

INITIAL ASSESSMENT REPORT

Specific Instance submitted for the activities of a multinational enterprise of the United States of America and Peruvian companies

This Initial Assessment Report is prepared with respect to the Specific Instance submitted by FUNDACIÓN LUZ MARINA on behalf of three Peruvian citizens and an indigenous community, for the alleged breach of the Organisation for Economic Co-operation and Development - OECD Guidelines for Multinational Enterprises (GUIDELINES) by a multinational enterprise (hotel company) from the United States (MULTINATIONAL ENTERPRISE), and three Peruvian companies.

The Initial Assessment aims to determine whether the issues raised deserve a more detailed examination and **does not determine if the MULTINATIONAL ENTERPRISE has or has not performed according to the GUIDELINES.**

PROVISIONS OF THE GUIDELINES IN THE SPECIFIC INSTANCE

Chapter II, General policies (Items 2, 10, 11 and 12)

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard:

A. *Enterprises should: (...)*

2. *Respect the internationally recognised human rights of those affected by their activities. (...)*

10. *Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.*

11. *Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.*

12. *Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship."*

Chapter IV, Human Rights (Items 1, 2 y 3)

"States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. *Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.*

2. *Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*

3. *Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts."*

Chapter VII, Combating Bribery, Bribe Solicitation and Extortion (Item 1)

"Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage.

Enterprises should also resist the solicitation of bribes and extortion. In particular, enterprises should:

1. Not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners. Likewise, enterprises should not request, agree to or accept undue pecuniary or other advantage from public officials or the employees of business partners. Enterprises should not use third parties such as agents and other intermediaries, consultants, representatives, distributors, consortia, contractors and suppliers and joint venture partners for channelling undue pecuniary or other advantages to public officials, or to employees of their business partners or to their relatives or business associates."

I. CHRONOLOGY OF THE SPECIFIC INSTANCE

1. On December 18, 2018, the OECD National Contact Point in Peru (NCP PERU) received the Specific Instance raised by FUNDACIÓN LUZ MARINA, on behalf of three citizens identified as part of an Indigenous People, who state they represent that ethnical group. The specific instance is submitted with regard to the activities carried out by the MULTINATIONAL ENTERPRISE from the hotel industry and the Peruvian hotel company, the Peruvian real state company and the Peruvian construction company (jointly referred to as the Peruvian companies) that, according to the claimants, would be business partners of the MULTINATIONAL ENTERPRISE in a hotel project in the city of Cusco, Peru.
2. On December 20, 2018, the representative of FUNDACIÓN LUZ MARINA requested a coordination meeting.
3. On December 26, 2018, there was a preliminary call between NCP PERU and the representative of FUNDACIÓN LUZ MARINA.
4. On December 27, 2018, a face-to-face meeting was held between representatives of the NCP PERU and persons designated by the representative of FUNDACIÓN LUZ MARINA.
5. On January 8, 2019, the claimants submitted an additional writing.
6. On January 9, 2019, by Official Letter N° 25-2019/PROINVERSIÓN/DSI, the NCP PERU requested FUNDACIÓN LUZ MARINA to specify and/or support its specific instance, regarding, among others, representation of an indigenous people and of FUNDACIÓN LUZ MARINA, information on the Operational Contract and Architectural Adaptation Policy mentioned by the claimants, details of the violation of religious freedom and worship.
7. On January 24, 2019, additional information was submitted in response to the official letter sent by the NCP PERU.
8. On February 6, 2019, a meeting was held between the NCP PERU and representatives of the claimants.
9. On February 14, 2019, a first contact is made with the National Contact Point of the United States of America (NCP USA), to inform them of the existence of this specific instance and request their support to contact the MULTINATIONAL ENTERPRISE, since it does not have offices in Peru. On the other hand, it was indicated that all the information submitted by the claimants was in the process of being translated into English.
10. On February 19, 2019, by Official Letter N° 163-2019/PROINVERSIÓN/DSI, the claimants were informed that their request had been considered presented.




11. By email dated March 4, 2019, the claimants' representative informed NCP PERU and NCP USA that UNITE HERE was advising them and monitoring the progress of the procedure in the United States of America.
12. On March 5, 2019, the documents submitted by the claimants translated into English were sent to the NCP USA.
13. On March 6, 2019, at the request of the claimants, a telephone call was made between their representative and NCP PERU.
14. On March 7, 2019, NCP PERU held a meeting at the headquarters of the Decentralized Directorate in Cusco of the Ministry of Culture and visited the area where the hotel project is located.
15. On March 12, 2019, a coordination call was made between the NCP PERU and the NCP USA.
16. On March 14, 2019, UNITE HERE met with the NCP USA.
17. On March 18, 2019, the Peruvian real estate company and the Peruvian construction company were informed on the specific instance submitted and the documentation submitted by the claimants was sent for their replies. It should be noted that a communication was not sent to the Peruvian hotel company, since it no longer performs activities.
18. On March 26, 2019, NCP USA reported that it had had a preliminary communication with the MULTINATIONAL ENTERPRISE and was coordinating a telephone call with NCP PERU.
19. On March 27, 2019, a meeting with the Peruvian real estate company was held.
20. On April 3, 2019, a telephone call between the MULTINATIONAL ENTERPRISE, NCP USA and NCP PERU was made, in response to the coordination carried out by NCP USA.
21. On April 4, 2019, the MULTINATIONAL ENTERPRISE requested an extension of time until May 17, 2019 to submit its replies.
22. On April 12, 2019, the Peruvian real estate company requested an extension of time.
23. On April 15, 2019, by Official Letter N° 383-2019/PROINVERSIÓN/DSI it was considered pertinent to grant the requested period.
24. On May 16, 2019, the Peruvian real estate company submitted its rebuttal.
25. On May 17, 2019, the MULTINATIONAL COMPANY and the Peruvian construction company submitted their rebuttal.
26. On May 23, 2019, the claimants requested to be notified on the replies in the original language submitted.
27. On May 27, 2019, by Official Letter N° 511-2019/PROINVERSIÓN/DSI, the requested replies were sent to the claimants and they were told that although Directive N° 003-2015-PROINVERSIÓN - Attention of Specific Instances Regarding the Implementation of the OECD Guidelines does not contemplate the possibility of submitting new replies, a period of seven working days was granted to do so, that is, until June 7, 2019.



28. On June 24, 2019, the claimants submitted additional documentation and indicated that they would send a second part.
29. On June 28, 2019, the claimants were told that this information had been submitted after the deadline. Notwithstanding this, they were informed that in an exceptional way, the documentation would be admitted after the deadline and they will be granted until July 3 for the submission of the missing part. Likewise, they were informed that the MULTINATIONAL ENTERPRISE and the Peruvian companies would be granted the same number of days they took to respond, so that all parties have the same opportunity to submit their replies.
30. On July 1, 2019, the claimants submitted their additional replies.
31. On July 2, 2019, the documentation submitted by the claimants was sent to the MULTINATIONAL ENTERPRISE and to the Peruvian companies, and August 9, 2019 was granted as deadline.
32. On August 7, 2019, the Peruvian real estate company submitted its response letter.
33. On August 8, 2019, the MULTINATIONAL ENTERPRISE submitted its written response.
34. On August 15, 2019, an informative call was held with NCP USA.

II. ARGUMENTS OF CLAIMANTS

35. In 2014, THE INITIAL MULTINATIONAL ENTERPRISE¹ entered into a commercial agreement with the Peruvian hotel company, under which THE INITIAL MULTINATIONAL ENTERPRISE would be the operator of a hotel in Cusco.



Subsequently, the INITIAL MULTINATIONAL ENTERPRISE expanded said commercial relationship including the Peruvian real state company and the Peruvian construction company for the construction of the hotel. This construction was executed following the architectural adaptation policy of THE INITIAL MULTINATIONAL ENTERPRISE, according to which the INITIAL MULTINATIONAL ENTERPRISE sends a prototype to the hotel construction partner, after which the INITIAL MULTINATIONAL ENTERPRISE approves the construction plans and authorizes the start of the project, during whose construction it is permanently inspected by architects of the INITIAL MULTINATIONAL ENTERPRISE².

36. The INITIAL MULTINATIONAL COMPANY "*participated in the demolition of five Inca walls that make up the Huacapuncu Temple*", in sectors Saphy N° 386 (before 674), N° 704 and N° 714. It also desecrated graves in the Huacapuncu temple that constitute place of religious practice³. To support these facts, the claimants submitted the Directorial Resolution No. [...] -2018-DDC-CUS / MC⁴ and table N° 35 of the Audit Report No. [...] -2017-CG/EDUC-AC.

¹ The INITIAL MULTINATIONAL ENTERPRISE was acquired, through a merge, on September 2016 by the MULTINATIONAL ENTERPRISE against which the specific instance is filed.

² Literal E of the specific instance application filed on December 18, 2018.

³ Literals E and F of the specific instance application filed on December 18, 2018.

⁴ It should be noted that with Ministerial Resolution N° [...] 2018-MC of January 11, 2019, the Directorial Resolution N° [...] -2018-DDC-CUS/MC that imposed administrative sanctions on the Peruvian real estate company for promoting and carrying out archeological excavations in the property Saphy N° 386 (before 674) -704, dismantling three Inca platforms was declared void due to expiration of the administrative procedure. However, new administrative sanctions were subsequently imposed through Ministerial

37. Unlike the stated by MULTINATIONAL ENTERPRISE and the Peruvian construction company, the property at Calle Saphy N° 714, is part of the hotel project, this can be seen as provisioned in Report N° [...] -2017-FAP-AFGP-OPP-DDC-CUS/MC of March 22, 2017, in the Work notebook of the Peruvian real estate company dated December 4, 2013 and November 14, 2015 and in the Appeal dated December 21, 2018 submitted by the Peruvian real estate company, in which the following is mentioned "*and because we obtained ownership of an adjoining property, we previously requested the procedures required by law in the same year, 2014, a license of extension and modification N° [...] -SGAUR-GDUR-MC-2014*".
38. While the Directorate Resolution N° [...] -2018-DDC-CUS/MC mentions that the disassembly of the walls would have been carried out until July 2014, it should be considered that the Building License N° [...] - SGAUS-GDUR-MC-2014 was issued on December 29, 2014, that is, three months after the signing of the contracts with the INITIAL MULTINATIONAL ENTERPRISE. There are also work notebooks submitted by the Peruvian real estate company in which activities are mentioned until February 2016. On the other hand, Report N° [...] -2017-FAP-AFGP-OPP-DDC-CUS/MC on the property at Calle Saphy N° 714 indicates that a truck would have entered the area on March 22, 2017. In that sense, the aforementioned events have occurred, even, after the signing of the Operation Contract with the MULTINATIONAL ENTERPRISE.
39. The MULTINATIONAL ENTERPRISE has violated Chapter II, General Policies (Items 2, 10, 11 and 12).
40. The MULTINATIONAL ENTERPRISE has violated Chapter IV, Human Rights (Items 1, 2 and 3), as it violates its human right to maintain their culture and religious freedom. The claimants affirm that the MULTINATIONAL ENTERPRISE "*has had direct participation in the demolition of the affected site*" under the Operation Contract signed by the INITIAL MULTINATIONAL ENTERPRISE and for keeping control of the architectural and design plans of the hotel. Likewise, the MULTINATIONAL ENTERPRISE "*approved the construction plans and [it was] who monitored the demolition and construction by its own architects*".⁵
41. Similarly, they point out that the destruction of the Huacapuncu temple is an attack on their religious practice, as it is a "*sanctuary that includes a ceremonial burial center where the remains of members of the inka panaka of our father Manco Cápac and the guardians of the paqarinas that connect Sacsaywaman were buried*".⁶
42. With a letter dated January 24, 2019, a copy of the Physical Inspection Certificate N° [...] -2016-CG/EDUS-AC-DDCC is attached, containing, as stated by the claimants, "*a detailed description of one of the graves that were desecrated by*" the MULTINATIONAL ENTERPRISE and Peruvian companies. Likewise, they state that on pages 9, 260 and 261 of the document submitted by the Peruvian real estate company on May 16, 2019 it is mentioned that graves, as well as human bones were extracted.⁷
43. The MULTINATIONAL ENTERPRISE has violated Chapter (VII, Combating Bribery, Bribe Solicitation and Extortion), indicating that a public official had received undue advantages from the Peruvian construction company. Likewise, that at the time of said payments, the same public official issued favorable reports for the application of the Peruvian real estate company to the VAT Early Recovery Special Regime. According to the claimants, said

Resolutions of April 10 and May 30, 2019. These two new resolutions have been submitted by the complainants in their response of June 24, 2019.

⁵ Item 2.2. of Literal G of the specific instance application filed on December 18, 2018.

⁶ Item 2.4 of Section G of the specific instance application filed on December 18, 2018.

⁷ Page 5 of the writing submitted on June 24, 2019.

"payments constitute undue pecuniary advantages to a public official [and] were oriented to obtain favorable evaluations of said public official for commercial interests" of the MULTINATIONAL ENTERPRISE and of the Peruvian companies.⁸


44. The claimants first requested the following:
- That the MULTINATIONAL ENTERPRISE abandons the hotel project and restores the Inca artifacts it has extracted from the Huacapuncu temple.
 - That the MULTINATIONAL ENTERPRISE finances the reconstruction of the Huacapuncu temple and grants adequate compensation to those affected by its actions.

However, in a supplementary writing they stated that the request was as follows:

- Definite cancellation of the hotel project.
 - Reconstruction of the Huacapuncu temple, which includes:
 - a. Restitution of the extracted Inca artifacts.
 - b. Rebuild the Huacapuncu Temple (Restore the hillside of the temple and rebuild pre-Hispanic walls)
 - Compensation to the Indigenous People
45. The claimants state that the purpose of submitting the specific instance is to continue having the *"power to practice our religion in places that were bequeathed by our ancestors, such as the Huacapuncu temple"*.⁹

III. ARGUMENTS OF THE MULTINATIONAL ENTERPRISE AND PERUVIAN COMPANIES

❖ Of the MULTINATIONAL ENTERPRISE

- 
46. Neither the MULTINATIONAL ENTERPRISE nor its predecessor, the INITIAL MULTINATIONAL ENTERPRISE, has had any participation or responsibility in the demolition of pre-Hispanic walls of the Huacapuncu Temple.
47. The MULTINATIONAL ENTERPRISE is not the owner of the properties in which it is alleged that such demolition occurred nor is it responsible for the development or construction of the hotel.
48. According to Directorate Resolution N° [...] -2018-DDC-CUS/MC submitted by the claimants, the demolitions occurred between February 2012 and July 2014, that is, before the MULTINATIONAL ENTERPRISE was involved in the operation services contract that the INITIAL MULTINATIONAL ENTERPRISE signed on October 2014. At the time the contracts were entered into by the INITIAL MULTINATIONAL ENTERPRISE, the Peruvian real estate company had the corresponding permits and the construction of the Hotel structure was being executed.
49. Although the claimants mention in a subsequent writing (June 24, 2019), that there had been excavations after these dates, it should be noted that in 2015, the permits that the Peruvian real estate company had for the construction of the hotel were cancelled, and so far the construction of the hotel is paralyzed and unfinished. Likewise, the work notebooks do not indicate that the construction of the work was still being executed, but rather they refer to regulated and specifically designed monitoring plans, under the supervision of the Ministry of Culture.

⁸ Item 3.2 of Section G of the specific instance application filed on December 18, 2018.

⁹ Item I of the specific instance application filed on December 18, 2018.

50. The Peruvian real estate company owns the property at Calle Saphy Sector N° 386 (formerly 674) -704 and Calle Don Bosco 5, in Cusco. In 2008, construction excavations began and the Peruvian real estate company hired the Peruvian construction company. These actions were carried out prior to any participation of the INITIAL MULTINATIONAL ENTERPRISE in the potential contract for hotel operation services in Cusco signed in October 2014. Likewise, at no time the MULTINATIONAL ENTERPRISE has had contact or any type of business relationship with the Peruvian construction company, regarding this project. The relationship of this company is directly with the Peruvian real estate company.
51. Three of the five walls mentioned by the claimants would have been dismantled by the Peruvian real estate company in Calle Saphy Sector N° 386 and N° 704 around February and March 2012, May 2014 and July 2014.

The other two walls belong to Calle Saphy Sector N° 714. However, they point out that this property is not within the area that corresponds to the location of the hotel that would be built by the Peruvian real estate company and referred to in the Operation services contract with the INITIAL MULTINATIONAL ENTERPRISE. Also, according to the information provided by the claimants, this property was acquired by the Peruvian construction company in November 2013, a transaction in which neither the INITIAL MULTINATIONAL ENTERPRISE nor the Peruvian real estate company participated.

52. The specific instance mentions the desecration of graves; however, it is not clear on what they mean or what the participation of the MULTINATIONAL ENTERPRISE or THE INITIAL MULTINATIONAL ENTERPRISE would be. None of the supporting documents of the specific instance refers to the destruction of a Huacapunco Temple, including the Resolutions of the Culture sector presented by the claimants, or who or when it would have been destroyed. Nor is reference made to ceremonial burials that have been extracted from the property.
53. It is only in October 2014 that the INITIAL MULTINATIONAL ENTERPRISE is involved with the potential administration and operation of the hotel in Cusco. This participation was granted with a series of contracts signed between the INITIAL MULTINATIONAL ENTERPRISE and the Peruvian hotel company¹⁰, which was also a subsidiary of the Peruvian real estate company. These contracts were: (i) Operation Contract for the administration and operation of the hotel owned by the Peruvian real estate company (ii) Design review contract whose objective was to ensure compliance with the design of the hotels of the INITIAL MULTINATIONAL ENTERPRISE, operational requirements and safety and fire safety standards. The INITIAL MULTINATIONAL ENTERPRISE does not have authority or participation regarding the structural components of the hotel construction, nor does it review designs or plans related to the structure of the hotel, as the claimants have stated¹¹.
54. The relationship of the INITIAL MULTINATIONAL ENTERPRISE with the Peruvian real estate company and the Peruvian hotel company is that of an independent contractor to provide brand and administration services at the Hotel in Cusco, once it starts activities, however, it is not a business partners or main agent relationship.
55. It has not violated Chapter II on general policies of the GUIDELINES, as it has not had any participation in the affectations mentioned by the claimants. It also has a risk management system that allows it to identify, prevent and mitigate current and potential


¹⁰ According to the MULTINATIONAL ENTERPRISE, the Peruvian hotel company obtained the rights on the hotel as a result of the Usufruct Contract signed with the Peruvian real estate company.

¹¹ According to the MULTINATIONAL ENTERPRISE before the Hotel enters into operation, the MULTINATIONAL ENTERPRISE has a limited role to make recommendations and marketing plans, number of personnel required, system information, etc.

adverse impacts, policies that allow its employees and agents to protect the company's integrity in order to prevent human rights violations and adverse social impacts, as well as a Business Conduct and Ethics Code provisioning its commitments to social responsibility, including the protection of human rights, and prevention of bribery and corruption.

56. It has not violated Chapter IV on Human Rights of the GUIDELINES, as neither the INITIAL MULTINATIONAL ENTERPRISE nor the MULTINATIONAL ENTERPRISE have participated in the demolition of the walls, as the claimants incorrectly state, nor do they approve the construction plans of the hotel or supervise construction work with their architects, as the claimants also pointed out. Likewise, neither in the request for a specific instance nor in the supporting documents do the claimants mention how their right to religious freedom has been affected or what are the religious practices that were carried out (and that can no longer continue) in the place where the construction of the hotel is located.
57. It has not violated Chapter VII, Combating Bribery, Bribe Solicitation and Extortion; in the first place, because the facts mentioned refer to the Peruvian construction company with which the MULTINATIONAL ENTERPRISE has not had any business relationship; and they are in relation to the purchase of the land at Calle Saphy N° 714 that does not correspond to the location of the hotel. Likewise, if the alleged payments made in November 2013 to a public official to obtain favorable reports to the request for access the VAT Early Recovery Special Regime by the Peruvian real estate company had been made, that would have been prior to the existence of the contracts with the INITIAL MULTINATIONAL ENTERPRISE.
58. The MULTINATIONAL ENTERPRISE is not able to provide, nor is it legally responsible, any of the remedies requested by the claimants.

❖ **Of the Peruvian real estate company** ¹²

- 
59. Pre-Hispanic walls have not been demolished, on the contrary, having found these structures in a frank process of deterioration, the registration and cross-linking of the walls in their entire length was previously carried out and then the pieces were codified according to the corresponding archaeological processes, under the supervision of the Decentralized Directorate of the Ministry of Culture in Cusco.
60. Once this stage was completed, the structures in question were dismantled, under the direction of the resident archeologist, work that was supervised by professionals accredited by the Decentralized Directorate of the Ministry of Culture in Cusco. Therefore, it is not about demolitions, but about disassembly processes for the restoration and enhancement of the work structure, as it is registered in the supervision notebooks.
61. Archaeological evaluation and archaeological monitoring have several approval resolutions issued by the Culture sector and are not the product of clandestine excavations.
62. The project is in the urban and consolidated area of contemporary buildings in Cusco. On the site there was no Inca temple, neither other structures (except the retaining walls to contain the hillside that formed short terraces), this is fully evidenced and embodied in the cataloging sheets of the property. No ceremonial burials were found, the bones are of common individuals that were associated with certain utilitarian objects, as it was customary for them to be buried with their belongings.

¹² According to responses submitted on May 16, 2019 and August 7, 2019

63. The excavation and archaeological evaluation works, as well as the restoration of walls, were supervised by personnel of the Decentralized Directorate of the Ministry of Culture in Cusco and the cultural elements found were registered and delivered under inventory to the Decentralized Ministry of Culture in Cusco, in compliance with the Archaeological Interventions Regulation.

64. The following resolutions corresponding to the archeology specialty are available:

For the property at Calle Saphy N° 386 (before 674):

- Dictum N° [...] -DDC-Cusco dated December 21, 2008, issued by the Alternate National Commission of the National Archeology Commission of the National Institute of Culture (now the Ministry of Culture).
- Regional Directorate Resolution N° [...] /INC-Cusco dated June 7, 2010, the "Saphy Project 674" (Hotel and Residence) of the Historic Center of Cusco is declared approved.
- Regional Directorate Resolution N° [...] /MC-Cusco dated April 11, 2011 authorizing the execution of the Archaeological Monitoring Plan.
- Regional Directorate Resolution N° [...] -DDC-MC-Cusco dated July 18, 2012 authorizing the extension of the Archaeological Monitoring Plan.
- Regional Directorate Resolution N° [...] /MC-Cusco dated February 21, 2013 approving the final report of the Archaeological Monitoring Plan.
- Directorate Resolution N° [...] -DDC-MC-Cusco dated February 18, 2014 approving the restoration file of the pre-Hispanic and colonial wall in the building, found during the execution of the archaeological monitoring plan.
- Directorate Resolution N° 921-DDC-MC-Cusco dated December 5, 2014 approving the restoration of the pre-Hispanic and colonial wall in the building.

For the property at Calle Saphy N° 704:

- Vice-Ministerial Resolution N° [...] -2011-VMPCIC-MC dated May 13, 2011 authorizing the execution of the Archaeological Evaluation Project with excavations in the property.
- Directorate Resolution N° [...] -DGPC-VMPCIC-MC dated November 3, 2011 approving the final report of the Project of archaeological evaluation with excavations in the property.
- Directorate Resolution N° [...] -DDM-MC-Cusco dated February 26, 2015 authorizing the extension of the execution period of the Archaeological Monitoring Plan of the property, as a complement to the Archaeological Monitoring Plan of Property N° 386 Calle Saphy, approved by Regional Directorate Resolution N° [...] -DDC-MC-Cusco dated April 11, 2011

65. Also, the records of the inspection visits made by the supervisors of the archeology and architecture components of the Decentralized Directorate of Culture, during the seven years of paperwork and execution of work on the premises of their work property are available.

66. Their participation in the project was as owners of the real estate and constructors of the project, which was built according to municipal regulations by obtaining building and construction licenses, parameter certificates; administrative norms issued by the Decentralized Directorate of the Ministry of Culture in Cusco. Additionally, the architecture project was prepared by Peruvian architects.

67. They have not prevented or interfered in the performance of religious activities, because they have never been developed in their properties.

68. That Cusco is declared a Cultural Heritage of Humanity by UNESCO is not unknown to them, so they have complied with the established regulatory procedures. Similarly, as in

other cities declared cultural heritage of Humanity, it is lawful to build and display the architectural expression, complying with the procedures and rules that govern its development, as provisioned in the Athens Charter of 1933.

❖ **Of the Peruvian construction company¹³**

69. It does not maintain any corporate link with the companies mentioned by the claimants, except for a contract for the execution of a work signed with the Peruvian real estate company, dated September 2, 2013, for the property at Calle Saphy N° 674 and Don Bosco N° 05, under the Construction License N° [...] -SGAUR-GDUR-MC-200 dated March 21, 2011.
70. It owns the property at Calle Saphy N° 714 and there is no agreement with the Peruvian real estate company, the MULTINATIONAL ENTERPRISE, or any other, to transfer it. This asset is registered in its accounting entries and is part of its assets. Likewise, a copy of the registry entry confirming its ownership was attached.
71. The acquisition of said property was made through three legal acts, to different heirs property owners:
- Acquisition of 90.27%, by public deed dated November 24, 2014 from Notary Jorge Zuloeta.
 - Acquisition of 1.38%, by public deed dated November 24, 2014 from Notary Jorge Zuloeta.
 - Acquisition of 8.33%, by public deed dated October 12, 2013 from Notary Ruffo Gaona Cisneros. It is with respect to this transaction that the claimants indicate that bribery payments have existed.
72. There has been no payment of any bribe. Regarding the public deed dated October 12, 2013, a public deed of clarification was prepared on November 27, 2013, for which the services for the preparation of minutes and public deed were hired at the same notary, which is the reason why the minutes were authorized by one of the lawyers of the notary staff. This lawyer is not its advisor, they do not know him or have had any relationship with him, and he did not authorize the previous public deeds.
73. They state that regarding this acquisition of 8.33% of the property that is equivalent to an area of 56m², there is a judicial process of redemption¹⁴ initiated by the father of the representative of FUNDACIÓN LUZ MARINA. Related to that controversy, they are been asked for a payment of S/ 8 325 000.00 as compensation, although the right they claim to have has not been recognized in any forum.
74. They state that monitoring work, but not intervention, has been carried out on their property.
75. The property was totally abandoned and there have been no signs that it is a ceremonial center and much less a temple, as the claimants state.

IV. ON THE EXISTENCE OF PARALLEL INSTANCES

76. In this specific instance, the claimants have stated that in criminal proceedings there are investigations on the destruction of the monumental archaeological heritage, in which the MULTINATIONAL ENTERPRISE is not included.

¹³ As per rebuttal submitted on May 17, 2019.

¹⁴ A process related to a contractual right to recover something sold to someone else.

77. On the other hand, the documentation submitted shows that there are also administrative sanctions procedures against the Peruvian real estate company.
78. In this regard, it should be borne in mind that the GUIDELINES provisions that “NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation.”¹⁵
79. The National Contact Point seeks to contribute to the resolution of issues that may arise in relation to the implementation of the GUIDELINES, becoming a non-contentious forum for debate. It is not the function of this forum to supply the determinations that may arise in judicial or administrative forums.

Judicial or administrative pronouncements can provide useful guidance to the National Contact Points on how these issues have been evaluated by other entities. However, at the initial evaluation stage, the National Contact Point is not expected to determine whether the requirements of domestic law have been met. Similarly, at this stage of evaluation it is not determined whether there has been a breach of the GUIDELINES, but, if the issues raised merit further analysis in accordance with the criteria provisioned in Section 25 of the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, which establishes the following:

“25. In making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is bona fide and relevant to the implementation of the Guidelines. In this context, the NCP will take into account:

- *the identity of the party concerned and its interest in the matter.*
- *whether the issue is material and substantiated.*
- *whether there seems to be a link between the enterprise’s activities and the issue raised in the specific instance.*
- *the relevance of applicable law and procedures, including court rulings.*
- *how similar issues have been, or are being, treated in other domestic or international proceedings.*
- *whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.”*

V. NCP PERU CONSIDERATIONS REGARDING THE SPECIFIC INSTANCE

80. The GUIDELINES provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards¹⁶.
81. Similarly, it is established that the GUIDELINES “are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws and internationally recognised standards. Observance of the Guidelines by enterprises is voluntary and not legally enforceable.”¹⁷

¹⁵ OECD Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Item 26.

¹⁶ OECD Guidelines, Foreword, Item 1.

¹⁷ OECD Guidelines, Concepts and Principles, Item 1.

82. In this case, the NCP PERU reviewed the Specific Instance submitted by the claimants against the MULTINATIONAL ENTERPRISE and the Peruvian companies in the real estate, construction and hotel sector, on the possible breach of the Guidelines on general principles, human rights and combating bribery, bribe solicitation and extortion.

83. Regarding this specific instance, the NCP PERU has considered the following:

❖ **With respect to claimants**

84. The specific instance has been submitted by FUNDACIÓN LUZ MARINA on behalf of 3 self-identified natural persons from the Indigenous People and who declare that they submit this specific instance in their representation. Later, after questioning the representation of the applicant with respect to the Indigenous People, a letter from the president of an indigenous community was submitted requesting to be considered as affected population, likewise, a letter was submitted with the signature of 19 additional people; however, they would also belong to that community.

85. It should be noted that the consultation to the Ministry of Culture on the representation of an indigenous people, said that *"it is important to consider the difference between ethnic self-identification, exercised by an individual from an indigenous or native people, and the representation or not of the indigenous or native people that an individual can perform.*

Ethnic self-identification is the exercise of an individual to be considered or not as an indigenous or native people, according to a series of criteria, such as customs and/or ancestors.

Indigenous or native people in Peru are usually identified according to the identification criteria established in current regulations. On many occasions localities are generally constituted by native communities, or peasants (titled or not), hamlets or sectors, given that ILO Convention 169 recognizes the belonging to an indigenous or native people regardless of their legal status.

The representation logics conform to the distinctive organizational forms that make them autonomous, (...). These organizational forms generate federative levels or representative organizations, through the election of sole or collegiate leaders, who exercise representativeness with powers provisioned in minutes or records determined by each organization. In this context, if a natural person states that they represent an indigenous or native people, they should submit the minutes, records or agreements that accredit them as such."¹⁸ It is for this reason that this specific instance is considered submitted by the three natural persons and the indigenous community, and not as submitted by the Indigenous People, for whom they have not provided sufficient representation.

86. On the other hand, in their writing of January 8, 2019, the claimants requested that the NCP PERU consider the application of *Rule 23* of the *Federal Rules of Procedure* of the United States of America (*class action*), according to which the Indigenous People constitute a class for the procedure. In this regard, the NCP PERU considers that a specific instance cannot be treated as a *class action*, since the representation, which is essential to reach an agreement that resolves the issues raised, would not be guaranteed in this case and it would not ensure the effectiveness of the agreement reached, nor the legitimacy of the people who assume said representation. It should be noted that, according to *Rule 23*, for a *class action* to be admitted there are prerequisites that must be met as a whole. Thus, before this type of action can proceed collectively, an approval of the judge, through a certification that the action can be processed collectively is required. According to *Rule 23(c)(1)*, as soon as the action is filed, the judge must evaluate the presence of the requirements set forth in *Rule 23(a)* and the conformity that the facts submitted fit into one of the hypotheses provided in *Rule 23(b)*, which includes having

¹⁸ Official Document N° 000035-1019-VMPCIC/MC enclosing report N° D000178-2019-DDC-CUS/MC

adequate representation and common law or factual issues, which have not been demonstrated in relation to a group, such as the Indigenous People that encompass several regions in Peru other than Cusco¹⁹ and neighboring countries, such as Bolivia and Ecuador.

Likewise, another important aspect for which a specific instance could not be treated as a *class action* is that unlike a judicial process in which a *class action* can work as it is a third party (judge/jury) who evaluates facts and compliance of rules for making a decision, a specific instance seeks for the parties to arrive at consensual agreements and discussions (which are not necessarily limited to compliance with a domestic law), through a non-contentious forum facilitated by the National Contact Point.

87. Regarding FUNDACIÓN LUZ MARINA, which was through whom the specific instance was submitted, the corresponding registry search was carried out in the Registry Advertising System of the National Superintendence of Public Registries; however, no result was obtained on its existence and incorporation in Peru, despite having provided an address in the city of Lima. Being possible to be a foundation established abroad, an online search was conducted²⁰, but no results were obtained on its existence, objectives or interests.
88. Regarding the representative of FUNDACIÓN LUZ MARINA, it has been evidenced from the documentation submitted by the Peruvian construction company, that the father maintains a judicial dispute with the Peruvian construction company, in relation to the ownership of the property at Calle Saphy N° 714, comprised by the claimants in this specific instance and the representative of FUNDACIÓN LUZ MARINA has been acting as his lawyer/legal representative, so there could be a conflict of interest.

❖ **With respect to the MULTINATIONAL ENTERPRISE and Peruvian companies**

89. The MULTINATIONAL ENTERPRISE is a hotel chain company based in the United States of America and in more than one hundred countries.
90. The Peruvian real estate and construction companies were incorporated in 2008 and 1997, respectively. Both companies only have operations nationwide.
91. The Peruvian hotel company is no longer active, according to the report of the National Superintendence of Customs and Tax Administration (Superintendencia Nacional de Aduanas y de Administración Tributaria - SUNAT), which states that it was removed from their registries since August 31, 2015.

❖ **With respect to the issues raised in the specific instance**

92. The claimants have provisioned in their document dated December 18, 2018 that the MULTINATIONAL ENTERPRISE has destroyed a temple (demolition of walls) and ceremonial burial site (desecration of graves) that is the place of their religious practice. This site would be at Calle Saphy N° 386 (before 674), N° 704 and N° 714. They also state that the temple affected would be the Huacapuncu Temple.

In this regard, the NCP PERU has verified the following:

¹⁹ Amazonas, Áncash, Apurímac, Arequipa, Ayacucho, Cajamarca, Cusco, Huancavelica, Huánuco, Ica, Junín, La Libertad, Lambayeque, Lima, Moquegua, Pasco and Puno. In: <https://bdpi.cultura.gob.pe/>

²⁰ https://www.google.com/search?q=%22fundaci%C3%B3n+luz+marina%22&safe=active&rlz=1C1GCEU_enPE819PE820&ei=h8tvXdnICJKu5wL77rqwBg&start=10&sa=N&ved=0ahUKEwiZqNvasbfkAhUS11kKHxU3DmYQ8NMDCH0&biw=1366&bih=657

- The construction of the hotel is at Calle Saphy N° 386 (before 674) - 704 and Calle Don Bosco N° 05, in the city of Cusco and owned by the Peruvian real estate company. The property at Calle Saphy N° 714 is owned by the Peruvian construction company and is not included in the construction project. This has been verified with:
 - Declaration of the parties involved including review of the property registration.
 - The resolutions issued by the Ministry of Culture submitted by the claimants in their different writings do not refer to the property at Calle Saphy N° 714, when they refer to the hotel project construction. It should be noted that a consultation was made to the Ministry of Culture, since among the documentation provided by the claimants, the Report N° [...] -2017-FAP-AFGP-OPP-DDC-CUS/MC dated March 22, 2017 mentioned under "Subject" that an inspection was carried out on the hotel project on Calle Saphy N° 714, and the Decentralized Directorate of the Ministry of Culture in Cusco confirmed that the hotel project does not include the property at Calle Saphy N° 714²¹.
 - Although the claimants point out that in the work notebooks submitted by the Peruvian real estate company, the property at Calle Saphy N° 714 is mentioned, from their revision it has been verified that they indicate that there are lithic elements that are stored in said property, but it cannot be said that this implies that the property is also part of the hotel construction project, especially when there is the corresponding registration information and documentation of the Ministry of Culture that indicates otherwise.
- The existence of a temple or sacred place called Huacapuncu has not been substantiated

As indicated in the request for a specific instance, the claimants stated that the site specifically affected by the MULTINATIONAL ENTERPRISE is the temple "of *Huacapuncu*, a sanctuary that includes a ceremonial burial center where the remains of members of the panaka inka of our father Manco Cápac and the guardians of the paqarinas that connect Scsaywaman were buried." For these purposes they quote the writer known as Inca Garcilaso de la Vega, whose real name was Gómez Suárez de Figueroa:

"the neighborhood called Huacapuncu means the Door of the Sanctuary; because Huaca, as we declared, among many other meanings that it has, means temple or sanctuary. Puncu: it is door: [...] The entrance, Door of the Sanctuary or the Temple was called a door because besides from the neighborhoods dedicated to the Temple of the Sun, and to the house of the chosen virgins, which were their main sanctuaries, they considered all that city as sacred thing..."

It should be noted that the context in which the Huacapuncu neighborhood is mentioned, is when Inca Garcilaso de la Vega describes the division of the city, thus mentioning the following:

"The city was divided into the two parts that at the beginning were mentioned. Hanan Cozco, which is Cozco the high, and Hurin Cozco, which is Cozco the low. They were divided by the path of Antisuyo, which is the one that goes to the east (...). Beyond, to the north of the city, going through the same border, is the neighborhood called Carmenca, proper name, and not of the general language. (...) Returning through the border to the East, then there is the neighborhood called Huacapuncu, which means the Door of the Sanctuary; because huaca, as we declared, among many other meanings that it has, means temple or sanctuary. Puncu is door; they called it that because through that neighborhood enters the stream that passes through the main square of Cozco, and along the stream goes down a very wide and long street, and they both go through the entire city, and a league and a half of it will join the royal

²¹ Official Document N° 000035-1019-VMPCIC/MC enclosing Report N° D000178-2019-DDC-CUS/MC

road of Collaysuyo. They called that entrance Door of the Sanctuary or the Temple because besides from the neighborhoods dedicated to the Temple of the Sun and the houses of the chosen virgins, which were their main sanctuaries, they considered all that city as sacred thing, and it was one of their greatest idols; and for that reason they called this entrance of the stream and of the street, Door of the Sanctuary, and to the exit of the same stream and street they named it Lion's tail (Cola del León), meaning that their city was holy in their laws and vain religion, and a lion in their weapons and militia." (The underline is ours)

In this regard, being Cusco or Cozco the sacred city, this neighborhood that was the entrance to the sacred city of Cusco was called the Door of the Sanctuary or the Temple. It is not infer from this quote that there is a temple or sacred area called Huacapuncu, unlike the references made to the Temple of the Sun by Inca Garcilazo de la Vega.

On the other hand, in the Resolutions issued by the Ministry of Culture through which sanctions are imposed on the Peruvian real estate company, there is no reference to the demolition of a temple or sacred area, only the dismantling of pre-hispanic walls is mentioned.

Similarly, the Ministry of Culture states the following in relation to this neighborhood:

"According to the chronicle information and notarial protocols registered in the Regional Archive of Cusco, we can affirm that in the neighborhood where the aforementioned hotel is, the place of the "Guacapongo neighborhood" or "Guacapuncu neighborhood" has been evidenced, with the following details:

- *The Guacapuncu neighborhood is established on both sides of the Saphi River; whose right bank, located between the streets Tambo de Mortero, Amargura, belonged to the jurisdiction of the parish of San Cristóbal de Colcampata.*
- *At the intersection of Tambo de Montero, Amargura and Saphi streets, in the time of the Incas, the Guacapuncu or door to the sacred city of Cusco was located, which was reached through the Chichaysuyu road.*

In the 16th century, on the left bank of the Saphi River, between, now, Salesianos School and the Saphi River, two important neighborhoods were established: the Chocopata neighborhood (now Salesianos School) and the Guacapuncu neighborhood" around the hotel. (...)

In the 17th, 18th, 19th and 20th centuries, the process of buying and selling land within the Guacapuncu neighborhood was intense. It is also found that after 1720, as a result of a generalized epidemic, these neighborhoods and others were abandoned and many of them became corrals or fields of farms and fruit orchards. Observing the plans of the 17th and 19th century, the existence of these neighborhoods that were crisscrossed by streets was verified, as well as the "plan of the city of Cuzco 1865" made by Emilio Colpaert and the plan of E.G. Squier (1877), where Calle Cuicalle (now Coricalle), crosses Calle Amargura, which is evidence and testimony, of having constituted an urban area."²² (The underline is ours).

On the other hand, the claimants mention the following in their writing of December 18, 2019: "As evidenced by the documents that we attached to this complaint during the demolition of the Huacapuncu temple by [THE MULTINATIONAL ENTERPRISE] the burial of five of our former priests members of the Panaqa of Manco Cápac was desecrated, removing the ceremonial objects from their graves"

In this regard, the documents submitted are Chart N° 35 (Movable Cultural Property Recovered during Archaeological Monitoring Work) of Audit Report N° [...] -2017-CG /

²² Official Document N° 000035-1019-VMPCIC/MC enclosing Report N° D000178-2019-DDC-CUS/MC

EDUC-AC and the Physical Inspection Certificate N° [...] -2016-CG/EDUS-AC-DDCC, carried out by the Comptroller General of the Republic to the Decentralized Directorate of Culture of Cusco regarding the archaeological material delivered by the Peruvian real estate company, within the framework of the work of the Archeological Monitoring Plan of the site at Calle Saphy N° 386 and the Archaeological Assessment Plan of the site at Calle Saphy N° 704.

On these two documents, it should be noted that both agree that bone remains of four individuals were found on the site at Calle Saphy N° 386: (i) 7-year-old child associated to 4 ceramic objects, (ii) an adult of between 24 and 29 years old, male, and associated to 10 ceramic objects, (iii) a 21 to 24 years old adult, female, associated to 7 ceramic objects; and (iv) an adult between 25 and 30 years old, female, without material objects.

This information does not match with what was claimed by the claimants who stated that the tombs of five priests members of the Manco Cápac panaqa would have been desecrated, since only four bone remains are mentioned in the supporting documents. Also, because of their characteristics (child and women) they could not have been priests.

Likewise, the two documents submitted by the claimants state that these recoveries were made within the framework of the work of an Archaeological Monitoring Plan and an Archaeological Assessment Plan, procedures that were regulated at the time by the National Institute of Culture and currently by the Ministry of Culture, so there is no support to qualify these extractions, within the framework of an approved procedure and their subsequent custody by the Ministry of Culture, as of desecration.

Similarly, in order to confirm whether the burials found corresponded to ceremonial burials, the respective consultation was made to the Ministry of Culture, who stated the following:

"Through Regional Directorate Resolution No. [...] / MC-Cusco dated April 11, 2011, the execution of the "Archaeological Monitoring Plan of Property N° 386 Calle Saphy - Cusco" is authorized, and was in charge of the Archeologist Gloria Choque Centeno, and during the removal of land in the above-mentioned property, four funeral bundles are registered, three of them associated and one without any type of association.

The scope of the funeral bundles described in the PMA report is detailed below. The three funeral items found in the excavations correspond to common burials with the following characteristics:

- *Funeral bundles correspond to simple graves dug in the sub soil, without any treatment (...)*
- *The individuals analyzed correspond to:*
 - Funerary bundle 1: sub adult individual between 7 and 9 years old identified in this way by dental eruption, with 70% of the skeleton present and associated with everyday ceramics.*
 - Individuals 2 and 3 correspond to male and female adults whose ages range between 21 and 29 years old, (...) both are with 80% of the skeleton present, the analysis provided important information as these individuals show various pathologies and enthesopathies, (muscle insertions, traces of occupational stress caused by physical activity), which suggests that these individuals performed work related to agriculture, stonework and/or manual labor that demand effort.*

The space where the funerary bundles were located does not have a special treatment that suggests that this place had ceremonial connotations, consequently, due to the characteristics of these burials, they do not correspond to ceremonial funerary bundles.

On the other hand, (...) the lands of the descendants of Manco Capac and Mama Ocllo, by paternal path the ayllu Chima, was in Chimaracay located in the upper part of the population of the parish of San Jerónimo. And by the maternal path the Chima panaca, was in the neighborhood of Wimpillay, Muyuqurco, focused a part of them in the parish of San Sebastián and the other in the parish of Nuestra Señora de Belén. In this way, the referred funerary bundles belonging to the descendants of Manco Capac and Mama Ocllo could not be in the neighborhood of Guacapuncu, because the neighborhood of this family is in San Jerónimo, San Sebastián and Belén. For example, the mortal remains of the Inca Manco Cápac, were found by Mr. Polo de Ondegardo in 1559, in the Wimpillay village, which was the abode of those of Chima Panaca descendants of Mama Ocllo and Manco Cápac (Gamboa 1965 [1572], p25).²³ (The underline is ours)

Additionally, regarding where the residence of Manco Cápac was located, several authors place it in Collcampata or Colcampata, a neighborhood different from Huacapuncu:

"The ethnohistorical information provides data on the various palaces of Cusco and its link with the Inca rulers. This is the case of colcampata, related to Manco Capac; Cora-Cora, to Inca Roca; Cassana, to Huayna Capac; Hatun Cancha, to Tupac Yupanqui; and Amarucancho, to Huascar."²⁴

"The first neighborhood, which was the most important, was called Collcampata: 'collcam' must be the diction of the particular language of the Incas, I don't know what it means; 'pata' means 'platform'; it also means 'staircase', and because the platforms are made in the form of a staircase, they were given this name.

On that platform, Inca Manco Cápac founded his royal house, which was later of Paullu, son of Huayna Cápac. I only got to see a very large and spacious shed, which served as a square, on rainy days, to solemnize its main festivals there; only that shed was standing when I left Cuzco, others like them I left them all down."²⁵

In that sense, the issues raised by the claimants about the desecration of tombs of Inca priests and destruction of a ceremonial burial site, nor the removal of ceremonial objects have been substantiated.

93. The claimants allege that the MULTINATIONAL ENTERPRISE has violated Chapter II of the GUIDELINES, on General Principles, regarding the respect for the international human rights of the affected persons²⁶, implementation of due diligence based on risks, actions that prevent own activities from generating or contributing to generate negative impacts, even in cases where companies have not contributed to them, if they are directly related to their activities, products or services under a business relationship.

On this item, the claimants have emphasized the commercial relationship that would exist between the MULTINATIONAL ENTERPRISE and the companies.²⁷

In this regard, the NCP PERU considers the following:

- The existing commercial relationship between the INITIAL MULTINATIONAL ENTERPRISE/MULTINATIONAL ENTERPRISE and the Peruvian construction company in the hotel project has not been substantiated.

²³ Official Document N° 000035-1019-VMPCIC/MC enclosing Report N° D000178-2019-DDC-CUS/MC

²⁴ Ministry of Culture. 2013. Notebooks of the Qhapac Ñan. Year 1 Number 1. P.14.

²⁵ Inca Garcilaso de la Vega. Comentarios Reales de los Incas. 1609. P. 236.

²⁶ Regarding human rights, this matter will be discussed in item 94.


²⁷ See item 35 of this report.

The claimants stated in their document dated December 18, 2018, that at first the MULTINATIONAL ENTERPRISE entered into a commercial agreement with the Peruvian hotel company and subsequently expanded said commercial relationship with the Peruvian hotel company, the Peruvian real estate company and the Peruvian construction company. However, from the review of the contracts signed with the INITIAL MULTINATIONAL ENTERPRISE, it is noted that the Peruvian construction company did not participate in those agreements. Similarly, it is established that, according to the Usufruct Contract²⁸ between the Peruvian hotel company and the real estate company (owner of the premises where the hotel would be located), the latter will grant the Peruvian hotel company, the hotel with all the thick work and fine work finishes completed, conditioned and furnished and that the Peruvian hotel company as its counterpart will be responsible for the development and construction of the project. That is, in said contractual relationship, the one responsible for the construction is the Peruvian real estate company.

It should be noted that the relationship of the Peruvian construction company is with the Peruvian real estate company, with whom it signed as mentioned in item 69 of this report, a lump sum work contract on September 2, 2013 for the Construction of a hotel on Calle Saphi N° 674 and Calle Don Bosco N° 05 in Cusco, date on which there was still no commercial relationship between THE INITIAL MULTINATIONAL ENTERPRISE and Peruvian hotel and real estate companies.

In that sense, it is not appropriate to consider the Peruvian construction company as a company involved in this specific instance nor the facts that are mentioned related to it, as it is not associated to this specific instance.²⁹

- About the nature of the commercial relationship between the INITIAL MULTINATIONAL ENTERPRISE/MULTINATIONAL ENTERPRISE and the Peruvian hotel and real estate companies



The claimants pointed out that the MULTINATIONAL ENTERPRISE exercises a control relationship for which the Franchise Disclosure Documents registered by the [MULTINATIONAL ENTERPRISE] with the Federal Trade Commission of the United States of America are listed. For example, they mentioned that *"The [MULTINATIONAL ENTERPRISE] has had direct participation in the demolition of the affected site. This is because although the [MULTINATIONAL ENTERPRISE] is not an engineering company, it was the [MULTINATIONAL ENTERPRISE] who delivered the commercial partners the prototype that the hotel should have (...) and it was also who approved the construction plans and who constantly monitored the demolition and construction through its own architects. (...) Moreover, even in cases where the [MULTINATIONAL ENTERPRISE] does not participate as a hotel operator, but only as a franchisor, [THE MULTINATIONAL ENTERPRISE] retains control of the architecture and design plans of the hotel and the commercial relationship does not continue unless these plans are aligned with the policies and standards of [THE MULTINATIONAL ENTERPRISE]"*³⁰

Nevertheless, it has been verified that the commercial relationship is generated by virtue of the Operation Services Contract in which it is the MULTINATIONAL ENTERPRISE that will provide services to the Peruvian hotel company once the Peruvian real state company delivers the hotel to the Peruvian hotel company with all the thick work and fine work finishes completed and furnished. Also, in the case of the advisory contract for the design review, it is specified that the commercial relationship of the MULTINATIONAL

²⁸ This agreement was mentioned within the framework of the contracts signed by the INITIAL MULTINATIONAL ENTERPRISE.

²⁹ It should be noted that item 92 of this report provisions that the property in Calle Saphy N ° 714 owned by the Peruvian construction company is not part of the scope of the hotel project.

³⁰ Section 2.2 of Section G of the specific instance application filed on December 18, 2018.

ENTERPRISE with respect to the Peruvian real estate company is that of an independent contractor.

Thus, in these contracts that have different legal nature from that of a franchise contract - which is a hotel management model with different characteristics- there are clauses in which the responsibilities and obligations of each of the parties are explained in detail and contradict the claims of the claimants. For example, it is established that the development and construction of the Project is the responsibility of the Peruvian hotel company; it is provisioned that the MULTINATIONAL ENTERPRISE is not responsible for reviewing or commenting on designs, plans or specifications, regarding design or its engineering; it is also provisioned that THE MULTINATIONAL ENTERPRISE does not hire any engineer, architect, designer or other professional to provide services, design work, engineering, construction or others in relation to the project; among others.

In that sense, the allegations of the claimants are not substantiated, since they are based on characteristics taken from a franchise agreement that is not applicable to this case and have not submitted additional documentation to support their claims regarding direct participation and control of the MULTINATIONAL ENTERPRISE in the activities mentioned in their specific instance.

On the other hand, it should be taken into account that the INITIAL MULTINATIONAL ENTERPRISE/MULTINATIONAL ENTERPRISE did not carry out commercial operations in the hotel project, since a first required milestone has not been fulfilled so that other obligations of the Peruvian hotel company are triggered until reaching the operation by the MULTINATIONAL ENTERPRISE; and that milestone is the culmination of the construction of the hotel project, since to date this project remains paralyzed, due to the parallel procedures in which administrative and judicial issues are being discussed with the Peruvian real estate company.

94. The claimants indicate that the MULTINATIONAL ENTERPRISE has violated Chapter IV of the GUIDELINES, on human rights, specifically on their right to maintain their culture and religious freedom.

In that sense, they state that by destroying the temple of Huacapuncu the MULTINATIONAL ENTERPRISE has attacked its religious practice; additionally, they stated that the temple of Huacapuncu is a center of ceremonial burials. These two statements were discussed in Item 92 of this report.

Additionally, the claimants describe the practices and rituals of the Andean religiosity in general, which include pilgrimages, ritual ceremonies, dances, among others.

It is worth mentioning that, with Official Letter N° 25-2019/PROINVERSIÓN/DSI of January 9, 2019, claimants were requested to provide more information on the violation of human rights with regard to their religious freedom and freedom of worship, requiring them to indicate what religious practices they were carrying out in the location of the hotel project that have been infringed or prevented by the actions of the MULTINATIONAL ENTERPRISE and Peruvian companies. In the response letter submitted by the claimants on January 24, 2019, they stated that, in that place, payments to the land were made that consist of offerings to the land and the dead buried there, but do not submit additional documentation to verify that. Likewise, it should be noted that the information reviewed shows that the location where the construction of the hotel was developed was a private home.

Likewise, the Ministry of Culture stated the following regarding whether the construction area was or is a place of pilgrimage or religious ceremonies:

"The location of the waka and its function in this part is not known exactly. However, according to the system of ceques and wakas, the sixth waka of the sixth ceque, called "Zapipachan" (Ch. 6.6), was located on the Saphi River, where the Inca used to bathe. Offerings were made, so that the water did not take away the strength of the Inca and did not harm him. Also, at the Situa festivities, or purification or expulsion of diseases, the population went to bathe to purify themselves (Cristobal de Molina, 1575).

In this perspective, Inca Garcilaso de la Vega (1609) also highlights the neighborhood called Guacapuncu, which was the door of the sanctuary. He points out that through the Guacapuncu neighborhood passed a wide street along the channeled river and entered the sacred city of Cusco. According to the documents that have been studied, the Guacapuncu neighborhood was next to the Chocopata neighborhood.

Consequently, the Guacapuncu area, as the entrance gate, was located at the intersection between Calle Amargura, Calle Saphi and Tambo de Montero. Zapicpacchan, located on the Saphi River, was a waka for the Inca bath and for purification.

By the historical references of the 16th century, the current location of the Hotel was made up of a system of terraces that were located from the canalization of the Saphy River and parallel to the Inca Trail. In the middle of these terraces two small streets called Cuicalle (today Coricalli) and the current Calle Tecsecocha were located.

Therefore, and in accordance with the results of the archaeological interventions, it is inferred that the area in which the Hotel in mention is located does not correspond to any pilgrimage or ceremonial space." (The underline is ours)

95. The claimants state that Chapter VII of the GUIDELINES on combating bribery, bribe solicitation and extortion has been violated. On this item, two facts are mentioned:

- Payments made by a business partner of the MULTINATIONAL ENTERPRISE to a public official.

On this item it should be noted that the facts involve the purchase of the land, for which a relative of the claimants' representative claims ownership³¹. On the other hand, no major support is mentioned by which evidence of this payment can be inferred. Additionally, this fact is linked to the Peruvian construction company, which, as established in item 93 of this report, should not be considered as a party involved in this specific instance due to the considerations provisioned therein. In that sense, this issue should not be considered.

- Advantages obtained by the MULTINATIONAL ENTERPRISE by a public official, within the framework of a request for acceptance of the VAT Early Recovery Special Regime.

In this regard, it should be noted that this is a procedure that is regulated in Legislative Decree N° 973, its Regulations approved by Supreme Decree N° 084-2007-EF and its respective amending regulations, which stated that in order for a company, **owner of an investment project** that is in a **preoperative stage**, to recover in advance the Value Added Tax (VAT) for the purchases of goods, services and construction contracts made during that stage for use in the project, the company should sign an Investment Contract with the Peruvian Government, prior compliance with requirements and the procedure mentioned therein.

This financial benefit is granted to the owner of the project, which in this case is the Peruvian real estate company, not to the future operator of the project; since this is a

³¹ According to the notarized letters, annotations in the registry of the property and administrative resolutions issued, annexed to their response.


benefit that only applies during the preoperative stage of the project. Likewise, for the purpose of making effective the return of the VAT, the beneficiary must submit the invoices of the goods, services and construction contracts, which according to the applicable norms are those contained in the Ministerial Resolution (in this case issued by the Ministry of Foreign Trade and Tourism). These invoices must be in the name of the Peruvian real estate company, which is verified by the Peruvian tax administration (SUNAT). Likewise, it has been verified that said application was submitted on July 1, 2013 and the corresponding investment contract was signed on May 16, 2014; before the start of commercial relations with the INITIAL MULTINATIONAL ENTERPRISE/MULTINATIONAL ENTERPRISE.

In that sense, it is not demonstrated how it is that the granting of this financial benefit is an advantage obtained by the MULTINATIONAL ENTERPRISE, nor what is the form of bribery, extortion or corruption found in said procedure.

VI. NCP PERU CONCLUSIONS

96. NCP PERU considers that the specific instance does not merit further assessment because it does not meet all the criteria provisioned in Section 25 of the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, in response to the analysis carried out in Section V of this Report.

In accordance with the provisions of said item, the National Contact Point must determine whether the issue that has been raised merits further consideration. In that sense, it must establish whether the specific instance submitted is in good faith (real and authentic) and if it is related to the GUIDELINES (within the scope of the Guidelines), for which the following criteria must be considered:

- 
- i. The identity of the party concerned and its interest in the matter: This criterion has been developed in items 84 to 91 of this Report in which the identity of the parties involved has been reviewed, referring to the lack of representation of the claimants in relation to the Indigenous People; however, it has been considered that the specific instance has been submitted individually by the three natural persons listed in the document dated December 18, 2018 and the indigenous community incorporated with a document dated January 24, 2019. Regarding their interest in the instance, it was not possible to verify the background, objectives or interests of FUNDACIÓN LUZ MARINA who submitted the specific instance on behalf of the claimants. Finally, it is considered that the Peruvian construction company must be excluded from this specific instance since it has been verified that there is no connection with the facts submitted.
 - ii. If the issue is material and substantiated: Although the issues alleged in the specific instance (human rights, bribery, etc.) relate to the GUIDELINES, it has been noted in the review of the documentation submitted that these aspects have not been adequately supported³², it has even been verified that there have been incorrect and out of context statements in the request for a specific instance, which does not create a conducive environment to a good faith discussion between the parties involved.
 - iii. Whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance: Item 93 of this report mentions that the Peruvian construction company is not involved in this specific instance and does not have a commercial relationship with the MULTINATIONAL ENTERPRISE. On the other hand, it has been verified that there is a commercial relationship between the MULTINATIONAL ENTERPRISE and the Peruvian real estate (project owner) and

³² See Items 92 to 95 of this Report.

hotel (inactive) companies. However, unlike other specific instances in this case the relationship of control or ownership of the project is different, since it does not fall on the MULTINATIONAL ENTERPRISE but on the Peruvian hotel company. Likewise, the MULTINATIONAL ENTERPRISE did not operate the hotel project, so the commercial relationship with the Peruvian company has not had an effective exercise, since the construction of the hotel has been paralyzed for several years. Finally, the activities mentioned in the specific instance regarding the dismantling of pre-Hispanic walls, in accordance with the resolutions issued by the Ministry of Culture submitted by the claimants, would have been committed during the preoperative stage of the project (unfinished construction) by the Peruvian real estate company; issue that is still being elucidated in a parallel judicial process. In that sense, there would be no connection between the facts mentioned in the specific instance and the activities carried out by the MULTINATIONAL ENTERPRISE in relation to the hotel project.

- iv. The relevance of applicable law and procedures, including court rulings and how similar issues have been, or are being, addressed in other domestic or international proceedings: As mentioned in Section IV of this Report, there are parallel instances in which not only the issues mentioned in the specific instance are being discussed, but also the forms of remediation that include one of those raised by the complainants, that is, to stop the hotel project and the demolition of the structure that has been built in contravention with local regulations on archaeological interventions. These parallel instances only involve the Peruvian real estate company.
- v. Whether the consideration of the specific instance would contribute to the purposes and effectiveness of the GUIDELINES: The foreword of the GUIDELINES establish that these are recommendations directed by governments to multinational enterprises. Its objective is that the activities of these enterprises are developed in harmony with public policies; strengthen the mutual trust base between the companies and the societies in which it carries out its activity; contribute to improving the climate for foreign investment and boost contribution from multinational companies to sustainable development. As indicated in criteria iii and iv the issues in the specific instance are raised in relation to the activities carried out by the Peruvian real estate company, which only develops activities locally not qualifying as a multinational enterprise. Likewise, it has also been pointed out that the characteristics of the relationship between the MULTINATIONAL ENTERPRISE and the Peruvian real estate company mean that there is no connection between the MULTINATIONAL ENTERPRISE and the issues raised. Moreover, the remedies requested by the claimants could only be provided by the project owner who is not the MULTINATIONAL ENTERPRISE. In that sense, since we are dealing with a specific instance with issues related to a company that is not multinational, its consideration would not be within the scope of the GUIDELINES.

97. In accordance to Item 7.1.7 of Directive N° 003-2015-PROINVERSIÓN - Attention of Specific Instances related to the Implementation of the OECD Guidelines, the NCP PERU issues this Report detailing the reasons for which it considers that the specific instance does not merit further consideration according to the analysis carried out by the NCP PERU in accordance with the criteria set forth in Section 25 of the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises. Also, according to the same Section, this Initial Assessment Report is written in such a way that the identity of the parties is protected, the Specific Instance will be closed, and this Report published on the NCP PERU Web Page.

98. In accordance with the provisions of paragraph C-4 of the Procedural Guidance of the Implementation of the GUIDELINES, the information and views provided during the proceedings by another party involved will remain confidential, unless that other party

agrees to their disclosure of such information or views or when the non-disclosure is contrary to the provisions established in national legislation.

99. The NCP PERU is grateful for the support provided by the NCP USA throughout the development of this specific instance.

100. Finally, the NCP PERU reiterates its willingness to be a forum for debate and dialogue between the business sector and non-governmental organizations, that seek to resolve specific instances, in accordance with the applicable legislation and the GUIDELINES.



César Martín Peñaranda Luna
NATIONAL CONTACT POINT - PERU