

[English Translation from Spanish Original]

**UNDER THE RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES**

**Lupaka Gold Corporation**

*Claimant,*

*vs.*

**The Republic of Peru**

*Respondent.*

ICSID Case No ARB/20/46

**EXPERT OPINION ON ENVIRONMENTAL LAW AND THE LAW ON  
INDIGENOUS COMMUNITIES**

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## EXPERT REPORT ON RURAL COMMUNITIES

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## **I. Introduction**

### **A. Scope of the Legal Report**

1. The Republic of Peru (“Peru”), through the Special Commission attached to the Ministry of Economy and Finance, which represents Peru in international investment disputes, and its legal advisors, Arnold & Porter Kaye Scholer LLP, requests my legal opinion as an independent expert on the law of rural (and native) communities in Peru concerning aspects relevant to ICSID Case No. ARB/20/46, brought by Lupaka Gold Corp (“Lupaka” or “Claimant”) against Peru.
2. The considerations and conclusions of this report are based on the law in Peru on the subject matter of this report in force at the time of occurrence of the facts alleged in the application filed by Lupaka.

### **B. Qualifications of the Expert and Declarations**

3. My name is Daniel Vela Rengifo. I am a registered senior consultant lawyer with a Doctorate in Law and Political Sciences, and have completed a Master's Degree in Constitutional Law and Human Rights. I have 16 years’ experience specializing in constitutional, environmental and indigenous law, constructive management of social conflicts, and community and institutional relations.
4. I have acquired my experience in the public sector (Ombudsman’s Office, Office of the Chairman of the Council of Ministers, Environmental Assessment and Monitoring Body, and the Ministry of Transport and Communications), the private sector (Pluspetrol), as a consultant to national and regional indigenous organizations (Amazonian and Andean), and as an independent consultant lawyer and litigant.
5. As such, I have been involved in all areas relating to the management of socio-environmental conflict (public and private sector, and organizations representing

Indigenous Peoples), and have had broad experience and success in this regard, with knowledge of the applicable laws and the socio-environmental and indigenous realities, and the management thereof at the national, regional and local government levels.

6. I worked as an independent consultant lawyer providing specialist technical assistance to the Confederation of Amazonian Nations [*Confederación de Nacionalidades Amazónicas del Perú-CONAP*], in the development of initiatives to strengthen the institutional management of forestry authorities at national and regional levels to promote and support the community forestry management of the indigenous peoples of the Peruvian Amazon, within the context of the implementation of the “USAID Promoción de Bosques Sostenibles, Rentables e Inclusivos (*USAID Securing a Sustainable, Profitable and Inclusive Forest Sector in Peru*), PRO-BOSQUES” project. June 2021 – January 2022.
7. I worked as a legal advisor to the Confederación de Nacionalidades Amazónicas del Perú-CONAP and its regional organizations and affiliated native communities. March 2021 – January 2022.
8. I worked as an independent consultant to the Specialist Unit for the prevention of social conflict and governability of the Ombudsman’s Office, in the monitoring of compliance with agreements in the health sector in the context of social conflicts, and in the preparation of an evaluation and proposal for ensuring compliance with said agreements. October 2020 – January 2021.
9. I worked as a macro-regional coordinator at the Department for Social Management and Dialogue of the Presidency of the Council of Ministers, with responsibility for the prevention and management of social conflicts in the southeast of the country (Apurímac, Cusco, Puno and Madre de Dios), and I developed leadership in the handling of landmark cases in other departments in Peru. December 2019 – June 2020.

10. I worked as a macro-regional coordinator at the Department for Social Management and Dialogue of the Office of the Chairman of the Council of Ministers, with responsibility for the prevention and management of social conflicts in the North of the country (Tumbes, Piura, Lambayeque, Cajamarca, La Libertad and Áncash), and I developed leadership in the handling of landmark cases in other departments. April 2019 - December 2019.
11. I was appointed director of social management at the Ministry of Transport and Communications, by means of Ministerial Resolution 327-2018 MTC/01.02, published on 9 May 2018 in the Official Gazette El Peruano, and was responsible for the prevention and management of social conflicts and socio-environmental supervision of the transport and communications sub-sectors, providing active leadership in the social management of landmark projects in the transportation sub-sector (air, land, and water). May 2018 - February 2019.
12. I worked as head of institutional relations at the Department of Governmental Affairs of Pluspetrol (in permanent coordination with the legal department and the departments for environmental and community affairs), with direct responsibility for the Lot 108 Project in Selva Central, providing active leadership in the institutional and community management of other hydrocarbons lots at national level, and playing an active role as institutional spokesperson. December 2014 - January 2017.
13. I worked as coordinator of institutional relations at the Department of Government Affairs of Pluspetrol (in permanent coordination with the legal department and the departments for environmental and community affairs), with direct responsibility for the Lot 108 Project in Selva Central, and playing an active role as institutional spokesperson. September 2014 - December 2014.
14. I worked as supervisor of environmental appraisal bodies (national, regional and local government bodies), and advisor on the management of socio-

environmental conflicts at the Environmental Assessment and Monitoring Body (OEFA). September 2013 – June 2014.

15. I worked as legal advisor to the Confederation of Amazonian Nationalities of Peru-CONAP [*Confederación de Nacionalidades Amazónicas del Perú-CONAP*] and its regional organizations and affiliated native communities, with particular emphasis on the process of prior consultation on the Regulations under the Law on Prior Consultation with the Indigenous Peoples, and Draft Law Number 4141, the Draft Law on Forestry and Wildlife. December 2010 – August 2013.
16. I worked as an independent consultant lawyer to the Specialist Unit for the Environment, Public Services and Indigenous Peoples of the Ombudsman's Office, in the preparation of a study with recommendations on State institutions in relation to the Indigenous Peoples. June – July 2011.
17. I was advisor on indigenous Amazonian matters at the former Office for the Management of Social Conflicts at the Office of the Chairman of the Council of Ministers – PCM. February 2010 – September 2010.
18. I was a special commissioner in the area of the environment, indigenous peoples (Andean and Amazonian) and management of social conflicts in the departments of San Martín and Loreto (Indigenous Peoples Program of the Specialist Unit for the Environment, Public Services and Indigenous Peoples) of the Ombudsman's Office; and Good Governance Coordinator, in the Program of Decentralization and Good Governance of the Department of State Administration of the Ombudsman's Office. October 2006 – February 2010.
19. Similarly, inter alia, I worked as an independent consultant lawyer, on the following major consultancy projects relating to indigenous peoples, the environment and management of socio-environmental conflicts:

- Baseline Study of REDD+ Policies and rights of Indigenous Peoples in Peru [*Estudio de Base sobre Políticas REDD+ y derechos de los Pueblos Indígenas en Perú*]. International Work Group for Indigenous Affairs - IWGIA, and Kingdom of Norway. November - December 2017.
- Specialist legal consultant on Socio-environmental Safeguard Policies of the World Bank. Technical Agency for the Administration of Health Services [*Organismo Técnico de Administración de los Servicios de Saneamiento*] - OTASS (an agency attached to the Ministry of Housing, Construction and Sanitation). October - December 2017.
- Impact assessment of biofuel projects in deforested and/or degraded areas of Loreto, San Martín and Ucayali. Consultancy organized by the National Environmental Fund - [*Fondo Nacional del Ambiente*] FONAM, at the request of the Inter-American Development Bank - IDB. SNV Latin America. Dutch development cooperation. March - November 2013.
- Evaluation of the challenges and opportunities arising from the implementation of the right to prior consultation of the Indigenous Peoples Indigenous Peoples in the Mining Sub-sector. Consultancy organized by the World Bank on collaboration with the Government of Peru. CCPM Group Consultant. May - August 2013.
- Legal consultant on the project “Sharing of Know-how for Community Forestry Management” [*Compartiendo Saberes para el Manejo Forestal Comunitario*]. Legal consultant on the involvement of the national and regional indigenous organizations in the process of prior consultation on the Regulations under the Law on Prior Consultation with the Indigenous Peoples, and Draft Law Number 4141, the Draft Law on Forestry and Wildlife. Peru Forest Sector Initiative-PFSI [*Programa del Servicio Forestal de USA*] and Peruvian Eco-Development Company [*Sociedad Peruana de Ecodesarrollo*] - SPDE. December 2010 - December 2012.
- Consultancy projects for the Peruvian Amazon Research Institute [*Instituto de Investigaciones de la Amazonía Peruana*] - IIAP, organized by the former executive unit INDEPA - National Institute for the Development of Andean, Amazonian and Afroperuvian Peoples [*Instituto Nacional de Desarrollo de Pueblos Andinos, Amazónicos y Afroperuanos*] (attached to the Ministry of Culture). October 2010 - July 2011:

- Preparation of the Legal Baseline of the National Plan and Public Policies for the Benefit of Isolated Communities and Initial Contact [*Plan Nacional y Políticas Públicas a Favor de los Pueblos en Aislamiento y Contacto Inicial*].
  - Proposed Rules on State Supervision of Exploration and Extraction Activities within Territorial and Indigenous Reserves of the Peruvian State.
  - Proposed Rules on Authorization of Physical Access to the Territorial and Indigenous Reserves of the Peruvian State.
20. I also took part in the Caucus of the Indigenous Peoples of the Americas as a Technical Advisor on the negotiation of the draft American Declaration (OAS Declaration) on the Rights of the Indigenous Peoples, during the “XIII Negotiation Meeting to Search for Consensus of the OAS Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples.” Washington D.C. From January 16 to 20, 2011.

### C. **Conclusions**

21. A variety of native peoples have inhabited what is presently known as Peruvian soil, and their existence precedes the processes of colonization and, of course, the formation of the Peruvian State. Over time, these peoples (initially legally acknowledged as Indigenous or Original Peoples) have been able to preserve and maintain their cultural identity, their traditions, practices, customs and institutions. They usually self-identify as a community which, while forming part of political society, is culturally different from the majority.
22. The rural (and native) communities in Peru are forms of organization of the Indigenous or Original Peoples. Like other native peoples, they receive legal recognition and protection both at the international level and under domestic Peruvian law.

23. The rural (and native) communities have legal personality under private law. Hence, they are private legal entities in the same way as an association under civil law, with the distinctive feature that the rural communities have an inherently collective character and are of public interest due to their origins, objective, and the special protection they enjoy under the constitution.
24. The rural communities and, more particularly, their governing bodies - such as the general assembly and the communal board, as well as the *Rondas Campesinas* [*Rural Patrols*] in their supporting role - do not form part of the organic structure of the Peruvian State and perform their functions exclusively within the ambit of their community and not on behalf or through any delegation by the Peruvian State.
25. The rural communities do not perform functions under the instruction, control, or supervision of the Peruvian State. The acts of the authorities and representatives of the rural communities, and the implications thereof, are circumscribed to the ambit of the community in the context of its own customary law, and are not attributable to the Peruvian State.
26. Similarly, the performance of the judicial function recognized by the Constitution to rural (and native) communities within each respective community is limited to the application of the practices and customs of the community (that is to say, their own customary law) within its territory, and is further limited by the requirement of respect for the fundamental rights of a person enshrined in the Constitution of Peru and in other international sources adopted by Peru.
27. The exercising of the function acknowledged by the text of the Constitution in this respect does not mean that the authorities of the rural communities form part of the judicial system of Peru.

28. The rural communities are not state bodies and, therefore, the actions of their authorities and representatives cannot be attributed to the Peruvian State.
29. Neither can the individual conduct of the members of a rural community be attributed to the Peruvian State.
30. As the rural (and native) communities enjoy constitutional and legal recognition, their organic structure and their own purposes must be respected, above all in terms of their legitimate concern for protection of the environment and the natural resources that they consider of vital importance to their survival.
31. The Parán Community is a rural community under the terms of the Peruvian Constitution and the Law on rural communities.
32. The Peruvian legal system establishes a number of legal standards and guiding principles with regard to environmental obligations and social management in the context of extraction activities in Peru. This legal framework is aimed not only at safeguarding the environment and/or mitigating the impact of extraction activities on it, but also at protecting and promoting the quality of life of those communities that may be impacted by such activities. Compliance with these statutes and guiding principles is not only a legal imperative for any company seeking to perform extraction activities in Peru, but also makes for the good practices that, as domestic and international experience show, contribute to the prevention of potential social conflicts.
33. Supreme Decree No 040-2014-EM, Rules on Environmental Protection and Management for Mining Exploitation, General Labor, Transport and Storage Activities, seeks in a maximalist manner - as explained in its preliminary section, and in various of its articles - to guarantee responsible business conduct as regards community relations and social management in general, with a constant

focus on the welfare and development of the populations in the area of the project and on the prevention of social conflict.

34. At the global level, good practices in responsible business conduct includes the standards of the ICMM (International Council of Mining & Metals), and more specifically in the case of Canadian mining companies, the TSM (Towards Sustainable Mining) standards of the Mining Association of Canada. Any mining company worthy of the description should give the highest consideration to the ICMM standards, and more specifically, in the case of the Canadian companies, the TSM standards.
35. The ICMM's Good Practice Guide for Indigenous Peoples and Mining states that the mining companies which adopt good practices in relation to the Indigenous Peoples are more likely to obtain the support of the communities, build a positive reputation as responsible companies, and to successfully contribute to obtaining sustainable and equitable results over the life of the project.
36. According to the National Mining Association of Canada, the Canadian mining industry knows that there is a correct way and an incorrect way of operating, noting that sound practices in the area of corporate responsibility can help a mining company maintain its operating privilege, stressing that, for the Canadian mining companies, maintaining this privilege also involves working together with community groups and civil society.
37. The company *Invicta Mining Corp* (hereinafter "**Invicta**") (acquired by Lupaka in 2012) not only failed to observe the rules of the Peruvian legal system and the good practices provided for in the above-mentioned domestic and international instruments relating to community relations and the prevention of social conflict, but also repeatedly breached its environmental obligations and the few agreements it had entered into with the rural Parán Community.

38. In fact, Invicta had environmental and social obligations (contained in its Environmental Impact Study 2009, and specifically as part of its Community Relations Plan), to the three rural communities within the area of impact of its project (Parán, Lacsanga and Santo Domingo de Apache). Resolutions of the Peruvian environmental monitoring authority (the Environmental Assessment and Monitoring Body (OEFA)), show, however, multiple environmental and social violations by Invicta.
39. Experience in the area of community relations and social conflict in Peru allows a direct correlation to be inferred between the environmental and social violations by Invicta on the one hand, and the social conflict that has erupted with thearán Community, on the other.
40. In fact, a document signed in 2011 by the rural leaders of the various districts within the area of impact of the Invicta mining project shows that at that time there was already legitimate environmental concern and a warning of conflict and social confrontation. I refer specifically to a letter from the Environmental Defense and Promotion Front for the districts of Leoncio Prado, Paccho, Sayán and Ihuarí, in the provinces of Huaura and Huaral, sent to the Minister of the Environment (MINAM). Regrettably, it is apparent that since the beginning of the Invicta mining project, the company did not perform due diligence in guiding and developing its activities with proper social and environmental responsibility.
41. In my opinion, based on the experience acquired in the management of social conflicts at both the public and the private sectors, the authorities of the Peruvian State, and in particular the Ministry of Energy and Mines, the Ombudsman's Office, the Ministry of the Interior, and the Office of the Chairman of the Council of Ministers, acted in accordance with the Peruvian legal system and the criteria governing the use of force and the strategic handling of social conflicts in Peru.

## II. The Rural Communities in Peru

### A. Historical and Anthropological Context

42. Peru is country of enormous cultural diversity. From time immemorial, a variety of native peoples have inhabited what we today know as Peruvian soil. The existence of these peoples precedes the processes of colonization and, of course, the formation of the Peruvian state.
43. Over time, these peoples (initially legally acknowledged as Indigenous or Original Peoples) have been able to preserve and maintain their cultural identity, their traditions, practices, customs and institutions. They usually self-identify as a community which, while forming part of political society, is culturally different from the majority. For this reason, the native peoples receive legal recognition and protection both at the international level and under domestic Peruvian law.<sup>1</sup>
44. The legal framework relating to legal recognition and protection of the native peoples in Peru has referred to the latter in terms that have evolved over the years until reaching the phrasing currently provided for in the Political Constitution of Peru, that is, “rural or native communities.”<sup>2</sup>
45. In fact, the 1920 Political Constitution enshrined the first formal and express acknowledgment of the legal existence of the native peoples of Peru, referring to

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<sup>1</sup> **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989 (Articles 1, 2, 3, 4 and 5); **Ex. C-0023**, Political Constitution of Peru, 29 December 1993 (Articles 2 and 89); **Ex. R-0052**, Law No. 24656, 13 April 1987 (Articles 1, 2, 3 and 4); and **Ex. R-0151**, Law No. 29785, 6 September 2011 (Articles 1, 2, 3, 5 and 7).

<sup>2</sup> **Ex. C-0023**, Political Constitution of Peru, 29 December 1993 (Articles 88, 89 and 149).

these as “indigenous communities.”<sup>3</sup> It also declared the imprescriptibility of their property.<sup>4</sup>

46. More than a decade later, the 1933 Political Constitution confirmed the recognition of the legal existence and legal status of the indigenous peoples,<sup>5</sup> declaring the land owned by them imprescriptible, inalienable and guaranteed against seizure.<sup>6</sup>

47. In 1979, Peru approved a new Political Constitution. Its text maintains the acknowledgment of the lawful existence and legal status of the indigenous peoples, although it refers to them by use, for the first time in history, of the expression “rural and native communities.”<sup>7</sup> It acknowledges their autonomy

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<sup>3</sup> **Ex. DV-0001**, Political Constitution of Peru, 1920 (Title IV Social Guarantees, Article 58) (“The State will protect the indigenous race and dictate special laws for their development and culture consistent with their needs. The Nation acknowledges the legal existence of the indigenous communities and the law will dictate their corresponding rights.”).

<sup>4</sup> **Ex. DV-0001**, Political Constitution of Peru, 1920 (Title IV Social Guarantees, Article 41) (“Property of the State, public institutions and indigenous communities is imprescriptible and may only be transferred by public deed, in those cases and in the form established by law”). *See also, Ex. DV-0004*, Ministry of Justice and Human Rights, “*Compendio normativo y jurisprudencial sobre los derechos de los pueblos indígenas, comunidades campesinas y nativas*,” 2013 (page 15).

<sup>5</sup> **Ex. DV-0002**, Political Constitution of Peru, 1933 (Article 207) (“The indigenous communities have lawful existence and legal status”).

<sup>6</sup> **Ex. DV-0002**, Political Constitution of Peru, 1933 (Article 209) (“The property of the communities is imprescriptible and inalienable, other than in the case of compulsory purchase in the public interest, subject to compensation. It is, likewise, guaranteed against seizure”); **Ex. DV-0003**, Political Constitution of Peru, 1979 (Article 212) (“The State will dictate the civil, criminal, economic, educational, and administrative legislation, required by the specific circumstances of the indigenous peoples.”).

<sup>7</sup> **Ex. DV-0003**, Political Constitution of Peru, 1979 (Article 161) (“The rural and native communities have a lawful existence and legal status. They are autonomous with regard to organization, community work and land use, and to economic and administrative matters within the framework established by law. The State shall respect and protect the traditions of rural and native communities. It shall promote the cultural improvement of their members”). *See also, Ex. DV-0004*, Ministry of Justice and Human Rights, “*Compendio normativo y*

with regard to organization, community work and land use, and to economic and administrative matters within the legal framework. The State also undertook to respect and protect the traditions of said communities and to promote their comprehensive development, by confirming that the land of the rural and native communities is inalienable, imprescriptible, and guaranteed against seizure.<sup>8</sup>

48. The Constitution currently in force in Peru (Political Constitution of Peru, 29 December 1993) retains the terminology used since 1979 in referring to the native peoples as “Rural and Native Communities”<sup>9</sup>, although it amends the system of protection of communal land by abolishing the principles of inalienability and guarantee against seizure, and by maintaining its imprescriptible nature but only to a limited extent (e.g., land declared abandoned may revert to State ownership).<sup>10</sup>
49. The terms used to designate the Indigenous Peoples do not, however, change either their nature or their collective rights. Where Article 89 of the Political

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*jurisprudencial sobre los derechos de los pueblos indígenas, comunidades campesinas y nativas,”* 2013 (page 15).

<sup>8</sup> **Ex. DV-0003**, Political Constitution of Peru, 1979 (Article 162) (“The State shall promote the comprehensive development of the rural and native communities. It shall encourage communal businesses and cooperatives”); **Ex. DV-0003**, Political Constitution of Peru, 1979 (Article 163 (“The land of the rural and native communities is guaranteed against seizure and imprescriptible. It is also inalienable, except in the case of a law based on the interests of the community, and requested by a two-thirds majority of the qualified members of this, or in the case of compulsory purchase due to the needs or interests of the public”). *See also, Ex. DV-0004*, Ministry of Justice and Human Rights, “*Compendio normativo y jurisprudencial sobre los derechos de los pueblos indígenas, comunidades campesinas y nativas,*” 2013 (page 15).

<sup>9</sup> **Ex. C-0023**, Political Constitution of Peru, 29 December 1993 (Article 89) (“The rural and native communities have lawful existence and legal status. They are autonomous with regard to organization, community work and the use and free disposal of their land, and to economic and administrative matters within the framework established by law.”)

<sup>10</sup> **Ex. C-0023**, Political Constitution of Peru, 29 December 1993 (Article 89) (“Ownership of their land is imprescriptible, other than in the case of abandonment provided for in the above article. The State shall respect the cultural identity of the rural and native communities.”)

Constitution of Peru mentions the rural or native community, this must be understood as one of the organizational manifestations of the Indigenous or Original Peoples, as this is the form in which they have historically been established, with their members also self-identifying as such.<sup>11</sup>

50. As stated above, the first nomenclature used in the 1920 and 1933 Political Constitutions of Peru was Indigenous Communities, while the 1979 Constitution specifies the lawful existence of rural and native communities, which nomenclature is retained in our current Political Constitution of Peru (from 1993).
51. It is only recently, with the Law on the right to prior consultation of the Indigenous or Original Peoples acknowledged in Convention No. 169 of the International Labor Organization<sup>12</sup> that express use has been made of the nomenclature of Indigenous or Original Peoples, establishing that “the rural or Andean communities and the native communities or Amazonian peoples may also be identified as indigenous or original peoples, according to the criteria set out in this article. The names used to designate the Indigenous or Original Peoples do not change either the nature or the collective rights of these.”<sup>13</sup>

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<sup>11</sup> This is of course accompanied by the certainty of having specific collective rights to their land and territories and in relation to the natural resources located there, while legitimately seeking the sustainable use of these. **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989 (Articles 2, 13, 14, 15 and 16).

<sup>12</sup> **Ex. R-0151**, Law No. 29785, 6 September 2011. **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989 (approved by Legislative Resolution No. 26253, of 26 November 1994, coming into force in Peru, on the basis of this provision from 2 February 1995).

<sup>13</sup> **Ex. R-0151**, Law No. 29785, 6 September 2011 (Article 7) (“The rural or Andean communities and the native communities or Amazonian peoples may also be identified as indigenous or original peoples, according to the criteria set out in this article. The names used to designate the Indigenous or Original Peoples do not change either the nature or the collective rights of these”).

52. In accordance with the General Law on Rural Communities, Law 24656, the rural communities are public interest organizations, with a lawful existence and legal personality, made up of families that inhabit and control certain territories, linked by ancestral, social, economic and cultural ties manifested in the communal ownership of the land, community work, mutual support, democratic government, and the development of multi-sectorial activities for the purpose of the fulfillment of its members and of the country.<sup>14</sup>
53. According to studies by the Ombudsman's Office of Peru, by the year 2015 no less than 6,190 recognized rural communities were officially recorded in Peru.<sup>15</sup> This same report from the Specialist Unit of the Ombudsman's Office states that in 2017 the Ministry of Agriculture and Irrigation (hereinafter MIDAGRI) reported to the Congress of the Republic the existence of 6,220 recognized rural communities in Peru.<sup>16</sup>
54. Approximately 90% of the rural communities are established in the mountains. The remaining population of rural communities in Peru can be found on the coast and in the Amazon rain forest.<sup>17</sup>
55. "It is estimated that, overall, the rural and native communities occupy 27% of the national territory: the rural communities with 55% of the Andean region, and the native communities with 14.4% of the Amazonian region."<sup>18</sup>

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<sup>14</sup> Ex. R-0052, Law No. 24656, 13 April 1987.

<sup>15</sup> Ex. DV-0005, Report Number 002-2018-AMASPPI-PPI, 2018 (page 51).

<sup>16</sup> Ex. DV-0005, Report Number 002-2018-AMASPPI-PPI, 2018 (page 52).

<sup>17</sup> See Ex. DV-0006, Peru's Society of Environmental Law (SPDA), *Manual de Legislación Ambiental*, 2010 (page 296) (The rural communities on the coast have their land (or the greater extent of this) located on the side of the Pacific Ocean, at up to an altitude of 2,000 meters above sea level. The rural communities of the rain forest are made up of populations established on the banks of the rivers of the Amazon, and are identified as "mestizo riverside communities," "rural riverside communities" or simply "riverside communities").

**B. Legal treatment of the rural communities in Peru.**

56. Article 89 of the Political Constitution of Peru, provides special protection for the rural (and native) communities, acknowledging that “[T]he rural and native communities **have lawful existence and legal personality**. They are autonomous with regard to organization, community work and the use and free disposal of their land, and to economic and administrative matters within the framework established by law. Ownership of their land is imprescriptible, other than in the case of abandonment provided for in the above article. The State shall respect the cultural identity of the rural and native communities.”<sup>19</sup>
57. In a manner consistent with the constitutional provisions, the General Law on Rural Communities, Law 24656, establishes that “the State: a) Guarantees the integrity of the right of ownership of the territory of the rural communities; b) Respects and protects community work as a method of participation of the comuneros [*joint land owners*], aimed at establishing and preserving the goods and services of communal interest, governed by native customary law; c) Promotes the organization and operation of the communal and multinational businesses, and other forms of association freely set up by the Community; and, d) Respects and protects the practices, customs and traditions of the Community. Promotes the development of their cultural identity.”<sup>20</sup>

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<sup>18</sup> See **Ex. DV-0006**, Peru’s Society of Environmental Law (SPDA), *Manual de Legislación Ambiental*, 2010 (page 294).

<sup>19</sup> **Ex. C-0023**, Political Constitution of Peru, 29 December 1993 (Article 89).

<sup>20</sup> **Ex. R-0052**, Law No. 24656, 13 April 1987 (Article 1).

58. Law 24656 defines the governing bodies of the rural community and their respective functions, e.g. (i) the General Assembly,<sup>21</sup> (ii) the Communal Board,<sup>22</sup> and (iii) the Specialist Committees by type of activity and Annex.<sup>23</sup>
59. The rural (and native) communities have legal personality under private law. Their governing bodies, e.g. the General Assembly and the Communal Board, as well as the *Rondas Campesinas* in their support role, are not part of the organic structure of the Peruvian State, and although they perform functions of government within their own community, this corresponds to the special protection of the identity and autonomy of the indigenous peoples enshrined in both the Political Constitution of Peru and in the international instruments to which Peru is a party (and to which I refer in this section). Both the community authorities and the *Rondas Campesinas* represent the community as a private entity.
60. The rural communities do not perform functions under the instruction, delegation, control or supervision of the Peruvian State. Neither can the state violate the organizational and administrative autonomy of the rural communities or interfere in their functioning or the governing of their internal and domestic affairs. The acts of the bodies and representatives of the rural communities in their capacity as government authorities of a legal person under private law are

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<sup>21</sup> **Ex. R-0052**, Law No. 24656, 13 April 1987 (Article 17) (“The General Assembly is the supreme body of the Community. Its directors and community representatives are elected periodically by postal voting which is equal, free, secret and mandatory, in accordance with the procedures, requirements and conditions established in the Statutes of each Community”).

<sup>22</sup> **Ex. R-0052**, Law No. 24656, 13 April 1987 (Article 19) (“is the body responsible for the government and administration of the Community; it is made up of a President, Vice-president and a minimum of four Directors”).

<sup>23</sup> The Community Statutes currently make very little mention of the Specialist Committees by type of activity and Annex, with greater importance clearly being attached to the General Assembly and the Communal Board (also known as the Management Board).

not attributable to the Peruvian State and cannot result in any form of State responsibility.

61. Article 149 of the Constitution vests the authorities of the rural and native communities, “with the support of the *Rondas Campesinas*,”<sup>24</sup> with the power to “perform the judicial functions within their territorial area in accordance with customary law, provided this does not breach the fundamental rights of a person.”<sup>25</sup> The performance of “judicial functions” –that is to say, the power to resolve conflicts within the community—is nevertheless subject to clearly defined limitations in terms of scope and the matters subject to resolution by the communal authorities.
62. The power acknowledged by the Constitution extends solely to the resolution of disputes that may arise within the territory of the community and in accordance with the practices and customs of the community. It does not provide for the application of Peruvian law in the resolution of communal disputes, and of course does not mean that the authorities of the rural are considered part of the Peruvian judicial system.

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<sup>24</sup> “*Rondas Campesinas*” is defined as “the social organizations made up of rural inhabitants, and those made up of members of the rural communities, in rural areas.” **Ex. R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003 (Article 2). (Their role is to “contribute to the development, security, morals, justice, and social peace within their territorial areas, without discrimination of any kind, in accordance with the Constitution and the law. They assist in the resolution of conflicts and perform extra-judicial conciliation functions”). **Ex. R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003 (Article 3).

<sup>25</sup> **Ex. C-0023**, Political Constitution of Peru, 29 December 1993 (Article 149) (“The authorities of the rural and native communities, with the support of the *Rondas Campesinas* can perform the judicial functions within their territorial area in accordance with customary law, provided this does no breach the fundamental rights of a person.” The law provides for the forms of coordination of this special jurisdiction with the Magistrate Courts and the other bodies of the judiciary”).

63. For its part, the text of the Constitution requires that the practices and customs on which the resolution of disputes within a rural community is based do not violate the fundamental rights of a person,<sup>26</sup> as enshrined in the Constitution itself, in the Universal Declaration of Human Rights, in ILO Convention No. 169, and in law.<sup>27</sup>
64. The matters which may fall within the judicial function of the authorities of a rural community have been defined in greater detail in the Supreme Decree governing the Law on *Rondas Campesinas*.<sup>28</sup> This statute establishes that the *rondas campesinas* may “participate in the resolution of conflicts that arise within their territory either between members of the community or involving others from outside the community.” The same statute states that the matters subject to said conflict resolution are “exclusively those related to possession, usufruct of communal property, goods, and the use of various community resources.”<sup>29</sup>
65. At the international level, the legal instruments recognizing the rights of the indigenous peoples are Convention No. 169 of the International Labor Organization (hereinafter the Convention), in force since 1995 in Peru, and the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter the UN Declaration), adopted in 2007.
66. The Convention was adopted in Geneva, Switzerland, by the International Labor Organization (hereinafter ILO) at its 76th meeting on 27 June 1989, coming into

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<sup>26</sup> **Ex. C-0023**, Political Constitution of Peru, 29 December 1993 (Article 149)

<sup>27</sup> **Ex. R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003 (Article 4).

<sup>28</sup> **Ex. R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003 (establishing the legal instruments and procedures that must govern the Organization and Functions of the *Rondas Campesinas* recognized by Law No 27908).

<sup>29</sup> **Ex. R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003 (Article 13).

force on 5 September 1991.<sup>30</sup> In Peru, it was approved by Legislative Resolution No 26253 of 26 November 1994, coming into force in Peru as of 2 February 1995.<sup>31</sup>

67. The Convention has two basic tenets: the right of the Indigenous Peoples to maintain and strengthen their cultures, ways of life, and own institutions, and their right to participate effectively in the decisions impacting on them (which premises are the basis upon which its provisions must be interpreted). The Convention also guarantees the right of the indigenous and tribal peoples to decide their own priorities as regards the development process, to the extent that this affects their lives, beliefs, institutions, and spiritual well-being, and the land that they occupy or use in any way, and to control, as far as possible, their own economic, social and cultural development.<sup>32</sup>
68. The UN Declaration, adopted in 2007, shares and reinforces the principles and objectives enshrined in the Convention. The ILO emphasizes that the adoption of this is the culmination of a process of more than two decades led and promoted by the organizations representing the indigenous peoples. The Declaration sets minimum standards for respecting the rights of the Indigenous Peoples, including ownership of their land, the natural resources in their territories, the preservation of their traditional knowledge, self-determination, and prior consultation.<sup>33</sup>

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<sup>30</sup> See **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989 (page 13).

<sup>31</sup> **DV-14**, Legislative Resolution No. 26253, 26 November 1993.

<sup>32</sup> **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989 (page 4).

<sup>33</sup> **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989 (pages 5, 6, 10).

C. **Treatment of the rural communities in the case law**

69. Consistent with that stated by the Inter-American Court of Human Rights on this matter, the case law of the Peruvian Constitutional Court has recognized the following rights as collective rights of the indigenous peoples in Peru.

1. *Ethnic and cultural identity*

70. This collective right can be understood to be “(...) the entitlement of a person who is part of a particular ethnic group to be respected for the customs and traditions specific to them, thereby avoiding the disappearance of the uniqueness of this. That is to say, the right of the ethnic group to exist in accordance with the values inherited from their ancestors and under the symbols and institutions that distinguish this community from the others.”<sup>34</sup>

71. As established by the Inter-American Court of Human Rights, this collective right relates to land, since the Court “has recognized the strong connection between the land and the traditions, customs, languages, arts, rituals, knowledge and other aspects of the identity of the indigenous peoples, noting that as a function of their environment, their integration with nature and their history, the members of the indigenous communities pass down from generation to generation this intangible cultural heritage, which is permanently kept alive by the members of the indigenous communities and groups.”<sup>35</sup>

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<sup>34</sup> Judgment in CASE 3343-2007-PA, legal ground 29. See **Ex. DV-0012**, Ministry of Cultures, Collective Rights of Indigenous and Native Communities, June 2016 (page 18).

<sup>35</sup> Kichwa de Sarayacu versus Ecuador, paragraph 212; also in Comunidad Indígena Yakye Axa versus Paraguay, (paragraph 154). See **Ex. DV-0012**, Ministry of Cultures, Collective Rights of Indigenous and Native Communities, June 2016 (page 22).

2. *Land and territory*

72. In light of that stated concerning the right to ethnic and cultural identity, the collective right of the indigenous peoples to the land and territory must be understood in the sense that the Indigenous or Original Peoples “have a special cultural and spiritual connection [with the land they inhabit], which underpins their world view, and which goes beyond and transcends a merely patrimonial understanding of the right of ownership.”<sup>36</sup>
73. The case law of the Constitutional Court on this matter is consistent with that established by the Inter-American Court of Human Rights. On this point, the Court indicated that Article 21 of the American Convention on Human Rights, recognizes and guarantees the right to ownership in that it “protects the strong connection that the indigenous peoples have with their land, and with the natural resources of their ancestral territories and the intangible elements resulting from these. Among the indigenous or original peoples there is a communal form of collective ownership of the land, in the sense that it does not belong to an individual but to the group and its community. These concepts of property and possession of the land do not necessarily correspond to the classic conception of ownership, but merit equal protection by Article 21 of the American Convention.”<sup>37</sup>

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<sup>36</sup> Judgment in CASE 3303-2007, legal ground 32. See **Ex. DV-0012**, Ministry of Cultures, Collective Rights of Indigenous and Native Communities, June 2016 (page 18).

<sup>37</sup> **RLA-0036**, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-American Court of Human Rights, Judgement, 31 August 2001 (paragraphs 148 and 149). See **Ex. DV-0012**, Ministry of Cultures, Collective Rights of Indigenous and Native Communities, June 2016 (page 21).

74. The Constitutional Court has also recognized that the indigenous peoples “have a legitimate right, by virtue of their right of ownership, to control intrusions onto their property.”<sup>38</sup>

### **III. Procedure for Citizen Participation and Adoption of Agreements as a Requirement for the Extractive Activity Under Peruvian Legislation**

#### **A. Road Map for Responsible Business Conduct of an Extractive Company**

75. Extraction activities in Peru have commonly been carried out within the territories inhabited since time immemorial by indigenous communities (that is, rural or native communities). Consequently, both the planning and each step in the process of development and execution of an extractive project must adhere to (i) the regulatory requirements imposed by the Peruvian legal system, and (ii) a body of good practices with regard to community relations resulting from decades of experience in the field.

1. *The Peruvian legislative framework. Supreme Decree No 040-2014-EM (“DS 040-2014”)*

76. DS 040-2014 establishes the guidelines that govern the environmental protection and management of the mining industry in Peru.<sup>39</sup> This statute renders the owner of the mining activity solely liable for any impact that its operations may have on the environment, and consequently compels it to adopt “the measures for prevention, control, mitigation, remediation, rehabilitation or compensation” during the life of the project (even following completion and closure of the project).<sup>40</sup>

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<sup>38</sup> **Ex. DV-0007**, Proceeding No. 01126-2011-HC/TC, F.J. 21, 11 September 2012. *See Ex. DV-0012*, Ministry of Cultures, Collective Rights of Indigenous and Native Communities, June 2016 (page 18).

<sup>39</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014.

<sup>40</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 16).

77. The scope of the environmental protection considered in DS 040-2014 includes, as an essential element, the protection of the rural and native communities which may be impacted by the project. As provided by this legal instrument in its preliminary section, one of the guidelines for environmental management of mining activity consists of “seeking a positive interaction between the mining activity and sustainable local development, by understanding the population involved, in the context of social responsibility and inclusion.”<sup>41</sup>
78. A definition is provided there not only of what is meant by “Area of Direct Impact” of the extractive project (understood to be the sum of the spaces occupied by the project, and the areas directly impacted during the life cycle of this), but also what constitutes areas of *indirect* impact, in both environmental and social terms.<sup>42</sup> In essence, DS 040-2014 seeks to cover and address any possible environmental and social impact of an extractive project independently of the space where the project or mining unit is effectively located.<sup>43</sup>
79. DS 040-2014 considers and defines the concept of “Social Impacts” in the context of the environmental considerations involved in each extractive project. Thus, it refers to the effects that the planned mining activity may have on the “socio-economic and cultural aspects of a population that is located within the area of impact” of the project.<sup>44</sup>
80. Such impacts must be assessed for the purpose of prevention and/or mitigation within, and as an integral part of, the environmental impact study which the

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<sup>41</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Preliminary Section, part V).

<sup>42</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Articles 4.1-4.2).

<sup>43</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014.

<sup>44</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 4.16).

mining project owner must submit.<sup>45</sup> The statute thus establishes that the environmental studies for an extractive project in Peru must include a “Social Management Plan” which sets out the “strategies, programs, projects and measures for managing social impacts that must be adopted to prevent, mitigate, control, compensate or avoid negative social impacts and optimize the positive social impacts of the mining project in its respective areas of social influence.”<sup>46</sup>

81. As established by Article 60 of this legal instrument, the Social Management Plan must include a “Community Relations Plan” drawn up for the rural and native community or communities located within the areas of direct or indirect impact of the project.<sup>47</sup> This plan includes all the measures that the mining company must implement to maintain proper relations with the surrounding populations.<sup>48</sup>
82. Similarly, the same Article 60 specifies as minimum contents of the Social Management Plan the following plans:
  - a) Social consultation plan, containing the measures for prevention and mitigation of the risk of social impact, such as a significant impact on natural resources of critical importance to the community or the material cultural heritage of the locality, and the mechanisms for approaching and reaching consensus with the local populations on their various interests;

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<sup>45</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 46, Section IV).

<sup>46</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Articles 46(f), and 53).

<sup>47</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Articles 60 and 53).

<sup>48</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 60.1) (the Community Relations Plan must contain the following: Communications Plan, Social Relations Protocol, Code of Conduct for workers, inter alia, that the owner proposes for the purpose of achieving a harmonious relationship with the populations in the project surroundings).

- b) Community development plan, which must contain programs for local promotion and social inclusion, for the purpose of improving their socio-economic conditions, with emphasis on their productive activities, job creation, health, nutrition and education (with an obligation to promote the strengthening of local capabilities, among other, in coordination with the authorities and local population); and
  - c) Social Investment Program, containing the estimated annual investment program for implementation of the Social Management Plan, as well as a Social Impact Monitoring Program relative to the indicators identified in the social baseline and the environmental impact assessment.<sup>49</sup>
83. I must stress that this statute seeks, in a maximalist manner, to guarantee responsible business conduct with regard to community relations and social management in general, always with concern for the well-being and development of the populations in the area of the project.
84. Such maximalist approach is evident from the Preliminary Section of the statute, which sets out the following guidelines:<sup>50</sup>
- The environmental and social management must be responsible and proactive, aimed at full respect for human life and health, and improving quality of life in general.

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<sup>49</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 60.3-60.5).

<sup>50</sup> Supreme Decree No 040-2014-EM, in its Preliminary Section, also establishes that these guidelines, in the context of the environmental management of mining activities, shall be followed in accordance with the National Environmental Policy, the rights and principles established in the Preliminary Section of the General Law on the Environment, and the Law on the National Environmental Impact Assessment System (SEIA).

- Economic growth, environmental protection, and social welfare must be focused on the aim of contributing to the sustainable development of Peru and satisfying the needs of present and future generations.
- Ensuring that the outcome of the mining activity and the efficient use of the mineral resource represents a net positive balance, both for the country and the investor, according to the principle of replacement of real values or benefits, by avoiding, preventing, mitigating and/or compensating the negative impact on other resources in the area and the natural and cultural heritage of the Nation.
- A primary focus on prevention, full and integrated management of environmental impacts, and the management of risks that may result from carrying out the mining activity.
- Seeking a positive interaction between the mining activity and sustainable local development, by understanding the population involved, in the context of social responsibility and inclusion.
- Adoption of operational and social and environmental management practices, that are effective and efficient, ensuring full compliance with the current legislation, achievement of the objectives underpinning this, and the application of criteria of continuous improvement.
- Maximization of the benefits resulting from the mining activity and the social responsibility practices, thereby contributing the strengthening of capabilities and sustainable regional and local development.
- Commitment from senior officials, engineers, operators and the organization as a whole, who are responsible for the conducting of the mining activity, with the aim of ensuring environmental and social management thereof.
- Voluntary adoption of social responsibility practices and new technologies, in addition to the legal requirements, that maximize the positive impacts and minimize the negative impacts of the mining activity.
- Ensuring that the studies and measures that are carried out at all stages of the mining activity are mutually consistent and demonstrate a uniform

pattern of environmental performance and protection until closure of the operation.

85. In this respect, Article 57 of DS 040-2014 establishes a series of social management principles imposed as guiding criteria for the conduct of all those who are part of a mining project throughout the lifetime of the project.<sup>51</sup> These include:

- a) Compliance with “the social obligations undertaken through agreements, minutes, contracts and environmental studies, by the deadlines set forth in those documents;”<sup>52</sup>
- b) a responsible relationship with the communities, with respect for “the local people, organized groups, institutions, authorities and lifestyles.”<sup>53</sup> This includes the obligation to “promote measures to increase trust among parties associated with the mining project, through mechanisms and processes of citizen participation, to prevent and deal with conflicts, and the use of alternative resolution mechanisms;”<sup>54</sup>
- c) with the aim of contributing to the economic development of the communities, “to give preference to the hiring of local personnel to perform mining or related work, in accordance with the requirements of the owner at the various stages of the mining project and with emphasis on seeking consensus with the population in the area of direct social

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<sup>51</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 57).

<sup>52</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 57.3).

<sup>53</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 57.4).

<sup>54</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014.

impact and, wherever possible, providing opportunities for the necessary training, job creation and the development of business ventures”;<sup>55</sup>

- d) the need to “maintain a continuous, appropriate and transparent dialogue with the regional and local authorities and with the populations in the area of impact of the mining project, adopting an intercultural approach, and providing them with adequate, timely, and accessible information on its mining activities in a suitable language through the media available in the area. All of this with the aim of facilitating an exchange of opinions and suggestions with the participation of the main parties involved, in accordance with the applicable laws on citizen participation”;<sup>56</sup> and
- e) in line with the above, the owners of the extractive projects must also “implement mechanisms and processes for citizen participation that involve the populations located in the area of impact of the project.”<sup>57</sup>

## 2. *Good Practices*

- 86. DS 040-2014 brings together and regulates as a legal imperative a set of good practices aimed not only at promoting the well-being of the communities potentially impacted by an extractive project, but also at reducing the possibility of social conflicts associated with the project and maximizing in this way the viability and sustainability of the project over time.
- 87. The Good Practices for Responsible Business Conduct known globally include the ICMM (International Council of Mining & Metals), and more specifically the

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<sup>55</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 57.5).

<sup>56</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 57.7).

<sup>57</sup> **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014 (Article 57.9).

TSM (Towards Sustainable Mining) standards, corresponding to the Mining Association of Canada.

a. Regarding the ICMM standards

88. A document of paramount importance from the ICMM is the Good Practice Guide for Indigenous Peoples and Mining (hereinafter the “Guide”).<sup>58</sup> This states that the mining companies which adopt good practices in relation to the Indigenous Peoples are more likely to successfully contribute to obtaining sustainable and equitable outcomes, obtain the support of the communities, build a positive reputation, and be considered as responsible companies.<sup>59</sup>
89. The Guide helps companies to: recognize and respect that the Indigenous Peoples have distinct rights and interests; understand that by means of the law and/or custom the Indigenous Peoples often have a special relationship with the land, the territories and the resources; and use forms of participation that are sensitive to the local cultural traits.<sup>60</sup>
90. Similarly, the Guide contains a dedicated chapter on agreements with Indigenous Peoples, stating that these are mutually beneficial in that they provide the companies with a means of ensuring long-term access to the resources, and at the same time reduce the costs of transactions and disputes,

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<sup>58</sup> Ex. R-0086, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2013. (<https://guidance.miningwithprinciples.com/good-practice-guide-indigenous-peoples-and-mining/?lang=en>) From a reading of the ICMM website, it is clear that in 2010 there was already a Good Practice Guide for Indigenous Peoples and Mining, and that in 2013 the second edition was issued, with revised information on the preparation of this document.

<sup>59</sup> Ex. R-0086, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2013 (page 1). (<https://guidance.miningwithprinciples.com/good-practice-guide-indigenous-peoples-and-mining/?lang=en>)

<sup>60</sup> *Idem.*

and of legal actions.<sup>61</sup> In turn, for the Indigenous Peoples the agreements may positively redefine their relationships with the mining companies, and allow them to become partners and help maximize the impacts of the project.

91. The Guide states, consistent with that provided for in DS 040-2014, that an outline of the interests, plans, risks and opportunities of the company must be explained and understood with the full participation of the community, pointing out that long-term objectives should be established at the outset of the activities of the company.<sup>62</sup>

- b. Regarding the TSM standards

92. According to the same National Mining Association of Canada, hereinafter the Association, “The Canadian mining industry knows that there is a right way and a wrong way to operate. Doing it right builds trust among communities and decision-makers and reduces key business risks – both critical elements to the outcome of an extractive project.”<sup>63</sup>
93. It states that the business of mining carries great responsibility to the communities that surround operations and to the environment, stressing that sound corporate responsibility practices can help a mining company maintain its privilege to operate (emphasizing that for the Canadian mining companies, maintaining their privilege to operate also means working in association with community groups and civil society.)<sup>64</sup>

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<sup>61</sup> *Idem* (“Agreements”).

<sup>62</sup> *Idem* (“Tool 10 – Negotiation in good faith”).

<sup>63</sup> The Mining Association of Canada, *Corporate Responsibility*, (<https://mining.ca/our-focus/corporate-responsibility>), last accessed on March 16, 2022. As stated in the section on corporate responsibility of the Association's website. Free translation.

<sup>64</sup> *Idem* (section on “Corporate Responsibility,” sub-section on “Community”).

94. It states that a central component of the program is the Indigenous and Community Relationships Protocol (hereinafter the Protocol), which is designed to facilitate solid relations through effective processes of participation and decision-making, by further supporting indigenous participation through training, corporate development, employment, social investment and acquisitions.<sup>65</sup>
95. All of the foregoing is consistent with the text and in the spirit of DS 040-2014.
- c. Regarding the specific work of the specialists in community relations and social management
96. As the Ombudsman's Office explains, the holder of a concession may exercise their right of exploration and exploitation of natural resources, but first they must obtain the corresponding permits from the various competent entities, and they must also obtain the permission of the landowner or, alternatively, resort to a servitude via the administrative route.<sup>66</sup>
97. Accordingly, to ensure the rights to usage of communal land, extractive companies must obtain the prior agreement of the community or communities, or the governmental imposition of a servitude.<sup>67</sup> A prior agreement involves a deal directly between the company and the community, which is preferable as an initial agreement that is fundamental to the life of the project. The alternative of a government-imposed servitude is less desirable, since it involves forcing on a

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<sup>65</sup> *Idem* (section on "Protocols & Frameworks," sub-section on "Indigenous and Community Relationships").

<sup>66</sup> See **Ex. DV-0008**, Report No. 011-2009/AMASPPI-PPI, December 2009 (pages 83, 84 and 85, "El Derecho a la Propiedad y el Acuerdo Previo en el Peru."

<sup>67</sup> **Ex. DV-0009**, Supreme Decree No. 015-2003-AG, 7 May 2003, modifying articles of the of Rules of Article 7 of Law 26505, on the procedure for establishing a mining servitude (approved by Supreme Decree No 017-96-AG) (Articles 1, 2 and 3).

community a governmental decision that may not be wanted by the said community, all done at the behest of the company interested in fostering a constructive relationship with this community. Moreover, because the affected community is an indigenous one, the government-imposed servitude would have to be the subject to Prior Consultation.<sup>68</sup>

98. In addition to the above-mentioned agreement, there are other permanent agreements that must be reached with the communities throughout the life of an extractive project, and to that end the work of field specialists is vital.
99. In the opinion of the author, the process for the adoption of agreements aimed at establishing good neighborly relations between communities (particularly the rural and native communities) and extractive companies, necessarily entails the strategic involvement of field specialists. This is to build confidence between the various parties, more specifically between citizens (indigenous or non-indigenous) of the area of impact of the project.
100. As such, this community and institutional, and in any case communicative, work should be part of the basic daily routine, aimed at seeking to guarantee good relations with the area (in the social and environmental context).
101. When I refer to field specialists, I mean specialists in the areas of environmental and community matters, the area of government matters, and the area of communication, as well as all those areas where the work may involve contact with citizens connected (directly or not) with the project.
102. Every interaction count, and all workers and collaborators in an extractive company must be in a position to generate relationships of respect and

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<sup>68</sup> See **Ex. DV-0008**, Report Number 011-2009/AMASPPI-PPI, December 2009 (pages 83, 84 and 85, "*El Derecho a la Propiedad y el Acuerdo Previo en el Peru.*")

confidence in the project, in order to assist with enhancing the reputation of the company (principle of continuous improvement), with a view to building trust.

103. In the same vein, it must be emphasized that the *ad hoc* work of said specialists, in the opinion of the author, must be performed in a transversal and strategic manner as part of the performance of the following tasks:<sup>69</sup>

- Preparation of a Social Baseline Study, as preliminary work to be performed by any company wishing to carry out extractive activities.
- Community and institutional relations, as an ongoing task before, during, and even after, the development of an extractive project.
- Preparation of the Environmental Impact Study, as a mandatory legal requirement for the development of an exploration or exploitation project.
- Communications strategy deployment as an ongoing task (which must not be limited solely to the issuing of press releases and relations with the national, regional and local media, but must be understood as mentioned above as a basic daily task), in a way that seeks to ensure good relations with the area. This is a task which all workers and colleagues in an extractive company should be in a position to assist with, in the interests of generating relationships of respect and confidence in the project, and enhancing the reputation of the company (principle of continuous improvement), with a view to building trust.

104. All this proactive, transversal, and ongoing, work with a view to maximizing the quest for a sustained good neighborly relationship, must be led by field

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<sup>69</sup> Professional opinion based on my experience in the prevention and management of socio-environmental conflicts, and in a way that is consistent with the provisions of Supreme Decree No 040-2014-EM and reflecting the above-mentioned reference standards (ICMM and TSM).

specialists with experience of success in community and institutional relations and, as mentioned, communications in general.

105. Everything communicates: a no, a wave, a silence, a greeting, a scoff, an incoherent speech (contradiction between what is said and the facts), etc. That is to say that it is not only a case of verbal but also non-verbal language. This includes compliance with the obligations and undertakings, in respect of both the community and the authorities. A company that does not comply with its undertakings, will find it difficult to achieve good community relations.
106. It must have professionals with soft skills and a good sense of empathy and respect (for everyone and for everyone equally), at the same time as having the necessary self-confidence to intelligently manage high-pressure, conflict, and crisis situations.
107. And, above all, they must be people with a genuine vocation for intercultural dialogue, who and preferably know the area and the particular characteristics of its inhabitants. Similarly, the team of specialists must include persons who speak the original language of the area and if they were born or brought up there so much the better. Ultimately, this adds to the building of trust.

d. The Business Conduct of Invicta

108. Official documentation of the Peruvian State relating to the environmental and social conduct of the Invicta company shows multiple breaches by the company of its environmental obligations and, critically, in respect of the social management of its extractive project.
109. In fact, between 27 February and 4 March 2018, the Dirección de Supervisión Ambiental en Energía y Minas [*Directorate of Environmental Monitoring of Energy*

and Mining] (hereinafter, “DSEM”) carried out regular inspection of the Invicta project.<sup>70</sup> The inspection identified multiple breaches of the environmental legislation,<sup>71</sup> which led to an administrative sanctions procedure against Invicta on the grounds of environmental and social violations.<sup>72</sup> I refer to the conclusions of the decision rendered at the conclusion of this sanctions procedure.<sup>73</sup>

e. Environmental Breaches

110. According to its Environmental Impact Assessment (“EIA”), Invicta undertook a series of environmental obligations concerning the treatment of effluents from the mine, suitable disposal of residues resulting from the operation (deforestation), and suitable management and disposal of non-municipal domestic and non-hazardous industrial solid waste.<sup>74</sup>
111. According to the findings of the monitoring authority, Invicta has not adequately discharged these obligations.<sup>75</sup> For example, Invicta undertook to treat the effluents from the mine so that they meet the maximum limits of certain components in the water before being released into the natural water stream.<sup>76</sup> It

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<sup>70</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (paragraph 1).

<sup>71</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (paragraph 2).

<sup>72</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (paragraph 3) (*citing* Subdirectorial Resolution No 01118-2019-OEFA/DFAI/SFEM, of 17 September 2019, served on the subject on 19 September 2019).

<sup>73</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019.

<sup>74</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (Chapters III.1–III.3).

<sup>75</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019.

<sup>76</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (§ 26).

also envisaged keeping a daily record of the pH and flow rate of the effluent from the mine water treatment system in order to adjust the water treatment based on the changes in the effluent conditions.<sup>77</sup> The inspection at the site of the mine identified, however, that Invicta did not treat the drainage of effluents from the mine, with the consequent overflow into the environment of effluents containing higher than permitted levels of zinc.<sup>78</sup> It also confirmed that Invicta did not properly dispose of deforestation residues, nor did it properly dispose of the solid domestic and non-hazardous industrial waste, thereby breaching the environmental legislation.<sup>79</sup>

112. Invicta did not provide a defense for any of the allegations made against it in relation to the facts described above. This, despite being duly notified of the charges against it and having been guaranteed the right to present its arguments and to offer and produce evidence disproving or confirming the allegations leveled against it.

113. Social Breaches:

“The subject did not implement the community relations plan in the 2016 [and 2017] period, in relation to the following headings: (i) Program for hiring temporary local personnel; (ii) Health support and training activities; (iii) Educational support activities; and (iv) Workshops.”<sup>80</sup>

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<sup>77</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶ 18).

<sup>78</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 20-35).

<sup>79</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 42-44 and 61-67).

<sup>80</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (Chapters III.4 and III.5).

114. According to that stated by the DSEM in the Inspection Report, Invicta made the following social commitments in the context of its EIA:<sup>81</sup>

- a. “to hire local labor from the populations directly impacted by the project, provided they are technically qualified and are channeled through the Municipality;”<sup>82</sup>
- b. “to provide training activities for the community leaders; carrying out improvements to the infrastructure and equipment; and conducting campaigns for the prevention and control of Leishmaniasis and on health and nutrition topics in the communities [within the area of direct impact of the project (Lacsanga, Parán and Santo Domingo de Apache) (“ADI”)];”<sup>83</sup>
- c. “to conduct support or improvement activities for the local education services, equipment for local education, school campaigns, teacher training, and environmental education activities in the communities [included] in the ADI;”<sup>84</sup> and
- d. “to conduct support activities for sustainable development, through participatory development workshops or alliances with the communities

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<sup>81</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 76 and 77).

<sup>82</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶77.a).

<sup>83</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶ 77.b).

<sup>84</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶ 77.c).

in the three (3) communities of the [ADI], as stated in its environmental management document;”<sup>85</sup>

115. In the context of the inspection process, the DSEM requested that Invicta provide documentation demonstrating compliance with the undertakings identified in the previous paragraph, and interviewed various members of each of the three communities in the ADI.<sup>86</sup>
116. After interviewing the directors of each of the communities, the DSEM advised that approximately 60 people from the community of Santo Domingo were working temporarily on improving the project access road. However, the directors of the rural Parán Community and of the rural community of Santo Domingo de Apache claimed that they had not been asked to provide a list of members of the community who could be hired on a temporary basis for the project.<sup>87</sup>
117. The DSEM, for its part, found that Invicta had not carried out the health support and training activities committed to in its EIA. Neither did Invicta carry out training activities for the community leaders, or made any progress regarding activities to improve infrastructure and equipment, or with prevention and

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<sup>85</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶ 77.d). Invicta gained approval for its EIA in 2009, with the resolution approving the EIA stating that the area of direct impact of the project included the communities of Lacsanga, Santo Domingo and Parán.

<sup>86</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 81, 100).

<sup>87</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 81, 100).

control campaigns for Leishmaniasis, or health and nutrition campaigns in the communities of the ADI in the period assessed (i.e. 2016 and 2017).<sup>88</sup>

118. The DSEM advised that neither did Invicta furthered the educational support activities that it committed to, including improving the education services and equipment, school campaigns, teacher training, and environmental education, in any of the three communities of the ADI in the period assessed (2016 and 2017).<sup>89</sup>
119. Finally, the DSEM came to the same conclusion with regard to the absence of the participatory sustainable development workshops with any of the three communities of the EIA during the same period assessed (2016 and 2017).<sup>90</sup>
120. Ultimately, based on the foregoing analysis the DSEM determined that, during the period assessed, Invicta failed to implement what it undertook in its community relations plan in relation to four of the commitments made therein: (i) the program for hiring temporary local personnel; (ii) the activities to support and improve services, health equipment and health and nutrition campaigns; (iii) actions to support and improve services, educational equipment, school campaigns, teacher training and environmental education activities; and (iv) the activities for supporting sustainable development through participatory development workshops or alliances with the communities.<sup>91</sup>

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<sup>88</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 91, 111).

<sup>89</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 83, 102).

<sup>90</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 139, 143).

<sup>91</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 29, 51, 68, 87 and 106) for the attributed facts 1, 2, 3, 4 and 5, respectively.

121. Invicta has not provided a defense for any of the allegations made against it in relation to the facts described above,<sup>92</sup> limiting itself where necessary to stating that it was impossible to implement corrective measures proposed by the DSEM due to the blocking of the site access road.<sup>93</sup>
122. On 14 January 2020, Invicta filed an appeal against Resolution 02050-2019-OEFA/DFAI, but did not contest the breach of social obligations. The sanction in relation to this breach was confirmed by means of Resolution No 158-2021-OEFA-TFA-SE, of the Environmental Control Court (hereafter the Control Court), issued on 25 May 2021.<sup>94</sup>

f. Other Environmental and Social Breaches by the Invicta Project

123. The OEFA website provides access to information on companies which have breached the environmental legislation. OEFA's Interactive Environmental Control Portal (known as PIFA) provides a link to those subject to sanctions,

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<sup>92</sup> **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 84, 103).

<sup>93</sup> The first letter of defense was submitted by Invicta on 27 November 2019, while the second letter was submitted on 6 December 2019. **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (Recitals 6 and 7). It was recently, in the context of the administrative sanctioning process, that Invicta acknowledged – after more than a year since the blockade – that it was necessary to redefine its community relations and social responsibility policies with the parties in the area of impact of the project, with the aim of “restoring the channel of communication and resuming dialogue in the area.” **Ex. R-0062**, Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019 (¶¶ 30, 52, 69, 88, 107, 121).

<sup>94</sup> **Ex. DV-0010**, Resolution No. 158-2021-OEFA-TFA-SE, 25 May 2021 (pages 49 and 50) (The resolution of the Control Court revoked the sanctions relating to the environmental breaches based on technical considerations relating the motivation, classification and methodology of calculation of the penalties applied. Nevertheless, it did not ignore or detract from the fact and the existence of such breaches).

where information can be found on the cases, breaches and sanctions applied to the company in breach.<sup>95</sup>

124. A search therein for the 'Unidad Minera Invicta' yields a host of environmental and social breaches by the company in addition to those described above. The reiteration of breaches and the times when those were identified, investigated and penalized suggest a strong correlation with the opposition of the rural Parán Community to the Invicta project, and lend credibility to the obvious concern of the Parán Community about a perceived deterioration of the environment associated with the mining project.
125. Listed below are a number of environmental and social breaches that have been subject to sanctions and which can be found on the OEFA's Environmental Control Portal:
- Breach: "Performing exploration work without the authorization of the rural community of Santo Domingo de Apache to use the land surface."<sup>96</sup>
126. Although not involving the rural community de Parán, the gravity of the breach, and above all, the time when this took place (which must have been at the start of Invicta's activities), is definitely a factor in the dismal start to Invicta community relations, and constitutes a very poor reputational benchmark for the start of its activities, of which the other communities (such as the rural Parán Community) would be aware of and alert to.

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<sup>95</sup> Ex. DV-0013, OEFA, "*Portal Interactivo de Fiscalización Ambiental*," (last accessed 16 March 2022) giving an account of 26 breaches resulting in sanctions against Invicta.

<sup>96</sup> See in: <https://publico.oefa.gob.pe/administrados-sancionados/>, reference to Resolution 0116-2011-OEFA/DFSAI, of 9 December 2011 (subsequently confirmed by the Environmental Control Court, at the second and final administrative instance), issued in Case No 0029-2011-DFSAI/PAS.

- Breach: “The subject did not submit to the OEFA water quality, air, and noise monitoring reports for the Invicta unit to be monitored for the first, second and third quarters of 2018, in breach of its environmental management document.”<sup>97</sup>
127. Although the case and the sanction are from 2019, with access to the mining unit already blocked, they refer to breaches corresponding to at least two periods prior to the blocking of the mining unit (that is, to the first and second quarter of 2018). This breach was extremely serious, involving highly sensitive issues such as the water, air and noise components, and portrays a very negative image of the company to the communities located within the area of impact of the project.
- Breach: “The subject did not perform periodic maintenance of the channels for the ‘Invicta’ project.”<sup>98</sup>
128. This was also a highly sensitive breach due to the importance of proper management of the effluents from the mine.
- Breach: “Invicta Mining has exceeded the Maximum Permissible Limits for metallurgical mining effluents in respect of the total cadmium, total copper and total zinc parameters at the MEF-01 control point.”<sup>99</sup>
129. This is a new breach, the consequences of which could include contamination of the natural water streams in the area.

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<sup>97</sup> See in: <https://publico.oefa.gob.pe/administrados-sancionados/>, reference to Resolution No 1699-2019-OEFA/DFAI, of 29 October 2019, issued in Case No 0069-2019-OEFA/DFAI/PAS.

<sup>98</sup> See in: <https://publico.oefa.gob.pe/administrados-sancionados/>, reference to Resolution No 1924-2018-OEFA/DFAI, of 24 August, 2018, issued in Case No 0878-2018-OEFA/DFAI/PAS.

<sup>99</sup> See in: <https://publico.oefa.gob.pe/administrados-sancionados/>, with reference to **Ex. R-0074** (Resolution No 2203-2018-OEFA/DFAI, of 27 September 2018, issued in Case No 1629-2018-OEFA/DFAI/PAS).

g. Regarding the importance of the letter from the Environmental Defense and Promotion Front for the districts of Leoncio Prado, Paccho, Sayán and Ihuari, in the provinces of Huaura and Huaral

130. From as early as 2011, the rural communities located within the area of impact had contested the EIA for the Invicta project, expressing serious concerns about the negative impact that the project would have on the environment and their quality of life.
131. Indeed, in September 2011, the members of the Environmental Defense and Promotion Front for the districts of Leoncio Prado, Paccho, Sayán and Ihuari, in the provinces of Huaura and Huaral submitted to the Peruvian Ministry of the Environment an administrative complaint against the approval of the EIA from the Invicta company.<sup>100</sup>
132. This letter demonstrates the legitimate concern of the environmental advocates in the districts within the area of impact of the Invicta mining project with respect to the start of its activities, associating these with likely environmental damage. This letter specifically states that the population most disadvantaged would be the rural Parán Community.
133. In particular, said letter states that the Invicta project “poses a threat to access to water sources by the agricultural producers in the area, in particular by the rural Parán Community,”<sup>101</sup> and expresses serious misgivings about the poor process

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<sup>100</sup> **Ex. R-0071**, Letter sent to the Environment Minister (R. Giesecke) by the Environmental Defense and Promotion Front (A. Román) on 7 September 2011, entering an Administrative Complaint against the approval of the EIA from the mining company Invicta Mining Corp. S.A.C.

<sup>101</sup> **Ex. R-0071**, Letter sent to the Environment Minister (R. Giesecke) by the Environmental Defense and Promotion Front (A. Román) on 7 September 2011, entering an Administrative Complaint against the approval of the EIA from the mining company Invicta Mining Corp. S.A.C. (page 1).

of information and consultation that Invicta was legally obligated to implement with the communities located within the area of impact of the project.<sup>102</sup>

134. That is to say that since 2011 there already existed a legitimate concern of the communities that the Invicta project would affect the availability of water downstream for human consumption and agricultural production, thereby harming thousands of families and agricultural producers. In particular, the letter advises that the project “threatens to deplete the existing water sources,”<sup>103</sup> pointing out that the EIA itself acknowledges the lasting impact on underground water sources supplying the springs, and notes that the permanent surface water sources will also be affected as they will be diverted, and this diversion may also affect the flow of the water springs downstream.<sup>104</sup> As said document points out, “The economic impact of this disruption will be considerable for the inhabitants of Parán.”<sup>105</sup>
135. For the reasons set out in said letter, the leaders signing it instruct that a conflict had already arisen, warning also of a possible scenario of social confrontation which, as they themselves point out, must be avoided. They argue that the agricultural enterprise in its valley is at risk, and that they have already conveyed their concern to the regional and local authorities, which is why they were now approaching the environment minister.

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<sup>102</sup> *Idem* (page 4).

<sup>103</sup> *Idem* (page 2).

<sup>104</sup> *Idem* (page 3).

<sup>105</sup> **Ex. R-0071**, Letter sent to the Environment Minister (R. Giesecke) by the Environmental Defense and Promotion Front (A. Román) on 7 September 2011, entering an Administrative Complaint against the approval of the EIA from the mining company Invicta Mining Corp. S.A.C.

136. Despite the existence of a legitimate environmental concern and of the alert of of conflict and confrontation from the start of the mining project, regrettably the company - as we have seen thus far - did not conduct itself with due diligence in guiding and performing its activities with proper social and environmental responsibility.
137. It is evident that since 2011, the rural leaders of the districts in the area of impact of the mining project have been expressing their disquiet about Invicta's community relations.

**B. The report from the Ombudsman's Office**

138. According to the Ombudsman's Office in its Conflicts Report,<sup>106</sup> a meeting was held on 26 February 2019, with representatives of the Invicta mining company and of the rural Parán Community, mediated by the OGGs MINEM. As the Ombudsman's Office expressly states, as a result of this meeting it was agreed that the representatives of the rural Parán Community would submit for consultation at its General Assembly of 2 March 2019, the decision to suspend the protest preventing access to the mining unit.<sup>107</sup>
139. Similarly, the Ombudsman's Office states that it has taken cognizance that the General Assembly of the Parán Community agreed to suspend the protest and that access to the mining unit by the company be provided solely and exclusively via the road from this community.<sup>108</sup>

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<sup>106</sup> **Ex. R-0109**, Reference Summary of Ombudsman's Office Report No. 177 on Social Conflicts, November 2018 (page 3).

<sup>107</sup> **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C. and MINEM, 26 February 2019.

<sup>108</sup> **Ex. R-0109**, Reference Summary of Ombudsman's Office Report No. 177 on Social Conflicts, November 2018 (page 3).

140. Moreover, the Ombudsman's Office states that "based on liaison and meetings between MININTER and MINEM, the parties agreed to hold a meeting on 1 April, in the district of Sayán. So, on this date, the rural Parán Community, MINEM, DIPRESGESCON, the Sub-prefect of Huaura and the PNP Colonel, Huacho Division, met in the absence of the company." The Ombudsman's Office reports that the rural Parán Community confirmed its readiness for dialogue, and given the non-attendance of the Company, placed on record in the minutes its request for closure of the mining unit.<sup>109</sup>
141. It also reports as follows: "On May 14, 2019, a confrontation occurred involving firearms in the entrance area of the mining site of the Invicta mining company. This confrontation was between approximately 50 private security guards, presumably hired by the Invicta mining company, and around 100 inhabitants of the rural Parán Community."<sup>110</sup>
142. As a result of this confrontation, a purported private security guard died from an acute hemorrhage caused by chest trauma inflicted by a firearm. Likewise, there is information that 11 people were arrested by forces from the Sayán road traffic police, and that on 15 May they were moved to the facilities of the Public Prosecutor of Huaura Province, located in Huacho city.<sup>111</sup>
143. Both the deceased and those detained were private security guards. There is no record of any member of the community being injured. At the request of the president of the rural community, the Department for Social Management and

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<sup>109</sup> **Ex. R-0109**, Reference Summary of Ombudsman's Office Report No. 177 on Social Conflicts, November 2018 (page 3).

<sup>110</sup> **Ex. R-0109**, Reference Summary of Ombudsman's Office Report No. 177 on Social Conflicts, November 2018 (page 3).

<sup>111</sup> **Ex. R-0109**, Reference Summary of Ombudsman's Office Report No. 177 on Social Conflicts, November 2018 (page 3).

Dialogue of the Office of the Chairman of the Council of Ministers, together with the General Social Management Office of the MINEM, called a working meeting, with the participation of MININTER, SGSD-PCM, MEM, the Ombudsman's Office and the rural communal board, which took place on Monday, 20 June at the offices of the MEM.<sup>112</sup>

144. At this meeting the community directors stated the firm intention of the population to seek the removal of the mine from their locality, indicating that it was impossible to maintain opportunities for dialogue since the company did not take part in the latest meeting scheduled for 1 April, and that the latest confrontation was a sign of hostility on the part of the company.<sup>113</sup>
145. During the meeting, and as a result of questions and comments by the representatives of the sectors and the Ombudsman's Office, the community expressed its intention to consult with the General Assembly on the possibility of maintaining its readiness to keep open an opportunity for dialogue with the company on the following points: 1) it was requested that certain local representatives of the mining company be removed, as it was considered that they were causing friction in relations and possibilities for dialogue between the community and the company, and 2) execution of a Framework Agreement between the rural Parán Community and the Invicta mining company on the same terms as those entered into with the other communities in the area of impact of the mining company.<sup>114</sup>

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<sup>112</sup> **Ex. DV-0011**, Letter No. 275-2019-MEM/OGGS, 8 May 2019.

<sup>113</sup> **Ex. R-0109**, Reference Summary of Ombudsman's Office Report No. 177 on Social Conflicts, November 2018 (page 4).

<sup>114</sup> **Ex. R-0109**, Reference Summary of Ombudsman's Office Report No. 177 on Social Conflicts, November 2018 (page 4).

146. On 4 June, the rural Parán Community submitted official letter No 11-2019-CPP to the Minister of Energy and Mines, in which it stated that as a result of the General Assembly held on 25 May, the community voted by a majority to request the final closure of the Invicta Mining Corp project.”<sup>115</sup>
147. As we can see, important facts reveal the inadequate management of the conflict by the Invicta company, as well as actions that demonstrate its scant regard for community relations in general.

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148. This opinion is based on my professional experience, acquired in various areas of social conflict, and I certify that its content is true to the best of my knowledge and belief.

  
Daniel Vela Rengifo  
Date: 22 March 2022

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<sup>115</sup> **Ex. R-0109**, Reference Summary of Ombudsman’s Office Report No. 177 on Social Conflicts, November 2018 (page 4).

## Expert Report from Daniel Vela Rengifo:

### Table of Annexes

<u>Title and Date</u>	<u>Exhibit No.</u>
Political Constitution of Peru, 1920.	<b>DV-0001</b>
Political Constitution of Peru, 1933.	<b>DV-0002</b>
Political Constitution of Peru, 1979.	<b>DV-0003</b>
Ministry of Justice and Human Rights, <i>“Compendio normativo y jurisprudencial sobre los derechos de los pueblos indígenas, comunidades campesinas y nativas,”</i> 2013.	<b>DV-0004</b>
Report No. 002-2018-AMASPPI-PPI, 2018.	<b>DV-0005</b>
Peru’s Society of Environmental Law (SPDA), <i>Manual de Legislación Ambiental</i> , 2010.	<b>DV-0006</b>
Proceeding No. 01126-2011-HC/TC, F.J. 21, 11 September 2012.	<b>DV-0007</b>
Report No. 011-2009/ AMASPPI-PPI, December 2009.	<b>DV-0008</b>
Supreme Decree No. 015-2003-AG, 7 May 2003.	<b>DV-0009</b>
Resolution No. 158-2021-OEFA-TFA-SE, 25 May 2021.	<b>DV-0010</b>
Letter No. 275-2019-MEM/OGGS, 8 May 2019.	<b>DV-0011</b>
Ministry of Cultures, <i>Collective Rights of Indigenous and Native Communities</i> , June 2016.	<b>DV-0012</b>
OEFA, <i>“Portal Interactivo de Fiscalización Ambiental”</i> , last accessed 16 March 2022.	<b>DV-0013</b>
Legislative Resolution No. 26253, 26 November 1993.	<b>DV-0014</b>