

THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

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In the Matter of Arbitration :
Between: :
:
LUPAKA GOLD CORP., :
:
Claimant, : Case No. ARB/20/46
and :
:
THE REPUBLIC OF PERÚ, :
:
Respondent. :
:
- - - - -x Volume 6

HEARING ON THE MERITS

Monday, April 3, 2023

The World Bank Group
1125 Connecticut Avenue, N.W.
Conference Room C3-150
Washington, D.C.

The hearing in the above-entitled matter
came on at 9:30 a.m. before:

PROF. JOHN R. CROOK, President

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DR. GAVAN GRIFFITH KC, Co-Arbitrator

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C O N T E N T S

	PAGE
PRELIMINARY MATTERS.....	1572
EXPERTS:	
ERIK VON DUIJVENVOORDE	
EDMOND RICHARDS	
Presentation of Claimant Experts.....	1576
Cross-Examination by Mr. Bombassaro.....	1602
Questions by the Tribunal.....	1641, 1777
ISABEL SANTOS KUNSMAN	
ALEXANDER LEE	
Presentation by Respondent Experts.....	1648
Cross-Examination by Dr. Veit.....	1667
Redirect Examination by Mr. Bombassaro.....	1759
Questions by the Tribunal.....	1760
Conclusion of Evidence/Post-Hearing Matters.....	1781
CONFIDENTIAL SESSION: (None)	

P R O C E E D I N G S

PRESIDENT CROOK: All right. In that case, let's begin the sixth session of this hearing where we will be hearing today from the various financial valuation experts.

A couple of administrative notes before we begin.

The Tribunal has been discussing how best to approach the post-hearing submissions that it was agreed would be done in lieu of closing arguments.

Now, we are going to be deliberating tomorrow. We have begun to formulate some questions that we would like you to address, but I think we've decided it would be better for us to sort of see what may emerge in our deliberations tomorrow, and then be able to formulate the questions to you more precisely.

That said, it would be useful for us to have from you at the end of the day today, from each party, an oral indication of the nature of the final written submission that you would regard as most useful from your perspective, aside from whatever questions we might elect to put to you after our deliberations

1 tomorrow.

2 So at the end of the day, we would like an
3 informal indication. This is basically just for the
4 guidance of the Tribunal as it determines the sort of
5 post-hearing submissions that we will be ordering.

6 Is that clear all around?

7 DR. VEIT: It's clear.

8 PRESIDENT CROOK: Okay. Final
9 administrative thing, I--some days ago, I did ask
10 that--I think it's R-1, the Treaty or the Agreement,
11 be put in in all three languages. I don't know if
12 that has happened, but if not, we would--we do request
13 that that be done.

14 We do not need the full, however many
15 hundred pages, but the investment provisions and any
16 other sort of final provisions that may be relevant to
17 understanding the text.

18 Is that clear? Can somebody do that?

19 I think it's a Respondent's exhibit; is that
20 right?

21 MR. GRANÉ: Yes, sir. I understand that it
22 has been already submitted--

1 PRESIDENT CROOK: It has been submitted.

2 Okay, that's great.

3 MR. GRANÉ: --as RLA-10.

4 PRESIDENT CROOK: Okay. Very good. All
5 right, thanks.

6 SECRETARY: Mr. President, I'm not sure.

7 PRESIDENT CROOK: All right. Well, we'll
8 sort this out offline. But if it's in, great; if it's
9 not, we need it, we'll sort that out.

10 All right. Any other administrative
11 matters?

12 If not, we will turn to the experts.

13 Now, here, it was agreed that in the
14 examinations, either expert could respond to a
15 question, but that that decision having been made, it
16 is irrevocable, and we cannot have multiple experts
17 responding to a single question.

18 So the experts can determine as between
19 themselves who will answer a question, and at that
20 point, the other glues his mouth shut irrevocably.

21 Is that clear and agreed all around?

22 It was the subject of some discussion. I

1 think that's where we are.

2 Okay, with that, gentlemen, welcome. Could
3 you introduce yourselves for the record, and then
4 we'll go through the formality of swearing you in
5 prior to your report.

6 You then are all familiar with the
7 procedure. You'll be cross-examined, and then there
8 will be the possibility of redirect.

9 If at any point, you need to take a break,
10 leave the room, let us know. We will seek to
11 accommodate.

12 Is everybody okay with that?

13 All right. Could I ask you each separately
14 to read out loud the expert's affirmation that should
15 be on the desk before you.

16 ERIK VON DUIJVENVOORDE, CLAIMANT EXPERT, CALLED

17 EDMOND RICHARDS, CLAIMANT EXPERT, CALLED

18 MR. VAN DUIJVENVOORDE: Yes. I solemnly
19 declare upon my honor and conscience that my statement
20 will be in accordance with my sincere belief.

21 PRESIDENT CROOK: Thank you, sir.

22 MR. RICHARDS: I solemnly declare upon my

1 honor and conscience that my statement will be in
2 accordance with my sincere belief.

3 PRESIDENT CROOK: All right. And so, as to
4 assist the reporter in knowing who is talking, could
5 you introduce yourselves?

6 MR. VAN DUIJVENVOORDE: My name is Erik van
7 Duijvenvoorde, partner at Accuracy.

8 MR. RICHARDS: Edmond Richards, also a
9 partner at Accuracy.

10 PRESIDENT CROOK: All right. Now, I
11 understand you will be giving us a 30-minute report;
12 is that the case?

13 MR. RICHARDS: Correct.

14 PRESIDENT CROOK: All right. Over to you,
15 gentlemen.

16 PRESENTATION BY CLAIMANT EXPERTS

17 MR. VAN DUIJVENVOORDE: Thank you.

18 Good morning, members of the Tribunal. As I
19 said, my name's Erik van Duijvenvoorde, and to my left
20 is Edmond Richards, and we are the damages expert
21 instructed by the Claimant in this matter.

22 Now, I think it's useful to give some

1 background, which has--is important to quantum in this
2 matter.

3 First of all, that in October 2012, Claimant
4 acquired the Invicta project and attributed over 10
5 million Canadian dollars in value to it.

6 Subsequently, they worked to commission
7 reports and studies relating to the mine, carried out
8 a number of pre-production activities, including
9 tests, bulk sampling testing and pre-production runs.

10 On the 30th of June 2016, indeed, they
11 obtained a financing agreement with PLI, and one of
12 the precedents to receiving the first installment on
13 that loan agreement was a road access agreement with
14 either the Lacsanga or Parán communities.

15 And indeed, in 2017, Claimant signed a
16 service rights agreement with Lacsanga.

17 Following that, in April 2018, they engaged
18 SRK, a leading mining and expiration consulting firm.
19 They published a PEA on the project. The PEA was
20 defined by a six-year operating plan at a production
21 rate of 355 tons per day.

22 Indeed, SRK also provided a financial model,

1 which valued the PAA mine plan at US \$43.4 million.

2 And we know that SRK concluded that the
3 project was of considerable merit and demonstrated
4 positive PEA results.

5 Following that, Claimant planned to acquire
6 the Mallay plant with the aim of increasing production
7 capacity, reducing processing costs and resolving the
8 issues with third-party toll processors.

9 By September of that year, draft contracts
10 for the purchase were substantially complete, and an
11 amendment to the PLI loan agreement had been drawn up
12 for further funding of \$13 million.

13 Furthermore, Red Cloud was instructed to
14 update the SRK model, including an estimate of
15 additional CAPEX required and an increase in
16 production and processing capacity to 590 tons per day
17 over a seven-year period.

18 Red Cloud also valued the project at a net
19 present value of 86.3 million US dollars.

20 However, as we know, because of the
21 blockade, Claimant's acquisition of the Mallay plant
22 was never completed.

1 On this slide, I set out the alleged
2 breaches. You will be familiar with them, so I won't
3 spend much time on them, simply to say the Claimant's
4 case is that Parán's actions and Respondent's
5 omissions caused the loss of Claimant's investment.

6 So what did we have to do in terms of
7 damages? We were instructed to assess damages
8 incurred by Claimant as a result of the breaches as of
9 the valuation date, which is the 26th August 2019.
10 Specifically, we were asked to do that by reference to
11 the fair market value of Claimant's lost investment in
12 Perú.

13 In our second report, we were asked to
14 review the comments from AlixPartners' first report,
15 and also to update our damages assessment in light of
16 new information, including the Micon report, Micon
17 being the technical mining experts engaged by the
18 Claimant.

19 Now, in line with the principle of full
20 reparation, we assessed damages as the difference
21 between the but-for situation, and the actual
22 situation, standard approach. We assessed the value

1 of the actual situation to be nil. In the but-for, as
2 I said, we assessed the fair market value of the
3 Claimant's investment, and we did that using a DCF
4 approach.

5 We did it for both the scenarios, the
6 355-tons-per-day scenario and the 590-tons-per-day
7 scenario.

8 In our preparation for the hearing, we
9 did--we were reviewing our models, we noticed a small
10 inconsistency in our assessment, which was set out in
11 Accuracy 2, and as you can see from this slide, it
12 just marginally reduces the assessment of damages
13 before interest to a range of \$31.5 million to \$40.4
14 million.

15 We also benchmark our damages assessment to
16 other indicators of value of the project, which
17 supported the reasonableness of our assessments under
18 the DCF approach.

19 Now, AlixPartners, in their report, they
20 disagree with a number of areas of our work and our
21 report. Firstly, they refer to fundamental flaws,
22 which they say if remain unresolved, would mean that

1 the value of the project would be nil.

2 They also disagreed and challenged some of
3 our inputs into our valuation, and they also disagreed
4 with our other indicators of value, saying that
5 they're either inaccurate or do not demonstrate the
6 reasonableness of our damages assessment.

7 Now, we disagree with those, and in the
8 remainder of this presentation, we will set out, for
9 the benefit of the Tribunal, why.

10 MR. RICHARDS: Thank you, Erik.

11 Good morning, members of the Tribunal.

12 AlixPartners allege four fundamental flaws--

13 PRESIDENT CROOK: Sir, could you get a
14 little closer to your microphone, please.

15 MR. RICHARDS: Yes. I'll get closer. Is
16 that better? Perfect.

17 AlixPartners allege four fundamental flaws
18 in our quantification of damages, firstly, that
19 removing the alleged breaches would not resolve the
20 access road protest. Secondly, our failure to account
21 for the remaining social license risk. Thirdly, even
22 absent the alleged breaches, they opine that Claimant

1 would have defaulted on the PLI loan. Fourthly, our
2 failure to account for difficulties in refinancing.

3 Based on these fundamental flaws, they
4 conclude that Claimant's damages are nil.

5 The alleged fundamental flaws largely
6 pertain to liability issues, upon which we are not
7 qualified to opine.

8 However, to assist the Tribunal, we set out
9 our limited comments on the following slides.

10 In relation to the first two flaws,
11 AlixPartners opine that intervention by the police
12 appears to have been unlikely to permanently resolve
13 the blockade or the conflict with the Parán Community,
14 and that our damages model omits related costs and
15 delays.

16 They further state that no evidence was
17 provided to support the assumption that Claimant would
18 obtain and maintain social licenses to operate with
19 all of the affected local communities, and that
20 Claimant's failure to do so would negatively impact
21 its operations and could reduce damages to nil.

22 Now, these comments assume that the Tribunal

1 finds that the actions of Parán are not attributable
2 to Perú. We note that Claimant had signed agreements
3 with the Lacsanga and Santo Domingo communities, and
4 it is not clear why AlixPartners extrapolate the
5 issues with Parán to all of the affected communities.

6 We further note that the PEA mine plan
7 prepared by SRK included \$1.2 million of capital
8 expenditure related to community infrastructure, and
9 \$3 million of community relations costs over the
10 six-year mine plan.

11 AlixPartners calculate an impact of \$2.4
12 million in the 590-ton-per-day scenario for the cost
13 of obtaining and maintaining an agreement with Parán.
14 We've reviewed this calculation and we consider that
15 it contains errors that overstate the cost. To the
16 extent an agreement with Parán was required, and
17 related costs not already included by SRK, we include
18 a sensitivity later in this presentation to assist the
19 Tribunal.

20 Turning now to the last two flaws relating
21 to financing, AlixPartners believe that even without a
22 blockade, Claimant would have defaulted on the PLI

1 loan under both production scenarios, firstly because
2 of the Dufour report's conclusion that Micon's
3 production schedule, which assumes a start date of
4 November 2018, is not feasible, and missing approvals
5 would have prevented Claimant from exploiting the
6 Invicta project before July 2020.

7 Secondly, because Micon provided no specific
8 basis for their assumption that issues at the
9 third-party processing facilities would be resolved.

10 Thirdly, that Claimant had committed 14
11 defaults under the PLI loan, several of which were
12 unrelated to the alleged breaches.

13 Furthermore, under the 590-ton-per-day
14 scenario, that we unreasonably assumed that PLI would
15 concede payment extensions to Claimant and lend
16 additional funds of \$13 million despite Claimant's
17 continued refusal to obtain and maintain its social
18 license to operate.

19 And lastly, that the Claimant's attempt to
20 raise \$1 million, five months before the valuation
21 date, was undersubscribed and yielded less than 5
22 percent of the early termination amount.

1 Responding to these issues in turn, we note
2 that Ms. Dufour's position is more nuanced than
3 reported in the second AlixPartners report. In her
4 report, she appears to refer to two conclusions, an
5 optimistic scenario of December 2019, and a
6 conservative scenario of July 2020.

7 However, we do understand that the issue of
8 production start-date is disputed between the parties,
9 and to assist the Tribunal, we show later in this
10 presentation the monthly impacts of delaying the start
11 of production in both scenarios.

12 Contrary to AlixPartners' representations,
13 the Micon report does explain how third party
14 processing issues would have been resolved. To ensure
15 adequate processing capacity, Micon model a
16 three-month ramp-up in production, and they ultimately
17 conclude that, absent the blockade, Lupaka would have
18 been able to produce the ore tonnages and grades
19 required to service the PLI facility.

20 Now, in relation to the 14 defaults under
21 the PLI loan, Claimant's position is that these
22 defaults either directly resulted from a blockade or

1 were related to reporting requirements with which
2 Lupaka complied, or lastly, were waived.

3 We note that the alleged defaults were
4 raised for the first time in July 2019, when Lonely
5 Mountain acquired Pandion's interest in the PLI loan,
6 at which point Claimant had not had access to the site
7 for over eight months.

8 So thinking now about the but-for situation,
9 we note that the draft third amendment to the PLI loan
10 included an updated indicative gold delivery schedule,
11 with the first delivery due in September 2019.

12 We understand that the operative terms were
13 that the first delivery would be due nine months after
14 the closure of the Mallay acquisition, community
15 approval for which was received in March 2019. Based
16 on this date, the first delivery under the third
17 amendment would have been January 2020, which is
18 within the range of Ms. Dufour's possible production
19 start dates.

20 I think it's important to note here that the
21 possibility of delays to the effective start date of
22 the third amendment and the consequences on the

1 delivery schedule were foreseen by Pandion in October
2 2018.

3 Immediately prior to the blockade, Pandion
4 was therefore contemplating tripling its exposure to
5 the Invicta project from \$7 million to \$20 million,
6 while delaying the date of first repayment to
7 September 2019, at the earliest, and acknowledging the
8 possibility of further delays.

9 To us, this appears consistent with evidence
10 of Pandion's previous flexibility set out in
11 Mr. Ellis' witness statement.

12 Lastly, AlixPartners claimed that following
13 their assumed default on the PLI loan, Claimant
14 wouldn't have been able to raise financing to settle
15 the early termination amount, citing Claimant's
16 undersubscribed equity placement in March 2019.

17 AlixPartners--in doing so, AlixPartners
18 ignore the adverse impact of the blockade and
19 Claimant's lack of physical possession of the Invicta
20 project on its ability to raise financing. We note
21 that the fundraisings prior to the blockade were
22 either fully or oversubscribed.

1 MR. VAN DUIJVENVOORDE: Turning now to our
2 assessment at the valuation date.

3 As I said before, our assessment is based on
4 the work of Micon, the technical mining experts, and
5 they were instructed to do a number of things,
6 including ascertain the validity of the Red Cloud
7 model, adjust the PEA production and cost schedules to
8 reflect the actual situation at the mine in October
9 2018, and opine on Lupaka's ability to meet its
10 obligations under the PLI loan, and explain variances
11 in pre-production grades achieved at third-party toll
12 processors.

13 Now, when it comes down to it, the
14 disagreements between Accuracy and AlixPartners
15 largely relate to two areas; firstly, Micon's inputs,
16 and secondly, our--Accuracy's discount rate
17 assumptions.

18 So quickly, on Micon, for the 590-ton-day
19 scenario as compared to the Red Cloud model, Micon
20 updated its mine plan, started production in November
21 2018, and applied higher operating costs and capital
22 expenditure.

1 Similarly, in the 355-ton-day scenario, they
2 started production in November 2018, and also applied
3 higher operating costs and adjusted the capital
4 expenditure.

5 Now, AlixPartners have a number of comments
6 on Micon's inputs. Clearly, they haven't been called
7 to give evidence to the Tribunal this week. The--what
8 we've tried to do is point in the Appendix B, point
9 the Tribunal to answers to AlixPartners' questions,
10 which are already in the Micon report, and in other
11 evidence submitted in these proceedings.

12 First of all, I wanted to just pick up on
13 the comments of my colleague about the fact that the
14 Tribunal may consider that the project start date
15 needs to be adjusted. That's a dispute between the
16 parties, obviously. And also, costs of an agreement
17 with the Parán Community, the Tribunal may think it
18 appropriate to do so.

19 Again, that's disputed between the parties.

20 But to assist, we've assessed the delay of
21 the start of production to be, on average, 500,000 US
22 dollars per month in the higher scenario and \$250,000

1 per month in the lower scenario.

2 Including the costs of maintaining an
3 agreement with Parán, we've calculated that on a
4 similar basis to the deals that were done with the
5 other communities. And after tax, this would decrease
6 damages by US \$1.6 million, in highest scenario, and
7 US \$1.2 million, in the lower scenario.

8 I just wanted to give an example, though, of
9 one of the disagreements from AlixPartners.

10 I mean, AlixPartners consider that the
11 10-year mine plan in Micon's 590-ton-per-day scenario
12 to be unreasonable. And then they come in and they
13 propose a sensitivity where they simply lop off the
14 last three years of that mine plan.

15 Now, of course, you don't need to be a
16 technical mining expert to say, well, if you're going
17 to reduce the life of the mine and the life of the
18 mine plan, then you just don't lop off the last three
19 years. You change the plan. You look at taking the
20 highest grade material from the mine, and you do that
21 at a lower capital expenditure.

22 So it changes the economics. So that sort

1 of brutal adjustment is inappropriate.

2 As I said, there are a number of other
3 areas, but I won't dwell on those. We've given
4 pointers in the Appendix in the--to the presentation
5 as to where the Tribunal might find the evidence in
6 the Micon report to respond to the other questions.

7 Now, turning to our own inputs, on top of
8 Micon inputs in both scenarios, we make assumptions
9 for metal prices, financing cash flows, working
10 capital requirements and taxation.

11 Our understanding is that AlixPartners agree
12 with the way in which we apply these assumptions.

13 The area where they disagree is the discount
14 rate. What have we done? We've obtained the fair
15 market value. To do so, we discount the resulting
16 free cash flows to equity back to the valuation date
17 using an estimate of the cost of equity for a
18 hypothetical gold mining entity operating in Perú.

19 We applied a real discount rate of 12.2
20 percent, can be broken down between the real cost of
21 equity of 8.9 and a pre-production premium of 3.3
22 percent, just based on independent industry studies to

1 reflect the stage of development of the Invicta
2 project and the associated risks.

3 Now, AlixPartners say, well, this study
4 you've come up with on pre-production premiums is too
5 old. It dates back a few years, but there's no reason
6 to believe that the findings have changed; and, of
7 course, AlixPartners don't propose any alternative.

8 They go on to say, well, if we're going to
9 use that study, we should be using a premium of 5.7
10 percent instead of 3.3 percent, because they say that
11 the 3.3 percent is applicable to mining projects that
12 have undergone feasibility studies; whereas in this
13 case, the PEA is akin to a pre-feasibility study.

14 But, of course, that's a very narrow view.
15 You've got to look at the context of this case. And
16 given that the feasibility study is there to raise
17 financing, this case, the project had already received
18 third-party financing, and they progressed it to an
19 extent where it was close to entering into production.

20 So, in fact, you can argue that the position
21 of this project was more advance-stage than some
22 projects at the feasibility study stage. It's for

1 that reason, we are comfortable with the
2 pre-production premium of 3.3 percent.

3 They also consider that our discount rate
4 does not reflect risks relating to obtaining relevant
5 permits; secondly, project-specific social license
6 risk; and thirdly, execution risks such as third-party
7 processing issues.

8 Now, we consider that the project-specific
9 risks are sufficiently accounted for through the
10 premiums applied to our discount rate and the
11 assumptions underlying the cash flow projections.

12 Indeed, our country risk premium reduces our
13 valuation by 3 million under the higher scenario and
14 our pre-production by 6 million US dollars, also under
15 the higher production scenario.

16 Indeed, the last point is, on the fair
17 market value standard, any Claimant-specific risks
18 should not be taken into account. So I understood
19 that there was some disagreement as to the
20 effectiveness of the community relations team. Those
21 are Claimant-specific and, in determining the value
22 under the fair market value standard, should not be

1 taken into account.

2 MR. RICHARDS: Turning now to benchmarking,
3 we sought to benchmark our DCF valuations against
4 three alternative indicators of value, Claimant's
5 market capitalization, Claimant's sunk costs and
6 transactions in comparable gold properties.

7 Market capitalization is recognized by
8 CIMVAL as a secondary valuation technique. And as you
9 can see from the chart on the bottom of the slide,
10 from January 2013 to the blockade date, there was
11 broad correlation between Claimant's share price,
12 which is the blue line, and the GDXJ, which is an
13 index of junior gold mining companies represented by
14 the yellow line.

15 However, following the blockade, there was a
16 marked decline in Claimant's share price, which
17 diverged significantly from the GDXJ, and this
18 suggests the Claimant's share price was negatively
19 affected by the alleged breaches.

20 Now, in their first report, AlixPartners
21 noted that Claimant's market capitalization appears to
22 have underperformed the GDXJ between the 28th of March

1 2018 when its option on the Josnitoro project lapsed
2 and the blockade date.

3 And you can see that by the decline in the
4 blue line just before the vertical dotted line.

5 However, we note that the underperformance
6 was immediately preceded by offsetting
7 overperformance, and that the blue line ends up in the
8 same place as the yellow line.

9 So in order to estimate Lupaka's market
10 capitalization in the but-for situation at the
11 valuation date, 26 of August 2019, we applied the
12 movement in the junior gold miner index between the
13 blockade and valuation dates to Claimant's market
14 capitalization as at the blockade date.

15 Now, this is a recognized approach.

16 We then added a control premium to reflect
17 the additional consideration that a hypothetical
18 investor would pay to own a controlling interest in a
19 company or project, and this resulted in an
20 illustrative valuation of the Invicta project at the
21 valuation date of \$32.8 million.

22 I think it's important to note here that as

1 the market was unaware of the proposed Mallay
2 acquisition and the draft PLI loan amendment, this is
3 a more appropriate benchmark to our valuation under
4 the 355-ton-per-day scenario.

5 AlixPartners argue that daily changes in the
6 index demonstrate a weak relationship with daily
7 movements in Lupaka's share price, and using the
8 relationship based on the correlation of monthly
9 changes, instead, they calculate reductions of up to
10 half a million dollars to our valuation.

11 Notwithstanding the point that the purpose
12 of our analysis is to estimate how Claimant's share
13 price would have performed over a 10-month period,
14 absent the alleged breaches, and not to predict daily
15 changes, this alternative calculation doesn't move the
16 needle.

17 They further argue that our control premium
18 was not applicable and that our assessment of the
19 control premium was, in any event, overstated.

20 We disagree.

21 The control premium we applied was an
22 objective average based on two studies of observed

1 transactions in the mining industry. And again,
2 applying a control premium to quoted share prices
3 based on observed transactions is standard practice.

4 We further benchmark our damages assessment
5 against an indicator of value based on Claimant's sunk
6 costs by firstly identifying costs incurred by
7 Claimant in relation to its investment up to the
8 valuation date, including both the acquisition costs
9 and the subsequent expenditure, to which we applied an
10 expected rate of return from the date the costs were
11 incurred to the valuation date.

12 We applied an expected rate of return of 12
13 percent, which corresponds to the post-tax effective
14 interest rate on the PLI loan. And after adjusting
15 for the early termination amount, this results in a
16 benchmark value of \$27.2 million.

17 PRESIDENT CROOK: Let me interrupt you for a
18 moment. We have less--you have less than five minutes
19 remaining, so you may want to consider how you want to
20 proceed.

21 MR. RICHARDS: Thank you. I'll speed up.

22 So according to AlixPartners, under CIMVAL

1 guidelines, the cost approach is not appropriate for
2 the valuation of development properties. We agree
3 that's what CIMVAL says; however, we only use sunk
4 costs as a benchmark, and we consider the sunk costs
5 to be indicative of the minimum value of the project
6 as at the valuation date.

7 They further argue that our application of
8 Claimant's borrowing rate of 12 percent capitalized
9 sunk costs is inappropriate; however, we consider it
10 to be conservative when compared to our adjustment for
11 the early termination amount, which also includes the
12 cost of outside participation. And we note that
13 capitalizing at a rate of less than 12 percent assumes
14 that Claimant would have made returns below its cost
15 of debt.

16 Our calculation implies a value to cost
17 multiple of 1.74 times, which is conservative in
18 comparison to mining industry practice, which
19 recommends a multiple of three times for properties at
20 a similar stage to Invicta.

21 And again, this is a recognized approach
22 under CIMVAL guidelines, and applying a three-times

1 multiple to Claimant's sunk costs would result in an
2 illustrative valuation of \$58.5 million.

3 Lastly, on transaction multiples, we
4 identify 26 transactions, meeting the criteria set out
5 on the page, which resulted in a median equity value
6 multiple of \$219 per ounce and a mean of \$368 per
7 ounce.

8 I think it's important to note that our
9 analysis demonstrated a positive correlation between
10 gold grade and the gold reserves multiple, and that
11 can be seen on the chart below.

12 After adjusting for the pre-production
13 premium in our DCF valuation to ensure comparability
14 with our sample, which included some producing
15 properties, we obtained an implied multiple for the
16 Invicta project of \$198 per ounce under the lower
17 scenario and \$144 per ounce under the higher
18 production scenario.

19 Those are indicated by the red dots on the
20 chart below.

21 We consider that given the comparatively
22 higher grade of the Invicta project compared to recent

1 industry transactions, our DCF valuation is
2 conservative.

3 So AlixPartners' main criticism is our
4 transaction multiples analysis includes companies that
5 aren't comparable, and they calculate benchmarks using
6 three different sets limited to pre-production
7 companies only.

8 One of these sets calculates an implied
9 valuation of circa \$22 million under the
10 355-ton-per-day scenario and circa \$42 million under
11 the 590-ton-per-day scenario.

12 So there is overlap between the benchmarks
13 calculated by AlixPartners and our valuation of the
14 590-ton-per-day scenario. And we note again that all
15 of the transactions within AlixPartners' benchmark
16 sets had a lower grade than the Invicta project, and
17 AlixPartners did not respond to our analysis
18 demonstrating the correlation between grade and
19 multiple.

20 And lastly, we note that Lupaka already had
21 financing in place for the 355-ton-per-day scenario,
22 and this may not have been the case for pre-production

1 properties within our sample.

2 On this slide, we set out the results of our
3 benchmarking analysis, which shows that our
4 assessments are either in line with or conservative as
5 compared to the benchmarks. Whereas AlixPartners'
6 assessments and, in particular, their alternative
7 valuation of the 590-ton-per-day scenario using DCF in
8 the bottom right, appears understated.

9 MR. VAN DUIJVENVOORDE: Forty-five seconds
10 to wrap up, Mr. President.

11 Just on pre-award interest and Accuracy,
12 too, we were instructed to apply preorder interest
13 using alternative rates of LIBOR plus 4 and UST plus
14 5.

15 By contrast, AlixPartners present the
16 pre-award interest calculation using different rates,
17 UST plus 2 and SOFR plus 2, and they say those are
18 reasonable alternatives. But in our view, the rates
19 proposed by AlixPartners are inappropriate as they
20 result in cumulative rates below inflation.

21 And what this means is that the value of an
22 award to Claimant would decline in real terms with the

1 passage of time. That doesn't seem reasonable to us.

2 Indeed, UST and SOFR are risk-free rates,
3 and you would need to apply a spread to those to
4 equate to the LIBOR.

5 PRESIDENT CROOK: Sir, with that, your time
6 is expired.

7 MR. VAN DUIJVENVOORDE: Just ten seconds.

8 PRESIDENT CROOK: Fifteen, take fifteen.

9 MR. VAN DUIJVENVOORDE: Fifteen, okay.

10 Well then, in summary, having applied
11 interest, damages including pre-award interest amount
12 to between 38.5 million and 50.4 million US dollars,
13 depending on the production scenario and the interest
14 rate applied.

15 Thank you very much for your attention,
16 members of the Tribunal. That concludes our
17 presentation.

18 PRESIDENT CROOK: Thank you, gentlemen.

19 Over to counsel for the Respondent.

20 MR. GRANÉ: My colleague, Mr. Bombassaro,
21 will conduct the cross-examination.

22 CROSS-EXAMINATION

1 BY MR. BOMBASSARO:

2 Q. Good morning, Mr. Duijvenvoorde and
3 Mr. Richards. My name is Brian Bombassaro, and I will
4 be asking you questions about the two reports you
5 submitted in this arbitration.

6 Those two reports should be in front of you,
7 along with a binder of documents, to which I'll refer
8 to as we proceed.

9 Do you have your two reports and the binder?

10 A. (Mr. Van Duijvenvoorde) Yes. Thank you.

11 Q. As I ask questions, I may refer to the
12 initial transcripts of the past hearing days, whose
13 pagination could change due to eventual corrections.
14 Any transcript references I make today will be to the
15 pages of the initial transcripts that we have
16 received.

17 In your first report, will you please turn
18 to page 28, and Paragraph 4.6.

19 In that paragraph, you define fair market
20 value to mean the price expressed in cash or
21 equivalents at which an asset would change hands
22 between a hypothetical buyer and seller, acting at

1 arm's length in an open market where the parties are
2 knowledgeable, informed, prudent and under no
3 compulsion to transact.

4 Last Monday, the Tribunal asked two
5 questions to Claimant's counsel regarding your fair
6 market value valuations, and I would like to check if
7 you agree with counsel's answer.

8 As recorded in Monday's transcript at page
9 167, the Tribunal asked whether the hypothetical
10 well-informed purchaser of Invicta, "Would be able to
11 carry forward the business free of any social
12 disruption," and whether, "the premise is that Perú
13 would, going forward in the future, do whatever is
14 required, whenever is required, to assure that result.
15 Is that the premise?"

16 Claimant's counsel responded, yes, that's
17 the premise.

18 Let me ask you, did the Tribunal state
19 correctly the premise of your damages calculations?

20 A. (Mr. Richards) I mean, I think we're
21 obviously assessing damages under Claimant's case,
22 which is that the intervention by Perú would have

1 resolved the blockade.

2 I think it's beyond our expertise to say
3 what the outcome of the social issues would have been.

4 Q. If the Tribunal were to instruct you to
5 process into your valuations a new assumption that on
6 the valuation date, the entire Parán Community
7 voluntarily relocates itself 1,000 kilometers away to
8 live there permanently and never again approach the
9 Invicta Mine, which elements of your valuations would
10 you change?

11 A. (Mr. Richards) I mean, from our
12 perspective, that would obviously de-risk the project.
13 It would reduce the social license risk.

14 So we would probably consider an adjustment
15 to the cash flows to remove some of the social costs.
16 We could consider a reduction to the discount rate to
17 remove some of the pre-production premium and some of
18 the country risk premium.

19 Q. So you're indicating that you would process
20 social license risk into your valuations?

21 A. (Mr. Van Duijvenvoorde) The risk of social
22 license is already incorporated into our valuation in

1 general terms.

2 So under the fair market value, we're
3 talking about an investor, hypothetical investor, if
4 you like, investing in a gold mine in Perú. And in
5 order to evaluate that risk, he takes that into
6 account in his, either, discount rate, when he's
7 assessing the value, or in his cash flows.

8 Now, there are elements in the discount rate
9 which take into account the social license risk.

10 It could be in the beta, which relates to
11 the mining industry in general. It could be in the
12 country risk premium, which sets out the risk relating
13 to doing business in Perú. And also, that
14 hypothetical purchaser, as we have done, provided a
15 pre-production premium, which also would take into
16 account the risks in general, but also the risks
17 relating to social license, on the basis that, at that
18 stage of the development, the risk of needing to do so
19 was higher than if the agreements had already been
20 reached and the project had gone into production.

21 Now, the other hand of that is that you can
22 also take risk into account in your cash flows. Of

1 course, if we look at this case, in determining the
2 fair market value, risk has been taken into account in
3 the cash flows in the form of the estimated payments
4 to the communities, reflecting the agreements with
5 Lacsanga and Santo Domingo.

6 So the hypothetical purchaser, taking into
7 account the risk where he can in the cash flows as
8 well as in the discount rate. In fact, there may be
9 some duplication there. The question here is to what
10 extent does risk need to be taken into account for the
11 Parán Community, for example.

12 Now, in general, that risk is taken into
13 account in the discount rate because that's generally
14 a risk that an investor faces when investing in a
15 mining project in Perú.

16 But the question for the Tribunal is, well,
17 should an additional cost be incorporated into the
18 assessment of damages for the Parán Community.

19 Now, at that stage we can't help because
20 that's a matter that's disputed between the parties.
21 All we can do is say, Tribunal, if you think that you
22 need to incorporate extra costs into those cash flows

1 to deal with the risk, then we have given the
2 opportunity for the Tribunal to do so by quantifying
3 that as a sensitivity.

4 Q. Thank you, Mr. Duijvenvoorde.

5 Just to remind you, we're on a time limit,
6 so I'd just kindly request succinct answers to the
7 questions.

8 Could you please turn to your second report,
9 page 69. On this page, Paragraph 7.43 states that you
10 estimate the annual nominal effective interest rate on
11 the PLI loan to be 17.0 percent pre-tax, and 12.0
12 percent post-tax.

13 Do either of those loan interest rates
14 account for expected payments of upside participation
15 under the PLI loan?

16 A. (Mr. Richards) No, they don't.

17 Q. If you had included expected payments of
18 upside participation in your calculation, would the
19 annual effective interest rate on the PLI loan have
20 been higher than 17.0 percent pre-tax, and 12.0
21 percent post-tax?

22 A. (Mr. Richards) Yes.

1 Q. Still on your second report, please turn to
2 page 43. In footnote 163, you state that you
3 calculated an effective interest rate of 16.1 percent
4 nominal--

5 A. (Mr. Van Duijvenvoorde) Sorry, Counsel.
6 Give me time to find the page, and that will be very
7 helpful. Thank you.

8 Q. I'm sorry.

9 The pages are also being displayed on the
10 screens as well.

11 In footnote 163, you state that you
12 calculated an effective interest rate of 16.1 percent
13 nominal pre-tax in your 590-tons-per-day scenario.
14 This 590 scenario includes the PLI loan plus the draft
15 third amendment; is that correct?

16 A. Yes.

17 Q. Does this 16.1 percent interest rate account
18 for expected payments of upside participation under
19 the PLI loan and draft third amendment?

20 A. (Mr. Richards) No, it does not.

21 Q. If you had included expected payments of
22 upside participation in your calculation here, would

1 the annual effective interest rate on the PLI loan and
2 draft third amendment be higher than 16.1 percent?

3 A. (Mr. Richards) Yes, it would have.

4 ARBITRATOR GARIBALDI: Excuse me. Would you
5 please explain or remind us what upside participation
6 is, briefly, please.

7 MR. RICHARDS: Thank you for the question.

8 So upside participation is whereby the
9 lender would benefit, in part, from an increase in
10 gold prices above a pre-defined level.

11 So they had these payment obligations,
12 delivery obligations where the lender would be able to
13 buy the ounces at market prices, less a discount of
14 \$500, and that was how Lupaka was going to make its
15 repayments under the PLI loan.

16 The deemed value of those repayments was
17 \$500 per ounce.

18 Then on top of that, there was an additional
19 upside for the lender where I think they got 30
20 percent of the gold price above a certain value, a
21 threshold value.

22 ARBITRATOR GARIBALDI: Thank you.

1 BY MR. BOMBASSARO:

2 Q. Still on your second report, please turn to
3 Paragraph 5.25.

4 In that paragraph, you mention that your
5 valuations apply cost of equity of 12.2 percent.
6 Paragraph 5.25 states that this 12.2 percent cost of
7 equity is not comparable to the PLI loan's 17.0
8 percent pre-tax annual effective interest rate,
9 because, among other reasons, the PLI loan's interest
10 rate is "Claimant-specific," whereas your cost of
11 equity applies only to a "hypothetical gold mining
12 entity in Perú."

13 What does it mean for your cost of equity to
14 apply only to a hypothetical gold mining entity in
15 Perú rather than being Claimant-specific?

16 A. (Mr. Richards) It means we've calculated it
17 using the capital asset pricing model. So it's based
18 on the returns required by an average market
19 participant investing in the mining sector in Perú,
20 before we apply our premiums, our additional
21 pre-production premium.

22 Q. So when you say, "it's based on the returns

1 required by an average market participant," does that
2 mean your cost of equity applies specifically to an
3 average or typical gold mining entity in Perú rather
4 than any hypothetical gold mining entity in Perú?

5 A. (Mr. Richards) I mean, before we apply the
6 pre-production premium, yes.

7 Q. Thank you.

8 In your reports, is it correct that your
9 valuations are not of a hypothetical gold mining
10 entity in Perú, but rather, they are valuations of one
11 particular mining entity in Perú, namely, the Invicta
12 mining Corporation?

13 A. (Mr. Van Duijvenvoorde) Yes, but it
14 represents, under the fair market standard, a
15 transaction between a hypothetical seller and a
16 hypothetical purchaser.

17 Q. Is it correct that in each of your
18 valuations, you used your discount rate as the cost of
19 equity?

20 A. (Mr. Richards) Yes.

21 Q. In your second report, will you please turn
22 to Paragraph 5.18. In this paragraph, you state that

1 you updated the modeling in your first report to
2 instead assume that "a prospective purchaser would
3 have acquired the Invicta project with the PLI loan in
4 place."

5 When you say the "prospective purchaser,"
6 are you referring to the hypothetical buyer in your
7 definition of fair market value?

8 A. (Mr. Richards) Yes.

9 Q. Are you contemplating, then, that the
10 prospective purchaser is not just any hypothetical
11 buyer of the Invicta shares, but rather, it is a buyer
12 who is willing both to purchase the Invicta shares and
13 also to undertake Claimant's payment obligations under
14 the PLI loan?

15 A. (Mr. Van Duijvenvoorde) That's a question
16 of at the valuation date in August--in August. In
17 August 2019 the transaction for Mallay, for example,
18 would have occurred, because that was due to occur in
19 a but-for situation in March. So that debt would be
20 in place.

21 So even if the hypothetical purchaser came
22 in and, using his own financing through his discount

1 rate, he would have two options. In fact, we have
2 chosen the most prudent option, in terms of how to
3 deal with the financing, that was in place at the
4 valuation date by assuming that that financing would
5 stay in place, and would be supported by future cash
6 flows until extinction.

7 Q. Does your valuation account for a narrower
8 pool of hypothetical buyers, if any exist, who not
9 only want to purchase the Invicta shares, but who are
10 also willing to assume Claimant's payment obligations
11 under the PLI loan?

12 A. (Mr. Richards) I mean, I don't know if I
13 quite see it that way. I think there are--obviously,
14 we conducted our valuation using the fair market value
15 standard.

16 We also had to give consideration to the
17 principle of full reparation, and the facts on the
18 record.

19 The facts on the record show that Claimant
20 was contemplating funding the acquisition of the
21 Mallay plant using the PLI loan, and the amendment to
22 the PLI loan. The PLI had already advanced sums to

1 Claimant.

2 So it seemed--and I think it was one of the
3 criticisms that AlixPartners made of how we'd modeled
4 financing in our first report, that we didn't take
5 into account the terms of the PLI loan.

6 So we were trying to reduce the areas of
7 disagreement between the experts by modeling the PLI
8 loan directly in the cash flows in our second report.

9 Q. Were you instructed to estimate damages
10 based on the fair market value valuation?

11 A. (Mr. Van Duijvenvoorde) Yes. As we said in
12 our presentation.

13 Q. Mr. Richards, when you said you also took
14 reference to the principle of full reparation, does
15 that mean you estimated damages based on the different
16 concept of investment value?

17 A. (Mr. Richards) No, it does not.

18 Q. Regarding interest rates, are daily quotes
19 of SOFR, dollar LIBOR, and one-year US Treasury
20 interest rates each market determined?

21 A. (Mr. Van Duijvenvoorde) Sorry, is that a
22 question--

1 Q. Yes, the question is--

2 A. (Mr. Van Duijvenvoorde) Forgive me. Could
3 you repeat the question.

4 Q. That's okay. Yes.

5 Are daily quotes of the SOFR, dollar LIBOR,
6 and one-year US Treasury interest rates each
7 market-determined?

8 A. (Mr. Van Duijvenvoorde) They are
9 market-determined, but they're not comparable to
10 LIBOR.

11 Q. Are daily quotes of SOFR, dollar LIBOR and
12 one-year US Treasury interest rates fixed interest
13 rates or variable interest rates?

14 A. (Mr. Van Duijvenvoorde) They're variable,
15 but the difference--

16 Q. Thank you.

17 Go ahead.

18 A. (Mr. Van Duijvenvoorde) Sorry, I was just
19 going to explain for the benefit of the Tribunal.

20 That first of all, UST is a risk-free rate
21 because it's based on Treasury bills, US Treasury
22 bills.

1 Q. If I may interject, Claimant's counsel will
2 have an opportunity on redirect to ask you questions
3 beyond the scope of my questions.

4 A. (Mr. Van Duijvenvoorde) I'm simply trying
5 to make my responses as informative for the Tribunal
6 as possible.

7 PRESIDENT CROOK: I think while the Tribunal
8 appreciates that, still, I would encourage you to
9 respond precisely to the question that was asked.

10 BY MR. BOMBASSARO:

11 Q. As variable interest rates, do SOFR, dollar
12 LIBOR and one-year US Treasury interest rates each
13 respond to prevailing economic conditions?

14 A. (Mr. Van Duijvenvoorde) In general, yes.

15 Q. Among the economic conditions that those
16 interest rates respond to, would you include changes
17 in interest rate policies set by the United States
18 Federal Reserve?

19 A. (Mr. Van Duijvenvoorde) Yes.

20 Q. And is it your understanding that, among the
21 United States Federal Reserve mandates, is a mandate
22 to apply interest rate policies to foster low and

1 stable inflation?

2 A. (Mr. Van Duijvenvoorde) I'm not sure I'm in
3 a position to comment on US government policy.

4 Q. I'd like to return to the concept of fair
5 market value in your first report in Paragraph 4.6.

6 As we discussed earlier, fair market value
7 contemplates a hypothetical buyer and seller with
8 certain attributes transacting in certain
9 circumstances.

10 All else equal, does the seller always
11 prefer to receive a higher price for a given asset?

12 A. (Mr. Richards) Yes.

13 Q. And all else equal, does the buyer always
14 prefer to pay a lower price for a given asset?

15 A. (Mr. Richards) All else equal, yes.

16 Q. And all else equal, does the buyer determine
17 its offer price based on the value to the buyer of
18 owning the particular asset?

19 A. (Mr. Richards) Yes.

20 Q. And when the buyer is determining its offer
21 price for the asset, does the buyer take into account
22 any attributes of the seller or only attributes of the

1 asset?

2 A. (Mr. Richards) Well, it depends if it's
3 under the fair market value standard or not.

4 Q. Yes, under the fair market value standard.

5 A. (Mr. Richards) So under the fair market
6 value standard, no.

7 Q. For example, under the fair market value
8 standard, does the hypothetical buyer adjust its offer
9 price depending on the indebtedness of the seller?

10 A. (Mr. Richards) No, because you're dealing
11 with a hypothetical buyer and seller, so you wouldn't
12 take into account the attributes of the specific
13 seller.

14 Q. Thank you.

15 In your first report, please turn to page
16 14, which is where Section 3 of your report begins.

17 On page 14 in Paragraph 3.2, you stated
18 that, "In this section, we summarize the facts of the
19 dispute that are relevant to our assessment of
20 damages."

21 Is that correct?

22 A. (Mr. Richards) Yes. That was our

1 intention.

2 Q. Still on Section 3, on page 16, will you
3 please turn to and review Paragraphs 3.10 and 3.11.

4 In these two paragraphs, you discuss certain
5 mine authorizations and permits and an Environmental
6 Impact Assessment.

7 Why did you consider these facts to be facts
8 relevant to your damages assessment?

9 A. (Mr. Richards) I mean, it's really just
10 part of the general background. I mean, I wouldn't
11 say that we had relied on these.

12 I think when you lead into Paragraph 3.11,
13 we understood from Claimant that the development works
14 had been materially completed, and that was relevant
15 for how we did--adjusted the CAPEX, was included in
16 the first year in the PEA mine plan.

17 Q. Paragraphs 3.10 and 3.11 include citations
18 to Claimant's request for arbitration; specifically,
19 Paragraphs 14, 18, and 19.

20 Did you review all of the paragraphs
21 numbered from 14 to 19 in Claimant's request for
22 arbitration?

1 A. (Mr. Van Duijvenvoorde) I have to say, I
2 don't--I personally don't recall reviewing all of
3 those paragraphs, but I would highlight Paragraph 3.3.

4 This is background to the dispute. So it's
5 not relating to our expertise. It's background. The
6 summary, as we say in 3.3, is not intended to be
7 contentious, nor is it intended to be an exhaustive
8 description of all matters relating to the dispute,
9 and we say, some of which obviously fall outside the
10 scope of our instructions or which we may not be aware
11 of.

12 Q. So as you stated, am I understanding
13 correctly Paragraph 3.3 states that the summary is not
14 intended to be an exhaustive description of all
15 matters relating to this dispute, but Paragraph 3.2
16 says that we summarize the facts of the dispute that
17 are relevant to our assessment of damages?

18 Am I reading that correctly?

19 A. (Mr. Richards) Yes.

20 Q. Claimant's request for arbitration is in
21 your binder in Tab 30. Will you please open it and
22 turn to Paragraph 15.

1 A. (Mr. Van Duijvenvoorde) Sorry, which tab?

2 Q. Tab 30, 3-0.

3 This Paragraph 15 and footnote 13 indicate
4 that Claimant's mining plan was approved through
5 Resolution Number 0566-2014; is that correct?

6 A. (Mr. Richards) Yes. That's what it says.

7 Q. Okay. Resolution 0566-2014 is in Exhibit
8 C-9 in Tab 2.

9 Could you please turn to Exhibit C-9.

10 For the record, in this Exhibit C-9, the top
11 right corner says "C-9 corrected translation," and it
12 includes the original version of this document in
13 Spanish.

14 Please turn to page 10 of this exhibit.
15 Page 10 has a bold, underlined header that says
16 "Resolution"--

17 A. (Mr. Van Duijvenvoorde) Sorry, could
18 you--could I get there first before you ask the
19 question? Thanks.

20 Q. It's the final page of the document in your
21 binder. Not in the printed version of the binder, but
22 in the record, Claimant did submit the original

1 Spanish in Exhibit C-10--C-9. I'm sorry.

2 The top of page 10 has a bold, underlined
3 header that says, Resolution Number 0566-2014.

4 And the first sentence of the resolution
5 states that, "Having seen the above report and
6 agreeing with the opinion of the mining technical
7 directorate, approve the mining plan of the Invicta
8 mining project to carry out mining activities with a
9 capacity of 400 tons per day, presented by Invicta
10 Mining Corp."

11 According to the first sentence of this
12 resolution, was Invicta Mining Corporation approved to
13 carry out mining activities with the capacity of 400
14 tons per day?

15 A. (Mr. Richards) Yes.

16 Q. In your first report, did you include in
17 Section 3, as a fact relevant to your damages
18 assessment, that Invicta was approved for mining at a
19 capacity of 400 tons per day?

20 A. (Mr. Richards) No, we did not. I don't
21 think we were aware of this at the time. We hadn't
22 looked at the underlying exhibit.

1 Q. Are any of your valuations premised on
2 mining activities that would exceed 400 tons per day?

3 A. (Mr. Richards) Yes. Obviously, the
4 590-ton-per-day scenario is premised on a capacity of
5 greater than 400 tons per day.

6 But if I understand correctly, Invicta had
7 initially planned a much larger-scale operation, I
8 think 5,000 tons per day, and this application for a
9 capacity of 400 tons per day was a reduction. They
10 were applying in effect for a reduction of their
11 initial license capacity.

12 So while it's outside of my expertise, I
13 think, as a lay person, I don't see that they would
14 have faced great difficulties in getting a license for
15 590 tons per day.

16 Q. In the first line of that same resolution in
17 Exhibit C-9, where the resolution says "Approved" in
18 bold capital letters, does it say that the resolution
19 is approving "the mining plan of Invicta Mining
20 Corporation"?

21 A. (Mr. Richards) Yes, to approve the mining
22 plan of the Invicta mining project, yes.

1 Q. Did you review the approved mining plan?

2 A. (Mr. Richards) No, I did not.

3 Q. For the record, the mining plan that
4 Claimant submitted to MINEM was subject to certain
5 modifications that are summarized in the first nine
6 pages of this Exhibit C-9, which appear to be stated
7 in full in Exhibit MD-86, which is in Tab 29.

8 The mining plan that Claimant initially
9 submitted is in Exhibit C-41. Will you please open
10 that exhibit, C-41, and Tab 3.

11 In Exhibit C-41 in Tab 3, please turn to the
12 last page, which is page 119. Do you see the title on
13 this page as stating: "Chapter 11, Schedule of
14 Activities"?

15 A. (Mr. Richards) Yes.

16 Q. In this schedule, the left-most column lists
17 six activities: Explorations, preparations and
18 development, exploitation, progressive closure, final
19 closing, and maintenance and post-closure monitoring.

20 According to this schedule, which is part of
21 the mining plan that MINEM approved, in which years
22 does exploitation occur?

1 A. (Mr. Van Duijvenvoorde) With respect,
2 Counsel, I think these are questions concerning the
3 mine plan, and should really be addressed to the
4 technical mining expert, Micon.

5 I'm not sure we're comfortable about
6 responding to these questions. I think they're
7 outside of our expertise.

8 ARBITRATOR GRIFFITH: Counsel, can't we read
9 that for ourselves? I mean, we've got these documents
10 which say what they say. Why ask the witness do they
11 say what they say?

12 You've done this about six, seven times in a
13 row. You can take us to the documents. We can see
14 what they say. You don't have to ask the witness
15 whether they say that.

16 MR. BOMBASSARO: Thank you, Dr. Griffith.

17 BY MR. BOMBASSARO:

18 Q. In your second report, how many years of
19 exploitations activities do you value in your
20 590-tons-per-day scenario?

21 A. (Mr. Van Duijvenvoorde) Sorry, where in the
22 second report?

1 Q. Well, anywhere in your second report. Do
2 you recall how many years of exploitation activities
3 you provided for in your 590-tons-per-day production
4 scenario?

5 A. (Mr. Van Duijvenvoorde) I mean, once again,
6 the mine plan was developed by the technical mining
7 expert, in terms of the life of the mine, the mine
8 plan.

9 We can cite the length of the periods and
10 all that sort of thing, but the questions as to why it
11 was done that way, the assumptions upon which it was
12 done that way, they're not questions for us, really.
13 They're questions for the technical mining expert.

14 Q. Did I ask any questions about why the
15 assumptions were in the parameters they were--why they
16 were? I'm just asking if you identified them.

17 A. (Mr. Van Duijvenvoorde) You're asking a
18 question about the life of the mine under the mine
19 plan.

20 Q. I'm asking about what is stated in the
21 mining report on page 119. The mining plan that was
22 approved by MINEM.

1 A. (Mr. Van Duijvenvoorde) Sorry, I still
2 don't understand the question, and I'm not sure it's
3 within our expertise to--

4 ARBITRATOR GRIFFITH: Counsel, I can answer
5 that question, because it says it's years two, three,
6 four, five, six, and seven.

7 Do you need the witness to answer that?

8 MR. BOMBASSARO: Thank you, Dr. Griffith.

9 BY MR. BOMBASSARO:

10 Q. In your second report, could you please turn
11 to Paragraph 6.43. This paragraph mentions the
12 assumptions that you adopted from Micon for the start
13 date and ramp-up period for commercial exploitation.

14 It states that "Consistent with the approach
15 taken in the 590-tons-per-day scenario, in order to
16 ensure availability of adequate toll processing
17 capacity, Micon assume a start date for production in
18 November 2018, starting at 100 tons per day and
19 ramping up to steady state production of 355 tons per
20 day, using third-party toll processors, by February
21 2019."

22 Could you please turn to Paragraph 3.25(d).

1 MR. BOMBASSARO: May I implore the Tribunal
2 for a short break?

3 PRESIDENT CROOK: Of course. We are
4 scheduled for a 10-minute break in 20 minutes. Your
5 wish is for something shorter than that, or do you
6 want the 10-minute break?

7 MR. BOMBASSARO: Ten minutes would be fine.

8 PRESIDENT CROOK: You want us to have the
9 scheduled 10-minute break 20 minutes earlier?

10 MR. BOMBASSARO: Please, yes.

11 PRESIDENT CROOK: All right. We will rise
12 for ten minutes.

13 (Whereupon, there was a recess in the
14 proceedings, 10:41 a.m. - 10:52 a.m.)

15 PRESIDENT CROOK: All right. Let's resume
16 the cross-examination of the experts, then.

17 BY MR. BOMBASSARO:

18 Q. Thank you.

19 Is it your understanding that Pandion
20 eventually sold PLI Huaura to Lonely Mountain?

21 A. (Mr. Richards) Yes.

22 Q. In the transcript from last Monday on page

1 121, Claimant's counsel suggested that Pandion sold
2 PLI Huaura to Lonely Mountain for "pennies on the
3 dollar."

4 Are you aware of any evidence of the exact
5 or approximate price that Lonely Mountain paid to
6 Pandion to purchase PLI Huaura?

7 A. (Mr. Richards) I think that's a technical
8 issue with the exhibits. Were you trying to take me
9 to anything to the transcript or not?

10 Q. No. I'm just asking your recollection.

11 A. (Mr. Richards) No. I'm not aware.

12 Q. Okay. Last Monday, Claimant's counsel also
13 suggested that PLI Huaura would abstain from enforcing
14 its rights under the PPF Agreement because the
15 agreement was a "lucrative gold streaming loan."
16 That's on page 120 of the transcript.

17 In your second report, you valued the
18 so-called gold streams, which you referred to as PLI
19 Huaura's upside participation, on page 83 in
20 Paragraphs A2.13, and A2.17.

21 If we can go to Paragraph A2.13 first,
22 please. Paragraph A2.13 states that you "estimate

1 total upside participation to be \$6.7 million in the
2 355-ton-per-day scenario."

3 When you say the sum is a total estimate,
4 does that mean that you did not discount the upside
5 participation payments totaling 6.7 million to their
6 net present value as of the valuation date?

7 A. (Mr. Richards) I can't recall whether that
8 6.7 million number is before or after discounting.

9 Q. Similarly in Paragraph 2.17, you state that
10 you "estimate total upside participation to be \$9.9
11 million in the 590-tons-per-day scenario."

12 Do you recall whether this figure would have
13 been discounted to net present value as of the
14 valuation date?

15 A. (Mr. Van Duijvenvoorde) We have the same
16 response to that. What I would add is that in
17 AlixPartners' report, they agree with the way we apply
18 the financing.

19 So I'm not sure what's subject to dispute
20 here.

21 Q. Just trying to understand the paragraphs.

22 Would you kindly remind the Tribunal what

1 the term "upside participation" means specifically;
2 what is the upside, who participates, and by what
3 means?

4 A. (Mr. Richards) So the upside participation
5 is whereby the lender gets to share in the benefits to
6 Lupaka if the gold price goes above a certain
7 threshold level.

8 I think I touched on this earlier. It looks
9 like my reflection was broadly correct. You can see
10 it at Paragraphs A2.9 and A2.10, I think just on the
11 previous page.

12 Q. Thank you.

13 If the lender, PLI Huaura in this case, in
14 its business judgment considered that over time
15 Claimant was becoming increasingly unlikely to operate
16 the Invicta Mine according to the mining plan, would
17 PLI Huaura be rational to reduce its valuation of its
18 upside participation in the PPF Agreement?

19 A. (Mr. Richards) I don't know whether it's a
20 question of rational or not, but I think, obviously,
21 it's something that they would model, and they did
22 have detailed models. We know they were exchanging

1 e-mails with Claimants and updating their models based
2 on, for example, the prospective Mallay acquisition.

3 But obviously, if you delay production, if
4 you delay repayment significantly, then the present
5 value of the upside participation to Pandion would be
6 reduced.

7 Q. If PLI Huaura were to seize the Invicta
8 shares, are you aware of any reason why PLI Huaura
9 could not resell those shares for fair market value?

10 A. (Mr. Van Duijvenvoorde) Yes, but it follows
11 a foreclosure, so that foreclosure would be in the
12 public domain, and therefore, you would be viewed as a
13 distressed sale; and therefore, you would be using a
14 different valuation standard in respect of that, not
15 the fair market value.

16 Q. Is it correct that the value of the shares
17 to PLI Huaura would not be limited or affected by PLI
18 Huaura's ability or inability to conduct mining
19 operations?

20 A. (Mr. Richards) Yes. I think that's
21 correct, but I think there--the big factor here was
22 obviously the blockade, and whether anyone could have

1 actually physically had access to this mine.

2 Q. If PLI were to foreclose on the Invicta
3 shares, and resell them, are you aware of any reason
4 why PLI could not retain a portion of the shares for
5 itself, for instance, as a minority shareholder?

6 A. (Mr. Richards) I'm not aware of any reason,
7 no.

8 Q. If PLI were to foreclose on the Invicta
9 shares and resell them, are you aware of any reason
10 why PLI Huaura could not sell the shares subject to
11 having for itself upside participation in Invicta's
12 subsequent operations under a new owner?

13 A. (Mr. Richards) Again, I'm not aware of any
14 restriction.

15 Q. I'd like to briefly show you three e-mails
16 among members of Claimant's management from July,
17 August, and September 2018, before the Access Road
18 Protest where they comment on the company's financial
19 situation.

20 Could you please turn first to Exhibit R-217
21 at Tab 25.

22 This first e-mail is dated 28 July 2018, and

1 includes a note from Claimant's management that, "The
2 mine needs to produce a minimum of 6,000 tons of
3 mineral each month so that sufficient concentrates
4 will be produced and sold to cover cost."

5 Am I correct that 6,000 tons per month
6 corresponds to approximately 200 tons per day?

7 A. (Mr. Richards) Yes.

8 Q. Okay. If you could turn to Exhibit R-215 at
9 Tab 26.

10 On page 3, the e-mail states, "Cash forecast
11 from 3 August 2018 indicated that Invicta needed 7,000
12 tons to break even based on monthly expenditures.

13 Am I correct that 7,000 tons corresponds to
14 approximately 233 tons per month, assuming they're
15 referring to 7,000 tons per month?

16 ARBITRATOR GRIFFITH: Sorry, Counsel, I
17 shouldn't do this, but this is just arithmetic that's
18 being put to this witness. And when you say 200 tons
19 a day, that's assuming at one shift for five days. So
20 where does this get us?

21 MR. BOMBASSARO: Well, in general, the
22 references to the production rate in this case had

1 been stated in terms of tons per day rather than tons
2 per month, so I just wanted to translate the rate, and
3 then ensure they agree with the arithmetic.

4 BY MR. BOMBASSARO:

5 Q. Finally, could you please turn to Tab C-421
6 at Tab 20.

7 On page 3, the message notes that Invicta
8 was "at the point where it would not be able to pay
9 its contractors and suppliers."

10 Under the heading "Mining/mining license."

11 A. (Mr. Van Duijvenvoorde) Found it, thanks.

12 Q. Did you inspect any cash flow records of
13 Invicta Mining Corporation from the years 2018 or 2019
14 in preparing your valuations?

15 A. (Mr. Richards) Yeah, I think we reviewed
16 the financial statements generally in prepping our
17 sunk costs analysis, but I don't recall looking
18 at--specifically at cash flows in 2018 and 2019.

19 Q. When you say you reviewed the financial
20 statements, were those specifically of Invicta Mining
21 Corporation or Lupaka Gold Corporation?

22 A. (Mr. Richards) Lupaka Gold Corp.

1 Q. Thank you.

2 Regarding sunk costs, in your reports, am I
3 correct that one of your other indicators of value is
4 sunk costs?

5 A. (Mr. Richards) Yes.

6 Q. And as a general proposition, is it true
7 that a value of a business can decline to be lower
8 than the amount of sunk costs that were invested in
9 the business?

10 A. (Mr. Richards) As a general proposition,
11 yes.

12 Q. Thank you.

13 Do you recall a comment from AlixPartners
14 concerning a discrepancy between the gold ore grade
15 reported in Invicta's records from its actual
16 operation of the mine versus the budgeted ore grade
17 that Invicta Mining Corporation had contemplated?

18 A. (Mr. Richards) Yes.

19 Q. Do you understand AlixPartners to have
20 raised that issue as casting doubt on whether the ore
21 grade--the gold ore grade assumed in your valuations
22 was the appropriate ore grade--gold ore grade to

1 apply?

2 A. (Mr. Richards) Yeah. I think so, yes.

3 Q. If I asked you to process into your
4 valuations an assumption that Invicta was 100 percent
5 certain to achieve the ore grades contemplated in your
6 valuations, would you make any changes to those
7 valuations?

8 A. (Mr. Richards) So, in effect, you're asking
9 me to assume that the cash flows are certain?

10 Q. Not the cash flows, but the gold ore grade
11 achieved from commercial mining operations.

12 A. (Mr. Richards) I mean, I think I'd have to
13 discuss that with the technical mining expert to work
14 out how that compares to what they've used for their
15 cash flows currently.

16 Q. If I asked you to process into your
17 valuations an assumption that Claimant would have no
18 issues or problems using third-party ore processors,
19 that those issues--that there would be no issues,
20 before Claimant's start date for commercial mining,
21 would you make any changes to your valuations?

22 A. (Mr. Van Duijvenvoorde) Again, I think

1 that's a question for Micon, the technical mining
2 expert.

3 I mean, we know that they took an assumption
4 to run part production in both scenarios, to take into
5 account some teething problems at the processing
6 plants, but--so, you know, if there were none, you
7 wouldn't have to potentially ramp up the production,
8 but as I say, this is generally a question that's more
9 appropriate to ask the technical mining experts.

10 Q. As you understand your damages model,
11 though, is the three-month ramp-up period the only
12 place that takes account of potential problems using
13 third-party ore processors?

14 A. (Mr. Van Duijvenvoorde) No, of course not.
15 It's in the pre-production premium of 3.3
16 percent. Given the stage of development of the mine,
17 that may well cover those sort of potential issues.

18 Q. And is it correct that your pre-production
19 premium accounts for the average risk encountered by a
20 typical mine that has been subject to a feasibility
21 study?

22 A. (Mr. Van Duijvenvoorde) I think we covered

1 this off in the presentation.

2 Q. Can you remind me of the answer?

3 A. (Mr. Van Duijvenvoorde) The answer was that
4 there were two--two pertinent rates. There was a rate
5 of 5.7 percent, pre-production premium, which, as
6 stated, relate to projects at the feasibility study
7 stage.

8 And then there was the 3.3 percent rate,
9 which--sorry, 3.3 percent relating to feasibility
10 study stage and 5.7 for an earlier stage.

11 What we said here, that's the general rule,
12 but you need to look at the context of the case and
13 the position of the company. The position of the
14 company was that it had already raised finance, and
15 that was one of the main things that you generate a
16 feasibility study for, is to go out to the market, use
17 that to generate finance. They didn't need to do that
18 because they had finance in place.

19 The second element was that they were close
20 to production. They were doing pre-production runs;
21 and therefore, in that context, as I said in the
22 presentation, the project was arguably more advanced

1 than certain projects, which had been subject to a
2 feasibility study.

3 It was on that basis that we were--we found
4 it more than reasonable to assume the lower
5 pre-production premium of 3.3 percent.

6 MR. BOMBASSARO: Thank you,
7 Mr. Duijvenvoorde, and thank you, Mr. Edwards. I have
8 no further questions.

9 PRESIDENT CROOK: All right. Over to
10 Claimants for any redirect?

11 DR. VEIT: Thank you, Mr. President.

12 No redirect.

13 PRESIDENT CROOK: Let me ask my colleagues
14 if they have any questions.

15 Please.

16 QUESTIONS BY THE TRIBUNAL

17 ARBITRATOR GRIFFITH: May I address you
18 collectively as experts?

19 MR. VAN DUIJVENVOORDE: Of course, sir.

20 ARBITRATOR GRIFFITH: Thank you.

21 Am I incorrect that often it's put that a
22 discounted cash flow approach is inappropriate when

1 there's not an established business?

2 MR. VAN DUIJVENVOORDE: That's--it depends,
3 I think. You can't generalize. You need to look at
4 the specific context of the case, but--

5 ARBITRATOR GRIFFITH: Well, I'm asking the
6 question because, as I read your two reports, you
7 don't admit that as a possibility as a primary method.

8 MR. VAN DUIJVENVOORDE: So we don't admit--

9 ARBITRATOR GRIFFITH: You don't admit that
10 as a possibility as a primary valuation method for a
11 non-established business.

12 MR. RICHARDS: Yeah, I think in this case,
13 there is agreement between AlixPartners and Accuracy
14 that DCF is the appropriate approach, and the reason--

15 ARBITRATOR GRIFFITH: It's for the Tribunal
16 to decide. I mean, there are other decisions out
17 there which in no way bind us, which indicate where
18 there's no established business, sunk cost is an
19 appropriate methodology; is that correct?

20 MR. RICHARDS: I understand that there are
21 decisions out there that have decided that sunk costs
22 are appropriate for earlier-stage businesses.

1 However, my personal view is that in this
2 case, the DCF methodology is appropriate, because
3 effectively, we are dealing with a resource, a
4 property that's in development. So if you look at the
5 CIMVAL guidelines, it says the income approach is
6 appropriate, and in fact, it says the cost approach is
7 not appropriate.

8 Bear in mind what Micon have done, they have
9 done an extremely detailed level of work, which shows
10 a 3D map of what was going to be mined over these
11 years, with the grades, with all the little ramps that
12 get between the different levels. It's much more
13 certain than a speculative business plan for a
14 business that hasn't started yet.

15 ARBITRATOR GRIFFITH: Well, would you, as
16 expert, accept the possibility that one can go beyond
17 benchmark and adopt sunk costs as a valuation method
18 where there's not an established business?

19 MR. VAN DUIJVENVOORDE: It's always
20 possible, but in this particular case, we are guided
21 by CIMVAL, the Canadian Mining Institute for Valuation
22 of Mines. And clearly, they set out the different

1 criteria, the stage of the mine, and the methods that
2 are proposed to which are recommended to be used at
3 each stage of the mine development.

4 And in this case, I don't think there's any
5 dispute between AlixPartners, Accuracy, indeed, Micon,
6 that it was at the development stage.

7 So if you look up the CIMVAL guidance, one
8 can see that their recommended approach, the primary
9 approach, is indeed a discounted cash flow approach.

10 ARBITRATOR GRIFFITH: Thank you.

11 Nonetheless, would you accept that as a
12 benchmark, as you refer to it, sunk costs gives you a
13 valuation in the same range as the valuation of
14 discounted cash flow that you adopted here?

15 MR. RICHARDS: It's in the same range as our
16 lower valuation under the 355.

17 ARBITRATOR GRIFFITH: No.

18 MR. RICHARDS: Yeah, but obviously the
19 590-ton-per-day scenario is more closely aligned with
20 the Claimant's actual plans for development of the
21 project.

22 ARBITRATOR GRIFFITH: Well, if you adopt the

1 300-ton-per-day approach, would you agree that the
2 sunk costs approach is confirmatory in the range of
3 the amount that you have as your valuation on 300 tons
4 per day?

5 MR. VAN DUIJVENVOORDE: It's in the range,
6 but then so are the other benchmarks, market
7 capitalization, et cetera.

8 ARBITRATOR GRIFFITH: Which you can add them
9 all up and see that that's the range. Thank you.

10 DR. VEIT: Maybe just for the record, the
11 document, I think, that the experts were referring to,
12 you will find it at AC-22.

13 ARBITRATOR GRIFFITH: Thank you, Counsel.

14 PRESIDENT CROOK: So if I went to AC-22, is
15 that the CIMVAL methodology?

16 DR. VEIT: Correct. That's the CIMVAL
17 methodology. We saw the table, I think in the opening
18 statements of the experts, and that's at page 18.

19 PRESIDENT CROOK: Any further questions?
20 No.

21 In that case, then, gentlemen, we thank you
22 for your assistance. You are now free men.

1 MR. VAN DUIJVENVOORDE: Thank you very much,
2 Mr. President.

3 MR. RICHARDS: Thank you.

4 PRESIDENT CROOK: You may be excused.

5 We will now have to sort out some
6 housekeeping as to whether we are in a position to
7 proceed to the next examination.

8 Take guidance from the parties. I see an
9 affirmative nod from the Claimant. All right.

10 (Pause in the proceedings.)

11 PRESIDENT CROOK: Ms. Kunsman, Mr. Lee, can
12 you for the record identify yourselves, please.

13 MS. KUNSMAN: Yes, my name is Isabel Santos
14 Kunsman.

15 MR. LEE: My name is Alexander Lee.

16 PRESIDENT CROOK: Okay. Welcome. There
17 should be in front of you a an expert's declaration.

18 Do you see that?

19 MS. KUNSMAN: I do.

20 PRESIDENT CROOK: Can you each read it out
21 loud, please.

22 MS. KUNSMAN: Yes. I solemnly declare upon

1 my honor and conscience that my statement will be in
2 accordance with my sincere belief.

3 ISABEL SANTOS KUNSMAN, RESPONDENT EXPERT, CALLED

4 ALEXANDER LEE, RESPONDENT EXPERT, CALLED

5 MR. LEE: I solemnly declare upon my honor
6 and conscience that my statement will be in accordance
7 with my sincere belief.

8 PRESIDENT CROOK: Okay. I'm sure that you
9 are, as experts, familiar with the procedure. I
10 understand you will be doing a 30-minute introductory
11 report; is that correct?

12 MS. KUNSMAN: Yes.

13 PRESIDENT CROOK: You will then be examined.
14 If at any time you need to take a break or anything,
15 let us know.

16 We will probably take a short break sometime
17 around 11:50, but we will let you know when we are
18 nearing that point.

19 Are you comfortable with the procedure?

20 MS. KUNSMAN: Yes.

21 PRESIDENT CROOK: All right, then, well,
22 then, let us hear your 30-minute report.

1 MS. KUNSMAN: Great. Thank you very much.

2 Okay. This is not working. I can just tell
3 you when to turn the slide.

4 PRESIDENT CROOK: The dreaded words, "This
5 is not working."

6 Are we ready to begin or still standing by?

7 MS. KUNSMAN: I believe we are still
8 standing by for the clicker.

9 PRESIDENT CROOK: All right. You let us
10 know when you are ready.

11 MS. KUNSMAN: Okay, we'll let you know.
12 Okay, if you could please turn to the next slide.

13 In this slide, we just present--

14 PRESIDENT CROOK: All right. So we will
15 begin your 30 minutes right here.

16 MS. KUNSMAN: Okay. Thank you.

17 PRESENTATION BY RESPONDENT EXPERTS

18 MS. KUNSMAN: So in this slide, we just
19 present a brief summary of our qualifications.

20 Next slide, please.

21 In this slide, we present the damages that
22 Accuracy calculates in their first and second report

1 under the 590-tons-per-day scenario which is the
2 scenario that the Claimant relies on to claim damages.

3 Accuracy's damages are not based on the fair
4 market value fair market value standard in that
5 they're not based on a hypothetical buyer, but instead
6 a buyer that would have acquired the Invicta project
7 with the PLI loan in place.

8 Originally, they did calculate fair market
9 value since they deducted 15.9 million, as noted by
10 the letter C on the table, to settle the PLI loan,
11 which I believe has also been referred to as PPF. So
12 it is the same thing.

13 Now, however, as we pointed out in our first
14 report, their damages were overstated for many
15 reasons, but one of them was because they were
16 calculating free cash flows to the firm which includes
17 the values of the shares and the debt.

18 So in order to just calculate the value of
19 the shares, they needed to subtract 13 million for the
20 Mallay plant debt implied in their model.

21 Now, in their second report, they now are
22 using the correct measure of cash flows, since they

1 subtract the debt payments for the initial loan and
2 for the Mallay loan; however, as I mentioned, they are
3 using the incorrect standard of value in that they're
4 not assuming a hypothetical buyer.

5 Next slide, please.

6 Before we get into the details of our
7 opinions, it's important to review the underlying
8 assumptions in Accuracy's damages calculation for the
9 590-tons-per-day scenario in their second report.

10 In this graph, I show in blue the tons of
11 ore that Invicta expected to process in their 2018
12 budget. In red, I show the actual tons processed that
13 were dramatically lower.

14 In green bars, I show the tons that Accuracy
15 projects Invicta would produce in their 590 scenario
16 between November 2018 and October 2027. I note that
17 in their original first report, they assumed that
18 operations would start in August 2019, the valuation
19 date, but in their second report, they moved it up
20 based on Micon's report to November 2018.

21 Below the graph, I show Accuracy's key
22 assumptions. So first, for Invicta to produce--to

1 process this ore, they assume that within two weeks,
2 the Parán Community conflicts would be solved
3 permanently and at no cost, that a qualified
4 third-party processor would be found, and that the
5 outstanding permits would be obtained.

6 Second, they assume that between December
7 2018 and March 2019, PLI would have allowed Lupaka to
8 be in default of monthly payments required under the
9 PLI loan second amendment, because during that period,
10 that would be the only amendment in force, according
11 to their assumptions.

12 Now, third, they assume that in March 2019,
13 the Mallay plant agreement would be signed and closed,
14 and the PLI loan third amendment signed and closed,
15 and Lupaka would receive 13 million in financing.

16 Finally, they assumed that in September
17 2019, IMC would obtain permits to transfer to and
18 process ore at the Mallay plant and IMC would obtain
19 approval to process 590 tons per day for 10 years
20 instead of what had been approved up to that point
21 which was 400 tons per day for seven years.

22 Next slide, please.

1 So now we turn to the fundamental flaws in
2 Accuracy's damages calculation. Accuracy did a great
3 job of explaining our position, so a lot of this is a
4 bit repetitive, but...

5 In the first flaw, we noted that Accuracy
6 did not consider that intervention by the police would
7 not have permanently resolved the conflict with the
8 Parán Community, or the Access Road Protest.

9 Accuracy's underlying assumption is that the
10 conflict with the Parán Community would have been
11 immediately and permanently resolved at no additional
12 cost by the start of production date, which would be
13 November 2018.

14 This assumption contradicts Mr. Castañeda's
15 statement that--where he indicated, "We knew that the
16 Parán representatives would not be deterred for long
17 and that once the police had left, the site would
18 again be at risk of invasion."

19 Accuracy dismisses their observation on the
20 grounds that the requirements that may exist under
21 Peruvian law to conclude agreements with local
22 communities are factual issues which fall outside

1 their scope, and are not relevant to their assessment
2 of damages under Claimant's case.

3 So just to clarify, our opinion is not that
4 it--that a social license is required from a legal
5 perspective. Our opinion is that obtaining a social
6 license is critical in that you need to acquire the
7 social acceptance from the community to be able to
8 operate your business.

9 So implicit in Accuracy's
10 assumption--valuation is that the police would need to
11 intervene repeatedly to quell further unrest, as
12 Mr. Castañeda expected.

13 From a valuation perspective, an investment
14 that requires periodic police intervention to operate
15 entails higher risk that should be reflected in the
16 valuation, which could be a combination of delayed
17 cash flows and interruption of cash flows, higher
18 cost, or an increased discount rate, if you do it
19 indirectly.

20 Next slide, please.

21 The second flaw is that Accuracy did not
22 consider the remaining social license risk. Social

1 license needs to be managed prior to, during, and
2 after the mining project, and failing to obtain it
3 could lead to project failure.

4 So in the case of Parán, Accuracy has not
5 provided evidence to support that Claimant would
6 obtain and maintain the social license from November
7 2018 onward.

8 They also don't take into account that prior
9 to the road blockade, the social licenses with the
10 Lacsanga and the Santo Domingo communities were also
11 deteriorating.

12 Next slide, please.

13 Third, Accuracy did not consider that
14 Claimant would have defaulted on its PLI loan
15 obligations absent the measures under both scenarios
16 due to missing approvals and the ore processing
17 difficulties.

18 With regards to the missing approvals, in
19 this graph, I show three lines in red, the payable
20 gold produced actually by Invicta between June and
21 October 2018. Then in green, I show the amount of
22 payable gold required to fulfill the PLI loan

1 agreement, so the second amendment. And in blue, the
2 amount of payable gold required to fulfill the
3 expected draft third amendment to the PLI loan with
4 the delayed Mallay transaction. And when I say
5 expected, that's the assumption that Accuracy makes.

6 DR. VEIT: If I may, Mr. Chairman, the
7 expert is referring to events, or requirements, which
8 were are struck by you from the Dufour report--or
9 rather than struck, you ruled that you wouldn't
10 consider these additional requirements, such as
11 authorization to purchase and store fuel, license to
12 use water from sources not contemplated in the 2009
13 EIA.

14 PRESIDENT CROOK: I wonder if the experts
15 are familiar with the Tribunal's earlier ruling with
16 respect to elements of Ms. Dufour's report. Have you
17 been briefed on that?

18 MS. KUNSMAN: We have, and in this slide, we
19 present where we first mentioned these issues in the
20 first report, or that they're mentioned in the
21 Counter-Memorial.

22 PRESIDENT CROOK: All right. Well, we will

1 allow you to proceed, but with the caveat that we may
2 disregard portions of your report if we conclude that
3 we don't share your assessment that these particular
4 issues were previously raised at a sufficiently early
5 time.

6 Is that understood?

7 MS. KUNSMAN: Yeah, I understand.

8 PRESIDENT CROOK: All right. So be warned.

9 MS. KUNSMAN: Thank you.

10 Okay. So then in this graph, I also show in
11 a gray bar with the letter C underneath the assumption
12 that--well, the opinion from Mrs. Dufour that, at the
13 earliest Invicta would have been able to operate the
14 mine as planned would have been June to July 2020.

15 Next slide, please.

16 Now, with regards to the ore processing
17 issues, Micon provides no basis for their assumption
18 that the failures at the third-party processing plants
19 would be resolved by November 2018.

20 It is also not clear from the Micon or
21 Accuracy reports which specific facilities they assume
22 Claimant would use for ore processing before Mallay.

1 And the contemporaneous evidence indicates
2 that the ore processing issue was a significant issue.
3 So, for example, in an e-mail between Lupaka's
4 management on October 19, 2018, Will Ansley says, "As
5 a result of milling being significantly behind the
6 mine development, I have suspended all development
7 activities."

8 And it's also worthy of note that in
9 September 2018, Invicta was actually considering
10 ceasing all operations until it was feasible to take
11 the ore to the Mallay plant.

12 Next slide, please.

13 So typically, the issues that I just
14 mentioned would need to be adjusted for either in the
15 cash flows, through a delay or interruption of the
16 cash flows, an increase in cost, or through the
17 discount rate.

18 However, in this case, because of the PLI
19 loan lien on Lupaka's shares in Invicta, if a default
20 occurs, it means that Claimant would have to pay a
21 settlement of 15.9 million to make sure they kept
22 ownership of their shares.

1 Otherwise, if you are selling them to a
2 hypothetical buyer under the fair market value
3 standard, the hypothetical buyer would question
4 whether those shares are available for sale or not.

5 Neither Claimant nor Accuracy have submitted
6 sufficient evidence to show how Claimant would have
7 been able to obtain additional financing to settle the
8 PLI loan agreement.

9 In fact, the contemporaneous evidence shows
10 that prior to the blockade, they were desperately low
11 on funding and had significant funding issues.

12 Next slide, please.

13 So setting aside the threat of PLI's seizure
14 of the Invicta's mine shares, Accuracy
15 doesn't--discount rate does not account for the risk
16 associated with our fundamental flaws.

17 The Perú country risk premium of 1.4 that
18 they use just takes into account the additional
19 average risk that an investor faces in Perú over the
20 United States. And the pre-production premium only
21 accounts for the level of study of the mineral
22 properties that is scoping pre-feasibility or

1 feasibility study.

2 And as they mentioned earlier today, the
3 social license issues specific to Lupaka, they exclude
4 because they believe those are just associated with
5 the buyer--I mean, sorry, with the seller, not a
6 hypothetical seller.

7 And with that, I will pass on to my
8 colleague.

9 MR. LEE: Next slide, please.

10 So this slide demonstrates our assessment of
11 damages in this--in the--with the assumption that
12 Lupaka would be able to overcome the fundamental flaws
13 discussed by Ms. Kunsman.

14 You can see here we've considered a number
15 of adjustments that we have been able to quantify as
16 well as ones that we have not been able to quantify
17 due to a lack of information.

18 I had addressed each of these adjustments on
19 the following slides.

20 Next slide.

21 So this first slide compares Accuracy's
22 first report production schedule versus its second

1 report production schedule.

2 In the second report, Accuracy both assumed
3 that production would begin sooner and last longer
4 than its first report, moving the start of production
5 to November 2018 for the first time.

6 We understand, based on the permits that
7 have been outstanding at various points, that November
8 2018 is not necessarily an acceptable start date, and
9 that by moving the start date to July 2020, consistent
10 with Ms. Dufour's opinion, damages would be reduced by
11 \$8.7 million on a stand-alone basis.

12 Next slide, please.

13 This next slide demonstrates the impact of
14 increasing the life of mine from seven years to ten
15 years. You can see here that it's a quite significant
16 part of the value, accounting for about 25 percent of
17 damages. If we had limited the production schedule
18 provided to seven years, that would have a reduction
19 in damages of approximately \$10.2 million.

20 Next slide, please.

21 This slide is an attempt that we have made
22 to quantify the cost of obtaining the social license

1 from the Parán Community specifically. We use the
2 information that was available in the record,
3 including past payments made to the Parán Community,
4 the Lacsanga Community and the Santo Domingo
5 Community, and were instructed to use scenario one
6 here, which is based on the Parán's past requests, as
7 long as an average of the requests made by the--or
8 cash payments made to the neighboring communities.

9 That amounts to 300,000 US dollars as a
10 one-time payment and an annual cost of approximately
11 \$300,000. Damages are reduced by \$2.4 million as a
12 result of this one adjustment.

13 I note that this does not include any
14 additional costs related to some of the unquantified
15 issues that we raised in our report, such as the cost
16 of mitigating any third-party processing issues, the
17 costs to remediate the discrepancy between expected
18 and actual meatal grades, and the cost to meet any
19 other regulatory requirements raised by Ms. Dufour.

20 Next slide.

21 Now we turn to the discount rate, and
22 specifically Accuracy's pre-production premium.

1 We note in the 590 scenario that the
2 pre-production premium dropped from 6.9 percent to 3.3
3 percent between Accuracy's first and second reports.
4 We note here that the 3.3 percent is commensurate with
5 a feasibility study level, but that Claimant's public
6 disclosures note specifically that there was no
7 feasibility study or pre-feasibility study at that
8 point.

9 Third, we also note that Micon noted in
10 their report that the confidence level of their review
11 only raised the Red Cloud model to that of a--the 2018
12 PEA, that's a pre--preliminary economic analysis,
13 which is a lower level of confidence than a
14 pre-feasibility study.

15 While the project may have been at a later
16 stage of development, as suggested by Accuracy, we
17 note that Micon's own reports state that the
18 preliminary economic analysis has a much larger margin
19 for error. There's an error band around preliminary
20 economic analyses that doesn't--that gets smaller as
21 you go up levels of feasibility study.

22 Making this one adjustment on a stand-alone

1 basis decreases damages by \$3.6 million, but we note
2 that this adjustment cannot account for the
3 fundamental flaws.

4 Next slide, please.

5 This slide highlights some of the
6 inconsistencies that we noted between Accuracy's first
7 and second reports. By virtue of extending the
8 production schedule, Accuracy has added 30 percent to
9 the production in tonnages, but has only added between
10 2.4 and 13 percent to its CAPEX.

11 As I'm sure we're all going to be made
12 aware, we are not qualified mining technical experts.
13 We cannot estimate what the additional CAPEX should
14 be. We just point to this inconsistency as a
15 potential area where additional CAPEX may be required.

16 Next slide, please.

17 This final slide summarizes our adjustments
18 that we have been able to make and quantify as well as
19 lists a number of adjustments that we have not been
20 able to quantify.

21 As Ms. Kunsman mentioned earlier, ideally,
22 we would like to adjust the cash flows to account for

1 any changes or uncertainties, but we have also offered
2 a sensitivity analysis that would allow the Tribunal
3 to modify the discount rate, which is a blunter
4 instrument in this case, to increase the discount rate
5 to account for these uncertainties, and therefore,
6 decrease damages.

7 Next slide.

8 This slide just summarizes the same
9 adjustments that we've made for the 300-tons-per-day
10 scenario. One thing that we'd note here is that
11 Accuracy did not increase or expand the life of mine
12 in this case, even though they said that it might be
13 appropriate, they chose not to. So that adjustment is
14 not on this slide.

15 Next slide, please.

16 And this slide also presents the adjustments
17 that we have been able to quantify, notes the ones
18 that we have not been able to quantify, and provides a
19 sensitivity analysis that could be of help to the
20 Tribunal.

21 Next slide, please.

22 This slide just is our overview of the other

1 indicators of value that accuracy provided. We note
2 here that none of those indicators of value can really
3 consider the fundamental flaws because the market
4 metrics that have been used here are disassociated
5 with the flaws and the risks that were present at and
6 around the valuation date.

7 We also noted a number of additional
8 comments that we had in our report and have referenced
9 to those sections, but we will not cover them in this
10 presentation.

11 Next slide.

12 Finally, this slide covers our overall
13 position on damages. First, if damages are
14 incorporating the fundamental flaws and they're not
15 overcome, we would consider that damages should be
16 rendered to nil; however, if the Tribunal should find
17 that the fundamental flaws are not appropriate to
18 consider or that Lupaka could overcome those
19 fundamental flaws, the damages should be changed to
20 the numbers per the sensitivity analyses shown here.

21 We've also calculated pre-award interest
22 using the premium that Claimant instructed Accuracy to

1 use in its first reports--that's 2 percent over either
2 the SOFR or the UST--and have calculated damages based
3 on those pre-award interest numbers at the bottom of
4 this chart.

5 One last thing that I'd like to note is that
6 Perú has the position that PLI's foreclosure action is
7 not attributable to Perú. If the Tribunal were to
8 find that to be the case, we would say that the actual
9 scenario's value of the IMC shares should be increased
10 to match that of PWC's independent valuation of \$13.4
11 million. So that would reduce damages overall as
12 Accuracy assumes that the IMC shares are worth nil,
13 zero dollars, in that case.

14 Thank you.

15 PRESIDENT CROOK: All right. Thank you very
16 much for a succinct and unusually timely report.

17 I think it might--we are scheduled--we
18 anticipate taking about a five-minute break at some
19 point. I think this might be a good point at which to
20 take it. We can then turn to the examination by
21 Claimant's attorney, so let us rise for five minutes.

22 (Whereupon, there was a recess in the

1 proceedings, 11:45 a.m. - 11:53 a.m.)

2 PRESIDENT CROOK: All right, then, let us
3 turn to the examination of the experts. It's over to
4 you, sir.

5 DR. VEIT: Thank you, Mr. President.

6 CROSS-EXAMINATION

7 BY DR. VEIT:

8 Q. So good morning, Ms. Kunsman. Good morning,
9 Mr. Lee. My name is Marc Veit. I will be asking you
10 some questions. I guess you know the drill, if you've
11 been doing this before.

12 So Ms. Kunsman, let me take you to your CV,
13 Appendix 1 of your first report, you find it at Tab 1.
14 It's page 73 and following of the first report.

15 Now, Ms. Kunsman, this is the ninth ICSID
16 case in which you act as an expert appointed by Perú;
17 correct?

18 A. (Ms. Kunsman) I believe it is the seventh,
19 but I have worked on Perú cases where I wasn't the
20 appointed expert but I was on the team that was
21 working on behalf of Perú.

22 Q. You were just working in the background?

1 A. (Ms. Kunsman) Right.

2 Q. But you still represented Perú; correct?

3 A. (Ms. Kunsman) We were engaged on behalf of
4 Perú, yes. And there's one where we were against.

5 Q. Yes. So let's go and count them. You say
6 there were seven. I think I counted nine. So--

7 A. (Ms. Kunsman) So Gramercy.

8 Q. Gramercy, that's one.

9 A. (Ms. Kunsman) Lupaka--well, this one.

10 Q. Lupaka. This one, yes.

11 A. (Ms. Kunsman) SMMCV, Freeport, that's four.
12 Lidercon.

13 Q. Lidercon, five.

14 A. (Ms. Kunsman) Five.

15 Q. Kuntur Wasi, six.

16 A. (Ms. Kunsman) Right. So I wasn't the
17 expert on that one. So five where I'm the appointed
18 expert, and then where I'm not the appointed expert,
19 Kuntur, the two Levi cases and Convial. And--

20 Q. Yes--

21 A. (Ms. Kunsman) --then the Duke Energy again.
22 So yes.

1 Q. Yes. That's nine.

2 A. (Ms. Kunsman) Yes, that's nine. What I
3 meant--what I wanted to clarify, that it was nine but
4 I was only appointed as an expert on a subset of
5 those.

6 Q. True, but you worked on the team that was
7 appointed as expert?

8 A. (Ms. Kunsman) Yes, yes.

9 Q. I presume that was in your earlier years
10 acting as expert.

11 A. (Ms. Kunsman) That's right.

12 Q. Correct. Now--

13 ARBITRATOR GARIBALDI: I have one point for
14 the record. I don't think it matters, but
15 nevertheless, I wanted to point it out. One of the
16 cases mentioned here--where is it?

17 Tidewater versus Venezuela. Ms. Kunsman was
18 a junior member of the--I represented--I was lead
19 counsel to the Claimant in that case, and my client
20 instructed a company of which Ms. Kunsman was a junior
21 member, so she was--she participated in that case but
22 not as testifying expert.

1 MS. KUNSMAN: I'd also like to make a
2 clarification. We forgot to count Renco as well.

3 ARBITRATOR GARIBALDI: Renco?

4 DR. VEIT: Exactly. I would have come to
5 that right now.

6 MS. KUNSMAN: Yes, yes, I forgot to mention
7 it. I skipped it.

8 BY DR. VEIT:

9 Q. There are actually two further cases, right?
10 Renco versus Perú & Activos Mineros and then Renco
11 versus Perú 2. So these are two additional cases?

12 A. (Ms. Kunsman) They may be from a legal
13 perspective. From a damages perspective, I was only
14 asked to put in one report for both, it's the same.
15 So I count them as one.

16 Q. Okay. One report and two cases?

17 Okay. So that's--

18 PRESIDENT CROOK: Ma'am, you need to respond
19 verbally rather than with a nod.

20 A. (Ms. Kunsman) Yes.

21 Q. Okay. Any reason you didn't disclose these
22 two other cases?

1 A. (Ms. Kunsman) The two Renco cases?

2 Q. Yes.

3 A. (Ms. Kunsman) Because when I presented
4 the--the original--my first testimony on this case, I
5 was not yet engaged on those cases.

6 So my updated CV now shows that.

7 Q. Okay.

8 A. (Ms. Kunsman) But I do have the Renco case
9 in my CV as consulting because--I know that case goes
10 on way back, and I have it somewhere in my CV. I can
11 look for it.

12 But I was just acting as a consultant, not
13 as a damages expert.

14 Q. Okay, but on Renco, just to clarify, you are
15 now acting as an expert on financing and accounting?

16 A. (Ms. Kunsman) That's right.

17 Q. Are there any other cases which you have not
18 disclosed to this Tribunal where you are acting as an
19 expert for Perú?

20 A. (Ms. Kunsman) No. The last one that would
21 have fallen out would have been Renco, because Worth
22 is here; right? Is Worth not here? No.

1 Okay. Worth versus Perú would have been
2 another one.

3 Q. Another one?

4 A. (Ms. Kunsman) Because I was engaged after I
5 presented my first report on this case.

6 Q. Okay. So that's 12 cases.

7 Anywhere you are acting or were appointed by
8 Peruvian State-owned entities?

9 A. (Ms. Kunsman) Nope. No.

10 Q. Okay. In addition to these 12 cases where
11 you have acted for Perú, have you also recently
12 pitched to work for Perú or Peruvian State-owned
13 entities in other cases?

14 A. (Ms. Kunsman) I've presented several
15 pitches to Perú.

16 Q. Mm-hmm.

17 A. (Ms. Kunsman) I don't have that information
18 with me. I don't know if I was pitching it to an
19 entity or to the State, so I can't remember, but yeah,
20 there are several.

21 Q. But you regularly pitch work for Perú?

22 A. (Ms. Kunsman) I do, yes.

1 Q. As a matter of fact, Perú is your number one
2 client, isn't it?

3 A. (Ms. Kunsman) No.

4 In terms of revenue, depending on the time,
5 I would say it is top five. In terms of profit, I
6 would say it's top ten.

7 And then that's just my personal as a
8 practice that I co-lead, I would say it's top ten in
9 terms of revenue, top 20 in terms of profitability.

10 And then for AlixPartners, as a whole, I'm
11 afraid it's just a rounding error.

12 Q. Now, if I look at the cases that you have in
13 your CV, 12 out of some 43 cases that you have
14 disclosed here are where you're working for Perú;
15 correct?

16 A. (Ms. Kunsman) Yes.

17 Q. So that's roughly 25 percent of your cases?

18 A. (Ms. Kunsman) Yes. I try to keep my cases
19 to be approximately half on behalf of Claimant and
20 half on behalf of Respondent. And my Respondent is
21 Perú, and I've done work for--I'm currently working on
22 behalf of Panama for one, and then in the past I've

1 done a couple other states.

2 But all my other cases are Claimants, and
3 they're all over the world in Latin America. And
4 several of my mining cases have been Claimants.

5 Q. Okay. But it seems also that the love with
6 Perú is mutual. I mean, you seem to be Perú's
7 favorite expert; right?

8 A. (Ms. Kunsman) I don't think so. They
9 actually--I pitch all the time, and I lose all the
10 time those pitches, so I don't know what the total
11 tally is, but I wouldn't consider myself their
12 favorite.

13 They also have a lot of construction cases,
14 which I don't do.

15 Q. Well, out of 37 ICSID cases in which Perú
16 was the Respondent, you acted as an expert in 9 of
17 them; right? That's--

18 A. (Ms. Kunsman) Yeah.

19 Q. I mean, you're the accountant. That's
20 roughly 23 percent; right?

21 A. (Ms. Kunsman) Right, but you said their
22 favorite. I was just thinking, am I their top, I

1 don't think so. I think there are others.

2 Q. But you're a favorite expert, aren't you?

3 A. (Ms. Kunsman) I am one of their favorites,
4 yes.

5 Q. Okay. Now, you've included the current case
6 within your expertise as a testifying expert. Let's
7 take a look at it, and how you describe it. Page 74.

8 So here you say you were engaged as a
9 damages and valuation expert on behalf of South
10 American State to rebut a \$50 million claim brought by
11 Canadian Mining or mining company; right? Do you see
12 that?

13 A. (Ms. Kunsman) Mm-hmm.

14 Q. So your instructions in this case are to
15 rebut Lupaka's damages claim?

16 A. (Ms. Kunsman) What I mean there by rebut is
17 that I am--I've been engaged by Respondent, not by
18 Claimant.

19 So to present would be if I'm working for
20 Claimant, and to rebut--yeah, I mean, that was my
21 instruction, to look at the--to look at Accuracy's
22 testimony, and present my opinion in rebuttal of that

1 testimony.

2 Q. Okay. So are you suggesting that, in
3 presenting your opinion to rebut the claim, you are
4 finding all counter-arguments that you can?

5 A. (Ms. Kunsman) No, not at all.

6 I'm not using the word "rebut" as in the
7 legal way. I don't know if there's a specific
8 definition. And I don't argue. I present opinions
9 and observations, but I don't argue a case.

10 Q. Okay.

11 Okay, let's go to that. We will come to
12 that in a minute.

13 Now, let's move on. In your expert
14 declaration, Ms. Kunsman, you say that--and I can
15 refer you to it at page 72 of your first statement,
16 you say that all matters upon which you have expressed
17 an opinion are within your area of expertise; right?

18 A. (Ms. Kunsman) Correct.

19 Q. And then if we take a look at the--at your
20 second report, page 2, Paragraph 6, you're saying that
21 you're responding to Accuracy's second report and the
22 Micon report.

1 Do you see that?

2 A. (Ms. Kunsman) Well, hold on. Let me just
3 read the sentence.

4 Q. Sure.

5 A. Yes. If you read the paragraph from the
6 beginning, it says, "This report is in response to
7 Accuracy's second expert report," and that Claimant
8 also submitted an expert report by Micon, containing
9 opinions related to the planning, production, and
10 operation of the Invicta project.

11 This--and then, yes, this--this report
12 responding to the Accuracy's second report and the
13 Micon report, because in order to respond to Accuracy,
14 you need to review Micon's report because they based
15 most of their assumptions based on Micon.

16 So we needed to understand what those
17 assumptions were, and we looked at the Micon report
18 from a valuation perspective, due diligence
19 perspective, not from a--as a mining expert, which I'm
20 not. We're not.

21 Q. Okay, so just want to clarify that the Micon
22 report is a technical mining report; right?

1 A. (Ms. Kunsman) Yes, but technical reports
2 like the PEA and the pre-feasibility study and
3 the--and a feasibility study, those are reports that
4 are produced for valuation experts and
5 finance--investors, right? And I consider myself--I
6 am an expert in that field.

7 So I am the user of those reports, so that's
8 how I'm looking at it.

9 Q. Exactly, you're using the outputs of these
10 technical mining reports as the inputs for your
11 valuation; correct?

12 A. Right, just like Accuracy does.

13 Q. Okay. And technical mining, as you said,
14 isn't within your area of expertise?

15 A. No.

16 Q. And it isn't in yours, Mr. Lee, either?

17 A. (Mr. Lee) No.

18 Q. Have you been advised by a technical mining
19 expert when reviewing the mining--Micon report?

20 A. (Ms. Kunsman) No, I have not.

21 Q. Now, moving on to another topic that seemed
22 to refer a lot in your two reports, social license.

1 Now, you mentioned, I counted it, and
2 forgive me if I have overlooked one or two, but you
3 have around 7--50 times in your two reports, you
4 mention social licensing.

5 Just to clarify, you are not an expert on
6 social licensing, are you?

7 A. (Ms. Kunsman) I am not an expert on how to
8 obtain a social license, no.

9 Q. And you're not an expert, either, on whether
10 a social license is required and to what extent, if
11 any, it is required?

12 A. (Ms. Kunsman) A social license from a
13 valuation perspective is required. From a legal
14 perspective, no, I'm not an expert, but from a
15 valuation perspective, you do need a social license to
16 operate for a project to be successful.

17 Q. Can we agree that this is an assumption that
18 you rely on, and that this assumption, or the extent
19 of the assumption, is disputed?

20 A. (Ms. Kunsman) No, it is not an assumption.
21 For example, I was just at PDAC in Canada,
22 the annual conference on mining, and one of the main

1 topics was social license and how social license
2 impacts the performance of mining, and not obtaining a
3 social license can destroy the value of your mine.

4 So yeah, I can evaluate it from that
5 perspective, and a social license is critical.

6 Q. But when you evaluate it, is--you're doing
7 it under the assumption that you need to obtain a
8 social license; correct?

9 A. (Ms. Kunsman) You need to obtain acceptance
10 by the community of your project, which that's how I
11 define social license.

12 Q. Now, let's turn to this topic, social
13 licensing.

14 Now, I'm not interested in your views as to
15 whether Lupaka needed a social license and to what
16 extent it needed one, from Parán, as you're not an
17 expert on social licensing.

18 What I want to explore with you, however, is
19 how to deal with the social licensing risk in terms of
20 valuation.

21 Now, would you agree with me that when
22 valuing the fair market value of an asset like a mine,

1 using a DCF analysis, you can capture the social
2 license risk either in the discount rate or in the
3 cash flows?

4 A. (Ms. Kunsman) Correct.

5 Q. And when the actual costs to acquire and
6 maintain a social license are known, or when it is
7 possible to estimate, reasonably estimate these costs,
8 you would probably model these costs explicitly in the
9 cash flows; right?

10 A. You would model them in the cash flows, but
11 if it's an estimate, you would also have to account
12 that it's an estimate on the discount rate, so...

13 Q. Exactly.

14 And when these costs of acquiring the social
15 license cannot be reasonably estimated or when there
16 is some uncertainty, then, as you said, the social
17 license risk would be reflected in discount rate;
18 correct?

19 A. It would be mainly reflected in the discount
20 rate, yes.

21 Q. Okay. Now, you--if you reflect the social
22 license risk in the discount rate, you would reflect

1 it in a way quite similar as how you deal with other
2 permitting risks or other completion risks in a mining
3 project, at a certain development stage; right?

4 A. (Ms. Kunsman) You would add a premium. It
5 depends. It would need to depend on the due diligence
6 that has been done at that point in the project to
7 understand that risk.

8 So if I were valuing a mine, I would ask the
9 management to walk through the legal--I mean the
10 authorizations or permits that they need, which ones
11 they have obtained, which ones they haven't, and how
12 long it would take.

13 And sometimes they point to someone like
14 Ms. Dufour that does that, and they would say, oh, we
15 have this report from this person.

16 Q. I probably have expressed myself not clearly
17 enough, but in terms of the valuation exercise.

18 A. (Ms. Kunsman) Yes.

19 Q. When determining which discount rate you
20 want to apply in general, you would deal with the
21 social license risk in the same manner as you would
22 deal with any other permitting risk; correct?

1 A. (Ms. Kunsman) You would add a premium,
2 yeah, to the discount rate, yeah, for both.

3 Q. Because there's always the risk that a
4 permit would not be granted; correct?

5 A. (Ms. Kunsman) Yes, but the risk for a
6 permit is usually not binomial, the risk--so you
7 either get it or you don't.

8 Q. (Overlapping speaker.)

9 A. A lot of times, it's time or cost. Most
10 often, that's the case.

11 Q. And that would apply to social license, too;
12 correct?

13 A. (Ms. Kunsman) Social license is different
14 in that once you have a permit, it typically doesn't
15 get removed, right? You have it and it's done.

16 With social license, it's different, because
17 you have to maintain it throughout the project. So
18 you have to understand very well how the community is
19 before your project, and then how the project will
20 affect that community at each stage, so you know when
21 your social license risk is higher or lower.

22 So sometimes in a case, the biggest part of

1 the social license risk is when you're closing the
2 mine. Other times is at the beginning. It depends.

3 So it's different than the permitting in
4 that regard.

5 Q. But a permit may also be revoked if you
6 don't fulfill the requirements anymore; right?

7 A. (Ms. Kunsman) Yeah, but I wouldn't call
8 that a permitting risk. I would call that an
9 execution risk more than permitting, because you do
10 get the permit.

11 Q. If you fulfill the requirements.

12 A. (Ms. Kunsman) Yeah. I mean, if I think in
13 a valuation there's a chance that the company's not
14 going to fulfill their requirements, that's a
15 different type of risk. Like I said, that's more of
16 an execution--I don't--or owner risk. I'm not sure...

17 Q. So if you take--if you add a premium for
18 permitting risks, you assume that the owner has a
19 right to the permit, but that for some reason, it
20 doesn't get issued within the time that the owner
21 hoped?

22 A. (Ms. Kunsman) Yes, but you're assuming that

1 I would add permitting risk through the discount rate.

2 Q. Yes.

3 A. (Ms. Kunsman) I wouldn't, because
4 permitting is something that should be very clear to
5 the owner of the mine on what the requirements are.

6 So, for example, the SRK Report already put
7 in what were the permits that were required.

8 So it's not something ambiguous like social
9 license risk. Certain aspects are more ambiguous, but
10 with permitting, it's not, and you can get an estimate
11 of, okay, what is your best case scenario for
12 permitting, what is your worst case scenario, and then
13 in speaking with the mining operator, you come to a
14 decision that you think is reasonable, and you start
15 projecting your cash flows from that date.

16 Q. Okay. So just that I get you correctly, you
17 wouldn't include a permitting risk in the discount
18 rate; that's your opinion, isn't it?

19 A. (Ms. Kunsman) I would model--I would try to
20 model it directly into the cash flows.

21 Q. Okay.

22 A. (Ms. Kunsman) Unless an expert on

1 permitting tells me, well, this permit is going to
2 be--I have no idea whether we're going to get it or
3 not, and then, yeah, I would put that...

4 Q. Okay. Now, let's explore together how
5 social license risk is reflected in the discount rate.
6 And let's go to your second report, page 69, Paragraph
7 231.

8 A. (Ms. Kunsman) Second report, page 69.

9 Yes.

10 Q. Okay.

11 A. Wait, what paragraph?

12 Q. 231.

13 A. (Ms. Kunsman) Yeah.

14 Q. You say here that, I quote, "The fact is
15 that most countries in this region face persistent
16 conflicts due to the insufficient consultation with
17 affected communities."

18 Do you see that?

19 A. (Ms. Kunsman) Yes.

20 Q. And when you say, "this region," you mean
21 Latin America; right?

22 A. (Ms. Kunsman) Yes.

1 Q. So this means that, generally speaking,
2 Latin American countries face social license risk; is
3 that what you're trying to say here?

4 A. (Ms. Kunsman) Mining reflects
5 social--within mining, yes.

6 Q. Within mining?

7 A. (Ms. Kunsman) Yeah.

8 Q. So in Latin American--or before we get
9 there, so are you saying that social license risk
10 differs based on the geographic location of a specific
11 mining project?

12 A. (Ms. Kunsman) They can, yes. If you're
13 putting a mine where there's no population around, you
14 have lesser mining risk. Yeah.

15 Q. Yes.

16 You would have--

17 A. (Ms. Kunsman) Or for example, if you have a
18 project--it's a company's second project, and they
19 already have social acceptance from a prior project
20 nearby, that second project would have lower social
21 license risk.

22 Q. Let's focus again on the area or the region,

1 because I think what you're trying to suggest here
2 that mining companies in Latin America are facing a
3 specific social mining risk.

4 A. (Ms. Kunsman) Yes, that they face social
5 mining risk, yeah.

6 Most mining companies face social license
7 risk, but the degree varies and the degree that
8 companies manage that risk also varies.

9 Q. Okay. So you have social license risk, as
10 well, in, let's say, the US or Europe, but it's more
11 pronounced in Latin America; is that what you're
12 trying to suggest here?

13 A. (Ms. Kunsman) I'm not making a comparison.
14 I'm just saying in Latin America, mines face
15 persistent conflicts due to insufficient consultation
16 with affected communities.

17 Q. Okay. And not sure I fully understand you,
18 but let's try to get to the bottom of it.

19 A. (Ms. Kunsman) Okay.

20 Q. And probably looking at the first sentence,
21 putting into context what you are saying here is, do I
22 understand you correctly that it is your view that

1 industries such as the investment attractiveness index
2 rank mining risks by country; is that what--that's
3 what you're saying?

4 A. (Ms. Kunsman) Yes, and I'm actually going
5 to pass the question--if you're asking a question
6 about the index--to my colleague.

7 Q. Okay.

8 Now, let's look at the footnote you refer
9 to, footnote 205. You refer to this investment
10 attractiveness index, which is an annual survey by the
11 Fraser Institute, I understand.

12 A. (Ms. Kunsman) Yes.

13 Q. Okay. Let's go to Exhibit AP-75, and you
14 can find that at Tab 46.

15 Now, if I look at AP-75, this is only an
16 executive summary, isn't it?

17 A. (Ms. Kunsman) Yes.

18 Q. But I take it that you have also--or
19 Mr. Lee, maybe, rather, has also read the underlying
20 survey; right?

21 A. (Mr. Lee) I think we just appended the
22 executive summary in this case.

1 Q. Yes, you appended the executive summary;
2 that's correct, but you--also, you're aware of the
3 survey itself; correct?

4 A. (Mr. Lee) I'm aware of the survey, yes.

5 Q. Would you agree with me that, in that
6 survey, we don't have it on record, Perú actually
7 ranks quite high, at least through 2019?

8 A. (Mr. Lee) Highly ranking as in more
9 attractive.

10 Q. More attractive, yes. Actually quite
11 attractive.

12 A. (Mr. Lee) Yes. Yes.

13 Q. In fact, it was, I think, the second-most
14 attractive country in Latin America behind Chile.

15 Would that sound about right?

16 A. (Mr. Lee) Yes.

17 Q. So it was regarded as a quite stable
18 country; right?

19 A. (Mr. Lee) In the survey, yes.

20 Q. Now, did you notice that in this survey
21 on--I'm very sorry we don't have it on the record,
22 the--Perú's policy perception index actually declined

1 dramatically in 2021 and later on?

2 A. (Mr. Lee) I don't have the survey in
3 front--I couldn't say.

4 Q. Any reason why you didn't include the whole
5 survey?

6 A. (Mr. Lee) I don't think it was relevant to
7 the point that we were making in that particular
8 paragraph.

9 Q. Now, let's look at how one estimates the
10 discount rate that should be used in a DCF
11 calculation.

12 ARBITRATOR GARIBALDI: Have you left the
13 topic of social approval?

14 DR. VEIT: No, not--no. There is actually
15 quite a long line to follow now where I deal
16 extensively with--

17 ARBITRATOR GARIBALDI: All right. Please
18 signal when you are done with the topic because I have
19 a question. But I don't want--

20 DR. VEIT: Sure. If you want to do it now,
21 I'm very happy for you to interject.

22 ARBITRATOR GARIBALDI: I don't want to

1 preempt what you are trying to do. Thanks.

2 DR. VEIT: Okay. Yes, but it may take
3 another half an hour.

4 ARBITRATOR GARIBALDI: (Comment off
5 microphone.)

6 DR. VEIT: Okay.

7 BY DR. VEIT:

8 Q. Are you ready?

9 A. (Ms. Kunsman) Yes.

10 Q. Okay. Now, would you agree that to
11 calculate the discount rate to be used in a DCF
12 analysis, you would first have to calculate the WACC
13 of a hypothetical gold mining entity in Perú?

14 Just for the benefit of the uninitiated, the
15 WACC is the acronym for weighted average cost of
16 capital.

17 A. (Ms. Kunsman) It depends if I'm valuing the
18 entire enterprise or I'm just valuing the shares.

19 I would use the WACC if I'm valuing the
20 entire enterprise or the cost of equity if I'm just
21 valuing the shares.

22 Q. Okay. Now, we don't have to do this all by

1 heart, I mean, I'm very happy for you to look at the
2 Accuracy report, page 89. Maybe also for the benefit
3 of the Tribunal, it may be easier--

4 A. (Ms. Kunsman) First report?

5 Q. The first Accuracy report. You find it at
6 Tab 4. I'm sure you know this all by heart, but just
7 maybe for the Tribunal it's easier to follow. It's a
8 relatively technical line of questioning that's coming
9 now.

10 Now, when looking at what Accuracy has done
11 to calculate the discount rate, they use as a starting
12 point the average cost of capital for companies in the
13 precious metals industry based on data from Professor
14 Damodaran; right?

15 ARBITRATOR GARIBALDI: What page?

16 DR. VEIT: It's page 89.

17 ARBITRATOR GARIBALDI: At Tab 4?

18 DR. VEIT: At Tab 4, yes. That's the first
19 Accuracy report.

20 A. (Ms. Kunsman) Right. So in their first
21 report, they used the capital asset pricing model to
22 calculate the cost of equity based on the average cost

1 of capital for companies in the precious metal
2 industries.

3 BY DR. VEIT:

4 Q. Yes, and--

5 A. (Ms. Kunsman) From Professor Damodaran,
6 what they mean from Professor Damodaran is that they
7 are using the beta calculated by Damodaran.

8 Q. Okay. Using beta data or this discount rate
9 data from Professor Damodaran is fairly common in your
10 industry, isn't it?

11 A. (Ms. Kunsman) Yes. I use Damodaran as well
12 for betas.

13 Q. Now, you refer to--you mention that Accuracy
14 used the capital asset pricing model to calculate the
15 cost of equity.

16 Now, to do that, you calculate the cost of
17 equity on the basis of a risk-free return plus an
18 equity risk premium, right, that would reflect the
19 return of an equity market portfolio over risk-free
20 investment; right?

21 A. (Ms. Kunsman) Right.

22 Q. Then you adjust this equity risk premium to

1 the specific industry you're looking at, using a
2 factor called beta?

3 A. (Ms. Kunsman) In the United States.

4 Q. Yes.

5 A. (Ms. Kunsman) Yeah.

6 Q. This beta factor measures the sensitivity of
7 the specific equity you're looking at, or you're
8 trying to value, compared to changes in the market
9 return overall; right?

10 A. (Ms. Kunsman) For companies listed in the
11 United States, yes.

12 Q. And to calculate this factor beta, you would
13 typically look at actual market data in--from
14 companies operating in a similar sector as the one
15 that you are trying to value; correct?

16 A. (Ms. Kunsman) It's a sector average. You
17 would try to approximate as much as you can, yeah.

18 Q. And the beta used by Accuracy on the basis
19 of Professor Damodaran's survey for precious metals
20 industry is 1.19 for 2019, and 1.44 for 2020.

21 You would agree with that; right?

22 A. (Ms. Kunsman) Yes.

1 Q. Okay.

2 So just for the Tribunal to understand what
3 this beta means, this beta factor, now, in laymen's
4 terms, the precious metal industry, since the beta is
5 above one, would face higher risks than the general
6 market; right?

7 A. (Ms. Kunsman) Yes. It has a higher
8 volatility, yeah.

9 Q. Higher volatility.

10 That beta includes all kinds of risks?

11 A. (Ms. Kunsman) All kinds of risks.

12 Q. All kinds of risks, including social license
13 risk; correct?

14 A. (Ms. Kunsman) Yes. It includes an average
15 of all of the risk that the companies that Damodaran
16 uses in calculating the betas which he lists that are
17 traded in the--traded in the United States, yeah.

18 Q. Correct.

19 Now, Accuracy has found that 40 percent of
20 the companies surveyed by Professor Damodaran have
21 operations in Latin America?

22 A. (Ms. Kunsman) We could not evaluate that

1 statement because they didn't submit the analysis. It
2 was just a statement without a list of the companies
3 and which ones had it and to what extent they had. It
4 was just an unsourced statement so I don't know.

5 Q. Have you checked the statement yourself?

6 A. (Ms. Kunsman) Yes, I have.

7 Q. And--

8 A. (Ms. Kunsman) Oh, no. Have I
9 calculated--no, I did not, no.

10 Q. Now, just assume with me--and I know you may
11 not agree with this because you have not checked
12 it--but assume with me that Accuracy is right, that 40
13 percent of these American companies in the survey have
14 operations in Latin America.

15 Now, if social licensing is a problem in
16 Latin America, the beta at least for those companies
17 operating in Latin America would actually include a
18 social licensing risk?

19 A. (Ms. Kunsman) That beta--first of all, I
20 would need to understand if one company--if, when they
21 say they have operations in Latin America, is it 1
22 percent of their operations, or is it 80 percent of

1 their operation. It really changes.

2 Then I would need to check where the other
3 operations are. I mean, maybe the other operations
4 are in countries that have other issues; right?

5 The beta, like you said, contains so many
6 risks, I don't know to what degree the social license
7 risk is represented. The list that the companies
8 that--that Damodaran includes, these are companies--a
9 lot of them are majors with a lot of projects, so it's
10 an average.

11 Is there some social license risk included
12 in there. Absolutely. But is this specific social
13 license risk that Invicta faced included in there?
14 No, not in the beta.

15 Q. Okay. Help me to understand your answer.

16 You're trying to distinguish a general
17 social licensing risk from a specific social licensing
18 risk; right?

19 A. (Ms. Kunsman) Right. Because the beta is
20 an average, so then you're dealing with an average,
21 and it contains all types of risk.

22 Q. These social license risks may be higher for

1 some companies and lower for others?

2 A. (Ms. Kunsman) Right. It gets diluted so
3 much that you don't know to what degree. There is
4 some, but there's also pricing risk, cost changes
5 risk, earthquake risk. I mean, there's so much in
6 there.

7 I haven't seen anyone that has tried to
8 desegregate the beta risk, and that's why companies--I
9 mean, that's why valuation professionals add premiums.

10 Q. Now, I think if I understand correctly what
11 you have said before, you have said--and I don't want
12 to misquote you--that there's no question that a
13 mining company needs a social license?

14 A. (Ms. Kunsman) Yes.

15 Q. So if that statement is true, then typically
16 all mining companies would need social licenses;
17 correct?

18 A. (Ms. Kunsman) Yes.

19 Q. So the beta would actually include that risk
20 on an average, but it would include the risk, as you
21 say before?

22 A. (Ms. Kunsman) Right, but you are making the

1 jump there that all companies face a social license
2 risk that is the same, no. For one company it might
3 be much easier to obtain a social license than for
4 another.

5 Q. Okay, but some social license risk is
6 included in the beta, can we agree on that?

7 A. (Ms. Kunsman) Yes. Yes. Of--I mean, I
8 don't think there's a dispute amongst the experts on
9 that. They've said it's the average risk of a
10 hypothetical mining company.

11 Yeah, we agree with that.

12 Q. Okay. Now, let's discuss country risk
13 premiums.

14 Now, when calculating the cost of equity,
15 Accuracy has added a specific country risk premium;
16 right?

17 A. (Ms. Kunsman) Yes.

18 Q. Would you agree with me that the country
19 risk premium is the additional return or premium an
20 investor would require to compensate for the risk of
21 doing business in a certain country compared to a
22 risk-free country like the US or Canada?

1 A. (Ms. Kunsman) Almost. I would just--

2 Q. Almost?

3 A. (Ms. Kunsman) --take out a risk-free
4 country, I would just say compared to doing business
5 in the United States. United States is not a
6 risk-free country, but because your capital--all the
7 other variables in CAP-M are done based on the US,
8 then it is compared to the US.

9 Q. Okay, because--you say that the US is not
10 risk-free because the US also contains risks like
11 social licensing risk; right?

12 A. (Ms. Kunsman) No, because when you
13 calculate your CAP-M, you're adding the equity risk
14 premium. That's what I'm saying.

15 Q. Okay.

16 A. (Ms. Kunsman) That it's not just the
17 risk-free rate.

18 Q. Okay, and Accuracy has taken that country
19 risk premium from the modeling data again?

20 A. Yes.

21 Q. Now, would you agree with me, Ms. Kunsman,
22 that the country risk premium reflects the political

1 and economic risk for a country?

2 A. (Ms. Kunsman) Political, economic, yeah.

3 Q. And the political and economic risk is, at
4 least to some extent, linked to social stability,
5 isn't it?

6 A. (Ms. Kunsman) Yeah, yeah. There's some
7 social risk in there, too.

8 Q. Now, the CPR--I think we agree on that--does
9 reflect social stability, to some extent?

10 A. For the average investor in Perú, so--

11 Q. Mm-hmm.

12 A. (Ms. Kunsman) Yeah.

13 Q. And social licensing is a function of social
14 stability, isn't it?

15 A. (Ms. Kunsman) It's different--yes, it's
16 definitely affected by it, but social license risk is
17 different in that, depending on your type of business,
18 acquiring a social license may not be as difficult
19 because the impact of that specific business in the
20 community is very small.

21 For a mine, for any extractive industry,
22 it's big, because of environmental issues, water usage

1 issues, labor issues, so...

2 So some companies may not be as big. If you
3 are--I don't know--trying to think of a company that
4 may not have a--

5 Q. A bakery, I guess.

6 A. (Ms. Kunsman) A bakery, for example, yes.

7 Q. So a bakery wouldn't be affected by a
8 country risk; right?

9 A. (Ms. Kunsman) A bakery would not be as
10 affected by country risk, but for example, a bakery
11 would be affected more by the prices than by the
12 exchange rate, and a mining company wouldn't be
13 because their cost and revenue are typically all in US
14 dollars.

15 So country risk, it contains a lot, and you
16 need to unpack it. I don't--I think their country
17 risk is fine, but I would have unpacked it a bit more.

18 Q. Let's look at the impact of the country risk
19 premium that Accuracy has applied. They have applied
20 a country risk premium of 1.4 percent.

21 Now, would you agree with me that this
22 country risk premium reduces the net present value by

1 roughly \$3 million?

2 A. (Ms. Kunsman) I haven't calculated, but
3 that sounds right, yeah.

4 Q. Now, let's move on to the pre-production
5 premium that Accuracy adds to the WACC to get to the
6 discount rate.

7 A. (Ms. Kunsman) Yeah.

8 Q. I think you touched on that, as well, in
9 your second report. At Tab 2, page 39, it's Paragraph
10 134.

11 So if I look at that, you take issue with
12 Accuracy's pre-production premium of 3.3 percent;
13 right?

14 A. (Ms. Kunsman) Yes.

15 Q. Now, if I look at the next paragraph,
16 Paragraph 135, I think you would have preferred a
17 pre-production premium of 5.7 percent.

18 A. (Ms. Kunsman) Correct.

19 Q. Okay. Now, before we discuss the
20 appropriate figure, let's try to agree on why you
21 would want to add a pre-production premium to WACC.

22 Can we agree that by adding a pre-production

1 premium to the weighted average cost of capital, that
2 this is an adjustment to capture the different stages
3 of development of a mining project compared to an
4 actually producing mine?

5 A. (Ms. Kunsman) I would say it's an
6 adjustment to the different levels of study that have
7 been done on a project.

8 Q. So you would only refer to it as a study and
9 not as the development risk?

10 A. (Ms. Kunsman) Yes.

11 Q. And how does it make sense, Ms. Kunsman,
12 from an economic perspective, to look at studies
13 rather than the reality?

14 A. (Ms. Kunsman) Because these businesses are
15 not operating yet. Mines get valued by CIMVAL based
16 on scoping studies, pre-feasibility studies or
17 feasibility studies, and the assumptions that go into
18 those studies have a margin of error. We have a
19 figure in our report that shows what are the--what's
20 the level of confidence of the inputs that goes into
21 those studies.

22 So because the mines are not producing, you

1 have to rely on those studies.

2 If the mine is producing, absolutely, you
3 would rely on the actuals, but until that point, all
4 you can do is rely on studies.

5 So it's the level of confidence of that
6 particular study. And this is general, right, each
7 study may contain more or less information.

8 So you would need to look at the study to
9 see, okay, does it take into account--have they done a
10 detailed study of permitting or of social license
11 risk. That--it's the study that you're relying on.

12 Q. And so, you're saying--you're telling me
13 that it's only the study and you're not looking at
14 actual risks at that point in time?

15 A. (Ms. Kunsman) You're only adding a premium
16 based on the level of study.

17 So you look at the study, see what the
18 margin of error is and the type of study that it is,
19 and then based on that, you may need to add another
20 premium on top of that, or ideally, you model your
21 cash flows to account for other risks.

22 Q. Okay, but let me try to understand this.

1 So you say you--you know, you have a
2 feasibility study or whatever level of study.

3 A. (Ms. Kunsman) Yes.

4 Q. And the reality shows that your assumptions
5 in that study don't hold true anymore. You can see
6 that I've moved on from that study.

7 A. (Ms. Kunsman) If you're producing, if you--

8 Q. Not producing, if you--you're still at the
9 preproduction stage.

10 A. (Ms. Kunsman) If you're at the
11 preproduction stage, no, you wouldn't move from that
12 study, because you're still preproduction. You're
13 just taking out small samples. And you still don't
14 know fully your cost.

15 And if your valuation is based on the output
16 of that study that you're relying on in terms of what
17 your costs are going to be and your capital
18 expenditures and your grade and production, then it is
19 the level of that study that you need to rely on.

20 But if you modify your calculation to take
21 into account, okay, so we're in preproduction, we
22 thought this was going to--we were going to have this

1 grade, but now we have this other grade. We've
2 modified our grade based on the actual production,
3 then yeah.

4 Q. Then you would take into account the actual
5 facts rather than what you have assumed is not--

6 (Overlapping speakers.)

7 A. (Ms. Kunsman) For that specific--for that
8 specific item, but there's still a lot of risk on that
9 study.

10 Q. Okay.

11 A. (Ms. Kunsman) So--where is the table?

12 Q. I'll get to the table immediately. Don't
13 worry.

14 A. (Ms. Kunsman) Oh, okay.

15 Q. Maybe not immediately, but in two minutes.

16 Now, would we agree that the risks to be
17 captured in that pre-production premium are the risks
18 associated with bringing this mine to production, or
19 this project to production?

20 A. (Ms. Kunsman) Yes, but the studies make
21 certain assumptions, like all permits will be
22 acquired, or that they will have certain contracts in

1 place, or that there will be already social acceptance
2 by the community, and that's why there are disclaimers
3 in the study.

4 So those studies deal more with the--with
5 what mining experts deal with, which is the
6 mineralization, the cost of taking out the ore, the
7 cost of the capital--I mean, of the PP & E.

8 Q. You would agree with me that there is a risk
9 at every stage of the development of the mine or
10 mining project. There's a risk that the project will
11 not make it to the--to a producing mine; correct?

12 A. (Ms. Kunsman) Yeah.

13 Q. Yes.

14 And that risk of not making it to a
15 producing mine becomes lower the closer you get to
16 production; correct?

17 A. (Ms. Kunsman) It depends on which risk
18 you're talking about.

19 Q. I'm looking at all risks associated with
20 bringing a mining project to production; technical
21 risks, permitting risks, construction risks,
22 geological risks.

1 A. (Ms. Kunsman) The closer--getting closer to
2 production is a very broad statement.

3 So if you go to permitting, it's a yes or no
4 whether you have the permit or not. Maybe you don't
5 need your permit--

6 Q. Well, haven't we agreed that--haven't you
7 said before that permitting is not a risk that you
8 would usually look at?

9 A. (Ms. Kunsman) No, you're right. I would, I
10 would model directly--I would look at the risk, but I
11 would model it directly into the cash flows.

12 Q. Okay. So we are looking at technical risks,
13 construction risks, geological risks?

14 A. (Ms. Kunsman) Those are all included in the
15 level of study, yes.

16 Q. Okay. You would agree with me that the
17 closer you get in your level of studies to production,
18 the lower these risks are getting?

19 A. (Ms. Kunsman) It would depend on the level
20 of study because--

21 Q. Yes.

22 A. (Ms. Kunsman) --the risk doesn't change--if

1 you don't have--and I know I'm going to--if you don't
2 have a license to operate or to sell the ore, you
3 can't just--your risk of--your risks are not going to
4 materialize or materialize more on a specific date.

5 Up to that date, whether you're a month
6 before or two weeks before, it doesn't matter, because
7 you have a very specific production date.

8 Q. I'm not sure we're talking about the same
9 thing, Ms. Kunsman.

10 A. (Ms. Kunsman) Okay.

11 Q. You were talking about these studies, and
12 let's maybe go to that table.

13 A. (Ms. Kunsman) Okay.

14 Q. Figure 5 on page 15 of your, I think, first
15 report. Is that the table you were referring to?

16 A. (Ms. Kunsman) Hold on. I'm not there yet.
17 Figure 5, page 15. Yes.

18 Q. Okay.

19 PRESIDENT CROOK: Counsel, could you give us
20 a minute to get there, please.

21 DR. VEIT: Sure.

22 PRESIDENT CROOK: The cite again, please.

1 DR. VEIT: So that's AlixPartners' first
2 report, Tab 1--or you may have it separately--page 15,
3 Figure 5.

4 PRESIDENT CROOK: Thank you.

5 BY DR. VEIT:

6 Q. Now at the top of this table, you're listing
7 the different stages of studies; correct? Preliminary
8 economic assessment, pre-feasibility study,
9 feasibility study; right?

10 A. (Ms. Kunsman) I'm listing the three levels
11 of studies.

12 Q. Yes. Three levels.

13 A. (Ms. Kunsman) Yes.

14 Q. Do we agree that the further right we get,
15 the closer we get to production?

16 A. (Ms. Kunsman) The further right you
17 get--yes, but as, for example, in Invicta, you might
18 get to production without a feasibility study or
19 pre-feasibility study.

20 So not all companies will do all of the
21 studies. Some may not. They may go directly to a
22 feasibility study without going through the others. I

1 mean, it's rare, but it--you can skip, basically.

2 Q. So you can skip studies and actually base
3 your investment decisions on the real facts you're
4 observing rather than doing another study; correct?

5 A. (Ms. Kunsman) If you can update the facts
6 in the study based on real observations, then you
7 would, but that's not what happened here. They're
8 still relying on that initial study that was done.

9 Q. Okay. Can we agree, maybe just take it one
10 by one, that the further to the right we get, the more
11 you have derisk, the more you are derisking a project?

12 A. (Ms. Kunsman) A feasibility --yes, a
13 feasibility study has derisked the project more than a
14 preliminary economic assessment, yes.

15 Q. Now, let's have a look at AC-47, page 18.
16 That's on Tab 35. Now--

17 A. (Ms. Kunsman) AC-47. Okay.

18 Q. This is a conference paper presenting the
19 results for metal mining industry surveys which
20 indicate common industry practice on discount rates
21 used at different stages of the projects.

22 If you look at slide 18, or page 18, we see

1 that the pre-production premium for a producing mine
2 is 0 percent, then we have 3.3 percent for a project
3 at feasibility study level, 5.7 at pre-feasibility,
4 and then 6.9 at scoping study, PEA level; right?

5 A. (Ms. Kunsman) Right.

6 Q. Now, you would agree with me that these
7 premia that you find here include all risks, depending
8 on the stage of development to bring a project to
9 production; right?

10 A. (Ms. Kunsman) No.

11 Q. Can you explain to me which risks would be
12 included in this pre-production premium, and which
13 risks would be excluded.

14 A. (Ms. Kunsman) Like I said before, it's not
15 a risk that's based on the stage of production. It's
16 a risk that's based on the type of study that you have
17 done.

18 Q. Now--

19 ARBITRATOR GARIBALDI: May I ask a question
20 at this point?

21 DR. VEIT: Please, yes.

22 ARBITRATOR GARIBALDI: --on this subject

1 because I find it rather difficult to understand, as a
2 layman, all of this.

3 Suppose that we have a study, I don't care
4 which level of study it is, but it is in the
5 pre-production stage.

6 Now, suppose that this study says, well, to
7 get to production, you need A, B, and C, so on that
8 basis, there is a risk; the risk that you won't get A,
9 B, and C to start production. All right. Fine. So
10 you assess the risk on the basis of this study that
11 talks about A, B, and C.

12 Now, if after the--assume that after this
13 study, the company gets A, so the two things that are
14 missing are B and C. Is it rational to say that,
15 well, the risk has diminished a little or not?

16 MS. KUNSMAN: No, because what you're doing
17 is--if you go--it's simpler if you go to Figure 5.
18 Those studies, what they do is that they will estimate
19 the type of minerals that you have, right, and they
20 will estimate based on that mineral that you have, how
21 much you're going to be able to extract and you're
22 going to be able to sell.

1 So in all of that, they are estimating how
2 much ore you need to take out, how much--what the
3 grade is going to be, what the yield is going to be,
4 how deep you're going to need to go, how many tunnels
5 you're going to need--in making those estimates, they
6 will assign a confidence level to them, and the
7 confidence level for a preliminary economic assessment
8 is lower--

9 ARBITRATOR GARIBALDI: I understand--I
10 understand that.

11 MS. KUNSMAN: Okay.

12 ARBITRATOR GARIBALDI: But using your
13 example, if the tunnel's already built--

14 MS. KUNSMAN: Yes.

15 ARBITRATOR GARIBALDI: --okay, then that
16 part of that study, which was an estimate at the time
17 the study was made, is no longer an estimate. It's a
18 reality.

19 MS. KUNSMAN: Right, but--

20 ARBITRATOR GARIBALDI: Can we take that into
21 account or not?

22 MS. KUNSMAN: I would update the study

1 based--

2 ARBITRATOR GARIBALDI: But there is no
3 updating of the study. There is no--the study has not
4 been updated. We have to assess the situation with
5 that old study, not updated, and those tunnels have
6 been built.

7 MS. KUNSMAN: I would say I would still need
8 to look at that study that was done and take the cell
9 and figure out--I would model the cash flows based on
10 my actual data, figure out the impact, and possibly
11 reduce the discount rate with that level of study.

12 ARBITRATOR GARIBALDI: That's where I wanted
13 to get. Thank you.

14 MS. KUNSMAN: Yeah. Yeah.

15 But just to clarify, the--well, no. That's
16 fine. Yeah.

17 PRESIDENT CROOK: Just an observation.
18 We're about two or three minutes out from the
19 scheduled lunch break, if you can come to an
20 appropriate point to suspend the examination.

21 DR. VEIT: Then I would probably do it now,
22 with your permission, Mr. Chairman.

1 PRESIDENT CROOK: I am--I suspect you'd get
2 relatively little dissent around the room for that.

3 All right. Well, then let us rise for our
4 40-minute lunch. The experts, I'm sure, are familiar
5 with the procedure and know that they should not
6 discuss their testimony and the questions being asked
7 with anyone.

8 Well, I think they can discuss it with each
9 other, yeah. Is that agreeable, can they discuss the
10 questions with each other during--does sequestration
11 mean they can't talk to each other? I'm seeking the
12 views of the parties here.

13 DR. VEIT: Probably, yes.

14 PRESIDENT CROOK: Say again.

15 DR. VEIT: I'd prefer if they talked about
16 the food or the lovely weather, spring in the city,
17 rather than--

18 PRESIDENT CROOK: All right. So we will
19 confine--say again.

20 MR. GRANÉ: Mr. Chairman, we have a
21 different view if we may be heard on the issue.

22 PRESIDENT CROOK: Do we want to delay

1 people's lunch on this issue?

2 MR. GRANÉ: I believe, yes.

3 PRESIDENT CROOK: Okay. I guess we do.
4 Please.

5 MR. GRANÉ: Yes. We do not agree with the
6 submission by Claimant's counsel. The experts here
7 have submitted a joint report. No questions are being
8 posed going forward that they are discussing,
9 obviously they don't a crystal ball.

10 The instructions were that once a question
11 was posed, only one may answer and the other may not
12 supplement, but everything that has been discussed up
13 until now should be available for the experts to
14 discuss.

15 (Off the record between the Tribunal.)

16 PRESIDENT CROOK: All right, I think the
17 experts should confine themselves to the subject of
18 the quality of the food and the state of the weather,
19 and we will see you all in 40 minutes.

20 MS. KUNSMAN: Understood. Thank you.

21 (Whereupon, there was a recess in the
22 proceedings, 1:01 p.m. - 1:46 p.m.)

1 PRESIDENT CROOK: The secretary brought to
2 my attention that during the course of the
3 proceedings, there have been some various offers or
4 undertakings to provide lists and documents of varying
5 kinds. I gather the Treaty we asked about has now
6 been put in.

7 But as I recall, Claimants were going to put
8 in a legal authority on the--a legal provision
9 relating to who determines or plays some role in the
10 determination of boundary disputes along rural
11 communities, and Respondent was then going to put in a
12 subsequent paper listing other authorities they
13 thought might be appropriate.

14 I'm sure there's some other things of a
15 similar ilk, but I would ask you to check your memory
16 banks and see what it is you may have committed to
17 provide, and we will do the same.

18 To the extent we are still missing some
19 things, we will in due course bring this to your
20 attention.

21 That said, are we ready to resume the
22 cross-examination?

1 DR. VEIT: Yes, Mr. President, we are.

2 PRESIDENT CROOK: Okay. And are we ready on
3 the Reporters' end? Yes, ma'am.

4 All right, interpreters.

5 Okay.

6 ARBITRATOR GARIBALDI: Let me remind you
7 that I have a pending question about social license.
8 So whenever you finish the topic, let me know.

9 DR. VEIT: I know, sir. I will now leave
10 the topic of social license and discount rate, and
11 we'll actually come to social licensing in the cash
12 flow.

13 So if your question relates to social
14 licensing in discount rates, that would be the--

15 ARBITRATOR GARIBALDI: Okay.

16 BY DR. VEIT:

17 Q. Now, Ms. Kunsman, Mr. Lee, let's turn to how
18 you have modeled the costs for acquiring and obtaining
19 a social license in your report.

20 Before doing so, just to check, you are
21 aware that IMC has signed agreements with Lacsanga and
22 the Santo Domingo communities; right?

1 A. (Ms. Kunsman) Yes.

2 Q. Okay. The SRK mine plan included 1.2
3 million of CAPEX related to community infrastructure
4 and 3 million of ongoing community relation costs; are
5 you aware of that?

6 A. (Ms. Kunsman) Yes.

7 Q. So would you agree with me that the mine
8 plan already includes the cost for acquiring and
9 maintaining a social license from Lacsanga and Santo
10 Domingo?

11 A. (Ms. Kunsman) Yes.

12 Q. Okay. The amount is actually a bit larger
13 than what Lacsanga and Santo Domingo have asked for;
14 right?

15 A. (Ms. Kunsman) Up to now, yes. But I
16 understand that what we show in the table, it's just
17 what they asked for in cash, but there are also some
18 noncash items that they asked for.

19 Q. Okay. Now, you were referring to a table.
20 Let's go to that table. I think it's Appendix 5 of
21 your second report.

22 Is that the table that you are referring to?

1 A. (Ms. Kunsman) Yes.

2 Q. Okay. Now, just for the benefit of the
3 Tribunal, in this table, you are calculating how much
4 the social license would cost for Parán; right?

5 A. (Ms. Kunsman) It's a rough estimate, yes.

6 Q. A rough statement, okay.

7 Now, let's look at what you did here. If we
8 look at the top, we see--

9 PRESIDENT CROOK: Counsel, excuse me. Is
10 this in the binder, because, of course, it doesn't
11 appear in the version here?

12 DR. VEIT: The problem is, it is an Excel
13 spreadsheet.

14 PRESIDENT CROOK: All right. Well, we'll
15 put on our glass and take a look.

16 DR. VEIT: We can--I mean, you can operate,
17 if you prefer--because the figures are the same, you
18 can operate out of Figure 13 on page 33 of
19 AlixPartners' second report. I'm just referring to
20 the Excel spreadsheet because it contains underlying
21 data, and I would like to take the expert to the
22 underlying data.

1 PRESIDENT CROOK: No, that's fine. Thank
2 you.

3 BY DR. VEIT:

4 Q. So at the top, we see what you call Parán
5 original agreement, which is some 322,000 soles;
6 right?

7 A. (Ms. Kunsman) Yes.

8 And if you don't mind, I'm going to pass on
9 this question to Mr. Lee.

10 Q. Sure.

11 A. (Mr. Lee) 324,000, yes.

12 Q. Yes, and that would be roughly 96,000 US
13 dollars?

14 A. (Mr. Lee) Yes.

15 Q. And this forms part of your Parán past
16 request, which amounts to roughly a million soles;
17 right?

18 A. (Mr. Lee) Yes.

19 Q. And if we go to the documents review tab, we
20 actually can see that the amount, the 324,000 soles,
21 comes from the Exhibits C-60, C-61, and C-62; correct?

22 A. Yes.

1 Q. But these are amounts which Andean agreed to
2 pay to Parán, not IMC; right?

3 A. (Mr. Lee) I'm not certain about who the
4 payor was, but the purpose of this schedule is to
5 forecast what a social license cost could be in the
6 future.

7 Historical payments were just one of the
8 things that we used to base that on.

9 Q. These are historical payments from 2008 and
10 2011; correct?

11 A. (Mr. Lee) These are historical agreements.
12 I'm not certain about when they were actually paid.

13 Q. At that time, in 2008, '9, '10, '11, the
14 concessions that Andean was looking at were on Parán
15 land; right?

16 A. (Mr. Lee) Are you referring to the previous
17 design of the project?

18 Q. Yes.

19 A. (Mr. Lee) I believe that--yes.

20 Q. Parán never requested these amounts from
21 Lupaka; right?

22 A. (Mr. Lee) If you mean they didn't sign that

1 agreement with Lupaka?

2 Q. No, they never requested the 322--324,000
3 soles from Lupaka. They requested a different amount
4 from Lupaka; correct?

5 A. (Mr. Lee) They made other requests to
6 Lupaka at different points, yes.

7 Q. Yes, the ones that you see on the next line,
8 going back to the summary, they actually requested
9 700,000, not 324,000 soles from Lupaka; right?

10 A. (Mr. Lee) Right. So the purpose of this
11 schedule, again, is to summarize all of the past
12 requests made by Parán to who--whichever entity was in
13 control of the project at the time.

14 Q. And you would just add them up irrespective
15 of whether they--Parán asked them from Lupaka?

16 A. (Mr. Lee) In this schedule, because we're
17 conducting an illustrative example of what that cost
18 could be. We're not people who can estimate it with
19 any kind of clarity. We took all the historical
20 amounts and added them up as an indicative amount.

21 Q. Okay. Can we agree that Parán asked from
22 Lupaka 700,000 soles, which is roughly 207,000 US

1 dollars?

2 A. Yes.

3 Q. Now, if I go back to the summary tab to your
4 scenario 1, to the--these payments, the previous
5 requests, you actually add another one-time payment.

6 Just for me to understand what you're doing,
7 you're calculating an average between Lacsanga's
8 one-time payment of--or the one-time payment to
9 Lacsanga of 210, and the zero that was paid to Santo
10 Domingo; right?

11 A. (Mr. Lee) Yes.

12 Q. And the Lacsanga one-time payment refers to
13 actually a construction of a tap, a water reservoir,
14 and national festivals; right?

15 A. (Mr. Lee) I believe you're showing me now
16 on the page--I think it's the one-time ones only.

17 Q. Yep.

18 Parán never made those requests to Lupaka;
19 do you agree?

20 A. (Mr. Lee) They--sorry, I don't understand
21 your question.

22 Q. These are requests from Lacsanga to Lupaka,

1 not from Parán to Lupaka?

2 A. (Mr. Lee) Correct, and I think in the
3 previous summary schedule, we note them as Lacsanga
4 requests.

5 Q. Yes.

6 So they shouldn't be included in what Parán
7 is asking for, should they?

8 A. (Mr. Lee) So we were asked by counsel to
9 estimate this based on the requests made by Parán,
10 Lacsanga and Santo Domingo as an estimate of what the
11 social license would cost.

12 Q. So you added every--all the figures you can
13 find together to get the maximum number, even though
14 Lupaka has already paid some of these amounts to
15 Lacsanga and Santo Domingo?

16 A. (Mr. Lee) I wouldn't characterize it like
17 that.

18 We took the information that was available
19 in the record to try and estimate what the social
20 license would cost.

21 Q. Okay.

22 ARBITRATOR GARIBALDI: The social license

1 from Parán?

2 MR. LEE: From Parán specifically.

3 ARBITRATOR GARIBALDI: All right.

4 BY DR. VEIT:

5 Q. And you added demands from Lacsanga, even
6 though Parán only asked for 700,000 soles upfront;
7 correct?

8 A. (Mr. Lee) Correct, under the understanding
9 that Parán might request more based on what other
10 communities received.

11 Q. Now, let's have a look at Paragraph 115 of
12 your second report, that's on page 33.

13 A. (Mr. Lee) I see that.

14 Q. So you describe what you have been doing,
15 and I think what you have explained here, you say that
16 you accounted for a one-time payment of \$300,000 US
17 and then an annual payment of another \$300,000 for ten
18 years; correct?

19 A. (Mr. Lee) Correct.

20 Q. That's based on the average payments made to
21 Lacsanga and Santo Domingo?

22 A. (Mr. Lee) Correct.

1 Q. You say that the net cost is around \$2.4
2 million US?

3 A. (Mr. Lee) On a stand-alone basis assuming
4 ten years' worth of payment, yes.

5 Q. Yes. Now, when you say you calculated these
6 costs on a stand-alone basis, what does that mean?

7 A. (Mr. Lee) So if we only made this
8 adjustment, the net impact that we calculated was \$2.4
9 million. So no other adjustments that we discussed in
10 the report.

11 Q. But you're also ignoring the impact of these
12 costs on working capital and taxation, aren't you?

13 A. (Mr. Lee) I think that they flow through
14 the model. We add them as an operating expense.

15 Q. That wouldn't make sense, sir, if you just
16 look at the figures; 10 times 300,000.

17 A. (Mr. Lee) Mm-hmm.

18 Q. You discount that. You take off 30 percent
19 tax. That would give a lower figure than \$2.4
20 million, wouldn't it?

21 A. (Mr. Lee) Could you show me in the model?

22 Q. I cannot. I just have to put it to you,

1 Accuracy has calculated it. But let's take 3
2 million--3.3 million, take away 30 percent tax, you
3 would end up at 2 million; right? As an impact on the
4 NPV, without even discounting it, would you?

5 A. (Mr. Lee) I think Isabel has input on this
6 one.

7 A. (Ms. Kunsman) We can't make these
8 calculations like that on the fly here. It's a
9 calculation that Accuracy has presented in the hearing
10 presentation.

11 So we would need to review that calculation.

12 But we're happy to show you in our model how
13 we toggle the model to say whether these are included
14 or not and how it flows through the discount rate and
15 it flows through the taxes, but yes, we're not
16 prepared to discuss in such details without Excel in
17 front of us.

18 Q. Okay, but you would agree with me that if
19 you were assessing the impact on the NPV, this would
20 have--you would have to take into account the post-tax
21 effect of the social licensing costs; right?

22 A. (Ms. Kunsman) And that's how we did it in

1 the model.

2 BY DR. VEIT: Now I will move to another
3 topic, Mr. Garibaldi.

4 ARBITRATOR GARIBALDI: Thank you very much.

5 I have a--I have difficulty understanding
6 all of this.

7 MS. KUNSMAN: Okay.

8 ARBITRATOR GARIBALDI: For the following
9 reason: That you purport to calculate the cost of
10 obtaining and maintaining social license from the
11 Parán Community on the basis of what they asked in the
12 past and maybe an average of what is being paid to the
13 other communities.

14 But there is one factor here that is missing
15 and that is that the other communities did provide
16 what you call social license. The Parán Community did
17 not.

18 So the amounts that they received, the
19 amounts they asked for, were obviously not enough to
20 provide a social license. That's one problem.

21 The second problem is that there is evidence
22 that we have seen to the effect that in addition to

1 these payments, the Parán Community wanted other
2 things, like 10 percent of the profits of the mine,
3 like suspension of operations of the mine. It claimed
4 to be expropriated, and ultimately they wanted to
5 operate the mine themselves and did operate the mine
6 themselves.

7 That's the second problem.

8 The third problem is that we have heard
9 testimony here and argument to the effect that there
10 are really no limits to what the Parán Community can
11 demand in exchange for granting social license.

12 So in essence, here you are trying to
13 calculate something that could be an infinite number,
14 and I say "infinite"--it's not exactly accurate
15 because it's sufficiently high numbers so that the
16 company goes bankrupt or doesn't--abandons the mine.

17 So since there are no limits to that and the
18 Community of Parán is not obligated any in way to
19 grant social license in exchange for anything, it's up
20 to them to make whatever demands they want and to keep
21 on making demands for maintaining that social license.

22 So I don't know how you can calculate it.

1 MS. KUNSMAN: Okay.

2 ARBITRATOR GARIBALDI: Yeah.

3 MS. KUNSMAN: So, yes, this--on the first
4 point, this is just an estimate based on the
5 assumption that Parán Community would ask for
6 something similar to what the other communities had
7 asked.

8 You are absolutely right that there is no
9 guarantee that that would have satisfied them. We're
10 just the running the numbers in case the Tribunal
11 thinks that makes sense.

12 ARBITRATOR GARIBALDI: Excuse me, but it's
13 not a question of guarantee. We know that it didn't
14 happen.

15 MS. KUNSMAN: Okay. Then I wouldn't rely on
16 those calculations and that is why we called the
17 social license risk a fundamental flaw at the
18 beginning, in that there was a chance that they
19 wouldn't get it.

20 ARBITRATOR GARIBALDI: All right.

21 MS. KUNSMAN: Yeah.

22 ARBITRATOR GARIBALDI: But isn't it

1 unquantifiable?

2 MS. KUNSMAN: It is--based on the data that
3 we have, yes, it's very hard. But they did get the
4 social license from the other two communities, and
5 then based on the valuation from KPMG or PWC, I can't
6 remember right now, they assigned a value to the mine
7 of \$13.4 million once--with the blockade and
8 everything.

9 So like Ms. Dufour testified, it is an issue
10 of time, right? Maybe they could wait or maybe even
11 if they waited, it wasn't going to happen. The
12 investors have three choices, right: Wait, walk out,
13 or sell.

14 So if it was an issue of the
15 specific--specific to Lupaka, then maybe there was
16 still fair market value. But like you said, getting
17 the social license from Parán could lead to the
18 project being worth zero.

19 And we would need to--from our--if I had
20 access to all of the information, it would be an issue
21 of understanding from the community and understanding
22 from--from Lupaka what could still be done, from a

1 valuation perspective. How much would it cost and
2 if--based on what that cost, if it would still be
3 profitable to run the mine.

4 I mean, but this happens all the time in
5 businesses. Think of it, for example, with unions,
6 right? They want to get paid as much as they can, but
7 you also have to make them understand that you reach a
8 certain point where, because of what they're asking,
9 the business is no longer profitable, so any benefits
10 they would get from the business they would stop
11 receiving.

12 So part of getting a social license is doing
13 that, and we have a list of what's recommended and one
14 of them is understanding some of the benefits--

15 ARBITRATOR GARIBALDI: It's not the same
16 situation because unions are subject to legal
17 constraints, mandatory mediation, mandatory
18 negotiation, all those sorts of things. Here we have
19 nothing. There is no constraint here, according to
20 what we have heard.

21 MS. KUNSMAN: Right. It's a much higher
22 risk.

1 ARBITRATOR GARIBALDI: It's entirely up to
2 the Parán Community to say yes or no or how much price
3 they want to be paid for it.

4 MS. KUNSMAN: Right. So the onus is on the
5 investor to try to convince the Parán Community, like
6 they were--like they successfully did with
7 Santo Domingo and Lacsanga, that there is a benefit
8 for them. They were able to do it for two of the
9 communities, just not the third one.

10 ARBITRATOR GARIBALDI: Well, I can think of
11 other possibilities, but that is not the area of
12 expertise.

13 So that's my question. Thank you very much.

14 DR. VEIT: Thank you.

15 BY DR. VEIT:

16 Q. Now, maybe just before I continue,
17 Ms. Kunsman, on what you just said right now, it would
18 be--let's try to model this as an economist, what
19 you've just said.

20 So it would be rational for a community
21 asking for a social license to ask essentially as much
22 as the profit made by the entity that is holding the

1 prospective mine, because that would be the break-even
2 point where it wouldn't be worthwhile anymore for the
3 mining entity to go ahead with the project; right?

4 A. (Ms. Kunsman) Not the profit, it
5 would--because investors have a required rate of
6 return. So you would need to account for a required
7 rate of return on top of the profit.

8 Q. But up to that point, a rational community,
9 if it's right, what you are saying, would be able to
10 siphon off the whole profit. Because the--if it's
11 correct what you are saying, they could demand an
12 amount up to the point where it would be--wouldn't
13 make a difference for the investor or for the mining
14 company to walk away or continue with the project;
15 correct?

16 A. (Ms. Kunsman) They would still make their
17 required rate of return.

18 But yeah, at some point--and that's the
19 issue, communities have that--communities have that
20 power, but that's why companies often employ people
21 from those communities. They train them. They
22 provide profit-sharing. In Perú, you have

1 profit-sharing.

2 So you have--you absolutely have to convince
3 the community that there are additional benefits to
4 just cash payments.

5 Q. But why would they walk away with just a few
6 classrooms and community programs if they can have the
7 full 41 percent of the NPV that, here in this case,
8 Lupaka would have generated with the project?

9 A. (Ms. Kunsman) I cannot evaluate what a
10 community might value more. Some communities may
11 value training more than cash. I don't know. I don't
12 know this community.

13 Q. But if what you are saying is right, they
14 could ask up to 41 million, and they would be in the
15 right to ask up to 41 million, and they would be silly
16 if they didn't ask up to 41 million US dollars for
17 this project; correct?

18 A. (Ms. Kunsman) No, because the other
19 communities didn't do that. They saw other benefits
20 besides cash.

21 Q. Because, actually, the concept of social
22 licensing doesn't allow you to ask unlimited amounts,

1 does it?

2 A. (Ms. Kunsman) The concept of social license
3 is not about--it's acceptance from the community. You
4 achieve that acceptance through various means.

5 Like I said, some of them are providing
6 employment, providing training, providing education,
7 providing roads. Many, many ways. It's not just a
8 cash payment.

9 And also, sharing the benefits of the
10 project by issuing participation for your workers,
11 like they do.

12 Q. But if--if the community had an unlimited
13 right to demand the social license, they would be
14 silly and irrational if they didn't ask for 41
15 million; correct?

16 A. (Ms. Kunsman) Like I said, I can't make
17 that assessment because I don't know this specific
18 community. I don't know what's important to them.

19 Q. And if they could ask up to 41 million for
20 the project, that would be a complete expropriation of
21 the project, wouldn't it?

22 A. (Ms. Kunsman) First of all, I--the 41

1 million, you're saying that's the valuation, the 41
2 million? No, they wouldn't ask for 41 million,
3 because then that wouldn't cover the rate of return.

4 So--but expert--I don't know, you used a
5 legal word that I can't opine on.

6 Q. Let's move topic, unless--okay--and discuss
7 the impact of a delay in the production start date.

8 Let's look at Paragraph 70 on page 22 of
9 your second report.

10 Here you say that these missing approvals
11 would have--I think you refer to regulatory approvals,
12 would have prevented the Claimant from exploiting the
13 project until July 2020; correct?

14 A. (Ms. Kunsman) Yes.

15 Q. Okay. Now, I'm not going to discuss with
16 you what the correct production start date is, since
17 you are neither a technical nor regulatory expert, but
18 let's try and agree on the impact of a delayed
19 starting date on the project's value.

20 Now, if I move on in your report and go to
21 Paragraph 87, you come to the conclusion that revising
22 the production start date from November 2018 to July

1 2020 would reduce the damages by 8.7 million; is that
2 right?

3 A. (Ms. Kunsman) Yes, that's what we say.

4 Q. Okay. So you calculate a reduction of 8.7
5 million for a 20 months delay; right?

6 A. (Ms. Kunsman) Correct.

7 Q. Now, I know it's a very rough approximation,
8 but would it be fair to say that the reduction of
9 damages per month is around \$435,000 on average?

10 A. (Ms. Kunsman) Yes.

11 Q. So let's assume for a moment that neither
12 the--that the Tribunal came to the conclusion that
13 neither the Claimant's production start date of
14 November 2018 nor the Respondent's start date of July
15 2020 is realistic, but that in a proper but-for
16 scenario, the production start date would be somewhere
17 in between.

18 Now, can we help the Tribunal in the sense
19 that they could get an approximation of the damages by
20 reducing the damages claimed by the Claimant by
21 approximately \$435,000 per month in the
22 590-tons-per-day scenario?

1 A. (Ms. Kunsman) If that was the only
2 adjustment they were making--the problem is the
3 discounting; right? So the--the reduction is greater
4 the closer you are to the production start, but it
5 would be an approximation.

6 Q. It's an approximation?

7 A. (Ms. Kunsman) Yeah, and it would--if that
8 is the only adjustment. If there's another
9 adjustment, they could be under or overcompensating.

10 Q. Okay, and if we give them a rough figure
11 for--a rough figure for the 355-tons-a-day scenario, I
12 suggest we go to page 44, and Paragraph 153 of your
13 second report.

14 A. (Ms. Kunsman) Yes.

15 Q. So we see a reduction in the net present
16 value of some 6.1 million for 20 months?

17 A. (Ms. Kunsman) Yeah.

18 Q. So that would be approximately \$300,000 per
19 month?

20 A. (Ms. Kunsman) Yeah. Same issues, but yeah.

21 Q. Okay. I'll move on, so if you are
22 considering asking questions. Okay.

1 Now, let's turn to your second report, page
2 28, Paragraph 92.

3 So you talk about Micon's extended
4 production schedule; right?

5 A. (Ms. Kunsman) Right.

6 Q. Okay. But you say again, we understand...
7 and then you continue to say that you understand that
8 this schedule was made just for the arbitration.

9 A. (Ms. Kunsman) Yes.

10 Q. Okay. Have you looked at Micon's
11 explanation for the extended production schedule?

12 A. (Ms. Kunsman) I have looked at it, yeah.

13 Q. Mm-hmm, okay.

14 Let me take you to the Micon report at page
15 36. That's Tab 9. And Paragraph 111.

16 ARBITRATOR GARIBALDI: What tab?

17 DR. VEIT: Tab 9, sir.

18 BY DR. VEIT:

19 Q. Now, here Micon says that--or explains that
20 Red Cloud assumed a six-year production period,
21 similar to the life of mine in the PEA, but then that
22 Micon's review showed that there was potential for at

1 least eight years of steady-state production.

2 Can you see that?

3 A. (Ms. Kunsman) Yes.

4 Q. Okay. Now, if we go to Paragraph 93 of your
5 report. Your second report, sorry.

6 On page 28, you say that Red Cloud's
7 production schedule was created at the time that
8 Lupaka was considering acquiring the Mallay plant.

9 A. (Ms. Kunsman) Around that time, yes.

10 Q. Yes.

11 Then you go on, and I'm struggling there
12 where you say essentially that Red Cloud's forecast
13 is, therefore, a more credible basis for estimating
14 damages, then I quote, "than the revised production
15 schedule that Micon improvised."

16 A. (Ms. Kunsman) Yes.

17 Q. Now, Ms. Kunsman, it's not for me to give
18 you a lesson in the English language, but wouldn't the
19 word "improvised" be more appropriate for an advocate
20 rather than an independent expert? I mean, after all,
21 you're not the technical expert.

22 A. (Ms. Kunsman) I could have used another

1 word, yeah.

2 Q. You just got carried away a bit, I assume,
3 after rebutting so many cases.

4 A. (Ms. Kunsman) Now looking at it again, I
5 would have edited it.

6 No, that's not true.

7 Q. Okay. But you agree with me that the Red
8 Cloud model was based on the SRK PEA; right?

9 A. (Ms. Kunsman) Yes.

10 Q. And you do agree with me that the SRK PEA
11 measured 2.5 million tons of measured and indicated
12 resources in the Atenea vein?

13 I can take you to the document.

14 A. (Ms. Kunsman) I trust you.

15 Q. Okay.

16 A. (Ms. Kunsman) Yeah, that's fine.

17 Q. Let's go to the Micon report, page 37, Table
18 5.13.

19 So in Micon's 10-year production plan, Micon
20 only included 1.8 million tons to be mined; right?

21 A. (Ms. Kunsman) Yes.

22 Q. So that's only about 72 percent of the total

1 indicated resources; right?

2 A. (Ms. Kunsman) I trust you on that, yeah.

3 Q. Yeah.

4 1.8, then?

5 A. (Ms. Kunsman) Yeah.

6 Q. Compared to 2.7--2.5, sorry.

7 So there was potential for even further
8 expansion of the production plan; right?

9 A. (Ms. Kunsman) Yes, but that was known at
10 the time the SRK model was put together, and Red
11 Cloud. So that didn't change; yet, Invicta didn't
12 consider it at that time--they didn't model that
13 scenario. It's not until this arbitration that
14 they've modeled the scenario.

15 Q. So in practice--I mean, you're not a mining
16 expert, and tell me if you can't answer, but in
17 practice, if production comes to an end and there is
18 more resource available to mine, it would make sense
19 for a mining company to extend the production
20 schedule; right?

21 A. (Ms. Kunsman) I don't know. It depends on
22 how much it would cost to take out that additional

1 resource and what prices are at that point.

2 So I don't know, and it's not something that
3 Invicta contemplated at the time. It's not until this
4 arbitration that this model emerged.

5 Q. Okay.

6 Now, going back to your Paragraph 96 of your
7 second report, on page 29, you then remove three years
8 of productions on that basis that ten years weren't
9 contemplated at the time of the Red Cloud model, and
10 you eliminate additional capital costs and closure
11 costs for the three-year extension; right?

12 A. (Ms. Kunsman) Right.

13 Q. Okay. Then you arrive at the damages
14 estimate, which is around 10 million lower than
15 Accuracy's?

16 A. (Ms. Kunsman) Right.

17 Q. Okay. But in doing so, you leave everything
18 else the same, and only count the production and the
19 expenses of the last three years; correct?

20 A. (Ms. Kunsman) Correct.

21 Q. Now, if a mining company planned to mine for
22 a shorter period than the ten years, it presumably

1 would focus on the best material; right? It would
2 focus on the best stopes, and extract the better
3 material in each block. Would you agree?

4 A. (Ms. Kunsman) I would say that because of
5 time value of money, you would always want to do that,
6 to mine the most profitable part of the mine first, no
7 matter what.

8 Q. Mining expert may disagree with you on that.
9 But if you mined the high-grade ore early,
10 this would increase the cut-off grade, wouldn't it?

11 A. (Ms. Kunsman) Yeah.

12 Q. There would also be additional savings
13 compared to the ten-year mine plan in capex since
14 there would be no need to extend development out to
15 the margins of the ore body; right?

16 A. (Ms. Kunsman) These are all very technical
17 questions I can't answer.

18 Ideally, the Micon report would have been
19 submitted on the first round. We would have made this
20 observation, and they would have adjusted their model
21 to seven years or what--and they would have explained
22 those issues.

1 We're just making an observation that they
2 extended it by ten years, and this was the best way we
3 could approximate what it would be to take out the
4 last three years.

5 But again, because we received it on the
6 second round, we don't know the answer from Micon.

7 Q. Okay. But can we agree that just cutting
8 off the last three years is inappropriate way to
9 calculate the NPV of a shorter project?

10 A. (Ms. Kunsman) I don't--I don't know. I
11 don't have the technical expertise to answer that
12 question.

13 Q. Now, let's turn to interest.

14 You agree with me that the FTA requires a
15 commercially reasonable rate?

16 A. (Ms. Kunsman) Correct.

17 Q. And you agree with me that the commercially
18 reasonable rate is not a risk-free rate; right?

19 A. (Ms. Kunsman) Correct.

20 Q. Now, you suggested US Treasury bills and
21 SOFR as a suitable replacement for LIBOR?

22 A. (Ms. Kunsman) We thought the Tribunal might

1 want to consider those two because LIBOR is being
2 decommissioned. Is that the right--yeah.

3 Q. I mean--

4 A. (Ms. Kunsman) No, decommissioned, but it's
5 going away. I don't know if it's the
6 same--decommission is the right word, but LIBOR is
7 going away, so we said you might want to use SOFR or
8 US Treasury, which other tribunals have done to award
9 a commercially reasonable interest rate.

10 Q. Let's go to the Accuracy presentation of
11 this morning. It's slide 54 at Tab 49. I don't think
12 it's in a tab, I'm sorry. But you got the
13 presentation this morning.

14 MS. KUNSMAN: Oh. Thank you.

15 BY DR. VEIT:

16 Q. Slide 54.

17 A. (Ms. Kunsman) 54? It goes to 48.

18 Q. 39. Sorry. Sorry for that. Sorry for the
19 confusion.

20 We see here a comparison of LIBOR, SOFR, and
21 1-year US Treasury bills; right?

22 A. (Ms. Kunsman) Right.

1 Q. We can see the movements of all of these
2 rates between August 2021 and July 2022?

3 A. (Ms. Kunsman) Yes.

4 Q. Now, we can see that LIBOR and UST move more
5 or less in parallel, but that UST, Treasury bills, is
6 consistently below LIBOR; right?

7 A. (Ms. Kunsman) Yes.

8 Q. And SOFR is again consistently below US
9 Treasury bills; right?

10 A. (Ms. Kunsman) Yes.

11 Q. And the way you would actually bridge the
12 difference between SOFR, UST, and LIBOR is by applying
13 a spread to UST or SOFR; right?

14 A. Yeah, that's assuming that the Tribunal
15 considers LIBOR to be--LIBOR plus 2 to be the gold
16 standard for awarding interest.

17 They might consider UST or SOFR instead of
18 LIBOR.

19 I mean, the difference is that UST and SOFR
20 are based on actual transactions while LIBOR is not.
21 They're based on estimates from brokers.

22 Q. Okay, but to actually bring UST or SOFR up

1 to the level of LIBOR, you would have to add a spread;
2 correct?

3 A. (Ms. Kunsman) Correct.

4 Q. And looking at that chart here, I mean, I
5 know it's an inexact exercise that we are doing, but
6 it would make sense, you know, towards '22/'23 to
7 adjust UST by about 1 percent to get to LIBOR and SOFR
8 by about 1 percent in February 2023, but a bit more, 1
9 to 2 percent, earlier on in summer 2022; right?

10 A. (Ms. Kunsman) It depends on the period.

11 Q. But around now, the 1 percent--1 percent to
12 2 percent would seem about right?

13 A. (Ms. Kunsman) The 2 percent seems high.

14 Q. Mm-hmm?

15 A. (Ms. Kunsman) 1 percent.

16 Q. 1 percent, a bit more than 1 percent?

17 A. (Ms. Kunsman) Actually, it's hard to...

18 PRESIDENT CROOK: Counsel, can you remind us
19 what the acronym SOFR is for.

20 DR. VEIT: Yes, this is actually--secured
21 overnight forward rate. I'm pretty sure our economic
22 experts can explain it better than I can.

1 PRESIDENT CROOK: Okay. Secure overnight
2 federal or forward?

3 DR. VEIT: Federal rate.

4 PRESIDENT CROOK: Federal rate. Okay.

5 MS. KUNSMAN: So to adjust the--to adjust
6 UST or SOFR to LIBOR, somewhere between .75 to 1
7 percent, but we can calculate that easily.

8 BY DR. VEIT:

9 Q. At the current moment?

10 A. (Ms. Kunsman) At the current moment, right.

11 Q. But more, before?

12 A. (Ms. Kunsman) It depends how you define
13 "before."

14 Q. Okay. More--more between May 2022 and
15 November 2022?

16 A. (Ms. Kunsman) I'm sure that this chart has
17 the underlying data in one of their appendices with
18 the numbers and it would be simpler to just look at
19 that, and we can talk about exact figures rather than
20 try to eyeball it here, because we actually don't have
21 the grid lines either so it makes it difficult, so...

22 Q. I know we have a difficult job, Ms. Kunsman.

1 A. (Ms. Kunsman) Okay. Well, then my question
2 is, I don't know.

3 Q. Okay. Now, let's talk about the inflation.

4 I think in your second report, page 51,
5 Paragraph 183, you say that UST, SOFR, and LIBOR are
6 market-determined rates that respond to fluctuations
7 in the market; correct?

8 A. (Ms. Kunsman) Correct.

9 Q. I think we heard a similar question this
10 morning from Mr. Bombassaro.

11 Now, if we look at the Accuracy table A6.1,
12 and you can find that in Accuracy's second report,
13 page 87, Tab 6, if you are going by tabs, or if you
14 have the Accuracy report separate, it's page 86.

15 A. (Ms. Kunsman) I'm there.

16 DR. VEIT: Yes, I'm waiting for the Tribunal
17 members.

18 ARBITRATOR GARIBALDI: Tell us again.

19 DR. VEIT: It's page 86 of Accuracy's second
20 report. Page 87, sorry.

21 ARBITRATOR GARIBALDI: Tab?

22 MR. VEIT: Which is at Tab 6.

1 ARBITRATOR GARIBALDI: Page 86.

2 DR. VEIT: Page 87. Sorry.

3 BY DR. VEIT:

4 Q. Now, if we look at that table, we can see
5 that in early 2021, inflation was quickly rising well
6 over LIBOR plus 2 or UST plus 2.

7 Do you see that?

8 A. (Ms. Kunsman) I do.

9 Q. So would you agree with me that, at least
10 over the last two years, inflation was significantly
11 higher than UST plus 2 or LIBOR plus 2?

12 A. (Ms. Kunsman) Yes. I have not been
13 compensated for inflation on my money market accounts.

14 Q. Now, there's no obligation by your bank to
15 make you whole; right?

16 A. (Ms. Kunsman) That's right.

17 Q. There is an obligation under the BIT to
18 fully compensate--well, you're not a legal expert,
19 sorry.

20 A. (Ms. Kunsman) I thought we were talking
21 about the commercially reasonable rate. That's what
22 I'm opining on.

1 Q. Okay.

2 A. (Ms. Kunsman) Whether compensating for
3 inflation is--would be considered a commercially
4 reasonable rate.

5 Q. Now, you would agree with me that awarding
6 an interest rate of LIBOR or SOFR plus 2 percent would
7 mean that the real interest rate is negative?

8 A. (Ms. Kunsman) Yes. We've had negative
9 interest rates for a long time now.

10 Q. So Perú would have had--would have every
11 incentive not to pay the award, as the amount
12 outstanding would get lower every day in real terms;
13 right?

14 A. (Ms. Kunsman) I'm not sure Perú would make
15 that calculation, and if that's the way that Perú
16 would with decide to raise debt, that they have
17 simpler, less costly ways to fund--to obtain funding,
18 I'm not sure through the delay of paying awards would
19 be the most effective way.

20 Q. Okay.

21 Let's move on to page 88 and look at Table
22 A62.

1 Accuracy have here plotted the comparison
2 between inflation and LIBOR plus 4 and UST plus 5
3 percent; correct?

4 A. (Ms. Kunsman) Yes.

5 Q. You would agree with me that these two rates
6 are more in line with inflation; right?

7 A. (Ms. Kunsman) They're over inflation for a
8 big period, from December 19 to February 22nd, but
9 from February--I mean, they're--I think--hold on, I
10 misunderstood the question.

11 Yeah, they're above. They're over--in
12 line--not for a--for a period, I would say plus 3
13 would be closer.

14 Q. Yes, but even --

15 A. (Ms. Kunsman) LIBOR plus 3 and UST plus 4.

16 Q. But even at this nominal rate, the real
17 interest would still be very low and at times even
18 negative; right?

19 A. (Ms. Kunsman) Which real rate?

20 Q. The difference between interest and
21 inflation, that's real interest rate, isn't it?

22 A. (Ms. Kunsman) Right. Like I said, real

1 interest rates have been negative for a long time.

2 Q. Okay.

3 DR. VEIT: I think that concludes my
4 cross-examination.

5 PRESIDENT CROOK: Thank you.

6 Any redirect?

7 MR. BOMBASSARO: Yes, Mr. President, and
8 we'll be brief.

9 REDIRECT EXAMINATION

10 BY MR. BOMBASSARO:

11 Q. Ms. Kunsman, early in the questions from
12 counsel, he inquired about a statement in your CV
13 indicating that your engagement in this case was to
14 rebut the damages claim.

15 Do you recall whether you disclosed in your
16 first report the instructions that you received from
17 Perú's counsel?

18 A. (Ms. Kunsman) I do.

19 Q. Could you point us to the paragraph where
20 you disclosed those instructions?

21 A. (Ms. Kunsman) Can you help me? It'd be
22 quicker if you told me where it is.

1 Q. I understand, but it's in Paragraph 5, if
2 I'm remembering correctly, of your first report.

3 A. (Ms. Kunsman) Yes.
4 Paragraph 5 of my first report, that's where
5 I give--

6 Q. Paragraph 4, I'm sorry.

7 A. (Ms. Kunsman) Okay.
8 Yes. It says--my specific instructions were
9 Accuracy--sorry.

10 "Accuracy presents its opinions in an expert
11 report dated October 1st, 2021, appended to Claimant's
12 Memorial. Counsel asked us to review the Accuracy
13 report and offer independent expert opinion on whether
14 and to what extent its calculations correctly measured
15 Claimants' alleged damages as a result of the
16 measures."

17 MR. BOMBASSARO: Thank you. No other
18 questions.

19 PRESIDENT CROOK: Let me ask, do my
20 colleagues have any questions? Do you have any?

21 QUESTIONS BY THE TRIBUNAL

22 ARBITRATOR GRIFFITH: With reference to

1 investment arbitrations, Treaty disputes, investment
2 Treaty disputes, did I understand your evidence to be
3 that, apart from one other matter for Respondents,
4 Perú has been the only retainer that you've vectored?

5 MS. KUNSMAN: No. I've had Panama, as well,
6 one.

7 ARBITRATOR GRIFFITH: So apart from one,
8 you...

9 MS. KUNSMAN: Oh, yeah, and then when I
10 wasn't the expert testifier, I was retained as a
11 junior member by several other countries.

12 ARBITRATOR GRIFFITH: Well, there's somewhat
13 a difference between being retained as counsel and
14 being retained as an expert. You cross a large gulf
15 from one to the other.

16 MS. KUNSMAN: I'm so sorry. I don't think I
17 understood your question.

18 ARBITRATOR GRIFFITH: Well, it's one thing
19 to be part of a team of counsel. It's another thing
20 to be an independent expert when you have obligations
21 not to your team, but obligations to the Tribunal.

22 MS. KUNSMAN: Absolutely. My obligation is

1 to the Tribunal.

2 ARBITRATOR GRIFFITH: Could I ask you
3 briefly to comment upon Part 8 of Accuracy's first
4 report where it referred to benchmarks, other
5 indicators of the value of the report.

6 What's your own view as to the use the
7 Tribunal may make as to references to benchmarks such
8 as Accuracy refers to?

9 MS. KUNSMAN: I don't think those are valid
10 benchmarks. I explain it in my report, for several
11 reasons.

12 ARBITRATOR GRIFFITH: You don't use
13 benchmarks?

14 MS. KUNSMAN: No, I will use benchmarks, but
15 those benchmarks that they used are not--are not the
16 correct ones to use in this case.

17 But typically, if I'm doing a valuation, I
18 would implement the three valuation approaches; DCF,
19 market transactions and publicly traded company
20 multiples.

21 But what you find sometimes is that you
22 can't find a good comparable to the project that

1 you're valuing.

2 And then I would also look at prior
3 transactions or internal valuations that were done
4 outside of the dispute.

5 ARBITRATOR GRIFFITH: Well, what would you
6 regard benchmarks as, a cross-reference for
7 confirmation, or what other reference point?

8 MS. KUNSMAN: No, I would actually adjust my
9 valuation. I would treat a transaction or probably a
10 publicly traded company, not just as a benchmark, but
11 I might adjust my DCF valuation based on that.

12 ARBITRATOR GRIFFITH: Well, that seems to be
13 a distinction between a reference point to adjust your
14 valuation and a cross-reference in confirmation.

15 MS. KUNSMAN: Yes.

16 ARBITRATOR GRIFFITH: As I understand your
17 answer, you prefer the first and not the second, as
18 they're used for benchmarks.

19 MS. KUNSMAN: Correct.

20 ARBITRATOR GRIFFITH: Well, how can you
21 regard that as a benchmark?

22 MS. KUNSMAN: Well, I--you're right, I--it's

1 not a benchmark, it goes into my valuation. It's
2 another point.

3 ARBITRATOR GRIFFITH: All right.

4 MS. KUNSMAN: So I don't--

5 ARBITRATOR GRIFFITH: So I'm just trying to
6 find out what your position is on these references to
7 benchmarks in Accuracy's first report.

8 Is your basic position is that they're no
9 assistance?

10 MS. KUNSMAN: They're no assistance, no.

11 ARBITRATOR GRIFFITH: Thank you.

12 PRESIDENT CROOK: But to be clear, you're
13 saying they're of no assistance because these
14 particular--well, I'll use the prohibitive
15 word--benchmarks, for one reason or another, were
16 inappropriately calculated, reflect inappropriate
17 comparators, and so forth; that's--is that your view?

18 MS. KUNSMAN: Correct.

19 PRESIDENT CROOK: You do not, as a general
20 matter, object or criticize or question the fairly
21 common practice of seeking a valuation utilizing
22 different methods, and then seeing how those stack up

1 in relation to one another?

2 MS. KUNSMAN: Different methods than the
3 DCF?

4 PRESIDENT CROOK: Yes.

5 MS. KUNSMAN: Yes. Correct.

6 PRESIDENT CROOK: That is a common technique
7 in your field of endeavor?

8 MS. KUNSMAN: Right, and that's what I was
9 saying, that I would actually take it farther. I
10 wouldn't just consider it a benchmark, but actually
11 more than that.

12 PRESIDENT CROOK: Okay. Is that--just, I'm
13 curious, I--in your experience, is that how it's
14 commonly done, or is this a reflection of how you do
15 the business?

16 MS. KUNSMAN: It depends. It depends on
17 what you're valuing, because you're applying fair
18 market value, right? So what you're trying to
19 get--what you're trying to do is what a hypothetical
20 buyer and seller do in that specific market.

21 So if typically in a market, investors use
22 just DCF, then you might use just DCF, but if

1 investors use the three typical approaches, then you
2 use the three. If they use the cost approach, then
3 you use the cost approach.

4 It really depends on what--you're trying to
5 mimic that hypothetical investor, not my personal
6 opinion on how I would do it.

7 PRESIDENT CROOK: All right. Thank you.

8 ARBITRATOR GRIFFITH: So if I pick up the
9 President's reference, if one is seeking to make a
10 reference by reason to market value, is that basically
11 on the basis of what will have fully informed another
12 anxious buyer, be prepared to offer to a fully
13 informed but not over-anxious seller? Is that a
14 summary of the usual test?

15 MS. KUNSMAN: That are knowledgeable of that
16 market, yes.

17 ARBITRATOR GRIFFITH: Now, if the claim is
18 the business is valueless because of the action of the
19 other party for which it is responsible, would you not
20 then disregard the effective market value that's been
21 brought about by that alleged action?

22 Sorry, I see your brow furrowing. I'll put

1 it another way.

2 If one assumes--this is abstracted from the
3 previous circumstances.

4 MS. KUNSMAN: Yeah.

5 ARBITRATOR GRIFFITH: That the business has
6 become unmarketable, there's no market for it because
7 of the action complained of that's rendered it
8 valueless, so there would be no market for the
9 business, should you disregard that aspect in seeking
10 to find market value, or would you search for another
11 method of valuation?

12 MS. KUNSMAN: You would need to understand
13 if the reason for the failure is particular to the
14 owner or if it's particular to the business.

15 If the business--if it's particular to the
16 business, then rather than valuing it as a going
17 concern, you would value it under liquidation--orderly
18 liquidation or regular liquidation.

19 That would still represent fair market
20 value, but it would be a different premise.

21 ARBITRATOR GRIFFITH: Well, but I'll ask
22 another question.

1 If one were to assume, because of the action
2 for which there's claims against the Respondent, the
3 business became valueless, how, then, would you find
4 the value for quantum of damages?

5 MS. KUNSMAN: You would need to remove the
6 measures that are being alleged are in breach of the
7 treaty from your valuation.

8 ARBITRATOR GRIFFITH: Has that been done in
9 this case?

10 MS. KUNSMAN: They've removed more than
11 that. They've removed--they've assumed that--they
12 would have obtained--they would have been able to
13 start production even though, for reasons unrelated to
14 the measures, Claimant would not have been able to
15 start production.

16 ARBITRATOR GRIFFITH: Is that a rather
17 artificial inquiry of the business is valueless
18 because of the action of the Respondent against whom
19 relief is claimed?

20 If you assume that the business is
21 valueless, isn't it a somewhat artificial analysis to
22 try and find value when it's worth nothing, in a

1 market?

2 MS. KUNSMAN: Well, because the business
3 lost value completely, assuming--in the actual
4 scenario, not--not because of the measures, but
5 because Claimant lost its shares.

6 So if the Tribunal finds that Claimant loses
7 its--Claimant losing its shares is not attributable to
8 Respondent, then the business would still have value,
9 which is the 13.4 million that PWC estimated.

10 But otherwise, yeah, it would be zero.

11 ARBITRATOR GRIFFITH: Well, I haven't
12 finished yet.

13 Well, let's abstract my questions away from
14 the fact of the shares being valueless or having some
15 value.

16 If we assume that the claim to be
17 compensated arises wholly from actions of the party
18 against whom the claims are brought, what you're
19 saying, that it would be somewhat artificial inquiry
20 to inquire what's the market value of the business
21 that's been made valueless by the actions that are
22 complained of?

1 MS. KUNSMAN: It depends on the timing of
2 those actions. The business could have been valueless
3 before those actions.

4 ARBITRATOR GRIFFITH: Well, can I make it a
5 bit simpler. Let's assume the business has been
6 expropriated. I'm not saying anything about the
7 circumstances here.

8 MS. KUNSMAN: Yeah. Okay.

9 ARBITRATOR GRIFFITH: The business is
10 entirely lost.

11 MS. KUNSMAN: Yeah.

12 ARBITRATOR GRIFFITH: Isn't it somewhat
13 artificial to apply the market value test, willing
14 we're not anxious buyer, et cetera, if--common ground
15 that the business is worth nothing, valueless?

16 MS. KUNSMAN: I mean, you could still find a
17 company that hasn't been expropriated that's operating
18 in the market that's comparable.

19 ARBITRATOR GRIFFITH: Well, is it possibly
20 to--more useful to go to one of these benchmarks that
21 you reject; for example, if you can't estimate value
22 any other way, go to sunk costs?

1 MS. KUNSMAN: The problem with sunk cost in
2 this case is that some of those sunk costs are quite
3 old, and sunk cost--you may invest in a company, and
4 the value could be less than your sunk costs at the
5 end.

6 ARBITRATOR GRIFFITH: But the assumption I'm
7 asking you to make is that at the end it's worth
8 nothing, because of the actions of the party against
9 whom the claims are brought.

10 MS. KUNSMAN: Oh, that you could still have
11 your sunk cost. Yeah.

12 ARBITRATOR GRIFFITH: That's all you're left
13 with, isn't it?

14 MS. KUNSMAN: Yeah, sunk costs.

15 ARBITRATOR GRIFFITH: If you started with
16 something, and because of the actions, one assumes, of
17 the party against whom the claim is made, and it's
18 liable for breach of some treaty obligation, then
19 isn't sunk cost a rational reference point?

20 MS. KUNSMAN: Sunk cost would be a rational
21 reference point, but I would be wary to use a very
22 conservative interest rate to bring forward--

1 ARBITRATOR GRIFFITH: Actually, I'm not on
2 interest rates.

3 MS. KUNSMAN: Oh, yeah.

4 ARBITRATOR GRIFFITH: But I mean, the
5 Claimant mightn't like that either, because it might
6 say its business had such potential but for the event.

7 MS. KUNSMAN: Right.

8 ARBITRATOR GRIFFITH: Sunk costs wouldn't be
9 an adequate remedy, but it would be a base measure,
10 would it not?

11 MS. KUNSMAN: It would be, but then in the
12 actual scenario, too, you would need to see if there's
13 still any sunk--any value to those assets that are
14 there.

15 ARBITRATOR GRIFFITH: Yes. I'm sorry, I was
16 asking you to assume there's no value.

17 MS. KUNSMAN: Oh, yes. Sorry. Yes, yes.
18 So yes, sunk costs.

19 ARBITRATOR GRIFFITH: Thank you. That's
20 very helpful.

21 MS. KUNSMAN: Yeah.

22 ARBITRATOR GARIBALDI: I have a question--or

1 a series of questions which are more conceptual than
2 theoretical, if you will.

3 In this case, we have basically three
4 claims; expropriation, breach of fair and equitable
5 treatment, and breach of full protection and security.

6 In the case of expropriation, the standard
7 of value is fair market value at an appropriate date.
8 This is what you have done, and this is what Accuracy
9 has done. So both reports, if I understand correctly,
10 whatever their failures--

11 MS. KUNSMAN: Right.

12 ARBITRATOR GARIBALDI: --are an attempt to
13 determine the fair market value of the asset at the
14 valuation date; right?

15 MS. KUNSMAN: Right.

16 ARBITRATOR GARIBALDI: Okay.

17 And therefore, they'd respond to the
18 question, what is the valuation in the case of
19 expropriation?

20 Now, let's put that aside.

21 We have two other claims, and let's forget
22 about expropriation for a moment. Let's suppose that

1 it doesn't exist.

2 In the case of claims for other than
3 expropriation, if I recall correctly, the Treaty
4 doesn't provide any particular measure of
5 compensation. So the normal way Tribunals deal with
6 this is that they go to the standard of Chorzów
7 Factory, with which you are familiar.

8 Now, my question to you is this: Let's
9 assume that there are only two claims; the claim for
10 breach of fair and equitable treatment, the claim for
11 breach of full protection and security.

12 And the standard of compensation is that of
13 Chorzów Factory, which is full compensation, putting
14 the Claimant in the same position it would have been
15 in had the breach not occurred.

16 What, if anything, would change in your
17 valuation in this hypothetical scenario?

18 MS. KUNSMAN: I would have looked more
19 closely at the discount rate and compared it to the
20 effective interest rate implied on the PLI loan,
21 including the upside participation, which makes it
22 much higher.

1 I would have--because then the discount rate
2 is specific to Lupaka. So I might have increased my
3 discount rate to be higher than the cost of debt,
4 because typically, they are. I mean...

5 So that's my--that's the only change,
6 really, a higher discount rate.

7 ARBITRATOR GARIBALDI: All right.

8 That's all I have. Thank you.

9 PRESIDENT CROOK: Okay. And just so I'm
10 clear, I--again, this is sort of more of a legal
11 question, but it may be one that is familiar to you.

12 I had understood the doctrinal position to
13 be that in assessing fair market value, you seek to
14 eliminate, insofar as possible, the effects on that
15 value associated with whatever the prescribed conduct
16 by the State might have been.

17 I thought that was sort of the black-letter
18 doctrine here.

19 Do I have that right?

20 MS. KUNSMAN: It is.

21 But Mr. Garibaldi's question, as I
22 understood it, was that you wouldn't need to do fair

1 market value, you would base it on Chorzów. I don't
2 know how to pronounce it.

3 PRESIDENT CROOK: No, I understand. I was
4 really addressing some other questions that were
5 asked.

6 MS. KUNSMAN: Oh, okay.

7 PRESIDENT CROOK: Thank you.

8 MS. KUNSMAN: Yeah.

9 PRESIDENT CROOK: All right. Any further
10 questions from our side?

11 All right. There being none, we thank the
12 experts for their assistance. And you, ma'am, and
13 too, sir, are now excused.

14 MS. KUNSMAN: Thank you.

15 PRESIDENT CROOK: So thank you for your
16 help.

17 MS. KUNSMAN: Thank you.

18 PRESIDENT CROOK: All right. You may
19 recall--

20 (Off the record between the Tribunal.)

21 All right. There has been a suggestion that
22 we might wish to recall the other party's experts in

1 order to address the question that Arbitrator
2 Garibaldi had put.

3 Would that be acceptable to the parties?

4 DR. VEIT: Certainly.

5 PRESIDENT CROOK: All right. Gentlemen, can
6 we invite you to come back up. You thought you were
7 free.

8 QUESTIONS BY THE TRIBUNAL

9 ERIK VAN DUIJVENVOORDE, CLAIMANT EXPERT, RECALLED

10 EDMOND RICHARDS, CLAIMANT EXPERT, RECALLED

11 PRESIDENT CROOK: All right. You can
12 continue to be under your undertaking of--as experts,
13 and I ask Ambassador Garibaldi--I keep trying to
14 promote him. I think it's a worthy promotion.

15 ARBITRATOR GARIBALDI: I'm not an
16 ambassador.

17 PRESIDENT CROOK: You look the part.

18 Over to Arbitrator Garibaldi.

19 ARBITRATOR GARIBALDI: Gentlemen, you have
20 heard my question.

21 Should I restate it?

22 MR. RICHARDS: Yeah. I think that would be

1 helpful. Thank you.

2 ARBITRATOR GARIBALDI: All right.

3 As I understand, the valuation of both
4 experts is based on fair market value, which is the
5 measure of damages in the case of expropriation.
6 Expropriation is one of the three claims, basically,
7 brought in this proceeding.

8 Let's forget about that one for the moment.

9 The other two claims, the claim for breach
10 of fair and equitable treatment and for breach of full
11 protection and security, so far as I can recall, do
12 not have specifically stated in the Treaty a measure
13 of damages, a measure of compensation.

14 In those cases, the standard procedure is
15 for Tribunals to apply customary international law,
16 which is reflected in a very old case of the Permanent
17 Court of International Justice, Chorzów Factory, and
18 the standard that this case adopted, is that the
19 measure of compensation is full compensation, which
20 puts the Claimant, the successful Claimant in the same
21 position it would have been in had the breach not
22 occurred.

1 Okay.

2 Now, so let's assume that this is the
3 measure of compensation in--for a claim for breach of
4 fair and equitable treatment, and/or for breach of
5 full protection and security.

6 My question, then, is: To what extent, if
7 any, your calculation of damages should be changed to
8 account for these two claims, as distinguished from
9 the claim for expropriation?

10 Thanks.

11 MR. RICHARDS: From my perspective, we would
12 largely agree with AlixPartners that their distinction
13 is, you're moving from a transaction between a
14 hypothetical buyer and seller to a valuation standard
15 that's specific to the Claimant.

16 So you might look to make some adjustments
17 to the discount rate. But we did in fact already
18 model the full cost of the PLI loan anyway, assuming
19 that a hypothetical investor would have taken those.

20 ARBITRATOR GARIBALDI: Well, you have to
21 explain a little more, for my own benefit, why you
22 need to change--or in what--not why, but in what

1 sense, what do you mean by saying that you need to
2 change the discount rate.

3 MR. RICHARDS: So the way we have built up
4 the cost of equity is based on an average investor in
5 the mining sector in Perú with an adjustment we have
6 made for the specific status of the project, so the
7 pre-production premium.

8 There may be factors that are specific to
9 the Claimant that distinguish it from average market
10 participants, which would require further adjustment,
11 but it's not something that we've looked into.

12 ARBITRATOR GARIBALDI: I understand that you
13 haven't, but do you agree that the discount rate would
14 be higher or do you think it might be lower or you
15 don't know at this point without going through the
16 calculations?

17 MR. RICHARDS: I don't know at this point.

18 ARBITRATOR GARIBALDI: All right. Thank
19 you.

20 PRESIDENT CROOK: Just so I understand, the
21 reason being, that we're now in a transaction
22 involving a particular party as opposed to the market

1 generically; that's the point: You need to have a
2 discount rate that reflects the characteristics of
3 this particular party?

4 MR. RICHARDS: Yeah, more or less, with the
5 qualification that you're no longer in a transaction
6 situation. You're already considering the benefits
7 that would have accrued to the Claimant in a
8 hypothetical scenario but-for the breaches.

9 PRESIDENT CROOK: Gentlemen, thank you. You
10 are again released.

11 MR. RICHARDS: Thank you.

12 CONCLUSION OF WITNESSES/POST-HEARING MATTERS

13 PRESIDENT CROOK: All right. That's been
14 helpful.

15 All right, now, as I mentioned at the
16 beginning of the day, the Tribunal will be convening
17 conceivably later today, but certainly tomorrow
18 morning to discuss a variety of subjects to include
19 the guidance we would like to give you with respect to
20 the post-hearing submissions. And I invited you to
21 give us your thoughts this afternoon on what you would
22 regard as most useful in the post-hearing submissions.

1 I wonder, are we in a position to do that at
2 this point? I know the schedule is a little different
3 than we might have envisioned.

4 Claimants, are you able to do that?

5 MR. GALLEGO: Yes, sir.

6 PRESIDENT CROOK: Respondent?

7 MR. GRANÉ: Yes, sir.

8 PRESIDENT CROOK: Okay. Again, I want to
9 make clear that we are simply seeking your input to
10 assist us in developing whatever order we generate
11 with respect to the post-hearing submission.

12 So with that background, let's hear from the
13 Claimants.

14 MR. GALLEGO: Thank you, Mr. President.

15 You referred earlier to the nature of the
16 post-hearing brief and to have our comments on that,
17 and we've discussed with the other side what they had
18 in mind.

19 Our position on this is quite clear, and
20 we're mindful of the very lengthy submissions that
21 have already been provided. We wish to be as helpful
22 to the Tribunal as possible.

1 We, therefore, wish to limit our
2 post-hearing submissions to answering the questions
3 that have been posed--or that will be posed by the
4 Tribunal.

5 Now, we understand our friends on the other
6 side wish to have an opportunity to make further
7 submissions outside the scope of the questions.

8 Now, we're opposed to this, as this would
9 then require a right to respond, which would further
10 add to the time and cost of these proceedings. In
11 fact, we're not just opposed; we're strongly opposed
12 to this.

13 We would just ask to limit the response to
14 the Tribunal's questions.

15 Thank you.

16 PRESIDENT CROOK: All right. Thank you.
17 That's very clear.

18 Let's hear from the Respondents.

19 MR. GRANÉ: Thank you, Mr. Chairman.

20 Anticipating this question yesterday, we
21 shared with our colleagues on the other side of the
22 room our thoughts on post-hearing submission. In

1 terms of nature--I can address nature, length, and
2 date.

3 In terms of nature, we believe that the
4 post-hearing submissions should contain two parts.
5 One would be answering questions from the Tribunal,
6 and the second part should be open for the party to
7 decide what other additional information it wishes to
8 bring to the attention of the Tribunal, but focused on
9 the evidence that has come to light during last week
10 and today.

11 This is, you may recall, Mr. Chairman, this
12 is something that we had raised during our pre-hearing
13 conference, and we believe that that would be
14 necessary, particularly in the light of the decision
15 by the Tribunal to not have closing arguments.

16 PRESIDENT CROOK: Now, let me just interrupt
17 you.

18 When you say, "additional information," you
19 mean new evidence--

20 MR. GRANÉ: No, sir.

21 PRESIDENT CROOK: --or simply your analysis
22 of what transpired in the hearing?

1 MR. GRANÉ: It's the latter.

2 PRESIDENT CROOK: The latter.

3 MR. GRANÉ: And in respect of the comment
4 from Claimant's counsel about a second round, we do
5 not believe that a second round of post-hearing
6 submissions would be necessary, and as the Tribunal
7 knows, it is not uncommon to have only a single round
8 of post-hearing submissions.

9 So that would be our strong preference.

10 In terms of length, we had proposed to
11 opposing counsel yesterday that the length be 17,500
12 words, which roughly come to 50 pages, but we also
13 indicated that that would be subject to the number of
14 questions that we received from the Tribunal, as if we
15 get many additional questions, perhaps 50 pages may
16 not be sufficient.

17 Lastly, in terms of date, we had proposed
18 that the submissions be submitted by the end of June
19 30th--30 June.

20 Those were the main parts of the proposal
21 that we put to Claimant's counsel yesterday.

22 PRESIDENT CROOK: Thank you for that.

1 Let me invite Claimant's views in particular
2 on the 17,500 words, and the date.

3 I have the sneaking suspicion that given a
4 couple of the questions the Tribunal may have in mind,
5 we may need a little more than that, but is that
6 a--consistent with your thinking or do you have
7 some--putting aside whatever the Tribunal may or may
8 not ask you, is that consistent with your thinking or
9 not?

10 MR. GALLEG0: Mr. President, I think that's
11 quite a difficult question to answer because we just
12 have no idea what the questions are going to be, and
13 what we want to be is as helpful to the Tribunal as
14 possible.

15 So we fully trust the Tribunal will provide
16 an adequate page or number limit, which concords with
17 the questions that are being asked, and we're in the
18 Tribunal's hands in that respect.

19 PRESIDENT CROOK: All right. Thank you.

20 Let me ask my questions if either of them
21 have any observations to make here? None from
22 Arbitrator Garibaldi.

1 Please.

2 ARBITRATOR GRIFFITH: Sorry, Counsel for the
3 Claimant, would a single simultaneous exchange cover
4 your first point in the objection?

5 MR. GALLEGO: Now, if it was limited to the
6 questions by the Tribunal, then we'd be totally fine
7 with that.

8 Now, if they are then going to argue points
9 out of the evidence that has come out of the hearing,
10 I mean, we're opposed to that precisely because we do
11 not want a second round.

12 ARBITRATOR GRIFFITH: Well, there wouldn't
13 be a second round if there's a simultaneous exchange.

14 MR. GALLEGO: There won't, sir, but out of
15 fairness, we would want to be able to respond to that,
16 and it would even--it would lengthen the proceedings
17 even more.

18 ARBITRATOR GRIFFITH: But what about an open
19 opportunity, apart from answering questions, to
20 address the Tribunal in no more than 17,000 words--I'd
21 have at least 12 point font and not with narrow
22 margins--on the points which you draw together to

1 establish your case after all the evidence? What's
2 unfair about that?

3 MR. GALLEGO: Well, it's very difficult for
4 us to know, because, I mean, we just don't know what
5 the questions are going to be, and it may be that we--

6 ARBITRATOR GRIFFITH: Apart from the
7 questions. I said--

8 MR. GALLEGO: Apart from the questions?

9 ARBITRATOR GRIFFITH: Apart from the
10 questions, yes.

11 MR. GALLEGO: So that would be 50 pages in
12 addition, or so, 17,000 words in addition to respond
13 to the other side's new points or new arguments that
14 have been raised.

15 ARBITRATOR GRIFFITH: No, no. Put your
16 affirmative case. You're the Claimants. You say,
17 drawing it all together, this is our case within the
18 four corners, full stop.

19 MR. GALLEGO: Thank you, Mr. Griffith.

20 If that is the case, then I think the way to
21 proceed may be instead to have a page limit for the
22 whole so that we would--because 50 pages just on the

1 evidence that has arisen from this hearing seems
2 rather a lot.

3 ARBITRATOR GRIFFITH: I'm sorry, can I back
4 you up there. It's not questions that have arisen
5 from the hearing.

6 The function of the hearings nowadays is to
7 give an opportunity to cross, with your written
8 skeleton which we have read. The function of the
9 hearing is to give an opportunity to cross and
10 re-examine.

11 So what my inquiry is, whether or not it's
12 appropriate to have an opportunity to assist the
13 Tribunal by pulling your final case together.

14 MR. GALLEGOS: Now, if the parties wish to do
15 that within--I'm just going back on my prior
16 submission.

17 If the Tribunal is minded to allow that,
18 then we would agree with the other side in that there
19 should be a 17,500, I think it was, word limit total
20 to answer.

21 ARBITRATOR GRIFFITH: The one that's fresh
22 in your mind, we have a limit at the end of May rather

1 than June. We don't want to hold you by it through
2 the summer, why not--you've got seven weeks or so;
3 isn't that enough? Everything's in now.

4 MR. GALLEGO: Now, this just depends on the
5 nature of the question, because some of the team is
6 unavailable.

7 Now, if--

8 ARBITRATOR GRIFFITH: It's not summer yet.
9 Your duty is to be available.

10 MR. GALLEGO: In particular, a hearing
11 that's coming up in the next week. So it just depends
12 on the nature of the questions.

13 If the questions do not touch upon the--sort
14 of the knowledge of some of the team members, then
15 May--end of May, may well be a good time.

16 Is that a time that would be convenient?

17 ARBITRATOR GRIFFITH: Well, it's not for me
18 to bargain, but could you agree to if we aimed for the
19 end of May, and you can make application if you wish a
20 longer period to reply to both parties?

21 MR. GALLEGO: Certainly, sir.

22 ARBITRATOR GRIFFITH: Okay.

1 And the last question I have is, would the
2 parties be content to have an award other than on
3 costs so that they can frame their submissions on
4 costs, knowing what the result is?

5 MR. GALLEG0: Yes. That would be helpful.

6 MR. GRANÉ: Our view on costs, Mr. Griffith,
7 is that there may be no need to wait for the award
8 before the submission of costs is made, if we are
9 allowed a month after we submit our post-hearing
10 submission, as at that point, we will have a full
11 accounting. We can present submission on costs.

12 If additional issues come up, for instance,
13 the Tribunal in its deliberations decides that it
14 wants a joint valuation report, which happens from
15 time to time, at that point, we could submit a second
16 cost submission to supplement the first one.

17 But we are in your hands--the hands of the
18 Tribunal. If you prefer to have a cost submission
19 after you issue an award, then we would do that.

20 ARBITRATOR GRIFFITH: Counsel, I'm just a
21 wing-it (phonetic) but more often than not, one had
22 the submissions of costs that are tailored to success

1 on issues. And if you had 40 percent of the hearing
2 on the matter where the successful claim was
3 unsuccessful, as night follows day, we would have long
4 submissions on the usual basis to apportion costs over
5 issues.

6 Isn't it better to know where you are rather
7 than to do the Full Monty as the English called it and
8 make submissions on every permutation?

9 MR. GRANÉ: We are in your hands, Mr.
10 Griffith, the hands of the Tribunal.

11 PRESIDENT CROOK: I think the Tribunal will
12 consult on this.

13 And let me just ask, has there been any
14 exchange between the parties on the question of
15 sequence and timing on costs, or are we--

16 MR. GALLEG0: None, sir.

17 PRESIDENT CROOK: None, fine. That's fine.

18 All right. Well, then the Tribunal will
19 take this up and give you the benefit of our wisdom,
20 such as it may be.

21 But I would only end this conversation with
22 the admonition that whatever else happens in these

1 post-hearing submissions, we do not need to hear yet
2 again the sort of underlying motif of your respective
3 cases.

4 We've heard it. We know it. We don't need
5 to hear it again.

6 All right. Let me ask, any concluding
7 observations?

8 There being--please.

9 MR. GRANÉ: We have one request for
10 guidance, and it concerns the issue that the Tribunal
11 raised on Day 4, but also earlier today as to the
12 exhibits that pertained to the authority that settles
13 any dispute between rural communities or the
14 boundaries between rural communities.

15 You had instructed us to make a submission
16 on that point, and we wish to know whether it's a
17 submission that we need to put in writing, we can make
18 verbally.

19 We have consulted with opposing counsel on
20 this issue earlier today, so I just wish to know how
21 you wish us to approach that issue.

22 This is in response to Mr. Garibaldi's

1 question.

2 PRESIDENT CROOK: Well, I had understood you
3 were going to give us a document listing additional
4 legal authorities that you regarded as relevant to
5 this question with an explanation as to why you
6 thought them to be relevant.

7 Have we understood this in some different
8 sense?

9 MR. GRANÉ: No, that is correct. You had
10 invited us to consult with opposing counsel, and we
11 have.

12 And so, my question is, how--

13 PRESIDENT CROOK: And do we have an
14 agreement or not?

15 MR. GALLEGO: So we have looked at the
16 document during the course of the day. In fact, there
17 are two documents. There's a law, which has been
18 provided, which we agree can enter the record, and
19 there's also a judicial decision, which we considered
20 to be irrelevant.

21 But we're not opposed to it being included
22 in the record, if the other side so wishes.

1 PRESIDENT CROOK: All right. Then let me
2 propose that we go ahead and put those in.

3 MR. GALLEGO: Okay.

4 PRESIDENT CROOK: Is there more to be
5 discussed here?

6 MR. GALLEGO: Yes.

7 So if you just--

8 PRESIDENT CROOK: Okay.

9 MR. GALLEGO: Just one further point.

10 Now, we've been provided this in the middle
11 of this morning. We've tried to have a look, and
12 we're not in a position yet to say this fully answers
13 or fully sets out the--the regulation or the law on
14 this issue of demarcation. Now--and we don't actually
15 know if there's anything else.

16 Now, we just would like to reserve the right
17 to provide--or to consult the other side as to whether
18 there is any additional legal authority that needs to
19 be submitted, and if so, and if the other side doesn't
20 agree, then we suggest proceeding the same way,
21 providing a list, and the Tribunal can rule.

22 PRESIDENT CROOK: All right.

1 Well, if you find the smoking transit, you
2 will consult, as you suggest, and then proceed along
3 those lines.

4 That seems reasonable enough.

5 ARBITRATOR GARIBALDI: May I add one point.

6 Just to remind you that what I was
7 interested in is the authorities, if any, in Perú that
8 deal with, one, adjudication, two, mediation of
9 territorial disputes between or among rural
10 communities.

11 Thank you.

12 PRESIDENT CROOK: We're all clear on that.
13 I think so.

14 MR. GALLEGGO: Thank you.

15 PRESIDENT CROOK: Okay. Is there anything
16 further we need to do at this stage?

17 MR. GALLEGGO: Yes. Just one further point.

18 PRESIDENT CROOK: All right.

19 MR. GALLEGGO: This morning, the Respondent
20 submitted an additional translation. It was R-127.
21 Or rather, an additional correction to the same
22 translation.

1 Now, we briefly had a look. We don't agree
2 with some of the changes that have been made, and
3 we're wondering how to proceed. There are a couple of
4 ways in which we could proceed. We could provide our
5 own translation. We could discuss our point of
6 disagreement with the other side. We are fully in the
7 Tribunal's hand on this.

8 PRESIDENT CROOK: R-127 sounds familiar.
9 Can somebody remind me what R-127 is.

10 MR. GALLEGGO: It's the Complaint that was
11 given by [REDACTED].

12 PRESIDENT CROOK: This is the report that
13 was taken at the police station?

14 MR. GALLEGGO: Yeah. Exactly.

15 PRESIDENT CROOK: All right. What I would
16 suggest you do is the parties consult and see if it is
17 possible for you to resolve whatever differences there
18 may be.

19 If you are unable to do so, what are our
20 options? I don't want to have the Tribunal burning up
21 a lot of its time or you burning up a lot of your time
22 adjudicating a translation issue.

1 So conceivably if we come to that, we would
2 simply ask you, if you are unable to agree, to each
3 put in your version of the appropriate translation,
4 and the Tribunal will look at them and decide, calling
5 on the expertise, in particular, of Arbitrator
6 Garibaldi.

7 Would that be acceptable?

8 MR. GALLEG0: Yes. Thank you.

9 PRESIDENT CROOK: Let's do it that way,
10 then.

11 Any other lingering issues? If not, it only
12 falls to me to thank everyone for an excellent
13 hearing. It's been, I think, very educational for us.
14 It is an interesting and, in many ways, complicated
15 and difficult case.

16 So you have not given us an easy job, but we
17 have appreciated the help you have given us. We thank
18 you. We wish those of you who are traveling, safe
19 journey home or to wherever your next destination may
20 be.

21 So we thank you, and barring any last
22 procedural developments...going once, going twice...

1 the hearing is closed.

2 (Whereupon, at 3:25 p.m., the Hearing on the

3 Merits was concluded.)

POST-HEARING REVISIONS
CERTIFICATE OF REPORTER

I, Marjorie Peters, FAPR, RMR-CRR, Court Reporter, do hereby attest that the foregoing English-speaking proceedings, after agreed-upon revisions submitted to me by the Parties, were revised and re-submitted to the Parties per their instructions.

I further certify that I am neither counsel for, related to, nor employed by any of the Parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

MARJORIE PETERS

MARJORIE PETERS