International Centre for Settlement of Investment Disputes
(ICSID)

LUPAKA GOLD CORP.,
Claimant,

v.

REPUBLIC OF PERU,
Respondent.

ICSID Case No. ARB/20/46

Republic of Peru's Reply on Jurisdiction and Rejoinder on Merits

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Arnold&Porter

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GLOSSARY

Term	Description
19 June 2018 Protest	The single day protest at the Invicta Mine on 19 June 2018
2009 EIAd	The Environmental Impact Assessment for the Invicta Project that was approved by the MINEM on 28 December 2009
2010 Feasibility Study	Optimized feasibility study for the Invicta Project by the Lokhorst Group dated 26 July 2010
2012 SRK Report	SRK NI 43-101 Technical Report on Resources for the Invicta Project dated 6 April 2012
2014 CSR Strategy	The Government of Canada's 2014 corporate social responsibility strategy
2014 Mining Plan	Revised mining plan submitted by Lupaka for the Invicta Mine, approved by the MINEM on 11 December 2014
2018 PEA	Preliminary economic assessment of the Invicta Project prepared by SRK Consulting Inc. dated 13 April 2018
26 February 2019 Agreement	Agreement between Invicta and Parán Community representatives signed on 26 February 2019
AAG	Andean American Gold Corp.
ABX	Minera ABX Exploraciones S.A.
Access Road Protest	Civilian blockade on the access road through Lacsanga Community territory leading to the Invicta Mine that began on 14 October 2018
AMinpro	AMinpro Mineral Processing Ltd.

Term	Description
ANA	National Water Authority (*Autoridad Nacional de Agua*)
Barrick	Barrick Gold Corp.
Buenaventura	Compañía de Minas Buenaventura S.A.A.
Canada-Peru CR Toolkit	Community relations toolkit created jointly by the Canadian Embassy in Peru and the MINEM and published in 2018
CEDIMIN	Compañía de Exploraciones, Desarrollo e Inversiones Mineras S.A.C.
CIDA	Canada's International Development Agency
CIL	Customary international law
CIMVAL	Canadian Institute of Mining, Metallurgy, and Petroleum on Valuation of Mineral Properties
Concessions	The following six mining concessions held by Invicta: Victoria Uno, Victoria Dos, Victoria Tres, Victoria Cuatro, Victoria Siete, and Invicta II
Constitution	1993 Political Constitution of the Republic of Peru
CPO	Chief Police Officer
CR Team	Lupaka's Community Relations Team
CSR	Corporate social responsibility

Term	Description
DEAR	Directorate of Environmental Assessment for Natural and Productive Resource Projects
Decentralization Framework Law	Peruvian Law No. 27783, which initiated an ongoing process of decentralizing the central government within Peru
DFAI	Directorate of Inspection and Application of Incentives
DGOP	General Office of Public Order
Dialogue Table(s)	Formal process of negotiation led by government representatives to promote dispute resolution, referred to as "*Mesa de Diálogo*" in Spanish
EIAd	Environmental impact assessment
El Misti	El Misti Gold S.A.C.
Environmental Mining Regulation	Peruvian Supreme Decree No. 040-2014-EM, which provides the definition for the areas of influence of mining activity in Peru
ESEMO	Environmental Supervision for Energy and Mines Office
ESG	Environmental, social, and governance practices
FET	Fair and equitable treatment
FPS	Full protection and security

Term	Description
Frente de Defensa	*Frente de Defensa del Medio Ambiente y Promoción de los Distritos Leoncio Prado, Paccho, Sayán e Ihuarí de las provincias de Huaura y Huaral*
General Mining Law	Peruvian Supreme Decree No. 014-92-EM, which governs all mining activities within Peru
Hochschild	Hochschild Mining PLC
ICJ	International Court of Justice
ICMM	International Council on Mining and Metals
ICMM Good Practice Guide	International Council on Mining and Metals "Good Practice Guide: Indigenous Peoples and Mining," which highlights the specific duties of mining companies in relation to indigenous and rural communities
ILC	International Law Commission
ILC Articles	ILC Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts
ILC Commentary	ILC Commentary on the ILC Articles
ILO Convention 169	International Labor Organization Indigenous and Tribal Peoples Convention, of 1989 (No. 169)
INGEMMET	Mining and Metallurgical Geological Institute
Invicta Mine	The base of activities and infrastructure developed by Lupaka in the Victoria Uno concession

Term	Description
Invicta or IMC	Invicta Mining Corp., a Peruvian subsidiary of Lupaka
Invicta Project or Project	Mining project developed by Invicta located within the bounds of the Victoria Uno concession
ITS	Supporting Technical Report (*Informe Técnico Sustentatorio*)
Lacsanga Community	Rural community of Lacsanga
Lonely Mountain	Lonely Mountain Resources S.A.C.
Lupaka or Claimant	Lupaka Gold Corp.
Mallay Community	Rural community of Mallay
Mallay Plant	Mallay processing plant
MEF	Ministry of Economy and Finance of the Republic of Peru (*Ministerio de Economía y Finanzas de la República del Perú*)
MFN Clause	Treaty Article 804
MINAM	Ministry of the Environment (*Ministerio del Ambiente*)
MINAR	Ministry of Agriculture and Irrigation (*Ministerio de Agricultura y Riego*)
Mine Closure Law	Peruvian law No. 280990, which governs the requirements for mine closure

Term	Description
MINEM	Ministry of Energy and Mines of the Republic of Peru (*Ministerio de Energía y Minas de la República del Perú*)
MINEM Organizational Decree	Peruvian Supreme Decree No. 021-2018-EM OGGS, which implemented dialogue as the key method for conflict management and resolution
MININTER	Ministry of Interior (*Ministerio del Interior*)
MININTER Regulations	Regulations on the Organisation and Functions of the Ministry of the Interior
Ministry of Justice	Ministry of Justice and Human Rights of the Republic of Peru (*Ministerio de Justicia y Derechos Humanos de la República del Perú*)
MST	Minimum standard of treatment
Mutual Release Agreement	Mutual Release Agreement between Claimant and PLI Huaura, wherein PLI Huaura agreed to release Claimant for its liability under the PPF Agreement
OEFA	Organization of Supervision and Environmental Assessment (*Organismo de Evaluación y Fiscalización Ambiental*)
OGGS	General Office of Social Management (*Oficina General de Gestion Social*) within the MINEM
Operational Plan	The Peruvian National Police's plan for the removal of the Access Road Protest in the event forceful intervention became legal and necessary
Osinergmin	The Supervisory Agency for Investment in Energy and Mining (*El Organismo Supervisor de la Inversión en Energía y Minería*)

Term	Description
Pacacorral	Minera Pacacorral S.A.C.
Pandion	Pandion Mine Finance LLC
Pangea	Pangea Peru S.A.
Parán Community	Rural community of Parán
PCM	Presidency of the Council of Ministers (*Presidencia del Consejo de Ministros*)
PEA Mine Plan	Six-year mine plan which is contemplated in the 2018 PEA and which uses a 4.0g/t AuEq cut-off grade
PERCAN	Peru-Canada Cooperation Program (*Proyecto de Reforma del Sector de Recursos Minerales del Perú*)
Pledge Agreement	Agreement between PLI Huaura, Claimant's subsidiary, AAG, Claimant's director, Gordon Ellis, and Invicta wherein AAG and Mr. Ellis pledged their shares in Invicta as security to PLI Huaura for the amounts provided by PLI Huaura to Invicta under the PPF Agreement, dated 2 August 2016
PLI Huaura	PLI Huaura Holdings LP
PNP	Peruvian National Police (*Policía Nacional del Perú*)
PPF Agreement	Pre-Paid Forward Gold Purchase Agreement entered into between Lupaka and PLI Huaura on 30 June 2016 and subsequently amended on 2 August 2017

Term	Description
Prior Consultation Law	Peruvian Law No. 29785, which requires consultation with indigenous and native communities as part of Peru's decision-making process when passing legislation that may directly impact those communities
Protective Measures Directive	Directive No. 0010-2015-ONAGI-DGAP
REINFO	Integral Mining Formalization Registry
Resolution No. 158	Peruvian Resolution No. 158-2021-OEFA-TFA-SE, which sanctioned Invicta for breaching its social obligations with the Rural Communities
Rural Communities	The rural communities within the Invicta Project's area of direct influence—the Santo Domingo de Apache, Lacsanga, and Parán communities
Rural Communities Law	Peruvian Law No. 24656, which details the status and rights of Peruvian rural communities
Rural Communities Regulation	Peruvian Supreme Decree No. 008-91-TR, which outlines Peruvian rural communities' status and rights
Santo Domingo Community	Rural community of Santo Domingo de Apache
Scenario 1	Claimant would have modified its EIAd
Scenario 2	Claimant would have supplemented its EIAd with a new Supporting Technical Report
Self-Defence Committee Regulations	Regulations on the Organisation and Functions of Self-defence Committees of 8 November 1991

Term	Description
SENACE	National Environmental Certification Service for Sustainable Investments
Simco	The Peruvian Ombudsman's Office's conflict management system
Social Management Plan	The portion of an EIAd that establishes the strategies that mining operators will take to avoid, mitigate, or compensate any negative social impacts of its activity, and to maximize the positive social impacts of the mining activity on the project's respective area of direct influence
Social Responsibility Affidavit Law	Peruvian Supreme Decree No. 042-2003-EM, which established a framework that would allow mining companies to manage the environmental and social impacts of their mining project on local communities
SRK	SRK Consulting (Canada) Inc.
SSS	Social Sustainable Solutions
SUNARP	National Superintendence of Public Registries
t/d	Tonnes per day
Third ITS	The third supporting technical report to Invicta's Environmental Impact Assessment submitted by Invicta on 29 August 2018
Treaty	Canada-Peru Free Trade Agreement
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Term	Description
Victoria Uno Concession	The mining concession where the Invicta Mine is located
Vienna Convention	Vienna Convention on the Law of Treaties
Waiver Requirements	Article 823.1(e) of the Treaty
War Dogs	War Dogs Security S.A.C.
Water Authority	Huaura Local Water Authority

I. INTRODUCTION

1. The Reply submitted by Lupaka Gold Corp. ("**Claimant**") has confirmed that Claimant's claims must be rejected. The Republic of Peru ("**Peru**") demonstrated in its Counter-Memorial,[1] and the Reply fails in refuting, that Claimant lost its investment in Peru—i.e., its shares in Invicta Mining Corporation ("**Invicta**")—due to Claimant's own failure to obtain and maintain support from a local rural community in the direct area of influence of the Invicta mine site ("**Invicta Mine**"). Specifically, and as discussed in greater detail below, Claimant grossly mismanaged its relations with the Parán Community. It knowingly marginalized that community and was callously dismissive of its concerns, including in respect of the environmental impact of Claimant's mining project. The Parán Community firmly believed that it had been unfairly treated and manipulated by Claimant: excluded from any of the benefits of exploitation of the Invicta Mine, while at the same time exposed to the brunt of its negative externalities. After enduring Claimant's disdain for years, the Parán Community ultimately resorted to forceful opposition. Such opposition culminated in the blockade of the main access road to the Invicta Mine, in October 2018 ("**Access Road Protest**"). Confronted with this resolute opposition from the local community, and not willing to devote the necessary time or resources to broker a peaceful and lasting resolution of the dispute, Claimant sought a quick fix: it demanded that the State use force against the rural community members. Once Claimant realized that the Peruvian National Police ("**PNP**") was unwilling to use force against the Parán Community *at the time and in the manner demanded by Claimant*, it commenced the present arbitration.

2. The use of force by the State against the Parán Community—in the context of the social conflict concerning the Invicta Mine—lies at the center of Claimant's case. Claimant's claims in this arbitration all rest upon the proposition that the minimum standard of

[1] To avoid burdening this Introduction with too many citations, only a few are provided; however, all assertions herein are supported with evidence and citations later in this submission. Unless otherwise stated, defined terms used in this Rejoinder are the same as those used in Peru's Counter-Memorial.

treatment of aliens ("**MST**") under customary international law ("**CIL**") obligated the Peruvian government to use force against the Parán Community. However, international law requires no such thing, and consequently, Claimant's contention that Peru breached the Canada-Peru Free Trade Agreement ("**Treaty**") because it did not use force against the Parán Community must be rejected.

3. Peru will show in this Reply on Jurisdiction and Rejoinder on Merits that Claimant's claims in this case distort the facts, mischaracterize the relevant legal standards, and disregard basic principles of causation and quantification. Considering the various factual and legal deficiencies in Claimant's case as articulated in the Reply, there are six basic reasons why Claimant's claims should be dismissed.

A. Claimant was responsible for its social conflict with the Parán Community

4. The *first* reason Claimant's claim fails is that the breakdown of Claimant's relationship with the Parán Community, which led to the loss of Claimant's investment, was entirely of Claimant's own making. International law principles, industry standards, and Peruvian law all emphasize the critical importance of obtaining and maintaining the support of local communities before proceeding with a mining project. Such critical need for local community support is crystallized in the concept of the "social license to operate," which requires that a mining company forge with local communities a relationship of trust and acceptance prior to, and during, any mining project. Without a social license, a mining project is doomed to failure. Yet Claimant unabashedly ignores this keystone concept in its submissions in this case, and dismisses Peru's arguments as a "disingenuous 'ESG defence.'"[2] According to Claimant, its obligations were strictly limited to obtaining surface rights agreements with communities on whose land the individual components of its mining infrastructure were located. In Claimant's own words,

> nowhere does Peruvian law require that mining companies must reach an agreement with the communities in the area of direct influence of a mining project to be able to develop it. Although Peru suggests that such a requirement is embodied in

[2] Claimant's Reply, ¶ 33.

> Peruvian law, it is not. **That should be the end of the matter.**[3]
> (Emphasis added)

5. However, that is not the end of the matter. Claimant's narrow and formalistic view, which simply dismisses with a wave of the hand the fundamental concept of a social license in the mining sector, explains—but does not excuse—Claimant's gross and manifest mismanagement of its community relations with the Parán Community. It also confirms that Claimant, far from being the hapless victim that it purports to be, bears primary responsibility for the loss of its investment. In this case, it was especially important to build a strong and lasting relationship with the Parán Community, in addition to the other local rural communities, namely the Lacsanga Community and Santo Domingo Community (together with the Parán Community, the "**Rural Communities**"). Such relationship was important because (i) not long before, all three Rural Communities had been embroiled amongst themselves in a territorial dispute directly pertaining to the area of the Invicta Mine, meaning that any unequal treatment or perceived favoritism of one or another of the Communities could swiftly lead to disharmony; (ii) of the three Rural Communities, the Parán Community's villages were the closest to the Invicta Mine; and (iii) the Parán Community's territory was directly adjacent to, and downhill from, the Invicta Mine, and therefore the most likely to be severely affected by the environmental impact of the mine.

6. Claimant's short-sighted and dismissive attitude to social licensing requirements in this arbitration is consistent with its attitude in its relations with the Parán Community. It was such attitude that caused the social conflict, and ultimately stymied Claimant's project. Claimant outsourced responsibility for its community relations to a third-party provider, Social Sustainable Solutions SAC ("**SSS**"). Together with SSS, Claimant then put in place a grossly inadequate community relations strategy that failed to recognize the need for continuous dialogue and engagement with local communities to address the latter's concerns. The evidence shows that Claimant first delayed engaging with the Parán Community, and when it

[3] Claimant's Reply, ¶ 76.

finally did engage, its actions were inadequate to forge a constructive relationship with that community. For example, while Claimant lauds its contributions to the Parán Community's welfare, on closer inspection such contributions consisted merely of the provision of certain medicines, snacks and refreshments, on three occasions. To make matters worse, Claimant dismissed the Parán Community's *bona fide* environmental concerns. Claimant also prioritized its relationships with other communities in the area of direct influence of the Invicta Mine, and played the Parán Community and Lacsanga Community off against each another in negotiations concerning the access road to the mine. Once it had obtained the access road that it wanted from the Lacsanga Community, Claimant ceased negotiations with the Parán Community. In other words, Claimant strung the Parán Community along, only to cast it aside when it decided that it no longer needed its support.

7. Claimant's community relations failings came to a head when the Parán Community staged a series of protests culminating in the Access Road Protest, in October 2018. At that crucial point, and just when its need to restabilize its community relations was most acute, Claimant allowed its contract with its outsourced community relations provider to lapse. The Peruvian authorities undertook extensive efforts to broker an agreement, and those efforts did in fact yield an agreement between Claimant and the Parán Community to resolve their differences ("**26 February 2019 Agreement**"). Thereafter, however, Claimant proceeded to breach that agreement, and refused to engage in dialogue. Then, in May 2019, Claimant committed the fatal mistake of taking matters into its own hands by unleashing an armed private security firm, War Dogs Securities S.A.C. ("**War Dogs**"), to quash the protest. Such action sparked a violent confrontation with Parán Community members. That move, coupled with Claimant's subsequent refusal to continue with dialogue following the unravelling of the 26 February 2019 Agreement, damaged Claimant's relations with the Parán Community beyond repair.

B. Peru's actions were reasonable and complied with domestic and international law

8. The *second* reason that Claimant's claims should be dismissed is because the evidence shows that Peru behaved diligently, reasonably, and in accordance with its duties under domestic and international law in its actions to mediate a solution to Claimant's social conflict with the Parán Community. Officials from at least eleven agencies of the Peruvian State expended countless hours, and arranged and attended numerous meetings between Claimant and the Parán Community, over the course of many months, in an effort to bring the parties to an amicable resolution. At the time, even Claimant itself praised the actions of the Peruvian authorities, only then to change tack in this arbitration, arguing that the very same actions that it had previously lauded in reality constituted breaches of the Treaty.

9. Claimant's arguments in the Reply can be boiled down to two basic propositions: (i) that dialogue would inevitably fail as a means of resolving the social conflict, and (ii) that therefore the only solution was to use force to dislodge the Parán Community protesters. This marks a continuation of Claimant's attitude at the time of the social conflict, during which it paid lip service to the dialogue process—which was the only real prospect of a sustainable resolution to the social conflict that Claimant had created—whilst at the same time lobbying the PNP and government ministers to persuade them to authorize the use of force to break up the Access Road Protest. The reasons for Claimant's truculent stance are all too apparent. Realizing that it had painted itself into a corner from which it could not extricate itself quickly enough—i.e., in time to begin ore extraction, milling, and delivery—it panicked. It turned to the State, demanding that the PNP solve its problem by forcibly removing the protesters. Once it understood that the State could not and would not resort to force at that stage, it resorted to aggression by dispatching War Dogs to reclaim the Invicta Mine.

10. Claimant's kneejerk reaction that force was the only answer is flatly contradicted by the Peruvian legal framework, which affords the PNP wide discretion to decide whether or not the use of force is appropriate, and which requires a careful balancing exercise. Despite that fact, in the Reply Claimant centers its case on the argument that

Peruvian law *mandated* the use of force to end the Access Road Protest. Claimant is mistaken. Rather, what the Peruvian law framework mandates is that force should only be used in relation to social conflicts in exceptional circumstances, and only once all avenues for a peaceful resolution have been exhausted. The need for such restraint in relation to social conflicts is justified and illustrated by the history of violent clashes between private companies, local communities and the PNP in connection with mining projects in Peru. While Claimant cites some of these examples in support of its argument that force should have been used, it succeeds only in proving the *opposite* proposition: that the use of force leads to an *increased* risk of violence and loss of life and, importantly for the present case, does not serve to propitiate the resolution of social conflicts, because force does not address the root cause of such conflicts. In this case, the PNP acted in full accordance with Peruvian law, and exercised appropriate caution in eschewing the use of force to resolve Claimant's social conflict with the Parán Community. The simple reality is that the use of force was *not* required under the circumstances, particularly since dialogue had already yielded a binding agreement between the two sides (viz., the 26 February 2019 Agreement).

11. A State should not be held liable under international law simply for determining, in conformity with its domestic legislation, that the use of force against a rural community was neither required nor appropriate in the circumstances. Contrary to what Claimant argues, the competent authorities' decision not to use force against the Parán Community did not contradict Peruvian laws and regulations. Nor has Claimant even attempted to argue that the Peruvian laws and regulations that the PNP observed when deciding not to use force in those circumstances are *de jure* an internationally wrongful act. And even if Claimant had established that the PNP, in exercising its wide discretion to decide whether to use force against the rural community, violated domestic law (quod non), that would not, without more, entail State responsibility under international law. Claimant has not demonstrated that the decision not to use force was arbitrary, grossly unfair, unreasonable in the circumstances, or idiosyncratic.

12. Ultimately, all of Peru's actions in this case reflected a careful weighing exercise regarding how to reach a lasting resolution to the social conflict without destabilizing an already fragile and volatile situation, and thereby risking violence and loss of life. The Tribunal should not second-guess that judgment, especially given the history of social conflict between mining companies and local communities—which is not unique to Peru—and the evidence showing that, in this particular case, dialogue was a viable avenue for a lasting resolution, and had indeed resulted in concrete progress in that regard (e.g., the 26 February 2019 Agreement).

13. In any event, none of Claimant's claims come close to meeting the high threshold for establishing a breach of international law. There is no principle under international law that mandates a State's police to use force to resolve a dispute between a private company and private communities that are affected by the company's activities. A State's obligation of due diligence under the full protection and security ("**FPS**") obligation contained in Article 805.1 of the Treaty, which is limited to the MST under CIL, does not encompass the use of force to resolve social conflicts, and even less so in the context of disputes that can likely be resolved through dialogue. The same conclusion applies under the fair and equitable treatment ("**FET**") obligation set forth in Article 805.1 of the Treaty, which is also limited to the MST under CIL. Declining to use force in the circumstances of this case was not arbitrary, grossly unfair, unjust or idiosyncratic—quite to the contrary, it was entirely reasonable and sensible. Nor did Peru's actions completely or nearly completely deprive Claimant of its investment, as is required to meet the standard for expropriation under Article 812 of the Treaty. The reality is that the loss of Claimant's investment was entirely due to Claimant's own actions, and those of its (private sector) creditor when the latter foreclosed on Claimant's shares in Invicta, following numerous contractual defaults by Claimant.

C. The actions of the Parán Community are not attributable to Peru

14. The *third* major failing in Claimant's case is that its attribution arguments are fundamentally flawed. In order to hedge its position in this arbitration, Claimant

makes the far-fetched and baseless assertion that, not only were the actions of the PNP and other government agencies unlawful, but the actions of each of the members of the Parán Community were attributable to Peru under international law and breached the treaty. This argument is contradicted by international investment law jurisprudence and international law principles on the recognition by States of the rights of indigenous and rural communities. As Peru explained in its Counter-Memorial, such argument is also manifestly contrary to Peruvian law, which provides that rural communities are autonomous, are not part of the State, and are not imbued with any governmental authority. Moreover, the relevant actions in this case—which include the forcible entry by Parán Community members into the Mine Site and the blockade of a road—could never conceivably fall within the scope of official authority, either actually or ostensibly.

15. No doubt aware of these inadequacies in its attribution case, in the Reply Claimant invented an entirely new argument, which is that that the Parán Community is a "territorial unit" of Peru. Such allegation does not withstand even the slightest scrutiny, however. Rural communities such as the Parán Community are not territorial units; rather, they are autonomous communities with certain (limited) powers to regulate their own affairs, and they do not form part of the Peruvian State. Claimant also ignores the well-established principle of State responsibility under international law that actions of organs and entities empowered with governmental authority will only be attributable to the State if they are carried out in the exercise of actual or ostensible authority. Claimant dances around that concept, never fully engaging with it. Instead, it invents its own legal standard, untenably arguing that the relevant issue for attribution purposes is the number of individuals carrying out the relevant conduct.[4]

16. Claimant's attribution case is also belied by the fact that not once during its social conflict with the Parán Community did Claimant assert that the members of that Community were representatives of the State or empowered with governmental

[4] Claimant's Reply, § 9.2.3.2.

authority. Nor did Claimant pursue any of the administrative law actions that would have been available for breaches of duty by public officials or agents.

17. Moreover, if accepted, Claimant's argument would set a dangerous precedent. States all over the world—including Peru and many other Latin American States—have achieved significant progress in establishing mechanisms to ensure that the rights of indigenous and rural communities are respected, that their interests are protected, and that economic activity can be undertaken—including by foreign investors—in a way that is respectful of the local communities' territory and customs. Any finding by an investment arbitration tribunal that a State is liable for the actions of a rural or indigenous community could have a ripple effect around the world. Such a ruling could trigger numerous new treaty claims against States whenever, as frequently occurs, tensions arise between foreign private investors and local communities. States' efforts to acknowledge, recognize, and protect the rights of such communities (e.g., by recognizing their autonomy and ancestral rights) would be severely hampered if such efforts were interpreted as vesting rural and indigenous communities with governmental authority, thereby rendering the State directly liable for their actions.

D. Claimant has not established a causal link between Peru's actions and the loss of its investment

18. The *fourth* reason Claimant's claim fails is that Claimant has failed to show any causal link between actions or omissions by Peru and the loss of its investment. Claimant incorrectly assumes that a forcible intervention by the PNP would have prevented future disruptions of Claimant's activities by community protesters. Claimant argues that "[i]f Peru had taken action by reestablishing law and order . . . Lupaka would not have lost its investment."[5] This submission is either naïve or disingenuous. Had the police used force to dismantle the Access Road Protest, this would have done nothing to address the underlying causes of the social conflict—namely, Claimant's inadequate community relations strategy. The most likely outcome following an aggressive intervention by the PNP—as demonstrated by other cases of social conflict

[5] Claimant's Reply, ¶ 42.

in Peru, including those cited by Claimant itself—is that the Parán Community protesters would have simply returned at a later time, and Claimant would have been in exactly the same situation.

19. Fatally for Claimant's case, the evidence on the record also shows that even in the absence of all of the measures and omissions by Peru that Claimant challenges in this arbitration, Claimant would still have forfeited its shares in Invicta to its creditor, PLI Huaura LP ("**PLI Huaura**"), and thus would have lost its investment (irrespective of any actions by Peru). Through its Prepaid Forwarding Agreement ("**PPF Agreement**") with PLI Huaura Holdings LP, Claimant had freely undertaken ambitious delivery obligations to PLI Huaura which could not have been fulfilled, even absent the Access Road Protest. The loss of Claimant's investment therefore cannot be attributed to Peru. As Peru explained in the Counter-Memorial, and as even Claimant itself acknowledges, the Invicta Mine never fulfilled all of the technical requirements to begin commercial exploitation mandated by the Peruvian mining regulations that were in force in October 2018. Specifically:

a. Claimant needed to secure an additional environmental certification for the Invicta Mine to begin commercial exploitation; however, as of October 2018 (i.e., when the Access Road Protest commenced), Claimant had not done so;

b. Claimant also needed new licenses to draw water for use in mining activities;

c. Claimant could not have legally begun to commercially exploit the Invicta Mine until it passed the MINEM's final inspection, and obtained the MINEM's authorization to exploit the Mine. Claimant never did so; and

d. Before it could purchase and use fuel deposits at the Invicta Mine for commercial ore extraction, Claimant also would have needed to have its fuel storage facilities approved by relevant authorities, and would have required registration in the Hydrocarbons Registry. Claimant never obtained the relevant fuel storage authorization, nor did it register in the Hydrocarbons Registry.

20. Furthermore, Claimant lacked the means to process ore itself, and thus needed third-party providers to perform that task. However, Claimant had not succeeded in obtaining reliable services from any mill operator that could handle such work, despite attempting (and failing) to do so with no fewer than *eight* different operators. Despite Claimant's assertion that its chronic failure to secure ore processing services would have been easy to remedy, extensive evidence—including Claimant's own contemporaneous documents—confirms that those problems were not only intractable, but likely insurmountable. Claimant's then-CEO Will Ansley himself acknowledged the significant delays to exploitation that were being caused by the milling issues above, noting that "[a]s a result of milling being significantly behind the mine development [he] suspended all development activities and sent the contractors away."[6]

21. The evidence on the record thus shows that the lack of competent ore processing plants constituted an impediment to Claimant's ability to fulfill its PPF Agreement obligations. Claimant's inability to secure competent ore processing services prevented Claimant from being able to extract and process sufficient ore from the Invicta Mine to meet its repayment obligations under the PPF Agreement. The failure by Claimant to meet those obligations gave PLI Huaura the contractual right to foreclose on Claimant's shares in Invicta—exactly the same outcome that Claimant now asserts was caused by Peru's actions.

E. Claimant relies on irrelevant facts to distract from the failings in its case

22. *Fifth*, in an attempt to divert attention from the many flaws in its case theory, Claimant has raised several issues that are not only fanciful, but also irrelevant to the Tribunal's considerations in this arbitration. For example, Claimant mounts a conspiracy theory that the Parán Community members staged the June 2018 Protest and the Access Road Protest in order to protect a community-wide illegal marijuana business, as, according to Claimant, the Community members were concerned that the mine's activities would lead to increased police presence in the area. Aside from constituting a

[6] **Ex. MI-0007**, Email from Will Ansley to Gordon Ellis, 19 October 2018, p. 2.

reprehensible accusation against an entire population, Claimant's hypothesis is unsupported by the evidence. It is also illogical, as it rests on the implausible premise that the Parán Community mounted a protest, blocked a road, and carried out acts of violence in order to *avoid* police attention. Claimant also advances in the Reply the unfounded theory that the Parán Community mounted the June 2018 Protest and Access Road Protest because it wanted to "steal the mine" for itself.[7] Claimant proclaims in that regard that

> the Respondent does not even address the Claimant's allegations that Parán was mining Invicta for itself – **yet this allegation is central to the Claimant's case** and dispositive of the Respondent's hopeless defence that the Parán Community had legitimate environmental concerns about mining at Invicta.[8] (Emphasis added)

23. The assertion that such allegation is "central to the Claimant's case" is bizarre and contradictory, however, given that Claimant had made only a passing reference to this allegation in its Memorial.[9] It is therefore inconsistent for Claimant now to pretend that this was at the core of its case all along.

24. In any event, (i) there is nothing in the record that would serve to substantiate Claimant's contention that the Parán Community had planned all along to illegally exploit the mine; and (ii) neither Claimant's marijuana theory nor its "steal the mine" theory substantiate the notion that the use of force in relation to the social conflict with the Parán Community was required under the Treaty, and/or that the use of force by Peru would have saved Claimant's investment.

25. Claimant also invokes the fact that in December 2021—well after Claimant had lost its investment—the PNP conducted a raid to close the Invicta Mine. According to Claimant, at that point the mine was being illegally exploited by the Parán Community. However, Claimant neglects to mention that such raid ended in failure,

[7] Claimant's Reply, ¶ 24.

[8] Claimant's Reply, ¶ 33.

[9] Claimant's Memorial, ¶ 5.

following a violent confrontation that led, tragically, to loss of life. Far from supporting Claimant's case, this regrettable incident serves to highlight the serious risks involved with the use of force in conflicts of this kind, and reinforces Peru's rationale for prioritizing dialogue over forceful intervention.

26. Claimant's claims thus fall well short of meeting the high thresholds required to demonstrate that Peru breached the MST under CIL or expropriated Claimant's investment. Moreover, were a State to be found liable for seeking to resolve a social conflict between foreign investors and a rural or indigenous community through peaceful dialogue, this would unduly impair that State's ability to manage social conflicts of this kind. Such conflicts are, by their very nature, sensitive and delicate, and give rise to significant risks including violence and loss of life, as Peru's history unfortunately shows. States would be disincentivized from handling social conflicts with the neutrality, care and restraint required if they were to face liability under international treaties for pursuing resolution to such conflicts through peaceful means.

F. Claimant's damages case is speculative and inaccurate

27. The *sixth and final* reason Claimant's claims must be dismissed is that Claimant's damages claim is riddled with deficiencies. While Claimant reduced the amount of its damages claim in the Reply, it did not resolve certain fundamental methodological and calculation errors identified by Peru in its Counter-Memorial and by AlixPartners in their first expert report. Claimant's counterfactual in the Reply still fails to account for the ongoing effects of Claimant's conflict with the Parán Community and the Access Road Protest, and instead falsely assumes that police intervention would have permanently resolved these issues. Claimant has also failed to factor into its damages analysis any social licensing risk relating to Claimant's community relations—a bizarre omission given the troubled history of Claimant's relations with the Rural Communities. Claimant similarly fails to take into account the fact that, even without the Access Road Protest and even without any of the acts and omissions by Peru that it alleges as Treaty breaches in this arbitration, Claimant still would have defaulted

on the PPF Agreement, and thus would have lost its investment as a result of the forfeiture of its shares pursuant to the provisions of a purely private contract voluntarily entered into by Claimant with its creditor. Peru cannot be faulted for any of that. Finally, Claimant's damages model ignores financing risks and incorrectly assumes that a hypothetical lender to Claimant would have ignored the heightened risks associated with the Invicta Project, such as social license, execution, and regulatory risks.

* * *

28. This Rejoinder is accompanied by the following supporting evidence:

a. The witness statement of **Mr. Fernando Trigoso**, who, starting from April 2012 and throughout the time period relevant to the facts at issue in the case *sub judice*, held various functions in the General Office of Social Management ("**OGGS**") (which is an organ of the MINEM).

b. The witness statement of **Mr. Miguel Incháustegui**, Vice Minister of Mines within the MINEM from April 2018 through May 2019. As Vice Minister of Mines, Mr. Incháustegui was charged, inter alia, with promoting sustainable development as well as evaluating and implementing government policies in the mining sector. Mr. Incháustegui also intervened in the conflict between Claimant and the Parán Community in order to address its concerns about the Invicta Mine and its potential impact on that Community.

c. The witness statement of **Mr. Soymán Román Retuerto**, former Subprefect of the Leoncio Prado region, who informed the relevant authorities about concerns communicated to him by the Parán Community regarding operations at the Invicta Mine, and who requested that the State intervene to commence a Dialogue Table mediation process.

d. The witness statement of **Mr. Nilton León**, a Social Specialist in the OGGS, who facilitated dialogue and mediation efforts between Claimant and the Parán Community starting in July 2018 and extending throughout the conflict.

e. The expert report of **Ms. Miyanou Dufour,** a Peruvian legal expert with extensive experience in mining law, the development of mining projects, and regulatory and environmental compliance. In her expert report, Ms. Dufour analyzes the laws and regulations governing Peru's mining sector, the need for mining operators to obtain a social license to operate, and the various requirements that needed to be fulfilled for the Invicta Project to reach the exploitation stage and for it to process ore into marketable minerals.

f. The expert report of AlixPartners, a financial advisory and global consulting firm, regarding quantum issues ("**AlixPartners Second Report**").

g. 99 factual exhibits, numbered Ex. R-0174 to Ex. R-0273; and

h. 38 legal authorities, numbered RLA-0155 to RLA-0193.

29. The remainder of this Rejoinder is structured as follows:

a. In **Section II**, Peru further describes facts relevant to the dispute;

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

c. In **Section IV**, Peru explains why Claimant's claims fail on the merits;

d. In **Section V**, Peru addresses quantum issues; and

e. In **Section VI**, Peru sets out its request for relief.

II. CLAIMANT HAS MISCHARACTERIZED THE FACTS

A. Claimant was required to gain the support of all three Rural Communities

1. Claimant continues to disregard the "social license to operate"

30. Peru demonstrated in the Counter-Memorial that, as a mine operator, Claimant was required to obtain and maintain support for its project from all of the Rural Communities in the Project's area of direct influence.[10] In this case, Claimant failed to obtain such support, and therefore failed to secure the crucial "social license to operate," which is acknowledged worldwide as a key requirement for mining projects.[11]

31. In the Reply, Claimant has all but ignored this widely accepted and industry-led concept and key obligation. Instead, Claimant relies on a narrow reading of the relevant legal requirements under Peruvian law, arguing that it needed no such license to operate. According to Claimant, because it was not explicitly required under Peruvian law to reach a surface rights agreement with the Parán Community, it did not need an agreement of any kind with that community, or the support of the community more generally.[12] As Peru will further demonstrate below, Claimant's position contravenes not only the spirit of Peru's legal mining framework, but also global industry standards, including those of the International Council on Mining and Metals, and the policies and standards set by Claimant's own home State of Canada for its mining operators. Claimant's position demonstrates an inexcusable lack of understanding of the concept of "social license."

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[10] *See* Peru's Counter-Memorial, §§ II.A.2, II.B.

[11] *See* Peru's Counter-Memorial, §§ II.A.2, II.B.2.b. *See also, e.g.*, **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration: Principles and Guidance Notes, PDAC, 2014; **Ex. R-0085**, Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?, Chatham House, 4 June 2013; **Ex. R-0087**, Social License to Operate in Mining: Current Trends & Toolkit, IBDO, 2020; **Ex. R-0094**, Understanding Company-Community Relations Toolkit, ICMM, 2015; **Ex. R-0086**, Good Practice Guide: Indigenous Communities and Mining, ICMM, 2015.

[12] *See* Claimant's Reply, § 3.2.2.

32. Peru explained in the Counter-Memorial that the concept of the social license entails the need to obtain the acceptance of all relevant local communities and stakeholders before commencing mining activity, due to the significant social and environmental impacts that such activity can have on the local area.[13] Failure to obtain the social license can have crippling effects on the mining activity, since it can generate impediments of various sorts. Such a concept is therefore a key aspect of any mining company's social risk-mitigation strategy.[14] The risks that the social license is intended to mitigate are well-known within the extractive sector globally: community protests, blockades, sit-ins, sabotage, and even violent acts of aggression—none of which are unique to Peru.[15]

33. Peru also explained in the Counter-Memorial that the need for, and costs associated with, obtaining and maintaining a social license have been accepted by the industry and in most jurisdictions as compulsory, and indeed are necessary for a mining operator to ensure a project's longevity and success. Without a social license, a project is guaranteed to face conflict, delays, extra costs, and in the worst case, complete operational failure. Obtaining a social license to operate has thus been the top industry concern worldwide for many years,[16] and a failure to obtain it is considered the biggest risk factor to a mining operation's success.[17] All of the above is well known to any reasonable mining operator.

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[13] Peru's Counter-Memorial, ¶ 55. *See also, e.g.*, **RLA-0005**, R. Boutilier, *et al*., "*Chapter 5: The Social License: The story of the San Cristobal mine*," ROUTLEDGE (2018), pp. 41–42.

[14] Peru's Counter-Memorial, ¶¶ 56–57.

[15] Peru's Counter-Memorial, §§ II.A.2, II.B2.b. *See also, e.g.*, **Ex. R-0028**, Canada-Peru CR Toolkit, p. 71.

[16] Expert Report of Miyanou Dufour von Gordon, 24 January 2023 ("**Dufour Report**"), ¶¶ 11, 271–272.

[17] Peru's Counter-Memorial, §§ II.A.2, II.B2.b. *See also, e.g.*, **Ex. R-0087**, BDO, Social License to Operate in Mining: Current Trends & Toolkit, 2020, p.11 ("[t]he nature of the risks associated with [mining investments] makes social license imperative. . . . In this context, social license is an essential risk management tool. The failure to obtain and maintain social license invariably results in conflict, project delay, and unplanned cost.").

34. Given the foregoing, Claimant's position in this arbitration that Peru is "clutching at straws" by referring to the concept of the social license is both astonishing and emblematic of the type of disregard of basic obligations that led to the loss of its investment.[18] Claimant also seeks to elide the imperative of a social license by claiming that this case is "not about ESG" but rather about the Parán Community's alleged illegitimate opposition.[19] Claimant does this resorting to rhetoric, hyperbole and gross distortions of Peru's arguments.[20]

35. In reality, and as Peru thoroughly explained in the Counter-Memorial, Claimant was (or should have been) aware from the outset about its obligations to secure a social license to operate in Peru. Such awareness should have stemmed from, amongst others, (i) widely known and accepted international industry standards and business practices; (ii) international legal instruments and jurisprudence; and (iii) Peruvian mining regulations and jurisprudence.[21] Claimant largely ignored the arguments in Peru's Counter-Memorial on the foregoing subjects, but rather than repeat such arguments here, Peru will instead herein (i) briefly expand on the subject of the social license as it is currently understood and applied in mining business practices, (ii) summarize the relevant international jurisprudence, and (iii) address Claimant's contentions that Peruvian law does not explicitly require a mining operator to obtain a social license to operate and that Claimant was required to obtain agreement only from the communities on whose land the project would be directly located.

[18] Claimant's Reply, ¶ 75.

[19] Claimant's Reply, ¶¶ 5, 10–11, 33, 119, 210.

[20] *See e.g.*, Claimant's Reply, ¶ 119.

[21] *See* Peru's Counter-Memorial, §II.B.

a. The "social license to operate" is widely recognized in the mining industry

36. Peru explained in the Counter-Memorial that the concept of a social license has been readily and widely accepted in the global mining industry.[22] Peru referred for example to the "Good Practice Guides" and the "Community Relations Toolkits" of the International Council on Mining and Metals ("**ICMM**"),[23] which is the industry's preeminent sustainable development platform.[24] In addition, ICMM has developed guidance on how mining companies can handle and resolve community grievances effectively, and in line with UN Guiding Principles on Business and Human Rights.[25]

37. These documents underpin and give practical effect to ICMM's recognition of the rights of Indigenous Peoples[26] to be invited to grant their free, prior, and informed consent in respect of projects that may affect them.[27] According to ICMM, free, prior, and informed consent comprises a process and an outcome. The process ensures that Indigenous Peoples are meaningfully engaged and have sufficient information about the project and sufficient time to be involved in decisions; they can freely make decisions without coercion, intimidation or manipulation; and are fully informed about the project and its potential impacts and benefits.[28] The outcome is that

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[22] Peru's Counter-Memorial, §§ II.A.2, II.B.2, ¶¶ 56–58. *See* Second Witness Statement of Luis Miguel Incháustegui Zevallos, 12 January 2023 ("**Incháustegui Second Witness Statement**"), ¶ 10.

[23] Peru's Counter-Memorial, ¶ 102; **Ex. R-0086**, Good Practice Guide: Indigenous Communities and Mining, ICMM, 2015; **Ex. R-0094**, Understanding Company-Community Relations Toolkit, ICMM, 2015.

[24] **Ex. R-0174**, "*Who we are,*" ICMM, last accessed 9 December 2022, p. 1 ("ICMM is a unique industry body. . . . we are a global leadership organisation for sustainable development, judging success by our contribution to creating a safe, just and sustainable world through responsibly produced metals and minerals.").

[25] **Ex. R-0175**, Handling and Resolving Local-Level Concerns and Grievances, ICMM, 2019.

[26] The ICMM notes that the term "Indigenous Peoples" also refers to First Peoples, Aboriginal Peoples, or Native Peoples. *See* **Ex. R-0176**, "*Respect Indigenous Peoples*," ICMM, last accessed 9 December 2022, p. 1.

[27] *See* **Ex. R-0176**, "*Respect Indigenous Peoples*," ICMM, last accessed 9 December 2022, p. 1.

[28] **Ex. R-0086**, Good Practice Guide: Indigenous Communities and Mining, ICMM, 2015, pp. 28–29.

Indigenous Peoples can give or withhold their consent based on good faith negotiation.[29] Negotiated agreements provide a practical means through which a community's consent for a project can be formalized and documented.[30]

38. Importantly, ICMM's position is that mining operators must recognize and apply principles of free, prior, and informed consent "irrespective of local context or where there may be no recognition of indigeneity"[31] for those rights. Thus, the ICMM's position is that the obligation to obtain the social license still applies where the community in question—here, the Parán Community—has a "distinct social, economic and political system," has "a strong link to the land and surrounding natural resources and are resolved to maintain and develop their environments and systems as distinct peoples."[32] This means that even if Peru did not formally recognize the Parán Community as an indigenous community under its domestic definition of that term, Claimant still would have needed to obtain the Parán Community's consent to Claimant's mining project.

39. The mining industry also recognizes that the concept of consent and the social license encompasses more than simply reaching one-time, discrete agreements with local communities.[33] Even though an agreement executed at a particular point in time may purport to establish a collaborative relationship, the local community's consent—i.e., *social acceptability* by stakeholders in the project—must be maintained continuously. Maintaining a social license to operate is therefore an ongoing and dynamic aspect of any mining project.

40. In addition, any reasonable and responsible mining operator knows that obtaining and maintaining the social license inevitably requires more from the mining company

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[29] **Ex. R-0086**, Good Practice Guide: Indigenous Communities and Mining, ICMM, 2015, p. 29.

[30] **Ex. R-0086**, Good Practice Guide: Indigenous Communities and Mining, ICMM, 2015, p. 29.

[31] **Ex. R-0192**, "*Indigenous Peoples and Human Rights*," ICMM, last accessed 12 December 2022, p. 1.

[32] **Ex. R-0176**, "*Respect Indigenous Peoples*," ICMM, last accessed 9 December 2022, p. 1.

[33] Peru's Counter-Memorial, § II.A.2; *see generally*, **Ex. R-0087**, BDO, Social License to Operate in Mining: Current Trends & Toolkit, 2020.

than simply complying with the bare minimum of regulatory requirements.[34] Strict regulatory compliance alone will not *ipso facto* be viewed by local communities as conferring on the mining company a legitimate right to operate, or as rendering the project socially acceptable.[35]

41. This responsible business approach vis-à-vis local communities is not confined to the mining industry, but applies to other industries as well. One illustrative example, from the paper and pulp industry, is a study by academic researchers on law and compliance, who observed that companies operating in that industry routinely adopted measures beyond the minimal regulatory requirements, precisely as a means to overcome potential social conflicts.[36] For instance, when local communities complained of nuisances that were not subject to regulatory licenses (e.g., odors and effluents from the plants), paper mills responded in a collaborative manner by investing in technology to stop the nuisances. Instead of arguing with the local communities about the extent of the environmental impact, or insisting that they were not obliged by law to take any remedial action, the mill operators recognized that the cost of investing in technology as a "beyond compliance" measure was vastly outweighed by the need to avoid social conflict and achieve social acceptability for their paper mills.

42. This example serves to illustrate that responsible companies recognize that they may need to make extra efforts, beyond compliance with the minimum legal obligations, are more likely to obtain a social license. The inverse is also true: companies that do not accept the importance of taking "beyond compliance" measures—such as

[34] Second Witness Statement of Andrés Fernando Trigoso Alca, 17 January 2023 ("**Trigoso Second Witness Statement**"), § II.B.

[35] **Ex. R-0177**, Luis Felipe Huertas Del Pino, "*Mineral Law and Policy: Structuring A Social License: An Oxymoron?*," CENTRE FOR ENERGY, PETROLEUM AND MINERAL LAW AND POLICY ANNUAL REVIEW, 2005, p. 7.

[36] **Ex. R-0178**, Neil Gunningham, *et al.*, "*Social License and Environmental Protection: Why Businesses Go Beyond Compliance*," CENTRE FOR ANALYSIS OF RISK AND REGULATION, 1992.

Claimant—typically fail to discharge their broader social obligations, and thus risk conflict with a frustrated community.

43. Experienced companies also know that a social license to operate is intimately tied to the "reputation capital" that a company gains from nurturing a positive relationship with communities.[37] Reputation capital requires a consistent investment of time and resources. Particularly in situations where a project has seen multiple ownership changes and unfulfilled promises by prior owners—as is the case here with *four* prior owners of the Invicta Project—a new owner (in this case Claimant, which was the *fifth* owner), has to be prepared to invest significantly to reverse and overcome any lingering lack of trust, in order to rehabilitate the negative reputational capital accrued by the project's previous owners. Companies that give short shrift to this important component of the social license will find their projects at risk by the deterioration of relationships with affected communities. As Peru will explain in **Section II.B**, Claimant disregarded the need to rehabilitate the Invicta Project's reputation capital in this case, which contributed to the failure of the project.

44. Further, experienced companies know that they cannot simply "buy" their way into a social license. Companies that view their relationship with local communities as purely transactional or expedient, as Claimant did in this case, often fail to build the trust that is needed for sustained social acceptance of the project. As Peru will explain in **Section II.B.2**, Claimant's approach was instead to content itself with repaying the monetary debt to the Parán Community of the prior owner, to make nominal donations to the community, and to display an arrogant sense of entitlement to an agreement with the Parán Community.

45. Importantly, a social license is not concerned merely with obtaining social acceptability from communities with whom a company must obtain surface rights agreements; rather, it encompasses all communities that are within the area of impact

[37] **Ex. R-0177**, Luis Felipe Huertas Del Pino, "*Mineral Law and Policy: Structuring A Social License: An Oxymoron?*," CENTRE FOR ENERGY, PETROLEUM AND MINERAL LAW AND POLICY ANNUAL REVIEW, 2005, pp. 7–8.

of the project.[38] As will be explained further in **Section II.A.2**, Claimant's decision to excise the Parán Community from the equation by redrawing the lines of the Project, in an obvious attempt to avoid any social obligations to this community, was ill-advised and predictably attracted conflict.

46. It is the company (here, Claimant), and not the host State, that is responsible for managing the social relationship with the local communities, in order to obtain the social license.[39] Claimant's investment may have been the target of backlash and opposition from the Parán Community (both peaceful and, at times, regrettably violent). However, Claimant's imperiousness and outraged victimhood in this arbitration attempts to obscure the fact that it is Claimant—and *not* Peru—that must bear responsibility for the deficient and destructive way in which Claimant managed its social relationship with that local community. Claimant ignored the importance of obtaining a social license at its own peril, and lost its investment as a result.[40]

b. <u>The requirement for a social license to operate is reflected in international law principles and international investment law jurisprudence</u>

47. As Peru explained in the Counter-Memorial, international law principles—such as those contained in the International Convention No. 169 of the International Labor Organization ("**ILO Convention 169**")[41] and the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**")[42]—affirm the right of both indigenous and tribal peoples to consultation, and free, prior, and informed consent with respect to

[38] Peru's Counter-Memorial, ¶ 9. *See also* **Ex. R-0175**, Handling and Resolving Local-Level Concerns and Grievances, ICMM, 2019, p. 7 (ICMM defines a "stakeholder" as "any individual who may be influenced by or can influence a company's activities.").

[39] Incháustegui Second Witness Statement, ¶ 11.

[40] For the reasons explained in Section II.D, Claimant would have breached its obligations under the PPF Agreement, and thus forfeited its shares, due to Claimant's own conduct, even absent opposition from the local community.

[41] Peru ratified the ILO Convention 169 in 1994. *See* Peru's Counter-Memorial, ¶ 53, § II.B.2.a.

[42] *See* Peru's Counter-Memorial, § II.B.2.a.

any projects that may have an impact on the territories that they inhabit.[43] Peru also highlighted that such rights are recognized regardless of whether or not a given project is actually *on* the indigenous people's territory, because the rights relate not solely to the physical effects of economic activity on the relevant community's actual land, but also to the overall *impact* of such activity on the community's well-being. This distinction is a critical one that Claimant either ignores or is hoping the Tribunal will overlook.[44]

48. Claimant attempts to dismiss the above-referenced instruments as inapplicable because, it argues, the Parán Community does not meet Peru's domestic legal definition of "indigenous community."[45] However, Claimant is mistaken for several reasons. *First*, rural communities (such as, here, the Parán Community) are analogous to "indigenous" or "tribal peoples" under international law.[46] *Second*, although Peruvian law distinguishes between native ("indigenous") peoples from the Amazon and rural communities from the Andes, Peru has recognized both rural and native communities as communities with many of the same protected rights, and that both may fall within the ambit of "indigenous peoples" under the ILO Convention 169.[47]

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[43] *See e.g.*, **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989 ("**ILO Convention 169**"), Art. 7.1 ("The peoples concerned shall have the **right to decide their own priorities** for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation of plans and programmes for national and regional development which may affect them directly." (emphasis added)); *see e.g.*, **RLA-0030**, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007 ("**UNDRIP**"), Art. 32.2 ("[the government] shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral**, water or other **resources**." (emphasis added)).

[44] Peru's Counter-Memorial, ¶ 97.

[45] Claimant's Reply, ¶ 435.

[46] Peru's Counter-Memorial, ¶¶ 87–89.

[47] **Ex. R-0151**, Law No. 29785, 6 September 2011, Art. 7 ("Rural or Andean communities and native communities or Amazonian peoples may also be identified as indigenous or original peoples, in

Third, associations like the ICMM recognize that such rights apply in a variety of contexts, regardless of whether the State formally recognizes a community as "indigenous."[48] Accordingly, government-controlled registries listing State-recognized "indigenous" communities are not definitive authorities on the international legal status of any community—including the Parán Community in Peru.

49. Moreover, the ILO Convention 169 is applicable, by virtue of ICSID Convention Article 42(1), and therefore must be taken into account.[49] Article 837 of the FTA, on Governing Law, provides that the Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[50] ILO Convention 169 is a rule of international law applicable to Peru. Therefore, the Tribunal is entitled to take the ILO Convention into account, in particular Article 15 thereof, on consultation requirements, in determining whether the Claimant appropriately carried out its obligation to address the concerns of the Parán Community.

50. Indeed, Peru's Supreme Court's Plenary Resolution No. 1-2009/CJ-116 has expressly confirmed that the ILO Convention 169 applies to legal questions concerning the rural communities of Peru. It did so in the context of its assessment of

> the criminal legal relevance of the different crimes charged against the members of the *Rondas Campesinas* or *Comunales* . . . in relation to . . . the Constitution **and the Convention number 169 of the International Labour Organisation 'concerning indigenous and tribal peoples** in independent countries', of 27

accordance with the criteria set forth in this article. The names used to designate indigenous or original peoples do not alter their nature or their collective rights.").

[48] **Ex. R-0192**, "*Indigenous Peoples and Human Rights*," ICMM, last accessed 12 December 2022, p. 1.

[49] *See* Dissenting opinion of Professor Phillipe Sands, ¶¶ 7, 11 in **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands).

[50] **RLA-0010**, Peru-Canada Free Trade Agreement, 29 May 2008 ("**Treaty**"), Art. 837.

> June 1989, approved by Legislative Resolution number 26253, of 5 December 1993 . . . .[51] (Emphasis added)

51. The concept of social license has also been explicitly recognized by international investment tribunals, including in the recent case of *Bear Creek v. Peru*, which (like the present one) was a mining case, and (like the present one) involved claims asserted under the Treaty. Specifically, the tribunal in *Bear Creek* emphasized that

> [e]ven though the concept of 'social license' is not clearly defined in international law, **all relevant international instruments are clear that consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities**.[52] (Emphasis added)

52. In contrast to Claimant in this case, the claimant in *Bear Creek* expressly recognized that "social support is fundamental to the successful execution of a mining project," and accordingly "devoted considerable efforts and resources toward forging a respectful relationship with local communities and exceeded government requirements."[53] Claimant here did the opposite.

53. Claimant's main argument is that because Peruvian law does not *explicitly* refer to a mining operator's obligation to obtain a 'social license,' Claimant did not contravene any of its obligations under Peruvian law. However, the *Bear Creek* tribunal did not question the *existence* of the obligation of a company (under Peruvian law or otherwise) to obtain a social license, but rather asked the parties to identify the *specific actions* that Peruvian law required of Claimant *to obtain a social license*.

54. According to Claimant, the *Bear Creek* tribunal "specifically confirmed . . . that a mining company is not required under Peruvian law to enter into an agreement with a neighboring rural community when **no** mining activities will take place on its

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[51] **Ex. C-0599**, Supreme Court, Plenary Resolution No. 1-2009/CJ-116, 3 November 2009, ¶ 3.

[52] **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 406.

[53] **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 242.

land."[54] However, contrary to Claimant's assertion, the *Bear Creek* tribunal made no such declaration in the paragraph cited by Claimant—or indeed in any other part of its award.

55. Claimant also argues in the Reply that the *Bear Creek* tribunal "stated in no uncertain terms that nearby 'communities [do not have] veto power over a project' under Peruvian law."[55] Claimant again mischaracterizes the legal authority that it cites; the tribunal in that case stated no such thing. What Claimant misleadingly puts forth as the tribunal's finding in that case is actually a summary, by the tribunal, of the *claimant's* arguments (and not an articulation of the views of the tribunal).[56]

56. In any event, Peru has never argued that nearby communities have veto power over a project. What Peru does argue is that failure to obtain a social license, including from communities in the area of influence, can and often does frustrate the development of a mining project. The partially dissenting opinion of Professor Phillipe Sands in the *Bear Creek* case illustrates the importance of obtaining a social license and the impact that it had in that case:

> Claimant's acts and omissions, in the period before 2008, during 2008, thereafter, and right up until May 2011, contributed in material ways to the events that unfolded and then led to the Project's collapse. In particular, **the Project collapsed because of the investor's inability to obtain a "social license**", the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it, whether directly or indirectly. **It is blindingly obvious that the viability and success of a project such as this, located in the community of the Aymara peoples, a group of interconnected communities, was necessarily dependent on local support.** . . . If nothing else, the absence of transparency at that early stage of the Project can only have contributed to an undermining of the conditions necessary to build trust over the longer term. The

[54] Claimant's Reply, ¶ 690.

[55] Claimant's Reply, ¶ 690 (*citing* **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 241).

[56] *See* **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 241 (in the context of "Claimant's Response to Amici Submission and Tribunal's Question (a)," ¶¶ 231–250).

> discontent that followed, expressed by many members of the affected local communities, was foreseeable. (Emphasis added)

57. In addition to *Bear Creek*, the issue of a social license (or lack thereof) has been raised in other investment arbitrations. For example, in *Copper Mesa v. Ecuador*, the tribunal took into account the claimant's involvement in the social conflict with the local communities.[57] And in *South America Silver v. Bolivia*, the tribunal similarly addressed the social conflict that impacted the mining project (albeit without explicitly using the term "social license"). The tribunal found that it was precisely to deal with the social conflict that Bolivia had adopted the challenged measure. As a result, the tribunal was satisfied that the measure was neither unnecessary nor disproportionate. Furthermore, the tribunal considered that the claimant had not demonstrated that the measures that claimant itself had adopted to address the conflict would have been sufficient to solve the problem, stating that:

> On the contrary, the strategy [claimant] adopted as of 2011, as already mentioned by the Tribunal, appear[ed] to have contributed to the escalation of the conflict and ultimate acts of violence.[58]

58. In the following section, Peru will demonstrate that the general obligation of obtaining a social license is inherent in a variety of specific legal obligations that make up Peru's mining law framework, and is reflected in the stated objectives of such framework.

c. The explicit terms and stated objectives of various provisions of Peru's mining law framework reflect the obligation to obtain a social license to operate

59. The fact that Peru's mining law framework requires mining companies to obtain a social license is reflected in a variety of specific regulations.[59] Claimant, however, has ignored this requirement, and instead adopts an unduly narrow view of community

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[57] **CLA-0031**, *Copper Mesa Mining Corporation v. Republic of Ecuador,* PCA Case No. 2012-2, Award, 15 March 2016 (Cremades, Simma, Veeder).

[58] **CLA-0097**, *South American Silver Ltd v. Plurinational State of Bolivia,* UNCITRAL, PCA Case No. 2013-15, Award, 22 November 2018 (Jaramillo, Vicuña, Guglielmino), ¶ 563.

[59] Peru's Counter-Memorial, § II.B.1.b.

engagement, arguing that Peruvian law only explicitly required Claimant to execute a surface rights agreement with communities on whose territory it would be carrying out extraction activities.[60] Accordingly, Claimant treated the specific physical coordinates of its mine infrastructure as the only relevant factor in determining which legal requirements it needed to comply with in relation to local communities.[61] Convinced that the infrastructure of the Invicta mining project was not located in the territory of the Parán Community, Claimant concluded that it was not required to obtain that Community's approval of the project. For the reasons explained below, Claimant was mistaken.

60. *First*, under Peruvian law, titleholders to a mining concession are required to conform with social commitments and obligations vis-à-vis the local communities identified within the "area of direct social impact," which is defined by Supreme Decree No. 042-2003-EM to "includ[e] the population and/or geographic area that is affected directly by the socio-environmental impacts of mining activity."[62] Such areas encompass those of communities that may not have surface rights in the specific territory where the project will be located.[63] The social components of the mining framework that applies to all local communities in the area of influence include: (i) a community relations program; (ii) a social agreement plan; (iii) a community development plan; (iv) a social investment schedule; and (v) a social impact and monitoring schedule. Together, these plans form a mining company's "Social Management Plan," which is designed to help a mining operator adopt measures to "avoid the negative social impacts and optimize the positive social impacts of the

[60] Claimant bases its position on **Ex. C-0228**, Supreme Decree No. 018-92-EM, MINEM, 17 January 2019 ("**Mining Procedures Regulation**"), Art. 23. *See* Claimant's Reply, § 3.2.2, ¶ 688.

[61] Claimant's Reply, ¶¶ 77–80.

[62] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 4.1.2. *See* Trigoso Second Witness Statement, § II.A; Incháustegui Second Witness Statement, § II.

[63] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 4 (defining the different areas of the project's influence). *See also* Expert Report of Daniel Vela Rengifo, 22 March 2022 ("**Vela Report**"), § III.A.1.

mining project."[64] This was explained in more detail in Peru's Counter-Memorial and in the Witness Statement of OGGS official, Mr. Trigoso.[65]

61. Claimant concedes that because the Parán Community was in the area of direct social impact,[66] Claimant was required as a matter of law to include the Parán Community in its detailed plans.[67] In **Section II.B**, Peru demonstrates that Claimant treated its compliance with these obligations not as an opportunity to build a long-term relationship with the Parán Community, but rather merely as regulatory check boxes to be ticked off.

62. *Second*, pursuant to Supreme Decree No. 042-2003-EM, mining companies are expected to establish harmonious and collaborative relationships with rural communities for their mutual benefit.[68] Claimant denies that these regulations establish what it disparagingly calls an "open-textured, ill-defined obligation" to "'establish and maintain amicable relations' with nearby communities."[69] Contrary to what Claimant argues, Peruvian regulations require mining operators to sign a sworn affidavit containing several pledges to the State regarding the *specific actions* that the operator will take to foster good relations with local communities "within the area of influence of mining activity."[70] The titleholder of a concession pledges to take, for example, the following concrete actions:

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[64] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 53 ("The Social Management Plan included in the environmental study establishes the strategies, programs, projects and measures for managing social impact that must be adopted in order to prevent, mitigate, control, offset or avoid the negative social impacts and optimize the positive social impacts of the mining project in its respective areas of social impact.").

[65] Witness Statement of Andrés Fernando Trigoso Alca, 11 March 2022 ("**Trigoso First Witness Statement**"), § III .

[66] Claimant's Reply, ¶ 51.

[67] Claimant's Reply, ¶ 76.

[68] **Ex. R-0098**, Supreme Decree No. 042-2003-EM, 12 December 2003 ("**Social Responsibility Affidavit Law**"), Art. 1.

[69] Claimant's Reply, ¶ 940.

[70] **Ex. R-0098**, Social Responsibility Affidavit Law.

a. "Promote actions that strengthen trust . . . through the establishment and validity of participatory processes and favouring the prevention and management of conflicts and the use of alternative conflict resolution mechanisms."

b. "Maintain an ongoing and timely dialogue with regional and local authorities, the population of the area of influence of the mining activity and its representative organisms, under an intercultural approach, by providing them with transparent, timely and accessible information about the mining activities . . . in accordance with applicable citizen participation rules . . . ."

c. "Comply with the social commitments assumed in agreements, minutes, contracts and environmental studies . . . ."

d. "Conduct mining activities within the framework of the State's environmental policy, in its interdependence with the social environment . . . ."

e. "Contribute to the sustainable development of the population located in the area of influence of mining activity . . . ."

f. "Contribute to local and/or regional economic development through the preferential acquisition of local and/or regional goods and services . . . ."

g. "[E]ncourage the hiring of local personnel . . . ."[71]

63. In **Section II.B**, Peru demonstrates that Claimant did not sufficiently reach out to the Parán Community in a manner consistent with its commitments under the mining company's sworn statement. Peru will also recall that Claimant's failings in this regard resulted in the initiation by the Organization of Supervision and Environmental Assessment ("**OEFA**") of formal investigations for Claimant's failures to meet its social obligations with respect to all three Rural Communities. Claimant should have done more.

[71] **Ex. R-0098**, Social Responsibility Affidavit Law, Art. 1.

64. *Third*, Peru explained that mining companies are also required by Peruvian law to engage the local community through a process of "**Citizen Participation**" (*Participación Ciudadana*).[72] Claimant also accepts that this was another obligation encompassing the right to be consulted, which it had to fulfill with respect to the Parán Community.[73] **Section II.B.2** below demonstrates that Claimant failed to adequately engage the Parán Community in such a process. Characteristically of Claimant, it claims the Parán Community was not interested in participating, instead of taking responsibility for the poor quality and deficiencies of its own outreach efforts.

65. The above shows that the obligations of titleholders of mining concessions are not limited to reaching social agreements with communities with respect to which surface rights are needed for mining infrastructure.[74] Rather, the framework requires mining companies to commit to fostering long-term relationships with *all* local communities "located within the area of influence of mining activity."[75] For practical purposes, such

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[72] Peru's Counter-Memorial, ¶ 82; **Ex. R-0007**, Supreme Decree No. 028-2008-EM, 26 May 2008, Art. 14 ("The execution of mining activities and/or mining operations assumes the execution of citizen participation mechanisms prior to preparation of the environmental studies, during the preparation thereof and during the assessment procedure carried out by the competent authority."); **Ex. R-0007**, Supreme Decree No. 028-2008-EM, 26 May 2008, Art. 15 ("The Citizen Participation Plan shall also contain proposed citizen participation mechanisms to be developed during execution of the mining project, which shall be assessed by the authority together with the environmental study and in accordance with the Community Relations Plan.").

[73] Claimant's Reply ¶¶ 692–695.

[74] Claimant bases its position on **Ex. C-0228**, Mining Procedures Regulation, Art. 23, which requires that mining companies ("[o]btain permission for the use of land by prior agreement with the owner of the terrain or the completion of the administrative easement procedure, in accordance with the regulations on the matter.").

[75] **Ex. R-0098**, Social Responsibility Affidavit Law, Art. 1.3 ("Maintain an ongoing and appropriate dialogue with the regional and local authorities, the **population in the area of influence** of the mining operations and their representative bodies, providing them with information on their mining activities." (emphasis added)); **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 60.1; *see also id.*, Art. 57.9 ("The project holders must implement mechanisms and processes for citizen participation involving the **populations located in the area of influence of the project**." (emphasis added)); *id.*, Art. 60.1; *see also id.*, Art. 57.5 ("Preferably promote the hiring of local staff to carry out mining or related work, according to the holder's requirements in the various stages of the mining project and favoring the search for agreement **with the population in the area of direct social impact** and, whenever possible, providing the necessary

relationships are best memorialized in agreements between the mining company and the local community, setting out the parties' respective rights and commitments. Claimant, however, found it more expedient to marginalize the Parán Community and reach agreement only with the Lacsanga and Santo Domingo Communities. That expediency had fatal repercussions.

66. The critical importance of obtaining and maintaining a social license for the development of mining activities in Peru is further elaborated in the expert report of Ms. Dufour, a Peruvian legal expert with extensive experience in mining law, the development of mining projects, and regulatory and environmental compliance.[76] Ms. Dufour explains the following in her expert report:

a. A social license to operate is not a simple one-time certification; rather, it involves a continuous and dynamic relationship between the company and the community.[77] This is why "continuous dialogue"[78] and "citizen participation"[79] are key obligations of mining operators under Peru's mining law framework.

b. A social license to operate is not granted by the State, but rather by the community itself (in the form of non-objection to the project and related activities). The State cannot impose or demand acceptability from a rural community, as acceptability is a function of normative components that include a company's legitimacy, credibility and trust vis-à-vis the local

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opportunities for training, retraining and the development of initiatives." (emphasis added)); *id.*, Art. 57.7 ("Maintain an ongoing, appropriate and transparent dialogue with the regional and local authorities and **with the populations in the area of influence of the mining project**, from an intercultural perspective, providing them with adequate, appropriate and accessible information on their mining activities in a suitable language through the means of communication prevailing in the area. This is in order to facilitate an exchange of opinions and suggestions with the participation of the main parties involved, in accordance with the rules on citizen participation in force." (emphasis added)); Vela Report, ¶ 85.

[76] Dufour Report, ¶¶ 4–6.

[77] Dufour Report, ¶¶ 265–266.

[78] Dufour Report, ¶¶ 294(v), 296, 299, 319.

[79] Dufour Report, ¶¶ 12, 28, 109, 215, 281–282.

community. These notions elude codification and cannot be mandated.[80] Thus, features of the Social Management Plan and a mining company's commitment—contained in its sworn statement—to maintain "continuous dialogue" and "citizen participation" are designed to facilitate the attainment of such objectives (legitimacy, credibility and trust), with the ultimate goal of securing a social license to operate.

c. Whereas regulatory licenses are based on objective conditions, acceptability via a social license to operate is based on subjective perceptions from the local community. Recognizing the special nature of the social license, Peru's normative legal framework is not prescriptive, and instead leaves ample room for mining companies to design, in consultation with the communities, an effective Social Management Plan. Companies under this framework ultimately decide how they will contribute to the socio-economic conditions of the local communities, and what social commitments they will undertake at any given time. While Peruvian law sets the baseline requirement of compiling a social management plan for the State's approval, the State cannot certify—as it may do in respect of compliance with technical prerequisites—that a mining company has obtained a social license.[81]

d. An attempt to regulate a social license more prescriptively—as Claimant seems to suggest would be necessary for that requirement to be legally cognizable—would be inimical to the very nature of the social license.[82]

67. For all of the foregoing reasons, Claimant's contention that an agreement with the Parán Community was neither required nor necessary under Peruvian law lacks merit. It is hardly surprising, given Claimant's contemptuous disregard for the concept of social license, that it was unable to bring the Invicta Project to fruition.

[80] Dufour Report, ¶ 267.

[81] Dufour Report, ¶¶ 12, 273.

[82] Dufour Report, ¶¶ 264, 275.

2. It was imperative to the Invicta Project's success that Claimant obtain and maintain the support of all three Rural Communities, including the Parán Community

68. Before Claimant acquired the Invicta Project in 2012, it conducted due diligence,[83] solicited technical reports to assess the Project,[84] and reviewed disclosures from AAG.[85] *All* of these materials confirmed that Invicta *needed to secure and maintain the support* of the Rural Communities in the Invicta Mine's area of direct influence—including the Parán Community—for the Mine to succeed.[86] In this arbitration, however, Claimant has changed tack, now arguing that the Parán Community's support was an *unnecessary component* of its progression towards exploitation of the

[83] **Ex. R-0180**, Memorandum from Estudio Grau (C. Gonzales, *et al.*) to Lupaka (D. Jones), 4 July 2012, p. 2 ("The area directly affected by the project ('Area of Influence'), includes Lacsanga, Parán and, in a smaller fashion, Santo Domingo de Apache Farming Communities (FC).").

[84] **Ex. C-0035**, Invicta Gold Project Optimized Feasibility Study, THE LOKHORST GROUP, July 2010, ¶¶ 8.3.2, 10.4.2; **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012.

[85] **Ex. R-0041**, Joint Disclosure Booklet between Lupaka Gold Corp. and Andean American Gold Corp., 22 August 2012 ("**Joint Disclosure Booklet**").

[86] Claimant and Peru agree that there were three such communities, namely the Lacsanga Community, the Santo Domingo Community, *and* the Parán Community. *See, e.g.*, Claimant's Reply, ¶¶ 8, 192, 195 ("In particular, Lupaka and Invicta's prior owner ensured the participation of the rural communities of the Project's area of direct influence ('Rural Communities') in public consultation processes before, during and after approval of the Project's key socio-environmental management instruments. **The Parán Community actively participated in these processes**" (emphasis added)); Peru's Counter-Memorial, ¶ 136(a)–(c); **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK CONSULTING, 13 April 2018; **Ex. C-0040**, Report No. 304-2015-MEM-DGAAM/DNAM/DGAM/C, MINEM, 9 April 2015, ¶ 3.8 ("In social terms, the areas of direct influence of the project have been found to be the socio-economic and cultural space of the Leoncio Prado and Paccho Districts. The communities of Lacsanga, **Parán** and Santo Domingo de Apache were determined as Area of Direct Social Influence" (emphasis added)); **Ex. C-0154**, Invicta Mining Corp. S.A.C. Memorandum, Training Programme for Invicta Mining Camp Project, 8 July 2017, p. 1 ("The objective of the field trip was to examine the current coexistence between the company INVICTA MINING CORP. S.A.C. (Invicta) owner of the "INVICTA" Mining Project and the **rural communities located in the area of direct influence. (CC of Parán**, CC of Santo Domingo de Apache and CC of Lacsanga)." (emphasis added)); **Ex. C-0408**, ANA, Technical Report No. 048-2018-ANA- AAA.CF.-ALA H/KHR, 13 July 2018, § 4.4, Graph 2.

Mine.[87] Claimant disclaims its obligation to gain the Parán Community's support on the asserted basis that the Invicta "Project's scope was significantly reduced as per IMC's revised mining plan . . . and did not entail activities on Parán [land]."[88]

69. Claimant's description of the Invicta Mine's "scope change" is misleading. The Reply acknowledges that, as originally envisioned, the Invicta Mine "was mostly on Parán land."[89] While the scope update in 2014 changed the tonnes per day that would be extracted from the Invicta Mine, it neither significantly changed the physical location of the Mine's infrastructure nor rendered the Parán Community immune from the Mine's impact.[90] Peru's approval of Claimant's First ITS confirms this by stating that "[t]he mining components w[ould] be located within the area of direct and indirect environmental influence approved [(in 2009)] **without any modification**"[91] (emphasis added). In her report, Peru's mining expert Ms. Dufour compares the area of direct social and environmental influence in Claimant's 2009 Environmental Impact Assessment for the Invicta Project ("**EIAd**") with the area of direct social influence in Claimant's First ITS (approved in 2015):[92]

[87] Claimant's Reply, ¶¶ 8, 63, § 3.2.2 ("Lupaka was not obliged to reach an agreement with the Parán Community to develop the Project").

[88] Claimant's Reply, ¶ 79; **Ex. C-0009**, Report No. 127-2014-MEM-DGM-DTM/PM, Resolution Approving Mining Plan, MINEM, 30 December 2014.

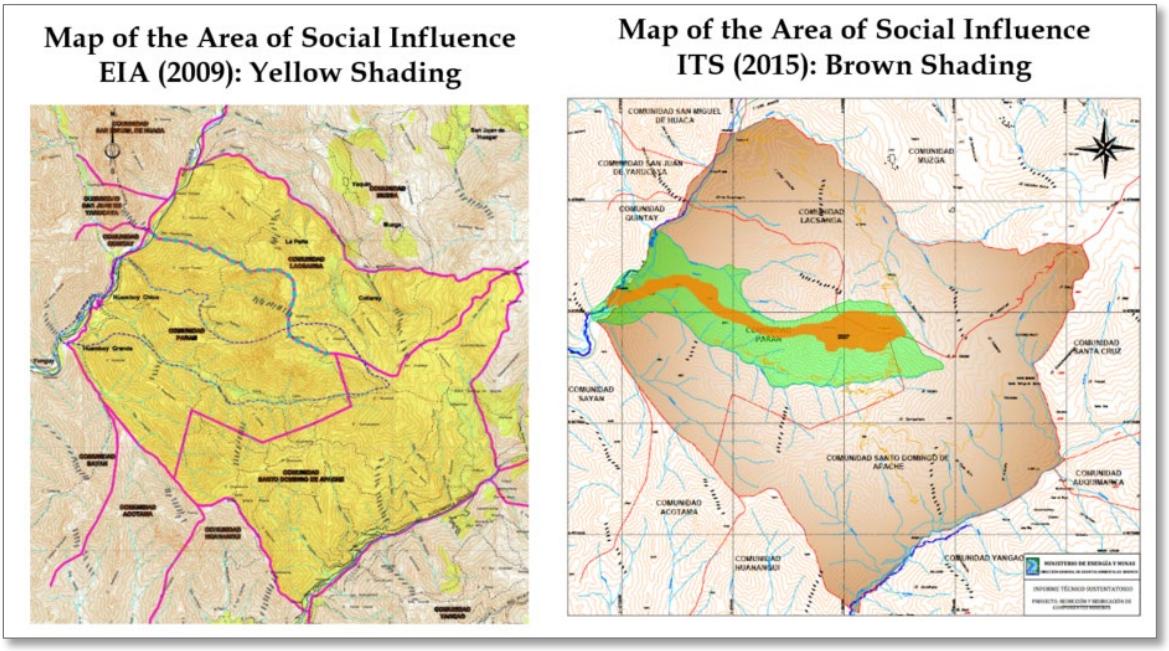
[89] Claimant's Reply, ¶ 149.

[90] **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK CONSULTING, 13 April 2018; **Ex. C-0040**, Report No. 304-2015-MEM-DGAAM/DNAM/DGAM/C, MINEM, 9 April 2015, p. 3; **Ex. C-0486**, IMC map - Community boundaries according to Peruvian registry, undated; **Ex. R-0136**, Weekly Report, OGGS, 31 March 2019, p. 1; **Ex. R-0056**, Invicta Mining Corp. S.A.C., Third Technical Report, Chapter 8.3 Social Baseline, undated, p. 10.

[91] **Ex. C-0040**, Report No. 304-2015-MEM-DGAAM/DNAM/DGAM/C, MINEM, 9 April 2015, p. 4.

[92] Dufour Report, ¶ 325.

Figure 1: Comparison of the Invicta Mine's 2009 and 2015 Areas of Social Influence[93]



As can be seen, the size and shape of the Invicta Mine's area of social influence stayed constant event after Claimant changed the scope of its mining plan. Consequently, the risks and social obligations that Claimant was aware of before it acquired the Invicta Mine in 2012 were not modified, and instead continued to apply even after the scope change.[94]

70. It should therefore have been obvious to Claimant—as it certainly would be to any responsible mining company—that advancing towards the exploitation of the Invicta Mine without the support of the Parán Community would give rise to significant risk of social conflict, especially in light of the following contemporaneous facts: (i) the Parán Community disputed the ownership of the territory beneath the Invicta Mine's infrastructure; (ii) the Parán Community's villages and orchards remained in the

[93] *See* **Anexo MD-0083**, Plano EIAd–Área de Influencia Social; **Ex. MD-0084**, Plano Primer ITS – Área de Influencia Social.

[94] **Ex. R-0180**, Memorandum from Estudio Grau (C. Gonzales, *et al.*) to Lupaka (D. Jones), 4 July 2012; **Ex. C-0035**, Invicta Gold Project Optimized Feasibility Study, THE LOKHORST GROUP, July 2010, ¶ 1.10.7; **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012; **Ex. R-0041**, Joint Disclosure Booklet.

Invicta Mine's area of direct environmental and social influence, which were located directly downstream and in the valley just below the Mine's infrastructure; and (iii) the Parán Community held the territory in which several of Claimant's water management facilities were located and controlled an access road to the Mine. Claimant was well aware of these facts, as demonstrated below.

71. *First*, Claimant should have understood that an agreement with the Parán Community was needed because the Parán Community disputed the other communities' ownership of certain territory around the Invicta Mine.[95] As Ms. Dufour explains, the Rural Communities disagreed over their respective territorial boundaries.[96] The Lacsanga and Santo Domingo Communities reached a bilateral agreement on their boundaries in 2001, and the Lacsanga Community subsequently registered that agreement with SUNARP.[97] Thereafter, the Parán Community filed its disagreement and reserved the right to contest the boundaries claimed by the other communities.[98] These boundaries remained in dispute throughout the Invicta Mine's development and should have further prompted Claimant to secure an agreement with the Parán Community.[99]

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[95] **Ex. C-0213**, Email from M. Estrada to L. Bravo, Invicta Mining Corp. S.A.C., 10 April 2019, p. 1 (showing Claimant's awareness that the Parán Community believed mining infrastructure was on its territory); **Ex. C-0264**, Lupaka News Release, "Lupaka Provides Update on Illegal Demonstration at Invicta, Announces Non-Brokered Private Placement, and Management Changes", 28 January 2019, p.1 (demonstrating Claimant knew the reason behind the Parán Community's opposition: "[t]he demonstration at Invicta has resulted from a land conflict that exists between two of Invicta's neighouring communities." and the Parán Community's belief that Invicta Mine was on Parán territory.); **Ex. C-0121**, Letter from Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Casteñeda), 4 May 2018 (showing that the Parán Community claimed that Invicta Mine was on Parán territory and was operating without the Community's authorization: "[Invicta Mine] since approximately 1997, without authorisation from the Rural Community of Parán, has taken possession in our land areas, installing a CAMP;" "PROCEED TO REMOVE THE PERSONNEL, EQUIPMENT AND OTHER PROPERTY FROM THE CAMP, where they are carrying out work, without the authorisation of our Rural Community;" "we ask you to vacate the territory of our rural Community.").

[96] Dufour Report, ¶¶ 308-313, 377–378, 382.

[97] **Ex. R-0232**, Settlement, 15 September 2006. *See also* Dufour Report, ¶ 336(i).

[98] **Ex. R-0233**, Extension, 5 June 2008; *see also* Dufour Report, ¶ 336(ii).

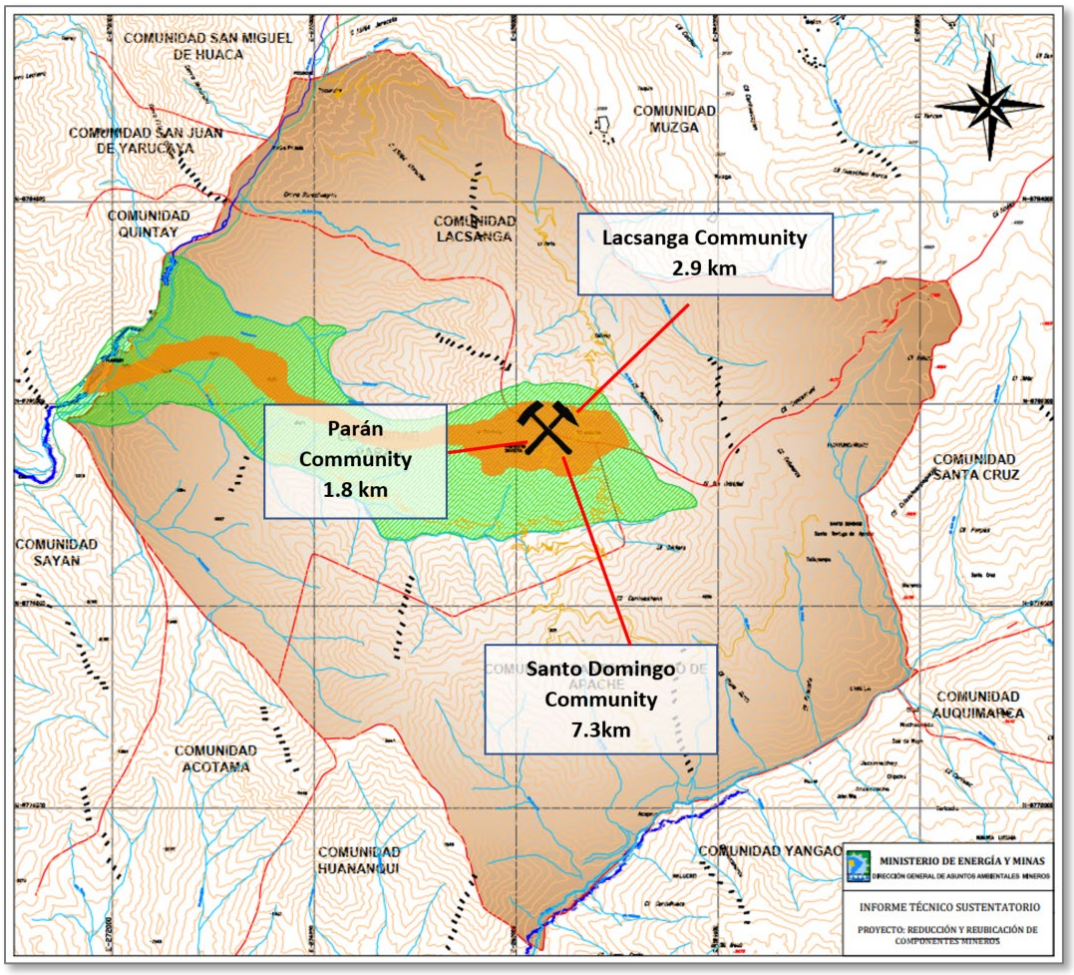
[99] Dufour Report, ¶¶ 385, 362, 409.

72. *Second*, Claimant agrees that even under the revised community borders included in its 2015 First ITS, the Parán Community remained within the Invicta Mine's area of direct influence.[100] Claimant's attempt to downplay the importance of this fact is both emblematic of Claimant's cavalier attitude about the concerns of the Parán Community and also inexplicable, given that the Parán Community members lived directly downstream of the Mine's infrastructure and closest to the Invicta Mine of any of the three Rural Communities.[101] Even a cursory review of the map that Claimant submitted with its First ITS shows that the Parán Community was impacted significantly more than either of the other two communities in the Invicta Mine's area of direct influence:

[100] **Ex. R-0047**, Environmental Impact Assessment, Invicta Mining Corp. S.A.C., 3 October 2008 ("**2009 EIA**"), p. 35; **Ex. C-0040**, Report No. 304-2015-MEM-DGAAM/DNAM/DGAM/C, MINEM, 9 April 2015, p. 3 ("The communities of Lacsanga, Parán and Santo Domingo de Apache were determined as [the] Area of Direct Social Influence."); *see also* Peru's Counter-Memorial, ¶ 136(c); **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK CONSULTING, 13 April 2018; **Ex. C-0154**, Invicta Mining Corp. S.A.C. Memorandum, Training Programme for Invicta Mining Camp Project, 8 July 2017; **Ex. C-0408**, ANA, Technical Report No. 048-2018-ANA- AAA.CF.-ALA H/KHR, 13 July 2018, § 4.4, Graph 2.

[101] **Ex. C-0486**, IMC map - Community boundaries according to Peruvian registry, undated (providing a map of the Invicta Mine's infrastructure); **Ex. C-0030**, Public Mining Registry No. 02029079: Victoria Tres Concession, 9 October 1996; **Ex. C-0408**, ANA, Technical Report No. 048-2018-ANA- AAA.CF.-ALA H/KHR, 13 July 2018, ¶¶ 6.3–6.4; **Ex. R-0076**, Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Council of Ministries (M. Aráoz), 4 January 2018. *See also* **Ex. C-0139**, Meeting Minutes, Sub-Prefecture Hearing between Invicta Mining Corp. S.A.C. and the Parán Community, 18 September 2018, p. 2 (demonstrating that the Parán Community made known to Claimant how Invicta Mine's close proximity to Parán villages and water sources posed a direct risk to that Community: "[W]e are harmed by the mining company, when they place explosives they are causing harm to the population with rocks falling and the water we drink being contaminated, the problem is that the mine is at the top and the community is at the bottom and it causes harm to us"); **Ex. R-0163**, Letter from the Parán Community (I. Palomares) to MINEM (F. Ismodes), 10 October 2018, p. 1 (showing the Parán Community's concern about Invicta Mine's impact on their Community: "My community is 100% geographically jeopardised due to the negative impacts that this mining company would cause us, harming the water sources, which in our community are not running but are rather all springs, and it would be harmful to our agriculture, which is our source of income and the livelihood of the residents of my community; we are dedicated to fruit growing, cultivating peaches, avocados, cherimoya fruit among others").

Figure 2: Impact of the Invicta Mine on the Rural Communities[102]



[102] Figure 2 the Invicta Mine—orange shading represents the area of direct environmental influence; the green shading represents the area of indirect environmental influence, and the brown shading represents the area of social influence. The map and shading was originally created and submitted by Invicta itself, as part of its First ITS. Peru has added a series of superimposed labels to assist with interpreting the map. According to the 2017 national census, there were 326 houses with 583 people in the Parán Community, 51 houses and 113 people in the Lacsanga Community, and 211 houses with 303 people in the Santo Domingo Community. **Ex. R-0231**, National Censuses 2017: XII of Population, VII of Housing, and III of Indigenous Communities, INEI, December 2018. *See also* **Ex. MD-0084**, Plano Primer ITS–Área de Influencia Social; **Ex. R-0219**, Third Technical Support Report of the Invicta Mining Unit, August 2018 (listing the distances from the Invicta Mine and the various Rural Communities—Parán–1.8 km, Lacsanga–2.9 km, and Santo Domingo–7.3 km).

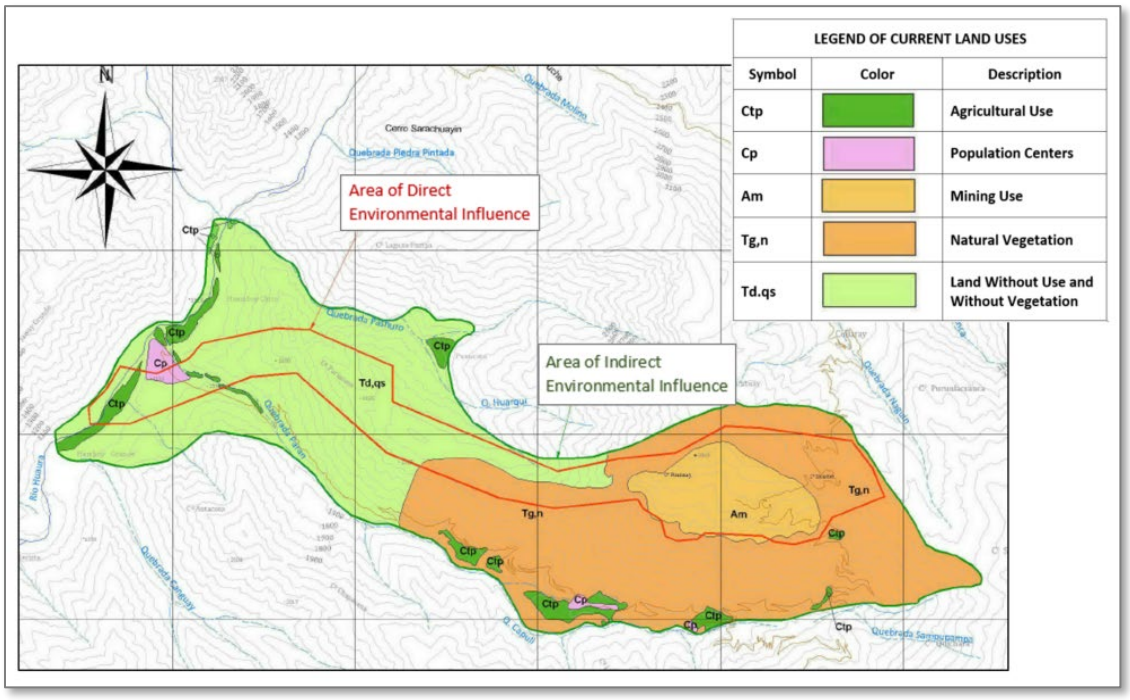
73. Further, a large proportion of the Parán Community's homes and farmland were located *downhill* and *downstream* of the Mine;[103] the latter sat "on the slopes of Pirahuay Hill and covers the lands of the communities of Parán and Lacsanga, in the districts of Leoncio Prado and Paccho, province of Huaura, department of Lima."[104] The Community's avocado and peach farmland were located roughly 2 km downhill from the Invicta Mine and downstream of the Invicta Mine along the Huaura River—these farm plots are identified in dark green shading below:[105]

[103] **Ex. R-0219**, Third Technical Support Report of the Invicta Mining Unit, August 2018; **Ex. R-0269**, "*Invicta Mining,*" GOOGLE MAPS, last accessed 20 January 2023; **Ex. R-0270**, "*Paran-Mapa-Mapcarta,*" MAPCARTA, last accessed 20 January 2023.

[104] **Ex. R-0047**, 2009 EIA, p. 2.

[105] **Ex. AC-0049**, Lupaka Gold Corp. 2013 Annual Report, p. 46 ("These communities largely consist of farmers that mainly cultivate avocadoes and peaches along the valley slopes, roughly 2 km from the Invicta Gold Project.").

Figure 3: Impact of the Invicta Mine on the Parán Community's Crop Zones and Villages[106]



74. *Third*, the Parán Community controlled land upon which Invicta maintained water management facilities[107] and an access road to the Invicta Mine.[108] Even under Claimant's flawed perspective that the only communities whose support it needed for the Invicta Mine to be exploited were those with registered surface rights under components of the Mine, Claimant nevertheless should have engaged the Parán Community and fully included it in the consultation and negotiation process. Such engagement was necessary because several of Claimant's components of the Mine (*see*

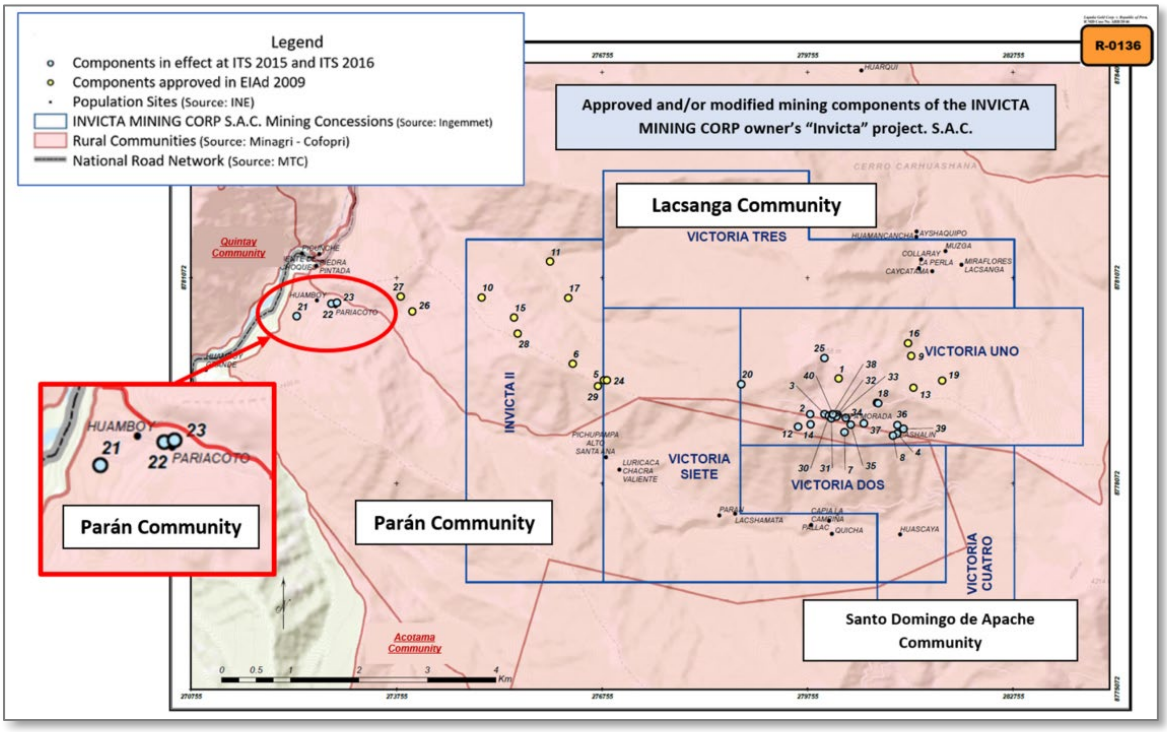
[106] Figure 3 depicts the area of direct and indirect environmental impact of the Invicta Mine. The legend in the upper righthand corner provides the corresponding meaning to each of the maps colors and labels. **Ex. R-0219**, Third Technical Support Report of the Invicta Mining Unit, August 2018.

[107] **Ex. R-0136**, Weekly Report, OGGS, 31 March 2019, p. 1; **Ex. C-0040**, Report No. 304-2015-MEM-DGAAM/DNAM/DGAM/C, MINEM, 9 April 2015, p. 15.

[108] **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK CONSULTING, 13 April 2018, p. 39 ("Pangea completed construction of the access road from the community of Paran to the Victoria Project camp").

components 21, 22, and 23 on the below map) were physically located on Parán Community territory, as shown in a map prepared by the OGGS in 2019:

Figure 4: Location of the Invicta Mine's Components[109]



75. In its submissions in this arbitration Claimant chose not to address the location of these mining components, nor their presence on Parán Community land, nor whether Invicta secured an easement from the Parán Community for use of the latter's territory.

76. In addition, the Parán Community controlled an access road to the Invicta Mine that became the catalyst of the social conflict between the Community and Claimant. This road was referenced in the first agreements that Invicta had executed with the Parán

[109] Figure 4 demonstrates the location of the various Invicta Mine components, including several water management facilities (Nos. 21, 22, and 23) that fall within Parán Community territory. **Ex. R-0136**, Weekly Report, OGGS, 31 March 2019, p. 1. *See also* **Ex. C-0040**, Report No. 304-2015-MEM-DGAAM/DNAM/DGAM/C, MINEM, 9 April 2015, p. 6.

Community[110] and featured prominently in negotiations between Claimant and the Community during the years of the Mine's development.[111]

77. Each of the above-described facts would have made it obvious to any serious and diligent mining company that the Parán Community's support was a *sine qua non* condition for exploitation of the Invicta Mine, not only pursuant to the Peruvian legal mining framework but also to industry standards on social licensing, and even to plain common sense.[112] Moreover, the various ways in which the Parán Community stood to be impacted by the Invicta Mine explains why that community reasonably expected Claimant to make efforts to reach an agreement with it before exploitation of the Invicta Mine began.

78. When Claimant chose to forge ahead with its plan to begin exploitation of the Invicta Mine despite not having secured the support and agreement of the Parán Community, it should have been obvious to it that by doing so it risked exacerbating opposition from that Community. That risk then materialized, in the form of an inflamed social conflict that led to both the June 2018 Protest and Access Road Protest. Such protests were totally foreseeable, and could have been averted had Claimant not marginalized the Parán Community—the community most likely to be adversely affected by the development of the Invicta Mine.

B. Claimant mismanaged its relationships with the Rural Communities, leading to the loss of its investment

79. Peru established in the Counter-Memorial that Claimant fundamentally failed to establish and maintain strong and constructive relationships with the Rural Communities in the area of direct influence of the Invicta Project, in particular with

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[110] **Ex. C-0060**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 29 April 2008; **Ex. C-0061**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 7 May 2008.

[111] *See, e.g.*, **Ex. C-0113**, Email from Invicta Mining Corp. S.A.C. (M. Mariños) to Lupaka Gold Corp. (J. Castañeda, *et al.*), 25 January 2017; **Ex. C-0114**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to the Parán Community (I. Palomares), 31 May 2017.

[112] The concept of a social license is described in Peru's Counter-Memorial and expanded upon herein in Section II.A.1.

the Parán Community, the local community that was to bear the environmental brunt of the Invicta Project.[113]

80. Despite its undeniable record of deficient community relations, Claimant argues that it had adequate experience and resources with respect to community relations, and that it engaged effectively with the Rural Communities.[114] The evidence proves the opposite, however. The objective and manifest flaws of Claimant's community relations included an acute failure (i) to understand the history of such relations and to improve Invicta's reputation when Claimant acquired the Invicta Project, (ii) to maintain continuous dialogue with the Parán Community, (iii) to recognize and address the legitimate concerns and expectations of the Parán Community, and (iv) to satisfy Claimant's monetary and social obligations with respect to all three Rural Communities.

81. Far from being a hapless and blameless victim, which is how Claimant attempts to portray itself in this arbitration,[115] Claimant was responsible for wrecking the relations with the Parán Community. Claimant ostensibly believed that the Parán Community was not important to the success of the project, ostensibly because the mining infrastructure would not be located in that community's territory. Rather than seek the acceptance of the Parán Community, Claimant therefore marginalized it, thereby saving the time and resources that developing such a relationship would have required.

82. However, it would have been obvious to any experienced and responsible mining company and community relations team that Claimant's approach would eventually lead to forceful opposition from the Parán Community. The opposition of the Parán Community that predictably ensued—and the growing opposition to the Invicta Project from members of the Lacsanga and Santo Domingo Communities (which

[113] Peru's Counter-Memorial, §§ II.D, II.F.2.

[114] Claimant's Reply, ¶ 120.

[115] Claimant's Reply, ¶ 118.

Claimant glosses over in the Reply)—show that Claimant's community relations strategy (to the extent it had one) was an abject failure.

83. In the subsections that follow, Peru will demonstrate that:

a. Claimant's evidence does not support its assertion that its community relations team was in fact sufficiently experienced or equipped to prevent or manage the social conflicts that arose with the Parán Community, as well as with the Lacsanga and Santo Domingo Communities (**Section II.B.1**);

b. Claimant's own evidence shows that it pursued a community relations strategy that marginalized and further antagonized the Parán Community, leading to the Access Road Protest (**Section II.B.2**);

c. Claimant employed negotiation tactics towards the Parán Community that, rather than bolster, undermined its relationship with the community (**Section II.B.3**);

d. Claimant mishandled the Parán Community's environmental concerns (**Section II.B.4**);

e. Claimant did not comply with its monetary obligations to the Rural Communities in a timely manner (**Section II.B.5**);

f. Claimant did not fulfill its social commitments to the Rural Communities (**Section II.B.6**);

g. Claimant's actions ended up pitting the Rural Communities of Lacsanga and Santo Domingo against the Parán Community, instead of helping resolve its social conflict with the Parán Community (**Section II.B.7**);

h. Claimant faced other problems with the Lacsanga and Santo Domingo Communities which were separate from those that prompted the Parán Community's opposition (**Section II.B.8**);

i. Claimant ceased to have a community relations strategy and dedicated team during the most critical period of the social conflict—after the Access Road Protest began on 14 October 2018 (**Section II.B.9**); and

j. Claimant's use of the War Dogs exacerbated the conflict (**Section II.B.10**).

1. Claimant's community relations team was inexperienced and its community relations strategy was ineffective

84. The evidence of Claimant's community relations failures is incontrovertible. The Parán Community was the largest and closest rural community to the Invicta Mine, and therefore the one at greatest risk of suffering from the potential environmental impacts of the Project.[116] For that reason, had it succeeded in building trust and establishing a harmonious and collaborative relationship with that community, Claimant might have averted that community's opposition and the Access Road Protest, as well as the emerging opposition from the Lacsanga and Santo Domingo Communities.[117]

85. In the Reply, Claimant attempts to distract attention from these failures by arguing that its community relations team ("**CR Team**") had a track record of "effective engagement with local communities."[118] Claimant's assertion is misleading, for several reasons.

86. To begin with, Claimant exaggerates the experience of its CR Team. Rather than forming its own community relations team, Claimant had outsourced the management of its community relations to an external company, Social Sustainable Solutions ("**SSS**"). Claimant asserts that the team that it hired from SSS was both "qualified and experienced," assertedly on the basis that its members had "worked together on several mining projects before working for IMC."[119] [redacted]

[116] Witness Statement of Soymán Román Retuerto, 12 January 2023 ("**Retuerto Witness Statement**"), ¶¶ 14, 33; Second Witness Statement of Nilton César León Huerta, 20 January 2023 ("**León Second Witness Statement**"), ¶ 17.

[117] *See infra* Section II.B.7.

[118] Claimant's Reply, § 4.1.

[119] Claimant's Reply, ¶ 126.

[redacted] and that only two of those projects included Mr. Zarauz, the community relations manager at SSS to whom he reported.

87. Significantly, the list of projects that Claimant offers as evidence of the CR Team's experience is inapposite to the nature and scope of the Invicta Project. Most of the projects Claimant has cited merely involved obtaining agreements with local communities in relation to early *exploration*, rather than *exploitation*, mining projects.[120] Such projects therefore did not involve the level of long-term community support that is required for a project during the much more lengthy and substantial exploitation phase.[121] Moreover, nearly every project that Claimant touts as a "success" faced significant social conflict and protests by local communities, including blockades to the main access roads to the mines.[122] The remaining projects that Claimant cites as purported relevant experience of the CR Team are likewise inapposite, as they involved agreements signed with communities for projects that are altogether *unrelated* to mining operations; for example, an agreement reached for the resettlement of pig producers, and agreements reached in relation to telecommunications

[120] Claimant's Reply, ¶ 126; [redacted] Claimant refers to the fact that members of the CR Team negotiated and signed agreements with communities concerning the following mining projects: Yauricocha, Mario, Accha, Dolores, Yanque, Santo Domingo, Tuacane, and Quenamari. However, Claimant admits that these agreements concerned only *exploration* activities, and not *exploitation* activities.

[121] Claimant's Reply, ¶ 126; [redacted]

[122] Concerning the Yarucocha project, in September 2022, Sierra Metals Inc. reported that members of the Alis community blocked the main access road to the Yauricocha Mine. *See* **Ex. R-0181**, "*Sierra Metals Provides Update on its Yauricocha Mine in Peru*," SIERRA METALS INC., 22 September 2022. As a result, mining productions remained suspended until the mining operator reached an agreement with that community. *See* **Ex. R-0182**, "*Yauricocha Mine (Yauricocha Expansion Project)*," MINING DATA SOLUTIONS, 2022. Concerning the Chancay project, there have been several protests by the local residents since agreements were reached with the SSS team. *See* **Ex. R-0183**, "*New Chinese-led port project faces backlash from local residents and environmentalists in Peru*," GLOBALVOICES, 5 March 2021. Concerning the Santo Domingo, Tuacane, and Quenamari projects, there have been several protests by the Pasanacollo community, including against the Santo Domingo project in 2016. *See* **Ex. R-0184**, "*Puno: Alcalde de Nuñoa afirma que comunidades rechazan proyecto Santo Domingo de Minsur*," NOTICIAS SER.PE, 18 May 2016.

projects.[123] Such examples hardly constitute a "track record" of reaching agreements and obtaining social licenses for advancing major mining exploitation operations. In sum, the experience that Claimant invokes does not represent a proven "track record" that was relevant to the Invicta Project, as Claimant mistakenly avers.[124]

88. In any event, as will be discussed in **Section II.B.1** below, Claimant's argument that Lupaka had "a qualified and experienced" CR Team relied heavily on its engagement of SSS,[125] but Claimant let its contract with SSS lapse following the Access Road Protest. As a result, it no longer had its allegedly experienced community relations team on hand during the most critical weeks of mediated dialogue and negotiation that followed the Access Road Protest.

2. Claimant marginalized and antagonized the Parán Community

89. Peru established in the Counter-Memorial that Claimant marginalized the Parán Community when it undertook the development of the Invicta Project.[126] In the Reply, Claimant embellishes and exaggerates its efforts to develop an amicable relationship with the Parán Community, asserting that Invicta engaged with that community for "close to six years," from the beginning of its investment in October 2012 until early 2018.[127] However, Claimant's characterization of its contact with the Parán Community is belied by the very evidence on which it relies.

90. Such evidence demonstrates the *failure* of Claimant's exiguous engagement with the Parán Community. As discussed in more detail in the following subsections, that evidence shows, among other things, that: (i) Claimant deprioritized and delayed engaging the Parán Community on the Project for *four long years* after acquiring the Invicta Project, and only engaged with that community after securing initial commitments from the neighboring Lacsanga Community; (ii) Claimant willingly

[123] Claimant's Reply, ¶ 126; [redacted]

[124] Claimant's Reply, ¶ 126.

[125] Claimant's Reply, § 4.1.1.

[126] Peru's Counter-Memorial, § II.D.2.

[127] Claimant's Reply, § 4.2.3.

agreed to give the Lacsanga Community "exclusive preference" to a variety of economic opportunities, but refused to entertain similar requests from the Parán Community; (iii) Claimant made social and economic investments for the benefit of the Lacsanga and Santo Domingo Communities, but made only nominal and fleeting contributions to the Parán Community; and (iv) Claimant engaged with the Parán Community with even less frequency and diligence than it did the Lacsanga and Santo Domingo Communities.

a. Claimant deprioritized and delayed its engagement with the Parán Community

91. Claimant waited to substantively engage the Parán Community until roughly *four* years after it assumed ownership of the Invicta Project.[128] This delay is particularly glaring given the history of the project and Invicta's strained relations with the Parán Community, which were well-known to Claimant when it acquired the Project. As noted in **Section II.A.2** above, when Claimant acquired Invicta in October 2012, it knew that the Project's development plans centered almost exclusively on the Parán Community's territory.[129] Claimant was also well aware that, through Invicta's 2008 Agreements and 2011 Addendum with the Parán Community, the latter had established its desire, commitment, and expectation to play a significant role in the development of the Project. Through those agreements between Invicta and the Parán Community, the latter had agreed not only to the use of its community road by Claimant for mining transport, but also to the construction of a tunnel to the mine

[128] *See* **Ex. C-0393**, SSS, Monthly Report, Project, October 2016; **Ex. C-0100**, Special Report: Field Visit in Lima with the Parán Community, INVICTA MINING CORP. S.A.C., 21 October 2016; *see also* **Ex. C-0390**, Report No. 010/RRCC/IMC-EOAV, January 2015, p. 2 (demonstrating that Claimant knew, from speaking with members of the Parán Community, that such community was eager to re-establish a dialogue with Invicta to reach an agreement: "In conversations with some community members from Parán, they expressed their wish to resume talks with the company and be able to reach a good agreement for our mutual benefit.").

[129] *See supra* Section II.A.2; Claimant's Reply, ¶ 149.

camp and the opening of other paths leading to Invicta's future processing plant.[130] Claimant admits that it knew that the Invicta Project's prior owners had breached these agreements and the trust of the Parán Community,[131] causing Claimant to inherit a strained relationship that would need to be rehabilitated.[132] A sound community relations strategy in that context required energetic engagement and committed dialogue by Claimant with the Parán Community. However, Claimant did the opposite. It chose not to engage with the Parán Community, and instead antagonized it by deliberately prioritizing negotiations with the Lacsanga Community in late 2014, which led to initial agreements with that community in early 2015.[133]

92. Claimant knew that, in addition to failing to abide by commitments to the Parán Community, Invicta's previous owners also had failed to keep promises they had made to the Lacsanga Community.[134] Unlike its follow-up with the Parán Community, however, it took Claimant only a matter of weeks to enter into a "settlement agreement" with the Lacsanga Community to resolve Invicta's differences with that community.[135] Moreover, approximately seven months later, in October

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[130] **Ex. C-0060**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 29 April 2008, pp. 1–2; **Ex. C-0061**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 7 May 2008, pp. 1–2.

[131] Claimant's Memorial, ¶ 66; Claimant's Reply, ¶ 158.

[132] Claimant's Memorial, ¶ 66 ("These agreements had not been performed to the Parán Community's satisfaction, which meant that the relationship with IMC was strained when Lupaka took over the Project."); Claimant's Reply, ¶ 158 ("It is true that in late 2016 . . .the Parán Community claimed certain breaches by Invicta's prior owner. These breaches had in fact created some tension").

[133] Claimant's Memorial, ¶ 60.

[134] Claimant's Memorial, ¶ 59 ("IMC's previous owners had made promises to the Lacsanga Community which they had not kept"); Claimant's Reply, ¶150 ("It is true that when IMC started negotiating with the Lacsanga Community in late 2014, the community demanded payment of PEN 500,000 (approximately USD 120,000) as compensation for the mining activities carried out by Invicta's prior owner before 2012. The community said that this amount had been agreed with Invicta's prior owner but not paid.").

[135] Claimant's Memorial, ¶ 60 ("on 31 March, 2015, IMC entered into a 'settlement agreement' with the Lacsanga Community.").

2015, Claimant sent a proposal to the Lacsanga Community for the construction of a main access road.[136] The commitments Invicta made to the Lacsanga Community in 2015 reflected a nearly complete displacement of the Parán Community from the initially projected mining plan.[137]

93. Claimant would delay nearly a full additional year before finally engaging the Parán Community with respect to the Project, through its CR Team in September 2016.[138] And even when Claimant finally, belatedly engaged with the Parán Community, it apparently did not do so of its own accord. A letter dated 30 June 2016 from Invicta to the President of the Parán Community indicates that it was the Parán Community—not Invicta—that had taken the initiative and had requested negotiations.[139] In that letter, Invicta acknowledged the Parán Community's desire to re-start negotiations for a usufruct agreement through the community's territory.[140] However, several months would pass before Claimant finally submitted, in October of 2016, a new proposal to Parán Community leaders for the construction of an access route to the Site.[141]

94. It should have been obvious to Claimant—as it was to the Parán Community—that the mining company's decision to first secure an access road and other major agreements with the neighboring community of Lacsanga would be deleterious to Invicta's relationship with the Parán Community. Furthermore, it is disingenuous for

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[136] Claimant's Memorial, ¶ 61; **Ex. C-0088**, Proposal to Lacsanga Community, Invicta Mining Corp. S.A.C., 19 October 2015.

[137] **Ex. C-0088**, Proposal to Lacsanga Community, Invicta Mining Corp. S.A.C., 19 October 2015.

[138] **Ex. C-0393**, SSS, Monthly Report, Project, October 2016, p. 3 ("Since our first intervention (09/09) and during the month, the most important activities and situations have focused on the relationship and coordination with the main leaders, authorities and community members of the Paran community . . . . 16 - 09 - 2016. First technical workshop. Issues. Technical Management of Peach Cultivation and Presentation of the Water Retaining Polymer in the Soil. This workshop was held in the Paran community. 17 community farmers participated.").

[139] **Ex. C-0389**, Letter from IMC to the Parán Community, 30 June 2016, p. 1.

[140] **Ex. C-0389**, Letter from IMC to the Parán Community, 30 June 2016 (Evidencing the Parán Community's willingness to negotiate and reach agreements with Invicta: "Having received by email the transcript of the agreements of the community with its offer and proposal to reach an agreement and sign a Usufruct agreement for the use of the road . . .").

[141] **Ex. C-0464**, IMC, Draft Agreement between Lupaka and the Parán Community, October 2016.

Claimant to contend that its negotiations with the Parán Community were difficult because the latter's demands were at odds with commitments that Invicta had just made to the Lacsanga Community. Rather, the situation was entirely of Claimant's making, as it was Claimant who deliberately negotiated with one community and not the other. The situation was aggravated by the fact that Claimant ignored Invicta's earlier agreements with the Parán Community and the expectations that those agreements had generated.[142]

b. Claimant willingly agreed to give the Lacsanga Community "exclusive preference" to a variety of economic opportunities, but refused to entertain similar requests from the Parán Community

95. Claimant's decision to prioritize and favor the Lacsanga Community further damaged its already fraught relationship with the Parán Community, and set the stage for the future social conflict that would ensue with the latter. Claimant now attempts to justify its approach of prioritizing its relationship with the Lacsanga Community by characterizing the Parán Community as unreasonable and "difficult" for making certain demands.[143] The main example offered by Claimant in this regard is that during the 2016 negotiations, the Parán Community had demanded that Invicta transport all its ore exclusively through the Parán road.[144] But had Claimant engaged an experienced community relations team, it would have been aware that such demands are commonly made by rural communities during negotiations with mining companies, and are therefore not unusual.[145] Moreover, Claimant can hardly portray the Parán Community as "difficult" on the basis that the latter sought for itself precisely the same type of concessions that Claimant had already offered the neighboring community of Lacsanga. Indeed, Invicta had no problem in yielding to

[142] *See* **Ex. C-0060**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 29 April 2008; **Ex. C-0061**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 7 May 2008; **Ex. C-0062**, Addendum to Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 13 December 2011.

[143] *See* Claimant's Reply, ¶ 202.

[144] Claimant's Reply, ¶ 202.

[145] León Second Witness Statement, ¶ 16; Trigoso Second Witness Statement, § IV.

the Lacsanga Community's demands for "exclusive preference" in a variety of areas during its negotiations with that Community, for example with regard to: (i) the supply of fuels; (ii) the purchase of food, lodging, laundry and other services required by Invicta; (iii) commercial contracts for the use of transport and other vehicles; and (iv) training and hiring of skilled and unskilled workers.[146]

96. In contrast to the treatment that it accorded the Lacsanga Community, Claimant categorically rejected any demands from the Parán Community for preferential commitments during its 2016 negotiations, treating that Community's demands as non-starters.[147] Invicta would, however, finalize its agreement with the Lacsanga Community on 9 June 2017, agreeing to that community's demands for preferential treatment.[148] The Parán Community's village centers (Parán, Capia, Santa Ana, Huamboy) and agricultural zones were geographically closest to the Site and to other Project components, and thus—unlike the Santo Domingo and Lacsanga Communities—were in the areas of direct and indirect environmental impact and risk of the Project.[149] Given that fact, the Parán Community's requests were not as unreasonable as Claimant suggests.

c. Claimant did not engage the Parán Community with the same frequency and diligence as it did the Lacsanga and Santo Domingo Communities.

97. The reports prepared by Claimant's external CR Team SSS paint a troubling picture, of Invicta's lack of diligent and continuous engagement with the Parán Community.[150]

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[146] **Ex. C-0090**, Registration of the Agreement between Invicta Mining Corp. S.A.C. and Lacsanga Community, SUNARP, 26 July 2017, p. 3.

[147] Claimant's Reply, ¶ 202; **Ex. C-0209**, Letter from IMC to MEM, 19 March 2019, p. 5.

[148] *See* **Ex. C-0089**, Constitution of Rights to Usufruct and Easement for Mining between Invicta Mining Corp. S.A.C. and Lacsanga Community, 19 July 2017.

[149] *See supra* Section II.A.2.

[150] **Ex. C-0530**, CR Team Report No. 003/RRCC/IMC, undated, p. 2; **Ex. C-0390**, IMC, CR Team, Report No. 10-2015-RRCC, January 2015, p. 2; **Ex. C-0374**, IMC, CR Team Report No. 009-2014-RRCC, December 2014, p. 2 (Table); **Ex. C-0386**, IMC, CR Team Report No. 05-2015/RRCC, May 2015; **Ex. C-0373**, IMC, CR Team Report No. 011-2014-RRCC, November 2014, p. 1; **Ex. C-0427**, SSS, Weekly Report, Project, 13–18 November 2017, p. 1. No monitoring of Parán Community, except to note that it has not formed its environmental monitoring committee.

Such reports demonstrate that, at the very least, Claimant's depiction in this arbitration of the Parán Community's stance is misleading. In particular, such reports show that: (i) Claimant ignored the Parán Community's consistent demand for an agreement; (ii) Claimant failed to keep the community informed on the progress of the Project, and indeed there were prolonged periods of time in which no contact whatsoever was made; and (iii) Claimant closely monitored and assiduously approached members of the Lacsanga and Santo Domingo Communities to address their concerns in relation to the Project, but failed to take a similar approach with the Parán Community.

98. *First*, Claimant largely ignored the Parán Community's consistent demand for an agreement with respect to an access road to Invicta Mine through Parán territory.[151] From the start, Claimant's CR Team reported that a majority of the Parán Community were either neutral or in favor of reaching an agreement with Invicta.[152] The desire by most of the Parán Community to reach an agreement with Invicta continued up until 14 May 2019, when Claimant decided to unleash a private security group—the descriptively named "War Dogs"—to forcibly remove the protesters from the Site—a fateful decision that Peru will address in more detail in **Sections II.B.10** and **II.C.3**.

99. To compound matters, Claimant had long settled Invicta's prior debts with the Lacsanga Community, and had made significant progress in its negotiations with that community, including publicly registering its agreement with the National Superintendence of Public Registries ("**SUNARP**") in July 2017.[153] Shortly thereafter, CR Team reports prepared by SSS reveal that Invicta was informed of the concern and

[151] **Ex. C-0530**, CR Team Report No. 003/RRCC/IMC, undated, p. 1; **Ex. C-0390**, IMC, CR Team, Report No. 10-2015-RRCC, January 2015, p. 2 ("In conversations with some community members from Parán, they expressed their wish to resume talks with the company and be able to reach a good agreement for our mutual benefit.").

[152] **Ex. C-0393**, SSS, Monthly Report, Project, October 2016, pp. 6–7. The Report noted that a few members of the Parán Community showed some reluctance to engage due to the risk that the Invicta Mine would pose of contamination of their crops, and such members' prior experiences with "bad mining practices."

[153] **Ex. C-0090**, Registration of the Agreement between Invicta Mining Corp. S.A.C. and Lacsanga Community, Sunarp, 26 July 2017.

displeasure by members of the Parán Community with Invicta's failure to address its own debt and to initiate discussions with the community to sign an agreement.[154]

100. *Second*, Claimant's CR Team failed to keep the Parán Community informed of developments in relation to the Project for weeks at a time.[155] For example, Claimant produces no evidence of any community relations activity with the Parán Community for a period of nearly six months from March 2017 through the first half of August 2017. Similarly, Claimant's document production concerning its contractual relationship with SSS reveals a gap in services from 10 through 30 November 2016, and again from 9 January through 31 July 2017.[156]

101. A mining company with an experienced community relations team and strategy would know that the absence of continuous and committed communication with communities that might be adversely affected by a mining project risks breeding distrust and deepening opposition amongst the members of such communities.[157] Claimant failed to adhere to its pledge under the legal mining framework to maintain "continuous dialogue" with the Parán Community.[158] Predictably, Claimant's lack of communication fostered an environment in which false rumors about the mine's operating status began to circulate among members of the Parán Community. Even Claimant acknowledges that members of that community began expressing both

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[154] **Ex. C-0425**, SSS, Weekly Report, Project, 2–7 October 2017, p. 3 ("[The President of the Parán Community] is very concerned because the payment of the debt by the company to his community has not materialized. He is very interested in meeting with the corporate management of the company.").

[155] **Ex. C-0111**, Report on Social Intervention for Signing of Agreement with the Parán Community, 2018, pp. 1, 4 (CR Team reporting that no consultation efforts were made with the Parán Community for periods in first semester of 2016 and 2017)

[156] Invicta and SSS signed a services contract on 9 September 2016, which expired on 9 November 2016. **Ex. R-0185**, Renewal and Addendum to Service Contract, 1 December 2016. There is a gap from 10 to 30 November 2016. The contract between Invicta and SSS was renewed from 1 December 2016 to 8 January 2017. **Ex. R-0186**, Service Lease Contract, 31 July 2017. The contract was renewed from 1 August 2017 to 31 July 2018. **Ex. R-0187**, Renewal and Addendum to Service Lease Contract, 1 August 2018, pp. 1–2.

[157] León Second Witness Statement, § II; Trigoso Second Witness Statement, § V.

[158] **Ex. R-0098**, Social Responsibility Affidavit Law. *See also* León Second Witness Statement, § II ; Trigoso Second Witness Statement, § V; Incháustegui Second Witness Statement, ¶ 9.

anger and fear that Invicta had commenced exploitation (which in fact had not yet happened) without first having reached a mutually beneficial agreement with such community.[159] What followed were some of the Parán Community's first threats to oppose and even block progress of the Project.[160]

102. In November 2017, Invicta received a direct warning from Wilber Narvasta Cruz, the President of the Parán Community, that adverse consequences could ensue unless that communities' concerns were addressed and an agreement was reached between the Parán Community and Invicta. According to the CR Team report dated 20 November, Mr. Narvasta Cruz warned SSS that "if the company starts operating the mine before paying the debt to the community, he [i.e., Mr Narvasta Cruz] will step aside, since he will not be able to control the actions of the community members against the Invicta project."[161] The abovementioned rumors and threats of protest were a direct and natural consequence of Claimant's failure to invest the time and resources necessary to build trust with the Parán Community.

103. Claimant argues that it did in fact attempt to reach out to the Parán Community for a set of community relations activities that it had planned for 2018, including various training workshops, environmental monitoring, and temporary hiring of community members as personnel, but that the Parán Community "refused to take part" in such

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[159] **Ex. C-0460**, SSS, Weekly Report, Project, 23–29 October 2017, p. 1 ("The latest information provided by the official is that a group of community members from Paran have been instigating a visit to the Invicta project, a visit that could become an attack on the project due to the comments that are being made in the community. These comments that have become rife are: THE COMPANY COMES TO WORK AT NIGHT, according to the community members of Paran, their community shakes at night and that the tremors are caused by the explosions that are supposedly being made in the project. Another comment that has become rife is that THE COMPANY HAS HIRED THUGS TO TAKE CARE OF THE PROJECT and finally this is causing a feeling of resentment in the community, making the comment that the COMPANY [sic] DOES HAS NOT PAID THE DEBT AND IS LEAVING THEM WITH NOTHING.").

[160] **Ex. C-0425**, SSS, Weekly Report, Project, 2–7 October 2017, p. 2; **Ex. C-0456**, SSS, Weekly Report, Project, 9–14 October 2017, p. 3; **Ex. C-0460**, SSS, Weekly Report, Project, 23–29 October 2017, p. 1; **Ex. R-0254**, Monthly Report: Project Invicta, SOCIAL SUSTAINABLE SOLUTIONS, October 2017, p. 4.

[161] **Ex. C-0426**, SSS, Weekly Report, Project, 20–27 November 2017, pp. 3–4.

activities.[162] Claimant's assertions are (i) not substantiated by the evidence, and (ii) also ignores the poor state of the social relations between Invicta and the Parán Community at the time Claimant belatedly sought that community's collaboration.

104. The only contemporaneous documentation that Claimant presents in support of its alleged active social contribution schedule for 2018 consists of two proposed social investment schedules; however, those were documents (i) that Invicta was *required* to prepare and submit as part of the social components (Social Management Plan) of its EIAd approval process;[163] and (ii) that merely constituted *plans* for social investment. Importantly, such documents do not evince Invicta's actual *execution* of those plans, nor do the documents identify a dedicated budget for carrying out those initiatives with the Parán Community.[164] Claimant offers no other evidence to support its assertion that it in fact approached Parán leadership with regard to most of the listed social initiatives that it allegedly planned to execute.

105. Claimant did approach the Parán Community to establish a joint environmental monitoring program, but it did so pursuant to Claimant's affirmative obligations under Peruvian law[165]—in other words, it did so because it had to. However, Claimant failed to obtain that Community's collaboration for a simple reason: Invicta's relations with the Parán Community had significantly deteriorated after nearly six years without any meaningful engagement and agreement with that Community.[166] Indeed, Claimant's CR Team reported that the Parán Community had grown frustrated, and

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[162] Claimant's Reply, ¶ 168; **Ex. C-0442**, IMC, Training plan for Health Promoters, Invicta Project (Lacsanga, Parán and Santo Domingo), April 2018; **Ex. C-0397**, SSS, Community Relations Annual Operating Plan, 2018.

[163] Peru's Counter-Memorial, ¶¶ 77–82; Trigoso Second Witness Statement, § II.B.

[164] **Ex. C-0442**, IMC, Training plan for Health Promoters, Invicta Project (Lacsanga, Parán and Santo Domingo), April 2018; **Ex. C-0397**, SSS, Community Relations Annual Operating Plan, 2018.

[165] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 46 ("The Environmental Study shall include an environmental management strategy that makes it possible to organize actions for the appropriate and adequate execution of the measures provided for in the following plans: a) Environmental Management Plan; b) Environmental Monitoring Plan containing Environmental Monitoring . . . .").

[166] **Ex. C-0435**, SSS, Weekly Report, Project, 14–20 May 2018, p. 3.

"ha[d] no intention of working with Invicta [in a joint environmental monitoring program] until an agreement [was] first signed with the Community."[167] Therefore, Claimant knew that showing a willingness to reach a meaningful agreement with the Parán Community—one that would address at least some of that community's concerns—was a first and necessary step to repair its relationship with the Parán Community and to gain their acceptance of the Project.

106. *Third*, the evidence shows that, in stark contrast to its approach with the Parán Community, Claimant invested in meaningful social outreach, conflict prevention, and conflict resolution with the Lacsanga Community, to build and maintain that community's trust. For example, a November 2014 SSS Report reveals that when it came to sensitizing the Lacsanga Community to the Project, *Claimant visited every single household of every single Lacsanga Community village* (i.e., Miraflores, Collaray, and La Perla) to discuss Invicta's planned mining activity and address the environmental concerns of that community.[168] In that same report, Claimant's community relations manager acknowledged that Invicta's social outreach to the Parán Community (and indeed, even to the Santo Domingo Community) had been much less frequent, and not as involved, by comparison.[169]

107. Claimant's relative lack of social outreach to the Parán Community continued from 2014 through 2018, and is confirmed by Claimant's own contemporaneous documents.[170] While those reports are filled with data points on week-by-week

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[167] **Ex. C-0435**, SSS, Weekly Report, Project, 14–20 May 2018, p. 3.

[168] **Ex. C-0373**, IMC, CR Team Report No. 011-2014-RRCC, November 2014, p. 1 ("The task of raising awareness in the Lacsanga RC house by house continued, talking with the families of the Miraflores, Collaray and La Perla sectors about mining activities and care for the environment . . .").

[169] **Ex. C-0373**, IMC, CR Team Report No. 011-2014-RRCC, November 2014, p. 1 ("also taking advantage of the visits made to the RCs of Santo Domingo and Paran, the same topics were addressed but, in less detail, compared with Lacsanga.").

[170] Reports for the years 2014 through 2018 show less dialogue, less monitoring, and overall less engagement with the Parán Community than with the neighboring communities of Lacsanga and Santo Domingo. For example, the following reports focus on Lacsanga and/or Santo Domingo,

engagement, descriptions of visits with individual community members, and charts on the status of community grievances—the vast majority of the information contained therein *pertain to the Lacsanga and Santo Domingo Communities*—not to the Parán Community. Thus, the lack of similar engagement and outreach to the Parán Community is rendered even more conspicuous by such reports. In some cases, rather than invest the time to engage in direct outreach with the Parán Community, it appears that Claimant was content to rely on a few informants, both internal and external to the Parán Community, to maintain some awareness about that community's ongoing views on the Project.[171]

108. When it came to monitoring opposition and managing community grievances, Claimant also took a far more diligent approach with the Lacsanga and Santo Domingo Communities than with the Parán Community. For example, Invicta established a loyalty program for members of Lacsanga and Santo Domingo,[172] by means of which Invicta closely monitored any signs of opposition to the Project and quickly deployed its CR Team to meet with any individual, or groups of families who had voiced opposition, to initiate dialogue with them and build trust.[173] Claimant worked to resolve the underlying grievance directly or in coordination with the

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while making little if any mention of the Parán Community: *see e.g.*, **Ex. C-0374**, IMC, CR Team Report No. 009-2014-RRCC, December 2014; **Ex. C-0386**, IMC, CR Team Report No. 05-2015/RRCC, May 2015; **Ex. C-0373**, IMC, CR Team Report No. 011-2014-RRCC, November 2014; **Ex. C-0427**, SSS, Weekly Report, Project, 13–18 November 2017, p. 1. No monitoring of Parán Community, except to note that it has not formed its environmental monitoring committee.

[171] Especially in reports during 2017, Claimant relied on a few external or internal informants to keep abreast of rumors circulating among the Parán Community, rather than attempting to engage more directly and consistently with that community. *See e.g.*, **Ex. C-0460**, SSS, Weekly Report, Project, 23–29 October 2017; **Ex. R-0254**, Monthly Report: Project Invicta, SOCIAL SUSTAINABLE SOLUTIONS, October 2017; **Ex. C-0414**, SSS, Weekly Report, Project, 6–11 November 2017; **Ex. C-430**, SSS, Monthly Report, Project, March 2018; **Ex. C-0452**, SSS, Monthly Report, Project, May 2018.

[172] **Ex. C-0425**, SSS, Weekly Report, Project, 2–7 October 2017; **Ex. C-0426**, SSS, Weekly Report, Project, 20–27 November 2017.

[173] **Ex. C-0426**, SSS, Weekly Report, Project, 20–27 November 2017, p. 9.

Lacsanga Community leadership.[174] For example, when members of the Lacsanga Community openly opposed Claimant's construction of an access path on the community's territory—by preventing further roadwork[175] or by blocking the access path to the Invicta Mine[176]—Claimant's response was to immediately approach those community members through dialogue in order to win their support.[177]

109. In another instance, Claimant faced a potentially serious crisis in its relationship with the Lacsanga Community in late 2017 and early 2018, when a group of community members accused the community's Board of agreeing to a future processing plant on Lacsanga territory without the community's consent. [178] Invicta proposed to form a commission to engage in dialogue with the community, as a way to resolve the issue;

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[174] **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, pp. 3–4 (Members of Lacsanga Community oppose the construction of a mineral processing plant on Lacsanga territory, even though such had been agreed to by the Community under the agreement with Invicta. To resolve this dispute and address existing grievances, Invicta proposes a dialogue commission.); **Ex. C-0436**, SSS, Monthly Report, Project, February 2018, p. 3. (In light of growing discontent with Invicta's contractors, Invicta reviews its agreement with the Lacsanga Community to emphasize that the contractor assumes sole responsibility for all claims related to damage.); **Ex. C-0161**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, p. 5 ("From Tuesday 17 to date, meetings and an arduous work of sensitization have been held with the community authorities of Lacsanga so that they allow the transfer of mineral to be carried out, which is being carried out by 08 dump trucks of the CELCH transport company. . . .The community board wanted to hold an emergency meeting . . . took their proposals and concerns to the meeting that was held on Monday 23/07/18 at the INVICTA office in the city of Lima."); **Ex. C-0162**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, August 2018.

[175] **Ex. C-0391**, SSS, Monthly Report, Project, December 2017, p. 14 (Invicta identifies two Lacsanga families that are responsible for causing the machines to stop in La Perla over grievances, but notes that "trust is being gained through on-going discussions with the community members who have always shown themselves to oppose the project"); **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, p. 2.

[176] **Ex. C-0161**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, pp. 5, 19 (explaining that Lacsanga Community members blocked the access road because they did not agree with Invicta's decision to contract with CELLCH for the removal and transport of mineral for metallurgical testing by that contractor, as the Community expected their consortium would be given preference for the transport of the mineral).

[177] **Ex. C-0391**, SSS, Monthly Report, Project, December 2017, p. 14 (wherein Invicta identifies two Lacsanga families that it viewed as responsible, due to grievances, for causing the machines to stop in La Perla, but notes that "trust is being gained through on-going discussions with the community members who have always shown themselves to oppose the project").

[178] **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, p. 3.

it also agreed to give the community additional consideration for the proposed processing plant, even though such consideration was not strictly required under the agreement that had been finalized with that community.[179]

110. By contrast, Claimant did not even attempt a similar strategy with the Parán Community. Instead, as mentioned above, Claimant primarily relied on informants within and outside of the Community to monitor and obtain information on Parán opposition.[180] Claimant sometimes then confronted the President of the Parán Community to enquire about rumors of imminent protests at the Site, based on what it was hearing from these indirect sources.[181] Had Claimant maintained a consistent dialogue with the Parán Community, and a meaningful community relations strategy, it would not have needed to rely on informants and, much more importantly, it might have averted the firm opposition that it eventually faced from the Parán Community.

111. Instead of investing more time to build trust and gain the social license from the Parán Community, Claimant advocated and demanded the use of force by the State to crush opposition by the local community. To recall, this was not the approach that Claimant took to oppositional members of the Lacsanga and Santo Domingo Communities. But Claimant's misguided and increasingly desperate strategy with respect to the Parán Community took other forms as well. As will be discussed in more detail below, Claimant's approach to Parán opposition also involved attempting to pit the Lacsanga and Santo Domingo Communities against the Parán Community (**Section II.B.6**), and

[179] **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, pp. 3–4.

[180] **Ex. C-0414**, SSS, Weekly Report, Project, 6–11 November 2017, p. 3 (explaining that Invicta primarily relied on informants within the Parán Community to obtain information about rumors that a group of opposition members were threatening to carry out an attack on the mining camp); **Ex. C-0460**, SSS, Weekly Report, Project, 23–29 October 2017, p. 1 (explaining that Invicta relied on a Santo Domingo community member, Ezequiel Zapata Torres, to act as informant on information related to Parán Community member opposition).

[181] **Ex. C-0430**, SSS, Monthly Report, Project, March 2018, p. 5 (explaining that Invicta relied on informants to obtain information about Parán Community members agreeing "to go to the Invicta camps to stage a sit-in against the works being carried out in the project" and that Invicta planned to confirm the rumor in an upcoming meeting with President of the Community).

then to unleash its own private security group on that Community (**Sections II.B.9 and II.C**).

d. Claimant's contributions to the Parán Community were inadequate and far less significant than those it made to the Lacsanga and Santo Domingo Communities

112. In attempting to refute Peru's argument about its marginalization of the Parán Community, Claimant has presented a list of its social contributions and donations to that community from 2014 through 2016.[182] Rather than refuting Peru's position, however, such list succeeds only in laying bare Claimant's minimalist approach to community relations with the Parán.

113. *First*, Claimant asserts that Invicta conducted "several training workshops on agricultural issues," but the reality is that it offered only a handful of technical workshops, during a short period of time: from September to October of 2016.[183] Claimant also fails to mention that for the workshops held in October 2016, only 13 members of the Parán Community (out of an overall population of nearly 600) were selected to participate.[184] Moreover, Claimant's own exhibit reveals that such workshops (i) were only intended to be a short-lived "initial strategy"[185]; and (ii) had the primary purpose of establishing initial contact with the Community in order to later introduce Claimant's proposal for an easement agreement.[186]

114. *Second*, Claimant states that it made contributions to the Parán Community in medicine and food in 2014 and 2015.[187] However, a closer inspection of Claimant's

[182] Claimant's Reply, ¶¶ 164–168.

[183] **Ex. C-0393**, SSS, Monthly Report, Project, October 2016, p. 3, **Ex. C-0394**, SSS, Monthly Report, Project, November 2016, pp. 3–4.

[184] **Ex. C-0393**, SSS, Monthly Report, Project, October 2016, p. 9.

[185] **Ex. C-0393**, SSS, Monthly Report, Project, October 2016, p. 3.

[186] **Ex. C-0393**, SSS, Monthly Report, Project, October 2016, p. 3 ("Since our first intervention (09/09) and during the month, the most important activities and situations have focused on the relationship and coordination with the main leaders, authorities and community members of the Paran community, the purpose being to create a relationship of trust in order to transmit to them and subtly make them aware of the advantages of proposed agreement by the company.").

[187] Claimant's Reply, ¶¶ 158, 164.

evidence reveals that Claimant's contributions to the community were negligible at best: (i) 104 bottles of pediatric medicine in November 2014; [188] (ii) a donation of chocolate bars, milk, spices, and disposable cups for the Parán Community to make hot chocolate for the Christmas holidays in December 2014;[189] and (iii) eight food baskets to be raffled among the members of the community for Mother's Day.[190] While the Parán Community appears to have appreciated them, such donations of meager amounts of non-essential goods do not amount to serious socio-economic development initiatives. It is notable that the above list represents the *entirety* of Claimant's donations to the Parán Community during its alleged *six-year* engagement with that community.

115. Claimant's nominal contributions to the Parán Community pale in comparison to the investments that it willingly made for the benefit of the neighboring Communities of Lacsanga and Santo Domingo. In relation to Santo Domingo, Claimant notes that it supported a pine plantation that it anticipated would create a valuable revenue stream for the Santo Domingo Community, as well as a water management initiative (including the construction of an irrigation system and the provisions of training to community members in relation to irrigation techniques).[191] Similarly, for the Lacsanga Community, Claimant improved and devoted resources for the construction

[188] **Ex. C-0383**, Letter from IMC to the Parán Community, 17 November 2014, p. 1 (listing a small donation of pediatric medicine for the children of the Parán Community, delivered in November 2014).

[189] **Ex. C-0381**, Letter from IMC to the Parán Community and Parán Educational Institution (Jorge Basadre School), 1 December 2014; **Ex. C-0382**, Letter from IMC to the Parán Community, Educational Institution of Parán (Colegio Jorge Basadre), 1 December 2014 (listing a small donation of a few chocolate bars, jars of milk, bread, cinnamon, cloves, and disposable cups for the Parán Community to make hot chocolate for the children during the holidays, delivered in December 2014).

[190] **Ex. C-0384**, Letter from IMC to the Parán Community, 17 November 2014, p. 1.

[191] Claimant's Reply, ¶ 154.

of a 17.9 km road,[192] and also devoted funds for the construction of a large community reservoir.[193]

116. *Third*, Claimant seeks to portray itself as generous on the basis that Invicta made certain payments[194] to the Parán Community and paid for the construction of a medical facility in 2013.[195] However, with respect to the payments, Claimant was belatedly settling debts that Invicta already owed to the Parán Community at the time that Claimant purchased Invicta. With respect to the construction of the medical facility, such construction simply amounted to the fulfillment of commitments that Invicta had made under agreements that the Parán Community had reached with the previous owner of the Invicta Mine (namely, the 2008 Agreements and under the 2011 Addendum).[196] Such prior contractual commitments had been inherited by Claimant, thereby becoming Claimant's liability and obligation. Thus, the reality is that rather than being generous, Claimant was merely complying with overdue obligations that it had inherited when it purchased the Project.

117. As highlighted above and in the remainder of this section, it is evident that Claimant was unwilling or unable to spend the additional time and resources required to gain the Parán Community's trust and move negotiations forward. Claimant's parsimonious posture towards the Parán Community was epitomized by its refusal to pay a USD 9,000 fee for a topographical survey on the Parán's territory, pursuant to the 26 February 2019 Agreement.[197] In **Section II.C.3** Peru will address in greater detail Claimant's dogged refusal to pay this fee, and how Claimant's failure to incur

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[192] **Ex. AC-0049**, Lupaka Gold Corp. 2013 Annual Report, p. 46.

[193] **Ex. C-0090**, Registration of the Agreement between Invicta Mining Corp. S.A.C. and Lacsanga Community, Sunarp, 26 July 2017, p. 3; **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, pp. 4 and 36 (showing a photograph of the Jalcan reservoir completed for the Community of Lacsanga).

[194] Claimant's Reply, ¶ 159.

[195] Claimant's Reply, ¶ 158.

[196] Claimant's Reply, ¶ 158; **Ex. C-0060**, Agreement between the Paran Community and Invicta Mining Corp. SA.C., 29April 2008; **Ex. C-0062**, Addendum to Agreement between Paran Community and Invicta Mining Corp. S.A.C, 13 December 2011.

[197] Claimant's Reply, § 6.6.2.

that minor expense ended up derailing the formal negotiations with the Parán Community, which competent government authorities had assiduously worked to facilitate.

3. Claimant's negotiation tactics ruptured the trust of the Parán Community

118. As Peru discussed in **Section II.A.1** above, trust is the cornerstone of mining company-rural community relationships, and one of the most important components of the social license. Without fostering and leveraging trust (and the resulting reputation capital), a mining company simply cannot achieve social acceptability for its project.[198] Unfortunately, Claimant did not act in accordance with this cardinal principle, instead employing "bait and switch" tactics with the Parán Community that fostered distrust and resentment.

119. Claimant initially committed to secure an agreement with the Parán Community before the Invicta Mine's exploitation—only to later renege and even disclaim such commitment. When Claimant acquired the Invicta Mine in 2012, it understood that it needed agreements with all three Rural Communities to bring the Invicta Mine into exploitation.[199] But later, when Claimant came to believe that it no longer had a need for the Parán Community, it cast that community aside. Claimant does not even attempt to deny this fact. Throughout the Memorial and the Reply, Claimant repeatedly indicates that, due to the Invicta Mine's scope reduction in 2014, Claimant needed to secure agreements only with the Lacsanga and Santo Domingo Communities, and not with the Parán Community.[200] However, Claimant's position is incorrect (as described above in **Section II.A**).

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[198] Incháustegui Second Witness Statement, ¶ 9.

[199] **Ex. R-0041**, Joint Disclosure Booklet, p. A-3 ("Invicta has a surface rights agreement with the community of Santo Domingo de Apache covering all aspects of mine development, mineral processing and infrastructure. Negotiations regarding surface rights agreements are ongoing with the communities of Parán and Lacsanga as agreements with all three communities are required to initiate construction and operation of a mine.").

[200] *See, e.g.*, Claimant's Reply, ¶ 706.

120. Claimant asserts that it "actively engage[d] with the Parán Community in 2016, 2017 and 2018 to build a lasting relationship and **reach a sustainable agreement**"[201] (emphasis added). During this period of time, Claimant submitted a series of proposals to the Parán Community for consideration, and negotiated the content of those proposals with the Community members.[202] Claimant's conduct and contemporaneous documents indicate that Claimant understood that securing an agreement with the Parán Community was critical.[203] Indeed, Claimant acknowledged to the Parán Community that it *needed* an agreement with that Community before it could overcome what Claimant describes as "a major hurdle to exploitation"—namely, the satisfaction of the PPF Agreement preconditions to the first instalment of payment.[204]

121. Up to September 2017, Claimant's interactions with the Parán Community had bolstered the Community's expectation that Claimant would secure an agreement with it before exploitation of the Invicta Mine began.[205] In the Reply and the Memorial, however, Claimant peddles the argument that its "strenuous efforts to engage and reach a sustainable agreement with the Parán Community" were merely an example

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[201] Claimant's Reply, ¶ 165.

[202] **Ex. C-0464**, IMC, Draft Agreement between Lupaka and the Parán Community, October 2016; **Ex. C-0102**, Draft on the Parán Community Counterproposal, Invicta Mining Corp. S.A.C, November 2016.

[203] Peru's Counter-Memorial, ¶ 166; **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK CONSULTING, 13 April 2018, p. 10 ("Invicta Mining Corp. **plans to have an agreement** with the Parán Community in the short term" (emphasis added)); **Ex. R-0235**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 11 July 2018, p. 2 ("Discussions and negotiations with Parán will **need** to begin soon to prepare a long term agreement with the community" (emphasis added)).

[204] **Ex. C-0114**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to the Parán Community (I. Palomares), 31 May 2017, p. 1 ("despite all the efforts made by Invicta (and Lupaka), to get the Banks to disburse [to Invicta] the money to fulfill [Invicta's debt for non-compliance with its former commitments] and **finance the mining Operation in Invicta**, they refuse to do so while the company does not **have and submit an Agreement signed with the Community of Parán** . . . This long-term Agreement is the **only** condition that the Banks place on Invicta to deliver the monetary funds." (emphasis added)).

[205] Claimant's Reply, ¶ 165 ("IMC continued to actively engage with the Parán Community in 2016, 2017 and 2018 to build a lasting relationship and reach a sustainable agreement.").

of its good faith, a manifestation of disinterested altruism on its part.[206] This position stands in contradiction with the actions of Claimant, the expectations reasonably formed by the Parán Community, and even common sense. The fact of the matter is that Claimant *did* need the Parán Community's social acceptance of its Project—something that the Parán Community knew perfectly well. [207] When Claimant later changed its position and told the Community that its support of the Invicta Mine was not needed after all, it ruptured the trust of the Community.[208]

122. Aside from Claimant's change of position regarding whether it needed an agreement with the Parán Community before exploiting the Invicta Mine, other examples of Claimant's deplorable "bait and switch" approach—described in greater detail below—include:

a. Claimant's commitment in January and May 2017 to pay late fees because its settlement payments to the Parán Community had been delayed; this commitment was reneged and disclaimed in December 2017 (see **Section II.B.5**);

b. Claimant's commitment in February 2019 to accept passage through the Parán Community's access road; this commitment was reneged and disclaimed in March 2019 (see **Section II.C.3**); and

c. Claimant's commitment to pay for the topographical survey in February 2019; this commitment was reneged and disclaimed in March 2019 (see **Section II.C.3**).

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[206] Claimant's Reply, ¶¶ 22, 51, 120, 706 and § 4.3.

[207] **Ex. C-0121**, Letter from the Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018.

[208] Claimant's Reply, ¶ 175; *see also* **Ex. C-0164**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, 1–30 September 2017, p. 6 ("[T]he company has all the permits granted by the Ministry of Energy and Mines to start its exploitation and that **it does not depend on any community to start this stage**. It was also clarified that the company has always requested an easement from the community, but not permission to exploit." (emphasis added)).

123. Claimant's repeated practice of making commitments to the Parán Community but later renouncing them wrecked the relationship between Claimant and the Community, destroying the little trust that the community still placed on Invicta, and fanning the flames of their social conflict.

4. Claimant mishandled the Parán Community's environmental concerns

124. As Peru explained in the Counter-Memorial, the Parán Community repeatedly expressed legitimate concerns regarding the potential environmental impact of the Invicta Project. Specifically, the Parán Community was anxious about potential contamination of their water sources, and the adverse long-term impact that water contamination would have on their agricultural activities and on their population's health, particularly given their proximity to Invicta Mine.[209] Rather than addressing such concerns early on, Claimant waited until it became the subject of an OEFA investigation in mid-2018 before taking any remedial actions.[210]

125. In the Reply, Claimant continues to downplay or dismiss the Parán Community's environmental concerns, advancing two arguments. *First*, Claimant argues that such concerns were simply unfounded.[211] For that proposition, it relies on the ALA's conclusion in July 2018 that the Invicta Project was not contaminating the Parán Community's water sources.[212] *Second*, Claimant alleges that Peru's argumentation on this issue is opportunistic, because, according to Claimant, "Peru . . . knows that the Project was not on Parán land, but on Lacsanga and Santo Domingo land."[213] Claimant's arguments miss the mark, and in fact do nothing other than confirm that

[209] Peru's Counter-Memorial, ¶¶ 192–197. *See also* **Ex. C-0139**, Meeting Minutes, Sub-Prefecture Hearing between Invicta Mining Corp. S.A.C. and the Parán Community, 18 September 2018, p. 2; **Ex. R-0163**, Letter from the Parán Community (I. Palomares) to MINEM (F. Ismodes), 10 October 2018, p. 1.

[210] Peru's Counter-Memorial, ¶¶ 192–197.

[211] Claimant's Reply ¶ 213.

[212] Claimant's Reply, ¶ 229.

[213] Claimant's Reply, § 5, ¶ 215.

Claimant was grossly negligent in managing its community relations with the Parán Community.

126. Given the proximity of the Invicta Mine to the Parán Community's peach and avocado orchards—which, importantly, is their main source of livelihood—it was perfectly legitimate for the Parán Community to be concerned about potential environmental contamination of their water sources for agricultural use, as any such contamination would potentially have a devastating effect on its cultivation of those orchards.[214] Claimant's position that such environmental concerns were merely opportunistic because the Invicta Mine was on Lacsanga and Santo Domingo territory is disingenuous, as any reasonable mining operator—and indeed, any reasonable person—is aware that the environmental impact of a mining operation might not be circumscribed to the four corners of the property on which the mine is located—contamination does not respect boundaries or coordinates. Claimant's argument in this regard therefore reflects its inexplicable disregard of the fact that the Parán Community's agricultural zones were in the area of environmental impact of the Project's mining activity.[215] Moreover, the contemporaneous evidence indicates that

[214] *See, e.g.,* **Ex. C-0139**, Meeting Minutes, Sub-Prefecture Hearing between Invicta Mining Corp. S.A.C. and the Parán Community, 18 September 2018, p. 2 (demonstrating that the Parán Community made known to Claimant how Invicta Mine's close proximity to Parán villages and water sources posed a direct risk to that Community: "[W]e are harmed by the mining company, when they place explosives they are causing harm to the population with rocks falling and the water we drink being contaminated, the problem is that the mine is at the top and the community is at the bottom and it causes harm to us."); **Ex. R-0163**, Letter from the Parán Community (I. Palomares) to MINEM (F. Ismodes), 10 October 2018, p. 1 (showing the Parán Community's concern about Invicta Mine's impact on their Community: "My community is 100% geographically jeopardised due to the negative impacts that this mining company would cause us, harming the water sources, which in our community are not running but are rather all springs, and it would be harmful to our agriculture, which is our source of income and the livelihood of the residents of my community; we are dedicated to fruit growing, cultivating peaches, avocados, cherimoya fruit among others.").

[215] *See supra* Section II.A.2.

there were in fact observable discolorations in the Parán Community's water sources,[216] rendering the Parán Community's concerns more than understandable.

127. ALA's later conclusion that there was no environmental contamination does not mean that the Parán Community's concerns were illegitimate. Far from it: the fact that ALA considered it necessary to carry out further testing and investigation in response to the concerns expressed by the Community demonstrates that such concerns were perceived even by ALA as valid at the time. Even if the concerns were ultimately not vindicated by ALA's conclusion, it was Claimant's duty to manage such concerns in a respectful manner, rather than a dismissive one. Such approach reflects its cavalier handling of local community concerns—part of its quest to reach exploitation at all costs and meet its obligations under the PPF Agreement. The fact is that Claimant mismanaged the Parán Community's concerns about water contamination.

128. With regard to other environmental infractions, Claimant admits that "OEFA found specific environmental infractions from time to time," but then mischaracterizes the record and again downplays their significance.[217] As Claimant admits, such environmental violations included (i) failure to service the drainage ditches located on the access road to the Invicta Mine in order to diminish the risk of landslides (which is of particular importance during the rainy seasons);[218] (ii) failure to segregate its solid and non-solid waste and to properly dispose of sludge, as well as failure to install

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[216] *See* **Ex. R-0247**, Monthly Report: Project Invicta, Social Sustainable Solutions, April 2018, p. 4. *See also* **Ex. R-0081**, Letter No. 105-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Ombudsman's Office (W. Gutiérrez), 8 May 2018, p. 1 (7 May 2018 inspection revealed "greenish rust residue on the floor and stones; The local inhabitants reported the waters are consumed by children."); **Ex. R-0080**, Technical Field Verification Report, ANA, 7 May 2018, p. 3 (The 7 May 2018 inspection revealed "cloudy water with a an off-white tone."); **Ex. C-0408**, ANA, Technical Report No. 048-2018-ANA- AAA.CF.-ALA H/KHR, 13 July 2018, p. 8 (showing that the 4 July 2018 inspection had revealed that the Parán had no access to water); Other sources showing monitoring of the waters in Fraile-Capia: **Ex. C-0435**, SSS, Weekly Report, Project, 14–20 May 2018; **Ex. C-0518**, SSS, Weekly Report, Project, 7–13 May 2015; **Ex. C-0452**, SSS, Monthly Report, Project, May 2018; Retuerto Witness Statement, ¶¶ 14–16.

[217] Claimant's Reply, ¶ 251.

[218] Claimant's Reply, ¶ 234.

a biodigester—instead of septic tanks, which was contrary to its EIA.[219] In addition, OEFA found that Claimant had taken actions that risked harm to flora and fauna.[220] Claimant argues that these technical violations found by the OEFA were never the subject of complaint or concern by the Parán Community, and thus, could not have been a cause of that Community's opposition.[221]

129. Claimant again misses the point. The fact is that Claimant ignored the direct and indirect environmental impact that its mining activity would have on the Parán Community. Claimant's environmental infractions impacted that Community, whether or not Parán members had an awareness or understanding of the technical violations that Claimant had committed. As a reminder, the location of the Invicta Mine on the mountain-side, less than two kilometers above the Parán Community and its fruit orchards, should have made it obvious to Claimant—as it had been to the Parán Community itself—that Claimant needed to obtain that community's support. From a practical perspective, the real impact of any mining activity would inevitably fall on the Parán Community's agricultural and residential areas.[222] No other Rural Community faced the same degree of impact to its inhabitants and agricultural zones as the Parán Community.[223]

130. Unfortunately, Claimant's treatment of the environmental concerns of the Parán Community mirrored its general approach with that community—minimal

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[219] Claimant's Reply, ¶ 236.

[220] **Ex. DV-0010**, Resolution No. 158-2021-OEFA-TFA-SE, 25 May 2021, p. 6 (Violation No. 2).

[221] Claimant's Reply, ¶ 232.

[222] Dufour Report, ¶¶ 376, 379, 384; Retuerto Witness Statement, ¶¶ 14, 33; León Second Witness Statement, ¶ 58. *See also* **Ex. C-0139**, Meeting Minutes, Sub-Prefecture Hearing between Invicta Mining Corp. S.A.C. and the Parán Community, 18 September 2018, p. 2; **Ex. R-0163**, Letter from the Parán Community (I. Palomares) to MINEM (F. Ismodes), 10 October 2018, p. 1.

[223] Retuerto Witness Statement, ¶¶ 14, 33; León Second Witness Statement, ¶¶ 17, 58; *see also* **Ex. R-0236**, Plan: Increased Land Use Capacity, IMC, October 2014 (2014 map from Claimant's ITS Report showing the agricultural zones in green, represented by labels "C2se" and "A2Se" and "F2se"); *see also* **Ex. R-0237**, Project: Environmental Impact Study Invicta Mine, IMC, October 2008. Although this map does not reflect Claimant's updated Mine Plan, this 2008 map shows the agricultural zones with the Parán villages of Parán, Santana, Capia and Huamboy and their relative distance from the main camp Site, which did not significantly change).

engagement, to the point of being negligible. For example, in response to a 5 May 2018 Letter from the Parán Community in which that Community had laid out its environmental concerns,[224] Claimant offered a three-paragraph response in a letter dated 30 May 2018, invoking by way of explanation the asserted fact that none of the operations were being carried out on Parán territory, and claiming that the Invicta Mine was not the cause of any alleged water contamination.[225] Claimant has not shown—and the documents on record do not evidence—that Claimant attempted to enter into any meaningful dialogue with the Parán Community concerning the latter's understandable concern. As a result of Claimant's callousness and lack of dialogue, the Parán Community President reached out directly to the MINEM for assistance and cited the "strong unrest" that had been created among the members of the community about Claimant's attitude.[226] Such members held the perception that Invicta had started operating the mine "without qualms about caring for the environment."[227] It is hardly surprising therefore that a fortnight after Claimant's dismissive three-paragraph response to the Parán Community's environmental concern, the latter carried out the 19 June 2018 Protest.

5. Claimant did not satisfy its monetary obligations to the Parán Community in a timely manner

131. In the Counter-Memorial, Peru challenged Claimant's position that its past engagement with the Rural Communities had been positive, citing to many examples of instances in which Claimant had in fact breached the trust of the Communities by failing to follow through on its social obligations. Claimant denied having committed

[224] **Ex. C-0121**, Letter from Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Casteñeda), 4 May 2018.

[225] **Ex. C-0122**, Letter from Invicta Mining Corp. S.A.C. (J. Casteñeda) to Parán Community (I. Román), 30 May 2018.

[226] **Ex. C-0163**, Letter from Parán Community (I. Román) to MINEM (F. Ismodes), 10 October 2018, p. 1.

[227] **Ex. C-0163**, Letter from Parán Community (I. Román) to MINEM (F. Ismodes), 10 October 2018, p. 1.

such breaches.[228] Contrary to Claimant's arguments, however, the evidence shows that Claimant failed to satisfy a wide variety of commitments made to the Rural Communities. In particular, as discussed in the remainder of this section, it failed to fully satisfy its monetary obligations to the Parán Community.

132. Claimant at least acknowledges that it owed the Rural Communities a series of payments as compensation for Invicta's breach of commitments undertaken before Claimant acquired the Invicta Project in 2012. Such payments were made to the Lacsanga Community,[229] Santo Domingo Community,[230] and Parán Community.[231]

133. With regards to the Parán Community, Claimant submits that the settlement payments were eventually paid in full in two installments, in December 2017 and January 2018, respectively.[232] However, in taking this position, Claimant glosses over two key factual circumstances related to such payments, namely (i) the delay in its payments; and (ii) Claimant's failure to pay certain required late fees to the Community.

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[228] Claimant's Reply, § 4.3.3.

[229] Claimant's Reply, ¶¶ 147–150.

[230] Claimant's Reply, ¶ 155.

[231] Claimant's Reply, ¶¶ 158–159 ("It is true that in late 2016, as part of its negotiations with IMC, the Parán Community claimed certain breaches by Invicta's prior owner . . . As to the alleged breaches by Invicta's prior owner, IMC reached an agreement with the Parán Community to address them. Specifically, it was agreed that IMC would pay the community, as a sign of good faith, PEN 300,000 (approximately USD 80,000) to make up for such breaches, following which IMC and Parán would start negotiations to conclude an agreement in relation to the Project."); *see also* **Ex. R-0188**, Estudio Grau Due Diligence, 27 June 2012, p. 6 ("Pursuant to the reports on social conflict released by the 'Ombudsman' (Defensoria del Pueblo), the members of the Farming Community of Paran, Leoncio Prado District, Huarua Province, are not in agreement with INVICTA because of INVICTA´s default of the terms of a certain agreement for the construction of local infrastructure and other benefits, dated 2008. Principal stakeholders: people of Paran and INVICTA; Secondary Stakeholders: Municipality of Leoncio Prado. Dialogue actions are not registered on May."); **Ex. C-0113**, Email from Invicta Mining Corp. S.A.C. (M. Mariños) to Lupaka Gold Corp. (J. Castañeda, *et al.*), 25 January 2017, p. 2; **Ex. C-0114**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to the Parán Community (I. Palomares), 31 May 2017.

[232] Claimant's Reply, ¶ 159.

134. Regarding the first of these two circumstances, as Claimant acknowledges, the prior owner of Claimant's investment vehicle breached its agreements with the Parán Community before Claimant acquired the Invicta Project in 2012. These breaches were not addressed by Claimant until, "as part of its negotiations with [Invicta in 2016], the Parán Community claimed certain breaches by Invicta's prior owner."[233] Claimant and the Parán Community later agreed to a settlement amount of PEN 300,000 for those breaches in January 2017.[234] Notwithstanding this agreement, it took Claimant nearly a year to make its first payment to the Parán Community. Thus, cumulatively it took Invicta almost a decade—from 2008, when its prior owner first signed the agreements with the Community, until January 2018, when the second payment was made—to satisfy its obligation towards the Parán Community. Such dilatory handling further fomenting the distrust and discontent of that Community towards the Invicta Project.

135. Claimant also failed to pay the late fees that were required as a result of the delays in its settlement payments to the Parán Community. Claimant's non-compliance payment (for failing to build the Community classrooms) in March 2017 triggered a late fee.[235] Throughout the Reply and Claimant's witness statements, Claimant characterizes the imposition of late fees by the Parán Community as "unilateral," asserting (i) that Claimant only agreed to pay these fees if an access road agreement was secured, and (ii) that the Parán Community "agreed to set aside the [late fees] that it had unilaterally imposed."[236] As explained below, however, Claimant's assertions

[233] Claimant's Reply, ¶¶ 158–159.

[234] **Ex. C-0113**, Email from Invicta Mining Corp. S.A.C. (M. Mariños) to Lupaka Gold Corp. (J. Castañeda, *et al.*), 25 January 2017, p. 1.

[235] **Ex. C-0113**, Email from Invicta Mining Corp. S.A.C. (M. Mariños) to Lupaka Gold Corp. (J. Castañeda, et al.), 25 January 2017, p. 2; **Ex. C-0119**, Letter No. 015-2018-CCP from the Parán Community (W. Narvasta) to Invicta Mining Corp. S.A.C. (J. Castañeda), 19 December 2017, p. 1; **Ex. C-0120**, Letter No. 004-2018-CCP from the Parán Community (I. Palomares) to Invicta Mining Corp. S.A.C. (J. Castañeda), 3 January 2018, p. 2.

[236] [redacted]

are contradicted by the evidence, including statements of its own witnesses and contemporaneous reports of its CR Team.

136. *First*, Claimant participated in a meeting on 21 January 2017 with the Parán Community regarding the non-compliance payments, and acknowledged its obligation to make those payments. Such meeting was held by the Parán Community Assembly for the purpose of "restarting the dialogue with the mining company INVICTA MINING."[237] [redacted] CR Team, attended this meeting and spoke with the Parán Community members about the non-compliance payments that Invicta would need to make for its failure to satisfy pre-acquisition commitments to the Community.[238]

137. At that meeting, the Parán Community submitted that such payments should include not only a principal amount of PEN 300,000, but also an additional amount as a fine if the principal was not paid within 45 days of the 21 January 2017 agreement.[239] [redacted] Those "agreements" included the payment of late fees if Claimant failed to pay the PEN 300,000 within 45 days of the 21 January 2017 meeting (which in fact occurred). Further, the SSS Community Report for January 2017 noted that

[237] **Ex. C-0113**, Email from Invicta Mining Corp. S.A.C. (M. Mariños) to Lupaka Gold Corp. (J. Castañeda, *et al.*), 25 January 2017, p. 2.

[238] [redacted]

[239] **Ex. C-0113**, Email from Invicta Mining Corp. S.A.C. (M. Mariños) to Lupaka Gold Corp. (J. Castañeda, *et al.*), 25 January 2017, p. 3.

[240] [redacted]

> [a]fter a heated discussion between the leaders who are allies, opponents, former managers and directors, community members and the intervention of Invicta itself, **the following agreements were reached** . . . **In case S/300,000.00 soles are not paid within 45 days, 22 voted to increase the debt by 50%. 40 voted if the sum is not paid within 45 days, the debt will be increased by 100%** . . . These **agreements were accepted by the company** and we found that a large number of community members have great interest in reaching an agreement with the company.[241] (Emphasis added).

138. *Second*, even Claimant's own witnesses acknowledge that Claimant was obliged to pay late fees.[242] For example, following the 21 January 2017 meeting, Mr. Castañeda sent a letter on 31 May 2017, noting therein that "**we accept the amount of the fine which we are willing to pay**"[243] (emphasis added). Contrary to Claimant's assertions above, this letter does *not* in any way indicate that Claimant's acceptance of the fine was conditioned upon the execution of an access road agreement, or that it was being made under protest. To the contrary, it confirms that Claimant was "willing to pay" the relevant "debt plus fine" (i.e., the debt of PEN 300,000 and the late fee for making payment more than 45 days after 21 January 2017), with the only precondition being the payment by Claimant's own creditor of the latter's first financing instalment under the PPF Agreement.

139. *Third*, Claimant's assertion that the Parán Community later "agreed to set aside the fine" is similarly unsupported by the record.[244] On this point, Claimant points to an SSS Report from December 2017.[245] Such report notes that, during a meeting between Claimant's CR Team and the Community in early December 2017, "the president of the community . . . rebuke[d] the company for the company's failure to pay the

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[241] **Ex. C-0429**, SSS, Monthly Report, Project, January 2017, p. 1.

[242] [redacted]

[243] **Ex. C-0114**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to the Parán Community (I. Palomares), 31 May 2017, p. 1.

[244] [redacted]

[245] *See generally* **Ex. C-0391**, SSS, Monthly Report, Project, December 2017.

community."[246] According to the SSS Report, the president of the Parán Community met later in the day with Invicta's representatives and "change[d] his mind and approve[d] the form of payment."[247] Despite making this declaration, the SSS Report does not offer any citation or present any evidentiary support for such assertion, and Claimant too failed to cite to any such evidence. On the contrary, letters sent by the Parán Community in late December 2017 and in early to mid-2018 indicated that the fine had *not* been waived, and was still outstanding, from the Parán Community's perspective.[248]

140. The above evidence thus shows that Claimant failed to satisfy its monetary obligations to the Parán Community—a fact that further inflamed the simmering social conflict with that Community.

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[246] **Ex. C-0391**, SSS, Monthly Report, Project, December 2017, p. 5.

[247] **Ex. C-0391**, SSS, Monthly Report, Project, December 2017, p. 5.

[248] *See, e.g.*, **Ex. C-0119**, Letter No. 015-2018-CCP from the Parán Community (W. Narvasta) to Invicta Mining Corp. S.A.C. (J. Castañeda), 19 December 2017, p. 1 ("That, we hereby invite you on Wednesday, 21 February 2018 at 3:00 p.m., in the district of Huacho, in order to be able to define **the pending payments by the company you represent**, in relation to the exploration works carried out in our Community, **as well as the interest accrued by non-payment** (over two years), within the agreed terms.") (emphasis added); **Ex. C-0120**, Letter No. 004-2018-CCP from the Parán Community (I. Palomares) to Invicta Mining Corp. S.A.C. (J. Castañeda), 3 January 2018, p. 2 ("On 13 December of the current year, after we met with their representatives and listened to the PAYMENT proposal, we agree that the first payment for the amount of S/. 100,000.00 (One Hundred Thousand 00/100 New Soles), will be made on 19 December 2017 and the amount of S/. 200,000.00 (Two Hundred Thousand New Soles) would be paid on the fortnight of January 2018. However, **we wish to EXPRESS our disagreement** due to their ignorance of the foregoing paragraphs as **they deliberately chose to DISREGARD the PENALTY FOR NON-COMPLIANCE** that concluded in the MINUTES on 21 January, since it is proper to remember that it was their own representatives who proposed the deadline for the payment of the debt." (emphasis added)); **Ex. C-0436**, SSS, Monthly Report, Project, February 2018, p. 7 ("With the community of Paran, during the month a meeting was held with the president of the community, Mr. Wilber Narvasta, who provided us with the following information . . . He reported on the company's compliance with the debt and this same group of community members demanded that he charge them the penalty for the delay in payment (S/150,000.00 thousand soles) and also demanded that the company pay for the unrecognised exploration rights.").

6. Claimant also failed to satisfy Invicta's social commitments to the Rural Communities

141. In the Counter-Memorial, Peru explained that Claimant had fostered distrust with the Rural Communities by breaching Invicta's commitments it made to carry out the social obligations delineated in its 2009 EIAd.[249] Nevertheless, in the Reply, Claimant repeatedly protests that "[Invicta] did not breach its social commitments."[250] Such assertion is squarely contradicted by not only the evidence, *but Claimant's own admissions*. Specifically:

a. On 27 June 2018, the OEFA issued a report identifying Invicta's many breaches of its social obligations under the EIAd,[251] and fined Invicta for those breaches.[252] In particular, the OEFA determined that Invicta had breached its obligations to: (i) implement a program to hire local personnel; (ii) support the Rural Communities' health and nutrition campaigns; (iii) assist the Rural Communities' educational and scholarship programs; (iv) assist with sustainable development programs through a series of workshops and partnerships with the Rural Communities; or (v) comply with Peruvian environmental norms.[253]

b. In the Reply, Claimant is forced to concede that "[i]t is true that the OEFA concluded that [Invicta] had not complied with these social obligations in 2016 and 2017 and fined the company."[254]

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[249] *See* Peru's Counter-Memorial, ¶¶ 173–177.

[250] Claimant's Reply, § 4.3.3.

[251] *See generally* **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018.

[252] **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, 17 December 2019, ¶¶ 91–92; Dufour Report, ¶¶ 346–348.

[253] *See* **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, pp. 42–54. *See also* Peru's Counter-Memorial, ¶ 175; **Ex. R-0047**, 2009 EIA, § 8.2.

[254] Claimant's Reply, ¶ 182.

c. Claimant itself acknowledges that it did not "carry[] out certain social activities in 2017 [or] 'implement[] a programme for temporary hiring of local personnel.'"[255]

142. Thus, *by its own admission, Claimant violated Invicta's social commitments to the Parán Community*.

143. Having been forced by the objective evidence to concede that it breached these social commitments, Claimant responds by seeking to show that such breaches were allegedly justified. According to Claimant, Invicta's "priority" at the time was securing an access road to the Invicta Mine.[256] Claimant argues that "[Invicta] would assume [its] commitments **in exchange** for the communities giving the company an access road to the Site"[257] (emphasis added). Thus, Claimant views its social obligations as part of a transaction or *quid pro quo* with the Communities.

144. Such attitude is wholly unjustified, as Invicta had undertaken these obligations as part of its 2009 EIAd; these commitments were not a bargaining chip in negotiations with the Rural Communities.[258] In this respect, the OEFA made clear that "the paralysis of development and preparation activities **does not exempt [Invicta] from responsibility for the implementation of its socioenvironmental commitments**"[259] (emphasis added). Furthermore, Claimant's attempt to dismiss its breaches reflects the disdain held by Claimant for its commitments to and relationship with the Parán Community.

145. As with its failure to fulfill its monetary commitments (discussed in the preceding subsection), Claimant's failure to fulfill its social commitments to the Rural

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[255] Claimant's Reply, ¶ 183.

[256] Claimant's Reply, ¶ 183.

[257] Claimant's Reply, ¶ 184.

[258] *See* **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 57.3 ("Compliance with Agreements. Comply with the social commitments assumed by all parties, by agreements, acts, contracts and environmental studies within the periods defined in those documents."); *See* **Ex. R-0047**, 2009 EIA, p. 36, §§ 4.1.2, 8.2.12.

[259] **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, ¶ 134.

Communities put undue pressure on its relationships with such communities, fostered distrust by them, and further threatened the success of the Invicta Project.

7. Claimant's increasingly frayed relationship with the other rural communities was caused by Claimant's own actions

146. Claimant acknowledges in the Reply that it also faced problems with the Lacsanga and Santo Domingo Communities, but tries to justify its handling of such problems. Contrary to Claimant's arguments, however, the evidence demonstrates that Claimant's own actions were to blame for the unrest and opposition that started forming in such communities. Notably, however, even where Claimant's relationship with these communities was unravelling, it still displayed a markedly more cooperative approach than it pursued with respect to the Parán Community.[260]

147. Claimant's CR Team reports indicate that in 2018, Claimant faced a brewing conflict with the Lacsanga Community, for a variety of reasons, none of which related to any actions of the Parán Community. Specifically, members of the Lacsanga Community:

a. Disagreed with Claimant's choice of a contractor (Minera Lucero S.A.C.) that had a bad reputation among community members for work such contractor had performed in the past; this disagreement led to confrontations between Claimant's contractor and community workers, which in turn caused the paralysis of further construction work;[261]

b. Expressed concern over the construction and widening of the Lacsanga access road, since that had the potential of damaging or encroaching on land possessed by certain community members. Affected community members demanded additional compensation and protested the continuation of roadwork by blocking further construction, and stopping the machinery that was widening the road;[262]

[260] Dufour Report, ¶¶ 415–416.

[261] **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, p. 17.

[262] **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, p. 17.

c. Were angered by damage to their properties caused by Claimant's contractors during the construction of the access road.[263] Specifically, affected members cited the loosening of rock and debris that damaged their properties, and referred to other harm to their property caused directly by excavators used for widening the access path;

d. Were disgruntled as a result of not being paid by Claimant's contractors;[264]

e. Opposed the construction of a processing plant on Lacsanga territory, despite the fact that the Lacsanga Community had reached an agreement with Invicta for such a plant. Members of the community alleged that the Lacsanga Community's Board had been bribed by Invicta, and had granted such permission to Invicta without the knowledge or consent of the wider community.[265] The oppositional members of the community even obtained legal counsel to represent their interests;

f. Were dismayed by Invicta's use of an external contractor to transport minerals for metallurgical testing, given that the Lacsanga Community had formed a Community company for the transport of minerals, and had expected Claimant to give preference to the Community's company for all mineral transport for the Project.[266]

148. Importantly, Claimant's approach to the resolution of the various tensions it experienced with the Lacsanga Community was markedly different to its approach to the social conflict with the Parán Community. As explained in **Section II.B.2**, with regards to the Lacsanga Community, Claimant prioritized continuous dialogue and embraced the possibility of further negotiations, notwithstanding that it already had an agreement in place with that community. Claimant's actions reveal a willingness

[263] **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, p. 17.

[264] **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, pp. 16–17.

[265] **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, pp. 3–4.

[266] **Ex. C-0161**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, pp. 4-5, 12.

to resolve the various community grievances that arose with Lacsanga, likely because it knew that if it did not, the members of that Community would have continued protesting, in much the same way that the Parán Community later would: by blocking access to the Invicta Mine.[267]

149. As for the Santo Domingo Community, Claimant also experienced growing opposition from that community. According to the reports from Claimant's CR Team, the tensions between Claimant and the Santo Domingo Community in 2018 were mainly caused by the length of time that Claimant had taken to sign an addendum to Invicta's agreement with that community, which caused the latter to grow frustrated with Invicta's inexplicable delay.[268] In addition, the Santo Domingo Community alleged breaches by Invicta under the original 2010 Framework Agreement between Invicta and that community.[269] Such was the discontent of the Santo Domingo Community that in March 2018 it called for the removal of that community's President Claros Condo for not demanding that Invicta (i) comply with the Framework Agreement, and (ii) sign the Addendum.[270] The Santo Domingo Community wrote to Claimant demanding a response on the Addendum and other concerns within 24

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[267] *See e.g.* **Ex. C-0161**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, p. 19 ("A permanent blockade of the road was avoided, which was intended to prevent the trucks returning to the INVICTA mining camp for their second trip through. Fortunately it was solved after talking with the community president").

[268] **Ex. C-0430**, SSS, Monthly Report, Project, March 2018, p. 7 ("[The President of the Lacsanga Community] was very concerned and informed us about the strong pressure that the community has been exerting due to the delay in signing the ADENDA and the slow response from the company"); **Ex. R-0247**, Monthly Report: Project Invicta, Social Sustainable Solutions, April 2018, p. 4 ("[The Santo Domingo community] is quite tense due to the exhaustion of the community's patience, who have continuously demanded to start working with the community, benefits for the community, and the community labor creation").

[269] **Ex. C-0444**, SSS, Monthly Report, Project, 14–19 August 2017, p. 4; **Ex. C-0162**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, August 2018, p. 3 (demonstrating the OGGS's involvement in mediating the disagreement between the Santo Domingo Community and Invicta).

[270] **Ex. C-0430**, SSS, Monthly Report, Project, March 2018, p. 7 ("The vast majority of community members have called for [the President of the Santo Domingo Community's] removal from office for not demanding that the company comply with the agreements established in previous months (signing of the ADENDA)").

hours, threatening to "take over" the Invicta Mine if it received no reply.[271] In the months of July and August 2018, Santo Domingo requested the intervention of OGGS to establish formal dialogue and mediation processes for resolving its conflict with Invicta.[272]

150. Two conclusions may be drawn from the events described in the preceding paragraphs. *First*, Claimant's Project was also endangered by opposition from the Lacsanga and Santo Domingo Communities, for reasons that had nothing to do with the Parán Community. *Second*, Claimant willingly accepted dialogue, negotiation, and mediation as methods to resolve the grievances that arose within the Lacsanga and Santo Domingo Communities. Unfortunately, as discussed in the Counter-Memorial and in **Section II.B.2** above, Claimant did not adopt a similarly constructive approach with respect to the Parán Community.

8. Claimant deliberately pitted the Lacsanga and Santo Domingo Communities against the Parán Community

151. Claimant accuses the Parán Community of actively seeking to form alliances with members of the Lacsanga and Santo Domingo Communities to oppose the Project.[273] Peru does not dispute that the Parán Community appears to have taken such an approach beginning in early 2018. However, the Parán Community did so only after, and as a result of, years of Claimant's marginalization of that Community. Moreover, the contemporaneous record reveals that rather than seeking diligently to resolve its

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[271] **Ex. C-0430**, SSS, Monthly Report, Project, March 2018, p. 8 ("By Thursday 05/04 at the latest, if there is no reply to their letter, they will convene an assembly…to agree to move up to the project and take over the Invicta camp").

[272] **Ex. C-0161**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, p. 20 ("A commission from the Santo Domingo community has been seeking legal advice to cancel the agreement and, if this is not possible, they will foster an approach to continue negotiations with the mining company INVICTA for an ADDENDUM, but with many more benefits for them"); **Ex. C-0162**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, August 2018, p. 5 ("The former president of the Santo Domingo community gave us the following documents: . . . Special conciliation hearing between the community of Lacsanga and Santo Domingo"); *id.*, p. 5 ("The former president of the Santo Domingo community informed us that the current board of directors . . . have been in dialogue with the MEM Office of social management").

[273] Claimant's Reply, ¶ 206.

conflict directly with the Parán Community, as early as November 2017 Claimant was fanning the flames of conflict between the Rural Communities, by attempting to pit the Lacsanga and Santo Domingo Communities against the Parán Community.

152. *First*, Claimant pressured the Lacsanga Community to demand that members from that community cease providing support to the Parán Community protesters.[274] Such Lacsanga members had been providing food, water, and other logistical support to the protesters who were blocking Claimant's access to the Invicta Mine.

153. *Second*, Claimant pressured both the Lacsanga and Santo Domingo Communities to take legal and forceful action against the Parán Community to evict members of the latter from territory that was purportedly theirs, and file other interim measures against the Parán Community.[275]

154. *Third,* Claimant welcomed security and surveillance training, including activating the *Rondas Campesina* of the Lacsanga Community, in order to prepare for and respond to any threatened protest of the Parán Community against the Project.[276]

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[274] **Ex. R-0189**, Email from MINECO (J. Arevalo) to Lupaka (W. Ansley), 5 November 2018, p. 4 ("[W]e need to send the community of Lacsanga a legal letter (no later than Monday morning) outlining the fact that Paran is on their registered legal land, and blocking access to our mine. Furthermore we have noted some instances where the Paran movement has been logistically supported by certain members from the Lacsanga community").

[275] **Ex. R-0190**, Email from Lupaka (R. Webster) to Lupaka (W. Ansley), 29 March 2019, p. 1 ("Lacsanga can pressure and file suits against Paran"). **Ex. R-0189**, Email from MINECO (J. Arevalo) to Lupaka (W. Ansley), 5 November 2018, p. 4 ("we need to press the procecutor [sic] to take action against the paran movement and help enforce our property & mineral rights. This is a legal matter, and the state should not allow a conflict to ensue. Ideally these efforts should be on behalf of Lacsanga"); **Ex. R-0191**, Email from FZ Abogados (F. Zelada) to Lupaka (L. Bravo), 8 May 2019 *attaching* Precautionary Measure of Preventive Eviction and Interim Ministerial Order, pp. 2-9 (Draft of where Zelada sends a "*medida cautelar de desalojo preventivo y ministracion provisional*" against members of the Paran Community, to be presented to the judiciary by Lacsanga); **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, p. 5 (Santo Domingo vows to fend off any legal challenge by the Parán Community to take over their territory); **Ex. C-0414**, SSS, Weekly Report, Project, 6–11 November 2017, p. 2 (Lacsanga President vows to support Invicta "in the problems that it may have with the other communities").

[276] **Ex. C-0426**, SSS, Weekly Report, Project, 20–27 November 2017, p. 6 ("[The Sayán police superintendent] recommended that we coordinate security and surveillance training so that,

9. Claimant had no community relations team or strategy shortly after 14 October 2018

155. As Peru explained in the Counter-Memorial and further elaborated in **Section II.B.1** above, it is essential for mining companies to have a dedicated community relations team to handle conflict management responses when a social conflict hits a crisis point.[277] Best practices instruct that, when a social conflict escalates, mining operators should cease all attempts to continue their operations, and instead prioritize de-escalation and resolution of the relevant conflict.[278] Failure to do so will generally aggravate the conflict, and potentially jeopardize the mining operation on a macro level.

156. Unfortunately in this case, Claimant lacked both a community relations team and a crisis response strategy at arguably the most critical juncture of the social conflict. The Parán Community commenced the Access Road Protest on 14 October 2018, marking a clear escalation in the social conflict. Just two weeks later, on 31 October 2018, Claimant's contract with SSS expired. Notwithstanding the ongoing Access Road Protest, and the evident need for continued advice from a community relations team, Claimant inexplicably declined to renew the SSS contract.[279]

157. Following its dismissal of the CR team in November 2018, Claimant downgraded its attempts to pursue dialogue with the Parán Community, in favor of demanding that Peru use force as a quick solution for Claimant to reach operational status fast enough

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through the superintendent and the national police, the members of the Rondas Campesinas of the Laczanga community are trained in security, regularization of weapons licenses, use of weapons, and others").

[277] Peru's Counter-Memorial, § II.B.2.b.

[278] Peru's Counter-Memorial, ¶ 520.

[279] [redacted] ("The contract between IMC and SSS started in September 2016 and was renewed on several occasions, until it came to an end on 31 October 2018 after the Blockade."). [redacted]

to meet looming payment obligations to its creditor, PLI Huaura.[280] Rather than prioritizing the de-escalation and resolution of its conflict with the Parán Community—as it should have—Claimant instead devised a "Police Roadmap" strategy plan for the PNP (i) to forcibly remove the Parán protesters on 30 October 2018, and (ii) to permanently station a PNP force at the Site thereafter.[281]

158. Claimant's "Police Roadmap" was quite detailed, demonstrating the extent to which Claimant was favoring a strategy of resorting to force to evict the Parán protesters, rather than of attempting to rehabilitate its relations with the Parán Community. For example, Claimant's plan included a budgetary allocation to be made by Claimant itself for the transportation of police forces, and the purchase of fuel, food, and bonus payments for police officers.[282] Claimant also appeared ready to prepare a logistical proposal to provide transport, food, accommodation and healthcare to the entire police contingent that under Claimant's proposal would execute the eviction plan.[283]

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[280] *See* **Ex. C-0242**, Meeting Minutes, Meeting between Invicta Mining Corp S.A.C. and the Parán Community, 21 November 2018; **Ex. C-0240**, Letter No. 268-2018-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to Invicta (D. Kivari), 22 November 2018, p. 2–3 ("We are aware of last week's visit of the Ministry of Energy and Mines at the Rural Community of Parán, making efforts to re-establish discussions between the Community of Parán . . . WE REQUEST FROM YOUR OFFICE, that before any further request for dialogue that you intend to transmit to us, you previously verify whether said Rural Community has removed its roadblock, in which case Invicta will openly participate in the meetings that are held to strengthen our community relations. Failing that, please do not transmit any such requests to us, as it would be tantamount to rewarding people who instead of using dialogue resort to threats and violence to achieve their victimising themselves through letters whose unilateral content only narrates a victimisation scenario, completely detached from the reality of the facts, as it may be verified by your officials who will be able to inform you of the real situation on site."). *See also* Peru's Counter-Memorial, ¶¶ 242–243.

[281] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 4–5.

[282] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 4–5; **Ex. C-0193**, pp. 19, 23, 24; *see also* Second Witness Statement of Luis Felipe Bravo, 23 September 2022 ("**Bravo Second Witness Statement**"), ¶ 55.

[283] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 4–5.

159. Claimant also undertook these plans notwithstanding the fact that only a few days prior, on 24 October 2018, it had met with the Parán Community and representatives from the MINEM and OGGS to begin engaging in de-escalation talks.[284] During that meeting, the Parán Community agreed to a process of government-supervised mediation and dialogue, showing once again their willingness and desire to reach a lasting agreement with Invicta.[285]

160. At the same time, Claimant was pursuing a parallel strategy that risked further destabilizing relations between the Rural Communities. In October 2018 it met with members of the Lacsanga and Santo Domingo Communities seeking to persuade them to take a coordinated position *against* the Parán Community.[286] Thus, rather than attempting to salvage its relations with the Parán Community by engaging directly with the latter, it sought to exploit divisions between the Rural Communities and pit them against each other, in order to further marginalize the Parán Community. [287]

161. Claimant's actions demonstrate that it never intended to participate in meaningful dialogue with the Parán Community. Rather, it remained obstinate in its position that Parán Community members had to be forcibly removed as a pre-condition for any dialogue.[288] Claimant thus wasted the opportunity to resolve its dispute with the Parán Community during a critical period of government-aided dialogue.

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[284] *See generally*, **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018.

[285] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, p. 2.

[286] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 5–6.

[287] Dufour Report, ¶ 412, 415–416.

[288] **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Ísmodes), 6 February 2019, p. 2 ("These people must abandon, or be removed, from the blockade before any meaningful discussions can occur").

10. Claimant exacerbated the social conflict with the Parán Community by unleashing the War Dogs private security group

162. As Peru explained in the Counter-Memorial, Claimant's mishandling of its social conflict with the Parán Community took a turn for the worse when it decided to contract the armed private security group War Dogs to retake control of the Invicta Project in May 2019.[289] Peru explained that this show of force predictably resulted in violence and the tragic loss of human life, and inflamed the dispute between Claimant and the Parán Community.[290] In the Reply, Claimant does not deny that the involvement of War Dogs not only precipitated violence but also further frayed Claimant's already delicate relationship with the Parán Community.[291] Claimant now relies on *ex post facto* arguments to justify the ill-fated actions that it took that day.

163. *First*, Claimant argues that it hired War Dogs to join the PNP in executing an operational plan to remove the Parán protesters and secure the Site from future invasions.[292] According to Claimant, its decision was justified because collaborations between private security forces and the PNP are "consistent with other police interventions."[293] Claimant offers two examples of such collaborations: (i) an intervention by the PNP and private security forces at the Las Bambas mining project in Peru on 28 April 2022 to remove protesters from the project site; and (ii) another intervention by police along with private contractors on 23 December 2016 in Subtanjalla to evict more than 100 protesters from privately-owned land where a real estate project was to be developed.[294] However, neither of these examples assists Claimant, as neither is analogous to the Invicta situation. First of all, and as Peru explains in **Section II.C.4** below, Las Bambas is hardly an example of a *successful* use of force to resolve a social conflict. Rather, the police intervention in that case (i)

[289] Peru's Counter-Memorial, § II.F.1.f.

[290] Peru's Counter-Memorial, ¶ 332.

[291] Claimant's Reply, ¶ 344.

[292] Claimant's Reply, ¶ 339.

[293] Claimant's Reply, ¶ 341.

[294] Claimant's Reply, ¶ 341.

resulted in 44 injuries—the largest number recorded for the Las Bambas project to date; and (ii) prompted the government to declare a state of emergency.[295] Claimant's second example (viz., the eviction of protesters in Subtanjalla), is similarly unhelpful to Claimant's case, given that it did not concern a mining project at all but rather an entirely different sector (real estate).[296]

164. Claimant alleges that it contracted the War Dogs with the intention of securing the Site only *after* the execution by the PNP of an Operational Plan lifting the Parán Community's Access Road Protest, and only *after* the PNP had retained control of the Site for a maximum of 72 hours.[297] Contrary to its stated objective, however, Claimant did not wait for the execution of any such plan by the authorities.[298] Instead, Claimant hired War Dogs, failed to supervise them appropriately, and failed also to coordinate with the PNP. War Dogs thus unilaterally accessed Invicta Mine on 14 May 2019. According to Claimant, War Dogs decided to access the site on that day because it had been confirmed earlier by one of Claimant's CR Team members that no Parán members were manning the Access Road Protest, which proved to be incorrect.[299] In fact, Claimant attempts to conceal the fact that War Dogs forcibly removed five members of the Parán Community in the process of approaching Invicta Mine.[300] Thus, rather than work together with Peruvian authorities, Claimant took matters into

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[295] *See infra* Section II.C.4; **Ex. R-0225**, Social Conflicts Report No. 218, Ombudsman's Office of Peru, April 2022, pp. 35–36; Incháustegui Second Witness Statement, ¶¶ 7–8.

[296] **Ex. C-0580**, "Ica: police evict more than 150 land invaders in Subtanjalla,", 24 horas (Transcript), 23 December 2016, p. 1.

[297] Claimant's Reply, ¶ 340.

[298] Claimant's Reply, ¶¶ 342–344.

[299] Claimant's Reply, ¶ 344.

[300] **Ex. R-0113**, Letter No. 52-2020-REGIÓN POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO from PNP Colonel (L. Pérez) to PNP General (H. Ramos), 22 February 2020, p. 9 ("On 14MAY2019 at 3:00 a.m. approx. arrived at the camp of the mining company INVICTA, located at km. 23 of the road of the community of Lacsanga, an area known as Milcopallan, approximately fifty (50) private security guards hired by the mining company invicta, in three minivan vehicles and entered the mining camp facilities, **forcing five community members of paran who were in the area of Milcopallan at the entrance to the camp to leave**." (emphasis added)).

its own hands in a moment of disastrously miscalculated opportunism. Predictably, Claimant's strategy backfired, and had fatal consequences.[301]

165. *Second*, Claimant seeks to defend its actions by relying on an internal document dated 20 February 2019 from the OGGS.[302] In that document, OGGS officials had noted that, based on the information available at the time, dialogue with the Parán Community had reached an impasse.[303] Claimants point to this as evidence that Peru considered that any further dialogue between Claimant and the Parán Community would be "pointless" and, therefore, the only remaining option was the forceful removal of the Community from the Invicta Mine. However, such 20 February 2019 document naturally reflected the state of affairs as of that date, but the circumstances changed soon thereafter. Indeed, the dialogue between the Parán Community and Invicta resumed in the days immediately following the date of the OGGS document, leading not only to significant progress, a breakthrough in the negotiations, and ultimately the signing of the 26 February 2019 Agreement. Thus, within just one week from the time of OGGS' reference to an impasse, such impasse was broken and an agreement was reached. Claimant's invocation of the OGGS statement in that document is therefore misleading.

166. In any event, at the time that Claimant decided to deploy the War Dogs (which was 14 May 2019), the 20 February 2019 document on which Claimant relies—and the intelligence contained therein with respect to the efficacy of dialogue—was not yet in Claimant's possession, and therefore could not have propitiated or even informed

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[301] Claimant acknowledges that because of the actions of War Dogs, approximately one hundred members of the Parán Community ascended on Invicta Mine and a violent clash ensued between those members and War Dogs, leading to injuries and even the loss of human life. *See* Claimant's Reply, ¶ 344 ("It was only some three hours after WDS personnel had accessed the Site that Parán's members arrived in the hundreds, shooting their guns and the WDS team and Mr Estrada to flee…Parán's attacks continued the next day, with community members intercepting other members of the WDS team and, sadly, killing one of them"). *See* also León Second Witness Statement, ¶¶ 50–57; Retuerto Witness Statement, § V.

[302] *See generally*, **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019.

[303] **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, pp. 2–3 ("Dialogue mechanisms are not appropriate in this case").

Claimant's resort to the War Dogs. Claimant's *post hoc* attempt to rely on the 20 February 2019 document to justify its misguided actions thus fails.

167. The fact of the matter is that Claimant's actions at this stage of the chronology put its contractor, civilians, and PNP officials' lives at risk. Peruvian authorities—including the PNP and the MINEM—were left to deal with the consequences and human cost of Claimant's rashness and misjudgment. Such actions also had catastrophic consequences for Claimant's investment, as they marked a point of no return for Claimant's relations with the Parán Community. In the days following the War Dogs incident, the Parán Community's General Assembly demanded that the MINEM order the final closure of the Invicta Project.[304] Such request demonstrates the fatal effect that the War Dogs incident had on the community's dynamic with Invicta, and the prospects of resolution of their areas of disagreement.[305]

168. For its part, and as already explained in the Counter-Memorial, government officials of Peru continued to work to facilitate a peaceful and sustainable resolution of the dispute between the Parán Community and Invicta, despite the latter's aggravation of the conflict.[306]

C. Peru took appropriate action to mediate a peaceful and lasting solution to Claimant's conflict with the Parán Community

169. The central thesis of Claimant's claims in this arbitration is that Peru took *no* action to protect Claimant's investment, and instead stood idle as the Parán Community caused Claimant to lose its investment.[307] Peru disproved Claimant's thesis in the Counter-Memorial, demonstrating—based on contemporaneous and unrebutted evidence—that, amongst many other actions, Peru undertook the following:

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[304] Peru's Counter-Memorial, ¶ 284; **Ex. R-0110**, Letter No. 011-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ísmodes), 4 June 2019, p. 1.

[305] Peru's Counter-Memorial, ¶ 284; **Ex. R-0110**, Letter No. 011-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ísmodes), 4 June 2019, p. 1.

[306] Peru's Counter-Memorial, ¶¶ 285–286.

[307] *See e.g.* Claimant's Memorial, ¶¶ 13, 132, 156, 161, 170, 190–191.

a. it deployed police to the Invicta Mine within hours of the inception of the Parán Community's protest on 19 June 2018;[308]

b. it pre-emptively secured the Invicta Mine to avoid a violent clash between Claimant's personnel and contractors and the Parán Community in September 2018; 309

c. it activated a panoply of State agencies and resources to proactively and professionally mediate Claimant's conflict with the Parán Community;[310]

d. it de-escalated and neutralized tensions during a critical point in the conflict—i.e., when the Parán Community commenced the Access Road Protest;[311]

e. it narrowed the scope of the conflict by brokering an agreement to resolve differences between the Rural Communities;[312]

f. it conducted mediations between Claimant and the Parán Community, and held at least 28 *ex parte* meetings with the parties; 313

g. it mediated the discussions that yielded the first breakthrough in the conflict: the written agreement between Claimant and the Parán Community signed on 26 February 2019, which laid the foundation for a potential definitive resolution of the conflict; 314

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[308] Peru's Counter-Memorial, § II.E.2.a.

[309] Peru's Counter-Memorial, § II.E.2.

[310] Peru's Counter-Memorial, § II.E.1–2.

[311] Peru's Counter-Memorial, § II.E.1–4.

[312] Peru's Counter-Memorial, ¶ 250. *See also* **Ex. R-0063**, Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, pp. 10–11 (showing that, on 26 January 2019, regional Peruvian Government agencies organized and hosted a meeting among the Rural Communities where the leaders of each of the Rural Communities agreed to avoid any confrontation amongst themselves, thereby establishing a favorable environment in the Invicta Project's area of direct influence).

[313] Peru's Counter-Memorial, § II.E.3.

[314] Peru's Counter-Memorial, § II.E.3.

h. it appropriately launched investigations into complaints alleging criminal conduct by certain members of the Parán Community against Claimant's personnel;[315] and

i. it remained engaged in an active and constructive fashion throughout the conflict (even after Claimant deployed its armed security force, the War Dogs, which aggravated the conflict and undermined mediation efforts).[316]

170. Faced with overwhelming evidence of Peru's helpful engagement, Claimant was forced in the Reply to abandon its original thesis and to concoct a new one. Instead of arguing that Peru took no action at all—as it had so assuredly asserted in the Memorial—Claimant has downgraded its accusation, and now argues only that Peru did not take *appropriate* action. On Claimant's revised case, the allegedly appropriate action that Peru should have taken would have been to use force against the Parán Community, in order to crush the Community's opposition to the Project.[317] Indeed, Claimant goes so far as to suggest that the PNP should have provided 24/7 security surveillance—i.e., to act as private security guards—at the Invicta Mine.[318] Claimant seeks to support this argument in various ways, including through inaccurate arguments on Peruvian law and industry practice, mischaracterizations of the facts, and comparisons to inapposite situations in Peru.

171. In the subsections that follow, Peru demonstrates that Claimant's new use-of-force thesis finds no support in Peruvian law, applicable standards, or in fact. Specifically, and contrary to Claimant's newfangled arguments, Peruvian law did *not* obligate Peru to use force against Parán Community members (see **subsection 1** below). Furthermore, State practice and applicable industry standards prioritize dialogue over the use of force in the context of social conflicts like this one (see **subsection 2** below). In accordance with these standards, Peru took reasonable, appropriate, and

[315] Peru's Counter-Memorial, ¶¶ 217, 651, 656.

[316] Peru's Counter-Memorial, § II.E.

[317] Claimant's Reply, § 6.2.2, 6.4–6.5, 6.7.

[318] Claimant's Reply, §§ 6.1–6.9, 7.

diligent steps to assist in finding a resolution to the conflict, including by facilitating dialogue (see **subsection 3** below). Finally, Claimant's attempt to bolster its new use-of-force theory by reference to other situations of social conflict in the Peruvian mining sector is unavailing (see **subsection 4** below).

1. Peruvian law did not obligate Peru to use force against Parán Community members

172. In an attempt to bolster its new use-of-force theory, Claimant insists in the Reply that Peruvian law *required* Peru to intervene and to use force against the Parán Community during the course of the conflict between Claimant and that Community.[319] Specifically, Claimant alleges that Article 920 of the Civil Code of Peru and Articles 8.2(c) and 8.2(e) of Legislative Decree 1186 legally obligated Peru to use force against the protesters.[320] However, Claimant's argument is based on an inaccurate interpretation and application of these provisions of Peruvian law, as explained below.

a. Contrary to Claimant's arguments, Peruvian law does not require the police to use force against civilians

173. As a preliminary matter, all of Claimant's arguments appear to rest on the false premise that Peruvian law *obligates* law enforcement to use force against civilians in circumstances like the Access Road Protest. However, that is not an accurate reflection of Peruvian law—nor of that of other democratic societies.[321] Rather, Peruvian law *authorizes* law enforcement to use force under certain circumstances, and only when such use is *necessary*.

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[319] Claimant's Reply, § 7.1.

[320] Claimant's Reply, § 7.1.

[321] **Ex. R-0248**, Anneke Osse, Understanding Policing, AMNESTY INTERNATIONAL, 2012; **Ex. R-0120**, Code of Conduct for Law Enforcement Official, United Nations, 17 December 1979, Art. 3; **Ex. R-0118**, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, United Nations, 7 September 1990; **Ex. R-0249**, Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Amnesty International, August 2015.

174. Peru's "Manual of Human Rights and Policing" confirms that the circumstances under which the use of force which establishes that

> **[t]he use of force** in the performance of duty is necessary when other means are ineffective or do not in any way guarantee the achievement of the legal objective sought. In other words, **when the objective of a law enforcement action can be achieved without resorting to the exercise of force**, the police will not use that power.[322] (Emphasis added)

175. Peruvian criminal law expert Mr. Meini has likewise confirmed that "**the PNP may not use force unless it has exhausted all alternative means that do not involve violence or a risk of harm to persons**"[323] (emphasis added).

176. The legal framework that authorizes—but does not require—law enforcement to use force as a measure of last resort is not unique to Peru, and is fundamental to a free society in which basic human rights are protected. In this respect, the Inter-American Court of Human Rights has repeatedly held that the use of force should only be used to protect a party's legal interests when the actions of others pose a *risk to the life, integrity or freedom of persons*, and that such use of force must be *necessary* and *proportionate*.[324]

177. Claimant's arguments are expressly premised on the notion that Peruvian law *obligated* or required the police to use force against individuals, including in particular

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[322] **Ex. IMM-0039**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, p. 51. *See also* **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 4 ("[T]he use of force by National Police officers shall be maintained, respecting fundamental rights and subject to the following principles: a. Legality – The use of force must be aimed at achieving a legal objective. The means and methods used to comply with their duty must fall within the scope of the International Human Rights Law, the Political Constitution of Peru and other national rules on the matter . . . ").

[323] Expert Report of Iván Meini, 22 March 2022 ("**Meini Report**"), ¶ 134.

[324] *See* **Ex. IMM-0032**, *J. v. Peru*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 17 April 2015; **Ex. IMM-0033**, *Nadege Dorzema, et al., v. Dominican Republic*, IACHR, Merits, Reparations and Costs, 24 October 2012, Series C No. 25; **Ex. IMM-0034**, *Mujeres Víctimas de Tortura Sexual en Atenco v. Mexico*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 28 November 2018, Series C No. 371; **Ex. R-0250**, Diego García-Sayán, *Justicia Interamericana y Tribunales Nacionales*, DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES (2013), pp. 825, 831. *See also* Meini Report, ¶ 75.

to protect mining assets.[325] These arguments are fundamentally inconsistent with the applicable legal framework, and fail for the reasons identified above, as well as those discussed below.

b. The Peruvian Civil Code did not require the forcible removal of Parán Community members by the PNP

178. Claimant argues in the Reply—for the first time in this arbitration—that Article 920 of the Civil Code *required* Peru to forcibly remove the Parán Community members that were participating in the Access Road Protest.[326] However, as explained below, Claimant is incorrect.

179. Article 920 of the Civil Code of Peru addresses the rights of a party that is dispossessed of its property, and provides in that regard as follows:

> The possessor, when dispossessed of his asset, can repel any force used against him or his asset in order to recover it. Said action must be taken within fifteen (15) days of becoming aware of the dispossession. The dispossessed, in acting to recover said asset, may not take actions that are not justified by the circumstances.
>
> The National Police of Peru and the respective Municipalities, within the framework of their powers as authorized under the Organic Law of Municipalities, must provide the necessary support to guarantee strict compliance with this article, under penalty of law . . .[327] (Emphasis added)

180. Thus, Article 920 authorizes a possessor of an asset to recover an asset of which he is dispossessed within 15 days.

181. Claimant argues (i) that by means of the Access Road Protest, the Parán protesters dispossessed Claimant of its property, and (ii) that Article 920 required that the PNP

[325] Claimant's Reply, ¶¶ 15, 254, 273, 358, 365–366.

[326] Claimant's Reply, ¶¶ 356–358.

[327] **Ex. R-0005**, Legislative Decree No. 295, Civil Code, 24 July 1984, Art. 920.

reestablish Claimant's possession within 15 days of the start of the Protest.[328] This argument fails for at least two reasons.

182. *First*, Claimant's argument is inconsistent with the terms and purpose of this provision of law. The default rule under Peruvian law is that a party cannot and should not engage in self-help action.[329] Article 920 creates an *exception* to that default rule—an exception that allows a dispossessed party to engage in self-help under limited circumstances. In other words, Article 920 is not designed to create or expand police authority.[330] The foregoing is confirmed by the plain text of Article 920, which establishes that: (i) the dispossessed party (itself) is authorized to "repel the force" used against it, and (ii) the PNP must provide "support" to the dispossessed party, while ensuring that the dispossessed party will "not take actions that are not justified by the circumstances."[331]

183. Peruvian criminal law expert Mr. Robin Toro Hurtado explains the purpose and effect of Article 920 as follows:

> [T]he participation of the National Police within the framework of Art. 920 of the Civil Code, **is limited to providing assistance** from the public force in the exercise of [its] own functions provided for in the Constitution and the Law, such as guaranteeing order and public safety, preventing the commission of crimes, etc.; **but NOT to execute the possessory defense itself**, **since said action according to the above,**

[328] Claimant's Reply ¶¶ 291–295.

[329] **Ex. C-0617**, Legislative Decree No. 635, Criminal Code, 3 April 1991, Art. 417; *see also* **RLA-0176**, Mario Solís Córdova, "*Defensoría posesoria extrajudicial*," CÓDIGO CIVIL COMENTADO (Vol. V, 2020), pp. 192, 197–198.

[330] **Ex. R-0251**, "*Naturaleza pública de la función policial: A propósito de los requerimientos de auxilio policial para fines particulares*," LA LEY, 2 November 2021 ("The Police service is of a public nature and its purpose is to serve the general interest of the community, not matters of a private nature"); **Ex. R-0252**, "*La función de la PNP en el marco de la defensa posesoria regulada en el artículo 920 del Código Civil*," LA LEY, 23 September 2021.

[331] **Ex. R-0005**, Legislative Decree No. 295, Civil Code, 24 July 1984, Art. 920.

> **corresponds exclusively to the dispossessed actor as owner of the action**.[332] (Emphasis added)

184. Thus, contrary to Claimant's argument, Article 920 did not even authorize—let alone *obligate*—the PNP to conduct an operation to forcibly remove the protesters participating in the Access Road Protest. Rather, Article 920 merely required the PNP to grant assistance to Invicta in the event that the latter had informed the PNP, "within fifteen (15) days after becoming aware of the dispossession,"[333] of its intent to repel the force used against Invicta by the protesters. But such assistance or support could not have taken the form of use of force, for all the reasons articulated by Peru in the preceding section, in the Counter-Memorial,[334] and by Mr. Meini in his expert report.[335]

185. *Second*, Claimant did not take the appropriate steps under Article 920 to request the "support" of the PNP. Article 920 only authorizes the PNP to provide "support" to a "possessor" of property that has been "dispossessed."[336] A party must therefore demonstrate that it lawfully possessed the allegedly dispossessed asset.[337]

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[332] **Ex. R-0252**, "*La función de la PNP en el marco de la defensa posesoria regulada en el artículo 920 del Código Civil*," LA LEY, 23 September 2021; *see also* **RLA-0191**, Julio Pozo & Paul Cajacuri, "*Capitulo Sexto: Defensa posesoria*," NUEVO COMENTARIO DEL CODIGO CIVIL PERUANO (Vol. V, 2022), p. 507 (what is sought with the intervention of the Police is to "ensure the legality of the new extrajudicial defense mechanism awarded to the owner and prevent events of extreme violence.").

[333] **Ex. R-0005**, Legislative Decree No. 295, Civil Code, 24 July 1984, Art. 920.

[334] *See* Peru's Counter-Memorial, ¶¶ 208, 233–234, 245, 533–538.

[335] *See* Meini Report, ¶¶ 172–174.

[336] **Ex. R-0005**, Legislative Decree No. 295, Civil Code, 24 July 1984, Art. 920.

[337] **RLA-0191**, Julio Pozo & Paul Cajacuri, "*Capitulo Sexto: Defensa posesoria*," NUEVO COMENTARIO DEL CODIGO CIVIL PERUANO (Vol. V, 2022), p. 507 ("[F]or the authorities to provide support, they first need to have certainty that the requirements of the aforementioned article have been met, i.e., they shall verify that they have been approached by the owner of the property, that the current possessor has no title, and that this possessor has not possessed the property for over 10 years . . ."). *See also* **RLA-0176**, Mario Solís Córdova, "*Defensoría posesoria extrajudicial*," CÓDIGO CIVIL COMENTADO (Vol. V, 2020), p. 209 ("[U]pon request of the interested party, the Police [are] required to ensure strict compliance with the law, for which reason for the Police to intervene it must verify that the requesting party meets certain requirements, such as: verification of the 15-day term since becoming aware of the dispossession, the condition of aggrieved possessor, the ownership rights . . . .").

Furthermore, the PNP has established a protocol for requests for police intervention in cases related to Article 920.[338] Such protocol requires that any request for police support (i) be filed in the jurisdiction in which the property is located,[339] and (ii) include sufficient information to substantiate the request, including (inter alia) evidence of previous possession of the property, and a map of the property.[340] As a practical matter, the need for such steps is obvious: The police cannot be expected to provide support to a private party in enforcing legal rights if that party has not established that it possesses such rights to begin with.

186. Claimant neither acknowledges nor attempts to show compliance with these requirements. Instead, it merely refers to a letter dated 17 October 2018 sent by Invicta to the PNP headquarters in Lima.[341] However, such communication (i) did not reference Article 920 or Invicta's alleged right to defense of its possession, (ii) did not include any of the documents required to substantiate such request, and (iii) was not

[338] **Ex. R-0252**, "*La función de la PNP en el marco de la defensa posesoria regulada en el artículo 920 del Código Civil*," LA LEY, 23 September 2021, p. 3 ("For the purpose of providing assistance with public force, the National Police pursuant to the legal reserve established in Article 168 of the Political Constitution issued the 'Protocol of interventions of the National Police of Peru in the extrajudicial recovery of State-owned land' approved with Directorial Resolution No. 216-2015-DIRGEN/EMG-PNP of 12MAR2015 **[] which is applicable for the extrajudicial recovery of privately owned land in regards to the absence of a specific rule**." (emphasis added)).

[339] **Ex. R-0253**, Protocol of interventions of the PNP in the extrajudicial recovery of state-owned property approved by Directorial Resolution No. 216-2015-DIRGEN/EMG-PNP, 12 March 2015, p. 3 ("The request for police assistance from the Public Prosecutor must be submitted in writing to the police station of the jurisdiction where the property is located").

[340] **Ex. R-0253**, Protocol of interventions of the PNP in the extrajudicial recovery of state-owned property approved by Directorial Resolution No. 216-2015-DIRGEN/ EMG-PNP, 12 March 2015, pp. 3–4 ("The request for Police Assistance from the Public Prosecutor, must be filed compulsorily and in writing, to the police station in the jurisdiction where the State-owned property to be recovered is located and must contain the following original documents: 1) Accreditation of ownership, competence or administration of the State agency over the property to be recovered. 2) The perimetric plan - location. 3) The registry record of the property or the Cadastre Negative Certificate when the state property is not registered. 4) Expressly state that the occupants lack a property title.").

[341] *See* Claimant's Reply, ¶¶ 293–295 (discussing **Ex. C-0170**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to Lima Police Department (G. Rodríguez), 17 October 2018).

directed to the competent Huaura Police Department.[342] Thus, Claimant failed to carry out the steps required to request assistance from the PNP—which assistance, as stated above, in any event could not and would not have included the execution by the police of an operation to forcibly remove the protesters.

187. For these reasons, and contrary to Claimant's argument, Article 920 of the Peruvian Civil Code did *not* require the PNP to use force against the Parán Community protesters.

c. Article 8.2(c) of Legislative Decree 1186 did not obligate Peru to use force against Parán Community members

188. Claimant also introduces in the Reply (again, for the first time in this proceeding) the argument that Article 8.2(c) of Peruvian Legislative Decree 1186 required the police to use force against the protesters in order to prevent the perpetration of crimes.[343] Claimant's argument is expressly predicated on the notion that the PNP was *required* to act.[344] However, Article 8.2(c) of Legislative Decree 1186 created no such obligation; its plain text unequivocally renders the use of force *discretionary*:

> The personnel of the National Police of Peru **may** use force, in accordance with articles 4, 6 and numeral 7.2, in the following circumstances: . . .(c) [to] [p]revent the commission of crimes and misdemeanors.[345] (Emphasis added)

189. The fact that the text uses the term "*may*" means the PNP has the discretion to—but is not required to—use force under certain circumstances. As discussed above, this is consistent with the general approach to law enforcement authority to use force in Peru and in other democratic societies.

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[342] *See generally* **Ex. C-0170**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to Lima Police Department (G. Rodríguez), 17 October 2018).

[343] Claimant's Reply, ¶ 358.

[344] Claimant's Reply, ¶ 371 ("[T]he Tribunal must conclude that Peru was obliged to authorise a police intervention to lift the Blockade, either in response to IMC's request for Police support dated 17 October 2018, to prevent the commission of further crimes or in the face of the Parán members' resistance of authority.").

[345] **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2(c).

190. Claimant incorrectly claims that Prof. Meini's analysis confirms that the PNP was required under Article 8.2(c) to use force against the Parán Community protesters.[346] That is incorrect; Prof. Meini instead explained that Article 8.2(c) could *not* have been the basis of forcible removal of the Access Road Protest, because preventative action by the PNP under that provision could only have taken place *before* the events of October 2018:

> The possibility is ruled out in this case that the PNP faced a situation in which it would have had to use force to prevent the perpetration of crime or misdemeanors, as provided for by [A]rticle 8.2.c of Legislative Decree 1186. The use of force by the PNP as a preventive measure would require an analysis of the actions of the police officers at a time prior to that of the events that Lupaka considers to be harmful to its rights. In fact, preventive action by the PNP could only have taken place before the occurrence of the events that took place in June and October 2018.[347]

191. Thus, the Access Road Protest did not justify the use of force by the PNP under Article 8.2(c).[348]

d. Article 8.2(e) of Legislative Decree 1186 did not obligate Peru to use force against Parán Community members

192. Claimant's final argument in respect of Peruvian law is that under Article 8.2(e) of Legislative Decree 1186, the PNP was "obliged to use force and arrest 'anyone resisting authority.'"[349] Claimant's argument misinterprets and misapplies Peruvian law.

193. Article 8.2(e) of Legislative Decree 1186 provides as follows:

> The personnel of the National Police of Peru **may** use force, in accordance with articles 4, 6 and numeral 7.2, in the following circumstances: . . .

[346] Claimant's Reply, ¶ 358.

[347] Meini Report, ¶ 74.

[348] *See* Meini Report, ¶ 74.

[349] Claimant's Reply, ¶ 366.

> e. [To] [c]ontrol who opposes resistance to authority.[350] (Emphasis added)

194. Claimant relies on this provision to argue that, in relation to two inspections of the area near the Mine,[351] "Peru was **obliged** to authorise a police intervention . . . in the face of the Parán members' resistance of authority"[352] (emphasis added). That argument also fails.

195. First of all, and just like Article 8.2(c), the plain text of Article 8.2(e) uses the discretionary word "*may*"—i.e., the PNP has the *discretion*, but is *not* required, to use force to control a person who is resisting authority. Because Article 8.2(e) does not include any *obligation* to use force, the PNP cannot be held to have breached Article 8.2(e) by failing to use force against the Parán Community protesters.

196. Furthermore, As Prof. Meini explains,

> [t]he possibility that the PNP would have had to use force to control anyone resisting authority, as provided for by article 8.2.e of Legislative Decree 1186,65 must also be ruled out in this case. The requisite context for such an analysis would include either the existence of an order issued by any authority which had also been disobeyed and thus warranted the use of force; or a certain police action that was resisted and required the use of force to be carried out. **This case, however, does not involve the existence of an order [whose] execution was resisted or a police measure which, having been resisted, warranted the use of force**. On the contrary, Lupaka's claim arises from the absence of an order to retake possession of the Site and from the lack of action by the PNP. In any event, the use of force by the PNP must in all cases be examined in the light of the test of reasonableness.[353] (Emphasis added)

197. Prof. Meini thus concludes that the facts presented by Claimant in this case of individuals resisting authority did not merit the use of force.[354]

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[350] **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2(e).

[351] Claimant's Reply, ¶¶ 368–370.

[352] Claimant's Reply, ¶ 371.

[353] Meini Report, ¶ 76.

[354] *See* Meini Report, ¶ 76.

198. In sum, Claimant has taken the extreme position that Peruvian law (and specifically the three provisions discussed above) required the Peruvian police to use force against the Parán Community protesters. However, each of the legal provisions cited by Claimant merely *authorizes* the police to use force under certain circumstances. As Prof. Meini has explained, none of those circumstances existed in the present case.[355] And in any event, even if Claimant had demonstrated that the use of force was authorized under the circumstances (quod non), the PNP would still be required to assess whether the use of force would be necessary (i.e., that "other means [would be] ineffective"),[356] and would retain discretion to determine when and to what extent to use force. For these reasons, Claimant is wrong and has not demonstrated that Peru violated Peruvian law by failing to use force.

2. State practice and applicable industry standards prioritize dialogue over use of force

199. Claimant's new theory that Peru was affirmatively required to use force against the protesters not only is inconsistent with Peruvian law, but finds no support in State practice, and is contrary to the industry standards—all of which prioritize dialogue with the local communities. As Peru demonstrated in the Counter-Memorial, industry leaders, associations, and consulting experts worldwide all emphasize the need to favor alternative dispute resolution mechanisms—primarily dialogue and mediation—to resolve social conflicts in the mining sector.[357] *None* of those authorities promotes or advises the use of force.

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[355] *See* Meini Report, ¶¶ 169–174.

[356] **Ex. IMM-0039**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, p. 51. *See also* **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 4.

[357] *See* Peru's Counter-Memorial, ¶ 57. *See also, e.g.*, **Ex. R-0088**, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 2017; **Ex. R-0084**, Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict: Land and Conflict, UNEP, 2012; **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration: Principles and Guidance Notes, PDAC, 2014; **Ex. R-0085**, Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?, Chatham House, 4 June 2013; **Ex. R-0086**, Good Practice Guide: Indigenous Communities and Mining, ICMM, 2015; **Ex. R-0087**, Social

200. By way of example:

a. "*The Equator Principles*" is a risk management framework adopted by financial institutions, which encompasses environmental, social and governance ("**ESG")** practices. Claimant pledged to uphold the Equator Principles,[358] pursuant to which mining companies are expected to: (i) demonstrate effective stakeholder engagement without coercion or intimidation; (ii) establish grievance mechanisms scaled to the risks and impacts of a project, to facilitate the resolution of concerns and grievances that give rise to opposition; and (iii) engage in a continuous process of informed consultation and participation with the local communities.[359]

b. Canada's "2014 *CSR Strategy*" is the Government of Canada's corporate social responsibility strategy for Canadian companies in the mining sector, which: (i) articulates the expectation that Canadian mining companies will take part in mechanisms designed to facilitate dialogue towards dispute resolution when social conflicts arise;[360] (ii) advises that non-judicial conflict resolution mechanisms that "bring parties together" are "crucial" to finding "mutually beneficial solutions" and to the "long-term success of extractive projects abroad;"[361] and (iii) takes the use and importance of its own mediation and conflict resolution program so seriously that "**[t]he Government [of Canada] will introduce consequences for companies that are not willing to participate in the dialogue facilitation processes**" (emphasis added).[362]

License to Operate in Mining: Current Trends & Toolkit, IBDO, 2020; **Ex. R-0094**, Understanding Company-Community Relations Toolkit, ICMM, 2015; **Ex. R-0141**, OXFAM, "*La Participación ciudadana en la minería peruana: concepciones, mecanismos y casos*," 8 September 2009; **Ex. R-0028**, Canada-Peru CR Toolkit; **Ex. R-0089**, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Sector Abroad, 2014 ("**2014 CSR Strategy**").

[358] Peru's Counter-Memorial, ¶ 116; **Ex. R-0041**, Joint Disclosure Booklet, p. C-7.

[359] Peru's Counter-Memorial, ¶ 116; **Ex. R-0129**, The Equator Principles, pp. 11–13.

[360] Peru's Counter-Memorial, ¶¶ 106–107; **Ex. R-0089**, 2014 CSR Strategy, p. 11.

[361] Peru's Counter-Memorial, ¶ 107; **Ex. R-0089**, 2014 CSR Strategy, p. 11.

[362] Peru's Counter-Memorial, ¶ 108; **Ex. R-0089**, 2014 CSR Strategy, p. 11.

c. *Article 810 of the Treaty* provides that Peru and Canada should encourage investors to conform with internationally recognized CSR standards through their domestic policies.[363] Such CSR standards include the *ICMM Good Practice Guide*, which emphasizes the need to reach agreements with local communities in a process of dialogue, joint decision-making, and free, prior, and informed consent at all stages of a mining project.[364]

201. Relevant State practice and applicable industry standards—which Claimant largely ignored in the Reply—thus contradict Claimant's new theory that Peru was required to use force against the protesters.

3. Peru took reasonable and proactive steps to facilitate a solution

202. Peru demonstrated in the Counter-Memorial that it engaged constructively with Claimant and the Parán Community to assist in resolving the conflict.[365] Thanks to the diligent and reasonable actions of numerous State agencies,[366] Peru created opportunities for Claimant to establish dialogue with the Parán Community and to take positive steps to resolve the social conflict. Even Claimant's own contemporaneous documents recognized and praised such actions by the Peruvian State.[367] However, Claimant's disingenuous and expedient approach to dialogue,

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[363] **RLA-0010**, Treaty, Art. 810 ("Corporate Social Responsibility Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.").

[364] Peru's Counter-Memorial, ¶¶ 102–104; **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015.

[365] Peru's Counter-Memorial, § II.E.

[366] Peru's Counter-Memorial, § II.E.1.

[367] *See* Peru's Counter-Memorial, § II.E.2–5. *See also, e.g.*, **Ex. C-0182**, Summary Report of Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018, p. 2 ("Dr. Nilton León was in attendance, who with his considerable experience and impetus, managed the meeting, allowing time for all items on the agenda to be discussed . . . Dr León was direct and professional with his answers and the way in which he led the meeting.").

combined with its insistence on immediate use of force by the Peruvian law enforcement authorities, undermined that constructive approach, and limited its chances of success.

203. In the Reply, Claimant continues to argue—without any basis—that Peru is to blame for the unraveling of Claimant's investment. It bases its argument on a variety of baseless attacks, including the notion that Peru should have anticipated and prevented protests caused by Claimant's own missteps. In the following subsections, Peru will address each of those allegations, demonstrating that they are unsubstantiated, as the reality is that Peru acted reasonably and diligently at all times, as part of a sustained good faith effort to mediate a solution to the conflict.

a. 19 June 2018 Protest: Peru responded diligently and effectively

204. In its Counter-Memorial, Peru demonstrated that it responded to the 19 June 2018 Protest appropriately, diligently and in accordance with Peruvian law and procedures, including by leading a PNP patrol team to inspect the Site.[368] At the time, Claimant expressed its gratitude to Peru for these diligent efforts.[369]

205. In the Reply, Claimant cannot and does not dispute these proven facts.[370] Instead, it changes tack, offering new theories that Peru should have prevented and/or was somehow responsible for the 19 June 2018 Protest. These theories are unsubstantiated and untrue, as shown below.

(i) Claimant falsely asserts that Peru should have known in advance about the 19 June 2018 protest

206. One strand of Claimant's theory is that Peru should have somehow prevented the 19 June 2018 Protest. This strand rests primarily on Claimant's argument that Peru

[368] Peru's Counter-Memorial, ¶ 217.

[369] Peru's Counter-Memorial, ¶ 218. *See* **Ex. C-0129**, Special Report: Seizure of Invicta Mine Camp and Facilities, SOCIAL SUSTAINABLE SOLUTIONS, 19 June 2018, **Ex. C-0161**, Monthly Report on Invicta Mine, Social Sustainable Solutions, July 2018; **Ex. C-0463**, SSS, Weekly Report, Project, 9–15 July 2018.

[370] *See* Claimant's Reply, ¶¶ 273–274, 666–667, 672–673; §§ 6.1–6.2.

had been aware in October 2017 of a potential "invasion" of the Invicta Mine.[371] However, the evidence proves otherwise. In reality, there was no "invasion" or "attack" in October 2017, but rather merely a set of rumors of discontent, of which Claimant was aware. Such rumors were not connected to the protest that took place some *eight months later*, on 19 June 2018.

207. As of October 2017, Invicta had paused mining development. Invicta's CR Team had become aware of various rumors concerning discontent in the Parán Community. Specifically, an SSS Report noted that in October 2017, a group of "members from Parán [] intended to go to the [Site] to check and see if the company is at work on the project."[372] These individual Parán Community members wanted to visit the Site to investigate rumors that "the company ha[d] been working at night" to advance their mining operations, "without taking [the Parán Community] into account at all."[373]

208. Separately, Claimant's CR Team had identified a small group of the Project's opponents that was generating "rumors" and circulating "false information" about a possible takeover by the Parán Community of the Site.[374] According to Claimant's CR Team's records, such rumors were understood by Invicta as a ploy to generate "concern" by the operators of the Mine.[375]

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[371] Claimant's Reply, § 6.2.2.

[372] **Ex. R-0254**, Monthly Report: Project Invicta, Social Sustainable Solutions, October 2017, p. 4. *See also* Claimant's Reply, ¶ 257.

[373] **Ex. R-0254**, Monthly Report: Project Invicta, Social Sustainable Solutions, October 2017, pp. 1, 5

[374] **Ex. C-0414**, SSS, Weekly Report, Project, 6–11 November 2017 ("Part of the information provided by the allies was the alleged attack against the Invicta camp (Wednesday morning), a date on which supposedly a group of community members (25 to 30) had already prepared to carry out their attack, waiting to seize and burn the camp early on [Wed]nesday morning. This false information was to rumo[r]s promoted by a group of community members employed [by the Pe]ruvian army, who stated that they would take action against the camp.").

[375] **Ex. C-0414**, SSS, Weekly Report, Project, 6–11 November 2017, p. 20 ("Although it is true there are rumors by Paran community members, who intend to promote social conflicts with the company, it is also true that these rumors are exploited by unscrupulous community leaders who want to incite unease in the company to obtain a personal benefit, this modus operandi is well known by some community members, who are already identified by the community relations team.").

209. In both instances, Claimant's CR Team understood these to be merely rumors, and that any alleged action by individual members had *not* been sanctioned by the Parán Community Board or by the rest of the Parán Community.[376] In short, there was no plan by the Parán Community to invade the Invicta Mine in October 2017, and as Claimant itself concedes, no invasion or site visit materialized at that time.[377]

210. Nonetheless, in the fall of 2017, Claimant decided to approach the PNP regarding the situation. As confirmed by contemporaneous documentary evidence, and as Claimant appears to concede,[378] Claimant received an entirely satisfactory response from the PNP. Claimant's representatives met with highly ranked members of the PNP (Colonel Walter Fernández, Major Andrés Rosales, and Senior Police Officer Henry Lezcano), who agreed to investigate and monitor the situation at the Mine, and indeed proceeded to do so.[379] The evidence further reveals that:

a. Claimant acknowledges[380] that the PNP worked with Invicta "to **help IMC** [(i.e., Invicta)] anticipate possible attacks by Parán"[381] (emphasis added).

b. In November 2017, the Police Station informed Invicta that if any problems arose, "[Invicta should] explain that [it (i.e., Invicta) is] in constant

[376] **Ex. C-0414**, SSS, Weekly Report, Project, 6–11 November 2017, p. 3. ("It is important to report that both officials with whom we spoke mentioned to us that they had heard rumours from the community members of Paran who intended to go up to the Invicta camp to pressure the company to pay their debt, but did not have the support of the board and other community members, but could not specify these rumors.").

[377] Claimant's Reply, ¶ 258.

[378] Claimant's Reply, ¶¶ 257–259 [redacted]

[379] Claimant's Reply, ¶¶ 257–259.

[380] **Ex. C-0414**, SSS, Weekly Report, Project, 6–11 November 2017, p. 6; Claimant's Reply, ¶ 258.

[381] Claimant's Reply, ¶ 12.

communication with the Sayán commissioner, [and should] call immediately if any of these groups [of Community members] appear in the area." [382]

c. The Sayán Police Station had fifteen police officers specifically assigned to cover all incidents that might arise within that station's jurisdiction, and could respond if any incidents arose.[383]

d. Multiple internal reports from SSS (Claimant's external PR consultants) confirm that Claimant appreciated "the support and willingness of the Sayán [Police] commissioner" to assist the company in monitoring the situation.[384]

e. On multiple occasions, Claimant praised "the police presence," its commitment, and assistance at the Site when "the company [had] complaints" with the communities.[385]

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[382] **Ex. C-0445**, SSS, Weekly Report, Project, 20–24 November 2017, p. 4 ("If during the company's work these people show up, let them know that we are in constant communication with the commissioner of Sayán. He asked that we call him immediately if any of these groups appear in the area . . . He commented that he is coordinating with the head of the road division of Sayán, Major PNP. Salcedo so that he can help with any necessary steps. The commissioner stated that he is willing to support the Invicta project. . . . The Sayán police station is supported by 30 police officers from the DIVINRAP unit under the command of Captain PNP. Puente, who are also ready to support any request from the company.").

[383] **Ex. R-0130**, Police Report No. RPL-DIVPOL HUACHO, 10 May 2018.

[384] **Ex. C-0414**, SSS, Weekly Report, Project, 6–11 November 2017 ("We have the support and willingness of the Sayán Superintendent and it is extremely important to continue and strengthen relations with this stakeholder, since he knows the communities affecting the project, and we surely will need the support of the national police at any time."); *see* **Ex. C-0445**, SSS, Weekly Report, Project, 20–24 November 2017, p. 4; **Ex. C-0462**, SSS, Weekly Report, Project, 9–15 April 2018, p. 7 ("Major - Sayan Superintendent . . . he is willing to support any request from the company, especially to anticipate any risk of social conflict in the project.").

[385] **Ex. R-0256**, Weekly Report: Project Invicta, SOCIAL SUSTAINABLE SOLUTIONS, 3–14 January 2018, p. 7 ("On 01/09 in the afternoon in the Miraflores annex, an information meeting was held with the commissioner of Sayán Major PNP Andrés Rosales, the major was in the area making a labor inspection, following the orders of the Huacho-Huaura Regional Labor Directorate, which had issued a complaint by Mr. Eugenio Poma, worker of the company MINERA LUCERO SAC"). *See also* **Ex. R-0257**, Social Management Report: Invicta Project, 11–16 December 2017, p. 4 ("Coordination with the commissioner of Sayán Major PNP. Andrés Rosales, who, fulfilling his commitment, by visiting the Lacsanga community on two occasions, providing a police presence and reaffirming his commitment to support the Invicta project. Coordinated with the police chief

211. Thus, contrary to what Claimant now argues in the Reply, the evidence shows that (i) there was no planned invasion of the Mine in October 2017, but rather only rumors that were known to Claimant, and that proved in any event to be unsubstantiated, as there was in fact no such invasion; and (ii) Claimant was satisfied and even pleased with the assistance and cooperation that it received from the Peruvian law enforcement authorities.

212. Finally, and critically, Claimant has provided *no evidence* whatsoever linking the rumors in October 2017 with the protest that happened eight months later, in June 2018. Accordingly, Claimant has utterly failed to show that Peru could or should have anticipated the 19 June 2018 Protest. Indeed, as Peru demonstrated in the Counter-Memorial, the Sayán Police authorities received less than a week's notice of the 19 June 2018 Protest, and acted diligently to respond to that event.[386]

(ii) Claimant relies on a new and baseless conspiracy theory to try to blame Peru for the 19 June 2018 Protest

213. Desperate to find a way to support its new theory that Peru was responsible for the 19 June 2018 Protest, Claimant asserts in the Reply—yet again, for the first time in this arbitration—that a regional government official, Soymán Román Retuerto, incited and/or led the Protest.[387] However, such assertion is nothing more than a conspiracy

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to give him a Christmas present this week"); **Ex. C-0430**, SSS, Monthly Report, Project, March 2018, p. 17 (Andrés Rosales "High level of influence. He believes that mining projects bring development to the communities. From his position as commissioner of the Sayán commissariat, he is willing to support any request from the company, especially if he anticipates any risk of social conflict in the project"); **Ex. C-0462**, SSS, Weekly Report, Project, 9–15 April 2018, p. 7. Andrés Rosales supports a conciliation with a community member from Lacsanga. They describe him as: ("he is willing to support any request from the company, especially to anticipate any risk of social conflict").

[386] Peru's Counter-Memorial, ¶¶ 211–218. [redacted]
Claimant's Reply, ¶ 269.

[387] Claimant's Reply, ¶ 264. *See also* Section 6.2.1.

theory invented by Claimant, which in turn is built purely on hearsay provided by its witness and Invicta's former employee.[388] The theory has no basis in evidence or fact.

214. Mr. Retuerto was the Subprefect[389] of Leoncio Prado from 2017 to 2022, and the evidence shows that he was a professional and diligent regional official, who acted in good faith at all relevant times. For example, when Mr. Retuerto first learned of the planned 19 June 2018 Protest, mere days before it was set to begin, he immediately alerted the proper authorities. Specifically, on 15 June 2018, Mr. Retuerto sent a letter to the Regional Directorate of Energy and Mines, noting that the President of the Community of Parán had indicated that a protest would take place at the Mine on 19 June 2018.[390] Mr. Retuerto promptly provided such notification precisely so that the regional authorities could intervene in a timely fashion, and thereby avoid "an escalation of the conflict by resolving the problems through dialogue tables."[391]

215. Far from leading the Parán Community in opposition to the Project, as Claimant baselessly asserts, Mr. Retuerto was in fact considered *persona non grata* by the Parán Community. As Mr. Retuerto explains in his witness statement, from 2009 to 2012 he was the President of the Santo Domingo de Apache Community, whose views at the time were not aligned with those of Parán Community in respect of the Invicta Mine (in part due to the discord that had been sown by Claimant within and amongst the local communities).[392] Accordingly, when Mr. Retuerto arrived to the area of the Access Road Protest hoping to help mediate the conflict, the Parán Community actually prevented him from entering the area.[393] Months later, in January 2019, the Parán Community again demonstrated their opposition to Mr. Retuerto, when it

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[388] [redacted]

[389] A Subprefect is a public officer responsible for planning, coordinating, evaluating and overseeing the work of the political authorities within a defined area or jurisdiction of Peru.

[390] **Ex. C-0550**, Letter from Leoncio Prado Subprefect (MININTER) to MEM, 15 June 2018, p. 1.

[391] **Ex. C-0550**, Letter from Leoncio Prado Subprefect (MININTER) to MEM, 15 June 2018, p. 1; Retuerto Witness Statement, ¶ 19.

[392] **Ex. C-0550**, Letter from Leoncio Prado Subprefect (MININTER) to MEM, 15 June 2018, p. 1; Retuerto Witness Statement, ¶ 20.

[393] Retuerto Witness Statement, ¶ 20.

asked that he leave the convention center in which the Community and Invicta were holding discussions.[394]

216. Thus, the evidence squarely contradicts the notion that Mr. Retuerto was leading or otherwise inciting the Access Road Protest by the Parán Community. Nevertheless, Claimant in the Reply inexplicably concocts a conspiracy theory that Mr. Retuerto was somehow behind the Access Road Protest. However, the alleged evidence cited by Claimant does not support such theory. [redacted] Such unsubstantiated hearsay, self-servingly offered by Claimant's own witness at the eleventh hour, cannot be seriously countenanced as evidence of Mr. Retuerto's alleged involvement in the Access Road Protest.

217. [redacted] in his witness testimony in the present arbitration he states that "**Parán's officials** claimed that [the Protest] had been authorised by the Sub-Prefecture of Leoncio Prado" (emphasis added).[397] [redacted]

[394] Retuerto Witness Statement, ¶ 21.

[395] Claimant's Reply, ¶ 269, fn. 512.

[396] *See* [redacted]

[397] [redacted] (citing to **Ex. C-0154**, Invicta Mining Corp. S.A.C. Memorandum, Training Programme for Invicta Mining Camp Project, 8 July 2017, p. 4 ([o]n [Friday] 15/06/18 a meeting was held with the **Paran community** [Governing Committee] in which took part Eng. Justo Arellano, Manager of the INVICTA Mine; [CR Team] and 06 managers of the aforementioned community. No satisfactory terms were reached and we were informed of the imminent peaceful protest authorised by the Sub-prefecture of the Leoncio Prado district." (emphasis added)).

[redacted] contradictory, vague, and unsupported comments are manifestly insufficient to substantiate Claimant's theory that Mr. Retuerto was behind the 19 June 2018 Protest.[398]

218. Further embroidering baselessly on its conspiracy theory, Claimant adds in the Reply the accusation that Mr. Retuerto engaged in a defamatory campaign against Invicta.[399] Claimant bases this accusation on letters sent by Mr. Retuerto, in his capacity as the Subprefect, to the PCM, MINEM, and the Ombudsman's Office.[400] Again, the cited evidence simply does not support Claimant's arguments. Instead, an examination of the relevant letters show that Mr. Retuerto was dutifully and appropriately informing the agencies of the information that he was receiving. For example:

a. In a January 2018 letter addressed to the PCM,[401] Mr. Retuerto notified the authorities that he had heard that the members of the Parán Community were concerned that the Mine was going to enter into the exploitation phase before Claimant reached an agreement with the Community.[402] He also reported on the Community's concern about environmental damage that could be caused by the Mine's Operation.[403]

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[398] Claimant also refers to various SSS reports that likewise fail to support its allegations. *See* Claimant's Reply, ¶ 269. However, an examination of these documents reveals that there is no evidence therein that Mr. Retuerto led or participated in the Protest. *See generally* **Ex. C-0444**, SSS, Weekly Report, Project, 14–19 August 2017; **Ex. C-0157**, Monthly Report on Invicta Project, Social Sustainable Solutions, June 2018; **Ex. C-0164**, Monthly Report on Invicta Project, Social Sustainable Solutions, 1–30 September 2017; **Ex. C-0548**, MC, Matrix of Local Stakeholders, Invicta Project, undated.

[399] Claimant's Reply, ¶ 266. *See also id.*, fn. 375.

[400] Claimant's Reply, ¶ 266.

[401] **Ex. R-0076**, Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Roman) to President of Ministry Council (M. Aráoz), 4 January 2018, p. 1.

[402] **Ex. R-0076**, Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Roman) to President of Ministry Council (M. Aráoz), 4 January 2018, p. 1.

[403] **Ex. R-0076**, Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Roman) to President of Ministry Council (M. Aráoz), 4 January 2018, p. 1.

b. In a May 2018 letter addressed to the MINEM and the Ombudsman,[404] Mr. Retuerto explained the results of a visit he had made to the Mine with the environmental authorities (ALA) on 7 May 2018. Mr. Retuerto communicated in this letter that during that visit they had observed greenish water that could indicate contamination. Mr. Retuerto further noted that Invicta had not yet reached an agreement with the Parán Community.[405]

219. The other letters cited by Claimant similarly contradict its defamation theory. Thus, the evidence on which Claimant relies in fact shows that Mr. Retuerto conducted his regional director duties diligently and in good faith.

220. In sum, Claimant has failed to substantiate its recently-minted theories that Peru should have prevented and/or was responsible for the 19 June 2018 Protest.

b. Peru took prompt and effective pre-emptive action in relation to the September 2018 Planned Protest

221. As discussed above, the gravamen of Claimant's case as originally articulated was that Peru had taken no action to address the conflict between Claimant and the Parán Community. Peru decisively refuted that argument in the Counter-Memorial, including by showing that the PNP and relevant agencies had taken prompt and effective pre-emptive action in anticipation of a protest that was planned by the Parán Community for September 2018.[406] Seeing its original case theory defeated, and determined to find a way to blame Peru, Claimant now argues that the PNP's

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[404] **Ex. R-0081**, Letter No. 105-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Ombudsman's Office (W. Gutiérrez), 8 May 2018, p. 1.

[405] **Ex. R-0081**, Letter No. 105-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Ombudsman's Office (W. Gutiérrez), 8 May 2018, p. 1; **Ex. R-0165**, Letter No. 104-2018-DGIN-LMP-HUA from Huaura Subprefect (S. Retuerto) to MINEM (F. Ismodes), 8 May 2018. Although Claimant is correct that the ALA concluded that no pollution was found in the Parán's water sources that could be linked to the Invicta Mine, the agency nevertheless had identified certain violations, had proceeded to sanction Invicta, and had ordered it to take specific corrective measures to prevent environmental harm. **Ex. C-0408**, ANA, Technical Report No. 048-2018-ANA- AAA.CF.-ALA H/KHR, 13 July 2018, p. 10; Retuerto Witness Statement, ¶ 11; **Ex. C-0528**, Interview with Leoncio Prado Subprefect (MININTER) (Video), 8 July 2019, Min. 3:40.

[406] Peru's Counter-Memorial, ¶¶ 224–226.

preemptive response in September 2018 demonstrates that Peru should have used force in response to the Access Road Protest.[407] However, Claimant's argument rests on the false premise that the situations presented in September 2018 (in relation to the PNP's successful preemptive action) and October 2018 (in relation to the Access Road Protest) were the same. They were not. In particular, there are several critical factors that distinguish the events in September 2018 from those related to the Access Road Protest the following month.

222. *First*, Peruvian authorities had received sufficient advance notice of the planned protest in September 2018 (unlike the October 2018 protest). Specifically, the PNP learned of the September protest on 2 September 2018—nine days before it was set to take place.[408] That advance notice provided the PNP with sufficient time to develop and execute an operational plan to secure the perimeter of the Mine *before* the planned protest, including by organizing and dispatching police reinforcements.[409]

223. *Second*, given the advance notice provided, Peruvian authorities were able to meet with members of the Parán Community in advance of the protest. As Claimant acknowledges,[410] multiple State authorities (including the Public Prosecutor's Office, the Huaura Subprefecture, and the PNP) met with the Parán Community on 7 September 2018—four days before the date of the planned protest[411]—to try to ease tensions. The State authorities succeeded in dissuading the Parán Community from following through on its protest plans.[412]

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[407] Claimant's Memorial, ¶ 113.

[408] **Ex. C-0137**, Report on Police Intervention at Camp Project, Invicta Mining Corp. S.A.C, 13 September 2018. *See also* Peru's Counter-Memorial, ¶ 224.

[409] *See generally* **Ex. C-0136**, Order No. 1035-2018-REGPOL LIMA/DIVPOL-H-OFIPLO, Police Approval of Plan to Avoid Parán Community Invasion, 8 September 2018. *See also* Peru's Counter-Memorial, ¶ 225.

[410] Claimant's Memorial, ¶ 112. *See also* **Ex. C-0138**, Monthly Report on Invicta Mining, SOCIAL SUSTAINABLE SOLUTIONS, September 2018, pp. 4–5.

[411] **Ex. C-0138**, Monthly Report on Invicta Mining, SOCIAL SUSTAINABLE SOLUTIONS, September 2018, pp. 4–5. *See also* Peru's Counter-Memorial, ¶ 224.

[412] **Ex. C-0137**, CR Team Report on Police Intervention at Project Site, Invicta, 13 September 2018, p. 2. *See also* Peru's Counter-Memorial, ¶ 225.

224. *Third*, the police operation for the September 2018 Protest was specifically designed to facilitate a peaceful resolution. The operational plan that the PNP executed in September 2018 involved the deployment of police officers around the perimeter of the Mine a day in advance of the planned protesters—i.e., *before any protesters had arrived*.[413] The aim of such operation was to prevent the protest from taking place to begin with (as opposed to forcibly removing or arresting protesters on an *ex post* basis, which is what Claimant later was to demand from Peru in respect of the Access Road Protest).

225. *Fourth*, and as a result of the foregoing, Peru did *not* find it necessary to use force in September 2018. Ultimately, and precisely as a result of the careful planning and successful execution of the authority's preemptive intervention with respect to the anticipated September 2018 protest—including the authorities' helpful outreach to the Parán Community)—the protest was defused and never happened in the end.

226. In sum, and in light of the particular circumstances surrounding the planned protest in September 2018, Peru was able to plan and execute a preemptive operation that was peaceful and orderly, and did not require the use of force against the Community.[414] Peru's response was diligent, effective, and consistent with its policy of mediating a peaceful resolution to the conflict. Claimant's attempts to accuse Peru of inaction, and to create the appearance of inconsistency on the part of Peru, thus fail.

c. The September 2018 Commitment: Peru brokered an agreement, but Claimant then demanded that Peru enforce that private agreement for Claimant

227. Peru's diligent peace-seeking efforts not only preempted the planned protest in September 2018, but created a new opening for Claimant to engage collaboratively with the Parán Community. Specifically, on 18 September 2018 (shortly after the PNP operation that had thwarted the planned protest a few days earlier), the Subprefect of Huaura convened a mediation hearing with Claimant's representatives and the Parán

[413] Claimant's Memorial, ¶¶ 113; Peru's Counter-Memorial, ¶¶ 225–226; Claimant's Reply, ¶ 276.
[414] Peru's Counter-Memorial, ¶¶ 224–226.

Community.[415] During that meeting, both sides expressed their concerns, and committed to "reach[ing] a long-term agreement that would allow them to resolve their disagreements" ("**18 September 2018 Commitment**").[416] However, Claimant failed to reset its relationship with the Parán Community, and the latter initiated the Access Road Protest on 14 October 2018.

228. Claimant correctly notes that the Access Road Protest constituted a breach of the parties' 18 September 2018 Commitment to maintain peace and refrain from hostilities.[417] However, Claimant argues in the Reply that the Subprefect violated Peruvian law by failing to file a criminal complaint against the Parán Community for contempt of authority, based upon breach of the 18 September 2018 Commitment.[418] Claimant again is wrong, for at least the following four reasons.

229. *First*, a breach of the 18 September 2018 Commitment by either party would not trigger criminal liability under Peruvian law. Pursuant to Article III of the Peruvian Criminal Code, unless the law expressly identifies particular conduct as a crime that is subject to a specific sanction, such conduct is not deemed criminal in nature.[419] However, the violation of an agreement like the 18 September 2018 Commitment by a party is not specified as a crime under Peruvian law, and no criminal liability attaches. Specifically:

a. As Claimant recognizes, Directive No. 0010-2015-ONAGI-DGAP ("**Protective Measures Directive**") governs administrative proceedings like the one that that resulted in the 18 September 2018 Commitment.[420] The Protective Measures Directive provides that participants who are engaged in a mediation

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[415] Peru's Counter-Memorial, ¶ 227.

[416] **Ex. C-0139**, Meeting Minutes, Subprefecture Hearing between Invicta Mining Corp. S.A.C. and the Parán Community, 18 September 2018, p. 2.

[417] Claimant's Reply, ¶ 281.

[418] Claimant's Reply, ¶ 285.

[419] **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, 3 April 1991, Preliminary Chapter, Art. III.

[420] Claimant's Reply, ¶ 283.

procedure and reach an agreement will sign a "Mandatory Compliance Commitment."[421] However, the Protective Measures Directive does not specify that breach thereof will constitute a crime.[422] The 18 September 2018 Commitment was by its terms a "Mandatory Compliance Commitment."[423]

b. By contrast, other types of agreements will create criminal liability. Specifically, under the Protective Measures Directive, if the parties are unable to reach a Mandatory Compliance Commitment, the mediating authority—in this case, the Huaura Subprefect—will issue a "Resolution."[424] If a Resolution is issued, and a party fails to comply therewith, the Protective Measures Directive provides that there may be criminal liability "for resistance or disobedience to authority, in accordance with article 368 of the Penal Code of Law."[425]

230. In sum, because the 18 September 2018 Commitment was *not* a Resolution, Claimant is incorrect that the violation thereof could trigger criminal liability.

231. *Second*, even if a party's breach of a "Mandatory Compliance Commitment" could trigger criminal liability (quod non), Directive No. 0010-2015-ONAGI-DGAP expressly provides that the *interested party*—in this case, Claimant—must file the relevant criminal complaint before the Prosecutor's Office:

> Failure to comply with the provisions contained in the Resolution that grants the personal guarantees empowers the Interested Party to file legal actions before the Public Ministry,

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[421] **Ex. C-0566**, MININTER - ONAGI, Directive No. 0010-2015- ONAGI-DGAP, 27 November 2015, Art. 7.4.8.

[422] **Ex. C-0566**, MININTER - ONAGI, Directive No. 0010-2015- ONAGI-DGAP, 27 November 2015, Art. 7.4.8.

[423] **Ex. C-0139**, Meeting Minutes, Subprefecture Hearing between Invicta Mining Corp. S.A.C. and the Parán Community, 18 September 2018, p. 2 ("With the agreement of the parties, they undertake to make this 'MANDATORY COMPLIANCE COMMITMENT' . . . ").

[424] **Ex. C-0566**, MININTER - ONAGI, Directive No. 0010-2015- ONAGI-DGAP, 27 November 2015, Art. 7.5.1.

[425] **Ex. C-0566**, MININTER - ONAGI, Directive No. 0010-2015- ONAGI-DGAP, 27 November 2015, Art. 7.5.7.

> for resistance or disobedience to authority, in accordance with article 368 of the Penal Code of Law."[426] (Emphasis added)

232. The law thus does not create or establish any obligation on the part of the administrative authority to file a criminal complaint on the interested party's behalf; instead, it obligates the interested party itself to do so. Accordingly, and contrary to Claimant's argument, the Subprefect of Huaura was *not* required to file any criminal complaint against the Parán Community for its violation of the 18 September 2018 Agreement.

233. *Third*, Article 236(2) of the Criminal Code of Procedure provides that "any person has the right to report criminal acts to the respective authority."[427] In this respect, Claimant had the right to report alleged criminal activity to the Huaura Prosecutor's Office. However, Claimant did not do so.

234. *Fourth*, and in any event, Claimant provides no explanation as to whether or how the filing, whether by the Subprefect of Huaura or by Claimant, of a criminal complaint against members of the Parán Community, would have in any way resolved the social conflict and thereby secured the long-term operational viability of Claimant's Project. In fact, as Claimant knows, the filing of a criminal complaint likely would have done nothing other than to inflame the conflict and aggravate the situation. The foregoing is evinced by the fact that when Claimant reported criminal activity after the 19 June 2018 Protest, the Parán Community demanded that Claimant withdraw the complaints against members of its Community before dialogue could proceed.[428]

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[426] **Ex. C-0566**, MININTER - ONAGI, Directive No. 0010-2015- ONAGI-DGAP, 27 November 2015, Art. 7.5.7.

[427] **Ex. C-0555**, Criminal Code of Procedure, 2004, Art. 426(1), p. 107.

[428] **Ex. C-0182**, Summary Report of Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018, p. 1; **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 1–3 (showing that the Parán Community demanded as a condition to continue dialogue that Claimant withdraw its criminal complaints against members of the Community).

235. For all of the reasons articulated above, Claimant is wrong that the Subprefect of Huaura was required to file criminal complaints against members of the Parán Community for breaching the agreement under the 18 September 2018 Commitment.

d. Access Road Protest: Peru mediated a constructive dialogue that yielded the 26 February 2019 Agreement

236. In the Memorial, Claimant argued that Peru did *nothing* in response to the Access Road Protest.[429] In the Counter-Memorial, however, Peru demonstrated that it took affirmative action, including the facilitation and mediation of a constructive dialogue between Claimant and the Community which ended up yielding the February 2019 Agreement.[430] Claimant in the Reply again shifts its position, now arguing that Peru's failure to use force against the protesters was arbitrary. It was not.

237. Certain key facts are undisputed. For example, the Parties agree (i) that the PNP prepared the Operational Plan in relation to the Access Road Protest on 9 February 2019;[431] (ii) that the PNP ultimately did not execute the Operational Plan,[432] and (iii) that Peruvian agencies were actively involved in mediating the conflict.[433] However, Claimant reiterates its false assertion that Peru's failure to use force was motivated by political considerations.[434] Specifically, Claimant alleges that the MININTER "blocked" implementation of the Operational Plan for political reasons.[435] This argument fails for at least two reasons.

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[429] *See e.g.* Claimant's Memorial, ¶¶ 13, 132, 156, 161, 170, 190–191.

[430] Peru's Counter-Memorial, § II.E.

[431] Peru's Counter-Memorial, ¶ 256; Claimant's Reply, ¶¶ 52, 300.

[432] Peru's Counter-Memorial, ¶ 233;Claimant's Reply, ¶ 296.

[433] Peru's Counter-Memorial, ¶ 233;Claimant's Reply, ¶ 302.

[434] *See* Claimant's Reply, ¶¶ 309–310. Claimant also argues that Peru's failure to use force violated Peruvian law. Peru refuted this argument in the Counter-Memorial, and again in Section II.C.1 above, demonstrating that Peru's conduct was in fact fully consistent with Peruvian law. *See* Peru's Counter-Memorial, § II.E.

[435] Claimant's Reply, § 6.5.

238. *First*, it rests on the false premise that the MININTER had the authority to—and was in fact *required* to—approve the Operational Plan.[436] MININTER did not have any such authority. As Peru demonstrated in the Counter-Memorial, under Peruvian law the PNP has operational autonomy and independence to act,[437] including the discretion to develop an operational plan in response to a particular situation, as well as to decide whether or not to implement that plan.

239. *Second*, and in any event, the MININTER in fact did *not* "block" implementation of the Operational Plan. Claimant's argument to the contrary is built on pure speculation, including (i) the allegation that OGGS supported the use of force, and (ii) the fanciful notion that because the use of force did not take place, it follows *a fortiori* that it must have been "blocked" by the MININTER. As shown below, Claimant's construct crumbles upon even the most cursory of inspections.

240. First, Claimant's allegation that OGGS had "agreed" to the use of force is based on misrepresentations of the relevant evidence,[438] including the following:

    a. Claimant alleges that in a 13 February 2019 meeting between Claimant's representative Mr. Bravo and OGGS Director Mr. Trigoso, the latter agreed

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[436] Claimant's Reply, ¶¶ 308–310; Bravo Second Witness Statement, ¶ 27.

[437] Peru's Counter-Memorial, ¶¶ 207–208. *See also* **Ex. R-0101**, Ministerial Resolution No. 1520-2019-IN, 4 October 2019, Art. 169 ("The National Police of Peru is an institution of the State with the characteristics of an executive entity, depending of the Ministry of Interior; with administrative competence and operational autonomy for the exercise of police activity throughout the country"); **Ex. IMM-0027**, Peruvian National Police Law - Legislative Decree No. 1267, 16 December 2006, Art. 1; Witness Statement of Esteban Saavedra Mendoza, 15 March 2022 ("**Saavedra Witness Statement**"), ¶ 25(d) ("Finally, but no less relevant, my competence and powers as Vice Minister

for Internal Order did not include arranging, ordering or controlling the PNP intervention. The powers and competences of the Deputy Ministry for Internal Order are expressly set forth by law, and do not include ordering the use of police force. By law, the PNP has administrative and functional autonomy and therefore does not have to and does not consult the Vice Minister for Internal Order on the execution of a plan or an order for operations and nor does the latter have authority over the PNP by law.").

[438] Claimant's Reply, ¶ 302.

with Claimant's demand that the Operational Plan be executed.[439] As Mr. Trigoso explains in his second witness statement, it is true that Claimant's representatives were lobbying for implementation of the Operational Plan.[440] As contemporaneous evidence confirms, Mr. Trigoso asked Claimant what it would take for the company to continue the dialogue with the Community.[441] Mr. Trigoso made it clear to Claimant that from the perspective of the OGGS, dialogue and mediations should continue, irrespective of whatever police actions might be taken.[442] Mr. Trigoso unequivocally states in his witness statement that at no time did he agree with, or endorse, Claimant's position that the Operational Plan should be executed.[443]

b. Claimant relies on a letter dated 18 February 2019 from Mr. Trigoso as alleged support for the notion that OGGS wanted to execute the Operational Plan.[444] In that letter, Mr. Trigoso had simply urged the Parán Community to end the Blockade, and to reengage in the dialogue with Claimant to restart it under

[439] Claimant's Reply, ¶ 302; Bravo Second Witness Statement, ¶¶ 63–64.

[440] Trigoso Second Witness Statement, ¶ 28–29.

[441] **Ex. C-0341**, Email from Lupaka to LAVETA with attachment, 13 February 2019, p. 3 ("[OGGS Director, Mr. Trigoso] asked for the terms we might accept. Attached a draft based on January 29 document.").

[442] Trigoso Second Witness Statement, ¶¶ 30–32; **Ex. C-0341**, Email from Lupaka to LAVETA with attachment, 13 February 2019, pp. 2–3 (Claimant's contemporaneous documentation of the meeting notes that OGGS Director, Mr. Trigoso agreed to continue "trying to get Parán's leaders [*sic*] back to a dialogue table" "without affecting the [Operational Plan] while it's implemented.").

[443] Trigoso Second Witness Statement, ¶¶ 34–35; **Ex. C-0341**, Email from Lupaka to LAVETA with attachment, 13 February 2019, pp. 2–3 (Claimant's contemporaneous documentation of the meeting notes that OGGS Director, Mr. Trigoso, agreed to continue "trying to get Parán's leaders [*sic*] back to a dialogue table" "without affecting the [Operational Plan] while it's implemented.").

[444] Claimant's Reply, ¶¶ 302–305, 335; Bravo Second Witness Statement, ¶¶ 63–67.

peaceful circumstances.[445] But *nowhere* in that letter did Mr. Trigoso express support for the use of force against the Community.[446]

c. OGGS subsequently forwarded the 18 February 2019 letter to the Sayán Police,[447] but—contrary to what Claimant suggests—the mere act of forwarding the letter did not constitute a request for, or endorsement of, the use of force.[448] Instead, the Peruvian agencies were simply being diligent and keeping open lines of communication for purposes of inter-agency transparency and coordination, thus keeping the PNP appraised of the situation and allowing that agency to adopt whatever measures it deemed necessary.

d. Claimant alleges that a 20 February 2019 internal memorandum prepared by the OGGS indicated that dialogue between Claimant and the Parán Community had failed.[449] However, that is a blatant mischaracterization. In such memorandum, OGGS had reported on challenges that were hindering the dialogue process. The letter provided several reasons for this. *First*, the OGGS noted that Claimant was refusing to participate in any dialogue as long as the Parán Community maintained its Access Road Protest.[450] *Second*, the OGGS noted that the Parán Community was refusing to lift its Access Road Protest

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[445] **Ex. C-0570**, Email from MEM to Chief of Sayán Police with attachment, 18 February 2019, p. 1 ("first: the dialogue must be established under equal conditions and on the basis of social peace, in accordance with public order, in this sense, such continuity will be exercised without any measure of force, in this context, the next session will be convened immediately after verifying that there is no blockade in the area, or resistance from the population against the company,").

[446] Trigoso Second Witness Statement, ¶¶ 32–35; Nilton Second Witness Statement, ¶¶ 42–45.

[447] **Ex. C-0570**, Email from MEM to Chief of Sayán Police with attachment, 18 February 2019, p. 1.

[448] In any event, OGGS had no authority to order action by the PNP. *See* León Second Witness Statement, § IV; Trigoso Second Witness Statement, § III.a.

[449] Claimant's Reply, ¶ 306 (discussing **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019).

[450] **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, p. 1 ("The company accepted the demands as agenda items, prior to lifting the protest measure, to which the community responded negatively, breaking the space
for dialogue").

until it secured an agreement with Invicta.[451] *Third,* the OGGS recognized that "the social process . . . is affected by [the] presence of **interests outside the State** (producers of marijuana plantations)."[452] Thus, the memorandum did not at all contain any statement by the OGGS that the dialogue had failed, and—contrary to Claimant's argument—it did not endorse the implementation of the Operational Plan. [453]

e. Claimant also alleges that "the Operational Plan was only contingent on the approval by the MININTER."[454] The memorandum notes that "[t]he PNP has prepared an operational plan to effect the unblocking of the access roads, the approval of which is pending by the Ministry of Interior's senior officials."[455] Contrary to Claimant's argument, however, and as explained above, the MININTER did not have the legal authority to approve or order implementation of the Operational Plan.[456] Thus, the OGGS internal memorandum upon which Claimant relies does not demonstrate either that MININTER possessed such legal authority, or that it effectively exercised it, and that is so simply because neither proposition was true.

f. Claimant furthermore alleges that the MINEM-OGGS called for the execution of an operational plan by citing two additional internal memoranda dated 18 March 2019 and 20 March 2019.[457] Those documents do not support Claimant's theory. In those documents, the MINEM-OGGS "recommended that the public

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[451] **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, p. 1 ("The Community presented their demands: I.- Archiving of the criminal complaint against leaders and community members for having taken the installation of the company, II.- The construction of a new road that passes through the community of Paran, III.- Economic compensation for the damage caused to the environment of the community of Paran").

[452] **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, pp. 1–2.

[453] Trigoso Second Witness Statement, ¶¶ 23–25; León Second Witness Statement, ¶¶ 46–47.

[454] Claimant's Reply, ¶ 308.

[455] **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, p. 2.

[456] Peru's Counter-Memorial, ¶¶ 207–208; **Ex. IMM-0027**, Peruvian National Police Law - Legislative Decree No. 1267, 16 December 2006, Art. 1; Saavedra Witness Statement, ¶ 25(d).

[457] Claimant's Reply, ¶ 387.

order mechanisms be activated by the MININTER"[458] and that "the re-establishment of public order through the corresponding channels, MININTER, PNP, DGOP, should proceed."[459] As the text indicates, these were internal recommendations, and in no way did this constitute an order from the OGGS to execute an operational plan for the same reasons that Peru has already explained above. OGGS Specialist Nilton León explains in his second witness, statement, "restoring public order" does not necessarily imply the use of force or the execution of an operational plan.[460] Each of the entities identified above (*viz.* MININTER/DGOP, PNP) have their own mechanisms for de-escalation, dialogue, negotiation, and persuasion.[461] For example, the MININTER promotes spaces for dialogue and prevention in through its Directorate for Prevention and Management of Social Conflicts, and also through the General Directorate of Public Order.[462] The PNP also has negotiation strategies to resolve social conflicts short of using force.[463]

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[458] **Ex. C-0576**, MEM, aide mémoire, 20 March 2019, p. 2.

[459] E**x. C-0353**, Report No. 003-2019-MEM-OGGS/NCLH, 18 March 2019, p. 2.

[460] León Second Witness Statement, ¶ 41.

[461] León Second Witness Statement, ¶ 41.

[462] *See* León Second Witness Statement, ¶ 41; **Ex. R-101**, Resolución Ministerial No. 1520-2019, Arts. 110, 114.

[463] *See* León Second Witness Statement, ¶ 41; **Ex. R-150**, Anexo 2, Guía Básica del Negociador en las Operaciones de Mantenimiento y Restablecimiento del Orden Público, pp. 14-18. *See also* **RER-0001**, Meini Expert Report,¶¶ 200–205, 210; **Ex. R-0117**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, p. 29 (discussing the concept of verbalization and noting that it "[i]s the tool or resource most used in police intervention, which seeks to maintain or restore the principle of authority by using oral expression , firmly and with appropriate energy for each particular situation. In situations in which there is no clear resistance but cooperation, action must be taken with the appropriate courtesy and deference. On the other hand, when there is resistance to police intervention or when one is faced with an alleged offender, the firmness and energy of the language used shall be those required to persuade or convince the offender to abandon their unlawful attitude, particularly when it deprives them of their freedom. Correctly used, this minimizes the risks and maximizes the results of the intervention. Training in techniques of verbal expression, to communicate with respect, certainty and firmness, is as important as knowing how to shoot or keep fit.").

241. In sum, the evidence cited by Claimant does not support the notion that the OGGS had ordered, or approved, or was advocating for the implementation of the Operational Plan. To the contrary, the OGGS was actively monitoring the situation and continuing to encourage dialogue between the parties, in an effort to find a peaceful and lasting resolution to their dispute.

242. The above is sufficient to reject Claimant's theory of interference, based on supposed political motivation, by the MININTER. But in any event, Claimant does not adduce any evidence that the MININTER actually stepped in to "block" the implementation of the Operational Plan—much less that it did so for political reasons. Instead, Claimant feebly relies for such proposition on a WhatsApp exchange between Mr. Bravo, Claimant's representative, and Mr. Saavedra, Deputy Minister of the MININTER.[464] However, the text of the messages themselves—which Claimant does not quote directly, but which are reproduced below—reveal that Minister Saavedra was simply communicating to Claimant the Government's consistent policy of pursuing peaceful resolution:

> [15/02/19 5:35:03 a. m.] Esteban Saavedra: Luis Felipe I spoke with General Mario Arata who told me that the Community has presented a letter to the MEM, **agreeing to sit down and talk. They will wait for the result**.
>
> [15/02/19 5:37:53 a. m.] Esteban Saavedra: **This is in line with the procedures that are followed in the treatment of this type of event, that is before** [*sic*] **the Police must not intervene and must respect the dialogue**[.][465] (Emphasis added)

243. In his expert report, Mr. Meini explained that this position expressed by Mr. Saavedra is entirely consistent with Peruvian law: "[T]he PNP may not use force unless it has exhausted all alternative means that do not involve violence or a risk of harm to persons."[466]

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[464] Claimant's Reply, ¶ 309.

[465] **Ex. C-0192**, WhatsApp exchanges between Lupaka Gold Corp. (L. Bravo) and MININTER (E. Saavedra), 5–20 February 2019, p. 2.

[466] Meini Report, ¶ 134.

244. Claimant also alleges that Mr. Saavedra wanted to prevent police intervention—in Claimant's words—"out of fear of bad press and political repercussions."[467] In making that allegation, however, Claimant does not actually cite to Mr. Saavedra's statements. In fact, Mr. Saavedra's actual words confirm that he was advocating that Peruvian law be complied with, and that failure to do so could result in national and international scrutiny:

> Political lobbying is required in congress so that **rules can be laid down. If we do not adhere to the Protocol on the use of public force and there are consequences**, these will fall back on the country and the national and international press will do their thing, which is why we must be scrupulous.[468] (Emphasis added)

245. Nowhere in his messages did Mr. Saavedra state, or even remotely suggest, (i) that the MININTER had the authority to approve or "block" the Operational Plan, or (ii) that the MININTER had actually "blocked" the Plan.

246. In sum, Claimant's theory that the MININTER somehow blocked the use of force is baseless and contrary to Peruvian law.

e. <u>February 2019: Peru brokered an agreement, and Peru continued to encourage dialogue when the parties disagreed on interpretation</u>

247. As Claimant appears to concede, Peru's diligent efforts to encourage a peaceful resolution—including the mediation by OGGS of multiple meetings between the parties—resulted in the 26 February 2019 Agreement between Claimant and the Parán Community.[469] At the time, Claimant openly acknowledged the Peruvian authorities' efforts in helping achieve this outcome. For example, in October 2018, Claimant recognized that the OGGS's active coordination, and the CPO of Sayán security, had steered Claimant and the Parán Community to begin talks to establish the Dialogue

[467] Claimant's Reply, ¶ 310.

[468] **Ex. C-0192**, WhatsApp exchanges between Lupaka Gold Corp. (L. Bravo) and MININTER (E. Saavedra), 5–20 February 2019, p. 2.

[469] Peru's Counter-Memorial, ¶¶ 250–262.

Table.[470] Claimant also highlighted the OGGS representative's experience and dynamism in brokering the dialogue between the parties to resolve the dispute.[471] Then, when the parties signed the 26 February 2019 agreement, Mr. Ansley (Claimant's then-CEO) publicly celebrated it, and explicitly manifested Claimant's gratitude to the Peruvian authorities for their assistance in brokering the agreement.[472]

248. However, soon after the signing of the 26 February 2019 Agreement it became evident that the parties had different interpretations of the commitments they had agreed to thereunder, and of proper compliance therewith. Consequently, both Claimant and the Parán Community began to assign fault to the other for breaching the terms of the Agreement.

249. Claimant again seeks to assign blame to Peru for Claimant's (and the Parán Community's) failure to resolve the dispute. In particular, Claimant argues in this arbitration that the Parán Community immediately breached the Agreement,[473] and that in response to that Peru should have forced the Parán Community to adhere to Claimant's interpretation of the Agreement.[474]

250. In the discussion below, Peru (i) exposes the foregoing as mischaracterizations by Claimant, (ii) shows that the Parán Community's interpretation of the Agreement was in fact reasonable; and (iii) demonstrates that, in any event, Peru acted appropriately when it urged Claimant to return to mediation to resolve its new disagreements with the Parán Community.

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[470] Peru's Counter-Memorial, ¶ 236; **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018.

[471] Peru's Counter-Memorial, ¶ 237; **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018.

[472] Peru's Counter-Memorial, ¶ 265; **Ex. R-0132**, "*We are very pleased to announce the… conclusion of the illegal blockade*," MINING JOURNAL, 5 March 2019.

[473] Claimant's Memorial, ¶¶ 154–155; Claimant's Reply, §§ 6.6.1–6.6.2.

[474] Claimant's Reply, § 6.6.

(i) The Parán Community's interpretation of the 26 February 2019 Agreement was reasonable

251. Ultimately, in order to adjudicate Claimant's claims, the Tribunal need not decide whether the Parán Community's interpretation of the 26 February 2019 Agreement was correct. Nevertheless, Claimant seeks to portray the Parán Community's interpretation thereof as preposterous and made in bad faith, in an attempt to bolster its arguments that Peru should have compelled that community—including through the use of force—to comply with Claimant's interpretation of the Agreement. Peru corrects below Claimant's misrepresentations and baseless arguments.

(a) <u>The Parán Community reasonably expected that Claimant would access the Invicta Mine through the Parán Community's territory</u>

252. The first issue under the 26 February 2019 Agreement in respect of which the parties disagreed concerns the route for access to the Invicta Mine. The Agreement stated that the Parán Community would guarantee "the development of the activities of the mining company **through the access road of the Parán Community**"[475] (emphasis added). The text also links the Parán Community's agreement to allow use of its access road to its "guarantee[] [of] social peace with the company."[476]

253. During the negotiation, the Parán Community had consistently requested that Invicta agree to develop and use an access road to the Invicta Mine through the Community's territory.[477] These requests reflected a long-held expectation by the Community, given

[475] **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C. and MINEM, 26 February 2019, p. 2.

[476] **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C. and MINEM, 26 February 2019, p. 2.

[477] **Ex. C-0569**, Internal MEM email (with attachment), 16 January 2019, p. 1 (PDF p.2) ("On 07.11.18, OGGS specialists met with representatives of the community and Invicta Mining Corp. Where the community proposed the following agenda items: I.- Archiving of the criminal complaint against leaders and community members for having taken the installation of the company, II.- The construction of a new road that passes through the community of Paran, III.- Economic compensation for the damage caused to the environment of the community of Paran."); **Ex. C-0353**, Report No. 003-2019-MEM-OGGS/NCLH, 18 March 2019, p. 1 (The social conflict

that—as Lupaka well knew—under its prior owners, Invicta had created the expectation that its primary access path to the Mine would be through the Parán Community's territory.[478] Furthermore, the proximate location of Invicta Mine to the Parán Community meant that any mining activity would have the most consequential impact on that Community of all the affected communities.[479] In addition, the Parán Community disputed Lacsanga and Santo Domingo's unilateral claims of territorial ownership over the surface lands on which Invicta Mine was located—lands that Invicta had previously recognized belonged wholly to the Parán Community.[480] For all these reasons, the Community understood that Claimant was agreeing to use the Community's access road (rather than Lacsanga's access road).

254. However, Claimant later took the position that the wording of the Agreement required the Parán Community to lift its protest on *Lacsanga's* access road.[481] Claimant

materialized with a blockade of access roads, motivated by the following demands of the rural community of Paran: 1.- Dismiss the accusations directed at the community members who participated in the protests. 2.- Relocate the access route to the mining company through the Paran RC (currently the route passes through the Lacsanga CC)."). *See also* León Second Witness Statement, ¶¶ 24–25.

[478] *See supra* Section II.A.2. *See also* **Ex. C-0060**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 29 April 2008; **Ex. C-0061**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 7 May 2008 (demonstrating that an access road through Parán territory had featured prominently in the plans for Invicta Mine); Dufour Report, ¶¶ 367, 384.

[479] *See supra* Section II.A.2. *See also* **Ex. R-0219**, Third Technical Support Report of the Invicta Mining Unit, August 2018; **Ex. R-0269**, "Invicta Mining," Google Maps, last accessed 20 January 2023; **Ex. R-0270**, "Paran-Mapa-Mapcarta," Mapcarta, last accessed 20 January 2023 (demonstrating that a large proportion of the Parán Community's homes and farmland were located downhill and downstream of the Mine); **Ex. AC-0049**, Lupaka Gold Corp. 2013 Annual Report, p. 46 ("These communities largely consist of farmers that mainly cultivate avocadoes and peaches along the valley slopes, roughly 2 km from the Invicta Gold Project."); **Ex. R-0219**, Third Technical Support Report of the Invicta Mining Unit, August 2018 (map demonstrating the area of direct and indirect environmental impact of Invicta Mine, and further showing that the Parán Community's villages and crop zones were in the area of both direct and indirect environmental impact).

[480] *See supra* Section II.A.2. *See also* Dufour Report, ¶¶ 329, 381; **Ex. R-0233**, Extension, 5 June 2008 (showing that the Parán Community reserved its right to contest the boundaries claimed by the Lacsanga and Santo Domingo Communities).

[481] Claimant's Reply, ¶ 313.

argues that the phrase in the Agreement which states that the parties would "suspend all coercive measures"[482] proves that the Parán Community had agreed to allow Claimant free movement in and out of the Invicta Mine—including through the Lacsanga access road.[483] That is not necessarily the case, however. As Peru explained earlier, from the perspective of the Parán Community, the suspension of coercive measures simply meant that the Parán Community would accept the Project and would allow Claimant untrammelled access to the Invicta Mine.

255. The OGGS confirmed that the Parán Community had effectively abided by the commitment that the latter had made in the 26 February 2019 Agreement, by allowing Claimant passage through Parán territory shortly after the Community Assembly adopted the text of the Agreement.[484] Claimant also confirmed in a message to its shareholders that "[t]he community of Parán has granted the Company access to Invicta by way of their access route."[485]

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[482] **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C. and MINEM, 26 February 2019, p. 2.

[483] Claimant's Reply, ¶ 313.

[484] **Ex. R-0258**, Aide-Mémoire: The Case of the Invicta Mining Company and the Rural Community of Parán, 8 March 2019 ("It was confirmed on March 03, 2019 by OGGS/MEM personnel the unblocking of the area that was first taken by the Paran Rural Community, likewise the Invicta Mining Company personnel carried out the verification and inventory of its property in the camp, as well as in its other facilities."); León First Witness Statement, ¶¶ 42, 70; León Second Witness Statement, ¶ 33. *See* **Ex. R-0171**, Lupaka Gold Corp., "*Lupaka Announces End of Illegal Demonstration at Invicta: Access to Site Restored,*" 4 March 2019; **Ex. C-0207**, Email from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigoso), 21 March 2019, ¶ 2.

[485] **Ex. R-0171**, Lupaka Gold Corp., "*Lupaka Announces End of Illegal Demonstration at Invicta: Access to Site Restored,*" 4 March 2019, p. 1 ("Although the illegal blockade has been disbanded, access to the site is limited due to road damage sustained from local heavy rainfall. The access roads to Invicta have sustained damages from both the Lacsanga and Parán routes, with partial access possible from the Parán route The community of Parán has granted the Company access to Invicta by way of their access route, and the Company is in the process of conducting a full inspection of the camp to ensure that mine infrastructure has not been impacted by the prolonged demonstration. Preliminary evaluations indicate the camp remains in good condition, however, underground inspections remain outstanding. Repairs to the road through the Lacsanga community will begin later this week and it is anticipated that full access can be restored within a few weeks, depending on the availability of equipment and personnel.").

256. Claimant further argues that it would never have agreed to access the Mine exclusively through the Parán Community's access road, because it already (i) had an existing agreement with the Lacsanga Community to use the latter's access road; and (ii) had expended significant resources in developing that access road.[486] Tellingly, however, these issues had not been raised at all by Claimant's representatives during the joint mediations that led to the signing of the 26 February 2019 Agreement.[487] In addition, Claimant has not demonstrated that agreeing to exclusive use of the Parán Community's territory to transport ore from the Mine would have violated any agreement with the Lacsanga Community. And, in any event, days before the execution of the Agreement, torrential rainfalls had caused landslides that damaged roads in the area,[488] and the Lacsanga Community's access road had become heavily damaged and was inaccessible.[489] As a result, at the time of signature of the 26 February 2019 Agreement, Claimant had ample reason to negotiate access through the Parán Community's territory instead of through the Lacsanga access road.

257. In sum, the Parán Community's interpretation had support in the text of the Agreement, in Claimant's contemporaneous actions and pronouncements, and in the prevailing circumstances.

(b) The Parán Community reasonably expected that Claimant would pay for a topographical survey

258. The second disagreement between the parties concerned the 26 February 2019 Agreement's provision for a topographical survey.[490] Through the Agreement, the

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[486] Claimant's Reply, ¶318.

[487] León Second Witness Statement, § III; Trigoso Second Witness Statement, § IV.B.

[488] **Ex. R-0132**, "*We are very pleased to announce the… conclusion of the illegal blockade*," MINING JOURNAL, 5 March 2019, p. 1 ("However despite the blockade being lifted, the company said its access was still limited due to heavy rainfall damaging roads in the area.").

[489] **Ex. R-0132**, "*We are very pleased to announce the… conclusion of the illegal blockade*," MINING JOURNAL, 5 March 2019, p. 1 ("However despite the blockade being lifted, the company said its access was still limited due to heavy rainfall damaging roads in the area.").

[490] **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C. and MINEM, 26 February 2019, p. 1.

parties had agreed to "identify and locate the affected land" through a "topographical survey" which was to be performed on 20 March 2019.[491]

259. Pursuant to that provision, the Parán Community expected that such survey would enable it to assess (i) whether land conditions were suitable for future construction or improvements to the Parán Community's access road; and (ii) whether Invicta had already built infrastructure within the Parán Community's territory without its consent.[492] Based on the agreement for a topographical survey, the Parán Community expected Claimant to pay the fees for the survey.[493]

260. For its part, Claimant contends that the purpose of the topographical survey was to assess alleged environmental damage to the Parán Community's lands.[494] However, the drafting history of the relevant provision of the Agreement contradicts Claimant's argument. Specifically, the requirement for a "topographic survey" was absent from the version of the draft Agreement that had been discussed by the parties the day before signature. That earlier version referred only to a joint environmental study that would assess "any negative impacts to which the Community refers have occurred on

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[491] **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C. and MINEM, 26 February 2019, p. 1.

[492] León First Witness Statement, ¶¶ 64, 70; Trigoso First Witness Statement, ¶¶ 38, 43. *See also* **Ex. C-0213**, Email from M. Estrada to L. Bravo, Invicta Mining Corp. S.A.C., 10 April 2019, p. 1 (showing Claimant's awareness that the Parán Community believed mining infrastructure was on its territory); **Ex. C-0264**, Lupaka News Release, "Lupaka Provides Update on Illegal Demonstration at Invicta, Announces Non-Brokered Private Placement, and Management Changes," 28 January 2019, p. 1 (demonstrating Claimant knew the reason behind the Parán Community's opposition: "The demonstration at Invicta has resulted from a land conflict that exists between two of Invicta's neighouring communities"); **Ex. C-0121**, Letter from Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Casteñeda), 4 May 2018 (showing that the Parán Community claimed that Invicta Mine was on Parán territory and was operating without the Community's authorization: "[Invicta Mine] since approximately 1997, without authorisation from the Rural Community of Parán, has taken possession in our land areas, installing a CAMP;" "PROCEED TO REMOVE THE PERSONNEL, EQUIPMENT AND OTHER PROPERTY FROM THE CAMP, where they are carrying out work, without the authorisation of our Rural Community;" "we ask you to vacate the territory of our rural Community.").

[493] León First Witness Statement, ¶¶ 45, 65–67; Trigoso First Witness Statement, ¶ 43.

[494] Claimant's Reply, ¶¶ 323–324.

land that they describe as being part of their territory . . . by the mining facilities,"[495] through "a representative of the OEFA."[496] However, the requirement for an environmental study was eliminated in the executed Agreement, and the parties instead agreed to "identify the location of the affected land" through a "topographical survey," which would require the services of a topographical surveyor.[497]

261. Consistent with the terms of the agreement, the Parán Community proceeded to arrange for a topographer for the purpose of conducting the survey.[498] However, Claimant argues that in doing so, the Parán Community's President had changed the purpose of the survey, and was demanding that Claimant immediately pay for a service to which it had not agreed.[499] From the perspective of the Parán Community, however, Claimant's refusal to pay for the topographical survey violated the 26 February 2019 Agreement.[500]

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[495] **Ex. C-0199**, Email from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM, 25 February 2019, p. 3. *See also* **Ex. C-0344**, Draft agreement between Parán, MEM and IMC (as drafted by the MEM during 29 January 2019 meeting), 29 January 2019, pp. 1–2 ("Invicta Mining Company together with the Parán Community will carry out the identification and location of the possible damages in the lands that the Community refers to, within the mining components located within the territory of the Parán Community . . . to be accompanied by a representative of the OEFA, which will take place on Tuesday 05 February 2019. The meeting point will be at 07:00 hours in the Plaza de Armas of the Comunidad Campesina de Paran.").

[496] **Ex. C-0344**, Draft agreement between Parán, MEM and IMC (as drafted by the MEM during 29 January 2019 meeting), 29 January 2019, pp. 1–2 (" Invicta Mining Company together with the Parán Community will carry out the identification and location of the possible damages in the lands that the Community refers to, within the mining components located within the territory of the Parán Community . . . to be accompanied by a representative of the OEFA, which will take place on Tuesday 05 February 2019. The meeting point will be at 07:00 hours in the Plaza de Armas of the Comunidad Campesina de Paran."). *See* **Ex. C-0199**, Email from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM, 25 February 2019.

[497] **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C. and MINEM, 26 February 2019, p. 1.

[498] **Ex. C-0576**, MEM, aide mémoire, 20 March 2019, p. 1.

[499] **Ex. C-0576**, MEM, aide mémoire, 20 March 2019, p. 1; **Ex. C-0201**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigoso, *et al.*), 28 February 2019; **Ex. C-0207**, Email from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigoso), 21 March 2019; Witness Statement of Luis Felipe Bravo, 1 October 2021 ("**Bravo First Witness Statement**"), ¶ 60.

[500] **Ex. C-0576**, MEM, aide mémoire, 20 March 2019, p. 1; **Ex. R-0111**, Letter No. 010-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ísmodes), 6 May 2019, p. 1.

262. As Mr. Trigoso explains, an environmental study is not the same as a topographical survey.[501] An environmental study evaluates environmental *damage*. A topographical survey, on the other hand, studies the physical and geological characteristics of the land to determine what changes (if any) must be carried out before starting any construction or development project thereon.[502] Mr. León also explains that the 26 February 2019 Agreement, which included the commitment to carry out a topographical study, was executed precisely to restore access to the mine through the Parán Community's access road,[503] and Claimant agrees that, at the time, such road was "barely traversable" and needed development to be suitable for transit.[504] Thus, a topographical surveyor would have assessed the land conditions for possible improvements to the Parán Community's access road. Such purpose for the survey was consistent with the Parán Community's long-stated objective of having its access road developed, so that it could service the Invicta Mine and benefit the Community.

263. Another key task of a topographical surveyor is to identify relevant boundaries. As Claimant has acknowledged,[505] the Parán Community claimed that Invicta Mine had been operating and had built mining infrastructure on the community's territory, without the latter's consent.[506] Hence, the topographical study was intended to

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[501] Trigoso Second Witness Statement, ¶ 51.

[502] Trigoso Second Witness Statement, ¶ 51; León Second Witness Statement, ¶ 29.

[503] León Second Witness Statement, ¶¶ 26–29.

[504] Claimant's Memorial, ¶ 156.

[505] *See* Claimant's Reply, ¶ 172, 174.

[506] *See* **Ex. C-0344**, Draft agreement between Parán, MEM and IMC (as drafted by the MEM during 29 January 2019 meeting), 29 January 2019, p. 1 (in which the Parán Community included a statement indicating that mining infrastructure had been built on its territory) *See also supra* Section II.A.2; **Ex. C-0213**, Email from M. Estrada to L. Bravo, Invicta Mining Corp. S.A.C., 10 April 2019, p. 1 (showing Claimant's awareness that the Parán Community believed mining infrastructure was on its territory); **Ex. C-0264**, Lupaka News Release, "Lupaka Provides Update on Illegal Demonstration at Invicta, Announces Non-Brokered Private Placement, and Management Changes", 28 January 2019, p.1 (demonstrating Claimant knew the reason behind the Parán Community's opposition: "[t]he demonstration at Invicta has resulted from a land conflict that exists between two of Invicta's neighouring communities." and the Parán Community's belief that Invicta Mine was on Parán territory.); **Ex. C-0121**, Letter from Parán

analyze whether the "affected land" was or was not within the Parán Community's territorial boundaries.[507] A surveyor would have (i) reviewed public information on the boundary lines; (ii) taken note of the boundary line under the 2009 EIAd (which showed that most of Invicta Mine was in fact on the Parán Community's territory);[508] and (iii) realized and reported that the boundary line between the three Rural Communities was in dispute at that point in time.[509]

264. In a letter sent to the President of the Parán Community, a Claimant representative opposed the topographical survey:

> [W]e have learnt that your client has hired the services of a surveyor to carry out a **topographic survey of the access road through the Community of Paran**.
>
> **This work is not part of the agreements entered into and does not seems** [*sic*] **to have a practical purpose with regard to the formal dialogue process already set up**.[510] (Emphasis in original)

265. The Parán Community understood that, by contesting the purpose of the topographical study and refusing to pay for it, Claimant was reneging on one of the core components of the 26 February 2019 Agreement.[511] Not surprisingly, from the Parán Community's viewpoint, Claimant was therefore the first of the parties to

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Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Casteñeda), 4 May 2018 (showing that the Parán Community claimed that Invicta Mine was on Parán territory and was operating without the Community's authorization: "[Invicta Mine] since approximately 1997, without authorisation from the Rural Community of Parán, has taken possession in our land areas, installing a CAMP;" "PROCEED TO REMOVE THE PERSONNEL, EQUIPMENT AND OTHER PROPERTY FROM THE CAMP, where they are carrying out work, without the authorisation of our Rural Community;" "we ask you to vacate the territory of our rural Community.").

[507] Dufour Report ¶ 413.

[508] Dufour Report ¶ 329.

[509] Dufour Report ¶¶ 308–309.

[510] **Ex. C-0205**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to the Parán Community President (A. Torres), 18 March 2019, p. 2.

[511] *See* Claimant's Reply, ¶ 324 (admitting that "IMC . . . refuse[d] to pay the fees for a . . . topographer"); see also Leon's Second Witness Statement, ¶ 31 (explaining that the Parán Community reestablished its protest after Claimant's alleged breach in refusing to pay for the topographer).

breach an obligation under the Agreement. This perceived breach by Claimant both frustrated and angered the Parán Community, setting back the relationship yet again, and at a critical moment.

266. Mr. León and Mr. Trigoso have confirmed that Claimant's refusal to pay the relatively modest amount of PEN 30,000 (approximately USD 9,000) for the surveyor struck the Parán Community as unreasonable and short-sighted, and also as a sign of bad faith.[512] In response, Claimant in the Reply asserts that "IMC [i.e., Invicta] was right to refuse to pay the fees for a unilaterally appointed topographer who was **not** going to do what was stipulated in the 26 February 2019 Agreement"[513] (emphasis in original).

267. However, even if the payment for a topographical survey had not been part of the 26 February 2019 Agreement—a position that does not appear to be borne out by the text of the Agreement—it seems wholly illogical that Claimant would have been willing to jeopardize the breakthrough agreement of 26 February 2019, and an investment allegedly worth USD 13.4 million,[514] over the paltry sum of USD 9,000. Such amount is a measly one for an international mining company but a small fortune for a poor, rural community.

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[512] León First Witness Statement, ¶¶ 63–68; Trigoso First Witness Statement, ¶ 48; León Second Witness Statement, ¶ 31; Trigoso Second Witness Statement, ¶ 52.

[513] Claimant's Reply, ¶ 324.

[514] Claimant's Memorial, ¶ 60. Claimant's position with respect to the cost for improving the Parán Community's Access road over time would later change, as demonstrated by a letter Invicta submitted to the MINEM on 28 March 2019, Mr. Ansley explains the breach of the 26 February Agreement but does not refer to the costs or the scope of the topographical survey, but refers to the negotiation to lift the Lacsanga road in exchange for "invest in their community by bringing water through their community up to the project and by making enhancements to their access road (over time). All of these items will cost us a considerable amount of money, and we have no obligation to do so given we already have an access agreement in place." This demonstrates that the cost of a topographical survey was not so significant as to justify Claimant's refusal to cover the expense. *See* **Ex. C-0354**, Email from Lupaka to Laveta, 27 March 2019, p. 2; **Ex. C-0625**, Contract between IMC and PLI Huaura, 26 August 2019, ¶ 1.7 (describing the PwC valuation amount as USD 13.4 million).

268. Predictably, following this *volte face* by Claimant in respect of the topographical study, the Parán Community staged another demonstration at Invicta Mine on 20 March 2019[515]—which, not coincidentally, was the same day on which the topographic survey had been scheduled to take place pursuant to the 26 February 2019 Agreement. Despite the fact that it was Claimant's refusal to pay USD 9,000 that led to a renewed escalation of the conflict, Claimant would use the fact of the Parán Community's 20 March 2019 demonstration to press Peruvian authorities to use force against that rural community.[516] The latter seems perverse given that Claimant itself had provoked the situation that it then tried to exploit to demand the use of force to terminate the community protests.

(ii) Peru's agencies were not authorized to enforce a private agreement on behalf of Claimant and against the Parán Community

269. In the Counter-Memorial, Peru incontrovertibly refuted Claimant's claim that Peru took no action following the breakdown of the 26 February 2019 Agreement.[517]Accordingly, Claimant had no choice but to pivot in the Reply, abandoning its earlier argument that Peru had done nothing and instead attacking Peru's actions as inappropriate. More specifically, in the Reply Claimant adopted the mantra that Peru should have used force against the Parán Community.[518]

270. That argument fails, however. As shown above, the PNP is not required to use force under Peruvian law,[519] and in any event the use of force would have been counter-

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[515] Claimant alleges that Peru was silent about the demonstration at Invicta Mine on 20 March 2019. Claimant is wrong. Messrs. León and Mr. Trigoso refer to the March events in their first witness statement, explaining how it was a consequence of Claimant's breach of the 26 February 2019 Agreement. *See* León First Witness Statement, ¶ 45; Trigoso First Witness Statement, ¶ 39. It is Claimant who dramatized the 20 March 2019 event for the first time in its Reply as a violation of Peru's obligations under the Treaty.

[516] Claimant's Reply, ¶ 331 ("The March 2019 Invasion confirmed once again that dialogue with Parán was futile and a police intervention to lift the Blockade was necessary.").

[517] Peru's Counter-Memorial, § II.E.4.

[518] Claimant's Reply, § 6.6

[519] *See supra* Section II.C.1.

productive in the context.[520] Moreover, as Peru demonstrated in the Counter-Memorial, Peru's agencies are not authorized to enforce agreements between private parties.[521] Claimant has not disputed that neither the OGGS nor the DGOP had the legal means to enforce a private agreement between a mining company and a rural community.

(iii) Peru made reasonable efforts to bring the parties back to the Dialogue Table

271. Although Peru could not enforce the private agreement for Claimant, it did take active and reasonable measures to generate space for a dialogue and to broker a solution.[522] Claimant does not appear to dispute that Peru made such efforts, including through the following concrete actions:

a. On 26 and 28 March 2019, the OGGS met with the Parán Community and Claimant (respectively) to gather information about their respective positions, with a view to reestablishing the mediation process.[523]

b. On 1 April 2019, the OGGS invited the parties to participate in a meeting. As Claimant admits,[524] *Invicta refused to engage in dialogue* unless the PNP first forcefully removed the Parán protesters.[525] The Parán Community leaders

[520] Peru's Counter-Memorial, § II.A.1, ¶¶ 533–540

[521] Trigoso First Witness Statement, ¶ 23; Saavedra Witness Statement, ¶ 25.d; **Ex. R-0101**, Ministerial Resolution No. 1520-2019-IN, 4 October 2019, Arts. 5, 91, 110–111. *See also* Peru's Counter-Memorial, ¶ 274.

[522] Peru's Counter-Memorial, § II.E.4.

[523] Peru's Counter-Memorial, ¶¶ 276–277; León First Witness Statement, ¶¶ 47–48. *See* Claimant's Reply, ¶ 328 (Claimant is wrong to assert that the State did not provide a response to its communications in March 2019. The reason why there was no written response to some of the letters is because the OGGS and other authorities held numerous in-person meetings, as explained by Mr. Nilton Leon, and thus responded in that context rather than in writing.).

[524] Claimant's Reply, ¶ 335.

[525] Claimant's Reply ¶ 335; *see also* **Ex. R-0114,** Meeting Minutes, Meeting between the Parán Community, OGGS, MININTER, and Sayán Police Station, 1 April 2019.

expressed their regret to the OGGS that Claimant had refused to attend the joint meeting.[526]

c. On 6 May 2019, the Parán Community requested a meeting. OGGS met with representatives of the Parán Community on their territory, and actively encouraged the Community to re-engage in mediation with Claimant to resolve the parties' differences with respect to the 26 February 2019 Agreement.[527]

272. Claimant takes the illogical position that Peru should not have encouraged a dialogue because such dialogue failed in the end.[528] First of all, Claimant is wrong as a factual matter, as far from having failed, the dialogue facilitated by the OGGS had in fact yielded some significant successes (including notably, the 26 February 2019 Agreement). Moreover, it was not at all clear going into the dialogue that the discussions would not yield a lasting resolution to the conflict; it is therefore facile for Claimant now—after the fact—to argue that the dialogue should not have been undertaken at all, simply because in the event it turned out not to be wholly successful.

273. Furthermore, in Peru's experience with the resolution of social conflicts of this nature, setbacks in negotiations between the parties are typical,[529] so it was not unexpected that the dialogue would ebb and flow some before yielding a permanent solution.

274. In sum, Peru took diligent and appropriate action when it: (i) insisted that Claimant and the Parán Community resort to dialogue as the primary method of resolving their disagreements; (ii) refrained, while it brokered the 26 February 2019 Agreement, from

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[526] *See* **Ex. R-0026**, Letter No. 006-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 21 March 2019; **Ex. R-0114**, Meeting Minutes between the Parán Community and Invicta Mining Corp. S.A., 1 April 2019.

[527] Peru's Counter-Memorial, ¶ 280; **Ex. R-0111**, Letter No. 010-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ísmodes), 6 May 2019, p. 1.

[528] *See* Claimant's Reply, § 4.3.5.

[529] León Second Witness Statement, ¶ 34; Trigoso Second Witness Statement, ¶ 35; Incháustegui Second Witness Statement, ¶¶ 18–19.

executing an operational plan to remove the protesters by force; and (iii) similarly refrained from executing the operational plan, or otherwise taking forceful action against the Parán Community, after disagreements arose between the parties with respect to performance of their commitments under the 26 February 2019 Agreement.

f. May 2019: Claimant's deployment of the War Dogs to use force proved highly counter-productive to the resolution of the conflict with the Parán Community

275. As Peru demonstrated in the Counter-Memorial, Peru's ongoing efforts to mediate the conflict were seriously undermined by Claimant's insistence on the forceful lifting of the Access Road Protest, at all costs, as a *conditio sine qua non* for dialogue.[530] Specifically, as Claimant concedes, it hired the private security company War Dogs, whose armed intervention produced a violent confrontation with the protesters on 14 May 2019.[531]

(i) Claimant searched for and hired a "powerful" private security force to forcefully remove the protesters

276. In the Reply, Claimant desperately seeks to downplay the role and actions of the War Dogs, and the disastrous impact that the War Dog's intervention had on the chances of an amicable and lasting resolution of the dispute. Claimant asserts that the War Dogs "peacefully entered the Site,"[532] and neither confronted nor attacked the protesters,[533] such that "[t]here was nothing wrong with how [the War Dogs] proceeded" on that day.[534] In other words, according to Claimant, the War Dogs were completely peaceful, and the members of Parán Community are solely to blame for the ensuing violence. This account of what transpired on 14 May 2109 is squarely

[530] Peru's Counter-Memorial, ¶¶ 310–311, §§ II.F.2.d–f.

[531] Peru's Counter-Memorial, ¶ 281; **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019; **Ex. C-0552**, Internal PCM email with attachment, 21 May 2019.

[532] Claimant's Reply, ¶ 349.

[533] Claimant's Reply, ¶ 344 ("WDS's access to the Site was therefore made without any confrontation, much less by attacking Parán community members.").

[534] Claimant's Reply, ¶ 349.

belied by the contemporaneous evidence, thereby exposing Claimant's argument as nothing more than an attempt to whitewash the conduct of its hired guns.

277. As a preliminary matter, Claimant's own contemporaneous records confirm that it was actively seeking a security firm that would be "powerful" and intimidating. For example, in an email dated 8 March 2019 from Mr. Bravo to Mr. Ansley, Mr. Bravo stated:

> [W]e don't have any **powerful security guys** there and they [would] keep the Paran [*sic*] people out of [the] site . . . .
>
> **It's critical to hire Security. I don't think that a regular security company will help us at this point.** It's either the expensive War Dogs or our own security people from Lima.[535] (Emphasis added)

278. Furthermore, the contemporaneous evidence confirms that the War Dogs did in fact engage in hostilities with the protesters. The PNP prepared a report on the day of the armed confrontation between the War Dogs and the protesters,[536] which confirmed that approximately 50 security agents of War Dogs, all carrying weapons, had arrived to the Site on 14 May 2019 and had forcibly removed a group of protesters.[537]

279. A second PNP report, also dated 14 May 2019, confirms that when the War Dogs approached the Site, members of the Parán Community immediately contacted the

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[535] **Ex. R-0259**, Email from Lupaka (M. Velasquez) to Lupaka (L. Bravo), 28 March 2019.

[536] **Ex. R-0113**, Letter No. 52-2020-REGIÓN POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO from PNP Colonel (L. Pérez) to PNP General (H. Ramos), 22 February 2020, ¶ 23 ("On 14MAY2019 approx. at 03.00 they arrived at the camp of the INVICTA mining company, located at km. 23 of the road to the Lacsanga community, an area known as Milcopallan, approximately fifty (50) private security guards hired by the mining company [I]nvicta, in three minivan vehicles and entered the mining camp facilities, forcing five community members of [P]aran who were in the Milcopallan area at the entrance to the camp. Later, approximately one hundred Paran community members went up to the mining camp area carrying firearms and firing shots and forced the private security guards at the camp to leave, resulting in the injury of Eudy Freddy FLORES MENACHO by PAF, likewise they retained three minivans that had transported the security guards and drivers.").

[537] **Ex. R-0113**, Letter No. 52-2020-REGIÓN POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO from PNP Colonel (L. Pérez) to PNP General (H. Ramos), 22 February 2020, ¶ 23.

police.[538] When the PNP arrived, members of the Parán Community reported to the PNP that the War Dogs had begun firing their weapons upon arrival.[539]

280. Thus, the contemporaneous evidence directly contradicts Claimant's efforts to portray the War Dogs as peacemakers who played no role in the violence that marked their intervention in the conflict.

(ii) Claimant attempts to deflect responsibility by blaming the Parán Community and Peru

281. Another opportunistic argument made by Claimant concerns the firearms that were held by some members of the Parán Community. Specifically, in the Reply Claimant complains that certain members of the Parán Community had long-range weapons, and criticizes Peru for not searching for and confiscating those weapons.[540] However, Claimant's allegation misconstrues the context and facts. Ultimately, whether viewed discretely or as part of Claimant's composite act theory, this issue is immaterial.

282. In the Counter-Memorial, Peru explained that it had overcome a period of political instability, including a stretch of military rule, before beginning its transition to democracy in the 1990s.[541] In that context, during the 1980s and early 1990s, a violent insurgent terrorist group known as *Sendero Luminoso* had engaged in widespread terrorist activity throughout the country.[542] The group inflicted intense violence and abuse on many rural communities.[543] To shore up security in these remote and rural settings, the Government set up local security programs that included the *Rondas Campesinas*.[544] It was in that context that the military provided long-range weapons to

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[538] **Ex. R-0262**, Intervention Act No. 5, 14 May 2019.

[539] **Ex. R-0262**, Intervention Act No. 5, 14 May 2019.

[540] Claimant's Reply, ¶¶ 15, 306, 353, 347, 386.

[541] Peru's Counter-Memorial, ¶¶ 48-49, 499.

[542] **Ex. R-0263**, "*Sendero Luminoso (Shining Path)*," ENCYCLOPEDIA.COM, 16 January 2023.

[543] **Ex. R-0263**, "*Sendero Luminoso (Shining Path)*," ENCYCLOPEDIA.COM, 16 January 2023.*See also* **Ex. R-0272**, "*Shining Path,*" Peru Reports, last accessed 25 January 2023.

[544] **Ex. C-0597**, "Compensation to the Members of the Self- Defence Committees and Rondas Campesinas Victims of Terrorism", Ombudsman's Office, Report No. 54, 30 November 2000, pp. 3-4.

the villagers, to assist them in the self-defense of their communities from the Sendero Luminoso.[545] A large number of such weapons have since remained in circulation within those communities.

283. Peru has not adopted a policy of forcibly removing these arms from local communities for a variety of reasons. Notably, past experience in other States with efforts to forcefully disarm civilian has demonstrated that such programs can generate violent encounters, create distrust, and prove ineffective in achieving disarmament.[546] For that reason, the UN recommends conflict-sensitive national programs that facilitate the voluntary surrender of weapons.[547] Peru's approach is aligned with the UN's recommendations, as it has established a legal and policy framework designed to incentivize the voluntary surrender of arms.[548] For example, in 2001, Peru enacted legislation that would grant amnesty to all those who surrendered weapons to the authorities within a 180-day deadline.[549] More recently, in 2021, Peru enacted legislation establishing a new amnesty period and providing further incentives for the

[545] **Ex. C-0597**, "Compensation to the Members of the Self- Defence Committees and Rondas Campesinas Victims of Terrorism", Ombudsman's Office, Report No. 54, 30 November 2000, pp. 3-4.

[546] *See, e.g.*, **RLA-0185**, "'*Get the Gun!": Human Rights Violations by Uganda's National Army in Law Enforcement Operations in Karamoja Region: I. Summary,*" HRW, last accessed 22 January 2023; **Ex. R-0273**, Integrated Disarmament, Demobilization and Reintegration Standards, UNITED NATIONS, 16 June 2020, p. 6 ("Forced disarmament can have a negative impact on contexts in transition, including in terms of restoring trust in authorities and efforts towards national reconciliation. In addition, removing weapons forcibly from combatants or persons associated with armed forces and groups risks creating a security vacuum and an imbalance in military capabilities which may generate increased tensions and lead to a resumption of armed violence.").

[547] **RLA-0184**, Small Arms: No Single Solution, United Nations, last access 22 January 2023, pp. 3, 6, 7.

[548] *See generally,* **Ex. R-0264**, Law No. 28397, 25 November 2004; **Ex. R-0265**, Law No. 31324, 5 August 2021.

[549] **Ex. R-0264**, Law No. 28397, 25 November 2004.

voluntary surrender of weapons.[550] As a result of that program, nearly 11,000 weapons were surrendered in 2021.[551]

284. This social context, and the arming of the *Rondas Campesinas*, are well known within Peru. The remaining arms are held within many of the rural communities, not just the Parán Community. In fact, the Lacsanga Community—with which Claimant worked collaboratively—likewise held weapons.[552] Claimant was not only aware of this fact, but sought to use that reality to its advantage: as revealed by Claimant's own evidence, Invicta was coordinating with the Police of Sayán to activate and provide arms training to the *Ronda Campesina* of the Lacsanga Community, for the eventual purpose of protecting what that Community believed to be its territory beneath the Invicta Mine site.[553]

285. Furthermore, the social conflicts between local communities and mining companies in Peru have not been driven by the former's possession of the long-range weapons distributed by the military during the *Sendero Luminoso* period. To the contrary, local communities—including the Parán Community—have generally expressed their opposition to certain mining projects through protests that have not involved the use

[550] **Ex. R-0265**, Law No. 31324, 5 August 2021.

[551] **Ex. R-0266**, "*Peru – Gun Facts, Figures and the Law,*" last accessed 22 January 2023.

[552] *See* **Ex. C-0426**, SSS, Weekly Report, Project, 20–27 November 2017, p. 6 (PNP Major Andrés Rosales Andrade "recommended that we coordinate security and surveillance training so that through the superintendent and the national police, the members of the Rondas Campesinas of the Lacsanga community are trained in security, regularization of weapons licenses, use of weapons, and others"); **Ex. C-0391**, SSS, Monthly Report, Project, December 2017, pp. 9, 15, 16, 79 87, **Ex. C-0162**, Monthly Report on Invicta Mine, Social Sustainable Solutions, August 2018, pp. 11, 13, 33, 34, 39, 40.

[553] *See* **Ex. C-0426**, SSS, Weekly Report, Project, 20–27 November 2017, p. 6 (PNP Major Andrés Rosales Andrade "recommended that we coordinate security and surveillance training so that through the superintendent and the national police, the members of the Rondas Campesinas of the Lacsanga community are trained in security, regularization of weapons licenses, use of weapons, and others"); **Ex. C-0391**, SSS, Monthly Report, Project, December 2017, pp. 9, 15, 16, 79 87, **Ex. C-0162**, Monthly Report on Invicta Mine, Social Sustainable Solutions, August 2018, pp. 11, 13, 33, 34, 39, 40.

of weapons.[554] In this respect, there is no evidence to suggest that, during the Access Road Protest, or during the encounter with the War Dogs on 14 May 2019, the Parán's *Ronda Campesina* actually used any of the firearms that had been distributed to it decades earlier by the Peruvian military.[555]

286. Thus, Claimant's attack on Peru for failing to forcibly remove weapons from the Parán Community falls flat and is simply another red herring. Claimant was or should have been well aware of the social context in Peru, the possession of long-range weapons by *Rondas Campesinas* (including not only of the Parán Community but also the other Rural Communities), and the central Government's national strategy to reclaim those weapons. It would have been inconsistent with this national strategy, and counter-productive with respect to the conflict between Claimant and the Parán Community, if Peru had singled out the Parán Community and forcibly confiscated its weapons. Furthermore, it is disingenuous for Claimant to advocate such a tactic, given that Claimant was itself aware of, and quite content with, the possession of weapons by other local communities in the area, such as the Lacsanga (as discussed above). Importantly, Claimant has not shown that a forcible stripping of such weapons—had it taken place—would have dampened the Community's opposition, prevented the Road Access Protest, or in any way helped to resolve the social conflict.

(iii) Peru continued its diligent efforts to broker a solution to the social conflict

287. Even after Claimant deployed its "powerful"[556] War Dogs security forces to the Site, Peru continued its diligent efforts to secure a peaceful solution. For example, the

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[554] *See e.g.* **Ex. C-0161**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, p. 19 (demonstrating that Claimant faced several incidences of blockades and other forms of protest by the Lacsanga Community: "A permanent blockade of the road was avoided, which was intended to prevent the trucks returning to the INVICTA mining camp for their second trip through. Fortunately it was solved after talking with the community president.").

[555] *See contra* **Ex. C-0552**, Internal PCM email with attachment, 21 May 2019; **Ex. R-0113**, Letter No. 52-2020-REGIÓN POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO from PNP Colonel (L. Pérez) to PNP General (H. Ramos), 22 February 2020.

[556] **Ex. R-0259**, Email from Lupaka (M. Velasquez) to Lupaka (L. Bravo), 28 March 2019.

OGGS, MININTER, PCM, and the Ombudsman Office held separate meetings with the Community and Claimant in late May 2019.[557] The Parán Community eventually "expressed [its] willingness to start negotiations and put forward [its] proposals," but wanted Claimant to sideline its representatives who had been involved in the failed negotiations up until that point.[558] However, by that point Claimant was already refusing to engage with the local community through any means other than State-enabled use of force.

g. Peru fully adjudicated all of Claimant's criminal complaints in accordance with Peruvian law

288. Claimant criticizes the way in which the Peruvian authorities handled certain criminal investigations filed by Claimant against specific individuals.[559] However, the facts and evidence show, and Claimant admits, that Peru took immediate action and that the Prosecutor's Office initiated criminal investigations diligently and in accordance with Peruvian law.[560]

289. As explained in its Counter-Memorial, Peru carried out the criminal investigations in accordance with Peruvian law, including principles of due process.[561] If Claimant did not believe this to be the case, it could have taken appropriate legal recourse, but it did not. For example, Claimant never filed any complaint against any public authority, either from the Executive or Judiciary branch, concerning the handling of

[557] *See, e.g.*, **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019; **Ex. C-0364**, IMC, Minutes of meeting between IMC and MEM, 27 May 2019; **Ex. C-0552**, Internal PCM email with attachment, 21 May 2019; **Ex. C-0578**, PCM, aide mémoire, 27 May 2019.

[558] **Ex. C-0365**, Email from MEM to IMC, 8 July 2019 ("[A]t our insistence, they stated that they could change their decision as long as the owner of the company guarantees that they will fire all the officials involved in the failed attempts at negotiation frustrated to date and that they will attend the general assembly to express their willingness to start negotiations and put forward their proposals").

[559] Claimant's Reply, ¶ 674(b).

[560] Claimant's Reply, ¶ 277.

[561] Peru's Counter-Memorial, ¶¶ 217, 246, 517, 536-537, 651, 656.

the criminal investigations.[562] The lawfulness of Peru's actions in that regard is confirmed by the independent criminal law expert Mr. Meini, who concluded in his report that the criminal complaints filed by Claimant's representatives had been processed and handled in compliance with Peruvian law and due process.[563]

290. Claimant's argument that Peru failed to arrest the individuals against which it had filed criminal complaints is misplaced. Article 24(e) of the Peruvian Constitution reflects the fundamental legal principle that every person must be presumed innocent until proven guilty by a competent court of law. Consistent with this principle, the Peruvian Supreme Court and the Constitutional Tribunal have established that preventive imprisonment is reserved only for exceptional circumstances[564]—for example, when there is evidence of flight risk or when there are reasonable grounds to believe that the accused will interfere with the criminal investigation if not incarcerated.[565] Claimant has not demonstrated—or even argued—that such exceptional circumstances were present in any of the proceedings that it refers to in this arbitration.

291. Bereft of any facts or evidence that would demonstrate that Peru did not conduct the criminal investigations and proceedings in accordance with its obligations under Peruvian and international law, Claimant again resorts to vague and unfounded assertions. Specifically, it argues that the Prosecutor's Office for the Huaura Province "blatantly disregarded Peruvian law when he acted with very significant delay and absolved the Parán offenders from any responsibility despite the grave crimes."[566]

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[562] Meini Report, ¶ 187.

[563] Meini Report, ¶¶ 186, 187.

[564] **Ex. R-0260**, Plenary Ruling No. 341/2022, Peruvian Constitutional Tribunal, 25 October 2022; **RLA-0179**, *Case of Yvon Neptune v. Haiti*, ICHR, Judgment, 6 May 6, 2008 (Quiroga, García-Sayán, *et al.*), ¶ 107 ("This is so, given that pre-trial detention "is the most severe measure that can be applied to a person accused of a crime, so that its application must be exceptional in nature, limited by the principles of legality, the presumption of innocence, need and proportionality, all of which are strictly necessary in a democratic society").

[565] **Ex. IMM-0007**, Criminal Procedure Code of Peru, Legislative Decree No. 957, 22 July 2004, Arts. 268–270.

[566] Claimant's Reply, ¶ 279.

Claimant focuses in particular on a criminal investigation that led to a decision issued by the Huaura Prosecutor's Office dated 5 June 2022,[567] which Claimant offers as evidence of "Peru's [alleged] passivity and erratic behavior in respect of enforcing its own laws."[568] That 5 June 2022 decision had been issued in relation to the 19 June 2018 Protest [redacted][569] However, Claimant has not adduced any evidence to support these wholly unsubstantiated characterizations of the Huaura Prosecutor's Office or of the latter's decision. Nor does Claimant explain why the 5 June 2022 decision—or any other prosecutorial or judicial decision in this case—was wrong as a matter of Peruvian law. This is not surprising, considering that the evidence shows that there was no impropriety or other defect that would amount to a violation of Peruvian law or of Peru's obligations under public international law. Taking the 5 June 2022 decision to which Claimant refers as an illustrative example, there are various reasons that support the above conclusion.

292. *First,* with respect to Claimant's usurpation and false imprisonment claims relating to events that took place on June 2018, the Prosecutor concluded that "the mining camp where the facts took place, is in the actual control of the mining company, as it is shown in the 19 June 2018 minute,"[570] adding that "there is no evidence of disturbance, as it was recorded that the community members conducted an inspection to verify the damages that the mining company could be causing to the community's territory,

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[567] Claimant mistakenly stated that the decision is dated 15 June 2022. Claimant's Reply, ¶279. However, as shown in **Ex. Ex. R-0261**, the correct date is 5 June 2022. In addition, Claimant incorrectly alleges that this decision was issued "more than three years after its expiry and just a few months before Claimant lodged" its Reply. *See* Claimant's Reply, ¶279. Claimant misrepresents the facts. This was the *second* decision issued by the Huaura Prosecutor's Office in this investigation. As stated in the 5 June 2022 decision, the Superior Prosecutor's Office annulled the first decision issued by the Huaura Prosecutor as a result of an appeal filed by Invicta's counsel, and ordered the issuance of a new resolution, which led to the 5 June 2022 decision.

[568] Claimant's Reply, ¶ 280.

[569] [redacted] *see also* **Ex. IMM-0047**, Index of Criminal Investigation Files, Invicta Mining Co., Item 1.

[570] [redacted]

toured the premises and left."[571] [redacted]

293. *Second*, with regard to the coercion claim, the Prosecutor concluded that "[redacted] the community members wished to talk to the company's representatives and reach an agreement, and they [the company's representatives] agreed to tour the facilities of the mining camp,"[573] adding that "there was no threat of violence to access the site and tour the mining camp, [redacted] In addition, the Prosecutor concluded that "there is no real and specific charge against any individual where it is shown that they coerced, threatened or attacked them in order to cause them to tour the premises."[575]

294. *Third*, in reference to the assault claim, the Prosecutor noted that there was no evidence of injuries, and that Mr. Estrada did not point to any specific person as his alleged attacker.[576]

295. *Fourth*, regarding the theft claim, [redacted] In addition, the PNP investigations did not reveal any possible suspect for that alleged crime, and Invicta failed to file any evidence to substantiate its allegation that a theft had even actually occurred in the first place.[577]

296. As demonstrated above, the Prosecutor's Office conducted a thorough investigation, interviewed the parties involved, reviewed the evidence, and issued a reasoned

[571] [redacted]
[572] [redacted]
[573] [redacted]
[574] [redacted]
[575] [redacted]
[576] [redacted]
[577] [redacted]

decision in accordance with Peruvian law. That decision has not been challenged under either domestic or international law.

297. In conclusion, there is no evidence on the record that the 5 June 2022 decision was wrong as a matter or Peruvian or international law. In any event, neither the 5 June 2022 decision nor any other prosecutorial or court decision issued in any of the criminal investigations referred to by Claimant is being challenged in this arbitration as a violation of Peru's obligations under the Treaty.

4. Experience in prior conflicts confirms that Peru was justified in not using force against the Parán Community

298. As Peru demonstrated in the Counter-Memorial, Peru has developed a policy designed to manage conflicts between communities and mining companies,[578] which takes into account the need to ensure the long-term success of mining projects, while respecting the human rights of local communities.[579] Accordingly, Peru's mining law framework—which includes cooperation with the Canadian government—promotes peaceful dialogue and conflict resolution between mining companies and local communities, and reserves the use of force for deployment only as a last resort.[580]

299. Nevertheless, in its Reply, Claimant insists that Peru could and should have used force against the Parán Community, and that such use of force would have somehow resolved Claimant's conflict with the Community or at least quashed local opposition. Claimant seeks to support such argument with a purported comparison of Peru's efforts to mediate the conflict related to the Invicta Mine with Peru's responses in other mining conflicts.[581] However, Claimant's comparison is superficial, false, and misleading. An objective analysis of the facts reveals that, far from supporting Claimant's thesis, the other situations cited by Claimant *confirm* that (i) Peru's

[578] Peru's Counter-Memorial, § II.A.1.

[579] Peru's Counter-Memorial, § II.A.1.

[580] Peru's Counter-Memorial, ¶¶ 50–52.

[581] Claimant's Reply, ¶ 380 ("These police interventions show that, contrary to Peru's contention, throughout Lupaka's tenure of the Invicta mine, the State remained committed to the use of Police force in the face of conflict with local communities"); Claimant's Reply, § 7.2.1.

consistent policy has been to facilitate constructive dialogue, and use force only as a last resort, and (ii) the use of force tends not to resolve social conflicts and, to the contrary, often aggravates them.

300. In particular, Claimant points to the situation concerning a mining project known as "Las Bambas," which Claimant offers as an example of a "successful" use of force in the context of a social conflict.[582] However, rather than support Claimant's contention, the facts regarding the situation in Las Bambas prove that use of force is *not* the appropriate means to deal with local opposition to a mining project, and that it will often aggravate rather than resolve the dispute:

a. The first protest from the local community in relation to the Las Bambas mine occurred in 2004.[583] As Claimant knows, the PNP did not intervene in the ongoing conflict there until *September 2015*, and only after (i) the local community had expressly refused to engage in dialogue, and (ii) 400 community members had established a protest that blocked access to the mine and to a public road.[584] Notably, the road at issue was a highly-travelled, transportation corridor in the region.[585] The prolonged protest thus created economic and safety concerns *for the entire region*, and not just the affected mining operator (as was the case here).[586]

b. The police intervention in September 2015 resulted in harm to the local community. Specifically, when the PNP deployed armed units to forcibly

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[582] Claimant's Reply, ¶¶ 379–380.

[583] **Ex. R-0224**, Infographics Las Bambas 2003–2019, Ombudsman's Office of Peru, 5 April 2019, p. 2; **Ex. R-0223**, Leonidas Wiener Ramos, *Debida Diligencia y Minería: Las Bambas*, November 2022 p. 23. Since the tender for the project in 2004, different communities have protested against the Las Bambas mining project, generating successive episodes of social conflict.

[584] Claimant's Reply, ¶ 802; **Ex. R-0243**, "*Las Bambas: cronología de los conflictos en toda la historia del proyecto minero,*" EL COMERCIO, 31 August 2018, p. 2; **Ex. R-0244**, Social Conflicts Report No. 139, Ombudsman's Office of Peru, September 2015, p. 34.

[585] Incháustegui Second Witness Statement, ¶ 17; **Ex. R-0224**, Infographics Las Bambas 2003–2019, Ombudsman's Office of Peru, 5 April 2019, p. 2.

[586] Incháustegui Second Witness Statement, ¶ 17; **Ex. R-0243**, "*Las Bambas: cronología de los conflictos en toda la historia del proyecto minero,*" EL COMERCIO, 31 August 2018, pp. 3-4.

remove protesters and regain control of the mine site at Las Bambas, the protesters resisted.[587] As a result, three members of the community lost their lives, and 29 were injured.[588] Not surprisingly, that first intervention by the police did not resolve—but instead inflamed—the conflict.

c. Months later, in August 2016, the local community restored the blockade.[589] Accordingly, in October 2016, the police were forced to intervene once again, which led to additional violence and injuries.[590]

d. The second intervention likewise did not resolve the conflict. Instead, there were continued protests, and continued clashes between the protesters and the police in September 2018, March 2019, September 2021, April 2022, and July 2022.[591] The April 2022 clashes were firmly criticized by the Ombudsman's Office,[592] as that intervention left 44 people wounded and—again not surprisingly—did not solve the conflict.

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[587] **Ex. R-0243**, "*Las Bambas: cronología de los conflictos en toda la historia del proyecto minero,*" EL COMERCIO, 31 August 2018, pp. 2–3; **Ex. R-0244**, Social Conflicts Report No. 139, Ombudsman's Office of Peru, September 2015, p. 34.

[588] **Ex. R-0224**, Infographics Las Bambas 2003–2019, Ombudsman's Office of Peru, 5 April 2019, p. 2.

[589] **Ex. R-0243**, "*Las Bambas: cronología de los conflictos en toda la historia del proyecto minero,*" EL COMERCIO, 31 August 2018, pp. 3–4.

[590] **Ex. R-0224**, Infographics Las Bambas 2003–2019, Ombudsman's Office of Peru, 5 April 2019, p. 2.

[591] *See* **Ex. R-0224**, Infographics Las Bambas 2003–2019, Ombudsman's Office of Peru, 5 April 2019, p. 2; Claimant's Reply, ¶ 379; **Ex. C-0314**, "*Peruvian police carry out a new eviction of an indigenous community in the Las Bambas mine*", *Euronews*, 28 April 2022; **Ex. C-0315**, "*Peruvian police evicts communities in Las Bambas mining*", *teleSURtv*, 28 April 2022.

[592] **Ex. R-0225**, Social Conflicts Report No. 218, Ombudsman's Office of Peru, April 2022, p. 35; **Ex. R-0226**, "*Conflicto en Las Bambas: Defensoría del Pueblo exige cese inmediato de la violencia en Challhuahuacho y Coyllurqui,*" Ombudsman's Office of Peru, 28 April 2022, p. 1; Incháustegui Second Witness Statement, ¶ 17.

e. In July 2022, the police once again tried to forcefully remove the community members. However, the next day, the number of community members participating in the blockade increased.[593]

f. Finally, after the police's repeated interventions did not yield results, in November 2022 the mining company itself requested that the State help to "solve the problems **through dialogue**."[594] (Emphasis added.)

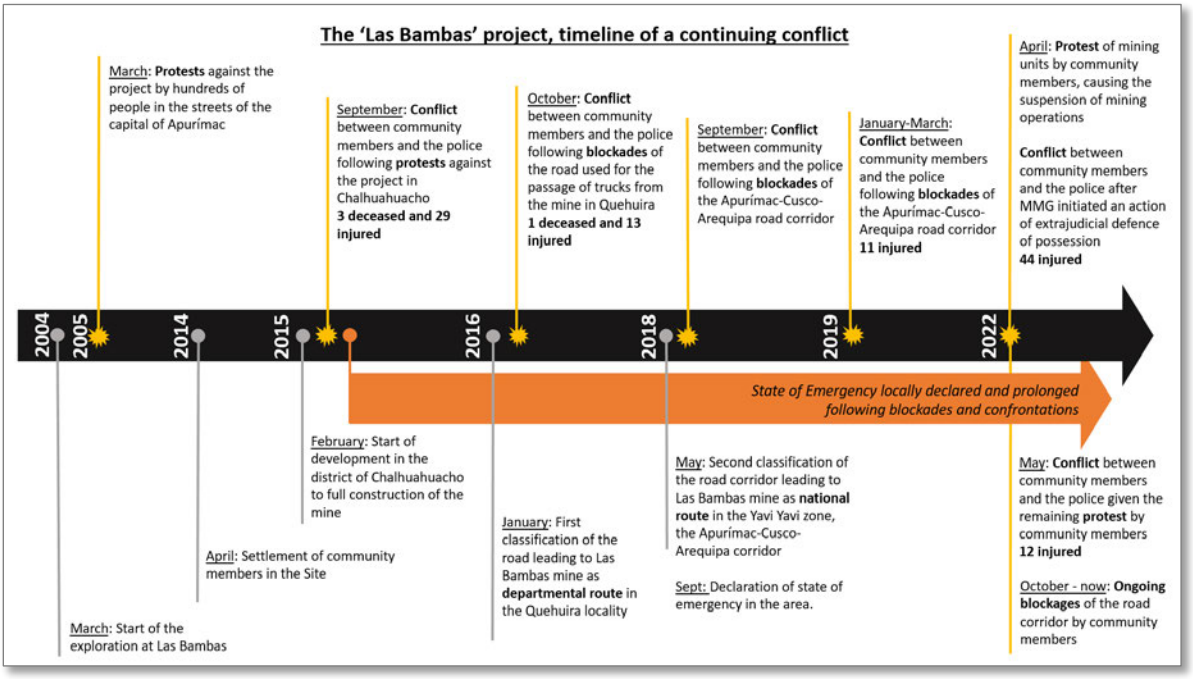
g. These events are depicted on the following chronology:[595]

[593] *See* **Ex. C-0318**, "Las Bambas: mining conflict gets out of control and the crisis worsens due to attacks by community members", *Instituto de Ingenieros de Minas del Perú*, 29 April 2022.

[594] **Ex. R-0227**, "*Las Bambas inicia reducción progresiva de sus operaciones debido a bloqueos viales*," LA REPÚBLICA, 3 November 2022, p. 1.

[595] The chronology reflects the information contained in the following documents: **Ex. R-0224**, Infographics Las Bambas 2003–2019, Ombudsman's Office of Peru, 5 April 2019, p. 2; **Ex. R-0243**, "*Las Bambas: cronología de los conflictos en toda la historia del proyecto minero,*" EL COMERCIO, 31 August 2018; **Ex. R-0225**, Social Conflicts Report No. 218, Ombudsman's Office of Peru, April 2022, p. 35; **Ex. R-0238**, Social Conflicts Report No. 219, Ombudsman's Office of Peru, May 2022, p. 39; **Ex. R-0227**, "*Las Bambas inicia reducción progresiva de sus operaciones debido a bloqueos viales*," La República, 3 November 2022; **Ex. R-0245**, Supreme Decree No. 068-2015-pcm, State of Emergency, 28 September 2015; **Ex. R-0246**, "*Decreto Supremo que deja sin efecto la declaración de estado de emergencia,*" GOB.PE, 13 June 2022.

Figure 5: Las Bambas Social Conflict



301. In sum, and contrary to Claimant's argument, the Las Bambas conflict confirms that (i) the circumstances that led to the PNP use of force in that case were not present at the Invicta Mine, (ii) Peru resorted to the use of force at Las Bambas as a measure of last resort, several years after protests began, and (iii) when force was used, it did not resolve the dispute but rather aggravated it and resulted in the tragic loss of life and injuries to many.

302. In an attempt to find support for its argument that Peru should have used force against the protesters of the Parán Community, Claimant cites various other situations in the Peruvian mining sector,[596] all of which are equally unavailing. By way of example:

a. Claimant cites the situation involving the Century Mining Perú mining company. As Claimant concedes, the local communities there first began to protest in 2010.[597] The PNP did not intervene until 2016—i.e., six years later—

[596] Claimant's Reply, § 7.2.1, ¶¶ 375–377.

[597] Claimant's Reply, ¶ 375.

when the protesters had decided to move their occupation from the mine site to the *Plaza de Armas*, the central square in Arequipa, where the President of Peru was holding an event in the city.[598] In this respect, the PNP operational plan did not have as its objective the lifting of a blockade at the mine site, but rather to prevent the protesters from obstructing and threatening the President of Peru at a national event in a central public place.[599] This situation therefore was not at all analogous, and therefore does not support the notion that Peru should have forcibly removed the protesters who blocked the access road to the Invicta Mine.

b. Claimant also invokes an incident relating to the occupation of private land in the town of Pasco.[600] In that case a local community had invaded a mining area for the purpose of establishing a permanent settlement camp.[601] As confirmed by the evidence cited by Claimant itself, the PNP conducted an inspection to evict the local community and found four homemade bombs in the camps established by the invaders.[602] For the latter reason alone, the situation in that case was not at all comparable to that of the Parán Community, which had established a peaceful protest to block the access road to the Invicta Mine.

c. Claimant also cites the situation at the Apumayo mine,[603] where the Apumayo SAC and Ares SAC companies were developing a mining project. In that case, as the company itself explained, anti-mining third parties—not the local communities—had organized a strike and had engaged in vandalism,

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[598] **Ex. C-0304**, "Arequipa: with pellets they try to evict protesters from the Plaza de Armas", *Diario Correo*, 14 August 2016.

[599] **Ex. C-0304**, "Arequipa: with pellets they try to evict protesters from the Plaza de Armas", *Diario Correo*, 14 August 2016.

[600] Claimant's Reply, ¶ 376.

[601] **Ex. C-0305**, "Pasco: Police evicted invaders from private land of a mining company", *Andina*, 23 May 2016.

[602] **Ex. C-0305**, "Pasco: Police evicted invaders from private land of a mining company", *Andina*, 23 May 2016.

[603] Claimant's Reply, ¶ 377.

including by burning down the offices of the mining camp.[604] As a result, the police intervened.[605] Such a situation of third-party vandalism, reflecting opposition to the project based on ideology rather local community grievances, cannot be compared with the Parán Community's Access Road Protest. In any event, in that instance, despite the police's intervention, the demonstrators did not cease their activities until after they met with MINEM representatives[606]—i.e., after engaging in a dialogue.[607] Also, in contrast to Claimant, Apumayo SAC and Ares SAC companies publicly supported dialogue with local communities as the appropriate means to resolve any social conflicts.[608]

303. In addition to the foregoing examples, Claimant mentions in passing a handful of additional situations allegedly involving police intervention in Peru. By Claimant's own admission, however, these examples fall "outside the mining sector"[609]—and thus do not involve the same type of social conflict, and balance of interests, at play in the mining sector in Peru. Furthermore, *none* of the seven additional examples invoked by Claimant involved a protest by a local community.[610] To the contrary, each of those cases involved intervention by the police in order to evict "invaders" that sought to *permanently* settle on private property.[611] Because none of those instances

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[604] **Ex. C-0581**, "At least ten injured and a mining camp destroyed in protests in Peru", *SWI swissinfo*, 30 October 2021. *See* **Ex. R-0239**, "*Apumayo: ¿Cómo se recupera la mina ayacuchana luego del asalto e incendio de sus instalaciones?*," EL COMERCIO, 30 April 2022.

[605] **Ex. R-0240**, Report: Agreements between the National Police and extractive companies in Peru, EARTHRIGHT INTERNATIONAL, February 2019.

[606] **Ex. C-0581**, "At least ten injured and a mining camp destroyed in protests in Peru", *SWI swissinfo*, 30 October 2021, p. 2.

[607] This was ratified by the Ombudsman's Office, which explained that "the representatives of the Defense Fronts announced . . . to start a dialogue." *See* **Ex. R-0241**, Social Conflicts Report No. 212, Ombudsman's Office of Peru, October 2021, p. 37.

[608] **Ex. C-0581**, "At least ten injured and a mining camp destroyed in protests in Peru", *SWI swissinfo*, 30 October 2021, p. 2.

[609] Claimant's Reply, ¶¶ 383–384.

[610] Claimant's Reply, ¶¶ 383–384.

[611] *See* **Ex. C-0586**, Tambo Case, "Police and Prosecutor evict land invaders (VIDEO)", *Correo*, 20 October 2015, p. 1 ("The police officers with prosecutors Yackeline Orihuela Maraví and Haydé

involved local communities protesting or showing opposition to a mining project, they are not analogous or instructive in any way.

304. In sum, none of the cases cited by Claimant support its submission that Peru should have immediately used force to remove the Parán Community protesters as a means of resolving the conflict. To the contrary, an examination of the other situations identified by Claimant confirms that: (i) Peru's policy is to reserve the use of force as a last resort (often after years of stalemate), and/or to address situations that pose serious threats to (a) public order in populated areas (e.g., the *Plaza de Armas* in Arequipa), (b) fundamental freedoms of the general public (e.g., freedom of movement, as in Las Bambas), or (c) public safety (e.g., mass killings, as could result from the use of homemade bombs); and (ii) the use of force is not effective in providing a lasting solution to an ongoing social conflict, and in fact often has the opposite effect, of inflaming or aggravating the dispute.[612] The examples discussed above prove that, as explained by Peru in the Counter-Memorial, even if the PNP had deployed force against the Parán Community and had succeeded by such means in lifting the Access

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Martínez from the Huancayo Fourth Prosecutor's Office arrived at the property located in the 16th block of prolongación Trujillo in Incho, **where they spoke with Jaime Churampi, who was leading the group that had set up 50 tents to take possession of the land.** The authorities explained to the citizens that they were committing the crime of usurpation and warned them that if they did not withdraw they would use force" (emphasis in original)); Yurimagua Case, **Ex. C-0584**, "Yurimaguas: two policemen injured after eviction of land invaders", *RPP Noticias*, 5 June 2014**,** p. 1 ("In a surprise operation that lasted more than five hours, 250 members of the special forces of the National Police managed to evict approximately one thousand invaders who had taken possession of 10 hectares of land at kilometre 4 of the Yurimaguas - Tarapoto road"); Tabalda de Lurín Case, **Ex. C-0585**, "Police evict invaders from Tablada de Lurín archaeological site", *TVPerú*, 19 May 2015 ("Despite innumerable calls for them to leave the site, as it is an intangible zone, the encroachers continued to confront the PNP, throwing stones and bricks, and tried to return to the land"); **Ex. R-0242**, "*Tablada de Lurín: policía cuida zona arqueológica tras desalojo,*" EL COMERCIO, 20 May 2015, p. 2 ("In the eve, the invaders were emphatic in pointing out that nothing would remove them from the site. In fact, they had already plotted the land and blamed Mayor Carlos Palomino for having promised them, during the election campaign, to give them the area"); Villa El Salvador Case, **Ex. C-0589**, "Villa El Salvador: Police begin eviction of invaders in Lomo de Corvina", *TVPerú*, 28 April 2021, p. 2 ("It should be recalled that this intangible zone was invaded by thousands of people on the night of Monday 12 April, who at the time said that they would stay there because they had nowhere else to go").

[612] Incháustegui Second Witness Statement, ¶¶ 18–19.

Road Protest, the local community would have continued to oppose the Project, and in all likelihood would have reinstalled the blockade soon after the PNP had forcibly removed them.

D. Claimant lost its investment in the Invicta Mine due to circumstances created by Claimant's own failures and lack of diligence

305. In the Counter-Memorial, Peru demonstrated that Claimant mischaracterized and oversimplified the circumstances that resulted in the loss of its investment. Claimant failed to explain and account for multiple circumstances created by Claimant itself that caused its investment in the Invicta Mine to fail.[613] The evidence on the record shows that, even in the absence of the measures and omissions that it challenges in this arbitration, Claimant would have forfeited its shares to its creditor, PLI Huaura, and thus lost its investment. Such loss therefore cannot be attributed to Peru.

306. In the Reply, Claimant posits that "[t]here is no reason why it would not have been successful absent Parán's violence and Peru's inaction."[614] However, the evidence shows that Claimant is wrong, as its arguments fail to account for the various obstacles that Claimant faced which were the result of its own failures and lack of diligence, and that impeded Claimant from developing and operating its investment. Such obstacles included:

a. Claimant's failure to comply with outstanding regulatory requirements, which prevented Claimant from lawfully beginning commercial exploitation at the Invicta Mine (**Subsection 1**);

b. Claimant's failure to obtain the social license necessary to avoid disruption to its investment by the Parán Community (**Subsection 2**); and

c. The absence of reliable ore processing capacity available to Claimant to convert mined ore into marketable minerals (**Subsection 3**).

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[613] Peru's Counter-Memorial, § II.F.

[614] Second Witness Statement of Gordon Lloyd Ellis, 23 September 2022 ("**Ellis Second Witness Statement**"), ¶ 54.

307. Each of these obstacles impeded Claimant from developing and operating the Invicta Mine in time for Claimant to meet its obligations to PLI Huaura, which in turn triggered certain contractual grounds (among others[615]) for PLI Huaura to seize Claimant's investment (which in fact occurred) (**Subsection 4**).

1. Claimant's failure to meet certain regulatory requirements prevented it from satisfying its repayment obligations

308. In the Counter-Memorial, Peru showed that, contrary to Claimant's assertions, the Invicta Mine was not even close to being ready for commercial mining in October 2018, when the Access Road Protest commenced.[616] Claimant still needed to fulfill several regulatory requirements, including mandatory procedures, inspections, and permits, before it could begin commercial ore extraction.[617] A variety of sources and documents (including testimony from Claimant's witnesses,[618] PPF Agreement schedules,[619] technical reports that Claimant solicited,[620] correspondence between Claimant and the MINEM,[621] and reports and resolutions by Peruvian mining

[615] *See infra* Section II.D.4 (explaining additional contractual grounds that, independent of Claimant's Events of Defaults that resulted from the requirements and obstacles listed above, entitled PLI Huaura to seize Claimant's investment).

[616] Peru's Counter-Memorial, § II.F.1.

[617] Peru's Counter-Memorial, § II.F.1.

[618] *See, e.g.*, Witness Statement of Julio Felix Castañeda, 1 October 2021 ("**Castañeda First Witness Statement**"), ¶¶ 18–27.

[619] *See, e.g.*, **Ex. C-0045**, Second Amended and Restated PPF Agreement, Schedule H; **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule H.

[620] *See, e.g.*, **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK Consulting, 13 April 2018; **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK Consulting, 6 April 2012.

[621] *See, e.g.*, **Ex. C-0081**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to MINEM, 6 September 2018; **Ex. C-0011**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to MINEM (A. Rodriguez), 17 October 2018.

agencies[622]) show that, at the time of the Access Road Protest, Claimant had not yet satisfied several of the requirements necessary to begin commercial mining.[623]

309. In the Reply submissions, Claimant nevertheless repeats its allegation that the Invicta Mine was on the "brink of production,"[624] and insists that, "from an operational perspective, IMC was ready to start commercially extracting the ore in October 2018."[625] These contentions remain squarely contradicted by the evidence that Peru highlighted in the Counter-Memorial[626] and further explains below. Contrary to what Claimant contends, as of October 2018 (which is when the Access Road Protest began) Claimant was not even close to being ready "from an operational perspective"[627] to start commercially extracting ore from the Invicta Mine.[628]

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[622] *See, e.g.*, **Ex. C-0082**, Report No. 092-2018-MEM-DGM-DTM/PM, MINEM, 23 October 2018; **Ex. C-0231**, Report No. 011-2019-MEM-DGM-DTM/PM, MINEM, 17 January 2019; **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018; **Ex. R-0168**, Report No. 099-2015-MEM-DGM-DTM/PM, 20 August 2015 *attaching* Resolution No. 0384-2015-MEM-DGM/V, 26 August 2015; **Ex. R-0074**, Directorial Resolution No. 2203-2018-OEFA/DFAI, 27 September 2018; **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018.

[623] Peru's Counter-Memorial, § II.F.1.

[624] Claimant's Reply, ¶¶ 2, 62–63 ; *see also* Claimant's Reply ¶¶ 45–46, 57, 104.

[625] Ellis Second Witness Statement, ¶ 74.

[626] Peru's Counter-Memorial, § II.F.1; *see also* Castañeda First Witness Statement, ¶¶ 18–27; **Ex. C-0045**, Second Amended and Restated PPF Agreement, Schedule H; **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule H; **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK Consulting, 13 April 2018; **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK Consulting, 6 April 2012; **Ex. C-0081**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to MINEM, 6 September 2018; **Ex. C-0011**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to MINEM (A. Rodriguez), 17 October 2018; **Ex. C-0082**, Report No. 092-2018-MEM-DGM-DTM/PM, MINEM, 23 October 2018; **Ex. C-0231**, Report No. 011-2019-MEM-DGM-DTM/PM, MINEM, 17 January 2019; **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018; **Ex. R-0168**, Report No. 099-2015-MEM-DGM-DTM/PM, 20 August 2015 *attaching* Resolution No. 0384-2015-MEM-DGM/V, 26 August 2015; **Ex. R-0074**, Directorial Resolution No. 2203-2018-OEFA/DFAI, 27 September 2018; **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018.

[627] Ellis Second Witness Statement, ¶ 74.

[628] Ellis Second Witness Statement, ¶ 74 (Mr. Ellis does not explain why he qualified his assertion that "IMC was ready to start commercially extracting the ore in October 2018" with the phrase "from an operational perspective").

310. As Peru explained in the Counter-Memorial and Claimant acknowledges, Invicta never fulfilled the technical requirements mandated by the Peruvian mining regulations in force in October 2018 to begin commercial exploitation of the Mine.[629] Ms. Dufour, Peru's mining expert, explains in detail the various procedures, inspections, and permits needed for commercial exploitation of the Invicta Mine, and assesses the status of Claimant's permitting as of October 2018.[630] She explains that Claimant was legally required to obtain—but had not yet obtained—the following:

a. Authorization to purchase and store hydrocarbons at the Invicta Mine[631] (see **subsection (a)** below);

b. Approval of modifications to the Invicta Mine's EIA[632] (see **subsection (b)** below);

c. MINEM authorization to begin commercial exploitation of the Invicta Mine[633] (see **subsection (c)** below); and

d. Licenses to use water from sources not contemplated in Claimant's 2009 EIA[634] (see **subsection (d)** below).

311. As explained below, Ms. Dufour estimates that, had the Access Road Protest not occurred, the Mine would not have been ready for lawful commercial exploitation until *July 2020*, i.e., more than a year and a half after the start date of Claimant's repayment obligations to PLI Huaura.[635] Ms. Dufour's report is supplemented by a permitting timeline that specifies the basis for her estimates.[636]

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[629] Peru's Counter-Memorial, § II.F.1.a.

[630] Dufour Report, § II.A.

[631] Dufour Report, ¶¶ 64–66.

[632] Dufour Report, ¶¶ 83–87.

[633] Dufour Report, ¶¶ 12, 247.

[634] Dufour Report, ¶ 138.

[635] Dufour Report, ¶¶ 7, 159.

[636] *See* Dufour Report, ¶ 160; **Ex. MD-0047**, Permitting schedule to initiate mining operations (mining and processing) according to market conditions.

a. Claimant needed authorization to purchase and store hydrocarbons at the Invicta Mine

312. Before it could purchase and store hydrocarbon at the Invicta Mine for commercial ore extraction, Claimant also needed to obtain government authorization for its hydrocarbon storage facilities, and to register itself and its facilities in the Hydrocarbons Registry kept by the regulatory agency, Osinergmin.[637] However, it is uncertain whether Claimant obtained the requisite hydrocarbon storage authorization, and it had not registered in the Hydrocarbons Registry.[638]

313. To obtain a fuel storage authorization, Claimant needed to prepare an application to Osinergmin, detailing its plans to construct hydrocarbon storage facilities. To obtain such authorization, Claimant's facilities would have needed to comply with certain hydrocarbon safety standards.[639]

314. If Osinergmin approves a proposal for hydrocarbon storage construction, it issues a "Favorable Technical Opinion" that authorizes the mining operator to build fuel storage facilities.[640] Once such facilities are built, Osinergmin inspects them for conformity with the approved construction plans.[641] If the operator passes this inspection, it must then register itself, along with the details of its hydrocarbon storage facilities, with the Hydrocarbons Registry before it can lawfully purchase and store hydrocarbon at the relevant mine.[642] Claimant could have tried to obtained the above-referenced authorization and registration to store and purchase hydrocarbons in parallel with the other permits described below.[643]

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[637] *See* Dufour Report, ¶¶ 64, 147; **Ex. C-0285**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement (Final version), 5 October 2018; **Ex. MD-0026**, Osinergmin Resolution No. 191-2011-OS-CD, 18 October 2011, Arts. 1–2 of Annex 1.

[638] Dufour Report, ¶ 143.

[639] Dufour Report, ¶ 65(ii).

[640] Dufour Report, ¶¶ 65(i), 147.

[641] Dufour Report, ¶¶ 65(ii), 147.

[642] Dufour Report, ¶¶ 65(iii), 147.

[643] Dufour Report, ¶ 148.

315. As of September 2018, it is possible that Claimant had obtained the approval necessary to construct its hydrocarbon facilities and subsequently constructed them. However, it had not yet passed an inspection of its hydrocarbon facilities by Osinergmin or registered with the Hydrocarbons Registry. Ms. Dufour estimates that it would have taken Claimant between two to four months to pass its inspection and register with the Hydrocarbons Registry.[644] Thus, if Claimant had previously obtained authorization to construct its hydrocarbon facilities and constructed such facilities, Claimant would not have been able to purchase or store hydrocarbons before November 2018.[645] Each of these unfulfilled requirements for fuel purchase and storage impeded any potential launch of the commercial exploitation phase of the Invicta Mine.

b. Claimant could not have obtained approval of its modified EIAd before December 2019

316. As Peru noted in the Counter-Memorial, and as Claimant has acknowledged,[646] Claimant needed to secure an additional environmental certification for the Invicta Mine to begin commercial exploitation.[647] However, as of October 2018, it had not yet done so.[648]

317. Because Claimant did not have an approved water system to treat the underground mine effluents,[649] the MINEM communicated to Claimant in August 2015 that it needed to implement an "alternative mine water management system . . . which must have the corresponding environmental certification."[650] Almost two years later, the

[644] Dufour Report, ¶ 150.

[645] Dufour Report, ¶ 150.

[646] Claimant's Reply, ¶ 988.

[647] Peru's Counter-Memorial, ¶¶ 299–301; Second Witness Statement of Julio Felix Castañeda Mondragón, 23 September 2022 ("**Castañeda Second Witness Statement**"), ¶ 89 (Lupaka's "water management system [needed] to be certified by the DEAR").

[648] Peru's Counter-Memorial, ¶¶ 299–301; Castañeda Second Witness Statement, ¶ 89.

[649] **Ex. R-0168**, Report No. 099-2015-MEM-DGM-DTM/PM, 20 August 2015 *attaching* Resolution No. 0384-2015-MEM-DGM/V, 26 August 2015, p. 4.

[650] **Ex. R-0168**, Report No. 099-2015-MEM-DGM-DTM/PM, 20 August 2015 *attaching* Resolution No. 0384-2015-MEM-DGM/V, 26 August 2015, p. 4.

Directorate of Inspection and Application of Incentives ("**DFAI**")[651] carried out an inspection of the Invicta Mine, from 10 to 12 of June 2017, and concluded that Claimant did not meet the requisite environmental parameters with respect to effluent water coming from inside the underground mine. For that reason, it ordered Invicta to submit proof that the Invicta Mine water system was efficient and held the necessary environmental certifications.[652]

318. As Ms. Dufour explains, to obtain such environmental certifications, the Peruvian mining legal framework does not accept a "build first, certify later" approach.[653] Instead, Claimant needed to attain an environmental certification for an alternative water treatment system first, *and only after that* build that system in accordance with the approval granted.[654] Contrary to such regulatory framework, however, Claimant built an alternative water system first, and then sought approval for it—on an *ex post* basis—through Claimant's Third ITS.[655] The Directorate of Environmental Assessment for Natural and Productive Resource Projects ("**DEAR**") properly withheld its approval.[656]

319. To rectify the unlawful sequencing of Claimant's construction of a water system and request for approval thereof, Claimant first would have been required to *deconstruct* the water system—a step that would have taken several months to complete.[657] In addition, Claimant would have needed to prepare a request (i.e., a dossier including relevant information needed to assess the environmental impact of the proposed infrastructure) and to obtain an environmental certification for a new *proposed*

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[651] The DFAI is the office within the OEFA that was responsible for overseeing Claimant's compliance with the latter's environmental obligations in the first instance.

[652] Peru's Counter-Memorial, ¶ 181; Claimant's Reply, ¶¶ 87–88; **Ex. R-0072**, Directorial Resolution No. 2005-2018-OEFA/DFAI, 29 August 2018, pp. 17–18.

[653] *See* Dufour Report, ¶ 33.

[654] Dufour Report, ¶ 33.

[655] Claimant's Reply, ¶¶ 87–88.

[656] **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018.

[657] Dufour Report, ¶¶ 104, 109.

alternative water management system.[658] This step could have been taken in parallel to the deconstruction of the water system.[659]

320. Peru's mining expert, Ms. Dufour, identifies two approaches (described below as Scenarios 1 and 2) that Claimant could have adopted to obtain the necessary environmental certification of the alternative water management system that it was required to implement *before* beginning commercial exploitation of the Invicta Mine.[660]

321. Pursuant to the first approach ("**Scenario 1**"), Claimant would have modified its Environmental Impact Assessment ("**EIA**") to include both the alternative water management system (for groundwater) and two new superficial water sources (i.e., two springs not contemplated in the original EIA) and accompanying infrastructure.[661] Additionally, all of the water sources (groundwater and superficial) would require specific permits for the construction of the water infrastructure and to obtain the right to use the water resources for Claimant's mining activities. Under Scenario 1, Ms. Dufour expects that the earliest the EIAd modification could have been approved was *December 2019* and the expected commercial exploitation start date is *July 2020* (because of the need to obtain additional construction and use permits separate of the EIAd modification process—discussed in subsection (d) below).[662]

322. Pursuant to the second approach ("**Scenario 2**"), Claimant would have: (i) supplemented its EIAd with a new Supporting Technical Report (*Informe Técnico Sustentatorio,* "**ITS**") that included the alternative water management system; and subsequently (ii) modified its EIAd to obtain the environmental approval for the construction of water infrastructure at the new superficial water sources.[663] Due to the nature of the ITS, in Scenario 2 Claimant would have been required to obtain: (i) a Permit related to the water availability for the underground source, and (ii) the

[658] Dufour Report, ¶ 109.
[659] Dufour Report, ¶ 109.
[660] Dufour Report, ¶¶ 105, 110–111.
[661] Dufour Report, ¶¶ 104–105.
[662] Dufour Report, ¶¶ 110, 139.
[663] Dufour Report, ¶¶ 111, 112.

construction and water use Permits mentioned in Scenario 1.[664] Under Scenario 2, the expected commercial exploitation start date would remain *July 2020*, for the reason explained below.[665]

323. Ms. Dufour explains that Scenario 2 would be risky as it is only arguable that Claimant's additional ITS would have been approved, and instead would have required a modification to its EIA, given that Claimant's modified mining activity (for which authorization was needed) would have involved an impacted water source.[666] In Scenario 2, Claimant could not reasonably have hoped to obtain approval of its ITS before March 2019, and the environmental certification and construction of new water infrastructure (to account for the new superficial water sources) could not have been completed before *July 2020*.[667] For that reason, Ms. Dufour considers that July 2020 is the earliest date by which commercial exploitation of the Invicta Mine, with each of the updated water infrastructure components (for both subterranean and superficial water sources), could have begun under Scenario 2.[668] The only way Claimant could do that, however, was by modifying the Invicta Mine's EIA.[669] Given the risk involved in Scenario 2, it is unlikely that a mining company exercising due diligence and reasonable care would have chosen to proceed under Scenario 2.[670] Accordingly, the schedule described below is based on Scenario 1.[671]

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[664] Dufour Report, ¶ 112.

[665] Dufour Report, ¶ 161.

[666] Dufour Report, ¶ 161.

[667] Dufour Report, ¶ 161.

[668] Dufour Report, ¶ 161.

[669] Dufour Report, ¶¶ 104–106 (explaining that, although Peruvian law generally offers two options for attaining the required environmental certification—modifying an EIAd or supplementing an EIAd with an ITS—in cases involving negative impacts on water sources, Peruvian law affirmatively requires an EIAd modification).

[670] Dufour Report, ¶ 105.

[671] For the sake of clarity, Peru's arguments and conclusion in respect of Claimant's regulatory requirements are not dependent upon Claimant's hypothetical use of Scenario 1 (rather than Scenario 2). If in the unlikely event that Claimant had chosen to proceed in accordance with Scenario 2, the evidence still shows that Claimant would not have been able to comply with its

324. To obtain a modification to the existing EIAd, Claimant would have needed to provide sufficient detail to support its request for modification, including by providing a hydrogeological study demonstrating water resource availability and system feasibility.[672] As Ms. Dufour explains, preparing a sufficiently detailed request would likely have taken six to nine months, and the SENACE would require an average of seven months to evaluate Claimant's request.[673] If Claimant had begun this process immediately after receiving the rejection of its Third ITS in December 2018, the earliest it could have expected to receive the approval of its EIAd modification would have been December 2019.[674]

c. Claimant could not have obtained the MINEM's authorization for exploitation before January 2020

325. As Peru detailed in the Counter-Memorial, Claimant was not legally allowed to begin to commercially exploit the Invicta Mine until it passed the MINEM's final inspection and obtained an exploitation authorization.[675] Claimant never did so.

326. On 6 September 2018, Claimant requested a final inspection by the MINEM.[676] Claimant then solicited a suspension of its request on 17 October 2018, while the

repayment obligations under the PPF Agreement. Specifically, if Claimant had proceeded through Scenario 2 and received approval of the ITS in March 2019, Claimant may have been able to begin limited mining activity in January 2020. That start date still post-dates by several months Claimant's first repayment obligation. Further, and in any event, the nature of that activity would have been limited: Claimant would have had to rely solely on the underground water source, and would not have had access to new superficial industrial water catchment points. Such limited operation likely could not support the full exploitation and operation of the Invicta Mine. *See* **Ex. MD-0047**, Permitting Schedule to initiate mining operations according to market conditions; **Ex. C-0406**, IMC, Statement of Objections, 20 June 2018.

[672] Dufour Report, § II.A.1.

[673] Dufour Report, ¶¶ 104, 109.

[674] Dufour Report, ¶ 110.

[675] Peru's Counter-Memorial, ¶¶ 293–296; Claimant's Reply, § 3.3.1; Dufour Report, ¶ 128.

[676] **Ex. C-0081**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to MINEM, 6 September 2018.

Access Road Protest was taking place.[677] The MINEM granted that request.[678] In doing so, the MINEM also advised Claimant, in good faith, that its inspection request of 6 September 2018 was deficient because Claimant had not submitted a required "certificate of quality assurance of the [Invicta Mine's] construction and/or installations."[679] For a final inspection to take place, Claimant first needed to provide the MINEM that certificate. Claimant eventually provided that certificate of quality assurance, but not until two months later, in December 2018.[680]

327. The certificate of quality assurance was not, however, in itself sufficient for Claimant to *pass* the final inspection and secure MINEM authorization to exploit the Invicta Mine.[681] For that, Claimant also needed to provide the MINEM with a financial guarantee of the Mine Closure Plan,[682] and prove that an alternative mine water management system and the underground water collection point had been environmentally certified (discussed above).[683] Ms. Dufour estimates that, given these outstanding requirements, Claimant could not have received an authorization for exploitation from the MINEM before January 2020.[684]

d. Claimant could not have obtained the necessary water licenses before July 2020

328. Claimant also needed new licenses to draw water for use in mining activities.[685] In its 2009 EIA, Invicta had specified that it would obtain water only from a certain set of approved water sources (viz., ones located between the Huamboy Grande and

[677] **Ex. C-0011**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to MINEM (A. Rodriguez), 17 October 2018, p. 1.

[678] **Ex. C-0082**, Report No. 092-2018-MEM-DGM-DTM/PM, MINEM, 23 October 2018, p. 2.

[679] Castañeda Second Witness Statement, ¶ 96; **Ex. C-0082**, Report No. 092-2018-MEM-DGM-DTM/PM, MINEM, 23 October 2018, p. 2.

[680] **Ex. C-0492**, Letter from IMC to MEM, 20 December 2018.

[681] Dufour Report, ¶ 121.

[682] Dufour Report, ¶ 124.

[683] Dufour Report, ¶ 119.

[684] Dufour Report, ¶ 220.

[685] Dufour Report, ¶ 138.

Huamboy Chico estates).[686] Claimant's ITS submissions did not purport to modify the sources from which Invicta planned to draw water. However, Invicta thereafter began to collect water from two new water sources (the Ruraycocha springs and the Tunanhuaylaba springs) which were located *outside* the zone of approved water sources.[687] Another water source not included in the environmental certification was reuse of the underground water coming from inside the underground mine.[688]

329. Before Claimant could exploit the Invicta Mine, it would have needed to account for these new water sources in its modified EIAd (described in subsection (b) above).[689] To do so, Claimant would have needed to submit a request to the SENACE that described the water collection points and needed infrastructure, identified the possible environmental and socio-economic impacts of this activity, and outlined an environmental management strategy for those impacts.[690] As Ms. Dufour indicates, for the approval of this permit it would have been necessary to apply mechanisms of citizen participation and to obtain a favorable opinion from the National Water Authority (which would have been required by SENACE directly, as part of its evaluation procedure).[691] The SENACE would then have considered Claimant's modification request, and if satisfied that it met the relevant regulatory requirements, would have approved it.[692] As subsection (b) above explains, this process could not have been completed until December 2019.

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[686] **Ex. R-0047**, 2009 EIA, p. 29 ("The water supply project consists of tubular wells located on the left bank of the Huaura River, between the Huamboy Grande and Chico estates, at an altitude of 1,027 meters above sea level, and a conduction system using pumps and pipes").

[687] **Ex. C-0406**, IMC, Statement of Objections, 20 June 2018, p. 12 ("The industrial water comes from a catchment of two springs, RURAYCOCHA (286,119E; 8781,883N; 4,195 [meters above sea level]) and TUNANHUAYLABA (285445E; 8780520N; 3,900 masl) of the Lacsangaz [*sic*] community").

[688] **Ex. MD-0036**, Directorial Resolution No. 36-2018-SENACE-PE-DEAR, 12 November 2018 *attaching* Report No. 00214-2018-SENACE-PE/DEAR, § 3.1.9.1.2.

[689] Dufour Report, ¶ 138.

[690] Dufour Report, ¶¶ 104, 138.

[691] Dufour Report, ¶¶ 28–29.

[692] Dufour Report, ¶ 110.

330. Next, Claimant would have needed to request and obtain approval from the ANA to construct water infrastructure at the Invicta Mine's water sources.[693] According to Ms. Dufour, to obtain this construction permit, Claimant would have needed to obtain a modification of its environmental certification (to include the new water intake points, as well as the water infrastructure), in addition to the surface rights and the authorization or concession for the activity for which the water was going to be used).[694]

331. Had the ANA approved the proposed water infrastructure, Claimant could have constructed that infrastructure as approved.[695] However, Claimant still would have needed to apply for and obtain water use licenses from ANA for each new water source. This process would have been a separate one from the EIAd modification process, would have taken approximately three months to complete, and would have required ANA to conduct a field inspection at the site of each new water collection point, to ensure that the water works were constructed as authorized.[696]

332. Ms. Dufour estimates that the earliest that Claimant could have completed this process to use water from the Ruraycocha and Tunanhuaylaba springs would have been July 2020.[697] The same would have been true with respect to the underground water license related to the water coming from the underground mine under Scenario 1.[698]

333. Claimant could have commenced commercial exploitation of the Invicta Mine only after completing each of the four regulatory steps described above.[699] Given the timeline that Ms. Dufour has specified in her expert report, that means that Claimant could not have begun extracting ore from the Invicta Mine commercially until, *at the*

[693] Dufour Report, ¶¶ 60(iii), 138.
[694] Dufour Report, ¶¶ 60(iii), 138.
[695] Dufour Report, ¶ 138.
[696] Dufour Report, ¶ 138.
[697] Dufour Report, ¶ 139.
[698] Dufour Report, ¶ 139.
[699] Dufour Report, ¶¶ 247–248.

earliest, July 2020—i.e., nineteen months after Claimant's monthly repayment obligations began to accrue in December 2018.[700]

2. *Claimant lacked the social license necessary to commence lawful commercial exploitation of the Invicta Mine and to avoid several Events of Default under the PPF Agreement*

334. In the Counter-Memorial, Peru explained that obtaining a social license is a necessary step to execute mining activities, both as a matter of law and also of responsible, prudent practice.[701] Notwithstanding the volumes of international and domestic legal authorities and guidance that Peru has invoked on this subject, Claimant somehow insists that "there is simply no requirement for Lupaka to obtain a 'social license.'"[702] As discussed in **Section II.A.1**, however, Claimant is wrong; it was obligated to attain such a license from the rural communities in the Invicta Mine's area of direct and indirect social and environmental influence, including the Parán Community, before it could operate the Invicta Mine.[703] The fact itself that Claimant continues to argue that it did not need a social license confirms that Claimant lacked the necessary knowledge and expertise for the mining project it was attempting to undertake—and also that it lacked plain common sense.

335. In the Counter-Memorial, Peru explained that mining investors that mismanage relations with the local communities who are impacted by their mining operations can expect serious obstacles to their mining projects.[704] The Canada-Peru CR Toolkit that Peru explained and analyzed in the Counter-Memorial—which Claimant *completely* ignores in the Reply submissions—expressly forecasted both the cause-and-effect relationship between Claimant's failure to obtain a social license from the Parán

[700] **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule P.

[701] Peru's Counter-Memorial, § II.A2.

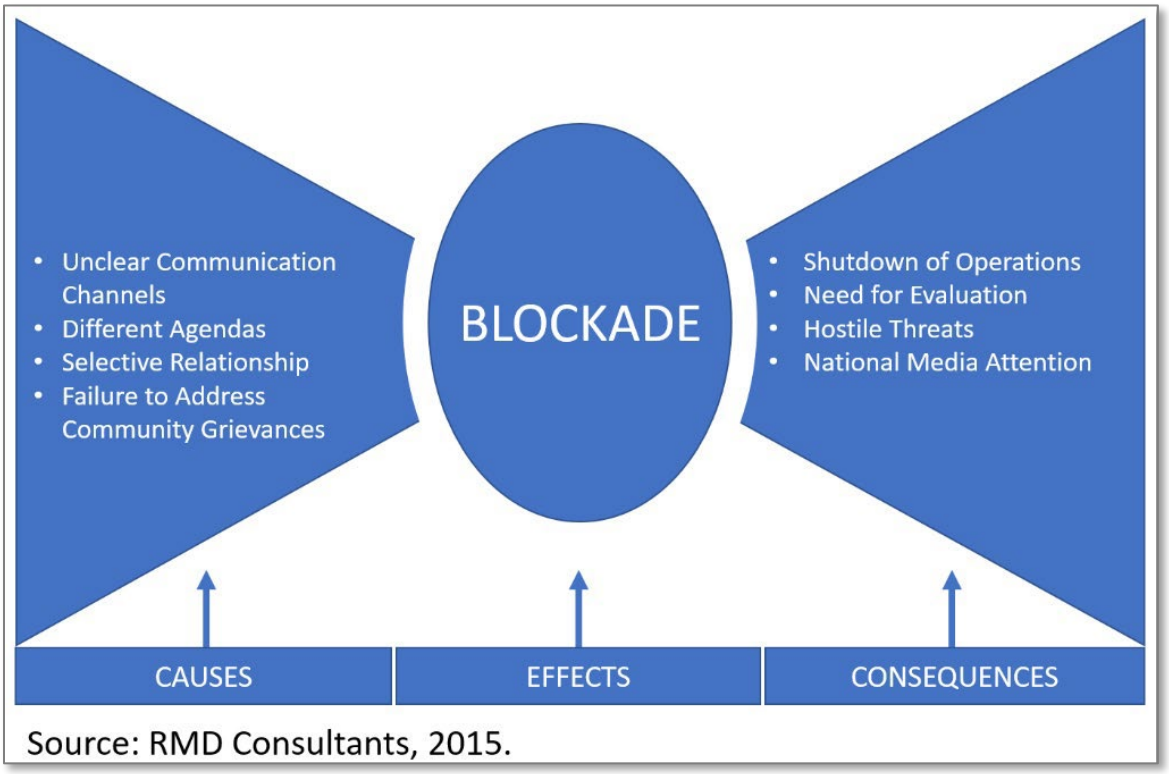
[702] Claimant's Reply, ¶ 1033.

[703] *See supra* Section II.A.1.

[704] Peru's Counter-Memorial, § II.B.2.

Community and the ensuing Access Road Protest, as well as the resulting disruptions to the Invicta Mine:[705]

Figure 6: Blockade (Canada-Peru CR Toolkit)[706]



336. **Sections II.B and II.C.3** above demonstrate that each of the causes listed in the Canada-Peru CR Toolkit graphic in **Figure 6** (shown above and listed below) was present in Claimant's relationship with the Parán Community:

a. *Failure to Address Community Grievances*—Claimant failed to address at least the following Parán Community grievances: (i) the absence of an agreement by Claimant with the Community before exploitation of the Invicta Mine could begin;[707] (ii) the concern that the Invicta Mine was causing environmental

[705] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 71; *see also* Peru's Counter-Memorial, ¶¶ 111–112.

[706] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 71; *see also* Peru's Counter-Memorial, ¶ 112.

[707] *See* Peru's Counter-Memorial, § II.D.2.a; **Ex. C-0164**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, 1–30 September 2017, p. 6 ("[T]he company has all the permits granted

harm to Community farmland and water resources;[708] (iii) the fact that Claimant was treating the other two rural communities in the Mine's area of direct social influence more favorably than it treated the Parán Community;[709] and (iv) Claimant's failure to honor its commitments, including that of paying late fees to the Community for Claimant's late payment of its debts in December 2017 and January 2018.[710]

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by the Ministry of Energy and Mines to start its exploitation and that **it does not depend on any community to start this stage**. It was also clarified that the company has always requested an easement from the community, but not permission to exploit." (emphasis added)); **Ex. C-0391**, SSS, Monthly Report, Project, December 2017, p. 5; **Ex. C-0111**, Report on Social Intervention for Signing of Agreement with the Parán Community, 2018, p. 4; **Ex. C-0121**, Letter from the Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018. *See also infra* Section II.E.3.

[708] *See* Peru's Counter-Memorial, § II.D.2.b; **Ex. C-0121**, Letter No. 038-2018-CCP from the Parán Community (I. Palomares) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018, p. 3; **Ex. R-0077**, Letter from the Parán Community (W. Narvasta) to Huaura Local Water Authority, 10 April 2018, p. 1; **Ex. R-0065**, Meeting Minutes, Meeting between the Parán Community and MINEM, 11 August 2018, p. 1; **Ex. R-0066**, Meeting Minutes, Meeting between the Parán Community and MINEM, 22 August 2018. See also León First Witness Statement, ¶¶ 22–23; **Ex. C-0182**, Summary Report of Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, et al., 7 November 2018, p. 1 (The community, taking the initiative, proposed 3 items for the agenda . . . Environment and economic compensation for the alleged damage caused to the alleged territories of the community"). *See also supra* Section II.B.4.

[709] *See supra* Section II.B.2 (explaining the variety of benefits granted by Claimant to the Lacsanga and Santo Domingo Communities as well as the disparity in Claimant's engagement with all three Rural Communities).

[710] *See, e.g.*, **Ex. C-0113**, Email from Invicta Mining Corp. S.A.C. (M. Mariños) to Lupaka Gold Corp. (J. Castañeda, *et al.*), 25 January 2017, p. 1 (committing to make payments to the Parán Community); **Ex. C-0119**, Letter No. 015-2018-CCP from the Parán Community (W. Narvasta) to Invicta Mining Corp. S.A.C. (J. Castañeda), 19 December 2017, p. 1 ("That, we hereby invite you on Wednesday, 21 February 2018 at 3:00 p.m., in the district of Huacho, in order to be able to define **the pending payments by the company you represent**, in relation to the exploration works carried out in our Community, **as well as the interest accrued by non-payment** (over two years), within the agreed terms.") (emphasis added); **Ex. C-0120**, Letter No. 004-2018-CCP from the Parán Community (I. Palomares) to Invicta Mining Corp. S.A.C. (J. Castañeda), 3 January 2018, p. 2 ("**we wish to EXPRESS our disagreement** due to their ignorance of the foregoing paragraphs as **they deliberately chose to DISREGARD the PENALTY FOR NON-COMPLIANCE** that concluded in the MINUTES on 21 January, since it is proper to remember that it was their own representatives who proposed the deadline for the payment of the debt." (emphasis added)); **Ex. C-0436**, SSS, Monthly Report, Project, February 2018, p. 7. *See supra* Section II.B.5.

b. *Selective Relationships*—Claimant prioritized and favored the Lacsanga and Santo Domingo Communities over the Parán Community, offering agreements to those two communities that committed Claimant to accord to their members preferential treatment—including in respect of infrastructure, jobs, and financial compensation.[711]

c. *Different Agendas*—The Parán Community wanted its environmental grievances to be recognized and addressed by Claimant, and wanted an agreement with Claimant on terms similar to those of the agreements between Claimant and the other Rural Communities.[712] Claimant, on the other hand, wanted the Parán Community to cease interference with the Invicta Mine so that it could proceed with its mining activities.[713]

d. *Unclear Communication Channels*—Claimant's CR Team changed several times throughout its relationship with the Parán Community, and in November 2018—while the Access Road Protest was still ongoing—Claimant dismissed

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[711] *See, e.g.*, **Ex. C-0043**, Minutes of the Contract for the Usufruct, Surface and Easement of Land between Invicta Mining Corp. S.A.C. and Lacsanga Community, 18 July 2017 (providing the Lacsanga Community with preferential treatment over the Parán Community); **Ex. C-0373**, IMC, CR Team Report No. 011-2014-RRCC, November 2014, p. 1 ("also taking advantage of the visits made to the RCs of Santo Domingo and Paran, the same topics were addressed but, in less detail, compared with Lacsanga."); **Ex. C-0063**, Contract for the Constitution of Mining Easement between Invicta Mining Corp. S.A.C. and Santo Domingo de Apache Community, 22 October 2010. *See also supra* Section II.B.2.

[712] *See* León First Witness Statement, ¶ 22 ("The Parán Community expressed their environmental, social and economic concerns in connection with the Project"); **Ex. C-0121**, Letter No. 038-2018-CCP from the Parán Community (I. Palomares) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018; **Ex. R-0065**, Meeting Minutes, Meeting between the Parán Community and MINEM, 11 August 2019; **Ex. C-0182**, Summary Report of Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, et al., 7 November 2018, p. 1.

[713] *See, e.g.*, Incháustegui First Witness Statement, ¶¶ 22-23 ("Mr. Ansley assumed an arrogant attitude, demanding the use of force to break up the Protest commenced by the Parán Community in October 2018 . . . it was clear to me that Mr. Ansley wanted an immediate solution to a conflict that called for dialogue and that could not be resolved by force."). *See supra* Section II.C.3.

SSS, the external consultant that it had hired to assist with its community relations with the Parán Community.[714]

337. As foreseen by the Canada-Peru CR Toolkit, Claimant's decision to shirk its obligation to secure a social license with the Parán Community led to the Access Road Protest.[715] Once the Access Road Protest occurred, the ordinary and expected consequences outlined in the Canada-Peru CR Toolkit graphic in **Figure 6** in fact materialized at the Mine, including "hostile threats" and "shutdown of operations."

3. The absence of ore processing capacity made it impossible for Claimant to meet its repayment obligations under the PPF Agreement

338. In the Counter-Memorial, Peru demonstrated that even if Claimant had brought the Invicta Mine to commercial exploitation by late 2018, Claimant would have lacked sufficient ore processing capacity to satisfy in a timely fashion its repayment obligations under the PPF Agreement.[716]

339. In the Reply, Claimant argues that it could have processed sufficient ore to meet its repayment obligations either through (i) the use of third-party processing plants or (ii) the acquisition of the Mallay Plant.[717] However, the evidence proves, and Ms. Dufour's expert opinion confirms, that both of these arguments are false.

a. <u>Claimant lacked toll processing services, as a result of which it could not meet its obligations under the PPF Agreement</u>

340. In the Counter-Memorial, Peru showed that, even if Claimant could have begun commercial ore extraction at the Invicta Mine, Claimant lacked access to the necessary toll processing services for Claimant to convert ore into marketable minerals.[718]

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[714] *See supra* Section II.B.9; León Second Witness Statement, § II; Trigoso Second Witness Statement, ¶ 45.

[715] *See supra* Sections II.B and II.C.3; **Ex. R-0028**, Canada-Peru CR Toolkit, p. 71. *See also* Peru's Counter-Memorial, ¶¶ 111–112.

[716] Peru's Counter-Memorial, § II.F.1.c.

[717] Claimant's Reply, § 3.4.2.

[718] Peru's Counter-Memorial, § II.F.1.c.

341. In the Reply, Claimant alleges that it could have "easily resolved any [such] issues with the [third-party] offsite processing plants,"[719] and characterizes such issues as "easy to remedy"[720] with "some basic remediation and without incurring high costs or delays."[721] This argument is contradicted by the record and the expert opinion of Ms. Dufour, which shows that the problems Claimant faced with these processing plants were far from "easy to remedy."

342. Claimant considered contracting with at least *eight* different ore processing plants.[722] Claimant only considered and tested the processing capabilities of three plants: (i) San Juan Evangelista,[723] (ii) Altagracia (referred to by Claimant as the Coriland Plant),[724] and (iii) Huancapeti II.[725]

343. In addition to each of the three plants listed above, Claimant also considered processing at the Mallay Plant while it remained under the ownership of Buenaventura. However, none of those four plants were capable of reliably and lawfully processing ore for Claimant to satisfy its PPF Agreement obligations.

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[719] Claimant's Reply, § 3.4.2.

[720] Ellis Second Witness Statement, ¶ 80.

[721] Claimant's Reply, ¶ 114.

[722] Castañeda First Witness Statement, ¶ 85; **Ex. R-0196**, Email from Lupaka (R. Webster) to Lupaka (W. Ansley, *et al.*), 24 July 2018, p. 2; **Ex. R-0197**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 29 October 2018, p. 1.

[723] The San Juan Evangelista Plant is also referred to as the Huari Plant because of its location. **Ex. R-0198**, Email from Lupaka (R. Arrarte) to IXM (B. Alva, *et al.*), 17 September 2018, p. 1 (referring to the San Juan Evangelista plant as "San Juan Evangelista (Huari)").

[724] Throughout the Reply, Claimant refers to the Altagracia Plant by the name "Coriland Plant," presumably because such plant is operated by Minera Coriland S.A.C. Claimant also refers to the Altagracia Plant as the Yep Plant, presumably because Claimant's contact at the plant was Javier Yep. **Ex. C-0141**, Service Contract for Mineral Treatment between Minera Coriland S.A.C. and Invicta Mining Corp. S.A.C., 16 May 2018; **Ex. R-0199**, Email from Lupaka (J. Castañeda) to Lupaka (W. Ansley, *et al.*), 7 August 2018, p. 1.

[725] Castañeda Second Witness Statement, ¶ 100 ("We could have overcome the issues we identified when testing the offsite processing plants – i.e., Huancapeti, [Altagracia] and San Juan Evangelista").

(i) The San Juan Evangelista Plant was inadequate and lacked the permits needed to process ore for Claimant

344. Claimant signed a contract with the San Juan Evangelista Plant in July 2018 for ore processing.[726] Significant problems that Claimant reported with this plant included: "issues with shipping,"[727] "mechanical failure[s],"[728] and the fact that it "lacked a cyanidation treatment option and had piles of mineral accumulated due to processing commitments with other mining companies."[729] These deficiencies caused Claimant to describe this plant, both while it was working with the plant[730] and again in this arbitration, as unsatisfactory.[731]

345. Claimant's monthly reports indicate that by September 2018, Claimant had stopped delivering ore to the San Juan Evangelista Plant.[732] In November 2018, Claimant stated in the minutes of a management meeting, which Claimant delivered to its CEO, that

[726] **Ex. C-0144**, Service Contract No. 01.07/SJE-2018 for Ore Processing between Consorcio Metalúrgico San Juan Evangelista S.A.C. and Invicta Mining Corp. S.A.C., 10 July 2018. **Ex. R-0200**, Email from Lupaka (D. Kivari) to Lupaka (J. Castañeda), 22 July 2018, p. 1 (Claimant deciding later that month that it "need[ed] to negotiate better prices with [this plant] to treat more ore").

[727] **Ex. R-0196**, Email from Lupaka (R. Webster) to Lupaka (W. Ansley, *et al.*), 24 July 2018, p. 2.

[728] **Ex. C-0302**, IMC Management Call Notes, 9 October 2018, p. 2.

[729] Castañeda First Witness Statement, ¶ 88.

[730] **Ex. R-0198**, Email from Lupaka (R. Arrarte) to IXM (B. Alva, *et al.*), 17 September 2018 (Claimant's Administration and Finance Officer complaining that "[t]reatment at the San Juan Evangelista plant (Huari) has not been satisfactory, and neither is the size of the plant (100 tpd)").

[731] Castañeda First Witness Statement, ¶ 89 ("Based on the unsatisfactory results and experiences with [Altagracia], San Juan Evangelista and Huancapati II, we decided to restart negotiations with Buenaventura").

[732] **Ex. C-0086**, Monthly Report, LUPAKA GOLD CORPORATION & INVICTA GOLD PROJECT, September 2018, p. 7 (showing that zero tonnes of ore were transported to the Huari plant in September 2018); **Ex. C-0052**, Monthly Report, LUPAKA GOLD CORP. & INVICTA GOLD PROJECT, December 2018, p. 5 (indicating that zero tonnes of ore were transported to Huari in October through December 2018).

the San Juan Evangelista plant was "out."[733] That statement indicated that Claimant no longer trusted the San Juan Evangelista Plant to continue processing ore.

346. In addition to the problems revealed in Claimant's contemporaneous documents and in Claimant's pleadings, the San Juan Evangelista Plant lacked the requisite permits to lawfully process ore for Claimant during the period from July 2018 and October 2019.[734] Ms. Dufour explains that, before this plant could lawfully begin processing ore for Claimant, it needed to obtain a processing concession from the Junin Regional Government.[735] The San Juan Evangelista Plant obtained this concession only on 9 October 2019—ten months *after* Claimant's repayment obligations had already begun under the PPF Agreement.[736] Thus, even if the San Juan Evangelista Plant had had satisfactory processing capabilities (which it did not, as even Claimant has recognized[737]), Claimant could not have lawfully relied on this plant to process ore to enable Claimant to fulfill its repayment obligations to PLI Huaura. In this respect—and directly contrary to Claimant's argument—none of these restrictions on Claimant's ability to rely on the San Juan Evangelista Plant were "easy to remedy."

(ii) The Altagracia Plant breached its contract with Claimant and was legally prohibited from processing Claimant's ore

347. Claimant and the Altagracia Plant concluded a contract in May 2018 for ore processing.[738] In the Reply, Claimant admits and discusses the Altagracia Plant's lack

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[733] **Ex. R-0198**, Email from Lupaka (R. Arrarte) to IXM (B. Alva, *et al.*), 17 September 2018, p. 1; **Ex. R-0201**, Email from Lupaka (R. Webster) to Lupaka (G. Ellis), 15 November 2018, p. 3 (wherein under "Other Plants:. . .", Claimant wrote "Huari out;" Huari was another name that Claimant uses for the San Juan Evangelista Plant).

[734] Dufour Report, ¶¶ 224–226; **MD-0055**, Summary of mining rights - San Juan Evangelista.

[735] Dufour Report, ¶¶ 223–225.

[736] Dufour Report, ¶ 226; **MD—0055**, Summary of mining rights - San Juan Evangelista.

[737] Claimant's Reply, ¶¶ 114–115.

[738] *See* **Ex. R-0202**, Email from Lupaka (K. Scales) to Lupaka (R. Arrarte, *et al.*), 24 July 2018, p. 2; **Ex. C-0141**, Service Contract for Mineral Treatment between Minera Coriland S.A.C. and Invicta Mining Corp. S.A.C., 16 May 2018; **Ex. C-0142**, Addendum No. 1 to Service Contract for Mineral Treatment between Minera Coriland S.A.C. and Invicta Mining Corp. S.A.C., 16 July 2018; **Ex. C-0143**, Addendum No. 2 to Service Contract for Mineral Treatment between Minera Coriland

of cyanidation treatment in its tailings facility.[739] This was not the only problem Claimant experienced with the Altagracia Plant; Claimant amassed a long and scathing list of grievances with this plant and its incompetence, concluding that the Plant's owner "**d[id] not run [the Altagracia Plant] as a rational business**"[740] (emphasis added).

348. Starting in August 2018, Claimant repeatedly considered "dispute resolution"[741] options against the Altagracia Plant. Claimant accused the Altagracia Plant of contract breaches, including failure to give "priority [treatment] to the processing of Invicta material"[742] and failure to maintain a low moisture content of Claimant's ore concentrate.[743] The Altagracia Plant also failed to process the contractually agreed quantities of ore due to "mechanical and operational delays."[744]

S.A.C. and Invicta Mining Corp. S.A.C., 30 July 2018. **Ex. R-0200**, Email from Lupaka (D. Kivari) to Lupaka (J. Castañeda), 22 July 2018, p. 1 (Claimant deciding that it ("need[ed] to negotiate better prices with [this plant] to treat more ore").

[739] Claimant's Reply, ¶¶ 115–116; Castañeda First Witness Statement, ¶ 88.

[740] **Ex. R-0199**, Email from Lupaka (J. Castañeda) to Lupaka (W. Ansley, *et al.*), 7 August 2018, p. 1.

[741] **Ex. R-0205**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 19 August 2018, p. 5 ("Is there a time period for dispute resolution? No—terms are open"); **Ex. R-0206**, Email from Lupaka (J. Castañeda) to Lupaka (D. Kivari, *et al.*), 14 September 2018, p. 1 ("I am passing this to the lawyers for their opinion and to start with the legal reclamation or process"); **Ex. R-0207**, Email from Lupaka (D. Kivari) to Lupaka (R. Carbajal, *et al.*), 9 September 2018, p. 1; **Ex. R-0208**, Email from Lupaka (G. Ellis) to Lupaka (R. Webster), 11 September 2018, p. 2.

[742] **Ex. R-0206**, Email from Lupaka (J. Castañeda) to Lupaka (D. Kivari, *et al.*), 14 September 2018, p. 1 ("[Altagracia] will give priority to the processing of Invicta mineral [(i.e., it will process Invicta's ore first and will meet its capacity obligations to Claimant)]. . .[Altagracia] gave priority to the treatment of their ore and interrupted the processing of the Invicta").

[743] **Ex. R-0206**, Email from Lupaka (J. Castañeda) to Lupaka (D. Kivari, *et al.*), 14 September 2018, p. 1 ("[Altagracia] breached the contract on several fronts . . . Dewater and air dry the Invicta concentrates to a maximum moisture content of 8%. The concentrates of last shipments of the contained greater than 10% of moisture because [Altagracia] needed to place their concentrates on the concrete pad to dry so that the Invicta concentrates were removed before drying to the 8% moisture content."); **Ex. R-0207**, Email from Lupaka (D. Kivari) to Lupaka (R. Carbajal, *et al.*), 9 September 2018, p. 1 (On 9 September 2018, Claimant complained of [Altagracia] unilaterally changing the moisture content of the ore, noting that "[Altagracia] must follow the terms of the contract and the addenda not change the moisture content as they want.").

[744] **Ex. R-0208**, Email from Lupaka (G. Ellis) to Lupaka (R. Webster), 11 September 2018, p. 2.

349. Claimant's executives reported in internal emails several instances of the Altagracia Plant proving itself to be incapable of processing Claimant's ore:

a. "**[Altagracia] did not perform as per the contract and there were a number of mechanical and operational delays**"[745] (emphasis added);

b. "As agreed with [Altagracia], the process plant was to treat between 2000 to 4000 tonnes of mineral in August 2018. **It was agreed with [Altagracia] to process 3000 tonnes in August and [this] was not completed**"[746] (emphasis added);

c. "[Claimant's Director of Operations] to send bullet points regarding **breach of contract** to [Mr. Castañeda]"[747] (emphasis added); and

d. "Why did we send [the Altagracia Plant owner] 3kt in August – **we knew he wouldn't deliver**"[748] (emphasis added).

350. Claimant was so frustrated with the Altagracia Plant by September 2018 that Claimant reclaimed ore that it already had delivered to the Altagracia Plant and transferred it to the Huancapeti II Plant. In management call minutes of 11 September 2018, Claimant recorded that "**10 trucks left [Altagracia] with ore to Huancapeti** . . . We need to get our lead concentrate off of [the Altagracia Plant's] property . . . [Mr. Castañeda] will demand release of the concentrate after the last haul trucks leave [Altagracia] for Huancapeti . . . **Prepare to threaten legal action** due to breach of contract **and prepare to physically remove our material if necessary**."[749] (emphasis

[745] **Ex. R-0208**, Email from Lupaka (G. Ellis) to Lupaka (R. Webster), 11 September 2018, p. 2.

[746] **Ex. R-0206**, Email from Lupaka (J. Castañeda) to Lupaka (D. Kivari, *et al.*), 14 September 2018, p. 1.

[747] **Ex. R-0208**, Email from Lupaka (G. Ellis) to Lupaka (R. Webster), 11 September 2018, p. 2.

[748] **Ex. R-0208**, Email from Lupaka (G. Ellis) to Lupaka (R. Webster), 11 September 2018, p. 2.

[749] **Ex. R-0208**, Email from Lupaka (G. Ellis) to Lupaka (R. Webster), 11 September 2018, pp. 1–2.

added). By the end of September 2018, the "[Altagracia] chapter of [Claimant's] toll-milling strategy [was] over."[750]

351. In any event, and leaving aside Claimant's litany of grievances with the Altagracia Plant, there is no record that such plant held the appropriate processing concession necessary to begin lawfully processing ore for Claimant in late 2018.[751] Its lack of the necessary concession is yet another reason that Claimant could not have relied on this plant to lawfully process any amount of ore from the Invicta Mine. Thus, any suggestion by Claimant that issues with the Altagracia Plant would have been "easy to remedy"[752] in the absence of the Access Road Protest is contradicted by evidence.

(iii) The Huancapeti II Plant was unreliable and similarly could not have met Claimant's ore processing needs

352. Claimant argues that it could have received adequate ore processing services from the Huancapeti II Plant, because, according to Claimant, any deficiencies in such service would have been "easy to remedy."[753] However, as described below, the evidence—including contemporaneous documentation from Claimant itself—shows that the Huancapeti II Plant would have remained operationally incapable of supplying reliable ore processing for Claimant.

353. The reality is that Huancapeti II Plant failed to provide adequate ore processing for Claimant,[754] and there was no reason to believe its services would improve.

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[750] **Ex. C-0421**, Internal Lupaka email chain, 26–27 September 2018, p. 1; **Ex. R-0201**, Email from Lupaka (R. Webster) to Lupaka (G. Ellis), 15 November 2018, p. 3 (Under "Other Plants:" Claimant wrote "[Altagracia] out"); **Ex. C-0086**, Monthly Report, LUPAKA GOLD CORPORATION & INVICTA GOLD PROJECT, September 2018, p. 7 (showing that zero tonnes of ore were transported to the Altagracia plant in September 2018); **Ex. C-0052**, Monthly Report, LUPAKA GOLD CORP. & INVICTA GOLD PROJECT, December 2018, p. 5 (indicating that zero tonnes of ore were transported to Altagracia in October through December 2018).

[751] Dufour Report, ¶¶ 229–236.

[752] Ellis Second Witness Statement, ¶ 80.

[753] Ellis Second Witness Statement, ¶ 80.

[754] **Ex. R-0209**, Email from Lupaka (R. Webster) to Lupaka (W. Ansley, *et al.*), 16 July 2018, p. 1; **Ex. R-0197**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 29 October 2018, p. 1.

Huancapeti II never provided on-time service,[755] and by October 2018, its repeated delays led Claimant to conclude that it could not rely on it to process Claimant's ore.[756]

354. When Claimant first tried to partner with Huancapeti II, ore processing was scheduled to begin on 15 September 2018, but the date of commencement was delayed until 18 September 2018, then again to 5-6 October 2018, and then yet again to an unspecified date in the range of 10 to 15 October 2018.[757]

355. Even as late as 19 October 2018—four days after the deadline set by the *third* extension—the Huancapeti II Plant still had processed zero ore[758]. Claimant attributes such delay to "unexpected mechanical failures."[759]

356. In an email to Mr. Gordon Ellis (Claimant's current CEO and President) of 19 October 2018, Mr. Ansley complained that "[d]espite have [sic] a signed contract to commence milling 6000 tonnes of material on September 15 at Huancapeti ("HCT"), **[Huancapeti II had] yet to mill anything** at this facility; **5 weeks late the owner ke[pt] promising [Claimant] 'next week**'"[760] (emphasis added).

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[755] **Ex. R-0210**, Email from Lupaka (W. Ansley) to Lupaka (G. Ellis), 23 July 2018, p. 1; **Ex. R-0211**, Email from Lupaka (J. Castañeda) to Lupaka (R. Webster, *et al.*), 13 September 2018, p. 1; **Ex. R-0212**, Email from Lupaka (W. Ansley) to Lupaka (G. Ellis), 9 October 2018, p. 1; **Ex. C-0302**, IMC Management Call Notes, 9 October 2018, p. 2; **Ex. R-0213**, Email from Lupaka (R. Arrarte) to Lupaka (D. Kivari), 4 October 2018, p. 1.

[756] **Ex. R-0197**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 29 October 2018, p. 1 (stating that relying on this plant would be "**very risky** because of the **unreliability** of the owner of Huancapati [II] to **follow any type of agreement**" (emphasis added)).

[757] **Ex. R-0210**, Email from Lupaka (W. Ansley) to Lupaka (G. Ellis), 23 July 2018, p. 1 ("Processing here has now moved out until mid September"); **Ex. R-0211**, Email from Lupaka (J. Castañeda) to Lupaka (R. Webster, *et al.*), 13 September 2018, p. 1 ("Has the commencement date of processing at Huancapeti changed? The schedule now shows September 18th which is 3 days later than our plan."); **Ex. R-0212**, Email from Lupaka (W. Ansley) to Lupaka (G. Ellis), 9 October 2018, p. 1 (in meeting notes from a call on 2 October 2018, Claimant indicated that processing was "expected to start this weekend"); **Ex. C-0302**, IMC Management Call Notes, 9 October 2018, p. 2 ("The new date to start processing at Huancapeti is anywhere between the 10th to the 15th [of October 2018]"); **Ex. R-0213**, Email from Lupaka (R. Arrarte) to Lupaka (D. Kivari), 4 October 2018, p. 1.

[758] **Ex. MI-0007**, Email from Will Ansley to Gordon Ellis, 19 October 2018, p. 1.

[759] Castañeda First Witness Statement, ¶ 88.

[760] **Ex. MI-0007**, Email from Will Ansley to Gordon Ellis, 19 October 2018, p. 1.

357. On 29 October 2018, when Claimant considered whether it could count on "monthly production of 8,000 tonnes through Huancapeti [II]," it concluded that doing so would be "**very risky** because of the **unreliability** of the owner of Huancapati [II] to **follow any type of agreement**"[761] (emphasis added).

358. Claimant's attempt at partnering with the Huancapeti II Plant brought the Invicta Project to a halt. On 19 October 2018, Claimant noted that, "**[a]s a result of milling being significantly behind the mine development [Claimant] suspended all development activities and sent the contractors away**"[762] (emphasis added).

359. In addition to each of the issues with the Huancapeti II Plant identified by Claimant during pre-production testing, it is not clear that the Huancapeti II Plant could have lawfully processed sufficient ore to satisfy Claimant's needs. While such plant did have the appropriate processing concession, the owner of the plant, Minera Venard S.A.C., is currently listed in the Integral Mining Formalization Registry ("**REINFO**") as "suspended."[763] As Ms. Dufour explains, the formalization process conducted by the MINEM is the process by which an informal ore processor (i.e., a processor that had not received government approval before it commenced ore processing) can become a formally registered processor. Formalization requires the processing plant to register with REINFO, limit its processing capacity below a certain threshold, and follow a series of requirements. Minera Venard S.A.C.'s current designation indicates that the plant's capacity would have been limited and that the plant owner failed at some point to conform with the formalization requirements.[764] This casts further doubt on the plant's ability to lawfully process ore for Claimant in 2018.[765]

360. The foregoing evidence and Claimant's contemporaneous conclusions about Huancapeti II thus squarely contradict Claimant's unsubstantiated assertion that the

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[761] **Ex. R-0197**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 29 October 2018, p. 1.

[762] **Ex. MI-0007**, Email from Will Ansley to Gordon Ellis, 19 October 2018, p. 1.

[763] Dufour Report, ¶ 244.

[764] Dufour Report, ¶ 244.

[765] Dufour Report, ¶¶ 244–245, 249.

Huancapeti II Plant's chronic failures would have been "easy to remedy."[766] To the contrary, the evidence shows that the Huancapeti II Plant was incapable of supplying reliable ore processing for Claimant.

(iv) Claimant also could not have relied on the Mallay Plant to process ore

361. The evidence shows that the Mallay Plant similarly would not have been an option for Claimant's ore processing needs. In the Counter-Memorial, Peru showed that Claimant never possessed any rights to own, modify, or use the Mallay Plant for processing.[767]

362. Claimant responded in the Reply by asserting that it could have processed ore at the Mallay Plant, even while it was owned by Buenaventura.[768] Specifically, Claimant argues that, "as part of the Mallay Purchase Agreement, Buenaventura had also agreed to allow [Claimant] to process its Invicta ore at the Mallay plant until Lupaka formally took over ownership of the plant."[769] Mr. Ellis states that, "[h]ad the Mallay Purchase Agreement been signed on 15 October 2018 as anticipated, we would have been able to rely on . . . Mallay [to process ore] at [a rate of] 600 t/d."[770] Mr. Ellis concedes, however, that the Mallay Purchase Agreement was never signed in the end,[771] thus mooting the expected provision that would have allowed Claimant to process ore at the Mallay Plant before taking ownership of it.

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[766] Ellis Second Witness Statement, ¶ 80.

[767] *See, e.g.*, Peru's Counter-Memorial, ¶ 780 ("Likewise, in the present arbitration, ownership, modification, and use of the Mallay Plant are rights that Claimant simply 'never possessed'").

[768] Claimant's Reply, ¶ 1010 ("Mr Ellis also explains that, as part of the Mallay Purchase Agreement, Buenaventura had also agreed to allow Lupaka to process its Invicta ore at the Mallay plant until Lupaka formally took over ownership of the plant upon completion on the transaction").

[769] Claimant's Reply, ¶ 1010.

[770] Ellis Second Witness Statement, ¶ 88.

[771] **Ex. MI-0007**, Email from Will Ansley to Gordon Ellis, 19 October 2018, p. 1 (Buenaventura "refuse[d] to sign the purchase agreement and announce[d] the transaction before the [Mallay] [C]ommunity agreement [was] transferred [from Buenaventura to Claimant]").

363. No doubt aware of the above, Mr. Ellis speculates in his witness statement that, "if the Blockade had not occurred 10 days later, [Claimant] would have still reached an agreement with Buenaventura to start processing [its] ore at Mallay."[772] In support of such statement, Mr. Ellis cites to a single document—a two-sentence email from November 2018 that merely referred to contemplated metallurgical testing, and that did not even suggest—let alone confirm—Buenaventura's willingness to assume Claimant's processing needs.[773]

364. Even if Buenaventura had been willing and able to process Claimant's ore at the Mallay Plant (for which there is no evidence), Claimant could not rely on it to do so because Buenaventura lacked the requisite permits to process ore from third parties.[774] For the Mallay Plant to lawfully process ore from the Invicta Mine, the following would have been required:

a. Buenaventura would have needed to obtain an environmental certification and operating permit to process Claimant's ore;[775]

b. Claimant would have needed to modify the Invicta Mine's EIAd to account for Claimant's proposed transportation of ore from the Invicta Mine to the Mallay Plant;[776] and

c. Claimant would have needed to complete each of the steps outlined in **Section II.D.1** above, which were required to commercially exploit the Invicta Mine.[777]

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[772] Ellis Second Witness Statement, ¶ 88.

[773] Ellis Second Witness Statement, ¶ 88 (citing exclusively to **Ex. C-0303** for his position that the Mallay Plant was willing to assume Claimant's processing needs). *See also* **Ex. C-0303**, Email from Buenaventura to Lupaka, 15 November 2018, p. 1 ("We can have the people from Lupaka in charge of making the metalurgical testing until December 15th. Please let us know about your plans on that end").

[774] Dufour Report, ¶ 215.

[775] Dufour Report, ¶¶ 9(a); 181(iii).

[776] Dufour Report, ¶¶ 251–252.

[777] Dufour Report, ¶ 248.

365. As Ms. Dufour explains, Buenaventura and Claimant could not have completed the steps delineated above before *July 2020*.[778] Thus, Claimant could not have relied on the Mallay Plant to process ore from October 2018 to July 2020.

b. Even acquisition of the Mallay Plant would not have provided Claimant with sufficient ore processing capacity to service its PPF Agreement obligations

366. In the Reply, Claimant also argues that it could have overcome the lack of available ore processing infrastructure by acquiring the Mallay Plant outright.[779] According to Claimant, "the Mallay plant would have provided Lupaka with sufficient processing capacity to meet its gold repayment obligations under the PPF Agreement."[780]

367. However, Claimant's potential acquisition of the Mallay Plant could not have been completed earlier than March 2019. And even if that could have been accomplished, Claimant could not have commenced ore processing at the Mallay Plant in time to meet its repayment obligations to PLI Huaura. That is so because, as further explained below, Claimant (i) determined that it could not assume that it would acquire the Mallay Plant by 2019, (ii) already would have been in default under the PPF Agreement for several months by the earliest time the Mallay Plant acquisition could have been completed, and (iii) fails to account for the period of time that Claimant (and/or Buenaventura) would have needed to complete the regulatory steps necessary to lawfully process ore at the Mallay Plant. Each of these obstacles are addressed *seriatim* below.

368. *First*, Claimant determined in October 2018 that its proposed acquisition of the Mallay Plant was not on track to materialize in 2019. In an internal email concerning Claimant's 2019 budget, Claimant's CFO confirmed to the Board of Directors that he spoke with "Will [Ansley] about the assumptions [Claimant] should use for the [2019]

[778] Dufour Report, ¶ 9(a).

[779] Claimant's Reply, ¶ 112.

[780] Claimant's Reply, ¶ 112.

budget and. . . **we will assume that the Mallay acquisition does not close**"[781] (emphasis added).

369. *Second*, in the Reply, Claimant ignores that *its repayment schedule would not have been deferred* unless (i) Claimant and PLI Huaura had amended the PPF Agreement (which did not happen); and (ii) Claimant had satisfied all of the conditions precedent to both the Fourth Effective Date and Fifth Effective Date under the draft third amendment to the PPF Agreement (which also did not happen).[782] One such condition precedent was for Claimant to execute a purchase agreement for acquisition of the Mallay Plant.[783] While such purchase agreement was still pending signature, Claimant's repayment obligations would not have been deferred, however, and instead would have begun in December 2018.[784] Buenaventura would not sign the proposed Mallay Purchase Agreement until it had reached an agreement with the Mallay Community (a rural community in the Mallay Plant's area of influence).[785] However, Buenaventura did not do the latter until March 2019—three months *after* Claimant's repayment obligations already had begun.[786]

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[781] **Ex. R-0197**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 29 October 2018, p. 2.

[782] **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, p. 4 (defining "Fourth Effective Date" and "Fifth Effective Date").

[783] **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, p. 7 (providing that one condition precedent to the "Fourth Effective Date" and "Fifth Effective Date" was that "All of the conditions precedent in Section 11.1 of the draft dated September 20, 2018 of the Mallay Purchase Agreement [(labeled "Conditions Precedent for Closure")] shall have been satisfied."); **Ex. C-0287**, Draft Mallay Plant Agreement, § 11.1 (outlining the conditions precedent to the closure of this agreement).

[784] **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule P.

[785] **Ex. MI-0007**, Email from Will Ansley to Gordon Ellis, 19 October 2018, p. 1 (Buenaventura "refuse[d] to sign the purchase agreement and announce[d] the transaction before the [Mallay] [C]ommunity agreement [was] transferred [from Buenaventura to Claimant].").

[786] **Ex. C-0289**, Notarized Addendum to the Easement Contract between Buenaventura and the Mallay Community, 14 March 2019.

370. *Third*, in the Reply, Claimant fails to account for the minimum period of fifteen months that, had it acquired the Mallay Plant, would have elapsed before it could process ore directly at that Plant. That is the amount of time that Claimant would have needed to complete the following steps required for processing ore at the Mallay Plant:

a. Modification of the Invicta Mine's EIAd to account for transportation of ore from the Invicta Mine to the Mallay Plant,[787]

b. Modification of the operating permit of the Mallay Plant,[788]

c. Transfer to Claimant of Buenaventura's mining and processing concessions and operating permits,[789]

d. Modification of the discharge authorizations of the Mallay Plant,[790]

e. Procurement of a new water license for water collection points used by the Mallay Plant;[791]

f. Procurement of an updated authorization to use explosives;[792] and

g. Completion of each of the steps required to commercially exploit the Invicta Mine (as outlined in **Section II.D.1** above).[793]

371. Ms. Dufour analyzed the amount of time that Claimant would have needed to complete each of these additional steps, and concluded that even if Claimant had concluded its attempted acquisition of the Mallay Plant, such plant could not have begun processing ore before *July 2020*.[794] Such limitation would have deprived

[787] Dufour Report, ¶¶ 183(ii), 184–185.
[788] Dufour Report, ¶ 183(iii).
[789] Dufour Report, ¶¶ 191, 197–198.
[790] Dufour Report, ¶¶ 199–201.
[791] Dufour Report, ¶¶ 202–203.
[792] Dufour Report, ¶¶ 204–206.
[793] Dufour Report, ¶ 248.
[794] Dufour Report, ¶¶ 217–218; **Ex. MD-0053**, Permitting Schedule for ore processing.

Claimant of the marketable minerals it needed to sell to satisfy a full year and a half of repayment obligations (i.e., from December 2018 to July 2020).[795]

372. Even if Claimant and PLI Huaura had amended the PPF Agreement (which, in fact, they did not in the end[796]), and even if Claimant had satisfied all of the conditions precedent for the Fourth and Fifth Effective Dates under that Agreement (which also did not happen), Claimant would still have missed ten months' worth of its repayment obligations (i.e., from September 2019 to July 2020).[797]

373. In light of the foregoing, it is clear that even if Claimant had acquired the Mallay Plant, doing so would not have enabled Claimant to extract and process sufficient ore from the Invicta Mine to fulfill its repayment obligations to PLI Huaura in a timely fashion.

* * *

374. In sum, despite Claimant's assertion that its chronic failure to secure ore processing services would have been "easy to remedy,"[798] there is extensive evidence in the record—including Claimant's own contemporaneous documents—that confirms that, to the contrary, the problems with Claimant's potential ore processing options were insurmountable ones. By October 2018, each of the processing plants that Claimant had attempted to use for processing ore could not have provided Claimant with reliable ore processing capacity, either because they were inadequate and breached their contracts (viz., San Juan Evangelista and Altagracia) or because they were "very risky"[799] and "unreliabl[e]"[800] (viz., Huancapeti II). For its part, the Mallay Plant

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[795] *See supra* Section II.D.1.

[796] **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018.

[797] **Ex. C-0045**, Second Amended and Restated PPF Agreement, pp. 6-7 (outing the "Contract Quantity" and the number of months after each effective date where repayment obligations would begin); **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedules P, P-2.

[798] Ellis Second Witness Statement, ¶ 80.

[799] **Ex. R-0197**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 29 October 2018, p. 1.

[800] **Ex. R-0197**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 29 October 2018, p. 1.

would not have been able to begin processing ore from the Invicta project before July 2020 at the earliest, and thus it too was not a viable option.

375. Claimant's own contemporaneous statements illustrate that the lack of competent ore processing plants constituted an impediment to Claimant's ability to fulfill its PPF Agreement obligations. In addition to others presented above, the following examples of contemporaneous statements by Claimant demonstrate that the absence of sufficient ore processing constituted an insurmountable problem:

a. On *20 July 2018*, Mr. Ellis expressed to Mr. Castañeda that the need to secure "**plants that [were] likely to process [ore]** for [Invicta]" was a "**real problem** that [Claimant] need[ed] to solve."[801] (emphasis added)

b. On *21 July 2018*, Claimant indicated that it had "[n]o ability to make payroll without processing 6,000-8,000 tonnes per month."[802] (emphasis in original)

c. On *28 July 2018*, Claimant stated that "[t]he mine needs to produce a minimum of 6000 tonnes of mineral each month so that sufficient concentrates will be produced and sold to cover the costs."[803]

d. On *3 August 2018*, Claimant's cash forecast indicated that Invicta needed "7,000 . . . tonnes to break even based on monthly expenditures."[804]

e. On *26 September 2018*, Claimant noted that it was "at the point where [it would not] be able to pay [its] contractors and suppliers."[805]

376. In sum, Claimant's inability to secure competent ore processing services impeded Claimant from being able to extract and process sufficient ore from the Invicta Mine

[801] **Ex. R-0216**, Email from Lupaka (G. Ellis) to Lupaka (J. Castañeda), 26 July 2018, p. 2.

[802] **Ex. R-0214**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 21 July 2018, p. 2.

[803] **Ex. R-0217**, Email from Lupaka (R. Arrarte) to Lupaka (W. Ansley, *et al.*), 1 August 2018, p. 1.

[804] **Ex. R-0215**, Email from Lupaka (J. Castañeda) to Lupaka (R. Webster), 13 August 2018, p. 3 (Cash forecast from 3 August 2018 indicated that Invicta needed "7,000 . . . tonnes to break even based on monthly expenditures").

[805] **Ex. C-0421**, Internal Lupaka email chain, 26–27 September 2018, p. 3.

to timely meet its repayment obligations and to sustain its investment, which failed as a result.

4. Claimant's 14 Events of Default under the PPF Agreement entitled its creditor PLI Huaura to seize Claimant's investment

377. In the Counter-Memorial, Peru explained that Claimant's PPF Agreement with PLI Huaura exposed Claimant's investment to foreclosure based on any "Event of Default"[806] by Claimant.[807] Among other obligations, the PPF Agreement required Claimant to credit PLI Huaura the value received from the sale of the following amounts of gold during the indicated periods:

Table 1: Claimant's Repayment Obligations to PLI Huaura

No. of Months after "First Effective Date"	Months	Claimant's Repayment Obligation to PLI Huaura[808]
16–18	Dec. 2018 to Feb. 2019	**187 oz per month**
19–21	Mar. 2019 to May 2019	**326 oz per month**
22–60	Jun. 2019 to Aug. 2022	**504 oz per month**
61–63	Sep. 2022 to Nov. 2022	**317 oz per month**
64–66	Dec. 2022 to Feb. 2023	**178 oz per month**

378. The PPF Agreement also identified several actions by Claimant that would amount to an "Event of Default."[809] If Claimant committed any Event of Default, then, with written notice, PLI Huaura would have a right to (i) terminate the PPF Agreement, (ii) set an "Early Termination Date," and (iii) determine an "Early Termination

[806] **Ex. C-0045**, Second Amended and Restated PPF Agreement, §§ 13–14.

[807] Peru's Counter-Memorial, § II.F.1.

[808] **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule P.

[809] **Ex. C-0045**, Second Amended and Restated PPF Agreement, §§ 13–14.

Amount."[810] Peru explained in the Counter-Memorial that Claimant lost its investment to PLI Huaura after Claimant committed no less than *fourteen (14)* Events of Default under the PPF Agreement, *each of which* enabled PLI Huaura—pursuant to the express terms of such agreement—to seize Claimant's investment.[811]

379. Claimant granted PLI Huaura the right, in response to an Event of Default by Claimant,[812] to enforce against loan collateral or the "Peruvian Security Documents."[813] Such collateral[814] included Claimant's shares in Invicta.[815] Thus, when Claimant pledged its investment to PLI Huaura as collateral for the latter's loan to Claimant, Claimant directly exposed its investment to seizure by PLI Huaura in response to *any* Event of Default that Claimant might incur. It was precisely Claimant's Defaults (described below), and PLI Huaura's foreclosure on Claimant's investment in response to the latter's Defaults, that caused Claimant to lose its

[810] **Ex. C-0045**, Second Amended and Restated PPF Agreement, §§ 5.8, 14 (defining the "Early Termination Amount" as the amount that PLI Huaura could demand of Claimant in the event of Claimant's default under the PPF Agreement).

[811] Peru's Counter-Memorial, § II.F.4.

[812] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 14.

[813] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 14 ("'Peruvian Security Documents' means the Security Documents subject to Peruvian law, including, but not limited to, all agreements and documents related to (a) the mortgage over the Mining Concessions, including any amendment thereto; (b) the mortgages and/or pledges over the Sites; (c) the pledges over all moveable property of [Claimant and its subsidiaries]; (d) security interests under the Material Agreements; (e) the pledge over the outstanding shares of stock of the Guarantors; (f) guarantees granted by any Guarantor; (g) the Peruvian Notes; (h) any other security instrument set forth in Schedule M; and (i) any other security instrument necessary or desirable to grant the Buyer a first priority security interest in the Collateral located in Peru, subject to Permitted Liens").

[814] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 6 ("'Collateral' means any and all real and personal property, assets, rights, titles and interests in respect of which [PLI Huaura] has or will have a Lien pursuant to a Security Document, whether tangible or intangible, presently held or hereafter acquired, and all products and proceeds of the foregoing, including insurance proceeds related to the foregoing. The collateral shall consist of, without limitation, all real and personal assets of [Claimant and its subsidiaries]").

[815] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Art. 6.1.

investment. All of that flowed pursuant to an agreement between private parties, in which Peru had no involvement.

380. In the end, Claimant incurred fourteen Events of Default between January and July 2019, as a result, *inter alia*, of the following: (i) its failure to fulfill the relevant regulatory requirements to commence commercial exploitation of the Invicta Mine; (ii) Claimant's conflict with the Parán Community; (iii) Claimant's inability to procure adequate ore processing services, and (iv) certain administrative failures by Claimant. Each of Claimant's fourteen Events of Default is summarized in the table below:

Table 2: Claimant's Events of Default under the PPF Agreement

No.	Event of Default[816]	PPF Agreement Provision that Claimant Violated
1	Claimant failed "to Deliver or cause to be Delivered any amount of Gold as and when required by the PPF Agreement"	§ 13(1)(a)
2	Claimant and its subsidiaries failed to "to timely Deliver, or cause to be Delivered, the Scheduled Monthly Quantity of Gold for each Monthly Delivery Date"	§ 5
3	Claimant and its subsidiaries failed to "timely deliver monthly management reports"	§ 12(1)(a)(vi)
4	Claimant and its subsidiaries failed to "timely deliver Capital Expenditure Reports"	§ 12(1)(a)(viii)
5	Claimant and its subsidiaries failed to "timely deliver Monthly Reports"	§ 12(1)(a)(ix)

[816] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I (listing the "Specified Defaults" committed by Claimant). *See also* **Ex. C-0264**, Lupaka News Release, "Lupaka Provides Update on Illegal Demonstration at Invicta, Announces Non-Brokered Private Placement, and Management Changes," 28 January 2019.

No.	Event of Default[816]	PPF Agreement Provision that Claimant Violated
6	Claimant and its subsidiaries failed to "timely deliver notice of any anticipated failure to Deliver as required on [a] Monthly Delivery Date"	§ 12(1)(c)(i)
7	Claimant and its subsidiaries failed to "timely deliver statements of the chief financial officer of [Claimant] setting forth the details of [Claimant's] Default or Events of Default"	§ 12(1)(c)(ii)
8	Claimant and its subsidiaries failed to "timely maintain a fully executed and enforceable [Mineral Offtake Agreement] containing terms substantially similar to those set forth in Schedule E of the PPF Agreement"	§ 12(1)(r)
9	Claimant and its subsidiaries failed to "perform and cause[d] [each other to fail] to perform, all of . . . their obligations under all Material Agreements[817] in all material respects"	§ 12(1)(w)
10	Claimant and its subsidiaries failed to "timely cure funding deficits"[818]	§ 12(1)(aa)
11	Claimant's "insolvency and general inability . . . to pay its debts as they become due"	§ 13(1)(m)
12	The "occurrence, in the opinion of [PLI Huaura], of an event or development that would	§ 13(1)(n)

[817] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 12 ("'Material Agreements' means this [PPF] Agreement, the Security Documents, the Mining Contractor Agreement, each Mineral Offtake Agreement, the Mineral Tolling Agreement and all other agreements to which [Claimant or its subsidiaries] is a party and relate in any manner to the access to or the development, construction, operation and maintenance of the Mine and/or the Mining Concessions, including the conduct of mining activities thereon").

[818] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 12(1)(aa) (requiring that Claimant and its subsidiaries cure within ninety days any "funding deficits" identified in the "Capital Expenditure Report").

No.	Event of Default[816]	PPF Agreement Provision that Claimant Violated
	reasonably be expected to have a Material Adverse Effect[819]"	
13	Claimant and its subsidiaries "deviation . . . from the Initial Expense Budget[820]"	§ 13(1)(s)(i)
14	Claimant and its subsidiaries "change[d] . . . from the Initial Production Forecast[821] and updated Annual Production Forecasts[822]"	§ 13(1)(s)(ii)

381. In the Reply, Claimant presents a similar table that lists each Event of Default.[823] Claimant divides them into two categories: (i) Events of Default that were unrelated

[819] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 12 ("'Material Adverse Effect' means, with respect to [Claimant and its subsidiaries], the Mine, the Sites (other than the Josnitoro Gold Project, so long as it is not owned by the Seller or its Affiliates or Subsidiaries) or the Collateral, as applicable, a material and adverse effect on (a) its financial condition, business, properties, assets or prospects, (b) the operation of any Site, (c) its ability to perform its obligations under this Agreement or any of the Transaction Documents, (d) the validity or enforceability against it of this Agreement or any of the Transaction Documents or (e) the validity, enforceability or priority of the security interest provided for in the Transaction Documents").

[820] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 10 ("'Initial Expense Budget' means the budget set forth in Schedule O").

[821] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 10 ("'Initial Annual Production Forecast' means the Annual Production Forecast of Covered Metals for a period commencing on the First Effective Date and ending on the nine (9) year anniversary thereof, in the form attached as Schedule B hereto").

[822] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 5 ("'Annual Production Forecast' means an annually updated forecast of production of each Covered Metal from the Mine for a period commencing on the date of such update and ending on the nine (9) year anniversary of the First Effective Date, which includes (a) forecasted production for the next 12 months of operation on a monthly basis and (b) forecasted production thereafter on an annual basis, and is in the form attached as Schedule B hereto").

[823] Claimant's Reply, ¶ 976; Ellis Second Witness Statement, ¶ 53.

to Claimant's "inability to deliver gold"[824] to PLI Huaura; and (ii) Events of Default that were related to Claimant's "inability to deliver gold" to PLI Huaura—i.e., the "result of Parán's [Access Road Protest]."[825] In this way, Claimant attempts to link some of the Events of Default to Peru's alleged conduct in respect of the Access Road Protest.

382. This effort by Claimant fails. As explained below, the evidence confirms that *all fourteen* of the Events of Default were the result of Claimant's own failures and lack of diligence.[826]

a. Claimant acknowledges that four of its Events of Default were the result of Claimant's own actions

383. In the Reply, Claimant concedes that four of its Events of Default under the PPF Agreement—specifically, those numbered 3, 4, 5, and 8 in the table above—were "not directly related to the [Access Road Protest]"[827] (or by extension to Peru's alleged conduct[828]). These four Events of Default include Claimant's failure to provide PLI Huaura with several sets of required information on Claimant's development of the Invicta Mine, as well as Claimant's failure to maintain an executed Mineral Offtake Agreement:[829]

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[824] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 7 ("'Delivery' means the delivery of Gold by the Seller to the Buyer by means of credit to the Buyer's Unallocated Gold Account and 'Deliver' and 'Delivered' shall have corresponding meanings.")

[825] Claimant's Reply, ¶ 976; Ellis Second Witness Statement, ¶ 53.

[826] As noted in Section V.A below, even if only one Event of Default was the result of Claimant's own failure, that fact would defeat Claimant's attempt to blame Peru, and its entire case in this arbitration would disintegrate. Importantly in this regard, Claimant admits (as explained below) that at least four of the Events of Default are attributable only to Claimant itself.

[827] Ellis Second Witness Statement, ¶ 52.

[828] Claimant's Reply, ¶ 976.

[829] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 12 ("'Mineral Offtake Agreement' means any agreement entered into by [Claimant and its subsidiaries], with an Offtaker that includes: (a) the sale of all gold containing concentrate produced by the Depositors to an Offtaker; or (b) the smelting, refining or other beneficiation of Produced Gold by an Offtaker for the benefit of [Claimant and its subsidiaries], as the same may be supplemented, amended,

Table 3: Claimant's Events of Default that Claimant Concedes Were Unrelated to the Access Road Protest (and by Extension Unrelated to Peru's Measures)

No.	Event of Default[830]	Provision of the PPF Agreement
3	Claimant and its subsidiaries failed to "timely deliver monthly management reports"	§ 12(1)(a)(vi)
4	Claimant and its subsidiaries failed to "timely deliver Capital Expenditure Reports"	§ 12(1)(a)(viii)
5	Claimant and its subsidiaries failed to "timely deliver Monthly Reports,"	§ 12(1)(a)(ix)
8	Claimant and its subsidiaries failed to "timely maintain a fully executed and enforceable [Mineral Offtake Agreement] containing terms substantially similar to those set forth in Schedule E of the PPF Agreement."	§ 12(1)(r)

384. Having conceded that these Events of Default were the result of its own conduct, Claimant attempts to erase or excuse such Events of Default, even though these Events of Default in fact caused the forfeiture of Claimant's shares in Invicta. Claimant makes two arguments, neither of which is substantiated.

385. *First*, Claimant alleges that it materially complied with the reporting requirements in the PPF Agreement.[831] Claimant's argument is contradicted by the record. For

restated or superseded from time to time and is otherwise substantially compliant with the requirements set forth on Schedule hereto"); *see also* **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 14 ("'Offtaker' means any person other than [Claimant and its subsidiaries] that purchases Minerals from [Claimant and its subsidiaries] or that takes delivery of Minerals for the purpose of smelting, refining or other beneficiation of such Minerals for the benefit of [Claimant and its subsidiaries]").

[830] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I (listing the "Specified Defaults" identified by PLI Huaura).

[831] Claimant's Reply, ¶ 976 (alleging that Claimant "provided all the relevant information to [PLI Huaura]"); Ellis Second Witness Statement, ¶ 52 (alleging that Claimant "materially complied at all times" with the reporting requirements outlined in the PPF Agreement). With respect to Claimant's obligation to maintain a fully enforceable Mineral Offtake Agreement, Claimant does

example, in a letter that it sent to PLI Huaura in August 2019 disputing all of the Events of Default that PLI Huaura had invoked,[832] Claimant's legal counsel contested the Events of Default on only two grounds: (i) that PLI Huaura should have provided additional notice; and (ii) that PLI Huaura had waived the reporting requirements.[833] Nowhere in the letter, however, did Claimant suggest that it believed it had materially complied with the PPF Agreement's reporting requirements.[834] Claimant also has not cited to a single document that purports to demonstrate material compliance by Claimant with its reporting obligations.

386. *Second*, Claimant's argument that PLI Huaura waived all four Events of Default unrelated to the Access Road Protest (and two that it contends were related to such Protest—Defaults 6 and 7 discussed below)[835] is completely unsubstantiated. The PPF Agreement states that "[a]ny notice or other communication (including, without limitation, **any consent or waiver by [PLI Huaura]** hereunder or in connection herewith) to be given under this Agreement or any other Transaction Document **shall be in writing**"[836] (emphasis added). Thus, for any waiver of an Event of Default to be valid under the PPF Agreement, it would have needed to be "in writing."[837] However, Claimant has submitted no evidence of any written waiver by PLI Huaura of *any* of

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not even assert that it materially complied with such obligation. Claimant's Reply, ¶ 976; Ellis Second Witness Statement, ¶¶ 52–53.

[832] **Ex. R-0218**, Letter from Lupaka's Legal Counsel (R. Powers) to PLI Huaura (S. Alva), 19 August 2019.

[833] **Ex. R-0218**, Letter from Lupaka's Legal Counsel (R. Powers) to PLI Huaura (S. Alva), 19 August 2019 (this letter includes in its list of "Specified Defaults" several failures by Claimant that correspond to the Events of Default numbered 3 to 8 in the table).

[834] *See* **Ex. R-0218**, Letter from Lupaka's Legal Counsel (R. Powers) to PLI Huaura (S. Alva), 19 August 2019.

[835] Claimant's Reply, ¶ 976; Ellis Second Witness Statement, ¶ 53; **Ex. C-0293**, Lupaka, MD&A for the period ended 30 June 2018 and 30 June 2017, 15 August 2018.

[836] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 18(1).

[837] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 18(1). **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 24(2) (Even if PLI Huaura delayed enforcing its rights under the PPF Agreement from January 2019 (when Claimant first defaulted) to July 2019,the PPF Agreement expressly stated that PLI Huaura's "[d]elay in exercising or non-exercise of any right . . . under [the PPF] Agreement [was] not a waiver of that right").

the Events of Default—let alone the four that were wholly unconnected to the Access Road Protest. Claimant's argument that PLI Huaura waived any Events of Default lacks any evidentiary basis, and thus should be rejected.

b. The ten additional Events of Default by Claimant resulted from Claimant's failures to prevent or resolve obstacles to commercial exploitation of the Invicta Mine and processing of ore

387. Of the additional ten Events of Default by Claimant, two arose from Claimant's own failure to "deliver"[838] gold to PLI Huaura (by crediting the value of Claimant's sale of its marketable minerals to PLI Huaura, as opposed to providing the gold itself[839]), which correspond to the Events of Default numbered 1 and 2 in the table above, and reproduced below for convenience:

Table 4: Claimant's Defaults on its Repayment Obligations

No.	Event of Default[840]	Provision of the PPF Agreement
1	Claimant failed "to Deliver or cause to be Delivered any amount of Gold as and when required by the PPF Agreement"	§ 13(1)(a)
2	Claimant failed "to timely Deliver, or cause to be Delivered, the Scheduled Monthly Quantity of Gold for each Monthly Delivery Date"	§ 5

388. Claimant argues that its failure to repay its loan to PLI Huaura was "[d]irectly related to" the Access Road Protest.[841] To recall, Claimant's repayment obligations began in December 2018.[842] At that time (and thereafter), Claimant was still unable to

[838] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I.

[839] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 7 ("'Delivery' means the delivery of Gold by the Seller to the Buyer by means of credit to the Buyer's Unallocated Gold Account and 'Deliver' and 'Delivered' shall have corresponding meanings.").

[840] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I (listing the "Specified Defaults" identified by PLI Huaura).

[841] Claimant's Reply, ¶ 976.

[842] *See* **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 7.

commercially exploit the Invicta Mine, because it lacked (i) the necessary permits to do so, and (ii) the reliable ore processing capacity needed to satisfy its repayment obligations.[843] As explained above in **Section II.D.1–3**, both of these problems were caused by Claimant's own failures and lack of diligence in managing the mine and in complying with the relevant regulatory requirements.

389. Claimant presents no analysis of the remaining eight Events of Default (viz., those numbered 6, 7, 9, 10, 11, 12, 13, and 14), each of which is described below, along with Peru's response (in the far right hand column) to Claimant's contentions:

Table 5: Peru's Response to Non-Repayment Obligations that were Allegedly ""Directly related to" the Access Road Protest

No.	Event of Default[844]	Peru's Response
6	Claimant and its subsidiaries failed to "timely deliver notice of any anticipated failure to Deliver as required on such Monthly Delivery Date," under § 12(1)(c)(i)	Claimant has not proven that it "materially complied" with this reporting requirement or that it was waived by PLI Huaura; Claimant also does not explain how such breaches could have been cured, given Claimant's own failures and lack of diligence.
7	Claimant and its subsidiaries failed to "timely deliver statements of the chief financial officer of the Seller setting forth the details of Seller Default or Events of Default," under § 12(1)(c)(ii)	Claimant has not proven that it "materially complied" with this reporting requirement or that it was waived by PLI Huaura; Claimant also does not explain how such breaches could have been cured, given Claimant's own failures and lack of diligence.
9	Claimant and its subsidiaries failed to "perform and cause [Claimant's subsidiaries] to perform, all of its and their obligations under all Material Agreements in all material respects" under § 12(1)(w)	Claimant does not deny this failure or explain which Material Agreements were breached or how such breaches could have been cured, given Claimant's own failures and lack of diligence.

[843] *See supra* Sections II.D.1–3.

[844] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I (listing the "Specified Defaults" identified by PLI Huaura).

No.	Event of Default[844]	Peru's Response
10	Claimant and its subsidiaries failed to "timely cure funding deficits" under § 12(1)(aa)	Claimant does not deny that it failed to cure its funding deficit or explain how this deficit could have been cured, given Claimant's own failures and lack of diligence.
11	Claimant's "insolvency and general inability . . . to pay its debts as they become due" under § 13(1)(m)	Claimant does not deny its insolvency and inability to service its debts or explain how these defaults could have been cured, given Claimant's own failures and lack of diligence.
12	The "occurrence, in the opinion of [PLI Huaura], of an event or development that would reasonably be expected to have a Material Adverse Effect" under § 13(1)(n)	Claimant does not deny that PLI Huaura believed that an event had occurred which had a Material Adverse Effect. Nor could Claimant deny this Event of Default, as it was based upon the opinion of PLI Huaura. Claimant also fails to explain how this default could have been cured, given Claimant's own failures and lack of diligence.
13	Claimant and its subsidiaries' "deviation . . . from the Initial Expense Budget" under § 13(1)(s)(i)	Claimant does not deny that it deviated from the Initial Expense Budget or explain how such deviation could have been cured, given Claimant's own failures and lack of diligence.
14	Claimant and its subsidiaries' "change[d] . . . from the Initial Production Forecast and updated Annual Production Forecasts" under § 13(1)(s)(ii)	Claimant does not deny that it failed to conform to the Initial Production Forecast and updated Annual Production Forecasts, or explain how this default could have been cured, given Claimant's own failures and lack of diligence.

390. In Mr. Ellis' Second Witness Statement, he lists the Events of Default identified in the chart above, and attaches to each one the following label, which is unsupported by any evidence: "Directly related to Lupaka's inability to deliver gold as a result of [the

Access Road Protest]."[845] Mr. Ellis argues—again without any supporting evidence or analysis—that

> Lupaka would have obviously been in a different situation financially if its Invicta Project had not been held to ransom by Parán officials. There is no reason why it would not have been successful absent Parán's violence and Peru's inaction. If we had needed more cash, we could have raised it from the market given the prospects (absent the Blockade). Yet, **as we were unable to produce, it was only natural that we were failing to cover our expenses, had effectively become insolvent, and were not meeting our production forecasts**.[846] (Emphasis added)

391. Mr. Ellis' position cites no evidence and provides no analysis as to the content of Claimant's obligations, or to the circumstances of Claimant's failure to perform each one. He alleges that "[t]here is no reason why [Claimant] would not have been successful absent Parán's violence and Peru's inaction,"[847] but does not address any of the obstacles and requirements to the Invicta Mine's development and operation which threatened Claimant's ability to fulfill its PPF Agreement obligations—for example, Claimant's need to obtain additional permits, inspections, and approvals before it could begin commercially exploiting the Invicta Mine, and Claimant's lack of access to ore processing capacity.[848]

392. Mr. Ellis asserts that (i) the repayment schedule that Claimant needed to satisfy was flexible, (ii) that the Invicta Mine's pre-production testing indicated that it was in a good position to meet its obligations to PLI Huaura, and (iii) that, "if Lupaka did not produce enough concentrates to meet its delivery obligations under the PPF Agreement, Section 5(5) allowed Lupaka to pay any shortfall directly in cash." Each of these assertions is refuted below.

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[845] Ellis Second Witness Statement, ¶ 53.

[846] Ellis Second Witness Statement, ¶ 54.

[847] Ellis Second Witness Statement, ¶ 54.

[848] *See supra* Sections II.D.1–3.

393. *First*, Claimant argues that its repayment schedule under the PPF Agreement was "flexible," as PLI Huaura and Claimant had "agreed to defer Lupaka's gold repayment obligations until at least September 2019 under the Draft Amendment and Waiver No. 3 to the PPF Agreement."[849] As Claimant concedes, however, the alleged agreement was no more than an *unsigned draft* amendment to the PPF Agreement that included an alternative delivery schedule shifting Claimant's first repayment obligation to September 2019.[850] *The parties did not sign this draft amendment, and therefore never entered into effect*.

394. In any event, even if Claimant and PLI Huaura had signed this draft amendment (which they did not), the shift in Claimant's delivery schedule under such draft amendment would not have been automatic: Claimant would have first needed to satisfy certain preconditions, including, among others, the closure of Claimant's purchase of the Mallay Plant.[851] However, Claimant could not have satisfied this precondition for many months. As explained in **Section II.D.3** above, the Mallay Plant transaction was delayed until Buenaventura could reach an agreement with a local community surrounding the plant to transfer Buenaventura's agreement with such community to Claimant.[852] This was not completed until March 2019, three months after the deadline for the first repayment obligation.[853] Faced with this obstacle, Claimant insists that PLI Huaura would not have required Claimant to meet its delivery schedule during those months. In other words, Claimant argues (i) that it could have secured a delay in its repayment obligation, through an amendment that

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[849] Ellis Second Witness Statement, § 4.3.

[850] Ellis Second Witness Statement, ¶ 35.

[851] **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018.

[852] **Ex. MI-0007**, Email from Will Ansley to Gordon Ellis, 19 October 2018, p. 1 (Buenaventura "refuse[d] to sign the purchase agreement and announce[d] the transaction before the [Mallay] [C]ommunity agreement [was] transferred [from Buenaventura to Claimant].").

[853] **Ex. C-0289**, Notarized Addendum to the Easement Contract between Buenaventura and the Mallay Community, 14 March 2019.

was never signed; and (ii) that until that amendment was signed, Claimant could have obtained in the interim a separate, hypothetical extension. This chain of hypotheticals does not change the facts or the terms of the existing legally binding documents. Put simply, Claimant's argument is baseless and nothing more than wishful thinking.

395. Moreover, even if Claimant had successfully delayed its delivery schedule (which it did not), Claimant could not have complied with even its extended repayment obligations. Specifically, Claimant could not have begun commercial exploitation of the Invicta Mine until *July 2020*, as demonstrated by Ms. Dufour in her independent expert report. That would not have allowed Claimant to meet the extended deadline of September 2019.

396. In short, Claimant's argument that it could have avoided its defaults on its repayment obligations through hypothetical extensions in the repayment schedule is unsubstantiated and must be rejected.

397. *Second*, Mr. Ellis uses the results of Claimant's pre-production testing to allege that Claimant "would have been able to satisfy its gold deliveries by a comfortable margin," noting that "the tonnage of ore mined and processed by Lupaka during pre-production was only 11% of the tonnage for commercial production."[854] His position does not account for Claimant's inability to transition into commercial production before July 2020. Indeed, no matter the results of Claimant's pre-production testing, it could not have met its repayment obligations, because it could not have transitioned from pre-production development into commercial exploitation in time.

398. *Third*, Mr. Ellis relies on the Gold Shortfall provision in Section 5 of the PPF Agreement to assert that Claimant could have used cash payments to satisfy its obligations.[855] This characterization is inaccurate. The Gold Shortfall provision in Section 5(5) of the PPF Agreement converted any *failed* obligation by Claimant to "deliver" gold to PLI Huaura into an obligation to pay PLI Huaura "in US Dollars an amount equal to the

[854] Ellis Second Witness Statement, ¶ 98.

[855] Ellis Second Witness Statement, ¶¶ 99–100.

product of the Gold Shortfall [(i.e., the amount scheduled to be repaid minus the among actually paid)] and the Gold Price Discount [(i.e., US$500/Ounce)]."[856] This amount was then supplemented by interest which accrued every day after the *missed* Monthly Delivery Date that Claimant failed to repay PLI Huaura.[857] Claimant could only rely on this provision *after first breaching the PPF Agreement*, subjecting itself to the threat of foreclosure in the process.

399. Under Sections 5(6) and 5(7) of the PPF Agreement, Claimant had limited options to avoid default by notifying PLI Huaura in advance that it would not "deliver gold" (i.e., credit PLI Huaura) in the amount owed by the Monthly Delivery Date.[858] These provisions required that Claimant pay off the Gold Shortfall within thirty days and that such payment be made via "delivery" (i.e., a credit to PLI Huaura's Unallocated Gold Account) of "a quantity of Gold" (i.e., "gold bars or unallocated gold, derived from all of the Produced Gold").[859] Neither provision supports Claimant's supposition that cash payments not arising from the sale of processed ore from the Invicta Mine could be used to satisfy its obligations, *without Claimant first breaching such obligations*. Further, Claimant could also only rely the limited extension under Sections 5(6) and 5(7) a few times each—Section 5(6) no more than twice during the term of the agreement and no more than once during any twelve month period, and Section 5(7) no more than twice during the term of the agreement and no more than once within any six month period.[860]

400. After introducing this Gold Shortfall Provision to argue that Claimant could have met its repayment obligations with cash, Mr. Ellis asserts that "[i]f [Claimant] had needed more cash, [Claimant] could have raised it from the market given the prospects."[861] He provides no evidence that Claimant in fact tried to raise such capital. In other

[856] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 5(5).
[857] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 5(5).
[858] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 5(6)–(7).
[859] **Ex. C-0045**, Second Amended and Restated PPF Agreement, §§ 1, 5(6)–(7).
[860] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 5(6)–(7).
[861] Ellis Second Witness Statement, ¶ 54.

words, Claimant's argument is pure speculation. Claimant has not showed—and cannot show—that it could have satisfied its repayment obligations under the PPF Agreement.

401. In conclusion, *all* of the fourteen Events of Default by Claimant were caused by Claimant's own failures and own lack of diligence. Each of those Events of Default, in turn, entitled PLI Huaura to foreclose on Claimant's investment. PLI Huaura did just that, and Claimant lost its investment because of its breaches of the PPF Agreement.

E. Claimant's theories of ulterior motives by the Parán Community, and its allegations that Peru's efforts to mediate the dispute were a sham, are baseless and offensive

402. Peru has shown that it acted with reasonable due diligence in trying to resolve the conflict between Claimant and the Parán Community.[862] Officials from at least eleven Peruvian agencies intervened over a period of fourteen months to facilitate a resolution to the conflict.[863] Peru hosted at least twenty-eight meetings dedicated to brokering an agreement.[864] Social Specialists from the OGGS, such as Messrs. Léon and Trigoso, traveled regularly to the conflict area, including to the remote and rugged territory of the Invicta Mine, which is located more than four hours from Lima.[865]

403. Claimant contends that, despite Peru's mediation, "the Parán Community was not interested in coming to an agreement with [Claimant]," and that Peru "knew [this]

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[862] *See* Peru's Counter-Memorial, § II.E; *supra* Section II.C.3.

[863] Peru's Counter-Memorial, § II.E.1 (explaining the roles of the PCM, Ombudsman's Office, MINEM, OGGS, MININTER, General Directorate of Internal Government, PNP, and Public Prosecutors' Office); Witness Statement of Nilton César León Huerta, 22 March 2022 ("**León First Witness Statement**"), ¶ 16 (describing the work of OGGS with the PCM, MININTER, ANA, OEFA, and PNP).

[864] *See* Peru's Counter-Memorial, § II.E.

[865] León First Witness Statement, ¶ 13 ("In order to mediate in the conflict, I travelled from Lima to the cities of Sayán and Huacho, and to the territory of the Parán Community, to attend the meetings planned in the region. I also visited the Project area; which was connected to Lima by a single-track, unpaved and steeply sloping road of over 27 kilometers, which took 4 hours to traverse. I made those trips on at least 20 occasions, sometimes in with other Social Specialists (such as Mr. Víctor Vargas and Mr. Daniel Amaro)").

perfectly well."[866] Claimant also argues that Peru's "higher authorities" were in "consensus" that any agreement between Claimant and the Parán Community would be "impossible,"[867] and that Peru nevertheless "required that [Claimant] lose its time (and ultimately its investment) through pointless dialogue."[868] According to Claimant, in reality, Peru "knew perfectly well"[869] and was in "consensus"[870] that "the Parán Community was not interested in coming to an agreement" because—again, according to Claimant, that community wanted to protect an alleged marijuana business[871] and to "steal the mine."[872]

404. Claimant suggests that Peru knew that any efforts to resolve the conflict would be futile because the government itself viewed an agreement as "impossible."[873] Thus, according to Claimant, Mr. León's journeys from Lima to the conflict area—including on weekends and holidays[874]—were a sham. Peruvian public servants from multiple agencies assembled to lead meetings devoted to addressing the social conflict, yet those too were a charade, Claimant suggests. The OGGS led the Dialogue Table that yielded a successful signing of the 26 February 2019 Agreement, which, at the time,

[866] Claimant's Reply, ¶ 825.

[867] Claimant's Reply, ¶ 44.

[868] Claimant's Reply, ¶ 44.

[869] Claimant's Reply, ¶ 825.

[870] Claimant's Reply, ¶ 44.

[871] Claimant's Reply, ¶¶ 22, 825.

[872] Claimant's Reply, ¶¶ 24, 825.

[873] Claimant's Reply, ¶ 44.

[874] León First Witness Statement, ¶ 14 (noting that meetings "even occurred during weekends and public holidays because those were the days on which the Parán Community held its meetings, so we knew that it was the best time to acquire first-hand knowledge of the situation and to talk to the Community members").

Claimant applauded and credited to Peruvian authorities.[875] Now, however, Claimant contends the Dialogue Table was a hoax.[876]

405. Claimant's brazen attempt to discredit the dedicated work of Peru's public servants and accuse Peru of misleading Claimant is shameful and should be rejected. For reasons explained by Peru in the Counter-Memorial, Claimant's accusations are false,[877] and the two grounds that Claimant invokes as the basis for its suspicions are baseless, contradicted by the evidence on the record, and even illogical, as shown below.

1. Claimant's accusation that the Parán Community opposed the Project because it had a marijuana business that it wanted to protect is unsupported and illogical

406. In the Reply, Claimant asserts that "one of the Parán Community's key motivations for opposing the Project was to protect its illegal marijuana business," "which would be harmed by the increased attention that the Project would bring to the Parán area."[878] That bald accusation against the community as a whole is both baseless and an obvious attempt to distract from Claimant's own shortcomings. It is also reprehensible that Claimant would cast aspersion against the entire Parán Community.

407. As a threshold matter, there is no evidence that the entire Community ran an "illegal drug business."[879] Instead, the documents relied on by Claimant speak only to

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[875] **Ex. R-0132**, "*We are very pleased to announce the… conclusion of the illegal blockade*," MINING JOURNAL, 5 March 2019, p. 2 ("We are very pleased to announce the positive conclusion of the illegal blockade and **would like to thank** our employees, **the authorities,** and our community partners that worked together to reach this successful result" (emphasis added)). *See also* Peru's Counter-Memorial, ¶¶ 264–266.

[876] *See, e.g.*, Claimant's Reply, ¶ 44 ("Peru required that Lupaka lose its time (and ultimately its investment) through pointless dialogue with the Parán Community while the latter held Lupaka hostage through a Blockade.").

[877] *See* Peru's Counter-Memorial, § II.E.

[878] Claimant's Reply, ¶¶ 22, 647(c).

[879] Claimant's Reply, ¶¶ 307, 335, 771(c). *See* Retuerto Witness Statement, ¶¶ 31–33; Trigoso Second Witness Statement, § V; León Second Witness Statement, ¶¶ 60–61.

suspicions of cultivation by individual actors within the Community.[880] Furthermore, Claimant's assertion is contradicted by its own contemporaneous assessment of the Parán Community's reasons for opposing the Project.[881] Never once during the social conflict did Claimant allege that the Community was opposed to the Invicta Mine because it allegedly desired to shield a drug trade from police attention.

408. In this arbitration, Claimant alleges that "three or four families heavily involved in the marijuana business"[882] led opposition to the Invicta Mine "because it would bring more Police presence to the Parán area and thus disturb their illegal drug trade."[883] Claimant proceeds to only identify "[o]ne such family,"[884] namely the Narvasta family. Claimant's position is contradicted by the evidence that it cites. In particular, Claimant's own CR Reports indicate that many members of the Narvasta family were supporters of the Invicta Project and wanted Claimant to reach an agreement with the Parán Community.[885]

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[880] *See, e.g.*, **Ex. C-0103**, Email from M. Mariños to Lupaka Gold Corp. (J. Castañeda), 14 November 2016. p. 2 ("This opposition leader and his family have been supported by a **group of oppositor community members** who live in Huacho and whose main activity is the cultivation of marijuana. This group is **not very empowered in the community** and it is possible to dismantle them in the short term.") (emphasis added); **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 4 ("INVICTA indicated that the Paran leaders are being advised and / or financed by **outsiders of the community** with their own interests (drug trafficking and informal mining mafias)." (emphasis added)); **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, PDF p. 3 (noting "the presence and active participation of **local actors** who, with an economy outside the law, subsidize activities contrary to public order against the mining project." (emphasis added)).

[881] *See, e.g.*, **Ex. C-0103**, Email from M. Mariños to Lupaka Gold Corp. (J. Castañeda), 14 November 2016. p. 2; **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 4.

[882] Claimant's Reply, ¶ 37.

[883] Claimant's Reply, ¶ 40.

[884] Claimant's Reply, ¶ 37.

[885] *See, e.g.*, **Ex. C-0394**, SSS, Monthly Report, Project, November 2016, p. 7 (describing Joel Narvasta as a "[l]eader who is in favour of the project" and Jonatán Narvasta as "Lieutenant Governor and powerful leader with regular influence at the community level. He is in favour of the project and is a potential ally who needs to be backed. He agrees with the proposals made by

409. Further, Claimant accuses only five individuals—i.e., less than one percent of Parán Community members—of leading the opposition to protect illegal marijuana activity, and it has presented *no* evidence to link four of those five individuals to marijuana business. As evidence, Claimant cites only one document as referring to marijuana cultivation by *one* of those individuals, Absalón Narvasta.[886] Claimant's accusations

the company"); **Ex. C-0457**, SSS, Monthly Report, Project, November 2016, p. 3 ("This work of personalised conversation allowed us to identify leading actors with high power of influence and to mobilise people within the community, such that we were able to establish good relations of coordination and support with Mr. José Chirca (Santa Ana), Mr. Absalón Narvasta (Huamboy) and Mr. Leonel Palomares (Capia), with all these actors, we worked directly to organise anal information meetings. Based on this strategy, the anexal assemblies organised by the leaders in coordination with the RRCC team began."); **Ex. C-0424**, SSS, Monthly Report, Project, December 2016, p. 4 ("The elected director is an ally (Mr. Absalón Narvasta) who requested the presence of the entire board and the negotiating committee"); **Ex. R-0254**, Monthly Report: Project Invicta, Social Sustainable Solutions, October 2017, pp. 1, 3 ("Currently, the position of president is being assumed by Mr. Wilmer Narvasta Ceva, who shows interest in meeting with the corporate management to program the payment of the debt and initiate discussions for the signing of the agreement with the community").

[886] Claimant's Reply, ¶ 39 (*citing* **Ex. C-0481**, IMC, Matrix of Local Stakeholders, Invicta Project, undated IMC, Matrix of Local Stakeholders, Invicta Project, undated IMC, Matrix of Local Stakeholders, Invicta Project, undated, p. 4 (listing Absalon as a "moderate opponent" of the Invicta Mine and noting that "[t]his stakeholder is considered the leader of marijuana producers in the Huamboy area")).

against Saúl Torres Narvasta,[887] Israel Narvasta,[888] Luis Narvasta Escudero,[889] Wilber Narvasta[890]—are baseless speculation. Even if Claimant had proven that five individuals were cultivating marijuana (quod non), they would represent *less than one percent* of more than five hundred Parán Community members, many of whom advocated reaching an agreement with Claimant.

410. Moreover, Claimant's theory leaves certain obvious questions unanswered, including:

a. On what basis does the Claimant allege that the Parán Community members

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[887] Claimant's Reply, ¶ 39 [redacted] (describing Saul as "part of the Parán Dialogue Committee and a staunch opponent of the Project"); Meini Report, ¶ 178 (describing criminal charges "for the crime of coercion"); **Ex. IMM-0053**, Supplemental Criminal Complaint, 7 January 2019, p. 1 (extension of a criminal complaint for alleged crimes of "violence against the authority to prevent the exercise of its functions in its aggravated form, disobedience to authority, aggravated usurpation, aggravated theft and illegal possession of explosives,"); **Ex. C-0394**, SSS, Monthly Report, Project, November 2016, p. 6 (describing Saul as "a leader with regular influence within the community, he is very closed-minded and reluctant to talk about the project. His speech on the project is that this will pollute the local population's crops and that he knows of experiences of bad mining practices. He is one of the main opponents of the project"); **Ex. C-0458**, Sayán Police, Report No. 002-2019- REGPOL.LIMA/DIVPOL-H-CS.SEC, 4 January 2019 (documenting Saul's involvement in the 19 June 2018 Protest)).

[888] Claimant's Reply, ¶ 39 [redacted] (describing Israel as "part of the leadership of the Huamboy area"); **Ex. C-0444**, SSS, Weekly Report, Project, 14–19 August 2017 (listing a series of notes about Israel: "Regular level of influence in his annex. This young official has adopted an intimidating position, wanting to assume leadership against the project, he says that he has the support of his annex to pressure the company to sign an agreement under the conditions they want. He does not represent a latent danger for the project."); **Ex. C-0479**, SSS, Special Report, IMC dealings with the Parán and Lacsanga Communities, 9 February 2017 (describing a meeting that involved Israel Narvasta)).

[889] Claimant's Reply, ¶ 39 (citing Meini Report, ¶ 178 (describing criminal charges "for the crime of coercion"); **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, p. 3 (describing José Luis Narvasta Escudero as a "radical Paran community member[]"); **Ex. C-0125**, Criminal Complaint Filed by Invicta Mining Corp. S.A.C., PNP and Sayán Police Station, 20 June 2018 (this criminal complaint does not list José Luis by name)).

[890] Claimant's Reply, ¶ 39 [redacted] (describing Wilber Narvasta as a "strong opponent to the Project" with "often changing views"); **Ex. C-0424**, SSS, Monthly Report, Project, December 2016, p. 8 (indicating the following regarding Wilber Narvasta: "As a member of the negotiating committee, he was in favour of the project, but in this last meeting, he showed his true position by disagreeing and trying to alienate the company from the community. He has presented himself as a potential opponent.")).

believed Mine operations would increase Police attention? [891]

b. How can the Parán Community's repeated requests for an agreement with Claimant be reconciled with the Community's supposed desire to protect its drug trade by opposing the Mine?

c. Why would the Parán Community have asked Claimant to build an access road to the Invicta Mine through its territory if it wanted to decrease attention therein and oppose the Invicta Mine?

d. If a paramount objective of the Parán Community was to "protect" an alleged marijuana business from "increased attention," as Claimant alleges,[892] why did the Community mount multiple public protests, the obvious result of which was to attract attention?

e. Why, if the alleged illegal drug trade made an agreement impossible, were Claimant and the Parán Community able to reach the milestone 26 February 2019 Agreement?

411. In fact, and contrary to Claimant's assertion, the Parán Community was *eager* for "increased attention"[893] to its territory and activities. The Community asked Peru to intervene in the social conflict, even urging Peruvian officials to visit the Community.[894] The Parán Community's protests also foreseeably provoked the Police to dispatch law enforcement teams to the Invicta Mine and to investigate Parán Community members and their activities.[895]

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[891] Claimant's Reply, ¶ 22.

[892] Claimant's Reply, ¶ 22.

[893] Claimant's Reply, ¶ 7.

[894] *See e.g.*, Peru's Counter-Memorial, ¶ 232 ("The Parán Community requested that MINEM officials act as mediators in the subsequent Dialogue Table negotiations"). *See also supra* Sections II.B.4, II.C.3; León First Witness Statement, ¶¶ 20–24 (outlining the OGGS engagement directly with the Parán Community).

[895] Peru's Counter-Memorial, § II.E (describing the robust engagement of Peruvian officials, including police, in the social conflict between Claimant and the Parán Community).

412. The above undisputed facts are in direct opposition to the objectives that Claimant ascribes to the Parán Community, and thus refute Claimant's made-for arbitration theory. Ordinary Mine operations would not have attracted Police attention; in contrast, the Parán Community's protests did. The Parán members would not have engaged in such protests if their objective was to *avoid* attracting Police attention to the area.

413. That Claimant would make this defamatory accusation against an entire population, labelling all of the rural community leaders and its members as criminals, without evidence, is illustrative of the disrespect and contempt in which Claimant held the local communities. Such contempt was present during the Access Road Protest, where Claimant's then President and CEO referred to the community protesters as "terrorists," and has continued in this arbitration.[896] That baseless, disrespectful, and irresponsible narrative should be repudiated.

2. Claimant's theory that the Parán Community protested the Invicta Mine to "steal" the mine for the purpose of exploiting it itself is opportunistic and speculative

414. As Peru explained in the Counter-Memorial, the Parán Community first protested the Invicta Mine on 19 June 2018.[897] That date was (i) eight months *before*, according to Claimant, the Parán Community threatened to exploit the Mine;[898] and (ii) more than

[896] **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Ismodes), 6 February 2019, p. 2 ("It is vital that we identify a concrete action plan and hold people accountable for completion of their respective tasks within the plan. We would like to point out that engaging in dialogue and negotiations **with terrorists**, and people who have attempted murder, is not a process that we will participate in. These people must abandon, or be removed, from the blockade before any meaningful discussions can occur. Otherwise the process is plainly extortion by people with no legal right or claim to our mine." (emphasis added)).

[897] Peru's Counter-Memorial, § II.E.

[898] Claimant's Reply, ¶ 25; *see also* **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Ismodes), 6 February 2019, p. 2 (Mr. Ansley alleged to Peru in February 2019 that someone from the Parán Community "indicated" that she or he "intend[ed]" to "steal" the Invicta Mine).

twelve months before Claimant first alleged that the Parán Community stole ore from the Mine.[899]

415. Claimant's theory that the Parán Community protested the Mine to "steal it" lacks any rationale, and is nothing more than yet another opportunistic, made-for arbitration argument by Claimant. First, there is no evidence of any threat or intention by the Community to steal the mine before it began its protests against Claimant in June 2018. Rather, Claimant's evidence shows that the Parán Community wanted to work with Claimant on the Invicta Mine's development and repeatedly emphasized its interest in securing an agreement with Claimant to such effect.[900]

416. Further, the untenability of Claimant's "steal" theory is exposed by the fact that the following questions have no logical answer:

a. Why did the Community actively participate in the Dialogue Table, request financial compensation from Claimant, or seek an agreement with Claimant?

b. How was "stealing" the Mine—which foreseeably would (and did) provoke Police intervention—consistent with the Community's alleged objective to avoid attracting attention to its alleged marijuana business?

c. Why did the Community wait more than a year after its first protest to begin extracting ore from the Invicta Mine?

417. The actions of the Parán Community throughout the social conflict indicate that its protests were not merely a pretext to enable the Community to steal the Invicta Mine, as Claimant argues. There is nothing on the record that substantiates the claim that the Parán Community planned all along to illegally exploit the mine.[901] In fact, at no point prior to this arbitration did Claimant allege that such illegal exploitation of the Mine was the ulterior motive behind the Parán Community's opposition to the Project.

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[899] **Ex. C-0222**, Meeting Summary between MINEM, *et al.*, 15 July 2019, ¶¶ 20–21 ("Parán is, in fact, transporting ore and other materials out [of the Mine]").

[900] *See, e.g.*, Peru's Counter-Memorial, § II.D.2.a.

[901] León First Witness Statement, ¶¶ 60–62.

3. Peru could not simply dismiss the Parán Community's concerns about the Invicta Mine, let alone do so on the basis of unfounded theories of ulterior motives

418. Claimant's assertion that "the State knew [that "the Parán Community's marijuana business"] was the driver of Parán's conduct" is simply false.[902] Throughout Peru's engagement with Claimant and the Parán Community, neither the Community *nor Claimant* alleged that "major drivers" of the Community's actions were to protect an illegal marijuana business or steal the Invicta Mine. Nor would either party have done so, as evidence suggests that neither rationale prompted or drove the Community's protests of Claimant's mining activities.

419. To the contrary, Peru's understanding was that the Parán Community had at least three core complaints: (i) that the Invicta Mine posed environmental risk to the Parán Community's homes, and to its agricultural cultivation (mainly of peaches and avocados);[903] (ii) that Claimant neglected to reach an agreement with the Parán Community before attempting to exploit the Invicta Mine;[904] and (iii) that Claimant favored the Lacsanga and Santo Domingo Communities, while marginalizing the Parán Community.[905] Each of these issues is discussed briefly below.

420. *First*, the Community was troubled by the potential environmental impact of the Invicta Mine on the Parán Community's homes and farmland.[906] As explained above in **Section II.A.2**, the Parán Community lives downhill and downstream from the Invicta Mine.[907] As the Mine developed, the Community worried that the negative

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[902] Claimant's Reply, ¶ 853

[903] *See* Peru's Counter-Memorial, § II.D.2.b.

[904] *See* Peru's Counter-Memorial, § II.D.2.a.

[905] *See* Peru's Counter-Memorial, § II.D.2.a.

[906] Peru's Counter-Memorial, § II.D.2.b. *See also supra* Section II.B.4; Léon First Witness Statement, ¶ 20 ("[P]art of the issues giving rise to the discontent of the Parán Community related to environmental concerns"); **Ex. R-0165**, Letter No. 104-2018-DGIN-LMP-HUA from the Sub-prefect of Huaura (S. Retuerto) to MINEM (F. Ísmodes), 8 May 2018.

[907] *See supra* Section II.A.2; Retuerto Witness Statement, ¶ 33; León Second Witness Statement, ¶¶ 17, 58.

externalities of mining activity would harm its water sources.[908] The Community informed Claimant on 4 May 2018 that it believed that the Invicta Mine was "significantly contaminating [the Community's] springs which flow with *WASTE WATERS*, which join waters used to irrigate peach plantations."[909] The Community also raised its complaints with the local water authority,[910] which inspected the impact of the Mine on the Community's water sources on 7 May 2018 and 4 July 2018.[911]

421. Even though the water authority concluded that the Mine had not yet harmed the Community's water sources,[912] that does not mean that the Community's ongoing concerns in that regard were unwarranted, or that such concerns could simply be ignored by Claimant.[913] Notably, the Community again raised concerns of that nature with OGGS officials on 11 August 2018, on 22 August 2018,[914] and with OGGS officials and Claimant on 7 November 2018.[915] Whether or not it was material, the risk that the Community's territory would suffer serious environmental harm from the Mine remained a core and sincere grievance of the Community throughout the conflict.[916] Claimant could not deny that then, and cannot deny it now.

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[908] Peru's Counter-Memorial, § II.D.2.b. *See also supra* Section II.B.4.

[909] **Ex. C-0121**, Letter No. 038-2018-CCP from the Parán Community (I. Palomares) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018, p. 3.

[910] **Ex. R-0077**, Letter from the Parán Community (W. Narvasta) to Huaura Local Water Authority, 10 April 2018, p. 1; Retuerto Witness Statement, ¶¶ 15–17.

[911] **Ex. R-0091**, Technical Report No. 048-2018-ANA-AAA.CF.-ALA H/KHR, ANA, 13 July 2018.

[912] **Ex. C-0408**, ANA, Technical Report No. 048-2018-ANA- AAA.CF.-ALA H/KHR, 13 July 2018, ¶¶ 5.2, 6.3.

[913] *See supra* Section II.B.4.

[914] **Ex. R-0065**, Meeting Minutes, Meeting between the Parán Community and MINEM, 11 August 2018, p. 1; **Ex. R-0066**, Meeting Minutes, Meeting between the Parán Community and MINEM, 22 August 2018. *See also* León First Witness Statement, ¶¶ 22–23.

[915] *See, e.g.*, **Ex. C-0182**, Summary Report of Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018, p. 1 (The community, taking the initiative, proposed 3 items for the agenda . . . Environment and economic compensation for the alleged damage caused to the alleged territories of the community").

[916] Léon First Witness Statement, ¶ 20. *See also supra* Section II.B.4.

422. *Second*, the Parán Community complained repeatedly that Claimant flouted its obligation to reach an agreement with it.[917] For example, the Community emphasized the importance of reaching an agreement in meetings with Claimant's CR Team in late 2017,[918] in letters sent to Claimant between January and May 2018,[919] in letters sent to OGGS throughout the summer and fall of 2018,[920] and to Claimant and Peru during the Access Road Protest.[921] The Parán Community cited Claimant's denial that such an agreement was necessary as a central reason for its protests against the Invicta Project.[922]

423. *Third*, as discussed in more detail in **Section II.B.2** above, Claimant's preferential treatment of the Lacsanga and Santo Domingo Communities was a core grievance of the Parán Community.[923] Claimant provided the Lacsanga and Santo Domingo

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[917] Peru's Counter-Memorial, § II.D.2.a. *See also* **Ex. C-0164**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, 1–30 September 2017, p. 6 ("[T]he company has all the permits granted by the Ministry of Energy and Mines to start its exploitation and that **it does not depend on any community to start this stage**. It was also clarified that the company has always requested an easement from the community, but not permission to exploit." (emphasis added)); **Ex. C-0391**, SSS, Monthly Report, Project, December 2017, p. 5; **Ex. C-0111**, Report on Social Intervention for Signing of Agreement with the Parán Community, 2018, p. 4; **Ex. C-0121**, Letter from the Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018.

[918] **Ex. C-0391**, SSS, Monthly Report, Project, December 2017, p. 5.

[919] **Ex. C-0111**, Report on Social Intervention for Signing of Agreement with the Parán Community, 2018, p. 4 ("In the month[s] of February, March, April and May 2018, the Parán community was visited and we met repeatedly with the governing committee to propose the formation of an environmental monitoring committee and work on social responsibility issues according to the Invicta mine's EIA. The community begins to issue notarised eviction letters arguing that we are using their lands without any agreement with the community and polluting their lands"); **Ex. C-0121**, Letter from the Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018.

[920] León First Witness Statement, ¶¶ 22, 78–79.

[921] *See* León First Witness Statement, ¶¶ 78–79; León Second Witness Statement, ¶ 58.

[922] *See e.g.*, León First Witness Statement, ¶¶ 78–79 ("The Parán Community wanted to reach an agreement with Invicta, but felt that the mining company had ignored them").

[923] Peru's Counter-Memorial, ¶¶ 222–223. *See also* León First Witness Statement, ¶ 22 ("[The Parán Community] conveyed their impression that Invicta had avoided them in negotiations with the communities declared to be in the area of direct social influence of the Project. They explained that Invicta had signed an agreement with the Lacsanga Community to build a road in their

Communities with cash, jobs, and infrastructure,[924] but not the Parán Community. OGGS observed that the Parán Community therefore felt Claimant "ignored them" and concluded this was a main reason for the Access Road Protest.[925]

424. Peru never had any reason to discredit the sincerity of the three core Parán Community concerns delineated above, or to treat them as mere pretexts to conceal or disguise ulterior motives.

425. Ultimately, however, the issues of marijuana-related criminal activity in the Parán Community or ore theft at the Invicta Mine raised by Claimant in this arbitration are *immaterial*. Even if law enforcement had immediately eradicated regional marijuana cultivation and trade, or had prevented illegal mining immediately after it was first reported in July 2019, this would not have resolved the conflict between Claimant and the Parán Community or prevented the Road Access Protest. The Community would still have maintained the above grievances and sought to ensure no environmental harm came to its territory, an agreement was executed between itself and Claimant, and that it was granted benefits similar to those that Claimant provided to the other two local communities.

4. The dialogue and negotiations between the Parán Community and Claimant propitiated by Peru were not "pointless," as Claimant alleges

426. Claimant characterizes the dialogue and negotiations by Invicta with the Parán Community as "pointless,"[926] and contends that Peru itself believed that an agreement was "impossible."[927] According to Claimant, Peru was sceptical because the Parán

territory to access the Project. Once that contract had been signed with the Lacsanga Community, Invicta had not returned to the Parán Community to reach an agreement concerning the Project's social impact.").

[924] *See supra* Section II.B.2.

[925] León First Witness Statement, ¶¶ 22, 78–79.

[926] *See, e.g.*, Claimant's Reply, ¶ 7 ("It did so despite Peru's own internal documents showing not only that Peru was aware of Parán's criminality at the time, but that **any further "dialogue" with the community was pointless** as a result" (emphasis added)).

[927] Claimant's Reply, ¶ 44 ("Peru's internal documents therefore show that there was consensus among many of the higher authorities that Parán's drug business would **make it impossible to reach an agreement** and that only police intervention would" (emphasis added)).

Community had ulterior motives to oppose the Project.[928] As evidence of the foregoing, Claimant cites two documents reflecting internal communications by Peru: (i) an OGGS memorandum assessing the social conflict as of 20 February 2019,[929] and (ii) [redacted][930] Claimant does not allege that it considered either motive to be a driving force of the Community's actions and neither document cited by Claimant supports its speculative accusation that Peru believed as much.

427. *First*, Claimant invokes a 20 February 2019 OGGS internal memorandum, which stated that "[d]ialogue mechanisms are not appropriate in this case" due to indications of "local actors who, with an economy outside the law, subsidize activities contrary to public order against the mining project."[931] Contrary to Claimant's allegations, nowhere in this document does it state that the Community at large ran a marijuana business or desired to steal the Invicta Mine.[932] Further, the opinion expressed in such OGGS memorandum was not a conclusion of fact or policy by the Government of Peru, writ large; rather, it reflected the views of its author, on an individual level.[933] Importantly, despite what that internal memorandum stated, the OGGS continued diligently mediating the social conflict, and shortly thereafter—just a few days after the referenced OGGS memorandum was written (in 20 February 2019)—brokered the milestone 26 February 2019 Agreement.[934] The latter agreement proved that dialogue and negotiations had in fact been productive and fruitful, rather than "pointless" as Claimant alleges.[935]

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[928] Claimant's Reply, ¶ 7.

[929] **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, p. 2.

[930] [redacted]

[931] **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, p. 3.

[932] León Second Witness Statement, ¶¶ 39, 496–447, 60–62; Trigoso Second Witness Statement, § III.A.

[933] *See* **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, p. 3 ("This is all I have to report.").

[934] León Second Witness Statement, ¶ 47; Trigoso Second Witness Statement, § III.A.

[935] *See supra* Section II.C.3.

428. That the 26 February 2019 Agreement only provided temporary relief from the social conflict was not the result of Community opposition to protect an alleged drug business, or to steal the Mine; it resulted from Claimant's refusal to pay the topographical survey, the sole concession made by Claimant at the formal Dialogue Table that Peru helped to install. It was never alleged by Claimant that the failure of the February 2019 negotiations had *anything* to do with either alleged motive on which Claimant now hangs a central component of its case theory.

429. Further, the 20 February 2019 OGGS memorandum post-dated the Parán Community's 19 June 2018 Protest by eight months. Throughout that eight-month period, the MINEM and OGGS dedicated themselves to resolving the social conflict through negotiations, including via the Dialogue Table.[936] Such fact further confirms that, contrary to what Claimant alleges, the OGGS, MINEM and other Peruvian authorities did *not* believe continuing the dialogue would be "pointless" or futile.

430. [redacted][937] [redacted][938] [redacted][939]

[936] *See* Peru's Counter-Memorial, § II.E.3-5. *See also supra* Section II.C.3.

[937] *See* [redacted]

[938] *See* [redacted]

[939] *See* [redacted]

[redacted][940] [redacted]

[redacted]

431. Whatever its basis might have been, the hypothesis stated in the [redacted] is from two years *after* Claimant had already lost its investment. Therefore, even if the hypothesis had any validity at all (quod non), it would say nothing about whether Peru did or did not believe—during the period of time that Claimant still owned the Invicta Mine—that dialogue between Invicta and the Parán Community would be "pointless," or that an agreement between those two parties would be "impossible." The [redacted] therefore does not support Claimant's argument.

432. In sum, Peru mediated Claimant's conflict with the Parán Community diligently and in good faith, and Claimant's *post hoc* theory of ulterior motives by the Parán Community is baseless, contradicted by the evidence, and illogical.

F. The police raid on 14 December 2021 at the Invicta Mine is irrelevant to this arbitration and does not support Claimant's position that Peru should have forcefully intervened during the Access Road Protest

433. On 14 December 2021—*after* Claimant had already forfeited its shares in Invicta to its creditor—the PNP carried out an operational plan to attempt to close the Invicta Mine.[941] Such operational plan was effected pursuant to a MINEM Directorial Resolution.[942] Claimant argues that Peru's execution of this operational plan in December 2021 proves: (i) that Peru had no policy of prioritizing dialogue, but rather that "the State remained committed to the use of Police force in the face of conflict with local communities;"[943] (ii) that Peru's December 2021 operational plan was a

[940] *See* [redacted].

[941] *See* [redacted]

[942] *See* [redacted]

[943] Claimant's Reply, ¶¶ 378, 380.

"long overdue" use of force that should have been executed two years prior;[944] and (iii) that Peru's refusal to execute the February 2019 operational plan to protect Claimant's investment was an "act [or] omission [that] led to the loss of Claimant's investment."[945] Claimant is incorrect and ignores that the social conflict between Claimant and the Parán Community presented materially different circumstances than those under which Peru executed the December 2021 operational plan.

434. As explained above in **Section II.C.1**, Peruvian law *authorizes* the use of force, and only under limited circumstances—namely, "when other means are ineffective or do not in any way guarantee the achievement of the legal objective sought."[946] Moreover, under international law, force should only be used to protect a party's legal interests when the actions of others pose a risk to the life, integrity or freedom of persons, and such use of force must be necessary and proportionate.[947]

435. At no point during Claimant's ownership of the Invicta Mine other than the altercation between the Community and Claimant's private security force did Claimant report circumstances in which human life was in imminent danger. The same was true in December 2021: Peruvian law did not require the PNP to execute an operational plan to forcibly evict the Parán Community protesters.

436. Throughout the period that Claimant owned the Invicta Mine, and in December 2021 as well, the PNP retained discretion to decide whether the use of force was required

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[944] Claimant's Reply, ¶ 353.

[945] Claimant's Reply, ¶ 353.

[946] **Ex. IMM-0039**, Manual of Human Rights applied to the Police Force, approved by Ministerial Resolution No. 952-2018-IN, p. 51. *See also supra* Section II.C.1; Meini Report, ¶ 134 ("the PNP may not use force unless it has exhausted all alternative means that do not involve violence or a risk of harm to persons").

[947] *See* **Ex. IMM-0032**, *J. v. Peru*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 17 April 2015 (M. Ventura Robles, *et al.*); **Ex. IMM-0033**, *Nadege Dorzema, et al., v. Dominican Republic,* IACHR, Merits, Reparations and Costs, 24 October 2012 (Gracias-Sayan); **Ex. IMM-0034**, *Mujeres Víctimas de Tortura Sexual en Atenco v. Mexico*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 28 November 2018 (Grossi, *et al.*), Series C No. 371; **Ex. R-0250**, Diego García-Sayán, *Justicia Interamericana y Tribunales Nacionales*, Diálogo Jurisprudencial en Derechos Humanos entre Tribunales Constitucionales y Cortes Internacionales (2013), pp. 825, 831. *See also* Meini Report, ¶ 75.

or justified given the relevant circumstances. The circumstances prevailing in December 2021 were materially different from those that existed at the time that Claimant owned the Invicta Mine. That difference in circumstances explains why in December 2021 the PNP reached a determination on the propriety of using force that was different from its determination on that issue in earlier instances.

437. For example, the operational plan of 14 December 2021 had as its objective, pursuant to the mine owner's request and to a MINEM order, the closure of the Invicta Mine.[948] By contrast, the unexecuted Operational Plan of February 2019 had as its objective the removal of Parán Community members who were participating in the Access Road Protest.[949]

438. Additionally, Peru's execution of an operational plan on 14 December 2021:

a. did not occur amidst an active social conflict;

b. did not contemplate forceful removal of a rural community protesters;

c. did not seek to enable operation of a mine over the objections of a rural community that was living in its direct and indirect areas of social and environmental influence; and

d. did not occur during an active period of State-facilitated dialogue and mediation between a rural community and the mine owner.

439. By contrast, as reflected in its 11 February 2019 Operational Plan, the PNP understood at the time of such plan that a social conflict between the Parán Community and the mine operator was active, and had recently escalated.[950] The PNP understood that attempting to forcefully remove Parán Community protesters risked sparking a

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[948] **Ex. C-0255**, PERU00000929-PERU00000937, Huacho DIVPOL and Sayán Police Station, Report No. 07-2022-REGPOL LIMA/DIVPOL-H-COM.SAYÁN.ADM, 15 February 2022, p. 1.

[949] **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 31. ("[I]t is clear that the residents of the Rural Community of Parán, during their act of protest, will react against Police Forces and will try to force their way into the facilities of Invicta Group Corp. SAC., by trying to overwhelm the police cordon . . .").

[950] **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, pp. 27–31.

violent confrontation and physical harm, and possibly even fatalities, on all sides.[951] It was for this reason that the PNP explicitly categorized the potential eviction mission as one of "HIGHEST RISK status."[952]

440. Importantly, and as discussed in **Section II.C.3**, Peru decided *not* to execute the Operational Plan in 2019 because Claimant and the Parán Community were at the time engaged in dialogue and State-facilitated mediation. Execution of the Operational Plan would have diminished prospects for a long-term resolution and intensified the risk of violence, loss of life, and aggravation of the conflict.

441. Thus, during the period when Claimant owned the Invicta Mine, and again in December 2021, Peru needed to weigh different risk circumstances against various objectives. Based on those factors and the PNP intelligence assessments, Peru determined that it made sense to execute an operational plan on 14 December 2021.

442. That operational plan failed, however. As the PNP entered Huamboy route to the Mine, they were surrounded by approximately 100 Parán Community members armed with sticks, stones, and brooms, demanding that the PNP leave.[953] In the ensuing confrontation when the PNP attempted to restore order, the PNP officers made a number of arrests, and a Parán Community member fell to his death when he lost his balance on the base of an irrigation canal while attempting to flee from the police.[954] Several PNP officials suffered injuries during the mission.[955] In light of those

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[951] **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 48, ¶ B ("RESIDENTS OF THE COMMUNITIES OF PARÁN MAY ATTACK PNP PERSONNEL WHO WOULD INTERVENE ON THE PICUNCHE ROAD TO CLEAR THE ROAD, WHICH HAS BEEN CLOSED SINCE 14 OCT 2019.").

[952] **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 31.

[953] **Ex. C-0255**, PERU00000929-PERU00000937, Huacho DIVPOL and Sayán Police Station, Report No. 07-2022-REGPOL LIMA/DIVPOL-H-COM.SAYÁN.ADM, 15 February 2022, p. 1.

[954] **Ex. C-0255**, PERU00000929-PERU00000937, Huacho DIVPOL and Sayán Police Station, Report No. 07-2022-REGPOL LIMA/DIVPOL-H-COM.SAYÁN.ADM, 15 February 2022, p. 2.

[955] **Ex. C-0255**, PERU00000929-PERU00000937, Huacho DIVPOL and Sayán Police Station, Report No. 07-2022-REGPOL LIMA/DIVPOL-H-COM.SAYÁN.ADM, 15 February 2022, p. 2.

developments, the PNP decided to suspend its operational plan and to retreat, so as to avoid any further violence or harm to human life.[956]

443. Given the foregoing, far from substantiating Claimant's argument that the use of force was "long overdue" with respect to the occupying protesters,[957] Peru's execution of the 14 December 2021 operational plan illustrates the high risk of resorting to force in this type of conflict, and conversely, the merits of prioritizing peaceful means of conflict resolution.

444. Peru has not executed any operational plans at the Invicta Mine since 14 December 2021. However, future circumstances and intelligence might warrant execution of an operational plan to close the Invicta Mine.

445. For the reasons explained above, neither Peru's execution of an operational plan on 14 December 2021 to evict the Parán Community protesters, nor Peru's disclosure that it may in the future consider such an operation to close Invicta Mine, assists any of Claimant's claims or assertions.

III. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMANT'S CLAIMS

446. Peru demonstrated in the Counter-Memorial that the Tribunal lacks jurisdiction over Claimant's claims, for at least two reasons. *First*, Claimant does not qualify as an "investor" for the purposes of Article 847 of the Treaty, as it sold not only the investment it had in Peru (which is the subject of this arbitration), but also the litigation rights associated with such investment.[958] Specifically, Claimant transferred its shares in Invicta—the entity to which its claims exclusively relate—to PLI Huaura in August 2019, before Claimant's Request for Arbitration was registered by ICSID. In doing so, Claimant also transferred to PLI Huaura the right to submit a claim against Peru under the Treaty for alleged damage relating to Claimant's interest in such

[956] **Ex. C-0255**, PERU00000929-PERU00000937, Huacho DIVPOL and Sayán Police Station, Report No. 07-2022-REGPOL LIMA/DIVPOL-H-COM.SAYÁN.ADM, 15 February 2022, p. 2.

[957] Claimant's Reply, ¶ 353.

[958] Peru's Counter-Memorial, ¶¶ 349–373.

shares.[959] *Second*, Claimant did not provide a waiver on behalf of Invicta of the latter's right to assert claims against Peru.[960] Consequently, Claimant failed to comply with the consent requirement under Article 823.1(e) of the Treaty.[961]

447. In the Reply, Claimant contests both of the above jurisdictional objections, but for the reasons discussed in the sections that follow, Claimant's arguments lack merit. Accordingly, Peru's jurisdictional objections should be upheld.

A. The Tribunal lacks jurisdiction *ratione personae* because Claimant is no longer an investor that can claim under the Treaty

1. The relevant legal principles

448. In the Counter-Memorial, Peru established that the following three principles apply in cases such as this one in which an investor has disposed of its investment prior to commencing arbitration: (i) pursuant to applicable principles of international law, the relevant time for establishing whether an investor has standing is the time that the proceedings are instituted[962] (which in this case is 30 October 2020, the date on which ICSID registered Claimant's Request for Arbitration); [963] (ii) a general rule under international investment law is that an investor must own its investment at the time that it commences arbitration (or have retained the litigation rights associated with the investment; see below), otherwise the tribunal will lack jurisdiction;[964] and (iii) the

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[959] Peru's Counter-Memorial, ¶¶ 365–373.

[960] Peru's Counter-Memorial, ¶ 374.

[961] Peru's Counter-Memorial, ¶¶ 375–381. *See also* **RLA-0010**, Treaty, Art. 823.1(e).

[962] **RLA-0011**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999 (Buergenthal, Bernadini, Bucher), ¶ 31.

[963] ICSID Rules, Rule 6(2).

[964] **RLA-0017**, *David R. Aven, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018 (Siqueiros, Baker, Nikken), ¶ 298. The *Aven v. Costa Rica* tribunal referred to the "general rule that an investor must own the investment at the date of Notice of Arbitration to benefit from treaty protection." The tribunal's conclusion that the above-mentioned general rule applies was based on a detailed review of the relevant jurisprudence. *See, e.g.*, **RLA-0155**, *CCL v. Republic of Kazakhstan*, SCC Case No. 122/2001, Jurisdictional Award, 1 January 2003 (Carter, Söderlund), ¶ 82; **RLA-0156**, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009 (McRae, Lévy, Lew), ¶ 166; **RLA-0157**, *Perenco*

above-mentioned general rule is subject to two narrow exceptions: (a) where there are "special circumstances," namely "direct causation" between the State's actions and the disposal of the investment;[965] and (b) where the agreement pursuant to which the original investor sold its investment contained an express reservation of the original investor's right to bring a claim against the host State in relation to the investment.[966]

449. Applying the above principles to the instant case, the Tribunal lacks jurisdiction.[967] Claimant (i) did not own its investment at the time that it commenced the present arbitration; and (ii) neither of the two narrow exceptions identified above is met.

2. Claimant disposed of its investment – including the right to bring claims relating to such investment – prior to commencing arbitration

450. Claimant transferred its shares in Invicta, the investment which forms the basis of its claims, to PLI Huaura on 26 August 2019—more than a year *prior* to the commencement of this arbitration on 30 October 2020.[968] Accordingly, pursuant to the general rule cited above, the Tribunal will lack jurisdiction unless either of the established exceptions to that general rule apply. However, neither exception applies.

Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador, ICSID Case No. ARB/08/6, Decision on Jurisdiction, 30 June 2011 (Tomka, Kaplan, Thomas).

[965] **RLA-0017**, *David R. Aven, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018 (Siqueiros, Baker, Nikken), ¶¶ 298–299. *See also* Peru's Counter-Memorial, ¶ 355.

[966] **RLA-0018**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010 (Fortier, Gómez, Veeder), ¶¶ 5–33; **RLA-0012**, *National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006 (Sureda, Debevoise, Garro), ¶ 121.

[967] Parties and tribunals sometimes categorize an objection based on the sale of an investment as an objection to the tribunal's jurisdiction *ratione personae. See, e.g.*, **RLA-0018**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010 (Fortier, Gómez, Veeder), ¶ 5.6; **RLA-0019**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (Dupuy, Brower, Janeiro), ¶ 154, where the Tribunal addressed the issue as one of whether "[the claimant] enjoys standing as a qualifying investor"). Such an objection could also potentially be categorized as an objection to the Tribunal's jurisdiction *ratione materiae*. Regardless of whether the objection herein is categorized as one of *ratione personae* or *ratione materiae*, there is no doubt that an investor's disposal of its investment is an issue that goes to the tribunal's jurisdiction.

[968] Peru's Counter-Memorial, ¶ 360.

451. Concerning the *first* possible exception, there are no "special circumstances"[969] in this case because there is no direct causation between any action taken by Peru and the transfer of Claimant's shares in Invicta.[970] As Peru demonstrated in the Counter-Memorial, the loss of Claimant's investment was directly caused by the following actions, none of which is attributable to Peru: (i) Claimant's evident mismanagement of community relations with the Parán Community, which is located within the Invicta Project's direct area of influence;[971] (ii) Claimant's voluntary entry into the unrealistically ambitious terms of the PPF Agreement, and the production schedule envisaged therein;[972] and (iii) the actions of Claimant's creditor, PLI Huaura, in enforcing its security over Claimant's shares in Invicta.[973] Concerning the third of the above proximate causes, Claimant itself deemed that PLI Huaura's actions were illegal at the time, and threatened to sue PLI Huaura for such actions.[974]

452. Concerning the *second* possible exception to the general rule stated above, at the time that it transferred its shares to PLI Huaura, Claimant did not reserve its right to bring a claim against Peru associated with harm to such shares. In fact, the contrary is

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[969] **RLA-0017**, *David R. Aven, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018 (Siqueiros, Baker, Nikken), ¶¶ 298–299. *See also* Peru's Counter-Memorial, ¶¶ 353–354.

[970] Peru's Counter-Memorial, ¶¶ 361–364.

[971] Peru's Counter-Memorial, ¶¶ 361–364.

[972] Peru's Counter-Memorial, ¶ 362, §§ II.C.4, II.F.3.

[973] Peru's Counter-Memorial, § II.F.4.

[974] *See, e.g.,* **Ex. R-0230**, Lupaka Gold Corp. Management's Discussion and Analysis, 21 August 2019, p. 3 ("On July 3, 2019 the Company announced that PLI Huaura Holdings L.P. ("**PLI**"), the creditor to the Company under the PLI Financing Agreement, had issued a formal notice of acceleration on the PLI Agreement, as well as declaring an early termination date of the loan and immediate payment of US$15,581,654 - Lupaka expressly does not agree with PLI's estimation of the early termination amount as set out in the Acceleration Notice or their attempt to enforce on security pursuant to the Acceleration Notice, and will respond to PLI's actions in due course. Lupaka is currently considering all actions available to it in response to PLI's Acceleration Notice"(emphasis in original)). *See also* **Ex. R-0234**, Lupaka Gold Corp. Management's Discussion and Analysis, 9 July 2020, p. 3 ("On November 25, 2019, the Company issued a response to the PLI Letter advising PLI that the Company reserves all of its rights including, without limitation, commencing litigation in New York or another appropriate forum in seeking equitable and legal relief from PLI").

demonstrated by the Share Allocation Agreement, which was produced by Claimant in the document production phase of the present arbitration. To recall, the Share Allocation Agreement was the legal instrument through which Claimant transferred its shares in Invicta to PLI Huaura,[975] a Canadian company and therefore also a potential "investor" under the Treaty. [976] The terms of that agreement did not include any reservation of Claimant's right to bring a claim against Peru. To the contrary, such terms demonstrate that Claimant affirmatively transferred its right to bring claims—including against Peru—with respect to alleged damage to its shareholding interest in Invicta. Specifically, Clause 2.2 of the Share Allocation Agreement provided that Andean American (the subsidiary through which Claimant held its shares in Invicta) transferred not only its shares in Invicta, but also:

> **all matters of fact or of law pertaining to the Encumbered Shares, without reservation or limitation, including but not limited to the following rights:**
>
> (a) All economic, ownership and information rights related to the Encumbered Shares, without limitation of any nature . . . (Emphasis added)

453. Thus, through the Share Allocation Agreement, Claimant's subsidiary transferred not only its shares in Invicta, but *all* matters of fact or law "pertaining to" or "related to" such shares, "without reservation or limitation," "including but not limited to" a wide variety of "rights." Since they are described as being "without limitation," such matters of law and rights necessarily included the right to bring an arbitration claim against Peru with respect to the measures at issue in this case and their impact on Claimant's interest in Invicta. The purported jurisdictional basis of the entirety of Claimant's claims in the present arbitration stems from its shareholding interest in

[975] **Ex. R-0193**, Share Allocation Agreement between (1) Servicios Notreg E.I.R.L on behalf of Andean American Corp and Gordon Ellis; and (2) PLI Huaura Holdings LP, 26 August 2019 ("**Share Allocation Agreement**").

[976] As the recitals to the Pledge Agreement indicate, PLI Huaura is a company incorporated in British Columbia, Canada. **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Recitals.

Invicta, and the concessions and rights held by Invicta.[977] Moreover, all of Claimant's claims relate to alleged treatment by Peru of Invicta and to the adverse impact of such treatment on rights held by the latter.[978] Claimant's claims are thus inextricably linked to its ownership of Invicta, and are therefore undoubtedly "matters of fact or law pertaining to" Claimant's shares in Invicta. For the same reason, any such claims are also "economic . . . rights related to" such shares.[979] Because Claimant divested of all of the above matters and rights "without reservation or limitation,"[980] Claimant divested itself of the right to bring claims against Peru with respect to its shares in Invicta from the date of the Share Allocation Agreement, namely 26 August 2019.

454. The fact that the rights Claimant transferred to PLI Huaura under the Share Allocation Agreement included litigation rights is underscored by the terms of the Pledge Agreement, by which Claimant originally pledged its shares in Invicta to PLI Huaura. It was PLI Huaura's enforcement of such pledge that led to the transfer of Claimant's shares under the Share Allocation Agreement discussed immediately above. Pursuant to the Pledge Agreement, Claimant pledged to PLI Huaura "any right, title and interest that may derive from" such shares, as well as "all voting and economic rights pertaining to" them.[981] Such rights therefore included the right to bring an arbitration claim against Peru with respect to any damage to Claimant's interest in such shares.[982] Such litigation rights were thus transferred to PLI Huaura when PLI Huaura enforced its security under the Pledge Agreement in August 2019 and Claimant's shares were transferred to PLI Huaura under the Share Allocation Agreement.[983] The Tribunal therefore lacks jurisdiction over Claimant's claim.

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[977] Claimant's Memorial, ¶ 209.

[978] Claimant's Memorial, ¶ 312; Peru's Counter-Memorial, ¶ 371.

[979] **Ex. R-0193**, Share Allocation Agreement, Clause 2.2.

[980] **Ex. R-0193**, Share Allocation Agreement, Clause 2.2.

[981] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Arts. 6.1, 6.4.

[982] Peru's Counter-Memorial, ¶¶ 365–373.

[983] **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. to Invicta Mining Corp., 23 September 2019. Peru's Counter-Memorial, ¶ 370.

3. Claimant's arguments that the Tribunal has jurisdiction lack merit

455. In the Reply, Claimant asserts that the transfer of its shares in Invicta does not affect the Tribunal's jurisdiction.[984] However, Claimant has failed to engage with the substance of Peru's jurisdictional objection. Notably, Claimant has not cited *any* case law in support of its position that the Tribunal's jurisdiction is unaffected by Claimant's wholesale transfer of its Invicta shares and all rights associated therewith. Claimant has not even addressed any of the cases on which Peru relies, save for a single and uncritical reference to *Aven v. Costa Rica* that does not address, much less challenge, the substance of the tribunal's findings in that case.[985] Claimant also does not contest Peru's argument that PLI Huaura's security under the Pledge Agreement included the right to bring claims against Peru with respect to damage to Invicta. Finally, even after Peru interposed its objection relating to the transfer of the Invicta shares, Claimant still failed to exhibit, let alone analyze, the Share Allocation Agreement pursuant to which Claimant transferred its shares in Invicta to PLI Huaura.[986] The bulk of Peru's arguments therefore stand unrebutted.

456. Rather than address the substance of Peru's jurisdictional objection and supporting legal authorities, Claimant contents itself with asserting (i) that because the Treaty definition of investor includes an enterprise of Canada that "has made" an investment,[987] the general requirement that an investor must still hold its investment

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[984] Claimant's Reply, ¶¶ 394–411.

[985] Claimant's Reply, ¶ 409.

[986] Even though Claimant did not append the Share Allocation Agreement as an exhibit to any of its pleadings so far, Peru obtained that document through the document production phase of the present arbitration, and has introduced it into the record as **Ex. R-0193**, Share Allocation Agreement.

[987] **RLA-0010**, Treaty, Art. 847 (The entire provision reads as follows: "investor of a Party means: in the case of Canada: Canada or a state enterprise of Canada, or a national or an enterprise of Canada, that seeks to make, is making or has made an investment; a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship; and in the case of Peru: a state enterprise of Peru, or a national or enterprise of Peru, that seeks to make, is making or has made an investment; a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship").

at the time of bringing proceedings does not apply;[988] (ii) that it is sufficient for purposes of establishing jurisdiction that the investor hold a covered investment at the time of the alleged measures and alleged loss (as opposed to the time of institution of arbitral proceedings, as argued by Peru);[989] and (iii) that in any event, "special circumstances" of the type contemplated by the *Aven* tribunal are in fact present in the instant case.[990] Each of these arguments is flawed, as Peru will demonstrate *seriatim* in the sections that follow.

a. The Treaty language confirms that an investor must hold the investment at the time that proceedings are instituted

457. The language of the Treaty is consistent with the general rule that a tribunal will lack jurisdiction in cases where a claimant has already disposed of its investment prior to commencing arbitration. The definition of an investor under Article 847 of the Treaty refers to an enterprise of Canada that "seeks to make, is making or **has made** an investment" (emphasis added). As a grammatical matter, the use of the present perfect tense—i.e., "**has** made an investment"—in this context must be construed as referring to an investment that was made in the past but has continued through to the present time.[991] If the Treaty parties had intended the definition of an investor to encompass all investors who made an investment in the past but subsequently disposed of it, they would have used the simple past tense, i.e., the Treaty would refer to investors "who **made** an investment." Claimant's assertion that the reference to an investor who "has made" an investment encompasses a situation in which an investor made an investment in the past but no longer holds that investment[992] is therefore at variance with a plain text interpretation of Article 847 of the Treaty.

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[988] Claimant's Reply, ¶¶ 399–400.

[989] Claimant's Reply, ¶¶ 401–403.

[990] Claimant's Reply, ¶¶ 406–411.

[991] *See* **RLA-0170**, Sidney Greenbaum, OXFORD ENGLISH GRAMMAR, 1996, p. 270 ("The state present perfect refers to a state that began before the present time of speaking or writing and **continues until that time**, perhaps including it" (emphasis added)).

[992] Claimant's Reply, §§ 8.1, 8.1.1. *See also* Canada's Non-Disputing Party Submission, 26 May 2022 ("**Canada's NDP Submission**"), ¶ 5.

458. Other provisions of the Treaty similarly indicate that the Treaty protections were only intended to apply to investors who still hold a covered investment at the time of institution of arbitral proceedings. For example, Article 823.1(e) sets out the requirements for bringing a claim, and stipulates that "where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor **owns or controls** directly or indirectly," a waiver must be provided by the enterprise to which the claim relates. The use of the present tense in this provision ("owns or controls") is consistent with the interpretation above of Article 847, in the sense that it indicates that the Treaty only contemplates claims by an investor with respect to enterprises that the investor *currently* owns or controls—not enterprises that the investor may have owned or controlled in the past.

459. Claimant argues in the Reply that, under Peru's interpretation of the Treaty's jurisdictional requirements, no investor could ever bring a claim with respect to an investment that has been taken from it (e.g., pursuant to a formal expropriation), because the investor would lack title to its investment at the time of bringing its claim.[993] Claimant misconstrues Peru's position, and draws a conclusion that in any event is contradicted by case law. In particular, Claimant overlooks the "special circumstances" exception—namely, where there is "direct causation" between the State's actions and the transfer of the claimant's investment. Such exception was articulated by the *Aven* tribunal, and addressed by Peru not only earlier in this Rejoinder, but also in the Counter-Memorial.[994] Where such special circumstances are established, the investor can bring a claim, even though it may no longer hold title to the investment at the time that it brings the arbitration. In the present case, however, the "special circumstances" exception is not met, as will be discussed in subsection (c) below.

[993] Claimant's Reply, ¶ 405.

[994] **RLA-0017**, *David R. Aven, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018 (Siqueiros, Baker, Nikken), ¶ 299; Peru's Counter-Memorial, ¶ 354.

460. Claimant has not engaged with *Aven*, or any of the other cases that Peru cited in the Counter-Memorial.[995] To recall, the relevant jurisprudence establishes the following general rule, articulated by the *Aven* tribunal:

> The relevant case law instructs that in general terms, an investment sold after the date of Notice of Arbitration meets the criteria for an "investment" in the terms of DR-CAFTA. On the other hand, an investor who disposes of ownership of the investment in question before arbitral proceedings should not be eligible to seek the Treaty's protection, **unless special circumstances are present**.[996] (Emphasis added)

461. The argument that Claimant offers to contest the general rule articulated by *Aven* is that "an investor can bring a claim where it held a qualifying investment, suffered a breach and the loss is attributable to that breach."[997] Claimant's argument, however, accords with the "special circumstances" exception identified by the *Aven* tribunal and referred to above, which also requires that the loss of the investment is attributable to a breach by the State. Claimant also overlooks the fact that the definition of an investor in the treaty at issue in *Aven*—namely, Article 10.28 of the DR-CAFTA—is in all material respects identical to the definition of "investor" under Treaty Article 847.[998] The general rule referred to by the *Aven* tribunal is therefore directly applicable in the present case.

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[995] In addition to the *Aven* case, Peru cited various others. *See* Peru's Counter-Memorial, ¶ 355 (*citing* **RLA-0018**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010 (Fortier, Gómez, Veeder); **RLA-0012**, *National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006 (Sureda, Debevoise, Garro); **RLA-0019**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (Dupuy, Brower, Janeiro)).

[996] **RLA-0017**, *David R. Aven, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018 (Siqueiros, Baker, Nikken), ¶ 301.

[997] Claimant's Reply, ¶ 407.

[998] **RLA-0158**, Dominican Republic-Central America Free Trade Agreement, 5 August 2004, Chapter 10, Art. 10.28 ("investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party . . . ").

b. The relevant time to assess jurisdiction is when proceedings are instituted

462. Claimant argues that the Tribunal will have jurisdiction *ratione personae* provided that the investor held a covered investment at the time of the alleged breach and loss.[999] However, Claimant is disregarding the well-established principle, noted above and in Peru's Counter-Memorial, that the relevant time for the assessment of a tribunal's *ratione personae* jurisdiction is the time at which proceedings are instituted (rather than the time of the alleged breach or loss, as Claimant contends).[1000] Such principle is reflected in the case law of the International Court of Justice ("**ICJ**") and investment treaty tribunals. For example, in the *Arrest Warrant* case, the ICJ noted that "[a]ccording to [the ICJ's] settled jurisprudence, **its jurisdiction must be determined at the time that the act instituting proceedings was filed**"[1001] (emphasis added). Numerous investment treaty tribunals have reached the same conclusion, holding that the relevant time for assessing jurisdiction is the time that the proceedings were instituted.[1002]

c. No "special circumstances" exist in this case

463. Claimant argues that "special circumstances" within the meaning of *Aven* apply in this case, because the sale of its investment to PLI Huaura was "a distressed transfer" caused by actions attributable to Peru.[1003]

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[999] Claimant's Reply, ¶¶ 401–403. *See also*, Canada's NDP Submission, ¶¶ 3–4.

[1000] Peru's Counter-Memorial, ¶ 352.

[1001] **RLA-0159**, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ, Judgment, 14 February 2002 (Guillaume, Shi, *et al.*), ¶ 26.

[1002] *See, e.g.*, **RLA-0011**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999 (Buergenthal, Bernadini, Bucher), ¶ 31; **RLA-0012**, *National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006 (Sureda, Debevoise, Garro), ¶¶ 114–118; **RLA-0013**, *Blusun S.A., et al. v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (Crawford, Alexandrov, Dupuy), ¶ 307; **RLA-0014**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 (Buergenthal, Alvarez, Hossain), ¶ 255.

[1003] Claimant's Reply, ¶ 411.

464. Claimant is incorrect. As explained in detail in **Section II.D** above, and in Peru's Counter-Memorial, the transfer of Claimant's investment to PLI Huaura resulted from (i) Claimant's own failure to properly manage its community relations, in particular with the Parán Community; (ii) Claimant's voluntary entry into risky financing arrangements that left no room for error in the event that the support of local communities for the Invicta Project could not be obtained, or was delayed; and (iii) the actions of PLI Huaura in enforcing its security over the shares in Invicta (which actions Claimant itself contended were illegal).[1004]

465. Moreover, as Peru noted in the Counter-Memorial, Claimant obtained a key benefit from the transfer of its shares in Invicta: the release of its liability to PLI Huaura for Claimant's breach of the PPF Agreement, which liability was higher than the value of the Invicta shares.[1005] The value of such shares, according to an independent valuation by PwC, was USD 13.4 million—approximately USD 2 million *less* than the amount of Lupaka's liability to PLI Huaura, which stood at USD 15.9 million.[1006] Thus, Claimant's allegation that the sale of the shares to PLI Huaura under the Share Allocation Agreement was a "distressed transfer"[1007] is contradicted by the evidence.

466. As is evident from the above discussion, there is a degree of overlap in the jurisdictional, merits, and quantum aspects of this case with respect to whether or not there was a direct causal link between Peru's conduct and the transfer of Claimant's shares in Invicta. The fact that there was no direct causation between Peru's conduct and Claimant's loss of its shares in Invicta means not only that there is no jurisdiction *ratione personae* (because the "special circumstances" exception is not met), but also that Claimant's expropriation claim must be dismissed on the merits (because, as explained in **Sections IV** and **V** below, Peru would not have caused the deprivation

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[1004] Peru's Counter-Memorial, ¶¶ 310–348.

[1005] **Ex. AC-0018**, Mutual Release, 22 July 2020, § 5(a)(iii). *See also* Peru's Counter-Memorial, ¶ 364.

[1006] **Ex. R-0193**, Share Allocation Agreement, Clause 3; **Ex. C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., *et al.*, Notice of Enforcement, 24 July 2019, p. 2.

[1007] Claimant's Reply, ¶ 411.

of Claimant's investment). The legal analysis in either case would be the same, but the nature of the jurisdictional finding means that the Tribunal would be required to dismiss *all* claims—including those that do not require a showing of deprivation of the investment.

B. The Tribunal lacks jurisdiction *ratione materiae* because Claimant did not provide a waiver from Invicta.

467. Peru established in the Counter-Memorial that the Tribunal also lacks jurisdiction due to Claimant's failure to comply with the waiver requirement under Article 823.1(e) of the Treaty ("**Waiver Requirement**"). To recall, the Waiver Requirement provides as follows:

> **A disputing investor may submit a claim to arbitration under Article 819 only if: . . . the disputing investor and, where the claim is for loss or damage to an interest in an enterprise** of the other Party that is a juridical person **that the investor owns or controls directly or indirectly [here, Invicta], the enterprise, waive their right to initiate or continue** before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, **any proceedings with respect to the measure** of the disputing Party that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.[1008] (Emphasis added)

468. Claimant does not dispute either (i) that its claim is "for loss or damage to an interest in an enterprise," namely Invicta, or (ii) that it did not provide such a waiver. Instead, Claimant attempts to justify the omission by invoking Article 823.5 of the Treaty, which provides an exception to the Waiver Requirement where "a disputing Party has deprived a disputing investor of control of an enterprise."[1009] For the reasons explained below, Claimant's argument lacks merit.

[1008] **RLA-0010**, Treaty, Art. 823.1(e).

[1009] Claimant's Reply, ¶¶ 415–416.

469. Article 823.5 does not exempt Claimant from the requirement to provide a waiver from Invicta because Peru "has [not] deprived a disputing investor [here, Claimant] of control of an enterprise [here, Invicta]." As an initial matter, Claimant's argument appears self-servingly to change the terms of the Treaty—and consequently the applicable legal standard. Instead of demonstrating that Peru "deprived" Claimant of "control of an enterprise [i.e., Invicta]," as required under Treaty Article 823.5, Claimant asserts merely that Peru's acts and omissions vis-à-vis the Project "**resulted in** the Claimant's loss of control over IMC" (emphasis added).[1010] This distinction in terminology—"deprived" v. "resulted in"—is significant. In order to show that Peru "deprived" Claimant of its investment, Claimant would need to show more direct causation than if the requirement were merely to show that Peru's actions somehow "resulted in" Claimant's loss. The latter is a much more diffuse standard, and one in which the chain of causation can be more remote.

470. Claimant's attempt to loosen the standard under the Waiver Requirement and thereby evade the effects of such requirement runs counter to the rulings of investment tribunals, which have consistently held that waiver requirements should be construed strictly.[1011] As the tribunal in *Thunderbird v. Mexico* noted in relation to the waiver requirements in NAFTA, which are almost identical to those under the Treaty,[1012] such requirements are "conditions precedent to the submission of a claim to arbitration.

[1010] Claimant's Reply, ¶ 416.

[1011] *See, e.g.*, **RLA-0171**, *Canfor Corporation and others v. United States of America*, UNCITRAL, Decision of Preliminary Question, 6 June 2006 (van den Berg, Mestral, Robinson), ¶ 237 ("On the basis of its review, the Tribunal believes that the drafters of the NAFTA sought to avoid concurrent or parallel proceedings. For example, Article 1121(1)(b) and Article 1121(2)(b) require an investor to waive its 'right to initiate. . .any proceedings with respect to the measure of the disputing Party that is alleged to be a breach.'"); **RLA-0190**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Processings, 26 June 2002 (Crawford, Civiletti, Magallón), ¶ 27 ("No doubt the concern of the NAFTA parties in inserting Article 1121 was to achieve finality of decision and to avoid multiplicity of proceedings").

[1012] *See* **RLA-0172**, North American Free Trade Agreement, 17 December 1992, Arts. 1121.1–1121.2.

One cannot therefore treat lightly the failure by a party to comply with those conditions"[1013] (emphasis added).

471. In any event, Claimant has not met either the legal standard pursuant to the actual terms of Article 823.5 or Claimant's fabricated standard. It is a well-established principle that investors bear the burden of showing that the tribunal has jurisdiction over their claims. This principle is confirmed by, among others, the case of *Cortec Mining v. Kenya*, in which the tribunal noted that:

> [t]he Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends.[1014]

472. Claimant's arguments in relation to the Waiver Requirement fall well short of meeting such burden of proof. In response to Peru's argument, Claimant simply proffers a conclusory argument that "Peru's acts and omissions vis-à-vis the Project resulted in the Claimant's loss of control over IMC and with it, its investment in Peru," without demonstrating that Peru's acts and omissions did in fact result in the loss of control by Claimant of Invicta.[1015] By contrast, despite not bearing the relevant burden of proof, Peru has affirmatively demonstrated that it did *not* deprive Claimant of its

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[1013] **RLA-0053**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 (van den Berg, Ariosa, Wälde), ¶ 115.

[1014] **RLA-0160**, *Cortec Mining Kenya Ltd., et al. v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018 (Binnie, Dharmananda, Stern), ¶ 250. *See also* **RLA-0157**, *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction, 30 June 2011 (Tomka, Kaplan, Thomas), ¶ 98 ("The burden of proof to establish the facts supporting its claim to standing lies with the Claimant"); **RLA-0161**, *ICS Inspection and Control Services Ltd. (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (Dupuy, Lalonde, Torres Bernárdez), ¶ 280 ("The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.").

[1015] Claimant's Reply, ¶ 416.

control of Invicta,[1016] And that instead Claimant lost control of Invicta due to Claimant's own actions and those of its creditor, PLI Huaura.[1017]

473. For the foregoing reasons, Claimant has failed to establish that it can properly invoke the Treaty Article 823.5 exception to the Waiver Requirement. Accordingly, Claimant's failure to provide a waiver on behalf of Invicta deprives the Tribunal of jurisdiction *ratione materiae*.

474. Finally, Peru notes that there are similar overlapping jurisdictional, merits, and quantum issues in relation to the Waiver Requirement as there are in relation to the "special circumstances" exception referred to in *Aven* above. That is so because the exception to the Waiver Requirement advocated by Claimant would apply only if Claimant shows that Peru "deprived" it of its shares in Invicta, an issue that also goes to the merits of Claimant's expropriation claim, as well as to causation (and thus damages). Specifically, if Claimant fails to establish that Peru deprived it of its ownership of Invicta, its expropriation claim must be dismissed for lack of causation. Thus, the finding that Claimant has failed to establish deprivation of its shares would have two separate legal consequences: *first*, it would lead to the finding that the Tribunal lacks jurisdiction (because Claimant would not meet the exception to the Waiver Requirement); *second*, it would lead to the dismissal of Claimant's expropriation and damages claims (because Peru's conduct did not cause the loss of the investment). Given that lack of jurisdiction means that the Tribunal cannot—and need not—reach a finding on merits and quantum, the first legal consequence of Claimant's failure to establish deprivation of its shares takes precedence and trumps the second legal consequence. The finding that the Tribunal lacks jurisdiction would require the dismissal of *all* other claims.

[1016] *See* Peru's Counter-Memorial, § V.B.1. *See also infra* Section V.A.

[1017] *See* Peru's Counter-Memorial, § V.B.1. *See also infra* Section V.A.

IV. CLAIMANT'S CLAIMS LACK LEGAL MERIT

A. The actions of Parán Community members are not attributable to Peru

475. Claimant argues that Peru is liable for the actions of members of the Parán Community.[1018] However, as Peru showed in the Counter-Memorial and further elaborates below, Claimant is wrong and its arguments must be dismissed.

476. It bears recalling at the outset the outlandish nature of the proposition that Claimant is making in this case, namely that the actions of a rural or indigenous community are attributable to a State under public international law. As Peru noted in the Counter-Memorial, Claimant has been unable to identify a single precedent from any international court or tribunal (or even any domestic court, whether in Peru or anywhere else) that has reached such a conclusion.[1019]

477. The lack of authorities to support Claimant's case on attribution is unsurprising. As explained in detail in the remainder of this section, rural or indigenous communities do not form part of the State apparatus, and the rights that they enjoy do not reflect a delegation or conferral of State power, including under any rule, principle or theory under public international law. Nor does a State have effective control over them. Such communities therefore do not fall into any of the recognized categories of individuals or entities whose actions are attributable to the State for purposes of public international law.

478. Moreover, Peru respectfully submits that any finding by the Tribunal that rural or indigenous community actions are indeed attributable to the State—absent effective control—would set a dangerous precedent. States all over the world have made significant efforts over the last half century to develop international law tools and mechanisms to ensure that the rights of such communities are properly respected. Such progress has been marked by a number of significant milestones, including but not limited to: (i) the International Labor Organization Convention 169 on Indigenous

[1018] Claimant's Memorial, § 4.1; Claimant's Reply, § 9.2.

[1019] Peru's Counter-Memorial, ¶ 400.

and Tribal Peoples of 1989 ("**ILO Convention 169**"), and (ii) the United Nations Declaration on the Rights of Indigenous Peoples of 2007 ("**UNDRIP**"), which was approved by a majority of 143 votes at the UN General Assembly (including Peru,[1020] with Canada later issuing its endorsement of such declaration).[1021] The acknowledgement of special rights under these international law instruments, as well as under the domestic laws adopted by States to implement such instruments, represent important steps towards the recognition of indigenous rights worldwide. Notably, it is precisely laws of that nature, adopted by Peru—for example, the General Law of Rural Communities,[1022] General Law on *Rondas Campesinas*,[1023] and provisions of the Peruvian Constitution recognizing the rights of rural communities[1024]—that Claimant now invokes to argue that the actions of the Parán Community are attributable to the State and, on that basis, to demand compensation.[1025] Such a claim, if upheld, could have a deleterious effect on States' efforts to uphold the rights of rural and indigenous communities. Furthermore, given how many States have within their borders communities with that special status, a finding of attribution of the actions of such a community could give rise to a host of investor-State claims from investors whose projects face firm opposition from those communities.

479. Turning to the specifics of the Parties' respective positions on attribution, it is not in dispute that Claimant's argument can only succeed if the relevant actions of members of the Parán Community are attributable to Peru as a matter of public international law.[1026] Both Parties also agree that the relevant customary international law rules regarding the attribution of acts to a State are reflected in Articles 4-11 of the

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[1020] **RLA-0078**, *UNDRIP*, Voting Record, 13 September 2007.

[1021] **Ex. R-0100**, "*Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples,*" Government of Canada, 10 May 2016.

[1022] **Ex. R-0052**, Law No. 24656, General Law of Rural Communities, 13 April 1987.

[1023] **Ex. R-0116**, Law No. 27908, 6 January 2003.

[1024] **Ex. C-0023**, Political Constitution of Peru, 29 December 1993 ("**Constitution**"), Art. 149.

[1025] *See, e.g.*, Claimant's Reply, ¶¶ 478–486.

[1026] *See, e.g.*, Peru's Counter-Memorial, ¶ 384; Claimant's Memorial, ¶ 237; Claimant's Reply, ¶ 418.

International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**").[1027]

480. In the Memorial, Claimant relied on ILC Article 5, which codifies the principle that a State is liable for the actions of individuals or entities who are "empowered by the law of th[e] State to exercise elements of the governmental authority . . . provided the person or entity is acting in that capacity in the particular instance."[1028] This principle entails two requirements: (i) that the entity in question is empowered under the State's law to exercise elements of governmental authority; and (ii) that such entity was actually exercising the relevant authority when carrying out the relevant acts.[1029] According to Claimant, both of these requirements are satisfied in relation to the alleged actions of Parán Community members, and in particular the Parán Community's *Rondas Campesinas*. However, Peru demonstrated in the Counter-Memorial that Claimant's contention is without merit, as the alleged actions of Parán Community members and its *Rondas Campesinas* do *not* meet either element of attribution under ILC Article 5.[1030]

481. *First*, rural or indigenous communities such as the Parán Community are not "empowered to exercise elements of governmental authority." Rather, they tend to be recognized by States as having a special status outside the bounds of the State's apparatus, due to their deep historical and cultural connection with the land on which they reside.[1031] Such recognition by States does not involve the delegation or conferral of sovereign powers.[1032]

482. Consistent with the above principles, the Parán Community, like other rural communities (*comunidades campesinas*) in Peru, enjoys a certain degree of autonomy as

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[1027] Claimant's Memorial, ¶ 238; Peru's Counter-Memorial, ¶ 385.

[1028] **CLA-0003**, International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"), Art. 5.

[1029] *See also*, Canada's NDP Submission, ¶¶ 12-13.

[1030] Peru's Counter-Memorial, § IV.A.

[1031] Peru's Counter-Memorial, ¶¶ 406–417.

[1032] Peru's Counter-Memorial, ¶¶ 407–409.

a matter of Peruvian law.[1033] For example, it enjoys certain special rights and powers with respect to the administration of community matters within its territory; however, it does not exercise governmental functions.[1034] While Claimant makes much of the fact that the Parán Community, like many other rural communities, has formed certain rural patrols (*Rondas Campesinas*), such patrols do not perform any governmental function. Rather, the *Rondas Campesinas* act as extrajudicial conciliators with respect to a limited range of community issues, and may only act with respect to disputes arising within a rural community's territory.[1035]

483. Even assuming, for the sake of argument, that the above rights and powers could be considered "elements of governmental authority" conferred by the State (quod non), they would not be attributable to Peru, as they do not meet the second limb of the test under ILC Article 5, namely that the acts in question must have been carried out in the exercise of governmental authority.[1036] In this case, the Parán Community members' actions that form the basis of Claimant's claim—viz., the June 2018 Protest and the Access Road Protest—fall so far outside the scope of any powers and rights of the Parán Community and of the *Rondas Campesinas* that they cannot reasonably be deemed to have been carried out in the exercise of governmental authority.[1037]

484. In the Reply, no doubt mindful of the gaping flaws in its theory on attribution, Claimant changed tack. It narrowed the scope of its reliance on ILC Article 5 to include only the actions of the *Rondas Campesinas*, rather than those of other members of the Parán Community, or of the Parán Community as a whole. More strikingly, Claimant trotted out an entirely different legal basis for its (still flawed) theory. Whereas previously Claimant had relied solely on the principles enshrined in ILC Article 5,[1038]

[1033] **Ex. C-0023**, Constitution, Art. 89. *See also* Peru's Counter-Memorial, ¶ 419.

[1034] Peru's Counter-Memorial, ¶¶ 427–437.

[1035] **Ex. R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003, Art. 13. *See also* Peru's Counter-Memorial, ¶ 425.

[1036] **CLA-0003**, ILC Articles, Art. 5.

[1037] Peru's Counter-Memorial, ¶¶ 456–459, 467–475.

[1038] Claimant did mention ILC Article 4 in passing in its Request for Arbitration (*see* ¶ 57 and fn. 36), but then did not rely on, or even refer to, such Article in the Memorial.

in the Reply Claimant invoked ILC Article 4, which codifies the principle that a State is liable for the actions of its organs.[1039] Claimant purports to rely on ILC Article 4 to advance an entirely new argument: that the Parán Community is a "territorial unit" of Peru, and therefore an organ of the Peruvian State.[1040]

485. Much as with its original case on attribution, Claimant's reconfigured case suffers from a multitude of factual and legal flaws. In the sections that follow, Peru will address *seriatim* each of those flaws, and will demonstrate that the actions of the Páran Community, including its *Rondas Campesinas*, are *not* attributable to Peru. Specifically, Peru will demonstrate that:

a. The legal requirements for attribution under the principles enshrined in ILC Article 4 require Claimant to demonstrate that the Parán Community is either (i) structurally part of the State as a matter of Peruvian law, or (ii) has a relationship of complete dependence on the State (**Section IV.A.1**);

b. The Parán Community is not an organ of the State for purposes of ILC Article 4. Contrary to Claimant's arguments, rural communities are not "territorial units" of the Peruvian State (**Section IV.A.2**);

c. Claimant's new arguments under ILC Article 5 in relation to the *Rondas Campesinas* fail because the *Rondas Campesinas* are not empowered to exercise elements of governmental authority (**Section IV.A.3**); and

d. In any event, the alleged actions of the *Rondas Campesinas* were not carried out in exercise of any actual or ostensible governmental authority, and are therefore not attributable to Peru under either ILC Article 4 or ILC Article 5 (**Section IV.A.4**).

1. The legal requirements for attribution under ILC Article 4

486. ILC Article 4 provides as follows:

[1039] **CLA-0003**, ILC Articles, Art. 4.

[1040] Claimant's Reply, ¶¶ 433–448.

> 1. **The conduct of any State organ shall be considered an act of that State under international law,** whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity **which has that status in accordance with the internal law of the State**. (Emphasis added)

487. ILC Article 4 is typically referred to as the "structural" test for attribution, since it focuses on the position of the entity in question within the apparatus of the State (rather than the entity's *functions*, which are more relevant for purposes of ILC Article 5).[1041] As noted in the ILC Commentary, ILC Article 4 encompasses "all the individual or collective entities which make up the organization of the State and act on its behalf."[1042]

488. For the purpose of identifying the individuals or entities that constitute an organ of the State, the starting point is the classification of the entity as a matter of domestic law.[1043] An entity that has that status under domestic law is a *de jure* State organ.

489. In the event that an entity is *not* classified as an organ under domestic law, it may nonetheless fall within the scope of ILC Article 4 if it qualifies as a *de facto* organ for purposes of international law.[1044] However, international law imposes a very high

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[1041] *See* **RLA-0024**(bis), Crawford, p. 127. *See also* **RLA-0025**, *Jan de Nul N.V., et al., v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 157 ("In order for an act to be attributed to a State, it must have a close link to the State. Such a link can result from the fact that the person performing the act is part of the State's organic structure (Article 4 of the ILC Articles), or exercises governmental powers specific to the State in relation with this act, even if it is a separate entity (Article 5 of the ILC Articles)").

[1042] **CLA-0018**, Draft Articles on Responsibility of States for Internationally Wrongful Acts (with commentaries), United Nations, 2001 ("**ILC Commentary**"), p. 40, ¶ 1.

[1043] **RLA-0025**, *Jan de Nul N.V., et al., v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 160 ("To determine whether an entity is a State organ, one must first look to domestic law"). *See also* **RLA-0024**(bis), Crawford, p. 115 (explaining that Article 4 "operates largely though not exclusively by *renvoi* to the internal constitutional and legal arrangements of the state in question").

[1044] **RLA-0024**(bis), Crawford, pp. 124–126.

threshold for establishing that an entity is a *de facto* organ. As the ICJ noted in the *Bosnian Genocide* case,

> persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, **provided that in fact the persons, groups or entities act in "complete dependence" on the State**, of which they are ultimately merely the instrument.[1045] (Emphasis added)

490. The mere existence of some link between the entity and the State in question is insufficient to meet the above test of "complete dependence." Rather, the "reality of the relationship" must be such that the entity is "so closely attached [to the State] as to appear to be nothing more than its agent."[1046] It is irrelevant in this context whether the entity has some type of participation in the public sector, or is subject to some degree of State control or oversight.[1047]

491. Where an entity has separate legal personality from the State, there is a strong presumption that it is *not* a State organ—either *de jure* or *de facto*. Thus, for example, in *Unión Fenosa v. Egypt,* the Egyptian General Petroleum Corporation—a legal entity with an independent budget and the ability to contract on its own account[1048]—was *not* considered an organ for purposes of ILC Article 4, even though it was denominated under Egyptian law as a public authority.[1049]

[1045] **RLA-0162**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ, Judgment, 26 February 2007 (Higgins, Al-Khasawneh, *et al.*), ¶ 392.

[1046] **RLA-0162**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ, Judgment, 26 February 2007 (Higgins, Al-Khasawneh, *et al.*), ¶ 392.

[1047] **RLA-0163**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 (Veeder, Rowley, Clodfelter), ¶ 9.98; **RLA-0164**, *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 (Bernardini, Pryles, Stern), ¶ 135.

[1048] **RLA-0163**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 (Veeder, Rowley, Clodfelter), ¶ 9.101.

[1049] **RLA-0163**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 (Veeder, Rowley, Clodfelter), ¶ 9.98. *See also* **CLA-0048**, *Bayindir Insaat Turizm*

492. The *Unión Fenosa* case illustrates that even the formal classification of an entity as a public authority is not dispositive. Moreover, and importantly, for conduct to be considered attributable to the State pursuant to ILC Article 4, the individual or entity in question must have been acting in an official capacity.[1050] Accordingly, a State will only be liable for acts carried out in the exercise of actual or ostensible authority.[1051]

2. The Parán Community is not a "territorial unit" of Peru for purposes of ILC Article 4

493. Claimant's rebranded case under ILC Article 4 rests entirely on the notion that the Parán Community is a "territorial unit" of Peru.[1052] However, such notion is entirely misconceived, as explained in the paragraphs that follow.

494. As an initial matter, Claimant asserts that, in the Counter-Memorial, Peru tried to "escape" the conclusion that the Parán Community "fall[s] within the definition of 'territorial units of the State' under Article 4 of the ILC Articles."[1053] That allegation—like so many others from Claimant—is disingenuous; as Peru noted above, in the Memorial Claimant had not relied at all on ILC Article 4—let alone argue that the Parán Community is a territorial unit of Peru. In any event, Claimant's arguments under ILC Article 4 fail because the Parán Community is in fact *not* a territorial unit of Peru.

495. As the ILC Commentary and international case law make clear, the concept of a territorial unit refers to the *political* subdivisions of a State—namely, the constituent

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Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009 (Kaufmann-Kohler, Berman, Böckstiegel), ¶ 119.

[1050] *See, e.g.,* **RLA-0165**, *The Claims of Rosa Gelbtrunk and the "Salvador Commercial Company" et al (El Salvador/USA),* Award, 2 May 1902 (Strong, Dickinson, Castro), p. 477 ("[A] State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, **so far as the acts are done in their official capacity**" (emphasis added)); **RLA-0024**(bis), Crawford, p. 117 ("The commentary to Article 4 makes it clear that responsibility for the acts of state organs is unlimited, **insofar as the act of the organ in question is performed in an official capacity**" (emphasis added)).

[1051] *See* Peru's Counter-Memorial, ¶¶ 461–466.

[1052] *See* Claimant's Reply, ¶¶ 425–448.

[1053] Claimant's Reply, ¶ 442.

provincial, regional, or geographical administrations that, while separate from the centralized government, nonetheless form part of the State.[1054] Such limited scope of the concept of "territorial unit" is confirmed by the fact that all of the cases cited in the ILC Articles in relation to the responsibility of States for territorial units exclusively concern the acts of *federated* States—which Peru is not—or of the regional government of a country.[1055]

496. Investment arbitration tribunals have taken a similar approach to that reflected in the international law cases cited in the ILC Articles, holding that the term "territorial unit" encompasses entities such as provinces and municipalities. For example, the tribunal in the *Stabil v. Russia* case referred to "the acts of [Russia's] **territorial units, such as provinces, constituent states, and municipalities**" (emphasis added).[1056] In a similar vein, leading commentators Dolzer & Schreuer have noted that the "principles of attribution apply to the acts of **territorial units of states, such as provinces and municipalities**" (emphasis added).[1057]

497. None of the above authorities indicate, or even suggest, that rural or indigenous communities could ever be considered territorial units of a State, or indeed any other type of State organ. This is unsurprising, since such a conclusion would be inconsistent with the treatment of indigenous communities under international law. As Peru explained in the Counter-Memorial, indigenous communities have a separate and independent existence from the societal and political framework of the State in which they reside.[1058] They are therefore not structurally part of the State, but rather separate from it. Such differentiation is reflected, for example, in Article 1 of ILO

[1054] *See* **CLA-0018**, ILC Commentary, Art. 4, ¶ 8 ("[T]he principle in article 4 applies equally to organs of the central government and to those of regional or local units").

[1055] *See* multiple cases cited in the ILC Commentary at footnote 117.

[1056] **RLA-0166**, *Stabil LLC, et al v. Russian Federation*, PCA Case No. 2015-35, Final Award, 12 April 2019 (Kaufmann Kohler, Price, Stern), ¶ 168.

[1057] **RLA-0001**, Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), p. 218.

[1058] Peru's Counter-Memorial, ¶ 407.

Convention 169 (on the Rights of Indigenous Peoples), which provides that indigenous communities are

> tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.[1059]

498. Indigenous communities are more properly viewed as "collective non-state actors."[1060] To the extent that indigenous communities regulate themselves through their own autonomous institutions—as is the case in many, if not most, States—such independence reflects the "recognition of an inherent [i]ndigenous authority" that "do[es] not rely on delegated authority from settler government legislation."[1061] Accordingly, the relationship between States and indigenous communities is one of co-operation and partnership, rather than one of delegated or decentralized authority.[1062]

499. Peruvian law is consistent with the above international law principles, and treats "rural communities" (such as the Parán Community) as analogous, for legal purposes, to indigenous communities. Specifically, Article 89 of the Peruvian Constitution distinguishes between two types of community: (i) **native communities**, which originate in the Amazonian region of Peru; and (ii) **rural communities**, which originate in the Andes or coastal region of Peru.[1063] Peruvian law—concretely, Law

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[1059] **RLA-0028**, ILO Convention 169, Art. 1.

[1060] **RLA-0042**, William Worster, "*Relative Legal Personality of Non-State Actors*," BROOKLYN JOURNAL OF INTERNATIONAL LAW (2016), pp. 225–226.

[1061] **RLA-0029**, Benjamin Richardson, *et al.*, "*Chapter 11: Indigenous Self-Determination and the State*," INDIGENOUS PEOPLES AND THE LAW (2009), p. 293.

[1062] *See, e.g.*, **RLA-0030**, UNDRIP, Preamble ("[T]reaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for **a strengthened partnership between indigenous peoples and States**" (emphasis added)). *See also id.*, Art. 15 ("States shall take effective measures, **in consultation and cooperation** with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society" (emphasis added)).

[1063] **Ex. C-0023**, Constitution, Art. 89.

No. 29785 on the Right to Prior Consultation with Indigenous or Native peoples ("**Prior Consultations Law**"), which implemented the prior consultation rights afforded to indigenous communities under ILO Convention 169—clearly establishes that both rural communities and native communities may fall within the ambit of "indigenous peoples" under ILO Convention 169:

> Rural or Andean communities and native communities or Amazonian peoples may also be identified as indigenous or original peoples, in accordance with the criteria set forth in this article. The names used to designate indigenous or original peoples do not alter their nature or their collective rights.[1064]

500. This fact has also been confirmed by Peru's rural communities expert, Daniel Vela.[1065]

501. Further, Peruvian law expressly establishes that rural communities are *not* part of the State's structure, but rather are:

> organizations of public interest, with legal existence and legal personality, integrated by families that inhabit and control certain territories, linked by ancestral, social, economic and cultural ties, expressed in communal land ownership, community work, mutual assistance, democratic government and the development of multisectoral activities, whose purposes are aimed at full realization of its members and of the country.[1066]

502. As noted above, the fact that rural communities such as the Parán Community have separate legal personality[1067] is sufficient to create a strong presumption that the Parán Community is not an organ of the State.[1068]

[1064] **Ex. R-0151**, Law No. 29785, 6 September 2011, Art. 7.

[1065] Vela Report, ¶ 51.

[1066] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 2.

[1067] **Ex. C-0023**, Constitution, Art. 89 ("**The Rural and Native Communities have legal personality and are juridical persons**. **They are autonomous** in their organization, in communal work and in the use and free disposal of their lands, as well as in economic and administrative matters, within the framework established by law" (emphasis added)).

[1068] *See, e.g.*, **RLA-0163**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 (Veeder, Rowley, Clodfelter), ¶ 9.94. *See also* **RLA-0167**, *Muhammet Çap &*

503. Other evidence similarly confirms that rural communities are *not* considered State organs under Peruvian law. As Peruvian law expert Prof. Meini confirmed in his first expert report, Article 425 of the Peruvian Criminal Code sets out a closed list of entities and persons that are considered *de jure* organs under Peruvian law, and for whose actions the State may be held criminally liable.[1069] Rural communities do not appear on that list (consistent with the fact that they are not *de jure* organs under Peruvian law). Prof. Meini explained in his independent expert report that the leaders of the Parán Community are not government officials, either *de jure* or *de facto*, and concluded that their acts cannot be attributed to the Peruvian State.[1070]

504. The fact that rural communities are not State organs is confirmed in Peru's Constitution, Title IV of which addresses "The Structure of the State." Such Title comprises a detailed set of provisions on the powers and responsibilities of Peru's various State organs, including those in the executive, legislative and judicial branches.[1071] However, such provisions make no mention of rural (or native) communities.

505. Nor are rural communities "territorial units" of the Peruvian State, as Claimant contends.[1072] Chapter XIV of Peru's Constitution, titled "Decentralization, regions and municipalities," provides for a level of decentralization in Peru's political system, and designates certain territorial units as part of Peru's State apparatus.[1073] For example, Article 189 of the Constitution provides that

> **[t]he territory** of the Republic **is divided into regions, departments, provinces and districts**, in whose constituencies

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Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Award, 4 May 2021 (Lew, Hanotiau, de Chazournes), ¶ 755.

[1069] **Ex. IMM-0011**, Legislative Decree No. 635, Criminal Code of Peru, Art. 425; Meini Report, ¶¶ 62–63.

[1070] Meini Report, ¶¶ 64–67.

[1071] **Ex. C-0023**, Constitution, Arts. 90–199.

[1072] Claimant's Reply, § 9.2.1.3.

[1073] **Ex. C-0023**, Constitution, Chapter XIV title and Arts. 189–199.

> the unitary government is exercised in a decentralized and deconcentrated manner.[1074] (Emphasis added)

506. Thus, it is the decentralized government authorities referred to in Article 189 that constitute the territorial units of the Peruvian State, not rural communities such as the Parán Community.

507. Claimant advances a series of baseless arguments in an effort to support its theory that the Parán Community is a "territorial unit" of the Peruvian State, and that the Parán Community's actions are therefore attributable to Peru under ILC Article 4. Notably, despite the fact that the starting point of the relevant analysis is domestic law, Claimant does not cite to any Peruvian law authorities in support of its position that the Parán Community is a "territorial unit" of Peru. Claimant's first argument in this regard is that none of the international legal instruments that are relied on by Peru to illustrate the unique status of indigenous communities—for example ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples—contain any rules *against* the attribution of indigenous communities' actions to the State. That submission, in addition to being facile, misses the point. The above-mentioned international instruments serve to demonstrate that indigenous communities are *not* structurally part of the State in which they reside, and that therefore the actions of such communities are not attributable to the State under ILC Article 4. As noted above, the same principles apply to rural and native communities under Peruvian law.

508. Moreover, Claimant's focus on the lack of any explicit prohibition of attribution of indigenous communities' acts to the State is an attempt to distract from Claimant's own failure to point to any legal authority *in favour* of attribution to the State of such acts. As Peru noted in the Counter-Memorial, (i) Claimant failed to identify any such legal authority in the Memorial; and (ii) investment treaty tribunals that have addressed the relationship between indigenous communities and States—such as those in *Bear Creek v. Peru* and *Von Pezold v. Zimbabwe*—have affirmatively concluded

[1074] **Ex. C-0023**, Constitution, Chapter XIV title and Art. 189.

that indigenous communities are *not* part of the State.[1075] In the Reply, Claimant has not redressed its failure to provide relevant precedents or other legal authorities, for the attribution to the State of acts of rural or indigenous communities. Nor has Claimant addressed either of the cases referred to above (*Bear Creek* and *Von Pezold*). Its argument therefore remains bereft of any legal support.

509. Claimant also argues that the Parán Community "does not qualify as an indigenous community under Peruvian law, nor under international law", and that therefore none of the international law instruments cited by Peru in relation to indigenous peoples are applicable.[1076] This argument is based on a report by MINEM stating that "the indicators indicated by the Ministry of Culture do not concur, to determine as a reference the existence of an indigenous people" in the area of the Invicta Mine.[1077] Claimant's argument misses the point. As explained above, Peruvian law distinguishes between rural communities (*comunidades campesinas*) and native communities *(comunidades nativas*), on the one hand, and indigenous peoples, on the other hand. The Political Constitution of Peru recognizes that rural and native communities have independent legal personality and expressly provides that the State respects their "cultural identity."[1078] Article 89 of the Constitution establishes these communities

> are autonomous in their organization, in communal work and in the use and free disposal of their lands, as well as in economic

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[1075] *See* **RLA-0026**, *Bernhard von Pezold, et al., v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012 (Fortier, Williams, Chen), ¶ 52 ("[The tribunals are] not persuaded on the basis of the materials before them that the functions of the chiefs of the indigenous communities are functions of the government"). **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 666 ("[t]he indigenous communities, irrespective whether they were in favor of or against the Project, are not respondent party in this arbitration. Rather, the State of Peru and its Government are Respondent and it is their conduct which the Tribunal has to decide upon").

[1076] Claimant's Reply, ¶ 435.

[1077] **Ex. C-0009**, Report No. 127-2014-MEM-DGM-DTM/PM, Resolution Approving Mining Plan, MINEM, 30 December 2014, p. 6, ¶ 4.6.

[1078] **Ex. C-0023**, Constitution, Art. 89.

> and administrative matters, within the framework established by law.[1079]

510. Indigenous peoples also enjoy special protection under Peruvian law. For example, they are afforded the right to prior consultation under the Prior Consultations Law, subject to meeting certain criteria, which are set out in more detail in guidelines issued by the Peruvian Ministry of Culture and include factors such as the community's ancestral and spiritual connection with their territory, historical continuity to pre-colonial times and the languages spoken by the community.[1080]

511. Ultimately, the MINEM concluded that because the main language spoken by the Rural Communities was Spanish, they did not meet the criteria for the prior consultation requirement under the Prior Consultations Law. However, such conclusion does not alter the fact that there were undoubtedly rural communities in the area (including the Parán Community), and that such communities enjoy autonomy and specialized rights under Peruvian law that are analogous to those acknowledged by States worldwide in relation to indigenous communities, including through ILO Convention 169.

512. According to Claimant, "several commentators" have noted that communities with "governmental functions over a specific autonomous area" are akin to decentralized municipalities.[1081] However, Claimant was able to identify only one such "commentator"—a private practitioner named Klint Cowan who published a paper in relation to the accountability of American Indian Tribes for human rights violations.[1082] Claimant relies on Mr. Cowan's opinion that an international tribunal should find human rights violations committed by American Indian tribes attributable to the State under ILC Article 4. Mr. Cowan's analysis is flawed and inapposite, for several reasons.

[1079] **Ex. C-0023**, Constitution, Art. 89.

[1080] **Ex. C-0626**, Law No. 29785, Prior Consultation Act, 31 August 2012, Art. 7.

[1081] Claimant's Reply, ¶ 439.

[1082] *See* Claimant's Reply, ¶ 439; **CLA-0111**, K. Cowan, "International Responsibility for Human Rights Violations by American Indian Tribes", *Yale Human Rights & Developments L.J.*, Vol. 9, p. 34.

513. *First*, Mr. Cowan incorrectly dismisses the importance of domestic law in the analysis of attribution under ILC Article 4, arguing that the attributability of American Indian tribes' acts "does not depend on the domestic characterization of tribal powers."[1083] While Mr. Cowan is correct that attribution does not depend on the position of a particular entity within the State's structure,[1084] this does not render domestic law altogether irrelevant. As noted above, and to the contrary, domestic law is the starting point of the analysis.[1085] If an entity is not considered a *de jure* State organ under domestic law, a very high threshold—namely, "complete dependence"—applies for finding that the entity is a *de facto* organ of the State.[1086] Mr. Cowan does not even attempt to show either (i) that American tribes are State organs pursuant to US law; or (ii) that the high threshold of "complete dependence" is met in the case of American Indian tribes.

514. *Second*, Mr. Cowan explicitly acknowledges that there is extensive jurisprudence in the United States holding that tribal powers are "non-governmental" in nature.[1087] Such jurisprudence even indicates that tribal powers in the United States are analogous to those of private associations or landowners.[1088] The foregoing significantly undermines Mr. Cowan's argument that American Indian tribes should be considered State organs of the United States. Claimant's arguments in relation to

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[1083] **CLA-0111**, K. Cowan, "International Responsibility for Human Rights Violations by American Indian Tribes", *Yale Human Rights & Developments L.J.*, Vol. 9, p. 32.

[1084] **CLA-0003**, ILC Articles, Art. 4(1).

[1085] **RLA-0025**, *Jan de Nul N.V., et al., v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 160 ("To determine whether an entity is a State organ, one must first look to domestic law"). *See also* **RLA-0024**(bis), Crawford, p. 115 (explaining that Article 4 "operates largely though not exclusively by *renvoi* to the internal constitutional and legal arrangements of the state in question").

[1086] **RLA-0162**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment, 26 February 2007 (Higgins, Al-Khasawneh, *et al.*), ¶ 392.

[1087] **CLA-0111**, K. Cowan, "International Responsibility for Human Rights Violations by American Indian Tribes", *Yale Human Rights & Developments L.J.*, Vol. 9, pp. 34–35.

[1088] **CLA-0111**, K. Cowan, "International Responsibility for Human Rights Violations by American Indian Tribes", *Yale Human Rights & Developments L.J.*, Vol. 9, pp. 34–35.

rural communities are similarly undermined by relevant norms and principles of Peruvian law. As Peru noted in the Counter-Memorial, the majority of the rights enjoyed by rural communities in Peru relate to the administration of private property rights, rather than to the endowment or exercise of any public power.[1089]

515. *Third*, Mr. Cowan admits that American Indian tribes are treated as sovereign nations, and are not subject to the US Constitution.[1090] Contrary to Mr. Cowan's analysis, such distinction reflects the fact that American Indian tribes are separate from the US State apparatus, rather than part of it. Thus, the actions of American Indian tribes are in principle not attributable to the United States under ILC Article 4.

516. Claimant also relies on commentary by Djamchid Momtaz, Professor of International Law University of Tehran, who argues that the term "State organ" under ILC Article 5 encompasses "territorial communities."[1091] However, Professor Momtaz does not explain what he means by the term "territorial communities," nor does he state (or even suggest) that the term encompasses indigenous communities. In any event, as noted above, rural communities in Peru do *not* fall within the definition of a territorial community for purposes of attribution under international law.

517. Claimant argues that it is irrelevant for the purpose of ILC Article 4 that the Peruvian State cannot interfere with the autonomy of rural communities, or that the State would incur liability if it did so.[1092] Again, Claimant is mistaken. As noted above, where, as here, an entity is not a *de jure* State organ under domestic law, it will only be considered a *de facto* organ if there is a relationship of "complete dependence" to the

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[1089] Peru's Counter-Memorial, ¶ 423; **Ex. R-0052**, Law No. 24656, 13 April 1987, Arts. 4, 7, 10, 11.

[1090] **CLA-0111**, K. Cowan, "International Responsibility for Human Rights Violations by American Indian Tribes", *Yale Human Rights & Developments L.J.*, Vol. 9, pp. 6, 26.

[1091] **CLA-0109**, D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", in *The Law of International Responsibility*, p. 239.

[1092] Claimant's Reply, ¶ 445.

State.[1093] In a situation where the State cannot interfere with the activities of the entity in question, and would in fact attract liability if it did—as is the case here[1094]—there is no relationship of complete dependence.

518. For all of the foregoing reasons, Claimant has failed to establish that the Parán Community is a "territorial unit" of the Peruvian State. Claimant's sole basis for relying on ILC Article 4 therefore fails.

519. In a final attempt to somehow hoist its newfangled theory under ILC Article 4, Claimant posits as relevant the alleged fact that the acts in this case were carried out by the Parán Community *as a whole*, rather than by individual Parán Community members.[1095] However, Claimant's argument fails for three reasons. *First*, even if it were true (quod non) that the relevant conduct was committed by the Parán Community as a whole, that would not alter the attribution analysis, because the Parán Community as a whole is likewise not empowered to exercise government functions, and thus neither the Community writ large nor its individual members could have acted in a governmental capacity.

520. *Second,* Claimant's assertion that the actions were committed by the Parán Community as a whole is not supported by the evidence on which Claimant relies. For example, Claimant argues that the Parán Community members conducting the Access Road Protest were *Rondas Campesinas* that were responding to direct orders from the President of the Parán Community.[1096] In support of this argument, Claimant relies on a report by its community relations manager, SSS.[1097] However, such report does not even mention the *Rondas Campesinas* or the Access Road Protest; it merely notes that, at a meeting of the Parán Community assembly, such assembly "did not

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[1093] **RLA-0162**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment, 26 February 2007 (Higgins, Al-Khasawneh, *et al.*), ¶ 392.

[1094] Meini Report, ¶ 50.

[1095] Claimant's Reply, ¶¶ 449–457.

[1096] Claimant's Reply, ¶ 454.

[1097] **Ex. C-0162**, SSS, Monthly Report, Project, August 2018.

define any action against the company."[1098] In addition, Claimant relies on an unsupported paragraph [redacted] which simply avers that the Access Road Protest was initiated by the *Rondas Campesinas*; however such paragraph does not indicate either (i) the basis for concluding that the individuals initiating the Access Road Protest were themselves *ronderos*; or (ii) that such individuals were acting on orders from the President of the Parán Community.[1099]

521. *Third*, even if the Parán Community as a whole were indeed empowered to exercise elements of governmental authority, as Claimant argues (again, quod non), Claimant has not established that the individual community members who actually carried out the alleged actions (on which Claimant's claims are based) were acting in the exercise of such authority.[1100]

3. The Rondas Campesinas of the Parán Community are not empowered to exercise governmental authority

522. In the Reply, Claimant narrowed the scope of its arguments under ILC Article 5 to encompass only actions taken by the Parán Community's *Rondas Campesinas*, as opposed to those of the Parán Community more broadly.[1101] Claimant thus appears to have abandoned its previous arguments that the Parán Community (as a whole), and its "elected officials," are empowered with elements of governmental authority.[1102] In any event, as Peru explained in the Counter-Memorial, such arguments are untenable.[1103]

523. Claimant's narrowed argument that the actions of the *Rondas Campesinas* are attributable to Peru under ILC Article 5 likewise fails.

[1098] **Ex. C-0162**, SSS, Monthly Report, Project, August 2018, p. 3.

[1099] [redacted]

[1100] Peru's Counter-Memorial, ¶¶ 402, 448.

[1101] *See* Claimant's Reply, ¶¶ 479–536, which relate exclusively to the *Rondas Campesinas*, not the Parán Community as a whole.

[1102] *See* Claimant's Memorial, ¶ 237.

[1103] Peru's Counter-Memorial, ¶¶ 428–448.

524. Peru already established in the Counter-Memorial that neither of the ILC Article 5 requirements discussed above—viz., empowerment to exercise governmental authority and conduct in the exercise of such authority—is met with respect to the *Rondas Campesinas*.[1104] The first of those requirements will be further elaborated in this **Section IV.A.3**, and the second (which applies equally to attribution under ILC Article 4) will be addressed in the next **Section IV.A.4**.

a. The relevant requirements for an entity to be empowered with the exercise of governmental authority, for purposes of ILC Article 5

525. The assessment of whether an entity is empowered with governmental authority must take into account "the particular society in question [i.e., the society of the State in question], its history and traditions."[1105] The relevant case law and commentary to ILC Article 5 has elucidated several factors that are relevant to such assessment: (i) the content of the powers conferred on the entity; (ii) the manner in which the relevant power is conferred; (iii) the purpose of the power, i.e., whether such power is intended to advance sovereign or private objectives; and (iv) the level of accountability the entity has to the State's government when exercising governmental authority.[1106] Applying the above factors to the facts of the instant case confirms that the *Rondas Campesinas* of the Parán Community are *not* empowered with the exercise of governmental functions.

b. The requirements of the first limb of ILC Article 5 are not met with respect to the *Rondas Campesinas*

526. To recall, a rural community has the right to form *Rondas Campesinas* in order to exercise the community's rights of self-defense over its territory and property, and to

[1104] Peru's Counter-Memorial, ¶¶ 442, 447–448, 453–454, 456–459.

[1105] **RLA-0024**(bis), Crawford, p. 129. *See also* Canada's NDP Submission, ¶ 14.

[1106] *See* Peru's Counter-Memorial, ¶ 391; **RLA-0024**(bis), Crawford, pp. 129–131; **CLA-0018**, ILC Commentary, p. 43, ¶ 6.

coordinate with governmental authorities where necessary.[1107] Additionally, *Rondas Campesinas* may act as non-judicial conciliators, but only with respect to a narrow category of property disputes, namely disputes in relation to "possession, usufruct of communal property, property, and the use of the different communal resources."[1108] *Rondas Campesinas* may also only act with respect to matters arising on community territory, and must comply with fundamental rights.[1109]

527. Against that factual background, Peru will apply each of the four factors referenced in the ILC Commentary to Article 5 to the powers of the *Rondas Campesinas*, and will explain why such factors contradict Claimant's thesis that the *Rondas Campesinas* are empowered with governmental authority.

528. Regarding the *first* factor (viz., the *content* of the relevant powers), the *Rondas Campesinas'* powers are expressly extrajudicial as a matter of Peruvian law, and therefore do not connote the exercise of any governmental power. This is confirmed by Article 1 of the Rural Patrols law, which states that *Rondas Campesinas* carry out "**extrajudicial** conciliation functions" (emphasis added).[1110] Similarly, Supreme Decree No. 025-2003-JUS of 29 December 2003, which further regulates the powers of

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[1107] *See* Peru's Counter-Memorial, ¶ 425; **Ex. R-0116**, Law No. 27908, 6 January 2003, Art. 1 (providing that the Rondas Campesinas carry out "functions related to security and peace within their territorial area"), Art. 8 ("In the exercise of their duties, the Rural Patrols coordinate with the political, police, and municipal authorities, the Ombudsman's Office, and others, within the framework of national legislation. In addition, they may establish coordination with rural social organizations and private entities within their local or regional area or nationally"). *See also* **Ex. R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003, Art. 12 (a) (providing that one of the functions of the *Rondas Campesinas* is to "[c]ontribute to the defense of the physical, moral, and cultural integrity of the members of the rural community, native community, village, or other population center, in order to maintain the peace and security of the population, as well as to contribute to the progress of its people"); *id.*, Art. 12(h) (providing that the *Rondas Campesinas* "[c]oordinate, within the framework of national legislation, with the political, police, municipal, and regional authorities, the representatives of the Ombudsman's Office, and other agencies of public administration").

[1108] **Ex. R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003, Art. 13; **Ex. C-0023**, Constitution, Art. 149.

[1109] Peru's Counter-Memorial, ¶¶ 425–426.

[1110] **Ex. R-0116**, Law No. 27908, 6 January 2003, Art. 1.

rural communities, provides that *Rondas Campesinas* "collaborate in the resolution of conflicts and perform functions involving **extrajudicial conciliation**" (emphasis added).[1111]

529. The non-judicial nature of the powers exercised by *Rondas Campesinas* is underscored by the fact that they are empowered to exercise such powers "in accordance with **customary law**" (emphasis added), i.e., the law developed by the customs and traditions of the rural community in question.[1112] *Rondas Campesinas* therefore have no authority or mandate to apply, administer, or enforce Peruvian law.

530. Furthermore, the powers of *Rondas Campesinas* are *communal* in nature and relate only to the collective, private property rights exercised by rural communities under Peruvian law. This fact is reflected in the Rural Patrols Law, which provides that "[t]he Rural Patrols [are] to be recognized as an autonomous and democratic form of communal organization."[1113] Similarly, Peru's Supreme Court confirmed in its binding opinion of 13 November 2009 that

> **[t]he *Rondas Campesinas* . . .form part of a communal system of their own and,** strictly speaking, **constitute a form of communal authority** in the places or rural areas of the country where they exist.[1114] (Emphasis added)

531. Regarding the *second* of the above factors (viz., the *manner of conferral* of the relevant powers), the powers of *Rondas Campesinas* under Peruvian law do not reflect any conferral at all of powers of, by, or from the State. On the contrary, the *Rondas Campesinas'* powers merely reflect a recognition of the inherent rights and prerogatives of rural communities to regulate their own affairs. Again, this understanding was confirmed by the Peruvian Supreme Court in its opinion of 13 November 2009, which explained that *Rondas Campesinas* were traditionally formed

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[1111] **Ex. R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003, Art. 3.

[1112] **Ex. C-0023**, Constitution, Art. 149.

[1113] **Ex. R-0116**, Law No. 27908, 6 January 2003, Art. 1.

[1114] **Ex. C-0599**, Supreme Court, Plenary Resolution No. 1-2009/CJ-116, 3 November 2009, p. 4, ¶ 7.

by "decision of the peasants [i.e., rural community members] themselves or neighbors of a sector, estancia or hamlet, as a communal or collective need for protection."[1115] The Supreme Court explained that, rather than reflecting an emanation of State power, the *Rondas Campesinas* are

> expressions of the rural world—of some sectors of the rural population in more or less focused geographical areas—, they have common characteristics in their organisation, they follow certain traditions and react to threats to their environment with certain common patterns—they organise life in the countryside in a certain way—, and they have defined—although with relative heterogeneity—the corresponding measures and procedures based on their particular conceptions.[1116]

532. The recognition of the power that rural communities enjoy under Peruvian law to form *Rondas Campesinas* reflects the principle enshrined in ILO Convention 169 and UNDRIP according to which States must respect the rights of indigenous communities to establish and maintain their traditional institutions, free from State interference.[1117] For example, Article 2.2(b) of ILO Convention 169 provides that States must take "measures for . . . promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions."[1118] Article 5 of UNDRIP similarly provides that

> [i]ndigenous peoples have the right to maintain and strengthen their **distinct political, legal, economic, social and cultural institutions**, while retaining their right to participate fully, if

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[1115] **Ex. C-0599**, Supreme Court, Plenary Resolution No. 1-2009/CJ-116, 3 November 2009, p. 4, ¶ 7.

[1116] **Ex. C-0599**, Supreme Court, Plenary Resolution No. 1-2009/CJ-116, 3 November 2009, p. 5, ¶ 7.

[1117] **Ex. C-0599**, Supreme Court, Plenary Resolution No. 1-2009/CJ-116, 3 November 2009, p. 3, ¶ 6 ("The purpose of the Convention, and also of the Declaration, is to ensure respect both for the right of these peoples to their social and cultural identity, their customs and traditions, and their institutions (Article 2(b) of the Convention, Article 5 of the Declaration), and for the individual right of their members to participate in this way of life without discrimination. The Declaration precisely stipulates that they have the right to promote, develop and maintain their structures, institutions and their own customs, spirituality, traditions, procedures, practices and, where they exist, customs or legal systems, in accordance with international human rights standards").

[1118] **RLA-0028**, ILO Convention 169, Art. 2.2(b).

> they so choose, in the political, economic, social and cultural life of the State.[1119] (Emphasis added)

533. Thus, the fact that Peru has taken certain measures to formalize the right of rural communities to form *Rondas Campesinas* does not constitute a delegation of any State authority that falls within the scope of ILC Article 5. Rather, such measures reflect the recognition by Peru—along with the parties to ILO Convention 169 and UNDRIP—of the need to protect rural or indigenous communities' rights to express their traditions and maintain their institutions outside the purview of the State.

534. The *third* of the factors referred to in the ILC Commentary (viz., the *purpose* of the relevant powers) weighs against attribution here for similar reasons. As noted above, the purpose of the recognition of *Rondas Campesinas*' powers is *not* to delegate or confer governmental power upon such groups, but rather simply to provide them with means to ensure respect for the relevant communities' customs, traditions, and institutions. In other words, whereas the delegation of authority in many cases encompassed by ILC Article 5 serves to extend the reach of the State into additional areas through the delegation of governmental powers to private entities, the recognition of rural community institutions such as the *Rondas Campesinas* does the opposite: it *diminishes* the reach of the State in the affairs of such communities.

535. The *fourth* and final factor relevant for the analysis under ILC Article 5 (viz., *accountability* of the individual or entity to the State) weighs heavily against Claimant's attribution case. As Peru demonstrated in the Counter-Memorial, rural communities in Peru are not politically or organizationally accountable to the central government for their actions.[1120] They enjoy extensive autonomy and in fact the Peruvian central government would attract liability if it were to interfere with the affairs of rural communities.[1121] With respect to *Rondas Campesinas*, such communal organizational

[1119] **RLA-0030**, UNDRIP, Art. 5.

[1120] Peru's Counter-Memorial, ¶ 434.

[1121] Meini Report, ¶ 50.

bodies are not subject to instructions, oversight, or supervision from the State.[1122] Moreover, the *Rondas Campesinas* cannot be held liable for the offence of usurpation of public office under Article 361 of the Peruvian Criminal Code for the simple reason that they are *not* carrying out any public office. As the Supreme Court confirmed, they are merely carrying out "a constitutionally recognised and guaranteed communal jurisdictional function."[1123]

536. Claimant's arguments with respect to the alleged accountability of *Rondas Campesinas* to the State are misguided and irrelevant. For example, Claimant relies on the commentary of Hannah Tonkin, an international criminal lawyer, to argue that a lack of accountability mechanisms strengthens the rationale for attribution.[1124] However, such commentary relates to accountability mechanisms in contracts between States and private military contractors in armed conflicts, and is therefore wholly inapposite to the instant case.[1125]

c. The Claimant's arguments in relation to the alleged powers of the *Rondas Campesinas* lack merit

537. Claimant appears to concede that the four factors pertaining to ILC Article 5 analyzed above are relevant to the assessment of whether the actions of the *Rondas Campesinas* are attributable to Peru.[1126] However, Claimant argues that all such factors warrant the attribution of such actions to the Peruvian State. Claimant is incorrect, as Peru will demonstrate in the paragraphs that follow.

538. In support of its arguments in relation to the four factors referred to above, Claimant relies on (i) the role of *Rondas Campesinas* as conciliators, including under Article 149 of the Peruvian Constitution; (ii) the fact that *Rondas Campesinas* have the right to

[1122] **Ex. C-0023**, Constitution, Art. 89; Vela Report, ¶ 48, fn. 9; *see also* Meini Report, ¶ 52.

[1123] **Ex. C-0599**, Supreme Court, Plenary Resolution No. 1-2009/CJ-116, 3 November 2009, p. 9, ¶ 13.

[1124] Claimant's Reply, ¶ 528.

[1125] **CLA-0113**, H. Tonkin, "State Control Over Private Military and Security Companies in Armed Conflict", Chapter 3, Cambridge Studies in International and Comparative Law (CUP, 2011), p. 103.

[1126] *See* Claimant's Reply, ¶ 512.

coordinate with law enforcement authorities under the Regulations on the Organisation and Functions of the Ministry of the Interior ("**MININTER Regulations**"); and (iii) the fact that certain *Rondas Campesinas* were given weapons by State authorities in the context of counter-measures against the Shining Path (*Sendero Luminoso*) terrorist movement in the 1990s.[1127] However, none of these three facts indicate that the *Rondas Campesinas* are empowered with governmental authority.

539. With regard to the role of *Rondas Campesinas* as conciliators, as noted above, such role does not involve a conferral of judicial power. Rather, *Rondas Campesinas* act simply as extrajudicial conciliators (i.e., outside the bounds of the State's apparatus) and moreover they apply customary law, not Peruvian law.[1128]

540. Claimant makes much of the fact that the *Rondas Campesinas'* powers under Article 149 of the Peruvian Constitution are included in a section headed "Judicial Power."[1129] However, the provisions in the relevant section of the Constitution make it clear that the *Rondas Campesinas* do not constitute a part of the judicial system (whether by delegation or otherwise). For example, Article 143 provides that

> [t]he Judicial Branch is made up of jurisdictional bodies that administer justice on behalf of the Nation. The jurisdictional bodies are: the Supreme Court of Justice and the other courts and tribunals determined.[1130]

541. The provision thus does not include the *Rondas Campesinas* amongst the nation's "judicial" bodies. And as the ILC Commentaries make clear, "the internal law in question must **specifically authorize** the conduct as involving the exercise of public authority" (emphasis added).[1131] The only bodies that "administer justice on behalf of

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[1127] Claimant's Reply, ¶¶ 478–499.

[1128] **Ex. R-0116**, Law No. 27908, 6 January 2003, Art. 1; **Ex. R-0103**; Supreme Decree No. 025-2003-JUS, 29 December 2003, Art. 3; **Ex. C-0023**, Constitution, Art. 149.

[1129] *See* Claimant's Reply, ¶ 478.

[1130] **Ex. C-0023**, Constitution, Art. 143.

[1131] **CLA-0018**, ILC Commentary, p. 43, ¶ 7.

[Peru]" are the specific jurisdictional bodies listed in Article 143 of the Peruvian Constitution, and they do not include *Rondas Campesinas*. This means *a fortiori* that the *Rondas Campesinas* are not authorized under Peruvian law to exercise judicial powers, contrary to what Claimant asserts.

542. In any event, even if the *Rondas Campesinas* did in fact have some judicial function (quod non), this would not be sufficient in and of itself to establish attributability under international law. As Peru noted in the Counter-Memorial, the *von Pezold* Tribunal rejected an argument that the actions of indigenous community leaders in Zimbabwe should be attributed to the State, even though such leaders had been appointed by the government and acted as justices of the peace.[1132] Claimant did not respond to this argument in the Reply.

543. Claimant relies on a statement from the Peruvian Supreme Court opinion of 13 November 2009 which refers to the fact that *Rondas Campesinas* sometimes detain individuals pursuant to customary law.[1133] However, as the Supreme Court emphasized, when *Rondas Campesinas* detain individuals they do so not in the exercise of any judicial power but rather merely pursuant to the *Rondas Campesinas*' "**communal** jurisdictional function" (emphasis added).[1134] In other words, detentions by *Rondas Campesinas* relate to the collective private rights of rural communities, rather than to any government or public function. Indeed, such powers of arrest are analogous to the rights of "citizen's arrest" that exist in many jurisdictions, whereby private citizens may arrest a person who is in the act of committing a crime. It cannot be credibly argued that such concept connotes any delegation of governmental authority, or that the actions of a citizen in carrying out a citizens' arrest are attributable to a State.

[1132] Peru's Counter-Memorial, ¶ 405; **RLA-0026**, *Bernhard von Pezold, et al., v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012 (Fortier, Williams, Chen), ¶ 52.

[1133] Claimant's Reply, ¶ 519; **Ex. C-0599**, Supreme Court, Plenary Resolution No. 1-2009/CJ-116, 3 November 2009, pp. 9–10, ¶ 13.

[1134] **Ex. C-0599**, Supreme Court, Plenary Resolution No. 1-2009/CJ-116, 3 November 2009, p. 9, ¶ 13.

544. Claimant also argues that the powers of the *Rondas Campesinas* under Article 149 of the Constitution arose "to fill the institutional vacuum left by the near-total absence of State institutions" in the areas where rural communities reside.[1135] While it is possible, in extreme circumstances, for conduct to be attributable to the State in cases where persons act in the absence or default of official authority, such scenario falls not within the purview of ILC Article 5 but rather of ILC Article 9, which provides as follows:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.[1136]

545. However, Claimant has not attempted to rely on ILC Article 9. In any event, any such reliance would have been misplaced. As the ILC Commentary makes clear, ILC Article 9 will apply only in "exceptional case[s]" and "rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative."[1137] The circumstances must strictly "call for" persons or groups of persons to exercise government functions, which is a stringent test.[1138] None of those circumstances were present in the instant case.

546. Claimant's reliance on the MININTER Regulations is similarly unavailing. Such regulations provide for a degree of cooperation between *Rondas Campesinas* and certain law enforcement agencies.[1139] However, the mere fact that an individual or

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[1135] Claimant's Reply, ¶ 524.

[1136] **CLA-0003**, ILC Articles, Art. 9.

[1137] **CLA-0018**, ILC Commentary, p. 49, ¶ 1.

[1138] **CLA-0018**, ILC Commentary, p. 49, ¶ 1.

[1139] *See, e.g.*, **Ex. C-0609**, Supreme Decree No. 004-2017-IN, Approval of Regulation on the Organization and Functions of the Ministry of the Interior, Art. 87(3) (providing that one of the duties of the *Rondas Campesinas* Directorate of the MININTER is to "[r]aise awareness, train,

entity cooperates with public authorities does not mean that it exercises governmental functions. Indeed, government agencies all over the world regularly co-operate with the private sector in the provision of various public services (for example, transport and provision of utilities), yet such cooperation does not amount to a delegation of sovereign powers.

547. Finally, Claimant points to the fact that certain *Rondas Campesinas* were given weapons by the central government in the context of the latter's fight against the *Sendero Luminoso* terrorist movement in the 1990s.[1140] Claimant relies primarily on the Regulations on the Organisation and Functions of Self-defence Committees of 8 November 1991 ("**Self-Defence Committee Regulations**"), and in particular Article 7 thereof, which provides that self-defense committees formed under those regulations are permitted to use weapons "in accordance with the law, subject to prior authorization by the Joint Command of the Armed Forces."[1141] However, as Article 3 of such regulations makes clear, the rights of rural communities and other organizations to form self-defense committees related purely to

> carry[ing] out self-defence activities against crime, prevent[ing] the infiltration of terrorism and illicit drug trafficking, defend[ing] themselves against their attacks and support[ing] the Peruvian Armed Forces and National Police in the tasks of pacification and socio-economic development of the areas in which they operate.[1142]

548. Thus, such committees only had the right to act in self-defense of the interests of communities in specifically defined circumstances, rather than any State purpose. In addition, they could play only a supporting role in relation to the Peruvian Armed

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promote, advise and coordinate, with the *Rondas Campesinas* and Rural and Native Communities, their intervention for the peaceful resolution of conflicts within their communal jurisdiction, respecting their uses and customs; as well as promote the strengthening and formalisation of the *Rondas Campesinas* and Rural and Native Communities at the national level").

[1140] Claimant's Reply, ¶¶ 497–499.

[1141] **Ex. C-0615**, Supreme Decree No. 077-92-DE, Regulations on the Organisation and Functions of the Auto-Defence Committees, 8 November 1981, Art. 7.

[1142] **Ex. C-0615**, Supreme Decree No. 077-92-DE, Regulations on the Organisation and Functions of the Auto-Defence Committees, 8 November 1981, Art. 3.

Forces and National Police, and did not replace the functions of those organizations. The Self-Defence Committee Regulations also expressly provided that the powers of Self-Defence Committees were "of a transitory nature and their validity is limited to the needs of self-defence as established in the previous paragraph [i.e. paragraph of Article 3 cited above]."[1143] Such transitory, limited powers—dating from more than 30 years ago—do not constitute the exercise of elements of governmental authority. Nor does the fact that some rural communities are still in possession of the firearms provided to them for purposes of self-defense mean that such communities exercise governmental authority. Such firearms could only ever be used for the narrow purposes listed above. Moreover, as explained in Section II.C.3 above, the basis for which such weapons were provided has now long since expired, as demonstrated by the fact that, over the last 20 years, Peru has been carrying out a successful process for voluntary disarmament of the *Rondas Campesinas* who still possessed those weapons.[1144]

4. The actions of the Parán Community members and the Rondas Campesinas were not carried out in exercise of any actual or ostensible authority

549. Even assuming that the *Rondas Campesinas* had indeed been empowered to exercise governmental authority (quod non), the actions of which Claimant complains—namely the June 2018 Protest and Access Road Protest—were so removed from the scope of any authority exercised by the *Rondas Campesinas* that they can only be categorized as private acts.

550. To recall, both ILC Article 4 and ILC Article 5 will only apply to actions of an individual or entity that are carried out in an official capacity.[1145]

[1143] **Ex. C-0615**, Supreme Decree No. 077-92-DE, Regulations on the Organisation and Functions of the Auto-Defence Committees, 8 November 1981, Art. 3.

[1144] *See* § II.C above.

[1145] *See* **CLA-0018**, ILC Commentary, p. 43, ¶ 3 (providing that, in relation to ILC Article 4, "the State is responsible for the conduct of its own organs, **acting in that capacity**" (emphasis added)). **CLA-0003**, ILC Articles, Art. 5(2) (providing that ILC Article 5 will apply to the actions of individuals or entities who are empowered to exercise governmental authority "provided the person or entity is acting in that capacity in the particular instance").

551. As Peru explained in the Counter-Memorial, the relevant case law in relation to the above principle delineates two categories of conduct: (i) official conduct that is *ultra vires* (which ILC Article 7 confirms is still attributable to the State);[1146] and (ii) acts that are so far removed from the scope of the official's authority that they should be assimilated to the acts of private individuals rather than of the State.[1147] Former International Law Commission Special Rapporteur and ICJ Judge James Crawford noted that the touchstone to determining which of the two categories an act falls into is whether or not the individual or entity was exercising *ostensible* governmental authority.[1148] In other words, if the relevant entity was "cloaked by the authority provided to the entity by the state" when carrying out the relevant conduct, such conduct will be attributable to the State.[1149] However, if the individual was *not* cloaked with such authority, its actions will be considered merely private acts, and accordingly not attributable to the State. [1150]

552. The question of whether an individual or entity is exercising ostensible authority is an objective test, which requires a reasonable conclusion that the entity or individual was

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[1146] **CLA-0003**, ILC Articles, Art. 7 ("The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions").

[1147] Peru's Counter-Memorial, ¶¶ 460–466. *See* **RLA-0031**, *Estate of Jean-Baptiste Caire (France) v. United Mexican State*s, Decision No. 33, 7 June 1929, p. 529. *See also id.*, p. 530 ("But in order to accept this so-called objective liability of the State for acts committed by its officials or bodies outside the limits of their competence, it is necessary that they have acted at least to all appearances as competent officials or bodies, or that in acting they have used powers or means appropriate to their official capacity"); **RLA-0032**, *Francisco Mallén (United Mexican States) v. United States of America*, Decision, 27 April 1927, ¶¶ 4–7.

[1148] **RLA-0024**(bis), Crawford, p. 137. *See also* **CLA-0018**, ILC Commentary, p. 46, ¶ 7.

[1149] **RLA-0024**(bis), Crawford, p. 137.

[1150] *See, e.g.*, **RLA-0033**, *Kenneth P. Yeager v. Islamic Republic of Iran*, IUSCT Case No. 10199, Award, 2 November 1987 (Böckstiegel, Holtzmann, Mostafavi), ¶¶ 64–67 (finding that the actions of an Iran Air official in extorting a bribe for an air ticket were not attributable to Iran, because they were undertaken purely for private gain, whereas the actions of Revolutionary Guardsmen in seizing money belonging to the claimant *were* attributable to the State, because they were carried out in exercise of purported governmental authority to carry out the functions of immigration, customs or security officers).

in fact cloaked with State authority.[1151] While this is an objective test, the knowledge of the person claiming that actions were carried out in ostensible authority is also relevant. As one commentator notes in relation to the attributability of acts of corruption, "whether the corrupt act will be attributable to the State depends on the state of knowledge of the party making the claim—it is this state of knowledge that will partly determine whether the act in question was still taken in an official capacity."[1152] Thus, if a person knows that the relevant government official does not have authority to carry out the relevant act, they cannot later allege that the official had ostensible authority.[1153]

553. In the instant case, no credible argument can be made that the alleged actions of the Parán Community (including the *Ronda Campesina* of that community), which form

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[1151] **RLA-0168**, James Crawford & Paul Mertenskötter, "*Chapter 3: The Use of the ILC's Attribution Rules in Investment Arbitration*," BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (2015), p. 41 ("[T]he question is not whether the actor can cloak herself with authority, but whether it is reasonable to assume that the principal has cloaked the actor with the necessary authority").

[1152] **RLA-0168**, James Crawford & Paul Mertenskötter, "*Chapter 3: The Use of the ILC's Attribution Rules in Investment Arbitration*," BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (2015), pp. 39-40, *citing* **RLA-0169**, Aloysius P. Llamzon, "*Chapter 10: State Responsibility for Corruption: The Attribution Asymmetry*," CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014), pp. 261–263.

[1153] **RLA-0169**, Aloysius P. Llamzon, "*Chapter 10: State Responsibility for Corruption: The Attribution Asymmetry*," CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014), p. 277 ("[I]f the public official accepts a bribe, the State of that corrupted official is arguably not responsible towards the party that paid the bribe **because such corruption amounted to purely private conduct and was known to be so by the investor, and thus cannot be attributed to the host State**. (The host State may therefore invoke corruption as a defence.) . . . The host State may nonetheless be responsible towards third parties who did not know of or participate in the corrupt acts at issue" (emphasis added)). *See also* **RLA-0007**, *Noble Ventures, Inc. v. Romania,* ICSID Case No. ARB/01/11, Award, 12 October 2005 (Böckstiegel, Lever, Dupuy), ¶ 81 ("Even if one were to regard some of the acts of SOF or APAPS as being ultra vires, the result would be the same. This is because of the generally recognized rule recorded in Art. 7 2001 ILC Draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. Since, **from the Claimant's perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so**, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown" (emphasis added)).

the basis of Claimant's claim, were carried out in the exercise of official authority, be it actual or ostensible. To recall, such *alleged* actions comprise: (i) the forcible entry to the Invicta mine site; (ii) the detention of Invicta personnel; (iii) violent threats to Invicta's community relations team; (iv) the beating of Invicta's staff; (v) the creation of falsified minutes that Invicta personnel were coerced to sign; (vi) the expulsion of Invicta's staff from the mine site; (vii) an armed blockade of the main access road to the mine through the territory of another rural community (the Lacsanga Community); and (viii) the use of weapons to guard the blockade.[1154] As Peru established in the Counter-Memorial, even if the *Rondas Campesinas* were empowered with governmental authority (quod non) all such actions fall so far outside the scope of any authority or power of the *Rondas Campesinas* that they can only be considered to be private acts, and are not attributable to Peru.[1155]

554. There are several reasons that support the above conclusion. *First*, the *Rondas Campesinas* must act in accordance with the law and respect fundamental rights.[1156] The above-mentioned actions of Parán Community members, if true, would have infringed on various fundamental rights enshrined in the Peruvian Constitution, including the rights to physical integrity, property, liberty and security of the person.[1157] This means that such acts could not have been conducted in the exercise of State power.

555. *Second*, the Parán Community's *Rondas Campesinas* only had the power to act in relation to disputes within the territory of the Parán Community itself.[1158] Claimant

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[1154] Claimant's Memorial, ¶¶ 105–107; Claimant's Reply, § 9.3.4.1.

[1155] Peru's Counter-Memorial, ¶¶ 467–474.

[1156] **Ex. C-0023**, Constitution, Art. 149; **Ex. R-0116**, Law No. 27908, 6 January 2003, Art. 1. *See also,* Peru's Counter-Memorial, ¶ 458.

[1157] **Ex. C-0023**, Constitution, Arts. 2(1), 2(16) and 2(24).

[1158] **Ex. C-0023**, Constitution, Art. 149 ("The authorities of the Rural and Native Communities, with the support of the Rural Patrols, may exercise jurisdictional functions **within their territorial scope** in accordance with customary law, provided that they do not violate the fundamental rights of the individual" (emphasis added)); **Ex. R-0116**, Law No. 27908, 6 January 2003, Art. 1 ("The Rural Patrols to be recognized as an autonomous and democratic form of communal

has insisted all along that all of the relevant alleged acts described above occurred on the territory of the Lacsanga Community, rather than that of the Parán Community.

556. *Third*, the powers of the *Rondas Campesinas* to act as extrajudicial conciliators only extends to certain limited categories of property dispute, namely rights of possession, usufruct and use of the community's property and resources.[1159] Forcibly entering and blockading a privately owned mining project, and detaining or beating Invicta personnel, would fall outside the scope of such powers.[1160]

557. *Fourth*, even assuming for the sake of argument that in the context of the June 2018 Protest and Access Road Protest the Parán Community used weapons given to them by the Peruvian army three or four decades ago, such use bore no relation to the purposes for which such weapons were provided, namely the exercise of self-defense rights against the *Sendero Luminoso* terrorist group.

a. Claimant misrepresents and misapplies the relevant legal standard under ILC Article 7

558. In the Memorial, Claimant did not even attempt to show that the Parán Community members' actions were carried out with ostensible authority. Now, in the Reply, in

organization, they can establish dialogue with the State, support the exercise of the jurisdictional functions of the rural and native communities, collaborate in the resolution of conflicts, and carry out extrajudicial conciliation functions, in accordance with the Constitution and the law, as well as functions related to communal security and peace **within their territorial area**" (emphasis added)).

[1159] **Ex. R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003, Arts. 3, 13.

[1160] Claimant argues at ¶ 485 of the Reply that Article 7 of Supreme Decree No. 025-2003-JUS, 29 December 2003 (**Ex. R-0103**) is unlawful because it restricts the powers of the *Rondas Campesinas* through subordinate legislation, whereas those powers are not restricted under the relevant primary legislation, namely Law No. 27908, 6 January 2003, Art. 7 (**Ex. R-0116**). Claimant's argument is based on the opinion of the Peruvian Ombudsman of September 2006 in relation to "State recognition of the *Rondas Campesinas*" (**Ex. C-0600**, p. 19). However, the opinion of the Ombudsman is not legally binding or an authoritative statement of Peruvian law. In any event, as the Ombudsman notes "it will be up to the communal justice system and, eventually, to the common justice system, not to apply it" (**Ex. C-0600**, p. 19). Thus, unless and until Art. 7 of Supreme Decree No. 025-2003-JUS, 29 December 2003 is disapplied by the Peruvian courts or is revoked it remains reflective of the current state of the authority of *Rondas Campesinas* Peruvian law.

response to the above arguments, Claimant has belatedly set out its case in relation to this issue. However, Claimant has both misstated and misapplied the law.

559. Claimant argues that, pursuant to ILC Article 7,

a. Peru must prove that the actions complained of "cannot be viewed as the actions the Parán Community and its *Ronda Campesina* as a whole, but simply that of private individuals who happen to be members of a State organ with delegated powers under Articles 4 and 5 of the ILC Articles respectively;" and

b. "attribution will only be excluded if the acts of the individuals involved can be viewed as 'purely private in nature.'"[1161]

560. These arguments suffer from a number of fatal flaws. *First*, Claimant subverts the burden of proof by arguing that "Respondent must prove" that the relevant acts are not attributable.[1162] This is incorrect. Pursuant to the well-established principle *onus probandi actori incumbit*, the burden is on Claimant to show that the relevant acts are attributable to Peru, not the other way around.[1163]

561. *Second*, Claimant ignores the baseline requirement under ILC Articles 4 and 5 that acts will only be attributable to the State if they are carried out in the exercise of actual or ostensible authority.[1164] Claimant's purported test for non-attribution—that the acts must be "purely private" in nature—elides this requirement and fabricates a new and completely baseless legal test. According to Claimant, actions of officials or entities

[1161] Claimant's Reply, ¶ 544.

[1162] Claimant's Reply, ¶ 544.

[1163] **CLA-0100**, *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (El-Kosheri, Goldman, Asante), ¶ 56 ("The international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion") and ¶ 58 (holding that foreign investors bore the burden to establish that "governmental forces" had caused the alleged destruction of property). *See also* **RLA-0021**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 (Robinson, Jacovides, Rubin), ¶ 311; **RLA-0022**, *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999 (Böckstiegel, Fielding, Giardina), ¶ 84.

[1164] *See* Sections IV.A.1 and IV.A.3.a above.

empowered with governmental authority will always be attributable to the State, except where the relevant officials or entities carry out acts that are "wholly unrelated" to their functions.[1165] However, as both the ILC Commentary and the late Prof. Crawford explain, and as noted above, the distinction between, on the one hand, official but *ultra vires* acts and, on the other hand, acts that are purely private in nature, comes down to whether or not the relevant official or entity acted under cover of ostensible authority—not whether the acts in question were "wholly unrelated" to governmental functions, as Claimant wrongly posits.[1166]

562. Claimant appears to base its purported test on a 1957 report by Special Rapporteur Francisco García Amador to the International Law Commission, in which he illustrated the principle of attribution through examples.[1167] However, the report on which Claimant relies supports Peru's case, not Claimant's, as it notes that criminal acts of officials will not be attributable to the State. The full text of the relevant excerpt of the report, which Claimant omits to quote, reads as follows:

> If the official acted in a capacity wholly unrelated to his office or function and **commits a purely private act, such as homicide, theft or other crime**, then the opinion of learned writers and practice agree unanimously that **the State does not incur any responsibility for the said act**.[1168] (Emphasis added)

[1165] Claimant's Reply, ¶ 555 and § 9.2.3.2.

[1166] **RLA-0024**(bis), Crawford, p. 137 ("Apparently the difference between an *ultra vires* act that invokes state responsibility and a strictly private act that does not is that the former is performed using and cloaked by the authority provided to the entity by the state"); **CLA-0018**, ILC Commentary, commentary on Art. 7, ¶ 7 ("The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been 'carried out by persons cloaked with governmental authority'").

[1167] Claimant's Reply, ¶ 546.

[1168] **CLA-0116**, Special Rapporteur F. V. Garcia Amador, "Second Report on State Responsibility", Yearbook of the International Law Commission, Vol. II(1)A/CN.4/106, 15 February 1957, p. 110, ¶ 11.

563. The full set of draft articles that Mr. García Amador proposed to the International Law Commission in 1961 also set out an express requirement that *ultra vires* acts would only be attributable to the State if they were carried out in ostensible authority.[1169] Claimant's purported test is therefore contradicted by the very authority on which it relies.

564. *Third*, Claimant's argument relies on the conclusory statement that

> in the case of various individuals – who all happen to be members of a given organ or entity – acting in concert in a particular instance, it will be highly unlikely that these individuals acted purely as private citizens and that it was a pure coincidence that all the individuals involved were all members of the same organ or entity.[1170]

565. Claimant's position thus appears to be that, in cases where individuals act together, their actions must always be deemed attributable to the State if such individuals belong to an organ or agency of the State (regardless of whether or not they were in fact acting in the exercise of State authority). This purported legal standard is entirely of Claimant's invention. None of the relevant case law or commentary suggests that the *number* of individuals involved in a particular action in and of itself, is determinative of whether or not such action was carried out under cover of ostensible authority. In fact, if Claimant's theory were correct, this would be an unacceptable expansion of the principles of attribution under public international law.

566. *Fourth*, Claimant misrepresents the relevant case law. For example, Claimant argues that the *Mallén* case, which Peru had cited with respect to ILC Article 7, "did not feature a decision on attribution."[1171] Claimant is mistaken. The ILC Commentary itself cites *Mallén* in relation to the issue of ostensible authority, and notes that the

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[1169] **RLA-0024**(bis), Crawford, Appendix 4 - ILC Draft Articles on State Responsibility, Art. 12(2) ("An act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity").

[1170] Claimant's Reply, ¶ 548.

[1171] Claimant's Reply, ¶ 554.

Mexico-US claims commission held that certain conduct of a US official was attributable to the State.[1172]

567. Claimant also cites the *Caire* case for the proposition that the actions of State officials will *not* be attributable to the State only if "the act in question had no connection whatsoever with his or her official function."[1173] What Claimant neglects to mention, however, is that in the *Caire* case, the French-Mexico Claims Commission clearly established that for an *ultra vires* act to be attributable, it must be carried out in exercise of ostensible authority:

> [I]n order to accept this so-called objective liability of the State for acts committed by its officials or bodies outside the limits of their competence, **it is necessary that they have acted at least to *all appearances* as competent officials or bodies, or that in acting they have used powers or means appropriate to their official capacity**.[1174] (Emphasis added)

568. Thus, once again, Claimant's case is not even supported by Claimant's own authorities.[1175] In conclusion, Claimant advances a flawed articulation of the relevant legal principles in relation to ILC Article 7, and fabricates a new and baseless legal standard (viz., that for the relevant acts to not be attributable to the State, such acts (i) must have been committed by individuals acting alone, and (ii) must have been "wholly unrelated" to the nature of the relevant authority).

b. <u>Claimant's application of the legal principles in relation to ILC Article 7 fails</u>

569. In addition to the glaring errors in Claimant's articulation of the legal standards under public international law, Claimant's application of the law to the facts is riddled with errors, omissions, and misconceptions.

[1172] **CLA-0018**, ILC Commentary, p. 42, ¶ 13.

[1173] Claimant's Reply, ¶ 550.

[1174] **RLA-0031**, *Estate of Jean-Baptiste Caire (France) v. United Mexican State*, Decision No. 33, 7 June 1929, p. 530.

[1175] **RLA-0031**, *Estate of Jean-Baptiste Caire (France) v. United Mexican State*, Decision No. 33, 7 June 1929, p. 529.

570. *First*, Claimant's arguments in relation to ostensible authority relate exclusively to the alleged authority of the *Rondas Campesinas*.[1176] However, as noted above, the actions of the *Rondas Campesinas* only form the subject of Claimant's attribution case under ILC Article 5. Claimant's case in relation to ILC Article 4, by contrast, relates to the actions of the Parán Community as a whole.[1177] Claimant has not even attempted, however, to argue that the actions of the Parán Community as a whole were carried out in an official capacity, as required under ILC Article 4. Claimant's new arguments in relation to ILC Article 4 therefore fail at the threshold.

571. *Second*, as Peru explained in the Counter-Memorial, the actions of the *Rondas Campesinas* that form the basis of Claimant's claims—namely the June 2018 Protest and Access Road Protest—did *not* require the exercise of any governmental authority. Rather, and leaving aside the legality of such actions, any private individual could have acted in a similar manner. As the tribunal in *Jan de Nul v. Egypt* confirmed, in circumstances in which the actions of individuals or entities are not carried out in the exercise of State functions, such actions will not be attributable to the State even if the relevant individuals or entities are empowered with governmental functions.[1178] Thus, for example, the mere fact that a person who commits a robbery happens to be a government official does not mean that such act is attributable to the State, since it was not carried out in the exercise of a government function. In *Jan de Nul*, the Suez Canal Authority—which was an entity empowered with governmental authority[1179]—had refused to grant an extension of time to the investor under a contract for the performance of dredging operations in the Suez Canal. The tribunal considered that such actions were *not* attributable to Egypt, because

> the refusal to grant an extension of time at the time of the tender does not show either that governmental authority was used,

[1176] Claimant's Reply, ¶¶ 556–598, and in particular the table included at ¶ 561.

[1177] Claimant's Reply, ¶¶ 449–457.

[1178] **RLA-0025**, *Jan de Nul N.V., et al., v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 170.

[1179] **RLA-0025**, *Jan de Nul N.V., et al., v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 166.

> irrespective of the reasons for such refusal. **Any private contract partner could have acted in a similar manner**.[1180] (Emphasis added).

Claimant has not addressed the above argument in the Reply.

572. *Third*, the contemporaneous evidence shows that, at the time, Claimant did not consider that the relevant actions of the *Rondas Campesinas* had been carried out under cover of governmental authority, but rather—and to the contrary—in *defiance* of authority. For example, in its criminal complaint of 7 January 2019 following the commencement of the Access Road Protest, Invicta reported an "alleged crime of violence **against the authority** to prevent the exercise of its functions in its aggravated form, **disobedience to authority**, aggravated usurpation, aggravated theft and illegal possession of explosives"[1181] (emphasis added). And similarly, in its complaint to the Sayán Police in relation to the June 2018 Protest, Invicta reported that various Parán Community members entered the mine site "without any authorization" and committed acts of vandalism.[1182]

573. Claimant's correspondence with its creditor PLI Huaura also demonstrates that Claimant did not consider the acts of the *Rondas Campesinas* to be official acts. For example, in a letter to PLI Huaura dated 19 August 2019, Claimant described the impediments that the Access Road Protest was posing to its ability to meet its obligations under the PPF Agreement, and noted that

> Section 14(b) [of the PPF Agreement] imposes an obligation on PLI Huaura to negotiate in good faith to reschedule Delivery obligations **in the event Lupaka is unable to make deliveries as a result of force majeure or an act of state**.[1183] (Emphasis added)

[1180] **RLA-0025**, *Jan de Nul N.V., et al., v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 170.

[1181] **Ex. IMM-0053**, Supplemental Criminal Complaint, 7 January 2019, ¶ 1.

[1182] **Ex. C-0125**, Criminal complaint filed with the Sayán Police by IMC representatives, 20 June 2018, p. 1.

[1183] **Ex. R-0218**, Letter from Lupaka's Legal Counsel (R. Powers) to PLI Huaura (S. Alva), 19 August 2019, p. 3.

Notably, later in the same letter, Claimant characterized the actions of the Parán Community as force majeure, but not as an act of state: "The continuing illegal blockade by community members representing Paran was and is an unforeseeable series of events caused by parties outside of the PPF Agreement, **and therefore constitutes continuing force majeure**"[1184] (emphasis added). This letter therefore shows that, at the time of the relevant actions by the Parán Community and its *Rondas Campesinas*, Claimant itself did not deem such actions "act[s] of state."[1185] In a similar vein, in communications with the MINEM in relation to the final inspection of the mine site prior to exploitation, Claimant requested that such inspection be delayed for reasons of *force majeure*.[1186] Having actively asserted at the time that the relevant actions were not carried out in exercise of any authority, but rather were an event of *force majeure*, Claimant cannot now credibly reverse its position and argue that the relevant actions were conducted under cloak of official authority.[1187]

574. Moreover, if Claimant had genuinely believed that the actions of the *Rondas Campesinas* were carried out in an official capacity or in the exercise of governmental authority, it could have filed criminal actions with the Peruvian criminal courts in relation to (i) abuse of authority (*abuso de autoridad*) under Article 376 of the Peruvian Criminal Code; and/or (ii) abuse of office (*aprovechamiento indebido de cargo*) under

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[1184] **Ex. R-0218**, Letter from Lupaka's Legal Counsel (R. Powers) to PLI Huaura (S. Alva), 19 August 2019, p. 3.

[1185] **Ex. R-0218**, Letter from Lupaka's Legal Counsel (R. Powers) to PLI Huaura (S. Alva), 19 August 2019, p. 3.

[1186] **Ex. C-0011**, Letter from IMC (J. Castañeda) to MINEM (A. Rodriguez), 17 October 2018, p. 1 ("Due to these circumstances of force majeure, we are compelled to request you to suspend, on a temporary basis, the inspection visit that was requested by letter No.2851025"); **Ex. C-0232**, Letter from Invicta Mining Corp. S.A.C. to MINEM (H. Morales), 22 January 2019, p. 1 ("Due to force majeure, which is the blockage of the entrance to our mining operation by the Rural Community of Paran, which has not been resolved to date according to the knowledge of the General Office of Social Management of the MEM, as was the planning of the work that was carried out during December in this regard, is that we request the postponement of the verification visit mentioned above UNTIL FURTHER NOTICE").

[1187] **RLA-0169**, Aloysius P. Llamzon, "*Chapter 10: State Responsibility for Corruption: The Attribution Asymmetry*," CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014), p. 277.

Article 399 of the Peruvian Criminal Code.[1188] The fact that Claimant did not file either type of action confirms that it did not consider that the actions of the *Rondas Campesinas* had been carried out in an official capacity or in the exercise of governmental authority. Nor did Claimant assert at any point in its discussions with the Peruvian Government that preceded this arbitration, nor in its Notice of Dispute, that it considered that the actions of the Parán Community were attributable to Peru.[1189] This fact serves to emphasize that Claimant's current attribution arguments were concocted solely for purposes of this arbitration.

575. *Fourth*, Claimant's argument that the alleged actions of the Parán Community's *Rondas Campesinas* are "closely related to powers conferred to [them]"[1190] is belied by the very evidence on which Claimant relies. Claimant has compiled a table of the alleged actions at issue in this arbitration and of the alleged powers of the *Rondas Campesinas* to which the relevant actions "closely relate[]."[1191] However, Claimant's table does not withstand scrutiny. By way of illustrative example, Claimant argues that the occupation of the Invicta Mine on 19 June 2018 is related to the *Rondas Campesinas'* alleged "[p]ower to carry out inspection and conduct searches over their community territory to ensure the preservation of the environment."[1192] Claimant's submission that the occupation of the Invicta Mine is related to such powers is flawed. Claimant has not cited any legal provision that grants the *Rondas Campesinas* the right to carry out searches or inspections of mining projects. In any event, forcibly entering and occupying a mine site would be well beyond the scope of any right to "carry out inspection and conduct searches . . . to ensure the preservation of the environment."[1193] Moreover, even on Claimant's own case, the relevant "inspection[s]" and "searches" could only be carried out by *Rondas Campesinas* on their

[1188] **Ex. IMM-0011**, Legislative Decree No. 635, Criminal Code of Peru, Arts. 376, 399.

[1189] Notice of Intention, 12 December 2019.

[1190] Claimant's Reply, ¶ 561.

[1191] Claimant's Reply, ¶ 561.

[1192] Claimant's Reply, ¶ 561, table, row 3.

[1193] Claimant's Reply, ¶ 561, table, row 3.

community territory, whereas Claimant itself has consistently held that the occupation of the mine site took place on the land of a different community (viz., Lacsanga).

576. Similarly, Claimant argues that the alleged creation of falsified minutes of the June 2018 Protest and alleged coercion of Invicta's personnel to sign such minutes was "closely related" to "[the *Rondas Campesinas'*] general official duties."[1194] Claimant has not explained, however, what "general official duties" it is referring to, nor has it provided any citation to the source of such alleged duties. In any event, it is difficult to comprehend what official duties could possibly "closely relate" to the creation of false minutes.

577. The other entries in Claimant's table are similarly flawed. To illustrate such flaws, Peru attaches at Annex 1 hereto a version of Claimant's table, supplemented with an additional column that explains why, contrary to Claimant's arguments, each alleged duty of the *Rondas Campesinas* is in fact *not* "closely related" to the alleged actions on which Claimant bases its claim.

578. *Fourth*, Claimant has not shown that the actions of which it complains were actually carried out by the *Rondas Campesinas*. Indeed, Claimant has not even purported to identify which specific members of the Parán Community's *Rondas Campesinas* were supposedly involved in the relevant events. While Claimant states that "the Parán Community's *Ronda Campesina* comprised more than 150 *ronderos*" and purports to exhibit a register of such members, on closer inspection such register actually appears simply to be a list of *all* members of the Parán Community.[1195] Claimant also repeatedly asserts that the Parán Community's *Rondas Campesinas* used weapons in the relevant incidents,[1196] but it has not established that those individuals that used weapons were actually *Ronderos*. For example, Claimant's witness Luis Bravo merely

[1194] Claimant's Reply, ¶ 561, table, row 7.

[1195] Claimant's Reply, ¶ 495; **Ex. C-0551**, SSS, Parán Community *Ronderos* Register (prepared by Marco A. Estrada). The register itself is titled "Registry of the Community of Paran."

[1196] Claimant's Reply, ¶¶ 550, 660(a), 674(a).

notes generally that there were "20 armed gunmen" manning the Access Road Protest, but he does not identify such gunmen as members of the Parán Community's *Rondas Campesinas* (as opposed to other members of the Parán Community, or even individuals from outside that Community).[1197]

579. *Fifth*, while Claimant relies on the draft Operational Plan of the Sayán police force to argue that the Parán Communities' *Rondas Campesinas* were using weapons given to them by the Peruvian army. Claimant's own position is that such weapons were given to the *Rondas Campesinas* in the 1990s to combat terrorism.[1198] Even if, in carrying out the 19 June 2018 Protest and the Access Road Protest, the *Rondas* had in fact used weapons given to them by the Peruvian army (which has not been shown), it seems clear that such weapons were not used to combat terrorism, which was the only authorized use of State-granted weapons). Thus, the weapon use would not have been carried out in the exercise of authority.

580. Moreover, Claimant has advanced no basis on which to presume that all of the Parán Community members who were allegedly using weapons (i) were in fact members of the Parán Community's *Rondas Campesinas*; or (ii) were using weapons given to them by the Peruvian army.

581. *Sixth and finally,* in response to Peru's submission that the actions of the Parán Community were for personal gain rather than any public purpose, Claimant wrongly asserts that this fact is irrelevant to the analysis under ILC Article 7. As the *Yeager* case demonstrates, the fact that the relevant actions are motivated by personal considerations is highly relevant to the analysis of whether actions are attributable to the State. In that case, the Iran US Claims Tribunal examined the actions of an Iran air official in extorting a bribe, and held that there was

> no indication in this case that the Iran Air agent was acting **for any other reason than personal profit**, or that he had passed on the payment to Iran Air. He evidently did not act on behalf or in the interests of Iran Air. **The Tribunal finds, therefore, that this**

[1197] Bravo First Witness Statement, ¶ 80.

[1198] Peru's Counter-Memorial, ¶ 256.

> **agent acted in a private capacity and not in his official capacity as an organ for Iran Air**.[1199] (Emphasis added)

582. Claimant's argument, like its others, therefore fails.

* * *

583. In sum, the evidence in this case shows that the alleged actions of the Parán Community and its *Ronda Campesina* were so far removed from the scope of any official authority actually or allegedly conferred on them that their acts must be considered to be those of private individuals, rather than of State officials. There is no evidence that such actions were carried out under cover of either actual or ostensible authority. Thus, when the relevant legal principles are applied to the facts, the only reasonable conclusion is that the acts of the Parán Community, and the alleged acts of its *Ronda Campesina,* are not attributable to Peru under public international law.

B. Peru has fulfilled its obligation of full protection and security under the CIL MST

584. Claimant argues that Peru breached its obligation under Treaty Article 805.1 to accord to covered investments "treatment in accordance with the customary international law [("**CIL**")] minimum standard of treatment [("**MST**")] of aliens, including . . . full protection and security [("**FPS**")]."[1200] In the Counter-Memorial, Peru demonstrated that Peru fulfilled its FPS obligation under the CIL MST by acting reasonably under the circumstances relevant to the present case.[1201]

585. In the Reply, Claimant invents a series of obligations that it says are part of the FPS obligation, and argues that Peru breached each of these purported obligations. Claimant further provides a laundry list of conduct that Peru allegedly should have taken.[1202] Claimant's claims have a common denominator: they are premised on the contention that Peru was required to use force against the members of the Parán

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[1199] **RLA-0033**, *Kenneth P. Yeager v. Islamic Republic of Iran*, IUSCT Case No. 10199, Award, 2 November 1987 (Böckstiegel, Holtzmann, Mostafavi), ¶ 65.

[1200] **RLA-0010**, Treaty, Art. 805.1.

[1201] *See* Peru's Counter-Memorial, § IV.B.

[1202] Claimant's Reply, ¶¶ 657, 670 674, 678.

Community that expressed their opposition to the mining Project—including through the Access Road Protest. Thus, in order to uphold Claimant's FPS claims, the Tribunal must determine that Peru was required, as a matter of domestic and international law, to use force against the members of the Parán Community. Such a ruling would not be consistent with the CIL MST (which establishes a "floor" of treatment,[1203] and not a requirement to use force), nor would it be justified by the facts of this case.

586. Moreover, the ruling that Claimant asks this Tribunal to adopt would have extraordinary consequences, both within and outside of Peru. A State should not be held liable for concluding, in conformity with its domestic legislation, that the use of force against a rural community—particularly in the context of a social conflict that was still the subject of dialogue—was neither required nor appropriate in the circumstances. Claimant has not even shown that the competent Peruvian authorities were authorized—let alone required—under Peruvian law to use force; nor that if the PNP had been so authorized (quod non), the decision not to use force in *the specific circumstances then present* was contrary to Peruvian laws and regulations.[1204] But even if Claimant had established that the PNP, in exercising its wide discretion to decide whether to use force against the rural community, violated domestic law (quod non), that does not entail State responsibility under international law. In these circumstances, the Tribunal should not hold Peru liable—unless it concludes that such laws and regulations *themselves* constitute an internationally wrongful act. Claimant has not even made that argument, let alone demonstrated that Peruvian laws and regulations concerning the use of force are *de jure* contrary to public international law.

587. In the following sections, Peru will demonstrate (i) that Claimant bears the burden of proving the standard applicable to its claim (see **subsection 1** below); (ii) that the FPS obligation under the CIL MST requires States to exercise due diligence—i.e., to take

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[1203] **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 615. *See also* Claimant's Reply, ¶ 628.

[1204] *See supra* Section II.C.1 (addressing each of the three provisions of Peruvian law invoked by Claimant, and demonstrating that none of those provisions required the police to use force against the Parán Community protesters). *See also* Meini Report, ¶¶ 169–174.

measures that are reasonable under the circumstances (see **subsection 2** below); and (iii) that Peru satisfied that obligation (see **subsection 3** below).

1. Claimant seeks to evade its burden to prove the legal standard applicable to FPS under the CIL MST

588. Treaty Article 805.2 specifies that the concept of "full protection and security" in Article 805.1 "do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[1205]

589. In the Counter-Memorial, Peru showed that Claimant (i) bears the burden of proving the legal standard applicable to its claim; and (ii) has failed to satisfy that burden.[1206] Numerous legal authorities, including ICJ decisions cited by Peru, establish that a party that invokes an alleged rule of CIL has the burden to prove both the rule's existence and its content.[1207] In this respect, and citing ICJ jurisprudence, the *Glamis Gold v. United States* tribunal articulated the proper approach, as follows:

> The question thus becomes: **what does this customary international law minimum standard of treatment require of a State Party vis-à-vis investors of another State Party?** Is it the same as that established in 1926 in *Neer v. Mexico*? Or has Claimant proven that the standard has "evolved"? If it has evolved, what evidence of custom has Claimant provided to the Tribunal to determine its current scope? **As a threshold issue,**

[1205] **RLA-0010**, Treaty, Art. 805.2.

[1206] Peru's Counter-Memorial, § IV.B.1.

[1207] *See* Peru's Counter-Memorial, ¶¶ 480–482 (*citing* **RLA-0080**, *Asylum Case (Colombia v. Peru)*, ICJ, Judgment, 20 November 1950, p. 276; **RLA-0085**, *Case of the S.S. Lotus (France v. Turkey)*, PCIJ Case No. 9, Judgment, 7 September 1927 (Huber, Weiss, Loder), p. 18; **RLA-0081**, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ, Merits Judgment, 16 March 2001, ¶¶ 205, 209; **RLA-0082**, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, ICJ, Judgment, 20 February 1969, ¶ 79).

> **the Tribunal notes that it is Claimant's burden to sufficiently answer each of these questions**.[1208] (Emphasis added)

590. In the Reply, Claimant seems determined to evade—or at least lighten—its burden of proof, resorting to several confused (and confusing) arguments,[1209] none of which have merit. For instance, Claimant takes the position that "[s]ince the existence of the Respondent's obligation to provide [FPS] under [CIL] is not even in dispute, there is nothing further for the Claimant to prove."[1210] Not so: general legal principles, the jurisprudence, as well as common sense, dictate that a claimant alleging a violation must demonstrate the relevant legal standard in order to prove that the State's conduct failed to satisfy such standard.[1211]

591. Claimant further argues that Peru's demand that Claimant satisfy its burden of proof "flouts procedural efficiency"[1212] and that proving CIL would be "not efficient or helpful."[1213] Peru emphatically disagrees. The burden of proof is a fundamental element of due process and, as noted by the ICJ and investment tribunals, a claimant's failure to discharge its burden is fatal to its claims.[1214]

[1208] **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶¶ 600–601. *See also* **RLA-0039**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (Veeder, Rowley, Christopher), Part IV, Ch. C, ¶ 26.

[1209] *See* Claimant's Reply, § 9.3.1.

[1210] Claimant's Reply, ¶ 614.

[1211] *See, e.g.*, **RLA-0080**, *Asylum Case (Colombia v. Peru)*, ICJ, Judgment, 20 November 1950, p. 276 ("The Party which relies on a custom [of international law] must prove that this custom is established in such a manner that it has become binding on the other Party"); **RLA-0003**, *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru,* ICSID Case No. ARB/19/28, Non-Disputing Party Submission of the United States, 19 November 2021 (van den Berg, Tawil, Vinuesa), ¶ 23 ("The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*").

[1212] Claimant's Reply, ¶ 611.

[1213] Claimant's Reply, ¶ 622.

[1214] *See, e.g.*, **RLA-0082**, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, ICJ, Judgment, 20 February 1969, ¶ 79; **RLA-0050**, *Obligation to Negotiate Access to the Pacific Ocean*, ICJ, Award, 1 October 2018, ¶ 162. *See also* Peru's Counter-Memorial, ¶ 480 & fn. 961.

592. Claimant then pivots to the *Windstream v. Canada* award,[1215] in which the tribunal had noted that "it is for each Party to support its position as to the content of the [customary] rule."[1216] The *Windstream* tribunal's reasoning does not relieve Claimant of its burden; to the contrary, *Windstream* confirms that a claimant that alleges that the respondent State's conduct has violated CIL bears the burden "to support its position" by proving that CIL prohibits such conduct.[1217]

593. Unable to escape its *burden* of proof, Claimant seems determined to diminish the *standard* of proof: it argues that a claimant need not produce evidence of State practice or *opinio juris* to substantiate the existence and content of alleged CIL norms.[1218] Claimant's position is that "a party may of course submit whatever legal authorities or evidence it considers appropriate," and that "it is not efficient or helpful to a tribunal for the parties to argue every proposition of law from first principles."[1219] In the face of Claimant's persistent disregard of basic principles of international law, Peru reiterates the established rule that to prove the existence and content of an asserted rule or principle of CIL, a party must prove (i) that such rule or principle has crystallized into widespread and consistent State practice, and (ii) that such State practice flows from a sense of legal obligation (i.e., *opinio juris*).[1220]

[1215] Claimant's Reply, ¶¶ 617–618.

[1216] **CLA-0125**, *Windstream Energy L.L.C. v. Government of Canada*, PCA Case No. 2013/22, Award, 27 September 2022, ¶ 350.

[1217] **CLA-0125**, *Windstream Energy L.L.C. v. Government of Canada*, PCA Case No. 2013/22, Award, 27 September 2022, ¶ 350.

[1218] *See* Claimant's Reply, ¶ 622.

[1219] Claimant's Reply, ¶ 622.

[1220] *See, e.g.*, **RLA-0087**, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ, Judgment, 3 February 2012, ¶ 55 ("[T]he existence of a rule of customary international law requires that there be 'a settled practice' together with opinio juris"); **RLA-0082**, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, ICJ, Judgment, 20 February 1969, ¶¶ 77–78; **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 602. *See also* **RLA-0002**, *Bear Creek* (Canada's NDP Submission), ¶ 9; Canada's NDP Submission, ¶ 17, citing **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 605 (noting that international tribunals' awards can "serve as illustrations of

594. Relying once again on *Windstream*, Claimant insists that it need not produce any such evidence. In *Windstream*, the tribunal accepted that CIL is shown by reference to State practice and *opinio juris*, but observed that, in the case before it, "neither [p]arty [had] produced such evidence."[1221] On that basis, the tribunal concluded that "the [t]ribunal must rely on other, indirect evidence . . . [because] the Tribunal cannot simply declare *non liquet*."[1222] The *Windstream* tribunal took care to clarify the weight to be ascribed to indirect evidence: "This approach is consistent with the approach that the International Court of Justice is required to adopt under Article 38 of its Statute, which provides that the Court may refer to 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'"[1223] Thus, the *Windstream* award does not alter the content of CIL, or either negate or reduce a claimant's burden to produce evidence thereof. Rather, it simply confirms that a claimant bears the burden of proving the content of any alleged rule or principle of CIL that it invokes, and that in the absence of direct evidence a tribunal may rely on indirect evidence in assessing a claimant's claim.

595. In sum, the overwhelming weight of legal authorities support Peru's position that Claimant bears the burden of proving the existence and content of any alleged CIL rules that it claims were violated. Claimant has refused to produce primary evidence of such rules, insists that subsidiary evidence is sufficient, and believes that the burden of identifying and substantiating the content rests with some combination of Peru and

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customary international law if they involve an examination of customary international law", but that they "do not constitute State practice and thus cannot create or prove international law."); **RLA-0193**, *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Transcript of Hearing (16 March 2022) ("***Mamacocha* Transcript (United States' Testimony"**), Thornton, Day 8, Tr. 1487:23-1489:11*)*.

[1221] **CLA-0125**, *Windstream Energy L.L.C. v. Government of Canada*, PCA Case No. 2013/22, Award, 27 September 2022, ¶ 351.

[1222] **CLA-0125**, *Windstream Energy L.L.C. v. Government of Canada*, PCA Case No. 2013/22, Award, 27 September 2022, ¶ 351.

[1223] **CLA-0125**, *Windstream Energy L.L.C. v. Government of Canada*, PCA Case No. 2013/22, Award, 27 September 2022, fn. 742.

the Tribunal. Consistent with settled jurisprudence,[1224] Claimant's failure to satisfy its burden must be fatal to is claims.

596. In the Counter-Memorial and again herein, Peru has agreed to state—without prejudice to its rights—its understanding of the State practice and *opinio juris* that gives content to the legal standard applicable to FPS under the CIL MST.[1225] In any event, and for the avoidance of doubt, Peru expressly reserves all its rights, including its due process right to be heard in respect of any alleged evidence the Claimant may hereafter invoke with respect to the issue of the standard applicable to its FPS claims, and to introduce rebuttal evidence.[1226]

2. FPS under the CIL MST requires States to act with "due diligence" as is reasonable "in the circumstances"

597. Peru demonstrated in the Counter-Memorial that the FPS obligation under the CIL MST requires a State to exercise due diligence. In the Reply, Claimant acknowledges that Peru's articulation of the legal standard is "uncontroversial,"[1227] such that the Parties are "in agreement as to the general characteristics of the FPS standard."[1228] Specifically, the Parties seem to agree that:

a. the FPS standard "requires the host State to exercise reasonable due diligence;"[1229]

[1224] *See, e.g.*, **RLA-0082**, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, ICJ, Judgment, 20 February 1969, ¶ 79; **RLA-0050**, *Obligation to Negotiate Access to the Pacific Ocean*, ICJ, Award, 1 October 2018, ¶ 162. *See also* Peru's Counter-Memorial, ¶ 480 & fn. 961.

[1225] Peru's Counter-Memorial, § IV.B.1.

[1226] If a source merely contains references to extrinsic evidence of State practice and *opinio juris*, the direct evidence of State practice and *opinio juris* at issue must be made available for scrutiny. As a fundamental rule of procedure, Peru would need to have a reasonable opportunity to be heard regarding the meaning and weight of such direct evidence of State practice and *opinio juris*, and to introduce rebuttal evidence. In addition, the Tribunal would need to examine the alleged direct evidence of State practice and *opinio juris* and reach its own conclusions from it.

[1227] Claimant's Reply, § 9.3.2.

[1228] Claimant's Reply, ¶ 626.

[1229] Claimant's Reply, ¶ 626. *See also* Peru's Counter-Memorial, ¶¶ 488–490.

b. the State is expected "to take 'such measures to protect the foreign investment as are reasonable under the circumstances;'"[1230]

c. "tribunals must take into account 'the circumstances of the particular case;'"[1231]

d. the FPS obligation does *not* "impose strict liability on the host State to prevent physical or legal infringement of the investment," or provide any "guarantee" or "warranty;"[1232]

e. the FPS standard is an objective one (i.e., one that does not vary from State to State, or investor to investor);[1233] and

f. to succeed with a claim for breach of the FPS standard, a claimant must demonstrate that if the State had acted with "due diligence," it would "in fact have prevented the claimant's alleged losses."[1234]

598. Despite agreeing that the reasonability of the State's measures to protect the investment must take into account the circumstances of the particular case,[1235] Claimant argues—incorrectly—that any consideration of the particular circumstances of a case (e.g., the host State's means and resources, and the general situation of the country) would render the FPS obligation less objective, and therefore inappropriate.[1236] Such position is inconsistent with the case law and tries to negate its recognition that "tribunals must take into account 'the circumstances of the particular case.'"[1237] The jurisprudence demonstrates the following points (some of which are accepted by Claimant itself):

[1230] Claimant's Reply, ¶ 626. *See also* Peru's Counter-Memorial, ¶ 489.

[1231] Claimant's Reply, ¶ 626. *See also* Peru's Counter-Memorial, ¶ 491.

[1232] Claimant's Reply, ¶ 626. *See also* Peru's Counter-Memorial, ¶¶ 490–493.

[1233] *See* Claimant's Reply, ¶¶ 627–628; Peru's Counter-Memorial, ¶ 490, fn. 978.

[1234] Claimant's Reply, ¶ 626. *See also* Peru's Counter-Memorial, ¶ 494 (citing **RLA-0007**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (Böckstiegel, Lever, Dupuy), ¶ 166.)

[1235] *See* Claimant's Reply, ¶ 626. *See also* Peru's Counter-Memorial, ¶ 494.

[1236] Claimant's Reply, ¶¶ 629–632.

[1237] Claimant's Reply, ¶ 626. *See also* Peru's Counter-Memorial, ¶ 491.

a. "The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted."[1238]

b. The FPS obligation under the CIL MST is an obligation of means, rather than of result.[1239] The threshold for breach is therefore high.[1240]

c. The standard is an objective one, and "is not meant to vary from state to state or investor to investor."[1241]

d. That objective standard—i.e., one that applies to all States that are subject to the FPS obligation under CIL MST—is the standard of "due diligence."[1242]

e. The "due diligence" standard requires a State "to take such measures to protect the foreign investment as are reasonable under the circumstances."[1243]

[1238] **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 615. Claimant concedes this point. *See* Claimant's Reply, ¶ 628.

[1239] **RLA-0178**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (Kaufmann-Kohler, Hanotiau, Stern), ¶ 627 (*quoting* **CLA-0100**, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (El-Kosheri, Goldman, Asante), ¶ 77). Claimant concedes this point. *See* Claimant's Reply, ¶ 626.

[1240] **RLA-0007**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (Böckstiegel, Lever, Dupuy), ¶ 165 ("The [International Court of Justice] found that the protection provided by Italy could not be regarded as falling below the full protection and security required by international law, which, considering the facts of that case, indicates that violations of protection standards are not easily to be established").

[1241] **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 615. Claimant concedes this point. *See* Claimant's Reply, ¶ 628. Claimant concedes this point. *See* Claimant's Reply, ¶ 626.

[1242] *See, e.g.*, **RLA-0001**, Rudolf Dolzer & Christoph Schreuer, "*Chapter VII: Standards of Protection*," PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), p. 161; **CLA-0100**, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (El-Kosheri, Goldman, Asante), ¶ 53. Claimant concedes this point. *See* Claimant's Reply, ¶ 626.

[1243] **RLA-0001**, Rudolf Dolzer & Christoph Schreuer, "*Chapter VII: Standards of Protection*," PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), p. 161. *See also* **CLA-0100**, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (El-Kosheri, Goldman, Asante), ¶ 77; Peru's Counter-Memorial, ¶ 489. Claimant concedes this point. *See* Claimant's Reply, ¶ 626.

f. Accordingly, when applying the "due diligence" standard to the facts of a case, the tribunal is required to take into account the specific circumstances in order to determine whether the State's conduct was "reasonable under th[os]e circumstances."[1244]

g. "[T]he [FPS] duty of due diligence cannot be viewed in the abstract and in isolation from the conditions prevailing in [the host State]."[1245]

599. Thus, and contrary to Claimant's argument, in assessing Claimant's claim of violation by Peru of the FPS obligation, the Tribunal is indeed required to consider whether the State's conduct was reasonable *under the relevant circumstances in this particular case*. Circumstances found to have been relevant include, inter alia, the general situation within the State;[1246] the State's development, means, and resources;[1247] and the existence of civil strife.[1248]

600. Having agreed with the FPS legal standard as articulated by Peru, Claimant proceeds in the Reply to propose a new standard of its own making. Under its spurious standard, Claimant posits a set of "four obligations" that it alleges are contained or subsumed within the FPS obligation.[1249] In particular, according to Claimant, the FPS obligation imposes on a host State the following four additional obligations: (1) "not to cause harm to investors and their investments;" (2) "to take all reasonable steps to prevent harm to investors and their investments;" (3) "to take all necessary steps to restore the investor to the enjoyment of its rights over its investment;" and (4) "to

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[1244] **RLA-0001**, Rudolf Dolzer & Christoph Schreuer, "*Chapter VII: Standards of Protection*," PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), p. 161.

[1245] **RLA-0084**, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 19 June 2020 (Crook, Crivellaro, Ziadé), ¶ 234; Peru's Counter-Memorial, ¶ 492.

[1246] **CLA-0025**, *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018 (Fernández-Armesto, Mayer, Khairallah), ¶ 406.

[1247] **CLA-0025**, *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018 (Fernández-Armesto, Mayer, Khairallah), ¶ 406.

[1248] **RLA-0008**, Andrew Newcombe & Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009), p. 310.

[1249] Claimant's Reply, ¶ 636.

punish offenders committing crimes against investors and their investments."[1250] There is no legal support for Claimant's proposition.

601. Claimant makes no attempt to argue that the list of obligations that it posits reflects widespread State practice and *opinio juris*. Nor can any such list be found in any subsidiary source of law—i.e., in case law or highly qualified commentary. Instead, Claimant contents itself with cobbling together excerpts from findings of various tribunals—which analyzed circumstances specific to *those* cases—in an attempt to substantiate the existence of each of the four obligations that Claimant has made up.[1251] By way of example, Claimant notes that in a 1929 award, the United States-Mexico General Claims Commission concluded that the Mexican authorities' refusal to investigate and arrest the perpetrators of a robbery at a local store "fell short of [the authorities'] duty to protect the claimants by providing appropriate means to prosecute and punish the offenders."[1252] From this, Claimant derives the existence of an alleged obligation "to punish offenders for committing criminal acts."[1253] However, an award issued as far back in time as 1929, which did not even purport to interpret or apply the FPS obligation under the CIL MST, and that involved entirely different circumstances, does not serve as the source or basis of a purported general obligation that forms part of the FPS obligation under CIL MST.

602. Similarly, Claimant's scattered references to other awards (including awards issued in 1926, 1929, and 1930) do not constitute evidence of the existence of the other three obligations that Claimant—wrongly—suggests are part of the FPS standard under CIL MST.[1254]

[1250] Claimant's Reply, §§ 9.3.3.1, 9.3.3.2, 9.3.3.3, 9.3.3.4, ¶ 636.

[1251] *See, e.g.*, Claimant's Reply, ¶ 643 (citing a 1926 award as support for the existence of a general obligation that allegedly forms part of the FPS obligation under the CIL MST).

[1252] **CLA-0129**, *Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 2 April 1929, p. 442. *See also* Claimant's Reply, ¶ 653.

[1253] Claimant's Reply, ¶ 652.

[1254] *See, e.g.*, Claimant's Reply, ¶¶ 643–644, 653.

603. Another obvious defect with Claimant's invented list of obligations is that it contradicts the text of the Treaty. Specifically, Article 805.1 of the Treaty provides that "[e]ach Party shall accord **to covered investments** treatment in accordance with the [CIL MST], including . . . full protection and security"[1255] (emphasis added). However, Claimant's proposed obligations purportedly apply not only to investments, but also to *investors*: Claimant contends that Peru's FPS obligation requires it "not to cause harm to **investors** and their investments"[1256] (emphasis added), and "to take all reasonable steps to prevent harm to **investors** and their investments"[1257] (emphasis added). However, by its terms the Treaty does not require that Peru extend FPS protection to "investors" as such, but rather only to investments.

604. In sum, the list of four obligations that according to Claimant exists under the FPS standard is merely *an invention by Claimant*, which finds no support in CIL, the Treaty, or the relevant jurisprudence. As shown above, the FPS obligation under the CIL MST requires merely that the State exercise due diligence, and whether the State has done so will depend upon whether its conduct was reasonable under the circumstances.[1258]

605. Canada also notes in its Non-Disputing Party submission that the requirements under the FPS standard are limited to providing physical security only, and do not extend to legal security.[1259] Peru agrees. However, as demonstrated below, whether or not the FPS standard extends to legal protection, Peru did not breach the FPS standard.

[1255] **RLA-0010**, Treaty, Art. 805(1).

[1256] Claimant's Reply, § 9.3.3.1

[1257] Claimant's Reply, § 9.3.3.2. *See also id.*, at §§ 9.3.3.3 (alleging that Peru is required "to take all necessary steps to **restore the investor** to the enjoyment of its rights over its investment" (emphasis added)); *id.,* § 9.3.3.4 (alleging that Peru is required "to punish offenders committing crimes against **investors** and their investments" (emphasis added)).

[1258] *See* **CLA-0100**, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (El-Kosheri, Goldman, Asante), ¶ 77; **RLA-0001**, Rudolf Dolzer & Christoph Schreuer, "*Chapter VII: Standards of Protection*," Principles of International Investment Law (2012), p. 161. *See also* Peru's Counter-Memorial, ¶ 489.

[1259] Canada's NDP Submission, ¶¶ 23-24.

3. *Peru exercised due diligence in accordance with its FPS obligation under the Treaty*

606. In this case, as Peru demonstrated in the Counter-Memorial, Peru fulfilled its obligation to exercise due diligence by taking action that was reasonable under the circumstances.[1260] In the Reply, Claimant deliberately avoids any discussion of the affirmative actions that Peru took, insists that Peru should have used force against the protesters, and either ignores or dismisses the circumstances of the dispute.

607. In the following sections, Peru will demonstrate that (i) Peru acted reasonably under the circumstances (see **subsection a** below); (ii) Claimant's claims that Peru should have used force against the protesters all fail (see **subsection b** below); and (iii) Claimant has not demonstrated that if Peru had used force against the protesters, Claimant would not have suffered its alleged losses (see **subsection c** below). Accordingly, Claimant's FPS claims must be rejected.

a. Peru acted reasonably under the circumstances

608. As demonstrated above, and as confirmed by investment tribunals, whether and what particular conduct is reasonable must be determined in the light of the specific circumstances of the particular case.[1261] Peru addresses below those circumstances, and demonstrates that its conduct was objectively reasonable, especially in the light of those circumstances.

[1260] *See* Peru's Counter-Memorial, § IV.B.1.b.

[1261] *See, e.g.*, **RLA-0084**, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 19 June 2020 (Crook, Crivellaro, Ziadé), ¶ 235 ("As Dolzer and Schreuer maintain, the standard of liability under the full protection and security standard requires a host State 'to take such measures to protect the foreign investment as are reasonable in the circumstances'"); **CLA-0060**, *CME Czech Republic B.V. v. Czech Republic,* UNCITRAL, Partial Award, 13 September 2001 (Kühn, Schwbel, Hándl), ¶ 353 ("A government is only obliged to provide protection which is reasonable in the circumstances"); **RLA-0083**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein), ¶ 308 (requiring "such due diligence in the protection of foreign investment as reasonable under the circumstances").

(i) The circumstances surrounding Claimant's conflict with the Parán Community

609. Claimant's claims concern Peru's conduct during the course of Claimant's social conflict with the Parán Community—a conflict for which Claimant bears most of the responsibility, as shown in **Section II.B** above. As Peru explained in the Counter-Memorial, the circumstances giving rise to and surrounding such conflict include the following.

a. Both within and outside of Peru, there is a long history of conflicts between mining companies and local communities residing nearby and affected by mining activities.[1262]

b. Both within and outside of Peru, these conflicts are multi-dimensional, reflecting concerns about (inter alia): the environmental impacts of extraction and exploitation of natural resources; the impacts on the local economy of mining activities; the social impacts on local (often rural) communities of the opening of a Mine; the territorial rights of local communities; the human rights of individuals within local communities, including the fundamental right to a clean environment and the freedom of expression; the rights of investors; and the protection of private property.[1263]

c. Both within and outside of Peru, these multi-dimensional conflicts can and often have escalated into violent confrontations.[1264]

[1262] *See* Peru's Counter-Memorial, § II.A.1.

[1263] *See* Peru's Counter-Memorial, § II.A.1; **RLA-0182**, *Enhancing Well-Being in Mining Regions: Key Issues and Lessons for Developing Indicators*, OECD, undated, pp. 15–23.

[1264] *See, e.g.*, **Ex. R-0025**, Ombudsman's Office Report, "*Actuaciones Defensoriales en el marco del conflicto de Bagua*," March 2017, pp. 39–40; **Ex. R-0144**, A. Leon, *et al.*, "*Peru protesters lift blockade at China-funded mine in hope of talks*," LATIMES, 30 September 2015, p. 2. *See also* Incháustegui First Witness Statement, ¶¶ 35, 45; Incháustegui Second Statement, § III; **Ex. R-0028**, Canada-Peru CR Toolkit; **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013.

d. Both within and outside of Peru, free and democratic societies permit the use of force by law enforcement agencies under limited and exceptional circumstances.[1265]

e. The allocation of law enforcement resources within a State varies, with relatively more personnel established in urban areas, and fewer in rural areas.[1266]

f. Law enforcement's interactions with and operations in respect of specially-protected communities must be carefully managed.

g. Both within and outside of Peru, law enforcement agencies are not designed or equipped to serve as private security forces for companies and their investments.

h. When force has been used by State actors, it often has resulted in injuries and death, inflamed tensions, and hindered progress towards long-term solutions.[1267] In other words, the use of force has proved counter-productive.

i. In light of the foregoing, States in which these social conflicts have unfolded have over time and based upon their experience developed legal and policy

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[1265] *See infra* Section II.C.1. *See also* **Ex. IMM-0032**, *J. v. Peru*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 17 April 2015 (M. Ventura Robles, *et al.*); **Ex. IMM-0033**, *Nadege Dorzema, et al., v. Dominican Republic*, IACHR, Merits, Reparations and Costs, 24 October 2012(García-Sayán)); **Ex. IMM-0034**, *Mujeres Víctimas de Tortura Sexual en Atenco v. Mexico*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 28 November 2018 (Grossi, *et al.*); **Ex. R-0250**, Diego García-Sayán, *Justicia Interamericana y Tribunales Nacionales*, DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES (2013), pp. 825, 831. *See also* Meini Report, ¶ 75.

[1266] **RLA-0183**, *International Comparison of Indigenous Policing Models*, Savvas Lithopoulos, 2007, p. 28 (noting that there are less per capita policing services located in the rural areas of Canada, the United States, and Australia, than in more populous areas of those States).

[1267] *See supra* Section II.C.4. *See also* **Ex. R-0025**, *Actuaciones Defensoriales en el marco del conflicto de Bagua*, Ombudsman Office, March 2010, pp. 39–40; **Ex. R-0144**, "*Peru protesters lift blockade at China-funded mine in hope of talks*," LATIMES, 30 September 2015, p. 2; Witness Statement of Luis Miguel Incháustegui Zevallos, 6 March 2022 ("**Incháustegui First Witness Statement**"), ¶¶ 35, 45. *See also* Peru's Counter-Memorial, ¶ 501.

frameworks designed to balance competing interests, avoid violence, and create lasting solutions by promoting negotiation and dialogue.[1268]

j. Likewise, companies and industry experts have developed standards and practices that encourage constructive engagement with local communities, and expect mining companies to reach agreements with such communities—recognizing that such approach serves the interests of both the mining company and the local community.[1269]

k. Peru developed a legal and policy framework that reflects (i) international treaty law;[1270] (ii) the law and policy of other States—including Canada, which directly assisted Peru in developing the applicable framework;[1271] (iii) the lessons learned from Peru's own history, including its decades of military rule and serious social conflicts in the mining sector and with rural communities;[1272] (iv) established CSR norms and ESG standards;[1273] (v) established policy and practice specific to the mining industry; [1274] (vi) logistical and operational

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[1268] *See, e.g.*, **RLA-0028**, ILO Convention 169, Arts. 7.1, 15.2; **RLA-0030**, UNDRIP.

[1269] *See, e.g.*, **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration: Principles and Guidance Notes, PDAC, 2014; **Ex. R-0085**, Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?, Chatham House, 4 June 2013; **Ex. R-0087**, Social License to Operate in Mining: Current Trends & Toolkit, IBDO, 2020; **Ex. R-0094**, Understanding Company-Community Relations Toolkit, ICMM, 2015; **Ex. R-0086**, Good Practice Guide: Indigenous Communities and Mining, ICMM, 2015.

[1270] Vela Report, ¶¶ 65–67, 97, fn. 68.

[1271] *See, e.g.*, **Ex. R-0089**, 2014 CSR Strategy, p. 3; **Ex. R-0096**, Project profile—Peru-Canada Mineral Resources Reform Project (PERCAN), last accessed 6 March 2022; **Ex. R-0058**, Mariella Bautista Ascue, *Manual de Participación Ciudadana*, PERCAN, 8 February 2011; **Ex. R-0028**, Canada-Peru CR Toolkit.

[1272] *See generally* **Ex. R-0023**, The Value of Dialogue, Ombudsman Office, September 2017. *See also* **Ex. R-0025**, *Actuaciones Defensoriales en el marco del conflicto de Bagua*, Ombudsman's Office, March 2010.

[1273] *See, e.g.*, **Ex. R-0129**, Equator Principles, EP4, July 2020 (**"The Equator Principles"**).

[1274] *See, e.g.*, **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration: Principles and Guidance Notes, PDAC, 2014; **Ex. R-0085**, Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?, Chatham House, 4 June 2013; **Ex. R-0087**, Social License to Operate in Mining: Current Trends & Toolkit, IBDO, 2020; **Ex. R-0094**, Understanding Company-Community Relations Toolkit, ICMM, 2015; Vela Report, ¶¶ 77–94.

challenges;[1275] and (vii) the protected status of rural communities under Peruvian law.[1276] This legal and policy framework aims to ensure the active and constructive participation of local communities, obtain their acceptance, and promotes dialogue and mediation as the best means of resolving any disputes that may arise with the mining company.[1277]

610. These circumstances must be taken into consideration when determining whether Peru's conduct was reasonable.[1278]

(ii) Peru took reasonable action designed to achieve the lasting resolution of the conflict

611. Claimant's claims in this arbitration were built upon the false premise that Peru took no action in relation to Claimant's social conflict with the Parán Community. In the Counter-Memorial, Peru provided a detailed account of its unwavering, affirmative efforts to help broker a peaceful and lasting resolution of Claimant's conflict with the Parán Community.[1279]

612. With its entire case theory thoroughly rebutted by Peru, Claimant changed tack. No longer able to credibly argue that Peru took no action, in the Reply, Claimant concedes that Peru took action, but now insists that such action was insufficient or

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[1275] *See, e.g.*, **Ex. R-0028**, Canada-Peru CR Toolkit; **Ex. R-0094**, Understanding Company-Community Relations Toolkit, ICMM, 2015.

[1276] *See* **Ex. R-0052**, Law No. 24656, 13 April 1987; **Ex. C-0025**, Supreme Decree No. 008-91-TR, 12 February 1991.

[1277] Peru's Counter-Memorial, § II.B.1–2. *See also* **Ex. R-0011**, Law No. 28090, 13 October 2003, Art. 7 ("Mining activity operators shall submit the Mine Closure Plan to the competent authority within a maximum period of one year as from approval of the Environmental Impact Study (EIA) and/or the Environmental Adaptation and Management Program (PAMA). . ."); **Ex. R-0008**, Supreme Decree No. 033-2005-EM, 14 Agosto 2005, 14 August 2005, Art. 17 ("A mining activity operator who does not have an approved Mine Closure Plan may not initiate the development of mining operations").

[1278] *See, e.g.*, **RLA-0084**, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 19 June 2020 (Crook, Crivellaro, Ziadé), ¶ 235; **CLA-0060**, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 (Kühn, Schwbel, Hándl), ¶ 353; **RLA-0083**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein), ¶ 308.

[1279] Peru's Counter-Memorial, § II.E.

inadequate.[1280] In other instances, Claimant either mischaracterizes or ignores altogether the actions taken by Peru.

613. Whatever Claimant's evolving position may be, the evidence shows that Peru undertook diligent, affirmative action throughout the course of Claimant's conflict with the Parán Community, and that such action was reasonable under the circumstances. That reasonable conduct included—but was not limited—to the following affirmative action by the Peruvian authorities:

Table 6: Peru's Diligent and Reasonable Actions

Date	Peru's Reasonable Actions
October 2017	The PNP took prompt and reasonable action to investigate Invicta's concerns caused by rumors of community discontent, and monitor the zone for any suspicious activity. Claimant's CR Team became aware of rumors that certain members of the Parán Community were discontented.[1281] PNP officers met with Invicta,[1282] worked with Invicta to investigate and anticipate any issues,[1283] and affirmed that Invicta could "call immediately" with any concerns.[1284] Claimant praised the assistance of the Sayán Police with respect to its complaints. [1285]
19–20 June 2018	The PNP and the Public Prosecutor's office took prompt and reasonable action to investigate the events surrounding the 19 June 2018 Protest. On 19 June 2018, approximately 250 members of the Parán Community occupied and inspected the Invicta Mine for several hours.[1286] Invicta's representatives filed a complaint the

[1280] *See, e.g.*, Claimant's Reply, §§ 6.1–6.2.

[1281] **Ex. C-0414**, SSS, Weekly Report, Project, 6–11 November 2017, p. 3.

[1282] Claimant's Reply, ¶¶ 257–259.

[1283] Claimant's Reply, ¶ 12.

[1284] *See, e.g.*, **Ex. C-0445**, SSS, Weekly Report, Project, 20–24 November 2017, p. 4; **Ex. R-0257**, Social Management Report: Invicta Project, 11–16 December 2017, p. 4.

[1285] *See, e.g.*, **Ex. C-0445**, SSS, Weekly Report, Project, 20–24 November 2017, p. 4.

[1286] **Ex. R-0063**, Operations Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, p. 2; **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, pp. 2–3; **Ex. C-0160**, Police Inspection Report of Invicta Mine, Sayán Police Station, 20 June 2018.

Date	Peru's Reasonable Actions
	next day at the Sayán Police Station. Within hours of taking the Invicta representative's statements, the Sayán police conducted a detailed inspection of the Invicta Mine, and prepared a report for the Public Prosecutor, who opened an investigation.[1287] Claimant's representatives welcomed these actions by the Peruvian authorities.[1288]
July–August 2018	The OGGS took diligent and reasonable action by meeting with representatives of Invicta and the Parán Community, and proposing that the parties enter into a Dialogue Table.[1289]
7 September 2018	Peru acted promptly and reasonably by meeting with the Parán Community to discourage a planned protest. No protest took place. The PNP received advance notice of a protest sanctioned by the Community that was planned to take place on 11 September 2018.[1290] On 7 September 2018, the Public Prosecutor's Office, the Huaura Subprefect, and the PNP met with the Community to discourage the protest.[1291]
10–12 September 2018	The PNP took reasonable, preemptive action to prevent any violence. No protest took place. The Sayán Police Station pre-emptively deployed officers to the Mine site in advance of the Parán Community's planned

[1287] **Ex. C-0160**, Police Inspection Report of Invicta Mine, Sayán Police Station, 20 June 2018.

[1288] *See, e.g.*, **Ex. C-0129**, Special Report: Seizure of Invicta Mine Camp and Facilities, Social Sustainable Solutions, 19 June 2018, p. 3; *see also, e.g.,* **Ex. C-0161**, Monthly Report on Invicta Mine, Social Sustainable Solutions, July 2018, pp. 20–21.

[1289] *See* León First Witness Statement,¶¶ 20–27; **Ex. R-0065**, Meeting Minutes of Coordination between the Parán Community and MINEM, 11 August 2018; **Ex. R-0066,** Meeting Minutes, Meeting between the Parán Community and MINEM, 22 August 2018.

[1290] *See* Castañeda First Witness Statement, ¶ 73; **Ex. C-0134**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to Sayán Police Station (A. Rosales), 2 September 2018. *See also* Claimant's Memorial, ¶¶ 111, 225.

[1291] [redacted] **Ex. C-0137**, Report on Police Intervention at Camp Project, Invicta Mining Corp. S.A.C, 13 September 2018, p. 1. *See also* Claimant's Memorial, ¶ 112.

Date	Peru's Reasonable Actions
	occupation on 11 September 2018.[1292] The protest was thus thwarted.
18 September 2018	The Subprefect took reasonable action by holding a mediation. The Subprefect of Huaura convened a formal hearing with Claimant's representatives and the Parán Community, allowing each to state their position, and seeking a commitment to resolution of the conflict through dialogue.[1293]
14 October 2018	The PNP took immediate action to neutralize a tense encounter and establish a short-term agreement. The Parán Community established its Access Road Protest. The PNP arrived within hours,[1294] and mediated an agreement through which Claimant agreed that the Parán Community could continue its protest while the parties worked towards a permanent solution.[1295]
24 October 2018	Peru's agencies took reasonable action to advance the mediation process between the parties. The OGGS Specialists, the CPO of Sayán, and the Public Prosecutor's Office held a meeting with the parties.[1296] Claimant applauded the skill with which Peru's officials

[1292] **Ex. R-0068**, Official Letter No. 494-2018-REGION POLICIAL LIMA/DIVPOL-H-CS-SBNCRI, 4 September 2018 (demonstrating the CPO of Sayán requested authorization from the Public Prosecutor's Office to dispatch police reinforcements to the Invicta Mine to prevent a potentially violent confrontation).

[1293] *See generally* **Ex. C-0139**, Meeting Minutes, Subprefecture Hearing between Invicta Mining Corp. S.A.C. and the Parán Community, 18 September 2018. *See also* Peru's Counter-Memorial, ¶ 227.

[1294] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1; **Ex. R-0139**, Official Letter No. 585-2018-REGION POLICIAL LIMA/DIVPOL-H-CS-SEINCRI, 14 October 2018. *See also* Peru's Counter-Memorial, ¶ 233.

[1295] **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C, and Sayán Police Station, 14 October 2018.

[1296] *See generally* **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018. *See also* Peru's Counter-Memorial, ¶ 236.

Date	Peru's Reasonable Actions
	facilitated and contributed to advancing the discussion between Claimant and the Parán Community.[1297]
7 November 2018	Peru's agencies took reasonable action to advance the mediation process between the parties. The OGGS hosted a formal meeting between Claimant and the Parán Community to help the parties reach a compromise and urge the Parán Community to end its Access Road Protest.[1298] The Huaura Subprefect, the Lima Regional Police, DIVPOL, and the Sayán Police also attended the meeting.[1299] Claimant expressed satisfaction at the handling of the meeting by Peruvian officials.[1300]
21 November 2018	The OGGS took reasonable action to advance the mediation process between the parties. The OGGS held negotiations, yielding an agreement that (i) the Community would submit to its general assembly the question of whether to cease or continue the Access Road Protest, and would inform the OGGS of the outcome; and (ii) Claimant would remain committed to the dialogue process.[1301]
15–16 January 2015	The OGGS continued to advance the dialogue by holding separate meetings with Invicta and the Parán Community.[1302]
22–23 January 2019	Peru's ministries heard and responded to Claimant's position.

[1297] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, p. 2. *See also* Peru's Counter-Memorial, ¶¶ 236–238.

[1298] León First Witness Statement, ¶¶ 28–30. *See also* Peru's Counter-Memorial, ¶ 240.

[1299] **Ex. C-0182**, Summary Report of Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018; **Ex. C-0183**, Summary Report of 2018 Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018. *See also* Peru's Counter-Memorial, ¶ 240.

[1300] **Ex. C-0182**, Summary Report of Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018, p. 2. *See also* Peru's Counter-Memorial, ¶¶ 240–241.

[1301] **Ex. C-0242**, Meeting Minutes, Meeting between Invicta Mining Corp S.A.C. and the Parán Community, 21 November 2018. *See also* Peru's Counter-Memorial, ¶ 242.

[1302] **Ex. R-0258**, Aide-Mémoire: The Case of the Invicta Mining Company and the Rural Community of Parán, 8 March 2019.

Date	Peru's Reasonable Actions
	The MINEM and the MININTER held meetings with Claimant.[1303] Peruvian officials reiterated Peru's long-standing policy to refrain from the use of force in situations of social conflict involving mining operations.[1304] The MINEM affirmed that, consistent with that policy, all available agency resources were focused on re-establishing dialogue between the parties.[1305]
25 January 2019	The OGGS continued to advance the dialogue by holding a meeting with Claimant to prepare for a joint mediation.[1306]
26 January 2019	Peru's agencies took reasonable and proactive steps to narrow the scope of the dispute. Several agencies hosted a meeting among the Rural Communities, wherein the Parán Community committed to allow inspections of the Invicta Mine.[1307] Peruvian officials shepherded an agreement between the Communities, thereby establishing a favorable environment in the Invicta Project's area of direct influence.[1308]
29 January 2019	The MINEM took reasonable action to re-establish dialogue. The MINEM hosted a meeting between the parties, seeking to re-establish formal dialogue.[1309] Claimant refused to participate in any substantive dialogue until the Parán Community terminated its Access Road Protest.[1310]
12 February 2019	The OGGS took reasonable action to re-establish dialogue.

[1303] *See* Bravo First Witness Statement, ¶ 17; Incháustegui First Witness Statement, ¶¶ 21–22. *See also* Peru's Counter-Memorial, ¶ 251–252.

[1304] Incháustegui First Witness Statement, ¶ 23. *See also* Peru's Counter-Memorial, ¶ 252.

[1305] Incháustegui First Witness Statement, ¶ 23.

[1306] Bravo First Witness Statement, ¶ 23. *See also* Peru's Counter-Memorial, ¶ 253.

[1307] **Ex. R-0063**, Operations Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, pp. 10–11.

[1308] Peru's Counter-Memorial, ¶ 250; **Ex. R-0063**, Operations Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, pp. 10–11.

[1309] León First Witness Statement, ¶ 35; **Ex. R-0157**, Attendance List to the meeting between the Parán Community and Invicta Mining Corp. S.A.C., 29 January 2019. *See also* Peru's Counter-Memorial, ¶ 254.

[1310] León First Witness Statement, ¶ 35. *See also* Peru's Counter-Memorial, ¶ 254.

Date	Peru's Reasonable Actions
	The Parán Community requested the help of the OGGS to re-establish dialogue with Claimant.[1311] The OGGS responded by expressly urging the Community to end the Access Road Protest.[1312] The Parán Community later agreed to continue negotiations with the understanding that it would allow Claimant to access the Invicta Mine. Claimant also agreed to re-engage.
13 February 2019	The OGGS continued to promote and advance the dialogue by holding a meeting with Claimant.[1313]
22 February 2019	The OGGS continued to promote and advance the dialogue by holding a meeting with Claimant.[1314]
26 February 2019	The OGGS succeeded in brokering a key agreement. The OGGS brokered the 26 February 2019 Agreement, through which the parties formally established a Dialogue Table.[1315] The Parán Community promised to allow Claimant's free access to the Invicta Mine through the Parán Community's territory. Claimant praised the outcome of this key agreement facilitated by the OGGS.[1316]
3-4 March 2019	The OGGS travelled to the Invicta Mine confirmed that the Parán Community provided access by Claimant to Invicta Mine.[1317]

[1311] **Ex. R-0013**, Official Letter No. 004 from the Parán Community (A. Torres) to MINEM (F. Ismodes), 12 February 2019. *See also* Peru's Counter-Memorial, ¶ 259.

[1312] **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to the Parán Community (A. Torres), 18 February 2019, p. 2. *See also* Peru's Counter-Memorial, ¶ 259.

[1313] **Ex. C-0341**, Email from Lupaka to LAVETA with attachment, 13 February 2019.

[1314] **Ex. C-0197**, Emails between Canadian Embassy (M. Mahfouz, *et al.*) and Lupaka Gold Corp. (W. Ansley, *et al.*), 20–27 February 2019.

[1315] **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019. *See also* Peru's Counter-Memorial, ¶ 261.

[1316] **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019, pp. 1–2. Peru's Counter-Memorial, ¶ 264.

[1317] **Ex. R-0258**, Aide-Mémoire: The Case of the Invicta Mining Company and the Rural Community of Parán, 8 March 2019.

Date	Peru's Reasonable Actions
8 March 2019	The OGGS continued to advance the dialogue by holding a meeting with Claimant.[1318]
21 March 2019	The MINEM and MININTER met with the Claimant following the Parán Community's demonstration at Invicta Mine on the day before on 20 March 2019.[1319]
26 March 2019	Peru's agencies took reasonable efforts to investigate Claimant's claims and to restore dialogue when a new disagreement arose. Claimant accused the Parán Community of breaching the 26 February 2019 Agreement, and demanded that Peru use force to enforce Claimant's interpretation of the Agreement.[1320] The OGGS and MININTER met with the Parán Community to discuss Claimant's alleged breach of the 26 February Agreement.[1321] The Parán Community explained that Claimant had breached the Agreement first.[1322] The OGGS urged the parties to use dialogue to reconcile their different interpretations of the 26 February 2019 Agreement.[1323]
28 March 2019	The OGGS and the MININTER meet with Claimant and a representative of the Canadian Embassy to discuss the Parán Community's alleged breach of the 26 February Agreement and Claimant's conditions to dialogue.[1324]
1 April 2019	The OGGS took reasonable action to re-establish dialogue.

[1318] **Ex. C-0352**, Email from LAVETA to MEM, 7 March 2019; Bravo Second Witness Statement, ¶ 106.

[1319] **Ex. C-0355**, Email from Canadian Embassy to IMC, 21 March 2019; Bravo First Witness Statement, ¶ 70.

[1320] **Ex. C-0201**, Letter from Invicta Mining Corp S.A.C. (L. Bravo) to MINEM (F. Trigoso, *et al.*), 28 February 2019, p. 5; **Ex. C-0017**, Letter from Lupaka Gold Corp. (L. Bravo) to MININTER, 28 February 2019, p. 2. *See also* Peru's Counter-Memorial, ¶¶ 273–276.

[1321] *See* **Ex. R-0112**, List of Attendees, OGGS Meeting, 26 March 2019; **Ex. R-0026**, Letter No. 006-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 21 March 2019; León First Witness Statement, ¶ 47. *See also* Peru's Counter-Memorial, ¶ 276.

[1322] *See* León First Witness Statement, ¶ 47. *See also* Peru's Counter-Memorial, ¶ 276.

[1323] *See* León First Witness Statement, ¶ 47. *See also* Peru's Counter-Memorial, ¶ 276.

[1324] *See* León First Witness Statement, ¶ 48. *See also* Peru's Counter-Memorial, ¶ 277; Bravo Frist Witness Statement, ¶ 71.

Date	Peru's Reasonable Actions
	The OGGS hosted a meeting for Claimant and the Parán Community to resolve their disagreement as to the correct interpretation of the 26 February 2019 Agreement. Claimant refused to attend the meeting, rejected any further dialogue with the Parán Community, and insisted on police intervention.[1325] The Parán Community understood that Claimant had no intention to reach a long-term agreement.[1326]
9 April 2019	The Chief of the Intelligence Service from Huacho met with Claimant to discuss the status of the PNP operational plan and issues related to the Parán Community's territorial dispute.[1327]
14 May 2019	The PNP took immediate and reasonable action to prevent further violence after Claimant sent in the War Dogs. The PNP responded quickly to violence that erupted at the Invicta Mine when the War Dogs, carrying weapons, attempted to forcibly secure access to the Invicta Mine.[1328] The PNP arrested several members of the War Dogs, and launched an investigation.[1329]
20 May 2019	The OGGS took reasonable steps to re-establish trust and participation through dialogue. The OGGS met with the Parán Community and encouraged it to re-engage in dialogue.[1330] The Parán Community demanded the immediate and indefinite closure of the Invicta Mine, but

[1325] *See* León First Witness Statement, ¶ 49; **Ex. R-0114**, Meeting Minutes, Meeting between the Parán Community, OGGS, MININTER, and Sayán Police Station, 1 April 2019. *See also* Peru's Counter-Memorial, ¶ 279.

[1326] León First Witness Statement, ¶ 49; **Ex. R-0114**, Meeting Minutes, Meeting between the Parán Community, OGGS, MININTER, and Sayán Police Station, 1 April 2019; **Ex. C-0552**, Internal PCM email with attachment, 21 May 2019. *See also* Peru's Counter-Memorial, ¶ 279.

[1327] **Ex. C-0213**, Email from M. Estrada to L. Bravo, Invicta Mining Corp. S.A.C., 10 April 2019.

[1328] León First Witness Statement, ¶ 51. *See also* Peru's Counter-Memorial, ¶ 279.

[1329] *See generally* **Ex. R-0262**, Intervention Act No. 5, 14 May 2019; **Ex. R-0113**, Letter No. 52-2020-REGIÓN POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO from PNP Colonel (L. Pérez) to PNP General (H. Ramos), 22 February 2020. *See also* Peru's Counter-Memorial, ¶ 279.

[1330] León First Witness Statement, ¶¶ 50–51. *See also* Peru's Counter-Memorial, ¶ 280.

Date	Peru's Reasonable Actions
	agreed to reconsider dialogue if Claimant replaced its community relations team as a show of good faith.[1331]
27 May 2019	Various Peruvian State agencies took reasonable steps to work directly with Claimant and find a solution. The OGGS, PCM, MININTER, and Ombudsman's Office met with Claimant's representatives to discuss the War Dogs' activities, and urged Claimant to re-establish dialogue with the Parán Community. Claimant refused.[1332]
2 July 2019	The OGGS took reasonable action by scheduling a joint meeting between the parties, but the Parán Community decided not to attend.[1333]
8 July 2019	Peru's agencies took reasonable efforts to re-establish trust and dialogue between the Parties. The OGGS met with the Parán Community to urge a return to dialogue. The Ombudsman's Office emphasized that it remained ready and able to help broker an agreement.[1334]
8 July 2019	Claimant sent a letter to Peru reaffirming that it had no desire to resume dialogue.[1335]

[1331] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 6. *See also* Peru's Counter-Memorial, ¶ 282.

[1332] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019. *See also* Peru's Counter-Memorial, ¶ 282.

[1333] **Ex. C-0220**, Letter No. 033-2019-MINEN/OGGS/OGDPC from MINEM (M. Kuzma) to Parán Community (A. Torres), 19 June 2019; **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019. *See also* Peru's Counter-Memorial, ¶¶ 285–286.

[1334] Peru's Counter-Memorial, ¶ 287; **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, p. 4 ("In this regard, Mr. Vera from the Ombudsman's Office stated that the support of other sectors of the state such as the Ministry of Health, the Ministry of Agriculture and others could be compromised to carry out awareness raising campaigns with the population of the community of Parán to look for viable an agreement with them").

[1335] León First Witness Statement, ¶ 55; **Ex. C-0013**, Letter from Lupaka Gold Corp. (L. Bravo) to MINEM (M. Kuzma), 8 July 2019. *See also* Peru's Counter-Memorial, ¶ 288.

Date	Peru's Reasonable Actions
15 July 2019	The MINEM Vice Minister of Mines met with Claimant to discuss the status of the dialogue process and the Parán Community's territorial dispute [1336]
25 August 2019	The OGGS took action to re-establish dialogue by meeting with the Parán Community.[1337] The Parán Community indicated its willingness to resume dialogue and to attend a meeting scheduled for 13 September 2019.[1338]

614. As shown in the foregoing table, Peru took diligent action through a panoply of State agencies, including (inter alia) the OGGS, the PNP, the MININTER, the MINEM, the PCM, the Ombudsman's Office, and the Public Prosecutor's Office. In total, Peru held at least 28 ex parte meetings with the Claimant and the Parán Community, and seven joint mediations between the parties.[1339]

615. In sum, Peru engaged actively, tirelessly, and consistently throughout the course of Claimant's conflict with the Parán Community. Those actions—which were designed to encourage dialogue, avoid violence, and broker a lasting resolution of the dispute that would enable Claimant to develop the Invicta Mine—were objectively diligent and entirely reasonable under the circumstances. Claimant's FPS claim is therefore meritless and must be dismissed.

b. Claimant is wrong to insist that Peru should have used force against the local community

616. Claimant's transparent strategy in the Reply is to ignore the reasonable actions taken by Peru—many of which it had praised at the time of their adoption. Instead, Claimant invents a set of alleged obligations, comes up with a wish list of conduct that Claimant asserts Peru should have taken pursuant to such spurious obligations, and argues that

[1336] **Ex. C-0222**, Meeting Summary between MINEM, *et al.*, 15 July 2019.

[1337] León First Witness Statement, ¶ 56.

[1338] León First Witness Statement, ¶ 56.

[1339] *See supra* Table 6: Peru's Diligent and Reasonable Actions. *See also* Peru's Counter-Memorial, § II.E.3.

Peru thereby breached the Treaty.[1340] As Peru explained above, Claimant's list of purported obligations find no support in CIL or in jurisprudence. Peru will refute below Claimant's arguments about the actions that Peru allegedly should have taken.

(i) Claimant argues that Peru should have preemptively used force to prevent harm to Claimant or its investment

617. At the top of Claimant's wish list is the alleged requirement that Peru "take all necessary measures to prevent harm to the Claimant's employees and investment."[1341] Claimant carefully avoids any explicit description of what it believes Peru should have done, preferring to rely instead on vague language—e.g., by arguing that Peru "failed to take the necessary steps,"[1342] that Peru "should have taken preventative measures,"[1343] or that Peru "should have implemented plans to provide adequate police protection."[1344] However, examination of its submissions confirms that Claimant is claiming that Peru—and specifically the police—should have preemptively used force against the Parán Community and provided the equivalent of private security services thereafter.[1345] This claim fails, for at least the following reasons.

618. *First*, Claimant's claim fails because the CIL MST does not include an obligation to "take all necessary measures to prevent harm to the Claimant's employees and investment."[1346] As Peru demonstrated in the Counter-Memorial and in **Section IV.B.2** above, the FPS obligation under the CIL MST requires the State to exercise *due diligence* by taking measures to protect Claimant's investment that are *reasonable under the circumstances*.[1347] Claimant has not provided evidence—for there

[1340] *See* Claimant's Reply, ¶¶ 657, 670 674, 678.
[1341] Claimant's Reply, § 9.3.4.2.
[1342] Claimant's Reply, ¶ 665.
[1343] Claimant's Reply, ¶ 666.
[1344] Claimant's Reply, ¶ 667.
[1345] *See* Claimant's Reply, ¶¶ 667–670.
[1346] Claimant's Reply, § 9.3.4.2.
[1347] *See supra* Section IV.B.2.

is none—that the CIL MST requires more than due diligence. Furthermore, Claimant seeks to hold Peru strictly liable for "failing to prevent the harm caused by the Parán Community."[1348] Because the obligation invoked by Claimant does not exist, Peru cannot be held liable under international law even if it were true that Peru did not take "all necessary steps"—whatever that may mean according to Claimant.[1349]

619. *Second*, Claimant has not satisfied its burden of demonstrating that it would have been reasonable—or even legal—for Peru to preemptively use force against the Parán Community. In this respect, Claimant hopes to use the vagueness of its arguments to its advantage. By way of example, Claimant argues that Peru could and should have somehow prevented the 19 June 2018 Protest,[1350] but Claimant does not bother to identify any specific action, or to show why such action would have been reasonable under the circumstances. Instead, Claimant merely repeats incessantly that Peru should have prevented all possible harm to its investment. Repeating this tired mantra does not satisfy Claimant's burden of showing that Peru failed to take reasonable action, or that the FPS obligation under CIL MST required Peru to preemptively use force against the Parán Community.

620. *Third*, it would not have been reasonable—or even legal—under these circumstances for Peru to preemptively use force against the Parán Community. Claimant invokes Article 8.2 of Legislative Decree 1186 to argue that Peru was required to preemptively use force against the Parán Community.[1351] However, as described in detail in **Section II.C.1** above, that provision authorizes—rather than requires—the police to use force under certain circumstances,[1352] and none of those circumstances justifying the use of force were present at that time.[1353] Thus, it would not have been legal for

[1348] Claimant's Reply, ¶ 672.

[1349] Claimant's Reply, ¶ 665.

[1350] Claimant's Reply, ¶ 666.

[1351] Claimant's Reply, ¶ 358.

[1352] *See infra* Section II.C.1; **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2 ("The personnel of the National Police of Peru **may** use force, in accordance with articles 4, 6 and numeral 7.2, in the following circumstances . . . " (emphasis added)).

[1353] *See infra* Section II.C.1; Meini Report, ¶¶ 74, 76, 169–174.

Peru to have preemptively used force against the Parán Community protesters, as Claimant argues. In any event, even if Peruvian law had authorized preemptive use of force against the Parán Community (quod non), the PNP would retain discretion to determine whether, when, and how the use of force would have been appropriate and justified.[1354]

621. Furthermore, and as described in detail in **Section II.C.2** above, the Peruvian legal and policy framework—which is consistent with State practice and industry norms—promotes negotiation and dialogue as the appropriate means of resolving social conflicts between mining companies and local communities.[1355] The preemptive use of force against such communities would have directly contravened this framework. Furthermore, experience in Peru and elsewhere has shown that the use of force by the State in such conflicts is counter-productive, in inflaming tensions, entrenching the parties, and prolonging the dispute.[1356] Indeed, Claimant has failed to identify any instance in which Peru used force to preemptively and permanently smother social opposition to a mining project, and thereby secure the long-term operational viability of that project. Rather, the evidence on the record confirms that the use of force may have a short-term effect (lasting several hours or several days), but it only leads to new and more intense cycles of violence.[1357]

622. As part of its claim that Peru should have used force, Claimant includes a generalized claim that Peru should have "confiscate[ed]" any weapons held by members of the Parán Community.[1358] Claimant conveniently avoids any description of why, or how, or when, this confiscation should have taken place, or of the relevant circumstances surrounding the social conflict. However, such circumstances reveal that forcible removal would have been unreasonable. As demonstrated in **Section II.C.3** above,

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[1354] *See infra* Section II.C.1; Meini Report, ¶ 134 ("[T]he PNP may not use force unless it has exhausted all alternative means that do not involve violence or a risk of harm to persons").

[1355] *See* Peru's Counter-Memorial, ¶ 503.

[1356] *See* Meini Report, ¶¶ 190, 193–199, 203–204. *See also* Peru's Counter-Memorial, ¶¶ 501–502.

[1357] *See supra* Section II.C.4.

[1358] Claimant's Reply, ¶ 670(a).

and as recognized by Claimant, many local communities throughout Peru hold weapons as part of the historical counter-insurgency fight against the terrorist group *Sendero Luminoso*.[1359] Consistent with international principles,[1360] Peru has undertaken efforts to facilitate the voluntary disarmament of these populations.[1361] In this context, Peru did not target a specific community, the Parán Community, and forcibly search for and seize weapons.

623. Importantly, Claimant's complaint about confiscation of firearms is immaterial, yet another red herring. To recall, to succeed with its claim for breach of the FPS standard, Claimant admits that it must demonstrate that if the State had acted with "due diligence," it would "in fact have prevented the claimant's alleged losses."[1362] Yet Claimant has not demonstrated that if the weapons held by certain members of the Parán Community had been confiscated by Peru, Claimant's forfeiture of its share to PLI Huaura would have been prevented. In other words, Claimant has not and cannot show that the possession of firearms by certain protesters determined the outcome, and that confiscation of such weapons would have prevented or thwarted the Access Road Protest or, more generally, the Parán Community's opposition to the Invicta Project. Indeed, the seizure of the firearms by the State would not have prevented or resolved the conflict. The Parán Community used a variety of tactics to express opposition to the Invicta Mine, most of which did *not* involve the use of firearms.[1363]

[1359] *See* Claimant's Reply, ¶ 477.

[1360] *See* **RLA-0184**, Small Arms: No Single Solution, UNITED NATIONS, last accessed 22 January 2023.

[1361] *See supra* Section II.C.3. *See also* **Ex. R-0264**, Law No. 28397, 25 November 2004; **Ex. R-0265**, Law No. 31324, 5 August 2021.

[1362] Claimant's Reply, ¶ 626. *See also* Peru's Counter-Memorial, ¶ 494 (citing **RLA-0007**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (Böckstiegel, Lever, Dupuy), ¶ 166.)

[1363] *See supra* Section II.F. *See also, e.g.*, **Ex. C-0255**, PERU00000929-PERU00000937, Huacho DIVPOL and Sayán Police Station, Report No. 07-2022-REGPOL LIMA/DIVPOL-H-COM.SAYÁN.ADM, 15 February 2022, p. 1 (Parán Community members armed with sticks, stones, and brooms, demanding that the PNP leave.).

624. *Fourth*, Claimant's claim that Peru violated the FPS obligation by failing to preemptively use force is based on factual inaccuracies. For example, Claimant argues that Peru could have somehow prevented the 19 June 2018 Protest, based on the allegation that Peru somehow knew about this protest in October 2017.[1364] That is incorrect. As Claimant's own evidence shows, Claimant became aware of rumors of discontent amongst individual members of the Parán Community in October 2017, reported those rumors to the police, and was pleased with the police's response and assistance.[1365] As discussed in more detail in **Section II.C.3** above, Claimant has provided no evidence linking those rumors to the June 2018 Protest, or showing that Peru was aware of that protest months previously.

625. In sum, through its first claim, Claimant is requesting that the Tribunal hold that Peru violated public international law by failing to preemptively use force against a local community to ensure that no protests against Claimant's Mine would ever take place. Neither the Treaty nor CIL require such conduct by Peru.

(ii) Claimant argues that Peru should have used force to enforce Claimant's property rights

626. Next on Claimant's wish list is its claim that Peru violated an alleged obligation "to take all necessary steps to restore the Claimant to the full enjoyment of its investment."[1366] As with its first FPS claim (described above), Claimant couches this second FPS in terms designed to elide what Claimant believes Peru was required to do: Claimant suggests that Peru should have "intervene[d] and lift[ed] the Blockade,"[1367] that Peru should have "remove[d] weapons,"[1368] or that Peru should have "contemplate[d] action other than dialogue."[1369] Behind the façade created by these vague terms is Claimant's claim that Peru violated the Treaty by failing to use

[1364] Claimant's Reply, ¶ 666.
[1365] Claimant's Reply, ¶¶ 256–260.
[1366] Claimant's Reply, § 9.3.4.3.
[1367] Claimant's Reply, ¶ 673.
[1368] Claimant's Reply, ¶ 674(a).
[1369] Claimant's Reply, ¶ 676.

force against the protesters for Claimant's benefit. That claim must be rejected, for at least the following reasons.

627. *First*, Claimant's claim fails because the CIL MST does not include an obligation "to take all necessary steps to restore the Claimant to the full enjoyment of its investment."[1370] As shown above, the FPS obligation under the CIL MST requires the State to exercise *due diligence*,[1371] and Claimant has not provided evidence that the CIL MST requires a State to restore investors to their investments. Moreover, the obligation invented by Claimant is inconsistent with the nature of the FPS obligation as an obligation of means, not results.[1372] Claimant distorts the applicable legal standard that it had previously acknowledged, in an attempt to turn FPS into an obligation of result, whereby a State would be held strictly liable if an investor loses possession of its investment, whatever the circumstances may be.

628. *Second*, Claimant's claim is based on inaccurate representations of Peruvian law. Specifically, Claimant alleges that "[t]he State was obliged by its own law to intervene and lift the Blockade."[1373] That is not true. As discussed in detail in **Section II.C.1** above, Peruvian law *authorizes—but does not require*—law enforcement to use force under limited and exceptional circumstances, and provides law enforcement with discretion to whether and when the use of force is appropriate and justified.[1374] In this

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[1370] Claimant's Reply, § 9.3.4.3.

[1371] *See supra* Section IV.B.2. *See also* **RLA-0001**, Rudolf Dolzer & Christoph Schreuer, "*Chapter VII: Standards of Protection*," PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), p. 161; **CLA-0074**, *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Naon, Fernández, Bernal), ¶ 177.

[1372] **RLA-0178**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (Kaufmann-Kohler, Hanotiau, Stern), ¶ 627 (*quoting* **CLA-0100**, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (El-Kosheri, Goldman, Asante), ¶ 77). Claimant concedes this point. *See* Claimant's Reply, ¶ 626.

[1373] Claimant's Reply, ¶ 673.

[1374] *See supra* Section II.C.1; **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2 ("The personnel of the National Police of Peru **may** use force, in accordance with articles 4, 6 and numeral 7.2, in the following circumstances . . . " (emphasis added)). *See also* Meini Report, ¶ 134 ("[T]he PNP may not use force unless it has exhausted all alternative means that do not involve violence or a risk of harm to persons").

instance, the circumstances did not justify the use of force at that time,[1375] and the State took reasonable and diligent measures to promote dialogue and resolve the dispute.[1376] However, in submitting this claim, Claimant is asking the Tribunal to second-guess the judgments of law enforcement agencies—exercising their legal authority and discretion as to when to use force against a rural community—and hold the State internationally responsible for determining that it was not appropriate to force against a rural community. Such ruling would be unjustified and unprecedented.

629. *Third*, Claimant bases its claim on the inaccurate allegation that "[using force] was consistent with the State's reaction to other social conflicts within the mining sector and outside of it."[1377] In fact, Peru's legal and policy framework promotes dialogue as the best means to resolve a social conflict. And, as demonstrated in **Section II.C.4** above, the instances in which Peru has used force in the past show that (i) it did so as a last resort, after years of entrenchment or other aggravating circumstances, (ii) in circumstances that were unlike those in the present case, and (ii) such use of force was counter-productive.[1378] Claimant has thus failed to show that the use of force would have been reasonable under the circumstances.

630. *Fourth*, Claimant further bases its claim on its made-for-arbitration argument that "one of the Parán Community's key motivations for opposing the Invicta Project was to protect its illegal marijuana business."[1379] As described in **Section II.E** above, Claimant did not at the time of these events ever claim that the Parán Community was protesting its Mine in order to protect an alleged marijuana business of the entire community from police attention. That is because there is no evidence that the Parán

[1375] *See supra* Section II.C.1; Meini Report, ¶¶ 74, 76, 169–174.

[1376] *See supra* Table 6: Peru's Diligent and Reasonable Actions.

[1377] Claimant's Reply, ¶ 673.

[1378] *See supra* Section II.C.4.

[1379] Claimant's Reply, ¶ 674(c).

Community had a marijuana business,[1380] or that the community's opposition to the Project was motivated by a desire to protect a community-wide drug trade. This accusation by Claimant against the whole local community is unfounded, irresponsible, and defamatory. It is also contradicted by the contemporaneous evidence emanating from Claimant's own witness, [redacted] Furthermore, Claimant's speculative argument makes no sense; why would a community seeking to protect an illegal business from police attention, as argued by Claimant, engage in a protest that would *attract* police attention? It would not.

631. *Fifth*, the evidence confirms that it would *not* have been reasonable under these circumstances for Peru to use force against the protesters in order to assist Claimant. Peru has demonstrated above that the reasonable course of action in the light of the circumstances was to mediate a constructive dialogue designed to achieve a lasting solution. It would have been inconsistent with Peruvian policy and counter-productive for Peru to intervene in the social dispute and use force against one party for the benefit of the other.

632. For these reasons, Claimant's claim that Peru violated the FPS obligation under the CIL MST by failing to use force against the protesters for Claimant's benefit is meritless and must be rejected.

[1380] Claimant misleadingly relies on information about individual members of the Community. *See* Claimant's Reply, ¶¶ 37–39.

[1381] **Ex. C-0103,** Email from M. Mariños to Lupaka Gold Corp. (J. Castañeda), 14 November 2016. p. 2 ("This opposition leader and his family have been supported by a **group of oppositor community members** who live in Huacho and whose main activity is the cultivation of marijuana. This group is **not very empowered in the community** and it is possible to dismantle them in the short term." (emphasis added)). *See also* **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 4 ("INVICTA indicated that the Paran leaders are being advised and / or financed by **outsiders of the community** with their own interests (drug trafficking and informal mining mafias)." (emphasis added)); **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, p. 2 (noting "the presence and active participation of **local actors** who, with an economy outside the law, subsidize activities contrary to public order against the mining project." (emphasis added)).

(iii) Claimant argues that Peru should have arrested the protesters

633. Claimant further claims that Peru breached the Treaty by violating an alleged "obligation to punish offenders for committing criminal acts against foreigners."[1382] There are at least three reasons why this argument by Claimant does not support a finding of liability for an alleged breach of the FPS obligation under the Treaty.

634. *First*, the CIL MST does not include an "obligation to punish offenders for committing criminal acts against foreigners."[1383] Claimant has not provided evidence to show that this is an obligation under CIL, nor that such alleged obligation is part of—or even connected to—the FPS obligation of the CIL MST. Instead, as Peru has demonstrated, the FPS obligation under the CIL MST requires the State to exercise due diligence with respect to *the protection of the investor's investment*.[1384] Furthermore, the FPS obligation is an obligation of means, and not of result.[1385] Claimant attempts to create an obligation of result, whereby a State would be held strictly liable for not "punish[ing]" any individuals that an investor believes have committed any crime. CIL simply does not pose such an obligation.

635. *Second*, Claimant's claim is based on the mischaracterization or misunderstanding of Peruvian law. As addressed in **Section II.C.3** above, the Peruvian Constitution reflects the fundamental legal principle that every person must be presumed innocent until proven guilty by a competent court of law.[1386] Consistent with this principle, the Peruvian Supreme Court and the Constitutional Tribunal have established that

[1382] Claimant's Reply, ¶ 677.

[1383] Claimant's Reply, ¶ 677.

[1384] *See supra* Section IV.B.2.

[1385] *See* **RLA-0178**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (Kaufmann-Kohler, Hanotiau, Stern), ¶ 627 (*quoting* **CLA-0100**, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (El-Kosheri, Goldman, Asante), ¶ 77). Claimant concedes this point. *See* Claimant's Reply, ¶ 626.

[1386] *See* **Ex. C-0023**, Constitution, Art. 2(e).

preventive imprisonment is reserved for exceptional circumstances[1387]—for example, when there is evidence of possible flight risk or when there are reasonable grounds to believe that the accused will interfere with a criminal investigation.[1388] Other than generalized and conclusory assertions, Claimant has not demonstrated—or even attempted to demonstrate—that Peru committed an international delict (e.g., denial of justice) in the manner in which it conducted the criminal investigations and prosecutions. Claimant's claim is based on the premise that its own accusations against members of the Parán Community should have been sufficient to secure arrests and punishments, which is simply not consistent with Peruvian law—or any other civilized State.

636. *Third*, and contrary to Claimant's arguments, the evidence shows that Peru acted reasonably under the circumstances. Claimant's primary argument is that Peru did not dole out punishments in relation to the 19 June 2018 Protest.[1389] As Claimant concedes, there was an investigation that led to the decision issued by the Huaura Prosecutor's Office dated 5 June 2022.[1390] In that report, the Prosecutor concluded that "the mining camp where the events transpired, is in the actual control of the mining company," adding that "there is no evidence of disturbance, as it was recorded that

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[1387] **Ex. R-0260**, Plenary Ruling No. 341/2022, Peruvian Constitutional Tribunal, 25 October 2022, ¶ 89; **RLA-0179**, *Case of Yvon Neptune v. Haiti*, ICHR, Judgment, 6 May 6, 2008 (Quiroga, García-Sayán, *et al.*), ¶ 107 ("This is so, given that pre-trial detention 'is the most severe measure that can be applied to a person accused of a crime, so that its application must be exceptional in nature, limited by the principles of legality, the presumption of innocence, need and proportionality, all of which are strictly necessary in a democratic society'").

[1388] **Ex. IMM-0007**, Criminal Procedure Code of Peru, Legislative Decree No. 957, 22 July 2004, Arts. 268–270.

[1389] Claimant's Reply, ¶ 678(a).

[1390] Claimant's Reply, ¶ 679. Claimant mistakenly stated that the decision is dated 15 June 2022. However, as shown in **Ex. R-0261**, the correct date is 5 June 2022. In addition, Claimant incorrectly alleges that this decision was issued "more than three years after its expiry and just a few months before Claimant lodged" the Reply. Claimant's Reply, ¶ 678(b). Claimant misrepresents the facts. This was the *second* decision issued by the Huaura Prosecutor's Office in this investigation. As stated in the 5 June 2022 decision, the Superior Prosecutor's Office annulled the first decision issued by the Huaura Prosecutor as a result of an appeal filed by Invicta's counsel, and ordered the issuance of a new resolution, which led to the 5 June 2022 decision.

the community members conducted an inspection to verify the damages that the mining company could be causing to the community's territory, toured the premises and left."[1391] The Prosecutor noted that these facts had been corroborated [redacted] In particular:

> [redacted] the community members wished to talk to the company's representatives and reach an agreement, and they [the company's representatives] agreed to tour the facilities of the mining camp . . . .
>
> [T]here was no threat of violence to access the site and tour the mining camp, [redacted] . . . .
>
> [T]here is no real and specific charge against any individual where it is shown that they coerced, threatened or attacked them in order to cause them to tour the premises.[1393]

637. Claimant has not argued—let alone adduced evidence—to show that the Prosecutor's findings were inaccurate and it certainly has not demonstrated that this final resolution—or any other prosecutorial or judicial decision in connection with the cases mentioned by Claimant in paragraph 678 of the Reply—constitutes a denial of justice or otherwise a violation of international law.

638. For these reasons, there is no merit whatsoever to Claimant's claim that Peru violated the FPS obligation under the CIL MST by failing to punish members of the Parán Community against which Invicta or its representatives filed complaints.

(iv) Claimant has no legal or factual basis on which to attribute the acts of the Parán Community to the Peruvian State

639. Claimant's final FPS claim is that Peru breached a negative obligation not to cause harm to Claimant's investment by harming Claimant and its investment through the

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1391 [redacted]

1392 [redacted]

1393 [redacted]

actions of the Parán Community.[1394] However, for the reasons explained in Peru's Counter-Memorial and in **Section IV.A** above, the actions of the Parán Community are not attributable to Peru under international law.[1395] Thus, Claimant's argument that Peru breached its negative obligation through the actions of the Parán Community lacks legal—and factual—support and must be rejected.

640. In the Reply, Claimant introduces for the first time the argument that Peru also harmed Claimant and its investment by encouraging or contributing to the actions of the Parán Community.[1396] In the Merits section of the Reply, Claimant asserts that such incitement was carried out by "Peruvian officials" (plural), but it only names a single official.[1397] That official, Mr. Soyman Roman Retuerto, was the Subprefect of Leoncio Prado.[1398] As Peru demonstrated in **Section II.C.3** above, Mr. Retuerto did not encourage or contribute to the Parán Community's protest activities, and Claimant's arguments to the contrary are based upon mischaracterizations of the evidence.[1399]

641. In fact, the evidence confirms that Mr. Retuerto engaged in reasonable efforts to contribute to the resolution of the conflict, including by requesting that the authorities activate a formal dialogue process for the avoidance of social conflict.[1400] Furthermore, and directly contrary to Claimant's claims about him, the evidence shows that the Parán Community considered Mr. Retuerto to be *persona non grata*, because he was a

[1394] Claimant's Reply, § 9.3.4.1.

[1395] *See supra* Section IV.A. *See also* Peru's Counter-Memorial, § IV.A.

[1396] *See* Claimant's Reply, § 6.2.1.

[1397] Claimant's Reply, ¶ 664.

[1398] Claimant's Reply, ¶ 263; *See* also Claimant's Reply, § 6.2.1.

[1399] *See supra* Section II.C.3.

[1400] *See, e.g.*, **Ex. R-0076**, Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Roman) to President of Ministry Council (M. Aráoz), 4 January 2018; **Ex. R-0081**, Letter No. 105-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Ombudsman's Office (W. Gutiérrez), 8 May 2018; **Ex. R-0165**, Letter No. 104-2018-DGIN-LMP-HUA from Huaura Subprefect (S. Retuerto) to MINEM (F. Ismodes), 8 May 2018.

member and former president of the Santo Domingo Community.[1401] The Parán Community even prevented Mr. Retuerto from entering the Site on the day of the planned June 2018 Protest,[1402] and requested that he not be present at a mediation in January 2019 between Claimant and the Parán Community.[1403]

642. Claimant's arguments that Peru breached a negative obligation to not harm Claimant or its investment are thus unsubstantiated and should be rejected.

643. For all of the foregoing reasons, Claimant's FPS claims—each based on a non-existent obligation, and each demanding the use of force—must be rejected.

c. Claimant casually dismisses the relevant circumstances in the context of which Peru's conduct must be assessed

644. As Peru demonstrated in the Counter-Memorial and above, the FPS obligation under the CIL MST requires a State to conduct itself reasonably *under the circumstances*.[1404] To recall, when applying the "due diligence" standard to the facts of a case, the tribunal is required to take into account the specific circumstances in order to determine whether the State's conduct was "reasonable under th[os]e circumstances."[1405] In the words of the tribunal in *Strabag SE v. Libya*, "the [FPS] duty of due diligence cannot be viewed in the abstract and in isolation from the conditions prevailing in [the host State]."[1406]

[1401] **Ex. C-0550**, Letter from Leoncio Prado Subprefect (MININTER) to MEM, 15 June 2018, p. 1; Retuerto Witness Statement, ¶ 20.

[1402] **Ex. C-0550**, Letter from Leoncio Prado Subprefect (MININTER) to MEM, 15 June 2018, p. 1; Retuerto Witness Statement, ¶ 20.

[1403] **Ex. C-0550**, Letter from Leoncio Prado Subprefect (MININTER) to MEM, 15 June 2018, p. 1; Retuerto Witness Statement, ¶ 21.

[1404] *See* **RLA-0001**, Rudolf Dolzer & Christoph Schreuer, "*Chapter VII: Standards of Protection*," PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), p. 161. *See also* **CLA-0100**, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (El-Kosheri, Goldman, Asante), ¶ 77; Peru's Counter-Memorial, ¶ 489. *See also* Claimant's Reply, ¶ 626.

[1405] **RLA-0001**, Rudolf Dolzer & Christoph Schreuer, "*Chapter VII: Standards of Protection*," PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), p. 161.

[1406] **RLA-0084**, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 19 June 2020 (Crook, Crivellaro, Ziadé), ¶ 234.

645. Claimant completely ignores the observation by the tribunal in *Strabag SE.* Instead, in the Reply, Claimant simply argues that the circumstances "do not constitute an excuse" for any alleged conduct because, according to Claimant (i) the rights of local communities are extremely limited, (ii) Peruvian law places limits on the right to protest, and (iii) the doctrine of *force majeure* does not apply.[1407] These disjointed, inchoate arguments by Claimant do not support its FPS claims, for the following reasons.

646. *First*, Claimant's argument that the factual circumstances "do not serve as an excuse" for its conduct misrepresents both Peru's position and the applicable case law. [1408] Peru has not and does not claim that these circumstances of social conflicts—which are relevant to Claimant's claim—somehow constitute an "excuse." Neither have investment tribunals somehow relied on such circumstances as "excuse[s]." Instead, when deciding based upon the accepted legal standard whether a State's conduct was "reasonable under the circumstances," investment tribunals have by necessity considered what those circumstances were.[1409] Claimant's attempt to cast aside these circumstances thus fails.

647. *Second*, Claimant's arguments about the rights of local communities does not assist its case. Peru provided in the Counter-Memorial a detailed account of the history of social conflicts between mining companies and local communities in Peru and in other States.[1410] Peru demonstrated that this history led to the development of State practice, domestic regulations, and industry standards that call for community engagement and collaboration, and prioritize dialogue.[1411] Claimant's only answer is to argue that a mining company is only under certain, highly specific obligations to engage with

[1407] Claimant's Reply, § 9.3.5.

[1408] Claimant's Reply, ¶ 685.

[1409] *See, e.g.*, **RLA-0084**, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 19 June 2020 (Crook, Crivellaro, Ziadé), ¶ 234. *See also id.*, ¶ 235.

[1410] *See* Peru's Counter-Memorial, § II.A.1.

[1411] *See* Peru's Counter-Memorial, § II.A.2.

local communities (e.g., to prepare a Citizen Participation Plan),[1412] and that the rights of such communities are extremely limited (e.g., to consult as part of any mine closure process).[1413] In other words, Claimant is determined to minimize or dismiss its own responsibilities as a mining company operating in the vicinity of rural communities. Such effort not only exposes Claimant's pitiful community relations strategy, but also backfires. Claimant's submissions in fact *confirm* that the history of social conflicts within and outside of Peru confirm the reasonability of the State's policy of and mechanisms for collaborative engagement with local communities.[1414] Those circumstances are relevant when assessing Peru's conduct.

648. *Third*, Claimant's arguments regarding the right to protest under Peruvian law are confusing and do not support its claim. Claimant observes that the right to protest under Peruvian law is limited,[1415] and concludes that "Peru cannot rely on the fact that social conflicts arise between mining companies and rural communities to abdicate its responsibilities towards foreign investors under the FTA."[1416] Peru agrees that the right to protest under Peruvian law is limited, and in this respect reiterates that its officials never acquiesced in, accepted, or expressed agreement with the Parán Community's chosen tactics. Peru demonstrated through the evidence that its officials repeatedly urged the Parán Community to cease its Access Road Protest.[1417] For example, in a letter sent from the OGGS to the Parán Community on 18 February 2019, Peru "urge[d] [the Parán Community] to lift [their] coercive measure [i.e., the Access Road Protest] in order to restart the process of dialogue and to continue in a climate of peace and peaceful coexistence with the mining company Invicta Mining Corp

[1412] Claimant's Reply, ¶ 692.

[1413] Claimant's Reply, ¶ 696.

[1414] *See, e.g.*, **Ex. R-0140**, Ministerial Resolution No. 596-2002-EM/DM, 20 December 2002. *See also* Peru's Counter-Memorial, ¶ 82.

[1415] Claimant's Reply, ¶ 700.

[1416] Claimant's Reply, ¶ 707.

[1417] *See supra* Section II.C.3.

S.A.C."[1418] Thus, Peru did not agree with or encourage the Community's conduct. However, as Claimant expressly concedes, "[i]t is the State's responsibility to strike a balance between those competing demands,"[1419] and Peru struck that balance by following international, domestic, and industry best practices in an effort to create a lasting solution to the conflict.[1420]

649. *Fourth*, and finally, Claimant creates a straw-man argument by alleging that the doctrine of *force majeure* does not apply.[1421] Claimant correctly notes that Article 23 of the ILC Articles provides that "[t]he wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure."[1422] Claimant then proceeds to argue that the requirements for a *force majeure* event are not met in this case. As Claimant no doubt knows, Peru has not invoked Article 23 of the ILC Articles, or the doctrine of *force majeure*, in respect of this dispute. Instead, Peru has properly applied the legal standard applicable to the FPS obligation under the CIL MST to show that its conduct was reasonable under the circumstances. Claimant's force majeure argument can therefore be dismissed for what it is: a straw-man.

d. Claimant has not demonstrated that the use of force would have prevented its alleged loss—which it would not have

650. Even if Claimant had properly identified the relevant circumstances—which Claimant did not—and demonstrated that Peru did not act reasonably under those circumstances (quod non), Claimant would need to satisfy another element for its FPS claims to succeed. As Claimant expressly recognizes in the Reply, Claimant is required to demonstrate that if Peru had acted with "due diligence," it would "in fact have

[1418] **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS OGDPC from MINEM (F. Trigoso) to the Parán Community (A. Torres), 18 February 2019, pp. 1–2.

[1419] Claimant's Reply, ¶ 707.

[1420] *See supra* Table 6: Peru's Diligent and Reasonable Actions.

[1421] Claimant's Reply, § 9.3.5.2.

[1422] **CLA-0003**, ILC Articles, Art. 23.1.

prevented the claimant's alleged losses."[1423] However, Claimant makes no effort in the Reply to demonstrate that if Peru had used force against the protesters, then Peru would have prevented Claimant's losses. Claimant's claim should be dismissed on this basis.

651. The use of force by Peru would not have prevented Claimant's alleged loss. This is so for the following reasons.

a. Claimant's claimed loss is the loss of its shares in Invicta. As demonstrated in **Section II.D.4** above, Claimant lost its shares in Invicta because Claimant voluntarily pledged its shares to PLI Huaura, breached the PPF Agreement, and then legally forfeited its shares.[1424] The hypothetical use of force by Peru would not have changed those facts.

b. The evidence related to other social conflicts within Peru reveals that the use of force by the police has not resolved social conflicts, but only aggravated and prolonged them.[1425] Claimant is unable to identify an instance in which the use of force did in fact resolve such a conflict. Thus, Claimant has not shown that

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[1423] Claimant's Reply, ¶ 626. *See also* Peru's Counter-Memorial, ¶ 494 (citing **RLA-0007**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (Böckstiegel, Lever, Dupuy), ¶ 166).

[1424] *See supra* Section II.D.4.

[1425] *See supra* Section II.C.4. *See also* **Ex. R-0224**, Infographics Las Bambas 2003–2019, Ombudsman's Office of Peru, 5 April 2019, p. 2; **Ex. R-0223**, Leonidas Wiener Ramos, *Debida Diligencia y Minería: Las Bambas*, November 2022; **Ex. R-0243**, "*Las Bambas: cronología de los conflictos en toda la historia del proyecto minero,*" EL COMERCIO, 31 August 2018; **Ex. R-0244**, Social Conflicts Report No. 139, Ombudsman's Office of Peru, September 2015, p. 34; **Ex. C-0304**, "Arequipa: with pellets they try to evict protesters from the Plaza de Armas", *Diario Correo*, 14 August 2016; **Ex. C-0305**, "Pasco: Police evicted invaders from private land of a mining company", *Andina*, 23 May 2016; **Ex. C-0581**, "At least ten injured and a mining camp destroyed in protests in Peru", *SWI swissinfo*, 30 October 2021; **Ex. R-0239**, "*Apumayo: ¿Cómo se recupera la mina ayacuchana luego del asalto e incendio de sus instalaciones?,*" EL COMERCIO, 30 April 2022; **Ex. C-0586**, Tambo Case, "Police and Prosecutor evict land invaders (VIDEO)", *Correo*, 20 October 2015; **Ex. C-0584**, "Yurimaguas: two policemen injured after eviction of land invaders," *RPP Noticias*, 5 June 2014; **Ex. C-0585**, "Police evict invaders from Tablada de Lurín archaeological site", TVPerú, 19 May 2015; **Ex. R-0242**, "Tablada de Lurín: policía cuida zona arqueológica tras desalojo," EL COMERCIO, 20 May 2015; **Ex. C-0589**, "Villa El Salvador: Police begin eviction of invaders in Lomo de Corvina", TVPerú, 28 April 2021.

the use of force would have resolved the conflict, and thereby avoided or prevented Claimant's losses.

c. Although Claimant insists that Peru should have forcibly disarmed the Parán Community, Claimant has not demonstrated whether or how such action would have resolved its social conflict, and thereby prevented its losses. The evidence in fact indicates that such use of force by Peru would not have resolved the conflict. The Parán Community did not need weapons to demonstrate their opposition, or to either initiate or maintain the Access Road Protest, which means that their opposition could (and likely would) have continued with or without the existence of weapons.[1426] Furthermore, the evidence shows that most of the community members who were protesting were *not* armed.

652. In conclusion, Claimant has submitted claims of a violation of the FPS obligation that (i) are based upon obligations invented by Claimant, that do not exist under CIL, and (ii) are all founded on the premise that Peru was required under Peruvian and international law to use force against the Parán Community. In order to uphold these claims, the Tribunal would have to conclude that there is a CIL rule that requires a State to intervene in a social conflict on behalf of a mining company and use force against local community protesters. The consequences of such a finding would be extraordinary, both within and outside of Peru. By contrast, Peru respectfully asks this Tribunal to apply the FPS legal standard under CIL MST and to conclude, based on the evidence on the record, that Peru exercised due diligence by taking action that was reasonable under the circumstances, and thus dismiss Claimant's FPS claims under Article 805.1 of the Treaty.

C. Peru has fulfilled its obligation to accord to the investment fair and equitable treatment under the CIL MST

653. Claimant alleges that Peru breached its obligation under Treaty Article 805.1 to accord to "covered investments treatment in accordance with the customary international

[1426] *See supra* Section II.C.3.

law minimum standard of treatment of aliens, including fair and equitable treatment [("**FET**")] . . . ."[1427] In the Counter-Memorial, Peru demonstrated that Claimant had failed to satisfy its burden of proof,[1428] and that Peru in fact satisfied its FET obligation under the CIL MST.[1429] In the Reply, as explained below, Claimant abandoned its earlier claims, and developed new ones. However, these claims are also meritless and must be rejected.

654. In the following sections, Peru demonstrates that (i) Claimant has failed to establish that Peru's actions constitute a composite act (see **Section 1** below); (ii) the FET obligation under the CIL MST establishes a high threshold for breach (see **Section 2** below); (iii) Peru complied with that obligation (see **Section 3** below); and (iv) Claimant cannot cast aside the applicable legal standard of CIL MST expressly set forth in Treaty Article 805 and instead import an autonomous FET obligation from another treaty (see **Section 4** below).

1. Claimant has failed to establish that Peru's actions constitute a composite act

655. Claimant alleges that Peru breached the FET obligation through a composite act—i.e., through a series of measures that, in Claimant's estimation, together amount to a breach.[1430] Claimant's framing of its claim as a composite act reflects Claimant's recognition that the individual acts of which it complains would not alone constitute a breach of the FET obligation.[1431]

[1427] **RLA-0010**, Treaty, Art. 805.1. *See also* Claimant's Memorial, § 4.3; Claimant's Reply, § 9.4. To recall, Treaty Article 805.2 specifies that the concept of FET in Article 805.1 "do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." **RLA-0010**, Treaty, Art. 805.2.

[1428] Peru's Counter-Memorial, § IV.C.1.

[1429] Peru's Counter-Memorial, § IV.C.2.

[1430] *See* Claimant's Memorial, §§ 4.3.3, 4.3.4.

[1431] *See* Claimant's Memorial, ¶ 283 (observing that "'[t]he cumulative effect of a succession of impugned actions by the State of the investment can together amount to a failure to accord [FET] even where the individual actions, taken on their own, would not surmount the threshold for a Treaty breach'").

656. As Peru demonstrated in the Counter-Memorial, in order for a claimant to establish the existence of a "composite act" under customary international law, the claimant must show that the individual acts were "sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system."[1432] Professor Crawford explained that "a composite act is more than a simple series of repeated actions, but, rather, a legal entity the whole of which represents more than the sum of its parts."[1433] Furthermore, each of the individual acts constituting the alleged composite act must have had "an adverse effect" on the investment.[1434]

657. In the Reply, Claimant argues that international law provides *no* legal standard for the identification of a composite act.[1435] Claimant's theory thus appears to be that a claimant can identify and amalgamate any combination or permutation of isolated acts or omissions—whether or not they are inter-connected, and over any period of time—and hold it up as a composite act or legal entity. Claimant's theory is illogical, implausible, and inconsistent with the Commentary to the ILC Articles (addressed above), as well as investment jurisprudence.

658. For example, the tribunal in *LSF-KEB Holdings SCA v. Korea* rejected a composite act theory similar to that invented by Claimant. The tribunal confirmed that a claimant may not cobble together any set of actions or omissions:

> The basic issue is to determine what is the "composite act" which has "acquired a different legal character" from its composite parts. . . . [T]he alleged post-2011 [conduct] simply added new and different episodes to the [c]laimants' earlier grievances. The [c]laimants have not established a scheme of systemic [conduct]

[1432] **CLA-0018**, ILC Commentary, Art. 15(1), cmt. 5. *See also* Peru's Counter-Memorial, § IV.C.2.

[1433] **RLA-0024**(bis), Crawford, p. 266.

[1434] **CLA-0071**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (Sureda, Brower, Janeiro), ¶ 263 (*quoted in* Claimant's Memorial, ¶ 309) (quoted approvingly in **CLA-0082**, *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (Lévy, Gotanda, Boisson de Chazournes), ¶ 670).

[1435] Claimant's Reply, § 9.4.2.

> separate and distinct from a series of acts or omissions which they claim individually give rise to State liability.
>
> In the [t]ribunal's view, the post-2011 alleged []conduct was repetitive, not transformative. The [alleged State conduct] events as outlined by the [c]laimants amounted to a "series of repeated actions" and not, as discussed by Professor James Crawford, "a legal entity the whole of which represents more than the sum of its parts."[1436]

659. Thus, in order to substantiate its claim that Peru violated its FET obligation through a composite act, Claimant must demonstrate that the conduct that it challenges formed part of a common pattern or system.

660. Having at first denied that any such requirement exists, Claimant then seems to acknowledge that it must do more than identify separate acts or omissions—or, in the words of Professor Crawford, "a simple series of repeated actions."[1437] Claimant thus argues that "[v]iewed as a whole, the State's actions and omissions clearly evince a firm political decision . . . to refrain from intervening into the dealings of the Parán Community."[1438] Claimant then lists several "illustrative examples" of the alleged conduct that it argues is contrary to FET under CIL MST.[1439] However, Claimant's argument fails for at least the following reasons.

661. *First*, Claimant has failed to substantiate its claim that there was a "political decision" adopted by the Peruvian State. Claimant (i) has not identified what individual or agency made such decision; (ii) has not indicated when such decision was made; (iii) has not provided any evidence showing how or when such decision was

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[1436] **RLA-0177**, *LSF-KEB Holdings SCA, et al., v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 30 August 2022 (Binnie, Brower, Stern), ¶¶ 354–355 (*quoting* **RLA-0024**(bis), Crawford, p. 266). *See also* **CLA-0051**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271 (rejecting a composite act claim because a series of actions "would only be [a composite act] where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough").

[1437] **RLA-0024**(bis), Crawford, p. 266.

[1438] Claimant's Reply, ¶ 770.

[1439] Claimant's Reply, ¶ 771.

communicated to the relevant State agencies (e.g., the OGGS, the PNP, the MININTER, the MINEM, the PCM, the Ombudsman's Office, and the Public Prosecutor's Office).[1440] Critically, Claimant has not and cannot point to a single order or instruction; there simply was no "political decision," as Claimant falsely claims, that interfered with the PNP's exercise of its discretion in deciding if, when, and how to use force in connection with the dispute between Claimant and the Parán Community. It is evident that Claimant hopes to satisfy its burden by simply asserting that there was a common pattern or scheme, but without offering any evidence that would even begin to prove the existence of such common pattern or scheme.

662. *Second*, Claimant's list of purportedly illustrative examples represent not a "political decision" to favor the Parán Community, as Claimant argues, but rather a one-sided and twisted narrative of the events at issue. In particular, Claimant lists what it believes Peru should have done. Specifically, Claimant asserts—again, without a shred of evidence—that the decision to use force to lift the Access Road Protest[1441] shows a "political decision" to favor the Parán Community. Claimant's list deliberately omits the affirmative, frequent, and reasonable action that Peru did take in an effort to end the Access Road Protest and broker a peaceful and lasting resolution to the conflict between two parties.[1442] In order to uphold Claimant's claim of a composite act, the Tribunal would have to conclude that Peru's policy of pursuing a peaceful settlement of the conflict between Claimant and the Parán Community—and the PNP's decision that the use of force against the rural community ultimately was neither required nor appropriate—reflects a common scheme on behalf of the State to hurt Claimant. Such conclusion has no basis in law or fact.

663. *Third*, the alleged composite act fabricated by Claimant is no more than a repetition of the same grievance. As noted above, the *LSF-KEB Holdings SCA v. Korea* tribunal asked whether the composite act "ha[d] 'acquired a different legal character' from its

[1440] *See supra* Table 6: Peru's Diligent and Reasonable Actions.

[1441] Claimant's Reply, ¶ 771(a).

[1442] *See* Claimant's Reply, ¶ 771.

composite parts'"[1443]—what Professor Crawford referred to as "a legal entity the whole of which represents more than the sum of its parts."[1444] The tribunal concluded that the claimant was complaining of conduct that "simply added new and different episodes to the [c]laimants' earlier grievances," such that the "conduct was repetitive, not transformative."[1445] The same is true here: Claimant wanted Peru to use force against the protesters, and it simply lists—as alleged omissions—the instances in which Peru did not use force against the protesters. To borrow the words of the *LSF-KEB Holdings SCA* tribunal, such alleged omission "simply added new and different episodes to the [c]laimants' earlier grievances," and does not demonstrate the crystallization of a *composite* act that "'acquired a different legal character' from its composite parts.'"[1446]

664. There simply was no composite act—no coordinated pattern or scheme, no legal entity—in this case, and Claimant has not shown otherwise.

2. The FET obligation under the CIL MST establishes a high threshold for breach

665. Even if Claimant had satisfied the requirements under CIL for establishing the existence of a composite act (quod non), Claimant's claim that such composite act violated the FET obligation under the CIL MST is meritless and must be rejected.

[1443] **RLA-0177**, *LSF-KEB Holdings SCA, et al., v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 30 August 2022 (Binnie, Brower, Stern), ¶ 354. *See also* **RLA-0024**(bis), Crawford, p. 266; **CLA-0051**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271 (rejecting a composite act claim because a series of actions "would only be [a composite act] where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough").

[1444] **RLA-0024**(bis), Crawford, p. 266.

[1445] **RLA-0177**, *LSF-KEB Holdings SCA, et al., v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 30 August 2022 (Binnie, Brower, Stern), ¶¶ 354–355.

[1446] **RLA-0177**, *LSF-KEB Holdings SCA, et al., v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 30 August 2022 (Binnie, Brower, Stern), ¶ 354. *See also* **RLA-0024**(bis), Crawford, p. 266; **CLA-0051**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271 (rejecting a composite act claim because a series of actions "would only be [a composite act] where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough").

a. Claimant failed to meet its burden to prove the legal standard applicable to FET under the CIL MST

666. As Peru explained in the Counter-Memorial[1447] and in **Section IV.B.1** above, Claimant has the burden to produce evidence of State practice and *opinio juris* to prove the CIL MST—including with respect to the CIL MST legal standard for FET. Because Claimant has produced no such evidence, its arguments regarding the legal standard applicable to FET under the CIL MST (i.e., under Treaty Article 805.1) should be rejected.[1448]

667. As a threshold matter, it bears noting that Peru does not bear any burden of its own to prove the alleged CIL rules that Claimant has invoked against Peru, as such burden falls exclusively on Claimant. Notwithstanding the foregoing, in the present case Peru has agreed to articulate—without prejudice to its rights—its own understanding of the State practice and *opinio juris* that has generated the legal standard applicable to FET under the CIL MST. Peru emphasizes that there is nothing in the record in this arbitration that would justify any deviation from the CIL MST legal standard for FET that Peru has identified.

b. The FET obligation under the CIL MST establishes a high threshold for breach

668. In the Counter-Memorial, Peru noted that the legal standard for FET under CIL MST as articulated by the tribunal in *Waste Management II*[1449] reflects contemporary State practice and *opinio juris*.[1450] The *Waste Management II* tribunal described such standard as follows:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and

[1447] Peru's Counter-Memorial, §§ IV.B.1, IV.C.1.

[1448] The analysis presented in Section IV.B with respect to the FPS legal standard under the CIL MST applies equally to the FET legal standard under the CIL MST. For the avoidance of doubt, Peru accordingly incorporates its analysis from Section IV.B on FPS to this Section IV.C on FET.

[1449] **CLA-0037**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (Crawford, Civiletti, Magallón), ¶ 98.

[1450] Peru's Counter-Memorial, ¶ 561.

> equitable treatment is infringed by conduct attributable to the State and harmful to the claimant **if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic**, **is discriminatory** and exposes the claimant to sectional or racial prejudice, **or involves a lack of due process leading to an outcome which offends judicial propriety**—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[1451] (Emphasis added)

Subsequent investment tribunals have accepted this *Waste Management II* formulation as an accurate articulation of the FET legal standard under the CIL MST.[1452]

669. In the Reply, Claimant confirmed that it accepts this *Waste Management II* excerpt as a correct articulation of the relevant legal standard.[1453] However, no sooner does Claimant accept the foregoing articulation of the applicable standard than it departs from such standard. In fact, Claimant does *not* address what the CIL MST prohibits (e.g., conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic"[1454]), and does not seek to show that the conduct of which it complains breached that standard (e.g., by showing that such conduct was "arbitrary, grossly unfair, unjust or idiosyncratic"[1455]).

670. Instead, Claimant articulates its own view of the CIL MST. In particular, it embarks on a meandering, inchoate discussion of various decisions (beginning with the 1924 decision of the U.S.-Mexico General Claims Commission in *Neer v. Mexico*),[1456] and

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[1451] **CLA-0037**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (Crawford, Civiletti, Magallón), ¶ 98.

[1452] Claimant's Memorial, ¶ 270, fn. 444; Peru's Counter-Memorial, ¶¶ 561, fn. 1173.

[1453] *See* Claimant's Reply, ¶ 724 ("[Peru] actually endorses the **very same** definition of FET that Claimant put forward in its Memorial: the definition expounded by the tribunal in *Waste Management II*" (emphasis in original)). *See also id.*, ¶ 738.

[1454] **CLA-0037**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (Crawford, Civiletti, Magallón), ¶ 98.

[1455] **CLA-0037**, *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (Crawford, Civiletti, Magallón), ¶ 98.

[1456] *See* Claimant's Reply, ¶¶ 743–754.

including reliance on the *Tecmed v. Mexico* award[1457] (which, as Professor Zachary Douglas famously observed, the *Tecmed* standard of FET is "actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain."[1458]). On that basis, Claimant leaps to the conclusion that the CIL MST creates a universal and strict "obligation on the host State to enforce its own laws vis-à-vis third parties causing damage to protected investments."[1459] Thus, according to Claimant's case, CIL obligates States to ensure that no domestic law is ever broken in a way that could harm a foreign investor's investment. That is a gross and blatant misrepresentation of the law.

671. The CIL MST includes no such obligation. The CIL MST "serve[s] as a floor, an absolute bottom, below which conduct is not accepted by the international community."[1460] While non-compliance with domestic law could be relevant to an FET claim, the State conduct "must be **sufficiently egregious and shocking**—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—**so as to fall below accepted international standards**"[1461] (emphasis added). In this respect, the *Díaz Gaspar v. Costa Rica* tribunal concluded as follows:

> This of course does not mean, that a contradiction or inconsistency in the State's behavior during the life of the investment cannot be in breach of the fair and equitable

[1457] Claimant's Reply, ¶ 752.

[1458] **RLA-0175**, Zachary Douglas, "*Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*," ARBITRATION INTERNATIONAL (2006), p. 28.

[1459] Claimant's Reply, p. 755.

[1460] **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 615.

[1461] **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 616. *See also* **RLA-0186**, *Adel a Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (Williams, Brower, Thomas), ¶ 390 ("[A] breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations. It will certainly not be the case that every minor misapplication of a State's laws or regulations will meet that high standard").

> treatment standard. In the latter case, however, the relevant issue is to know whether, by changing its position, or by acting in a certain way, **the State behaved in an aberrant, unfair, unreasonable or idiosyncratic manner**, without the investor's expectations being relevant in principle to assess a breach of international law, since any investor always expects the State to act reasonably and comply with the existing regulatory framework[1462] (Emphasis added)

672. Similarly, in assessing whether "instances of failures to implement important elements of [State] regulations" could violate the CIL MST, the *GAMI v. Mexico* tribunal considered whether there was an "'outright and unjustified repudiation'" of the relevant legal framework.[1463]

673. In sum, under the CIL MST—and even under an autonomous standard of FET—, neither Peru nor any other State can be held strictly liable for ensuring complete compliance with its domestic laws at all times. Instead, in order to show that the State's conduct falls below the floor of acceptable conduct (i.e., below MST), such that it may trigger international responsibility, Claimant must show, in the words of the

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[1462] **RLA-0180**, *Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award, 29 June 2022 (Mourre, Jimenez, Gonzalez Garcias), ¶ 368. *See also id*., ¶ 371 ("The fact that the State has violated the regulatory framework may, depending on the circumstances of the case, be in violation of international law, but the fact that the investor had the expectation that the State would have complied with the law does not generally add anything to the analysis that must be made to assess the existence of such a violation.").

[1463] **RLA-0049**, *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004 (Reisman, Lacarte Muró, Paulsson), ¶ 103. *See also* **CLA-0140**, *Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia*, ICSID Case No. ARB/14/27, Award, 9 November 2018, ¶ 239 (applying the higher autonomous FET standard; holding that "the failure to satisfy requirements of national law, taken for itself, does not necessarily amount to a violation of international law;" and finding a violation based upon evidence of "a manifest, systemic and sweeping lack of application of the [domestic] legislation"); **RLA-0187**, *Ioan Micula, Viorel Micula and others v. Romania (II)*, ICSID Case No. ARB/14/29, Award, 5 March 2020 (McRae, Beechey, Crook), ¶ 367 ("The Tribunal agrees that there may be circumstances in which a failure to enforce laws could amount to a denial of legitimate expectations and hence a breach of the obligation to provide fair and equitable treatment. The GAMI tribunal recognized that a failure to enforce regulations could amount to a violation of NAFTA Article 1105 if it 'amounted to an 'outright and unjustified repudiation' of the relevant regulations. . . . , the Tribunal does not consider that what the Claimants rely on to show that the Respondent had failed to enforce its laws in this case meets the GAMI test of an 'outright and unjustified repudiation' of its law. There is no 'repudiation' of the standards set out in the legislation.").

GAMI tribunal, that the conduct was "egregious and shocking," reflecting "manifest arbitrariness, blatant unfairness a complete lack of due process, evident discrimination, or a manifest lack of reasons."[1464] As shown below, Claimant has not even come close to making any such showing. In fact, the evidence on the record shows that Peru did *not* breach the CIL MST.

3. Peru complied with its FET obligation under the CIL MST

674. Claimant's claim that Peru breached the FET obligation is a moving goal post. In the Memorial, Claimant had raised three individual allegations of breach, namely that Peru: (i) breached Claimant's alleged legitimate expectations; (ii) allegedly acted in an arbitrary manner in relation to Claimant's conflict with the Parán Community; and (iii) failed to act transparently and consistently with respect to Claimant's investment.[1465] Peru refuted such claims in the Counter-Memorial,[1466] including by demonstrating that:

a. Claimant's alleged legitimate expectations are not protected by the CIL MST;[1467] and in any event, Claimant had failed to substantiate any legitimate expectations, or violation thereof;[1468] and

b. Peru acted reasonably, transparently and consistently at all times, including by taking action to engage with the parties to the conflict and broker a lasting solution to the social conflict between those two parties.[1469]

675. Unable to rebut the above, in the Reply Claimant has changed tack. Claimant's FET claim now consists of two parts: (i) that the actions of the Parán Community violated the FET standard;[1470] and (ii) that Peru was under an obligation to ensure compliance

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[1464] **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 616.

[1465] Claimant's Memorial, § 4.3.4.

[1466] Peru's Counter-Memorial, ¶¶ 619–666.

[1467] Peru's Counter-Memorial, ¶¶ 566–571.

[1468] Peru's Counter-Memorial, ¶ 632.

[1469] Peru's Counter-Memorial, ¶¶ 655–666.

[1470] *See* Claimant's Reply, § 9.4.3.2.

with its laws, and Peru failed "to enforce the law against the Parán Community to prevent further damage to the Claimant's investment."[1471] Claimant also appears to have abandoned its claims (i) for breach of legitimate expectations; and (ii) that Peru did not act consistently and transparently.[1472] As shown below, Claimant's new claims fare no better than its original set of claims.

a. The actions of the Parán Community are not attributable to Peru

676. Claimant's first claim is that the actions of the Parán Community violated Peru's FET obligation under the MST CIL.[1473] As Claimant appears to concede, such claim requires Claimant to prove that the conduct of the Parán Community is attributable to Peru.[1474] As Peru demonstrated in the Counter-Memorial and in **Section IV.A** above, the conduct of the Parán Community is not attributable to Peru.[1475] Claimant's first FET claim therefore must be rejected.

b. Peru's actions did not repudiate or manifestly fail to apply its own legal framework

677. Claimant's second FET claim is that "Peru has systematically failed to enforce the law against the Parán Community to prevent further damage to the Claimant's investment."[1476] This claim rests on two false premises: *first*, that Peru "systematically failed to enforce the law;"[1477] (ii) *second*, that there is an obligation under CIL MST "to enforce its own laws vis-à-vis third parties causing damage to protected investments."[1478]

678. Claimant's first premise is incorrect. Claimant has not demonstrated that Peru failed to enforce its domestic law on a single instance, let alone that such alleged failure was

[1471] Claimant's Reply, § 9.4.3.3.
[1472] *See generally* Claimant's Reply, § 9.4.3.3.
[1473] *See* Claimant's Reply, § 9.4.3.2.
[1474] Claimant's Reply, §§ 9.1, 9.2 (providing Claimant's case on attribution).
[1475] *See supra* Section IV.A.
[1476] Claimant's Reply, § 9.4.3.3 heading.
[1477] Claimant's Reply, § 9.4.3.3 heading.
[1478] Claimant's Reply, § 9.4.3.1 heading.

widespread enough to qualify as what Claimant calls a "systematic[] fail[ure] to enforce the law."[1479] Instead, Claimant has made clear that it misunderstands the contours of Peruvian law on forceful police interventions, including by arguing that the PNP was required to forcefully intervene at the Invicta Mine.[1480] However, Peruvian law does not mandate the use of force, but authorizes force (at the discretion of the police) where alternative means of engagement, such as dialogue, would not suffice.[1481] Further, Claimant has presented no administrative or judicial complaint filed by itself or by Invicta against any public official or agency for any alleged dereliction of duty or failure to enforce the law.[1482] As Claimant's arguments incorrectly apply Peruvian law and fail to cite any complaint against any member of the PNP, they should be rejected.

679. Concerning the second premise of Claimant's FET claim, Peru has demonstrated that failure to enforce domestic law, in and of itself, does not constitute a breach of CIL MST. Instead, Claimant must prove that Peru's alleged conduct was "**sufficiently egregious and shocking**—a gross denial of justice, manifest arbitrariness, blatant

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[1479] Claimant's Reply, § 9.4.3.3 heading.

[1480] *Compare* Claimant's Reply, § 7.1 (presenting Claimant's understanding of Peruvian law) *with supra* Section II.C.1 (explaining that forceful police intervention against civilians is not mandated under Peruvian law). *See also* **Ex. IMM-0039**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, p. 51; **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2.

[1481] Meini Report, ¶ 134 ("In order to comply with its purpose and function, members of the PNP may use force. However, the use of force is never discretionary or arbitrary. It is regulated in detail in internal law and in international law. According to those sources of law, the PNP may not use force unless it has exhausted all alternative means that do not involve violence or a risk of harm to persons (the use of force is admitted as an exception or as a last resort) or that involve a risk of minor injury (criterion of progressiveness in the use of force)."); *see also* **Ex. IMM-0039**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, p. 51; **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2.

[1482] *See* Meini Report, ¶¶ 186–187 ("All in all, what confirms the correct and proper performance of the members of the PNP and of the MP is the absence of any reports or complaints filed against them. It is to be expected that anyone filing a criminal complaint and believing that the investigations are not following their legal course will raise the corresponding complaints. The law in force in Peru provides for this possibility. As there are no criminal or administrative complaints that question the actions of the police officers and those of public prosecutors responsible for the investigations in which Invicta is the injured party, it follows that the Claimant itself does not believe such challenges to exist.").

unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons"[1483] (emphasis added). To satisfy the applicable legal standard under CIL, it is not enough for Claimant to argue that Peru's authorities did not comply with Peruvian law.[1484] Rather, Claimant must demonstrate that Peru's conduct constituted an "outright and unjustified repudiation"[1485] of the relevant legal framework or a "manifest, systematic and sweeping lack of application"[1486] of such framework. Claimant is unable to make such a showing, because Peru complied with its obligation to accord FET.

(i) Claimant wrongly assumes that Peru was required to use force to dislodge the Parán Community protesters

680. As a preliminary matter, it is critical to note that all of Claimant's arguments in relation to Peru's alleged failure to uphold its legal framework share a common denominator: namely, that Peru was required to use force to extinguish the Access Road Protest.[1487] In other words, Claimant posits that the *only* permissible approach to a social conflict of this nature is to use force. Such contention betrays a fundamental misunderstanding of Peruvian law, as well as principles of international standards

[1483] **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 616. *See also* **RLA-0186**, *Adel a Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (Williams, Brower, Thomas), ¶ 390 ("[A] breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations. It will certainly not be the case that every minor misapplication of a State's laws or regulations will meet that high standard.").

[1484] *See supra* Section IV.C.2.

[1485] **RLA-0049**, *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004 (Reisman, Lacarte Muró, Paulsson), ¶ 103. *See also* **CLA-0140**, *Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia*, ICSID Case No. ARB/14/27, Award, 9 November 2018 (Simma, Böckstiegel, Lowe), ¶ 369.

[1486] **RLA-0187**, *Ioan Micula, Viorel Micula and others v. Romania (II)*, ICSID Case No. ARB/14/29, Award, 5 March 2020 (McRae, Beechey, Crook), ¶ 367.

[1487] Claimant's Reply, ¶¶ 770–773.

and industry practice, all of which emphasize the importance of reaching a peaceful and lasting resolution to social conflicts, *without* resorting to physical force.[1488]

681. Claimant's allegation that Peru's pursuit of dialogue instead of armed force to resolve Claimant's social conflict with the Parán Community was contrary to the Peruvian legal framework is wrong. Peruvian law—and specifically Article 8.2 of Legislative Decree No. 1186, which Claimant invokes[1489]—provides that the police "**may** use force" (emphasis added) under limited circumstances.[1490] As demonstrated in **Section II.C.1**, those circumstances did not exist in respect of Claimant's opposition to the Access Road Protest.[1491]

682. However, even if the PNP had been authorized to use force (quod non), it would have been required to satisfy itself, pursuant to the principles of proportionality and

[1488] Peru's Counter-Memorial, ¶ 57. *See also e.g.*, **Ex. R-0088**, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 2017; **Ex. R-0084**, Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict: Land and Conflict, UNEP, 2012; **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration: Principles and Guidance Notes, PDAC, 2014; **Ex. R-0085**, Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?, Chatham House, 4 June 2013; **Ex. R-0086**, Good Practice Guide: Indigenous Communities and Mining, ICMM, 2015; **Ex. R-0087**, Social License to Operate in Mining: Current Trends & Toolkit, IBDO, 2020; **Ex. R-0094**, Understanding Company-Community Relations Toolkit, ICMM, 2015; **Ex. R-0141**, OXFAM, "*La Participación ciudadana en la minería peruana: concepciones, mecanismos y casos*," 8 September 2009; **Ex. R-0028**, Canada-Peru CR Toolkit; **Ex. R-0089**, 2014 CSR Strategy.

[1489] *See* Claimant's Reply, ¶ 358.

[1490] *See* **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2 ("The personnel of the National Police of Peru **may** use force, in accordance with articles 4, 6 and numeral 7.2, in the following circumstances . . . " (emphasis added)). Claimant invokes Article 920 of the Civil Code, concerns police support of a possessor's action within 15 days of being dispossessed of an asset, and is not applicable for the reasons described in Section II.C.1 above. *See infra* Section II.C.1; **Ex. R-0005**, Legislative Decree No. 295, Civil Code, 24 July 1984, Art. 920. *See also* Meini Report, ¶ 134 ("[T]he PNP may not use force unless it has exhausted all alternative means that do not involve violence or a risk of harm to persons").

[1491] *See infra* Section II.C.1; Meini Report, ¶¶ 74, 76, 169–174.

necessity, that "other means are ineffective or do not in any way guarantee the achievement of the legal objective sought."[1492]

683. The need for restraint when deciding whether to exercise force is particularly acute with respect to social conflicts in rural communities in Peru, given the very real risk that using force will lead to violence and loss of life.[1493] Regrettably, such risks have materialized on several occasions in recent history. In the Counter-Memorial, Peru provided several examples of instances in which forceful intervention by the PNP led to both violence and the loss of life—including at least the following incidents:[1494]

a. a confrontation in June 2009 known as *El Baguazo* resulted in 33 deaths and over 200 people injured;[1495]

b. a series of confrontations in September 2015, October 2016, September 2018, March 2019, September 2021, April 2022, and July 2022 between police and a local community at the Las Bambas mine resulted in at least four deaths and 97 people injured;[1496] and

[1492] **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2. *See also* **Ex. IMM-0039**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, p. 51; Meini Report, ¶ 134 ("[T]he PNP may not use force unless it has exhausted all alternative means that do not involve violence or a risk of harm to persons").

[1493] *See* Peru's Counter-Memorial, ¶¶ 47–54.

[1494] *See supra* Section II.C.4; Peru's Counter-Memorial, ¶¶ 50–51.

[1495] Peru's Counter-Memorial, ¶ 50. *See also* Incháustegui First Witness Statement, ¶¶ 35–37.

[1496] Peru's Counter-Memorial, ¶ 51; **Ex. R-0224**, Infographics Las Bambas 2003–2019, Ombudsman's Office of Peru, 5 April 2019, p. 2; **Ex. R-0243**, "*Las Bambas: cronología de los conflictos en toda la historia del proyecto minero,*" EL COMERCIO, 31 August 2018; **Ex. R-0225**, Social Conflicts Report No. 218, Ombudsman's Office of Peru, April 2022, p. 35; **Ex. R-0238**, Social Conflicts Report No. 219, Ombudsman's Office of Peru, May 2022, p. 39; **Ex. R-0227**, "*Las Bambas inicia reducción progresiva de sus operaciones debido a bloqueos viales*," LA REPÚBLICA, 3 November 2022; **Ex. R-0245**, Supreme Decree No. 068-2015-pcm, State of Emergency, 28 September 2015; **Ex. R-0246**, "*Decreto Supremo que deja sin efecto la declaración de estado de emergencia,*" GOB.PE, 13 June 2022.

c. a police intervention in October 2022 at the Apumayo mine left at least 10 people injured.[1497]

684. The fact that the use of force should be the measure of last resort for resolving social conflicts is also reflected in international jurisprudence.[1498] For example, the risks of using force with respect to social conflicts between mining companies and local communities were highlighted by the tribunal in *South American Silver v. Bolivia*.[1499] In that case, which also related to a social conflict between a mining company and local communities, the claimant argued that Bolivia should have used military force to quell the conflict, and had breached FET by not doing so.[1500] The tribunal dismissed this allegation, noting that "there is no evidence that the militarization of the area would have been an appropriate measure conducive to remedying the social conflict and allowing the Project to continue."[1501] The same conclusion should apply to the use of force in this case; it would have destabilized, rather than resolved the conflict, as explained in the remainder of this section.

[1497] **Ex. C-0581**, "At least ten injured and a mining camp destroyed in protests in Peru", *SWI swissinfo*, 30 October 2021. *See* **Ex. R-0239**, "*Apumayo: ¿Cómo se recupera la mina ayacuchana luego del asalto e incendio de sus instalaciones?*," EL COMERCIO, 30 April 2022.

[1498] *See, e.g.*, **Ex. IMM-0032**, *J. v. Peru*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 17 April 2015 (M. Ventura Robles, *et al.*); **Ex. IMM-0033**, *Nadege Dorzema, et al., v. Dominican Republic*, IACHR, Merits, Reparations and Costs, 24 October 2012 (García-Sayán); **Ex. IMM-0034**, *Mujeres Víctimas de Tortura Sexual en Atenco v. Mexico*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 28 November 2018 (Grossi, *et al.*); **Ex. R-0250**, Diego García-Sayán, *Justicia Interamericana y Tribunales Nacionales*, DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES (2013), pp. 825, 831.

[1499] *See generally* **CLA-0097**, *South American Silver Ltd v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Award, 22 November 2018 (Jaramillo, Vicuña, Guglielmino).

[1500] **CLA-0097**, *South American Silver Ltd v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Award, 22 November 2018 (Jaramillo, Vicuña, Guglielmino), ¶ 671.

[1501] **CLA-0097**, *South American Silver Ltd v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Award, 22 November 2018 (Jaramillo, Vicuña, Guglielmino), ¶ 672.

(ii) Each of the "illustrative examples" cited by Claimant demonstrates that Peru upheld its own legal framework

(a) Peru's response to the Access Road Protest was reasonable and conformed with its obligations under Peruvian law

685. The first "illustrative" example cited by Claimant in support of its argument that Peru "systematically failed to enforce the law" is that Peru did not authorize police intervention to lift the Access Road Protest.[1502] This allegation lacks any factual or legal foundation.

686. *First*, Claimant's argument proceeds from the false premise that Peru refrained from intervening in the Access Road Protest. As Peru explained at length in the Counter-Memorial and above in **Section II.C.3**, Peru engaged numerous Peruvian officials from at least *eleven* different Peruvian agencies to intervene in the Parán Community's protests of the Invicta Mine.[1503] Peru spent fourteen months working alongside Claimant and the Parán Community to broker a peaceful resolution to their social conflict, convening at least 26 meetings between Claimant and the Parán Community, establishing a formal Dialogue Table, encouraging both Claimant and the Parán Community to try and find common ground, and urging them to return to dialogue when they struggled to do so.[1504] That Peru did not acquiesce to Claimant's demands that it forcefully remove the protesting Parán Community members from the Invicta Mine does not mean that it failed to intervene. Rather, it took appropriate action to try to mediate a lasting solution to the social conflict that Claimant itself had caused.

687. *Second*, Claimant misguidedly relies on the principle that the right to protest under Peruvian law cannot justify the violation of other fundamental rights such as property, physical integrity and life.[1505] However, as Peru explained above in relation to

[1502] Claimant's Reply, ¶¶ 770–771(a).

[1503] *See* Peru's Counter-Memorial, § II.E; *supra* Section II.C.3.

[1504] *See supra* Table 6: Peru's Diligent and Reasonable Actions (providing a table summarizing the actions that Peru took throughout the social conflict).

[1505] Claimant's Reply, ¶ 771, referring to § 9.3.5.1.

Claimant's attempt to rely on such principle in support of its FPS claim, protests against mining projects such as Claimant's often take various forms of civil disobedience—including through access road obstructions like the one enacted by the Parán Community.[1506] It is overly simplistic of Claimant to suggest that the protests should have been managed in the same way as other instances of crime within Peru. Rather, such actions by the Parán Community necessitated a nuanced response aimed at the long-term resolution of the larger social conflict, rather than short term forceful intervention that would, at best, have only temporarily removed the protesters and would have negated any chance for peaceful resolution.[1507]

688. *Third,* Claimant cites in support of its proposition the fact that the Public Prosecutor dismissed a complaint for usurpation of property filed by the Lacsanga Community in relation to the Access Road Protest, but that fact does not support Claimant's case.[1508] As explained by Peru's expert on Peruvian law, Mr. Ivan Meini, the reason such complaint was dismissed was that the Lacsanga Community had not met the relevant legal requirements to substantiate its complaint.[1509] Claimant does not contest that decision or argue that it was contrary to Peruvian law—let alone contrary to the CIL MST.

689. *Fourth*, the fact that the PNP did not use force in relation to the Access Road Protest was entirely consistent with Peruvian law.[1510] While Claimant has argued, for the first time in the Reply, that the PNP should have intervened on the basis of Article 920 of the Civil Code of Peru and/or Article 8.2 of Legislative Decree 1186, neither provision

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[1506] *See, e.g.,* **Ex. R-0181**, "*Sierra Metals Provides Update on its Yauricocha Mine in Peru*," SIERRA METALS INC., 22 September 2022; **Ex. R-0182**, "*Yauricocha Mine (Yauricocha Expansion Project),*" MINING DATA SOLUTIONS, 2022. **Ex. R-0183**, "*New Chinese-led port project faces backlash from local residents and environmentalists in Peru*," GLOBALVOICES, 5 March 2021. **Ex. R-0184**, "*Puno: Alcalde de Nuñoa afirma que comunidades rechazan proyecto Santo Domingo de Minsur,*" NOTICIAS SER.PE, 18 May 2016.

[1507] Meini Report, ¶¶ 202–205.

[1508] Claimant's Reply, ¶ 771(a).

[1509] Meini Report, ¶ 176.

[1510] *See supra* Section II.C.1. *See also, e.g.*, **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2; **Ex. IMM-0039**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, p. 51.

required that Peru forcefully remove Parán Community protesters or make mass arrests.[1511] As explained in **Section II.C.1**, Article 920 of the *Civil* Code neither expands nor creates police authority. Rather, Article 920 only requires that the police play a supporting and supervisory role with respect to a dispossessed property owner's *own efforts* to regain their property.[1512] It does not require that the police intervene forcefully whenever a person is dispossessed of property—indeed, such a requirement would plainly be unworkable, as it would require the police to act as a 24/7 security service to protect the property of everyone in the entire country. In any event, Claimant did not take any of the steps necessary to activate a process of repossession under Article 920 of the Peruvian Civil Code.[1513]

690. Regarding Article 8.2 of Legislative Decree 1186 (also discussed above in **Section II.C.1)**, it provides that: "[t]he personnel of the National Police of Peru **may use** force, in accordance with articles 4, 6, and numeral 7.2"[1514] (emphasis added). It then lists certain narrow situations in which such discretion is allowed, two of which form the basis of Claimant's allegation that force should have been used, namely: (i) to *prevent* a crime from taking place;[1515] and (ii) to "control" any person resisting authority.[1516] With respect to the first of these situations, Claimant's allegation is not that the PNP should have prevented illegal activity, but rather that the PNP should have intervened with respect to alleged illegal activity that was *ongoing*, namely the Access Road Protest that had *already taken place*. The cited provision of law is thus inapplicable. Regarding the second situation, Prof. Meini explains that "[t]he possibility that the PNP would have had to use force to control anyone resisting

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[1511] *See supra* Section II.C.1.

[1512] *See supra* Section II.C.1. *See also* **Ex. R-0005**, Legislative Decree No. 295, Civil Code, 24 July 1984, Art. 920.

[1513] *See supra* Section II.C.1. As noted in that section, a request must be filed in the jurisdiction where the property is located and include sufficient information to substantiate the applicant's previous possession of the property.

[1514] **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2.

[1515] **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2(c).

[1516] **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2(e).

authority, as provided for by [A]rticle 8.2.e of Legislative Decree 1186, must also be ruled out in this case."[1517] The use of force pursuant to Article 8.2(e) is only permissible where either a Peruvian authority's order has been disobeyed or police action has been resisted—neither circumstance existed within the context of the Access Road Protest.[1518]

691. Both of these provisions thus provide that the PNP enjoys discretion when deciding whether or not to exercise these powers.[1519] In this case, there were good reasons for the PNP not to use force, including:

a. the importance of avoiding the violent escalation of the conflict;[1520]

b. the likelihood that dialogue would offer the best prospect for a long-term agreement between the parties to the conflict;[1521]

[1517] Meini Report, ¶ 76.

[1518] Meini Report, ¶ 76.

[1519] **Ex. R-0005**, Legislative Decree No. 295, Civil Code, 24 July 1984, Art. 920 ("The National Police of Peru and the respective Municipalities, within the framework of their powers as authorized under the Organic Law of Municipalities, must provide the necessary support to guarantee strict compliance with this article, **under penalty of law** . . . " (emphasis added)); **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Arts. 8.2(c), (e) ("The personnel of the National Police of Peru **may use force**, in accordance with articles 4, 6 and numeral 7.2, in the following circumstances: . . . c. [to] [p]revent the commission of crimes and misdemeanors . . . e. [to] [c]ontrol who opposes resistance to authority" (emphasis added)).

[1520] Many instances of forceful intervention have resulted in significant harm to human safety and life. *See, e.g.*, Peru's Counter-Memorial, ¶ 50-51; Incháustegui First Witness Statement, ¶¶ 35–37; **Ex. R-0224**, Infographics Las Bambas 2003–2019, Ombudsman's Office of Peru, 5 April 2019, p. 2; **Ex. R-0243**, "*Las Bambas: cronología de los conflictos en toda la historia del proyecto minero,*" EL COMERCIO, 31 August 2018; **Ex. R-0225**, Social Conflicts Report No. 218, Ombudsman's Office of Peru, April 2022, p. 35; **Ex. R-0238**, Social Conflicts Report No. 219, Ombudsman's Office of Peru, May 2022, p. 39; **Ex. R-0227**, "*Las Bambas inicia reducción progresiva de sus operaciones debido a bloqueos viales*,"LA REPÚBLICA, 3 November 2022; **Ex. R-0245**, Supreme Decree No. 068-2015-pcm, State of Emergency, 28 September 2015; **Ex. R-0246**, "*Decreto Supremo que deja sin efecto la declaración de estado de emergencia,*" GOB.PE, 13 June 2022; **Ex. C-0581**, "At least ten injured and a mining camp destroyed in protests in Peru", *SWI swissinfo*, 30 October 2021; **Ex. R-0239**, "*Apumayo: ¿Cómo se recupera la mina ayacuchana luego del asalto e incendio de sus instalaciones?,*" EL COMERCIO, 30 April 2022.

[1521] Trigoso First Witness Statement, ¶¶ 17–21, 49; Saavedra Witness Statement, ¶ 24; Incháustegui First Witness Statement, ¶ 23.

c. the continued prospect of resolving (or at least deescalating) the dispute through dialogue between Claimant and the Parán Community (as evidenced through the milestone 26 February 2019 Agreement);[1522] and

d. the flexibility of the Peruvian legal framework, which allowed Peruvian officials to give dialogue an opportunity to succeed.[1523]

692. These circumstances notwithstanding, Claimant repeatedly sought to use Peru as its own security force, doing nothing to resolve the tensions in its relationship with the Parán Community and then trying to deputize the police to prevent its own community relations failures from impacting its Mine.[1524] Contrary to Claimant's argument, the fact that Peru did not submit to Claimant's unreasonable demands is not evidence of a decision to "refrain from intervening into the dealings of the Parán Community,"[1525] and it was entirely reasonable and in conformity with Peruvian law.

(b) Peru was not obligated under Peruvian law to prosecute the Parán Community for alleged contempt of authority

693. Claimant also cites as an "illustrative example[]" of Peru's conduct the alleged failure of the Huaura Subprefect to file a complaint against the Parán Community protesters for contempt of authority in relation to the Community's breach of the September 2018 Commitment and interference with subsequent attempts to conduct inspections at the Invicta Mine.[1526] These allegations are unsupported.

694. As Peru demonstrated in **Section II.C.3** above, an action for contempt of authority would not have been applicable to a breach of the September 2018 Commitment. The

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[1522] *See* **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019, pp. 1–2; **Ex. R-0132**, "*We are very pleased to announce the… conclusion of the illegal blockade*," MINING JOURNAL, 5 March 2019. *See also* Peru's Counter-Memorial, § II.E.3.

[1523] Meini Report, ¶ 76; **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2. *See also supra* Section II.C.1.

[1524] *See supra* Sections II.B. and II.C.3.

[1525] Claimant's Reply, ¶¶ 770, 771(a).

[1526] Claimant's Reply, ¶¶ 770, 771(d).

September 2018 Commitment was reached as part of a specific form of mediation process under Peruvian law. Under the relevant directive governing such process, namely Directive No. 0010-2015-ONAGI-DGAP ("**Protective Measures Directive**"), proceedings for contempt of authority may only be filed in the event of a breach of a *resolution* by the mediating authority. However, the September 2018 Commitment did not constitute such a resolution and so the concept of contempt of authority simply is not applicable.

695. This same reasoning applies to Claimant's argument that contempt of authority charges should have been brought against the Parán Community for their interference with governmental inspections in December 2018. The circumstance of that conduct also did not include a resolution that could be breached pursuant to the Protective Measures Directive.

696. Moreover, even if an action for contempt of authority had been available in either case, there would be no obligation on the Huaura Subprefect to file such an action. Rather, Claimant would have had the right to file the relevant complaint—subject to fulfilment of the relevant legal requirements—but Claimant did not do so.[1527] Claimant's allegations regarding contempt of authority therefore do not evidence any non-compliance with Peruvian law, let alone a repudiation of the legal framework or any other conduct that falls below the floor established by the CIL MST.

(c) Peruvian law did not require Peru to take preemptive possession of the Parán Community's firearms

697. Claimant also attempts to evidence Peru's so called "political decision" not to intervene in the affairs of the Parán Community by citing the alleged failure of the Peruvian authorities to confiscate firearms from that Community.[1528] This argument mischaracterizes the legal obligations of the PNP and ignores the larger national framework for arms confiscation that has been enacted in Peru.

[1527] *See supra* Section II.C.3.

[1528] Claimant's Reply, ¶ 771.

698. In the Counter-Memorial and **Section II.C.3** above, Peru described its transition to democracy in the 1990s and the historical impact of an insurgent, terrorist group known as Sendero Luminoso (Shining Path).[1529] This group terrorized rural communities throughout Peru in the 1980s and early 1990s, causing Peru to create local security programs in rural communities.[1530] Through these programs, the military provided arms to the community members to assist them in defending their communities from Sendero Luminoso.[1531] In many cases, the distributed long-range weapons remained in circulation within those same communities, even after the Sendero Luminoso had been neutralized.

699. To address this national issue, Peru has implemented laws and programs that incentivize the voluntary surrender of arms.[1532] These legal instruments follow the UN's recommended approach to disarming civilian populations, as they are non-violent, non-confrontational, and consistent with Peru's overall approach to social conflict with rural communities.[1533]

700. Claimant recognizes that the issue of firearms remaining in circulation within the rural communities is a well-known and nation-wide situation, but asserts that forceful disarmament of the Parán Community was required under the Peruvian legal framework.[1534] Claimant's suggestion is incorrect and naïve in light of the larger social context at play. Given the especially sensitive nature of social conflicts between

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[1529] Peru's Counter-Memorial, ¶¶ 47-52; **Ex. R-0263**, "*Sendero Luminoso (Shining Path)*," ENCYCLOPEDIA.COM, 16 January 2023; **Ex. R-0272**, "*Shining Path,*" Peru Reports, last accessed 25 January 2023.

[1530] **Ex. C-0597**, "Compensation to the Members of the Self- Defence Committees and Rondas Campesinas Victims of Terrorism", Ombudsman's Office, Report No. 54, 30 November 2000, pp. 3-4.

[1531] **Ex. C-0597**, "Compensation to the Members of the Self- Defence Committees and Rondas Campesinas Victims of Terrorism", Ombudsman's Office, Report No. 54, 30 November 2000, pp. 3-4.

[1532] *See, e.g.*, **Ex. R-0264**, Law No. 28397, 25 November 2004; **Ex. R-0265**, Law No. 31324, 5 August 2021.

[1533] **RLA-0184**, Small Arms: No Single Solution, UNITED NATIONS, last accessed 22 January 2023.

[1534] Claimant's Reply, ¶¶ 15, 17, 771(b).

mining companies and rural communities, it would have been counter-productive for Peru to attempt to forcefully confiscate all arms in circulation in the Parán Community or in all of the Rural Communities surrounding the Invicta Mine as part of an effort to quash local opposition to the Project.[1535]

701. Furthermore, even if Peru had forcefully disarmed the Parán Community (as Claimant alleges it should have), it would not have removed the Community's fierce opposition to Claimant's Invicta Project or Claimant's need to resolve its social conflict before completing additional mining activities—on the contrary, it would have inflamed it.[1536] In other words, confiscation of the weapons would not have resolved the social conflict, lifted the Access Road Protest, or avoided Claimant's breach of its obligations with PLI Huaura and the forfeiture of its shares.

702. Accordingly, the fact that the PNP did not confiscate the Parán Community's firearms did not amount to a repudiation of the legal framework and was not an example of a manifest or systematic failure to apply Peruvian law. Rather, it constituted the reasonable exercise of discretion not to use force in favor of ensuring that the dialogue process could continue and yield a firm solution to the social conflict.

(d) Claimant's allegation that Peru allowed members of the Parán Community to cultivate marijuana with impunity is contradicted by its own evidence

703. In the Reply, Claimant concocts yet another a new argument—and red herring: that Peru knew that the Parán Community opposed the Invicta Mine to "protect its illegal marijuana business" and nevertheless allowed the Community to pursue such business with impunity.[1537] Claimant's argument is flawed, for several reasons.

704. *First*, as a threshold matter—and as explained in greater detail in **Section II.E.2**—Claimant has failed to substantiate its speculative and defamatory allegation that the

[1535] *See supra* Section II.C.3.

[1536] *See supra* Section II.C.4 (discussing instances in which the use of force against local communities has aggravated the dispute).

[1537] Claimant's Reply, § 2.2, ¶¶ 5, 7, 9, 22, 647(c), 706.

Parán Community as a whole was engaged in and motivated by an "illegal drug business."[1538] In fact, the evidence shows that to the extent that any Parán Community members were involved in the illegal drug trade, they constituted a minor, non-influential faction within the community.[1539] Further, despite its bald assertions, Claimant has not demonstrated that the alleged marijuana plots kept by some individuals motivated the Parán Community's opposition to the Project or dispelled the legitimacy of that community's grievances towards Claimant.[1540]

705. *Second*, Claimant's claim is illogical as it supposes that the Parán Community opposed the Invicta Mine through robust protests in order to avoid police attention.[1541] This contention simply makes no sense; plainly the alleged actions of the Parán Community, which included forceful opposition and blocking of a road, *increased* police attention, not decreased it.

706. *Third*, Claimant's allegation that members of the Parán Community were allowed to continue marijuana cultivation with impunity is contradicted by its own arguments and evidence. Claimant itself acknowledges that the Peruvian authorities made extensive efforts to combat marijuana cultivation in the Huaura region in which the

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[1538] Claimant's Reply, ¶ 307. *See also supra* Section II.E.

[1539] *See, e.g.*, **Ex. C-0103**, Email from M. Mariños to Lupaka Gold Corp. (J. Castañeda), 14 November 2016. p. 2 ("This opposition leader and his family have been supported by a **group of oppositor community members** who live in Huacho and whose main activity is the cultivation of marijuana. This group is **not very empowered in the community** and it is possible to dismantle them in the short term" (emphasis added)); **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 4 ("INVICTA indicated that the Paran leaders are being advised and / or financed by **outsiders of the community** with their own interests (drug trafficking and informal mining mafias)" (emphasis added)); **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, PDF p. 3 (noting "the presence and active participation of **local actors** who, with an economy outside the law, subsidize activities contrary to public order against the mining project" (emphasis added)).

[1540] *See, e.g.*, **Ex. C-0103**, Email from M. Mariños to Lupaka Gold Corp. (J. Castañeda), 14 November 2016. p. 2; **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 4; **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, PDF, p. 3.

[1541] *See supra* Section II.E.

mine was located, noting that "[m]assive seizures or incinerations ranging from 3,000 to 10,000 marijuana plants were reported in the area multiple times between 2014 and 2018 by the local press."[1542] Claimant then cites numerous articles reporting the Peruvian authorities' investigations, seizures, and arrests in relation to the perpetrators of the illegal drug trade, as well as the widespread incineration of marijuana plants.[1543] Such extensive enforcement actions by the Peruvian authorities belie Claimant's allegation that Peru turned a blind eye to marijuana cultivation in the Huaura region and systematically failed to uphold the legal framework.

(e) Peru did not "refrain from any forcible action" with regard to the Parán Community's theft of ore from the Invicta Mine

707. Claimant's argument that Peru granted the Parán Community "blanket immunity" by allowing it to steal ore from the Invicta Mine is false. The first time that Claimant alleged to Peru that the Parán Community was stealing ore from the Invicta Mine was in July 2019, when Claimant sent Peru a letter indicating its concerns and discussed those concerns with Peruvian and Canadian officials.[1544] At the latter meeting, the Peruvian Minister of Mines listened to Claimant's concerns and indicated that he would look into whether the allegations Claimant made were true. He noted that *if* it was found to be true that the Parán Community was stealing ore, then he would reach out to representatives from the MININTER about securing the Invicta Mine.

[1542] Claimant's Reply, ¶ 35.

[1543] *See* Claimant's Reply, ¶ 35, fn. 37. **Ex. C-0104**, "*More than 3,000 marijuana plants incinerated in the highlands of Lima*," Andina, 13 August 2014; **Ex. C-0105**, "*Nearly 10,000 marijuana plants seized in Huamboy - Leoncio Prado*," Diario Ecos Huacho, 9 May 2017; **Ex. C-0106**, "*Nearly 10,000 Marijuana Plants Found in Huaura*," Peru21, 9 May 2014; **Ex. C-0107**, "*Hard Blow to Drug Trafficking: Sierra of Huaura Province is the Drug Haven of the Norte Chico,*" Agencia Digital de Noticias - Huacho, 11 April 2018; **Ex. C-0108**, "*5,000 Marijuana Plants Valued at 1.5 Million Soles Icinerated*," Litoral Noticias, 12 April 2018; **Ex. C-0109**, "*More Drugs Seized in Huamboy*," Litoral Noticias, Vol. 194, 9 May 2014; **Ex. C-0476**, "Peruvian National Police seizes 789 marijuana plants in the Sayán District", *Andina*, 19 September 2017; **Ex. C-0475**, "Sayán is no longer the country of the sun, it is the country of marijuana", *Prensa al Día*, 12 January 2016.

[1544] **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Ismodes), 6 February 2019, p. 2.

708. When an investigation into the Parán Community's occupation of the Invicta Mine demonstrated that the Community was exploiting the Mine in November 2019 and Invicta (under the control of a third party) later requested the closing of the Invicta Mine, Peru prepared and executed a police operation designed to forcefully remove the Parán Community. The details of this operation are outlined above in **Section II.F** and do not demonstrate, as Claimant alleges, that Peru granted the Parán Community immunity to exploit the Invicta Mine.[1545]

709. In any event, Claimant's complaint to the authorities that the Parán Community was stealing ore from the mine occurred mere weeks before it breached its obligation with PLI Huaura and at a time when Claimant did not have the necessary permits for commercial exploitation of the mine nor the facilities to process the ore. Consequently, the situation that Claimant reported to the Peruvian authorities for the first time in July 2019 is immaterial to the loss of its shares in Invicta.

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710. In sum, none of the so-called "illustrative examples" that Claimant provides shows that Peru exhibited a systemic practice of refraining from "intervening in the Parán Community's affairs." To the contrary, each example further exemplifies Peru's significant—and by any measure reasonable—commitment of time and resources to the resolution of Claimant and the Parán Community's social conflict and its good faith efforts to uphold and enforce the law. In conclusion, Claimant has not demonstrated that Peru failed to apply its own laws, let alone that it repudiated the legal framework or that it failed to apply its laws in a manifest, sweeping, and systemic way.

c. <u>Peru's conduct was not arbitrary and went above and beyond the MST</u>

711. In the Reply, after listing the alleged "illustrative examples" of Peru's conduct referred to above, Claimant makes the cursory allegation that "[t]he same acts and omissions of the Peruvian State amount to arbitrary treatment of the Claimant's investment,

[1545] *See supra* Section II.F.

which also breaches the minimum standard of treatment."[1546] Claimant's one-sentence argument falls well short of meeting the relevant legal standard concerning arbitrariness under international law. To recall, the tribunal in *Siemens v. Argentina* observed that "the most authoritative interpretation of international law"[1547] on arbitrariness appears in the ICJ Judgment rendered in the *ELSI (United States v. Italy)* case, where the ICJ held that

> [a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.[1548]

712. As the preceding section shows, the "illustrative examples" cited by Claimant serve only to show that Peru acted in a reasonable and rational manner in conformity with the relevant legal framework.

713. Nor does any of Peru's conduct beyond the "illustrative examples" listed by Claimant demonstrate arbitrary treatment. On the contrary, Peru demonstrated in the Counter-Memorial that its engagement in the Parán Community and Claimant's social conflict was robust, reasonable, and in conformity with the requirements of Peruvian law.[1549] Such measures were consistent, followed its internal policies and legal framework, and aimed at the peaceful resolution of a conflict that Claimant itself inflamed and exacerbated.

714. In sum, there is not a single act or omission that Claimant points to that constitutes a "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety" or that is opposed to the rule of law.[1550]

[1546] Claimant's Reply, ¶ 774.

[1547] **CLA-0071**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (Sureda, Brower, Janeiro), ¶ 318.

[1548] **RLA-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, ICJ, Judgment, 20 July 1989, ¶ 128.

[1549] Peru's Counter-Memorial, ¶¶ 655–663.

[1550] **RLA-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, ICJ, Judgment, 20 July 1989, ¶ 128.

715. The only attempted substantiation that Claimant provides with respect to its claim of arbitrary treatment is that Peru violated an alleged "policy . . . to provide a balance between the interests of local communities and of mining investors."[1551] However, Claimant has not explained why a mere breach of a policy would, if established, equate to a violation of MST. In fact, Claimant has not identified with any specificity what policy it alleges Peru disregarded. Nor has Claimant explained how Peru's actions violated that policy.[1552]

716. Even if Claimant's vague statement in relation to Peru's policy were sufficient to meet the required threshold under MST—which it is not—Peru did balance the interests of Claimant and the Parán Community. During Peru's involvement in the conflict between Claimant and the Parán Community, Peru balanced the Community's environmental, social, and economic concerns against Claimant's desire to advance its mining activity at the Invicta Mine. The best way for Peru to address both of these interests in the long-term was for Peru to support Claimant and the Community in reaching an agreement through dialogue.[1553] This was the only way for the social conflict to reach a peaceful resolution that would provide for the Parán Community's acceptance of the Invicta Mine and Claimant's advancement towards exploitation without Community interference.[1554]

717. Peru went above and beyond to enable Claimant and the Parán Community to reach such a resolution. As noted above, Peru mobilized numerous officials from multiple agencies to convene and attend meetings with Claimant and the Community in order

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[1551] Claimant's Reply, ¶ 774.

[1552] **RLA-0051**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (Pryles, Caron, McRae), ¶ 296 (As the *Cargill* tribunal noted, in order for conduct to violate that standard it must go "beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals").

[1553] *See* Meini Report, ¶¶ 202–205; León Second Witness Statement, §§ IV–V; Trigoso Second Witness Statement, §§ II, III.A; Incháustegui Second Witness Statement, ¶¶ 18–19.

[1554] *See* Meini Report, ¶¶ 202–205; León Second Witness Statement, §§ IV–V; Trigoso Second Witness Statement, §§ II, III.A; Incháustegui Second Witness Statement, ¶¶ 18–19.

to seek to broker a solution to the social conflict.[1555] OGGS specialists in particular made at least twenty visits to the Parán Community and Invicta Mine to advocate on behalf of *both* parties—pushing Claimant to dialogue with the Community and for the Community to lift its Access Road Protest. This extraordinary expenditure of Peruvian officials' time and resources proved worthwhile when the Parán Community and Claimant reached the 26 February 2019 Agreement, a milestone in the Dialogue Table that Claimant itself applauded as the end to its conflict.[1556]

718. When Claimant later breached this agreement—described in **Section II.C.3**—Peru continued to assist in the conflict, reinstating the dialogue mechanisms and pushing both Claimant and the Community to return to dialogue.[1557] Claimant even continued to receive widespread support from Peru after its privately hired security force, War Dogs, was involved in a violent altercation with the Community that seemingly decimated Claimant's opportunity for resolution.[1558]

719. None of these actions represents any level of departure from a so-called policy of balancing interests between mining companies and rural communities. Thus, Claimant's allegation, like its others, fails. Accordingly, Claimant's claim for breach of Article 805.1 must be dismissed.

720. In any event, Claimant again ignores the applicable legal standard. Even assuming that Claimant had demonstrated that Peru did not manage—despite its best efforts—

[1555] *See supra* Section II.C.3.

[1556] *See* **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019, pp. 1–2; **Ex. R-0132**, "*We are very pleased to announce the… conclusion of the illegal blockade*," MINING JOURNAL, 5 March 2019, p. 2. *See also* Peru's Counter-Memorial, § II.E.4.

[1557] *See supra* Section II.C.3.

[1558] *See* **Ex. R-0113**, Letter No. 52-2020-REGIÓN POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO from PNP Colonel (L. Pérez) to PNP General (H. Ramos), 22 February 2020, ¶ 23; **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019; **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019. *See also* Peru's Counter-Memorial, § II.E.5.

to "balance . . . the interests of local communities and of mining investors,"[1559] that would *not* "amount to arbitrary treatment of the Claimant's investment, which also breaches the minimum standard of treatment."[1560] Claimant has not demonstrated that the alleged failure to balance the interests of the Parán Community and of Claimant,[1561] even if it had occurred, was a "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety" and opposed to the rule of law. In other words, the alleged conduct that Claimant (wrongly) imputes to Peru does not constitute a breach of the FET obligation under the CIL MST.

4. Claimant's attempts to create or import an autonomous FET obligation fail

721. At the conclusion of the FET section of the Reply, and after having recognized the *Waste Management II* tribunal's articulation of the CIL MST, Claimant devotes 10 pages to the argument that a higher standard applies.[1562] Specifically, Claimant argues that the autonomous FET standard applies to its claims,[1563] and/or that Claimant can import and rely on an autonomous FET obligation from another treaty.[1564] Bizarrely, while Claimant insists that this higher standard of treatment is required, it makes no effort to apply such higher standard to its claims in order to demonstrate a breach. Accordingly, Claimant has failed to establish that Peru's conduct breached any autonomous FET obligation, and such claim must be rejected.

722. In any event, for the sake of completeness, Peru demonstrates below that: (i) the Treaty requires treatment in accordance with the CIL MST, and does *not* include an autonomous FET obligation; and (ii) Claimant cannot import an autonomous FET provision from another treaty. As Canada's Non-Disputing Party Submission confirms, "Article 804 of the Treaty does not allow for the importation of substantive

[1559] Claimant's Reply, ¶ 774.
[1560] Claimant's Reply, ¶ 774.
[1561] Claimant's Reply, ¶ 774.
[1562] *See* Claimant's Reply, pp. 296–306.
[1563] *See* Claimant's Reply, ¶ 790.
[1564] *See* Claimant's Reply, ¶ 795.

obligations or procedural rules contained in other international treaties."[1565] This is because

> [s]ubstantive obligations and procedural rights in other international treaties do not constitute 'treatment' of investors. Hypothetical treatment that may result from a treaty cannot give rise to a breach of the most-favoured nation treatment obligation.[1566]

a. The Treaty prescribes the CIL MST, and does not include an autonomous FET obligation

723. Claimant argues in the Reply that the autonomous FET standard should apply to its FET claim.[1567] However, the text of Treaty Article 805.1 leaves no doubt that only the CIL MST standard FET is applicable, not an autonomous FET standard; it provides that "[e]ach Party shall accord to covered investments treatment in accordance with the **customary international law minimum standard of treatment** of aliens, including fair and equitable treatment . . . ."[1568] (emphasis added). For the avoidance of doubt, Article 805.2 specifies that the concept of "fair and equitable treatment" in Article 805.1 "do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[1569] Claimant's attempt to read those two provisions out of the Treaty and thus ignore the express will of the Treaty Parties, Peru and Canada. As Canada explains in its Non-Disputing Party Submission:

> Pursuant to the principle of effectiveness, or *effet utile*, the phrase 'in accordance with the customary international law minimum standard of treatment,' alongside the words 'fair and equitable

[1565] Canada's NDP Submission, ¶ 28.

[1566] Canada's NDP Submission, ¶ 29.

[1567] *See* Claimant's Reply, ¶¶ 790–794.

[1568] **RLA-0010**, Treaty, Art. 805.1 (containing the obligation to "accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment . . . ."); *id.,* Art. 805.2 (clarifying that the concept of FET in Article 805.1 "do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens").

[1569] **RLA-0010**, Treaty, Art. 805.2.

> treatment,' in both paragraphs 1 and 2 [of Article 805] must be given meaning.[1570]

724. The attempt by Claimant to excise these words from the Treaty contravenes the primary rule of treaty interpretation—namely, that a treaty be interpreted "in accordance with the ordinary meaning to be given to [its] terms."[1571]

725. In the Counter-Memorial, Peru explained that FET under the CIL MST—which is the standard expressly provided by Treaty Article 805—is materially narrower than the *autonomous* FET standard established in many bilateral investment treaties.[1572] In the Reply, Claimant dismisses this analysis as "an academic sideshow."[1573] This remark is both flippant and untrue. There is a material difference between the autonomous FET standard and the FET standard under the CIL MST;[1574] for example, as Peru demonstrated in the Memorial, the FET obligation under the CIL MST does not include any legal obligation to protect or act in accordance with an investor's legitimate expectations.[1575] Notably, both Treaty Parties agree on this issue. Canada notes in its Non-Disputing Party Submission that "[t]here is no general obligation

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[1570] Canada's NDP Submission, ¶ 16.

[1571] **RLA-0128**, VCLT, Art. 31(1).

[1572] Peru's Counter-Memorial, § IV.C.4.

[1573] Claimant's Reply, ¶ 722.

[1574] *See, e.g.*, **RLA-0188**, *Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020 (Lévy, Alexandrov, Thomas), ¶ 1702 ("The Tribunal also finds that a difference must be drawn between treaties that expressly refer to the MST under customary international law (such as NAFTA), and those (such as this one) which refer only to 'fair and equitable treatment'. In accordance with the principle of *effet utile*, the use of this different wording must have some meaning").

[1575] *See* Peru's Counter-Memorial, ¶ 566. *See also* **RLA-0050**, *Obligation to Negotiate Access to the Pacific Ocean*, ICJ, Award, 1 October 2018, ¶ 162; **RLA-0048**, *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016 (Kaufmann-Kohler, Brower, Landau), ¶ 502 ("[T]he Tribunal shares the view held by a majority of NAFTA tribunals that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of [the obligation of fair and equitable treatment]"); **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 620 ("Merely not living [up] to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA"); **CLA-0040**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 July 2012 (Sureda, Eizenstat, Crawford), ¶ 219 (expressly adopting the *Waste Management II* articulation of MST).

under the customary international law minimum standard of treatment, and therefore under Article 805(1) of the Agreement, to protect an investor's legitimate expectations."[1576] Claimant is therefore wrong to dismiss the differences between the autonomous FET standard and the CIL MST as "an academic sideshow."[1577] The fact that Claimant is attempting to import an autonomous FET standard from another treaty (see next subsection) betrays Claimant's recognition that there *is* a material difference between that standard and the FET standard under the CIL MST. Leaving aside Claimant's disingenuity, its attempt to amend the express terms of the Treaty in order to introduce an autonomous FET obligation must be rejected.

b. Claimant cannot import an FET provision from another treaty

726. In a further attempt to ignore the express will of the Treaty Parties and unilaterally impose the higher autonomous FET obligation, Claimant argues that it can use Treaty Article 804 ("**MFN Clause**") to substitute the legal standard set forth in Treaty Article 805 with the autonomous FET provision that appears in the 1993 Peru-United Kingdom investment treaty.[1578] Peru demonstrates below that Claimant cannot use the MFN Clause in this way, because (i) the MFN Clause does not allow Claimant to modify the content of the Treaty's FET provision, and (ii) Annex II of the Treaty precludes Claimant from importing an FET provision from another Treaty.

(i) The MFN Clause does not allow Claimant to modify the content of the Treaty's FET provision

727. Claimant's attempt to rely on the MFN Clause to import the autonomous FET standard from the 1993 Peru-United Kingdom investment treaty contradicts the plain text of the MFN Clause, and therefore should be rejected. Paragraphs 1 and 2 of the MFN Clause of the Treaty provide as follows:

> 1. Each Party **shall accord to investors** of the other Party **treatment no less favourable than that it accords, in like circumstances**, to investors of a non-Party with respect to the

[1576] Canada's NDP Submission, ¶ 20.

[1577] Claimant's Reply, ¶ 722.

[1578] Claimant's Reply, § 9.4.3.

> establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
>
> 2. Each Party **shall accord to covered investments treatment no less favourable than that it accords, in like circumstances**, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.[1579] (Emphasis added)

728. In the Counter-Memorial, Peru analyzed the MFN Clause pursuant to the CIL rules of treaty interpretation, as codified in the Vienna Convention.[1580] Peru demonstrated that the text[1581] and context[1582] of the MFN Clause preclude Claimant's attempt to "import[]"[1583] into the Treaty an FET provision from the 1993 Peru-United Kingdom investment treaty. Peru also showed that neither of the two investment arbitration decisions that Claimant invoked to support its theory (i.e., *MTD Equity v. Chile* and *Rumeli Telekom v. Kazakhstan*) assist Claimant's argument.[1584]

729. In the Reply, Claimant seeks to alter the terms of the MFN Clause. For example, Claimant does violence to the text of the MFN Clause by arguing that the treaty phrase "treatment . . . that [the State] **accords**, in like circumstances"[1585] (emphasis added) should be construed as if the relevant phrase instead stated "treatment that the State **would accord** in 'like circumstances'"[1586] (emphasis added). However, the text of the MFN Clause represents the authentic expression of the will of the two parties to the

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[1579] **RLA-0010**, Treaty, Art. 804.

[1580] Peru's Counter-Memorial, § IV.C.3.a.

[1581] Peru's Counter-Memorial, ¶¶ 591–595. *See also* Canada's NDP Submission, ¶¶ 28-29; **RLA-0193**, *Mamacocha* Transcript (United States' Testimony), Thornton, Day 8, Tr. 1489:12-1490:18.

[1582] Peru's Counter-Memorial, ¶ 596.

[1583] Claimant's Memorial, ¶ 275. *See also* Claimant's Reply, § 9.4.4.3.

[1584] Peru's Counter-Memorial, ¶¶ 599–605.

[1585] **RLA-0010**, Treaty, Art. 804.1.

[1586] Claimant's Reply, ¶ 799 ("[T]here is nothing in the ordinary meaning of the words 'accords, in like circumstances' to suggest they limit the protection provided to actual instances of preferential treatment, as opposed to the treatment the State **would accord** in 'like circumstances' to an investor . . . ." (emphasis added)).

Treaty (Peru and Canada),[1587] and the text as signed and ratified by those two States must therefore be applied herein.

730. Claimant also posits that applying the plain text of the MFN Clause as it was written by the States Parties to the Treaty "would, in practice, mean the State could avoid its obligation under Article 804 simply by **finding minor distinguishing facts** to argue the circumstances are not 'like'" (emphasis added).[1588] In other words, according to Claimant, the Treaty should not be applied as written, because to do so would make it harder for Claimant to substantiate its claim. This argument must be rejected, and the Treaty, including the MFN Clause, must be interpreted based upon the ordinary meaning of its terms, in accordance with the Vienna Convention.[1589]

731. Lastly, Claimant attempts to justify its construal of the MFN Clause by relying on Treaty Annex 804.1, which clarifies the meaning of the phrase "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments" in the MFN Clause.[1590] That Annex provides, for greater clarity, that

> treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments" referred to in paragraphs 1 and 2 of Article 804 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international treaties or trade agreements.[1591]

732. Clarification that "treatment" under the MFN Clause "does not encompass dispute resolution mechanisms" does not mean, as Claimant pretends, that the MFN Clause

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[1587] *See, e.g.*, **RLA-0181**, Draft Articles on the Law of Treaties with Commentaries, ILC, 1966, Art. 28, cmt. 18. ("[T]he Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties . . ."); Art. 27, cmt. 11 ("[T]he text must be presumed to be the authentic expression of the intentions of the parties"); Art. 17, cmt. 12 ("The treaty itself remains the sole authentic statement of the common agreement between the participating States").

[1588] Claimant's Reply, ¶ 799.

[1589] **RLA-0128**, VCLT, Art. 31(1).

[1590] **RLA-0010**, Treaty, Annex 804.1.

[1591] **RLA-0010**, Treaty, Annex 804.1.

entitles an investor to import wholesale into the Treaty a substantive provision from another treaty—in this case, an autonomous FET obligation.

733. Ultimately, and unable to escape the Treaty language, Claimant argues that it nevertheless has satisfied the MFN Clause's requirement of "like circumstances" by allegedly describing "numerous recent examples of Peru using substantial Police force to remove invading protesters from mining investors' projects."[1592] But plainly Claimant's allegation does not fulfill the "like circumstances" requirement. Among other defects,[1593] Claimant never identifies with any precision the circumstances of any comparator mining investors, nor does it attempt to analyze the alleged likeness between their respective circumstances.[1594] Claimant also never alleges that any of those alleged "mining investors" was a *foreign* investor, which is a pre-requisite to any invocation of the MFN Clause.[1595] Claimant has therefore failed to substantiate its argument under the MFN Clause.

[1592] Claimant's Reply, ¶ 802.

[1593] In the Counter-Memorial, Peru explained that Claimant was required to identify—but had not identified: (i) an investor or investment of a non-Party, (ii) the circumstances of such investor or investment, (iii) the 'likeness' of those circumstances with those of Claimant or Claimant's investment; and (iv) 'treatment' accorded by a Treaty Party to the identified investor or investment of a non-Party"). *See* Peru's Counter-Memorial, ¶ 592. Again in the Reply, Claimant did not specify any of these four required elements to plead an MFN Clause claim. *See* Claimant's Reply, § 9.4.4.3.

[1594] *See* Claimant's Reply, ¶ 802 (wherein Claimant discusses the "like circumstances" requirement, but without presenting any inventory or analysis of Claimant's alleged circumstances, the alleged circumstances of other alleged "mining investors," or the alleged likeness between their respective circumstances).

[1595] **RLA-0010**, Treaty, Art. 804.1 ("Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors **of a non-Party** with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory"); *id.*, Art. 804.2 ("Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments of investors **of a non-Party** . . . ." (emphasis added)).

(ii) In any event, Treaty Annex II precludes Claimant from invoking the MFN Clause to import an FET provision from another Treaty

734. Peru adduced in the Counter-Memorial an additional reason for which Claimant cannot use the MFN Clause to invoke the 1993 Peru-United Kingdom investment treaty.[1596] Specifically, Treaty Article 808 provides that each Party can identify in its schedule to Annex II sectors or activities to which the MFN Clause does not apply.[1597] In its schedule to Annex II, Peru entered a Treaty reservation enabling Peru to adopt or maintain any measure that accords differential treatment to countries under an international agreement—such as an investment treaty or trade agreement—that was in force or signed prior to the date that the Treaty entered into force.[1598] The treaty invoked by Claimant (i.e., the 1993 Peru-United Kingdom investment treaty) is a treaty that was in force or signed prior to the date of entry that the Treaty entered into force, and therefore falls within the scope of Peru's reservation in Annex II.[1599] Accordingly, Annex II precludes Claimant from importing the FET provision from the 1993 Peru-United Kingdom investment treaty.

735. In the Reply, Claimant purports to respond to the above by contending that Peru's schedule to Annex II only excludes from scope of the MFN Clause treatment by Peru of "countries," but does not exclude treatment by Peru of "investors."[1600] This is a false dichotomy[1601] that would deprive Peru's reservation in its schedule to Annex II of *effet*

[1596] *See* Peru's Counter-Memorial, ¶¶ 609–611.

[1597] **RLA-0010**, Treaty, Art. 808. *See also* Peru's Counter-Memorial, ¶ 608.

[1598] **RLA-0010**, Treaty, Annex II, Schedule of Peru, p. 1. *See also* Peru's Counter-Memorial, ¶¶ 609–610; **RLA-0003**, *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Non-Disputing Party Submission of the United States, 19 November 2021 (van den Berg, Tawil, Vinuesa), ¶ 41; **RLA-0193**, *Mamacocha* Transcript (United States' Testimony), Thornton, Day 8, Tr. 1490:19-1492:22 (interpreting an analogous Treaty reservation).

[1599] Peru's Counter-Memorial, ¶ 611.

[1600] Claimant's Reply, ¶ 801.

[1601] Claimant seems to invent a similar false dichotomy between the terms "measures" and "standards of treatment," for which Claimant offers no legal authority, evidence, or explanation. *See* Claimant's Reply, ¶¶ 805–807.

utile. Peru's reservation expressly applies to the Treaty chapters on "Investment"[1602] and "Cross-Border Trade in Services,"[1603] both of which address treatment by Peru of activity by the *investors* (and services exporters) of "countries."[1604] Peru's treaties with other "countries" on "Investment" and "Cross-Border Trade in Services," such as the 1993 Peru-United Kingdom investment treaty, likewise address treatment by Peru of investors (and services exporters). Those treaties, including the 1993 Peru-United Kingdom investment treaty, are the direct subject of the Annex II exclusion.

736. For each of the reasons above, the Tribunal should reject Claimant's argument that the MFN Clause should be construed and applied to enable Claimant to import into the Treaty the autonomous FET provision from the 1993 Peru-United Kingdom investment treaty. Doing so would ignore the express will of the Treaty Parties to "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[1605]

D. Peru did not expropriate Claimant's investment

737. Claimant argues that Peru expropriated its investment, both directly and indirectly. As Peru demonstrated in the Counter-Memorial, and as further shown below, Claimant's investment was not expropriated, either directly or indirectly.[1606]

1. There was no direct expropriation of Claimant's investment

738. The sole basis for Claimant's direct expropriation claim is the Access Road Protest by the Parán Community.[1607] As Peru demonstrated in the Counter-Memorial, a direct expropriation within the meaning of the Treaty occurs only when there is a "formal transfer of title or outright seizure" of the investment by the host State.[1608] However,

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[1602] **RLA-0010**, Treaty, Annex II, Schedule of Peru, p. 3.

[1603] **RLA-0010**, Treaty, Annex II, Schedule of Peru, p. 3.

[1604] **RLA-0010**, Treaty, Annex II, Schedule of Peru, p. 1.

[1605] **RLA-0010**, Treaty, Art. 805.2.

[1606] *See* Claimant's Memorial, ¶ 312.

[1607] *See* Claimant's Memorial, § 4.4; Claimant's Reply, § 9.5.

[1608] **RLA-0010**, Treaty, Annex 812.1(a). *See also* Peru's Counter-Memorial, ¶ 671.

as demonstrated in **Section IV.A** above, the Access Road Protest was not attributable to Peru, and thus cannot form the basis for an expropriation claim.[1609] Furthermore, and in any event, the Access Road Protest did not amount to a formal transfer of title or outright seizure of Claimant's investment, and therefore could not and did not constitute a direct expropriation.[1610]

739. Claimant explicitly accepts that "a direct expropriation occurs when there is a 'formal transfer of title' or 'outright seizure' of a protected investment."[1611] Having failed to demonstrate the existence of any such transfer or seizure in the Memorial, Claimant attempts in the Reply to remedy this fatal defect by introducing three new arguments. Each of those is misguided and fails to establish that any direct expropriation occurred.

740. *First*, Claimant argues that the Access Road Protest should be deemed an "outright seizure" of its investment because, according to Claimant, such protest "effectively led to" the forfeiture of the investment (i.e., the shares in Invicta) and transfer of the latter to Claimant's creditor, PLI Huaura.[1612] Even if this statement were true (quod non), it would amount to an admission by Claimant that Peru's conduct in fact did *not* amount to a direct expropriation. That is so because a measure (such as the Access Road Protest) that merely "effectively led to"[1613] a formal transfer of title or outright seizure—as opposed to directly constituted such transfer or seizure—cannot properly be characterized as a direct expropriation.[1614]

[1609] *See supra* Section IV.A. *See also* Peru's Counter-Memorial, § IV.A.

[1610] *See* Peru's Counter-Memorial, § IV.D.

[1611] Claimant's Reply, ¶ 813. *See also id*., ¶ 830.

[1612] Claimant's Reply, ¶ 830. *See also id*., ¶¶ 819, 976.

[1613] Claimant's Reply, ¶ 830.

[1614] *See, e.g.*, **CLA-0061**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award, 23 December 2019 (Wolfrum, Reisman, Lévy), ¶ 227 ("The taking of property is necessary to qualify State actions against an investor as direct expropriation, whereas other measures, short of taking property but in one way or the other invalidating the investment, such as depriving or almost fully depriving the investment of its future profitability, may be qualified as indirect expropriation").

741. *Second*, the alleged seizure of Claimant's shares in Invicta was not conducted by Peru, nor was it otherwise attributable to Peru. Under the Pledge Agreement, Claimant had committed its Invicta shares as loan collateral to its creditor PLI Huaura, which is a private party.[1615] When Claimant breached its contractual obligations under the PPF Agreement, PLI Huaura foreclosed on the shares.[1616] This legal forfeiture was effected by PLI Huaura months after the start of the Access Road Protest.[1617] As Peru explained in the Counter-Memorial, and Claimant does not deny, the actions of PLI Huaura are not attributable to Peru.[1618] Instead, Claimant's decision to pledge its shares, and PLI Huaura's subsequent exercise of its contractual right under the Pledge Agreement to foreclose on Claimant's investment, are attributable solely to Claimant itself and its creditor. Thus, Claimant's claim that the Access Road Protest constituted a direct expropriation by Peru must be rejected.

742. *Third*, Claimant alleges that the decisions in *Wena Hotels v. Egypt* and *Amco v. Indonesia* show that mere "omissions" by a State can constitute a *direct* expropriation.[1619] As shown below, Peru disagrees with Claimant's interpretation of these decisions. In any event, even on Claimant's case, the relevant State must have "knowingly allow[ed]" a formal transfer of shares or outright seizure in order for a direct expropriation to be effected by means of an omission.[1620] In the present case, however, Peru never "knowingly allow[ed]" any transfer of shares (formal or otherwise) or any seizure of

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[1615] *See supra* Section II.D.4. *See also* **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Art. 6.1; **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 6 (providing the definition for "Collateral" under the PPF Agreement).

[1616] *See supra* Section II.D.4. *See also* **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. (M. Brenneisen) to Invicta Mining Corp. S.A.C. (L. Bravo), 23 September 2019; Ellis First Witness Statement, ¶ 57; Claimant's Memorial, ¶¶ 193–195.

[1617] *Compare* **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018 (describing the Access Road Protest as having commenced on 14 October 2018) *with* **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. (M. Brenneisen) to Invicta Mining Corp. S.A.C. (L. Bravo), 23 September 2019 (describing the foreclosure date as 26 August 2019).

[1618] Peru's Counter-Memorial, ¶ 765.

[1619] Claimant's Reply, ¶¶ 821–824.

[1620] *See* Claimant's Reply, ¶¶ 823, 848.

Claimant's investment (outright or otherwise),[1621] and Claimant does not and cannot show otherwise. Nor could have Peru blocked or impeded PLI Huaura from exercising its contractual rights under the Pledge Agreement to foreclose on Claimant's shares for the latter's breach of its obligations.

743. Furthermore, the facts of the two decisions that Claimant cites (*Wena Hotels* and *Amco*) do not support its direct expropriation claim. In *Wena Hotels*, the respondent State had knowingly allowed—and indeed had actively fomented—the forceful seizure of the claimant's investment by a local company (Egyptian Hotels Company) wholly owned by the Egyptian Government.[1622] The State made little to no effort to prevent or remedy such seizure, and was reportedly "uncooperative" and potentially even "part of the entire scheme."[1623] The State also later interfered with operating licenses of the investment, and prevented the investor from reclaiming its investment.[1624] There are no actions or conduct by Peru that are even remotely similar to those by the State in *Wena Hotels*; to the contrary, Peru has demonstrated that it took a series of actions over time to *support* Claimant and its investment, which included exhorting the Parán Community to lift the Access Road Protest and resolve its grievances with Claimant through dialogue.[1625]

744. In the other case cited by Claimant, *Amco v. Indonesia,* a local company operating under the guidance of the State forcibly took over management of the claimant's

[1621] Claimant's Reply, ¶ 848.

[1622] **CLA-0028**, *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award, 8 December 2000 (Leigh, Fadlallah, Wallace), ¶¶ 77, 96–101.

[1623] **CLA-0028**, *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award, 8 December 2000 (Leigh, Fadlallah, Wallace), ¶¶ 54, 91.

[1624] **CLA-0028**, *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award, 8 December 2000 (Leigh, Fadlallah, Wallace), ¶¶ 55, 57. *See e.g.,* **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to the Parán Community (A. Torres), 18 February 2019.

[1625] *See supra* Table 6: Peru's Diligent and Reasonable Actions. *See also* Peru's Counter-Memorial, ¶¶ 514–532.

investment with assistance from the State army and police forces.[1626] Subsequently, Indonesia revoked the claimant's license to conduct business.[1627] In *Amco*, as in *Wena Hotels*, the challenged State conduct was radically different from that at issue in the present case, as Peru never undertook any similar or analogous measures toward Claimant's investment. The *Wena Hotels* and *Amco* decisions are therefore inapposite, and do not support Claimant's direct expropriation claim.

745. For these reasons, Claimant's claim of a direct expropriation is manifestly meritless, and should be rejected.

2. There was no indirect expropriation of Claimant's investment

746. Claimant argues in the alternative that if there was no direct expropriation (which there was not), then Peru's alleged conduct constitutes an indirect expropriation.[1628] Claimant's indirect expropriation claim is based not on an individual act by Peru but rather on a theory of composite act and creeping expropriation.[1629] As demonstrated in the Counter-Memorial and further discussed below, however, in order to substantiate its creeping expropriation claim, Claimant must (i) demonstrate the existence of a composite act, through a coordinated pattern or scheme of conduct by the State, and (ii) satisfy the relevant requirements contained in the Treaty. Because Claimant does neither (as discussed below), its indirect expropriation claim therefore must be rejected.

[1626] **CLA-0066**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984 (Goldman, Rubin, Foighel), ¶¶ 100, 155, 164, 169–170.

[1627] **CLA-0066**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984 (Goldman, Rubin, Foighel), ¶¶ 127–128.

[1628] *See* Claimant's Memorial, ¶ 313; Claimant's Reply, ¶ 812, § 9.5.2 ("In any event, the Respondent's acts and omissions constitute an indirect expropriation").

[1629] Claimant's Reply, § 9.5.3 ("The Respondent's wrongful actions and omissions constitute a composite act and a creeping expropriation").

a. There was no coordinated pattern or scheme by Peru to harm Claimant's investment

747. Annex 812.1(a) of the Treaty recognizes that an indirect expropriation can result from either a "measure or series of measures."[1630] Claimant claims that there has been a creeping expropriation, and more specifically one that was effected through a series of measures that according to Claimant constitute a composite act.[1631]

748. In the Reply, Claimant not only wrongly recasts Professor Crawford's definition[1632] but also insists that it can simply identify scattered or isolated acts and proffer them as a "composite act."[1633] Rather, as Peru explained in the Counter-Memorial,[1634] Claimant must show that the measures were "sufficiently numerous and inter-connected to amount . . . to a pattern or system,"[1635] and that "each [measure] must have [had] an adverse effect" on Claimant's investment.[1636]

[1630] **RLA-0010**, Treaty, Annex 812.1(a) ("Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure"). *See also* Peru's Counter-Memorial, ¶ 680.

[1631] Claimant's Reply, § 9.5.3. *See also* Claimant's Memorial, § 4.4.1.2 ("An expropriation effected incrementally is a composite act"); **CLA-0071**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (Sureda, Brower, Janeiro), ¶¶ 263–264 ("By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. . . . We are dealing here with a composite act in the terminology of the [ILC Commentary]."); **RLA-0008**, Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment (2009), § 7.15 ("State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the [ILC Commentary].").

[1632] Claimant's Reply, ¶ 732 ("Professor Crawford explains in other words what the Claimant explained above: certain obligations may characterize as wrongful a series of acts or omissions which taken individually might not be so.").

[1633] Peru's Counter-Memorial, ¶ 681.

[1634] *See* Peru's Counter-Memorial, ¶¶ 584–588.

[1635] **CLA-0018**, ILC Commentary, Art. 15, cmt. 5 (*quoting Ireland v. United Kingdom*, ECHR, Application No. 5310/71, Award, 18 January 1978 (Pallieri, *et al.*), ¶ 159); *see also* **RLA-0056**, *RosInvestCo* (Final Award), ¶ 621 (concluding that a series of measures could "only be understood as steps under a common denominator in a pattern to destroy [the investment]").

[1636] **CLA-0071**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (Sureda, Brower, Janeiro), ¶ 263 (quoted in Claimant's Memorial, ¶ 309).

749. In the Memorial, Claimant did not even allege—let alone demonstrate—that the scattered conduct of which it complained satisfies the requirements of a composite act under CIL.[1637] In the Counter-Memorial, Peru explained that not every "series of actions or omissions"[1638] can be deemed to be a composite act, citing Professor Crawford's observation that "a composite act is more than a simple series of repeated actions, but, rather, a legal entity the whole of which represents more than the sum of its parts."[1639]

750. In the Reply, Claimant attempts to fill this hole, but such attempt consists merely of a lone paragraph, and the conclusory assertion that the complained-of conduct shows a "clear pattern" by which Peru "let the Parán Community act with impunity."[1640] This halfhearted attempt to establish a composite act fails, for at least the following reasons.

751. *First*, Claimant has utterly failed to substantiate its allegation of a common pattern or scheme. In this respect, Claimant adopts the same approach to its expropriation claim as to its FET claim: Claimant complains of various events, and draws the summary conclusion that there was a pattern or scheme between them.[1641] Yet Claimant has failed to demonstrate the existence of any pattern, either by identifying all of the relevant events, or providing evidence to show that the State was acting in a coordinate fashion. Simply put, Claimant has not demonstrated the existence of a composite act.

752. *Second*, the alleged composite act that Claimant created consists merely of the repetition of the same grievance. In assessing the existence of a composite act, the *LSF-KEB Holdings SCA v. Korea* tribunal asked whether the alleged composite act "ha[d]

[1637] *See* Claimant's Memorial, § 4.4.

[1638] Peru's Counter Memorial, ¶¶ 585–587 (*citing* **CLA-0018**, ILC Commentary, Art. 15(1)).

[1639] **RLA-0024**(bis), Crawford, p. 266.

[1640] Claimant's Reply, ¶ 880.

[1641] *See* Claimant's Reply, ¶ 770.

'acquired a different legal character' from its composite parts'"[1642]—i.e., whether it had become what Professor Crawford called "a legal entity the whole of which represents more than the sum of its parts."[1643] The tribunal concluded that the claimant was complaining of conduct that "simply added new and different episodes to the [c]laimants' earlier grievances," such that the "conduct was repetitive, not transformative."[1644] In this case, Claimant merely repeats again and again its complaint that Peru should have intervened and used force to suppress the protesters. However, such alleged omission "simply added new and different episodes to the [c]laimants' earlier grievances," and does not demonstrate the crystallization of a *composite* act that "'acquired a different legal character' from its composite parts.'"[1645] There is therefore no composite act.

753. *Third*, and finally, the evidence simply does not support Claimant's theory that there was a pattern of non-intervention by the State. To the contrary, and as explained in **Section II.C.3** above, the evidence demonstrates that Peru consistently took an active role, and made affirmative efforts, to resolve the social conflict. For example:

[1642] **RLA-0177**, *LSF-KEB Holdings SCA, et al., v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 30 August 2022 (Binnie, Brower, Stern), ¶ 354. *See also* **RLA-0024**(bis), Crawford, p. 266; **CLA-0051**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271 (rejecting a composite act claim because a series of actions "would only be [a composite act] where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough").

[1643] **RLA-0024**(bis), Crawford, p. 266.

[1644] **RLA-0177**, *LSF-KEB Holdings SCA, et al., v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 30 August 2022 (Binnie, Brower, Stern), ¶¶ 354–355.

[1645] **RLA-0177**, *LSF-KEB Holdings SCA, et al., v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 30 August 2022 (Binnie, Brower, Stern), ¶ 354. *See also* **RLA-0024**(bis), Crawford, p. 266; **CLA-0051**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 271 (rejecting a composite act claim because a series of actions "would only be [a composite act] where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough").

a. Officials from at least eleven Peruvian agencies played a role in responding to and seeking to resolve the conflict between Claimant and the Community.[1646]

b. Peru established and facilitated a Dialogue Table, through which Peru mediated in-person negotiations between representatives of Claimant and the Parán Community.[1647]

c. Such Dialogue Table yielded the milestone 26 February 2019 Agreement, for which Claimant publicly thanked Peru at the time.[1648]

d. When Claimant further inflamed tensions with the Parán Community by breaching the commitments it had made in the 26 February 2019 Agreement and by deploying the War Dogs, Peru continued to actively promote efforts for a peaceful resolution,[1649] including by advocating on Claimant's behalf with the Parán Community.[1650]

e. After conducting an investigation to determine whether the Parán Community had been engaging in ore theft and being asked by Invicta to close the Invicta Mine, Peru planned and executed a police operation.[1651]

754. The evidence thus shows that, far from a common pattern or scheme to harm or destroy Claimant's investment, Peru adopted multiple measures to assist Claimant in resolving its dispute with the Parán Community, and to protect Claimant's

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[1646] *See supra* Section II.C.3, Table 6: Peru's Diligent and Reasonable Actions.

[1647] *See* **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C, and Sayán Police Station, 14 October 2018, pp. 1–2. *See also supra* Section II.C.3.

[1648] *See* **Ex. R-0132**, "*We are very pleased to announce the. . .conclusion of the illegal blockade*," MINING JOURNAL, 5 March 2019, p. 2 ("**We are very pleased to announce the positive conclusion of the illegal blockade and would like to thank** our employees, **the authorities,** and our community partners that worked together to reach this successful result" (emphasis added)). *See also* Peru's Counter-Memorial, ¶¶ 264–266; *supra* Section II.C.3.

[1649] *See, e.g.*, **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019; **Ex. C-0220**, Letter No. 033-2019-MINEN/OGGS/OGDPC from MINEM (M. Kuzma) to Parán Community (A. Torres), 19 June 2019. *See also supra* Section II.C.3.

[1650] *See* León First Witness Statement, ¶ 55. *See also supra* Section II.C.3.

[1651] [redacted]

investment. Claimant cannot be allowed to ignore this overwhelming evidence of consistent action on the part of the State to claim that there was a pattern of inaction.

755. In sum, to borrow the words of the tribunal in *EDF v. Romania*, Claimant has not submitted evidence that the measures of which it complains form a "coordinated pattern adopted by the State."[1652] Having failed to substantiate the existence of any deleterious pattern or scheme, Claimant has not proven the existence of a composite act, or the existence of a creeping expropriation. Accordingly, its indirect expropriation claim must be rejected.

b. Claimant has failed to satisfy the Treaty's express requirements for a finding of indirect expropriation

756. In the Counter-Memorial, Peru explained that Treaty Annex 812.1 (titled "Indirect Expropriation") sets forth the Parties' "shared understanding" of what constitutes an "indirect expropriation."[1653] That annex "requires"[1654] an arbitral tribunal to take into account several specific factors when considering any indirect expropriation claim under the Treaty:

> (b) The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> > (i) **the economic impact of the measure** or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
> >
> > (ii) the extent to which the measure or series of measures interferes with **distinct, reasonable investment-backed expectations**, and

[1652] **CLA-0044**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (Bernardini, Rovine, Derains), ¶ 308.

[1653] Peru's Counter-Memorial, ¶¶ 676–682.

[1654] **RLA-0010**, Treaty, Annex 812.1(b).

(iii) **the character of the measure** or series of measures;

> (c) Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, **non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation**. (Emphasis added)

757. Other than a few passing references, Claimant had largely ignored Annex 812.1 in the Memorial, failing to address the legal standards applicable to each factor, or to apply such standards to its claim.[1655] Faced with Peru's arguments in the Counter-Memorial, Claimant in the Reply introduces a set of new arguments that purport to address the requirements of Annex 812.1. However, as demonstrated below, Claimant is unable to demonstrate that its indirect expropriation claim satisfies any of the mandatory factors contained in Treaty Annex 812.1.

(i) Annex 812.1(b)(i): Peru's alleged conduct had no adverse economic impact on Claimant's investment

758. The first factor in Annex 812.1(b) is "the economic impact" of an alleged measure on the relevant investment.[1656] Peru showed in the Counter-Memorial that this factor requires an investor to prove that the complained-of conduct caused a complete or near-complete destruction in value of Claimant's investment.[1657] The Treaty itself explicitly cautions that the mere fact that a State's measures have had *some* adverse impact (which in any event was not the case here) is insufficient, in and of itself, to configure an indirect expropriation.[1658]

[1655] Peru's Counter-Memorial, ¶¶ 676–678, 682.

[1656] **RLA-0010**, Treaty, Annex 812.1(b)(i).

[1657] Peru's Counter-Memorial, ¶¶ 683–691.

[1658] **RLA-0010**, Treaty, Annex 812.1(b)(i) ("[T]he sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred.").

(a) Claimant seeks to elude the requirement of showing loss of economic value

759. In the Reply, Claimant bases its indirect expropriation claim in part on the argument that Peru's alleged measures denied Claimant's "rights of ownership" over the Invicta Mine.[1659] According to Claimant, it can demonstrate the existence of an indirect expropriation through interference with its "legal right to enjoy" its investment.[1660] However, such argument amounts to nothing more than an attempt by Claimant to circumvent the requirement of showing an economic impact on its investment.

760. As affirmed in *ADM, Tate & Lyle v. Mexico*, "**the severity of the economic impact is the decisive criterion** in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place"[1661] (emphasis added). As Canada explains in its Non-Disputing Party Submission, "[m]ere interference with an investment's use or enjoyment of the benefits associated with property is not the standard for expropriation under international law."[1662] Alleged interference with a "legal right"[1663] does not, on its own and without more, constitute an "economic impact"[1664] on an investment (although of course in some cases such interference could in fact affect the economic value of an investment).[1665] But unless a claimant succeeds in demonstrating that a State's interference with legal rights had *economic*

[1659] Claimant's Reply, ¶ 845.

[1660] Claimant's Reply, ¶ 838.

[1661] **RLA-0102**, *Archer Daniels Midland Company, et al., v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (Cremades, Rovine, Siqueiros), ¶ 240.

[1662] Canada's NDP Submission, ¶ 30.

[1663] Claimant's Reply, ¶ 833.

[1664] **RLA-0010**, Treaty, Annex 812.1(b)(i).

[1665] *See* **CLA-0077**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 (Kaufmann-Kohler, Orrego Vicuña, Stern), ¶ 397 ("**[W]hat appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment**. In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return. After all, investors make investments to earn a return. If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment." (emphasis added)).

consequences for the investment, such interference would not amount to "economic impact."[1666] Claimant's argument that it need not show an economic impact thus runs contrary to the settled legal standard for indirect expropriation—"on which other [t]ribunals and doctrine have agreed,"[1667] and in respect of which there is "broad consensus"[1668]—which requires severe *economic impact*.

761. Claimant asserts that it "lost possession and all access" to the Invicta Mine during the Access Road Protest, and that "it lost title" as a result of Peru's conduct.[1669] All of this amounts to a claim of interference with its legal rights, but does not serve to demonstrate the requisite *economic* impact.[1670] Since Claimant's claim of indirect expropriation is based on its alleged loss of access, possession, and title, it fails to meet the Treaty's requirement that the alleged State conduct must have had an economic impact on the investment.

(b) Claimant also improperly seeks to lower the threshold for the severity of the economic impact on its investment

762. In the Reply, Claimant argues that Peru's alleged measures had an impact on "the value of its investment,"[1671] but contends that it need only show a "substantial deprivation" of the value of its investment to establish an indirect expropriation.[1672] In other words, Claimant disagrees with Peru that it needs to show a "complete" or "nearly complete" deprivation of the economic value of its investment.[1673] Claimant is incorrect.

[1666] **RLA-0010**, Treaty, Annex 812.1(b)(i).

[1667] **RLA-0102**, *Archer Daniels Midland Company, et al., v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (Cremades, Rovine, Siqueiros), ¶ 240.

[1668] **RLA-0102**, *Archer Daniels Midland Company, et al., v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (Cremades, Rovine, Siqueiros), ¶ 240.

[1669] Claimant's Reply, ¶ 847.

[1670] **RLA-0010**, Treaty, Annex 812.1(b)(i).

[1671] Claimant's Reply, ¶ 845.

[1672] Claimant's Reply, ¶ 839.

[1673] Claimant's Reply, ¶ 839.

763. As Peru showed in the Counter-Memorial, in the context of indirect expropriation claims, the standard that must be used to assess the severity of the economic impact is whether the alleged measure(s) caused a "complete" or "nearly complete" deprivation of the value of the investment.[1674] Peru thoroughly analyzed the use of the term "substantial deprivation" in the international jurisprudence, and showed that investment tribunals have consistently interpreted this term as meaning a complete or nearly complete deprivation of value.[1675] Only this interpretation is consistent with the explicit requirement in the Treaty that any indirect expropriation must "have an effect equivalent to direct expropriation without formal transfer of title or outright seizure"[1676] and that not every "adverse effect on the economic value" will configure an indirect expropriation.[1677]

764. Notwithstanding its attempt to lower the legal standard, Claimant does go on to argue that its investment was deprived of all value.[1678] In the Reply, Claimant argues that "[e]ven before PLI Huaura foreclosed on IMC's shares on 26 August 2019, the

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[1674] Peru's Counter-Memorial, ¶¶ 683–691.

[1675] *See* Peru's Counter-Memorial, ¶ 684. *See also* **CLA-0069**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award, 20 August 2007 (Kaufmann-Kohler, Verea, Rowley), ¶ 7.5.11; **CLA-0062**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (Veeder, Kaufmann-Kohler, Stern), ¶ 6.62; **RLA-0095**, *BayWa r.e. Renewable Energy GmbH, et al., v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (Crawford, Naón, Malintoppi), ¶ 423, fn. 554; **RLA-0062**, *Carlos Ríos y Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 246; **RLA-0100**, *InfraRed Environmental Infrastructure GP Ltd., et al., v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019 (Drymer, Dupuy, Park), ¶¶ 504–505; **RLA-0101**, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (Simma, Thomas, Cremades), ¶ 608.

[1676] **RLA-0010**, Treaty, Annex 812.1(a) ("Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;"). *See also* **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 355.

[1677] **RLA-0010**, Treaty, Annex 812.1(b)(i) ("[T]he sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred").

[1678] *See* Claimant's Reply, ¶ 845.

Claimant's investment had already lost its entire value as a result of the Blockade."[1679] In the Counter-Memorial, Peru explained that an independent valuation assessment of the Invicta shares yielded an appraisal value of USD 13.4 million at the time that Claimant lost the shares—a value greater than the cost of acquiring the shares.[1680] Claimant does not deny this: in the Reply it admits that "the IMC shares on which PLI Huaura foreclosed to satisfy partially the Claimant's outstanding USD 15.9 million debt (Early Termination Amount) **were valued at USD 13[.4] million, shortly before the Valuation Date**" (emphasis added).[1681] The value in these shares shows that Claimant's claim does not and cannot meet the "the severity of the economic impact"[1682] test.

765. Although Claimant acknowledges that an independent appraiser valued its investment at USD 13.4 million of value near the Valuation Date, Claimant argues that "even before PLI Huaura's foreclosure, the value of Claimant's investment was already negative,"[1683] and that Claimant therefore was deprived of "the value of its investment."[1684] Claimant's argument that its investment had "negative" value near the Valuation Date is incorrect for at least two reasons: (i) Claimant's notion of a so-called "net value" of its investment has no support from Accuracy or any legal authority, and (ii) shortly after Lonely Mountain acquired PLI Huaura, those two companies foreclosed on Claimant's investment, thereby demonstrating with their

[1679] Claimant's Reply, ¶ 918.

[1680] *See* Peru's Counter-Memorial, ¶ 709 (*citing* **Ex. R-0142**, Lupaka Gold Corp., Consolidated Financial Statements For the years ended December 31, 2019 and 2018, p. 22.); **Ex. C-0625**, Contract between IMC and PLI Huaura, 26 August 2019, ¶ 1.7 (noting that "[o]n 21 August 2019, PwC notified the Valuation Report in which the value of the Encumbered Shares was established as **US$ 13'400,000.00**) (emphasis added).

[1681] Claimant's Reply, ¶ 918; **Ex. C-0625**, Contract between IMC and PLI Huaura, 26 August 2019, ¶ 1.7.

[1682] **RLA-0102**, *Archer Daniels Midland Company, et al., v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (Cremades, Rovine, Siqueiros), ¶ 240.

[1683] Claimant's Reply, ¶ 844.

[1684] Claimant's Reply, ¶ 845.

conduct that they perceived the investment to have significant value. Each reason is discussed below.

766. To assert that its investment had a "negative" value, Claimant refers to a so-called "net value" of its investment, which Claimant defines as "consist[ing] of the value of the assets [Claimant] held (i.e., the shares in IMC) [and] also [the value] of the liabilities that served to finance these assets, and, especially, the debt owed to PLI Huaura under the PPF Agreement."[1685] As its only support for such "net value" of its investment, Claimant cites to one paragraph of Accuracy's second report.[1686] However, Accuracy's second report never refers to any so-called "net value" of Claimant's investment[1687]; in fact, the term "net value" does not appear anywhere in that report.[1688]

767. The complete paragraph from Accuracy's Second Report that Claimant cites as support for the so-called "net value" of its investment states the following[1689]:

> AlixPartners appear to ignore the fact that **the value of Claimant's economic wealth** in the Actual Situation prior to foreclosure would account for both (i) the value of Claimant's shares in IMC; and (ii) the value of Claimant's liabilities towards PLI. On an illustrative basis, deducting the USD 15.9m claimed by PLI in July 2019141 from a valuation of IMC of USD 13m would suggest that **Claimant's economic value in the Actual Situation** was, in fact, negative. (Emphasis added)

As the bold terms in the paragraph quoted above indicate, Accuracy addressed in that paragraph only the value of "Claimant's economic wealth" and "Claimant's economic value in the Actual Situation."[1690] In that paragraph, Accuracy did *not* purport to

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[1685] Claimant's Reply, ¶ 844.

[1686] Claimant's Reply, ¶ 844 (*citing* Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21 September 2022 ("**Accuracy Second Report**"), ¶ 4.62(a)).

[1687] *See* Accuracy Second Report, ¶ 4.62(a) (*cited in* Claimant's Reply, ¶ 844).

[1688] *See* Accuracy Second Report (never referring to a "net value" of anything). *See also* Expert Report of Edmond Richards and Erik van Duijvenvoorde, 1 October 2021 ("**Accuracy First Report**") (never referring to a "net value" of anything).

[1689] Accuracy Second Report, ¶ 4.62(a)

[1690] Accuracy Second Report, ¶ 4.62(a).

describe the value—"net" or otherwise—of Claimant's *investment*.[1691] The distinction is important between, on the one hand, *Claimant's* "economic wealth" (or *Claimant's* "economic value in [a] [s]ituation") and, on the other hand, the *investment's* value. The Treaty does not govern expropriation of "investors," such as *Claimant*; rather, the Treaty governs expropriation of "investment[s]."[1692] Because the Accuracy paragraph quoted above never addresses the value of Claimant's investment, the paragraph is irrelevant to any analysis of a potential expropriation of that investment. Claimant's citation to the quoted paragraph from Accuracy as support for its expropriation claim therefore is misplaced and reveals the lack of support for Claimant's argument.

768. Furthermore, when the Treaty Article on expropriation, Article 812, refers to the *value* of an investment, it uniformly refers to the investment's "fair market value."[1693] Article 812 never ascribes any relevance to a so-called "net value" of an investment."[1694] In addition, despite the vast library of expropriation jurisprudence and scholarship, Claimant cited no legal authority as support for its notion of "net value" ever having been a criterion for determining whether an investment was expropriated.[1695] Based on the foregoing, even if Accuracy had computed a so-called "net value" of Claimant's investment (quod non), such measure of the investment's value would be irrelevant to any expropriation analysis.

[1691] *See* Accuracy Second Report, ¶ 4.62(a).

[1692] **RLA-0010**, Treaty, Art. 812.1 ("Neither Party may nationalize or expropriate a **covered investment** either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation'), except for a public purpose 4, in accordance with due process of law, in a nondiscriminatory manner and on prompt, adequate and effective compensation.") (emphasis added). *See also id.*, Art. 812.4 ("The investor affected shall have a right under the law of the expropriating Party to prompt review of its case and of the **valuation of its investment**.") (emphasis added).

[1693] **RLA-0010**, Treaty, Art. 812.2 ("[C]ompensation shall be equivalent to the **fair market value** of the expropriated **investment** . . . . Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, **to determine fair market value**.") (emphasis added); *id.*, Art. 812.

[1694] *See* **RLA-0010**, Treaty, Art. 812.

[1695] *See* Claimant's Reply, ¶¶ 841-849.

769. Claimant's theory of using the "net value" of an investment to determine whether it was expropriated also would result in an interpretation of Article 812 that is unreasonable. Because Claimant's measure of an investment's "net value" varies depending on the level of "liabilities that served to finance [the investment] assets,"[1696] application of Claimant's "net value" metric could result, irrationally, in different outcomes of an expropriation analysis for two identical investments subject to the same government measure. Specifically, if one investment had been financed predominantly with *debt* (and thus with a low level of equity finance), while a second identical investment had been financed predominantly with *equity* finance (and thus with a low level of debt), then the same government measure could expropriate the former (heavily debt-financed) investment without expropriating the latter (heavily equity-financed) investment. Claimant has cited no basis in the Treaty or in expropriation jurisprudence to justify this contradictory and unreasonable outcome under its "net value" construct, which the Tribunal should reject.

770. The second reason why Claimant's argument that its investment had "negative" value near the Valuation Date is incorrect is evidenced by Lonely Mountain's acquisition of PLI Huaura.[1697] Near the Valuation Date, Lonely Mountain purchased all of Pandion's shares in PLI Huaura and promptly foreclosed on Claimant's investment.[1698] Claimant has not alleged, and the record does not indicate, that PLI Huaura owned any assets other than its rights under the PPF Agreement.[1699] Lonely Mountain's purchase of PLI Huaura and seizure of Claimant's investment therefore indicates that Lonely Mountain perceived significant economic value in Claimant's investment, consistent with PwC's appraisal of it. As the tribunal in *STEAG v. Spain* concluded, "[w]hen an

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[1696] Claimant's Reply, ¶ 844.

[1697] *See* Memorial, ¶ 194 ("In July 2019, Pandion transferred its interest in the PPF Agreement to Lonely Mountain Resources S.A.C. ('Lonely Mountain'), a Peruvian mining consortium."). *See also* **Ex. C-0053**, Email from Pandion (J. Archibald) to Lupaka Gold Corp. (W. Ansley, et al.), 1 July 2019.

[1698] *See* **Ex. C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., *et al.*, Notice of Enforcement, 24 July 2019.

[1699] Peru's Counter-Memorial, ¶ 139; Claimant's Memorial, ¶ 42.

investor from the same market is willing to invest in a project, it is clear that the economic value of that project has not been eliminated."[1700] Here, Lonely Mountain—which Claimant itself describes as a Peruvian mining consortium[1701]—is in the same market as Claimant.

771. In sum, the appropriate metric for whether an investment suffered a complete or nearly complete deprivation of value is fair market value. Near the Valuation Date, an independent appraiser, PwC, appraised Claimant's investment at USD 13.4 million,[1702] which Claimant then reported in its financial statements.[1703] Claimant's investment therefore had significant value near the Valuation Date.

772. As Claimant's investment did not suffer a complete or near complete deprivation of value as a result of any measures committed by, or attributable to, Peru, Claimant's indirect expropriation claim against Peru should be rejected.

(c) Peru did not cause the "the virtual annihilation, effective neutralization or factual destruction"[1704] of Claimant's investment

773. In addition to showing that its investment suffered a complete or near complete deprivation of value,[1705] Claimant must also show that such deprivation was caused

[1700] **RLA-0192**, *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Zuleta, Santiago Tawil, Dupuy), ¶ 680 ("When an investor from the same market is willing to invest in a project, it is clear that the economic value of that project has not been eliminated").

[1701] Claimant's Memorial, ¶ 194.

[1702] **Ex. C-0625**, Contract between IMC and PLI Huaura, 26 August 2019, ¶ 1.7. *See also* Peru's Counter-Memorial, ¶ 709; Claimant's Reply, ¶ 843 ("It is not in dispute between the Parties that PwC Peru concluded that the appraised value of the Claimant's shares in IMC was USD 13[.4] million."). *See also* **Ex. C-0625**, Contract between IMC and PLI Huaura, 26 August 2019, ¶ 1.7 (confirming that the total value of the PwC valuation was for USD 13.4 million).

[1703] **Ex. R-0142**, Lupaka Gold Corp., Consolidated Financial Statements For the years ended December 31, 2019 and 2018, p. 22.

[1704] **CLA-0062**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (Kaufmann-Kohler, Stern, Veeder), ¶ 6.62 (cited approvingly in Claimant's Memorial, fn. 475).

[1705] *See* Peru's Counter-Memorial, ¶¶ 683–687.

by Peru's alleged conduct.[1706] Claimant does not deny its burden to prove causation, but it has failed to carry such burden.

774. In the Reply, Claimant insists that "there is a clear causal link between Peru's actions and omissions and Lupaka's loss of its investment."[1707] However, Claimant's only specific allegation concerning Peru's conduct is that Peru failed to "restore the Claimant to possession of the Invicta Mine."[1708] This argument relies in turn on Claimant's argument—refuted in **Section IV.D.1** above—that a "dispossession may . . . result principally from the State's omissions."[1709] In particular, the cases on which Claimant relies (i.e., *Wena Hotels v. Egypt* and *Amco v. Indonesia*) concerned situations in which the State knowingly allowed, refused to take any action in response to, and even participated in the seizure of the relevant investment.[1710] Here, by contrast, Peru took affirmative actions to resolve the social conflict with the objective of restoring Claimant's access to the Invicta Mine.[1711]

[1706] Peru's Counter-Memorial, ¶¶ 688–689. *See also* **RLA-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, ICJ, Judgment, 20 July 1989, ¶ 101; **CLA-0052**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (Caflisch, Bernardini, Stern), ¶ 682; **RLA-0069**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Award, 27 September 2019 (Tomka, Kaplan, Thomas), ¶ 74; **CLA-0020**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (Hanotiau, Born, Landau), ¶¶ 785–787; **RLA-0070**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (de Maekelt, Rezek, van den Berg), ¶ 50; **RLA-0071**, *BG Group Plc v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007 (Aguilar Alvarez, van den Berg, Garro), ¶ 428; **RLA-0068**, *Jan Oostergetel y Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (Kaufmann-Kohler, Wladimiroff, Trapl), ¶ 319.

[1707] Claimant's Reply, ¶ 847.

[1708] Claimant's Reply, ¶ 840.

[1709] Claimant's Reply, ¶ 848.

[1710] *See* **CLA-0028**, *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award, 8 December 2000 (Leigh, Fadlallah, Wallace), ¶¶ 54, 91 (in which the host State had knowingly allowed the seizure of the claimant's investment, made little to no effort to remedy such seizure, and was reportedly "uncooperative"—and potentially even "part of the entire scheme."); **CLA-0066**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984 (Goldman, Rubin, Foighel), ¶¶ 100, 155, 164, 169–170 (in which a local company operating under the guidance of the host State forcibly took over management of the claimant's investment with assistance from the State army and police forces).

[1711] *See supra* Section II.C.3, Table 6: Peru's Diligent and Reasonable Actions.

775. Furthermore, here it was Claimant's own conduct that caused the legal forfeiture of its shares in Invicta. As described in **Section II.D** above, (i) Claimant had voluntarily pledged its shares to PLI Huaura as security for the loan amounts provided by PLI Huaura to Claimant under the PPF Agreement, such that Claimant would cede ownership to PLI Huaura of such shares in the event of a default by Claimant;[1712] (ii) Claimant in fact defaulted on a series of obligations under the PPF Agreement;[1713] and (iii) on 26 August 2019, in accordance with the PPF Agreement, PLI Huaura foreclosed on the shares.[1714] Critically, all of the defaults that triggered the forfeiture of shares were caused by Claimant itself—not by any alleged conduct by Peru.

776. In **Section II.D** above, Peru identified and explained each of Claimant's 14 events of default under the PPF Agreement. Two of those events of default were Claimant's default on its repayment obligations under the PPF Agreement.[1715] Claimant was required to repay its creditor PLI Huaura the value of 187 ounces of gold in December 2018, followed by an additional amount every month until February 2023.[1716] To satisfy these repayment obligations, Claimant needed to begin commercial operations well in advance of December 2018, as it needed to extract, process, and sell the extracted ore from the Invicta Mine to satisfy its repayment obligations to PLI Huaura, starting in December 2018.[1717] However, Claimant was unable to begin commercial

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[1712] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016.

[1713] *See, e.g.*, **Ex. C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., et al., Notice of Enforcement, 24 July 2019, p. 2 ("In accordance with section 11.2 of the Contract, we hereby communicate the occurrence of an Event of Default due to the failure of Lupaka Gold Corp. to meet its obligations under the Purchase Agreement").

[1714] *See* **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. to Invicta Mining Corp., 23 September 2019.

[1715] **Ex. C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., et al., Notice of Enforcement, 24 July 2019, p. 2.

[1716] *See* **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 7 (outlining the "Contract Quantity" and the number of months after each effective date where repayment obligations would begin).

[1717] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 7.

exploitation and processing in time, and that occurred for at least the following three reasons—*none* of which were caused by Peru.

777. *First*, Claimant was unable to begin lawful commercial mining operations, and thereby breached the PPF Agreement, because it failed to obtain the requisite regulatory approvals.[1718] Under Peruvian law, Claimant was required to obtain: (i) authorization to purchase and store fuel at the Invicta Mine;[1719] (ii) approval of modifications to the Invicta Mine's EIA;[1720] (iii) MINEM's authorization to begin commercial exploitation of the Invicta Mine;[1721] and (iv) licenses to use water from sources not contemplated in Claimant's 2009 EIA.[1722]

778. However, by October 2018 (which is when the Access Road Protest began), Claimant had not yet obtained *any* of these required approvals, and therefore had not yet begun commercially exploiting the Mine. Independent mining expert Ms. Dufour has analyzed these requirements and concludes that—even absent the Access Road Protest—Claimant would not have been able to begin commercial exploitation until July 2020 at the earliest[1723]—i.e., nearly *two years after* Claimant would have needed those approvals to be in place, to have enabled it to comply with its PPF Agreement obligations.[1724] In other words, Claimant could not have obtained the requisite regulatory approvals, and thus *could not have satisfied its PPF Agreement obligations*, and thus could not have prevented the forfeiture of its Invicta shares to PLI Huaura, *even*

[1718] *See supra* Section II.D.

[1719] Dufour Report, ¶¶ 7, 64–66.

[1720] Dufour Report, ¶¶33, 104.

[1721] Dufour Report, ¶¶ 126–129.

[1722] Dufour Report, ¶ 138.

[1723] Dufour Report, ¶159.

[1724] *See supra* Section II.D.4. *See also* **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 7 (outing the "Contract Quantity" and the number of months after each effective date where repayment obligations would begin); **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedules P, P-2.

if the Access Road Protest had never occurred. Thus, it was Claimant's own failures—rather than any conduct by Peru—that caused the forfeiture of its investment.

779. *Second*, Claimant was unable to begin commercial operations, and thereby breached the PPF Agreement, because Claimant had failed to resolve the social conflict with the Parán Community, and thus had failed to secure a social license for operation of the Invicta Mine. As discussed in **Section II.A.1**, mining operators in Peru must secure and maintain a social license from local rural communities before undertaking mining operations (especially exploitation), and then must maintain such social license throughout the development and operation of their mines.[1725] Such requirement protects the interests not only of the rural communities, but also of the mining companies themselves, including by preventing disruptions, delays, and shutdowns in the relevant mining operations. Yet Claimant glaringly failed to pursue an effective community relations strategy with the Parán Community,[1726] unapologetically dismissing—to this very day[1727]—the critical importance of obtaining and maintaining a social license from the local community.

780. There are clear procedures for mining company interactions with local rural communities and for obtaining a social license, such as those contained in the Canada-Peru CR Toolkit.[1728] Such toolkit also identifies mining company conduct that will be counter-productive,[1729] and Claimant engaged in precisely such conduct. For instance,

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[1725] *See supra* Section II.A.1. *See also* Dufour Report ¶¶ 289(ii), 292, 299.

[1726] *See supra* Section II.B.

[1727] *See* Claimant's Reply, ¶¶ 22, 51, 120, 706 and § 4.3.

[1728] *See generally* **Ex. R-0028**, Canada-Peru CR Toolkit.

[1729] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 70 (identifying the following conduct: (i) failure to address community grievances, (ii) selective engagement with communities surrounding the mining project, (iii) commitment to a different agenda than the surrounding rural communities, or (iv) unclear communication channels—can undermine a company's efforts to obtain a social license, and instead result in "hostile threats" and "shutdown of operations.).

a. It failed to address the Parán Community's environmental, social, and economic grievances;[1730]

b. It selectively engaged with the Lacsanga and Santo Domingo Communities, to the detriment of the Parán Community;[1731]

c. It disregarded its obligation to secure an agreement with the Parán Community;[1732]

d. It undermined its engagement with the Parán Community by regularly changing its CR Team;[1733] and

e. It limited the prospects of successful resolution of the social conflict by firing its external PR consultants from SSS in the midst of the Access Road Protest.[1734]

781. Claimant's failure to engage constructively with the Parán Community, and ultimately to secure a social license, is one of several factors that contributed to a delayed start of commercial operations of the Invicta Mine. Thus, Claimant's own

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[1730] *See* Léon First Witness Statement, ¶ 22 ("The Parán Community expressed their environmental, social and economic concerns in connection with the Project"); **Ex. R-0065**, Meeting Minutes, Meeting between the Parán Community and MINEM, 11 August 2019. *See also supra* Section II.D.2.

[1731] *See* León First Witness Statement, ¶ 22 ("[The Parán Community] conveyed their impression that Invicta had avoided them in negotiations with the communities declared to be in the area of direct social influence of the Project. They explained that Invicta had signed an agreement with the Lacsanga Community to build a road in their territory to access the Project. Once that contract had been signed with the Lacsanga Community, Invicta had not returned to the Parán Community to reach an agreement concerning the Project's social impact."). *See also supra* Section II.D.2; Peru's Counter-Memorial, ¶¶ 222–223.

[1732] *See* Peru's Counter-Memorial, § II.D.2.a; **Ex. C-0164**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, 1–30 September 2017, p. 6 ("[T]he company has all the permits granted by the Ministry of Energy and Mines to start its exploitation and that **it does not depend on any community to start this stage**. It was also clarified that the company has always requested an easement from the community, but not permission to exploit." (emphasis added)); **Ex. C-0391**, SSS, Monthly Report, Project, December 2017, p. 5; **Ex. C-0111**, Report on Social Intervention for Signing of Agreement with the Parán Community, 2018, p. 4; **Ex. C-0121**, Letter from the Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018. *See also supra* Sections II.A.1, II.D.2.

[1733] [redacted] *See supra* Section II.D.2.

[1734] *See* León Second Witness Statement, § II; Trigoso Second Witness Statement, § IV.A

conduct caused it to breach the PPF Agreement, and as a result to forfeit its shares in Invicta.[1735]

782. *Third*, Claimant was unable to begin commercial operations, and thereby breached the PPF Agreement, because it failed to secure adequate ore processing services.[1736] As noted above, the PPF Agreement required that Claimant begin repaying PLI Huaura in December 2018, and that Claimant comply with its gold delivery obligations until February 2023.[1737] To satisfy these obligations, Claimant needed to reliably process sufficient ore from the Invicta Mine. However, it is undisputed that Claimant did not have any facility of its own that could process sufficient ore to satisfy its delivery and repayment obligations under the PPF Agreement.[1738] Accordingly, it needed assistance from one or more third parties to undertake the ore-processing function.

783. Claimant alleges that it could have processed enough ore, in an adequate timeframe, by contracting third-party processing plants, or by acquiring the Mallay Plant.[1739] Peru refuted this argument in the Counter-Memorial, and again in **Section II.D.3** above, explaining that neither of Claimant's purported solutions would have allowed it to satisfy its repayment obligations under the PPF Agreement.[1740]

784. Furthermore, as demonstrated in **Section II.D.4**, Claimant's *twelve* other breaches of the PPF Agreement were likewise caused solely by Claimant's conduct—and not by any alleged acts or omissions by Peru.[1741]

[1735] *See supra* Section II.D.2.

[1736] *See supra* Section II.D.3. *See also* Dufour Report ¶ 9.

[1737] **Ex. C-0045**, Second Amended and Restated PPF Agreement, p. 7 (outlining the "Contract Quantity" and the number of months after each effective date where repayment obligations would begin); **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule P (summarizing Claimant's repayment obligations under the PPF Agreement's delivery schedule); .

[1738] *Supra* Section II.D.3.

[1739] Claimant's Reply, § 3.4.2. *See also supra* Section II.D.3; Peru's Counter-Memorial, ¶ 774.

[1740] *See supra* Section II.D.3.

[1741] *See supra* Section II.D.4.

785. In sum, it was a variety of actions, omissions, and deficiencies of Claimant itself that were the direct cause of its breaches of the PPF Agreement, and of the consequent forfeiture of Claimant's shares in Invicta.

(ii) Annex 812.1(b)(ii): Peru's alleged conduct did not interfere with any distinct, reasonable, and investment-backed expectations

786. In addition to economic impact on the investment, Treaty Annex 812.1(b)(ii) requires an assessment of whether the alleged State conduct "interfere[d] with distinct, reasonable, investment-backed expectations."[1742] In the Counter-Memorial, Peru addressed the legal threshold under the Treaty for establishing the existence of such expectations. It also showed that Claimant held no "distinct, reasonable, investment-backed" expectations at all, and that in any event Peru's measures could not have "interfere[d]" with any such expectations (even if Claimant had held any, which it did not).[1743]

787. Claimant argues that it expected that it would always have access to the Mine.[1744] Claimant frames this expectation in vague terms,[1745] but what Claimant evidently means is that it expected that Peru would forcibly remove the protesters who were participating in the Access Road Protest.[1746] Claimant asserts—without analysis or explanation—that these allege expectations were "distinct, reasonable and investment-backed."[1747]

[1742] **RLA-0010**, Treaty, Annex 812.1(b)(ii).

[1743] *See* Peru's Counter-Memorial, ¶¶ 692–696, 720–725.

[1744] Claimant's Reply, ¶ 851.

[1745] *See* Claimant's Reply, ¶ 851 (rejecting any effort to define its expectations as "an overly narrow construction").

[1746] This is confirmed by Claimant's own submissions. For example, Claimant asserts that it expected that Peru would have "disarm[ed] the Parán Community," and that "the Police [would have] secure[d] the Site." Claimant's Reply, ¶ 853. Further, Claimant's creeping expropriation claim is based on the argument that Peru "refrain[ed] from any forcible actions towards the Parán Community." Claimant's Reply, ¶ 771.

[1747] Claimant's Reply, ¶ 852.

788. However, Claimant cannot meet the expectations requirement under the Treaty simply by parroting the language of the Treaty. Instead, Claimant must satisfy the specific requirements expressly imposed by Treaty Annex 812.1(b)(ii):

a. Claimant must show that its alleged expectation is distinct,[1748] in that each has its origin in a clearly articulated and identified obligation, commitment, or declaration by the State.[1749] Claimant's only effort to identify any basis for its alleged expectation that Peru would forcibly remove the protesters is its comment that "[Claimant] expected that Peru would not fundamentally contradict basic principles of its own laws and regulations as well as maintain law and order."[1750] Such generalized reference to a State's alleged law does not qualify as a specific obligation or assurance on the part of the State. The tribunal in *Díaz Gaspar v. Costa Rica* recently explained—in the context of determining whether frustration of the investor's expectations violated FET—that an investor's expectation that the State would uphold a domestic law "generally adds nothing to the analysis" of whether there has been a breach of international law:

> [A]n investor always has the expectation that the State will act in accordance with the applicable regulations, and a violation of the regulatory framework by the State will always come as a surprise to the investor. Such an expectation is therefore of no particular relevance in assessing whether the investor was not granted fair and equitable treatment. The fact that the State has violated the regulatory framework, depending on the circumstances of the case, be in violation of international law, but the fact that the investor had the expectation that the State would have complied with the law generally does not add

[1748] **RLA-0010**, Treaty, Annex 812.1(b)(ii).

[1749] Peru's Counter-Memorial, ¶ 721 (citing **RLA-0062**, *Carlos Ríos y Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 254).

[1750] Claimant's Reply, ¶ 851.

anything to the analysis that must be made to assess the existence of such a violation.[1751]

b. In any event, as demonstrated in **Section II.C.1** above, there is no obligation under Peruvian law for the police to use force—and there is certainly no requirement that the police use force against protesters.[1752] Thus, Claimant's alleged expectation is not "distinct," as required by the Treaty.[1753]

c. Claimant must show that its expectations are objectively reasonable.[1754] Reasonableness is determined on a case-by-case basis and informed by the underlying State commitment and all relevant facts.[1755] Claimant has not made any effort to show that its alleged expectation of the use of force, other than to repeat yet again its unsubstantiated and manifestly false claim that Peruvian law obligated the police to use force against the Parán Community.[1756] It did not,[1757] and Claimant's purported expectation thereof is not reasonable. Furthermore, as Peru demonstrated in the Counter-Memorial, Claimant's alleged expectation that Peru would use force against the protesters is objectively *un*reasonable, because Peru's legal and regulatory framework prioritizes dialogue over force in the context of social conflicts in the mining sector.[1758]

[1751] **RLA-0180**, *Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award, 29 June 2022 (Mourre, Jimenez, Gonzalez Garcias), ¶ 371.

[1752] *See infra* Section II.C.1.

[1753] **RLA-0010**, Treaty, Annex 812.1(b)(ii).

[1754] **RLA-0062**, *Carlos Ríos y Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 255.

[1755] Peru's Counter-Memorial ¶ 723.

[1756] *See* Claimant's Reply, ¶¶ 851, 855.

[1757] *See infra* Section II.C.1.

[1758] Peru's Counter-Memorial, ¶ 723. *See also* Meini Report, ¶ 134; **Ex. IMM-0039**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, p. 51; **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2.

d. Claimant must also show that its alleged expectations are "investment-backed"[1759]—i.e., that absent such expectations, Claimant would not have invested.[1760] Claimant has failed to satisfy its burden in this regard, and its claim must be rejected on this basis. Claimant's only argument in this respect is the regurgitated claim that "Lupaka counted on Peru to uphold its own law."[1761] And as the *Díaz Gaspar* tribunal noted, that expectation "generally adds nothing"[1762] to the analysis of whether an internationally wrongful act has been committed. Claimant has thus provided *no* evidence that its expectation is "investment-backed," as required by the Treaty.[1763]

789. Claimant has failed to meet the various requirements of Annex 812.1(b)(ii), and such failure is fatal to its indirect expropriation claim.

(iii) Annex 812.1(b)(iii): The character of Peru's alleged conduct was not expropriatory

790. In addition to the foregoing requirements, Treaty Annex 812.1 also requires consideration of "the character of the measure or series of measures."[1764] The Treaty mandates that this be a "case-by-case" and "fact-based" inquiry.[1765] Relevant factors may include the object, context, and intent of the measure, and whether it had a public purpose.[1766] Peru demonstrated in the Counter-Memorial that the character of the

[1759] **RLA-0010**, Treaty, Annex 812.1(b)(ii).

[1760] **RLA-0062**, *Carlos Ríos y Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern), ¶ 256.

[1761] Claimant's Reply, ¶ 855.

[1762] **RLA-0180**, *Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award, 29 June 2022 (Mourre, Jimenez, Gonzalez Garcias), ¶ 371.

[1763] **RLA-0010**, Treaty, Annex 812.1(b)(ii).

[1764] **RLA-0010**, Treaty, Annex 812.1(b)(iii).

[1765] **RLA-0010**, Treaty, Annex 812.1(b).

[1766] *See* Peru's Counter-Memorial, ¶ 697 (*citing* **RLA-0064**, European Union-Singapore Investment Protection Agreement, 2018, Annex 1; **RLA-0063**, ASEAN Comprehensive Investment Agreement, 2009, Annex 2, Art. 3(c)).

alleged conduct—namely, the fact that Peru did not use force against the Parán Community protesters—is not expropriatory.[1767]

791. In the Reply, Claimant appears to concede—as it should—that the "character" of the alleged conduct is relevant,[1768] but nevertheless attacks Peru's reasoned analysis thereof. In particular:

a. Claimant argues that Peru's "intent" in managing and mediating Claimant's conflict with the Parán Community is not "determinative"[1769] for purposes of the indirect expropriation analysis. However, Peru never suggested that intent alone is "determinative;"[1770] rather, Peru noted simply that intent is one aspect of the "character" of a measure.[1771] In this respect, Peru explained in the Counter-Memorial that the intent of Peru's measures was to achieve a long-term, sustainable resolution to the social conflict between Claimant and the Parán Community.[1772] Claimant does not dispute that this was Peru's intent. Accordingly, the intent of the complained-of conduct was not expropriatory, and thus that aspect of the character of the alleged conduct does not support a finding of indirect expropriation.

b. With respect to the *context* of the alleged conduct, Claimant does not dispute that such context in this case was a social conflict between itself and the Parán Community. However, it insists that this context did not "justif[y] [Peru's] omission to uphold its own laws."[1773] Such argument mischaracterizes both Peru's position and Peruvian law. Contrary to what Claimant argues, Peru did not fail to uphold its own laws.[1774] The reality, as Claimant knows, is that the

[1767] *See* Peru's Counter-Memorial, ¶¶ 726–730.
[1768] Claimant's Reply, § 9.5.2.3.
[1769] Claimant's Reply, § 9.5.2.3.
[1770] Claimant's Reply, ¶ 861.
[1771] *See* Peru's Counter-Memorial, ¶ 697.
[1772] Peru's Counter-Memorial, ¶ 727.
[1773] Claimant's Reply, ¶ 862.
[1774] *See supra* Section II.C.1.

overall context—including the history of social conflict in the mining industry in Peru, the history and ongoing risk of the escalation of Claimant's specific conflict with the Parán Community, and Peru's legal and regulatory framework[1775]—confirms that the character of the alleged conduct was not expropriatory.

c. Peru has already provided a detailed explanation of the public policy objectives that informed its stance during the conflict between Claimant and the Parán Community, including the public purposes of defusing confrontation, prioritizing mediation and dialogue, avoiding violence, and facilitating a long-term resolution of the conflict.[1776] Claimant responds by alleging that Peru "creat[ed] confusion by mixing various alleged public policy objectives."[1777] It is self-evident that a particular State action is often motivated by multiple and mutually-reinforcing public policy objectives. Such fact does not render the action any less legitimate. The public policy objectives that motivated Peru's conduct in the present case confirm that the character of the alleged conduct was legitimate, and reasonable and certainly *not* expropriatory.

792. Claimant has thus failed to rebut Peru's arguments concerning the character of the alleged conduct, and moreover it has made no effort to develop its own analysis of such character. Instead, Claimant reverts to the position that, in an indirect expropriation analysis, the "'*effect* of the measure . . . is the critical factor,'"[1778] rather than the character of the alleged conduct. However, Claimant is not entitled to rewrite the Treaty to exclude requirements that it does not like, and the reality is that consideration of the character of the relevant measure(s) is mandated by Treaty Annex

[1775] *See* Peru's Counter-Memorial, § II.A.

[1776] Peru's Counter-Memorial, ¶ 729.

[1777] Claimant's Reply, ¶ 864.

[1778] Claimant's Reply, ¶ 861.

812.1(b)(iii). In this case, the character of the alleged conduct is *not* expropriatory, for the reasons that have been explained.

793. In sum, Claimant has failed to demonstrate that the alleged conduct of which it complains satisfies any of the factors under Treaty Annex 812.1(b) for a finding of indirect expropriation.

(iv) Annex 812.1(c): Peru's conduct was nondiscriminatory and undertaken in pursuit of legitimate public welfare objectives

794. The final provision of Treaty Annex 812.1 creates a strong presumption that nondiscriminatory measures taken for public welfare purposes are not expropriatory. Paragraph (c) thereof provides as follows:

> Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, **nondiscriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives**, such as **health**, **safety** and the environment, **do not constitute indirect expropriation**.[1779] (Emphasis added)

795. In the Memorial, Claimant had simply ignored this Treaty provision.[1780] In contrast, Peru demonstrated in the Counter-Memorial that Peru's decision not to use force against the local community falls squarely within the scope of Annex 812.1(c).[1781] In the Reply, Claimant therefore had no choice but to address Annex 812.1(c), but in doing so it characteristically attempts to alter the terms of such provision, and to limit its scope.[1782] Claimant's arguments fail for the reasons set forth below.

796. *First*, Claimant argues that Annex 812.1(c) applies only to "regulatory measures," and not to what Claimant calls "individual decisions."[1783] Thus, according to Claimant, the fact that Peru did not use force against the local community of Parán does not fall

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[1779] **RLA-0010**, Treaty, Annex 812.1(c). *See also* Peru's Counter-Memorial, ¶ 731.

[1780] *See* Claimant's Memorial, § 4.4.1.1.

[1781] *See also* Peru's Counter-Memorial, ¶¶ 698–736.

[1782] *See* Claimant's Reply, § 9.5.2.4.

[1783] Claimant's Reply, ¶ 875.

under the scope of Annex 812.1(c) and therefore cannot be presumed to be non-expropriatory. However, Claimant is unable to find support in the text of the Treaty for its purported interpretation.[1784] Annex 812.1(c) refers to "measures," in general, without any limitation or qualification. The only relevant factor is the policy objective for which such measure was "designed and applied."[1785]

797. Unable to rely on the text of the Treaty for its made-up argument, Claimant (i) points to the use of the term "regulatory measure" from two arbitral awards that had assessed expropriation claims,[1786] and (ii) purports to draw a distinction between a "regulatory measure" and an "individual decision" to argue that "individual decisions taken in relation to a particular investment, as in the present case, are not covered by this exception [under Annex 812.1(c)]."[1787] To be clear, no such distinction can be found either in Annex 812.1(c) or any of the two awards cited by Claimant.[1788] In short, Claimant's approach to the issue is simply a transparent, improper effort to circumvent a Treaty provision that is fatal to its indirect expropriation claim.

798. *Second*, Claimant seeks to alter the terms of Treaty Annex 812.1(c) by importing into that clause a provision that it does not contain; namely, that the State's conduct must have been "proportionate."[1789] However, this condition does not exist in the text of Annex 812.1(c), and Claimant's attempt to add it contravenes fundamental principles of treaty interpretation.[1790] In any event, even if the Treaty did contain a proportionality requirement (quod non), Peru has demonstrated that its conduct was in fact properly tailored to achieve legitimate public welfare objectives, e.g.: avoiding

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[1784] Claimant's Reply, ¶ 875.

[1785] **RLA-0010**, Treaty, Annex 812.1(c).

[1786] Claimant's Reply, ¶ 875, fn. 1421.

[1787] Claimant's Reply, ¶ 875.

[1788] *See generally* **CLA-0149**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSISD Case No. ARB/14/21, Non- disputing State party submission of the Government of Canada, 9 June 2016 (including no reference to "individual decision[s]"); **CLA-0150**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada, 27 February 2020 (including no reference to "individual decision[s]").

[1789] Claimant's Reply, ¶ 873.

[1790] **RLA-0128**, VCLT, Art. 31.

a violent confrontation, injuries and potentially loss of life; facilitating long-term solution to a delicate social conflict; and avoiding an aggravation of the dispute between Claimant and the local community.[1791] Claimant's only argument in this regard is that Peru's decision not to use force against the Parán Community protesters "le[]d to the taking [of Claimant's investment]."[1792] In other words, according to Claimant, the alleged conduct by Peru was expropriatory *because* it led to an alleged expropriation. The argument is tautological and cannot legally—or logically—be the basis of a finding of an expropriation. In any event, as already explained, the reality is that it was Claimant's own conduct, and not that of Peru, that caused the forfeiture of Claimant's shares in Invicta, and thus the loss of Claimant's investment.[1793]

799. *Third*, Claimant insists that Peru's conduct "was not taken out of a concern for 'health and safety.'"[1794] Claimant provides no support for its argument, and instead simply reiterates that Peru should have forcibly removed the protesters in the interest of "the investor's rights."[1795] In the Counter-Memorial, Peru provided (i) a detailed explanation of the risks to human health and safety that would have resulted from use of force against the Parán Community protesters; and (ii) evidence that interventions of that nature to attempt to resolve social conflicts in Peru had historically led to deaths and injuries.[1796] That evidence remains unrebutted by Claimant.

800. *Fourth*, and finally, Claimant argues that Peru's alleged conduct was discriminatory.[1797] Its argument in this respect consists of (i) two paragraphs in which it makes the generalized claim that "Peru has intervened with force to protect other

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[1791] *See, e.g.*, Peru's Counter-Memorial, ¶ 729.

[1792] Claimant's Reply, ¶ 874.

[1793] *See supra* Section II.D.

[1794] Claimant's Reply, ¶ 871.

[1795] Claimant's Reply, ¶ 871.

[1796] *See* Peru's Counter-Memorial, ¶ 732 (showing that one violent encounter left 33 people dead (security forces and civilians) and over 200 wounded, and another left 4 protesters dead, and 50 local residents and policemen wounded) (*citing* Incháustegui First Witness Statement, ¶¶ 35–37; **Ex. R-0144**, "*Peru protesters lift blockade at China-funded mine in hope of talks*," LATIMES, 30 September 2015). *See also supra* Section II.C.4; Incháustegui Second Witness Statement, 17.

[1797] *See* Claimant's Reply, ¶¶ 876–877.

investors, both national and international, in the face of opposition" in "countless occasions," and (ii) a cross-reference to two sections in the Reply.[1798] In such sections, Claimant lists certain instances of Peruvian police interventions in a handful (not "countless") other situations, but fails to compare the circumstances in such situations to those attendant to the Invicta Mine, or to provide *any* evidence of discrimination.[1799] For example, Claimant does not provide any evidence showing that the relevant investors were similarly situated, as would be required to substantiate a discrimination claim. In fact, in **Section II.C.4** above, Peru demonstrated that the circumstances in those cases mentioned by Claimant where force was used—and which failed to resolve the social dispute—were not in any way like the circumstances in the present case. Claimant's inchoate and unsupported claim of discriminatory conduct thus fails on its face. In any event, Peru provides a thorough discussion of the other situations raised by Claimant in **Section II.C.4** above, and proves that there was no discrimination.

801. In sum, the evidence shows that the conduct by Peru that Claimant impugns in this arbitration consisted of nondiscriminatory measures undertaken to advance legitimate public welfare objectives. Such conduct must therefore be deemed non-expropriatory, in accordance with the strong presumption under Treaty Annex 812.1(c).[1800]

V. CLAIMANT IS NOT ENTITLED TO ANY DAMAGES

802. In the Counter-Memorial, Peru demonstrated that even if Claimant were to prevail on jurisdiction and merits (which it should not), it would not be entitled to any damages at all. That is so because whatever harm was suffered by Claimant's investment in Peru was not caused by any of Peru's alleged conduct, but rather by Claimant's own actions and by those of third parties, none of which is attributable to Peru.[1801]

[1798] Claimant's Reply, ¶ 876.

[1799] *See* Claimant's Reply, § 7.2.1.

[1800] *See* Peru's Counter-Memorial, ¶¶ 698–699, 731–736.

[1801] *See* Peru's Counter-Memorial, § V.B.1.

Furthermore, and in any event, Claimant's damages theory is speculative, uncertain, and fails to take into account Claimant's contributory fault,[1802] and Claimant's quantum methodology and calculations are flawed.[1803] In the Reply, Claimant insists that it is owed damages, although it had no choice but to recognize certain critical errors in the quantification of its damages claim, which resulted in its inclusion in the Reply of a reduced damages claim—down from USD 47.7 million[1804] to USD 41 million.[1805]

803. However, as explained in the following sections, even Claimant's reduced damages claim must be rejected *in toto*. The evidence shows that Peru's alleged conduct was not the cause of any harm to Claimant's investment, and that instead it was Claimant's own actions and omissions that caused the legal forfeiture—to Claimant's own creditor—of Claimant's shares in Invicta (see **Section A** below). In any event, even if Claimant were entitled to damages (quod non), any damages award would need to be offset on the basis of Claimant's contributory fault (see **Section B** below). Additionally, Claimant is not entitled to recover for alleged damage to purely prospective investments that Claimant never actually made in the end (see **Section C** below). Finally, Claimant's quantum methodology and calculations are flawed and inaccurate (see **Section D** below).

A. Claimant is not entitled to any damages because none of Peru's alleged acts and omissions caused any harm to Claimant's investment

804. Peru demonstrated in the Counter-Memorial that none of the alleged conduct by Peru of which Claimant complains was the cause of Claimant's loss of its investment in Invicta. In the Reply, Claimant remains unable to show otherwise.

[1802] *See* Peru's Counter-Memorial, § V.B.2.

[1803] *See* Peru's Counter-Memorial, § V.D.

[1804] Claimant's Memorial, ¶ 16.

[1805] Claimant's Reply, ¶ 1061. *See also* Accuracy Second Report, ¶ 6.63.

1. Claimant bears the burden of proving causation

805. In accordance with the general of principle *onus probandi actori incumbit*, as well as jurisprudence on compensation under international law, Claimant bears the burden of proving that the alleged Treaty breach(es) caused the alleged loss or damages suffered.[1806] As Peru explained in the Counter-Memorial, this requires Claimant to demonstrate that the alleged damages were not due to causes other than the State acts and omissions alleged to constitute Treaty breaches.[1807]

806. In the Reply, Claimant acknowledges that the complained-of State conduct must have caused the injury.[1808] Claimant argues, however, that it need not prove that such damages were caused by the alleged Treaty breaches "*rather than by other causes*."[1809] Instead, according to Claimant, it is merely required to show that the alleged loss was the "normal or foreseeable consequence of the State's breach."[1810]

807. Claimant's posited test is inconsistent with the jurisprudence, and amounts to an attempt by Claimant to lower the standard of proof for causation. The jurisprudence confirms that a claimant must prove that the alleged damages were not due to causes other than the State acts and omissions alleged to constitute Treaty breaches.[1811] This principle was articulated, for example, by the tribunal in *S.D. Myers v. Canada*. That tribunal, noting with approval the submission of Canada (which, with Peru, is the other party to the treaty at issue in the present arbitration), held that:

[1806] Peru's Counter-Memorial, ¶ 741 (*citing* **RLA-0086**, C*ase Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ, Judgment, 20 April 2010, ¶ 162; **RLA-0096**, M. Kinnear, "Damages in Investment Treaty Arbitration," ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (2010), p. 556; **CLA-0051**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Berman, Donovan, Lalonde), ¶ 190).

[1807] *See e.g.*, Peru's Counter-Memorial, ¶¶ 746–748.

[1808] Claimant's Reply, ¶ 892.

[1809] Claimant's Reply, ¶¶ 896–898.

[1810] Claimant's Reply, ¶ 894.

[1811] *See* Peru's Counter-Memorial, ¶¶ 745–747 (*citing, e.g.*, **RLA-0083**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein), ¶ 234; **RLA-0049**, *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004 (Reisman, Lacarte Muró, Paulsson), ¶ 85).

> the burden is on [the claimant] to prove the quantum of the losses in respect of which it puts forward its claims; [and]
>
> compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached; **the economic losses claimed by [claimant] must be proved to be those that have arisen from a breach of the [treaty], and not from other causes** . . . .[1812] (Emphasis added)

808. Other investor-State tribunals have confirmed this requirement. For example, the *Lemire v. Ukraine* tribunal (which is cited by Claimant itself[1813]) similarly observed that "[t]he causal link . . . requires that the aggrieved party prove that **an uninterrupted and proximate logical chain** leads from the initial cause . . . to the final effect"[1814] (emphasis added). For its part, the tribunal in *Blusun v. Italy*, on which Professor James Crawford served as president, held that "[c]laimants have not discharged the **onus of proof** of establishing that the [State's] measures were **the operative cause** of the [investment's] failure"[1815] (emphasis added). As in the present case, the claimants in *Blusun* had argued that there was "a clear causal link between the series of measures adopted by [the State] and the [investment's] failure."[1816] However, the claimants failed to prove that their alleged losses had in fact been caused by a treaty breach, rather than by other causes.[1817]

[1812] **RLA-0066**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (Hunter, Schwartz, Chiasson), ¶ 316 (*cited in* Peru's Counter-Memorial, ¶ 741).

[1813] *See, e.g.*, Claimant's Reply, ¶ 927.

[1814] **CLA-0095**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Fernández-Armesto, Paulsson, Voss), ¶ 163.

[1815] **RLA-0013**, *Blusun S.A., et al. v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (Crawford, Alexandrov, Dupuy), ¶ 394.

[1816] **RLA-0013**, *Blusun S.A., et al. v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (Crawford, Alexandrov, Dupuy), ¶ 310.

[1817] **RLA-0013**, *Blusun S.A., et al. v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (Crawford, Alexandrov, Dupuy), ¶¶ 375–394.

809. Thus, the relevant case law confirms that Claimant must demonstrate that its alleged loss was caused by the alleged Treaty breaches, rather than some other cause not attributable to the respondent State.

810. In addition to seeking to lower the threshold for causation, Claimant in the Reply also introduces the notion of "concurrent causes," arguing that the existence of multiple concurrent causes will not sever the chain of causation.[1818] Claimant's theory in this regard is based on selective quotations from the ILC's Commentary on the Draft Articles on State Responsibility, but Claimant is unable to identify any case law supporting its argument.

811. The case law in fact contradicts Claimant's argument. For example, in *ELSI*, the ICJ analyzed a situation in which "there were several causes acting together that led to the disaster to [the investment]."[1819] However, the ICJ did not invoke or apply the principles of "concurrent causation" that Claimant argues should govern questions of causation in matters of State responsibility. Instead, in the *ELSI* case, much like the tribunals in *S.D. Myers*, *Blusun*, and *Karkey* subsequently did, the ICJ scrutinized the "several"[1820] causes at issue, and concluded that only one "underlying cause"[1821]—which was not the State conduct alleged—was legally dispositive. The ICJ even acknowledged in *ELSI* that "[n]o doubt the effects of the [State measure] might have been one of the factors involved"[1822] among the "several causes"[1823] at issue, and yet the ICJ did *not* hold the State responsible for the harm to the investment. Thus, even when a State measure is "one of the factors involved" amongst "several causes" of

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[1818] Claimant's Reply, ¶ 899.

[1819] **RLA-0006**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment, 20 July 1989 (Ruda *et al.*), ¶ 101.

[1820] **RLA-0006**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment, 20 July 1989 (Ruda *et al.*), ¶ 101.

[1821] **RLA-0006**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment, 20 July 1989 (Ruda *et al.*), ¶ 101.

[1822] **RLA-0006**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment, 20 July 1989 (Ruda *et al.*), ¶ 101.

[1823] **RLA-0006**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment, 20 July 1989 (Ruda *et al.*), ¶ 101.

damage to an investment, a State is not responsible for any damages if the State measure does not constitute the "underlying cause."[1824] Such approach is consistent with the *Lauder v. Czech Republic* tribunal's conclusion that "[i]n order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage."[1825]

2. Peru's alleged measures did not cause the loss of Claimant's investment

812. The harm with respect to which Claimant has asserted claims in this arbitration is the alleged loss of its investment in Invicta. However, the reality is that Claimant lost its investment as a consequence of the legal forfeiture of its shares to its creditor PLI Huaura,[1826] which is a private third party. Such forfeiture in turn was a direct result of Claimant's breaches of the PPF Agreement that governed its credit relationship with PLI Huaura.[1827] The forfeiture had nothing to do with Peru's alleged conduct, but to substantiate its claim for damages, Claimant would need to demonstrate an "uninterrupted" chain of causation.[1828] Concretely, it would have to prove that the forfeiture of its shares in Invicta was in fact caused by Peru's allegedly wrongful conduct, rather than the conduct of Claimant itself and/or of other parties.[1829] Claimant is unable to discharge this burden because, as shown below, (i) it was not Peru's conduct that caused Claimant to forfeit its shares in Invicta; and (ii) instead it was Claimant's own conduct that caused such forfeiture (and the consequent loss of Claimant's investment in Invicta).

[1824] **RLA-0006**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment, 20 July 1989 (Ruda *et al.*), ¶ 101.

[1825] **RLA-0083**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein), ¶ 234.

[1826] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I. **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. to Invicta Mining Corp., 23 September 2019.

[1827] **Ex. C-0045**, Second Amended and Restated PPF Agreement, §§ 13–14.

[1828] **CLA-0095**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Fernández-Armesto, Paulsson, Voss), ¶ 163.

[1829] *See* **RLA-0066**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (Hunter, Schwartz, Chiasson), ¶ 316.

a. Peru's actions and omissions did not cause Claimant's loss

813. At all times throughout Peru's engagement with Claimant and the Parán Community, Peru's conduct was supportive of the lawful development of the Invicta Mine. To that end, eleven Peruvian agencies spent more than fourteen months working to help Claimant resolve its community relations problems. Such problems were attributable to Claimant's own failed community relations strategies and practices.[1830]

814. In the Counter-Memorial, Peru demonstrated that it was not any acts or omissions by the State that caused Claimant's forfeiture of its Invicta shares to PLI Huaura.[1831] In the Reply, Claimant restates its argument that its loss of its investment was caused by two factors, namely, "[t]he Parán Community's [Access Road Protest] and seizure of the Claimant's Project;" and "[Peru's] subsequent failure to ensure compliance with the law in the vicinity of the Project and restore the Claimant to its rights over the Invicta Project."[1832] As shown below, both arguments fail.

815. Claimant's *first* argument is that it was the measures taken by the Parán Community to protest Claimant's mining activities that caused Claimant to lose its shares in Invicta.[1833] Even if that were true (quod non), Peru demonstrated in the Counter-Memorial,[1834] and in **Section IV.A** above, that the alleged conduct of the Parán Community is not attributable to Peru. Specifically, (i) the Parán Community is not an organ of the State; (ii) the Parán Community's *Rondas Campesinas* are not empowered to exercise elements of government authority; and (iii) none of the alleged actions of the Parán Community's *Rondas Campesinas* were carried out in the exercise of any actual or ostensible government authority.[1835] Because the Parán Community's

[1830] Dufour Report, ¶ ¶¶ 10, 13, 270, 271, 401–406, 416.

[1831] *See* Peru's Counter-Memorial, ¶¶ 749–750.

[1832] Claimant's Reply, ¶ 917.

[1833] Claimant's Reply, ¶ 917.

[1834] *See* Peru's Counter-Memorial, § IV.A.

[1835] *See supra* Section IV.A. *See also, e.g.*, **CLA-0003**, ILC Articles, Arts. 4, 5.

conduct is not attributable to Peru, Peru is not responsible for any harm to Claimant's investment that may have resulted from actions by the Parán Community.

816. Claimant's *second* argument is that it was Peru's alleged failure to intervene and use force against the Parán Community's protesters caused Claimant to lose its shares in Invicta.[1836] This argument rests on the (erroneous) premises that (i) Peru failed to take any action in respect of Claimant's conflict with the Parán Community, and (ii) Peru was required to and should have used force against the community protesters. The evidence proves that each of these premises is false. In particular, as Peru demonstrated in the Counter-Memorial,[1837] and as shown in **Section II.C.3** above, Peru undertook diligent efforts to broker a peaceful and long-term resolution to the dispute, including amongst others the following actions:

a. Peru activated relevant State agencies and resources to mediate Claimant's social conflict with the Parán Community;[1838]

b. In response to the 19 June 2018 Protest, Peru deployed police to the Invicta Mine;[1839]

c. When notified in advance of a planned protest in September 2018, Peru took preemptive action by engaging with the Parán Community and deploying resources to the area of the Mine; [1840]

[1836] Claimant's Reply, ¶ 917.

[1837] Peru's Counter-Memorial, § II.E.

[1838] Peru's Counter-Memorial, § II.E.1 (summarizing the roles of various Peruvian agencies), § II.E.2 (describing the actions Peru took throughout Claimant and the Parán Community's social conflict).

[1839] *See* **Ex. C-0129**, Special Report: Seizure of Invicta Mine Camp and Facilities, SOCIAL SUSTAINABLE SOLUTIONS, 19 June 2018, **Ex. C-0161**, Monthly Report on Invicta Mine, Social Sustainable Solutions, July 2018; **Ex. C-0463**, SSS, Weekly Report, Project, 9–15 July 2018. *See also* Peru's Counter-Memorial, § II.E.2.a.

[1840] *See* **Ex. C-0134**, Letter from Invicta Mine Corp. S.A.C. (J. Castañeda) to Sayán Police Station (A. Rosales), 2 September 2018; **Ex. R-0068**, Official Letter No. 494-2018-REGION POLICIAL LIMA/DIVPOL-H-CS-SBNCRI, 4 September 2018; Claimant's Memorial, ¶ 112; **Ex. C-0138**, Monthly Report on Invicta Mining, SOCIAL SUSTAINABLE SOLUTIONS, September 2018, pp. 4–5; [redacted] *See also* Peru's Counter-Memorial, § II.E.2.b.

d. In response to the Access Road Protest, Peru sought to defuse tensions and create opportunities for meaningful dialogue, including by establishing the Dialogue Table;[1841]

e. Peru narrowed the scope of the conflict by brokering an agreement to resolve differences between and amongst the Rural Communities;[1842]

f. Peru conducted mediations with Claimant and the Parán Community, and held at least 26 *ex parte* meetings with one or the other of those two parties;[1843]

g. Peru mediated the discussions that yielded the first breakthrough in the negotiations between the parties, which was the written agreement signed by Claimant and the Parán Community in February 2019; [1844]

h. Peru investigated complaints submitted by Claimant's personnel alleging criminal conduct by members of the Parán Community;[1845] and

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[1841] *See* Incháustegui First Witness Statement, ¶¶ 23, 37–44; Trigoso First Witness Statement, ¶¶ 18–21; León First Witness Statement, § II.A.ii; **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C, and Sayán Police Station, 14 October 2018, pp. 1–2; **Ex. C-0166**, Minutes of Meeting between Parán, *et al.*, 14 October 2018; **Ex. C-0171**, Letter from Invicta (J. Castañeda) to MINEM (F. Castillo), 15 October 2018, p. 2; **Ex. C-0173**, Report on Meeting between Invicta, *et al.*, 24 October 2018. *See also* Peru's Counter-Memorial, §§ II.E.1–4.

[1842] *See* **Ex. R-0063**, Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, pp. 10–11 (reflecting the fact that on 26 January 2019, regional Peruvian Government agencies organized and hosted a meeting among the Rural Communities where the leaders of each of the Rural Communities agreed to avoid any confrontation amongst themselves, thereby establishing a favorable environment in the Invicta Project's area of direct influence). *See also* Peru's Counter-Memorial, ¶ 250.

[1843] *See supra* Table 6: Peru's Diligent and Reasonable Actions (providing a chronological table of Peru's engagement with Claimant and the Parán Community). *See also* Peru's Counter-Memorial, § II.E.3.

[1844] *See* **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019, pp. 1–2; **Ex. R-0132**, "*We are very pleased to announce the… conclusion of the illegal blockade*," MINING JOURNAL, 5 March 2019. *See also* Peru's Counter-Memorial, § II.E.3.

[1845] *See* Peru's Counter-Memorial, ¶¶ 217, 651, 656.

i. Peru continued to meet with Claimant and the Parán Community even after Claimant deployed the War Dogs, which was an action by Claimant that acutely aggravated the conflict and undermined mediation efforts.[1846]

817. The foregoing amply demonstrates that Peru diligently worked to resolve the conflict. Contemporaneous evidence demonstrates that even Claimant itself acknowledged and expressed its appreciation at the time for Peru's engagement, steadfast efforts, and contributions to finding a resolution to the conflict.[1847]

818. Furthermore, and contrary to Claimant's repeated refrain, Peru was *not* obligated to use force against the Parán Community. Peruvian law decidedly did not mandate the use of force against the protesters.[1848] Rather, Peru's legal framework—consistent with international standards and practice—promotes the resolution of social conflicts in mining projects through peaceful dialogue.[1849] In this respect, the prevailing consensus—which is based upon, and supported by, historical data—is that forceful intervention in such social conflicts tends to inflame rather than resolve disputes between mining companies and local communities.[1850]

819. In sum, the evidence shows (i) that, if anything, Peru's conduct was intended to help Claimant resolve its dispute with the Parán Community; (ii) that in many respects Peru's actions in fact succeeded in mediating the dispute and neutralizing tensions;

[1846] *See* E**x. R-0113**, Letter No. 52-2020-REGIÓN POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO from PNP Colonel (L. Pérez) to PNP General (H. Ramos), 22 February 2020, ¶ 23; **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019; **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019. *See also* Peru's Counter-Memorial, § II.E.5.

[1847] *See, e.g.*, **Ex. R-0132**, "*We are very pleased to announce the . . . conclusion of the illegal blockade*," MINING JOURNAL, 5 March 2019 ("We are very pleased to announce the positive conclusion of the illegal blockade and would like to thank our employees, the authorities, and our community partners that worked together to reach this successful result."); **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 3, 9.

[1848] *See supra* Section II.C.1.

[1849] *See supra* Section II.C.2.

[1850] *See supra* Section II.C.4.

(iii) that Peru was not required to use force to evict the Parán Community protesters; (iv) that none of Peru's actions or omissions had any adverse impact on Claimant's investment; and (v) that therefore Peru's alleged conduct did not cause, and could not have caused, the loss of Claimant's shares in Invicta.

b. It was Claimant's own conduct that caused the forfeiture of its shares in Invicta to Claimant's creditor

820. In the Reply, Claimant asserts that "[**n]o other factors** [aside from Peru's conduct] contributed to the Claimant's loss of its investment"[1851] (emphasis added). However, this argument, and Claimant's efforts to dismiss or minimize the intervening causes of its losses, all fail. In the Counter-Memorial, Peru demonstrated, with concrete and indisputable evidence, that it was actually Claimant's own conduct that caused it to lose its investment. Specifically, Peru identified at least 5 distinct intervening causes, each of which is discussed below, and each of which is attributable solely to Claimant itself.

(i) Claimant failed to secure the social license necessary to develop the Invicta Mine

821. In the Counter-Memorial, Peru demonstrated that it was Claimant's own failure to resolve its conflict with the Parán Community—and Claimant's own aggravation of that conflict—that caused the loss of Claimant's investment.[1852] Peru explained that the social conflict between Claimant and the Parán Community was the direct and foreseeable result of Claimant's community relations failures, and of Claimant's own decision to disregard its obligation to obtain a social license to operate before proceeding with mining activities at the Invicta Mine.[1853] Had Claimant adequately managed its relationship with the Parán Community and secured the necessary social license to operate, Peru never would have needed to intervene in the conflict to begin with.

[1851] Claimant's Reply, ¶ 918.

[1852] Peru's Counter-Memorial, ¶¶ 751–754.

[1853] Peru's Counter-Memorial, § II.D.

822. In response, Claimant argues that, contrary to what Peru alleges, it "acted reasonably in its dealings with the Parán Community . . . at all times."[1854] However, this is false, as amply demonstrated both in the Counter-Memorial and in **Sections II.B** and **II.C.3** above.[1855] The reality is that Claimant mismanaged its relationship and the conflict with the Community, including as a result of the following actions and omissions:

a. Pursuing a community relations strategy that marginalized and antagonized the Parán Community,[1856] including by pitting the Rural Communities of Lacsanga and Santo Domingo against the Parán Community;[1857]

[1854] Claimant's Reply, § 10.1.3.1.

[1855] *See* Peru's Counter-Memorial, §§ II.B, D.

[1856] *See, e.g.*, **Ex. C-0164**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, 1–30 September 2017, p. 6 (Claimant told the Parán Community that "it d[id] not depend on any community to start" exploitation of the Invicta Mine); León First Witness Statement, ¶ 22 ("[The Parán Community] conveyed their impression that Invicta had avoided them in negotiations with the communities declared to be in the area of direct social influence of the Project. They explained that Invicta had signed an agreement with the Lacsanga Community to build a road in their territory to access the Project. Once that contract had been signed with the Lacsanga Community, Invicta had not returned to the Parán Community to reach an agreement concerning the Project's social impact."); **Ex. C-0121**, Letter from the Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018 (demanding that Claimant cease development at the Invicta Mine). *See also supra* Section II.B.2.

[1857] *See, e.g.*, **Ex. R-0189**, Email from MINECO (J. Arevalo) to Lupaka (W. Ansley), 5 November 2018, p. 4 ("[W]e need to send the community of Lacsanga a legal letter (no later than Monday morning) outlining the fact that Paran is on their registered legal land, and blocking access to our mine. Furthermore we have noted some instances where the Paran movement has been logistically supported by certain members from the Lacsanga community"); **Ex. R-0190**, Email from Lupaka (R. Webster) to Lupaka (W. Ansley), 29 March 2019, p. 1 ("Lacsanga can pressure and file suits against Paran"); **Ex. R-0189**, Email from MINECO (J. Arevalo) to Lupaka (W. Ansley), 5 November 2018, p. 4; **Ex. R-0191**, Email from FZ Abogados (F. Zelada) to Lupaka (L. Bravo), 8 May 2019 *attaching* Precautionary Measure of Preventive Eviction and Interim Ministerial Order, pp. 2-9; **Ex. C-0392**, SSS, Monthly Report, Project, January 2018, p. 5 (Santo Domingo vows to fend off any legal challenge by the Parán Community to take over their territory); **Ex. C-0414**, SSS, Weekly Report, Project, 6–11 November 2017, p. 2. *See also supra* Section II.B.7.

b. Misrepresenting to the Parán Community that Claimant would not be able to service its monetary debt to that Community until the latter reached an agreement with Claimant;[1858]

c. Dismissively ignoring the Parán Community's concerns that the Invicta Project posed a risk of environmental harm to the Community's water sources and agriculture;[1859]

d. Waiting almost a full year before making settlement payments to the Parán Community for Invicta's prior breach of social commitments made to the Community;[1860]

e. Refusing to pay late fees for the delays in such settlement payments;[1861]

f. Breaching its commitments to the Rural Communities under the EIA—including by failing to implement a local hiring program, to comply with environmental norms, and to support community health and nutrition

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[1858] *Compare* **Ex. C-0114**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to the Parán Community (I. Palomares), 31 May 2017, p. 1 ("It is for that reason we would be grateful to you, Mr. President, to put to the consideration of the Governing Committee and Assembly the convenience of signing an Agreement with Invicta, **since it is the only way that the Banks disburse the money, with which the debt plus the fine would be paid**.") (Emphasis added) *with* Claimant's Reply, ¶ 159 (describing how Claimant paid the debt to the Parán Community before it had secured an agreement with the Community). *See also supra* Section II.B.3.

[1859] *See* Léon First Witness Statement, ¶ 20 ("[P]art of the issues giving rise to the discontent of the Parán Community related to environmental concerns"); **Ex. C-0121**, Letter No. 038-2018-CCP from the Parán Community (I. Palomares) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018, p. 3. *See also supra* Section II.B.4.

[1860] *Compare* **Ex. C-0113**, Email from Invicta Mining Corp. S.A.C. (M. Mariños) to Lupaka Gold Corp. (J. Castañeda, *et al.*), 25 January 2017, p. 1 (noting that Claimant agreed to pay a debt to the Parán Community during a meeting on 21 January 2017) *with* Claimant's Reply, ¶ 159 (describing how Claimant's two payment installments were not made until December 2017 and January 2018). *See also supra* Section II.B.5.

[1861] *See* [redacted] (incorrectly alleging that the late fee was "unilaterally imposed" and acknowledging that it was never paid by Claimant); **Ex. C-0119**, Letter No. 015-2018-CCP from the Parán Community (W. Narvasta) to Invicta Mining Corp. S.A.C. (J. Castañeda), 19 December 2017, p. 1; **Ex. C-0120**, Letter No. 004-2018-CCP from the Parán Community (I. Palomares) to Invicta Mining Corp. S.A.C. (J. Castañeda), 3 January 2018, p. 2; **Ex. C-0436**, SSS, Monthly Report, Project, February 2018, p. 7. *See also supra* Section II.B.5.

campaigns, educational and scholarship programs, and sustainable development programs;[1862]

g. Employing a community relations team that was not sufficiently experienced or equipped to prevent or manage the social conflicts that arose with the Rural Communities;[1863]

h. Inexplicably terminating the services of its external CR Team (SSS), and abandoning its community relations efforts, *after* the Access Road Protest began on 14 October 2018—i.e., during the most critical period of the social conflict;[1864]

i. Reneging on its commitments under the 26 February 2019 Agreement, by refusing to access the Invicta Mine via the Parán Community's access road, and by refusing to pay for a topographical survey;[1865] and

j. Hiring a private security firm—the War Dogs—whose intervention severely aggravated the dispute.[1866]

823. As a result of these fundamental failings in its community relations efforts, Claimant failed to secure a social license before engaging in mining activities at the Invicta Mine. Claimant does not dispute that it failed to obtain such license, but instead contents itself with arguing that it does not matter that it did not do so, because, in its opinion,

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[1862] *See* **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, pp. 42–54. *See also supra* Section II.B.6; Peru's Counter-Memorial, ¶ 175; **Ex. R-0047**, 2009 EIA, § 8.2.

[1863] *See supra* Section II.B.1.

[1864] *See* [redacted] ("The contract between IMC and SSS started in September 2016 and was renewed on several occasions, until it came to an end on 31 October 2018 after the Blockade."); [redacted] *See also supra* Section II.B.9.

[1865] *See* **Ex. C-0576**, MEM, aide mémoire, 20 March 2019, p. 1; **Ex. C-0201**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigoso, *et al.*), 28 February 2019; **Ex. C-0207**, Email from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigoso), 21 March 2019; Bravo First Witness Statement, ¶ 60; **Ex. R-0111**, Letter No. 010-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ísmodes), 6 May 2019, p. 1. *See also Supra* Section II.C.3.

[1866] *See* León Second Witness Statement, ¶¶ 50–57; Retuerto Witness Statement, § V; **Ex. R-0259**, Email from Lupaka (M. Velasquez) to Lupaka (L. Bravo), 28 March 2019; **Ex. R-0262**, Intervention Act No. 5, 14 May 2019. *See also supra* Section II.B.10.

"no such obligation [to obtain a social license] exists under Peruvian law."[1867] However, as Peru explained in the Counter-Memorial, and again in **Section II.A.1** above, the need to obtain a social license is reflected not only in the Peruvian legal framework, but also in the international legal framework and in accepted international standards and practices in the mining industry.[1868]

824. Claimant also tries to dismiss the causal impact of its own conduct by citing to the *Bear Creek v. Peru* award,[1869] in which the investor's social engagement with the local communities was not found to have caused the investor's injury.[1870] Claimant notes that in *Bear Creek*, "the Peruvian authorities were aware of the investor's interactions with the communities, [and] had never raised any objections to the investor's engagement with the local communities."[1871] Claimant then attempts to analogize the *Bear Creek* case to the present one, by arguing that Claimant likewise had the support of Peru's agencies in respect of its community relations.[1872] That contention is inaccurate.

825. The facts of the present case differ substantially, and render the reasoning of the *Bear Creek* majority inapposite. (Notably, Professor Phillipe Sands dissented on the subject of the investor's contributory fault, as discussed in greater detail below.[1873]) In

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[1867] Claimant's Reply, ¶¶ 935–936.

[1868] Peru's Counter-Memorial, ¶¶ 55–59. *See also, e.g.*, **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration: Principles and Guidance Notes, PDAC, 2014; **Ex. R-0085**, Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?, Chatham House, 4 June 2013; **Ex. R-0087**, Social License to Operate in Mining: Current Trends & Toolkit, IBDO, 2020; **Ex. R-0094**, Understanding Company-Community Relations Toolkit, ICMM, 2015; **Ex. R-0086**, Good Practice Guide: Indigenous Communities and Mining, ICMM, 2015; **Ex. R-0129**, Equator Principles, EP4, July 2020 ("The Equator Principles"); **Ex. R-0028**, Canada-Peru CR Toolkit; Trigoso First Witness Statement, § III. *See also supra* Section II.A.1.

[1869] *See* Claimant's Reply, ¶¶ 946–949.

[1870] *See* **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 411.

[1871] Claimant's Reply, ¶ 949.

[1872] *See* Claimant's Reply, ¶¶ 953–954.

[1873] *See infra* Section V.B (*discussing* **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), Dissent (Sands)).

assessing the effect of the investor's community relations, the *Bear Creek* majority emphasized that the investor's efforts "were known to Respondent's authorities and were conducted with their approval, support, and endorsement, and that no objections were raised by the authorities in this context."[1874] In reaching such finding, the majority relied on a report issued by the OEFA, in which the OEFA had reported that "'[r]elations with the communities located around the [] Project area have not caused any kind of social conflict, in what can be construed as a very friendly relationship.'"[1875] Indeed, "the OEFA reported that [c]laimant enjoyed a harmonious relationship with communities,"[1876] and no other concerns were raised by other State agencies.[1877]

826. Those facts, upon which the *Bear Creek* majority expressly relied, stand in stark contrast to the facts of this case. As discussed in the Counter-Memorial, and in **Section II.B.6** above, the OEFA expressly determined that Claimant had breached the social obligations set forth in Invicta's EIAd, and imposed fines for such breaches.[1878] In particular, the OEFA determined that Invicta had breached its obligations to: (i) implement a program to hire local personnel; (ii) support the Rural Communities' health and nutrition campaigns; (iii) assist the Rural Communities' educational and scholarship programs; (iv) assist with sustainable development programs through a series of workshops and partnerships with the Rural Communities; and (v) comply

[1874] **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 412.

[1875] **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 411.

[1876] **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 246.

[1877] *See* **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 411.

[1878] *See* Peru's Counter-Memorial, ¶¶ 173–177; **Ex. R-0074**, Directorial Resolution No. 2203-2018-OEFA/DFAI, 27 September 2018; **Ex. R-0069**, Directorial Resolution No. 158- 2021-OEFA/TFA-SE, Invicta Mining Corp., 17 September 2019, ¶ 6. *See also supra* Section II.B.6.

with Peruvian environmental norms.[1879] The OEFA also emphasized that "the paralysis of development and preparation activities **does not exempt [Invicta] from responsibility for the implementation of its socioenvironmental commitments**"[1880] (emphasis added).

827. Thus, while the evidence in *Bear Creek* showed that the State agencies gave "their approval, support, and endorsement, and that no objections were raised by the authorities"[1881] in respect of the investor's community relations, the evidence reveals the opposite to be true in this case. The *Bear Creek* award thus does not support Claimant's arguments.

828. In sum, Claimant's community relations failures had the effect of contributing to, prolonging, and aggravating the social conflict (including the Access Road Protest, which, according to Claimant, is what proximately caused the loss of its investment in Invicta).

(ii) Claimant lacked the final regulatory approvals that it needed to exploit the Invicta Mine

829. As Peru demonstrated in the Counter-Memorial, another cause of the loss of Claimant's investment in Invicta was Claimant's own failure to comply with its repayment obligations under the PPF Agreement. Specifically:

[1879] *See* **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, pp. 42–54. *See also* Peru's Counter-Memorial, ¶ 175; **Ex. R-0074**, Directorial Resolution No. 2203-2018-OEFA/DFAI, 27 September 2018; **Ex. R-0069**, Directorial Resolution No. 158- 2021-OEFA/TFA-SE, Invicta Mining Corp., 17 September 2019, ¶ 6; **Ex. R-0047**, 2009 EIA, § 8.2.

[1880] **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, ¶ 134; **Ex. R-0074**, Directorial Resolution No. 2203-2018-OEFA/DFAI, 27 September 2018; **Ex. R-0069**, Directorial Resolution No. 158- 2021-OEFA/TFA-SE, Invicta Mining Corp., 17 September 2019, ¶ 6.

[1881] **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 412.

a. Claimant had voluntarily pledged its shares to PLI Huaura as security for the loan amounts that PLI Huaura provided to Claimant under the PPF Agreement;[1882]

b. Under the PPF Agreement, Claimant was required to repay PLI Huaura the value of 187 ounces of gold in December 2018, followed by an additional amount every month until February 2023;[1883]

c. To satisfy these repayment obligations, Claimant needed to begin commercial operations well before December 2018, so that it could extract, process, and sell the extracted ore from the Invicta Mine, and then use the proceeds of that in time to begin repaying PLI Huaura in December 2018;[1884]

d. As of October 2018, when the Access Road Protest began, Claimant had not obtained the requisite regulatory approvals that it needed to begin commercial operation;[1885] and

e. Claimant defaulted on its repayment obligations under the PPF Agreement,[1886] which—along with 12 other actions and omissions by Claimant itself that

[1882] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016.

[1883] **Ex. C-0045**, Second Amended and Restated PPF Agreement, pp. 6–7 (outlining the "Contract Quantity" and the number of months after each effective date when repayment obligations would begin); **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule P (summarizing Claimant's repayment obligations under the PPF Agreement's delivery schedule).

[1884] **Ex. C-0045**, Second Amended and Restated PPF Agreement, pp. 6–7; **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule P-2.

[1885] *See supra* Section II.D.1. *See also* Dufour Report, ¶¶ 126, 158.

[1886] *See* **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019 (terminating the PPF Agreement and accelerating Claimant's repayment obligations on the basis of fourteen "Specified Defaults"). *See supra* Section II.D.4.

constituted "Events of Default" under the PPF Agreement, caused PLI Huaura to foreclose on Claimant's shares in Invicta.[1887]

830. In the Reply, Claimant concedes that it needed—but did not have—additional regulatory approvals before it could begin exploiting the Invicta Mine.[1888] However, Claimant insists that it would in fact have been able to secure these approvals in time to begin commercial operation at the Mine, and thereby meet its first repayment deadline in December 2018.[1889] However, as discussed below, Claimant is incorrect.

831. The mining expert Ms. Dufour explains in her expert report that there were at least *four* remaining regulatory steps that Claimant would have needed to complete before it could begin lawful commercial exploitation of the Invicta Mine.[1890]

a. Claimant was legally required to obtain an authorization to purchase and store fuel at the Invicta Mine.[1891] However, Claimant did not address this authorization in the Reply.

b. Claimant was required to secure approval for certain modifications to the Invicta Mine's EIA.[1892] In the Reply, Claimant takes the position that it only needed to obtain DEAR's approval of its alternative water management system—a less cumbersome requirement.[1893] However, as explained by Ms.

[1887] *See* **Ex. C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., et al., Notice of Enforcement, 24 July 2019 (notifying Claimant and the Common Representative of PLI Huaura's decision to foreclose on Claimant's shares in Invicta); **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. (M. Brenneisen) to Invicta Mining Corp. S.A.C. (L. Bravo), 23 September 2019 (confirming that, as of 26 August 2019, all shares in Invicta were transferred to PLI Huaura).

[1888] Claimant's Reply, ¶¶ 986–988.

[1889] Claimant's Reply, ¶¶ 986–988.

[1890] Dufour Report, ¶ 7.

[1891] Dufour Report, ¶¶ 64–66, 147–150.

[1892] Dufour Report, ¶¶ 7, 104–105.

[1893] Castañeda Second Witness Statement, ¶ 89 ("The only outstanding issue was for our water management system to be certified by the DEAR, which we did not expect to be problematic or to take a lot of time, given the favourable results of our testing and the ALA's inspection. In my

Dufour, this would not have been sufficient, as Claimant would have needed to modify the existing terms of its EIAd (e.g., to account for its alternative water management system and new underground and superficial water sources).[1894] Thus, Claimant needed to secure approval to *modify* its EIA, which would have been more time-consuming.[1895]

c. As Claimant itself concedes,[1896] it needed to secure authorization from the MINEM to begin commercial exploitation of the Invicta Mine.[1897]

d. Claimant needed to obtain licenses to use water from sources not contemplated in Claimant's 2009 EIA.[1898] However, Claimant did not address this requirement in the Reply.

832. Contrary to Claimant's argument,[1899] it could not have obtained all such authorizations before December 2018. Based on her thorough analysis of the relevant regulations, Ms. Dufour concludes that:

a. Claimant would have needed at least two to four months to secure the authorization needed to purchase and store hydrocarbons at the Invicta Mine and register with Osinergmin's Hydrocarbon registry; if Claimant had started this process in September 2018, it could not have been completed before November 2018;[1900]

b. Claimant would have needed at least thirteen months to secure the modification to its EIA; if Claimant had begun this process immediately after

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experience, even accounting for some delay, we should have been able to obtain this certification in one month, approximately. Obtaining this certification would not have represented additional costs.").

[1894] Dufour Report, ¶¶ 104–105.

[1895] Dufour Report, ¶¶ 105–106.

[1896] Claimant's Reply, ¶¶ 988, 990.

[1897] Dufour Report, ¶¶ 126, 162.

[1898] Dufour Report, ¶¶ 104–105, 138.

[1899] Claimant's Reply, ¶¶ 988–995.

[1900] Dufour Report, ¶¶ 147–150.

its Third ITS was rejected in December 2018, it could not have secured approval of this modification before late December 2019;[1901]

c. Claimant could only have obtained the MINEM's authorization for Claimant's exploitation of the Mine after Claimant (i) successfully modified its EIA, (ii) scheduled an inspection of the Invicta Mine, and (iii) passed such inspection; if the modified EIAd had been approved in December 2019, Claimant could not have secured its authorization to exploit the Invicta Mine before January 2020;[1902]

d. Claimant would have needed at least six months after it secured the approval of its EIAd modification (i) to obtain approval of its construction plans for new water infrastructure, (ii) to construct that infrastructure, and (iii) to secure the water licenses needed to begin drawing water out of each new water source; if the modified EIAd had been approved in December 2019, Claimant could not have begun to draw water from its new sources before July 2020.[1903]

833. Given the foregoing, the relevant cumulus of regulatory authorizations could not have been obtained by Claimant before *July 2020*—i.e., more than a year and a half *after* Claimant's repayment obligations began accruing under the PPF Agreement.[1904] Claimant insists that it was on the "eve of production" in October 2018,[1905] but such argument is unsubstantiated and ignores the additional outstanding regulatory requirements that prohibited Claimant from beginning commercial exploitation.

834. Thus, Claimant's own failure to obtain requisite regulatory approvals caused it to default on its obligations and lose its investment.

[1901] Dufour Report, ¶ 110.

[1902] Dufour Report, ¶ 220.

[1903] Dufour Report, ¶¶ 139, 158–159.

[1904] Dufour Report, ¶ 159; **Ex. MD-0047**, Permitting schedule to initiate mining operations (mining and processing) according to market conditions.

[1905] *See* Claimant's Reply, ¶ 46 ("In the six years following its acquisition of the Project (October 2012–October 2018), Lupaka invested a significant amount of time and money to develop the Project, taking it to the eve of production before Parán installed the Blockade.").

(iii) Claimant failed to secure adequate and reliable ore processing capacity to convert its ore into marketable minerals

835. In the Counter-Memorial, Peru demonstrated with evidence that Claimant did not have sufficient capacity to process ore, such that, even if it had obtained the requisite regulatory approvals (which it did not), it would not have been able to process ore in time to satisfy its December 2018 repayment obligation to PLI Huaura.[1906]

836. In the Reply, Claimant concedes that it did itself not own an adequate ore processing facility as of October 2018,[1907] but asserts that it nonetheless would have been able to fulfil its obligations, pursuant to what it claims were two alternatives available to it:[1908] acquisition of the Mallay Plant, or use of third-party ore processors.[1909] For the reasons shown below, however, and contrary to Claimant's argument, neither of those alternatives would have allowed Claimant to fulfil its obligations under the PPF Agreement.

837. *First*, Claimant argues that it could have ensured sufficient capacity to process ore by purchasing the Mallay Plant from its then-owner, Buenaventura.[1910] Claimant is incorrect. The hypothetical acquisition of the Mallay Plant would not have enabled Claimant to satisfy its obligations under the PPF Agreement, because Claimant would have needed to complete a series of steps before it could begin to process ore at the Mallay Plant.[1911] Specifically, as confirmed by Ms. Dufour, Claimant and Buenaventura would have needed to:

[1906] Peru's Counter-Memorial, ¶¶ 766–767.

[1907] *See* Claimant's Reply, § 3.4 (describing Claimant's attempts to process ore from the Invicta Mine through the Mallay Plant, which was owned by Buenaventura, and three offsite third-party owned processing plants—San Juan Evangelista, Altagracia, and Huancapeti II).

[1908] Claimant's Reply, ¶ 1009.

[1909] *See* Claimant's Reply, ¶¶ 1009–1010.

[1910] *See* Claimant's Reply, ¶¶ 1009–1010.

[1911] *See supra* Section II.D.3.

a. Modify the Invicta Mine's EIAd to account for transportation of ore from the Invicta Mine to the Mallay Plant,[1912]

b. Modify the operating permit of the Mallay Plant,[1913]

c. Transfer Buenaventura's mining and processing concessions and operating permits to Claimant,[1914]

d. Modify the discharge authorizations of the Mallay Plant,[1915]

e. Procure a new water license for water collection points used by the Mallay Plant;[1916]

f. Procure an updated authorization to use explosives;[1917] and

g. Complete each of the steps required to commercially exploit the Invicta Mine (as outlined in **Section II.D.1** above).[1918]

838. Ms. Dufour analyzed these requirements and concluded that it would have taken Claimant roughly fifteen months, starting from the date on which it completed its purchase of the Mallay Plant for Claimant, to obtain the necessary authorization to process ore at the Mallay Plant.[1919] As Claimant concedes, that sale could not have taken place unless and until the local community (the Mallay Community) consented to the transfer to Claimant of the existing community agreement between Buenaventura and the Mallay Community.[1920] However, the Mallay Community did

[1912] Dufour Report, ¶ 181(ii).

[1913] Dufour Report, ¶ 181(iii).

[1914] Dufour Report, ¶¶ 192–198.

[1915] Dufour Report, ¶¶ 199–201.

[1916] Dufour Report, ¶¶ 202–203.

[1917] Dufour Report, ¶¶ 204–206.

[1918] Dufour Report, ¶¶ 209–213.

[1919] Dufour Report, ¶¶ 189, 217; **Ex. MD-0053**, Permitting Schedule for ore processing.

[1920] **Ex. MI-0007**, Email from Will Ansley to Gordon Ellis, 19 October 2018, p. 1 (Buenaventura "refuse[d] to sign the purchase agreement and announce[d] the transaction before the [Mallay] [C]ommunity agreement [was] transferred [from Buenaventura to Claimant].").

not provide its consent to such transfer until March 2019.[1921] Accordingly, the *earliest* that Claimant could have begun processing ore at the Mallay Plant would have been fifteen months after that date, which would have been July 2020;[1922] i.e., more than a year and a half *after* Claimant's payment obligations to PLI Huaura were scheduled to begin (December 2018). Thus, Claimant's hypothetical purchase and use of the Mallay Plant thus would not have allowed it to meet in a timely fashion its repayment obligations under the PPF Agreement.

839. *Second*, Claimant argues that, even without acquiring the Mallay Plant, it could have ensured sufficient capacity to process ore by contracting its ore processing needs to third parties.[1923] Specifically, Claimant asserts that it could have relied on a contracting combination of (i) the Huancapeti II plant (an ore processing facility owned by a third party), and (ii) the Mallay Plant (the ore processing facility owned by Buenaventura).[1924] However, as discussed below, the evidence shows that the services of these third parties would *not* have enabled Claimant to process sufficient ore sufficiently quickly to satisfy its obligations under the PPF Agreement.[1925]

840. With respect to the Huancapeti II plant, by late October 2018 Claimant had already conducted testing at the plant to assess its adequacy for the processing of ore from the Invicta plant.[1926] As described in **Section II.D.3**, those tests had revealed serious problems. In particular, Claimant's own contemporaneous records show that Claimant concluded in October 2018 that relying on the Huancapeti II plant to process the amounts of ore that it needed would be "**very risky** because of the **unreliability**

[1921] **Ex. C-0289**, Notarized Addendum to the Easement Contract between Buenaventura and the Mallay Community, 14 March 2019.

[1922] Dufour Report, ¶¶ 189.

[1923] *See* Claimant's Reply, ¶¶ 1009–1010.

[1924] Claimant's Reply, ¶ 1010.

[1925] *See supra* Section II.D.3.

[1926] *See* Claimant's Reply, ¶ 114; **Ex. C-0087**, Monthly Report, LUPAKA GOLD CORPORATION & INVICTA GOLD PROJECT, October 2018, p. 6 (describing ore transported to the Huancapeti II plant).

of the owner of Huancapeti [II] to follow any type of agreement"[1927] (emphasis added).

841. In any event, as described above, Claimant would have needed a series of authorizations to begin extracting ore from the Invicta Mine. Such authorizations could not have been secured until at least July 2020.[1928] Accordingly, the hypothetical scenario in which Claimant would have contracted with third parties to process ore at other facilities would simply not have allowed Claimant to fulfill its repayment obligations under the PPF Agreement.

842. *Third*, and finally, Claimant argues that, even if it had been unable in the end to secure reliable ore processing capacity, it still could have met its repayment obligations either by paying PLI Huaura in cash or simply by delaying its repayment obligations.[1929] These suppositions are speculative and unsupported. As explained in **Section II.D.4** above, Claimant has not established that it could have secured the funds needed to cover the amounts it owed to PLI Huaura. To the contrary, the fact itself that Claimant defaulted on its repayment obligations during the period from December 2018 to July 2019[1930] suggests that Claimant in fact did *not* have the capacity to secure funds (since presumably otherwise it would have obtained such funds to avoid defaulting). Furthermore, Claimant provides *no* evidence to suggest that PLI Huaura had agreed—or hypothetically would have agreed—to delay Claimant's repayment obligations under the PPF Agreement.

843. In sum, even if the Access Road Protest had never happened, and even if the alleged conduct by Peru had never happened, Claimant still would have forfeited its shares in Invicta to PLI Huaura, because it would not have had the requisite capacity to begin operating and processing ore in time to meet its repayment obligations on time.

[1927] **Ex. R-0197**, Email from Lupaka (W. Ansley) to Lupaka (R. Webster), 29 October 2018, p. 1.

[1928] Dufour Report, ¶ 159.

[1929] Claimant's Reply, ¶¶ 1012, 1014.

[1930] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I (listing the "Specified Defaults" committed by Claimant).

(iv) Claimant's own decision to pledge its investment as loan collateral caused the loss of its investment

844. In the Counter-Memorial, Peru also demonstrated that it was Claimant's own voluntary business decision to pledge its shares in Invicta (i.e., its investment) as loan collateral to its creditor PLI Huaura that ultimately caused the loss of its investment.[1931] Specifically, through the Pledge Agreement, AAG (Claimant's subsidiary and Invicta's parent company) and Mr. Ellis (Claimant's CEO and President) pledged their shares in Invicta as security to PLI Huaura for the loan amounts provided by PLI Huaura to Invicta under the PPF Agreement.[1932] Pursuant to the Pledge Agreement, if Claimant were to default on its PPF Agreement obligations, PLI Huaura would be authorized to foreclose on Claimant's shares in Invicta.[1933] And that is exactly what happened in the end. Peru noted that this situation is analogous to that in *Inversión y Gestión de Bienes v. Spain*, in which a banking entity had foreclosed on the claimants' investment after the claimants had ceased to make mortgage payments.[1934] The tribunal concluded that the State could not be held liable for the banking entity's foreclosure on the investment.[1935]

845. In the Reply, Claimant does not dispute that it voluntarily pledged its shares in Invicta as loan collateral.[1936] In response to Peru's argument that in making that pledge, Claimant had assumed the risk of forfeiture if it were to default on its obligations under the PPF Agreement, Claimant contents itself with an attempt to distinguish its own case from that in *Inversión y Gestión*. Specifically, Claimant argues that the

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[1931] Peru's Counter-Memorial, ¶¶ 755–758.

[1932] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Art. 6.1.

[1933] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Art. 6.1. *See also generally* **Ex. C-0045**, Second Amended and Restated PPF Agreement.

[1934] **RLA-0118**, *Inversión y Gestión de Bienes v. Kingdom of Spain*, ICSID Case No. ARB/12/17, Award, 14 August 2015 (Oreamuno Blanco), ¶¶ 178–179.

[1935] **RLA-0118**, *Inversión y Gestión de Bienes v. Kingdom of Spain*, ICSID Case No. ARB/12/17, Award, 14 August 2015 (Oreamuno Blanco), ¶¶ 178–179.

[1936] *See* Claimant's Reply, ¶ 960.

investors in the latter case had "wilfully" stopped fulfilling their obligations under the agreement with their creditor,[1937] whereas here Claimant's inability to make its loan payments to PLI Huaura had not been "wilful or negligent."[1938] However, the *Inversión y Gestión* tribunal did not make any such distinction, and did not indicate that it considered that wilfulness or negligence was required for its finding. Instead, the *Inversión y Gestión* tribunal merely noted that the claimants were aware of the risk of foreclosure if they defaulted on their obligations:

> The [c]laimants stopped making the mortgage payments, knowing that this constituted a breach of the signed contract, possibly leading to the initiation by [the banking entity] of an enforcement proceeding, as indeed happened.[1939]

846. The situation here is identical, as illustrated by a simple substitution of the present case's players and documents into the quote above from the *Inversión y Gestión* case:

> [The] Claimant[] [did not make] payments, knowing that this constituted a breach of the signed contract [(i.e., the PPF Agreement)], possibly leading to the initiation by the [creditor] entity [(i.e, PLI Huaura)] of [foreclosure on the shares], as indeed happened.[1940]

847. Thus, as in *Inversión y Gestión de Bienes v. Spain*, the loss of Claimant's investment was due to a third party creditor's foreclosure on Claimant's investment, for which the State cannot be held liable.

*(v) Claimant incurred **fourteen** events of default under the PPF Agreement – any one of which would have triggered forfeiture of Claimant's Invicta shares (and thus the loss of its investment)*

848. In addition to defaulting on the repayment obligations under the PPF Agreement, Claimant also defaulted on a series of other obligations thereunder. As Peru

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[1937] Claimant's Reply, ¶ 961.

[1938] Claimant's Reply, ¶ 960.

[1939] **RLA-0118**, *Inversión y Gestión de Bienes v. Kingdom of Spain*, ICSID Case No. ARB/12/17, Award, 14 August 2015 (Oreamuno Blanco), ¶ 178.

[1940] **RLA-0118**, *Inversión y Gestión de Bienes v. Kingdom of Spain*, ICSID Case No. ARB/12/17, Award, 14 August 2015 (Oreamuno Blanco), ¶ 178.

demonstrated in the Counter-Memorial, Claimant's failure to satisfy these other obligations under the PPF Agreement also caused the loss of its investment.[1941]

849. In the Reply, Claimant is forced to concede that it did, indeed, commit fourteen defaults under the PPF Agreement.[1942] Claimant is further forced to concede that at least four of those—namely, Defaults 3, 4, 5, and 8—were unrelated to either the Access Road Protest or to Peru's conduct.[1943] Bizarrely, Claimant then asserts with respect to each of these acknowledged defaults that *either* Claimant "materially complied" with the relevant requirements *or* that PLI Huaura had waived them.[1944] However, it is wholly inconsistent for Claimant to (i) concede that it defaulted on these obligations, (ii) while simultaneously alleging that it did *not* default on them (since, according to Claimant, it either materially complied with the relevant obligations or PLI waived them). In any event, there is *no* evidence to support the assertion that Claimant materially complied, or that PLI Huaura waived such defaults. To the contrary, PLI Huaura exercised its right to foreclose on Claimant's shares in Invicta, *based specifically upon the 14 events of default* (including Claimant's failure to meet its repayment obligations).[1945] This constitutes incontrovertible evidence that PLI Huaura did *not* waive the relevant obligations by Claimant.

850. In sum, Claimant's own admissions confirm what Peru proved in the Counter-Memorial: that it was Claimant's own failures to satisfy its obligations under the PPF Agreement that caused it to forfeit its shares in Invicta, and thus to lose its investment.

[1941] Peru's Counter-Memorial, ¶¶ 759–763.

[1942] Claimant's Reply, ¶ 976 (In the table of its Events of default, Claimant lists its Events of Default. For some Events of Default, Claimant alleges that such Events were related to the Access Road Blockade (which they were not). For others Events, Claimant does not even allege that they were related to the Access Road Blockade).

[1943] Claimant's Reply, ¶ 976.

[1944] Ellis Second Witness Statement, ¶¶ 52–53. *See also* Claimant's Reply, ¶ 976.

[1945] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I; **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. to Invicta Mining Corp., 23 September 2019.

c. As a last resort, Claimant tries to reframe its alleged loss

851. Faced with evidence of the foregoing causes of the loss of its investment, Claimant in the Reply seeks to reframe such loss. Specifically, Claimant now alleges that it "had already lost the entire value of its investment prior to PLI Huaura's foreclosure," such that Claimant need not demonstrate that it was Peru's conduct that caused PLI Huaura's foreclosure on Claimant's investment.[1946] However, this argument is squarely inconsistent with Claimant's damages claim. That is demonstrated unequivocally by the fact that both Claimant and its damages experts have quantified the damages based on the asserted value of Claimant's investment on 26 August 2019, *which is the date of PLI Huaura's foreclosure*.[1947] According to Claimant and its experts, that is the date on which Claimant's investment lost all value; this position is consistent with Claimant's submissions in the Memorial, wherein Claimant had identified its loss as the forfeiture of Invicta shares to PLI Huaura.[1948] Having consistently relied in both its Memorial and Reply on a damages theory that centers on the loss of the investment *as a result of* the foreclosure on Claimant's shares in Invicta, Claimant cannot now be heard to argue that its investment had in fact lost all value *prior to* such foreclosure.

852. As Claimant has failed to establish an uninterrupted chain of causation between Peru's alleged measures and Claimant's loss of its investment, Claimant's damages claim must be rejected.

[1946] Claimant's Reply, ¶ 968.

[1947] **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. to Invicta Mining Corp., 23 September 2019 (listing the foreclosure date as 26 August 2019).

[1948] Claimant's Memorial, ¶ 14 ("Ultimately, the actions of the Parán Community and the omissions of the Peruvian central authorities destroyed Lupaka's investment in Peru. After Lupaka was barred from exploiting its mine for months, it was unable to produce the ore necessary to service a debt facility agreement. In default, Lupaka's creditors foreclosed on its shares, resulting in the definitive destruction of its investment in August 2019."); *id.*, ¶ 195 ("Lonely Mountain's enforcement against IMC's shares was the direct consequence of Peru's acts and omissions."); *id.*, ¶ 325 ("In the present case, the expropriation of the Claimant's investment was completed on 26 August 2019 when Lonely Mountain seized the Claimant's shares in IMC.").

B. Any award of damages would need to be offset on the basis of Claimant's contributory fault

853. As Peru demonstrated in the Counter-Memorial, even if Peru's alleged conduct could be deemed to have caused Claimant's alleged damages (quod non), the amount of damages awarded would need to be offset based upon Claimant's contributory fault.[1949] In particular, as Peru explained,[1950] Article 39 of the ILC Articles provides that

> [i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.[1951]

854. Even if the Tribunal were to conclude that the loss of Claimant's investment was not *caused* by the Claimant's own conduct as described in the previous section—mainly, (i) Claimant's business decision to pledge its Invicta shares as collateral for its loan, (ii) Claimant's defaults under the PPF Agreement, and (iii) Claimant's failure to engage constructively with the Parán Community, and to obtain the social license—at a minimum it is clear that such conduct *contributed* to Claimant's loss. Any damages award would need to be reduced accordingly.

855. In the Reply, Claimant argues that there should be no such offset because (i) its conduct in fact was not wilful or negligent, (ii) its contribution to the injury was not material and significant, and (iii) its conduct was not illegal. Peru will address each of those arguments sequentially below.

1. Claimant's contributory conduct was wilful or negligent

856. As Claimant concedes, the Commentary to ILC Article 39 makes it clear that, in order to be considered "wilful or negligent," the relevant conduct must simply show "a lack of due care on the part of the victim of the breach for his or her own property or

[1949] Peru's Counter-Memorial, ¶¶ 768–772.

[1950] Peru's Counter-Memorial, ¶ 769.

[1951] **CLA-0018**, ILC Commentary, Art. 39.

rights."[1952] The investment arbitration case law has been consistent with that definition by the ILC. For example, in *MTD v. Chile*, the tribunal reduced the claimant's damages by 50% on the basis that poor business judgment exhibited by the investors had amounted to contributory conduct:

> [T]he [c]laimants incurred costs that were related to their business judgment irrespective of the breach of [the treaty]. As already noted, the [c]laimants, at the time of their contract with Mr. Fontaine, had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by [the State] to the [c]laimants.[1953]

857. Furthermore, as the commentary to the ILC Articles confirms, "other circumstances" must be taken into consideration:

> While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being "serious" or "gross", **the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case**. The phrase "account shall be taken" indicates that [ILC Article 39] deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.[1954] (Emphasis added)

858. In this case, Claimant's conduct demonstrated "a lack of due care . . . for [its] own property or rights."[1955] As described in detail above, Claimant's this willful or negligent conduct included the following:

[1952] Claimant's Reply, ¶ 912. *See also* **CLA-0018**, ILC Commentary, Art. 39, cmt. 5.

[1953] **CLA-0047**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* ICSID Case No. ARB/01/7, Award, 28 May 2004 (Sureda, Lalonde, Oreamuno), ¶ 242–243.

[1954] **CLA-0018**, ILC Commentary, Art. 39, cmt. 5. *See also* **RLA-0090**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/111, Award, 5 October 2012 (Fortier, Williams, Stern), ¶ 670 (noting that the tribunal had "a wide margin of discretion in apportioning fault").

[1955] **CLA-0018**, ILC Commentary, Art. 39, cmt. 5.

a. Making the voluntary business judgment to pledge its shares in Invicta as loan collateral,[1956] thereby exposing Claimant to the risk that any breach of its obligations under the PPF Agreement would result in forfeiture of such Invicta shares;

b. Agreeing to an aggressive repayment schedule under the PPF Agreement that required that repayment begin in December 2018,[1957] despite the fact that a series of regulatory steps were needed in order for Claimant to begin commercial operation of the Mine;[1958]

c. Knowingly agreeing to a series of provisions in the PPF Agreement that expressly required Claimant to provide update reports to PLI Huaura,[1959] and then failing to comply with those reporting obligations[1960]—even though failure to comply would expose its shares to forfeiture;[1961]

d. Knowingly agreeing to a provision of the PPF Agreement requiring Claimant to maintain a Mineral Offtake Agreement,[1962] but then failing to comply with such obligation[1963]—even though failure to comply with this obligation, too, would expose its Invicta shares to forfeiture;[1964]

[1956] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Art. 6.1.

[1957] *See* **Ex. C-0045**, Second Amended and Restated PPF Agreement, pp. 6–7 (providing for fifteen months between the First Effective Date (the date upon which the first PLI Huaura payment was made) and Claimant's first repayment obligation); **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule P.

[1958] Dufour Report, ¶¶ 7, 158.

[1959] *See, e.g.*, **Ex. C-0045**, Second Amended and Restated PPF Agreement, §§ 12(1)(a)(vi), 12(1)(a)(viii), 12(1)(a)(ix), 12(1)(c)(i), 12(1)(c)(ii).

[1960] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I. *See also* Claimant's Reply, ¶ 977.

[1961] **Ex. C-0045**, Second Amended and Restated PPF Agreement, §§ 13–14.

[1962] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 12(1)(r).

[1963] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I. *See also* Claimant's Reply, ¶ 977.

[1964] **Ex. C-0045**, Second Amended and Restated PPF Agreement, §§ 13–14.

e. Committing a total of *fourteen* defaults of the PPF Agreement—each of which triggered the forfeiture of Claimant's shares in Invicta;[1965]

f. Taking the position that it did not need to secure the acceptance of the Parán Community (thereby alienating that community);[1966] and

g. Taking steps that aggravated the social conflict with the Parán Community, including (inter alia) (i) hiring and deploying a "powerful"[1967] security force—i.e., the War Dogs—to intervene in the Access Road Protest, (ii) repeatedly insisting that the State use force against the protesters; (iii) dismissing the Parán Community's legitimate concerns that the Invicta Mine might pollute its water sources;[1968] and (iv) reaching agreements with other communities, to the exclusion of the Parán Community.[1969]

859. The foregoing wilful and negligent acts by Claimant caused, or at a minimum significantly contributed to Claimant's injury (i.e., the forfeiture of its investment), and

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[1965] *See supra* Section II.D.4; *see also* **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I.

[1966] Peru's Counter-Memorial, § II.D.2.a; *see also* Claimant's Reply, ¶ 175; **Ex. C-0164**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, 1–30 September 2017, p. 6 ("[T]he company has all the permits granted by the Ministry of Energy and Mines to start its exploitation and … **it does not depend on any community to start this stage**. … the company has always requested an easement from the community, but not permission to exploit." (emphasis added)).

[1967] **Ex. R-0259**, Email from Lupaka (M. Velasquez) to Lupaka (L. Bravo), 28 March 2019.

[1968] *See supra* Section II.B.4; *see also* **Ex. R-0065**, Meeting Minutes of Coordination between the Parán Community and MINEM, 11 August 2018, p. 1; **Ex. R-0066**, Meeting Minutes of Coordination between the Parán Community and MINEM, 22 August 2018. *See also* León First Witness Statement, ¶¶ 22–23; **Ex. C-0182**, Summary Report of Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018, p. 1 ("The community, taking the initiative, proposed 3 items for the agenda . . . [3.] Environment and economic compensation for the alleged damage caused to the alleged territories of the community.").

[1969] Peru's Counter-Memorial, ¶¶ 222–223. *See also* León First Witness Statement, ¶ 22 ("[The Parán Community] conveyed their impression that Invicta had avoided them in negotiations with the communities declared to be in the area of direct social influence of the Project. They explained that Invicta had signed an agreement with the Lacsanga Community to build a road in their territory to access the Project. Once that contract had been signed with the Lacsanga Community, Invicta had not returned to the Parán Community to reach an agreement concerning the Project's social impact.").

plainly reflect a lack of due care. Any damages award would thus need to be offset to take account of Claimant's contributory fault.

2. The contribution to Claimant's loss of its investment was material and significant

860. In the Reply, Claimant alleges the claimant's contribution to the injury must have been "material and significant."[1970] Even if such a requirement existed,[1971] it would certainly be satisfied in this case. That is demonstrated by the following events:

a. Claimant voluntarily pledged its shares in Invicta as part of its financing arrangement, thereby allowing PLI Huaura to foreclose on such shares in the event that Claimant were to default on its obligations under the PPF Agreement;[1972]

b. Claimant committed 14 defaults of its obligations under the PPF Agreement, thereby exposing it to automatic forfeiture of its Invicta shares;[1973]

c. As Peru has shown, all 14 of those defaults were caused by Claimant's own conduct,[1974] and even Claimant itself concedes that some of those defaults had no relationship to, and were not caused by, the Access Road Protest or Peru's alleged conduct;[1975]

[1970] Claimant's Reply, ¶ 912.

[1971] The text of ILC Article 39 does not include a requirement that the contribution be material or significant: **CLA-0018**, ILC Commentary, Art. 39. Claimant relies on the award of the *Yukos v. Russia* tribunal, which asserted that any contribution must be material and significant, but relying solely on the use of the word "materially" in the ILC Commentary to Article 39. *See* **CLA-0154**, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014, ¶ 1600.

[1972] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Art. 6.1.

[1973] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I.

[1974] *See supra* Section II.D.4. *See also* **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I.

[1975] *See* Claimant's Reply, ¶¶ 976–977.

d. PLI Huaura foreclosed on the Invicta shares on the basis of Claimant's defaults;[1976] and

e. The loss that Claimant claims in this arbitration is the value of its shares in Invicta, quantified on the basis of the value of such shares on the day that PLI Huaura foreclosed on them.[1977]

861. In short, the evidence demonstrates that Claimant's own conduct made a material and significant contribution to Claimant's claimed injury.

862. In support of its claim that it did not materially contribute to its own loss, Claimant cites *Bear Creek v. Peru* (also discussed in the context of causation above).[1978] Claimant argues that, "[a]s in *Bear Creek*, there is no cognisable causal link between the breaches of the Respondent's organs, including the Parán Community, and the Claimant's conduct."[1979] Such argument reflects a fundamental misunderstanding of the concept of contributory fault, which concerns the situation in which *a claimant's conduct* contributed to *that claimant's loss*[1980]—and not, as Claimant appears to believe, whether the claimant's conduct caused the respondent's conduct.

863. Further, and in any event, the *Bear Creek* case itself does not assist Claimant. In *Bear Creek*, Peru had issued a supreme decree that revoked Claimant's authorizations to own and operate a mining project,[1981] and the tribunal held that the supreme decree

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[1976] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I; **Ex. C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., et al., Notice of Enforcement, 24 July 2019.

[1977] Claimant's Reply, ¶ 1061 ("On that basis, Accuracy concludes that the Claimant's damages at the Valuation Date amount to USD 41.0 million, excluding interest.").

[1978] *See* Claimant's Reply, ¶¶ 946–50.

[1979] Claimant's Reply, ¶ 952.

[1980] **CLA-0018**, ILC Commentary, Art. 39.

[1981] *See* **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 375 (The tribunal determined that "Supreme Decree 032 . . . deprived Claimant of all the major legal rights it had obtained and needed for the realization of its mining Project").

constituted an indirect expropriation.[1982] Peru had argued that the claimant's attitude towards and misrepresentations to the local community had caused social unrest, which in turn rendered it necessary for Peru to adopt the supreme decree in question.[1983] The tribunal was split on the subject of contributory fault, with the majority unable to find that the claimant's conduct had in fact contributed to the harm to claimant's investment.[1984] That finding, however, was subject to a robust dissent by Professor Phillipe Sands, who opined that

> . . . the Respondent has clearly established the Claimant's contributory responsibility, by reason of its acts and omissions, to the social unrest that left the Peruvian government in the predicament it faced, and the need to do something reasonable and lawful to protect public well-being.[1985]

864. Here, the chain of causation is even more direct than that recognized by Professor Sands in *Bear Creek*: here, Claimant breached the PPF Agreement, and Claimant's creditor foreclosed on Claimant's shares in Invicta.[1986] Thus, unlike in *Bear Creek*,[1987] there was no supreme decree or other act by Peru that stripped Claimant of its rights or shares. Instead, the claimed injury was effected by a private party by virtue of a private agreement with Claimant.[1988]

865. Moreover—and also unlike the *Bear Creek* case—Peru's argument with respect to Claimant's contributory fault in the present case does not rest solely on Claimant's

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[1982] *See* **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 416.

[1983] *See* **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶¶ 560–561.

[1984] *See* **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 663.

[1985] **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), Dissent (Sands), ¶ 4.

[1986] *See* **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. (M. Brenneisen) to Invicta Mining Corp. S.A.C. (L. Bravo), 23 September 2019.

[1987] *See* **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 663.

[1988] *See supra* Section V.A.2; Peru's Counter Memorial, § V.B.1.

conduct in respect of its engagement with the local community. Instead, as shown above, there are a variety of acts and omissions by Claimant, unrelated to the social unrest, that contributed. For example, (i) Claimant imprudently pledged its Invicta shares as collateral;[1989] and (ii) Claimant failed to satisfy a significant number of contractual obligations to its creditor PLI Huaura[1990] (including obligations that by Claimant's own admission bore no relation to the social conflict or to Peru's conduct[1991]).

866. These events epitomize the principle of contributory fault, and any damages award would therefore need to be reduced to take account of Claimant's contributions to its losses.

3. Claimant's invented illegality requirement must be rejected

867. In a final attempt to avoid the consequences of its contributory conduct, Claimant argues that the alleged conduct by the investor must have been illegal in order to offset a damages award.[1992] However, Claimant is unable to point to any language in the ILC Articles or the commentary thereto that reflects—or even remotely suggests—the existence of such an "illegality" requirement; rather, Claimant purports to base such requirement on the alleged fact that, "[t]o the best of the Claimant's knowledge, in all the reported cases in which the tribunal reached a finding of contributory fault, the conduct of the investor was contrary to the laws and regulations of the host State."[1993] This argument fails for two reasons.

[1989] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Art. 6.1.

[1990] *See* **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019 (terminating the PPF Agreement and accelerating Claimant's repayment obligations on the basis of fourteen "Specified Defaults").

[1991] *See* Claimant's Reply, ¶ 976 (In the table of its Events of default, Claimant lists its Events of Default. For some Events of Default, Claimant alleges that such Events were related to the Access Road Blockade (which they were not). For others Events, Claimant does not even allege that they were related to the Access Road Blockade).

[1992] Claimant's Reply, ¶ 913.

[1993] Claimant's Reply, ¶ 913.

868. *First*, the assertion that the case law has "to the best of [a party]'s knowledge" reflected a certain set of circumstances does not and cannot substantiate the content of a principle of customary international law. Claimant's argument can therefore be rejected *in limine* on this basis.

869. *Second*, the case law in fact contradicts Claimant's theory that illegal activity is a requisite element for finding contributory fault. That is true even of one of the cases that Claimant itself cites as an authority—*MTD v. Chile.* Claimant invokes that case to argue that the tribunal's finding on contributory fault was based on conduct that "was contrary to the respondent State's zoning regulations."[1994] However, that assertion is entirely incorrect, as the *MTD* tribunal expressly based its contributory fault determination—and resulting reduction in damages—solely on the poor "business judgment" of the claimant—and not on any finding of illegality.[1995] The *MTD* award thus contradicts, rather than supports, Claimant's thesis.

870. For its part, the tribunal in *Cargill v. Poland* endorsed the *MTD* decision on contributory fault,[1996] and reduced the damages award by 40% because the investor "knowingly took a business or regulatory risk."[1997] As in *MTD*, the *Cargill* tribunal did not purport to identify any illegality in the conduct by claimant that had contributed

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[1994] Claimant's Reply, ¶ 914, fn. 1465.

[1995] **CLA-0047**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* ICSID Case No. ARB/01/7, Award, 28 May 2004 (Sureda, Lalonde, Oreamuno), ¶ 242 ("The Tribunal decided earlier that the [c]laimants incurred costs that were related to their business judgment irrespective of the breach of [the treaty]. As already noted, the [c]laimants, at the time of their contract with Mr. Fontaine, had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by [the State] to the [c]laimants. They accepted to pay a price for the land with the Project without appropriate legal protection. A wise investor would not have paid full price up-front for land valued on the assumption of the realization of the Project; he would at least have staged future payments to project progress, including the issuance of the required development permits"); *id.,* ¶ 243 ("The [t]ribunal considers therefore that the [c]laimants should bear part of the damages suffered and the [t]ribunal estimates that share to be 50% after deduction of the residual value of their investment . . . .").

[1996] **RLA-0189**, *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award, 29 February 2008 (Kaufmann-Kohler, Gaillard, Hanotiau), ¶ 665.

[1997] **RLA-0189**, *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award, 29 February 2008 (Kaufmann-Kohler, Gaillard, Hanotiau), ¶ 668.

to its own injury.[1998] Rather, it concluded that the claimant had made its investment knowing there was a "risk that it may not be able to use [the investment's] full capacity."[1999] Noting that investment treaty protection cannot "provide a blanket cover against specific risks knowingly assumed,"[2000] the *Cargill* tribunal decided to reduce its damages award to account for those investment risks.

871. Similarly, in *Bogdanov v. Moldova*, the tribunal concluded that the State had breached a treaty by unilaterally interpreting and applying a contract term, even though a regulation required that such term be interpreted and applied jointly with the claimant.[2001] Importantly for present purposes, the tribunal also determined that the claimant "must be deemed partially responsible for the loss because it did not ensure that the [contract]"[2002] was "appropriately precise."[2003] The tribunal therefore awarded the claimant only 49.9% of its damages claim.[2004] At no point did the *Bogdanov* tribunal suggest that illegal activity was required, or that any illegal activity by claimant had informed the tribunal's findings; rather, as in *MTD* and *Cargill*, the *Bogdanov* tribunal simply based its decision on the poor business judgment of the investor.

872. Thus, for the contributory fault rule to apply, there is no requirement that the allegedly contributory conduct of the claimant have been illegal. Claimant's attempt

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[1998] *See* **RLA-0189**, *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award, 29 February 2008 (Kaufmann-Kohler, Gaillard, Hanotiau),¶¶ 663–670.

[1999] **RLA-0189**, *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award, 29 February 2008 (Kaufmann-Kohler, Gaillard, Hanotiau), ¶ 668.

[2000] **RLA-0189**, *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award, 29 February 2008 (Kaufmann-Kohler, Gaillard, Hanotiau), ¶ 669.

[2001] **RLA-0174**, *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC Case No. 093/2004, Award, 22 September 2005 (Moss), § 4.1.

[2002] **RLA-0174**, *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC Case No. 093/2004, Award, 22 September 2005 (Moss), ¶ 91.

[2003] **RLA-0174**, *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC Case No. 093/2004, Award, 22 September 2005 (Moss), ¶ 91.

[2004] *See* **RLA-0174**, *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC Case No. 093/2004, Award, 22 September 2005 (Moss), §§ 5.2, 7 (awarding the claimant 310,000 lei from a claim for 621,021 lei).

to graft such requirement onto the contributory fault rule is therefore wrong and should be rejected.

873. In sum, Peru has demonstrated that Claimant's conduct contributed to its injury. In accordance with the CIL principle codified in Article 39 of the ILC Articles, such contributory fault should reduce the amount of damages awarded to the Claimant, should the Tribunal conclude that any are warranted (which it should not, for the multiple reasons that Peru has articulated).

C. Claimant cannot recover for alleged damage to prospective investments

874. In the Counter-Memorial, Peru explained that, even if Claimant were entitled to any damages (quod non), any compensation would need to be limited to the amount of the financial harm that was suffered by the investment that Claimant actually made, and not to any merely planned, or prospective, investments.[2005] Peru noted that Claimant would therefore not be entitled to any damages based on Claimant's *prospective* acquisition of the Mallay Plant, as ultimately that was an investment that Claimant never made.[2006]

875. In the Reply, Claimant accepts the principle that harm to a merely prospective investment is not compensable.[2007] Claimant protests, however, that it does not claim that the Mallay Plant was part of the Claimant's investment.[2008] Instead, Claimant argues that the Mallay Plant was part of Claimant's "business plan."[2009] However, such argument does not assist Claimant's case, because "business plans" are not covered investments deserving of protection under the Treaty, any more than prospective investments are.[2010]

[2005] Peru's Counter-Memorial, § V.C.

[2006] Peru's Counter-Memorial, ¶¶ 774–775.

[2007] Claimant's Reply, ¶¶ 883, 1018 (arguing only that the principle is "inapposite" and "a red herring" in Claimant's view, rather than arguing that it might be inaccurate).

[2008] Claimant's Reply, ¶ 1020.

[2009] *See, e.g.*, Claimant's Reply, ¶¶ 1020, 1042.

[2010] *See* **RLA-0010**, Treaty, Art. 801(1).

876. The Treaty defines "covered investment"[2011] to mean "an investment in [a Party's] territory of an investor of the other Party existing on the date of entry into force of this [Treaty], as well as investments made or acquired thereafter."[2012] In turn, the Treaty defines "investment"[2013] by listing several types of investments, but Claimant does not even purport to argue—because it cannot—that its "business plan" qualifies as any of the listed types of investment.[2014] Further, Claimant did not have any investment in the Mallay Plant that was "existing"[2015] on the date when the Treaty entered into force,[2016] nor was any investment in the Mallay Plant "made or acquired"[2017] by Claimant thereafter.[2018]

877. In sum, the Treaty does not apply to Claimant's prospective acquisition of the Mallay Plant, even if it was part of Claimant's "business plan," and therefore all of Claimant's damages claims based on, or relating to, the Mallay Plant must be dismissed.

D. Claimant has not proven that it is entitled to any damages

878. In accordance with the general of principle *onus probandi actori incumbit*, as well as jurisprudence on compensation under international law, Claimant bears the burden of proving quantum by showing that the amount of compensation that it claims accurately reflects its loss or damages.[2019]

[2011] **RLA-0010**, Treaty, Art. 847 ("covered investment").

[2012] **RLA-0010**, Treaty, Art. 847 ("covered investment").

[2013] **RLA-0010**, Treaty, Art. 847 ("investment").

[2014] *See* Claimant's Reply, § 10.2.

[2015] **RLA-0010**, Treaty, Art. 847 ("covered investment").

[2016] Claimant's Memorial, § 2.2.5; **CLA-0001**, Canada-Peru Free Trade Agreement, 2009; **Ex. R-0271**, Supreme Decree No. 044-2009-RE, 30 July 2009, p. 1 (listing the date of the Treaty's entry into force as 1 August 2009); Claimant's Reply, ¶ 998 ("As explained by Mr Ellis, in the absence of the Blockade, Buenaventura and Lupaka **would have** therefore been able to conclude the Mallay transaction in March 2019" (emphasis added)).

[2017] **RLA-0010**, Treaty, Art. 847 ("covered investment").

[2018] Claimant's Memorial, § 2.2.5; Claimant's Reply, ¶ 998 ("As explained by Mr Ellis, in the absence of the Blockade, Buenaventura and Lupaka **would have** therefore been able to conclude the Mallay transaction in March 2019" (emphasis added)).

[2019] Peru's Counter-Memorial, ¶ 741 (citing authorities).

879. Peru showed in the Counter-Memorial that Claimant's damages claim for USD 47.7 million was inaccurate and overstated.[2020] In their first report, Claimant's experts from Accuracy had failed to account for four fundamental flaws in their calculations. When such flaws are corrected, the damages actually caused by the alleged Treaty breaches would be nil.[2021] Further, Accuracy's calculations applied unrealistic assumptions and contained technical defects that inflated their damages estimate,[2022] and Accuracy's "other indicators of value"[2023] were not reliable as "benchmarks"[2024] for their damages estimate.[2025]

880. After correcting Accuracy's calculations, Peru's damages experts from AlixPartners determined in their first report that *even if* the four fundamental flaws were ignored (which they should not be[2026]), and *even if* Claimant's investment had been completely destroyed (which it was not[2027]), Claimant's maximum damages in the 590 t/day production scenario (i.e., in Accuracy's damages scenario that assumes Claimant's prospective acquisition and use of the Mallay Plant[2028]) would be USD 21.3 million,[2029]

[2020] Peru's Counter-Memorial, § V.D. *See also, e.g.*, Expert Report of AlixPartners, 24 March 2022 ("**AlixPartners First Report**"), ¶¶ 16(d), 18, 21, 25, 119, 134, 146, 175, 178, 199.

[2021] Peru's Counter-Memorial, ¶¶ 781–782; AlixPartners First Report, ¶¶ 16, 24, 109–135.

[2022] Peru's Counter-Memorial, ¶¶ 783–788; AlixPartners First Report, §§ VI, VII.

[2023] Accuracy First Report, ¶ 8.1.

[2024] Accuracy First Report, ¶ 2.11.

[2025] Peru's Counter-Memorial, ¶ 789; AlixPartners First Report, § IX.

[2026] Accounting for the four fundamental flaws results in a valuation of Claimant's investment as "worthless." AlixPartners First Report, ¶ 16 ("These fundamental flaws, if unresolved, each would render IMC's shares in the Invicta Project worthless.").

[2027] Because an independent appraiser, PwC, examined and valued Claimant's investment at USD 13.0 million near the Valuation Date, such residual value of the investment would need to be deducted from any damages award. *See* AlixPartners First Report, ¶¶ 97, 150, 166, 173. Despite the independent appraisal by PwC, Claimant argues that the value of the investment at the Valuation Date was nil. Claimant's Memorial, ¶ 328; Claimant's Reply, ¶¶ 1059–1060.

[2028] Accuracy First Report, ¶¶ 2.6–2.9; Accuracy Second Report, ¶¶ 1.18–1.20.

[2029] AlixPartners First Report, ¶ 19, Figure 21. In the 355 t/day production scenario that Accuracy contemplates, but with respect to which Claimant presents no damages claim, the maximum amount of damages that AlixPartners calculated in its first report under the same two assumptions (viz., ignoring the four fundamental flaws and ascribing to the investment a residual value of nil) was USD 23.2 million. AlixPartners First Report, ¶ 22, Figure 22.

which the AlixPartners second report updated to USD 20.5 million.[2030] Although Claimant has stated no claim for any damages under a 355 t/day production scenario (i.e., Accuracy's damages scenario based on Claimant's assets as of the Valuation Date, excluding the prospective acquisition and use of the Mallay Plant[2031]), AlixPartners found in their first report that the USD 28.3 million figure that Accuracy ascribed to such scenario was overstated and should be only USD 23.2 million, which the AlixPartners second report updated to USD 22.5 million.[2032]

881. In the Reply, and relying on Accuracy's second report, Claimant reduced the amount of its damages claim by USD 6.7 million—from USD 47.7 million to USD 41.0 million.[2033] The change to Claimant's damages claim corresponds to the reduced damages estimate that Accuracy calculated for the 590 t/day scenario in its second report.[2034] According to Accuracy, the USD 6.7 million reduction in its second report was due to modifications that Accuracy categorized into three groups: (1) changes based on the report by Claimant's mining experts, Micon (USD -3.5 million); (2) revisions to Accuracy's damages model (USD -2.0 million), and (3) the combined impact of modifications that Accuracy made in its calculations for the purpose of (i) incorporating as a new assumption that Claimant would have paid the PPF Agreement in installments (rather than as a lump sum) and (ii) reducing the discount rate from 6.9% to 3.3% ((i) and (ii) combined, USD -1.3 million).[2035]

882. The revised amounts resulting from the three categories above i.e., (1), (2), and (3), yielded a reduction in Claimant's damages claim, as of the Valuation Date, of USD 6.7

[2030] Expert Report of AlixPartners, 25 January 2023 ("**AlixPartners Second Report**"), ¶ 16.

[2031] Accuracy First Report, ¶¶ 2.6–2.9; Accuracy Second Report, ¶¶ 1.18–1.20.

[2032] AlixPartners Second Report, ¶ 20.

[2033] *Compare* Claimant's Memorial, ¶ 374(d) *with* Claimant's Reply, ¶ 1062(d).

[2034] Accuracy Second Report, ¶ 6.63 ("Following the updates to our damages assessment described above, we estimate damages at the Valuation Date to be: a) USD 41.0m in the 590t/day Scenario, a decrease of USD 6.7m in comparison to the First Accuracy Report."). *See also* Accuracy First Report, ¶ 7.8.

[2035] *See* Accuracy Second Report, Table 6.6 ("Variance" column). *See also* AlixPartners Second Report, § III ("Summary of Accuracy's Updated Damages Calculations").

million: from USD 47.7 million to USD 41.0 million. Despite this *decrease* in the principal amount of damages that would accrue pre-award interest—in the Reply Claimant *more than doubled* its pre-award interest claim, by unjustifiably elevating its proposed pre-award interest rate.[2036]

883. Although, as noted, Claimant stated no claim for damages under a 355 t/day production scenario, Claimant's experts from Accuracy raised their damages estimate in that scenario from USD 28.3 million to USD 32.1 million—an increase of USD 3.8 million. Accuracy attributed this increase to modifications in Accuracy's second report that Accuracy categorized into the same three groups already mentioned above in the context of describing Accuracy's modifications to its calculations under the 590 t/day scenario: (1) changes based on the report by Claimant's mining experts, Micon (USD +1.7 million); (2) revisions to Accuracy's damages model (USD -0.1 million), and (3) the impact of a new assumption that Claimant would have paid the PPF Agreement in installments (rather than as a lump sum) (USD +2.2 million).[2037]

884. However, as demonstrated in the AlixPartners Second Report, and as discussed briefly below, Claimant's damages claim and Accuracy's calculations (even as revised) are defective and should be rejected.

1. Four fundamental flaws fatally vitiate Accuracy's damages model

885. The revised damages calculations in Accuracy's second report retained many of the same defects that AlixPartners had identified in Accuracy's original calculations. Such defects included four fundamental flaws, each of which renders Accuracy's damages model completely unreliable.

886. As detailed in the AlixPartners first report, such four flaws are the following:

a. Accuracy fails to account for Claimant's conflict with the Parán Community and the Access Road Protest as continuing obstacles to commercial operation

[2036] Accuracy Second Report, Appendices 3, 4.

[2037] *See* Accuracy Second Report, Table 6.11 ("Variance" column). *See also* AlixPartners Second Report, § III ("Summary of Accuracy's Updated Damages Calculations").

of the Invicta Mine, and instead unrealistically assumes that a police intervention would have permanently resolved each one;[2038]

b. Accuracy failed to consider and incorporate social license risk with respect to the Parán, Lacsanga, and Santo Domingo, and—assuming Claimant had acquired the Mallay Plant—Mallay Communities, respectively, which in each case (and throughout the lifespan of the Invicta Project) could have materialized into delays or a shutdown of operations;[2039]

c. Accuracy failed to take into account the poor performance of Invicta Mine operations prior to the Access Road Protest, as a result of which Claimant was on track to default on the PPF Agreement even if the Access Road Protest had never occurred;[2040] and

d. Accuracy ignored risks with respect to the financing that Claimant needed to pay amounts due under the PPF Agreement and to pay for a hypothetical purchase of the Mallay Plant, including by assuming that a hypothetical lender to Claimant would have ignored, irrationally, the heightened risks associated with the Invicta Project (such as the social license, mining operations, and regulatory risks).[2041]

887. In its second report, Accuracy failed altogether to address **the first two fundamental flaws** that had afflicted its first report, where were, (1) that police use of force against the Parán Community would *not* have permanently resolved the Access Road Protest or the social conflict;[2042] and (2) that Claimant would have needed to obtain and sustain a social license with each affected local community, throughout the duration

[2038] AlixPartners First Report, ¶¶ 16(a), 109–115; Peru's Counter-Memorial, ¶ 782.

[2039] AlixPartners First Report, ¶¶ 16(b), 116–123; Peru's Counter-Memorial, ¶ 782. *See also* **Ex. R-0028**, Canada-Peru CR Toolkit, p. 71 (describing a "Shutdown of Operations" among the foreseeable consequences when mining companies poorly manage community relations).

[2040] AlixPartners First Report, ¶¶ 16(c), 124–130; Peru's Counter-Memorial, ¶ 782.

[2041] AlixPartners First Report, ¶¶ 16(d), 131–134; Peru's Counter-Memorial, ¶ 782.

[2042] AlixPartners First Report, ¶ 16(a).

of its planned operation of the Invicta Mine.[2043] Instead of estimating the impact of the risks, delays, and costs from these two factors on the value of the investment, such as payments to the local communities and shutdowns of Invicta Project operations, Accuracy professes to lack the competence to do so.[2044]

888. Because Accuracy has ignored those two basic conditions of Claimant's investment—i.e., that it remained subject to (i) the Access Road Protest and social conflict with the Parán Community, and (ii) the social license requirements—Accuracy's calculations are not a reliable measure of the "fair market value" of Claimant's investment. Accuracy's own definition of "fair market value" is the price "at which an asset would change hands between a hypothetical buyer and seller, acting at arm's length in an open market, **where the parties are knowledgeable, informed, prudent and under no compulsion to transact**"[2045] (emphasis added). However, Accuracy's valuation assumes that such a hypothetical buyer would have deemed (i) the persistent social conflict surrounding the Invicta Mine and (ii) the absence of a social license to operate it, as having *zero* impact on its value. This assumption is not realistic or credible.[2046] Accuracy's calculations therefore fail to reflect the "fair market value" of Claimant's investment, and should be discarded.

889. With respect to **the third fundamental flaw** in Accuracy's damages estimates (viz., their failure to take into account that, even if Peru had not committed the acts alleged to be Treaty breaches, Claimant *still* would have defaulted on the PPF Agreement),[2047]

[2043] AlixPartners First Report, ¶ 16(b).

[2044] Accuracy Second Report, ¶ 3.5 (describing the two fundamental flaws as "factual issues which fall outside of our scope of expertise" and stating that, "therefore, we do not opine on them").

[2045] Accuracy First Report, ¶ 4.6.

[2046] *See* AlixPartners First Report, ¶ 133 ("In fact, when assessing the Project, any potential lenders or investors would factor in the risks resulting from the unresolved conflict between Claimant and the Parán Community."); *id.*, ¶ 139 ("Any knowledgeable investor would account for the ongoing social license risk, execution risk, and regulatory risk when assessing the investment. In reality, a hypothetical, rational lender would demand terms more favorable to the lender than the terms of the PLI Loan Agreement, if any lender were willing to expose its capital to such risk at all.").

[2047] AlixPartners First Report, ¶ 16(c), § V.C.

Accuracy does attempt to address such flaw in its second report. However, it is unable to overcome the following critical facts: (i) Claimant committed *fourteen* separate defaults of the PPF Agreement, none of which was attributable to Peru, and each of which—on its own—entitled PLI Huaura to foreclose on Claimant's shares in Invicta and (ii) even if Peru had forcibly removed the Access Road Protest and Claimant's conflict with the Parán Community had been permanently resolved, Claimant still would have defaulted on the PPF Agreement (including for failure to satisfy its repayment obligations under the PPF Agreement, among 12 other reasons). The foregoing means that Claimant would have forfeited its Invicta shares—and thus lost its investment—*irrespective of any actions or omissions by Peru*.

890. Turning now to Claimant's fourteen defaults on the PPF Agreement, Accuracy simply ignores those defaults.[2048] Meanwhile, Claimant argues that all such defaults either (i) were waived by PLI Huaura, (ii) never actually occurred (i.e., Claimant alleges, without evidence, that it performed the contract obligations that were grounds for certain defaults), or (iii) resulted from Claimant's inability to "deliver" (i.e., to extract, process, and sell) marketable minerals due to Peru's (alleged) Treaty breaches and the Access Road Protest.[2049] However, only two of the 14 defaults were due to Claimant's failure to "deliver" marketable minerals.[2050] While Claimant alleges that eight other defaults were "directly related to [Claimant's] inability to deliver," it has failed to establish that this allegation through any evidence or analysis.[2051] Further, Claimant itself has acknowledged that the final four defaults were unrelated to any actions or omissions by Peru and the Parán Community.[2052] Each one of the 14 defaults

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[2048] *See* Accuracy Second Report, ¶¶ 3.7–3.22.

[2049] Claimant's Reply, ¶ 976.

[2050] *See supra* Section II.D.4 (*quoting* **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, Schedule I).

[2051] Claimant's Reply, ¶ 976.

[2052] *See* Claimant Reply, ¶ 976 ("**apart from several reporting requirements and a covenant relating to offtake agreements** (all of which had been waived by PLI Huaura under Pandion's ownership), all the breaches set out in PLI Huaura's Notice of Acceleration related directly to the Blockade") (emphasis added).

individually entitled PLI Huaura to seize Claimant's shares in Invicta.[2053] Accuracy failed to factor any of those twelve defaults into its valuation calculations to isolate the damages, if any, allegedly caused by a Treaty breach.

891. Further, Claimant did not own the Mallay Plant, and could not have fulfilled the requirements in the Draft Third Amendment to acquire the Mallay Plant.[2054] Since Claimant did not have any viable options to process ore from the Mine,[2055] it would have been unable to fulfill any of its payment obligations under the PPF Agreement.[2056] Claimant's payment default under the PPF Agreement therefore was inevitable, regardless of any alleged Treaty breach.

892. Rather than account for Claimant's inability to perform the PPF Agreement (irrespective of any actions or omissions by Peru), Accuracy seeks to justify ignoring this factor on two grounds.

893. *First*, Accuracy adopts Claimant's theory that Claimant's defaults would have been waived—for an indefinite period of time—by its creditor.[2057] Accuracy argues that Pandion would have given Claimant "flexibility"[2058] in that regard.[2059] In fact, however, any alleged "flexibility" from Pandion (or from the latter's former

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[2053] *See supra* Section II.D.4

[2054] *See supra* Section II.D.3.

[2055] *See supra* Section II.D.3.

[2056] AlixPartners First Report, ¶¶ 128(c), 129 (wherein AlixPartners (i) calculated Claimant's actual mineral production; (ii) compared it with Claimant's obligations under the PLI Loan Agreement; and (iii) concluded that "actual [ore] processing using third-party processing companies was far behind budgeted levels so it appears that, as of October 2018, [Claimant] would have defaulted on the PLI Loan Agreement even if it could have extracted additional ore from the ground"). *See also supra* Section II.D.3.

[2057] Accuracy Second Report, ¶¶ 3.7–3.18.

[2058] Accuracy Second Report, ¶ 3.12. *See also id.*, ¶ 3.16 (alleging that "Pandion" had "demonstrated flexibility"); *id.*, ¶ 3.17 (alleging that "evidence suggests" that "Pandion" would have "shown flexibility"); *id.*, ¶ 3.18 (arguing that "a degree of flexibility" from "Pandion" is "common sense" notwithstanding PLI's bargained-for contractual rights); *id.*, ¶ 3.19 (arguing that "Pandion" would "likely have shown flexibility regarding its financing of the Invicta Project" even though the lender in the PPF Agreement was PLI).

[2059] Accuracy Second Report, ¶¶ 3.12–3.19.

subsidiary, PLI Huaura) with respect to Claimant's defaults would have ended when Pandion sold PLI Huaura to Lonely Mountain.[2060] Pandion apparently made that sale to mitigate its losses resulting from Claimant's defaults on the PPF Agreement, which Pandion preferred to do rather than waive Claimant's defaults.[2061] PLI Huaura then promptly exercised its contractual right to seize Claimant's shares.[2062] Accuracy's assumption that Pandion or PLI Huaura would have indefinitely waived their own bargained-for contractual rights is thus an erroneous assumption, and one that is contradicted by the factual course of events. Accordingly, it is not a valid basis for estimating Claimant's damages.

894. *Second*, as support for its faulty premise that Claimant's breach of the PPF Agreement was caused by a Treaty breach, Accuracy assumes that Claimant would have paid its PPF Agreement obligations on time, even without acquiring the Mallay Plant, by commencing commercial ore production in November 2018,[2063] i.e., ten months earlier than the 26 August 2019 start date that Accuracy previously had assumed.[2064] Accuracy adopted this assumption from the Micon report.[2065] As explained above, however, Micon's assumption that Claimant could have launched commercial ore

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[2060] *See supra* Section II.D.4.

[2061] *See* Ellis Second Witness Statement, ¶ 24 (referring to Pandion as selling the PPF Agreement "at a steep haircut to Lonely Mountain").

[2062] *See supra* Section II.D.4. See also **Ex. C-0053**, Email from Pandion (J. Archibald) to Lupaka Gold Corp. (W. Ansley, *et al.*), 1 July 2019 (notifying Claimant that Pandion had sold its interest in PLI Huaura to Lonely Mountain); **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019 (terminating the PPF Agreement and accelerating Claimant's repayment obligations on the basis of fourteen "Specified Defaults"); **Ex. C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., et al., Notice of Enforcement, 24 July 2019 (notifying Claimant and the Common Representative of PLI Huaura's decision to foreclose on Claimant's shares in Invicta); **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. (M. Brenneisen) to Invicta Mining Corp. S.A.C. (L. Bravo), 23 September 2019 (confirming that, as of 26 August 2019, all shares in Invicta were transferred to PLI Huaura).

[2063] Accuracy Second Report, ¶ 3.20.

[2064] AlixPartners Second Report, ¶ 85 (*citing* Accuracy Second Report, ¶ 6.11; Accuracy First Report, fn. 153).

[2065] Accuracy Second Report, ¶ 320.

extraction by November 2018 fails to account for several requirements that Claimant still would have needed to satisfy to launch commercial ore production lawfully.[2066] Such requirements would have delayed commercial ore extraction until at least July 2020.[2067] Also, Micon's proposed November 2018 start date assumes that third-party ore processing would have been available to Claimant, which is an unwarranted assumption.[2068] Accuracy's damages model therefore is inaccurate due to its failure, yet again, to take into account that Claimant's breach of the PPF Agreement was inevitable, regardless of any actions or omissions by Peru.[2069]

895. As the **fourth fundamental flaw** identified by AlixPartners in Accuracy's model, Accuracy provided no "logic, basis, or evidence"[2070] for its assumption that Claimant would have managed to obtain financing from sources other than PLI.[2071] According to AlixPartners, "any potential lenders or investors would [have] factor[ed] in the risk resulting from the unresolved conflict between Claimant and the Parán Community,"[2072] especially given the "absence of a prefeasibility study, a feasibility study, or defined Mineral Reserves."[2073]

896. The availability of alternative sources of financing is relevant to whether Claimant either (a) would have had the option to settle its default on the PPF Agreement by paying a lump sum settlement to PLI Huaura or, alternatively, (b) would have had no choice but to surrender its Invicta shares to PLI Huaura. Accuracy assumed the former: that Claimant would have been able to borrow more than USD 15 million from an unspecified lender, retain its ownership of the Invicta Mine, and then proceed to

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[2066] *See supra* Section II.D.3; Dufour Report, ¶¶ 7, 158.

[2067] *See supra* Section II.D.3; Dufour Report, ¶¶ 7, 158.

[2068] *See supra* Section II.D.3; AlixPartners Second Report, ¶¶ 59-62; Expert Report of Christopher Jacobs, 21 September 2022 ("**Micon Report**"), ¶ 125.

[2069] AlixPartners Second Report, ¶¶ 60-63.

[2070] AlixPartners First Report, ¶ 133.

[2071] AlixPartners First Report, ¶¶ 131–134.

[2072] AlixPartners First Report, ¶ 133.

[2073] AlixPartners First Report, ¶ 132.

operate the mine.[2074] However, if one assumes instead that Claimant would *not* have been able to borrow money to pay a lump-sum settlement to PLI Huaura, then Claimant would have needed to surrender its Invicta shares to PLI Huaura. In that scenario, Claimant's damages could not be calculated based on any projected income from the Invicta Mine (because in such scenario the mine would have belonged to PLI Huaura, not to Claimant).

897. In its second report, Accuracy assumes that Claimant never would have needed financing from a source other than PLI Huaura in the first place. Its theory is that assuming a November 2018 start date for commercial ore extraction (instead of an August 2019 start date, as Accuracy had assumed in its first report), Claimant would have been able to pay the PPF Agreement in installments (as opposed to defaulting and having to pay a lump sum settlement). If this assumption (which, as noted, Accuracy adopted from the Micon report), were correct, Claimant would not have needed to obtain financing from a source other than PLI Huaura.

898. The problem is that the assumption is *not* at all sound: a November 2018 start date for (lawful) commercial ore production would have been impossible, because as described in **Section II.D.1**, Claimant would not have been able *until July 2020* at the earliest to fulfill the various pending regulatory requirements for such production. Moreover, Claimant would have lacked access to adequate and reliable ore processing services, and that too would have prevented it from commencing commercial ore production by November 2018.

899. In sum, the fourth fundamental flaw remains applicable to Accuracy's damages model. As a result, the calculations in both of Accuracy's reports are based on the faulty assumption that Claimant either would have had financing from sources other than PLI Huaura readily available or would not have needed such financing. Accuracy's calculations should be rejected for relying on that faulty assumption.[2075]

[2074] AlixPartners First Report, ¶¶ 7.1–7.7.

[2075] AlixPartners Second Report, ¶¶ 74-78; AlixPartners First Report, ¶ 133.

2. *Even if the four fundamental flaws in Accuracy's damages model were ignored, Accuracy's damages estimates would still be unreliable, because they are based on other unrealistic assumptions, and various technical defects*

900. In addition to suffering from the four fundamental flaws discussed above, Accuracy's damages calculations contain various other unrealistic assumptions and technical defects that have the effect of unduly inflating Accuracy's damages estimates.

901. For example, Accuracy's unjustified revision of the start date for commercial ore extraction from August 2019 to November 2018 not only contributed to the fundamental flaws discussed above (which, when corrected, each indicate Claimant's damages to be nil), but the start date revision also increased Accuracy's damages estimate by USD 4.1 million. Such start date change led Accuracy to apply a corresponding ten-month shift to the dates on which Claimant would have collected income from projected mineral sales. By assuming Claimant would have received those future income flows ten months *earlier* than Accuracy had assumed in its first report, each such income flow became subject to a shorter period of discounting, which in turn had the effect of artificially increasing the "present value" of such future income flows by USD 4.1 million.[2076] However, as explained previously, Claimant could not have begun commercial ore extraction any earlier than July 2020,[2077] such that this USD 4.1 million increase in Accuracy's damages calculation is unjustified, and should be disregarded.

902. As part of its (unsound) basis for shifting the start date of commercial ore production from August 2019 to November 2018, Accuracy assumed that Claimant would have been able to resolve its inability to access reliable third-party ore processing "immediately and at no cost."[2078] However, such assumption is contradicted by voluminous contemporary evidence demonstrating that in fact third-party ore

[2076] AlixPartners Second Report, ¶ 85.

[2077] *See supra* Section II.D.3; Dufour Report, ¶¶ 7, 158.

[2078] AlixPartners Second Report, ¶ 84.

processing would *not* have been available in sufficient time for Claimant to be able to meet its financial obligations.[2079]

903. According to Micon, Claimant could have taken "surveillance" and "security" measures that would have enabled it to address the problem of the unavailability of ore processing capabilities.[2080] In its second report, Accuracy adopted this argument by Micon.[2081] However, neither Micon nor Accuracy specified (i) *which* specific "surveillance" and "security" measures they are referring to, or, more importantly, (ii) how such measures could possibly have helped Claimant address the ore processing capabilities problem.[2082] In fact, there is substantial contemporary evidence that the ore processing deficiency was irredeemable.[2083] Even if somehow "surveillance" and "security" measures would have enabled Claimant to remedy the ore processing deficiency, Accuracy would have needed to account for the period of time and the costs that implementing such measures would have required. Accuracy's failure to do so therefore *a fortiori* had the effect of inflating its damages estimates.

904. Further still, Accuracy artificially boosted its damages estimate by USD 10.2 million by assuming that Claimant would have operated the Invicta Mine *for ten years*, rather than for seven years as Accuracy had assumed in its first report.[2084] Notably, during the period when Claimant owned the Invicta Mine, Claimant, SRK, and Red Cloud had all assumed only seven years of mine operations not ten years.[2085] As AlixPartners correctly observes, Claimant never presented any ten-year production plan, either "internally or to any third parties, including Canadian investors and regulators to whom Claimant reported quarterly and to whom it presumably owed certain

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[2079] *See supra* Section II.D.3.

[2080] Micon Report, ¶ 148 ("This suggests that Lupaka would have benefited from close supervision of – and improved security at – third-party toll-milling operations, to avoid ongoing losses of gravity-separable gold.").

[2081] Accuracy Second Report, ¶ 4.14.

[2082] *See* Claimant's Reply, ¶¶ 114-117; Accuracy Second Report, ¶ 4.14; Micon Report, ¶ 148.

[2083] *See supra* Section II.D.3.

[2084] Accuracy Second Report, ¶ 6.18, Appendix 3.

[2085] AlixPartners Second Report, ¶¶ 89-92, 96.

disclosure duties."[2086] The foregoing is also consistent with the fact that Claimant had obtained authorization to operate the Invicta Mine for a maximum of only seven years.[2087] Accuracy's assumption that Claimant would have operated the Invicta Mine for ten years—and that Claimant would have extracted and sold more ore and minerals compared to the amounts it would have extracted and sold during a seven-year production period[2088]—is therefore wholly unjustified.

905. The AlixPartners First Report observed that Claimant's ore sampling operations at the Invicta Mine had yielded ore that was inferior in mineral content than Claimant had anticipated; however, Accuracy failed to take that into account in its damages estimates.[2089] Instead of adjusting its calculations to account for the inferior ore grade, Accuracy simply adopted Micon's four hypotheses of the causes of the inferior ore grade,[2090] and also Micon's hypothesis that Claimant would have been able to identify and fully redress such ore quality problems.[2091]

906. However, neither Claimant nor Micon nor Accuracy provided any evidence—whether contemporaneous or otherwise—for Micon's theoretical explanations of the causes of the inferior ore grade, nor for the proposition that such theoretical explanations accounted for the *entirety* of the ore grade inferiority.[2092] Micon's hypothesis is pure conjecture, and thus cannot form the basis for any legal conclusion—including in the damages context. Because Accuracy assumed an inaccurate ore grade that in turn was based on mere conjecture by Micon, Accuracy's calculations lack merit.

[2086] AlixPartners Second Report, ¶ 83.

[2087] *See, e.g.*, **Ex. C-0009**, Report No. 127-2014-MEM-DGM-DTM/PM, Resolution Approving Mining Plan, MINEM, 30 December 2014, p. 5.

[2088] AlixPartners Second Report, ¶ 88, Figure 9.

[2089] AlixPartners First Report, ¶ 80, Figure 12.

[2090] Micon Report, ¶¶ 139–143.

[2091] Accuracy Second Report, ¶ 4.11.

[2092] *See* Micon Report, ¶¶ 139–143; Claimant's Reply, ¶ 1036; Accuracy Second Report, ¶ 4.11.

907. Another flaw in Accuracy's damages estimates derives from the fact that Accuracy underestimated Claimant's operating expenses and capital expenditures. With respect to the former, Accuracy assumed that Claimant would have incurred no costs at all (i) to attain a social license to operate the Invicta Mine, (ii) to fulfill several regulatory requirements that remained outstanding (including those that obligated Claimant to deconstruct and reconstruct an alternative mine water management system[2093]), and (iii) to implement the "surveillance"[2094] and "security"[2095] measures that, according to Accuracy and Micon, would have resolved the deficiencies and limitations of the third-party ore processors.[2096] Accuracy's calculations for the capital expenditures also "lack support and appear to be underestimated."[2097] For example, Accuracy assumes—unrealistically—that increasing the production period from seven to ten years would have required no additional capital expenditures.[2098]

908. Accuracy's revised damages estimates also newly assume that Claimant would have paid the PPF Agreement in installments to PLI Huaura, rather than as a lump sum to settle Claimant's default, and that Claimant would have acquired the Mallay Plant with financing under the Draft Third Amendment to the PPF Agreement. These assumptions implied financing costs with a present value of USD 17.2 million. The latter amount is slightly higher than the financing costs that Accuracy had previously assumed (which ignored the cost of financing the assumed acquisition by Claimant of the Mallay Plant), but much lower than the figure in the AlixPartners First Report of USD 28.9 million for financing costs.

909. Because Accuracy's assumption that Claimant would have paid the PPF Agreement in installments in turn requires assuming—implausibly—that Claimant would have begun commercial ore extraction in November 2018, Accuracy's estimate of

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[2093] *See supra* Section II.D.1.

[2094] Micon Report, ¶ 148; Claimant's Reply, ¶¶ 114-117.

[2095] Micon Report, ¶ 148; Claimant's Reply, ¶¶ 114-117.

[2096] AlixPartners Second Report, ¶¶ 102–109.

[2097] AlixPartners Second Report, ¶ 128.

[2098] AlixPartners Second Report, ¶¶ 120-128.

Claimant's costs from financing cash flows is unrealistic, and should therefore be rejected. Also, ascribing no cost at all to the financing of the assumed acquisition of the Mallay Plant, as Accuracy did in its first report, is likewise unrealistic.

910. Accuracy further inflated its damages estimate by reducing the discount rate that it applied to Claimant's projected future cash flows. Specifically, in its second report Accuracy revised the discount rate downward, to 12.2%,[2099] as compared to the discount rate of 14.7%[2100] that it had applied in its first report. Since lowering the discount rate applicable to a future cash flow increases the latter's present value, Accuracy's revised discount rate had the effect of boosting its damages estimate.

911. Accuracy's discount rate decreased from 14.7% to 12.2% because, although Accuracy increased one of the components of this rate from 7.8% to 8.9% (to correspond with a structural change Accuracy made to their accounting of financing cash flows[2101]), Accuracy decreased by a greater magnitude the other component of the discount rate: the project-specific premium. Accuracy's first report had applied a project-specific premium of 6.9%, whereas the second report applied 3.3% for such premium.[2102] However, Accuracy's reduction of the project-specific premium from 6.9% to 3.3% is unwarranted, for at least the following three reasons (which are explained in greater detail in the paragraphs that follow): (i) the source of Accuracy's rates for the project-specific premium is unreliable; (ii) even if Accuracy's source were reliable, it would require applying a project-specific premium of 5.7%, not 3.3%; and (iii) applying an average, generally applicable project-specific premium is not appropriate in this case because the Invicta Mine was exposed to exceptional project-specific risks.

912. With respect to the *first* reason, although Claimant characterizes the source of the project-specific premium as "a publicly available data set that was compiled by an

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[2099] AlixPartners Second Report, ¶ 144; Accuracy Second Report, ¶ 6.56.

[2100] Accuracy First Report, ¶ 6.19(d).

[2101] *Compare* Accuracy First Report, 6.19(d) (applying a 7.8% cost of capital in the discount rate pursuant to the FCFF method) *with* Accuracy Second Report, ¶¶ 5.2, 6.36-6.38 (applying an 8.9% cost of equity in the discount rate pursuant to the FCFE method).

[2102] AlixPartners Second Report, ¶ 134.

expert,"[2103] the source appears instead to consist of a single PowerPoint slide in an unpublished 61-slide presentation, with no underlying data visible or in the record.[2104] The source refers to alleged source data (which is not provided) as from three specific years—1996, 1999, and 2005—an arbitrary trio of years that precede the Valuation Date by at least fourteen years.[2105]

913. Turning to the *second* reason, even if the unreliable, obscure, and obsolete source for Claimant's project-specific premium were accepted as accurate, it would yield a 5.7% project-specific premium (rather than the 3.3% premium advanced by Accuracy[2106]). That is so because the referenced PowerPoint slide indicates that while a 3.3% premium would apply to mining projects that have undergone a feasibility study,[2107] a 5.7% premium would apply to mining projects that have undergone only a pre-feasibility study (rather than a full feasibility study).[2108] The latter is more accurate in the present context, because (i) the Invicta Mine never underwent a feasibility study,[2109] and (ii) the most advanced level of study that the Invicta Mine underwent was the SRK PEA, which is akin to—but less rigorous than—a pre-feasibility study.[2110]

[2103] Claimant's Reply, ¶ 1044.

[2104] **Ex. AC-0047**, Lawrence Devon Smith, The RADR Paradox-Discount Rates: Risk, & Long Life Projects, 2016, Slide 55.

[2105] **Ex. AC-0047**, Lawrence Devon Smith, The RADR Paradox-Discount Rates: Risk, & Long Life Projects, 2016, Slide 55.

[2106] Accuracy Second Report, ¶ 6.35.

[2107] **Ex. AC-0047**, Lawrence Devon Smith, The RADR Paradox-Discount Rates: Risk, & Long Life Projects, 2016, Slide 55 (indicating a 3.3% premium (i.e., a "Δ" or delta of 3.3%) as associated with gold projects with a "Level of Study" of "Feasibility").

[2108] **Ex. AC-0047**, Lawrence Devon Smith, The RADR Paradox-Discount Rates: Risk, & Long Life Projects, 2016, Slide 55 (indicating a 5.7% premium (i.e., a "Δ" or delta of 5.7%) as associated with gold projects with a "Level of Study" of "Pre-Feasibility").

[2109] AlixPartners Second Report, ¶ 136 (*quoting* **Ex. AP-0066**, Cision PR News, Lupaka Gold Commences Preliminary Economic Assessment on the Invicta Gold Development Project, Target Q1/18 Release, 28 November 2017 ("The [Invicta Gold Project] Production Decision and Plans were not based on a preliminary economic assessment, a pre-feasibility study or a feasibility study . . . .").

[2110] AlixPartners Second Report, ¶ 137 ("[A] preliminary economic assessment ('PEA') is subject to a lower confidence level than a Pre-Feasibility Study."); AlixPartners First Report, Figure 5.

Thus, by applying a 3.3% premium instead of 5.7%, Accuracy improperly inflated its damages estimate.

914. Finally, with regard to the *third* reason, and as AlixPartners explain in detail,[2111] the Invicta Mine was exposed to multiple, significant project-specific risks that would not be factored into any generally-applicable measure of the premium for an average mining project. To reflect risks specific to the Invicta Mine, "any rational investor would [have] adjust[ed] the overall risk premium"[2112] above the premium that would apply to an average mining project.[2113] As a baseline, AlixPartners calculate that replacing the 3.3% premium that Accuracy used with a 5.7% premium has the effect of reducing Accuracy's damages estimate by USD 3.6 million.[2114]

915. Claimant also instructed Accuracy to escalate the pre-award interest rate from 2.0% above LIBOR (which is what Accuracy had proposed in its first report) to 4.0% above LIBOR (or 5.0% above UST) (which is what Accuracy proposed in its second report).[2115] Claimant argues that doubling its proposed interest rate spread over LIBOR is needed because (i) "during the last twelve months, with the inflation rate in the US averaging approx. 8%, LIBOR+2% would have been constantly below inflation rate [*sic*];" and as a result of that (ii) Claimant "would effectively receive an award of compensation with a 'real interest rate' (nominal interest rate minus inflation rate) that would be negative."[2116]

[2111] AlixPartners Second Report, ¶¶ 137-144.

[2112] AlixPartners Second Report, ¶ 141.

[2113] AlixPartners Second Report, ¶¶ 137-144.

[2114] AlixPartners Second Report, ¶ 146. *See also id.*, Figures 20–21 (presenting a sensitivity analysis that applies additional premium to the discount rate with corresponding damages estimates).

[2115] Accuracy Second Report, ¶ 6.64 ("[W]e are instructed to calculate pre-award interest from the Valuation Date to 31 August 2022, being a proxy date for this report, using alternative interest rates of: a) LIBOR +4%; or b) UST +5%."); Claimant's Reply, ¶ 1055 ("Claimant instructed Accuracy to calculate pre-award interest in their second report based on LIBOR+4% (and, alternatively, UST+5% in light of LIBOR's upcoming discontinuance).").

[2116] Claimant's Reply, ¶ 1053.

916. However, Claimant cites no legal authority at all for its theory that the Treaty, the ICSID Convention, or any source of international law entitle it to an award with a certain "real" interest rate.[2117] Instead, Claimant posits a policy argument that "[a]warding negative real interest in an arbitral award can have grave consequences for a prevailing claimant" because "a respondent State would then have every incentive to delay payment of an award because . . . the value of the amount owed to the [c]laimant would decrease over time in real terms."[2118]

917. Claimant's argument for boosting the pre-award interest rate is substantively incorrect. As AlixPartners explain, all three of the contemplated benchmark interest rates—UST, SOFR, and LIBOR—are already "variable, market-determined interest rates that respond to fluctuations in the inflationary and macroeconomic environment."[2119] In addition, the rise in inflation that Claimant invokes is "not expected to last into 2023;"[2120] as AlixPartners note, the U.S. Federal Reserve projects inflation to decline to 3.1% in 2023 and to 2.5% in 2024.[2121]

918. Furthermore, Claimant's theory that Peru would have an "incentive to delay payment of an award because . . . the value of the amount owed to the Claimant would decrease over time in real terms"[2122] utterly disregards the effect of any potential depreciation of the Peruvian currency (the sol) in relation to the currency of Claimant's damages request (which is USD). As AlixPartners explain, "Peru's local currency has been generally depreciating against US dollars," such that, "from Peru's perspective, when Peru's [s]ol is depreciating against the dollar the 'value of the amount owed' would increase rather than 'decrease'."[2123]

[2117] *See* Claimant's Reply, ¶¶ 1050–1058.

[2118] Claimant's Reply, ¶ 1054.

[2119] AlixPartners Second Report, ¶ 183.

[2120] AlixPartners Second Report, ¶ 184.

[2121] AlixPartners Second Report, ¶ 184.

[2122] Claimant's Reply, ¶ 1054.

[2123] AlixPartners Second Report, ¶ 185.

919. The two pre-award interest rates that AlixPartners proposes, SOFR + 2.0% and UST + 2.0%, are "reasonable alternatives,"[2124] particularly given that "several financial institutions recommend referring to [SOFR] as a suitable replacement" for LIBOR.[2125] In fact, even in Claimant's home jurisdiction of British Columbia, Canada, courts award *post*-judgment interest at a rate analogous to UST, without any additional spread (and without any compounding)—i.e., "an annual simple interest rate that is equal to the prime lending rate of the banker to the government."[2126] From April 1992 through at least June 2023, the courts of British Columbia have issued pre-judgment interest at the same rate with a *negative* spread of 2.0%.[2127]

920. For the foregoing reasons, if any award of damages were justified in the present case (quod non), SOFR + 2.0% or UST + 2.0% would be reasonable alternatives for pre-award interest.

921. Lastly, Peru explained in the Counter-Memorial that an independent appraiser, PwC, determined that Claimant's investment had significant value near the Valuation Date: USD 13.4 million in value.[2128] Claimant does not dispute this appraisal, but again argues—as it did in connection with its expropriation claim—that the appraised value of its investment should be disregarded because the so-called "net value" of its investment (viz., the difference between the value of Claimant's investment and the value of Claimant's debt liabilities) was negative.[2129] However, as explained above in **Section IV.D.2**, Claimant's argument is incorrect because (i) Claimant's notion of a

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[2124] AlixPartners First Report, ¶ 171.

[2125] AlixPartners First Report, ¶ 170.

[2126] **Ex. R-0268**, *Court Order Interest Act*, [RSBC 1996], Ch. 79, ¶ 7(1).

[2127] *See* **Ex. R-0267**, Supreme Court–Court Order Interest Rates, 1991–2023 (displaying interest rates in the "Pre-Judgment Interest Rate Allowed" column that are 2.0% lower than those in the "Post Judgment Interest Rate Allowed" column from April 1, 1992 to June 30, 2023).

[2128] **Ex. C-0625**, Contract between IMC and PLI Huaura, 26 August 2019, ¶ 1.7. *See also* Peru's Counter-Memorial, ¶ 709.

[2129] Claimant's Reply, ¶ 843 ("It is not in dispute between the Parties that PwC Peru concluded that the appraised value of the Claimant's shares in IMC was USD 13[.4] million."). *See also* **Ex. C-0625**, Contract between IMC and PLI Huaura, 26 August 2019, ¶ 1.7 (confirming that the total value of the PwC valuation was for USD 13.4 million).

so-called "net value" of the investment has no support from Accuracy or any legal authority, and (ii) near the Valuation Date, Lonely Mountain (an independent third-party mining consortium) purchased Pandion's shares in PLI Huaura, and then Lonely Mountain and PLI Huaura promptly foreclosed on Claimant's investment, thereby demonstrating with their conduct that such investment indeed had significant value.[2130] The residual value of Claimant's investment therefore was USD 13.4 million, given that this was the appraised value of the investment near the Valuation Date—after any alleged Treaty breach would have occurred.

922. In conclusion, Accuracy's damages estimate, which Claimant adopted, is based on the incorrect assumption that Claimant's investment was completely destroyed on the Valuation Date, and that its residual value accordingly was nil after the alleged Treaty breaches.[2131] However, because the value of the investment on the Valuation Date and after any alleged Treaty breaches was actually USD 13.4 million, rather than nil, it is sum of USD 13.4 million that should be deducted from any damages award to Claimant.[2132] The above, however, is without prejudice to Peru's submission (explained in **Section IV.D.2** above) that this value of USD 13.4 million shows that the legal standard of expropriation was not met in this case.

[2130] **RLA-0192**, *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Zuleta, Santiago Tawil, Dupuy), ¶ 680 ("When an investor from the same market is willing to invest in a project, it is clear that the economic value of that project has not been eliminated.") ("*Cuando un inversionista del mismo mercado está dispuesto a invertir en un proyecto, es claro que no se ha eliminado el valor económico de ese proyecto*.").

[2131] Accuracy Second Report, ¶¶ 172–179.

[2132] AlixPartners First Report, ¶¶ 150, 166, 173; AlixPartners Second Report, Section VII.

VI. REQUEST FOR RELIEF

923. For the reasons set forth in the Counter-Memorial and in the present Rejoinder, the Republic of Peru respectfully requests that the Tribunal:

a. dismiss all of Claimant's claims for lack of jurisdiction;

b. dismiss for lack of merit any and all claims in respect of which the Tribunal may find that it has jurisdiction;

c. reject Claimant's request for compensation, should the Tribunal find that it has jurisdiction and that there is merit to one or more of Claimant's claims; and

d. order Claimant to pay all costs of the arbitration, as well as the totality of the legal fees and expenses incurred by Peru in the present proceeding, up to the date of the final award, plus compounded annual interest on such amounts until the date of effective payment, calculated on the basis of a reasonable interest rate to be determined by the Tribunal.

Respectfully submitted,

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