

International Centre for Settlement of Investment Disputes
(ICSID)

LUPAKA GOLD CORP.,
Claimant,

v.

REPUBLIC OF PERU,
Respondent.

ICSID CASE No. ARB/20/46

Republic of Peru's Statement of Costs

17 October 2023

Arnold & Porter

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1. In its previous submissions in the present arbitration,¹ the Republic of Peru (“**Peru**”) requested that the Tribunal exercise its authority and discretion under Article 841(1) of the Peru-Canada Free Trade Agreement (“**Treaty**”) and Article 61(2) of the ICSID Convention to order Claimant to pay all of Peru’s costs and expenses, including legal fees, as well as the costs and expenses of the members of the Tribunal and ICSID’s administrative fees and expenses (hereinafter “**Costs and Expenses**”). Peru hereby respectfully reiterates its request.
2. The present submission constitutes Peru’s Statement of Costs and is divided into the following sections: **Section I** provides an itemized schedule of Peru’s Costs and Expenses; **Section II** articulates the principles and factors to be applied concerning the allocation of costs; and **Section III** contains Peru’s request for relief concerning the allocation of costs.

I. PERU’S SCHEDULE OF COSTS AND EXPENSES

3. As specified in this section, the total amount of Costs and Expenses incurred by Peru in the present arbitration is USD 4,005,002.67. These Costs and Expenses have been incurred and processed by Peru in this proceeding, as at 17 October 2023.²
4. The undersigned, as counsel for Peru, hereby certify that the figures presented below are compiled from (i) information provided to Arnold & Porter by Peru, and (ii) Arnold & Porter’s own time entries and the relevant invoices (and supporting documentation thereto) that it has submitted to Peru.

¹ Counter-Memorial, § VI; Rejoinder, § VI; Peru’s Post-Hearing Brief, § V.

² Peru reserves the right to update the amount of Costs and Expenses reported in the present Statement of Costs, to reflect costs incurred or processed after 17 October 2023.

Table A: Summary of Peru's Costs and Expenses

Summary of Fees and Expenses	Amount (USD)
ICSID fees and expenses	450,000.00
Legal fees and expenses (Arnold & Porter, Garrigues)	2,986,502.67
Fees and expenses for damages expert (AlixPartners)	482,000.00
Fees and expenses for legal experts (Mr. Daniel Vela, Mr. Ivan F. Meini, Ms. Miyanou Dufour)	86,500.00
TOTAL COSTS	4,005,002.67

Table B: ICSID Administrative Fees & Expenses

Date of Payment to ICSID	Amount (USD)
17 January 2023	200,000.00
9 March 2023	250,000.00
ICSID Fees – Subtotal	450,000.00

Table C: Arnold & Porter's Legal Fees

Period of Service	Fees (USD)	Expenses (USD)
Initial Payment (May 2021)	300,000.00	-
June 2021	5,731.22	632.44
July 2021	5,764.85	-
August 2021	6,395.41	178.39
September 2021	3,011.32	-
October 2021	72,614.69	100.82
November 2021	77,754.01	347.67
December 2021	162,017.48	5,984.20
Subtotal (2021)	633,288.98	7,243.52
January 2022	282,350.12	-
February 2022	507,343.91	-
March 2022	644,945.32	732.15
April 2022	82,071.67	52,574.35
May 2022	-	21,850.73
June 2022	-	9,441.88
July 2022	-	413.00
August 2022	-	796.45
September 2022	-	922.60
October 2022	-	1,919.33
November 2022	-	694.60
December 1-19 2022	-	469.94
December 20-31 2022	146,512.71	-
Subtotal (2022)	1,663,223.73	89,815.03

January 2023	390,987.29	4,864.40
February 2023	-	3,650.59
March-April 2023	-	103,521.83
June 2023		1,300.00
Subtotal 2023 (as at 30 September 2023)	390,987.29	113,336.82
Arnold & Porter Legal Fees and Expenses - Subtotal	2,897,895.37	

Table D: Garrigues Legal Fees and Expenses

Period of Service	Fees (USD)	Expenses (USD)
October 2021	21,459.00	
December 2021	1,000.00	
January 2022	5,768.00	
November 2022	2,647.40	
December 2022	4,620.00	556.82
January 2023	2,136.00	
February 2023	3,190.00	686.91
March 2023	40,965.00	
March-April 2023		6,304.30
April 2023	3,600.00	
Garrigues Fees and Expenses - Subtotal	92,933.43	

Table E: Experts' Fees and Expenses

Costs and Expenses (not including legal fees paid by Peru to its counsel team)	Amount (USD)
Expert fees paid to Mr. Daniel Vela	10,000.00
Expert fees paid to Mr. Ivan F. Meini	16,500.00
Expert fees paid to AlixPartners	482,000.00
Expert fees paid to Ms. Miyanou Dufour von Gordon	60,000.00
Expert Fees and Expenses – Subtotal	568,500.00

5. The total amount of Costs and Expenses incurred by Peru in the present arbitration is reasonable, especially considering the complexity of the legal and factual issues in the case, the voluminous documentary record, and the requirement for expert evidence on numerous Peruvian law issues and quantum.³ Peru managed this case as efficiently as possible, despite the above complexities, and the expansive nature of the dispute and allegations brought by Claimant.
6. Peru notes that the total amount of Costs and Expenses that it has incurred (i.e., USD 4,005,002.67) is below the mean party costs incurred in ISDS proceedings by respondent State entities, which is approximately USD 4.7 million.⁴

II. PRINCIPLES CONSIDERED BY TRIBUNALS IN ALLOCATING COSTS

7. In determining how to allocate the costs of a proceeding, previous tribunals have adopted different approaches. For example, some tribunals have applied the principle

³ Procedural Order No. 3.

⁴ Matthew Hodgson, Yarik Kryvoi, Daniel Hrcak, 2021 *Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, British Institute of International and Comparative Law, Allen & Overy, June 2021, p. 4.

that “costs follow the event” and have awarded costs to the successful party.⁵ Other tribunals have undertaken a fact-specific analysis that takes into account the individual circumstances of the case at hand, in addition to the ultimate relative success of the parties. This approach ensures that tribunals “exercise [their] discretion in a rational way.”⁶ As observed by the *Burlington v. Ecuador* tribunal, “the apportionment of costs requires an analysis of **all** of the circumstances of the case, including to what extent a party has contributed to the costs of the arbitration and whether that contribution was reasonable and justified” (emphasis added).⁷

8. Previous ICSID tribunals have adopted an approach that considers the following factors: (i) the parties’ respective requests for relief concerning the allocation of costs; (ii) the outcome of the parties’ respective claims, defenses and applications; (iii) the complexity or novelty of the issues raised in the arbitration proceeding; (iv) the submission of frivolous claims; (v) conduct that unnecessarily increased the expense of the proceedings; and (vi) the reasonableness of the parties’ legal costs.⁸
9. An additional factor taken into account by several tribunals is the good faith motives of the State in adopting measures that are alleged to constitute a breach of its treaty obligations. For example, the tribunal in *Burlington Resources Inc. v. Ecuador* took into account the respondent States’ motives and good faith:

In the Tribunal’s view, after a consideration of all the relevant circumstances, the principles above may be adjusted to take into account that the respondent is a sovereign State. In particular, it considers that, even if a tribunal finds that a State has breached its international obligations vis-à-vis an investor, **consideration**

⁵ See, e.g., **CLA-008**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (Salpius, Voss, Paulsson), ¶ 24.1.

⁶ **CLA-0103**, *UAB E Energia v. Republic of Latvia*, ICSID Case No. ARB/12/33, Dissenting Opinion on Costs, 22 December 2017 (Reinisch), ¶ 12.

⁷ **CLA-0144**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 (Kaufmann-Kohler, Stern, Drymer), ¶ 620 (emphasis added); see also *id.* at ¶ 619.

⁸ See e.g., **CLA-0144**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 (Kaufmann-Kohler, Stern, Drymer), ¶ 620.

must be given to the State's motives and good faith. In particular, where the actions of a State have been guided by its good faith understanding of the public interest and the State could reasonably doubt that it was breaching its international obligations, **the Tribunal may consider it appropriate to apportion costs in a manner that alleviates the burden on the respondent State.**⁹ (Emphasis added)

10. On the basis of the above principles, Peru respectfully submits that, in the event that Peru is the successful party in this arbitration, Claimant should be ordered to pay the entirety of Peru's Costs and Expenses.
11. Conversely, in the event that Peru is not the successful party, Peru submits that the Tribunal should take into account the fact that, as Peru demonstrated in its pleadings, the relevant measures in this case were taken in good faith, with the aim of (i) preventing the escalation of the social conflict between Claimant and the Parán Community, (ii) securing a sustainable resolution to that dispute, and (iii) discharging Peru's legal obligations under international and domestic law.¹⁰
12. Finally, Claimant's conduct unnecessarily increased the length and cost of the proceedings in at least the following ways:
 - a. Claimant's excessively broad document production requests required Peru to spend significant time and resources in sifting through voluminous materials;
 - b. Claimant's challenge to Peru's privilege log—a challenge that ultimately yielded minimal reliance on the contested documents by Claimant—significantly escalated the costs of the proceedings;
 - c. Claimant's introduction of new arguments in the Reply—including (i) its frivolous allegation against a regional government official, and (ii) Peruvian

⁹ *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 (Kaufmann-Kohler, Stern, Drymer), ¶ 621. See also *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018 (Reinisch, Wirth, Griffith), ¶ 738.

¹⁰ Counter-Memorial, § II.E; Rejoinder § II.C.

law arguments—necessitated that Peru dedicate additional resources to respond to these belated arguments and change of tack by Claimant;

- d. Claimant withheld its objection to Ms. Dufour’s testimony and report until the Hearing, after it had called her for cross-examination; and
 - e. Claimant’s request for confidentiality concerning [REDACTED] caused the parties, the Tribunal, and the Centre collectively to devote a significant amount of time and effort throughout the arbitration to protecting the identity of [REDACTED] (including painstaking redaction of documents and other confidentiality-related tasks). The hearing testimony of [REDACTED] himself revealed unequivocally that all of that was completely unnecessary.
13. The above, as well as other circumstances resulting from Claimant’s litigation tactics, have imposed a substantial burden on Peru, and should be considered when determining the allocation of costs in this case.

III. REQUEST FOR RELIEF

14. In light of the foregoing, Peru respectfully requests that the Tribunal order Claimant to pay:
- a. all costs of the arbitration, including the totality of Peru’s legal fees and expenses, expert fees and expenses, arbitrator and institutional fees and expenses, and any other expenses incurred in connection with Peru’s defense in this arbitration, amounting to the total amount of **USD 4,005,002.67**, as at 17 October 2023;
 - b. any additional costs and expenses that Peru may reasonably incur before the Tribunal renders a final award; and
 - c. compounded interest on such amounts ordered by the Tribunal in favor of Peru, until the date of payment, calculated on the basis of a reasonable commercial rate determined by the Tribunal.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to be 'P. Di Rosa', with a large loop at the start and a trailing flourish.

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