaneous correspondence. *See* **Ex. C-0072**, Letter from PERUPETRO to Maple, 6 February 2019, titled "*Terminación del Contrato por Incumplimiento Contractual – Lote 31-B y 31-D*," p. 1.

[1415] Again, Maple Gas did not deny this fact in its contemporaneous correspondence. *See* **Ex. C-0073**, Letter from PERUPETRO to Maple, 25 March 2019, titled "*Terminación del Contrato de pleno derecho – Lote 31-E*," p. 1.

622. Thus, even if Claimant were entitled to claim as damages the alleged fair market value of Block 126 and the Refinery (quod non), the evidence overwhelmingly shows that the relevant alleged losses were not caused by Peru.

D. Claimant has failed to prove quantum of its alleged loss

623. Even if Claimant had established that it had incurred loss and that such loss was caused by one or more of the alleged Treaty breaches, Claimant has failed to substantiate the *quantum* of its alleged loss. As a result, its damages claim should be rejected.

1. Claimant bears the burden of proving quantum

624. As affirmed in the commentary to the ILC Articles, "[c]ompensation corresponds to the **financially assessable damage** suffered by the injured [party]"[1416] (emphasis added). In this respect, the Iran-U.S. Claims Tribunal has emphasized that "[o]ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded."[1417] Further, the burden to prove the quantum of a claimant's actual—rather than speculative or uncertain—loss rests with the claimant itself.[1418]

[1416] **CL-0006**, ILC, *Yearbook of International Law Commission*, 2001, Vol. II, Part Two, Art. 36, comment 4.

[1417] **RL-0093**, *Amoco International Finance Corp. v. Government of Islamic Republic of Iran, et al.*, IUSCT Case No. 56, Partial Award, 14 July 1987 (Virally, Brower, Moin), ¶ 238. *See also* **RL-0094**, *LG&E Energy Corp., et al., v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007 (de Maekelt, van den Berg, Rezek), ¶ 88; **RL-0095**, *Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003 (Kaufmann-Kohler, Böckstiegel, Cremades), ¶¶ 351–52; **RL-0096**, *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Award, 20 February 2015 (van Houtte, Janow, Sands), ¶¶ 473–74 (declining to award damages after applying a standard of "reasonable certainty" and finding that "too many critical questions remain open").

[1418] *See, e.g.*, **CL-0074**, *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL (1976), Partial Award, 13 November 2000, ¶ 316 ("[T]he burden is on [the claimant] to prove the quantum of the losses in respect of which it puts forward its claims."); **RL-0100**, Meg Kinnear, "*Damages in Investment Treaty Arbitration*," *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (2010), p. 556 ("The investor bears the burden of proving causation, quantum and the recoverability at law of the loss claimed"); **RL-0050**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 190 ("[I]t must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms").

625. As noted, Claimant has submitted two damages claims: the Block 126 Application Damages Claim, and the Refinery Damages Claim. Claimant's quantification of each of these damages claims is fundamentally flawed, and therefore cannot form the basis for an award of damages by the Tribunal.

2. Claimant's Block 126 Application Damages Claim is unsubstantiated, speculative, and inaccurate

626. Claimant claims that it is entitled to USD 99 million in damages for the alleged fair market value of Block 126. This claim hinges on (i) the counterfactual scenario in which, but for the alleged Treaty breaches, Maple Gas would have successfully licensed, invested in, explored, and exploited Block 126 until the year 2038;[1419] and (ii) the appraisal of Block 126 conducted by the consultant group Hidro-Carburos and presented as an expert report in this arbitration ("**Hidro-Carburos Report**"). However, as shown in the sections that follow, Claimant's counterfactual is an unproven and unrealistic one (**subsection a**); the Hidro-Carburos Report is an appraisal that does not purport to quantify damages (**subsection b**); and the Hidro-Carburos appraisal is in any event based on speculative and incomplete information (**subsection c**).

a. Claimant's Block 126 Application Damages Claim relies on a counterfactual scenario that is unproven and unrealistic

627. Claimant's Block 126 Application Damages Claim relies on the following counterfactual scenario: But for PERUPETRO's allegedly wrongful conduct in issuing the Rectification Decision (through which PERUPETRO determined that Maple Gas did not have the financial capacity to hold the Block 126 License), Maple Gas would have obtained the Block 126 License and explored and exploited the Block 126 fields until the year 2038.[1420] However, this premise is fundamentally flawed, and indeed downright fanciful, because to obtain and operate such license, Maple Gas would

[1419] *See* Memorial, ¶¶ 560, 577.

[1420] *See* Memorial, ¶¶ 560, 577.

have faced numerous obstacles that were not only intractable but also insuperable. Each of these obstacles is addressed in turn below.

628. *First*, Maple Gas would have needed to demonstrate that it had the requisite financial capacity to hold the License by satisfying objective criteria under Peruvian law.[1421] As discussed in **Section II.H.2** above, PERUPETRO had initially indicated that Maple Gas satisfied these criteria, but it reached that decision on the basis of incorrect information.[1422] When PERUPETRO reviewed the correct information—namely, Maple Gas' audited financial statements—PERUPETRO determined that Maple Gas did not have the requisite financial capacity, and issued the Rectification Decision.[1423] While both Maple Gas and Claimant have submitted complaints about the process by which the Rectification Decision was issued, neither Claimant nor Maple Gas has *ever* argued that Maple Gas satisfied the objective criteria under either the 2010 or 2017 Guidelines.[1424] Claimant thus appears to concede that Maple Gas was not qualified under Peruvian law to obtain the Block 126 License—a concession that destroys its counterfactual scenario and its damages claim.

629. *Second*, even if Maple Gas had been deemed financially qualified (which it was not), Maple Gas would have needed to secure complete a mandatory review and approval process in order to obtain the Block 126 License,[1425] and Claimant has produced no evidence to show that Maple Gas could or would have done so in the time available.

630. As Claimant concedes, Maple Gas needed to complete this process by 20 December 2017, on which date Frontera's Block 126 License would have expired.[1426] Specifically, as discussed in **Section II.H.3** above, Peruvian law required a company applying for the transfer of such a license to negotiate any proposed modifications to the license

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[1421] *See* **Ex. R-0074**, Qualification Regulations, Art. 2. *See also supra* **Section II.H.2**.

[1422] *See* **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1. *See also supra* **Section II.H.2**.

[1423] *See* **Ex. C-0044**, Letter from PERUPETRO to Maple Gas, 27 November 2017, p. 1. *See also supra* **Section II.H.2**.

[1424] *See supra* **Section II.H.2**.

[1425] *See* **RER-01**, Monteza Expert Report, ¶¶ 114–15, 120–21; **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Arts. 2.1–2.2, 4–5.

[1426] *See* Memorial, ¶ 16.

with PERUPETRO, then to complete the internal review process (requiring the agreement of PERUPETRO's General Manager, and the approval of PERUPETRO's Directorate), secure the agreement of the MINEM and the MEF, and then secure the final approval of President.[1427] These steps are not, as Claimant implies,[1428] mere formalities; often, one or more of the reviewers sends the draft contract back to the negotiators with observations and objections.[1429] Furthermore, pursuant to the Hydrocarbons Law,[1430] even if PERUPETRO had approved the license contract, the MINEM, the MEF, and President had 60 days to complete their review, and any objection would have reset the clock on that time period.[1431]

631. However, as demonstrated in **Section II.H.3**, Maple Gas was unlikely to complete this mandatory review and approval process by 20 December 2017. By the time that the Rectification Decision was issued on 27 November 2017, Maple Gas had not yet secured the agreement of PERUPETRO's General Manager or the approval of its Directorate. This meant that Maple Gas had approximately three (3) weeks within which to complete all stages of review and approval. To complicate matters further, Maple Gas had requested significant modifications to the Block 126 License, which increased the likelihood that objections would have been raised.[1432]

632. Absent any evidence that Maple Gas could have obtained all of these approvals in such a short period of time, Claimant's counterfactual scenario is entirely unrealistic.

633. *Third*, Claimant's damages claim relies on the assumption that Maple Gas could have financed the operation of Block 126. According to the Hidro-Carburos Report, which Claimant submitted as an expert report in this arbitration, Maple Gas would have needed to invest USD 79.6 million between 2017 and 2020 in order to be able to start

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[1427] *See, e.g.*, **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Arts. 2.1–2.2, 4–5.

[1428] *See* Memorial, ¶ 214 (asserting that the remaining steps "were typically a formality" and relying—not on a legal authority or expert testimony—but on the witness statement of Mr. Neumman).

[1429] **RWS-01**, Guzmán Witness Statement, ¶¶ 88–96.

[1430] **Ex. R-0139**, Hydrocarbons Law, Arts. 11–12.

[1431] *See* **Ex. R-0068**, Supreme Decree No. 045-2008-EM, 19 September 2008, Art. 6.

[1432] *See* **RWS-01**, Guzmán Witness Statement, ¶¶ 49–52.

producing oil.[1433] (Notably, even this large sum appears to have underestimated the amount required.[1434]) Hidro-Carburos simply assumes that the project would have been financed by 30% debt and 70% equity,[1435] but Claimant has made no effort to show how Maple Gas would have obtained the requisite financing. Indeed, it could not have done so: by 31 December 2017, Maple Gas' financial liabilities totaled USD 75,585,884, and the company was reporting negative net equity.[1436] This would have been an insurmountable obstacle in Claimant's but-for scenario.

634. *Fourth*, Claimant's damages claim contradicts Maple Gas' own plan of operation, presented to PERUPETRO in 2017. Specifically, in Claimant's but-for scenario, Block 126 would have started producing oil in 2019,[1437] after Sheshea 1X "had been rehabilitated and a road connecting the well to Block 126's barge-lading area was paved."[1438] However, the modifications proposed by Maple Gas and Frontera in October 2020 sought a retention period of 3 years, beginning on 20 December 2017, and projected the commencement of production—in the best-case scenario—in 2021.[1439] Claimant's but-for scenario of oil production starting as early as 2019 thus contradicts Maple Gas' contemporaneous plan, which had not projected oil

[1433] Hidro-Carburos Report, ¶ 160.

[1434] Hidro-Carburos estimates that the cost of drilling the wells would have been USD 9.2 million (*See* Hidro-Carburos Report, ¶ 21). In 2016, Frontera had drilled wells in Block 126, costing approximately USD 49 million for the Sheshea 1X well and USD 60 million for the La Colpa 2X well. **Ex. C-0040**, Spreadsheet with Investments in Block 126, August 2017, p. 1.

[1435] Hidro-Carburos Report, Addendum 1, p. 94.

[1436] **Ex. R-0006**, Letter No. MG-LEGA-L-050-2018 from Maple Gas (J. Bonilla) to PERUPETRO (R. Guzmán), 9 March 2018, p. 2.

[1437] *See* Memorial, ¶ 579.

[1438] Memorial, ¶ 271.

[1439] This plan contemplated the following steps: (1) during 2018, the licensee was going to evaluate the options for transportation of the crude oil; (2) between 2019 and 2020 the licensee would evaluate the productive potential of Sheshea 1X, Sheshea 2C, and Sheshea 3C, and the commercialization of the crude oil; and (3) by the end of 2020, the licensee would issue the declaration of commerciality of the crude oil it found (if any). **Ex. R-0101**, Email from Frontera Energy (J. Fonseca) to Pacific Energy (M. Silva, *et al.*) 20 October 2017, p. 1.

production to begin before 2021. Claimant has offered no evidence to support the notion that Maple Gas would have produced feedstock any sooner than 2021.[1440]

635. *Fourth*, Claimant incorrectly assumes that all of the crude from Block 126 through 2038 would have been used to feed the Pucallpa Refinery.[1441] Even if Maple Gas had not breached the Pucallpa Refinery Lease (which it did), the Lease Agreement was due to expire in March 2024,[1442] which means that Maple Gas would not have had any rights to the Pucallpa Refinery after 2024. Claimant makes no effort to account for the effect of the end of Maple Gas' lease.

636. *Fifth*, Claimant assumes that it would have produced and sold crude oil from Block 126 through 2038.[1443] However, the proposed Block 126 License would have expired on 20 December 2037, so it is unclear why Claimant and its expert assumed an extra year for production and sales of crude oil.

637. For all of the foregoing reasons, Claimant's but-for scenario is both unsubstantiated and unrealistic, and it cannot support Claimant's Block 126 Application Damages Claim.

b. <u>Claimant's Block 126 Application Damages Claim relies solely on the Hidro-Carburos Report, which does not purport to quantify damages</u>

638. In support of its quantification of the fair market value of Block 126, Claimant relies exclusively on the Hidro-Carburos Report. However, that Report cannot serve as support for Claimant's damages claim[1444] for the simple reason that it is not—and does not purport to be—a damages report.

[1440] The lack of evidence to support Claimant's assumption of high yield from Block 126 also undermines Claimant's Refinery Damages Claim, which relies on the assumption that Maple Gas would have used Block 126 feedstock to feed the Refinery in 2019 and 2020. *See* Memorial, ¶ 579.

[1441] *See* Hidro-Carburos Report, ¶ 26 ("All the production from the producing formations of the Sheshea Structure shall be sold to the Pucallpa Refinery"), ¶ 162.

[1442] *See* **Ex. R-0038**, 2014 Pucallpa Refinery Lease Agreement, 29 March 2014, Art. 4.1. *See also* Memorial, ¶ 77.

[1443] Hidro-Carburos Report, ¶ 26 ("All the production from the producing formations of the Sheshea Structure shall be sold to the Pucallpa Refinery"), ¶ 162.

[1444] Hidro-Carburos Report, ¶ 1.

639. Claimant misleadingly asserts in its Memorial that "**Worth Capital engaged . . . Hidrocarburos . . . to calculate the damages** resulting from Peru's unlawful acts equal to the fair market value of Worth Capital's stake in Block 126"[1445] (emphasis added). Yet, by Hidro-Carburos' own description, the Hidro-Carburos Report is a "development plan and resource appraisal."[1446] Indeed, a facial review of the Report reveals that Hidro-Carburos did not: (i) address any of the alleged measures undertaken by Peru; (ii) analyze the impact of those alleged measures; or (iii) identify or substantiate an appropriate valuation method for the fair market value of Block 126.

640. Claimant's Block 126 Application Damages Claim is thus exclusively based on an inapposite and uncertain resource appraisal, rather than on a damages analysis,[1447] and the claim should therefore be rejected as unsubstantiated.

c. <u>Claimant's quantification of the alleged value of Block 126 is speculative, inconsistent with contemporaneous indicators, and incomplete</u>

641. Even if the Hidro-Carburos Report were relevant to a quantification of Claimant's alleged damages in this arbitration (quod non), the resource appraisal in such report (from which Claimant purports to derive its damages figures) suffers from fatal flaws and omissions, as discussed below.

(i) Hidro-Carburos' appraisal relies on data that is speculative and unreliable

642. The Hidro-Carburos Report provides appraisals of Block 126 (P10, P50, and P90).[1448] Hidro-Carburos concedes that each of these three appraisals "have been built on the basis of the volumes of **contingent** and **prospective** resources"[1449] (emphasis added). However, "contingent" and "prospective" resources are—by definition—unrealized and speculative.

[1445] Memorial, ¶ 562.

[1446] Hidro-Carburos Report, ¶ 1.

[1447] *See* **RER-02**, Alix Damages Expert Report, ¶¶ 20–21.

[1448] Hidro-Carburos Report, ¶3.

[1449] Hidro-Carburos Report, ¶ 3.

643. In particular, as explained in the Alix Damages Report,[1450] classification guidelines commonly used in the oil and gas sector provide different categories of petroleum resources: reserves, contingent resources, or prospective resources.[1451] Reserves constitute a reliable estimate of resources, because those must be (i) discovered, (ii) recoverable, (iii) commercial, and (iv) remaining (as of the evaluation's effective date) based on the development project(s) applied.[1452] By contrast, contingent resources and prospective resources are categorized as those that are "potentially"—but not definitively—recoverable. For instance, contingent resources are those quantities of petroleum that are estimated to be potentially recoverable through development project(s), but that are not currently considered to be commercially viable owing to one or more contingencies[1453]—e.g., they would require technology that has not yet been developed.[1454]

644. Thus, insofar as it relies on contingent and prospective resource estimates, Hidro-Carburos's appraisal is inherently speculative. Hidro-Carburos further admits in its report that there is a "**significant risk that** undiscovered and sub-commercial **accumulations will not achieve a commercial production**"[1455] (emphasis added).

(ii) Hidro-Carburos' data is inconsistent with contemporaneous indicators

645. Hidro-Carburos ignores earlier resource estimates. As explained in detail in the Alix Damages Report, Hidro-Carburos includes a petroleum resource estimate for Block 126 that is at least 39% higher than the resource estimates contained in

[1450] **RER-02**, Alix Damages Expert Report, ¶ 59.

[1451] **Ex. AP-0007**, Petroleum Resources Management System, June 2018, p. 1.

[1452] **Ex. AP-0007**, Petroleum Resources Management System, June 2018, p. 3.

[1453] **RER-02**, Alix Damages Expert Report, ¶ 59.

[1454] **RER-02**, Alix Damages Expert Report, ¶ 59.

[1455] Hidro-Carburos Report, p. 2.

contemporaneous reports.[1456] Neither Claimant nor Hidro-Carburos is able to explain this major discrepancy in Hidro-Carburos' estimate.

646. Hidro-Carburos' guess about the investment that Maple Gas would need to have made in Block 126 is likewise inconsistent with contemporaneous estimates. As explained in the Alix Damages Report, Hidro-Carburos' estimates concerning the amount of investment required were lower than contemporaneous estimates. For example:

a. In September 2019, PERUPETRO estimated that USD 90 million would be required for the Exploration Phase *alone*.[1457] By contrast, in its made-for-arbitration report, Hidro-Carburos hypothesized that only USD 79.6 million would be required for *both* the Exploration *and* Exploitation Phases.[1458]

b. In a contemporaneous report that Hidro-Carburos prepared for Frontera in October 2017, Hidro-Carburos estimated the cost of transporting oil over 77 kilometers at USD 2.00 per barrel.[1459] In its appraisal developed for this arbitration, by contrast, Hidro-Carburos estimated the cost of transporting oil over 118 kilometers (i.e., a significantly *greater* distance) at USD 1.50 per barrel (a *lower* cost).

c. In 2016 Frontera invested USD 49.6 million to drill one well and USD 60.9 million to drill another.[1460] Yet Hidro-Carburos now estimates that the cost of such drilling would have been only USD 9.2 million per well.[1461]

[1456] *See* **RER-02**, Alix Damages Expert Report, ¶ 191 (*comparing* Hidro-Carburos Report, ¶ 17 *with* **Ex. CT-0003**, Informe de Reservas de Hidro-Carburos 2016, p. 1 (Contingent Resources: 5.9 MMSTB) *and* **Ex. AP-0008**, MINEM, 2016 Annual Resource Book of Hydrocarbon, Table 14 (Contingent Resources: 2.604 - 5.954 MSTB) *and* **Ex. AP-0025**, PERUPETRO, Press Release re Block 201, 2019.10.23 (Contingent Resources: 5.9 MMSTB)).

[1457] **Ex. C-0252**, PERUPETRO Press Release, Announcing the Block 201 Bid, 10 September 2019, p. 1 (further stating that "if there is a commercial discovery of hydrocarbons, the investments would be higher").

[1458] *See* Hidro-Carburos Report, ¶¶ 15, 17.

[1459] **RER-02**, Alix Damages Expert Report, ¶ 202; **Ex. R-0132**, Letter from Frontera (M. Silva) to PERUPETRO (M. Rodriguez), 23 October 2017, p. 6.

[1460] **RER-02**, Alix Damages Expert Report, ¶ 197.

[1461] Hidro-Carburos Report, ¶ 21. *See also* **RER-02**, Alix Damages Expert Report, ¶ 196.

647. Hidro-Carburos ignores the price that Maple Gas paid Frontera for the Block 126 License. As noted in the Alix Damages Report, "[i]n establishing the value of the opportunity Claimant allegedly lost in the present case, the Tribunal has the benefit of the price Maple Gas agreed to pay Frontera for the potential transfer of the Block 126 License only nine months before the valuation date."[1462] Indeed, case law confirms that the price paid for an asset in a previous transaction "provide[s] an accurate and realistic base for the estimate of the current fair market value."[1463]

648. Inexplicably, however, Hidro-Carburos failed to take account of the price that was actually paid by Maple Gas for the Block 126 License: on 13 March 2017, Frontera and Maple Gas entered into a binding term sheet indicating that 100% of the participating interest in the Block 126 License would be transferred to Maple Gas for consideration of USD 200,000,[1464] and Maple Gas in fact paid that amount on 14 March 2017.[1465] Presumably, the amount paid for the license by Maple Gas in an arms-length transaction is a fairly reliable indication of the value of the license, yet Hidro-Carburos disregarded that figure altogether in its report.

649. The Hidro-Carburos Report does not address the significant difference between the amount claimed by Claimant in this proceeding (USD 99 million) and the amount clamed before a Peruvian Administrative Court (USD 38 million) by Maple Gas for the same alleged harm. In April 2018, Maple Gas filed suit against PERUPETRO before the Peruvian Administrative Court, claiming USD 38 million in damages related to Block 126.[1466] The claim was based on the net income that Maple Gas had expected to obtain between 2017 and 2036.[1467] Hidro-Carburos makes no effort to reconcile or

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[1462] **RER-02**, Alix Damages Expert Report, ¶ 181.

[1463] **CL-0038**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 429. *See also* **CL-0082**, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States,* ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 191 ("[T]he price obtained in a public tender … is an efficient manner to determine the price of the assets sold").

[1464] **Ex. C-0180**, Binding Heads of Terms for Maple Gas, 13 March 2017, § 1.

[1465] **Ex. C-0036**, Farmout Agreement, 23 May 2017, § 3.2. It is unclear whether such amount was reimbursed by Frontera to Maple Gas.

[1466] **Ex. R-0098**, Maple Gas' Request for Reconsideration of 4 January 2018 Decision, 12 April 2018, p. 15.

[1467] **Ex. R-0098**, Maple Gas' Request for Reconsideration of 4 January 2018 Decision, 12 April 2018, p. 15.

explain the substantial difference between its USD 99 million appraisal in this arbitration and Maple Gas' previous claim of USD 38 million for exactly the same asset.[1468]

(iii) Hidro-Carburos simply ignores certain risks and expenses

650. Hidro-Carburos does not take into account in its calculations any project-specific risks. As explained by AlixPartners, typical risks in upstream and downstream oil and gas projects include, but are not limited to, economic risk, drilling and geological risk, regulation risk, social risk (e.g., community protests), and financing risk.[1469] While Hidro-Carburos concedes that there are "significant challenges, including the transport for the sale of the crude oil production as it implies a logistics of land transport combined with river transport,"[1470] it made no effort to reflect these realities in its appraisal.

651. Hidro-Carburos fails to consider expenses that Maple Gas would have incurred at the conclusion of the project. Hidro-Carburos excludes from its report—without explanation—the abandonment, decommissioning, and restoration costs that would have been incurred by Maple Gas at the end of the project period. By way of example, Frontera paid USD 10.3 million in abandonment costs for two wells in Block 126.[1471]

652. Hidro-Carburos assumes that Maple Gas would operate the Block 126 fields even after expiration of the license. As noted above, Hidro-Carburos inexplicably assumes production through the end of December 2038, even though the modified Block 126 License expiration date would have been 20 December 2037.[1472]

653. For all of the foregoing reasons, Claimant has failed to substantiate its claim for USD 99 million for the value of Block 126.

[1468] **Ex. R-0098**, Maple Gas' Request for Reconsideration of 4 January 2018 Decision, 12 April 2018, p. 3.

[1469] **RER-02**, Alix Damages Expert Report, ¶ 81.

[1470] Hidro-Carburos Report, p. 93.

[1471] **Ex. C-0055**, Frontera Energy Corporation, Annual Information Form, 27 March 2018, p. 15.

[1472] Hidro-Carburos Report, ¶ 159.

3. Claimant's Refinery Damages Claim is unsubstantiated and inaccurate

654. Claimant further claims that it is entitled to USD 37.3 million for the alleged fair market value of the Pucallpa Refinery, based upon the calculations of its damages experts from Compass Lexecon. This claim relies on the counterfactual scenario in which, but for the alleged Treaty breaches, Maple Gas would have been able to exponentially increase its production from the Refinery beginning in 2017, using feedstock from Aguaytía Energy, CEPSA, and Block 126 until the year 2024.[1473]

655. As will be demonstrated in the sections that follow, Claimant's counterfactual is deeply flawed (**subsection a**); and the Compass Lexecon Report is speculative and inaccurate, including because it relies upon the Hidro-Carburos Report and makes a series of unsupported—and unrealistic—assumptions (**subsection b**).

a. Claimant's counter-factual scenario for its Refinery Damages Claim is deeply flawed

656. For its Refinery Damages Claim, Claimant relies on a but-for scenario that the evidence shows to be unrealistic. For example, Claimant assumes that CEPSA and Aguaytía Energy would have sold all of their feedstock to Maple Gas. Such assumption utterly ignores the evidence that both companies had serious commercial disputes with Maple Gas—to such an extent that Aguaytía Energy, for example, felt compelled to initiate an ICC arbitration against Maple Gas, which yielded an award of more than USD 21.6 million in favor of Aguaytía Energy. There is no evidence to support Claimant's apparent assumption that these commercial disputes would have magically been overcome or forgotten such that Maple Gas would have been able to obtain sufficient feedstock.

657. Claimant further assumes that CEPSA would have sold feedstock to Maple Gas at a significantly lower price than the one CEPSA had charged Maple Gas in 2017. In this respect, Compass Lexecon acknowledges that "Maple [purchased] some volumes of crude oil from CEPSA starting in June 2017 . . . [and] paid a price equal to Brent plus

[1473] *See* Memorial, ¶¶ 560, 583.

a premium of USD 2 to 2.50 per barrel."[1474] However, Compass Lexecon nonetheless disregards this fact, and assumes—without explanation—that going forward CEPSA would have charged "Brent minus a discount of between USD 1.82 and 4.27 per barrel."[1475] Notably, this price discrepancy has a major impact: As explained by AlixPartners, "[r]emoving the discount to Brent of [USD] 1.82 to [USD] 4.27 per barrel Petroperú paid, Compass Lexecon's pre-interest damages would be reduced by [USD] 13.5 million or 36.3%."[1476] If a premium of USD 2.50 per barrel to Brent is considered (the price Maple Gas paid to CEPSA in June to August 2017), Compass Lexecon's pre-interest damages would decrease by USD 23.2 million (or 62.2%).[1477]

b. Claimant's quantification of the alleged value of the Pucallpa Refinery is speculative and inaccurate

658. Furthermore, and in any event, Compass Lexecon's quantification of the Refinery Damages Claim is defective, for at least the following reasons.

(i) Compass Lexecon's calculation relies on the Hidro-Carburos Report, which (as shown above) is speculative and unreliable

659. In purporting to quantify the value of the Pucallpa Refinery, Compass Lexecon assumes that such refinery would have received and processed feedstock from Block 126. In this respect, Compass Lexecon baselessly assumes that Maple Gas would have benefited from rights that it never actually had, which renders its quantification speculative and inaccurate.

660. Furthermore, in making this assumption, Compass Lexecon acknowledges that it was "instructed . . . to rely on the expert report of Hidrocarburos Consulting S.A.C. (Hidro-Carburos) for the volumes of crude oil that the Refinery could have expected to receive from Block 126."[1478] However, as is demonstrated in the preceding section and in detail in the Alix Damages Report, the Hidro-Carburos Report is unreliable, inter alia,

[1474] Compass Lexecon Report, ¶ 31.

[1475] Compass Lexecon Report, ¶ 31.

[1476] **RER-02**, Alix Damages Expert Report, ¶ 290.

[1477] **RER-02**, Alix Damages Expert Report, ¶ 290.

[1478] Compass Lexecon Report, ¶ 6.

because it calculates the potential output from Block 126 using data that is inherently speculative.

(ii) Compass Lexecon makes a series of unsupported assumptions about production from the Pucallpa Refinery

661. Compass Lexecon's purported quantification of the value of the Refinery is based on at least three unsubstantiated and unrealistic assumptions about the potential production from the Refinery.

662. *First*, the Compass Lexecon Report assumes—without explanation—that the daily production capacity of the Refinery would have increased exponentially. In 2016, the Refinery produced 938 BPD.[1479] Yet Compass Lexecon inexplicably assumes that "the Refinery would have processed approximately 3,000 BPD of total feedstock starting in 2017 until its lease expire[d] (in March 2024)."[1480] Neither Claimant nor Compass Lexecon provide any evidence to show that the Refinery could have more than *tripled* its production capacity between 2016 and 2017—because they cannot. There is simply no basis whatsoever to make such an assumption.

663. *Second*, Compass Lexecon also assumes that Maple Gas would have managed to acquire significantly more feedstock from CEPSA starting in 2017, despite Maple Gas' previous commercial dispute with CEPSA. Since 2014, CEPSA had entered into a number of non-exclusive supply agreements with Petroperú and was free to sell to Maple Gas,[1481] and yet it only sold small amounts of crude to Maple Gas.[1482] Notwithstanding that fact, Compass Lexecon assumes a dramatic increase in the amount of feedstock that Maple Gas would have acquired from CEPSA; specifically, Compass Lexecon posits that somehow Maple Gas would have succeeded in

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[1479] **Ex. CLEX-0001**, Compass Lexecon Valuation Model, 25 March 2022, Historical Feedstock.

[1480] Compass Lexecon Report, ¶ 56.

[1481] *See generally, e.g.*, **Ex. R-0019**, Petroperú-CEPSA Agreement for 60,000 barrels of crude, 13 March 2014, p. 1; **Ex. R-0023**, Petroperú-CEPSA Agreement for 305,000 barrels of crude, 11 September 2014, p. 1; **Ex. R-0124**, Petroperú-CEPSA Agreement for 230,000 barrels of crude, 28 January 2015; **Ex. R-0125**, Petroperú-CEPSA Agreement for 1.22 million barrels of crude, 5 May 2015.

[1482] *See* **RER-02**, Alix Damages Expert Report, ¶¶ 128–29 ("In 2017, Maple Gas signed short-term contracts with CEPSA for crude oil. . . . Between the two short-term contracts, in August 2017 Maple Gas attempted to negotiate a two-year agreement for a monthly volume of 45,000 to 75,000 barrels and a premium up to US$2.00 per barrel depending on the quantity. However, CEPSA declined this request").

persuading CEPSA to sell it, starting in 2017, *more than 100 times* more feedstock than in 2016:

Figure 9: Assumed Exponential Increase in Supply from CEPSA[1483]

Year	Supply of Crude from CEPSA
2016	21 BPD (actual)
2017	2,216 BPD (assumed)

664. There is simply no evidence to support an exponential increase of this magnitude from CEPSA—which had been reluctant to sell to Maple Gas due to commercial disputes,[1484] and which had sold Maple Gas only a modest amount.[1485]

665. *Third*, Compass Lexecon appears to assume that the operational and regulatory difficulties that had plagued the Refinery would have magically disappeared starting in 2017. As demonstrated in **Sections II.B.2** and **II.D.1** above, Maple Gas had repeatedly been sanctioned for its failure to comply with environmental and other regulations at the Refinery, and there is no basis to assume that Maple Gas would have been compliant going forward. Compass Lexecon omits to mention or consider these violations, or their potential impact on the production from, and value of, the Refinery.

(iii) Compass Lexecon underestimates important costs associated with running the Pucallpa Refinery

666. As explained in the Alix Damages Report, Compass Lexecon also underestimates other important categories of costs. In particular, it underestimates the operating expenses of the Refinery. As noted above, Compass Lexecon assumes extraordinarily

[1483] **Ex. CLEX-0001**, Compass Lexecon Valuation Model, 25 March 2022, Production.

[1484] *See generally* **Ex. R-0002**, Lima Arbitration (Award), ¶ 193 ("In this scenario of conflict with the natural suppliers, it is logical that the cause of the lack of access for the purchase of crude oil or the refusal of the suppliers to contract with MAPLE is the latter's own commercial conduct and not the concerted conduct by PETROPERU to displace the Respondent."). *See also supra* **Section II.D.3**.

[1485] *See* **Ex. CLEX-0001**, Compass Lexecon Valuation Model, 25 March 2022, Production.

high production at the Refinery from 2017 to 2023. However, to calculate the operating expenses for each of these hypothetical high-production years, Compass Lexecon relies on the operating expenses incurred by the Pucallpa Refinery in 2016—a year in which Maple Gas experienced a major decrease in feedstock, and thus substantially lower production from the Refinery.[1486] Compass Lexecon's calculation of operating expenses is thus illogical and inaccurate, insofar as it applies to high-production years projected operating expenses that were extrapolated from a year of far lower production.

667. This underestimation by Compass Lexecon has a significant impact: if it had instead used the Refinery's average operating costs from 2012 to 2016 (to reflect periods of higher production), its valuation would have been USD 11.6 million—or 31%—*lower*.[1487]

668. Furthermore, as noted above, Compass Lexecon assumes that Maple Gas would have purchased crude at a significant discount, even though previously it had done so at a *premium*.[1488] Again, this assumption had a major impact on the overall quantum asserted: if the price actually paid by Maple Gas had been used, Compass Lexecon's valuation would have been 62.2% lower—i.e., a decrease of at least USD 23.2 million.[1489]

(iv) Compass Lexecon simply ignores key indicators of value

669. Compass Lexecon quantified the fair market value of the Pucallpa Refinery at USD 44.7 million by applying a cash flow analysis, which allegedly reflects Claimant's equity interest and the value of debt.[1490] This figure reflects a deduction by Compass Lexecon of USD 7.8 million in debt owed by Maple Gas to third parties. However,

[1486] **RER-02**, Alix Damages Expert Report, ¶ 292.

[1487] **RER-02**, Alix Damages Expert Report, ¶ 294.

[1488] **RER-02**, Alix Damages Expert Report, ¶¶ 286, 287.

[1489] **RER-02**, Alix Damages Expert Report, ¶ 290.

[1490] Compass Lexecon Report, Table 1, p. 6. *See also* **RER-02**, Alix Damages Expert Report, ¶ 243.

Compass Lexecon simply ignores the USD 47 million that Maple Gas owed to Trailon,[1491] and no explanation is provided for this omission.

670. Additionally, Compass Lexecon fails to consider valuation approaches other than the discounted cash flow analysis to quantify the alleged fair market value of the Pucallpa Refinery. For instance, as Compass Lexecon concedes, "in principle, a transaction on the same asset ought to provide information on the value of the asset but for the Measures."[1492] In this case, Claimant alleges that it paid USD 15 million to purchase its equity interest (i.e., indirect shareholding) in Maple Gas.[1493] At that time, Maple Gas held a leasehold of the Pucallpa Refinery and licenses for Blocks 31-B, 31-D, and 31-E. Yet Compass Lexecon dismisses this alleged purchase price, arguing that the USD 15 million purchase price should be discarded because such price reflects Maple Gas' financial distress in November 2016, and the valuation date is in December 2017.[1494] Thus, according to Compass Lexecon, after Claimant allegedly purchased its equity interest in the financially-distressed Maple Gas for a mere USD 15 million in November 2016, the value of the Pucallpa Refinery alone suddenly became USD 37.3 million by December 2017. This argument is fanciful and is unsupported by any evidence.[1495]

671. Compass Lexecon's purported valuation of the Pucallpa Refinery is thus unsubstantiated and inaccurate.

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672. For all of the foregoing reasons, as well as those detailed in the Alix Damages Report, Claimant has failed to prove the quantum of its alleged loss, and its damages claims must therefore be rejected.

[1491] **RER-02**, Alix Damages Expert Report, ¶ 244. *See also* **Ex. CLEX-0022**, Maple Gas Corporation del Perú S.R.L. Financial Statements as of December 31, 2017- Preliminary.

[1492] Compass Lexecon Report, ¶ 46.

[1493] *See* Memorial, fn. 211.

[1494] Compass Lexecon Report, ¶ 46.

[1495] **RER-02**, Alix Damages Expert Report, ¶ 274.

E. Even if Claimant were entitled to damages, such damages would need to be reduced based upon Claimant's contributory fault

673. Article 39 of the ILC Articles provides that "[i]n the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission" of the entity seeking reparation.[1496] Arbitral tribunals have applied this principle; as confirmed by the *Occidental v. Ecuador* tribunal, "an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility."[1497]

674. When assessing the claimants' contributory fault, the tribunal in *MTD v. Chile* took account of the claimants' "business judgment." Specifically, it stressed that the claimants

> [had] made decisions that increased their risks in the transaction and for which they [bore] responsibility, regardless of the treatment given by [the State] to the [c]laimants.[1498]

675. On that basis, the *MTD* tribunal determined that "the [c]laimants should bear part of the damages suffered," and reduced the damages awarded by 50%.[1499]

676. Other tribunals have likewise confirmed that a claimant's ill-advised business decisions require a reduction in the amount of damages awarded. For instance, the *Azurix v. Argentina* tribunal emphasized that a "well-informed" investor would not have paid what the claimant had for its investment, and assessed instead "what an independent and well-informed third party would have been willing to pay" for that investment.[1500] Similarly, the *RosInvest v. Russia* tribunal noted that the claimant had

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[1496] **CL-0005**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 39.

[1497] **RL-0101**, *Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/111, Award, 5 October 2012 (Fortier, Williams, Stern), ¶ 678.

[1498] **RL-0097**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (Rigo Sureda, Lalonde, Oreamuno Blanco), ¶ 242.

[1499] **RL-0097**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (Rigo Sureda, Lalonde, Oreamuno Blanco), ¶ 243.

[1500] **CL-0016**, *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶¶ 426–27.

"acquired the company during a tumultuous period" and that "[i]t would stretch the bounds of plausibility . . . to accept that Yukos' management expected its belligerent response . . . to be successful in preserving the company."[1501] Accordingly, the *RosInvest* tribunal reduced the damages award by 50%.[1502]

677. Here, Claimant invested in Maple Gas, a company (i) that had been in financial decline for years;[1503] (ii) that had incurred debts of more than USD 70 million; (iii) that (as affirmed by the ICC Tribunal) had defaulted on millions of dollars of payments that it owed to its primary supplier of feedstock, Aguaytía Energy;[1504] (iv) that had alienated such primary supplier by abruptly terminating the relevant supply contract,[1505] while nevertheless expecting to continue to receive supply for free;[1506] (v) that had likewise alienated the only other possible supplier of feedstock, CEPSA, by forcing CEPSA to halt production unless it sold its production to Maple Gas;[1507] and (vi) that had repeatedly been sanctioned for violations of environmental and other regulations.[1508]

[1501] **RL-0099**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (Böckstiegel, Steyn, Berman), ¶ 634.

[1502] **RL-0099**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (Böckstiegel, Steyn, Berman), ¶ 685.

[1503] *See* **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, p. 7 (reporting net loss of USD 3,649,306 in 2015); **Ex. C-0188**, Letter from Maple Gas to PERUPETRO, 11 July 2017, p. 60 (reporting net loss of USD 6,034,968 in 2016); **Ex. R-0109**, Maple Gas, Audited Financial Statements, 2009–2013, p. 6.

[1504] *See* **Ex. R-0001**, ICC Arbitration (Award), ¶ 195 (i) (finding that Maple Gas had failed to pay approximately USD 5.3 million for supply in 2014;). *See also supra* **Section II.D.2**.

[1505] **Ex. R-0001**, ICC Arbitration (Award), ¶ 46 (m).

[1506] **Ex. R-0001**, ICC Arbitration (Award), ¶¶ 118, 195.

[1507] *See* **Ex. R-0083**, "*Maple Energy: Convocaremos a licitación para adquirir petróleo*," EL COMERCIO, 29 February 2016, p. 2. *See also* **Ex. C-0219**, "*Gerente de Petroperú explicó situación del combustible en Ucayali*," Impetu Perú, 22 February 2018, p. 1 ("[T]he relationship between the two companies–CEPSA and Maple–deteriorated to the point that Maple closed the doors and didn't allow the tankers that were arriving with crude to unload, and thus CEPSA fell into crisis"). *See also supra* **Section II.D.3**.

[1508] *See, e.g.*, **Ex. R-0065**, Ministry of the Environment, Directorate Resolution No. 002-2016-OEFA/DFSAI, 4 January 2016, pp. 3, 27–29; **Ex. R-0066**, Ministry of the Environment, Resolution No. 031-2016-OEFA/TFA-SEE, 6 May 2016, p. 27 (affirming Directorate Resolution No. 002-2016-OEFA/DFSAI); **Ex. R-0049**, Ministry of the Environment, Resolution No. 042-2016-OEFA/TFA-SEE, 3 June 2016, p. 27 (affirming Directorate Resolution No. 124-2016-OEFA/DFSAI); **Ex. R-0058**, Ministry of the Environment, Directorate Resolution No. 220-2015-OEFA/DFSAI, 13 March 2015, pp. 7–15.

678. This is precisely the type of poor "business judgment" that tribunals have taken into account when reducing damages for contributory fault. Claimant here acquired its investment "during a tumultuous [period],"[1509] and "[i]t would stretch the bounds of plausibility"[1510] to accept that a "well-informed"[1511] investor would have considered the acquisition of Maple Gas in June 2017 to be a wise investment. Thus, even assuming that Claimant had suffered compensable loss and that such loss was to some extent caused by the alleged breaches (quod non), any damages awarded to Claimant would need to be radically reduced due to Claimant's own deficient due diligence and poor business judgment.

F. Claimant applies the incorrect interest rate

679. As noted by the *Gold Reserve v. Venezuela* tribunal, the "purpose of pre-Award interest is to ensure Claimant is properly compensated for the [treaty] breach that has occurred."[1512] Here, Claimant claims that it should receive pre-award interest at a rate of 6.1% because, according to Claimant, that rate reflects "the relevant pre-tax cost of debt."[1513] However, the proposed interest rate should be rejected, for at least the following reasons.

680. *First*, Claimant has not demonstrated that it needs to be compensated for its cost of debt. As affirmed by the *Vestey v. Venezuela* tribunal, any pre-award interest must "compensate the victim for its **actual** losses. It is not to reward it for risks which it does not bear"[1514] (emphasis added). Accordingly, tribunals have declined to impose interest rates that would reward the claimant for risks to which they were not actually

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[1509] **RL-0099**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (Böckstiegel, Steyn, Berman), ¶ 634.

[1510] **RL-0099**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (Böckstiegel, Steyn, Berman), ¶ 634.

[1511] **CL-0016**, *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶¶ 426–27.

[1512] **CL-0046**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 853.

[1513] Memorial, ¶ 588.

[1514] **RL-0102**, *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (Kaufmann-Kohler, Naón, Blanco), ¶ 440.

exposed. For instance, the *Burlington v. Ecuador* tribunal refused to apply an interest rate that "include[d] a reward for all the risks involved in doing business."[1515] The tribunal determined that such "element of reward for risk . . . is inappropriate here because [the claimant] no longer bears the risk of operation."[1516] In such a situation, "the [claimant] entitled to interest compensating it for the time value of money, but it is not also entitled to compensation for the risks it did not bear."[1517] Here, Claimant has made no effort to prove that it was forced to borrow—and bear risk—as a result of the breaches.[1518]

681. *Second*, Claimant's proposed approach is speculative: As explained by Thibaud Senechal, "this market risk of debt is often difficult to estimate and depends on many assumptions and variables that could lead to arbitrary results."[1519]

682. For the foregoing reasons, the Tribunal should reject Claimant's proposed pre-award interest rate of 6.1%. Pre-award interest should not reflect Maple Gas' cost of debt, but rather the opportunity cost of earning interest in a deposit account. Therefore, as noted by AlixPartners, pre-award interest should be limited to a significantly lower rate (such as SOFR+2%, a potential replacement for LIBOR, or UST+2%, which represents the risk-free rate).[1520]

[1515] **CL-0020**, *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017**,** ¶ 532.

[1516] **CL-0020**, *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017**,** ¶ 533.

[1517] **RL-0103**, Franklin M. Fisher, *et al.*, "*Janis Joplin's Yearbook and the Theory of Damages*," JOURNAL OF ACCOUNTING AUDITING AND FINANCE (1990), p. 146.

[1518] **RL-0104,** Matthew Secomb, "*3. Interest Rate*," *in* INTEREST IN INTERNATIONAL ARBITRATION (2019), ¶ 3.72.

[1519] **RL-0105**, Thierry Sénéchal, "*Time Value of Money: A Case Study*," TDM (2007), p. 7.

[1520] **RER-02**, Alix Damages Expert Report, ¶ 315.

VI. REQUEST FOR RELIEF

683. For the reasons set forth in this Counter-Memorial, the Republic of Peru respectfully requests that the Tribunal:

a. dismiss all of Claimant's claims for lack of jurisdiction and/or lack of admissibility;

b. dismiss for lack of merit any and all claims in respect of which the Tribunal may find that it has jurisdiction;

c. reject Claimant's request for compensation, should the Tribunal find that it has jurisdiction and that there is merit to any of Claimant's claims; and

d. order Claimant to pay all costs of the arbitration, including the totality of Peru's legal fees and expenses, expert fees and expenses, and all other expenses incurred in connection with Peru's defense in this arbitration, plus compounded interest on such amounts until the date of payment, calculated at the risk-free US Treasury Bill rate.

Respectfully submitted,

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