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International Centre for Settlement of Investment Disputes
(ICSID)

LUPAKA GOLD CORP.
Claimant,

v.

REPUBLIC OF PERU,
Respondent.

ICSID CASE No. ARB/20/46

Republic of Peru's Memorial on Jurisdiction and Counter-Memorial on Merits

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24 March 2022

Arnold&Porter

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GLOSSARY

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

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

Term	Description
CSR	Corporate social responsibility
DEAR	Directorate of Environmental Assessment for Natural and Productive Resource Projects
Decentralization Framework Law	Peruvian Law No. 27783, which initiated an ongoing process of decentralizing the central government within Peru
DFAI	Directorate of Inspection and Application of Incentives
DGOP	General Office of Public Order
Dialogue Table(s)	Formal process of negotiation led by government representatives to promote dispute resolution, referred to as "*Mesa de Diálogo*" in Spanish
EIA	Environmental impact assessment
El Misti	El Misti Gold S.A.C.
Environmental Mining Regulation	Peruvian Supreme Decree No. 040-2014-EM, which provides the definition for the areas of influence of mining activity in Peru
ESEMO	Environmental Supervision for Energy and Mines Office
ESG	Environmental, social, and governance practices
Frente de Defensa	*Frente de Defensa del Medio Ambiente y Promoción de los Distritos Leoncio Prado, Paccho, Sayán e Ihuarí de las provincias de Huaura y Huaral*

Term	Description
General Mining Law	Peruvian Supreme Decree No. 014-92-EM, which governs all mining activities within Peru
Hochschild	Hochschild Mining PLC
ICMM	International Council on Mining and Metals
ICMM Good Practice Guide	International Council on Mining and Metals "Good Practice Guide: Indigenous Peoples and Mining", which highlights the specific duties of mining companies in relation to indigenous and rural communities
ILC	International Law Commission
ILC Articles	ILC Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts
ILC Commentary	ILC Commentary on the ILC Articles
ILO Convention 169	International Labor Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169)
INGEMMET	Mining and Metallurgical Geological Institute
Invicta Mine	The base of activities and infrastructure developed by Lupaka in the Victoria Uno concession area
Invicta or IMC	Invicta Mining Corp., a Peruvian subsidiary of Lupaka

Term	Description
Invicta Project or Project	Mining project developed by Invicta located within the bounds of the Victoria Uno concession
Lacsanga Community	Rural community of Lacsanga
Lonely Mountain	Lonely Mountain Resources S.A.C.
Lupaka or Claimant	Lupaka Gold Corp.
Mallay Community	Rural community of Mallay
Mallay Plant	Mallay processing plant
MEF	Ministry of Economy and Finance of the Republic of Peru (*Ministerio de Economía y Finanzas de la República del Perú*)
MINAM	Ministry of the Environment (*Ministerio del Ambiente*)
MINAR	Ministry of Agriculture and Irrigation (*Ministerio de Agricultura y Riego*)
Mine Closure Law	Peruvian law No. 280990, which governs the requirements for mine closure
MINEM	Ministry of Energy and Mines of the Republic of Peru (*Ministerio de Energía y Minas de la República del Perú*)
MINEM Organizational Decree	Peruvian Supreme Decree No. 021-2018-EM OGGS, which implemented dialogue as the key method for conflict management and resolution

Term	Description
MININTER	Ministry of Interior (*Ministerio del Interior*)
Ministry of Justice	Ministry of Justice and Human Rights of the Republic of Peru (*Ministerio de Justicia y Derechos Humanos de la República del Perú*)
Mutual Release Agreement	Mutual Release Agreement between Claimant and PLI Huaura, wherein PLI Huaura agreed to release Claimant for its liability under the PPF Agreement
OEFA	Organization of Supervision and Environmental Assessment (*Organismo de Evaluación y Fiscalización Ambiental*)
OGGS	General Office of Social Management (*Oficina General de Gestion Social*) within the MINEM
Operational Plan	The Peruvian National Police's plan for the removal of the Access Road Protest in the event forceful intervention became legal and necessary
Osinergmin	The Supervisory Agency for Investment in Energy and Mining (*El Organismo Supervisor de la Inversión en Energía y Minería*)
Pacacorral	Minera Pacacorral S.A.C.
Pandion	Pandion Mine Finance LLC
Pangea	Pangea Peru S.A.
Parán Community	Rural community of Parán
PCM	Presidency of the Council of Ministers (*Presidencia del Consejo de Ministros*)

Term	Description
PEA Mine Plan	Six-year mine plan which is contemplated in the2018 PEA and which uses a 4.0g/t AuEq cut-offgrade
PERCAN	Peru-Canada Cooperation Program (*Proyecto de Reforma del Sector de Recursos Minerales del Perú*)
Pledge Agreement	Agreement between PLI Huaura, Claimant's subsidiary, AAG, Claimant's director, Gordon Ellis, and Invicta wherein AAG and Mr. Ellis pledged their shares in Invicta as security to PLI Huaura for the amounts provided by PLI Huaura to Invicta under the PPF Agreement, dated 2 August 2016
PLI Huaura	PLI Huaura Holdings LP
PNP	Peruvian National Police (*Policía Nacional del Perú*)
PPF Agreement	Pre-Paid Forward Gold Purchase Agreement entered into between Lupaka and PLI Huaura on 30 June 2016 and subsequently amended on 2 August 2017
Prior Consultation Law	Peruvian Law No. 29785, which requires consultation with indigenous and native communities as part of Peru's decision-making process when passing legislation that may directly impact those communities
Resolution No. 158	Peruvian Resolution No. 158-2021-OEFA-TFA-SE, which sanctioned Invicta for breaching its social obligations with the Rural Communities
Rural Communities	The rural communities within the Invicta Project's area of direct influence—the Santo Domingo de Apache, Lacsanga, and Parán communities
Rural Communities Law	Peruvian Law No. 24656, which details the status and rights of Peruvian rural communities
Rural Communities Regulation	Peruvian Supreme Decree No. 008-91-TR, which outlines Peruvian rural communities' status and rights

Term	Description
Santo Domingo de Apache Community	Rural community of Santo Domingo de Apache
SENACE	National Environmental Certification Service for Sustainable Investments
Simco	The Peruvian Ombudsman's Office's conflict management system
Social Management Plan	The portion of an EIA that establishes the strategies that mining operators will take to avoid, mitigate, or compensate any negative social impacts of its activity, and to maximize the positive social impacts of the mining activity on the project's respective area of direct influence
Social Responsibility Affidavit Law	Peruvian Supreme Decree No. 042-2003-EM, which established a framework that would allow mining companies to manage the environmental and social impacts of their mining project on local communities
SRK	SRK Consulting (Canada) Inc.
t/d	Tonnes per day
Third ITS	The third supporting technical report to Invicta's Environmental Impact Assessment submitted by Invicta on 29 August 2018
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
Victoria Uno Concession	The mining concession where the Invicta Mine is located

Term	Description
Vienna Convention	Vienna Convention on the Law of Treaties
War Dogs	War Dogs Security S.A.C.
Water Authority	Huaura Local Water Authority

I. INTRODUCTION

A. Overview

1. Lupaka Gold Corp. ("**Claimant**") lost its investment in Peru due to its own failure to obtain and maintain support from a local rural and indigenous community in the direct area of influence of its mining project, namely the Parán rural community ("**Parán Community**"). Claimant marginalized the Parán Community and ignored that Community's concerns, including in respect of the environmental impact of Claimant's mining project, which were expressed well before, and following, Claimant's acquisition of its investment. The net result was a highly charged and volatile social conflict between Claimant and the Parán Community, which disrupted Claimant's operations and harmed Claimant's investment. That outcome, however, was exclusively Claimant's fault. It was Claimant that mismanaged the critical relationship with the Parán Community, which ended up having a fatal adverse effect on Claimant's ability to develop its mining project.

2. Indeed, Claimant disregarded the critical importance of securing harmonious relations with local communities. The need to establish such relations—and the risks that may arise from a failure to do so—are well-established in the mining industry and are reflected both in corporate social responsibility ("**CSR**") principles and industry practices. At the core of such principles and practices is the concept of a "social license" to operate, which requires, inter alia, empowering local communities and creating a constructive relationship with such communities. As any responsible and experienced mining operator anywhere in the world knows, obtaining a social license is fundamental to the viability of a mining project; without it, a mining project will likely face severe disruption, and may ultimately fail—as in fact occurred in the present case.

3. In the Republic of Peru ("**Peru**"), the CSR principles and inherent risks stemming from a failure to build and secure amicable community relations are well known to any mining sector operator that has experience there, or that conducts adequate due diligence. Claimant knew or should have known of such risks, and should have acted

accordingly. Instead, Claimant failed to live up to its responsibilities to the communities in the area of its mining project, and manifestly mismanaged its community relations. Having lost its investment as a result of that, and of the foreseeable backlash from the Parán Community in response to Claimant's conduct, Claimant is now attempting to transfer to Peru the consequences of Claimant's own conduct, improperly seeking to use the Treaty as an insurance policy. The failure of Claimant's investment could have been avoided if Claimant had properly understood the context in which it made its investment, and acted in accordance with Peruvian legislation, its CSR obligations towards the local communities, and best practices in the mining industry.

4. As this Counter-Memorial will show, a number of different State agencies in Peru made extensive and relentless efforts to assist Claimant throughout the latter's dispute with the Parán Community, acting with due diligence in order to mediate a long-term solution to the problems that either Claimant itself had created, or at the very least of which it was aware prior to investing and neglected thereafter. Peru's reaction to the dispute between Claimant and the Parán Community was reasonable, even-handed, taken in accordance with due process, and based on sound principles of Peruvian law and practice in relation to the peaceful management of disputes between mining operators and rural communities.

5. Despite Peru's best efforts to mediate a resolution of Claimant's conflict with the Parán Community, Claimant failed to take a constructive approach to negotiations with that Community. Instead of peaceful dialogue, Claimant made repeated demands for forceful intervention from the Peruvian Government and resorted to the use of force and violence by engaging and deploying a private security company called War Dogs Securities S.A.C ("**War Dogs**"). In taking this combative approach, Claimant was evidently driven by its desperate attempt to meet an ambitious and optimistic financing schedule to which it had committed itself with its lender, PLI Huaura Holdings LP ("**PLI Huaura**"), a schedule that left no margin for any contingency, let alone one as delicate and sensitive as developing and maintaining an adequate relationship with the relevant local communities. Boiled down to their essence,

Claimant's claims in this arbitration are predicated on a single principal fact: that Peru declined to use physical force to intervene in Claimant's social conflict with the Parán Community.

6. Ultimately, Claimant's stance with respect to the Parán Community cost Claimant its investment. Having abandoned negotiations with that Community, Claimant was unable to secure a resolution of the dispute, which in turn prevented it from restarting operations, which in turn caused it to default on its obligations under its financing arrangements. PLI Huaura then enforced its security over Claimant's shares in Invicta Mining Corporation ("**Invicta**"), as a result of which Claimant had to transfer such shares to PLI Huaura on 26 August 2019, thereby losing its investment.

7. The central argument and premise of Claimant's case is that Peru should have used overwhelming police force against an indigenous and rural community that was concerned about the environmental, economic, and social impact of the mining project on the Community's territory and people, and that expressed its opposition to Claimant's project by blocking access to the Invicta mine site ("**Invicta Mine**"). Peru responded to that social conflict in accordance with its local laws, policies, and international norms. Principally, it relied on dialogue to broker a long-term, sustainable solution to the conflict between Claimant and the rural community. The use of force not only was unjustified and would have been inconsistent with Peruvian law and policy, but it also would have been counter-productive, as it surely would have aggravated rather than resolved the dispute, rendering the mining project unviable.

B. Summary of key facts

8. Peruvian mining projects have a longstanding and well-known history of social conflict between local communities (including rural and indigenous communities), on the one hand, and investors, on the other hand. In order to avoid and manage the sometimes violent opposition from local communities to extractive industry activities in their vicinity, Peruvian law—and indeed international law and industry practices—emphasize the importance of the obtainment by mining operators of local community

support before the exploitation phase of a project can begin. Failure to obtain or maintain support from the local communities can generate significant risks to the project.

9. Claimant has previously overseen two failed mining projects in Peru in addition to its third mining project, the project operated by Invicta in the Huaura province of Peru ("**Invicta Project**"), which it acquired through its acquisition of Invicta, a Peruvian-incorporated company. When Claimant invested in the Invicta Project, it was aware (or at least ought to have been aware) of the risks that could arise if it failed to secure a harmonious relationship with the local rural communities that could be affected by the project. Indeed, Claimant invested in Invicta in the full knowledge of the significant strain that had already existed for several years in the relations between Invicta and all of the rural communities that would potentially be affected by the project. Specifically, Claimant knew, and even acknowledged,[1] that (i) there were three rural communities in the area of direct influence of the mine, namely the Parán Community, the Lacsanga rural community ("**Lacsanga Community**") and Santo Domingo de Apache rural community ("**Santo Domingo de Apache Community**") (together, "**Rural Communities**"); and (ii) the support of all three Rural Communities would be crucial for the project to successfully proceed to the exploitation phase. Not only was that support required as a practical matter and in accordance with industry practice, it was also legally required under Peruvian law. Such law mandates that mining companies consult with rural communities within their direct area of influence, and that they secure and maintain harmonious relations with such communities.

10. Despite being well aware of the need, and indeed obligation, to consult with the Rural Communities and obtain their support, Claimant failed to take the requisite steps to

[1] **Ex. R-0041**, Joint Disclosure Booklet between Lupaka Gold Corp. and Andean American Gold Corp., 22 August 2012 ("**Joint Disclosure Booklet**"), p. A-3 ("Invicta has a surface rights agreement with the community of Santo Domingo de Apache covering all aspects of mine development, mineral processing and infrastructure. Negotiations regarding surface rights agreements are ongoing with the communities of Paran and Lacsanga as agreements with all three communities are required to initiate construction and operation of a mine.").

accomplish that, and indeed adopted many measures that antagonized those Communities (especially the Parán Community). For example, it made certain commitments to those communities that it then reneged on. In part for those reasons, Claimant never obtained the all-important social license to operate that is widely recognized within the mining industry—and indeed international investment law—as a requirement for a mining project to get off the ground. As the tribunal in *Bear Creek v. Peru* noted:

> Even though the concept of "**social license**" is not clearly defined in international law, all relevant international instruments are clear that **consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities**.[2] (Emphasis added).

11. Claimant failed to secure such consent from the Parán Community, and accordingly never obtained the all-important social license.

12. Claimant exacerbated matters by exposing itself to risky project financing arrangements that left close to zero margin for error in the event that it did not promptly obtain the support of the Rural Communities. Claimant entered into such financial arrangements in 2016 in the form of a PPF Agreement with PLI Huaura. Pursuant to the PPF Agreement, Claimant undertook to advance the Invicta Project to the exploitation phase within fifteen months of receiving the first tranche of funding from PLI Huaura. Claimant knew or should have known that such an ambitious timeline would be unachievable if the Project were to be disrupted by any failure by Claimant to comply with essential requirements and achieve key milestones, such as obtaining adequate support from the Rural Communities.

13. In an effort to "fast-track" its Project, so that it could accommodate its tight project finance schedule, Claimant decided as a strategic matter to prioritize its relationships with the Lacsanga and Santo Domingo de Apache Communities over its relationship with the Parán Community, thereby driving a wedge not only between Claimant and

[2] **CLA-0086**, *Bear Creek Mining Corp. v Republic of Peru*, ICSID Case No. ARB14/21, Award, 30 November 2017, (Bockstiegel, Pryles, Sands) ("***Bear Creek* (Award)**"), ¶ 406.

the Parán Community, but also between and amongst the Rural Communities. Claimant made that strategic choice after concluding that it no longer needed access to the Project through Parán Community territory. Claimant thus pursued, and ultimately secured, agreements with the Lacsanga and Santo Domingo de Apache Communities, having deemphasized its efforts to reach a similar agreement with the Parán Community. Claimant thus disregarded the Parán Community, even though the latter was within the area of direct influence of the Invicta Mine.

14. Claimant made matters worse by ignoring the concerns of the Parán Community about the environmental impacts of the Invicta Mine—which included concerns over potential contamination of the Community's water sources—and refused to co-operate with the authorities in the investigation of such issues.[3]

15. These and other oversights and strategic blunders proved to be fatal in the end for Claimant's Project, as will be explained in detail herein.

16. In response to Claimant's dismissal of the Parán Community's concerns, and to Claimant's decision not to engage with it, the Parán Community decided to take certain protest actions against the Invicta Project. Such actions included mainly (i) staging a protest at the mine site on 19 June 2018 ("**19 June 2018 Protest**"), and (ii) erecting a civilian blockade in October 2018, which blocked the main access road to the mine ("**Access Road Protest**"). It is these actions, adopted by the local community to express its opposition to Claimant's mining project, that form the basis of Claimant's case in the present arbitration.

17. Peru took diligent and reasonable actions in relation to these protest activities. It mobilized a wide array of State agencies to investigate the 19 June 2018 Protest and Access Road Protest, and to mediate the conflict between Claimant and the Parán Community. Such agencies included, amongst others, (i) the General Office of Social

[3] **Ex. R-0080**, ANA, Record of Field Technical Verification, 7 May 2018, (which records that the Water Authority requested Claimant's permission to test the water sources on the Project site, but Claimant refused to grant the requested access because the relevant officials allegedly lacked requisite permits and insurance).

Management ("**OGGS**"), a division of the Ministry of Energy and Mines ("**MINEM**"), which had been established specifically to address social conflicts between mining companies and local communities; (ii) The Peruvian National Police ("**PNP**"), and its local police forces in Huacho and Sayán; (iii) the Ministry of Interior of the Republic of Peru ("**MININTER**"); (iv) the Public Prosecutor's Office; (v) the PCM; and (vi) the Ombudsman's Office (*Defensoría del Pueblo*). In line with the relevant legal framework, longstanding policy, and indeed common sense (given the history of violent social conflict in Peru), the various Peruvian State agencies that became involved in Claimant's conflict prioritized dialogue over the use of force.

18. Peru's numerous efforts to assist Claimant included meeting with the Parán Community separately on multiple occasions to encourage the Community to cease its protest measures, and to rely instead on productive dialogue and mediation processes to resolve its disagreements with Claimant. Peru also facilitated, coordinated, and/or hosted numerous meetings between Claimant and the Parán Community to foster an environment in which they could reach an agreement to resolve their differences. Further, in September 2018, Peru deployed a sizeable number of police officers in anticipation of a planned Parán Community protest at the Invicta Mine. With such mobilization, which did not involve any use of force, Peru defused the situation, as the relevant police units—assisted by certain regional government agencies—managed to persuade the Parán Community members not to stage the protest. Peru thereby avoided a potentially violent confrontation between the members of that Community and Invicta representatives. This and many other interventions by Peru were designed to mitigate the crisis, and to carve a path forward, through dialogue, for both Claimant and the Páran Community, and for the long-term security of Claimant's investment. Such actions were carried out fully in accordance with due process and Peruvian law, as will be demonstrated.

19. After several months of continuous efforts by Peruvian State agencies, and numerous meetings coordinated and facilitated by such agencies, Peru's efforts appeared to be bearing fruit. Claimant and the Parán Community managed to reach an agreement on 26 February 2019 ("**26 February 2019 Agreement**") that laid the foundation for a

potential resolution of the conflict. Claimant itself hailed this as a significant step towards the re-opening of the Invicta Mine, and publicly expressed its gratitude to the Peruvian authorities for their work in bringing about the agreement. For example, Claimant noted in a press release that it was

> very pleased to announce the positive conclusion of the illegal blockade and **would like to thank** our employees, **the authorities**, and our community partners that worked together to reach this successful result.[4] (Emphasis added)

20. Unfortunately, the 26 February 2019 Agreement did not yield a permanent resolution of the dispute. Not long after the agreement was signed, both Claimant and the Parán Community began to accuse each other of breaching the agreement, and relations once again soured. Thereafter, what should have been a minor issue proved to be determinant in a full breakdown of the relationship: Claimant's inexplicable refusal to pay a USD 9,000 fee for a topographical survey in the Parán Community's territory.

21. Claimant's lack of willingness to engage in a peaceful resolution of its dispute with the Parán Community was further demonstrated by the fact that, throughout the relevant discussions, Claimant repeatedly demanded that Peru break up the Access Road Protest through the use of force, unhelpfully referring to the Parán Community protestors as "terrorists."[5] Claimant even threatened Peru with arbitration in the event that it did not forcibly remove the protesters.[6] According to Claimant, violent action, not dialogue, was the only way to resolve the social conflict with the Parán Community. Had Claimant devoted as much time and energy to resolving the dispute with the Parán Community as it did trying to persuade the State to use force against that Community, the dispute might have been resolved, and the Access Road Protest peacefully concluded.

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[4] **Ex. R-0132**, "*We are very pleased to announce the. . . conclusion of the illegal blockade*," MINING JOURNAL, 5 March 2019.

[5] **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Ismodes), 6 February 2019, p. 2.

[6] **RWS-0002**, Witness Statement of Luis Miguel Incháustegui Zevallos, 6 March 2022 ("**Incháustegui Witness Statement**"), ¶ 22.

22. From April 2019 onwards, Claimant's position became even more entrenched, to the extent that it refused to continue discussions with the Parán Community. Then, in May 2019, Claimant made the ill-fated strategic decision to take matters into its own hands, by sending the above-mentioned private security firm War Dogs to the Invicta Mine to "secure the Site."[7] The arrival of the War Dogs not surprisingly led to a violent confrontation with the Parán Community members. This incident significantly aggravated the dispute. In the months that followed, Claimant refused to participate in further negotiations or discussions with the Parán Community. Consequently, the dialogue between Claimant and the Parán Community—which Peru had worked so hard to foster—indefinitely stalled.

23. In August 2019, following a breach by Claimant of its obligations under the PPF Agreement, PLI Huaura enforced its security over Claimant's shares in Invicta. Claimant argues that at this point the Invicta Mine was on the verge of the exploitation phase; however, at that time Claimant still lacked not only certain key permits, but even the ability to process its own ore. Claimant has not shown that it would have been able to overcome these obstacles and satisfy its financing obligations to its lender had the Access Road Protest never happened.

24. Importantly, Claimant was misguided in its insistence that Peru resort to the use of force to quash local opposition by the Parán Community to the Invicta Project. Even if Peru had used force against the Parán Community as Claimant repeatedly demanded, that would not have yielded the result sought by Claimant—namely, the restoration of its mining operations. In fact, such action by Peru would likely have served only to harden the Parán Community's opposition to the Project, and surely would have aggravated the dispute. Moreover, the Peruvian police could not reasonably have been expected to maintain a permanent police presence at the Invicta Mine. Ultimately, the solution to the conflict, and the ability to exploit the mine, lay exclusively in Claimant's hands. However, Claimant proved unwilling to devote the

[7] Claimant's Memorial, ¶ 176.

necessary time, or make the necessary concessions, to achieve a lasting and peaceful resolution of the social conflict—a conflict for which it, and it alone, was responsible.

C. Claimant's claims should be dismissed

25. As noted above and as explained in further detail in this Counter-Memorial, the loss of Claimant's investment was caused by: (i) Claimant itself, due to its failure to obtain support for the Invicta Project from local rural communities and meet its obligations to its lender, PLI Huaura; (ii) the Parán Community, chiefly due to its Access Road Protest; and (iii) Claimant's lenders, due to their foreclosure on Claimant's shares in Invicta. Despite the foregoing, and despite Peru's extensive efforts to assist Claimant in resolving the impasse with the Parán Community, Claimant now seeks to lay entirely on Peru the blame for the failure of Claimant's investment in Peru.

26. Claimant alleges that Peru's conduct in relation to Claimant's conflict with the Parán Community breached the following provisions of the Peru-Canada Free Trade Agreement ("**Treaty**"):

a. Article 805, which obliges Peru to afford covered investments "treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security."

b. Article 812, which obliges Peru not to "expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation . . . except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation."

1. The Tribunal lacks jurisdiction over Claimant's claims

27. As a threshold matter, the Tribunal lacks jurisdiction over the claims brought by Claimant, for the reasons explained briefly below and elaborated upon in subsequent sections of the present submission. On 26 August 2019, prior to commencing this arbitration, Claimant transferred to its creditor, PLI Huaura, Claimant's shares in

Invicta, together with all economic rights pertaining to those shares. Claimant had held such shares indirectly through its subsidiary, Andean American Gold Corp. ("**AAG**"). However, in doing so, Claimant did not reserve or retain any right to bring claims against Peru in connection with alleged harm to its investment in, and through, Invicta. Rather, prior to commencing this arbitration, Claimant divested itself fully of its shares and associated rights—including the right to assert arbitral claims against Peru. At the time that it asserted its claims against Peru, Claimant thus no longer had any surviving investment, or any surviving rights related to such an investment. For that reason, the Tribunal lacks jurisdiction *ratione personae* over Claimant's claims (see **Section III.A** below).

28. Claimant also failed to provide a waiver (required under Article 823 of the Treaty) on behalf of Invicta, with respect to claims against Peru. For this reason, the Tribunal also lacks jurisdiction *ratione materiae* (see **Section III.B** below).

2. Claimant's claims fail on the merits.

29. Claimant makes the outlandish argument that Peru is responsible for the actions of the Parán Community, asserting that such actions are attributable to Peru under public international law—in particular, the principles of attribution enshrined in Article 5 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"). However, the Parán Community's actions are *not* attributable to Peru. Neither the Parán Community nor its individual members are empowered to exercise elements of governmental authority. Even if they were so empowered, neither of the principal acts on which Claimant's claim is based—namely, the 19 June 2018 Protest and Access Road Protest—were carried out in the exercise of governmental authority. Rather, such acts were purely private in nature, as they were simply the acts of private citizens protesting against Claimant's mining operations (see **Section IV.A** below).

30. Claimant also challenges the "actions and omissions"[8] of various Peruvian State agencies in relation to the social conflict between Claimant and the Parán Community. Claimant argues that Peru breached its Treaty obligations (i) to afford Claimant full protection and security ("**FPS**"); (ii) to afford Claimant fair and equitable treatment ("**FET**"); and (iii) not to expropriate Claimant's investment. All of Claimant's claims essentially boil down to the same allegation: that Peru declined to yield to Claimant's demand that Peru use force against the indigenous and local community members that were expressing through protest activity their opposition to the Invicta Project, in particular the 19 June 2018 Protest (which lasted only one day), and the Access Road Protest. Contrary to Claimant's claims in the present arbitration, all of Peru's actions in connection with such incidents, and more generally with Claimant's conflict with the Parán Community, were conducted in full conformity with the Treaty, international law, and Peruvian law.

31. *First*, Peru fully complied with its Treaty obligation to provide FPS in accordance with the minimum standard of treatment under customary international law. Such standard requires the exercise of such due diligence as is reasonable in the circumstances, and that is precisely what Peru did in this case: it acted with reasonable due diligence, given the circumstances (see **Section IV.B below**). Peru's prioritization of dialogue over the use of force was entirely reasonable and justified, in the light of (i) the pervasive history of social conflict issues in the Peruvian extractive sector, (ii) the adverse—and in some instances, tragic and deadly—consequences of the use of force to quash local community opposition to extractive industry activities; and (iii) Peru's institutional means and resources. Peru acted reasonably and proactively at all times to address Claimant's conflict with the Parán Community.

32. Importantly, Claimant's proposed course of action—namely, the forcible removal by Peruvian police forces of the Parán Community members participating in the Access Road Protest—would not have addressed the root causes of Claimant's conflict with that Community. This is a fact that Claimant's witness and former president, Mr.

[8] Claimant's Memorial, ¶¶ 15, 266, 326, 332.

Castañeda, expressly acknowledges in his witness statement, noting in relation to police intervention at the Invicta Mine in September 2018 that Claimant "knew that the Parán representatives would not be deterred for long and that once the Police had left, the Site would again be at risk of invasion."[9] The counter-productive nature of violent repression in the circumstances presented is amply illustrated by the War Dogs incident. Thus, far from providing Claimant with full protection and security, Claimant's proposed course of action would have had the opposite effect.

33. *Second*, Peru's actions fully complied with Peru's Treaty obligation to provide FET in accordance with the minimum standard of treatment under customary international law (see **Section IV.C below**). This claim is largely duplicative of Claimant's FPS claim, and fails for similar reasons. While Claimant has asserted that it formed certain legitimate expectations, such expectations (even assuming that they were legitimate, which they would not have been) are not protected under the applicable minimum standard. And even if such expectations were protected (quod non), Claimant has failed to cite any specific representation or commitment made to it by Peruvian authorities which would have given rise to any legitimate expectation. Nor has Claimant demonstrated that its expectations were objectively reasonable, or that such expectations were indeed frustrated. Rather, Peru's actions were taken in full conformity with international and Peruvian law, and were not unfair, unreasonable, arbitrary, or non-transparent.

34. *Third*, Peru did not expropriate Claimant's investment (see **Section IV.D below**), and thus has not violated its obligation under Treaty Article 812. Even assuming, for the sake of argument, that the actions of the Parán Community were attributable to Peru as a matter of public international law, there was no transfer of title of Claimant's investment by the Parán Community, and accordingly there was no *direct* expropriation of such investment. Nor has there been any *indirect* expropriation. Annex 812.1 of the Treaty requires the Tribunal to consider the impact of the relevant

[9] **CWS-0003**, Witness Statement of Julio Castañeda, 1 October 2021 ("**Castañeda Witness Statement**"), ¶ 74.

measures when assessing whether an indirect expropriation has taken place. However, there were various supervening causes for Claimant's loss of its investment, *including* (i) Claimant's own mismanagement of its community relations, including failure to resolve the Access Road Protest through dialogue; (ii) Claimant's own failure to resolve certain regulatory matters that needed to be addressed for the Invicta Mine to reach the exploitation phase; (iii) Claimant's own inability to process ore extracted from the Invicta Mine; (iv) Claimant's own defaults under the PPF Agreement; and (v) Claimant's own failure to pay the Early Termination amount that could have allowed it to retain its shares in Invicta.

35. Peru's conduct also did not have an expropriatory character, which is another factor that must be considered pursuant to Annex 812.1 of the Treaty. Peru's actions in relation to Claimant's conflict with the Parán Community were taken simply as part of an effort to manage and mediate such conflict, and to help achieve a durable, sustainable resolution thereto. Peru's approach was also appropriate and proportionate to the public purpose of defusing a volatile social conflict, avoiding the risk of violence, loss of human life, and aggravation of the dispute, all of which would have rendered the long-term exploitation of the mine more unlikely, or even impossible.

36. Further, Annex 812.1 of the Treaty raises a strong presumption that measures designed and applied to protect legitimate public welfare objectives, such as health, safety, and the environment, are not expropriatory. Here, Peru's conduct was specifically designed to meet such objectives, and therefore did not breach Article 812 of the Treaty.

3. Claimant is not entitled to any compensation

37. In a hypothetical scenario that assumes, for the sake of argument, that the jurisdictional bars mentioned above do not exist, and that the impugned measures somehow breached any of the provisions of the Treaty, Claimant in any event would not be entitled to any compensation (see **Section V** below). Compensation would be due only if Claimant's alleged damages had been proximately caused by Peru, and

that was not the case. Rather, as noted above, Claimant's alleged damages were caused by Claimant's *own* failure to establish and maintain amicable relations with the Parán Community, as was its obligation under Peruvian law. Further, Claimant admits that it lost its investment only after its creditor, PLI Huaura, foreclosed on the investment pursuant to a contract that Claimant voluntarily chose to sign, and whose terms Claimant thus voluntarily accepted. That too was not an action or omission by Peru, and Peru is therefore not liable for the resulting alleged damages to Claimant. Additional superseding and intervening causes preclude Claimant from recovering compensation from Peru, such as Claimant's operational struggles, Claimant's failure to comply with outstanding regulatory requirements, and others.

38. Furthermore, even if Peru were deemed to be liable to pay compensation, in no case would Claimant's inflated claim be justified. Claimant's contributory fault would warrant a reduction of damages to zero, or close thereto. And even if Claimant were awarded compensation for the "fair market value" of the investment, as it is requesting, the expert report from AlixPartners shows that a proper calculation of fair market value yields a figure that is a fraction of what Claimant and its experts have demanded.

* * *

39. For the reasons identified above and elaborated further in this Counter-Memorial, Peru respectfully submits that the Tribunal should (i) dismiss Claimant's claims in their entirety, either for lack of jurisdiction or on the merits, or (ii) in the alternative, deny any and all compensation to Claimant.

40. This Counter-Memorial is accompanied by the following supporting evidence:

a. The witness statement of **Mr. Fernando Trigoso**, who has held various functions within the OGGS from April 2012, including throughout the relevant time period.

b. The witness statement of **Mr. Miguel Incháustegui**, Vice Minister of Mines within the MINEM from April 2018 through May 2019. In that capacity, Mr.

Incháustegui was charged with promoting sustainable development as well as evaluating and implementing policies relating to the mining sector. Mr. Incháustegui also personally participated in the Peruvian Government's efforts to resolve the conflict between Claimant and the Parán Community, and to address Claimant's concerns.

c. The witness statement of **Mr. Esteban Saavedra**, Vice Minister of Internal Order of the Ministry of the Interior from October 2018 and throughout the relevant time period. Mr. Saavedra participated in discussions with Invicta representatives and other Peruvian entities to coordinate conflict resolution efforts and to address Claimant's concerns.

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

e. The expert report of **Mr. Daniel Vela** ("**Vela Report**"), one of the preeminent practitioners in the field of rural communities and the management of social conflicts by operators in the Peruvian extractive industries. Mr. Vela's expert opinion addresses the history and legal nature of rural communities in Peru, as well as the legal framework and good practices applicable to the relationship of extractive industry operators with rural and indigenous communities, and the prevention and management of social conflicts in the mining sector. Mr. Vela's report is accompanied by 14 exhibits.

f. The expert report of **Dr. Ivan Meini** ("**Meini Report**"), a criminal law expert and professor of criminal law at *Pontificia Universidad Católica del Perú*, who provides an expert opinion on the rules, principles and authorities under Peruvian criminal law that are relevant to the present dispute. In particular, Dr. Meini analyzes from a criminal law perspective the implications of the events that occurred between 2018 and 2019 in connection with the Invicta Project, and provides his expert opinion on the actions taken by the Peruvian

authorities to prevent and manage the social conflict between Claimant and the Parán Community. Dr. Meini's report is accompanied by 55 exhibits.

g. The expert report of **AlixPartners**, a financial advisory and global consulting firm, regarding the quantum issues in relation to Claimant's claim ("**AlixPartners Report**"). The AlixPartners Report is accompanied by 64 exhibits.

h. 171 factual exhibits, numbered Ex. R-0001 to Ex. R-0171; and

i. 132 legal authorities, numbered RLA-0001 to RLA-0132.

41. The remainder of this Counter-Memorial is structured as follows:

a. In **Section II**, Peru describes the facts giving rise to the present dispute;

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

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

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

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

II. FACTS

A. Peru's mining investment environment

42. Peru is a global leader in the mining industry and is recognized as having one of the largest and most diversified mineral reserves on the planet.[10] It is among the world's top producers of copper, silver, lead, zinc, gold, and other precious metals.[11] Peru considers its mining industry to be one of the most important sectors of its economy, and views foreign investment in that sector as a means to further the social and economic development of the country.[12]

43. Hand in hand with the development of its burgeoning mining industry, like other resource-rich countries with emerging economies, Peru has recognized the need to strike a balance between the goals of (i) development of the extractive industry (including through foreign direct investment); and (ii) ensuring that the social and environmental impacts of such industry are appropriately managed and addressed. Such impacts include the significant effects that mining activity can have on indigenous and rural communities, an issue that is at the heart of the instant case.

44. As is widely recognized, the exploitation of high-value natural resources, including minerals, has long been a source of social conflict around the globe.[13] Peru has not been immune to these challenges. To ensure respect of the fundamental rights of local communities, protect the environment, and either avoid or mitigate the negative externalities of mining activity, Peru has developed one of the most advanced legal frameworks for mining in Latin America.[14]

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[10] **Ex. R-0001**, MINEM, "Peru In The Worldwide Ranking Of Mining Production," 2017.

[11] **Ex. R-0001**, MINEM, "Peru In The Worldwide Ranking Of Mining Production," 2017, p. 1.

[12] **Ex. R-0002**, MINEM, "Peru's mining & metals investment guide 2017/2018," 2017, pp. 13–14; *see also* **Ex. R-0153**, MINEM, "*Cartera de Proyectos de Construcción de Mina 2018*," 1 March 2018, pp. 10–11; *see also* **Ex. R-0145**, MINEM, "*Minería Genera Mayores Ingresos Para Las Regiones*," January 2022.

[13] **Ex. R-0084**, The United Nations Interagency Framework Team for Preventive Action, "Toolkit And Guidance For Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict," 8 October 2012, pp. 13, 14.

[14] *See generally* **RER-0002**, Expert Report of Daniel Vela, 22 March 2022 ("**Vela Expert Report**"), § III.

45. As investors in Peru's mining sector, Claimant and Invicta had an obligation to comply with that legal framework. In that context, it was critically important for them to apprise themselves of, and ensure compliance with, their legal obligations and responsibilities, including in relation to local communities. An understanding of such obligations—as well as of the scope of Peru's obligations and responsibilities when such communities voiced their opposition to mining activities—was crucial for the success (or failure) of the Invicta Project and Claimants' investment. However, despite the importance of these issues, Claimant largely ignores them in its Counter-Memorial, limiting itself to describing the permits that it obtained in relation to the Invicta Project.[15] Disregard for the social and environmental context in which Invicta operated is emblematic of the reasons for the failure of Claimant's project, which, as this Counter-Memorial will show, was largely self-inflicted.

46. The ultimate failure of the investment could have been avoided, had Claimant properly understood the context in which it made its investment, and had acted in accordance with Peruvian legislation, its corporate social responsibility obligations towards the local communities, and the industry's best practices.[16] To expose Claimant's failings in understanding that context and acting accordingly, Peru will briefly below (i) address the history of social conflict within Peru's mining sector, which is necessary to understand the evolution of Peru's legal and policy framework in relation to indigenous and local communities, and to social conflicts, in the mining sector; (ii) outline the critical concept of the "social license," which is discussed later in this submission, and which is the wherewithal that mining operators must obtain (and maintain) for the successful development of a mining project; and (iii) introduce the legal framework for mining projects in Peru, including the main rights and permits required to operate such projects.

[15] Claimant's Memorial, ¶¶ 76–84.

[16] **RER-0002**, Vela Expert Report, § III.

1. The history of social conflict between mining companies and local communities in Peru

47. As Claimant should have been well aware when it invested in Peru, mining in Peru has given rise to serious—and at times violent and even deadly—social conflict between mining companies and local communities, including rural and indigenous communities.[17] Indeed, at around the time that Claimant acquired Invicta in October 2012, the Ombudsman's Office had registered a monthly total of 233 social conflicts, with 167 of them considered active conflicts—123 of which concerned natural resource exploration or extraction.[18] The evolution of the mining industry in Peru has been profoundly shaped by this history and ongoing challenge.

48. Peru opened its mining sector to foreign investment in the 1990s, upon its return to democracy following decades of military rule.[19] Despite Peru's hugely successful free market policies and ensuing economic development starting in 1993,[20] the increase in foreign investment in Peru's extractive sector has been accompanied by opposition and protests from numerous local communities against mining and other natural resource extractive activities. These communities, often located in remote, impoverished rural regions of Peru, have felt excluded from the approval process by which companies are granted mining rights, harmed by the environmental impact of mining activity, and denied the opportunity to share in the economic benefits of such activity.[21]

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[17] **Ex. R-0009**, Ombudsmen's Office Report No. 214 on Social Conflicts, December 2021, pp. 5–6 (showing that for the month of December 2020, there were 200 registered conflicts in Peru, and that social conflict has hovered just below 200 since December 2020.); **RWS-0002**, Incháustegui Witness Statement, ¶¶ 32–35.

[18] **Ex. R-0082**, Ombudsman's Office Report No. 104 on Social Conflicts, October 2012, pp. 11–12.

[19] The 1990's also marked a tumultuous period in Peru's political development, with their still nascent democratic institutions challenged by the rule of then-President Alberto Fujimori, and violent clashes between Peruvian security forces and rural communities, resulting in historic tensions and distrust towards the State.

[20] **Ex. R-0152**, ProInversión, Foreign Direct Investment as Capital Contribution by Sector from 1980 to 2021.

[21] **Ex. R-0141**, OXFAM, "*La Participación ciudadana en la minería peruana: concepciones, mecanismos y casos*," 8 September 2009, p. 17.

49. During the first phases of local opposition to foreign investment in the mining sector—mainly in the 90's and early 2000's—Peru relied predominantly on declarations of emergency and the use of police and military force in response to social conflicts of the nature described above.[22] However, over time—and as the country strengthened its democratic institutions and gradually built a more representative political system—Peru began to recognize that this approach to resolving social conflicts was counter-productive. In addition to escalating violence, the use of force often exacerbated the distrust, local opposition, and violent clashes between local communities, mining companies, and the State.[23]

50. Two illustrative examples of the foregoing—both predating Claimant's investment—are the incidents that took place in Bagua in 2009 and Las Bambas in 2015. In 2009, Bagua, a province in the Amazon, was the scene of one of the most tragic events in Peru's recent history, a violent encounter that resulted in the death of 33 indigenous protesters and Peruvian security forces, and over 200 wounded.[24] The loss of life was the result of an attempt by security forces to forcefully remove community protesters who had blocked a road, in protest against a law that would allow private companies to engage in extractive industry activities—including for mining and oil exploration—in the Amazon region.[25] Beyond the tragic loss of life, this event left deep scars and became a turning point in the manner in which Peruvian security forces dealt with social protest and conflicts between local communities and private companies.[26]

51. In more recent years, violent clashes at the Las Bambas mining project outside of Cusco[27] came under public and international scrutiny. In that case, local residents

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[22] *See, e.g.*, **RWS-0002**, Incháustegui Witness Statement, ¶¶ 35–37.

[23] **RER-0001**, Expert Report of Iván Meini, 22 March 2022 ("**Meini Expert Report**"), ¶¶ 190, 193–99, 203, 204.

[24] **RWS-0002**, Incháustegui Witness Statement, ¶ 35.

[25] **RWS-0002**, Incháustegui Witness Statement, ¶¶ 35–37.

[26] *See generally* **R-0025**, Ombudsman's Office Report, "*Actuaciones Defensoriales en el marco del conflicto de Bagua*," March 2017.

[27] **Ex. R-0144**, A. Leon, *et al.*, "Peru protesters lift blockade at China-funded mine in hope of talks," LATIMES, 30 September 2015.

blocked the street that led to the Las Bambas mine in September 2015.[28] Four protesters were killed and dozens of others wounded, as local community members approached the project grounds.[29]

52. These two events, and dozens more, have highlighted the sensitive nature of the relations between extractive industries and local communities, and the catastrophic consequences that can result from the use of force to remove civilian blockades and other forms of resistance from such communities. As a result of those experiences, Peru has gradually developed a more balanced and nuanced response to social conflict relating to mining activity.

53. Peruvian society—and indeed, the international community—has rejected the routine use of force in resolving social conflict.[30] Specifically in relation to indigenous and rural communities, Peru has endeavored to ensure that such communities can be actively engaged, and their voices heard, in economic activities and other processes that could directly impact their environmental, economic, and cultural well-being, in line with international norms. For example:

a. In 1994, Peru ratified the International Convention No. 169 of the International Labor Organization ("**ILO Convention 169**"), which calls for the full participation of indigenous communities in policy and development processes that could impact them.

b. In 1996, Peru enacted legislation recognizing that the communal ownership of land by rural communities would not be subject to the same administrative or compliance requirements as those that ordinarily apply in the context of land easements for private investments.[31] In the same year, Peru enacted legislation

[28] **Ex. R-0144**, A. Leon, *et al.*, "Peru protesters lift blockade at China-funded mine in hope of talks," LATIMES, 30 September 2015.

[29] **Ex. R-0144**, A. Leon, *et al.*, "*Peru protesters lift blockade at China-funded mine in hope of talks*," LATIMES, 30 September 2015.

[30] **RER-0001**, Meini Expert Report, ¶ 13.

[31] **Ex. R-0027**, Law No. 26505, 17 July 1995 ("**Land Law**").

that would provide for citizen participation in the approval process of environmental studies for mining activity.[32]

c. In 1999, Peru passed legislation further expanding upon requirements for citizen participation and public access to environmental studies for mining activity.[33]

d. In 2002, Peru enacted Law No. 27783 ("**Decentralization Framework Law**"), which initiated an ongoing process of decentralization of the central government's power, in order to strengthen representative government at regional and local levels (akin to the principle of subsidiarity).[34] That law imposes obligations on the regional and local government authorities to promote citizen participation[35]—particularly that of rural and indigenous communities—in the planning, organization, and finalization of development plans and budgets, including matters relating to the environment and development.[36]

e. Also in 2002, Peru enacted legislation further expanding citizen participation procedures, by requiring citizen consultations and participation before,

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[32] **Ex. R-0083**, Ministerial Resolution No. 335-96-EM/SG, 25 July 1996.

[33] **Ex. R-0143**, Ministerial Resolution No. 728-99-EM/VMM, 30 December 1999.

[34] **Ex. R-0010**, Law No. 27783, 17 July 2002.

[35] **Ex. R-0010**, Law No. 27783, 17 July 2002, Art 17.1, ("The regional and local governments shall be required to promote citizen participation in the formation, discussion and consultation of their development plans and budgets, and on public management. For this purpose, they shall guarantee access to public information for all citizens, with the exceptions stipulated by law, as well as the formation and functioning of spaces and mechanisms for inquiries, consultation, control, assessment and accountability.").

[36] **Ex. R-0010**, Law No. 27783, 17 July 2002, Art. 6., ("SOCIAL OBJECTIVES: . . . b) Citizen participation in all its forms of organization and social control. c) Incorporate the participation of rural and native communities, recognizing their interculturality, and overcoming any type of exclusion and discrimination . . . ENVIRONMENTAL OBJECTIVES: . . . c) Coordination and inter-institutional consultation and citizen participation at all levels of the National Environmental Management System.").

during, and after environmental studies, as part of the approval process for mining activity.[37]

f. In 2003, Peru issued Supreme Decree No. 042-2003-EM ("**Social Responsibility Affidavit Law**"), establishing a framework for mining companies to responsibly manage the environmental and social impact on local communities of mining activity.[38] Among other things, the decree requires a sworn affidavit from all mining companies pledging to employ excellence in environmental management; respect local authorities, culture, and customs; and to maintain continuous dialogue with local communities and local authorities.[39]

g. In 2007, Peru created a new division called the **OGGS** within the **MINEM**, to promote harmonious relations between mining companies and civil society—including rural and indigenous communities—for conflict prevention.[40] Under Supreme Decree No. 021-2018-EM OGGS (**"MINEM Organizational Decree**"), Peru further identified the implementation of dialogue as the key method for conflict management and resolution.[41]

h. In 2011, Peru enacted Law No. 29785 ("**Prior Consultation Law**"), requiring consultation with indigenous and native communities as part of the State's

[37] **Ex. R-0140**, Ministerial Resolution No. 596-2002-EM/DM, 20 December 2002.

[38] **Ex. R-0098**, Supreme Decree No. 042-2003-EM, 12 December 2003.

[39] **Ex. R-0098**, Supreme Decree No. 042-2003-EM, 12 December 2003, Art. 1.3 ("Maintain an **ongoing** and appropriate **dialogue** with the regional and local authorities, the population in the area of influence of the mining operations and their representative bodies, providing them with information on their mining activities.") (emphasis added).

[40] **Ex. R-0023**, Ombudsman's Office Report, "*El valor del dialogo*," September 2017, p. 178; **RER-0001**, Meini Expert Report, ¶ 191.

[41] **Ex R-0012**, Supreme Decree No. 021-2018-EM, 18 August 2018, Art. 50.

decision-making process in passing legislation that may affect them directly.[42]

54. At the center of the legal framework conformed by the various laws, regulations and institutions identified above, is an emphasis on *participation*, *consent* and *continuous dialogue*. These principles go well beyond mere access to information, but rather obligate mining companies to actively and effectively engage with local communities in collaborative processes to improve the socio-economic situation of such communities, and to avert or minimize negative externalities that may result from the extractive industry.

2. The requirement for mining companies to obtain a social license to operate

55. The legal framework for mining activity in Peru—and in particular the obligations placed on mining companies vis-à-vis local communities—reflect the concept of a "**social license**."[43] That term was first coined in 1997, and developed as an accepted industry goal for the non-legal, yet critical requirement of obtaining the approval of the local communities and stakeholders *before* commencing any mining activity and then maintaining such approval throughout the exploitation and closure phase.[44] A social license entails achieving legitimacy, trust, and consent on the part of local communities, as well as observance by the company of the human rights of communities that are, or may eventually be, affected by its activities.[45] The mining company is responsible for securing and maintaining a social license,[46] which in

[42] **RER-0002**, Vela Expert Report, ¶ 43, note 1; **Ex. R-0151**, Law No. 29785, 6 September 2011. Although under Peruvian law the requirement of prior consultation ("*consulta previa*") does not apply to rural communities, this norm-setting law reinforces Peru's policy and legal framework of citizen participation and consultation generally as the primary method through which social conflict is avoided in the extractive sector.

[43] **RER-0002**, Vela Expert Report, § III.A.2.

[44] **RLA-0005**, R. Boutilier, *et al.*, "*Chapter 5: The Social License: The story of the San Cristobal mine*," ROUTLEDGE (2018), pp. 41–42.

[45] **RLA-0009**, J. Morrison, "*The Social License: How to Keep your Organization Legitimate*," PALGRAVE MACMILLAN (2014), p. 19.

[46] *See, e.g.*, **Ex. R-0087**, BDO, Social License to Operate in Mining: Current Trends & Toolkit, 2020.

practice means obtaining the ongoing and long-term support of local communities that are located within the project's purview.

56. The concept of the social license has been readily and widely accepted within the mining sector worldwide—as well as in recent investment arbitration—as a key obligation of any investor in the mining sector. For example, the tribunal in the case of *Bear Creek v. Peru* extensively examined the issue of whether the investor had obtained a social license, and emphasized that

> [e]ven though the concept of ''social license'' is not clearly defined in international law, all relevant international instruments are clear that consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities.[47]

57. Inter-governmental organizations,[48] world-leading policy institutes,[49] industry associations,[50] mining consultancy firms,[51] mining companies with operations in Peru,[52] and the Government of Canada itself (in addition to that of Peru)[53] all have recognized that managing the social aspects related to mining must be a top priority for the prevention of conflicts with local communities, and for securing the long-term viability of mining projects. For example, according to one industry source

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[47] **CLA-0086**, *Bear Creek* (Award), ¶ 406.

[48] *See, e.g.*, **Ex. R-0088**, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 2017; *see also* **Ex. R-0084**, The United Nations Interagency Framework Team for Preventive Action, "Toolkit And Guidance For Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict," 8 October 2012.

[49] *See, e.g.*, **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013.

[50] *See, e.g.*, **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015; *see also* **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration, "*Principles and Guidance Notes*," 2014.

[51] *See, e.g.*, **Ex. R-0087**, BDO, Social License to Operate in Mining: Current Trends & Toolkit, 2020.

[52] **Ex. R-0141**, OXFAM, "*La Participación ciudadana en la minería peruana: concepciones, mecanismos y casos*," 8 September 2009, p.16.

[53] *See* **Ex. R-0028**, Joint Publication between Canadian Embassy in Peru and MINEM, "*Kit De Herramientas De Relacionamiento y Comunicación*," 2018 (**"Canada-Peru CR Toolkit"**); *see also* **Ex. R-0089**, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Sector Abroad, 2014 ("**2014 CSR Strategy**").

> [t]he nature of the risks associated with [mining investments] makes social license imperative. . . . In this context, social license is an essential risk management tool. The failure to obtain and maintain social license invariably results in conflict, project delay, and unplanned cost.[54]

58. The overwhelming consensus is therefore clear: in order to manage a mining project successfully, a mining company *must* engage with local communities, as early as possible and throughout the life of a project, in order to promote trust and continuous dialogue regarding the long-term vision of the community in relation to the mining company and the latter's activities.[55] Mining companies have also recognized that establishing and managing an effective communication policy with local communities requires the investor to not only identify but also ultimately deliver on the promised positive impacts of new mining operations, through sustainable development initiatives and social contributions at every stage of the mine's life-cycle.[56]

59. As demonstrated in the remainder of this Counter-Memorial, Claimant and Invicta manifestly failed to obtain—let alone maintain—a social license to operate in Peru. This fundamental failure is a key reason why ultimately Claimant lost its investment, despite the best efforts of the Peruvian authorities (at the central and regional level) to mediate a solution to the conflict between Invicta and the Parán Community.

3. The legal framework for mining projects in Peru

60. Against the above background, Peru briefly summarizes below the main features of the Peruvian mining law framework with respect to (i) mining concessions, and (ii) social and environmental obligations.

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[54] **Ex. R-0087**, BDO, Social License to Operate in Mining: Current Trends & Toolkit, 2020, p.11.

[55] *See generally* **Ex. R-0028**, Canada-Peru CR Toolkit.

[56] *See* **RER-0002**, Vela Expert Report, § III.

a. Mining Concessions

61. Under the Peruvian Constitution ("**Constitution**"), all natural resources located within the territory of Peru are part of the Peruvian State's patrimony.[57] However, the Constitution authorizes Peru to grant usage rights to nationals and foreign individuals or companies, in accordance with regulations applicable to each sector.[58] Within the mining sector, Supreme Decree No. 014-92-EM, enacted in 1992 (**"General Mining Law**"), is the key piece of legislation governing all mining activities in Peru.[59] This law provides that any exploration, exploitation, general works, processing, and mineral transportation activities must be performed pursuant to rights obtained under a concession granted by the Peruvian State.[60]

62. Like in other mining jurisdictions, mining concessions in Peru accord certain rights (most importantly, the right to carry out exploration and extraction activity) that are distinct and independent from the land to which the concession relates. Peru retains ownership of all *subterranean* land and mineral resources in their natural state, independently of whether the *surface* land is privately owned, communally owned, or the property of the State.[61] Titleholders of mining concessions have vested rights only in the extracted mineral resources.[62] Therefore, in addition to obtaining a mining concession for the right to the exploration and extraction of mineral resources,

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[57] **Ex. C-0023**, Political Constitution of Peru, 29 December 1993 ("**the Constitution**"), Art. 66 ("Natural resources, renewable and non-renewable, are patrimony of the Nation. The State is sovereign in their use"); **Ex. R-0003**, Law No. 26821, 25 June 1997 ("**LOASRN**"), Art. 3. *See also* **Ex. R-0003**, LOASRN, Art. 4 ("Natural resources maintained at source, whether renewable or non-renewable, are the Nation's Assets. . . .").

[58] **Ex. R-0003**, LOASRN, Art. 19 ("Rights to the sustainable use of the natural resources are granted to individuals by the procedures established by the special laws for each resource . . .").

[59] **Ex. R-0004**, Supreme Decree No. 014-92-EM, 2 June 1992 ("**General Mining Law**").

[60] **Ex. R-0004**, General Mining Law, Art. II ("The use of mining resources shall be carried out through the business activities of the State and individuals under the system of concessions.").

[61] **Ex. R-0004**, General Mining Law, Art. 9 ("The mining concession is a separate asset from the land on which it is situated."); **Ex. R-0005**, Civil Code of Peru, 24 July 1984 ("**Civil Code**"), Art. 954 ("Ownership of the land shall extend to below and above the soil . . . Ownership of the subsoil shall not include the natural resources, deposits and archaeological remains, or other assets governed by special laws.").

[62] **Ex. R-0004**, General Mining Law, Art. 9.

concession holders must obtain the corresponding rights—from the State or from private parties (including rural communities), as applicable—to use the surface land.[63]

63. As will be discussed in further detail in **Section II.B.1**, a "rural community" in Peru is a group of individuals—typically composing a number of family units—that communally possess certain lands and have ancestral ties to that land, in many cases predating the formation of the Peruvian State.[64] Peru's Rural Communities Law defines "rural communities" as

> organizations of public interest, with legal existence and legal personality, integrated by families that inhabit and control certain territories, linked by ancestral, social, economic and cultural ties, expressed in the community property of the land, community work, mutual assistance, democratic government (. . .).[65]

64. In Peru, rural communities periodically elect their community representatives to form their supreme governing body, known as the General Assembly.[66] Where land is communally owned by a rural community, the concession holder must acquire surface rights either through the purchase of land or through easement contracts with the community, and such purchase or contract must receive the approval of the General Assembly of the community, with a favorable vote of no less than two-thirds of all community members.[67]

65. The MINEM is responsible for the general regulation of the Peruvian mining sector, and for setting Peru's mining policies. Although the MINEM administers and

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[63] **Ex. R-0027**, Land Law, Art. 7. ("The use of land for carrying out mining or hydrocarbon activities shall require prior agreement with the owner or completion of the easement procedure stipulated in the Regulations of this Law.").

[64] **Ex. R-0052**, Law No. 24656, General Law of Rural Communities, 13 April 1987, Art 2; *see also* **RER-0002**, Vela Expert Report, § II.

[65] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 2.

[66] **Ex. C-0025**, Supreme Decree No. 008-91-TR, 12 February 1991, Art. 38.

[67] **Ex. R-0027**, Land Law, Art. 11 ("To dispose of, place a lien on, rent or carry out any other measure on communal mountain and forest land, a resolution of the General Meeting shall be required with the favorable vote of at least two-thirds of all members of the Community.").

monitors activity relating to mining concessions[68] pursuant to the General Mining Law, the Mining and Metallurgical Geological Institute ("**INGEMMET**") is the government agency responsible for *granting* mining concessions. INGEMMET may grant concessions to companies that are wholly owned by foreign investors, or to subsidiaries of foreign companies, provided that the company that will serve as the concessionaire is incorporated in Peru for the principal business purpose of conducting mining activities.[69] There are two means by which foreign investors may obtain ownership of a mining concession: (i) applying to INGEMMET for the grant of a concession;[70] or (ii) entering into a contract with a company that already has a mining concession, and then having such company transfer the concession to the foreign investor.[71]

66. A mining concession grants the holder the exclusive right to the exploration and exploitation of the mineral resources in the area covered by the concession. Such grant is strictly subject to the limitations stipulated in the concession. The concession-holder must obtain all permits, licenses, and authorizations required in order to commence exploration and exploitation.[72] In other words, the mining concession grants its holder the exclusive right to *initiate* the procedures to obtain the required permits and licenses for mining exploration and exploitation, and to perform the activities permitted under those permits and licenses with respect to the minerals contained in

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[68] Separate concessions are required for the following mining activity: (i) processing of minerals; (ii) general works; and (iii) mineral transportation. **Ex. R-0004**, General Mining Law, Arts. 17, 19, 22.

[69] **Ex. R-0004**, General Mining Law, Art. 7.

[70] **Ex. R-0003**, LOASRN, Art. 23 ("Concessions are registerable intangible assets. They may be subject to an order, mortgage, transfer or claim, depending on the special laws. . . The concession, the order thereon and the establishment of real rights thereon, shall be entered in the respective registry.").

[71] **Ex. R-0004**, General Mining Law, Art. 164.

[72] **Ex. R-0003**, LOASRN, Art. 23 ("A concession, approved by the special laws, shall grant the concession holder the right to the sustainable use of the natural resource granted, under the conditions and with the limitations established by the respective title. . ."); **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 18 ("Every holder of a mining concession is required to: a) Comply with the environmental legislation applicable to its operations, the obligations derived from environmental studies, licenses, authorizations and permits approved by the competent authorities, as well as any undertaking assumed before them, in accordance with the law, within the periods and under the terms established.").

the subsurface of the concession-area. However, the mining concession does not itself guarantee the right to exploit the natural resource until the titleholder meets additional social and environmental obligations in order to receive authorization to commence exploration and exploitation activities.

b. Social and environmental obligations

67. As will be explained below in **Section II.B.1.b**, the legal framework for mining projects in Peru imposes on mining operators a range of obligations with respect to the environmental and socio-economic welfare of the local communities that are within their project's area of direct and indirect influence.[73] Supreme Decree No. 040-2014-EM ("**Environmental Mining Regulation**") defines 'area of direct social influence' as "includ[ing] the population and/or geographic area that is affected directly by the socio-environmental impacts of mining activity."[74] In other words, communities in the area of *direct influence* are, as the term itself denotes, those that are subject to the *direct* social and environmental impacts of a defined mining activity. The same regulation defines 'area of indirect social influence' as "includ[ing] the population and/or geographic area adjacent to the area of direct influence . . . where socio-environmental impacts associated with direct impacts are generated."[75] Therefore, communities within the *indirect* area of influence are subject to the *secondary* impacts of a defined mining activity. And finally, the Regulations for Environmental Protection and Management in Mining defines 'social impact' as "[e]ffects caused by the development of mining activities on the socioeconomic and cultural aspects of a population that are within the area of influence that were related to the identified environmental impacts."[76]

68. Depending on the specific mining activity in question (e.g., performance of metallurgical studies during the exploration phase, or installation of electrical

[73] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Arts 4.1.2, 4.2.2; *see also* **RER-0002**, Vela Expert Report, § III.A.1.

[74] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 4.1.2.

[75] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 4.2.2.

[76] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 4.16.

transmission lines during a construction phase) a given community may be identified as falling within *both* direct and indirect areas of influence. A mining company must identify in the project's Environmental Impact Assessment ("**EIA**") the various ways in which surrounding communities may fall within a mining activity's area of direct and/or indirect influence. This obligation, and its various environmental and social components, will be discussed in greater detail in **Section II.B.1.b** below. Importantly for the instant case, the full range of duties imposed on mining companies pursuant to the foregoing obligation under Peruvian law applies *whether or not the relevant communities own the land where the project is located*.[77]

69. In addition, mining operators are under a statutory obligation to follow through on their social commitments and agreements reached with the local communities.[78] They must respect local customs[79] and take actions to strengthen the trust between themselves and the local community.[80] Titleholders are required to prioritize the

[77] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 4 (defining the different areas of the project's influence); *see also* **RER-0002**, Vela Expert Report, § III.A.1.

[78] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 17 (enshrining titleholders' obligation to obtain an Environmental Certification); **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 18 (setting forth general titleholders' obligations, including compliance with obligations undertaken as part of the environmental impact studies and any commitments contained therein); **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 46 (including a *Social Management Plan* as a requisite component of any environmental impact study); **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 60 (setting forth the requisite components of any *Social Management Plan* contained within an environmental impact study); *see also* **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 57.3 ("Compliance with Agreements. Comply with the social commitments assumed by all parties, by agreements, acts, contracts and environmental studies within the periods defined in those documents."); **RWS-0001**, Witness Statement of Andrés Fernando Trigoso Alca, 11 March 2022 ("**Trigoso Witness Statement**"), ¶ 29; **RER-0002**, Vela Expert Report, ¶ 85.

[79] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 60.1; *see also* **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 57.4 ("Respect persons, organized groups, institutions, authorities and local lifestyles. Promote actions that strengthen trust among the parties connected with the mining project, by means of mechanisms and processes that promote citizen participation, the prevention and management of disputes and the use of alternative means of resolving them."); **RER-0002**, Vela Expert Report, ¶ 85.

[80] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 60.1; *see also* **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 57.9 ("The project holders must implement

hiring of local personnel for mining work and provide any required training, as well as contribute to the socio-economic development of the local communities.[81] Related to the above obligations and responsibilities, titleholders are required to maintain a *continuous dialogue* with all regional and local authorities, including with *all local communities* within the area of direct influence.[82] These general obligations are part and parcel of Peru's overall framework for the prevention and management of conflicts and the long-term success of projects in the mining sector. As an investor angling to carry out mining activity in Peru, Claimant was—or at least should have been—aware of these obligations.

B. Claimant was responsible for obtaining the communities' support for the project

70. Claimant denies that it had any obligation or responsibility to build an amicable relationship with the Parán Community through agreements to address the concerns of that Community vis-à-vis the Invicta Project.[83] As will be explained below, however, Claimant's position is belied by (i) Peruvian law; (ii) international law; and (iii) industry principles, all of which underline the importance of establishing an

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mechanisms and processes for citizen participation involving the populations located in the area of influence of the project."); **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 57.6 ("Contribute to local and regional economic development through the preferential acquisition of local and/or regional goods and . . . support business initiatives that seek diversification and preservation of local economic activities."); **RER-0002**, Vela Expert Report, ¶ 85.

[81] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 60.1; *see also* **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 57.5 ("Preferably promote the hiring of local staff to carry out mining or related work, according to the holder's requirements in the various stages of the mining project and favoring the search for agreement with the population in the area of direct social impact and, whenever possible, providing the necessary opportunities for training, retraining and the development of initiatives."); **RER-0002**, Vela Expert Report, ¶ 85.

[82] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 57.7 ("Maintain an ongoing, appropriate and transparent dialogue with the regional and local authorities and with the populations in the area of influence of the mining project, from an intercultural perspective, providing them with adequate, appropriate and accessible information on their mining activities in a suitable language through the means of communication prevailing in the area. This is in order to facilitate an exchange of opinions and suggestions with the participation of the main parties involved, in accordance with the rules on citizen participation in force."); **RER-0002**, Vela Expert Report, ¶ 85.

[83] *See, e.g.*, Claimant's Memorial, ¶¶ 67, 122.

amicable relationship with rural or indigenous communities—such as the Parán Community.

1. Peruvian law required Claimant to obtain community support before it could develop its mine

a. The Constitution and relevant legislation recognizes the special status of rural communities

71. The Constitution recognize rural communities as having separate legal personality and possessing a distinct set of rights.[84]

72. The constitutional rights of rural communities in Peru are enshrined in Articles 2 and 89 of the Constitution. Article 2 includes the right to "ethnic and cultural identity" amongst the list of fundamental freedoms enjoyed by all citizens in Peru.[85] Article 89, for its part, specifically relates to rural and native communities, and provides that "[t]he State respects the cultural identity of Rural and Native Communities."[86] That same article establishes protection for the abovementioned rights of rural communities to autonomy and free disposition of their lands, mandating that such communities are

> autonomous in their organization, in communal work and in the use and free disposal of their lands, as well as in economic and administrative matters, within the framework established by law. The ownership of their land is not subject to any statute of limitations, except in the case of abandonment as provided for in the previous article.[87]

73. Accordingly, the rights of rural communities in Peru include (i) the right to ethnic and cultural identity; and (ii) the right to organizational autonomy, which applies to rural communities' communal work, the use of and free disposition of their lands, and their economic and administrative affairs.[88]

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[84] **RER-0001**, Meini Expert Report, ¶¶ 47–50; **RER-0002**, Vela Expert Report, ¶¶ 47–48, 72–73.

[85] **Ex. C-0023**, the Constitution, Art. 2.19.

[86] **Ex. C-0023**, the Constitution, Art. 89.

[87] **Ex. C-0023**, the Constitution, Art. 89.

[88] *See* **Ex. C-0023**, the Constitution, Arts. 2.19, 89.

74. Similar protections had featured in previous constitutional instruments, as early as 1920, and including the 1979 constitution, which had declared the lands of rural communities as inalienable, unattachable, and imprescriptible.[89]

75. Law No. 24656 ("**Rural Communities Law**") and Supreme Decree No. 008-91-TR ("**Rural Communities Regulation**") set out further details of the status of rural communities under Peruvian law and the rights enjoyed by such communities. For example, in concordance with the Constitution, the Rural Communities Law provides that rural communities are recognized as organizations of public interest, with legal existence and legal personality.[90] The Rural Communities Law and Rural Communities Regulation also identify the various rights of rural communities with respect to the land they occupy, and establish rules regarding the management of that land and the affairs of the rural community.[91]

76. Claimant acknowledges in its Memorial that the Parán Community is formally recognized as a rural community in Peru.[92] Claimants further acknowledge that the Parán Community registered its status as a rural community pursuant to Peruvian law on 9 May 2001.[93] Thus, there is no dispute between the parties herein that the rights enjoyed by rural communities under Peruvian law applied fully to the Parán Community in this case.

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[89] **RER-0002**, Vela Expert Report, ¶ 47.

[90] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 2; **RER-0002**, Vela Expert Report, ¶ 52.

[91] *See, e.g.*, **Ex. R-0052**, Law No. 24656, 13 April 1987, Arts. 4, 16, 18, 19; **Ex. C-0025**, Supreme Decree No. 008-91-TR, 12 February 1991, Art. 63. These features of the Rural Communities Law and Rural Communities Regulation are discussed in more detail in Section IV.A below, which addresses Claimant's attribution arguments in relation to the Parán Community.

[92] **Ex. C-0026**, 2016 Directory of Rural Communities in Peru, SICCAM, December 2016, p. 1; *see* **Ex. C-0025**, Supreme Decree No. 008-91-TR, 12 February 1991, p. 3.

[93] Claimant's Memorial, ¶ 242.

b. Peruvian mining law requires that mining companies obtain community support

77. Mining companies operating in Peru are legally required to engage local communities and secure their participation at *every stage* of a mining project.[94] The legal framework imposes this central obligation of communication and participation in order to ensure that the communities within the mining project's area of influence have their interests heard, and in so doing facilitate an enduring community-company relationship. The main mechanisms through which mining companies must establish partnerships with local communities in Peru are the (i) the EIA, and (ii) the Social Management Plan ("**Social Management Plan**"). These concepts are explained in turn below.

78. Peru requires all mining companies that seek to pursue new mining development and production activities to prepare, file, and obtain approval of an EIA via an Environmental Certification.[95] EIAs incorporate technical, environmental, and social components.[96] In preparing an EIA, the mining company must identify and engage with all rural communities located within the mining activity's direct and indirect area of influence.[97]

79. The EIA approval process entails both technical evaluation and public involvement, in order to prevent, minimize, inform, and correct or mitigate any potential environmental impacts and negative externalities, while amplifying the positive

[94] **RER-0002**, Vela Expert Report, § III.A.1.

[95] **Ex. R-0155**, Supreme Decree 019-2009-MINAM, 24 September 2009, Art. 15 ("Any natural or legal person, incorporated under public or private law, whether national or foreign, which intends to develop an investment project likely to generate significant environmental or negative impact that is related to the environmental protection criteria established… must submit Environmental Certification to the corresponding competent authority. . .").

[96] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 46 ("The Environmental Study shall include an environmental management strategy that makes it possible to organize actions for the appropriate and adequate execution of the measures provided for in the following plans: a) Environmental Management Plan; b) Environmental Monitoring Plan containing Environmental Monitoring; c) Environmental Contingency Plan; d) Environmental Compensation Plan, where appropriate; e) Conceptual Closure Plan; f) Social Management Plan; g) any other plans which, owing to the nature or location of the mining project, require specific legislation or are determined by the competent environmental authority"); *see also* **RER-0002**, Vela Expert Report,¶ 80.

[97] *See infra* Section II.B.1.

impacts of a mining project.[98] A number of different government agencies are involved in the process of reviewing and approving EIAs, and overseeing compliance with EIAs once they have been approved:

a. The National Environmental Certification Service for Sustainable Investments ("**SENACE**"), which operates under the auspices of the Ministry of the Environment ("**MINAM**"), is the competent authority responsible for reviewing and approving EIAs.[99]

b. The OGGS provides specialized advice to evaluate social aspects of mining projects for the promotion of harmonious and synergetic relations between local communities and mining companies.[100] Once the Social Management Plan is approved (as part of the EIA), the mining company must register its social commitments with OGGS, which will then monitor their performance throughout the life of the mining project.[101]

c. The Organization of Supervision and Environmental Assessment ("**OEFA**") monitors a company's compliance with its EIA, and is authorized to levy fines

[98] **Ex. R-0155**, Supreme Decree 019-2009-MINAM, 24 September 2009, Art. 14 ("Environmental impact assessment is a technical-administrative participatory process intended to prevent, minimize, correct and/or mitigate and inform on the potential negative environmental impacts that may derive from policies, plans, programs and investment projects and also intensify their positive impact.").

[99] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 7 ("The National Environmental Certification Service for Sustainable Investments (SENACE), a member body of MINAM, is the competent authority responsible for reviewing and approving the Detailed Environmental Impact Studies regulated by Law No. 27446.").

[100] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 5.2 ("The General Social Management Office [OGGS] provides specialist advice, in order to assess the social aspects of the projects and mining activities and promote harmonious and synergic relations between the companies in the sector and their social environment.").

[101] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 61.2 ("Without prejudice to the competence assigned to the OEFA, the MINEM OGGS monitors social undertakings associated with this plan and any made following approval of the environmental study. The OGGS will submit to the OEFA information on the monitoring measures and the social undertakings referred to above, when required.").

in the event that a concession titleholder fails to comply with any applicable environmental regulations or Social Management Plans.[102]

In addition to the above and for smaller mining operators, the Regulations for Environmental Protection and Management in Mining authorize local regional governments to review and approve the EIA for projects within their jurisdiction.[103] Importantly, *mining projects or activities may not begin without Environmental Certification* from the relevant authorities.[104]

80. As part of its obligations in relation to the EIA, a mining operator must prepare and obtain approval of a Social Management Plan, which establishes the strategies, programs, and measures that the operator will take (i) to avoid, mitigate, or compensate any negative social impacts of its activity, and (ii) to maximize the positive social impacts of the mining activity on the project's area of direct influence.[105]

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[102] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 8 ("The Environmental Assessment and Monitoring Body (OEFA) is the governing body of the National Environmental Assessment and Monitoring System and is responsible for the environmental monitoring, supervision, assessment, control and sanctioning of the mining activities of medium-sized and large mines, as provided for by Law No. 29325, the Law on the National Environmental Assessment and Monitoring System and other additional provisions"), Art. 61.1 ("The OEFA is competent to supervise and monitor the plans and undertakings that form part of the Social Management Plan approved in the environmental study.").

[103] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 8 ("The Regional Governments, through their established bodies, are competent to conduct the process of categorizing, reviewing and approving the environmental studies, within the scope of the National Environmental Impact Assessment Study, presented by mine operators, whether classified as small or artisanal producers or not, provided they carry out their activities within those classifications and within their regional district and supervise those activities.")

[104] **Ex. R-0155**, Supreme Decree 019-2009-MINAM, 24 September 2009, Art. 15 ("The disapproval, irrelevance, inadmissibility or any other cause implying failure to obtain or loss of the Environmental Certification implies the legal impossibility of initiating works, executing and continuing with the development of the investment project. Non-compliance with this obligation is subject to penalties stipulated by law.").

[105] **RER-0002**, Vela Expert Report, ¶ 80; **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 53 ("The Social Management Plan included in the environmental study establishes the strategies, programs, projects and measures for managing social impact that must be adopted in order to prevent, mitigate, control, offset or avoid the negative social impacts and optimize the positive social impacts of the mining project in its respective areas of social impact..").

81. The Social Management Plan includes a number of social components: (i) a **Community Relations Program** (*Programa de Relaciones Comunitarias*), in which the mining company must detail how it expects to achieve a harmonious relationship with the relevant local communities;[106] (ii) a **Social Agreement Plan** (*Plan de Concertación Social*), in which a mining company must describe its impact prevention and mitigation measures, prioritizing the needs of the local population;[107] (iii) a **Community Development Plan** (*Plan de Desarrollo Comunitario*), in which the mining company must explain how it will improve the socio-economic conditions (e.g., employment, health, nutrition, education) of the local communities;[108] (iv) a **Social Investment Schedule** (*Programa de Inversión Social*) for the adoption and implementation of those social commitments;[109] and (v) a **Social Impact Monitoring Schedule** (*Programa de Monitoreo de Impactos Sociales*), in which the mining company must establish a schedule for monitoring social impacts of the mining activity in the local community within the area of influence.[110]

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[106] **RER-0002**, Vela Expert Report, ¶ 81; **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 60.1 ("Community Relations Plan: Communications Plan, Social Relations Protocol, Workers' Code of Conduct, among others, proposed by the holder in order to achieve a harmonious relationship with the populations and their lifestyles.").

[107] **RER-0002**, Vela Expert Report, ¶ 82; **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 60.3 ("Social consultation plan: this contains measures for the prevention and mitigation of the risk and social impact, such as the significant impact on natural resources, whenever it is a priority need of the population, or the material cultural heritage of the location as well as the mechanisms for assessing and consulting the various interests of the local populations.").

[108] **RER-0002**, Vela Expert Report, ¶ 82; **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 60.4 ("Community development plan: this must contain programs for local promotion and social inclusion, in order to improve their socioeconomic conditions, placing emphasis on their production activities, the creation of employment, health, nutrition and education. It must promote the strengthening of local skills, among other things, coordinating with the authorities and local population.").

[109] **RER-0002**, Vela Expert Report, ¶ 82; **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 60.5, ("Social Investment Program: this includes the estimated annual planning of investments planned for execution of the Social Management Plan.")

[110] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 60.6, ("Social impact monitoring program: based on the indicators identified on the social baseline and the assessment of environmental impacts.")

82. In addition to the above-mentioned social components of the Social Management Plan, the mining company must also engage directly with local communities concerning the mining activity itself, through a process called "**Citizenship Participation**" (*Participación Ciudadana*). The law foresees a variety of methods for local community engagement, including participatory workshops, informational workshops, and public hearings.[111] The onus is on the mining company to select the mechanisms that will best facilitate the population's access to information and adequate citizen participation. In addition, citizen participation must take place in five different stages: (i) before preparation of the EIA, (ii) during preparation of the EIA, (iii) during the evaluation phase of the EIA, (iv) during the construction of the mine, and (v) during the operation of the mine.[112]

83. Finally, under Peruvian Law No. 28090 ("**Mine Closure Law**"), the mining company must submit a **Mining Closure Plan**, which also necessitates a separate process of citizen participation.[113] As part of that process, local and regional authorities must also be given an opportunity to review and submit their views on the Mining Closure Plan. In such plan, the mining company must (i) detail the activities it will undertake before,

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[111] *See* **Ex. R-0007**, Supreme Decree No. 028-2008-EM, 26 May 2008, Art. 6.

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

[113] **Ex. R-0008**, Supreme Decree No. 033-2005-EM, 14 Agosto 2005, Art. 16. ("Any natural or legal person may go to the Directorate-General for Mining Environmental Matters of the Ministry of Energy and Mines, Regional Directorate for Energy and Mines, at the offices of the Regional Government, Provincial or District Municipalities and presidency of the corresponding community, to become aware of the Mine Closure Plan subject to the approval procedure indicated in article 13 of the present Regulations. Any observations, recommendations or documentation related to the Mine Closure Plan subject to assessment that it is wished to submit to the Ministry of Energy and Mines within the established citizen participation process must be submitted in writing to the Directorate-General for Mining Environmental Matters or the corresponding Regional Directorates for Energy and Mines, within the maximum period indicated in the notice of publication indicated in article 13, point 13.3, paragraph a). Any observations made will be assessed and considered by the Directorate-General for Mining Environmental Matters during the Mine Closure Plan assessment process.").

during, and after the operating life of the mine; (ii) describe the steps it will take to rehabilitate the concession area following the closure of the mine in compliance with environmental standards and regulations for the treatment of abandoned mines;[114] and (iii) include proposals prepared by a specialized consultant which outline the progressive closure, eventual closure, temporary suspensions, final closure, and post-closure phases of the mine. Without a Mining Closure Plan, the concession holder may not commence exploitation or extraction activities—although it may continue with the construction of mining installations pending approval of such plan.[115]

84. Social license principles are reflected in the legal framework applicable to all mining projects in Peru. For example, Peru's Environmental Mining Regulation obliges mining companies to (i) reach and fulfill social agreements with local communities; (ii) engage local communities at all stages; (iii) promote citizen participation processes; and (iv) participate in mechanisms for the prevention and resolution of any conflicts that may arise, among other commitments.[116]

85. As demonstrated above, under the Peruvian legal framework, mining companies are required to ensure local community engagement and participation at every stage of a mining project. Accordingly, as a mining company operating in Peru, Claimant should have known that it would need to establish a long-term relationship, and secure agreements with all three of the rural communities affected by Claimants' mining project, including the Parán Community, in order to fulfill its obligations under Peruvian law.

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[114] **Ex. R-0011**, Law No. 28090, 13 October 2003, Art. 7 ("Mining activity operators shall submit the Mine Closure Plan to the competent authority within a maximum period of one year as from approval of the Environmental Impact Study (EIA) and/or the Environmental Adaptation and Management Program (PAMA). . .").

[115] **Ex. R-0008**, Supreme Decree No. 033-2005-EM, 14 Agosto 2005, 14 August 2005, Art. 17. ("A mining activity operator who does not have an approved Mine Closure Plan may not initiate the development of mining operations.").

[116] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Ch. V.

2. *In light of relevant customary international law and international jurisprudence, Claimant should have been aware that it was required to obtain community support before developing its mine*

a. Customary international law

86. In addition to the rights of local communities and the obligations that a mining company owes to them under Peruvian law, Peru has various obligations under international law to ensure that indigenous communities are consulted and that their rights are protected. Such obligations are especially important in the context of mining activity, due to the impact that such activity can have on such communities' interests, territory, environment, and culture. Peru is a monist state; accordingly, and pursuant to the Constitution, international law obligations are automatically incorporated into domestic law without any need for further implementation.[117]

87. Peru's obligations under international law with respect to the rights of indigenous peoples apply equally to the treatment of rural communities (such as the Parán Community). The fact that rural communities constitute indigenous communities for the purposes of international law is evident from a comparison between the Peruvian law definition of rural communities and the relevant definitions applicable to indigenous and tribal peoples under international law. As mentioned earlier, Peru's Rural Communities Law defines "rural communities" as

> organizations of public interest, with legal existence and legal personality, integrated by families that inhabit and control certain territories, linked by ancestral, social, economic and cultural ties, expressed in the community property of the land, community work, mutual assistance, democratic government (. . .).[118]

88. Similarly, "indigenous peoples" are defined under Article 1.1.b. of ILO Convention 169 as

[117] **Ex. C-0023**, the Constitution, Art. 55 ("Treaties formalized by the State and in force are part of national law.").

[118] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 2.

> peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[119]

89. Moreover, Article 1.1.a of ILO Convention 169 includes a definition of "tribal peoples," which is also applicable to the Parán Community:

> [P]eoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.[120]

Importantly, there is *no distinction* between either group (indigenous and tribal peoples) in terms of the legal implications under the ILO Convention 169; both groups are entitled to the same rights.[121]

90. Further, the principle of self-determination is acknowledged as a principle of customary international law, and possibly even as *jus cogens*, i.e., a peremptory norm.[122] This norm—the substance of which places obligations on the State to respect, protect, and fulfill—has applied broadly to peoples, and is affirmed in the United Nations Charter and other international legal instruments.[123] In the context of

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[119] **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, Art. 1.1.b.

[120] **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, Art. 1.1.a.

[121] **RLA-0034**, J. Henrikson, "*Key Principles in Implementing ILO Convention No 169,*" 2008, p. 7; *see also* **Ex. R-0030**, Maritzia Paredes, "Fluid identities: Exploring ethnicity in Peru," June 2007 (explaining that in Peru, self-identifying as 'indigenous' is heavily stigmatized, risks further marginalization, and carries real or perceived costs. As such, ILO definition of 'tribal people' offers the same protections and might be helpful to some who seek to avoid the designation of 'indigenous'.); *see also* **RER-0002**, Vela Expert Report, § II.B.

[122] **RLA-0035**, J. Anaya, INDIGENOUS PEOPLE IN INTERNATIONAL LAW (1996), p. 97 ("Affirmed in the United Nations Charter and other major international legal instruments, self-determination is widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm.").

[123] *See* **RLA-0035**, J. Anaya, INDIGENOUS PEOPLE IN INTERNATIONAL LAW (1996), p. 97.

indigenous rights, this norm concerns the recognition of the right to cultural integrity, the right to development, and the right to self-governance.[124]

91. In addition, the rights of rural and indigenous communities to be consulted and to be part of effective participation processes is expressly recognized in ILO Convention 169. Under that treaty, the right of indigenous communities to exercise control over development that affects them is protected in Article 7.1, which provides that

> [indigenous peoples] shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.[125]

Furthermore, legal scholars have noted that "International Law now clearly acknowledges that Indigenous people have the right to self-determination."[126]

92. With regard to natural resources, Article 15.1 of ILO Convention 169 specifically provides that "[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded."[127] It also provides for indigenous peoples' right to participation in the "use, management and conservation" of such resources. [128] "Participation" in this context means establishing processes whereby indigenous people can freely participate in all levels of decision-making (e.g., at the national and regional levels).[129] Furthermore, Article 6.2 of that same legal instrument

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[124] **RLA-0035**, J. Anaya, INDIGENOUS PEOPLE IN INTERNATIONAL LAW (1996), p. 129 ("The international norms concerning indigenous peoples, which thus elaborate upon the requirements of self-determination, generally fall within the following categories: nondiscrimination, cultural integrity, lands and resources, social welfare and development, and self-government.").

[125] **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, Art. 7.1.

[126] **RLA-0075**, B. Richardson, *et al.*, "*Chapter 7: Indigenous Peoples and International Law and Policy*," INDIGENOUS PEOPLES AND THE LAW (2009), p. 164.

[127] **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, ILO 169, Art. 15.1.

[128] **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, ILO 169, Art. 15.1.

[129] **RLA-0034**, J. Henrikson, "Key Principles in Implementing ILO Convention No 169," 2008, pp. 19–20.

establishes that consultations with indigenous peoples must be carried out in good faith with the objective of achieving agreement or consent to the proposed measure.[130]

93. ILO Convention 169 goes on to provide indigenous peoples with the right to be consulted with respect to the exploration or exploitation of subterranean resources pertaining to their lands. Specifically, Article 15.2 provides as follows:

> In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.[131]

94. Furthermore, Article 7.4 establishes an obligation on States to "take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit."[132]

95. These same rights, as well as others, are also enshrined in the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**"). The UNDRIP is acknowledged as a fundamental international instrument that provides a comprehensive framework for States' recognition of indigenous peoples' rights.[133] It was adopted by the UN General Assembly in 2007 by a majority of 144 States in favor, including Peru.[134] Canada (Claimant's home State) later officially endorsed the UNDRIP, in 2016.[135] Together with ILO Convention 169, the UNDRIP reflects the global consensus regarding minimum standards for States to apply in recognition and

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[130] **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, Art. 6.2.

[131] **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, Art. 15.2.

[132] **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, Art. 7.4.

[133] **RLA-0030**, UNDRIP.

[134] **RLA-0078**, *UNDRIP*, Voting Record, 13 September 2007.

[135] **Ex. R-0100**, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples," Government of Canada, 10 May 2016.

observance of the rights and prerogatives of indigenous and rural peoples, including with respect to land and resources.[136]

96. Similar to ILO Convention 169, UNDRIP Art. 29.1 highlights indigenous peoples' rights to conservation and protection of the environment:

> Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

97. Indigenous peoples' right to consultation and free, prior and informed consent with respect to utilization of minerals and other resources is contemplated in Article 32.2 of UNDRIP, which states that a government shall

> consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent prior to the approval of any project affecting their lands or territories and other resources**, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[137] (Emphasis added)

Importantly, such right to free, prior and informed consent relates not just to projects that are actually *on* an indigenous community's lands, but extends to all projects "***affecting*** their lands" (emphasis added).

98. Further, Article 32.3 of UNDRIP provides that a government shall

> provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[138]

99. In sum, the aforementioned provisions of ILO Convention 169 and UNDRIP specifically provide for the right of indigenous and tribal peoples to be (i) consulted

[136] **RLA-0030**, UNDRIP.

[137] **RLA-0030**, UNDRIP, Art. 32.2.

[138] **RLA-0030**, UNDRIP, Art. 32.3.

before the exploration and exploitation of minerals where their communities may be affected; (ii) afforded with the opportunity to provide free, prior and informed consent with respect to such exploration and exploitation; and (iii) included in effective participation processes where those exploration and exploitation activities are concerned.[139]

100. The above legal framework existed at the time that Claimant made its investment in Invicta. Claimant therefore should have been aware of Peru's obligations with regard to protecting the rights of rural communities, including the Parán Community in this case. Had Claimant been aware of Peru's human rights treaty obligations, this would have impacted (i) Claimant's own assessment of the importance of maintaining good community relations, and (ii) what Claimant could reasonably have expected Peru to do in the face of social conflict.

b. International norms of corporate social responsibility put Claimant on notice that it must obtain community support before it could develop its mine

101. International norms of CSR are similarly norms that emphasize the need for consultation and consent of indigenous peoples in relation to the extraction of natural resources. Through such international CSR norms, the extractive industry widely recognizes the vital need for private companies to obtain community support before commencing mining or other extractive activities.[140] As will be explained below, Claimant failed to obtain that community support in respect of the Invicta Project.

102. Inclusion of local communities and participation of civil society has become an essential pillar of sustainable development agendas in the mining industry. For example, the International Council on Mining and Metals ("**ICMM**") published in 2010, and updated in 2015, a guide entitled "Good Practice Guide: Indigenous Peoples

[139] **RLA-0030**, UNDRIP, Art. 18, 27.

[140] *See, e.g.*, **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration, "Principles and Guidance Notes," 2014; *see also* **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013; *see also* **Ex. R-0087**, BDO, Social License to Operate in Mining: Current Trends & Toolkit, 2020; *see also* **Ex. R-0094**, ICMM, Understanding Company-Community Relations Toolkit, undated.

and Mining" ("**ICMM Good Practice Guide**").[141] This document highlights the specific duties of mining companies in relation to indigenous and rural peoples, including (i) ensuring inclusion of local communities at the earliest stages of a project's development; (ii) involvement of the local community in decision-making; and (iii) obtaining free, prior and informed consent from indigenous communities.[142] Indeed, the ICMM Good Practice Guide dedicates an entire chapter to the subject of reaching agreements with local communities, acknowledging that

> [t]here is now broad recognition among leading companies in the global mining industry that strong, but flexible agreements with indigenous groups are mutually beneficial for both the companies themselves and the communities they operate in.[143]

103. The ICMM Good Practice Guide goes on to note that such negotiated agreements between mining companies and indigenous communities are commonplace in several jurisdictions, including Claimant's home jurisdiction of Canada.[144] Finally, the Guide advises companies to allow adequate time for dialogue with communities, acknowledging that the process of engagement for the development of respect and mutual understanding can be time-consuming.[145] As shown below, Claimant tried to rush through the Invicta Project, without giving dialogue with the Parán Community the time that it required and deserved.

104. The Treaty itself mandates that Peru and Canada encourage enterprises to carry out their activities in accordance with internationally recognized CSR standards:

> **Article 810: Corporate Social Responsibility**
>
> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to v**oluntarily incorporate**

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

[142] **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015, pp. 23–25.

[143] **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015, p. 39.

[144] **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015, p. 40.

[145] **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015, p. 52; *see also* **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013, p. 9 ("successful engagement with communities requires time and patience.").

> **internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties.** These principles address issues such as labour, the environment, human rights, **community relations** and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.[146] (Emphasis added)

105. Claimant's home Government of Canada issued its own CSR Strategy in 2009,[147] and updated it in 2014.[148] Acknowledging the strong presence of Canadian companies in the global mining sector, the Government of Canada announced that its CSR policy would "support initiatives to enhance the capacities of developing countries to manage the development of minerals and oil and gas," and "promote widely-recognized international CSR performance guidelines with Canadian extractive companies operating abroad."[149]

106. According to Canada's 2014 CSR Strategy ("**2014 CSR Strategy**"), Canada expects its companies to (i) "respectfully engage relevant stakeholders, early on and regularly"; (ii) "[u]nderstand local customs, culture and expectations, and how they affect, and are affected by, the project"; (iii) "[w]ork with stakeholders to determine and communicate environmental, social and economic impact solutions"; (iv) "[e]xplore opportunities to build local capabilities"; and (v) "[w]ork with locals to develop a joint plan to contribute to local development."[150] Canada acknowledges that

> beyond doing the right thing . . . those that go above and beyond the basic level requirements to adapt their planning and operations along CSR lines are **better positioned to succeed in the long term, and to contribute to a more stable and**

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[146] **RLA-0010**, Peru-Canada FTA Art. 808.

[147] *See* **Ex. R-0154**, Canada, Building the Canadian Advantage: Canada's Corporate Social Responsibility Strategy for the Canadian International Extractive Sector, 2009, ("**2009 CSR Strategy**").

[148] *See* **Ex. R-0089**, 2014 CSR Strategy. Canada's Department of Foreign Affairs, Trade and Development (DFATD) and Natural Resources Canada (NRCan), along with other government agencies review Canada's CSR Strategy every five years.

[149] **Ex. R-0154**, 2009 CSR Strategy, p. 6.

[150] **Ex. R-0089**, 2014 CSR Strategy, p. 3.

> **prosperous environment for all affected parties.**[151] (Emphasis added)

107. When social conflicts do arise, Canada fully expects its companies to take part in mechanisms designed to facilitate dialogue towards dispute resolution, and notes that such mechanisms are crucial to the success of mining projects:

> [G]iven the challenging environments in which extractive sector operates, disputes can and do arise. . . . Canada understands that **dialogue facilitation and non-judicial resolution mechanisms**, which bring parties together to find mutually-beneficial solutions, **are crucial to the long-term success of extractive projects abroad and the sustainability of benefits to host communities**.[152] (Emphasis added)

108. Canada itself has established domestic agencies (similar to Peru's OGGS) that offer early detection and resolution programs in which dialogue facilitation mechanisms are employed to help communities and mining companies resolve their differences and foster constructive relationships.[153] Elevating the importance of such mechanisms, Canada's CSR Strategy warns that "[t]he Government [of Canada] will introduce consequences for companies that are not willing to participate in the dialogue facilitation processes of either the CSR Counsellor or the NCP."[154] Those consequences include the company's exclusion from receiving assistance with economic promotion abroad and from participating in Canada's trade missions.[155] Moreover, companies that refuse to engage in dispute resolution processes will undergo due diligence evaluations by the Government of Canada's financing crown corporation, and risk losing financial or other support.[156]

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[151] **Ex. R-0089**, 2014 CSR Strategy, p. 3.

[152] **Ex. R-0089**, 2014 CSR Strategy, p. 11.

[153] **Ex. R-0089**, 2014 CSR Strategy, p. 11.

[154] **Ex. R-0089**, 2014 CSR Strategy, p. 11.

[155] **Ex. R-0089**, 2014 CSR Strategy, p. 12.

[156] **Ex. R-0089**, 2014 CSR Strategy, pp. 12–13.

109. As mentioned above, another key objective of Canada's CSR Strategy is to engage in host country capacity-building.[157] As a result, both Treaty parties have collaborated extensively to implement extractive-sector strategies to ensure environmentally sustainable and socially responsible operations that support the protection of human rights and good community relations. For example, Canada's International Development Agency ("**CIDA**") established a partnership project with Peru ("**PERCAN**") and committed approximately USD 10 million dollars over at least a five year period (from 2003–2007) to help the Peruvian Government develop and promote: (i) multi-stakeholder dialogue; (ii) community participation; and (iii) conflict resolution mechanisms for the sustainable development and well-being of communities impacted by the extractive sector.[158] Through that program, Peru developed and made accessible to Invicta an extensive Citizen Participation Manual, which informed Invicta and all mining companies of their obligations under Peruvian law, as well as Peru's obligations under the ILO Convention No. 169.[159]

110. In addition, the Canadian Embassy in Peru, the Mining Association of Canada, and Prospectors and Developers Association of Canada all collaborated with Peru's OGGS to publish a detailed toolkit ("**Canada-Peru CR Toolkit**") and guide on how responsible mining companies should manage community relations early on and throughout the exploration phase.[160] The Canada-Peru CR Toolkit covers (i) governing principles for successful community relations; (ii) best practices for establishing initial contact and guaranteeing early citizen participation; (iii) due diligence and risk analysis; (iv) managing community concerns and expectations; (v) communication mechanisms; (vi) establishing grievance mechanisms that adequately respond to community concerns; and (vii) crisis prevention and management.[161]

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[157] **Ex. R-0154**, 2009 CSR Strategy, pp. 4–6.

[158] **Ex. R-0096**, Project profile—Peru-Canada Mineral Resources Reform Project (PERCAN), last accessed 6 March 2022.

[159] **Ex. R-0058**, M. Bautista Ascue, "*Manual de Participación Ciudadana*," PERCAN, 8 February 2011 ("**PERCAN, Citizen Participation Manual**").

[160] **Ex. R-0028**, Canada-Peru CR Toolkit.

[161] **Ex. R-0028**, Canada-Peru CR Toolkit.

111. The Canada-Peru CR Toolkit explicitly addresses the risk of social conflict or opposition from local communities, and the need for a mining company, its executives and staff, to be well prepared, "long in advance," for such a possibility:

> The company's executives and senior personnel must be well prepared for a crisis situation long before it happens; they must be alert to possible situations of risk and mitigation practices and be familiar with the crisis management plan.[162]

As will be shown herein, Claimant demonstrably either lacked, failed to execute, or poorly executed a Crisis Management Plan in this case with the Parán Community.

112. The Canada-Peru CR Toolkit further warns of mining company omissions or missteps that could give rise to a crisis, including the following:

a. A mining company's failure to monitor and adequately address community grievances may result in expressions of local opposition and disagreement *escalating to the point of threats or violence*.[163] In relation to such a situation, the guide stresses the vital importance of *continuous dialogue* as the method through which disagreements can be identified, addressed and resolved.[164]

b. The bedrock of trust between a local community and a mining company can erode if the mining company fails to follow through on its social commitments.[165]

c. The provision or receipt by a mining company of information, without understanding the concerns of the community, *or dismissal of those concerns as irrelevant*, could foment a reactive and high-risk relationship dynamic.[166] By contrast, lasting community alliances are formed through *permanent dialogue*

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[162] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 57.

[163] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 53.

[164] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 53 ("Dialogue on causes and prospects for the construction of solution options. The priority aim at this stage is: a) to identify the root causes of non-compliance; b) to check the relevant aspects of the complaint by means of dialogue with the claimant; and c) to generate options for solution.")

[165] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 38.

[166] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 14.

characterized by *two-way communication and exchange*, implementing principles of *participation*, and *reciprocal collaboration* whereby shared responsibilities and mutual benefits are recognized.[167] The following infographic on levels of communication is included in the Canada-Peru CR Toolkit:[168]

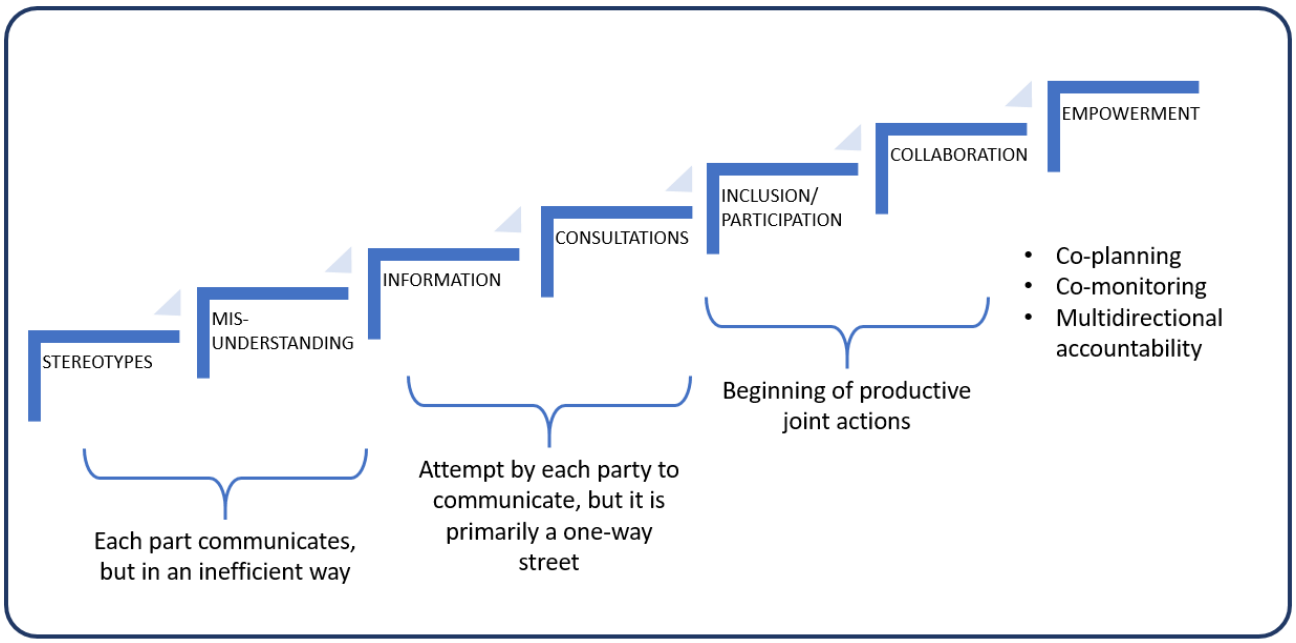


Figure 01: Levels of Communication and Relationships

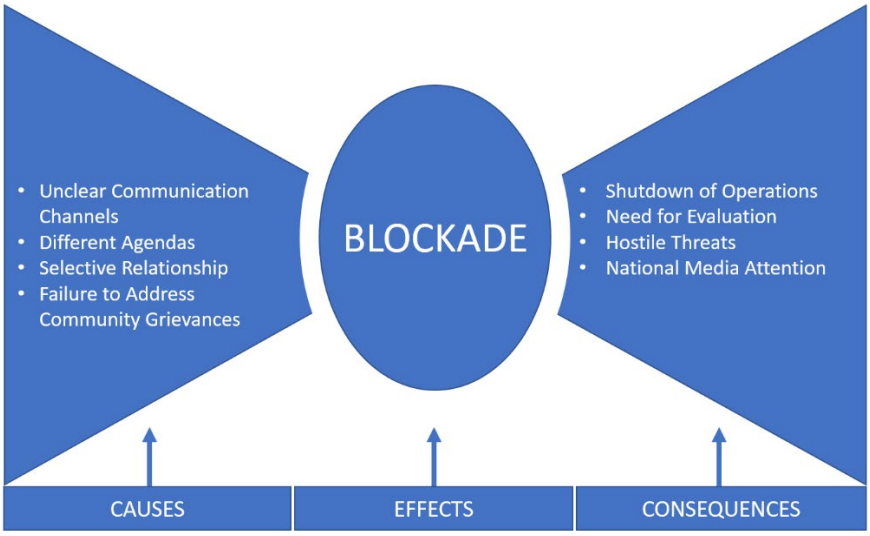
d. Communication is not sufficient if it is not accompanied by responsible management, transparency, respect, accountability and inclusion.[169]

e. A mining company may stoke the flames of opposition and violence when it acts in ways that further the social disparity, conflict and *inter-community rivalry among neighboring communities* within the project's purview.[170]

[167] **Ex. R-0028**, Canada-Peru CR Toolkit, pp. 14–15.
[168] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 14.
[169] **Ex. R-0028**, Canada-Peru CR Toolkit, pp. 16, 40.
[170] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 54.

f. When a social conflict escalates to a crisis, finding a resolution must become the mining company's highest priority, *relegating all mining activity as a lesser priority*.[171]

Finally, the Canada-Peru CR Toolkit explains that community protest (e.g., civilian blockades) are a natural consequence of a mining company's failure to manage community relations:[172]



Source: RMD Consultants, 2015.

Figure 02: Blockade

113. Unfortunately, in this case Claimant and Invicta committed all of the above omissions and missteps when it came to community relations with the local communities—and especially with the Parán Community. These failures and omissions will be described in detail in **Sections II.C.3, II.D, and II.F.2**.

114. Had Claimant been prepared for the real possibility of a social conflict and potentially a crisis arising with any of the local communities within the Invicta Project's area of influence, it would have adhered to industry best practices and CSR standards by activating a Crisis Prevention Plan and, if needed, a Crisis Management Plan.[173] Such

[171] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 60.

[172] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 71.

[173] *See, e.g.*, **Ex. R-0028**, Canada-Peru CR Toolkit, pp. 57–63.

plans would have recalibrated grievance mechanisms to effectively respond to community concerns, deployed resources to strengthen communication mechanisms with the community, and enabled closer collaboration with local and regional authorities in implementing a plan of action for responding to the crisis.[174]

115. Further to the above, in 2013, twenty-seven international business leaders and extractive sector experts identified 'stakeholder-related' risks as the single biggest issue in the mining sector.[175] Those business leaders advised that, along with strengthening cooperation with local communities, mining companies "need to become more open to the possibility that after weighting the costs and benefits, local communities may ultimately decide to reject or postpone a project."[176] In a similar vein, they stressed that, "[a]s a matter of principle, the 'no' option belongs on the table," and emphasized "the importance of taking seriously indigenous peoples and other communities' rights to self-determination."[177] Unfortunately, in the present case, Claimant was unwilling to consider as an option *pausing* mining operations to prioritize the resolution of the conflict — much less ending the Invicta Project for lack of support from the Parán Community (which was the largest rural community within the Project's area of influence).

116. At an early stage, prior to Claimant's investment,[178] Invicta appears to have recognized the importance of establishing a co-operative relationship with local communities, through its adoption of the Equator Principles. The latter is a prominent set of international guidelines for sustainable development via which a company undertakes to evaluate its environmental, social, and governance ("**ESG**") practices.[179]

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[174] *See, e.g.*, **Ex. R-0028**, Canada-Peru CR Toolkit, pp. 57–63.

[175] **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013.

[176] **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013, p. 9.

[177] **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013, p. 9.

[178] *See generally* **Ex. R-0041**, Joint Disclosure Booklet.

[179] **Ex. R-0129**, EP4, The Equator Principles, July 2020 ("**The Equator Principles**").

Specifically, in a Joint Disclosure Booklet published by Lupaka and AAG on 22 August 2012—two months before Claimant acquired its interest in Invicta—Claimant identified the Parán, Lacsanga, and Santo Domingo de Apache Communities within the direct area of influence of the Project, and declared that "[b]y adopting the 'Equator Principles,' the Invicta Project has committed to obtaining and maintaining good relationships with nearby and affected communities."[180] Accordingly, Invicta committed to: (i) implement "an Informed Consultation and Participation process" with all communities facing potentially significant adverse impacts from its Project, (ii) "facilitate Stakeholder Engagement" with disclosure on an ongoing basis of any environmental or social risks, and (iii) "establish effective grievance mechanisms which are designed for use by Affected Communities."[181]

117. As a Canadian mining operator, Claimant no doubt was aware of the above principles, and of the potential risks if it did not follow them. Nevertheless, Claimant failed to observe such principles, and wholly mismanaged its community relations with the Parán Community— a mistake that proved fatal to Claimant's investment.

C. Claimant's investment in the Invicta Project

1. Claimant's lack of experience with Peruvian mining projects

118. Lupaka, formerly Kcrok Enterprises Ltd., is a mining company based in British Columbia, Canada.[182] It describes its board and management team as having "years of experience in the mining industry and, specifically, with Peru."[183] However, Claimant's experience relevant to this arbitration is limited to three embryonic mining projects in Peru, none of which ever reached the exploitation stage: the Crucero project, the Josnitoro project, and the project at issue herein, which was the Invicta Project.[184] In each of those projects, Claimant failed to adequately manage its resources

[180] **Ex. R-0041**, Joint Disclosure Booklet, p. C-7.

[181] **Ex. R-0129**, The Equator Principles, pp. 11–13.

[182] **CWS-0002**, Witness Statement of Gordon Ellis, 1 October 2021 ("**Ellis Witness Statement**"), ¶ 2.

[183] Claimant's Memorial, ¶ 24.

[184] *See infra* Section II.C.1.

or to engage effectively with the local communities, leading to (i) an USD 11 million loss in the case of the Crucero project, [185] (ii) a terminated joint venture agreement in the case of the Josnitoro project,[186] and (iii) a default under its loan agreement and loss of its Peruvian subsidiary in the case of the Invicta Project.[187]

119. Claimant's first failed project (Crucero) began in 1996, when a Peruvian company called Compañia de Exploraciones, Desarrollo e Inversiones Mineras S.A.C. ("**CEDIMIN**") acquired a series of mining concessions in southern Peru.[188] In 2009, the Crucero project was transferred to another Peruvian company, Minera Pacacorral S.A.C. ("**Pacacorral**").[189] Claimant then acquired the project by purchasing 60% of Pacacorral in July 2010, and the remaining 40% in January 2012.[190] To its shareholders and the general public, Claimant reported that the Crucero project was both its "flagship project" and its "exploration priority."[191] Despite those representations, however, the project never got off the ground, and accordingly did not even come close to any exploitation phase. Instead, Claimant suspended active exploration at the site in 2014, in part due to its decision to preserve and reallocate its limited funding.[192]

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[185] **Ex. R-0036**, Consolidated Financial Statements for the years ended December 31, 2017 and 2016, Lupaka Gold Corp., 30 April 2018, p. 13; *see also* **Ex. R-0037**, "*Lupaka Gold Completes Sale of Crucero Project to GoldMining Inc.*," JUNIOR MINING NETWORK, 21 November 2017, p. 1 (outlining how Lupaka sold the Crucero project to Gold Mining Inc. ("**GMI**")).

[186] **Ex. R-0039**, Lupaka Gold Corp., "Lupaka Provides Development Update; Commercial Production Expected in Q3/18," 17 April 2018, p. 3 ("The Josnitoro joint venture agreement ("JV") with Hochschild Mining plc required the Company to obtain a community agreement for exploration by March 2018. Lupaka was unable to obtain a community agreement and requests for an extension with Hochschild were unsuccessful, resulting in termination of the JV.").

[187] *See infra* Section II.F.4.

[188] **Ex. R-0031**, GoldMining Inc., Technical Report, Crucero Property, 21 February 2018, p. 14.

[189] **Ex. R-0031**, GoldMining Inc., Technical Report, Crucero Property, 21 February 2018, p. 16.

[190] **Ex. R-0031**, GoldMining Inc., Technical Report, Crucero Property, 21 February 2018, p. 16

[191] **Ex. R-0032**, Lupaka Gold Corp., "Lupaka Gold Provides Summary of 2013 Activities and An Update on 2014 Exploration Programs," 30 January 2014, p. 4; **Ex. R-0033**, "*Lupaka Gold Acquires Andean American Gold Corp*," YAHOO NEWS, 1 October 2012, p. 1 ("Our exploration priority will remain the Crucero Gold project.").

[192] **Ex. R-0034**, Management's Discussion and Analysis, Lupaka Gold Corp., 20 April 2016, p. 13 (noting that active exploration at the site was suspended in 2014); *see also* **Ex. R-0049**, Management's

120. In November 2017, Claimant sold—at a loss—its interest in the Crucero project, thus completing its *volte face* concerning its erstwhile (and short-lived) "flagship project." Claimant's then-president and CEO, Will Ansley, stated at the time that "[c]losing the sale of [the] Crucero project, **a non-core asset**, bolsters our treasury as we focus on putting our Invicta Gold Development Project into production . . ."[193] (emphasis added). Thus, in the span of a mere three years, the Crucero project went from being Claimant's "flagship project" to a "non-core asset." Claimant reported that in the sale of the Crucero project, it suffered a loss of USD 11.03 million.[194]

121. The second of Claimant's failed projects was the Josnitoro project, which was first developed by Compañía Minera Ares S.A.C. and Minera del Suroeste S.A.C., two indirect Peruvian subsidiaries of Hochschild Mining PLC ("**Hochschild**"), a mining company registered in England and Wales.[195] In 2013, Claimant entered into a memorandum of understanding for a joint venture with Hochschild's Peruvian subsidiaries.[196] Pursuant to such memorandum of understanding, Claimant acquired an exercisable option to obtain up to 65% ownership of a future joint venture with Hochschild, in exchange for developing the Josnitoro project.[197] Under the joint

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Discussion and Analysis, Lupaka Gold Corp., 13 November 2015, p. 4 ("As of the MD&A Date, the Company has implemented various cost-cutting measures, primarily in the areas of administration, investor relations, and exploration, with the result that the Crucero and Josnitoro Gold Projects are being maintained on a care and maintenance basis only. For Invicta, management continues to evaluate and pursue available financing alternatives to fund the estimated US$2.-3.0 Million of preproduction expenditures and working capital needed to put the Invicta Gold Project into small-scale production.").

[193] **Ex. R-0035**, "*Lupaka Gold Receives $5.7 Million in Cash and Securities From Sale of Non-Core Asset to Goldmining*," NEWSWIRE, 21 November 2017, p. 1.

[194] **Ex. R-0036**, Consolidated Financial Statements for the years ended December 31, 2017 and 2016, Lupaka Gold Corp., 30 April 2018, p. 13 ("The transaction with GoldMining resulted in the Company recognizing a loss of $11,037,000"); *see also* **Ex. R-0037**, "*Lupaka Gold Completes Sale of Crucero Project to GoldMining Inc.*," JUNIOR MINING NETWORK, 21 November 2017, p. 1 (outlining how Lupaka sold the Crucero project to Gold Mining Inc. ("**GMI**")).

[195] **Ex. R-0038**, Lupaka Gold Corp., "Lupaka Gold Announces Josnitoro Gold Project Option With Hochschild Mining PLC," 26 November 2013.

[196] **Ex. R-0038**, Lupaka Gold Corp., "Lupaka Gold Announces Josnitoro Gold Project Option With Hochschild Mining PLC," 26 November 2013.

[197] **Ex. R-0038**, Lupaka Gold Corp., "Lupaka Gold Announces Josnitoro Gold Project Option With Hochschild Mining PLC," 26 November 2013.

venture agreement with Hochschild, Claimant was required to: (i) obtain an agreement with the mine's local community, to enable exploration of the site by March 2018, (ii) serve as the project operator, (iii) pay 100% of the cost of the early project development activities, and (iv) obtain a series of required permits.[198] If Claimant failed to achieve these goals, Hochschild had the right to terminate the joint venture.[199]

122. Claimant's president and CEO at the time, Eric Edwards, noted in relation to this transaction concerning the Josnitoro project that

> [t]his option complements [Claimant's] existing asset portfolio with a highly prospective, early stage exploration gold property in which we can apply our core abilities in discovering and developing gold resources, **and in securing social licenses** . . . With this significant step, [Claimant] continues its growth as a significant presence in the Peruvian gold exploration and development sector.[200] (Emphasis added)

123. Claimant thus acknowledged the importance of obtaining a social license in order for its mining project in Peru to be successful. But Claimant ultimately failed to obtain such social license, as discussed in detail below. Because Claimant failed to secure the local community agreements necessary to satisfy its commitments under the memorandum of understanding with Hochschild, the latter terminated the joint venture in April 2018.[201]

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[198] **Ex. R-0038**, Lupaka Gold Corp., "Lupaka Gold Announces Josnitoro Gold Project Option With Hochschild Mining PLC," 26 November 2013.

[199] **Ex. R-0038**, Lupaka Gold Corp., "Lupaka Gold Announces Josnitoro Gold Project Option With Hochschild Mining PLC," 26 November 2013.

[200] **Ex. R-0038**, Lupaka Gold Corp., "Lupaka Gold Announces Josnitoro Gold Project Option With Hochschild Mining PLC," 26 November 2013, p. 1.

[201] **Ex. R-0039**, Lupaka Gold Corp., "Lupaka Provides Development Update; Commercial Production Expected in Q3/18," 17 April 2018, p. 3 ("The Josnitoro joint venture agreement ("JV") with Hochschild Mining plc required the Company to obtain a community agreement for exploration by March 2018. Lupaka was unable to obtain a community agreement and requests for an extension with Hochschild were unsuccessful, resulting in termination of the JV.").

124. As with the Crucero project, Claimant exited the Josnitoro project during the exploration phase, never reaching the exploitation stage.[202] Thus, as of April 2018, its interest in the Crucero project had been sold at a loss, its interest in the Josnitoro project had been terminated, and it still lacked any experience in bringing any Peruvian mining project to the exploitation stage. At that point, Claimant's sole remaining project was the Invicta Project.[203]

2. History of the Concessions and Claimant's alleged qualifying investment

125. Between 2012 and 2019, Claimant acquired and tried to develop the Invicta Project.[204] In order to contextualize Claimant's allegations regarding the treatment of its investment, it is necessary to understand (i) the history of the mine and Concessions, as well as (ii) the various property rights involved in this case.

a. Claimant's acquisition of the Invicta Project

126. Claimant's mine is located in the area of the Victoria Uno mining concession ("**Victoria Uno Concession**"), in the province of Huaura, department of Lima, Peru. The areas surrounding the Victoria Uno Concession are subject to five other mining concessions (together with the Victoria Uno Concession, "**Concessions**").[205]

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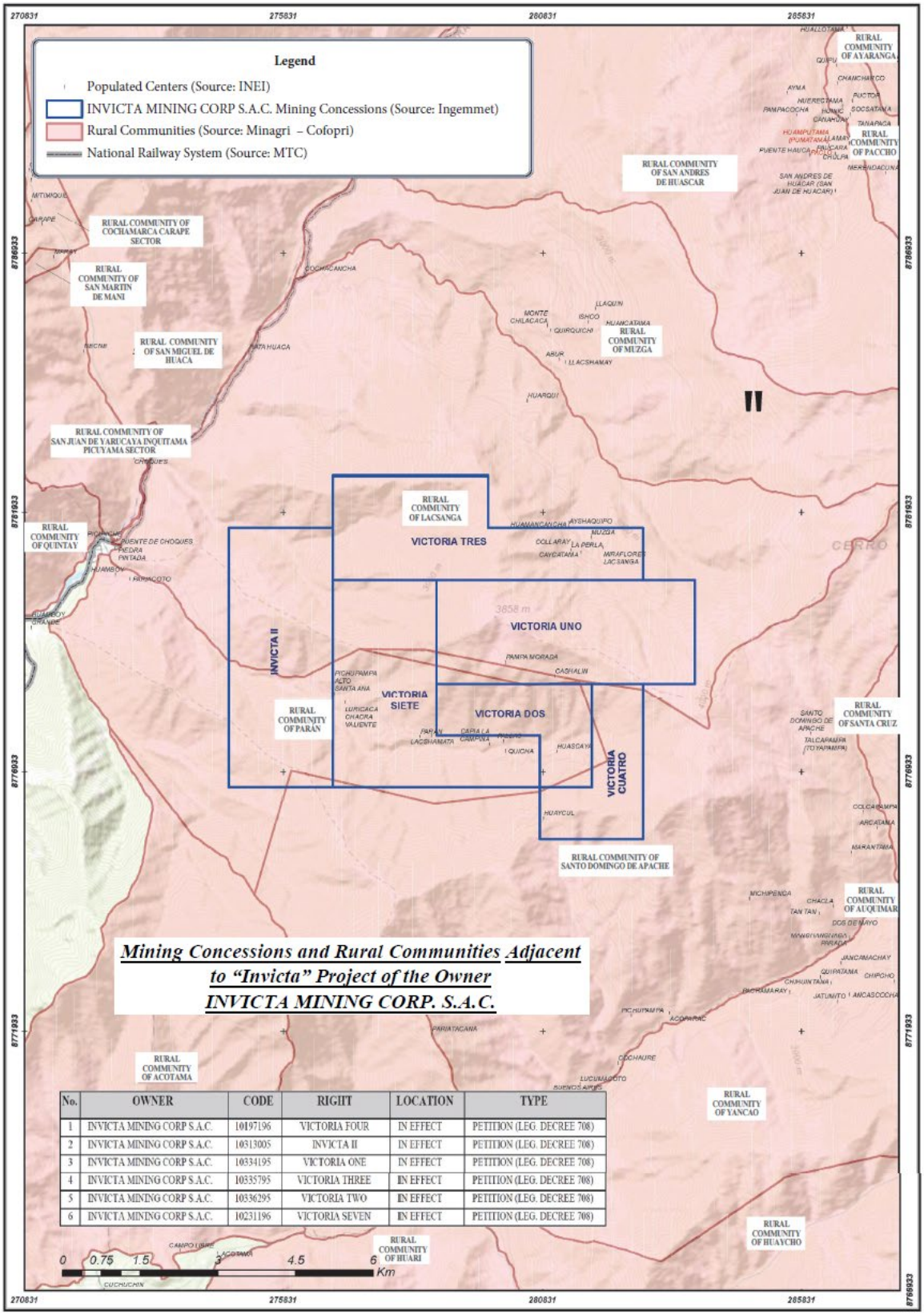
[202] **Ex. R-0038**, Lupaka Gold Corp., "Lupaka Gold Announces Josnitoro Gold Project Option With Hochschild Mining PLC," 26 November 2013, p. 1 (describing how the community agreements were precursors to the Preliminary Economic Assessment that was needed during the exploration stage of the project).

[203] **Ex. R-0040**, Management's Discussion and Analysis, Lupaka Gold Corp., 18 April 2018, p. 6 ("After the sale of the Crucero Gold Project and the termination of the Josnitoro Gold Project JV with Hochschild Mining plc ('Hochschild'), the Company's sole project is the Invicta Gold Development Project.").

[204] Claimant's Memorial, ¶¶ 2, 23, 209 ("This dispute arises out of Lupaka's project to mine gold, silver and copper in a rural area of the 'pre-Cordillera' of the Andes Mountains in Peru.").

[205] Claimant's Memorial, ¶¶ 23, 209 (outlining how Lupaka obtained six mining Concessions when it acquired Invicta, and listing "six mining Concessions in Peru" as an element of its alleged qualifying investment under the Treaty). *See also* **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, pp. 4, 29, Figure 2–1.



No.	OWNER	CODE	RIGHT	LOCATION	TYPE
1	INVICTA MINING CORP S.A.C.	10197196	VICTORIA FOUR	IN EFFECT	PETITION (LEG. DECREE 708)
2	INVICTA MINING CORP S.A.C.	10313005	INVICTA II	IN EFFECT	PETITION (LEG. DECREE 708)
3	INVICTA MINING CORP S.A.C.	10334195	VICTORIA ONE	IN EFFECT	PETITION (LEG. DECREE 708)
4	INVICTA MINING CORP S.A.C.	10335795	VICTORIA THREE	IN EFFECT	PETITION (LEG. DECREE 708)
5	INVICTA MINING CORP S.A.C.	10336295	VICTORIA TWO	IN EFFECT	PETITION (LEG. DECREE 708)
6	INVICTA MINING CORP S.A.C.	10231196	VICTORIA SEVEN	IN EFFECT	PETITION (LEG. DECREE 708)

Figure 03: Map of Invicta Mining Concessions and Rural Communities[206]

127. Ownership of the Concessions and of the Invicta Project mine site Invicta Mine has changed hands several times over the past thirty years.[207] Most recently, AAG, which is another Canadian mining company,[208] obtained the Concessions in 2008, through its Peruvian subsidiary, Invicta.[209]

128. On 28 October 2011, before Claimant became involved in the Invicta Project, AAG publicly announced that the initial capital cost of building an underground mine within the Victoria Uno Concession would be considerably higher than had been forecast in July 2010.[210] With that realization, AAG considered various merger and acquisition opportunities.[211]

129. On 13 February 2012, AAG announced that it had commissioned SRK Consulting (US) Inc. ("**SRK**") to update the existing resource estimates for the Invicta Project from the original estimates prepared in November 2009.[212] The resulting report ("**2012 SRK Report**") was published on 30 April 2012.[213] When Claimant became interested in acquiring AAG and the Invicta Mine, and in anticipation of such acquisition, it used

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[207] *See generally* **Ex. C-0028**, Public Mining Registry No. 02028980: Victoria Uno Concession, 19 July 1996 (providing the registry information for the Victoria Uno Concession); **Ex. C-0029**, Public Mining Registry No. 02029020: Victoria Dos Concession, 4 September 1996 (providing the registry information for the Victoria Dos Concession); **Ex. C-0030**, Public Mining Registry No. 02029079: Victoria Tres Concession, 9 October 1996 (providing the registry information for the Victoria Tres Concession); **Ex. C-0031**, Public Mining Registry No. 02029320: Victoria Cuatro Concession, 31 December 1996 (providing the registry information for the Victoria Cuatro Concession); **Ex. C-0032**, Public Mining Registry No. 02029352 Victoria Siete Concession, 24 January 1997 (providing the registry information for the Victoria Siete Concession); **Ex. C-0033**, Public Mining Registry No. 11875634: Invicta II Concession, 20 April 2006 (providing the registry information for the Invicta II Concession).

[208] **Ex. R-0041**, Joint Disclosure Booklet, p. C-2.

[209] Claimant's Memorial, ¶ 27; **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, p. 17 ("Invicta exercised the option for the above mentioned Victoria Properties in December 2008."); **Ex. C-0033**, Public Mining Registry No. 11875634: Invicta II Concession, 20 April 2006, p. 5.

[210] **Ex. R-0041**, Joint Disclosure Booklet, p. C-4 (*citing* **Ex. C-0035**, Invicta Gold Project Optimized Feasibility Study, THE LOKHORST GROUP, July 2010, which provided the financial forecasts used by AAG in its development of the Project).

[211] **Ex. R-0041**, Joint Disclosure Booklet, p. C-4.

[212] **Ex. R-0041**, Joint Disclosure Booklet, p. C-5.

[213] *See generally* **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012.

the 2012 SRK Report to prepare a Management Circular and a Joint Disclosure Booklet[214] These documents provided relevant background, and highlighted key risk factors for the combined company.[215]

130. On 1 October 2012, Claimant acquired: (i) AAG, (ii) "a 99.999% interest in [Invicta] through AAG," (iii) the Concessions held by Invicta, and (iv) "surface rights in the Project area held by [Invicta]."[216] These interests form the predominant part of the alleged qualifying investment upon which Claimant bases its jurisdictional arguments in this arbitration.[217]

b. Claimant, Peru, and the Lacsanga, Santo Domingo de Apache, and Parán Rural Communities held property rights linked to Claimant's mine

131. As explained in **Sections II.A.3 and II.B.1** above, during the process of progressing a mining project through the exploration and exploitation stages of development, mining operators in Peru are required to coordinate with the Peruvian Government and with the local communities that are located within their mine's area of direct and indirect influence.[218] Where Claimant's mine is concerned, there were at least four other parties with related property rights: (i) the Peruvian Government (which held the sovereign right to exploitation of subterranean natural resources); (ii) the Lacsanga Community; (iii) the Santo Domingo de Apache Community; and (iv) the Parán Community. All three of the local communities, referred to jointly herein as "**Rural**

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[214] *See generally* **Ex. R-0042**, Notice of Annual General and Special Meeting To Be Held On September 21, 2012 and Management Proxy Circular Regarding The Plan Of Arrangement between Lupaka Gold Corp. and Andean American Gold Corp., 22 August 2012 ("**Management Proxy Circular**"); **Ex. R-0041**, Joint Disclosure Booklet.

[215] *See generally* **Ex. R-0042**, Management Proxy Circular; **Ex. R-0041**, Joint Disclosure Booklet.

[216] **Ex. C-0036**, Share Certificate for Andean American Gold, 1 October 2012; *see also* **Ex. R-0043**, Business Acquisition Report, Lupaka Gold Corp., 14 December 2012; **Ex. R-0033**, "*Lupaka Gold Acquires Andean American Gold Corp*," YAHOO NEWS, 1 October 2012; Claimant's Memorial, ¶ 209 (outlining Lupaka's alleged qualifying investments under the Canada-Peru FTA, most of which Lupaka directly acquired through its acquisition of AAG).

[217] Claimant's Memorial, ¶ 209; *see also infra* Section III.

[218] *See supra* Section II.B.1; *see also* **RWS-0001**, Trigoso Witness Statement, ¶¶ 24, 25, 28; **RER-0002**, Vela Expert Report,¶¶ 80, 84–85.

Communities" had territory within the mine's area of direct influence, and held special property rights with respect to that territory.

132. As explained above, Claimant was required by law, best practices, and CSR norms to obtain the support of all rural communities within its mine's area of direct influence before it advanced to the exploitation phase of the mining project.[219] Three years before Claimant's acquisition of the Invicta Project, Invicta's 2009 Environmental Impact Assessment ("**2009 EIA**") described the Project's precise location (as initially planned), and identified the three Rural Communities (including the Parán Community) as falling within the Project's area of direct influence.[220] Invicta also included within its 2009 EIA a Social Management Plan, which similarly identified the Rural Communities, and in addition included plans for managing community relations, encouraging citizen participation, and providing socio-economic development for the benefit of those communities. [221]

133. Later, when Claimant was considering acquiring Invicta, it reviewed the 2012 SRK Report, which provided a technical overview of the state of the Invicta Project at that time. Invicta's own consultant, SRK, had flagged explicitly and in writing to Claimant that "[n]egotiations regarding surface rights agreements are ongoing with the communities of Parán and Lacsanga as **agreements with all three communities are required to initiate construction and operation**"[222] (emphasis added). As the 2012 SRK Report made clear, for the Invicta Project to make the transition into the exploitation stage, Invicta would need to develop positive relationships with each of the three rural communities:

> There are three neighboring communities within 12 km of the Invicta Project area: Parán, Lacsanga and San Domingo de Apache . . . These three communities are in the area of direct

[219] *See supra* Section II.B; *see also* **RER-0002**, Vela Expert Report, § III.A.2.

[220] **Ex. R-0047**, 2009 EIA, pp. 26–67.

[221] **Ex. R-0047**, 2009 EIA.

[222] **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, p. i (emphasis added); *see also* **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK Consulting, 13 April 2018, pp. iv, 6, 10.

> influence of the Invicta Project and are titleholders of the surface lands where Invicta Project development would occur. **By adopting the 'Equator Principles', the Invicta Project has committed to obtaining and maintaining good relationships with nearby and affected communities**.[223] (Emphasis added)

134. This recognition of the need for engagement and agreement with the Rural Communities was similarly articulated in the Joint Disclosure Booklet prepared by AAG and Claimant in 2012,[224] as well as in Claimant's own press releases and Management's Discussion and Analysis.[225] Indeed, Invicta expressly acknowledged that before the Invicta mine construction could begin, Invicta would need to secure Surface Land Use Agreements with *each* of the three Rural Communities, including the Parán Community.[226]

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[223] **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, p. 130.

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

[225] **Ex. R-0053**, Management's Discussion and Analysis, Lupaka Gold Corp., 9 May 2013, p. 14 ("Three communities, namely Parán, Lacsanga and Santo Domingo de Apache, will primarily benefit from the investment made as a mine is developed and operated at the Invicta Gold Project. **Before mine construction can begin, the Company and each of the three communities need to sign Surface Land Use Agreements**.") (emphasis added); **Ex. R-0054**, Management's Discussion and Analysis, Lupaka Gold Corp., 8 August 2013, p. 9 ("Four communities, namely Parán, Lacsanga, Santo Domingo de Apache and Sayán, will primarily benefit from the investment made if a mine is developed and operated at the Invicta Gold Project. Before mine construction can begin, **the Company and each of the three communities need to sign Surface Land Use Agreements**.") (emphasis added); **Ex. C-0076**, Lupaka Gold Corp., "Lupaka Gold Completes Community Agreement and Provides Update on Community Relations and Government Developments," 23 July 2013, p. 2 ("To date, **the Company** has signed a 20-year agreement with the community of Santo Domingo de Apache and **is working towards obtaining similar agreements with other communities within the Invicta Gold Project area of influence**.") (emphasis added).

[226] **Ex. R-0041**, Joint Disclosure Booklet, p. A-3; **Ex. R-0053**, Management's Discussion and Analysis, Lupaka Gold Corp., 9 May 2013, p. 14; **Ex. R-0054**, Management's Discussion and Analysis, Lupaka Gold Corp., 8 August 2013, p. 9; **Ex. C-0076**, Lupaka Gold Corp., "Lupaka Gold Completes Community Agreement and Provides Update on Community Relations and Government Developments," 23 July 2013, p. 2.

135. Under Claimant's ownership, Invicta revised its mining plan and obtained approval to perform mining activities under a capacity of 400 t/d.[227] In its Memorial, Claimant argues that this change reduced the scope and impact of the Invicta Project, and that "Lupaka's reduced Project did not touch upon Parán territory."[228] However, at the time of the alleged measures, the Parán Community was within the area of direct influence of the mining project, and Claimant was therefore required to obtain and maintain the support of that community.[229]

136. In fact, the record demonstrates that all three Rural Communities remained squarely within the Invicta Project's area of direct influence, even after the asserted reductions in the scope of Claimant's mining project. Claimant was therefore required to consult with all three of the communities with respect to the development of its Project. In terms of the geographic relationship between the territories of the three Rural Communities and the area of the Invicta Project:

a. The Lacsanga Community controlled territory within the Victoria Uno Concession and three of the surrounding concessions (viz., Victoria Tres, Victoria Siete, and Invicta II).[230] The primary infrastructure of, and access road to, Claimant's mine were located in the Lacsanga territory.

b. The Santo Domingo de Apache Community also remained within the mine's area of direct influence. That community-controlled land within the Victoria Uno Concession and two of the surrounding concessions (viz., Victoria Dos

[227] Claimant's Memorial, ¶ 80; **Ex. C-0009,** Report No. 127-2014-MEM-DGM-DTM/PM, Resolution Approving Mining Plan, MINEM, 30 December 2014.

[228] Claimant's Memorial, ¶ 67.

[229] Claimant's Memorial, ¶¶ 65–67 (Claimant notes that the Parán Community "reside[s] in two areas: one called 'Huamboy' and the other called 'Parán' — which, like Santo Domingo, are both located in the District of Leoncio Prado. The first hamlet is eight kilometres to the west of the [Project site], while the second hamlet lies in a valley, three kilometres downhill to the south of the [Project site]." Claimant then makes an unsupported claim that "Lupaka's reduced Project did not touch upon Parán territory," and fails to address whether Parán Community land was within the mine's area of direct influence).

[230] **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, p. 30, Figure 2-2; Claimant's Memorial, ¶ 62.

and Victoria Cuatro), including the surface land upon which portions of Claimant's mine were located.[231]

c. Finally, as Claimant's own consultant acknowledged, the Parán Community was a rural community within the mine's area of direct influence.[232] It held territory in the area covered by the Victoria Uno Concession (viz., the concession area in which the mine was located), as well as three of the surrounding concessions (viz., Victoria Dos, Victoria Siete, and Invicta II). The Parán Community also controlled an access road to the mine, and was located downhill from the mine in a place where the environmental risk posed by the mine to the community was particularly acute.[233]

137. Although in its Memorial Claimant attempts to downplay the Invicta Project's impact on the Parán Community,[234] the evidence shows that Claimant knew that the Parán Community remained a significant stakeholder in the Project's development and operation, and that therefore the support of that community would be required. In fact, Claimant's Third Sustainability Report explicitly acknowledged that the Parán Community (along with the Lacsanga Community and the Santo Domingo de Apache Community) was a community within the area of direct influence of the Invicta Project.[235] Further, an April 2018 preliminary economic assessment of the Invicta Project prepared by SRK at Claimant's request ("**2018 PEA**") noted that "**[t]he [Project] property is located within the boundaries of the Parán**, Lacsanga and Santo Domingo de Apache [Rural] communities"[236] (emphasis added). Both the Third Sustainability Report and the 2018 PEA were prepared and published *after* the above-

[231] Claimant's Memorial, ¶ 7.

[232] **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK CONSULTING, 13 April 2018, pp. iv, 6, 10.

[233] **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, p. 30, Figure 2-2; Claimant's Memorial, ¶¶ 3, 62.

[234] *See* Claimant's Memorial, ¶ 67.

[235] **Ex. R-0056**, Invicta Mining Corp. S.A.C., Third Technical Report, *Chapter 8.3 Social Baseline*, undated.

[236] **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK Consulting, 13 April 2018, pp. iv, 6.

mentioned "reductions" in project scope, yet they unequivocally described the Parán Community as being within the mine's area of direct influence.[237]

138. All of the foregoing implies that, to successfully exploit its mine in Peru, Claimant was required to engage with and maintain or secure the support of, and relevant authorizations and agreements with, each of the three Rural Communities, since they were all within the mine's direct area of influence.[238] So long as Claimant failed to do that, is mine could not lawfully be brought into the exploitation stage.

3. Claimant failed to conduct proper due diligence before acquiring its shares in Invicta, and to adequately manage certain risks thereafter

139. Despite its inexperience in advancing Peruvian mining projects to the exploitation stage, Claimant assumed that the Invicta Project would be a low-risk enterprise.[239] In his witness statement, Mr. Eric Edwards reveals that Claimant based that assumption on four factors: (i) the Invicta Project's already existing infrastructure; (ii) the projected profitability of the project; (iii) the regulatory progress that had already been made by Invicta immediately before Claimant's acquisition; and (iv) the pre-existing relationship between Invicta and certain local rural communities.[240] Claimant and Mr. Edwards maintained this position including during the time of Claimant's acquisition of financing from Pandion Mine Finance LLC ("**Pandion**") in 2016, through a specially incorporated Canadian investment vehicle called PLI Huaura. However, as the analysis in the remainder of this section demonstrates, Claimants' assumptions with respect to each of the above-referenced four factors were incorrect or misplaced.

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[237] **Ex. R-0056**, Invicta Mining Corp. S.A.C., Third Technical Report, *Chapter 8.3 Social Baseline*, undated; **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK Consulting, 13 April 2018, pp. iv, 6, 10.

[238] *See supra* Section II.B.1.

[239] Claimant's Memorial, ¶ 339 ("Even before acquiring the Project, Lupaka considered it to be almost production-ready from a technical perspective and of a 'reasonably low risk profile.'"); *see also* **CWS-0001**, Witness Statement of Eric Edwards, 1 October 2021 ("**Edwards Witness Statement**"), ¶ 17 ("From a technical standpoint, the [Invicta Gold] Project had a reasonably low-risk profile.").

[240] **CWS-0001**, Edwards Witness Statement, ¶ 17.

a. Claimant miscalculated the state of the Invicta Project's infrastructure

140. At the time it acquired the project, Claimant initially found encouraging the state of the mine's existing infrastructure.[241] Invicta had already developed "items such as the primary access road, water systems, and electrical power distribution."[242] While Claimant relies on the state of *that* infrastructure to conclude that the investment was low-risk, the identified items represent only part of the infrastructure that would be needed to develop the Invicta Mine. In fact, even as of early 2018—nearly six years after it acquired Invicta—Claimant still had several key infrastructure items outstanding, including: a power line, waste storage area (waste dumps), and a laboratory facility.[243]

b. Claimant accepted the risk that the Invicta Project would not be profitable if the mine was insufficiently financed

141. The Invicta Project was in need of additional capital costs when Claimant acquired it in October 2012.[244] Prior to acquiring AAG, Claimant considered the profitability of the Invicta Project and the capital costs that would be required to exploit the mine.[245] AAG and Invicta commissioned two feasibility studies from the Lokhorst Group—an initial one in 2009,[246] and a second one in 2010 ("**2010 Feasibility Study**").[247] The latter projected that the capital required to access the Invicta Mine's minerals would be

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[241] **CWS-0001**, Edwards Witness Statement, ¶ 36.

[242] **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, § 17.3.

[243] *Compare* **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, § 17.3 (outlining the infrastructure developed by Invicta as of the 2012 SRK Report) *with* **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK Consulting, 13 April 2018, § 17 (providing an updated summary of the completed and pending infrastructure at the mining site).

[244] **Ex. R-0041**, Joint Disclosure Booklet, p. C-4 (*citing* **Ex. C-0035**, Invicta Gold Project Optimized Feasibility Study, THE LOKHORST GROUP, July 2010).

[245] **CWS-0001**, Edwards Witness Statement, § 4.1.

[246] **CWS-0001**, Edwards Witness Statement, ¶ 18; *see also* **Ex. C-0057**, Invicta Mining Corp. S.A.C. Mine Feasibility Study, THE LOKHORST GROUP, June 2009.

[247] **CWS-0001**, Edwards Witness Statement, ¶ 18; *see also* **Ex. C-0035**, Invicta Gold Project Optimized Feasibility Study, THE LOKHORST GROUP, July 2010.

approximately USD 65.3 million.[248] AAG later found that "the initial capital cost to build an underground mine at the Invicta Gold Project would be considerably higher than forecast in the July 2010 feasibility study."[249] Indeed, this was one of the main reasons that AAG sought and secured Claimant's involvement with the Invicta Project in the first place.[250] Notwithstanding these capital forecasts, Claimant's then-president and CEO Mr. Edwards proclaimed that he was "confident that with a new strategy and mine plan, [Claimant] could make the [Invicta] Project very profitable."[251]

142. After acquiring AAG, but before entering into its financing arrangement with PLI Huaura, Claimant conducted a variety of follow-up studies and tests at the site of the Invicta Mine. These included tests and reports by AMinpro, a consulting group that reviewed the feasibility of the Invicta Project and of Claimant's potential acquisition of a separate processing plant (the Mallay Processing Plant).[252] In addition, Claimant coordinated with SRK Consulting to complete two follow-up studies in 2014, and a third one in 2018.[253]

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[248] **Ex. C-0035**, Invicta Gold Project Optimized Feasibility Study, THE LOKHORST GROUP, July 2010, pp. 8, 20 (noting that the mine was expected to produce 7.8 million tons of economically mineable ore over a five-year mining program, and that once such ore was processed, Invicta expected to obtain from the project 489,600 ounces of gold, 3,861,800 ounces of silver, 66,862,000 pounds of copper, 52,627,000 pounds of lead, and 41,205,700 pounds of zinc).

[249] **Ex. R-0041**, Joint Disclosure Booklet, p. C-4 (*citing* **Ex. C-0035**, Invicta Gold Project Optimized Feasibility Study, THE LOKHORST GROUP, July 2010, which provided the financial forecasts used by AAG in its development of the Project); *see also* **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, p. 24.

[250] **Ex. R-0041**, Joint Disclosure Booklet, p. C-4.

[251] **CWS-0001**, Edwards Witness Statement, ¶ 22.

[252] **Ex. C-0038**, Due Diligence Report Process, AMINPRO, 25 November 2014; **Ex. C-0073**, Tests on a Polymetalic (Pb/Zn/Cu) Sulphide Ore, AMINPRO, 23 October 2014; **Ex. C-0074**, Mallay Plant Visit Report, AMinpro, 23 November 2014.

[253] **Ex. C-0067**, Conceptual Study, Invicta Project Presentation SRK CONSULTING, 22 January 2014; **Ex. C-0037**, Conceptual Study, Invicta Project, SRK Consulting, 3 February 2014; **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK Consulting, 13 April 2018.

143. For the mine to be profitable, Claimant needed to reach the exploitation stage before its available capital was exhausted.[254] However, in the end Claimant failed to carry the Project into the exploitation stage, for reasons that were entirely foreseeable and that could have been avoided had Claimant not mismanaged its relations with the local communities. This issue is discussed further in **Section II.F.2** below.

c. By the time Claimant assumed control of the Project, Invicta had obtained only two of the requisite regulatory approvals

144. Claimant's optimism at the time of its acquisition of the Invicta Project seemed particularly premature and ill-founded, considering that by that point Invicta had obtained only two of the regulatory approvals that were required (one of which, moreover, was flawed and had to be amended by Claimant).[255] Specifically, prior to Claimant's involvement, Invicta had only obtained approval of its 2009 EIA and a Certificate of Non-existence of Archaeological Remains.[256] However, as admitted by Mr. Edwards in his witness statement, the 2009 EIA prepared by Invicta was "unrealistic," and included plans which "would require an amount of capital that was economically and environmentally problematic."[257] Thus, *after* its acquisition of Invicta in 2012, Claimant recognized that it would be necessary to reformulate Invicta's EIA, because it was unrealistic, and also to seek approval of various

[254] **Ex. C-0067**, Conceptual Study, Invicta Project Presentation, SRK CONSULTING, 22 January 2014; **Ex. C-0037**, Conceptual Study, Invicta Project, SRK Consulting, 3 February 2014; **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK Consulting, 13 April 2018; **Ex. C-0070**, Lupaka Gold Corp., "Invicta Gold Project Mineralization Sample Results Include 6.38 Grams per Tonne Gold and 1.68% Copper at 6.4 Meters Width and over 105 Meters Length Exposed in Drift," 10 July 2014; **Ex. C-0071**, Lupaka Gold Corp., "Global Recoveries of 94.6% Gold and 97.8% Copper Realized in Updated Metallurgical Testing for the Invicta Gold Project," 28 October 2014; **Ex. C-0072**, Lupaka Gold Corp., "Lupaka Gold Completes First Run-of-Mine Bulk Processing Test," 27 October 2015.

[255] **CWS-0001**, Edwards Witness Statement, § 4.2.

[256] **Ex. C-0007**, Directorial Resolution No. 427-2009-MEM-AAM, MINEM, 28 December 2009; **Ex. C-0059**, Certificate of Non-Existence of Archaeological Remains for Invicta, INC, 11 December 2009–18 June 2010.

[257] **CWS-0001**, Edwards Witness Statement, ¶¶ 32, 53.

additional permits and licenses (aside from the already obtained archaeological certificate).[258]

145. Claimant bore the responsibility over the ensuing seven years for navigating the Invicta Project through the regulatory permitting process to completion, but it failed to do so. Between 2012 and 2018, Claimant did succeed in obtaining the approval of a revised EIA, a water use permit, a mine closure plan, authorization to construct the mine and facilities, a global explosives license, a certificate of mining, a fuel usage authorization, and a road construction permit.[259]

146. However, as of September 2018, Claimant still had not obtained a number of additional regulatory approvals and actions that were required, including: (i) MINEM's approval of an amendment to Invicta's mine closure plan; (ii) an inspection of the Invicta Mine by the MINEM; and (iii) resolution of deficiencies with supplements that Invicta tried to make to its 2009 EIA.[260] On the date of the alleged expropriation, 26 August 2019, Claimant had not achieved any of the foregoing; its suggestion that the mine was virtually ready to exploit is therefore unfounded and incorrect.[261]

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[258] **CWS-0001**, Edwards Witness Statement, ¶¶ 39, 51 (describing how Lupaka sought "to extend the window to initiate development activities under the 2009 EIA by two years" and subsequently received the approval of its updated EIA on 9 April 2015); **Ex. C-0040**, Report No. 304-2015-MEM-DGAAM/DNAM/DGAM/C, MINEM, 9 April 2015; **Ex. C-0044**, Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 30 June 2016, Schedule H (providing a status list of the Project permits as part of the initial financing agreement between Lupaka and PLI).

[259] **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017, Schedule H (defining Schedule H as "Permits," and listing both the obtained and outstanding Project permits).

[260] **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule H (updating the list of outstanding permits as of September 2018); **CWS-0003**, Castañeda Witness Statement, ¶¶ 21–22.

[261] Claimant's Memorial, ¶¶ 193–194.

d. Claimant failed to conduct adequate due diligence on the Rural Communities in the Invicta Project's area of direct and indirect influence

147. Tellingly, Claimant thus far has provided only limited documentary evidence with respect to Invicta's relations with the Lacsanga, Santo Domingo de Apache, and Parán Communities prior to its acquisition of Invicta. Such evidence indicates that relations between Invicta and the Rural Communities at the time that Claimant acquired Invicta were not what Claimant would have the Tribunal believe. Rather, that evidence demonstrates that Invicta seriously mismanaged, and to varying degrees damaged, its relationship with the Rural Communities.

(i) Claimant knew or should have known that developing strong relationships and agreements with the Rural Communities would be challenging

148. As noted above, when Claimant acquired the Invicta Project, it was encouraged by the relationship that Invicta already had with the Rural Communities.[262] Lupaka's own annual report for 2012 noted that

> **[t]he importance of good community relations for long-term success cannot be overemphasized**. A significant portion of [Invicta's] energy and effort in Peru [is being] directed toward building and maintaining good community relationships.[263] (Emphasis added)

If Claimant had conducted adequate due diligence, however, it would have become obvious to it that (i) the development of relationships with the Rural Communities would be challenging; and (ii) the execution of agreements with such communities would be delicate and time-consuming.

[262] **CWS-0001**, Edwards Witness Statement, § 4.3.

[263] **Ex. AC-0048**, Lupaka Gold Corp. 2012 Annual Report, p. 3. *See also* **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012; and **Ex. C-0035**, Invicta Gold Project Optimized Feasibility Study, THE LOKHORST GROUP, July 2010, ¶ 1.10.7 ("Good community relations are an important part of a mining operation.").

149. When mining companies fail to engage with rural communities that are in their mine's area of direct and indirect influence, as required by Peruvian law,[264] social conflicts often erupt from disagreements concerning land use, environmental issues, and economic benefits to the rural communities, amongst other issues.[265]

150. Given that fact, Claimant could not have ignored the critical importance of reaching agreement with the three Rural Communities.[266] In fact, prior to making its investment, and as detailed below, Claimant itself had stressed (i) the risks posed by any failure to negotiate an agreement with the Rural Communities; and (ii) the fact that there was no guarantee that such agreements would be reached. For example, in August 2012, Claimant and AAG prepared a Joint Disclosure Booklet that outlined the various risk factors relevant to Claimant's acquisition of AAG. Such booklet highlighted that the shareholders should carefully consider the risks of this acquisition given the "high-risk nature" of the business of the "Combined Company" (i.e., the combined Claimant-AAG post-transaction company).[267] In particular, it flagged that an eventual failure to negotiate agreements with the Rural Communities could significantly hinder the Project once Claimant acquired AAG:

> **The failure** of the Combined Company **to successfully negotiate and maintain surface rights access** and purchase with respect to any of its projects **could cause substantial delays in the development of its projects**. With respect to the Invicta Gold Project, Andean's subsidiary, Invicta, has a surface rights agreement with the community of Santo Domingo de Apache covering all aspects of mine development, mineral processing and infrastructure. Negotiations regarding surface rights agreements are ongoing with the communities of Parán and

[264] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014.

[265] *See, e.g.*, **Ex. R-0055**, Ombudsman's Office Report No. 97 on Social Conflicts, March 2012 (providing a summary of the ongoing social conflicts between rural communities and private entities in Peru); **Ex. C-0018**, Meeting Summary between Invicta and MINEM *et al.*, 27 May 2019 ("Invicta stated that the community of Parán has a history of conflicts with several companies that work in the area"); *see also* **RWS-0001**, Trigoso Witness Statement, ¶¶ 17, 24, 28–29; **RWS-0002**, Incháustegui Witness Statement, ¶ 32.

[266] **Ex. R-0047**, 2009 EIA, p. 33 (which identifies the three communities in the area of influence: Santo Domingo de Apache, Lacsanga, and Parán).

[267] **Ex. R-0041**, Joint Disclosure Booklet, pp. A–8.

> Lacsanga as **agreements with all three communities are required** to initiate construction and operation of a mine. **There is no assurance that such additional agreements will be entered into on acceptable terms and that existing agreements will be maintained in good standing as required**.[268] (Emphasis added)

151. Claimant should have expected that negotiations with the Rural Communities might be protracted and difficult, and that a successful outcome was not assured. Given the history of social conflicts between mining companies and rural communities in Peru,[269] and the special status of such communities under Peruvian Law,[270] agreements concerning surface rights, road access, community benefits, and other topics generally take a long time to negotiate.[271] Claimant also should have been aware that this process is made even lengthier and more challenging by regular turnover in the communities' representatives, which forces negotiations to pause and later resume under the review of new governing committees.[272]

(ii) Claimant should have been aware that Invicta did not have amicable relationships with any of the Rural Communities

152. Despite Claimant's initial impressions, Invicta in fact did *not* have strong relationships with the Rural Communities at the time Claimant acquired the Invicta Project. As the available evidence shows, Claimant was forced to expend considerable time and resources on improving such relationships following its acquisition of Invicta. Claimant therefore undoubtedly was aware that the success of the Invicta Project would depend to a large extent on the success of such efforts.

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[268] **Ex. R-0041**, Joint Disclosure Booklet, pp. A–9.

[269] *See supra* Section II.A.1; *see also* **RWS-0002**, Incháustegui Witness Statement, ¶¶ 34–37.

[270] **RER-0001**, Meini Expert Report, §§ III.A, III.B; **RER-0002**, Vela Expert Report, § II.

[271] *See supra* Section II.B.1. **Ex. R-0041**, Joint Disclosure Booklet, p. A-9 (acknowledging the risk posed to the Project by the need to secure agreements with the various rural communities in the mine's area of direct influence). *See also, e.g.*, **Ex. R-0045**, Andean American Gold Corp., "Andean American Gold Provides Invicta Project Update," 17 June 2011, p. 1 (noting the slow pace of the agreement negotiation process); **RWS-0002**, Incháustegui Witness Statement, ¶ 16.

[272] *See, e.g.*, **Ex. C-0098,** Letter from the Parán Community (H. Alvarez, *et al.*) to Invicta (J. Castañeda), 6 October 2016 (cautioning that negotiations between Lupaka and Invicta would need to be suspended for some time "since the current governing committee [was] ending its term of office").

153. *First*, with respect to the Lacsanga Community, AAG reported in April 2011 that negotiations were moving at a "slower pace than anticipated,"[273] and that AAG was considering relocating the plant and tailings dam to an area that would "minimize the impact on the Lacsanga and Parán [C]ommunities."[274] AAG would later call the expectations of the Lacsanga Community "unrealistic and [unsustainable] based on management's understanding of the economics of the project."[275] Further, Claimant admits that "[Invicta's] previous owners had made promises to the Lacsanga Community which they had not kept."[276] As a result, according to Claimant, Invicta was forced to enter into a "settlement agreement" with the Lacsanga Community on 31 March 2015, in an attempt to repair its relationship with that community, and to secure its support for the Invicta Project going forward.[277]

154. *Second*, regarding the Santo Domingo de Apache Community, Invicta signed a settlement agreement with that community on 22 October 2010. Under the terms thereof, Invicta agreed to compensate the community for grievances related to Invicta's exploration activity, subsequent metallurgical research, sampling and mining work, and use of the Santo Domingo de Apache Community's land from 2005 to 2010.[278] The settlement agreement also stated that Invicta would promote sustainable development projects to benefit that Community.[279] However, it appears that the signing of this agreement—and any attempts thereafter by Invicta to implement it—were insufficient to assuage the Community's concerns. As Claimant admits, following its acquisition of Invicta, it became necessary to renegotiate the

[273] **Ex. R-0045**, Andean American Gold Corp., "Andean American Gold Provides Invicta Project Update," 17 June 2011, p. 1.

[274] **Ex. R-0045**, Andean American Gold Corp., "Andean American Gold Provides Invicta Project Update," 17 June 2011, p. 1.

[275] **Ex. R-0046**, Management's Discussion and Analysis, Lupaka Gold Corp., 10 May 2012, p. 6.

[276] Claimant's Memorial, ¶ 59.

[277] Claimant's Memorial, ¶¶ 59–60.

[278] **Ex. C-0064**, Letter to Notary re Agreement between Invicta Mining Corp. S.A.C. and Santo Domingo de Apache Community, 22 October 2010.

[279] **Ex. C-0064**, Letter to Notary re Agreement between Invicta Mining Corp. S.A.C. and Santo Domingo de Apache Community, 22 October 2010.

latter's agreement with the Santo Domingo de Apache Community in 2017, to increase the funds provided by Invicta to that Community.[280]

155. *Finally*, Invicta's relations with the Parán Community were also in a poor state at the time that Claimant acquired the Invicta Project. This had been due, in large part, to Invicta's own conduct—which the Parán Community had reason to interpret as evincing bad faith. For example, at a meeting between Invicta and the Parán Community on 5 April 2008, the parties had discussed the Parán Community's grievances with the Invicta Project, including the fact that Invicta (i) had violated the trust of the Community by creating a path through the community's territory without the Community's consent; and (ii) had caused dust pollution within the Parán Community's territory.[281]

156. Subsequently, Invicta concluded two agreements with the Parán Community—on 29 April 2008 and 7 May 2008, respectively—and then on 13 December 2011 also signed an addendum to the 29 April 2008 agreement.[282] These agreements memorialized Invicta's pledge that, for the Parán Community's benefit, it would build classrooms, an additional floor for the Community's communal hall, and a medical center, in exchange for the Community's permission to allow Invicta to construct a dirt access road to the Invicta Mine through the Community's territory.[283]

157. Claimant acknowledges in its Memorial that, after acquiring Invicta, it learned from the Parán Community that Invicta had breached these earlier Invicta-Parán

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[280] Claimant's Memorial, ¶¶ 54–56; **CWS-0003**, Castañeda Witness Statement, ¶¶ 48–50; **Ex. C-0094**, Draft Addendum to Framework Agreement between Santo Domingo de Apache Community and Invicta, 15 September 2017.

[281] **Ex. C-0060**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 29 April 2008, p. 1.

[282] Claimant's Memorial, ¶ 31; **Ex. C-0060**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 29 April 2008; **Ex. C-0061**, Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 7 May 2008; **Ex. C-0062**, Addendum to Agreement between the Parán Community and Invicta Mining Corp. S.A.C., 13 December 2011.

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

agreements, including inter alia (i) by constructing a storage facility for explosives on Community territory without the Community's authorization; (ii) failing to keep promises made in previous agreements with the Community to build certain facilities; and (iii) failing to make the payments that Invicta had promised under those same agreements.[284] Claimant submitted proposals to settle these breaches with the Parán Community in 2016 and ended up paying the Community for Invicta's former non-compliance.

4. Claimant entered into project financing with a timeline that forced it to rush negotiations with the Parán Community to try to meet its loan obligations on time

158. As described above, AAG sought a corporate merger with Claimant in 2012, because it had underestimated the capital expenditures that would be required to bring the mine to its exploitation stage.[285] Despite the foregoing, as well as the critical importance of reaching agreement with *all* of the Rural Communities in the Invicta Project's area of direct and indirect influence, Claimant secured project financing that left virtually zero margin for any errors or setbacks (whether likely or unexpected). Such financing imposed a tight gold delivery schedule that would force Claimant to rush various components of the mine development, and that threatened to compromise—and indeed, ultimately destroyed—Invicta's still-tenuous relationships with the Parán Community.

159. Between 2012 and 2014, Claimant guided the Invicta Project through various exploration-related tasks.[286] Then, in 2015 and 2016, Claimant sought financing intended to "fund the Project's transition from exploration to exploitation."[287] Claimant found a financer in Pandion, a company that "specialises in providing

[284] Claimant's Memorial, ¶ 68; **Ex. C-0102**, Draft Comments on Parán Community Counterproposal, Invicta, November 2016, p. 3; **CWS-0003**, Castañeda Witness Statement, ¶ 58.

[285] **Ex. R-0041**, Joint Disclosure Booklet, p. C–4.

[286] **Ex. C-0044**, Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 30 June 2016, Schedule H (providing a summary of the permits obtained by Invicta as of June 2016).

[287] Claimant's Memorial, ¶ 40.

funding solutions for mining companies in the precious metals sector."[288] On 30 June 2016, Pandion created PLI Huaura, a specially incorporated Canadian investment vehicle.[289] That same day, Claimant and PLI Huaura executed a Pre-Paid Forward Gold Purchase Agreement ("**PPF Agreement**"), which set out the terms for financing of the Invicta Project.[290]

160. The PPF Agreement provided that Claimant would receive gross proceeds of USD 7 million, payable in three installments, of USD 2.5 million, USD 2 million, and USD 2.5 million, respectively.[291] The *first installment* would be provided after Claimant satisfied various conditions (including execution of an agreement with either the Lacsanga or the Parán Community that would allow Invicta to lawfully pass along the relevant community's access roads).[292] Such conditions did not include satisfaction of each of the various legal requirements to bring the mine to exploitation, but rather simply certain basic steps that PLI Huaura needed Claimant to complete before it would pay out the first installment of the loan.[293] Once the first installment was paid, Claimant was to have fifteen months before its first gold delivery obligation of 187 ounces of gold per month would begin.[294]

161. The *second installment payment* required satisfaction of the conditions for the first installment payment, and proof that the concluded access road agreement was registered with the Peruvian Public Registry.[295] Once this occurred, payment of the

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[288] **CWS-0002**, Ellis Witness Statement, ¶ 31.

[289] **CWS-0002**, Ellis Witness Statement, ¶ 32.

[290] **Ex. C-0044**, Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 30 June 2016; *see also* **CWS-0002**, Ellis Witness Statement, ¶ 32.

[291] **CWS-0002**, Ellis Witness Statement, ¶ 33.

[292] **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017, § 3(1)(e)(x).

[293] **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017, § 3(1)(e).

[294] **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017, p. 6 ("Contract Quantity" means a total of 22,680 Ounces of Gold to be Delivered as follows: (a) 0 Ounces of Gold for each of the 15 calendar months following the calendar month in which the Gold Prepayment Amount is paid on the First Effective Date and 187 Ounces of Gold for each of the 45 calendar months thereafter").

[295] **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017, § 3.1 (outlining the conditions to the second payment installment).

second installment would be made on the "Second Effective Date," and the fifteen-month clock on an additional gold delivery requirement of 139 ounces of gold would be triggered.[296]

162. Finally, to receive the *third installment payment*, Claimant needed to meet all of the conditions for the first two installments, and in addition was required to (i) register a series of liens with the Peruvian Public Registry, and (ii) raise additional capital on terms satisfactory to PLI Huaura.[297] Payment related to the third installment would be made on the "Third Effective Date," and fifteen months later an additional 178 ounces of gold would be added to Claimant's gold delivery obligations.[298]

163. After agreeing to these time-sensitive gold delivery commitments, Claimant found itself needing to "fast-track" the Invicta Project to exploitation and production.[299] Thus, before receiving any money from its creditor, Claimant mounted a campaign of letters and meetings with the Parán Community.[300] For example, in May 2017, it sent a letter to the Parán Community, noting that

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[296] **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017, pp. 6–7, "Contract Quantity" (outlining the quantity of gold required after the "Second Effective Date").

[297] **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017, § 3.1 (outlining the conditions to the third payment installment).

[298] **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017, p. 7, "Contract Quantity" (outlining the quantity of gold required after the "Third Effective Date").

[299] **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK CONSULTING, 13 April 2018, pp. iv, 1, 142, 167 ("The Invicta Gold Project is being fast-tracked to production").

[300] *See, e.g.*, **Ex. C-0095**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to the Parán Community (H. Alvarez, *et al.*), 27 April 2016; **Ex. C-0096**, Letter from Invicta Mining Corp. S.A.C. (E. Nuñez) to the Parán Community (H. Alvarez), 30 June 2016; **Ex. C-0097**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to the Parán Community (H. Alvarez, *et al.*), 6 October 2016; **Ex. C-0098**, Letter from the Parán Community (H. Alvarez, *et al.*) to Invicta Mining Corp. S.A.C. (J. Castañeda), 6 October 2016; **Ex. C-0101**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to the Parán Community (H. Alvarez), 20 October 2016; **Ex. C-0148**, Email from (E. Vila) to Lupaka Gold Corp. (J. Castañeda), 29 October 2016; **Ex. C-0099**, Letter from Invicta Mining Corp. S.A.C. (E. Nuñez) to the Parán Community (H. Alvarez), 26 October 2016; **Ex. C-0102**, Draft Comments on the Parán Community Counterproposal, Invicta, November 2016; **Ex. C-0150**, Letter from Invicta Mining Corp. S.A.C. (E. Nuñez) to the Parán Community (H. Sellado), 10 November 2016; **Ex. C-0110**, Presentation to the Parán Community, Invicta, 10 December 2016; **Ex. C-0151**, Letter from Invicta Mining Corp. S.A.C. (R.

> in a first consultation in December 2016, the Community of Parán voted overwhelmingly to negotiate and sign an Agreement with Invicta, which [Claimant is] willing to sign, and pay the amounts of money that have been owed for several years. **This long-term Agreement with Invicta is the only condition that the Banks place on Invicta to deliver the monetary funds**. [301] (Emphasis added)

164. From this correspondence, it was clear that (i) Claimant had been engaging with the Parán Community for some time in hopes of reaching an agreement, consistent with its "fast-track" approach; and (ii) Claimant was explicitly acknowledging that an agreement with the Parán Community would be necessary for Claimant to obtain financing for the Invicta Project. Notwithstanding the above, and the expectations formed by the Parán Community based on Claimant's representations, Claimant later sought to disclaim the obligations it had undertaken with respect to the Parán Community.

165. In July 2017, Claimant entered into an agreement with the Lacsanga Community to use the Lacsanga access road, thereby satisfying the condition in the initial PPF Agreement for the first installment payment.[302] Claimant accordingly received such installment in August 2017.[303] Given the date of the first payment, Claimant's gold delivery obligations were to begin in December 2018, with 187 ounces of gold due to PLI Huaura that month.[304] However, contrary to Claimant's statements in its

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Zarauz) to the Parán Community Agricultural Association (A. Narvasta), 4 January 2017; **Ex. C-0152**, Letter from Invicta Mining Corp. S.A.C. (R. Zarauz) to the Parán Community Agricultural Association (A. Narvasta), 12 January 2017.

[301] **Ex. C-0114**, Letter from Invicta (J. Castañeda) to Parán Community (I. Román), 31 May 2017, p. 1.

[302] **Ex. R-0051**, Lupaka Gold Corp., "Lupaka Gold Completes Community Agreement and Provides Update on Community Relations and Government Developments," 23 July 2013.

[303] **Ex. R-0050**, Lupaka Gold Corp., "Lupaka Gold Receives First Tranche Under Amended Invicta Financing Agreement," 9 August 2017, p. 1 ("Lupaka Gold Corp . . . is pleased to announce that the Company has received Tranche 1 of the US$7,000,000 PLI Financing Agreement announced in the Company's news release of May 16, 2017.").

[304] **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017, p. 6 ("'Contract Quantity' means a total of 22,680 Ounces of Gold to be Delivered as follows: (a) 0 Ounces of Gold for each of the 15 calendar months following the calendar month in which the Gold Prepayment Amount

Memorial, the Invicta Project did not and could not reach the exploitation stage by this time.[305] In fact, Claimant itself acknowledges that the exploitation stage was not expected to commence until 2019, and that a number of tasks still needed to be completed before exploitation could begin.[306]

166. From its Memorial, it appears that Claimant considered that it was somehow released from all of its social and legal obligations to the Parán Community. Claimant bases this position on its so-called "reduction in production" of the Invicta Project.[307] Specifically, Claimant avers that "Lupaka's reduced Project did not touch upon Parán territory. Accordingly, Invicta was not obliged to conclude any agreements with the Parán Community."[308] However, the 2018 PEA, which was commissioned by Claimant itself, long *after* the territorial scope of the Invicta Project had been reduced in 2015 —confirms that the Invicta Project was in fact within the Parán Community's territory, and also that Claimant had not yet managed to reach agreement with that community.[309] Specifically, the 2018 PEA noted: "The [Project] property is located within the boundaries of the Parán, Lacsanga and Santo Domingo de Apache [Rural] communities," and "Invicta Mining Corp plans to have an agreement with the Parán Community in the short term."[310]

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is paid on the First Effective Date and 187 Ounces of Gold for each of the 45 calendar months thereafter."); *see also* **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule P (defining Schedule P as the "Delivery Schedule" and providing a schedule of the gold delivery obligations under the PPF Agreement).

[305] Claimant's Memorial, ¶ 5 (describing the Project as being "on the cusp of the exploitation phase" in late 2018).

[306] Claimant's Memorial, ¶ 54 ("In 2017, IMC started negotiations with the Santo Domingo Community to update the Framework Agreement by way of an addendum. It proposed to pay Santo Domingo . . . PEN 900,000 (approximately USD 219,000) **in 2019, when the exploitation phase of the Project was estimated to begin**") (emphasis added); *see also* **CWS-0003**, Castañeda Witness Statement, ¶ 50.

[307] Claimant's Memorial, ¶ 80.

[308] Claimant's Memorial, ¶ 67.

[309] **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK Consulting, 13 April 2018, p. 10.

[310] **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK Consulting, 13 April 2018, p. 10.

167. Given the various regulatory permits still outstanding, and the absence of proper engagement and agreements with the Parán Community, at that point it was unlikely that Claimant would be able to begin exploiting resources from the mine at the time or rate necessary to satisfy Claimant's' obligations to its lender (irrespective of the conflict between Claimant and the Parán Community, and even if that conflict had never arisen).[311]

168. Over the years that it controlled the Invicta Project, Claimant completed a series of exploration phase steps. However, much like with the Crucero and Josnitoro projects, Claimant never reached the exploitation phase with the Invicta Project, leaving it without the resources that it needed to pay back its creditor and to avoid defaulting on its loan agreements.[312]

169. In conclusion, the seeds of the Invicta Project's downfall, and of Claimant's eventual loss of its interest in Invicta, were sown by several failures and faulty decisions attributable to Claimant itself. Those included, amongst others, Claimant's own lack of experience; its own lack of adequate due diligence; its own risky project financing; its own incomplete permitting; and its own poor relations with the Rural Communities (including, in particular, its own inability to reach agreement and resolve social conflict with the Parán Community).

D. Claimant failed to obtain the support of the Rural Communities for the Invicta project

170. Claimant purports to be highly experienced in the development of Peruvian mines, including in the management of community relations.[313] For example, on its main website, it claims to "[a]ctively listen and develop open and transparent communication with local communities and stakeholders in Peru."[314] The facts of this case, however, belie those claims, and indeed prove the contrary: it was precisely

[311] *See infra* Section II.F.4.

[312] *See infra* Section II.F.4.

[313] Claimant's Memorial, ¶¶ 24, 47.

[314] **Ex. R-0044**, Lupaka Gold Corp., "Our Values," last accessed 3 March 2022.

Claimant's inadequate and ill-advised handling of its relations with the Parán Community that led to the social conflict between Invicta and that Community. It was such conflict in turn that ultimately blocked Invicta's Project from progressing at a pace that suited Claimant's project finance lenders.

171. As described in **Section II.B.1** above, Claimant either knew or should have known when it acquired its investment in Peru that the success of the Invicta Project depended on Invicta obtaining a social license from each Rural Community.[315] However, as the evidence discussed in the remainder of this section demonstrates, Claimant failed to obtain the social license it needed. Instead, Invicta (and thus Claimant) breached their obligations to each of the Rural Communities and, in particular, the Parán Community. Indeed, Invicta appears to have wrongly concluded that it no longer needed the Parán Community's support to exploit the Invicta Mine and therefore sidelined that Community, with catastrophic consequences for the viability of the Project.

1. Claimant failed to establish positive and strong relationships with the Rural Communities

172. Notwithstanding Claimant's acknowledgment of the impact that community relationships would have on the Project's success,[316] it failed to engage with the Rural Communities in a manner that would enable advancing the project mine to the exploitation phase. In particular, Claimant (i) breached commitments made to the Rural Communities following the acquisition of Invicta; and (ii) failed to comply with environmental regulations related to its mining activities.

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[315] *See supra* Section II.B.1; *see also* **RWS-0001**, Trigoso Witness Statement, ¶¶ 28–29; **RWS-0002**, Incháustegui Witness Statement, ¶ 18.

[316] Claimant's Memorial, ¶ 67 (Invicta "recognized the importance of good relations with all of the Rural Communities."); **Ex. AC-0048**, Lupaka Gold Corp. 2012 Annual Report, p. 3; ("The importance of good community relations for long-term success cannot be overemphasized. A significant portion of [Invicta's] energy and effort in Peru [is being] directed toward building and maintaining good community relationships."); **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012; **Ex. C-0035**, Invicta Gold Project Optimized Feasibility Study, THE LOKHORST GROUP, July 2010, ¶ 1.10.7 ("Good community relations are an important part of a mining operation.").

a. Invicta breached its obligations to all three Rural Communities within the Project's area of influence

173. At the same time that Claimant was trying to rehabilitate Invicta's image after the latter's violations of the agreements with the Rural Communities leading up to 2012,[317] Claimant generated further distrust by the Rural Communities following its acquisition of Invicta, by breaching various of its obligations to such communities.

174. Notably, Claimant breached Invicta's social commitments contained in the Social Management Plan that Invicta had submitted as part of its 2009 EIA.[318] Such breaches are significant for at least two reasons: (i) they illustrate how Claimant (mis)managed the critical relationship with the Rural Communities (in particular, the Parán Community) and how it conducted business; and (ii) they provide important context for Claimant's failure to build trust with the Rural Communities, secure support for the Project, and conclude an agreement with the Parán Community.

175. Claimant's breaches of its Social Management Plan were revealed during a Project inspection that was conducted from 27 February to 4 March 2018 by the Environmental Supervision for Energy and Mines Office ("**ESEMO**"), which is a department within the OEFA.[319] The ESEMO inspection revealed that Invicta had failed properly to implement its Social Management Plan.[320] Based on its inspection, the ESEMO issued a report finding that during 2016 and 2017, Invicta had breached its obligation to comply with social commitments owed to the Rural Communities

[317] Claimant's Memorial, ¶¶ 59–60, 68 (describing Claimant's discovery of Invicta's failure to comply with agreements it executed with the Lacsanga and Parán Communities); **Ex. C-0064**, Letter to Notary re Agreement between Invicta Mining Corp. S.A.C. and Santo Domingo de Apache Community, 22 October 2010 (providing the terms of settlement related to grievances that the Santo Domingo de Apache Community had with Invicta).

[318] *See* **Ex. R-0047**, 2009 EIA, p. 36, § 4.1.2. (informing that the Project's direct area of influence was comprised by the Lacsanga, Parán and Santo Domingo Communities); *see also* **Ex. R-0047**, 2009 EIA, 8.2.12.

[319] **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, pp. 2–3.

[320] **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, pp. 46–47. (outlining that Invicta provided a copy of (i) the 2017 Easement agreement with Lacsanga; (ii) 2012 easement agreement with Santo Domingo; (iii) 2010 framework agreement with Santo Domingo; and (iv) copy of annual declarations for the Project).

under the Social Management Plan component of its 2009 EIA.[321] In particular, the report found that Invicta had failed to: (i) implement a program to hire local personnel; (ii) support the Rural Communities' health and nutrition campaigns; (iii) assist the Rural Communities' educational and scholarship programs; (iv) assist with sustainable development programs through a series of workshops and partnerships with the Rural Communities; and (v) comply with Peruvian environmental norms.[322]

176. Invicta breached its social obligations (concerning health, labor, education, other) with all three Rural Communities in 2016 and 2017, and there is no evidence that it complied with its obligations in subsequent years.[323] Even while undergoing formal proceedings for failing to implement its *Plan de Relaciones Comunitarias*, Invicta never submitted evidence to contradict the allegations made, despite having been notified in a timely manner.[324] Further, Invicta never challenged the finding that it violated its commitments with all three of the Rural Communities.[325] While Invicta filed an appeal against Resolution No. 2050 on 14 January 2020, it did not disavow the breach of its social obligations.[326] The sanction was later confirmed through Resolution No. 158-2021-OEFA-TFA-SE ("**Resolution No. 158**") issued on 25 May 2021 by the second instance authority inside the OEFA (Tribunal of Environmental Inspection).[327]

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[321] **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, pp. 42–54.

[322] **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, pp. 42–54; *see* **Ex. R-0047**, 2009 EIA, § 8.2 (committing to develop the following activities with the communities under the Project's direct area of influence: (i) hiring local personnel; (ii) support and training in health matters; (iii) support and training in education; and (iv) Developing participative workshops. Under (iv), Invicta committed to developing workshops and implementing alliances with the local communities to support sustainable development, identifying projects that the local communities would deem convenient).

[323] **Ex. R-0062**, Directorial Resolution No. 2050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019, § III.4.

[324] **Ex. R-0062**, Directorial Resolution No. 2050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019, ¶ 65.

[325] **Ex. R-0062**, Directorial Resolution No. 2050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019, ¶ 4.

[326] **Ex. R-0069**, Directorial Resolution No. 158-2021-OEFA/TFA-SE, Invicta Mining Corp., 17 September 2019, No. 4, pp. 49–50.

[327] **Ex. R-0069**, Directorial Resolution No. 158-2021-OEFA/TFA-SE, Invicta Mining Corp., 17 September 2019, No. 4, pp. 49–50.

177. In an attempt to meet these obligations, Invicta had reached one agreement with the Lacsanga Community and two agreements with the Santo Domingo de Apache Community.[328] However, as OEFA clearly noted, those agreements did not prove the fulfilment of Invicta's social obligations with those communities.[329] In addition, Claimant failed, to successfully interact with, and ultimately come to an agreement with, the Parán Community.[330] Further, Invicta performed only the labor component of its Social Management Plan (and did so inadequately, at that), but made no progress on the health, education, and sustainable development components of it Social Management Plan, or with respect to any of the environmental concerns that had been raised.[331]

b. Invicta failed to comply with its environmental obligations

178. In its Memorial, Claimant admits that one key source of dispute between Invicta and the Parán Community was the concerns raised by that Community in relation to the environmental impact of the Invicta Mine.[332] Claimant attempts to dismiss those concerns as unfounded.[333] However, the contemporaneous evidence demonstrates that Claimant failed to comply with its environmental obligations, and that the Parán Community's concerns regarding potential environmental damage were legitimate.

179. Concerns regarding the negative environmental impacts of the Invicta Mine long predated Claimant's acquisition of Invicta. For example, Government authorities received advance warning of such potential negative environmental impacts as early as 7 September 2011, in a letter from the *Frente de Defensa del Medio Ambiente y*

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[328] Claimant's Memorial, §§ 2.2.3.1, 2.2.3.2.

[329] *See* **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, p. 48 (noting that the agreements filed did not show fulfillment of its social obligations).

[330] **Ex. R-0062**, Directorial Resolution No. 2050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019, ¶¶ 79–83.

[331] **Ex. R-0062**, Directorial Resolution No. 2050-2019-OEFA/DFAI, Invicta Mining Corp., 17 December 2019, ¶¶ 79–83.

[332] *See, e.g.*, Claimant's Memorial, ¶¶ 103, 145.

[333] *See* Claimant's Memorial, ¶¶ 73, 80, 103; **CWS-0004**, Witness Statement of Luis Bravo, 1 October 2021 ("**Bravo's Witness Statement**"), ¶¶ 25–26, 42.

Promoción de los Distritos Leoncio Prado, Paccho, Sayán e Ihuarí de las provincias de Huaura y Huaral ("***Frente de Defensa***"), which is a grassroots environmental advocacy organization.[334] That letter notified several Peruvian Governmental authorities that the Project posed significant environmental risks to local communities in the Project area, particularly with regard to their water sources.[335] For this reason, the *Frente de Defensa* identified what it considered to be the Invicta Project's environmental failings.[336] Such alleged failings included Invicta's failure to correctly identify which water sources might be impacted by its mining activities, and the scope of that impact.[337] The *Frente de Defensa* also asserted that Invicta had breached its obligation to consult the Rural Communities and to establish adequate citizen participation mechanisms.[338] Finally, the group's letter warned of the adverse long-term impact that water contamination would have on the Parán Community's agricultural activities and on its population's health.[339]

180. These concerns by the Rural Communities and others were subsequently proven legitimate in 2018 by the findings of the OEFA, when it investigated Invicta's compliance with its social and environmental obligations. On 29 August 2018, as the

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[334] **Ex. R-0071**, Letter from Frente de Defensa (A. Román) to MINAM (R. Giesecke), 7 Septemeber 2011, p. 1; *see also* **RER-0002**, Vela Expert Report, § III.A.2.g.

[335] **Ex. R-0071**, Letter from Frente de Defensa (A. Román) to MINAM (R. Giesecke), 7 September 2011, p. 1.

[336] **Ex. R-0071**, Letter from Frente de Defensa del Medio Ambiente y Promoción (A. Román) to MINAM (R. Giesecke), 7 Septemeber 2011, pp. 1–3 (claiming that the Project's EIA (i) breached the rural community's water rights since its prioritized the water use for the mining activity instead of human consumption and agricultural development; (ii) acknowledged the lack of information to weigh the Project's impact on water sources, since it did not know the mineral springs in the area or how the water flowed underground, and it did not guarantee the application of the precautionary principle; (iii) underestimated the socio-economic impact that the Project might have in the rural communities; and (iv) included an impact on permanent superficial waters).

[337] **Ex. R-0071**, Letter from Frente de Defensa (A. Román) to MINAM (R. Giesecke), 7 September 2011, p. 1.

[338] **Ex. R-0071**, Letter from Frente de Defensa (A. Román) to MINAM (R. Giesecke), 7 September 2011, p. 4.

[339] **Ex. R-0071**, Letter from Frente de Defensa (A. Román) to MINAM (R. Giesecke), 7 September 2011, p. 3.

social conflict between Claimant and the Parán Community deepened,[340] the Directorate of Inspection and Application of Incentives ("**DFAI**"), an agency under the auspices of the OEFA, declared that in 2015 Claimant had committed a series of violations of its 2009 EIA. Such violations included: (i) failing to implement adequate measures for the management of solid waste; (ii) using a biodigester, i.e., a system that biologically digests organic material, as part of its domestic wastewater treatment system, despite the fact that it was not authorized to do so under the 2009 EIA; and (iii) failing to adopt measures to manage sludge created by its treatment of wastewater.[341]

181. On 27 September 2018, the DFAI issued a further resolution against Invicta, after conducting an administrative visit to the Project site from 10 to 12 June 2017.[342] This resolution recorded the DFAI's conclusion that Claimant's mining activities had exceeded the maximum permissible limits for discharge of cadmium, copper, and zinc, contrary to Supreme Decree No. 010-2010-MINAM.[343] The DFAI explained that these metals are highly toxic to the environment, and that their presence could negatively impact local vegetation and fauna.[344] The DFAI found that Invicta had not implemented measures to control the level of these metals in the water sources impacted by the Project.[345] The DFAI conducted another inspection from 27 February to 4 March 2018, and once again found that the levels of metals that were being discharged from the mine were excessive.[346] As a corrective measure, the DFAI

[340] *See infra* Section II.E.2; *see* **Ex. C-0121**, Letter from the Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Castañeda), 4 May 2018.

[341] **Ex. R-0072**, Directorial Resolution No. 2005-2018-OEFA/DFAI, 29 August 2018, pp. 15, 18, 19, 20.

[342] **Ex. R-0074**, Directorial Resolution No. 2005-2018-OEFA/DFAI, 29 August 2018, pp. 1–2.

[343] **Ex. R-0073**, Supreme Decree No. 010-2010-MINAM, 20 August 2010, Art. 4, Annex 1; *see* **Ex. R-0074**, Directorial Resolution No. 2203-2018-OEFA/DFAI, 27 September 2018, p. 18.

[344] **Ex. R-0072**, Directorial Resolution No. 2005-2018-OEFA/DFAI, 29 August 2018, pp. 16–17.

[345] **Ex. R-0072**, Directorial Resolution No. 2005-2018-OEFA/DFAI, 29 August 2018, p. 16.

[346] **Ex. R-0072**, Directorial Resolution No. 2005-2018-OEFA/DFAI, 29 August 2018, p. 16.

ordered Invicta to provide proof of the implementation of its mine water treatment system, which thereafter was to be supervised by OEFA.[347]

182. The foregoing facts demonstrate that, contrary to Claimant's contentions, the Rural Communities (including the Parán Community) had legitimate and well-founded reasons to be concerned about the potential environmental impact of the Invicta Project, and about the Claimant's compliance with environmental laws and regulations. However, as discussed in further detail below, Claimant turned a blind eye to these concerns, thereby further stoking the conflict between Invicta and the Parán Community.

2. Claimant's community relations failures were especially harmful to its relationship with the Parán Community

183. While Claimant's inability to effectively build and manage its community relations with the Lacsanga and Santo Domingo de Apache Communities certainly damaged those relationships, it was Claimant's relationship with the Parán Community that was damaged most acutely. As noted above, the Parán Community's grievances predated Claimant's acquisition of Invicta. The remainder of this section will demonstrate that Claimant exacerbated those grievances by: (i) marginalizing the Parán Community, by ignoring or dismissing their interests, and later disclaiming the need for their involvement, and (ii) ignoring the Parán Community's legitimate concerns about the environmental impact that the Invicta Project could have on that Community's territory.

a. Claimant marginalized the Parán Community

184. Following its acquisition of Invicta, Claimant initially hoped to secure the support of the Parán Community, by (i) developing a good relationship with that Community; and (ii) establishing access to the Project site through that Community's territory. Accomplishing the latter goal would satisfy a condition of the PPF Agreement

[347] **Ex. R-0072**, Directorial Resolution No. 2005-2018-OEFA/DFAI, 29 August 2018, pp. 17–18.

(Claimant's project financing agreement), which required that Claimant secure road access before receiving the first tranche of three payments under that agreement.[348]

185. Presumably based on these commercial motivations, Claimant was eager to negotiate new agreements with the Parán Community at the time that it "submitted proposals to Parán officials" in 2016.[349] In addition to negotiating access to the mining site and infrastructure development, Claimant was willing to compensate the Parán Community for the actions of Invicta prior to Claimant's acquisition in 2012.[350] In addition, Invicta had promised the Parán Community that it would build classroom facilities within the Parán Community territory.[351] However, these classrooms were never built.[352]

186. Thereafter, on 25 January 2017, Claimant acknowledged Invicta's non-compliance with its previous agreement and agreed to pay a fee to settle its debt with the Parán Community.[353] Unfortunately, Claimant and the Parán Community later disputed the scope of payments that Claimant owed under the January 2017 agreement. Under the terms of that agreement, Claimant had agreed to pay the Parán Community "three hundred thousand [soles] . . . [approximately USD 80,000] within forty-five days" as compensation for Invicta's failure to build the classroom facilities that it had committed to construct.[354]

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[348] Claimant's Memorial, ¶ 68.

[349] Claimant's Memorial, ¶ 68.

[350] Claimant's Memorial, ¶ 68; **Ex. C-0102**, Draft Comments on the Parán Community Counterproposal, Invicta, November 2016.

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

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

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

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

187. Claimant later argued that it could not make this payment within the agreed 45 days (allegedly due to liquidity problems),[355] and was therefore liable to pay a penalty fee for non-compliance.[356] Mr. Castañeda acknowledges in his witness statement that "both the principal amount and the fine" had become due, and states that Claimant proposed to make these payments after a surface rights agreement was executed.[357] While Claimant eventually paid the principal amount due, it does not appear that it ever paid the fine for failing to make the initial penalty payment by the agreed deadline.[358]

188. In an attempt to explain why it failed to meet the 45-day payment deadline, Claimant sent a letter to the Parán Community in May 2017, emphasizing that Claimant *needed* an agreement with the Community to be able to obtain financing:

> [D]espite all the efforts made by Invicta (and Lupaka), **to get the Banks** to disburse [to Invicta] the money to fulfill [its] commitments and **finance the mining Operation in Invicta, they refuse to do so while the company does not have and submit an Agreement signed with the Community of Parán . . . This long-term Agreement is the only condition that the Banks place on Invicta to deliver the monetary funds**. It is for that reason we would be grateful to you, Mr. President, to put to the consideration of the Governing Committee and Assembly the convenience of **signing an Agreement with Invicta**, since it **is the only way that the Banks disburse the money, with which the debt plus the fine would be paid**. This Agreement would have an express clause indicating that it will not enter into force until Invicta fulfills its pending payment commitments.[359] (Emphasis added)

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[355] **CWS-0003**, Castañeda Witness Statement, ¶¶ 61–62.

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

[357] **CWS-0003**, Castañeda Witness Statement, ¶ 62.

[358] **CWS-0003**, Castañeda Witness Statement, ¶ 63 (noting that the principal amount was paid, but not referencing any payment of the fine); **Ex. C-0120**, Letter No. 004-2018-CCP from the Parán Community (I. Román) to Invicta Mining Corp. S.A.C. (J. Castañeda), 3 January 2018, pp. 1–2 (requesting that Claimant pay the fine associated with its non-compliance under the 21 January 2017 agreement).

[359] **Ex. C-0114**, Letter from Invicta (J. Castañeda) to Parán Community (I. Roman), 31 May 2017.

189. Despite acknowledging the importance of reaching an agreement with the Parán Community—which, as discussed above, was required not only to achieve the Claimant's narrow (financial) self-interest but also to comply with obligations under Peruvian law (see **Sections II.A.3 and II.B.1**)—Claimant abruptly changed its stance following the above correspondence. In particular, once Claimant had secured an agreement with the Lacsanga Community in July 2017 (i.e., a month or so after it had sent the May 2017 letter to the Parán Community quoted above), Claimant apparently discontinued attempts to reach an agreement with the Parán Community.[360] Claimant's agreement with the Lacsanga Community allowed it road access to the Invicta Project, thereby satisfying the final condition required for Claimant to receive its first installment of funding under the PPF Agreement (discussed in **Section II.C.4** above).[361]

190. Accordingly, after striking a deal with the Lacsanga Community, Claimant abandoned any pretense of trying to reach an agreement with the Parán Community. In fact, Claimant began to take affirmative actions *against* the Parán Community. For instance, in November 2017, Invicta sent a letter that Community notifying it of a police investigation that Claimant had initiated against Community members.[362] While the background to this letter is unclear, Claimant asserted therein—without explaining why—that it suspected that members of the Community were planning to "attack" the mining site.[363] Thus, without first broaching the subject with any Parán Community members, Claimant had involved the national police to take measures against the Community.[364]

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[360] **RWS-0003,** Witness Statement of Nilton León, 22 March 2022 ("**León Witness Statement**"), ¶ 22.

[361] **Ex. R-0075**, Lupaka Gold Corp., "Invicta Gold Project Receives Community Agreement," 24 July 2017.

[362] **Ex. C-0118**, Letter from Invicta Mining Corp. S.A.C. to the Parán Community (W. Narvasta), 7 November 2017, p. 1.

[363] **Ex. C-0118**, Letter from Invicta Mining Corp. S.A.C. to the Parán Community (W. Narvasta), 7 November 2017, p. 1.

[364] **Ex. C-0118**, Letter from Invicta Mining Corp. S.A.C. to the Parán Community (W. Narvasta), 7 November 2017, p. 1.

191. Notwithstanding its obligation to engage in continuous dialogue with the Parán Community and allow for their effective participation in the Invicta Project,[365] Claimant never reached an agreement, surface rights or otherwise, that demonstrated such Community's support for the project. This contrasted with agreements that Invicta had reached with the neighboring communities of Lacsanga and Santo Domingo de Apache—these Communities would benefit from the Invicta Project while the Parán Community would not.[366] This effectively side-lined the Parán Community from activities and consultations relating to the Invicta Project, generating further distrust and contributing to the social conflict that would later erupt. In such circumstances, it is hardly surprising that relations between Invicta and the Parán Community ultimately disintegrated.[367]

b. Claimant ignored the Parán Communities' environmental concerns about the Project

192. The relationship between Invicta and the Parán Community became even more strained as a result of the Community's legitimate concerns regarding the environmental impact of the Invicta Project. To aggravate matters, rather than address such concerns, Claimant dismissed them and refused to co-operate with the authorities that were investigating the environmental impacts of the mine.

193. Given the fundamental importance of a clean water supply to any community, and the fact that the Invicta Mine's water treatment systems were on the Parán

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365 *See supra* Sections II.B.1 and II.C.3.d; *see also, e.g.*, **Ex. R-0041**, Joint Disclosure Booklet, pp. A–9 (acknowledging the risk posed to the Project by the need to secure agreements with the various rural communities in the mine's area of direct influence).

366 **RWS-0003**, León Witness Statement, ¶¶ 20, 22, 78; *see* **Ex. C-0042**, Agreement of Proof of Fulfillment of Commitments between Invicta Mining Corp. S.A.C. and Lacsanga Community, 31 March 2015; *see also* **Ex. C-0063**, Contract for the Constitution of Mining Easement between Invicta Mining Corp. S.A.C. and Santo Domingo de Apache Community, 22 October 2010; **Ex. C-0064**, Letter to Notary re Agreement between Invicta Mining Corp. S.A.C. and Santo Domingo de Apache Community, 22 October 2010; **Ex. C-0065**, Letter to Notary re Contract for the Constitution of Mining Easement between Invicta Mining Corp. S.A.C. and Santo Domingo de Apache Community, 22 October 2010.

367 **Ex. R-0076**, Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Román) to Council of Ministries (M. Aráoz), 4 January 2018.

Community's territory,[368] the Peruvian authorities took notice of Parán Community's concerns in that regard, and took concrete measures to address them. For example, as early as 4 January 2018, the Leoncio Prado Subprefect (who was the local government official with responsibility for the district of Leoncio Prado) alerted the Presidency of the Council of Ministers ("**PCM**") (which is the State entity with oversight authority over all regulatory bodies),[369] that it was concerned that the Invicta Project was having a negative impact on the Parán Community's water sources.[370] In that letter, the Subprefect explained that prior to January 2018, he had organized discussions between Invicta's representatives, as well as representatives of the Rural Communities.[371] During those meetings, the Subprefect confirmed that, given the Invicta Project's location (directly northeast of the Parán Community's territory), the waste produced at the project site flowed down and into the Parán Community's water sources.[372] The Subprefect also expressed alarm at the fact that Claimant had decided not to execute an agreement with the Parán Community, despite the fact that such Community was located within the Project's area of direct influence, and thus "would suffer considerable environmental negative impact" from the Project.[373] As a result of his concerns, the Subprefect requested the PCM to conduct a formal investigation into the issue.[374]

194. On 10 April 2018, the Parán Community formally notified the Huaura Local Water Authority ("**the Water Authority**") of its concerns over the Project's potential negative

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[368] **Ex. R-0136**, Map of Invicta Project with Mine Components.

[369] *See infra* Section II.E.1.

[370] **Ex. R-0076**, Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Román) to Council of Ministries (M. Aráoz), 4 January 2018.

[371] **Ex. R-0076**, Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Román) to Council of Ministries (M. Aráoz), 4 January 2018.

[372] **Ex. R-0076**, Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Román) to Council of Ministries (M. Aráoz), 4 January 2018.

[373] **Ex. R-0076**, Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Román) to Council of Ministries (M. Aráoz), 4 January 2018.

[374] **Ex. R-0076**, Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Román) to Council of Ministries (M. Aráoz), 4 January 2018.

environmental impact on their community.[375] In particular, the Community expressed its concern regarding contaminated water reaching the Community's peach orchards and sources of drinking water.[376] In response to this notification, the Water Authority commenced an investigation and conducted two inspections, which took place on 7 May 2018 and 4 July 2018, respectively.[377] These inspections were attended by Invicta and Parán Community representatives.[378] A report on the findings of the inspections indicate that the Parán Community's water sources, including basins from which children from the Parán Community drank, contained oxide residues which discolored the water.[379] The Water Authority requested Claimant's permission to test the water sources on the Project site, but Claimant refused to grant the requested access because the relevant officials allegedly lacked requisite permits and insurance.[380]

195. The Subprefect of Leoncio Prado was so concerned by the results of the inspection, and by the problems that could arise if Community concerns were not addressed, that he wrote to the Ombudsman's Office on 8 May 2018. In his letter, the Subprefect noted his concern that Claimant possibly had started exploitation activities without (i) adequately assessing the environmental and social impact on the surrounding area; or (ii) obtaining the support of the Parán Community.[381] The Leoncio Prado Subprefecture requested the Ombudsman's Office to establish a formal dialogue and

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[375] **Ex. R-0077**, Letter from the Parán Community (W. Narvasta) to Huaura Local Water Authority, 10 April 2018**,** p. 1.

[376] **Ex. R-0077**, Letter from the Parán Community (W. Narvasta) to Huaura Local Water Authority, 10 April 2018, p. 1.

[377] **Ex. R-0091**, ANA, Technical Report No. 048-2018-ANA-AAA.CF.-ALA H/KHR, 13 July 2018.

[378] **Ex. R-0078**, Ministry of Agriculture and Irrigation, Multiple Citation No. 003-2018-ANA-AAA.CF.-ALA-H/KHR from ANA (V. Pineda) to Invicta Mining Corp. S.A.C. (J. Castañeda), 26 April 2018; **Ex. R-0079**, Ministry of Agriculture and Irrigation, Multiple Citation No. 003-2018-ANA-AAA.CF.-ALA-H/KHR from ANA (V. Pineda) to the Parán Community (W. Narvasta), 26 April 2018; **Ex. R-0090**, ANA, Letter No. 136-2018-ANA-AAA.CF.-ALA-HUAURA, 16 July 2018; **Ex. R-0092**, ANA, Notification No. 012-2018-ANA-AAA.CF.-ALA-H/KHR, 16 July 2018.

[379] **Ex. R-0080**, ANA, Record of Field Technical Verification, 7 May 2018, p. 3.

[380] **Ex. R-0080**, ANA, Record of Field Technical Verification, 7 May 2018, p. 3.

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

mediation process in order to address the apparent lack of communication between Claimant and the Parán Community, and to prevent what appeared to be imminent social conflict.[382]

196. On 4 May 2018, shortly before the social conflict erupted, the Parán Community wrote a letter to Claimant detailing its concerns regarding possible contamination of its water resources.[383] Almost a month later, on 4 June 2018, Claimant responded to the Parán Community's letter, denying all allegations regarding negative environmental impacts of the Project on the Parán Community—this despite the fact that the abovementioned environmental investigation was still ongoing, and that therefore its results were not yet known.[384] Notably, Claimant did not invite the Parán Community to engage in further discussions regarding the community's environmental concerns.

197. In sum, from the moment it acquired the Invicta Project in 2012, Claimant mismanaged the community relations issues relevant to its mining activities. With regard to the Parán Community specifically, Claimant (i) failed to rehabilitate Invicta's image, (ii) breached commitments it had made under its own Social Management Plan, (iii) violated environmental laws and regulations, (iv) marginalized and isolated the Parán Community by not entering into a long-term agreement with them (even though it had done so with its neighbors), and (v) ignored legitimate environmental concerns brought to its attention by the Parán Community. Each of these failures directly contributed to the breakdown of the relationship between Claimant and the Parán Community, which ultimately precipitate the social conflict that frustrated Claimant's investment.

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

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

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

E. Peru acted in good faith and with due diligence to mediate a durable solution to the conflict between Claimant and the Parán Community

198. Throughout its Memorial, Claimant mischaracterizes and glosses over key facts by alleging that Peru did not do enough, and largely refused to intervene, to protect Claimant's investment from the actions of the Parán Community.[385] Claimant furthermore misconstrues the facts when it argues that Peru's approach to the conflict demonstrates that Peru sided with the Parán Community, to Claimant's detriment.[386] Claimant is wrong on both accounts.

199. Specifically, the Parán Community undertook three actions that impacted or threatened to impact Claimant's operations: (i) it staged a protest at the Invicta Mine on 19 June 2018—the 19 June 2018 Protest; (ii) it threatened a second protest at the Invicta Mine on 11 September 2018; and (iii) it established a civilian blockade—the Access Road Protest—on 14 October 2018, thereby adversely affecting Claimant's access to the Invicta Mine, for an indefinite period of time.

200. As will be demonstrated in this section, Peru intervened appropriately in response to each of those three actions undertaken by the Parán Community. Moreover, Peru will demonstrate that it consistently and diligently engaged both Claimant and the Parán Community in an effort to assist Claimant in resolving its conflict with that community.

201. As explained in **Section II.A.1**, Peru's many years of experience with social conflict in the mining sector yielded legal and policy reforms to promote democratic governance and human rights through citizen participation and engagement with local communities. That legal and policy framework also promoted conflict resolution mechanisms over the use of force to manage and resolve social conflict within the mining sector. During Claimant's conflict with the Parán Community, Peru acted in accordance with the relevant Peruvian legislation and international law, aiming at all

[385] Claimant's Memorial, ¶¶ 132, 171, 184, 185, 266.

[386] Claimant's Memorial, ¶¶ 132, 171, 184, 185, 266.

times to catalyze a durable solution that would guarantee the long-term success of Claimant's investment.

202. This Section will demonstrate how Peru: (i) activated and coordinated the relevant agencies and authorities to assist Claimant to resolve its disagreements with the Parán Community (**Section II.E.1**); (ii) engaged both Claimant and the Parán Community separately and jointly through mediation and dialogue early in the conflict (**Section II.E.2**); (iii) responded appropriately—including through deployment of police forces to prevent a potentially violent confrontation between Invicta representatives and the Parán Community (**Section II.E.3**); (iv) responded appropriately to neutralize the conflict once the Parán Community commenced its Access Road Protest, and continued to provide assistance to Claimant, despite the latter's violation of its agreement with the Parán Community and its refusal to participate in dialogue efforts (**Section II.E.4**); and (v) continued to assist Claimant despite Claimant's serious aggravation of the conflict (**Section II.E.5**).

1. Peru activated the relevant State agencies to assist Claimant in its conflict with the Parán Community

203. Throughout Claimant's conflict with the Parán Community, several Peruvian governmental agencies adopted measures within their respective scope of authority and competencies to respond to the conflict. This Section identifies the main governmental entities that Peru activated to address the conflict, and briefly outlines the scope of each agency's authority to intervene in social conflicts in the mining sector.

204. The **PCM** coordinates national multi-sectoral policies of the executive branch, and manages relationships with other branches of government, autonomous bodies, and civil society groups.[387] The PCM has a **Secretariat of Social Management and Dialogue**, which is specifically dedicated to the task of strengthening democratic governance and developing conflict prevention and management strategies that institutionalize dialogue and sustainable development across all sectors and all levels

[387] **Ex. R-0123**, Supreme Decree No. 022-2017-PCM, 27 February 2017, Art. 2.1.

of government.[388] This Secretariat also conducts formal dialogue processes with the goal of resolving social conflicts and fomenting democratic values.[389] In coordination with other government entities, PCM officials participate in and mediate social conflicts to promote social stability.[390] In the conflict between the Claimant and the Parán Community, the PCM monitored dialogue between the parties and participated in mediation efforts.[391]

205. The **Ombudsman's Office** (*Defensoría del Pueblo*) is the Government office that works to uphold the constitutional and fundamental rights of individuals and the community. [392] It coordinates with and supervises other Government entities in the fulfilment of their duties—promoting dialogue, developing strategies to prevent harm to fundamental rights, and aiding in the resolution of social conflicts.[393] An important tool of this office is its Conflicts Monitoring System (known as "Simco"), which allows authorities to identify social conflicts at an early stage, establish dialogue, prevent aggravation of the dispute, and, in many cases, reach peaceful solutions between the disputing parties.[394] The Ombudsman's Office also continuously monitors ongoing social conflicts, and publishes monthly reports detailing their latest known status.[395] The Ombudsman's Office (i) identified disagreements between the Parán Community

[388] **Ex. R-0123**, Supreme Decree No. 022-2017-PCM, 27 February 2017, Art. 58.

[389] **Ex. R-0123**, Supreme Decree No. 022-2017-PCM, 27 February 2017, Art. 58.

[390] **Ex. R-0123**, Supreme Decree No. 022-2017-PCM, 27 February 2017, Arts. 2.1, 3.

[391] *See, e.g.*, **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 1; **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, p. 1; **Ex. R-0063**, Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, p. 1; **Ex. C-0172**, Report on Progress in Social Management by State Agencies, 22 October 2018.

[392] **Ex. C-0023**, the Constitution, Art. 161; **Ex. R-0126**, Law No. 26520, 4 August 1995, Art. 1; *see also* **Ex. R-0126**, Law No. 26520, 4 August 1995, Art. 32 (describing the regional offices that enable the Ombudsman's Office to better perform its functions).

[393] **Ex. C-0023**, the Constitution, Art. 161; **Ex. R-0126**, Law No. 26520, 4 August 1995, Art. 1; *see also* **Ex. R-0126**, Law No. 26520, 4 August 1995, Art. 32. *See also, e.g.*, **Ex. R-0108**, Ombudsman's Office Report No. 177 on Social Conflicts, November 2018, pp. 1–4 (explaining the Ombudsman's Office role in social conflicts, and how it classifies its assessment of conflicts).

[394] **Ex. R-0023**, Ombudsman's Office Report, "*El valor del dialogo*," September 2017, p. 10.

[395] *See, e.g.*, **Ex. R-0108**, Ombudsman's Office Report No. 177 on Social Conflicts, November 2018, p. 1.

and Invicta as early as January 2012,[396] (ii) alerted the relevant authorities and agencies of the Parán Community's disagreements with Claimant's Invicta Project in November 2018,[397] and (iii) thereafter continued to closely monitor the conflict.[398]

206. Within the MINEM, the **OGGS** is the specialized advisory agency tasked with promoting and maintaining harmonious relations between mining companies and local communities, among other parties.[399] To do this, the OGGS monitors a mining company's social commitments with local communities and provides guidance on community relations and social aspects of EIAs.[400] In addition, the OGGS responds to emerging social conflicts by encouraging and facilitating dialogue between local communities and mining companies, to build consensus and resolve their differences through long-term agreements.[401] The OGGS is therefore a key agency in Peru's social conflict prevention and management framework dedicated to the mining sector. In the unfortunate situations where a social conflict rises to a crisis point, the OGGS works to de-escalate disputes and neutralize the situation to re-engage the parties in a process of dialogue and reconciliation.[402] The MINEM and the OGGS are based in Lima, with 24 representative offices throughout Peru.[403] The OGGS carried out a wide

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[396] **Ex. R-0162**, Ombudsman's Office Report No. 95 on Social Conflicts, January 2012.

[397] **Ex. R-0108**, Ombudsman's Office Report No. 177 on Social Conflicts, November 2018, p. 59.

[398] **Ex. R-0109**, Reference Summary of Ombudsman's Office Report No. 177 on Social Conflicts, June 2021; *see also* **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 1; **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, p. 1.

[399] **Ex. R-0012**, Supreme Decree 021-2018-EM, 18 August 2018, Art. 51 (a)–(b).

[400] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Arts. 5.2., 61.2.

[401] *E.g.*, **Ex. R-0012**, Supreme Decree 021-2018-EM, 18 August 2018, Art. 50 ("The General Social Management Office is the advisory body responsible for promoting and strengthening harmonious relations among all parties involved in the sustainable development of activities in the Energy and Mining Sector; **using mechanisms for dialogue and consultation**, as well as traditional and innovative social tools and strategies required by law") (emphasis added).

[402] **Ex. R-0012**, Supreme Decree 021-2018-EM, 18 August 2018, Art. 51; *see also* **RWS-0001**, Trigoso Witness Statement, ¶¶ 13, 17–18, 22; **RWS-0002**, Incháustegui Witness Statement, ¶ 17; **Ex. R-0016**, Strategic Institutional Plan—PEI 2017–2019, MINEM, 2016, pp. 13, 15, 17, 67–70.

[403] **Ex. R-0115**, MINEM, "Directorio Regional," last accessed 7 March 2022.

gamut of tasks and initiatives to assist Claimant with its project and with its conflict with the Parán Community, as will be shown.

207. The **MININTER** is the head body of Peru's "Interior Sector,"[404] and is responsible for maintaining public order and security nation-wide.[405] The MININTER coordinates with other State agencies to formulate, organize, and execute specific measures in response to social conflicts.[406] It has its headquarters in Lima. Within the MININTER, the **General Directorate of Internal Government** (*Dirección General de Gobierno Interior*) is an autonomous body whose functions include directing and supervising the conduct of localized subprefectures (*subprefecturas*).[407] The subprefectures focus on maintaining public order and social peace in their respective regions.[408] They are hierarchically divided into district, provincial, and regional subprefectures.[409] The district subprefectures inform their superiors about social conflicts and the development of social programs within their jurisdictions.[410] The subprefectures that have jurisdiction over the Invicta Mine, and that mediated between the Parán Community and Invicta, are the Sayán and Huacho Subprefectures.[411]

208. Also within the MININTER is the **PNP**, which is an independent and autonomous institution whose functions include, inter alia, maintaining public order; providing protection and assistance; ensuring compliance with Peruvian laws; safeguarding the

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[404] **Ex. R-0059,** Legislative Decree No. 1266, 16 December 2016, Art. 2 (designating the Ministry of Interior as the head body of the Interior Sector), Art. 3 (noting that the Interior Sector comprises the Ministry of Interior, Peru's National Police and the Organisms and Funds ascribed to it).

[405] **Ex. R-0059,** Legislative Decree No. 1266, 16 December 2016, Arts. 2, 3, 5.

[406] **Ex. R-0101,** Ministerial Resolution No. 1520-2019-IN, 4 October 2019, Art. 2.3; *see also* **Ex. R-0059,** Legislative Decree No. 1266, 16 December 2016, Art. 5.

[407] **Ex. R-0101,** Ministerial Resolution No. 1520-2019-IN, 4 October 2019, Art. 117.

[408] **Ex. R-0101,** Ministerial Resolution No. 1520-2019-IN, 4 October 2019, 4 October 2019, Arts. 159, 163.

[409] **Ex. R-0101,** Ministerial Resolution No. 1520-2019-IN, 4 October 2019, Art. 160.

[410] **Ex. R-0101,** Ministerial Resolution No. 1520-2019-IN, 4 October 2019, 4 October 2019, Art. 166 (d).

[411] *See, e.g.*, Claimant's Memorial, ¶112; **Ex. C-0139**, Meeting Minutes, Subprefecture Hearing between Invicta Mining Corp. S.A.C. and the Parán Community, 18 September 2018; **Ex. C-0172**, Report on Progress in Social Management by State Agencies, 22 October 2018, p. 1; **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, p. 4.

free exercise of fundamental human rights and the normal development of activities of the population; and supporting other public institutions within its competency.[412] The PNP takes guidance from the Peruvian Constitution, statutes, regulations, and PNP policies and guidelines in assessing whether the use of forceful police intervention is permissible and appropriate, particularly in instances where it perceives a risk to human life or other significant social costs.[413] By express mandate under Peruvian law, any use of force must comply with international standards of human rights.[414] Intervention by PNP security forces, including their intervention in

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[412] *See, e.g.*, **Ex. R-0102**, Legislative Decree No. 1267, 16 December 2016, Art. 3 ("It shall ensure the protection, security and free exercise of people's fundamental rights and the normal development of the activities of the population; it shall provide support for the other public institutions within the scope of its competence."). **Ex. R-0102**, Legislative Decree No. 1267, 16 December 2016, Arts. 2, 7; *see also* **Ex. C-0023**, the Constitution, Art. 166; **RER-0001**, Meini Expert Report, ¶¶ 132–33.

[413] **RER-0001**, Meini Expert Report,¶ 198 ("International instruments, ICHR jurisprudence, national legislation and Supreme Court jurisprudence insist that the use of force may only be authorized as a last resort (use of force as an ultima ratio) and after exhausting all alternative mechanisms. This standard nurtures Peruvian officials' duty as criminal legal guarantor to assess and approve or reject the use of force."). *See* **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 4.1. (noting that the use of force by the PNP should always respect fundamental rights and should follow the principles of legality, necessity and proportionality); **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2. (outlining the circumstances in which the PNP is allowed to use force); *see also* **Ex. R-0117**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, Art. 1 ("Police officers may use force in a progressive and differentiated manner, in accordance with the principles of legality, necessity and proportionality and the levels of use of force in the following circumstances: - To arrest in the act or by judicial order in accordance with the law; - To comply with a duty or lawful orders issued by the competent authorities; - To prevent the perpetration of offences and infringements; - To protect or defend protected legal assets; - To control anyone applying resistance to the authority.").

[414] **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 4 ("the use of force by National Police officers shall be maintained, respecting fundamental rights and subject to the following principles: a. Legality – The use of force must be aimed at achieving a legal objective. The means and methods used to comply with their duty must fall within the scope of the International Human Rights Law, the Political Constitution of Peru and other national rules on the matter . . . ") (emphasis added); **Ex. R-0117**, Ministerial Resolution No. 952-2018-IN, 13 August 2018 (". . . the international standards on human rights applicable to the police function [] are supported by international documents (Basic Principles on the use of force and firearms by officers responsible for ensuring compliance with the law and the Code of Conduct for officers responsible for ensuring compliance with the law) and recommendations and decisions of international human rights bodies (UN bodies and the Inter-American Court of Human Rights)"); **RER-0001**, Meini Expert Report,¶ 134; *see also* **Ex. IMM-0042**, Plenary Agreement No. 05-2019/CJ-116, 10 September 2019, fn. 55–56; **Ex. R-0118**, The United Nations OHCHR, "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials," 1990, ¶

social conflicts, is generally planned carefully in advance and documented in an internal operational plan.[415] Such operational plans include a detailed assessment of the facts and circumstances that may require police intervention.[416] It is typical for operational plans to be drafted but in the end not executed, as they are created on a contingency basis so that they can be implemented promptly only in the event that forceful intervention becomes necessary, as a measure of last resort.[417] Peruvian police stations (*Comisarías*) are the smallest functional units within the PNP.[418] The Sayán Police Station (*Comisaría de Sayán*) has jurisdiction over the territories of the Lacsanga, Santo Domingo de Apache, and Parán Communities (i.e., the Rural Communities).[419]

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4 ("Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result."); **Ex. R-0118**, The United Nations OHCHR, "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials," 1990 ¶¶ 9, 12, 13, 14; **Ex. R-0119**, International Committee of the Red Cross, INTERNATIONAL RULES AND STANDARDS FOR POLICING, 2014, pp. 34–35; **Ex. R-0120**, The United Nations OHCHR, "Code of Conduct for Law Enforcement Officials," 17 December 1979, Art. 3; **Ex. R-0167**, The United Nations OHCHR, "Human Rights Standards and Practice for the Police," April 2003, p. 3; **RLA-0072**, *Zambrano Vélez et al. v. Ecuador*, IACHR, Judgment, 4 July 2007 (García, *et al.*), ¶ 83; **RLA-0073**, *Landaeta Mejías Brothers et al. v. Venezuela*, IACHR, Judgment, 27 August 2014 (Sierra Porto, *et al.*), ¶ 126; **RLA-0074**, *Cruz Sánchez et al. v. Peru*, IACHR, Judgment, 17 April 2015 (Sierra Porto, *et al.*), 263; **Ex. IMM-0032**, *J. v. Peru*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 17 April 2015 (M. Ventura Robles, *et al.*), ¶ 330; **Ex. IMM-0033**, *Nadege Dorzema, et al., v. Dominican Republic,* IACHR, Merits, Reparations and Costs, 24 October 2012 (Gracias-Sayan), ¶¶ 80, 85.

415 **RER-0001**, Meini Expert Report,¶ 158; **Ex. R-0117**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, Art. 1 ("The function of the National Police of Peru is to maintain and restore public order, which requires professional action based on human rights applied to the police function, guaranteeing the defense of the person, society and the State. In order to **perform this function, police action must be based on appropriate management, organization and execution of police operations**.") (emphasis added); *see also* **Ex. R-0121**, Supreme Decree No. 012-2016-IN, 26 July 2016, Art. 5.

416 **RER-0001**, Meini Expert Report,¶¶ 41, 161 (noting that the operational plan is drafted with input received from a report that evaluates: (i) potential risks ("*Informe de Riesgos*"); (ii) an assessment from the operation's executor ("*Apreciación de Situación*"); and (iii) an assessment made by the intelligence command of the PNP ("*Apreciación de Inteligencia*").

417 **RER-0001**, Meini Expert Report, ¶¶ 158, 171; **RWS-0004**, Witness Statement of Esteban Saavedra Mendoza, 15 March 2022 ("**Saavedra Witness Statement**"), ¶¶ 24, 33.

418 **Ex. R-0102**, Legislative Decree No. 1267, 16 December 2016, Art. 24.

419 Hierarchically, the Sayán Police Station belongs to the Huacho Police Division (*División Policial de Huacho*), which belongs to the Lima Police Region (*Región Policial de Lima*). *See* **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, pp. 1, 27.

209. The **Public Prosecutor's Office** (*Ministerio Público*) is an autonomous State organ that prosecutes crime and administers civil reparations, among other court-related mandates.[420] It may prosecute criminal action (i) *ex officio*, (ii) at the request of an aggrieved party, or (iii) by "*acción popular*."[421] Prosecutors (*Fiscales*) serve as representatives of the Public Prosecutor's Office, and are subject to the instructions of their respective superiors. [422]

210. As will be further demonstrated in the following sections, the Peruvian entities described above acted reasonably, diligently, and in accordance with their respective mandates to respond at every juncture and throughout the entire social conflict between Claimant and the Parán Community.

2. Peru intervened in the early stages of the conflict between Claimant and the Parán Community

a. Peru responded to the 19 June 2018 Protest appropriately and in accordance with Peruvian law and promptly activated conflict management mechanisms

211. On 19 June 2018, approximately 250 members of the Parán Community staged a protest at the Invicta Mine, but then departed that same day.[423] Claimant asserts that Peru failed to prevent or adequately respond to this event. However, as demonstrated below, Peru acted promptly, reasonably and diligently under the circumstances, in

[420] **Ex. R-0124**, Prosecutorial Resolution No. 3893-2018-MP-FN, 30 October 2018, Art. 1; *see also* **Ex. R-0125**, Legislative Decree No. 052, 16 March 1981, Art. 11.

[421] **Ex. R-0125**, Legislative Decree No. 052, 16 March 1981, Art. 11; *see also* **Ex. C-0023**, the Constitution, Art. 200 (stating that the *acción popular* is a legal proceeding to challenge the legality of hierarchically inferior norms issued by any governmental entity); **Ex. R-0164**, New Constitutional Procedural Code, Law No. 31307, 21 July 202, Arts. 83, 74, 75 (explaining that the *acción popular* can be commenced by any person or entity to challenge the legality and constitutionality of hierarchically inferior norms issued by any governmental entity).

[422] **Ex. R-0125**, Legislative Decree No. 052, 16 March 1981, Arts. 2, 5.

[423] **Ex. R-0063**, Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, p. 2; **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, pp. 2–3; **Ex. C-0160**, Police Inspection Report of Invicta Mine, Sayán Police Station, 20 June 2018. Other Peruvian entities became aware of the situation for the first time the following day. *See, e.g.*, **Ex. C-0126**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to MINEM (F. Ismodes), 20 June 2018; **Ex. C-0127**, Letter from Invicta Mining Corp. S.A.C. to OSINERGMIN, 20 June 2018; **Ex. C-0128**, Request by Invicta Mining Corp. S.A.C. (J. Castañeda) to Huaura Subprefecture for Protection, 26 June 2018.

accordance with Peruvian law and the minimum standard of treatment under customary international law.

212. Claimant's assertion that Peru should have adopted measures to *prevent* the 19 June 2018 Protest is unreasonable. The PNP would have required considerable notice to pre-emptively intervene to stop the Parán Community from following through on its plan for that protest, especially given (i) the distance between the Invicta Mine and the closest PNP authorities; and (ii) the scale of response that such an intervention would have required to be effective.

213. The PNP authorities closest to the Invicta Mine were those of the Sayán Police Station, which is located at least a two-hour drive away.[424] Reaching the Invicta Mine from the Sayán Police Station is difficult, requiring favorable weather conditions to travel across steep, unpaved terrain.[425] Traveling to the Invicta Mine—particularly with a large contingent of officers—thus would have required a certain minimum amount of time and planning.[426]

214. Moreover, the modest team of law enforcement personnel that is assigned to the Sayán Police Station covers a vast, rural territory—over 2.0 times larger than New York City.[427] By 2018, the Sayán Police Station had only fifteen police officers assigned to cover all incidents and issues that might arise within that station's area of jurisdiction.[428] To respond pre-emptively to the Parán Community's protest

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[424] *See, e.g.*, **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1 (noting that the police officers got together at 6:30 AM and arrived to the Invicta Mine access road at 8:30 AM).

[425] **RWS-0003**, León Witness Statement, ¶ 13; **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 45.

[426] **RWS-0003**, León Witness Statement, ¶ 13; *see, e.g.*, **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 45.

[427] **Ex. R-0169**, Map of LIMA/HUAURA/SAYAN, CPNP SAYAN, May 2020 (explaining that the Sayán Police Station's jurisdiction covers the districts of Sayán, Leoncio Prado and Paccho, under a surface area of 1630.38 km^2); **Ex. R-0163**, G. Lankevich, "*New York City | Layout, People, Economy, Culture, & History*," BRITANNICA, 11 March 2022 (stating New York City covers territory spanning 790 km^2).

[427] Claimant's Memorial, ¶ 109.

[428] **Ex. R-0130**, Police Report RPL-DIVPOL HUACHO, 10 May 2018.

effectively, the PNP would have thus required significant time and planning to (i) gather intelligence; (ii) devise an operational plan for a safe and productive police intervention; (iii) request personnel reinforcements from the Huaura and Lima Police Divisions to execute an operational plan that could deter potentially dozens or hundreds of Parán Community protestors; and (iv) allow sufficient time for police forces from the Lima and Huaura PNP Divisions to travel to the Invicta Mine to execute the relevant operational plan. Claimant's alleged expectation that Peru should have acted immediately to *prevent* a massive protest at the Invicta Mine was, therefore, simply unrealistic and unreasonable.

215. In any event, even if the PNP had been given sufficient notice, given the specific circumstances presented, it would not have been appropriate for the PNP to use force, either to prevent or repress the protest. Claimant is disregarding not only the specific circumstances, but also the limits imposed by Peruvian laws and regulations on the use of force against public demonstrations and social conflict.

216. Claimant also appears to suggest that Peru did not do enough to intervene *after* the Parán Community had commenced its protest at the Invicta Mine on 19 June 2018.[429] However, as Claimant acknowledges, the Parán Community members protesting that day departed the Invicta Mine only a few hours later.[430] Therefore, even if Peru could have responded with the immediacy and aggressive show of force that Claimant suggests would have been appropriate (quod non), there was no need for such action, and in any event would have been rendered moot by the protestors' departure, even before the Peruvian police forces could arrive at the scene.

[429] Claimant's Memorial, ¶ 109.

[430] *See* Claimant's Memorial, ¶ 109 ("Even with the Parán invaders gone, no one from the central Government guaranteed that Claimant's rights would be preserved and that further invasions would be prevented. The Police, which IMC had alerted before the invasion, only reached the Site the next day, on 20 June 2018.").

217. Despite Claimant's characterizations, Peru's response to the 19 June 2018 Protest was entirely consistent with Peruvian law and relevant police protocols and procedures.[431] [redacted] the Chief Police Officer ("**CPO**") of Sayán led a patrol team to conduct a detailed inspection of the Invicta Mine, after a two-hour trip in PNP vehicles through the barely accessible road, in order to collect information to prepare a police report, and then sent the information collected during the inspection to the Public Prosecutor's Office.[433] The Sayán Police Station and the Public Prosecutor's Office continued to monitor the Invicta Mine for potential subsequent disturbances, and furthermore initiated a criminal investigation into the 19 June 2018 Protest.[434]

[431] *See* **Ex. R-0135**, New Criminal Procedure Code of Peru, 22 July 2004, Art. 68 (explaining that in exercise of its investigational power, the PNP receives the filed complaints, takes witness declarations, and performs inspections, among other tasks).

[redacted]

[433] **Ex. C-0129**, Special Report: Seizure of Invicta Mine Camp and Facilities, SOCIAL SUSTAINABLE SOLUTIONS, 19 June 2018, p. 3 ("Witness statements were made at the Sayán police station"; "A coordination and support meeting was held with the commissioner of Sayán, Major PNP Andrés Rosales, and it was agreed to carry out a police inspection on 20/06 from 8.30 am"; "On 20/06, a police inspection was carried out, leaving Sayán with 04 police officers led by Major Rosales. An inspection of all of the camp facilities was carried out and a police report was drawn up"; *see also* **Ex. C-0160**, Inspection Report of Invicta Mine, SAYÁN POLICE DEPARTMENT, 20 June 2018; **Ex. R-0064**, Official Letter No. 350-2018-REGION POLICIAL LIMA/DIVPOL-H.CS-SEINCRI, 20 June 2018; *see also* **Ex. R-0135**, New Criminal Procedure Code of Peru, 22 July 2004, Art. 331

[434] *See, e.g.*, **Ex. C-0161**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, pp. 20–21 (noting that on 19 July 2018, two police officers from the Intelligence Division in Huacho (*División de Inteligencia*) conducted an inspection at the Project site to prepare an intelligence report that could provide insight to the Police of Sayán, and inform plans for potential police intervention).

218. Claimant's own exhibits suggest that at the time its representatives welcomed the actions taken by the PNP in response to the 19 June 2018 Protest, and coordinated with them on appropriate response measures.[435]

219. In parallel, during the months of July and August 2018, the OGGS assessed the state of the conflict,[436] collected information from both Invicta and the Parán Community, and initiated efforts to persuade both sides to resolve their disagreements through a formal process of negotiation and mediation known as a "**Dialogue Table**," in which parties in conflict commit to dialogue as the primary method for building consensus and finding amicable solutions to end their conflict.[437] But the OGGS was not the only agency to become involved in trying to broker a resolution of the conflict between Claimant and the Parán Community. As will be discussed below, various other Peruvian agencies were actively engaged in seeking a long-lasting solution to the conflict.[438]

220. Between August and October 2018, Peru actively organized, hosted, and mediated several sessions designed to de-escalate, neutralize, and resolve the conflict between Claimant and the Parán Community. During that period, the OGGS Social Specialists assigned to this conflict, Messrs. Nilton León, Daniel Amaro, and Victor Raúl Vargas, led, mediated, organized, and/or hosted multiple conferences in the Huacho Municipal Building, the Parán Community territory, and the MINEM offices in

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[435] **Ex. C-0129**, Special Report: Seizure of Invicta Mine Camp and Facilities, SOCIAL SUSTAINABLE SOLUTIONS, 19 June 2018, p. 3; **Ex. C-0161**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, pp. 20–21.

[436] **RWS-0003**, León Witness Statement,¶¶ 20–23; *see supra* Section II.E.1; **Ex. R-0012**, Supreme Decree No. 021-2018-EM, 18 August 2018, Art. 50 (a) (b).

[437] *See supra* Section II.E.2; **RWS-0001**, Trigoso Witness Statement, ¶¶ 13, 17 ("When the OGGS is informed of the existence of a social conflict between a mining company and rural communities, the Office for the Management of Dialogue and Citizen Participation provides a support, advisory and monitoring service in mediation and facilitation of the conflict… The function of the Social Specialist includes participating in meetings and facilitating the process of dialogue between the parties, and proposing mechanisms and guidelines to improve relations between the parties to the conflict."); **RWS-0003**, León Witness Statement, ¶¶ 26–27.

[438] **RWS-0001**, Trigoso Witness Statement, ¶ 14; **RWS-0004**, Saavedra Witness Statement, ¶¶ 19, 20, 27.

Lima.[439] In hosting additional meetings in MINEM's offices in Lima—Peru devoted State resources (including transportation for the Parán Community members) to enable and encourage the participation of the Parán Community in the mediation efforts.[440] Importantly, Mr. León and other members of the OGGS team made the four-hour journey from Lima to Sayán and the Parán Community territory *approximately 20 times*—including on weekends—to meet with the Parán Community during its assembly sessions, when the OGGS team could speak with the largest group of Parán Community members possible.[441] Peru's actions during this phase of the conflict were designed to facilitate a rapprochement between Claimant and the Parán Community, through a process of negotiation and dialogue.

221. During various meetings with the OGGS officials, the Parán Community expressed its concerns with regard to the Invicta Project's environmental and social impact on their community and their territory, and indicated that they felt that their concerns had been ignored by Claimant.[442] During these meetings, including the ones held on 11 and 22 August 2018, the Parán Community emphasized its social and environmental concerns with the Invicta Project, and requested that the Peruvian authorities further scrutinize the Project to address those concerns.[443] Specifically, with regard to the environmental impact of the Invicta Project, the Parán Community was concerned about the release of metals and contamination that would flow through their territory and contaminate water sources that its members relied on for

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[439] **RWS-0003**, León Witness Statement, ¶¶ 22–27; *see, e.g.*, **Ex. R-0170**, Official Letter No. 275-2019-MEM/OGGS from General Director (J. Carabajal) to President of the Parán Community, 8 May 2019; **Ex. C-0220**, Letter No. 033-2019-MINEN/OGGS/OGDPC from MINEM (M. Kuzma) to Parán Community (A. Torres), 19 June 2019.

[440] **RWS-0003**, León Witness Statement, ¶¶ 33, 47-48.

[441] **RWS-0003**, León Witness Statement, ¶¶ 13–14.

[442] **Ex. R-0065**, Meeting Minutes, Meeting between the Parán Community and MINEM, 11 August 2018; **Ex. R-0066**, Meeting Minutes, Meeting between the Parán Community and MINEM, 22 August 2018. Mr. León and other members of the OGGS occasionally traveled from Lima to Sayán, including on weekends, to attend meetings at a time when the Parán Community would usually hold their assembly sessions. *See supra* SectionII.D.2.b; *see* **RWS-0003**, León Witness Statement, ¶¶ 13–14.

[443] **Ex. R-0065**, Meeting Minutes, Meeting between the Parán Community and MINEM, 11 August 2018, p. 1; **Ex. R-0066**, Meeting Minutes, Meeting between the Parán Community and MINEM, 22 August 2018. *See also* **RWS-0003**, León Witness Statement, ¶¶ 22–23.

drinking water and for agricultural purposes.[444] With respect to the social impact of the Invicta Project, the Parán Community expressed frustration to the OGGS team that Claimant had not reached a long-term agreement with their community, despite their territory being within the Invicta Project's area of direct influence. [445]

222. In addition to its environmental concerns, the Parán Community was aware that Claimant had already secured agreements with the Santo Domingo de Apache and Lacsanga Communities. Thus, the Parán Community perceived that Claimant was not only dismissing their concerns but also failing to obtain the their Community's support for the Invicta Project through a mutually beneficial long-term agreement.[446]

223. Furthermore, the grievances that the Parán Community reported to the OGGS team on 11 and 22 August 2018 had a clearly defined legal foundation under Peruvian law. As explained in their respective witness statements by Mr. Fernando Trigoso, former Director of the OGGS, Mr. Luis Miguel Incháustegui, former Deputy Minister of Mines, and the expert Mr. Vela, Peruvian law required Claimant to secure a harmonious relationship with all Rural Communities within the Invicta Project's area of direct influence; engage those communities in continuous dialogue; and secure their participation as part of the EIA process and throughout the Invicta Project's existence.[447]

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[444] **RWS-0003**, León Witness Statement, ¶ 22.

[445] **RWS-0003**, León Witness Statement, ¶ 22; *see also* **Ex. C-0007**, Directorial Resolution No. 427-2009-MEM-AAM, MINEM, 28 December 2009 (declaring that the Parán, Santo Domingo de Apache, and Lacsanga Communities are part of the Project's area of direct influence); **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018, p. 14 ("**Area of Social Influence:** The area of social influence contemplated for the Third ITS Invicta corresponds to the same area approved in the Environmental Impact Study by Directorial Resolution No. 427-2009-MEM-AAM, dated December 28, 2009, which determines as Area of Indirect Social Influence the socioeconomic and cultural space of the districts of Leoncio Prado and Paccho, and as Area of Direct Social Influence the rural communities of Lacsanga, Parán and Santo Domingo de Apache") (emphasis in original); *see also* **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art 4.2.2.

[446] **RWS-0003**, León Witness Statement, ¶ 22. ; **RWS-0004**, Saavedra Witness Statement, ¶ 18.

[447] **RWS-0001**, Trigoso Witness Statement, ¶¶ 24–30; **RWS-0002**, Incháustegui Witness Statement, ¶¶ 37–40; **RER-0002**, Vela Expert Report,¶ ¶ 81–85. *See also supra* Section II.B.1; **Ex. C-0111**, Report on

b. Peru responded appropriately to the Parán Community's planned protest at the Invicta Mine on 11 September 2018

224. On 2 September 2018, two weeks after one of the many meetings held by the OGGS with the Parán Community members, Invicta informed the Sayán Police Station that it believed the Parán Community's assembly had decided to stage another protest at the Invicta Mine, and that such protest would be held on 11 September 2018.[448] Within two days of such notification, the CPO of Sayán requested authorization from the Public Prosecutor's Office to dispatch police reinforcements to the Invicta Mine to prevent a potentially violent confrontation.[449] As Claimant acknowledges, several government authorities, including the Public Prosecutor's Office, the Huaura Subprefecture, and the PNP organized a meeting with the Parán Community on 7 September 2018, and ultimately managed to persuade the Parán Community *not* to carry out the protest that it had scheduled for 11 September 2018.[450] Although, as explained in **Sections II.A.2, II.B, and II.D.2**, it was Claimant's responsibility to maintain a good relationship with the Parán Community,[451] Peru interceded to neutralize the imminent protest, thereby preventing a confrontation. In the process, Peru generated a new opportunity for Claimant to engage with the Parán Community to reach an amicable resolution of the dispute.

225. In this instance, Peru received nine days' advance notice of the Parán Community protest that was planned for 11 September 2018. Unlike with the previous protest, nine days proved to be sufficient time for the Sayán Police Station to plan and execute a

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Social Intervention for Signing of Agreement with Parán Community, undated, p. 4 (recognizing that Claimant had to work with the Parán Community through social responsibility issues according to its Environmental Impact Assessment)

[448] **Ex. C-0134**, Letter from Invicta Mine Corp. S.A.C. (J. Castañeda) to Sayán Police Station (A. Rosales), 2 September 2018.

[449] **Ex. R-0068**, Official Letter No. 494-2018-REGION POLICIAL LIMA/DIVPOL-H-CS-SBNCRI, 4 September 2018.

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

[451] **RWS-0001**, Trigoso Witness Statement, ¶¶ 24–30; **RER-0002**, Vela Expert Report,¶ 81-85.

strategic operational plan. Accordingly, the Sayán Police Station deployed a large PNP police contingency to the Invicta Mine on 10 September 2018.[452] Per orders from the Huacho Police Division, the police contingent thus acted mainly as a deterrent force, as they were under strict orders to avoid using force or a direct provocation that could generate violence, aggravate the dispute and/or harden opposition from the Parán Community to the Invicta Project.[453] Such police contingency remained at the Invicta Mine from 10 September 2018 until 12 September 2018, and succeeded in dissuading the Parán Community protestors from entering the Invicta Mine.[454] The Claimant recognizes that the PNP's intervention on 10 September 2018 effectively prevented the Parán Community from following through on its plan to protest at the Invicta Mine.[455] The Peruvian governmental authorities thus not only preempted the protest, but once again opened up a new space for Claimant to engage with the Parán Community and try to reach an agreement.

226. To be clear, Peru did not deploy—and would not have deployed—a police contingent on 10 September for the purpose of *forcibly* ending a Rural Community protest, as such an intervention would have been at high risk of resulting in physical violence between the PNP and civilians.[456] Rather, the police units were deployed for purely *deterrent* purposes, and in fact as described above succeeded in achieving that purpose.

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[452] Claimant's Memorial, ¶ 113; **Ex. C-0137**, Report on Police Intervention at Camp Project, Invicta Mining Corp. S.A.C, 13 September 2018.

[453] **Ex. C-0136**, Order No. 1035-2018-REGPOL LIMA/DIVPOL-H-OFIPLO, Police Approval of Plan to Avoid Parán Community Invasion, 8 September 2018, p. 1 ("The Commanding Officer will instruct the police personnel who participate in the execution of police planning operations while **avoiding at all times social costs or succumbing to provocations that negatively affect the image of the institution.**") (emphasis added).

[454] Claimant's Memorial, ¶ 113; **Ex. C-0137**, CR Team Report on Police Intervention at Project Site, Invicta, 13 September 2018, p. 2.

[455] **Ex. C-0138**, Monthly Report on Invicta Mining, SOCIAL SUSTAINABLE SOLUTIONS, September 2018, pp. 4–5.

[456] **RER-0001**, Meini Expert Report,¶ 147 ("Peruvian law expressly regulates the use of force by PNP [National Police of Peru] officers. The domestic legal framework, mainly formed by the law of the National Police of Peru and Legislative Decree 1186, which governs the use of force by the National Police of Peru, respects the constitutional and conventional standards, and **only authorizes the use of**

c. Peru responded appropriately to assist Claimant's representative in reaching a settlement agreement with the Parán Community

227. On 18 September 2018 (i.e., approximately one week after Peruvian authorities managed to dissuade the Parán Community from conducting a protest at the Invicta Mine), the Huaura Subprefect hosted a meeting between with Claimant and the Parán Community President, Mr. Palomares, pursuant to Mr. Castañeda's request for protective measures proceedings filed before the Subprefect. [457] The Huaura Subprefect's mediation led to the execution by Claimant and the Parán Community of a settlement agreement titled *Acta de Audiencia de Subprefectura con Acuerdo Compromiso de Cumplimiento Obligatorio* ("Minutes of Subprefecture Hearing with Agreement Commitment of Mandatory Compliance"). [458] Pursuant to that agreement, both parties jointly agreed to: (i) stop all violent acts, threats, and hostile manifestations, whether physical or psychological; (ii) maintain peaceful coexistence; and (iii) recognize the binding nature of the document, breach of which could trigger remedies provided by law. [459] Claimant asserts, however, that the agreement was "not worth the paper it was written on" because "[t]he central authorities were unwilling

force in exceptional cases, in a progressive and differentiated manner, and when use of force is appropriate, that is, when it is able to ensure compliance with the aims for which force is used.") (emphasis added); **RER-0001**, Meini Expert Report, ¶ 211 (explaining that the decision to execute the operational plan to intervene forcefully would have not met the constitutional threshold because "while alternatives such as dialogue exist, this should have been the path to follow and continue, particularly in view of the seriousness of the situation and the '**very high risk**' of proceeding with police intervention to regain possession of the Site. Moreover, far from guaranteeing a final definitive solution to the social dispute, the use of force would have made it worse and prolonged it. The authorization to execute Operations Order No. 002-2019-Región Policial Lima/DIVPOL-F-CS.SEC and its execution would have been unreasonable and, in the event that the risks identified in the Operations Order materialize with the consequent loss of human lives and damage to property, would have been illegal and unconstitutional.") (emphasis added).

[457] **Ex. C-0128**, Request from Invicta Mining Corp. S.A.C. (J. Castañeda) to DGIN for Protection, 26 June 2018. **Ex. C-0139**, Meeting Minutes, Subprefecture Hearing between Invicta Mining Corp S.A.C and the Parán Community, 18 September 2018.

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

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

to enforce the law against the Parán [Community]."[460] As a threshold matter, Claimant does not identify what "law" the referenced "central authorities" were allegedly unwilling to enforce, or even what "central authorities" it is referring to. Claimant also provides no evidence that it exercised—let alone exhausted—any judicial remedies to enforce its bilateral agreement with the Parán Community. Further, Claimant has not provided any evidence to show that *it* performed its own obligations to the Parán Community under this agreement.

228. On 10 October 2018, the Parán Community President wrote to the Ombudsman's Office and the Deputy Minister of Mines to request their intervention because Claimant's development of the Invicta Project was proceeding without consent from the Parán Community, in violation of Peruvian law and ILO Convention 169.[461] Claimant had not fulfilled its legal obligation to obtain a long-term agreement with the Parán Community that would secure that Community's support of the Invicta Project.[462]

3. Peru took appropriate action to manage the conflict after the Parán Community commenced its Access Road Protest on 14 October 2018

229. Peru's responses thereafter continued to focus on avoiding further confrontation or escalation of the conflict, and in particular avoiding physical violence that could lead to the loss of human life (which of course the State is obligated to protect under Peruvian law).[463] Within these legal parameters, Peru provided appropriate support to Claimant by (i) responding quickly to the Access Road Protest, which commenced

[460] Claimant's Memorial, ¶ 116.

[461] **Ex. R-0134**, Letter from the Parán Community (I. Palomares) to Ombudsman's Office (W. Camacho), 10 October 2018; **Ex. C-0163**, Letter from Parán Community (I. Román) to MINEM (F. Ismodes), 10 October 2018 (invoking ILO Convention 169, Peru's General Mining Law, and Supreme Decree 028-2008-EM on citizen participation in mining activities to note that the Parán Community was frustrated by Invicta's failure to seek an agreement, and denouncing Claimant's commencement of mining activities without the Community's agreement).

[462] *See supra* Sections II.B.1 and II.D.2.

[463] *See supra* Section II.E.3–4; **RER-0001**, Meini Expert Report,¶ 211.

on 14 October 2018; and (ii) instituting and advancing the Dialogue Table between Claimant and the Parán Community to broker a sustainable, long-term resolution.

a. Peru's response to the Access Road Protest was reasonable, and designed to foster a long-term relationship between Claimant and the Parán Community

230. On 14 October 2018, approximately 90 Parán Community members began the Access Road Protest, a civilian blockade roughly 300 meters from the entrance to the Invicta Mine, on the Lacsanga access road.[464] The blockade denied access to and from the Invicta Mine.[465] Unlike the protest that had been planned for September 2018 (with respect to which Invicta notified the PNP nine days in advance),[466] neither Claimant nor any other source alerted the PNP with sufficient notice or intelligence for the PNP to be able to plan and execute a pre-emptive intervention analogous to the one in September 2018.[467]

231. [redacted] The PNP deployed a police patrol early the next morning, at approximately 6:30 AM on 14 October 2018, and arrived at approximately 8:30 AM.[469] The police officers remained at the scene of the civilian blockade the entire day.[470] The CPO of Sayán was among the police officers who arrived, and he personally interviewed Parán Community leaders to de-escalate the situation and

[464] **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 3.

[465] **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 3.

[466] *See supra* Section II.E.2.b.

[redacted]

[469] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1.

[470] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1.

prevent violence.[471] The Parán Community again explained that the protest was being carried out because Claimant continued to ignore or dismiss the Community's environmental concerns, and refused to pursue an agreement with the Community.[472]

232. When the CPO of Sayán arrived on the morning of 14 October 2018, he also witnessed the negotiation and conclusion by Claimant and the Parán Community of an agreement.[473] Both Claimant and the Parán Community acknowledged in that agreement that the Parán Community could maintain its protest until they reached a more developed and long-term agreement that fully resolved their differences.[474] Claimant and the Parán Community also agreed in that agreement that they would formally commence a Dialogue Table, thereby committing to dialogue as the means through which they would resolve their disagreements.[475] The Parán Community requested that MINEM officials act as mediators in the subsequent Dialogue Table negotiations.[476] Unhelpfully, and as explained below, almost immediately after Claimant and the Parán Community leaders committed to that Dialogue Table process, Claimant took certain actions that significantly undermined progress in the negotiations.

233. Once the PNP arrived to the Access Road Protest the morning of 14 October 2018 (i.e., the same day that the protest commenced),[477] the PNP succeeded in maintaining the peace and in preventing an escalation of the conflict, and in doing so without resorting

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[471] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1 (explaining that the CPO of Sayán interviewed the Parán Community leaders, who explained that they were commencing a pacific protest against Invicta because the Project caused evident damage to the environment, and because Invicta had failed to execute an agreement with the Community).

[472] **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 3.

[473] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1.

[474] *See* **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C, and Sayán Police Station, 14 October 2018; *see also* **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1.

[475] **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C, and Sayán Police Station, 14 October 2018, pp. 1–2.

[476] **Ex. C-0166**, Minutes of Meeting between Parán, *et al.*, 14 October 2018.

[477] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1.

to, or inducing, any violence whatsoever.[478] The PNP also notified other authorities of the protest.[479] In so doing, the PNP acted appropriately, diligently, and in accordance with national and international norms on police use of force.[480] The PNP was entirely justified in not using force to defuse the Access Road Protest—in part because the PNP was aware that, on the very day of that protest, negotiations were being formally conducted between Claimant and the Parán Community (and in any event, such negotiations actually yielded an agreement, thereby vindicating the PNP's approach to the situation).[481] Throughout the period between the start of the Access Road

[478] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1.

[479] **Ex. R-0139**, Official Letter No. 585-2018-REGION POLICIAL LIMA/DIVPOL-H-CS-SEINCRI, 14 October 2018.

[480] *See supra* Section II.E; **RER-0001**, Meini Expert Report, ¶¶ 13–14, 17, 204, 211–17 (explaining that the PNP was entirely justified in not intervening with force under the circumstances, because a forceful intervention would have been (i) inadequate, given the opportunity for dialogue, (ii) unnecessary, because dialogue could still have achieve the ultimate goal of resolving the social conflict peacefully, fully, and permanently; (iii) counterproductive, because use of force would have aggravated rather than resolved the dispute; and (iv) disproportionate, because executing such a plan could have violated fundamental rights without effectively resolving the conflict);. **RER-0001**, Meini Expert Report, ¶¶ 147–51; **RER-0001**, Meini Expert Report,¶ 134 ("In order to comply with its purpose and function, members of the PNP may use force. However, the use of force by the PNP is never discretionary nor arbitrary. It is regulated in detail by national law and international law. According to these sources of law, the PNP may not make use of force until it has exhausted all alternative means that do not involve violence or any risk of harm to people (the use of force is exceptional or ultima ratio) or that involve a risk of minor injury (criterion of progressivity in the use of force)."). S*ee* **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Arts. 4.1, 8.2; *see also* **RLA-0072**, *Zambrano Vélez et al. v. Ecuador*, IACHR, Judgment, 4 July 2007 (García, et al.), ¶ 83 ("the use of force by the State security corps must be defined as an exception and must be planned and limited proportionately by the authorities. To this effect, the Court has considered that force or means of coercion may only be used when all other means of control have been exhausted or failed.").

[481] **RER-0001**, Meini Expert Report,¶¶ 200–05, 210 ; *see* **Ex. R-0117**, Ministerial Resolution No. 952-2018-IN, 13 August 2018 (discussing the concept of verbalization and noting that it "[i]s the tool or resource most used in police intervention, which seeks to maintain or restore the principle of authority by using oral expression , firmly and with appropriate energy for each particular situation.

In situations in which there is no clear resistance but cooperation, action must be taken with the appropriate courtesy and deference. On the other hand, when there is resistance to police intervention or when one is faced with an alleged offender, the firmness and energy of the language used shall be those required to persuade or convince the offender to abandon their unlawful attitude, particularly when it deprives them of their freedom. Correctly used, this minimizes the risks and maximizes the results of the intervention.

Training in techniques of verbal expression, to communicate with respect, certainty and firmness, is as important as knowing how to shoot or keep fit.); *see supra* Section II.D.1.

Protest and the date on which Claimant signed over its Invicta shares to Claimant's creditor, all of the actions by the PNP and other Peruvian agencies were designed to contain the dispute, to facilitate negotiations between Claimant and the Parán Community, and to help achieve a long-term, sustainable agreement between Claimant and the Parán Community.[482]

234. On 16 October 2018, Claimant sought Peru's help to pursue a dialogue with the Community, requesting intervention by the OGGS in facilitating, promoting, and coordinating the Dialogue Table in order to "initiate discussions and streamline the relationship between our company and the Rural Community of Parán."[483] The very next day, however, Claimant sent a letter to the PNP demanding that the PNP's Chief ". . . provide POLICE SUPPORT to recover and prevent acts of vandalism and the latent social conflict by the Parán Rural Community."[484] (Emphasis in original) Although in that letter Claimant argued that it had tried "by all means" to reach an agreement with the Parán Community,[485] the fact is that Claimant (i) had neglected to seek a long-term agreement that would have secured the Parán Community's support of the Invicta Project before the conflict escalated,[486] and (ii) was acting contrary to the agreement that it had just reached with the Parán Community a mere two days prior, whereby Claimant had agreed that "[t]he representative of the community will

[482] **RER-0001**, Meini Expert Report,¶ 186 ("[a] review of these reports indicates that the MP and PNP officials complied with their duty. They received the reports, they took the corresponding statements and they investigated . . . it may be said that the investigations and proceedings are taking place within the reasonable, common periods available to the Public Prosecutor's Office and the Peruvian Courts for this type of proceedings.").

[483] **Ex. C-0171**, Letter from Invicta (J. Castañeda) to MINEM (F. Castillo), 15 October 2018, p. 2; **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C, and Sayán Police Station, 14 October 2018.

[484] **Ex. C-0170**, Letter from Invicta (J. Castañeda) to Lima Police Department (G. Rodríguez), 17 October 2018, 1; *see* **RWS-0001**, Trigoso Witness Statement, ¶¶ 39–48; **RWS-0002**, Incháustegui Witness Statement, ¶ 15.

[485] **Ex. C-0170**, Letter from Invicta (J. Castañeda) to Lima Police Department (G. Rodríguez), 17 October 2018, p. 2.

[486] *See supra* Section II.D.2.a; *see also* **Ex. R-0075**, Lupaka Gold Corp., "Invicta Gold Project Receives Community Agreement," 24 July 2017.

continue to protest until a solution is found between the Community of Parán and the Invicta company."[487]

b. Peru mediated between Claimant and the Parán Community to establish the Dialogue Table and defuse the Access Road Protest

235. After the Parán Community's Access Road Protest commenced, multiple government entities became involved in conflict management and mediation efforts between Claimant and the Parán Community.[488] Such intervention was consistent with Peru's policy of favoring dialogue over the use of force to resolve social conflicts in the mining sector.[489] As explained in **Section II.A.1**, historically the use of police force in active confrontations between rural communities and mining operators had consistently failed to resolve conflicts, and had instead tended to aggravate disputes.[490] Claimant was well aware of the fact that the forcible removal of the Parán Community through the PNP was highly unlikely to yield a lasting solution to the problem, and that Claimant needed to instead reach a lasting, long-term resolution of the dispute.[491] In fact, referring to the threat of a blockade of the Invicta Project site in September 2018, Claimant's own witness, Mr. Castañeda notes in his witness statement that "[Claimant] knew that the Parán representatives would not be deterred

[487] **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C, and Sayán Police Station, 14 October 2018.

[488] Claimant's Memorial, ¶ 123; [redacted] **CWS-0004**, Bravo Witness Statement, ¶¶ 20–29, 39–44, 71–73, 86–90, 93–97.

[489] **RWS-0002**, Incháustegui Witness Statement, ¶ 23, 37-44; **RWS-0001**, Trigoso Witness Statement, ¶¶ 18–21; *see also* **Ex. R-0016**, Strategic Institutional Plan—PEI 2017–2019, MINEM, 2016, pp. 13, 15, 17, 67–70; *see supra* Sections II.A and II.B.2.

[490] **RWS-0002**, Incháustegui Witness Statement, ¶ 38; **RWS-0001**, Trigoso Witness Statement, ¶¶ 20–21.

[491] [redacted] **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and Sayán Police Station, 14 October 2018, p. 1 (noting that during a meeting on 14 October 2018 Claimant agreed to participate in the Dialogue Table with the Parán Community).

for long and that once the Police had left, the Site would again be at risk of invasion."[492]

236. Claimant also acknowledges that the OGGS's active coordination steered Claimant and the Parán Community to begin talks to establish the Dialogue Table on 24 October 2018.[493] On this date, several government officials contributed to this result, including (i) the OGGS Specialists, who served as the facilitators,[494] (ii) the CPO of Sayán, who provided security,[495] and (iii) the Public Prosecutor's Office.[496] In its summary of the meeting held on 24 October 2018, Claimant itself commended several of the Peruvian officials for the way in which they carried out the meeting. For example, Claimant noted with approval the OGGS representative's candid communications with the Parán Community. Claimant's summary of the meeting states that:

> [The Parán Community's position] **was categorically rejected by** Invicta, **the MEM representative [i.e., the OGGS representative] and the Prosecutor himself**, who took the opportunity to explain how the proceedings for a criminal complaint work.[497] (Emphasis added)

237. Claimant also expressly recognized the OGGS representative's experience and dynamism in brokering the dialogue between the parties with a view to resolving the

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[492] **CWS-0003**, Castañeda Witness Statement, 1 October 2021, ¶ 74 ("We knew that the Parán representatives would not be deterred for long and that once the Police had left, the Site would again be at risk of invasion. For this reason, we persisted in our efforts to secure an agreement with the Parán Community").

[493] **Ex. C-0173**, Report on Meeting between Invicta, *et al.*, 24 October 2018; Claimant's Memorial, ¶¶ 125, 127.

[494] *See* **Ex. C-0173**, Report on Meeting between Invicta, *et al.*, 24 October 2018, p. 1 ("[t]he initial strategy, coordinated with representative of the OSM – MINEM. . ."); **Ex. C-0173**, Report on Meeting between Invicta, *et al.*, 24 October 2018, pp.1–3 (noting that by this time, the OGGS had assigned specialists with experience handling social conflicts to lead the negotiation process. In accordance with its legal competences and functions, the OGGS's representative, Mr. Daniel Amaro, took a leadership role in this negotiation and led the discussions); **RWS-0001**, Trigoso Witness Statement, ¶ 13; *see supra* Section II.E.

[495] **Ex. C-0173**, Report on Meeting between Invicta, *et al.*, 24 October 2018.

[496] *See* **Ex. C-0173**, Report on Meeting between Invicta, *et al.*, 24 October 2018, p. 3.

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

dispute.[498] According to Claimant's own minutes, the Parán Community even accused this same OGGS official of taking *Claimant's* side, noting that "[h]e managed to [lead the meeting] even when the community members turned against him, arguing he was siding with the company. He was blunt and very harsh with the radical community members"[499]

238. Moreover, Claimant acknowledges that when the Parán Community demanded that Claimant withdraw its criminal complaints against Parán Community members, the MINEM and the Huacho Crime Prevention Prosecutor "categorically rejected" such demand, and instead "explain[ed] [to the Parán Community's representatives how the proceedings for a criminal complaint work."[500] Claimant also applauded the Prosecutor:

> The prosecutor played an important role, explaining at all times what his role as prosecutor entailed and that the community's stance was wrong. He also explained the proceedings for criminal complaints and that it was impossible to withdraw such complaints. He maintained a firm stance and identified the main radical opposition community members.[501]

239. During these meetings, Peruvian officials encouraged both Claimant and the Parán Community leaders to advance their negotiations by being clear, specific, and consistent about their demands and potential commitments.[502] According to

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[498] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 2, 8. ("The MEM representative stated that all those involved in this meeting did not come from so far away to hear that the round table was approved, but that all the discussions had not resulted in anything more substantial . . . Anthropologist Daniel Amaro also attended and [led] the meeting due to his experience; He managed to do so even when the community members turned against him, arguing he was siding with the company. He was blunt and very harsh with the radical community members.").

[499] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 2, 8.

[500] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 2, 8.

[501] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 3, 9.

[502] **Ex. C-0173**, Report on Meeting between Invicta, *et al.*, 24 October 2018, p. 2.

Claimant, during one of those meetings the Parán Community stated that there would "only ever be any agreement . . . if IMC [i.e., Invicta] agreed to pay 'whatever the community asked for.'"[503] However, Claimant has provided no evidence whatsoever to substantiate that allegation.

240. Peru continued to work with the Parán Community and Claimant in November 2018.[504] Thus, on 7 November 2018, the OGGS hosted a formal meeting between Claimant and the Parán Community, urging in advance that the parties arrive ready to reach a compromise solution at the meeting.[505] As Claimant recognizes, Peruvian officials took the lead during this meeting, and even urged the Parán Community to end its Access Road Protest.[506] In its summary of the meeting held on 7 November 2018, Claimant expressed its satisfaction with the handling of the meeting by the various Peruvian agency representatives:

> Dr Nilton León was in attendance, **who with his considerable experience and impetus**, managed the meeting, allowing time for all items on the agenda to be discussed. He was rather tolerant when the community members stated that the ministry was pressuring them to accept the company's conditions and that he was siding with the company. **Dr León was direct and professional with his answers and the way in which he led the meeting**.[507] (Emphasis added)

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[503] Claimant's Memorial, ¶ 127; [redacted] *see* Ex. **C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018; **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019.

[504] **RWS-0003**, León Witness Statement, ¶¶ 28–30.

[505] **Ex. C-0182**, Summary Report of Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018; **Ex. C-0183**, Summary Report of 2018 Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018.

[506] **Ex. C-0183**, Summary Report of 2018 Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018, p. 2 (explaining that Mr. León "[e]ncouraged dialogue, stating that INVICTA MINING CORP. S.A.C. has the mining plan permit that obliges the company to comply with its execution of the approved schedule, that the stoppage measure can cause damage to the environment and that both parties must yield and reach agreements.").

[507] **Ex. C-0182**, Summary Report of Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018, p. 2.

241. Claimant also praised the Subprefecture of Huaura, as follows:

> [The Huaura Subprefecture] who took on a neutral stance and facilitated dialogue, intervening dynamically to help the members of the committee understand that they were [] wrong.[508]

242. On 21 November 2018, Mr. León, an OGGS Specialist, presided over yet another session of negotiations, in which Claimant and the Parán Community agreed that (i) the Parán Community would submit to its general assembly the question of whether to cease or continue the Access Road Protest, and would inform the OGGS of the outcome; and (ii) Claimant would remain committed to dialogue.[509]

243. Despite the foregoing, on 22 November 2018 Claimant sent a letter to the MINEM stating that while Claimant recognized MINEM's efforts to establish dialogue,[510] Claimant would refuse to participate in any future negotiations unless the Parán Community removed its roadblock (i.e., ended its Access Road Protest).[511]

244. Contrary to Claimant's suggestion, the OGGS did not simply ignore Claimant's "request that the Access Road Protest be lifted."[512] Rather, in response, OGGS Director Mr. Trigoso sent a letter on 22 November 2018 to Invicta explaining that he had taken

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[508] **Ex. C-0182**, Summary Report of Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018, p. 2.

[509] **Ex. C-0242**, Meeting Minutes, Meeting between Invicta Mining Corp S.A.C. and the Parán Community, 21 November 2018.

[510] **Ex. C-0240**, Letter No. 268-2018-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to Invicta (D. Kivari), 22 November 2018, p. 2 ("We are aware of last week's visit of the Ministry of Energy and Mines at the Rural Community of Parán, making efforts to re-establish discussions between the Community of Parán . . .").

[511] **Ex. C-0240**, Letter No. 268-2018-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to Invicta (D. Kivari), 22 November 2018, p. 3 ("WE REQUEST FROM YOUR OFFICE, that before any further request for dialogue that you intend to transmit to us, you previously verify whether said Rural Community has removed its roadblock, in which case Invicta will openly participate in the meetings that are held to strengthen our community relations. Failing that, please do not transmit any such requests to us, as it would be tantamount to rewarding people who instead of using dialogue resort to threats and violence to achieve their victimising themselves through letters whose unilateral content only narrates a victimisation scenario, completely detached from the reality of the facts, as it may be verified by your officials who will be able to inform you of the real situation on site.").

[512] Claimant's Memorial, ¶ 134.

the initiative to convene the meeting that had been held on 21 November 2018, in yet another effort to broker an amicable resolution of the dispute, and termination of the Access Road Protest.[513] But as Mr. Trigoso explains in his witness statement, the OGGS lacked the means or authority to ensure that the Access Road Protest would cease before any talks and meetings could take place.[514]

245. Nor could the OGGS (or even the MINEM) order the intervention of the PNP —which is what Claimant kept demanding.[515] In practice, most dialogue tables between mining companies and rural communities in Peru take place while civilian blockades are in effect.[516] Further, as explained above,[517] the PNP was fully justified in not forcibly removing civilian blockades when negotiations are in progress; this is a deliberate public policy informed by (i) Peru's past experience with such conflicts, and (ii) international standards and guidelines.[518] As explained by the criminal law expert Dr. Meini, "the use of force would have made it worse and prolonged it. The authorization to execute Operations Order No. 002-2019-Región Policial Lima/DIVPOL-F-CS.SEC and its execution would have been unreasonable and, in the event that the risks identified in the Operations Order materialize with the consequent

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[513] *See* **Ex. C-0240**, Letter No. 268-2018-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to Invicta (D. Kivari), 22 November 2018, p. 1; *see also* **Ex. C-0241**, Letter No. 155-2018-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to Invicta (D. Kivari), 15 November 2018; **RWS-0001**, Trigoso Witness Statement, ¶ 35.

[514] **RWS-0001**, Trigoso Witness Statement, ¶¶ 19–20

[515] **RWS-0001**, Trigoso Witness Statement, ¶ ¶ 19–20.

[516] **RWS-0001**, Trigoso Witness Statement, ¶ 36.

[517] *See supra* Section II.E.1.

[518] *See supra* Section II.E.1; **RER-0001**, Meini Expert Report,¶¶ 200–205; *see* **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Arts. 4, 4.1, 8.2; **Ex. R-0117**, Ministerial Resolution No. 952-2018-IN, 13 August 2018, Art. 1; **Ex. R-0118**, The United Nations OHCHR, "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials," 1990, ¶¶ 4, 9, 12, 13, 14; **Ex. R-0119**, International Committee of the Red Cross, INTERNATIONAL RULES AND STANDARDS FOR POLICING, 2014, pp. 34–35; **Ex. R-0120**, The United Nations OHCHR, "Code of Conduct for Law Enforcement Officials," 17 December 1979, Art. 3; **Ex. R-0167**, The United Nations OHCHR, "Human Rights Standards and Practice for the Police," April 2003, p. 3.

loss of human lives and damage to property, would have been illegal and unconstitutional."[519]

246. In any event, in parallel to the Dialogue Table process, the Public Prosecutor's Office continued its investigations into the complaints that Invicta had filed after the 19 June 2018 events, at the beginning of the Access Road Protest in October 2018, and again in December 2018.[520]

247. In early December 2018, the Parán Community informed the OGGS that the Parán Community's assembly had decided not to terminate the Access Road Protest.[521] The Parán Community's position did not surprise the OGGS, which understood that negotiation processes are seldom a linear progression, go through different stages, and can feature setbacks and new demands from either side.[522]

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[519] **RER-0001**, Meini Expert Report,¶ 211; *see also* **RLA-0072**, *Zambrano Vélez et al. v. Ecuador*, IACHR, Judgment, 4 July 2007 (García, *et al.*), ¶ 83; **RLA-0073**, *Landaeta Mejías Brothers et al. v. Venezuela*, IACHR, Judgment, 27 August 2014 (Sierra Porto, *et al.*), ¶ 126; **RLA-0074**, *Cruz Sánchez et al. v. Peru*, IACHR, Judgment, 17 April 2015 (Sierra Porto, *et al.*), 263; **Ex. IMM-0032**, *J. v. Peru*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 17 April 2015 (M. Ventura Robles, *et al.*), ¶ 330; **Ex. IMM-0033**, *Nadege Dorzema, et al., v. Dominican Republic,* IACHR, Merits, Reparations and Costs, 24 October 2012 (Gracias-Sayan), ¶¶ 80, 85; **Ex. IMM-0042**, Plenary Agreement No. 05-2019/CJ-116, 10 September 2019, ¶¶ 52–53.

[520] Claimant filed another criminal complaint against the Parán Community on 4 December 2018, alleging extortion. Claimant has asserted that "[t]here was no reaction" to this complaint. However, this statement ignores the process through which complaints are internally assessed. Still, after Claimant's urgent request to expand the scope of its prior complaint, the Prosecutor's Office and 15 PNP officials visited the Project site on 21 December 2018 to conduct an inspection related to allegations of explosives use. The Prosecutor did not conduct the inspection because the Parán Community had not been told about the inspection, and would not allow him access to the Project site. The Prosecutor decided to reschedule the inspection rather than risk a confrontation. *See* Claimant's Memorial, ¶ 137. **Ex. C-0246**, Provincial Prosecutor's Report of Investigation, 21 December 2018; **Ex. R-0063,** Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, p. 5**; RER-0001**, Meini Expert Report,¶¶ 178–81 .

[521] **RWS-0003**, León Witness Statement, ¶ 31.

[522] **RWS-0002**, Incháustegui Witness Statement, ¶ 16 (explaining that negotiations sometimes break but this does not mean dialogue ceases to be an option).

248. Claimant adopted the intransigent posture that it would not even meet with the Parán Community unless the Access Road Protest was suspended.[523] In so doing, Claimant belied its professed commitment to find a solution through dialogue, undermined Peru's efforts to broker a peaceful and long-lasting solution, and aggravated the dispute.

249. On 7 December 2018, Invicta sent a letter to the PNP requesting—yet again—[524] police intervention, and claiming that it had already tried "all avenues of dialogue" with the Parán Community.[525]

c. From January 2019 through the execution of the 26 February 2019 Agreement, Peru once again led and promoted efforts for a peaceful resolution of the conflict, notwithstanding Claimant's unwillingness to negotiate

250. By January 2019, every stakeholder in the social conflict seemed ready to reach an agreement, except Claimant. On 15 January 2019, the Parán Community's assembly

[523] **Ex. C-0240**, Letter No. 268-2018-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to Invicta (D. Kivari), 22 November 2018, p. 3 ("WE REQUEST FROM YOUR OFFICE, that before any further request for dialogue that you intend to transmit to us, you previously verify whether said Rural Community has removed its roadblock, in which case Invicta will openly participate in the meetings that are held to strengthen our community relations. Failing that, please do not transmit any such requests to us, as it would be tantamount to rewarding people who instead of using dialogue resort to threats and violence to achieve their victimising themselves through letters whose unilateral content only narrates a victimisation scenario, completely detached from the reality of the facts, as it may be verified by your officials who will be able to inform you of the real situation on site.").

[524] **Ex. C-0134**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to Sayán Police Station (A. Rosales), 2 September 2018; **Ex. C-0170**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to Lima Police Department (G. Rodríguez), 17 October 2018; **Ex. C-0014**; Letter No. 003-2018-INVICTA-L from Invicta Mining Corp. S.A.C. (D. Kivari) to MINEM (I. Palomares), 14 November 2018; **Ex. C-0241**, Official Letter No. 155-2018-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to Invicta Mining Corp. S.A.C. (D. Kivari), 15 November 2018; **Ex. C-0184**, Letter No. 011-2018-INVICTA-L from Invicta Mining Corp. S.A.C. (R. Arrarte) to MININTER (C. Moran), 7 December 2018; *see also* **Ex. C-0245**, Letter No. 005-2018-INVICTA-L from Invicta Mining Corp. S.A.C. (W. Ansley) to MININTER (C. Morán), 12 December 2018; **Ex. C-0185**, Letter No. 010-2018-INVICTA-L from Invicta Mining Corp. S.A.C. (R. Arrarte) to MININTER, *et al.*, 7 December 2018. *see also* Claimant's Memorial, ¶¶ 111, 124, 134, 137

[525] **Ex. C-0184**, Letter No. 011-2018-INVICTA-L from Invicta Mining Corp. S.A.C. (R. Arrarte) to MININTER (C. Moran), 7 December 2018.

voted in favor of restarting negotiations with Claimant.[526] On 26 January 2019, regional Peruvian Government agencies organized and hosted a meeting among the Rural Communities, wherein the Parán Community leaders committed to allow government authorities to conduct inspections at the Invicta Mine.[527] Importantly, the leaders of each of the Rural Communities also agreed to avoid any confrontation amongst themselves, thereby establishing a favorable environment in the Invicta Project's area of direct influence.[528]

251. Meetings between Claimant and Peru's senior officials on 22 and 23 January 2019 revealed that Claimant was not approaching the matter in a manner conducive to resolving the dispute, or even to a temporary suspension of the Access Road Protest. On 22 January 2019, Mr. Esteban Saavedra, Deputy Minister of Internal Affairs (MININTER), hosted a meeting at the MININTER with Mr. Bravo, Claimant's Country Manager; Mr. Ansley, Claimant's CEO; and Mr. Jorge Arevalo, Claimant's external consultant.[529] As recounted by Mr. Bravo, during this meeting he insisted that a PNP operational plan "be carried out immediately to remove the [Access Road Protest]."[530]

252. In addition, on 22 January 2019, Mr. Incháustegui, Deputy Minister of Mines (MINEM), met at the MINEM offices with Mr. Ansley, CEO of Lupaka.[531] Mr. Incháustegui recalls that Mr. Ansley adopted an obstinate position during this meeting, insisting that the only acceptable response from Peru would be to order a

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[526] On 15 January 2019, the Parán Community informed the MINEM that during their assembly held on 5 January 2019, its members had agreed to restart negotiations with Claimant. **Ex. R-0104**, Official Letter No. 001 from the Parán Community (A. Torres) to MINEM (F. Ismodes, 15 January 2019, p. 1.

[527] **Ex. R-0063**, Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, pp. 10–11.

[528] **Ex. R-0063**, Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, pp. 10–11.

[529] **CWS-0004**, Bravo Witness Statement, ¶ 17.

[530] **CWS-0004**, Bravo Witness Statement, ¶ 17.

[531] **RWS-0002**, Incháustegui Witness Statement, ¶¶ 21–22. Despite Mr. Bravo's assertion that securing a meeting with Mr. Incháustegui was difficult, Mr. Incháustegui promptly met with Mr. Ansley (as was his general practice with mining companies). *See* **CWS-0004**, Bravo Witness Statement, ¶ 21; **RWS-0002**, Incháustegui Witness Statement, ¶ 20.

police intervention, while threatening arbitration if Peru did not acquiesce to his demand.[532] Mr. Incháustegui states that he strained to explain to Mr. Ansley that Peru's response of promoting dialogue was consistent with its longstanding policy to refrain from the use of force in situations of social conflict involving mining operations.[533] However, it was apparent to Mr. Incháustegui that Mr. Ansley was only interested in an immediate termination of the Access Road Protest, and was unreceptive to further opportunities for dialogue that could lead to a long-term solution to the social conflict.[534] The above demonstrates (i) that Claimant refused to accept that force was not an option while dialogue channels remained open and available; and (ii) that Claimant's inflexible attitude inhibited dialogue, and rendered less likely an agreement with the Parán Community.[535]

253. Nevertheless, trying to capitalize on the agreement between the Rural Communities, and the Parán Community's willingness to resume talks with Claimant,[536] the MINEM planned a new meeting between Claimant and the Parán Community to be held on 29 January 2019 in yet another attempt to establish a Dialogue Table discussion.[537] As recognized by Mr. Bravo, Mr. Trigoso and Mr. León of the OGGS invited him to a pre-meeting on 25 January 2019, in preparation for the meeting with the Parán Community.[538]

254. The meeting between the disputing parties was hosted by MINEM as planned on 29 January 2019.[539] At that meeting, Claimant demanded that the Parán Community

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[532] **RWS-0002**, Incháustegui Witness Statement, ¶ 22.

[533] **RWS-0002**, Incháustegui Witness Statement, ¶ 23.

[534] **RWS-0002**, Incháustegui Witness Statement, ¶ 23.

[535] *See* Claimant's Memorial, ¶ 144 ("... [I]t had become evident that further discussions were futile ... [Claimant]'s priority was that the Operational Plan go ahead rather than holding further unhelpful discussions.").

[536] **Ex. R-0104**, Official Letter No. 001 from the Parán Community (A. Torres) to MINEM (F. Ismodes), 15 January 2019, p. 1.

[537] **RWS-0001**, Trigoso Witness Statement, ¶ 37; **RWS-0003**, León Witness Statement, ¶ 35.

[538] **CWS-0004**, Bravo Witness Statement, 1 October 2021, ¶ 23.

[539] **RWS-0003**, León Witness Statement, ¶ 35; **Ex. R-0157**, Attendance List to the meeting between the Parán Community and Invicta Mining Corp. S.A.C., 29 January 2019.

terminate the Access Road Protest as a condition for Claimant to participate in any substantive negotiations with the Parán Community.[540] The Community's leaders indicated they were prepared to submit a proposal to end the Access Road Protest to their assembly on 2 February 2019. Claimant, however, rejected this proposal (because it would accept nothing short of an immediate and unconditional termination of the Access Road Protest).[541]The meeting thus ended without any agreement.[542]

255. One week later, Mr. Ansley sent a letter dated 6 February 2019 to Mr. Francisco Ísmodes, the Minister of Energy and Mines.[543] In such letter, Mr. Ansley alleged—incorrectly, as will be explained—that in the meeting held on 22 January 2019, Mr. Incháustegui had suggested, as a first step, to "remove the illegal blockade and regain access to the project (with use of the police)."[544] In his letter, Mr. Ansley also demanded that the Parán Community protestors "must abandon, or be removed" from the Access Road Protest, and denigrated such protesters referring to them as "terrorists" and would-be murderers[545] However, Mr. Incháustegui in his witness statement denies Mr. Ansley's allegation, and asserts that neither during the 22 January 2019 nor at any other time did he agree or commit to use force to end the Access Road Protest. Mr. Incháustegui also testifies that Mr. Ansley's attitude during that meeting raised concerns about whether Claimant was genuinely willing to negotiate.[546]

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[540] **RWS-0003**, León Witness Statement, ¶ 35.

[541] **RWS-0003**, León Witness Statement, ¶ 35.

[542] **RWS-0003**, León Witness Statement, ¶ 35.

[543] **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Ismodes), 6 February 2019.

[544] *See* **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Ismodes), 6 February 2019, p. 1 (alleging that Mr. Incháustegui had agreed to "steps to be taken sequentially (in order)" with the first one being to "remove the illegal blockade demonstration and regain access to the project (with use of the police)"); **CWS-0004**, Bravo Witness Statement, ¶ 23; Claimant's Memorial, ¶ 143 ("[On 23 January 2019]. . . the MEM's only proposal was for [Claimant] to continue discussions with the Parán Community"); *see also* **RWS-0002**, Incháustegui Witness Statement, ¶ 25.

[545] **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Ismodes), 6 February 2019, p. 2 ("We would like to point out that engaging in dialogue and negotiations with terrorists, and people who have attempted murder, is not a process that we will participate in.").

[546] **RWS-0002**, Incháustegui Witness Statement, ¶ 25.

256. Alongside the efforts undertaken by Peruvian Government officials and entities to arrange and lead negotiation meetings, the PNP continued to adopt measures to manage the conflict, and to prevent violence and loss of human life. On 9 February 2019, the Sayán Police Station drafted an operational plan that outlined how the police might intervene at the Invicta Mine if the Access Road Protest *eventually* were to require police intervention ("**Operational Plan**").[547] The PNP prepared this Operational Plan in response to Invicta's letter dated 7 December 2018, in which it had once again insisted on police intervention and had requested that an operational plan be prepared.[548] The PNP thus responded to Invicta's request by analyzing the conflict and drafting the Operational Plan.[549] However, the mere fact that an operational plan was drafted did not mean that it necessarily would be implemented if doing so would not be appropriate under the circumstances.[550] The PNP generally drafts operational plans in anticipation of the *potential* need for action, as a way to get organized and be prepared, should a need to intervene eventually be triggered in accordance with Peruvian legislation and international standards.[551] For that reason, although an Operational Plan in this case was drafted, it did not have any scheduled effective date of execution. The PNP took no position at that time on whether that particular Operational Plan should or would be implemented, or, if it *were* implemented, when that would occur.[552]

257. Claimant's insistence on police intervention became even more acute when it learned that the Sayán Police had drafted this Operational Plan. A WhatsApp conversation in

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[547] **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 1.

[548] **Ex. C-0186**, Letter No. 012-2018-INVICTA-L from Invicta Mining Corp. S.A.C. (R. Arrarte) to Sayán Police Station/MININTER, 7 December 2018; *see* Claimant's Memorial, ¶ 141.

[549] *See* **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, pp. 40–55.

[550] **RER-0001**, Meini Expert Report,¶¶ 42, 158; *See supra* Section II.E.1 (explaining operational plans); **RWS-0004**, Saavedra Witness Statement, ¶ 33.

[551] **RER-0001**, Meini Expert Report, ¶¶ 158, 171.

[552] **RER-0001**, Meini Expert Report,¶ 42; *see* **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 1 (. . . [to be implemented] " on "D" day at "H" hours, in the sector known as MILCOPALLAN. . .").

February 2019 between Mr. Saavedra and Mr. Bravo confirms Claimant's insistence on police intervention as the only solution.[553] Mr. Saavedra updated Mr. Bravo on developments he had heard about from the PNP, but he neither assured nor even intimated that the Access Road Protest would be ended through a police intervention.[554]

258. Mr. Bravo claims that Mr. Ansley told him that, after a meeting with the CPO of Lima, Mr. Ansley had been informed that execution of the Operational Plan was imminent.[555] However, this assertion is unsupported by any evidence. To the contrary, the WhatsApp conversations between Mr. Bravo and Mr. Saavedra (held between 5 February to 20 February 2019) contradict Mr. Bravo's statement.[556] That fact is that Peru consistently maintained that dialogue would be prioritized over force — the latter being a measure of last resort, and one that could only be carried out in strict adherence with the applicable law and regulations.

259. On 12 February 2019, the Parán Community requested that the MINEM attempt to restart the Dialogue Table discussions with Claimant.[557] In a letter dated 18 February 2019, Mr. Trigoso of the OGGS responded to the Parán Community, expressly urging

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[553] **Ex. C-0192**, WhatsApp exchanges between Lupaka Gold Corp. (L. Bravo) and MININTER (E. Saavedra), 5 February 2019–20 February 2019, pp. 1–2; **RWS-0004**, Saavedra Witness Statement, ¶ 29.

[554] **Ex. C-0192**, WhatsApp exchanges between Lupaka Gold Corp. (L. Bravo) and MININTER (E. Saavedra), 5 February 2019–20 February 2019, pp. 1–2; **RWS-0004**, Saavedra Witness Statement, ¶ 22.

[555] **CWS-0004**, Bravo Witness Statement, ¶ 18.

[556] **Ex. C-0192**, WhatsApp exchanges between Lupaka Gold Corp. (L. Bravo) and MININTER (E. Saavedra), 5 February 2019–20 February 2019, p. 2 (Mr. Bravo noting he had been told that "a meeting was going to take place with the MEM to insist on dialogue.")[556] **Ex. C-0192**, WhatsApp exchanges between Lupaka Gold Corp. (L. Bravo) and MININTER (E. Saavedra), 5 February 2019–20 February 2019, p. 2 (Mr. Saavedra telling Mr. Bravo that the Parán Community had agreed to "sit down and talk" and that the police would "wait for the result" because "[t]his is in line with the procedures that are followed in the treatment of this type of event, that is before the Police must not intervene and must respect the dialogue."); **Ex. C-0197**, Emails between Canadian Embassy (M. Mahfouz, *et al.*) and Lupaka Gold Corp. (W. Ansley, *et al.*), 20 February 2019–27 February 2019, p. 3 ("the Ministry of Interior has halted the plans to enter the community, since Parán has demonstrated their willingness for dialogue"). **RER-0001**, Meini Expert Report,¶ 200–05 (noting that under reasonableness, the use of force would not have been authorized while the negotiations were in place).

[557] **Ex. R-0013**, Official Letter No. 004 from the Parán Community (A. Torres) to MINEM (F. Ismodes), 12 February 2019.

it to end the Access Road Protest before the resumption of any dialogue with Claimant:[558]

> In this context, we urge you to lift your coercive measure in order to restart the process of dialogue and to continue in a climate of peace and peaceful coexistence with the mining company Invicta Mining Corp S.A.C.

260. Mr. Trigoso also reaffirmed that, while Peru was willing to mediate the conflict, ultimately the Parán Community and Claimant were the ones that needed to reach a solution:[559]

> The State, through the GOSM/MEM, guarantees this forum of dialogue, so that the parties can resolve their differences by generating their own plans for solution without the intervention of third parties, that is to say, the parties will resolve their differences with the presence of the State but without intervening directly in the solution.

261. The Parán Community later agreed to continue negotiations, and a meeting was scheduled for 26 February 2019.[560] Mr. Bravo later described Mr. Trigoso's communication urging the Parán Community to lift the Access Road Protest as the "correct position":[561]

> For these purposes we refer to your Official Letter No. 0028-2019-MEM/OGGS/OGDPC dated 18 February 2019, in which you respond to the request for the continuance of the space for dialogue from the Community of Parán . . . We believe that this correct position of the administration must be maintained and respected by all parties.

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[558] **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to the Parán Community (A. Torres), 18 February 2019, p. 2.

[559] **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to the Parán Community (A. Torres), 18 February 2019, p. 1.

[560] **Ex. C-0198**, Official Letter No. 005 from the Parán Community (A. Torres) to MINEM (F. Ismodes), 20 February 2019.

[561] **Ex. C-0209,** Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (Vice Minister), 29 March 2019, pp. 6–7 .

262. On 26 February 2019—when Peru, the Parán Community, and Claimant met to negotiate—Mr. Saavedra of the MININTER received a letter (dated 19 February 2019) from Mr. Bravo.[562] In such letter, Mr. Bravo articulated Claimant's opinion that the Parán Community was unwilling to negotiate, and again requested immediate removal of the Access Road Protest through a forcible police intervention.[563] Claimant now criticizes Peru for not having sent a response to this letter.[564] By that time, however, Peru had already made it abundantly clear to Claimant (including through the above-referenced WhatsApp communications between Messrs Bravo (Claimant) and Saavedra (MININTER))[565] that the negotiation process should first be exhausted, and that there was a strict protocol that need to be followed before any force could be used.[566] Also, if Claimant considered that the conflict had escalated to a "criminal problem," as it had asserted in its letter dated 19 February 2019,[567] then it needed to

[562] **Ex. C-0016**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MININTER (E. Saavedra), 19 February 2019.

[563] **Ex. C-0016**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MININTER (E. Saavedra), 19 February 2019,¶¶ 9, 13.

[564] Claimant's Memorial, ¶ 151.

[565] **RWS-0004**, Saavedra Witness Statement, ¶ 25; **Ex. C-0192**, WhatsApp exchanges between Lupaka Gold Corp. (L. Bravo) and MININTER (E. Saavedra), 5 February 2019–20 February 2019, p. 2 (Mr. Bravo noting he had been told that "a meeting was going to take place with the MEM to insist on dialogue.") **Ex. C-0192**, WhatsApp exchanges between Lupaka Gold Corp. (L. Bravo) and MININTER (E. Saavedra), 5 February 2019–20 February 2019, p. 2 (Mr. Saavedra telling Mr. Bravo that the Parán Community had agreed to "sit down and talk" and that the police would "wait for the result" because "[t]his is in line with the procedures that are followed in the treatment of this type of event, that is before the Police must not intervene and must respect the dialogue."); **Ex. C-0197**, Emails between Canadian Embassy (M. Mahfouz, *et al.*) and Lupaka Gold Corp. (W. Ansley, *et al.*), 20 February 2019–27 February 2019, p. 3 ("the Ministry of Interior has halted the plans to enter the community, since Parán has demonstrated their willingness for dialogue"); *see also* **RWS-0004**, Saavedra Witness Statement, ¶ 22–24; **RER-0001**, Meini Expert Report,¶ 200–05 (noting that under reasonableness, the use of force would not have been authorized while the negotiations were in place).

[566] **Ex. C-0192**, WhatsApp exchanges between Lupaka Gold Corp. (L. Bravo) and MININTER (E. Saavedra), 5 February 2019–20 February 2019, pp. 1–2; **RWS-0004**, Saavedra Witness Statement, ¶ 25.

[567] **Ex. C-0016**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MININTER (E. Saavedra), 19 February 2019,¶ 13; **RWS-0004**, Saavedra Witness Statement, ¶ 25.

seek redress through the judicial mechanisms available under Peruvian law (as Claimant had in fact done previously, when it filed various criminal complaints).[568]

4. Peru provided support and assistance to Claimant even after Claimant failed to comply with the 26 February 2019 Agreement with the Parán Community

263. In a meeting that the OGGS led on 26 February 2019, Claimant and the Parán Community reached a new interim agreement as part of the formal installation of the Dialogue Table. However, as this section will explain, Claimant and the Parán Community ended up disagreeing on how to implement that agreement, and their conflict thus persisted.

a. The interim agreement of 26 February 2019

264. Peru's continuous and relentless efforts to broker a long-lasting and peaceful resolution of the dispute between Claimant and the Parán Community finally appeared to bear fruit on 26 February 2019. On that date, Claimant and the Parán Community met and reached an agreement[569]—the 26 February 2019 Agreement—which featured the following points:

> 1. The parties agree to formally establish the [Dialogue Table] between the Rural Community of Parán and the mining company lnvicta Mining Corp. Ltd., with the involvement of the [OGGS].
>
> 2. The Rural Community of Parán will submit the [number of representatives], the name and the supporting documents of its representatives to the established [Dialogue Table] at the next meeting.
>
> 3. The mining company lnvicta Mining Corp. Ltd. will submit the [number of representatives], the name and the supporting documents of its representatives to the established [Dialogue Table] at the next meeting.

[568] **RER-0001**, Meini Expert Report,¶¶ 104–07 (explaining that Claimant could have petitioned Peruvian courts for an order requiring removal of protestors); **RWS-0004**, Saavedra Witness Statement, ¶ 25.

[569] **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019.

> 4. The Invicta mining company, together with the Rural Community of Parán, will identify and locate the affected land (Rural Community of Parán) through a topographic survey that will take place on 20 March 2019.
>
> 5. The parties agree that the Rural Community of Parán will suspend all coercive measures as of this date, which will be ratified by the Community Assembly on 2 March 2019. The RURAL COMMUNITY OF PARÁN guarantees the development of the activities of the mining company through the access road of the Parán Community as of the signing of this minutes, guaranteeing social peace with the company.[570]

265. The 26 February 2019 Agreement was a major milestone for both Claimant and the Parán Community.[571] In fact, Mr. Ansley, Claimant's then-CEO, publicly celebrated the agreement, and explicitly manifested its gratitude to the Peruvian authorities for their assistance in brokering the agreement:

> We are **very pleased to announce the positive conclusion of the illegal blockade** and **would like to thank** our employees, **the authorities**, and our community partners that worked together to reach this successful result.[572] (Emphasis added)

266. After reaching the 26 February 2019 Agreement, it was Claimant's and the Parán Community's own duty to fulfill their respective obligations thereunder.[573]

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[570] **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019, pp. 1–2.

[571] **RWS-0001**, Trigoso Witness Statement, ¶ 38; **CWS-0004**, Bravo Witness Statement, ¶ 42

[572] **Ex. R-0132**, "We are very pleased to announce the. . . conclusion of the illegal blockade," MINING JOURNAL, 5 March 2019.

[573] Claimant submits Exhibit C-0191, in which Mr. Trigoso made clear that even though Peru was willing to intervene in mediating the conflict, the Parán Community and Invicta were ultimately the ones that needed to reach a solution to their conflict.

b. Claimant and the Parán Community disagreed about the implementation of the 26 February 2019 Agreement

267. Unfortunately, thereafter Claimant and the Parán Community disagreed about the implementation of the 26 February 2019 Agreement, and about two issues in particular.[574]

268. *First*, Claimant asserts in its Memorial that the Parán Community breached the 26 February 2019 Agreement in part because the Parán Community had "allow[ed] access to the Site **only through** Parán's barely traversable road," not through the Lacsanga Community Access Road (emphasis added).[575] However, the 26 February 2019 Agreement only made reference to the Parán's access road, not the Lacsanga Community Access Road—it stated explicitly that the Parán Community "**guarantees** the development of the activities of the mining company **through the access road of the Parán Community** as of the signing of this minutes, guaranteeing social peace with the company"[576] (emphasis added). Such wording indicates that the Parán Community had agreed to allow access to the Invicta Mine only through its territory, and not through the Lacsanga Community Access Road. Thus, irrespective of whether or not the Parán Community's interpretation of the 26 February 2019 Agreement was correct, the Parán Community's position—that Claimant had agreed that it would only access the Invicta Mine via the Parán Community's access road—is entirely understandable, as is apparent from the text of the 26 February 2019 Agreement, which was negotiated and accepted by Claimant.

269. Furthermore, Claimant had wanted to condition dialogue on the Parán Community first ending their Access Road Protest. This was confirmed at the time by Claimant's witness and representative, Mr. Bravo, in a cover letter to MINEM representatives that attached an earlier draft of the 26 February 2019 Agreement. In that letter, Mr. Bravo

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[574] **RWS-0003**, León Witness Statement, ¶ 43.

[575] **CWS-0004**, Bravo Witness Statement, ¶ 53; Claimant's Memorial, ¶¶ 154, 156.

[576] **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019, p. 2; ") (Claimant's translation); *see also* **Ex. C-0017**, Letter from Lupaka Gold Corp. (L. Bravo) to MININTER, 28 February 2019, p. 1.

described the draft as the "Draft Protocol of Agreement, setting up the Formal Dialogue Process **subject to the lifting of the road block**" (emphasis added).[577]

270. However, no express condition to lift the Access Road Protest appears in the 26 February 2019 Agreement.[578] Also, as confirmed by Mr. León, the understanding during the 26 February 2019 meeting was that the access would be guaranteed through the Parán Community territory.[579] Although the Parán Community also agreed to "suspend all coercive measures," such actions were not a condition precedent to the commencement of a formal dialogue processes.

271. The *second* issue of disagreement over the implementation of the 26 February 2019 Agreement was a disagreement over the details of the topographical survey scheduled for 20 March 2019.[580] Claimant alleges that the Parán Community requested that Claimant pay PEN 30.000 (approximately USD 9,000) for the topographical survey that was scheduled for 20 March 2019.[581] However, Claimant refused to do so,[582] and the survey therefore was not performed.[583] During the 26 February 2019 meeting, Claimant and the Parán Community had agreed that the purpose of the topographical survey was for a topographer to analyze the Parán Community's land

[577] **Ex. C-0199**, Email from Invicta Mining Corp S.A.C. (L. Bravo) to MINEM, 25 February 2019 *attaching* Withdrawal of Criminal Complaints, 25 February 2019.

[578] *Compare* **Ex. C-0199**, Email from Invicta Mining Corp S.A.C. (L. Bravo) to MINEM, 25 February 2019 *attaching* Withdrawal of Criminal Complaints, 25 February 2019 *with* **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019.

[579] **RWS-0003**, León Witness Statement, ¶ 40.

[580] *See* **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019, p. 1.

[581] *See* Claimant's Memorial, ¶ 154. **Ex C-0207**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigoso, *et al.*), 28 February 2019, p. 3; **CWS-0004**, Bravo Witness Statement, ¶ 60.

[582] **RWS-0003**, León Witness Statement, ¶ 64; **Ex. C-0201**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigoso, *et al.*), 28 February 2019; **Ex. C-0207**, Email from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigoso), 21 March 2019.

[583] **RWS-0003**, León Witness Statement, ¶ 45.

that might be adversely affected by the works that were planned for the access road through Parán Community territory.[584]

272. As explained by Mr. León and Mr. Trigoso, Claimant's refusal to fund the topographical survey was unreasonable, and undermined the progress that had been brokered by Peru.[585] Even if the cost of the topographical survey may have appeared high, the relevant amount was not so significant as to justify the Claimant's refusal to cover the expense and the consequent frustration of the progress that had been achieved.[586] As explained by Mr. León, whereas the price of the survey was well within the financial means of a mining company, it was inaccessibly high for a rural community.[587] Also, in Mr. Trigoso's experience, Claimant's approach was incompatible with efforts that mining companies should undertake to secure harmonious relationships with local communities impacted by a mining project, especially in this case, given that Claimant had affirmatively agreed in the 26 February 2019 Agreement that the referenced topographical survey would be conducted.[588]

273. Conversely, however, Claimant asserted that the Parán Community had breached its own obligations under the 26 February 2019 Agreement. On 1 March 2019, the OGGS and the General Office of Public Order ("**DGOP**") in the MININTER received a letter from Mr. Bravo in which he denounced the Parán Community's alleged breach. In such letter, he yet again requested that both of the above-mentioned State entities "order and provide for the removal of the blockade on the access road to our mining

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[584] **RWS-0001**, Trigoso Witness Statement, ¶ 38; **RWS-0003**, León Witness Statement, ¶ 64; *see also* **RWS-0001**, Trigoso Witness Statement, ¶ 43 (noting that this understanding is consistent with the purpose of a topographical survey).

[585] **RWS-0001**, Trigoso Witness Statement, ¶ 48; **RWS-0003**, León Witness Statement, ¶ 66.

[586] **RWS-0003**, León Witness Statement, ¶ 66; **RWS-0001**, Trigoso Witness Statement, ¶¶ 43, 48.

[587] **RWS-0003**, León Witness Statement, ¶ 67.

[588] **RWS-0001**, Trigoso Witness Statement, ¶¶ 43, 48; *see also* **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019 ("The lnvicta mining company, together with the Rural Community of Parán, will identify and locate the affected land (Rural Community of Parán) through a topographic survey [that] will take place on 20 March 2019.").

camp, authorizing the use of public force, if necessary, and providing the necessary security to our personnel . . . ."[589]

274. However, as explained by Mr. Trigoso in his witness statement, the OGGS does not have legal competency to order the use of force, nor could it ensure or guarantee termination of the Access Road Protest.[590] Further, neither the OGGS nor the DGOP had the legal means to enforce a private agreement between a mining company and a rural community.[591] Nevertheless, the OGGS officials again traveled from Lima to the Invicta Mine to investigate the facts alleged by Claimant, and verified that the Parán Community had in fact granted Claimant access to the Invicta Mine through the Parán Community's road (as the parties had agreed would be done, in accordance with the 26 February 2019 Agreement).[592]

275. Claimant asserts—with no evidentiary support—that "despite committing to enforcing the 26 February 2019 Agreement, the Government was passive in the face of the Parán Community's unwillingness to abide by its commitments."[593] But if Claimant genuinely believed that the 26 February 2019 Agreement had been breached by the Parán Community, it should have considered possible legal recourses under Peruvian law (e.g., civil law actions, including before the judiciary).[594] There is no evidence, however, that Claimant pursued such recourses.

276. Further, Claimant's characterizations of Peru's posture are not only mistaken but wholly unfair. Peru was *not* passive in response to the parties' disagreement

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[589] **Ex. C-0201**, Letter from Invicta Mining Corp S.A.C. (L. Bravo) to MINEM (F. Trigoso, *et al.*), 28 February 2019, p. 5; **Ex. C-0017**, Letter from Lupaka Gold Corp. (L. Bravo) to MININTER, 28 February 2019, p. 2.

[590] **RWS-0001**, Trigoso Witness Statement, ¶¶ 19–20; **Ex. R-0012**, Supreme Decree 021-2018-EM, 18 August 2018, Art. 50 (b).

[591] **RWS-0001**, Trigoso Witness Statement, ¶ 23; **Ex. R-0101**, Ministerial Resolution No. 1520-2019-IN, 4 October 2019, Arts. 5, 91, 110–111.

[592] **RWS-0003**, León Witness Statement, ¶¶ 69–71; Claimant's Memorial, ¶ 158 (conceding that Claimant's personnel were given access to the Project site).

[593] Claimant's Memorial, ¶ 156; *see* **CWS-0004**, Bravo Witness Statement, ¶ 44.

[594] **RER-0001**, Meini Expert Report, § IV.C (explaining that Peruvian law comprises several civil actions targeted to defend a person's property and claim effective restitution of property).

concerning the alleged reciprocal breach of the 26 February 2019 Agreement. To the contrary, the OGGS collected information on the extent of the new disagreement between Claimant and the Parán Community, and then actively encouraged the parties to discuss their disagreements and potential misunderstandings with support and guidance of OGGS Specialists.[595] For example, OGGS Specialist Mr. León met with the Parán Community on 26 March 2019 to discuss its position concerning implementation of the 26 February 2019 Agreement.[596] At that meeting, the Parán Community accused Claimant of breaching that agreement by insisting on having access through the Lacsanga road, and by failing to commission the topographical survey.[597]

277. Further, in response to a request by Claimant, the MININTER and the MINEM led a meeting with Claimant and Canadian Embassy staff on 28 March 2019.[598] During that meeting, Claimant's position was that it had always been open to dialogue with the Parán Community, but that it would not resume the Dialogue Table unless the Access Road Protest were terminated.[599] At the same meeting, the OGGS for its part restated its commitment to facilitate a peaceful resolution to the conflict.[600]

278. The OGGS then scheduled a new meeting between Claimant and the Parán Community, for 1 April 2019, which was to be held in the Huacho Municipal building.[601] That same day, the MINEM received a letter from Claimant in which it (i) announced that it would not attend the proposed 1 April 2019 meeting; (ii) rejected

[595] **RWS-0001**, Trigoso Witness Statement, ¶ 37; **RWS-0003**, León Witness Statement, ¶¶ 44–51.

[596] **RWS-0003**, León Witness Statement, ¶ 47.

[597] **RWS-0003**, León Witness Statement, ¶ 47.

[598] **Ex. C-0209**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (Vice Minister), 29 March 2019.

[599] **RWS-0003**, León Witness Statement, ¶ 48.

[600] **RWS-0003**, León Witness Statement, ¶ 48.

[601] **Ex. R-0026**, Official Letter No. 006-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 21 March 2019, p. 1.

any further dialogue with the Parán Community; and (iii) once more insisted on police intervention to end the blockade.[602]

279. The 1 April 2019 meeting was held despite Claimant's absence. At such meeting, the Parán Community leaders expressed to OGGS their regret that Claimant had refused to attend, and interpreted that refusal as further evidence that Claimant could not be trusted and was not serious about reaching an agreement.[603] Claimant's absence from this meeting also prompted a decision by the Parán Community to request closure of the Invicta Project.[604] Thus, instead of contributing to a lasting resolution to the Access Road Protest, Claimant's intransigent attitude led to entrenchment by both parties in their respective positions, thereby rendering amicable resolution more elusive and unlikely. During the weeks following this meeting, the OGGS officials continued their efforts to persuade the Parán Community to remain committed to dialogue, notwithstanding the perceived slight from Claimant.[605]

280. On 6 May 2019, the MINEM received a new letter from the Parán Community, requesting a meeting to discuss Claimant's alleged breach of the 26 February 2019 Agreement.[606] In particular, the Parán Community stated in that letter that Claimant had failed to commission (and then pay for) the (earlier referenced) topographical survey, which had been scheduled for 20 March 2019.[607] Additionally, the Parán

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[602] **Ex. C-0209**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (Vice Minister), 29 March 2019, p. 6 ("Faced with all this, Mr Vice Minister, we consider it impossible to hold a new meeting with the representatives of the Rural Community of Parán such as the one called for 2 April in the city of Sayán until the aforementioned Rural Community respects the agreements already signed and complies with suspending the coercive measure, lifting the existing blockade and allowing us free movement through all possible means of access, including the access road through the Community of Lacsanga, as a prerequisite to the start of a Formal Dialogue Process.").

[603] **RWS-0003**, León Witness Statement, ¶ 49; **Ex. R-0114,** Meeting Minutes, Meeting between the Parán Community, OGGS, MININTER, and Sayán Police Station, 1 April 2019.

[604] **Ex. R-0114,** Meeting Minutes, Meeting between the Parán Community, OGGS, MININTER, and Sayán Police Station, 1 April 2019.

[605] **RWS-0003**, León Witness Statement, ¶ 49.

[606] **Ex. R-0111**, Official Letter No. 010-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 6 May 2019.

[607] **Ex. R-0111**, Official Letter No. 010-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 6 May 2019, p. 1.

Community noted in its letter Claimant's absence from the 1 April 2019 meeting.[608] In response, the OGGS representatives traveled to the Parán Community's territory to try to convince them to reinstate the Dialogue Table.[609]

5. Despite Claimant's aggravation of the conflict, Peru continued to work toward a resolution of the social conflict and conclusion of the Access Road Protest

281. During the OGGS's visit to the Parán Community's territory on 20 May 2019, the Parán Community reported that a violent attack had occurred at the Invicta Mine on 14 May 2019 by War Dogs,[610] the inexperienced private security force hired by Claimant.[611]

282. On 27 May 2019, the MINEM hosted a high-level meeting with Mr. Bravo and officials from the OGGS, PCM, MININTER, and Ombudsman's Office.[612] During this meeting, the Ombudsman's Office and PCM asked Mr. Bravo about the confrontation between the Parán Community and War Dogs.[613] Mr. Bravo sought to downplay the significance of the incident, and refused to answer their questions about it.[614] Peru explained to Claimant that the War Dogs confrontation had aggravated the conflict, and would make future negotiations with the Parán Community far more difficult.[615] Peru again proposed that Claimant agree to resume dialogue and to display an act of

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[608] **Ex. R-0111**, Official Letter No. 010-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 6 May 2019, pp. 1.

[609] **RWS-0003**, León Witness Statement, ¶¶ 50–51.

[610] **RWS-0003**, León Witness Statement, ¶ 51.

[611] Claimant's Memorial, ¶ 175. *See* **Ex. R-0131**, War Dogs Security S.A.C. Corporate Summary, COMPUEMPRESA.COM, last accessed 17 February 2022 (explaining that War Dogs began operations on 1 March 2019, but was not founded until 14 March 2019. Between September 2019 and September 2020, War Dogs had only two workers, and had between zero and five service providers, depending on the month).

[612] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019.

[613] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 5.

[614] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, pp. 4–5.

[615] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, pp. 5–6.

good faith towards the Parán Community—in particular, by replacing Claimant's community relations team.[616]

283. Claimant insisted during that meeting that it would not participate in the Dialogue Table until the Parán Community ended the Access Road Protest, and yet again demanded police intervention.[617] Once more, Peru explained that given the circumstances, police intervention was not necessary or reasonable, and that Claimant should continue its negotiation efforts by resuming the Dialogue Table.[618]

284. On 4 June 2019, the MINEM received another letter from the Parán Community, (i) noting that in response to the violent War Dogs incident on 14 May 2019, the Parán Community's general assembly had voted for final closure of the Invicta Project, and thus (ii) demanding that the MINEM order closure of the project.[619]

285. In yet another attempt to bring the parties to the Dialogue Table, the OGGS promptly invited the Parán Community and Claimant to hold a conference on 2 July 2019.[620] The OGGS emphatically highlighted the importance and purpose of the dialogue process, which was to peacefully resolve the conflict.[621]

286. However, this time it was the Parán Community that did not attend the meeting. Several Peruvian officials, including from the OGGS, PCM, MININTER, and Ombudsman's Office, nevertheless met with Claimant, and discussed with the latter's representatives the state of the conflict. The Peruvian officials asked Claimant again

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[616] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 6.

[617] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, pp. 6–7.

[618] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, pp. 5–7.

[619] **Ex. R-0110**, Official Letter No. 011-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 4 June 2019.

[620] **Ex. R-0105**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (M. Alfaro), 21 June 2019, p. 1.

[621] **Ex. C-0220**, Letter No. 033-2019-MINEN/OGGS/OGDPC from MINEM (M. Kuzma) to Parán Community (A. Torres), 19 June 2019.

about War Dogs, and about the violent 14 May 2019 incident.[622] Mr. Bravo acted surprised that Peru remained concerned about the 14 May 2019 incident, and that the authorities were not more focused instead on ensuring that Claimant's demands were met.[623] Peru emphasized—yet again—that it was committed to a peaceful resolution of the conflict, and that forceful police intervention would not be ordered.[624]

287. Claimant continued to insist—even after the 14 May 2019 physical attack against Parán Community protestors—that the only acceptable response from Peru would be to forcibly terminate the Access Road Protest.[625] Despite Claimant's obduracy, Peru continued proactively to intervene and mediate Claimant's dispute with the Parán Community. For example, the Ombudsman's Office emphasized that it remained ready and able to deploy other government entities to help broker an agreement with the Parán Community.[626]

288. On 8 July 2019, officials from the OGGS again traveled to Sayán, this time to meet with the Parán Community to encourage it to reinstate negotiations with Claimant.[627] On 10 July 2019, the OGGS received a letter from Claimant (dated 8 July 2019), expressing its position regarding the recent developments of the Access Road Protest.[628] In this letter, Claimant expressed no desire or willingness to resume dialogue with the Parán Community. Instead, it demanded that Peruvian authorities "take the necessary

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[622] **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, pp. 2–3.

[623] **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, pp. 3–4.

[624] **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, pp. 4–5.

[625] **RWS-0003**, León Witness Statement, ¶ 54.

[626] **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, p. 4 ("In this regard, Mr. Vera from the Ombudsman's Office stated that the support of other sectors of the state such as the Ministry of Health, the Ministry of Agriculture and others could be compromised to carry out awareness raising campaigns with the population of the community of Parán to look for viable an agreement with them.").

[627] **RWS-0003**, León Witness Statement, ¶ 55.

[628] **Ex. C-0013**, Letter from Lupaka Gold Corp. (L. Bravo) to MINEM (M. Kuzma), 8 July 2019.

measures to defend and protect the interests of our company as a foreign investor in the country," a clear harbinger of Claimant's move toward arbitration.[629] This was Claimant's last communication to the Peruvian authorities. A few months later—after Claimant forfeited its shares in Invicta to its creditor, PLI Huaura—Claimant filed its Notice of Intent to Arbitrate.

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289. In sum, from the very beginning to the very end of Claimant's conflict with the Parán Community, Peru deployed skilled and trained officials from a panoply of state agencies. Those officials displayed tremendous dedication and persistence in their attempts to broker a sustainable, long-term resolution of the social conflict between Claimant and the Parán Community, including with the goal of ending the Access Road Protest. At all times, Peru acted promptly, reasonably, diligently, and proactively to steer the conflicting parties toward a peaceful resolution—even after both parties, including Claimant, undermined the process of dialogue and negotiation, and sometimes even walked away from the negotiating table. Peru never gave up in its constant, affirmative efforts to mediate Claimant's conflict with the Parán Community in a manner that would avoid a violent confrontation (including with the PNP), as Peru had reason to believe that such a confrontation would have been inconsistent with Peruvian law and policy, as well as counterproductive and contrary to Claimant's long-term interests.

F. Claimant failed to adequately manage its mining operation and is responsible for the losses claimed in this Arbitration

1. Claimant has failed to establish that the Invicta Mine would have been ready for exploitation before December 2018 in the absence of the Access Road Protest

290. Had Claimant transitioned the Invicta Project from the *exploration* stage to the *exploitation* stage well before December 2018, it is conceivable that it could have met

[629] **Ex. C-0013**, Letter from Lupaka Gold Corp. (L. Bravo) to MINEM (M. Kuzma), 8 July 2019, p. 2.

its gold delivery obligations and avoided defaulting under the PPF Agreement.[630] However, it did not succeed in making that transition at all. Claimant failed diligently to complete the various milestones that were pending at the time the blockade took place in mid-October 2018. Just a couple of months later, Claimant defaulted on its loan agreement by failing to make its first gold delivery and subsequently lost its shares in Invicta to PLI Huaura, its creditor.[631] Claimant attributes this failure to Peru's decision not to forcefully remove the Parán Community protestors from the Invicta Mine.[632] However, this attribution is improper for many reasons, including the fact that Claimant has failed to demonstrate that, had Peru intervened with force, Claimant would have managed to (i) reach the exploitation stage, (ii) extract sufficient ore for processing, (iii) process that ore into gold, and (iv) deliver that gold to PLI Huaura in time to meet the contractual deadline. For Claimant to succeed in this Arbitration, it must show that it realistically would have been able to exploit the Invicta Mine and meet it obligations, absent Peru's alleged acts and omissions. However, it has failed to do so, and as shown below, the evidence suggests the contrary.

291. Claimant states in its Memorial that the exploitation stage of the Invicta Project was expected to commence only in 2019,[633] and admits that a number of tasks needed to

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[630] *See* **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017, p. 3 ("'Contract Quantity' means a total of 22,680 Ounces of Gold to be Delivered as follows: (a) 0 Ounces of Gold for each of the 15 calendar months following the calendar month in which the Gold Prepayment Amount is paid on the First Effective Date and 187 Ounces of Gold for each of the 45 calendar months thereafter"); *see also* **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule P (defining Schedule P as the "Delivery Schedule" and providing a schedule of the gold delivery obligations under the PPF Agreement).

[631] *See infra* Section II.F.4.

[632] Claimant's Memorial, ¶¶ 193–95.

[633] Claimant's Memorial, ¶ 54 ("In 2017, IMC started negotiations with the Santo Domingo Community to update the Framework Agreement by way of an addendum. It proposed to pay Santo Domingo i) PEN 600,000 (approximately USD 146,000) in quarterly instalments during 2018; and ii) PEN 900,000 (approximately USD 219,000) **in 2019, when the exploitation phase of the Project was estimated to begin.**") (emphasis added).

be completed before that could be achieved.[634] The outstanding tasks included: (i) finalizing outstanding regulatory approvals related to the Invicta Project; and (ii) engaging in continuous dialogue with the Parán Community to ensure their support and participation in the Invicta Project.[635] Both of these tasks had to be accomplished before Claimant's Invicta Mine could secure the requisite permits to enter the exploitation phase and begin producing sufficient ore for Claimant to meet its PPF Agreement gold delivery obligations.[636]

a. Claimant required additional regulatory approvals before the Invicta Mine could be exploited

292. At the time of the Access Road Protest, there were still several outstanding regulatory steps that Invicta needed to take before Claimant could bring the Invicta Mine into its exploitation stage. These included: (i) passing an inspection of the Invicta Mine; (ii) obtaining the MINEM's approval of amendments to the Invicta Project's Mine Closure Plan; [637] and (iii) responding to deficiencies to its third supporting technical report (*Informe Tecnico Sustentatorio* or "**Third ITS**").

293. *First*, the Invicta Mine needed to undergo and pass a final inspection by the MINEM before it could enter the exploitation phase.[638] This inspection was needed to confirm that the development of the Invicta Mine corresponded with the approved Mine Plan.

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[634] *See* Claimant's Memorial, ¶ 54; *see also* **CWS-0003**, Castañeda Witness Statement, ¶¶ 21, 50.

[635] *See* **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule H (updating the list of outstanding permits as of September 2018); **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, p. i ("Invicta has a surface rights agreement with the community of Santo Domingo de Apache covering all aspects of mine development, mineral processing and infrastructure. **Negotiations regarding surface rights agreements are ongoing with the communities of Parán and Lacsanga as agreements with all three communities are *required* to initiate construction and operation**.") (emphasis added); *see supra* Section II.A and II.B.1

[636] *See generally* **Ex. C-0045**, Second Amended and Restated Pre-Paid Forward Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 2 August 2017, §§ 4, 7, 8 (outlining Claimant's repayment obligations); *see supra* Section II.C.4.

[637] **CWS-0003**, Castañeda Witness Statement, ¶¶ 21–22.

[638] **CWS-0003**, Castañeda Witness Statement, ¶ 22 ("[MINEM] still needed to carry out an inspection of the completed development works in accordance with the Mining Plan 2014.").

Only after that inspection was completed could Invicta receive (i) a Certificate for the Start of Exploration and Exploitation Activities and (ii) a Fuel Storage Authorization.[639]

294. As an initial matter, development at the Invicta Mine had been stalled for a time because Claimant had been unable to obtain the requisite financing.[640] The Invicta Mine's development resumed in February 2018 and Claimant worked from February to September 2018 to prepare for an inspection. This inspection was requested by Claimant on 6 September 2018,[641] but, according to Mr. Castañeda, "never took place due to the Blockade."[642] Mr. Castañeda's rendition of the facts is incorrect.

295. The reasons that Claimant's September 2018 request did not result in an inspection was because Claimant's submission was missing a critical certification, and was therefore insufficient. The MINEM reminded Claimant of this deficiency in response to Claimant's October 2018 request to suspend the mine inspection on the basis of the Access Road Protest.[643] The MINEM made clear to Claimant that its September 2018 request for an inspection *was deficient* and that an inspection could not be conducted until such deficiency had been cured.[644] Specifically, the MINEM formally reminded Invicta that, "prior to the inspection request," Invicta needed to provide the MINEM with a certificate of quality of construction of the Invicta Mine.[645]

296. It took Claimant until 14 December 2018 to submit the requisite certificate, i.e., until roughly the same date on which Claimant's first delivery of gold was due to PLI

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[639] **Ex C-0045**, Second Amended and Restated PPF Agreement, Schedule H (outlining the outstanding permits needed for the Invicta Mine).

[640] **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, p. 48 (noting that Invicta "[w]ere carrying out preparation and development works in the Invicta mining unit. . .these works were paralyzed until the month of February 2018, as they did not have funding. . .").

[641] **Ex. C-0081**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to MINEM, 6 September 2018.

[642] **CWS-0003**, Castañeda Witness Statement, ¶ 22.

[643] **Ex. C-0011**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to MINEM (A. Rodriguez), 17 October 2018.

[644] **Ex. C-0082**, Report No. 092-2018-MEM-DGM-DTM/PM, MINEM, 23 October 2018, p. 2.

[645] **Ex. C-0082**, Report No. 092-2018-MEM-DGM-DTM/PM, MINEM, 23 October 2018, p. 2.

Huaura under the PPF Agreement.[646] Claimant has failed to establish that, but for Peru's alleged failure to remove the Access Road Protest by force, Claimant would have passed the requisite inspection, obtained the follow-up approvals and exploitation permits, exploited the mine, extracted enough ore for processing, processed that ore into gold, and delivered the gold to PLI Huaura, all before the end of the first delivery deadline on approximately 21 December 2018.[647] On its face, it seems highly implausible that Claimant would have managed to achieve all of those steps in the time it had available.

297. *Second*, Claimant needed the MINEM's approval of amendments that Invicta had proposed for its mandatory Mine Closure Plan.[648] Under Supreme Decree No. 033-2005-EM, mining operators are required to prepare a Mine Closure Plan that describes how they will rehabilitate the land used for their mining projects.[649] Mr. Castañeda, Claimant's witness, noted that even though he "was not involved in the preparation of the updated mine closure plan, [he was] not aware of any reason why it would not have been submitted and approved."[650] He asserts that the process of submitting and obtaining approval of such Mine Closure Plan would be "straightforward,"[651] but he (and Claimant) fail to recognize that this process was delayed due to Claimant's own conduct and failures.

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[646] *See* **Ex. C-0231**, Report No. 011-2019-MEM-DGM-DTM/PM, MINEM, 17 January 2019, ¶ 1.13 ("Invicta Mining Corp. SAC, through Document Nos. 2883233 and 2885124 dated 14 December 2018 and 21 December 2018, presented the [certificate of quality] and requested that the inspection be arranged.").

[647] Claimant's Memorial, ¶ 43 (noting that the First Effective Date (i.e., the date on which the first installment of payment was paid out by PLI Huaura) was 9 August 2017); **Ex. C-0045**, Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. And PLI Huaura Holdings L.P., 2 August 2017, pp. 3–4, 10 (noting that 0 ounces of gold would be due for the first fifteen months after the first installment was paid and that the first gold delivery date would be "the fourth Business Day prior to the last calendar day the Scheduled Delivery Month").

[648] **CWS-0003**, Castañeda Witness Statement, ¶ 21.

[649] **Ex. R-0011**, Mine Closure Law, Art. 5.

[650] **CWS-0003**, Castañeda Witness Statement, ¶ 21.

[651] **CWS-0003**, Castañeda Witness Statement, ¶ 21.

298. Claimant's exhibits show that by November 2018 Invicta had *failed to respond* to the concerns expressed by the Ministry of Environment regarding the Invicta Project's Third ITS (submitted by Invicta), and the impact of those concerns on the approval of any amendments to Invicta's Mine Closure Plan.[652] Therefore, contrary to Claimant's unsupported assertions,[653] this approval was delayed because of Claimant's own delays and failures. Claimant has failed to explain (i) whether it submitted the requisite amendments to the Mine Closure Plan, (ii) if so, what the content of those amendments was, or (iii) why Mr. Castañeda believed that, without participating in the Mine Closure Plan amendment process, that securing that approval would be "straightforward." In other words, Claimant has failed to meet its burden of proof that it could have overcome this regulatory obstacle in time to meet its gold delivery obligations under the PPF Agreement.

299. *Third*, even as its gold delivery deadline was fast approaching in December 2018, Claimant was still in the process of supplementing its EIA with details concerning a new water management system for the mine. That requirement had been imposed in August 2015, when the MINEM informed Invicta that an exploitation permit for the Invicta Mine would not be issued until the "alternative mine water management system . . . receive[d] the corresponding environmental certification."[654]

300. To receive the appropriate environmental certification from the Directorate of Environmental Assessment for Natural and Productive Resource Project ("**DEAR**") to

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[652] **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018, p. 48 ("It is worth mentioning that according to Article 133 of the Mining Environmental Regulations, the [Technical Sustainability Report] with the approval of the competent authority imply the consequent modification of the Closure Plan, which will be carried out in the corresponding Mine Closure Plan update, according to the legislation on the matter").

[653] **CWS-0003**, Castañeda Witness Statement, ¶ 21.

[654] **Ex. R-0168**, Report No. 099-2015-MEM-DGM-DTM/PM, 20 August 2015 (attaching Resolution No. 0384-2015-MEM-DGM/V, 26 August 2015), p. 4; **Ex. C-0231**, Report No. 011-2019-MEM-DGM-DTM/PM, MINEM, 17 January 2019, ¶ 1.10 ("The General Mining Directorate through Resolution No. 0384-2015-MEM-DGM/V, dated 26 August 2015, supported by Report No. 127-2014-MEM-DGM-DTM/PM, NOTIFIED to Invicta Mining Corp. SAC, that prior to the start of the exploitation activities of the 'Invicta' mining project, the mining company would implement the alternative mine water management system indicated in the discharge of Recommendation 6.0 of the preceding report, which must receive the corresponding environmental certification.").

build and use this system, the Invicta Mine needed approval of its Third ITS. Invicta presented its Third ITS to DEAR on 29 August 2018.[655] Invicta's presentation was insufficient, as a result of which DEAR requested more information related to the water management system on 14 and 17 September 2018.[656] Unable to meet the ten-day response deadline that DEAR had imposed for submission of the additional information requested, Invicta requested an extension on 27 September 2018, which was granted.[657] Invicta then sent DEAR clarifications on 17 and 19 October 2018.[658] However, those clarifications were later found inadequate.[659]

301. On 12 November 2018, the DEAR rejected Invicta's Third ITS because it hadd not provided sufficient technical information to support the development and use of the new water management system.[660] Accordingly, by this point Invicta was not yet able to begin building much less to begin using this new water system. In its pleadings, Claimant has failed to mention this change to its mining infrastructure, much less explain how DEAR's finding that the Third ITS was deficient might impact the Invicta Project's potential transition into the exploitation stage.

302. Claimant's suggestion that, had the Access Road Protest not occurred, it would have reached its regulatory goals, and then brought the Invicta mine into production within less than two months,[661] is not only unsupported by evidence but also speculative and even fanciful. Claimant's suggestion that it would have resolved all the regulatory

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[655] *See generally* **Ex. C-0229**, Presentation on ITS No. 3, Invicta Mining Corp. S.A.C., August 2018; *see also* **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018, ¶1.2.

[656] **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018, ¶ 1.3.

[657] **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018, ¶ 1.4.

[658] **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018, ¶¶ 1.7, 3.1–3.2.

[659] **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018, ¶¶ 1.7, 3.1–3.2.

[660] **Ex. C-0226**, Report No. 00214-2018-SENACE-PE/DEAR, 12 November 2018, ¶¶ 3.1–3.2.

[661] Claimant's Memorial, ¶¶ 193–95 (blaming all of its defaults under the PPF Agreement on the Access Road Protest).

issues mentioned above and obtained all necessary permits is even more remote given Claimant's various extension requests, and resulting delays.[662]

303. The above facts and evidence further demonstrate that Claimant undertook a major business risk when it agreed to have gold deliveries underway within fifteen months of receiving the first installment of payment under the PPF Agreement. Importantly, it was precisely the realization of this risk that ultimately led to the loss of Claimant's investment. Critically, Claimant has failed to establish that, absent the Access Road Protest and following DEAR's rejection of Claimant's defective Third ITS on 12 November 2018, the Invicta Mine would have been able to meet every milestone required to reach the exploitation phase with sufficient time to extract, process and deliver the first installment of gold under the PPF Agreement. Such milestones included (i) the need to cure the deficiencies to its Third ITS, (ii) DEAR's approval of a new, resubmitted ITS, (iii) construction of the new water treatment plant, (iv) a successful mine inspection, and (v) approval of the exploitation permit. Claimant has yet to show it would have been able to achieve all those milestones in a timely manner. At bottom, it was Claimant's own failures in business strategy, due diligence, planning, and development of the Invicta Project, that sounded the death knell of its investment.[663]

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[662] **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, p. 48 (noting that Invicta "w]ere carrying out preparation and development works in the Invicta mining unit. . .these works were paralyzed until the month of February 2018, as they did not have funding. . ." principally because Invicta had not secured agreements with the Lacsanga, Santo Domingo, and Parán Communities); **Ex. R-0074**, Directorial Resolution No. 2203-2018-OEFA/DFAI, 27 September 2018, p. 9 (noting that Claimant alleges that its mining activities were suspended because it had not secured an agreement with the Lacsanga Community); **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1 ("Senior authorities need to be informed that the mining company Invicta Mining Corp SAC has suspended its mining activities 10 days ago owing to specific issues within the company and they currently have only fourteen (14) workers").

[663] *See infra* Section II.F.

b. Claimant was legally required to continually engage with the Parán Community to ensure the latter's support for the Invicta Project

304. As described in **Section II.B.1**, Peruvian law requires all mining operators to engage and come to agreement with local communities that fall within a mine's area of direct and indirect influence.[664] Claimant was not exempted from this general legal obligation. Before the Invicta mine could be exploited, Claimant was required to obtain the social license from the three Rural Communities that were in the area of direct and indirect influence of the Invicta Project.[665] Put differently, without the Rural Communities' support for the Invicta Project, Claimant could not enter the exploitation phase.[666]

305. As of September 2018, Claimant had not reached the requisite agreement with the Parán Community.[667] Instead, Claimant found itself embroiled in a community relations crisis that had developed over the years as a result of: (i) the Parán Community's concerns that Claimant's mine would cause environmental harm to the Community's territory, and (ii) that Community's frustration at being the only rural community in the area with which Claimant had *not concluded* an agreement.[668]

306. Before Claimant could exploit its mine, it needed to address the Parán Community's concerns and reach an agreement with them related to the Invicta Project.[669] Instead, at some point, Claimant deliberately decided to abandon attempts to reach agreement with the Parán Community.[670] As explained in **Section II.C.2**, that decision was based on Claimant's mistaken belief that it was no longer required to reach agreement with

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[664] *See supra* Section II.B.1.

[665] *See supra* Section II.B.1 and II.C.3; **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK CONSULTING, 13 April 2018, pp. 6, 10; **RWS-0001**, Trigoso Witness Statement, ¶¶ 28–29.

[666] *See supra* Section II.B.1 and II.C.3; **RWS-0001**, Trigoso Witness Statement, ¶ 28.

[667] Claimant's Memorial, ¶¶ 69–75.

[668] *See supra* Sections II.D.2 and II.E.2 (describing the Parán Community's frustrations with Claimant).

[669] *See supra* Section II.B.1 and II.C.3.

[670] **RWS-0003**, León Witness Statement, ¶¶ 22, 78–79

that Community because "Lupaka's reduced Project did not touch upon Parán territory."[671] By choosing not to engage the Parán Community in continuous dialogue and by deciding (mistakenly) to proceed without securing that Community's support for the Invicta Project, Claimant placed the entire Invicta Project at risk, including by risking disruptive social conflict with the Parán Community before being able to exploit the mine to satisfy its obligations to its lender. That risk in the end materialized, leading to the Access Road Protest and ultimately to Claimant's default of the PPF Agreement and the forfeiture of its shares in Invicta.

c. Other factors rendered it unlikely that Claimant would have avoided defaulting under the PPF Agreement

307. Even if Claimant had been successful at advancing the Invicta mining project to the exploitation phase, Claimant still would have been unlikely to process ore at the rate necessary to satisfy the gold delivery obligations in the PPF Agreement. In September 2018, Claimant was having ore processing problems at four toll mills.[672] For example, in the meeting minutes from Claimant's September 2018 Board of Directors' meeting, Claimant noted that

> permits for the [Huancapeti] mill **do not cover our processing requirements** and are being applied for. Mr. Ansley stated that **out of the 4 toll mills selected, none are fulfilling their contracts**, proving once again that the Mallay plant purchase is in the best interest of the Company."[673] (Emphasis added)

308. To meet its gold delivery requirements, Claimant needed to gain additional capacity at its ore mills and find a way to insulate itself against contractual breaches perpetrated by those mills with which it had preexisting contracts. The above is

[671] Claimant's Memorial, ¶ 67.

[672] **Ex. C-0051**, Meeting Minutes, Lupaka Gold Corp. Board Meeting, 27 September 2018, p. 1; *see also* Claimant's Memorial, ¶ 87; **CWS-0003**, Castañeda Witness Statement, ¶¶ 88–89 ("Based on the unsatisfactory results and experiences with Coriland, San Juan Evangelista and Huancapati II, we decided to restart negotiations with Buenaventura.").

[673] **Ex. C-0051**, Meeting Minutes, Lupaka Gold Corp. Board Meeting, 27 September 2018, p. 1.

further evidence that Claimant cannot attribute its default under the PPF Agreement to Peru.[674]

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309. In sum, the evidence (including that submitted by Claimant itself) contradicts Claimant's main argument in this arbitration; that argument is that had the Access Road Protest been quashed with the use of force, the Invicta Project would have reached the exploitation stage and provided enough ore for Claimant to satisfy its obligations to its creditor and comply with the PPF Agreement.[675] But Claimant has failed to prove its argument, for at least three reasons: *first*, Claimant still had numerous regulatory requirements that it needed to satisfy before the Invicta Project could legally enter its exploitation phase;[676] *second*, even if Claimant had successfully obtained its outstanding regulatory approvals, Claimant still would have needed to gain the Parán Community's support for the Invicta Project; and *third*, Claimant was facing significant difficulties in securing reliable and sufficient ore processing.[677] All three of these issues needed to be resolved before Claimant could exploit the Invicta mine in a way that would allow it to satisfy its obligations to PLI Huaura under the PPF Agreement by the contractual deadline of December 2018.

2. *Claimant's own actions caused the social conflict with the Parán Community, and prevented its resolution*

310. In addition to Claimant's failure to conduct adequate due diligence on the status of relations between the Rural Communities and previous owners of Invicta,[678] Claimant (including its inexperienced community relations team) failed to effectively manage the Parán Community relationship once Claimant took ownership of the Invicta

[674] *See infra* Section IV.

[675] Claimant's Memorial, ¶¶ 312–13 (arguing that Peru's acts or omissions amount to expropriation because, according to Claimant, they caused Lupaka to lose its investment).

[676] *See supra* Section II.F.1.

[677] *See supra* Section II.F.1.

[678] *See supra* SectionII.C.3.d; *see* **RWS-0002**, Incháustegui Witness Statement, ¶ 18.

Project.[679] That failure resulted in a steady (but wholly avoidable) deterioration of Claimant's relationship with the Parán Community. Claimant's manifest inattentiveness to the imminent risk of social conflict, and its own missteps in managing that risk, deepened the Parán Community's distrust and escalated their expressions of disagreement and opposition. Claimant's failures in this regard, which are described in greater detail below, include:

a. its community relations team's inadequate and careless efforts;[680]

b. its disproportionate focus on the Lacsanga and Santo Domingo de Apache Communities and concomitant marginalization of the Parán Community, which created a real and perceived disparity in Claimant's treatment of those communities;[681]

c. its failure to adequately address the Parán Community's concerns that the Invicta mine was causing environmental harm to that Community's water supply;[682]

d. its insistence that the Peruvian Government should use force against the Parán Community;[683]

e. its withdrawal from conflict resolution efforts through formal mediation and dialogue with the Parán Community;[684] and

f. its escalation of the conflict when it hired a private security contractor to "secure the [Invicta Mine] Site" by force.[685]

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[679] **RWS-0001**, Trigoso Witness Statement, ¶¶ 46–49 ; **RWS-0003**, León Witness Statement, ¶¶ 73–77.

[680] *See supra* Section II.F.2.a.

[681] *See supra* Section II.F.2.b.

[682] *See supra* Section II.F.2.c.

[683] *See supra* Section II.F.2.d.

[684] *See supra* Section II.F.2.e.

[685] *See supra* Section II.F.2.f.

311. Each of these failures on Claimant's part (discussed in further detail in the following sub-sections) caused its tensions with the Parán Community to fester and escalate, and ultimately led to the loss of Claimant's investment.

a. Claimant's community relations efforts were manifestly inadequate

312. Claimant' community relations efforts were responsible for the disintegration of relations with the Parán Community. As has been widely emphasized in industry guides[686] as well as in numerous joint Peru-Canada publications for mining companies with operations in Peru, community relations is an integral element to developing mining projects.[687] In Peru, companies that wish to explore and exploit mines are legally responsible for managing community relations issues, even if doing so might require dedicating significant time, energy, and resources.[688] In this case, Claimant was not prepared or willing to make those commitments.

313. Among the many examples of Claimant's inadequate community relations efforts are the following:

a. From the beginning and throughout its relationship with the Rural Communities, Claimant appears to have failed to engage in collaborative communication strategies, in particular with the Parán Community. For example, instead of proactive outreach to the Rural Communities when it acquired the Invicta Project, Claimant allegedly "open[ed] a local office" whereby "[m]embers of the Rural Communities could thus drop into the IMC

[686] *See generally* **Ex. R-0086,** ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015; **Ex. R-0094**, ICMM, Understanding Company-Community Relations Toolkit, 2015; **Ex. R-0087**, BDO, Social License to Operate in Mining: Current Trends & Toolkit, 2020; **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013; **Ex. R-0084**, The United Nations Interagency Framework Team for Preventive Action, "Toolkit And Guidance For Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict," 8 October 2012; **Ex. R-0088**, OECD, Due Diligence Guidance for Meaningful Stakeholder Engagement in Extractive Sector, 2017.

[687] *See generally* **Ex. R-0028**, Canada-Peru CR Toolkit; **Ex. R-0128**, MINEM, "*Guía de participación ciudadana en el Subsector Minero*," 2010.

[688] *See supra* Section II.A.3 and II.B.1; **RWS-0001**, Trigoso Witness Statement, ¶¶ 48–49; **RWS-0002**, Incháustegui Witness Statement, ¶ 32-34.

office at their convenience to enquire about the Project."[689] The strained relationship suggests that Claimant's passive, one-way communication methods are at variance with the principles of participation and reciprocal collaboration, and contributed to a reactive and high-risk relationship dynamic with the Parán Community.[690]

b. Claimant appears to have waited until September 2016—*remarkably, nearly a full three years after* it acquired the Invicta Project—before its community relations team carried out their "first intervention" with the Parán Community.[691] As Canada and the MINEM have noted in their Peru-Canada CSR Toolkit for mining companies, establishing *early* and *continuous* dialogue, in addition to securing the *early* and *continuous* participation and collaboration of the local communities, is critical for building trust, confidence, and lasting support.[692] Claimant failed to do this.

c. Even when Claimant recognized that it needed the Parán Community's support, Claimant did not communicate that to the Community in a manner that was honest or respectful. Rather, Claimant's community relations team tersely and falsely declared that they had no need for rural community support before carrying out its mining activities.[693] As the Parán Community made clear, it knew that such representations were incorrect.[694] Such conduct by

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[689] Claimant's Memorial, ¶ 53; **CWS-0001**, Edwards Witness Statement, ¶¶ 23–24.

[690] *See* **Ex. R-0028**, Canada-Peru CR Toolkit, p. 14; **RWS-0001**, Trigoso Witness Statement, ¶ 48; **RWS-0003**, León Witness Statement, ¶¶ 76.

[691] **Ex. C-0111**, Report on Social Intervention for Signing of Agreement with the Parán Community, 2018.

[692] *See* **Ex. R-0028**, Canada-Peru CR Toolkit, pp. 22, 52.

[693] **Ex. C-0164**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, 1–30 September 2017, p. 6 ("In the same way, it was explained to him that the company has all the permits granted by the Ministry of Energy and Mines to start its exploitation and that it does not depend on any community to start this stage."); *see* **RWS-0001**, Trigoso Witness Statement, ¶ 48; **RWS-0002**, Incháustegui Witness Statement, ¶ 18.

[694] **Ex. C-0164**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, 1–30 September 2017, p. 6.

Claimant's representatives violated basic principles of respect, honesty, and transparency—all foundational principles for building community trust.[695]

d. In a letter dated 31 May 2017, Claimant made another false representation to the Parán Community, when it stated that Invicta could not pay the money it agreed to pay the Community in January 2017[696] *unless the Parán Community agreed to sign a long-term agreement with Invicta*:[697]

> [D]espite all the efforts made by Invicta (and Lupaka), to get the Banks to disburse [to Invicta] **the money to fulfill [Invicta's debt for non-compliance with its former commitments] and finance the mining Operation in Invicta, they refuse to do so while the company does not have and submit an Agreement signed with the Community of Parán . . .** [Invicta is] willing to sign [an agreement], and **pay the amounts of money that have been owed for several years. This long-term Agreement is the only condition that the Banks place on Invicta to deliver the monetary funds.** It is for that reason [Invicta] would be grateful to you, Mr. President, to put to the consideration of the Governing Committee and Assembly the convenience of **signing an Agreement with Invicta, since it is the only way that the Banks disburse the money, with which the debt plus the fine would be paid**.[698] (Emphasis added)

In fact, under the terms of its financing agreement, Claimant only required an agreement with *either* the Lacsanga Community or the Parán Community in order to obtain the first tranche of funding.[699] Accordingly, once Claimant secured an agreement with the Lacsanga Community in July 2017 (i.e., about a month after it sent its May 2017 letter to the Parán Community), it quickly

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[695] *See, e.g.*, **Ex. R-0028**, Canada-Peru CR Toolkit, p. 16.

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

[697] **Ex. C-0114**, Letter from Invicta (J. Castañeda) to Parán Community (I. Roman), 31 May 2017.

[698] **Ex. C-0114**, Letter from Invicta (J. Castañeda) to Parán Community (I. Roman), 31 May 2017.

[699] **Ex. C-0044**, Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 30 June 2016, § 3(e)(xi) (stating that Invicta required "a true, correct and complete copy of the Lacsanga Community Agreement **or** the Parán Community Agreement.") (emphasis added).

discontinued its efforts at reaching an agreement with the Parán Community, thus demonstrating that Claimant had acted in its narrow self-interest.[700] Again, such conduct violated principles of respect, honesty, and transparency—especially given that it had employed pressure tactics and coercion. Claimant's disdainful deployment of such tactics to manage the relationship naturally led the Parán Community to react negatively, deepening their opposition and distrust.[701]

e. Although Claimant takes the position that it was the Peruvian authorities' obligation to solve the social conflict by forcibly terminating the Parán Community's Access Road Protest,[702] the reality is that Claimant itself was the protagonist and the party responsible for the breakdown in its relations with each Rural Community within the Invicta Project's purview.[703] Accordingly, resolution of the social conflict lay entirely within Claimant's own control.

314. In addition to the above, Claimant did not have adequate mechanisms for addressing the concerns raised by the Rural Communities and thus prevent social conflict with such communities. This is evidenced by a demonstrated pattern of attempting to resolve issues reactively, only *after* disagreement by members of the community had manifested and taken the form of protests and civilian blockades. For example, its community relations team reported that members of the Lacsanga Community had also staged their own protests in the form of access road civilian blockades on multiple occasions.[704] As mentioned in **Section II.B.2.b**, protests (including in the form of civilian blockades) are a natural and foreseeable consequence of community relations

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[700] **Ex. R-0075**, Lupaka Gold Corp., "Invicta Gold Project Receives Community Agreement," 24 July 2017.

[701] *See, e.g.*, **Ex. R-0138**, Joint Publication between ACDI and MINEM, "*Guía para el Manejo de Crisis y la Comunicación de Crisis*," 2003–2008, pp. 18, 22–23.

[702] Claimant's Memorial, ¶ 139.

[703] **RWS-0001**, Trigoso Witness Statement, ¶¶ 24–30.

[704] **Ex. C-0161**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, pp. 36–37, (showing a blockade on 20 July 2018 by three women and one man of the Lacsanga Community; a blockade on 24 July 2018 by the secretary of the Lacsanga Community; a blockade on 29 July 2018 by a woman of the Lacsanga Community).

failures and, in particular, a sign of inadequate mechanisms by mining operators for receiving, addressing, and resolving community complaints as they arise.[705]

b. Claimant's focus on the Lacsanga and Santo Domingo de Apache communities isolated the Parán Community

315. Claimant incited opposition from the Parán Community when it exacerbated the social disparity, conflict, and inter-community rivalry between the Parán Community and the neighboring communities of Lacsanga and Santo Domingo de Apache. As described in **Section II.D.2.a**, the Parán Community felt marginalized by Claimant because it was the only community within the mine's area of direct influence with which Claimant had not reached an agreement.[706]

316. As Claimant admitted in its Memorial, it does not believe that it was legally obligated to negotiate and conclude an agreement with the Parán Community.[707] This is not only incorrect, but also exemplifies Claimant's disdain for the Parán Community and its poor judgment in managing community relations.

317. As explained in **Section II.C.3.d**, Invicta had reached long-term agreements with both the Santo Domingo de Apache Community and the Lacsanga Community. Invicta and the Santo Domingo de Apache Community signed their agreement in 2010, and in 2017 Claimant was negotiating an agreement to increase funds to that community. Invicta had also secured an agreement with the Lacsanga Community in 2015.[708] The Parán Community grew increasingly frustrated that their own community was being excluded from the social and economic benefits of a similar long-term agreement with

[705] *See, e.g.*, **Ex. R-0028**, Canada-Peru CR Toolkit, p. 53.

[706] *See supra* Section II.D.2.a.

[707] Claimant's Memorial, ¶ 74 ("Significantly, IMC did not need the Parán Community's agreement for the Project").

[708] **Ex. C-0042**, Agreement of Proof of Fulfillment of Commitments between Invicta Mining Corp. S.A.C. and Lacsanga Community, 31 March 2015; *see also* **Ex. C-0089**, Constitution of Rights to Usufruct, Surface and Easement for Mining between Invicta Mining Corp. S.A.C. and Lacsanga Community, 19 July 2017.

Claimant, while nevertheless bearing the negative impacts of the mine development and operations.[709]

318. There were other multiple manifestations of Claimant's exclusion and apparent disdain for the Parán Community:

a. As early as 2013, Claimant had undertaken long-term commitments to contribute to social and environmental development projects, which included two projects for the Santo Domingo de Apache Community and one for the Lacsanga Community.[710] Claimant had neither secured a long-term agreement with the Parán Community, nor offered any assistance for social or environmental development projects. Conversely, Claimant made no secret of the fact that its willingness to secure an agreement with the Parán Community was self-interested, and driven not by a sincere desire to improve the conditions of that Community, but rather by the need to receive third-party funding for the Invicta Project.[711]

b. Based on Claimant's own reports, Claimant hired workers predominantly from the Lacsanga Community, and only two workers from the Parán Community.[712] However, according to interviews conducted as part of the

[709] **RWS-0003**, León Witness Statement, ¶¶ 22, 24, 78–79.

[710] **CWS-0001**, Edwards Witness Statement, ¶ 64; **Ex. C-0076**, Lupaka Gold Corp., "Lupaka Gold Completes Community Agreement and Provides Update on Community Relations and Government Developments," 23 July 2013, p. 2 (announcing (i) the Pine Tree Nursery project in Santo Domingo, in which 50,000 pine tree seedlings were planted over 40 hectares to create a sustainable commercial wood source which would eventually lead to the production of 100,000 trees per year across 300 hectares of communal land; (ii) an irrigation channel project, which would improve and construct new irrigation channels and implementing new irrigation technologies for the Lacsanga Community; and (iii) improvement and construction of 17.9 km of road for the Lacsanga Community.).

[711] **Ex. C-0114**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to the Parán Community (I. Palomares), 31 May 2017 ("The main subject of this letter is to inform you that despite all the efforts made by Invicta (and Lupaka), to get the Banks to disburse us the money to fulfill our commitments and finance the mining Operation in Invicta, **they refuse to do so while the company does not have and submit an Agreement signed with the Community of Parán**.") (emphasis added).

[712] **Ex. C-0138**, Monthly Report on Invicta Mining Corp. S.A.C., SOCIAL SUSTAINABLE SOLUTIONS, September 2018, p. 8; **Ex. C-0157**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS,

oversight by the ESEMO, in February and March 2018, Peru found that Claimant had hired as many as 60 members from the Lacsanga Community and *zero* members of the Parán Community.[713]

c. Claimant gave explicit preference to the Lacsanga Community for the purchase of goods and services, without a similar level of commercial engagement with the Parán Community.[714]

d. Claimant's community relations team tellingly failed to include the Parán Community in the title of its own monthly reports on the progress of the Invicta Project.[715] Such omission suggests that Claimant did not even view the Parán Community as a relevant stakeholder in its community outreach efforts.

e. Lupaka's then president and CEO, Mr. Ansley, disrespectfully characterized the Parán Community as "terrorists" and "people who have attempted murder" in his letter dated 6 February 2019 to the Minister of Energy and Mines.[716] This openly prejudicial attitude towards the Parán Community no doubt contributed to the deterioration of the dynamics between Claimant and that Community.

June 2018, p. 7; **Ex. C-0161**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, p. 7; **Ex. C-0162**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, August 2018, p. 6; **Ex. C-0165**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, October 2018, p. 6-7 (e.g., showing that Invicta Project hired 27 Lacsanga Community members, and two Parán Community members).

[713] **Ex. R-0061**, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27 June 2018, p. 47.

[714] **Ex. C-0164**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, 1–30 September 2017, p. 5; **Ex. C-0157**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, June 2018, pp. 7–8; **Ex. C-0161**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, p. 7. The reports show that in many instances, there was *no* commercial engagement of any kind with Parán Community local businesses.

[715] **Ex. C-0164**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, 1–30 September 2017; **Ex. C-0157**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, June 2018; **Ex. C-0161**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, July 2018.

[716] **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Ismodes), 6 February 2019, p. 2.

319. Claimant's indifference to, and dismissal of, inter-community rivalries is also manifest. As Claimant's witness, Mr. Edwards, admitted,

> [Claimant] was aware of some disagreement between the Parán Community and the Santo Domingo Community, primarily because both were competing for employment at the Project, but this is fairly common amongst communities near a project of this type.[717]

320. It is clear that Claimant took no responsibility whatsoever for those tensions amongst and between the Rural Communities that stemmed from Claimant's mining project, and it therefore did not attempt to prevent or resolve such tensions. It seems that Claimant regarded such inter-community tension as an inevitable byproduct of doing business in Peru, and that it required no action on the part of Claimant. By prompting discord and ignoring resentment among the Rural Communities in relation to the Invicta Project, Claimant sowed the seeds of the foreseeable backlash against the mining project.

c. Claimant disregarded valid environmental concerns raised by the Parán Community

321. Claimant did not take seriously the Parán Community's environmental concerns about the risks posed to the Parán Community's water basin, resulting from Claimant's mining activities. Before the Access Road Protest in October 2018, the Parán Community repeatedly expressed concerns to Claimant and to governmental agencies that Claimant's mining activities were causing environmental damage to its territory, including harm to resources essential to the Parán Community's livelihood.[718]

322. As it developed the Invicta mine, Claimant failed to comply with several environmental requirements.[719] In a letter dated 7 September 2011, the *Frente de Defensa*, a Peruvian environmental advocacy group, warned Peruvian authorities that

[717] **CWS-0001**, Edwards Witness Statement, ¶ 67.

[718] *See supra* Sections II.D.2.b and II.E.2.

[719] *See supra* Section II.D.1.b.

Invicta had not properly reviewed the water sources impacted by its mining activities and failed to implement adequate community participation mechanisms.[720]

323. These concerns were confirmed in 2018, when the DFAI found that Claimant had failed to abide by its 2009 EIA. In a report issued by the DFAI on 29 August 2018, the regulatory agency found that Claimant had mismanaged the disposal of solid waste (by using a biodigester to break down waste) and failed to adequately handle sludge.[721]

324. On 4 January 2018, the MININTER issued an official letter laying out concerns that Claimant's mining activity was harming the Parán Community's water supply.[722]

325. In April 2018, the Parán Community formally notified the Water Authority of similar concerns and requested an investigation into Claimant's mining activity.[723] In particular, the Parán Community was concerned that runoff from the Invicta mine was seeping into water sources that the community depends on for drinking water and for agricultural irrigation purposes.[724] Peru carried out inspections at the mine site on 7 May 2018 and 4 July 2018.[725] The Water Authority found that the water was contaminated with oxide residue, but was unable to confirm its source.[726] Later the

[720] **Ex. R-0071**, Letter from Frente de Defensa (A. Román) to MINAM (R. Giesecke), 7 September 2011, p. 1.

[721] **Ex. R-0072**, Directorial Resolution No. 2005-2018-OEFA/DFAI, 29 August 2018, pp. 15, 18, 19, 20.

[722] **Ex. R-0076**, Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Román) to Council of Ministries (M. Aráoz), 4 January 2018.

[723] **Ex. R-0077**, Letter from the Parán Community (W. Narvasta) to Huaura Local Water Authority, 10 April 2018, p. 1.

[724] **Ex. R-0077**, Letter from the Parán Community (W. Narvasta) to Huaura Local Water Authority, 10 April 2018, p. 1.

[725] **Ex. R-0078**, Ministry of Agriculture and Irrigation, Multiple Citation No. 003-2018-ANA-AAA.CF.-ALA-H/KHR from ANA (V. Pineda) to Invicta Mining Corp. S.A.C. (J. Castañeda), 26 April 2018; **Ex. R-0079**, Ministry of Agriculture and Irrigation, Multiple Citation No. 003-2018-ANA-AAA.CF.-ALA-H/KHR from ANA (V. Pineda) to the Parán Community (W. Narvasta), 26 April 2018; **Ex. R-0090**, ANA, Letter No. 136-2018-ANA-AAA.CF.-ALA-HUAURA, 16 July 2018.

[726] **Ex. R-0080**, ANA, Record of Field Technical Verification, 7 May 2018, p. 2.

same year, in September 2018, the MINAM found that Claimant's mine had exceeded permissible limits of toxic metal discharge.[727]

326. In July 2018, the Water Authority also had investigated and concluded that Invicta was using water from *Quebrada Ruraycocha*, a creek belonging to the Lacsanga Community, without having obtained the legally-required water use rights.[728] The Water Authority thus commenced an administrative proceeding against Invicta for breach of Peruvian environmental laws.[729] Ultimately, Invicta was sanctioned by the Water Authority for using the waters of the *Quebrada Ruraycocha* without holding the rights to do so.[730] To redress this breach, Claimant needed to either stop using the water from the *Quebrada Ruraycocha* or obtain the necessary approvals.

327. Despite its history of noncompliance with environmental obligations and the Water Authority's finding oxide residue in water, Claimant refused to address the Parán Community's concerns, simply dismissing them as unfounded and unworthy of attention, let alone affirmative action.[731]

d. Claimant demanded use of force against the Parán Community even though dialogue was proving effective

328. Claimant insisted on the use of force against Parán Community members, even when dialogue was proving effective. Claimant repeatedly demanded that Peru intervene with physical force against the Parán Community. Claimant made these requests when the Access Road Protest began in October 2018, throughout January and February 2019, and after Claimant's own breach of the 26 February 2019 Agreement.[732]

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[727] **Ex. R-0073**, Supreme Decree No. 010-2010-MINAM, 20 August 2010, Art. 4, Annex 1; *see* **Ex. R-0074**, Directorial Resolution No. 2203-2018-OEFA/DFAI, 27 September 2018, p. 18.

[728] **Ex. R-0090**, ANA, Letter No. 136-2018-ANA-AAA.CF.-ALA-HUAURA, 16 July 2018.

[729] **Ex. R-0091**, ANA, Technical Report No. 048-2018-ANA-AAA.CF.-ALA H/KHR, 13 July 2018, ¶ 6.2.; **Ex. R-0092**, ANA, Notification No. 012-2018-ANA-AAA.CF.-ALA-H/KHR, 16 July 2018; *see supra* Section II.D.2.b.

[730] **Ex. R-0093**, Directorial Resolution No. 1502-2018-ANA-AAA-CAÑETE-FORTALEZA, 6 November 2018; *see supra* Section II.D.2.b.

[731] *See supra* Section II.D.2.

[732] *See supra* Section II.E.3-5.

Behind all of these demands by Claimant was the fact that, as of January 2019, Claimant was already in default under the PPF Agreement.

329. As Claimant should have known (and as Peru repeatedly reminded Claimant),[733] dialogue must be prioritized over force when there is a conflict between a rural community and a mining operator.[734] **Section II.A.1** provides a historical overview of social conflicts between mining companies and rural communities in Peru and explains the high social costs of use of force in the context of these conflicts, including the tragic deaths of local community members, mining workers, and Peruvian police.[735] Nevertheless, Claimant was oblivious or simply dismissive of the above, and made repeated demands that Peru use force against the protestors.[736] Claimant made such demands even though it had committed to engage in Dialogue Tables with the Parán Community, which were facilitated by the Peruvian Government.[737]

e. Claimant prematurely withdrew from negotiations with the Parán Community

330. Claimant walked out of negotiations with the Parán Community, exhibiting its unwillingness to reach the agreement that Claimant needed to conclude for the Invicta Project to reach the exploitation phase. Claimant's own consulting firm, SRK, confirmed in its April 2018 technical report—the 2018 PEA—that the Parán Community was within the mine's area of direct influence, and that Claimant planned to have an agreement with the Parán Community in the "short term."[738] However, a

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[733] *See, e.g.*, **RWS-0002**, Incháustegui Witness Statement, ¶ 23; **RWS-0003**, León Witness Statement, ¶ 36; **RWS-0004**, Saavedra Witness Statement, ¶¶ 24, 34; **Ex. C-0192**, WhatsApp exchanges between Lupaka Gold Corp. (L. Bravo) and MININTER (E. Saavedra), 5 February 2019–20 February 2019; **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019.

[734] *See supra* Section II.A.2 and II.B.1; **RWS-0001**, Trigoso Witness Statement, ¶¶ 17–21; **RWS-0004**, Saavedra Witness Statement, ¶ 24; Incháustegui Witness Statement, ¶ 23.

[735] *See supra* Section II.A.1; *see* Incháustegui Witness Statement, ¶ 36.

[736] *See supra* Section II.E.

[737] *See supra* Section II.E.

[738] **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK CONSULTING, 13 April 2018, pp. 6, 10.

year later Claimant still had not reached such agreement.[739] As of April 2019, Claimant even refused Peru's invitations to attend further Dialogue Tables, demanding instead that Peru forcefully remove the Parán Community from the site as a way to terminate the Access Road Protest.[740]

331. Claimant's withdrawal from negotiations with the Parán Community was counterproductive, as it needed to mend its relationship with the Parán Community to bring its mine to exploitation.[741] Without undertaking this work to completion, Claimant was misdirecting its efforts. Only after reconciliation and a sustainable agreement between Claimant and the Parán Community could the Invicta mine be exploited.

f. Claimant exacerbated the conflict by hiring and unleashing "War Dogs" on the Parán Community

332. Claimant inflamed the conflict when the private security contractor it hired, War Dogs, tried to remove the Parán Community members from the Access Road Protest.[742] Predictably, that ill-advised and rash measure resulted in the tragic loss of human life.

333. When Claimant breached its commitments under the 26 February 2019 agreement with the Parán Community, it had already been in default under its loan agreement for nearly two months.[743] Claimant, acting hastily, hired War Dogs, a private security contractor with extremely limited (if any) experience in Peru.[744] True to its overt

[739] Claimant's Memorial, ¶¶ 69–75.

[740] **Ex. R-0114**, Meeting Minutes, Meeting between the Parán Community, OGGS, MININTER, and Sayán Police Station, 1 April 2019; **Ex. C-0209**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (Vice Minister), 29 March 2019.

[741] **RWS-0003**, León Witness Statement, ¶ 49; **Ex. R-0111**, Official Letter No. 010-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 6 May 2019, p. 1.

[742] Claimant's Memorial, ¶ 175; *see* **RWS-0003**, León Witness Statement, ¶ 51.

[743] *See supra* Section II.E.4.

[744] **Ex. R-0131**, War Dogs Security S.A.C. Corporate Summary, COMPUEMPRESA.COM, last accessed 17 February 2022.

branding, War Dogs physically attacked the Parán Community protesters and sparked a violent confrontation.[745]

334. On 14 May 2019, the War Dogs approached and entered the Invicta Project site without a police escort or presence.[746] A violent encounter then broke out between the War Dogs, members of the Parán Community, and Claimant's representatives.[747] At least one individual died as a result of this confrontation, among other injuries.[748] In addition to the tragic loss of life, this altercation not only was ineffective at reinstating Claimant at the mine, but it also further splintered the relationship between Claimant and the Parán Community—a relationship that needed to be mended (rather than smothered) for Claimant to take its mine to the exploitation phase.[749]

335. Notably, Claimant could have—but did not—hire a new community relations team, even though Peruvian authorities stated this was a step that Claimant needed to take to regain the trust of the community after the events of 14 May 2019.[750] Claimant could have—but did not—take any crisis prevention, crisis management, or crisis follow-up measures recommended by industry guidelines and by joint publications by Canada

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[745] *See supra* Section II.E.5; **CWS-0004**, Bravo Witness Statement, ¶¶ 80–81; **Ex. C-0018**, Meeting Summary between Invicta and MINEM *et al.*, 27 May 2019, pp. 4–5; **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, pp. 1–2.

[746] *See supra* Section II.E.5; Claimant's Memorial, ¶ 175; **CWS-0004**, Bravo Witness Statement, ¶¶ 81–82.

[747] *See supra* Section II.E.5.

[748] **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, ¶¶ 6–10 (discussing the incident at the Invicta Mine on 14 May 2019 and the resulting death on 15 May 2019); *see also* **Ex. C-0018**, Meeting Summary between Invicta and MINEM *et al.*, 27 May 2019, pp. 4–5.

[749] **Ex. R-0110**, Official Letter No. 011-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 4 June 2019; **Ex. C-0018**, Meeting Summary between Invicta and MINEM *et al.*, 27 May 2019, pp. 4–5.; **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, pp. 1–2.

[750] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 6; **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, p. 4.

and Peru on mining operations in Peru.[751] Instead, Claimant's conflict with the Parán Community continued to deteriorate.[752]

3. Claimant executed the PPF Agreement with PLI Huaura at its own risk, knowing that the financing structure for the Invicta Project was risky and potentially inadequate

336. One of the primary reasons why the Invicta Project was available for sale in 2012 was a lack of adequate financing.[753] At the time of the 2012 sale, a Joint Disclosure Booklet, prepared by Claimant and the entity that Claimant acquired (AAG), outlined risk factors associated with Claimant's investment.[754] That document acknowledged that the Invicta Project presented certain risks, including a "Financial Risk":

> The Combined Company [viz., the company that Claimant was acquiring] has limited financial resources, has no source of operating income and has no assurance that additional funding will be available to it for further exploration and development of its projects. **There can be no assurance that the Combined Company will be able to obtain financing required to execute its business plan.** If the Combined Company is unable to obtain required financing, any investment in the Combined Company may be lost.[755] (Emphasis added)

337. Claimant thus knew and accepted that the Invicta Project would pose a significant financial risk.[756] Nevertheless, Claimant acquired AAG, Invicta, and the Invicta Project, making itself responsible for securing funding and any conditions associated with such funding.[757]

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[751] *See, e.g.*, **Ex. R-0138**, Joint Publication between ACDI and MINEM, "*Guía para el Manejo de Crisis y la Comunicación de Crisis*," 2003–2008; *see also, e.g.*, **Ex. R-0028**, Canada-Peru CR Toolkit, pp. 57–63.

[752] *See infra* Section II.E.

[753] **Ex. R-0041**, Joint Disclosure Booklet between Lupaka Gold Corp. and Andean American Gold Corp., 22 August 2012 ("**Joint Disclosure Booklet**"), p. C-4 ("Andean announced that the initial capital cost to build an underground mine at the Invicta Gold Project would be considerably higher than forecast in the July 2010 feasibility study, partly due to increases in the estimates for infrastructure.").

[754] *See generally* **Ex. R-0041**, Joint Disclosure Booklet.

[755] **Ex. R-0041**, Joint Disclosure Booklet, pp. A–11.

[756] **Ex. R-0041**, Joint Disclosure Booklet, pp. A–11.

[757] *See supra* Section II.C.2.

338. In 2015 and 2016, Claimant looked for funding for the Invicta Project.[758] It found a lender in Pandion's subsidiary PLI Huaura. As mentioned above in **Section II.C.4**, PLI Huaura and Claimant executed an initial PPF Agreement on 30 June 2016 under which Claimant was to receive gross proceeds of USD 7 million, payable in three installments of USD 2.5 million, USD 2 million, and USD 2.5 million, respectively, in exchange for deliveries of gold.[759] These amounts would be paid to Claimant upon Claimant's satisfaction of conditions outlined in the PPF Agreement.[760] One of those conditions was that Claimant execute an agreement with either the Lacsanga or Parán Communities that would allow Claimant to use at least one of the communities' access roads.

339. The conditions tied to the first installment of the loan were satisfied when Claimant and the Lacsanga Community entered into the Lacsanga Community Agreement in July 2017, which allowed Claimant to use the Lacsanga access road to reach the Invicta mine site.[761] PLI Huaura thus dispersed the first installment of payments to Claimant on the "First Effective Date,"[762] i.e., 9 August 2017.

340. The First Effective Date also started the clock for Claimant to develop the Invicta mine and deliver gold to PLI Huaura, specifically,

> 0 Ounces of Gold for each of the 15 calendar months following the calendar month in which the Gold Prepayment Amount is

[758] **CWS-0002**, Ellis Witness Statement, ¶ 31.

[759] **CWS-0002**, Ellis Witness Statement, ¶ 33.

[760] *See generally* **Ex. C-0044**, Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 30 June 2016, § 3 (outlining the conditions to the first installment of payments).

[761] *See* **Ex. R-0075**, Lupaka Gold Corp., "Invicta Gold Project Receives Community Agreement," 24 July 2017, p. 1 ("With the execution of a community agreement with the Lacsanga Community (the "Lacsanga Agreement"), the Company has completed the final significant condition precedent necessary to close the $4.5 million first tranche of financing for the Invicta Gold project in Peru.").

[762] **Ex. R-0095**, Lupaka Gold Corp., "Lupaka Gold Receives First Tranche Under Amended Invicta Financing Agreement," 9 August 2017.

> paid on the First Effective Date and 187 Ounces of Gold for each of the 45 calendar months thereafter.[763]

341. The First Effective Date started the fifteen-month period within which Claimant needed to (i) advance the mine to the exploitation phase, (ii) complete all preparations to mine sufficient ore to meet its production requirements, (iii) complete all preparations to process sufficient ore into deliverable gold, and (iv) deliver such gold to PLI Huaura in accordance with the terms of the PPF Agreement.[764] As demonstrated above, Claimant's argument that it would have been able to satisfy its delivery obligations if only the Access Road Protest had not occurred is unsupported and in fact contradicted by the evidence .[765]

4. Claimant is responsible for failing to satisfy the terms of the PPF Agreement, leading to a foreclosure on its shares in Invicta

342. In its Memorial, Claimant fails to describe in any detail the circumstances of the transfer of its investment, devoting only three paragraphs to (i) its default under the PPF Agreement, (ii) its creditor's acceleration of Claimant's loan obligations, and (iii) its creditor's foreclosure on Claimant's shares in Invicta.[766] It is plain that Claimant hopes that the Tribunal will not focus on the terms of the financing and the actual reasons that caused Claimant to default on its obligations under the PPF Agreement.

343. In early 2019, Claimant failed to deliver gold in accordance with its loan obligations.[767] Claimant's lender, Lonely Mountain Resources S.A.C. ("**Lonely Mountain**") (which

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[763] **Ex. C-0044**, Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 30 June 2016; **Ex. C-0045**, Second Amended and Restated PPF Agreement, 2 August 2017.

[764] **Ex C-0045**, Second Amended and Restated PPF Agreement.

[765] Claimant's Memorial,¶¶ 193–95.

[766] Claimant's Memorial, ¶¶ 193–95 (describing Lupaka's default on its financial obligations and PLI's subsequent foreclosure of the Invicta shares).

[767] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, p. 4 ("pursuant to Section 13(1)(a) of the PPF Agreement, the Seller's failure to Deliver or cause to be Delivered any amount of Gold as and when required by the PPF Agreement and the Seller's admission of such default in its press release re: Lupaka Provides Update on Illegal Demonstration at Invicta, Announces Non-Brokered Private Placement, and Management Changes, dated as of January 28, 2019").

had acquired PLI Huaura from Pandion[768]) later issued a "Notice of Acceleration" outlining Claimant's default under the PPF Agreement and claiming USD 15.6 million as the Early Termination Amount due on 2 July 2019.[769]

344. Claimant's failure to deliver gold was *not* Claimant's only default under the PPF Agreement.[770] PLI Huaura specified in its Notice of Acceleration each of the following events of default by Claimant: (i) failure to deliver gold[771]; (ii) failure to comply with "terms, covenants or agreements in the PPF Agreement or any other Transaction Document"[772]; (iii) Claimant's insolvency and general inability to pay its debts[773]; (iv) the occurrence of an event that could reasonably be expected to have a "Material Adverse Effect"[774]; (v) deviation from the "Initial Expense Budget," where such deviation had a "Material Adverse Effect"[775]; and (vi) diverting from the "Initial Production Forecast," where such deviation had a "Material Adverse Effect."[776]

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[768] **Ex. C-0053**, Email from Pandion (J. Archibald) to Lupaka Gold Corp. (W. Ansley, *et al.*), 1 July 2019; *see also* **CWS-0002**, Ellis Witness Statement, ¶ 55.

[769] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019 (outlining the "Specified Defaults" in Schedule I); *see also* Claimant's Memorial, ¶ 362; **CWS-0002**, Ellis Witness Statement, ¶ 56.

[770] *See generally* **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13 (specifying the events of default under the PPF Agreement).

[771] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(a) ("The Seller fails to Deliver or cause to be Delivered any amount of Gold.").

[772] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(f) ("Any Obligor fails to perform, observe or comply with any term, covenant or agreement contained in this Agreement or any other Transaction Document.").

[773] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(m) ("Any Obligor (i) becomes insolvent or generally not able to pay its debts as they become due.").

[774] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(n) ("There has occurred in the opinion of the Buyer an event or development that has or would reasonably be expected to have a Material Adverse Effect.").

[775] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(s)(i) ("Any (i) deviation from the Initial Expense Budget.").

[776] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(s)(ii) ("Any . . . change between the Initial Annual Production Forecast and any updated Annual Production Forecast that has or would reasonably be expected to have a Material Adverse Effect, each determined in the sole and absolute discretion of the Buyer.").

345. Claimant accuses Peru of being responsible for its failure to deliver gold to its creditor, PLI Huaura, resulting in the latter foreclosing on the Invicta shares that Claimant had pledged as loan collateral.[777] However, the five additional events of default described above (namely, Claimant's failure to comply with the terms of its loan documents, its insolvency, the occurrence of an event that would cause a "Material Adverse Effect," its deviation from the "Initial Expense Budget," and its diversion from the "Initial Production Forecast") each relate to failures by Claimant that Claimant has not even alleged to have been proximately caused by the Access Road Protest, much less by Peru's actions.[778] PLI Huaura later filed its Notice of Enforcement and took control of the Invicta shares, citing "the failure of Lupaka Gold Corp. to meet its obligations under the Purchase Agreement."[779]

346. Claimant could have paid the Early Termination Amount rather than submit to a foreclosure proceeding.[780] Claimant entered into discussions with Lonely Mountain, related to potential payment of the Early Termination Amount, but did not reach an agreement.[781] Because Claimant did not pay the Early Termination Amount, PLI Huaura was contractually entitled to foreclose on Claimant's shares in Invicta and did so.[782]

347. In sum, the facts outlined above belie Claimant's argument that Peru is responsible for the loss of its investment.[783] When the Access Road Protest occurred, Claimant had

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[777] Claimant's Memorial, ¶¶ 193–95 (describing Lupaka's default on its financial obligations and PLI's subsequent foreclosure of the Invicta shares).

[778] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019.

[779] **Ex. C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., *et al.*, Notice of Enforcement, 24 July 2019, pp. 1–2.

[780] **CWS-0002**, Ellis Witness Statement, ¶ 56.

[781] **CWS-0002**, Ellis Witness Statement, ¶ 56 ("We tried to negotiate with Lonely Mountain but were unsuccessful in convincing them to grant us more time to pay.").

[782] **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L., (M. Brenneisen) to Invicta Mining Corp. S.A.C. (L. Bravo), 23 September 2019; *see also* **CWS-0002**, Ellis Witness Statement, ¶ 57.

[783] Claimant's Memorial, ¶¶ 193–95.

less than two months remaining until its gold delivery obligation came due.[784] Claimant argues that, if the Access Road Protest had not occurred, it would have managed, in a mere two months, to complete the steps necessary to take the mine into the exploitation phase, including obtaining a number of additional regulatory approvals and gaining the Parán Community's support for the Invicta Project.[785] This position is unsupported and even fanciful.

* * *

348. Given the above-mentioned facts, Claimant's claims in this Arbitration lack the necessary factual basis to succeed. Moreover, Claimant's claims also lack sufficient legal basis. Claimant contends that by failing to forcefully remove the Parán Community and lift the Access Road Protest, Peru has breached its obligations under public international law, most notably the minimum standard of treatment ("**MST**") obligation under customary international law ("**CIL**"). That assumes that Peru was legally required (under Peruvian and international law) to use force in these circumstances against the Parán Community. As **Section IV.B and IV.C** below shows, Peru had no such obligation. In fact, Peru's decision was reasonably and entirely justified, and in accordance with Peruvian and international law.

[784] **Ex. C-0045**, Second Amended and Restated PPF Agreement.

[785] *See* Claimant's Memorial, ¶¶ 193–95.

III. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMANT'S CLAIMS

A. The Tribunal lacks jurisdiction *ratione personae* because Claimant had already disposed of its investment prior to commencing the present arbitration

349. Claimant fully disposed of its investment on 26 August 2019, when it transferred to PLI Huaura the interest that Claimant held (indirectly) in Invicta. By divesting, and by doing so without retaining the arbitration rights associated with the investment, Claimant renounced its right to bring claims against Peru with respect to that investment.

350. Peru will briefly summarise below (i) the requirements for qualifying as an "investor" under the Treaty; (ii) the effect on a tribunal's jurisdiction, under international investment law, of a claimant's disposal of its investment prior to the assertion of claims against the host State of the investment; and (iii) the reasons why, as a consequence of Claimant's disposal of its investment, the Tribunal lacks jurisdiction in this particular case.

1. The requirements for qualifying as an "investor" under the Treaty

351. Article 847 of the Treaty defines "investor" as follows:

> (a) [I]n the case of Canada:
>
> (i) Canada or a state enterprise of Canada, or
>
> (ii) **a national or an enterprise of Canada that seeks to make, is making or has made an investment**; a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship[.][786] (Emphasis added)

[786] **RLA-0010**, Peru-Canada Free Trade Agreement, 29 May 2008 ("**Peru-Canada FTA**"), Art. 847. Article 847 also defines the term "investment," which encompasses a wide range of assets, including "an equity security of an enterprise," "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise," "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes" and "contracts involving the presence of an investor's property in the territory of the Party, including . . . concessions[.]"

352. The relevant moment in time at which a claimant must qualify as an investor is the date on which the relevant arbitral proceedings were instituted.[787] Proceedings under the ICSID Convention are deemed instituted on the date that the request for arbitration is registered by the ICSID Secretary-General.[788] In the present case, the relevant date is therefore 30 October 2020.

2. The effect of the disposal of a claimant's investment on a tribunal's jurisdiction

353. Various tribunals in investment treaty arbitrations have considered the implications of a claimant's disposal of its investment on the claimant's status as a qualifying investor under an investment treaty. In that context, timing is critical. In cases where such disposal occurred *after* the commencement of the relevant arbitral proceedings, tribunals have typically held that the tribunal's jurisdiction is not vitiated.[789] By contrast, where an investor disposes of its investment *prior* to instituting proceedings, the general rule is that the investor will have lost standing to bring a claim (subject only to the two exceptions discussed further below; namely, where special circumstances exist, and where an investor has retained the right to assert a claim). The foregoing general rule, and the first of the exceptions, were confirmed by the tribunal in *Aven v. Costa Rica*:

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[787] *See, e.g.*, **RLA-0011**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999 (Buergenthal, Bernadini, Bucher) ("***Ceskoslovenska* (Decision)**"), ¶ 31 ("[I]t is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to **the date on which such proceedings are deemed to have been instituted**") (emphasis added). *See also* **RLA-0012**, *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006 (Sureda, Debevoise, Garro) ("***National Grid* (Decision on Jurisdiction)**"), ¶¶ 114–18; **RLA-0013**, *Blusun S.A., et al. v. Italy*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (Crawford, Alexandrov, Dupuy), ¶ 307; **RLA-0014**, *Teinver S.A., Transportes de Cercanías S.A. y Autobuses Urbanos del Sur S.A. v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 (Buergenthal, Alvarez, Hossain), ¶ 255; **RLA-0015**, C. Schreuer, *et al.*, The ICSID Convention: A Commentary, 31 August 2009, Art. 25, ¶ 36.

[788] ICSID Convention, Art. 36. ICSID Institution Rules, Rule 6(2).

[789] *See, e.g.*, **RLA-0011**, *Ceskoslovenska* (Decision), ¶ 31 ("Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case.").

> [T]he relevant case law instructs that in general terms, an investment sold after the date of Notice of Arbitration meets the criteria for an "investment" in the terms of DR-CAFTA. **On the other hand, an investor who disposes of ownership of the investment in question before arbitral proceedings should not be eligible to seek the Treaty's protection, unless special circumstances are present**.[790] (Emphasis added)

354. The tribunal explained that such "special circumstances" arise only where there has been "direct causation" between actions attributable to the State and the transfer of the claimant's investment.[791] Applying that test, the *Aven* tribunal concluded that the claimant had failed to demonstrate a direct causal link between Costa Rica's actions in shutting down the relevant project, on the one hand, and the pre-arbitration sale of the claimant's investments, on the other.[792] The absence of special circumstances in the present case is discussed further below.

355. Regarding the second of the two exceptions noted above, many tribunals have held that the sale or transfer of an investment prior to arbitration will deprive a tribunal of jurisdiction unless it is clear that, in the relevant transaction, the investor retained the right to bring an investor-State claim. For example, the tribunals in *Gemplus v. Mexico* and *National Grid v. Argentina* both found that they had jurisdiction, despite the fact that the claimants had already sold their investment *prior* to the commencement of the arbitration. They reached such conclusion because there was clear language in the relevant transaction documents confirming that the claimant had retained the right to bring claims in relation to the investment.[793]

356. Specifically, in *Gemplus*, the tribunal examined the wording of a memorandum of understanding relating to the sale of the claimants' shares in the company that was

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[790] **RLA-0017**, *David R. Aven, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018 (Siqueiros, Baker, Nikken) ("***David R. Aven* (Award)**"), ¶ 301.

[791] **RLA-0017**, *David R. Aven* (Award), ¶¶ 298–99.

[792] **RLA-0017**, *David R. Aven* (Award), ¶ 300.

[793] **RLA-0018**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010 (Fortier, Gómez, Veeder) ("***Gemplus* (Award)**"), ¶¶ 5–33; **RLA-0012**, *National Grid plc* (Decision on Jurisdiction), ¶ 121.

the subject of the claimants' claims against Mexico. Such memorandum of understanding provided: "[Claimants] retain all rights they currently have in relation to the Claims [viz., the ICSID claims against Mexico] and there shall be no effect on such rights by virtue of the transfer of the Shares.'"[794] For the tribunal, such wording was sufficient to show that

> **[t]he legal effect of the [memorandum of understanding]**, as those contracting parties manifestly intended, **was such that [the claimant] Gemplus retained all rights to maintain its existing claims** as advanced in these proceedings against the Respondent under Article 9 of the France BIT.[795] (Emphasis added)

357. For its part, the tribunal in *National Grid* similarly found that the claimant had expressly retained the right to bring claims against Argentina in the transaction pursuant to which it sold the subsidiary to which its claims related.[796] Accordingly, the sale was held not to affect the tribunal's jurisdiction.

358. The corollary of the above principle—that in order for the investor to have standing there must be evidence that it retained the right to bring a claim—is that where the evidence shows that an investor has relinquished its claim (e.g., by selling the investment without retaining the corresponding arbitration rights), the tribunal will lack jurisdiction. The foregoing corollary was confirmed by the tribunal in *Daimler v. Argentina*, where the tribunal noted that an investor's right to bring an arbitral claim will be extinguished if the investor "relinquish[ed]" its right to bring that claim.[797] On the facts of that case, the tribunal found that the claimant had *not* relinquished its right to bring an ICSID claim, inter alia because (i) the transfer of the investment had been

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[794] **RLA-0018**, *Gemplus* (Award), ¶¶ 5–21.

[795] **RLA-0018**, *Gemplus* (Award), ¶¶ 5–33.

[796] **RLA-0012**, *National Grid plc (*Decision on Jurisdiction), ¶ 121.

[797] **RLA-0019**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (Dupuy, Brower, Janeiro) ("*Daimler Financial* ("***Daimler Financial* (Award)**"), ¶ 145 ("The Tribunal finds that it should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken **– provided that the investor did not otherwise relinquish its right to bring an ICSID claim**") (emphasis added).

made for a negative purchase price (i.e., the seller paid the buyer EUR 250 million to take ownership of the shares), which the tribunal concluded should "be read as an implied reservation of the ICSID claim" in favor of the claimant;[798] and (ii) the claimant and the buyer had *expressly* confirmed by subsequent agreement that they did *not* intend for the ICSID claims to be transferred to the buyer along with the investment.[799] The tribunal accordingly concluded that it did not lack jurisdiction.

359. The jurisprudence therefore shows that a claimant will lack standing if, before commencing arbitration, it has transferred its interest in the investment allegedly harmed by acts or omissions attributable to the State, unless (i) there are special circumstances, and/or (ii) the evidence shows that the claimant has (either expressly or impliedly) retained the right to bring claims for the alleged harm. In the present case, as discussed below, at the time that it sold its investment, Claimant did *not* retain the right to assert claims for the measures it is now invoking.

3. Claimant's disposal of its interest in Invicta deprives the Tribunal of jurisdiction

360. There is no dispute that the transfer of Claimant's interest in Invicta occurred prior to the commencement of the arbitration. Such transfer took place on 26 August 2019, whereas Claimant's Request for Arbitration was registered by ICSID on 30 October 2020. Thus, applying the legal principles discussed above, Claimant's transfer of its investment in Invicta deprives the Tribunal of jurisdiction, unless at least one of the two exceptions discussed above applies. In the present case, however, neither of those exceptions applies: (i) no special circumstances exist; and (ii) prior to commencing arbitration, Claimant evidently relinquished its rights to assert an arbitral claim with respect to its investment in Invicta, as there is no indication that Claimant retained such rights (either expressly or impliedly) at the time of sale of its Invicta shares.

[798] **RLA-0019**, *Daimler Financial* (Award), ¶ 153.

[799] **RLA-0019**, *Daimler Financial* (Award), ¶¶ 149–56.

a. There are no "special circumstances" in this case

361. It is not a viable argument for Claimant that, prior to instituting arbitral proceedings, acts or omissions by Peru forced it to transfer its interest. That argument would be unfounded for at least the following three reasons.

362. *First*, as discussed in the remainder of this Counter-Memorial, any damage suffered by Claimant arose purely as a result of its own actions, including (i) its failure to establish an amicable relationship with the Parán Community; and (ii) its entry into financing arrangements that exposed it to the risk of losing its investment if it failed to establish amicable relations with rural communities in the Project's area of direct influence.[800] None of those actions are attributable to Peru. There is therefore no "direct causation" between Peru's actions and Claimant's transfer of its investment.[801]

363. *Second*, Claimant could have included in the agreements pursuant to which it transferred its shares in Invicta—namely, the Pledge Agreement and the Share Allocation Agreement—an express provision reserving its rights to bring a claim against Peru with respect to its investment in Invicta. However, there is no evidence that it did so (or indeed that it even *attempted* to include such a provision in those agreements).

364. *Third*, the evidence shows that Claimant received a substantial benefit from the transfer of its ownership interest to PLI Huaura. Specifically, it shows that, following the transfer of its investment, Claimant entered into a Mutual Release Agreement on 22 July 2020 ("**Mutual Release Agreement**"), pursuant to which PLI Huaura agreed to release Claimant from its claims for liability under the PPF Agreement, which were originally quantified at USD 15.9 million.[802] Such a release could not have been secured without Claimant having first transferred its ownership interest in Invicta to PLI Huaura. This is evident from the fact that, under the Mutual Release Agreement,

[800] *See supra* Sections II.C, D, E.

[801] **RLA-0017**, *David R. Aven* (Award), ¶ 299.

[802] **Ex.C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., *et al.*, Notice of Enforcement, 24 July 2019, p. 2.

Claimant "acknowledge[d] and represent[ed] that . . . any shares in Invicta issued for or on behalf of AAGC have been transferred to PLI by virtue of the foreclosure of shares."[803] There is no indication or suggestion that Lupaka pledged and then transferred the shares at a discounted price in exchange for retaining the rights to bring a claim against Peru.

b. Claimant relinquished its rights to bring a claim

365. There is also no evidence in the record that, at the time Claimant transferred its interest in Invicta, it retained—either expressly or even impliedly—its right to bring a claim against Peru under the Peru-Canada FTA. In fact, Claimant curiously declined to include as an exhibit in this arbitration the legal instrument by means of which the transfer of its shares in Invicta was effected—namely, the Share Allocation Agreement dated 26 August 2019. Such exclusion is notable because that particular document appears to have been an attachment to a letter that *was* exhibited by Claimant with its Memorial, yet the attachment to the letter was not included.[804]

366. Moreover, there is no evidence to suggest that Claimant impliedly reserved its right to bring a claim when it transferred its interest in Invicta to PLI Huaura. Unlike in the *Daimler* case discussed above, where the tribunal interpreted the negative purchase price for the transfer of the investment as an implied reservation of the right to bring a claim, Claimant appears to have received a substantial benefit in return for the transfer of its interest in Invicta. As noted above, such benefit took the form of the

[803] **Ex. AC-0018**, Mutual Release, 22 July 2020, Section 5(a)(iii).

[804] **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L., (M. Brenneisen) to Invicta Mining Corp. S.A.C. (L. Bravo), 23 September 2019, p. 1 ("**I comply by attaching to the present letter a simple copy of the Share Allocation Agreement dated 26 August 2019**, by virtue of which Servicios Conexos Notreg EIRL, acting on behalf of Andean American Gold Corp and Gordon Lloyd Ellis in their capacity as Common Representative duly appointed pursuant to the aforementioned Pledge Agreement over Shares contract, **awarded in favour of PLI Huaura Holdings LP 100% of the shares issued by the company Invicta Mining Corp. S.A.C**.") (emphasis added). Peru will seek production of the Share Allocation Agreement during the document production phase in this arbitration, and reserves its right to supplement or amend its jurisdictional objection in light of the contents of that document (and/or any other evidence obtained through document production).

release of PLI Huaura's USD 15.9 million claim against Claimant, pursuant to the Mutual Release Agreement.

367. In any event, there is other evidence that indicates that, at the time that it transferred its interest in Invicta to PLI Huaura, Claimant did *not* retain its right to bring any claims with respect to the damage allegedly suffered by Invicta. As explained in **Section II.F.4** above, that transfer took place when PLI Huaura enforced its security under a written agreement ("**Pledge Agreement**") between the following parties: (i) PLI Huaura; (ii) Claimant's subsidiary, AAG (through which Claimant held its interest in Invicta); (iii) Claimant's director, Gordon Ellis (who also held shares in Invicta); and (iv) Invicta.[805] Pursuant to the Pledge Agreement, AAG and Mr. Ellis had pledged their shares in Invicta as security to PLI Huaura for the amounts provided by PLI Huaura to Invicta under the PPF Agreement.[806] Crucially, however, that pledge encompassed not only the shares in Invicta, but also

> **any right, title and interest that may derive from [the shares]** in favour of the Constituents [*i.e.*, AAG and Mr. Ellis], **whether present or future**, as long as this Pledge [over Shares] remains in force[.][807] (Emphasis added)

368. Further, Article 6.4 of the Pledge Agreement provided that

> [i]n the event of an Event of Default, **all voting and economic rights pertaining to the Pledged Shares may be exercised directly by the Secured Creditor** [*i.e.*, PLI Huaura] without the need for the transfer or award of the Pledged Shares[.][808] (Emphasis added)

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[805] **Ex. C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., *et al.*, Notice of Enforcement, 24 July 2019.

[806] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Art. 6.1.

[807] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Art. 6.1.

[808] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Art. 6.4.

369. Thus, via the Pledge Agreement, AAG and Mr. Ellis pledged not only the shares in Invicta themselves, but also all rights, titles, and interests—"whether present or future"—attaching to such shares.

370. PLI Huaura notified AAG and Mr. Ellis on 24 July 2019 that an Event of Default under the Pledge Agreement had taken place due to Invicta's failure to meet its obligations under the PPF Agreement.[809] PLI Huaura thus proceeded with the enforcement of its security over the shares in Invicta and associated rights under the Pledge Agreement. Pursuant to the Share Allocation Agreement, such enforcement ultimately resulted in the transfer of rights in Invicta from AAG and Mr. Ellis to PLI Huaura, on 26 August 2019.[810]

371. Claimant's claims in this case undoubtedly relate to "rights" that "derive from" and "pertain[] to" the shares that it formerly held in Invicta.[811] Indeed, such claims relate almost entirely to rights arising from Claimant's ownership interest in Invicta. The primary investments that Claimant alleges it made in Peru consist of its shares in Invicta, along with the assets and rights held by Invicta (including Invicta's concessions in the Invicta Project).[812] The alleged acts and omissions by Peru that form the basis of Claimant's claims in this arbitration relate to Invicta's inability to carry out mining activity under Invicta's Concessions.[813] Claimant also cites the transfer of its shares in Invicta on 26 August 2019 as the moment at which its losses crystallised,[814]

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[809] **Ex. C-0055**, Letter from PLI Huaura Holdings L.P. (L. Elías) to Servicios Conexos Notreg E.I.R.L., *et al.*, Notice of Enforcement, 24 July 2019, p.2 ("In accordance with section 11.2 of the Contract, we hereby communicate the occurrence of an Event of Default due to the failure of Lupaka Gold Corp. to meet its obligations under the Purchase Agreement").

[810] **Ex. C-0056**, Letter from Servicios Conexos Notreg E.I.R.L. to Invicta Mining Corp. (SPA), 23 September 2019.

[811] **Ex. R-0097**, Pledge Agreement between Andean American Gold Corp., Gordon Lloyd Ellis, Invicta Mining Corp. S.A.C. and PLI Huaura Holdings LP, 2 August 2016, Arts. 6.1, 6.4

[812] *See* Claimant's Memorial, ¶ 209, which lists as investments the shares in Invicta, "six mining concessions in Peru held by IMC" and "surface rights in the Project area held by IMC." The only investments that Claimant alleges it held directly are certain unidentified "attendant equipment and infrastructure" and "expenses incurred by Lupaka for exploration drilling, assaying and metallurgical tests among others."

[813] *See, e.g.*, Claimant's Memorial, ¶ 312.

[814] *See, e.g.*, Claimant's Memorial, ¶¶ 194–95.

and uses the date of such transfer as the valuation date for the purposes of its expert's quantum analysis.[815]

372. In sum, Claimant relinquished its rights to claim for any alleged harm to its erstwhile investment in Invicta, because (i) Claimant's rights to bring claims with respect to Peru's treatment in Invicta were pledged to PLI Huaura under the Pledge Agreement; (ii) such rights were then in fact transferred to PLI Huaura on 26 August 2019 (which is when the latter enforced its security under the Pledge Agreement); and (iii) Claimant did not at any time retain its right to bring claims against Peru for harm to Invicta.

373. Given all of the foregoing, and since (i) the transfer of shares occurred prior to the date of institution of the present arbitration, with no reservation by Claimant of any corresponding arbitration rights, and (ii) there are no special circumstances, Claimant is not a covered investor under the Treaty, and the Tribunal thus lacks jurisdiction *ratione personae*.

B. The Tribunal lacks jurisdiction *ratione materiae* because Claimant failed to comply with the waiver requirements under Article 823.1 of the Treaty

374. The Tribunal also lacks jurisdiction because Claimant has not provided a waiver on behalf of Invicta, as required by Article 823.1(e) of the Treaty. Such waiver is a condition precedent for commencing an arbitration under the Treaty.

375. Claimant commenced this arbitration pursuant to Article 819 of the Treaty,[816] which provides that investors may submit a claim to arbitration on their own behalf,[817]

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[815] *See, e.g.*, **CER-0001**, Expert Report of Edmond Richards and Erik van Duijvenvoorde, 1 October 2021, p. 6.

[816] Claimant's Memorial, ¶ 219.

[817] Article 819 of the Treaty reads as follows: "An investor of a Party may submit to arbitration under this Section a claim that the other Party has breached: (a) an obligation under Section A, other than an obligation under paragraph 4 of Article 802, Articles 809, 810 or 816; (b) an obligation under subparagraph 3(a) of Article 1305 (Competition Policy, Monopolies and State Enterprises - Designated Monopolies) or paragraph 2 of Article 1306 (Competition Policy, Monopolies and State Enterprises - State Enterprises), only to the extent that a designated monopoly or state enterprise has acted in a

subject to the conditions precedent set forth in Article 823.1. The latter provision states in relevant part as follows:

> A disputing investor may submit a claim to arbitration under Article 819 **only if**:
>
> . . .
>
> (e) the disputing investor **and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue** before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, **any proceedings with respect to the measure** of the disputing Party that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party. (Emphasis added)

376. Thus, not only must the investor itself waive the right to bring claims with respect to the relevant measures before any administrative tribunal, court, or other dispute settlement procedure, but *any enterprise in relation to which the investor claims* damage to the investor's interest *must also provide an equivalent waiver*. In the present case, Invicta falls precisely in that category: it is an enterprise in relation to which Claimant claims damages.

377. The relevant jurisprudence establishes that a failure to provide a required waiver (such as that in Article 823.1 of the Treaty) will deprive a tribunal of jurisdiction. For example, the tribunal in *Methanex v. U.S.A.* confirmed that a State's consent to arbitration under NAFTA will only be established once *all* of the preconditions and formalities contained in NAFTA Articles 1118–1121 are fulfilled. Such preconditions

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manner inconsistent with the Party's obligations under Section A, other than an obligation under paragraph 4 of Article 802, Articles 809, 810 or 816; or (c)a legal stability agreement referred to in paragraph 2 of this Article, and that the investor has incurred loss or damage by reason of, or arising out of, that breach."

include those under Article 1121.1(b) of NAFTA,[818] which is a virtually identical waiver requirement to that contained in Article 823.1(e) of the Treaty.

378. In this case, Claimant's claims relate to "damage to an interest in an enterprise of the other Party," namely Claimant's former interest Invicta, through which Claimant held the majority of its investments in Peru.[819] Thus, in accordance with Article 823.1(e) of the Treaty, Claimant was required to submit a waiver by Invicta of the latter's right to bring claims in other fora with respect to the relevant measures. However, Claimant failed to do so, as it only submitted a consent and waiver on *its own behalf*.[820]

379. Claimant does not deny that it has failed to submit a waiver by Invicta. However, as explained below, it seeks to evade or overcome the legal consequences of that failure by arguing that it is exempt from the requirement under Article 823.1 to provide a waiver from Invicta. Specifically, it argues that its submission of a waiver only with respect to itself "exhausts the requirement at Article 823.1(e) and Article 823.5 of the FTA."[821] The latter article provides a narrow exception to the waiver requirement under Article 823.1(e), stating that "[a] waiver from the enterprise under [Article 823.1](e) [in this case, Invicta] or 2(e) **shall not be required only where a disputing Party has deprived a disputing investor of control of an enterprise**" (emphasis added).

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[818] **RLA-0039**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (Veeder, Rowley, Christopher), ¶ 120. *See also* **RLA-0040**, *The Renco Group, Inc. v. Republic of Peru* [I], ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (Moser, Fortier, Landau), ¶ 189; **RLA-0041**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (van den Berg, Grigera Naón, Thomas) (finding that a defective waiver by the claimant under 10.18(2)(b) of the US-Peru Trade Promotion Agreement deprived the tribunal of jurisdiction).

[819] *See supra* Section III.A. *See also* **CER-0001**, Expert Report of Edmond Richards and Erik van Duijvenvoorde, 1 October 2021 ("**Accuracy Report**"), ¶ 4.36 ("In line with Article 812 of the FTA, we are instructed to assess damages incurred by Claimant as a result of Respondent's Alleged Breaches by reference to the FMV of its Investment in Peru (i.e., the FMV of the Invicta Project which, materially, is equivalent to the value of Claimant's shares in Invicta Mining Corp.) at the Valuation Date").

[820] Claimant's Memorial, ¶ 219; **Ex. C-0021**, Lupaka, Consent and Waiver in accordance with Article 823 FTA, 27 September 2020

[821] Claimant's Memorial, ¶ 220.

380. However, Article 823.5 does not apply in this case. As also discussed in **Sections II.F.4 and V** of this Counter-Memorial, Peru did not deprive Claimant of its control in Invicta. Rather, Claimant lost control of Invicta when PLI Huaura foreclosed on Claimant's subsidiary AAG's shares in Invicta. Such foreclosure was not caused by any actions of Peru, but rather was a consequence of Claimant's own conduct and its dispute with the Parán Community. Accordingly, Claimant cannot rely on Article 823.5 to exempt it from the requirement to provide a waiver from Invicta. Indeed, Claimant has not even attempted to support with any jurisprudence or doctrine its suggestion that it falls under the narrow exception under Article 823.5. Therefore, Claimant has failed to show that such provision exempts it from procuring and submitting a waiver by Invicta.

381. In conclusion, this Tribunal lacks jurisdiction *ratione materiae* with respect to all of Claimant's claims due to Claimant's admitted failure to submit a waiver by Invicta, as required under Article 823.1 of the Treaty.

IV. CLAIMANT'S CLAIMS LACK LEGAL MERIT

382. Even assuming that the Tribunal has jurisdiction over the present dispute (quod non), Claimant's claims should be dismissed for lack of legal merit.

383. Although Claimant argues that it should be entitled to an award under three separate provisions of the Treaty, its three claims center on the same single allegation: that Peru declined to accommodate Claimant's demand that Peru forcibly remove persons who were participating in the Access Road Protest. As demonstrated above in **Section II.B.2 and II.E**, however, Peru's conduct with respect to Claimant's investment was at all times reasonable, appropriate, and consistent with Peruvian and public international law, including the Treaty. Under the applicable Treaty standards, Peru's conduct therefore did not violate the Treaty.

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

384. It is axiomatic that a State may only be held liable under international law for actions and omissions that (i) are attributable to the State pursuant to international law; and (ii) constitute a breach of an international obligation.[822] In this section, Peru will demonstrate that the relevant requirements for attribution under international law are not met with respect to the actions of members of the Parán Community. The second of the above two elements (i.e., breach of an international obligation) is addressed in **Sections IV.B, IV.C, and IV.D** below.

385. The relevant international law principles in relation to attribution are articulated in the ILC Articles, which are widely recognized as a codification of customary international law.[823] Claimant accepts in its Memorial that the applicable principles of attribution are those enshrined in the ILC Articles.[824]

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[822] *See* **CLA-0003**, ILC, *Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 ("**ILC Articles**"), Art. 2. The relevant principles in relation to attribution are contained in ILC Articles 4–11.

[823] *See, e.g.*, **RLA-0007**, *Noble Ventures* (Award), ¶ 69; **RLA-0020**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (Stern, Landau, Cremades) ("***Gustav* (Award)**"), ¶ 171.

[824] Claimant's Memorial, ¶ 238.

386. While Claimant has not particularised which specific acts of the Parán Community members it believes are attributable to Peru (a problem which Peru will address later in this section), the main acts relied upon by Claimant appear to be (i) the 19 June 2018 Protest; and (ii) the Access Road Protest. In presenting this argument, the Claimant relies on ILC Article 5, which provides as follows:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[825]

387. As the party alleging that the acts of the Parán Community members are attributable to Peru pursuant to the principles codified in ILC Article 5, Claimant has the burden of proof to establish that the relevant legal test for attribution under that provision is met in this case.[826] However, Claimant has failed to meet such burden.

388. Without prejudice to the above, and reserving its rights, Peru will demonstrate below that the relevant legal standard for attribution in fact is not met in this case.

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[825] **CLA-0003**, ILC Articles, Art. 5.

[826] **CLA-0100**, *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (El-Kosheri, Goldman, Asante) ("***Asian Agricultural Products* (Final Award)**"), ¶ 56 ("The international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion"); **CLA-0100**, *Asian Agricultural Products* (Final Award), ¶ 58 (holding that foreign investors bore the burden to establish that "governmental forces" had caused the alleged destruction of property). *See also* **RLA-0021**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 (Robinson, Jacovides, Rubin), ¶ 311; **RLA-0022**,*Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999 (Böckstiegel, Fielding, Giardina), ¶ 84.

1. The relevant legal standard to establish attribution under ILC Article 5

389. Claimant has not articulated—let alone analysed and applied—the relevant test for attribution under ILC Article 5. That test comprises two requirements, both of which must be fulfilled in order for acts to be deemed attributable to the State.[827]

390. The *first requirement* is that the person or entity whose actions are allegedly attributable to the State must be "empowered to exercise governmental authority."[828] This is commonly referred to as the "functional" test for attribution, as it focuses on the functions carried out by the person or entity in question, rather than its structural status within the State apparatus.[829]

391. The ILC's commentary on the ILC Articles ("**ILC Commentary**") lists four factors for assessing whether a person or entity is empowered with governmental functions.[830] Such factors have been analysed further by Professor Crawford, who was the ILC's Special Rapporteur on State Responsibility at the time the ILC Articles were drafted. The relevant factors for purposes of the first requirement, and Professor Crawford's analysis of them, may be summarised as follows:

a. The *first* factor is the content of the powers conferred on the entity. In relation to this factor, Professor Crawford suggests that it may be instructive to examine whether the power would ordinarily be reserved by the State for itself, or whether a private person could legitimately carry out the relevant function without the government's permission.[831]

b. The *second* factor is the manner in which the relevant power is conferred. In relation to this criterion, in order for the entity to be empowered with

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[827] **CLA-0003**, ILC Articles, Art. 5. *See also* **RLA-0023**, *Bosh International, Inc, et al., v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012 (Griffith, McRae, Sands) ("***Bosh International* (Award)**"), ¶ 164; **RLA-0004**, *Tulip Real Estate* (Award), ¶ 292.

[828] **CLA-0003**, ILC Articles, Art. 5.

[829] *See* **RLA-0024**, J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART (2014) ("**Crawford**"), p. 127.

[830] **CLA-0018**, Draft Articles on Responsibility of States for Internationally Wrongful Acts (with commentaries), United Nations, 2001, p. 43, ¶ 6 ("**ILC Commentary**").

[831] **RLA-0024**, Crawford, p. 130.

governmental powers, there must be a specific *delegation* of the power in question to the person or entity; mere *authorisation* of the relevant conduct under general law is not sufficient.[832]

c. The *third* factor is the purpose for which the powers are conferred. The relevant question with respect to this factor is whether the powers have been conferred to advance sovereign objectives or private ones.[833]

d. The *fourth* factor is the level of accountability that the person or entity has to the State's government. This factor concerns the extent to which the State's government is entitled to supervise the actions of the relevant person or entity.[834]

392. The above factors are neither prescriptive nor exhaustive. The ILC Commentary emphasises that the analysis of the first requirement under ILC Article 5 (i.e., whether a person or entity is empowered with governmental functions) will depend on the particular features of the legal and societal context in which the individual or entity operates.[835] As Professor Crawford notes, "[t]here is no consensus as to precisely what constitutes 'governmental authority' – the concept tends to depend 'on the particular society in question, its history and traditions.'"[836]

393. The *second* requirement of the attribution test under ILC Article 5 is that the relevant person or entity must have been "acting in [a governmental] capacity in the particular instance."[837] It follows from this requirement that it is not sufficient for a party seeking to attribute actions to a State to establish that the relevant person or entity was exercising governmental functions as a general matter. Rather, such party must establish that the relevant person or entity was *actually* exercising those functions

[832] **RLA-0024**, Crawford, pp. 130–31.
[833] **RLA-0024**, Crawford, p. 131.
[834] **CLA-0018**, ILC Commentary, p. 43, ¶ 6. **RLA-0024**, Crawford, p. 131.
[835] **CLA-0018**, ILC Commentary, p. 43, ¶ 6.
[836] **RLA-0024**, Crawford, p. 129.
[837] **CLA-0003**, ILC Articles, Art. 5.

when carrying out the allegedly unlawful act.[838] This requires a careful examination of the relevant facts, and the capacity in which the person or entity carried out the allegedly unlawful acts. Where acts concern merely private or commercial activity, they will not be attributable to the State, even if the person or entity is otherwise empowered to carry out governmental functions.

394. Various investment treaty tribunals have applied the above principles to the actions of entities allegedly empowered to carry out governmental functions. In doing so, such tribunals have distinguished between (i) allegedly wrongful actions carried out in the exercise of a governmental function, which were attributable to the State; and (ii) allegedly wrongful actions that were merely private or commercial in nature, which were not attributable to the State. Some tribunals have articulated the distinction between these two categories of actions in terms of the classic dichotomy under international law between *acta iure imperii* and *acta iure gestionis*.[839]

395. An important consideration when analysing whether a person or entity's acts are governmental or private in nature is whether the person or entity merely behaved in a way that any private person could have in the relevant circumstances. If that is the case, then the relevant acts will *not* be attributable to the State. For example, in the *Jan de Nul v. Egypt* case, the tribunal considered whether the actions of the Suez Canal Authority in refusing to grant an extension of time to a party participating in a tender process were attributable to Egypt. The tribunal concluded that such actions were *not* attributable, noting that

> the fact that the subject matter of the Contract related to the core functions of the SCA, i.e., the maintenance and improvement of the Suez Canal, is irrelevant. The Tribunal must look to the actual acts complained of. **In its dealing with the Claimants during the tender process, the SCA acted like any contractor trying to achieve the best price for the services it was seeking. It did not act as a State entity.** The same applies to the SCA's

[838] **CLA-0018**, ILC Commentary, p. 43, ¶ 5 ("If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage.").

[839] *See, e.g.*, **RLA-0020**, *Gustav* (Award), ¶¶ 250, 255, 266; **RLA-0023**, *Bosh International* (Award), ¶ 178.

> conduct in the course of the performance of the Contract.[840] (Emphasis added)

396. Finally, in order for actions to be attributable under ILC Article 5, "[t]he internal law in question must specifically authorize the conduct as involving the exercise of public authority."[841] It is therefore not sufficient to establish that the relevant activity was permitted "as part of the general regulation of the affairs of the community."[842] For this reason, the ILC Commentary concludes that ILC Article 5 encompasses a "narrow category" of attributable conduct.[843]

2. The legal standard for attribution under ILC Article 5 has not been met in this case

397. Applying the above principles to the facts of the instant case, the two key questions that the Tribunal should examine are the following:

- **Question 1**: Were the Parán Community or its members who carried out the actions of which Claimant complains empowered to exercise elements of governmental authority?
- **Question 2**: Were such actions actually carried out in the exercise of governmental authority?

398. In order for attribution to be established in this case, the Claimant must demonstrate that both of the above questions should be answered in the affirmative. As discussed in the sections that follow, however, the evidence shows that the answer to both of those questions is "no." As explained in more detail in this section, (i) the Parán Community and its members were *not* empowered to exercise elements of governmental authority (**subsection 3(a)**), and (ii) the actions of which Claimant complains were *not* carried out in the exercise of governmental authority (**subsection**

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[840] **RLA-0025**, *Jan de Nul N.V., et al., v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (Kaufmann-Kohler, Mayer, Stern), ¶ 169. *See also* **RLA-0004**, *Tulip Real Estate* (Award), ¶ 276 ("purely contractual conduct per se does not amount to (wrongful) action of the State.").

[841] *See* **CLA-0018**, ILC Commentary, p. 43, ¶ 7.

[842] *See* **CLA-0018**, ILC Commentary, p. 43, ¶ 7.

[843] *See* **CLA-0018**, ILC Commentary, p. 43, ¶ 7.

3(b)). In fact, the Parán Community never "purport[ed] to act on behalf of the State,"[844] and at no point did Claimant harbor any illusion—let alone a belief—that the Parán Community had done so (**subsection 3(c)**). For all of these reasons, the Tribunal should reject Claimant's attempt to cast as international law violations what in reality are merely private grievances concerning harm to its investment.

a. **Question 1**: Were the Parán Community or its members carrying out the allegedly unlawful actions empowered to exercise elements of governmental authority?

399. The answer to this question is *no*. Neither the Parán Community nor its members exercise any governmental functions. Claimant's argument that the relevant actions in this case were carried out by persons who were empowered to exercise elements of governmental authority fails, for at least the following three reasons.

400. *First*, Claimant has failed to cite any precedent to support the proposition that an indigenous or rural community should be characterised as empowered to exercise elements of governmental authority. In fact, the relevant authorities contradict that proposition. (The treatment of this issue under Peruvian law is discussed further below.)

401. *Second*, while the precise status of indigenous communities as a matter of public international law is as yet unsettled, the developing jurisprudence does not support the argument that an indigenous community is empowered to exercise elements of governmental authority. In most jurisdictions, such communities have a special status that is separate from the State in which they reside, and such status does not involve the conferral or delegation of governmental powers.

402. *Third*, Peruvian law does not support Claimant's argument that the Parán Community is empowered to exercise elements of governmental authority. The Parán Community is an autonomous rural community that—in common with many indigenous communities worldwide—(i) enjoys certain special rights under Peruvian law, including in relation to its ancestral territory and the administration of community

[844] **RLA-0024**, Crawford, p. 137.

matters, but (ii) does not exercise governmental functions. Moreover, even if Claimant could establish that the Parán Community *as a whole* is empowered to exercise elements of governmental authority (quod non), Claimant has not established that the *individual community members* carrying out the alleged actions on which its claims are based were empowered to exercise governmental authority.

(i) Claimant has not cited any precedent to support its arguments under ILC Article 5

403. Claimant has not cited any authority—whether in investment treaty or customary international law jurisprudence, public international law doctrine, or otherwise—for the proposition that an indigenous community is inherently empowered to exercise governmental functions. Nor could it; so far as Peru is aware, there is no such authority. In fact, Peru is unaware that any claimant in an investment treaty case has *ever* sought to argue that the actions of an indigenous community are attributable to the State respondent. Investor-State cases involving the actions of indigenous communities have instead primarily been based on the entirely different proposition—also advanced by Claimant in this case—that the State breached its international law obligations by failing to take appropriate action to address disruption of an investor's activities by an indigenous community.[845] The lack of any precedent for a claimant arguing that the actions of an indigenous community are *a fortiori* attributable to a State—let alone for a claimant actually prevailing on such an argument—illustrates the lack of legal support for Claimant's case.

404. The international investment tribunals that have addressed the relationship between an indigenous community and a State (including Peru) have concluded that the indigenous community is *distinct* from the State in question, i.e., the exact opposite of what Claimant argues in this case. For example, in *Bear Creek v. Peru*—a case that was brought under the exact same treaty as in this case, and that also involved the actions of indigenous communities—the tribunal noted that its mandate was merely to

[845] *See, e.g.*, **CLA-0086**, *Bear Creek* (Award); **CLA-0097**, *South American Silver Ltd v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Award, 22 November 2018 (Jaramillo, Vicuña, Guglielmino) ("***South American Silver* (Award)**").

address the conduct of the State and its government, not that of the indigenous communities in question, since such communities were not parties to the arbitration. The tribunal's implication/assumption was clearly therefore that the indigenous communities were *not* part of the State or government. Specifically, the tribunal noted that

> [t]he indigenous communities, irrespective whether they were in favor of or against the Project, are not respondent party in this arbitration. Rather, the State of Peru and its Government are Respondent, and it is their conduct which the Tribunal has to decide upon.[846]

405. In *Von Pezold v. Zimbabwe* – a case which comprised two conjoined arbitrations before two identically composed tribunals – the claimants had opposed an application by four indigenous communities to submit an *amicus curiae* brief, on the basis *inter alia* that the indigenous communities were "State organs."[847] In support of that argument, the claimants had relied on (i) the fact that the chiefs of the relevant communities were appointed by the Zimbabwean Government; and (ii) the functions of the leaders of the indigenous communities, which were prescribed in detail in an act of the Zimbabwean parliament (namely, the Zimbabwe Traditional Leaders Act 1998). Under that Act, the functions of the chiefs of the indigenous communities in question included "carrying out . . . the functions of a chief in relation to provincial assemblies, the Council and the overall leadership of his area," "adjudicating in and resolving disputes relating to land in his area," and "taking charge of traditional and related administrative matters in resettlement areas, including nominating persons for appointment as headmen by the Minister."[848] The Act further provided that "[i]n the exercise of his functions, a chief shall have the powers of a justice of the peace in terms of any law."[849] Notwithstanding the foregoing, the tribunals rejected the claimants'

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[846] **CLA-0086**, *Bear Creek* (Award), ¶ 666.

[847] **RLA-0026**, *Bernhard von Pezold, et al., v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No.2, 26 June 2012 (Fortier, Williams, Chen) ("***Bernhard von Pezold* (Procedural Order No. 2)**"), ¶¶ 29, 51.

[848] **RLA-0027**, Zimbabwe Traditional Leaders Act [Chapter 29:17], 1998, Section 5(1).

[849] **RLA-0027**, Zimbabwe Traditional Leaders Act [Chapter 29:17], 1998, Section 5(2).

arguments, concluding the following: "[The tribunals are] not persuaded on the basis of the materials before them that the functions of the chiefs of the indigenous communities are functions of the government."[850]

(ii) The special status of indigenous communities under public international law is not consonant with the notion that indigenous communities exercise governmental functions

406. Public international law in relation to the status and functions of indigenous communities does not support Claimant's case. While the relevant jurisprudence regarding indigenous communities is still developing, as discussed in further detail below the emergent principles demonstrate that indigenous communities (i) have a special status under public international law, (ii) are considered non-State actors, (iii) do not fit the traditional definition of States or governments, and (iv) do not rely for their self-governance on delegated authority from the State or government within which they reside. All of these features of indigenous communities' role, and of their treatment under international law, are inconsistent with Claimant's argument that an indigenous community should be considered an entity empowered with governmental authority.

407. *First,* it is generally accepted that indigenous communities have a separate and independent existence from the overall societal and political framework of the State in which they reside. They typically manage their affairs in accordance with their own unique social and institutional framework, which predates the formation of the State. This is reflected for example in ILO Convention 169, which is the principal legally binding convention that sets out the rights of indigenous peoples. As noted above, such convention has been ratified by Peru.[851] Article 1 thereof provides as follows:

> This Convention applies to:
>
> (a) tribal peoples in independent countries **whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is**

[850] **RLA-0026**, *Bernhard von Pezold* (Procedural Order No. 2), ¶ 52.

[851] *See supra* Section II.B.2.

> **regulated wholly or partially by their own customs or traditions or by special laws or regulations**;
>
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, **retain some or all of their own social, economic, cultural and political institutions**.[852] (Emphasis added)

408. In a similar vein, the UN Special Rapporteur on Discrimination against Indigenous Populations, José Cobo, noted the following in a study widely regarded as seminal in the field:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves **distinct from other sectors of the societies now prevailing on those territories, or parts of them**. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with **their own cultural patterns, social institutions, and legal system**.[853] (Emphasis added)

409. Thus, indigenous communities are distinct from the society and the State in which they live. To the extent that indigenous communities administer their own affairs through their own institutional apparatus, this merely reflects their ancestral rights and societal structures, as well as their right to self-determination.[854] It does not,

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[852] **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, Art. 1.

[853] **RLA-0098,** J. Martinez Cobo, "*Study of the Problem of Discrimination Against Indigenous Population*," UNITED NATIONS, 1987.

[854] *See* **RLA-0030**, UNDRIP, Art. 4 ("Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."); **RER-0002**, Vela Expert Report, ¶ 59.

however, reflect any conferral of governmental authority from the State. As one commentator aptly summarised,

> the sovereignty and self-government models [of indigenous communities] are characterised by the recognition of an **inherent indigenous authority** to make laws over a defined territory. **These indigenous governments do not rely on delegated authority from settler government legislation**.[855] (Emphasis added)

410. This separation between the institutions of indigenous communities and the State apparatus is reflected in UNDRIP, which provides that in order to obtain the free, prior informed consent of indigenous communities, the State shall "consult and cooperate in good faith with the indigenous peoples concerned **through their own representative institutions**"[856] (emphasis added). This language indicates that the State and indigenous peoples are separate from each other, and that the representative institutions of indigenous peoples do not form part of the State, but act as a liaison between the State and the indigenous community in question.

411. *Second*, it is acknowledged in various international law instruments, jurisprudence, and doctrinal commentary that indigenous communities constitute a specific category of non-State actor under international law, and that they may enter into international agreements in their own right. As the commentator William Thomas Worster notes:

> The ICJ, UN High Commissioner for Human Rights, and several states (at least historically) consider that indigenous peoples can be party to international agreements. The ICJ, however, refuses to hold that these entities are states, leading to the conclusion that **these collective non-state actors are a special case of legal person and have at least sufficient personality for certain agreements**.[857] (Emphasis added)

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[855] **RLA-0029**, B. Richardson, *et al*., "*Chapter 11: Indigenous Self-Determination and the State*," INDIGENOUS PEOPLES AND THE LAW (2009), p. 293.

[856] **RLA-0030**, UNDRIP, Art. 19.

[857] **RLA-0042**, W. Worster, "*Relative Legal Personality of Non-State Actors*," BROOKLYN JOURNAL OF INTERNATIONAL LAW (2016), pp. 225–26.

412. The fact that indigenous peoples can enter into treaties in their own right is also acknowledged in Article 37 of UNDRIP, which provides that:

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.[858]

413. As non-State actors who may enter into international agreements independently of the States in which they reside, indigenous communities should not be considered as "parastatal entities"[859], empowered with governmental functions conferred on them by a State (which are the focus of ILC Article 5). It would be incongruous to recognise indigenous communities as non-State actors that can enter into international agreements independently of the States in which they reside, yet at the same time treat them—as Claimant does—as empowered to exercise elements of the governmental authority of those very States.

414. *Third,* one of the main features of the international instruments concerning indigenous communities is that such instruments impose obligations on States vis-à-vis indigenous communities. For example, as noted in **Section II.B.2** above, several international instruments articulate States' obligation to provide indigenous communities with the right to "free, prior and informed consent" with respect to measures that would affect them.[860] States are also required to provide effective mechanisms for redress to indigenous communities with respect to the infringement of such communities' rights. For example, Article 8 of UNDRIP provides that "States shall provide effective mechanisms for prevention of, and redress" for a wide variety of actions, for examples "[a]ny form of forced assimilation or integration" and "[a]ny

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[858] **RLA-0030**, UNDRIP, Art. 37(1).

[859] **CLA-0018**, ILC Commentary, p. 42, ¶ 1 ("The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.").

[860] **RLA-0030**, UNDRIP, Art. 10; **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, Arts. 2(2), 16(2).

form of propaganda designed to promote or incite racial or ethnic discrimination directed against them."[861] Such obligations underscore the fact that indigenous communities should be considered as separate from the State in which they reside, rather than entities empowered by the State to effect sovereign functions.

415. *Fourth*, various legal instruments refer to "co-operation" or "partnership" between indigenous communities and States. For example, the UNDRIP notes in its preamble that "treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened **partnership between indigenous peoples and States**"[862] (emphasis added). Further, Article 15 of the same declaration provides that

> States shall take effective measures, **in consultation and cooperation with the indigenous peoples concerned**, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.[863] (Emphasis added)

416. The notions of "partnership" and "co-operation" between States and indigenous communities suggest both (i) a clear delineation and separation between indigenous communities and the State, and (ii) a level of structural equality in the relationship between them.[864] That is not consistent with the notion, advanced by Claimant in this arbitration, that an indigenous community is a vessel for the exercise of governmental power.

417. In its Memorial, Claimant simply fails to grapple with the unique nature and status of indigenous communities under public international law. For example, Claimant relies on the ILC Commentary to attempt to draw an analogy between members of the Parán

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[861] **RLA-0030**, UNDRIP, Art. 8.

[862] **RLA-0030**, UNDRIP, Preamble.

[863] **RLA-0030**, UNDRIP, Art. 15(2). *See also* **RLA-0030**, UNDRIP, Art. 31(2) ("**In conjunction with** indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights") (emphasis added).

[864] *See* **RLA-0043**, R. Barsh, "*Indigenous Peoples in the 1990s: From Object to Subject of International Law*," HARVARD HUMAN RIGHTS JOURNAL (1994), p. 34.

community and "private security firms contracted to act as prison guards" or "a railway company to which certain police powers have been granted."[865] On their face such analogies do not even come close to forming a legitimate basis for comparison with the nature and functions exercised by indigenous communities (either more generally, or in the specific circumstances in this case).

(iii) Peruvian law does not support Claimant's argument that the Parán Community and its members are empowered to exercise elements of governmental authority

418. Claimant's arguments are also contrary to Peruvian law. Peru will discuss below: (i) the rights, powers and functions of a rural community under Peruvian law; and (ii) the reasons why a proper analysis of the rights and prerogatives of rural communities leads to the conclusion that a community and its members are *not* empowered to exercise elements of governmental authority.

(a) The rights and prerogatives of a rural community under Peruvian law

419. As discussed in **Section II.B.1** and the Expert Report of Daniel Vela, Peruvian law recognises rural communities as having separate legal personality and enjoying certain rights, particularly with respect to the territory in which they reside.[866] The status and rights of rural communities are even enshrined in the Peruvian Constitution. Specifically, Article 89 thereof provides:

> The Rural and Native Communities have legal personality and are juridical persons. They are autonomous in their organization, in communal work and in the use and free disposal of their lands, as well as in economic and administrative matters, within the framework established by law. The land is not subject to any statute of limitations except in the case of abandonment as provided for in the previous article.[867]

[865] Claimant's Memorial, ¶ 247 (*citing* **CLA-0018**, ILC Commentary, commentary on Article 5, ¶¶ 2, 5).
[866] **RER-0002**, Vela Expert Report, ¶¶ 22–23, 43–48; *see also*, **RER-0001**, Meini Expert Report ¶¶ 47–49.
[867] **Ex. C-0023**, the Constitution, Art. 89.

420. The rights enjoyed by rural communities reflect the special ancestral ties that rural communities—in common with many indigenous communities worldwide—have with their lands.[868] The fundamental importance of such ties is reflected in Article 2 of the Rural Communities Regulation, which provides that

> **Rural Communities are organisations of public interest, with legal existence and legal personality**, integrated by families that inhabit and control certain territories, **linked by ancestral, social, economic and cultural ties, expressed in the community property of the land**, community work, mutual assistance, democratic government and the development of multi-sectoral activities, whose aims are directed towards the fulfilment of their members and the country.[869] (Emphasis added)

421. In order for a rural community to formalise its legal status under Peruvian law, and to have its collective rights and functions with respect to the territory in which it resides formally recognised, a rural community must register with the government. To obtain that registration, the rural community must show that it meets certain requirements, including the fulfilment of the criteria contained in Article 3 of the Rural Communities Regulation (cited above) and "possession of its territory."[870]

422. The specific functions of rural communities under Peruvian law are enunciated in the Rural Communities Law, Article 4 of which provides:

> The Rural Communities have competence to:
>
> a) Draw up and implement their integral development plans: agricultural, artisanal and industrial, promoting the participation of the community members;
>
> b) Regulate access to use of the land and other resources by its members;

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[868] *See, e.g.*, **RLA-0030**, UNDRIP, Art. 25 ("Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.").

[869] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 2.

[870] **Ex. C-0025**, Supreme Decree No. 008-91-TR, Approval of Regulation of the General Law of Rural Communities, 12 February 1991, Art. 3.

> c) Keep the communal register and define the areas of the population centres and those intended for agricultural, livestock, forestry, protection and other uses;
>
> d) Promote forestation and reforestation in regions suitable for forestry;
>
> e) Organize the working regime of their members for communal and family activities that contribute towards the best utilization of their assets;
>
> f) Centralize and arrange with public and private bodies the support services for production and any other services required by their members;
>
> g) Set up communal and multicommunal enterprises and other forms of associations;
>
> h) Promote, coordinate and support the development of civic, cultural, religious, social and other activities and festivities that correspond to their values, practices, customs and traditions; and
>
> i) Any others indicated by the Community Statutes.[871]

423. The Rural Communities Law recognises certain property rights to which rural communities are entitled with respect to their ancestral lands, including that: (i) rural communities' lands "cannot be seized or proscribed," and are inalienable;[872] and (ii) rural communities have preferential rights with respect to the acquisition of lands adjoining their own.[873] The Rural Communities law also prescribes certain basic parameters for the rural communities' management of their lands, including that

> Taking possession of land within the Community is prohibited. Each Community shall keep a land use register in which it shall record the family plots and their users. Each Rural Community shall determine the use of its land, for community, family or mixed purposes.[874]

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[871] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art.4.

[872] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 7.

[873] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 10.

[874] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 11.

424. The Rural Communities Law further provides that a rural community has certain governing bodies that carry out the prerogatives of the rural community prescribed by law.[875] The powers of each these governing bodies are set out in detail in the Rural Communities Law and Rural Communities Regulation.[876]

425. One of the powers of rural communities that is highlighted by Claimant in its Memorial is their right to establish "*Rondas Campesinas*," or rural patrols. The main purposes and prerogatives of the *Rondas Campesinas* are set out in Law No. 27908 and Supreme Decree No. 025-2003-JUS. Such laws explain that the purpose of the *Rondas Campesinas* is to exercise rural communities' rights of self-defence over their territory and property, and to co-operate with the authorities of the Peruvian Government where necessary.[877] In addition, the *Rondas Campesinas* may act as non-judicial conciliators of disputes that may arise in a rural community's territory[878] in relation to a limited range of issues, namely "possession, usufruct of communal property, property, and the use of the different communal resources."[879] When acting in such a capacity, the *Rondas Campesinas* must "respect the rights enshrined in the Universal

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[875] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 16.

[876] **Ex. R-0052**, Law No. 24656, 13 April 1987, Arts. 16, 18, 19; **Ex. C-0025**, Supreme Decree No. 008-91-TR, Approval of Regulation of the General Law of Rural Communities, 12 February 1991, Art. 63.

[877] *See* **Ex. R-0116**, Law No. 27908, 6 January 2003, Art. 1 (providing that the *Rondas Campesinas* carry out "functions related to security and peace within their territorial area"), Art. 8 ("In order to carry out their duties, the *Rondas Campesinas* coordinate with the political, police, municipal authorities, representatives of the Ombudsman's Office and others, within the framework of national legislation. In addition, they may establish coordination with rural social organizations and private entities within their local or regional area or nationally."). *See also* **Ex. R-0103**; Supreme Decree No. 025-2003-JUS, 29 December 2003, Art. 12 (a) (providing that one of the functions of the *Rondas Campesinas* is to "[c]ontribute to the defense of the physical, moral, and cultural integrity of the members of the rural community, native community, village, or other population center, in order to maintain the peace and security of the population, as well as to contribute to the progress of its people.") and Art, 12(h) (providing that the *Rondas Campesinas* "[c]oordinate, within the framework of national legislation, with the political, police, municipal, and regional authorities, the representatives of the Ombudsman's Office, and other agencies of public administration.").

[878] **Ex. R-0116**, Law No. 27908, 6 January 2003, Art. 1, "[The *Rondas Campesinas* carry out extrajudicial conciliation functions in accordance with the Constitution and the Law; **Ex. R-0103**; Supreme Decree No. 025-2003-JUS, 29 December 2003, Art. 1 ("[The Rondas Campesinas] collaborate in the resolution of conflicts and perform functions involving extrajudicial conciliation.").

[879] **Ex. R-0103**; Supreme Decree No. 025-2003-JUS, 29 December 2003, Art.13.

Declaration of Human Rights, ILO Convention No. 169, the Constitution, and the law."[880]

426. Finally, a rural community is permitted—through its rural patrols or otherwise—to exercise "jurisdictional functions" pursuant to Article 149 of the Peruvian Constitution.[881] This allows rural communities to resolve disputes that may arise within their territory, but respecting fundamental rights and in coordination with the Peruvian judiciary. None of the vested rights and prerogatives described above lead to the conclusion that rural communities exercise elements of governmental authority.

(b) A rural community is not empowered to exercise elements of governmental authority

427. As discussed in **Section III.A.1** above, the ILC Commentary lists four factors for assessing whether a person or entity is empowered to exercise governmental authority.[882] Peru will address each of these factors in turn below in relation to the Parán Community, and demonstrate that the Parán Community and its members are *not* empowered to exercise elements of governmental authority. Peru will then explain why the evidence and arguments cited by Claimant do not satisfy the relevant legal standard.

(1) The application of the factors listed in the ILC Commentary demonstrates that the Parán Community is not empowered to exercise elements of governmental authority

428. With respect to the *first* factor mentioned in the ILC Commentary on Article 5, (viz., the content of the powers possessed by the person or entity), as the analysis in the previous section demonstrates, the legal framework in relation to rural communities in Peru is primarily designed to recognise the rights of rural communities with respect to their ancestral lands. Accordingly, the powers of the rural community relate to the exercise of the rural community's rights over these lands, including the management

[880] **Ex. R-0103**; Supreme Decree No. 025-2003-JUS, 29 December 2003, Art.13.

[881] **Ex. C-0023**, the Constitution, Art. 149.

[882] **CLA-0018**, ILC Commentary, p. 43, ¶ 6.

and administration thereof, and the use thereof by members of the rural community.[883] For example, the prerogatives of rural communities include "regulat[ing] access to the use of land and other resources by [the rural community's] members"[884] and maintaining "a land use registry where family plots and their users are registered."[885] Rather than constituting delegated governmental authority, such powers relate to the exercise and administration by members of a rural community—who are also private citizens—of collective, private property rights. As the Peruvian Constitution and the Rural Communities Law acknowledge, these property rights stem from the inherent rights of rural communities with respect to the lands they possess and with which they have an important cultural relationship.[886]

429. Rural communities' powers also relate to the promotion of their cultural identity, as reflected in Article 4(h) of the Rural Communities Law, which lists among the functions of a rural community that of "[p]romot[ing], coordinat[ing] and support[ing] the development of civic, cultural, religious, social and other activities and festivities that correspond to their values, practices, customs and traditions."[887] Such functions are cultural, rather than governmental in nature.

430. In relation to *Rondas Campesinas*, as noted above, they exist to protect a rural community's territory and property.[888] In addition, they may act as conciliators with respect to disputes, but such power (i) may only be exercised with respect to matters that arise within the territory of a rural community, (ii) is expressly stated to be "extrajudicial" (i.e., it does *not* constitute a judicial function) and (iii) relates only to specific categories of property dispute, namely "matters related to possession, usufruct of communal property, property, and the use of the different communal

[883] **RER-0001**, Meini Expert Report ¶¶ 47–52; **RER-0002**, Vela Expert Report, ¶¶ 21–25, 42–48, 52.
[884] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 4(c).
[885] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 11.
[886] **Ex. C-0023**, the Constitution, Art. 89; **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 2.
[887] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art. 4(h).
[888] **Ex. R-0100**, Law No. 24571, 6 November 1986.

resources."[889] The aforementioned powers merely constitute a limited right on the part of the rural communities to defend their collective property rights and administer disputes that may arise with respect to such property rights.

431. Moreover, the relevant legislation makes it clear that the *Rondas Campesinas* act as *interlocutors* with the State on behalf of rural communities, rather than forming part of the State apparatus. For example, Article 12(e) of Supreme Decree No. 025-2003-JUS provides that a *Ronda Campesina* "[a]ct[s] as a spokesperson in interactions with the State"[890], and Article 1 of Law No. 27908 provides that *Rondas Campesinas* "can establish dialog with the State." Such provisions further emphasise the separation between rural communities (and the *Rondas Campesinas*) on the one hand, and the Peruvian State on the other.

432. Regarding the *second* factor (viz., the nature of the conferral of the relevant powers), the relevant legal framework does not *confer* on rural communities any powers as such. Rather, as Article 1 of the Rural Communities Law emphasises, Peruvian law merely "recognises" the rights of rural communities.[891] Rural communities can then have their rights formalised by registering as a rural community pursuant to Article 2 of the Rural Communities Regulation. This reflects the fact that such rights *already existed* prior to the promulgation of the Rural Communities Law; the purpose of the Rural Communities Law and other instruments is therefore to acknowledge and codify such rights. As rural communities expert, Mr. Vela confirms, rural communities predate the establishment of the colonial State in Peru, and their rights were developed within the communities themselves, rather than being conferred by, or delegated from, the Peruvian Government.[892]

433. Turning to the *third* of the above factors (viz., the purpose of the relevant powers), even if it could be said that Peruvian law confers powers on rural communities (quod

[889] **Ex. R-0116**, Law No. 27908, , 6 January 2003, Art. 1; **Ex. R-0103**; Supreme Decree No. 025-2003-JUS, 29 December 2003, Art. 13. *See also* **RER-0002**, Vela Expert Report, ¶¶ 61–64.

[890] **Ex. R-0103**; Supreme Decree No. 025-2003-JUS, 29 December 2003, Art. 12(e).

[891] **Ex. R-0052**, Law No. 24656, 13 April 1987, Art.1.

[892] **RER-0002**, Vela Expert Report, ¶¶ 42–43, 56–57.

non), the purpose of such powers is to allow rural communities to exercise their collective property rights and promote their cultural heritage, not to pursue any sovereign purpose. In fact, the purpose behind the Rural Communities Law and Rural Communities Regulation is to allow rural communities to exercise their rights and administer their affairs independently of the sovereign powers of the Peruvian Government.

434. In relation to the *fourth* factor (viz., the level of supervision exercised by the State), the Peruvian Constitution recognises that rural communities are "autonomous in their organization."[893] Rural Communities therefore conduct their affairs free from governmental supervision.[894] Moreover, neither the Rural Communities Law nor the Rural Communities Regulation confer on the Peruvian Government any power to appoint, dismiss, or otherwise direct or supervise the governing bodies of a rural community. Rather, such governing bodies are appointed by the members of the rural communities themselves, and exercise their functions independently, in accordance with Peruvian law.[895] In fact, as Peru's expert, Dr. Meini confirms, the Peruvian State would incur legal liability if any of its organs or instrumentalities were to interfere with the autonomy of a rural community.[896]

435. Finally, the fact that rural communities are not empowered with the exercise of governmental authority is confirmed by the Peruvian law framework regarding the attribution of criminal responsibility to the State for the acts of officials. As Dr. Meini explains, under Peruvian law, the State may be held liable for the actions of persons or entities that are either (i) *de jure*; or (ii) *de facto* public officials.[897] With respect to the first category of public officials (i.e., *de jure* officials) Article 425 of the Peruvian

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[893] **Ex. C-0023**, the Constitution, 1993, Art. 89.

[894] **RER-0002**, Vela Expert Report, ¶ 48, fn. 9; *see also*, **RER-0001**, Meini Expert Report, ¶ 52.

[895] *See, e.g.,* **R-0052**, Law No. 24656, 13 April 1987, Art.17 (providing that that the "directors and community representatives [of the rural community] are elected periodically by personal, equal, free, secret and compulsory vote, in accordance with the procedures, requirements, and conditions established by the Statute of each community.")

[896] **RER-0001**, Meini Expert Report, ¶ 50.

[897] **RER-0001**, Meini Expert Report, ¶¶ 61–67.

Criminal Code includes a closed list of entities or persons who are considered *de jure* officials.[898] Such list includes specific categories of public servant, such as the Peruvian civil service and members of the police and armed forces, and also a more general category of persons

> who, regardless of the employment regime in which he finds himself, maintains an employment or contractual relationship of any kind with entities or agencies of the State, including State enterprises or mixed economy companies included in the business activity of the State, and who by virtue of this exercises functions in such entities or bodies.[899]

436. Rural communities do not fall into any of these categories. Their members are not specifically included in the list in Article 425, nor do they "maintain an employment or contractual relationship" with the Peruvian State or State entities.[900]

437. Nor can rural communities be considered *de facto* public servants. As Dr. Meini explains, the concept of *de facto* public servants encompasses a narrow category of persons or entities which "exercise functions of a public office in an effective, exclusive, public, peaceful or continuous manner."[901] Analysing the role of the Parán Community and its members, Dr. Meini concludes that neither constitutes a *de facto* public servant because (i) the Parán Community and its representatives do not have capacity under Peruvian law to bind the State by their acts and decisions; and (ii) in order for a person to be a *de facto* public servant, they must hold a position that already exists within the State infrastructure. This requirement is not satisfied with respect to the Parán Community members or their directors or representatives.[902]

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[898] **RER-0001**, Meini Expert Report, ¶¶ 62–63.

[899] **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, Art. 425(3).

[900] **RER-0001**, Meini Expert Report, ¶ 64.

[901] **RER-0001**, Meini Expert Report, ¶ 65.

[902] **RER-0001**, Meini Expert Report, ¶¶ 65–67.

(2) Claimant has not shown that the Parán Community was empowered to exercise elements of governmental authority

438. Claimant has not even attempted to determine whether the Parán Community exercises governmental power in the light of the four factors discussed above. Rather, Claimant raises a number of baseless arguments that fall well short of fulfilling the requirements of the first limb of ILC Article 5.

439. *First*, Claimant paraphrases Article 89 of the Peruvian Constitution and Article 2 of the Rural Communities Law quoted above, evidently to suggest that rural communities are "parastatal entities" of the type referred to in the ILC Commentary.[903] However, neither of those provisions indicates that rural communities exercise governmental functions. On the contrary, as discussed above, such provisions merely recognise (i) the legal personality and autonomy of rural communities; and (ii) the right of rural communities to exercise ancestral property rights.

440. Claimant also avers that the Parán Community (i) receives some funding from the State; (ii) has its own "governmental and administrative apparatus"; and (iii) may exercise "jurisdictional powers."[904] However, in relation to (i), the mere fact that an entity is funded by the government does not mean that it exercises governmental functions. Countless private entities receive funding from governments around the world, but such fact does not render them *governmental* entities. In relation to (ii), the "governmental and administrative apparatus" referred to by Claimant relates to the self-governing bodies of the rural community. As discussed above, the role of such bodies largely relates to the administration of the property rights of the rural community and the promotion of its culture.

441. In relation to (iii), Claimant relies—again without offering any analysis—on Article 149 of the Peruvian Constitution, which provides as follows:

[903] Claimant's Memorial, ¶¶ 240–41.

[904] Claimant's Memorial, ¶ 243.

> The authorities of the Rural and Native Communities, with the support of the *Rondas Campesinas*, may exercise jurisdictional functions **within their territorial scope in accordance with customary law, provided that they do not violate the fundamental rights of the individual**. The law establishes the means of coordination of this special jurisdiction with the Peace Courts and with other bodies of the Judiciary.[905] (Emphasis added)

442. As this provision makes clear, the functions that may be exercised by the authorities of a rural community are strictly limited to ones exercised within the rural community's "territorial scope," and are subordinated to fundamental rights.[906] The "jurisdictional functions" to which Article 149 refers are limited to the ability of rural communities to settle disputes that arise in their territory under their own customary law—through, inter alia, the *Rondas Campesinas*.[907] However, as noted in the expert report of Mr. Vela, the authorities of rural and indigenous communities are not part of the Peruvian judicial system, and do not apply Peruvian State law.[908] The foregoing is demonstrated by the fact that Article 149 provides that the relevant authorities of the Parán Community shall "coordinat[e]" with the Peruvian judiciary (which a fortiori means that such authorities are not part of the judiciary). Such wording also shows that the community authorities do not carry out any judicial function themselves. The exercise of the functions contemplated under Article 149 therefore does not constitute the exercise of any governmental function.

443. The tribunal's findings in *Von Pezold v. Zimbabwe* are instructive in this regard. In that case, the tribunal considered the power accorded under domestic law to the leaders of the relevant indigenous communities to act as "justices of the peace", and was not persuaded that such power constituted exercise of governmental functions.[909]

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[905] **Ex. C-0023**, the Constitution, Art. 149.

[906] **RER-0002**, Vela Expert Report, ¶ 61.

[907] **RER-0002**, Vela Expert Report, ¶¶ 62, 63.

[908] **RER-0002**, Vela Expert Report, ¶ 62.

[909] **RLA-0026**, *Bernhard von Pezold* (Procedural Order No. 2), ¶ 52; **RLA-0027**, Zimbabwe Traditional Leaders Act [Chapter 29:17], 1998, Section 5(2).

444. In the present case, Claimant has not even argued let alone demonstrated that individuals or authorities within a rural community hold any official status within the Peruvian judiciary. Ultimately, and importantly, Claimant has not suggested that the Parán Community actions that form the basis of Claimant's case (namely the 19 June 2018 Protest and Access Road Protest) were carried out in exercise of the jurisdictional functions referred to in Article 149 of the Peruvian Constitution. This issue is discussed further in **Section III.A.2.b** below.

445. Claimant also paraphrases Article 62 of the Rural Communities Law, and refers to the fact that the president of a rural community is the legal representative of the community, and is empowered to execute certain organisational powers within and concerning the community.[910] However, this merely reflects the fact that, legally speaking, the community president is empowered to take actions on the rural community's behalf, much in the same way as the director of a company is empowered to take actions on behalf of the company that he or she represents.[911] Claimant also notes that a community president must "regularly liaise" with the Peruvian regional Government, and cites the fact that such president must present the rural community's balance sheet to the regional government if two communities merge.[912] However, the mere fact that the president of a rural community "liaise[s]" with government representatives in certain circumstances does not mean that either the president or the community that he or she represents, is exercising a governmental function in doing so. If anything, the dynamic that Claimants are invoking serves to highlight the *separation* between the rural communities and the Peruvian Government, rather than their unity or overlap.

446. A further argument raised by Claimant is that members of rural communities "participate in State regional and municipal councils and must thus be represented in

[910] Claimant's Memorial, ¶ 244.

[911] **RER-0001**, Meini Expert Report, ¶ 9, 52.

[912] Claimant's Memorial, ¶ 244, fn. 406.

the elections for those posts."[913] This argument by Claimant is based solely on the fact that at least 15% of the candidates that stand for election to such posts must be representatives of native, rural and indigenous communities.[914] However, the existence of quotas such as those referred to by Claimant does not confer any governmental function on rural communities or their members; such quotas relate to the rights of rural community members as private citizens to stand as candidates for local elections. If and when a community member is elected to a governmental position, then they become empowered with certain governmental functions. However, such was not the case with any of the individuals from the Parán Community who were involved in the 19 June 2018 Protest and the Access Road Protest.

447. The Claimant has made much of the fact that the Parán Community has the right to establish *Rondas Campesinas*, and that such groups carry weapons.[915] The Claimant has not, however, cited to or analysed the law that governs the rights and powers of the *Rondas Campesinas*, i.e., law no. 27908. As noted above, that law makes it clear that the purpose of the *Rondas Campesinas* is to aid rural communities with the defence of their property.[916] In that regard at least, they are akin to private security guards, many of whom also carry weapons yet are not thereby performing government functions. There is nothing to indicate that rural communities' right to defence of their own property constitutes a governmental function.

448. A final flaw in Claimant's argument is that the vast majority of its arguments relate to the status of the rural community as a whole, rather than to that of its individual members. Aside from allegations regarding the Parán Community's president and *Rondas Campesinas*, which are addressed above, Claimant has not asserted—let alone

[913] Claimant's Memorial, ¶ 245.

[914] **Ex.C-0251**, Resolution No. 0083-2018-JNE, Regulations for the Registration of Candidate Lists for Regional Elections, 7 February 2018, Art. 8.1; **Ex. C-0252**, Resolution No. 0082-2018-JNE, Regulations for the Registration of Candidate Lists for Municipal Elections, 7 February 2018, Art. 8.1.

[915] Claimant's Memorial, ¶ 246.

[916] **Ex. R-0116**, Law No. 27908, 6 January 2003.

established—that individual members of the Parán Community are empowered to exercise elements of governmental authority. Nor could it; individual Parán Community members are private citizens, and are not vested with any governmental authority at all.

b. **Question 2**: Were the actions of the Parán Community members and other individuals carried out in the exercise of governmental authority?

449. Even if Claimant had established that the Parán Community and/or its members and other individuals were empowered to exercise governmental authority (quod non), establishing attribution under ILC Article 5 demands compliance with a second requirement, as noted earlier. Such second requirement is that of demonstrating that the *relevant actions* were carried out in the exercise of governmental authority.

450. To recall, ILC Article 5 provides that the conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise certain elements of governmental authority shall be considered an act of the State under international law, "provided the person or entity is **acting in that capacity in the particular instance**"[917] (emphasis added). However, as discussed in further detail below, the Claimant has manifestly failed to demonstrate that members of the Parán Community exercised governmental authority in the particular instances or incidents that Claimant invokes (namely, 19 June 2018 Protest and the Access Road Protest).

451. The Claimant has all but ignored this second limb of the test under ILC Article 5. In fact, it appears from Claimant's Memorial that its entire case in relation to this limb is based on the following two conclusory assertions:

- "Parán's elected officials and community representatives committed the acts at the heart of Lupaka's claims in these proceedings."[918]

[917] **CLA-0003**, ILC Articles, Art. 5.

[918] Claimant's Memorial, ¶ 237.

- "In this case, Parán has two rural patrols which serve a policing role for the community. They abused that authority and played an important role in 19 June 2018 Invasion and the Blockade."[919]

452. Neither of these assertions comes close to satisfying the second limb of ILC Article 5. The *first* merely reproduces or reiterates Claimant's submission that the actions of the Parán Community and its members are attributable to Peru. But Claimant does not cite any evidence in support of its statement, nor does it specify in this statement (i) what concrete acts of the Parán Community are allegedly attributable to Peru; (ii) what the scope of the authority of the members allegedly carrying out such acts was; or (iii) any basis for concluding that the relevant acts were carried out in the exercise of governmental authority.

453. The *second* allegation is also unsubstantiated. It cross-references a paragraph of the facts section of Claimant's Memorial in which Claimant alleges that members of the Parán Community's *Rondas Campesinas* participated in 19 June 2018 Protest, and that during that Protest they used weapons provided to them by the Peruvian army.[920] This allegation in turn cites the following lone reference in the Operational Plan: "The rural guards of the rural community of Parán are using shotguns that were given to them by the army."[921]

454. However, that single statement from the Operational Plan is insufficient to establish Claimant's case in relation to the second limb of ILC Article 5. Amongst other things, (i) it relates only to 19 June 2018 Protest, and therefore does not constitute evidence of any involvement by the Parán Community's *Rondas Campesinas* in any of the other conduct of which Claimant complains, including the Access Road Protest; (ii) it does not indicate that the members of the "rural guards" it refers to were purporting to act

[919] Claimant's Memorial, ¶ 248.

[920] Claimant's Memorial, ¶ 106.

[921] **Ex. C-0193**, Lima Police Department Operational Plan No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, Plan to Lift Blockade, 9 February 2019, p. 30.

in a governmental capacity. For these reasons, it does not constitute evidence sufficient to satisfy the test under the second limb of ILC Article 5.

455. In any event, the evidence shows that the Parán Community members were not "acting in [a governmental] capacity in the particular instance" of the events which form the basis of Claimant's claim.[922]

456. As noted above, Claimant's allegations with respect to attribution focus on two specific incidents: (i) the 19 June 2018 Protest; and (ii) the Access Road Protest, which are discussed in **Section II.E.2 and II.E.3** above. With respect to the first of these incidents, Claimant alleges that on 19 June 2018 Parán Community members: (i) occupied the Invicta Mine; (ii) detained Invicta personnel and members of Invicta's community relations team against their will; (iii) threatened Invicta's community relations team with violence while conducting a search of the Invicta mine site; (iv) knocked to the ground and beat certain of Invicta's staff; and (v) created false minutes recording the events during the 19 June 2018 Protect and forced Invicta's community relations field manager to sign such minutes.[923] However, none of the above actions falls within the scope of any powers afforded to the Parán Community, its *Rondas Campesinas*, or its members more generally.

457. Regarding the second incident—the Access Road Protest—Claimant alleges that on 14 October 2018 approximately 100 Parán Community members (i) "converged" on the Invicta mine site, (ii) expelled Invicta's staff from the site; (iii) blocked access to the road through Lacsanga land that led to the site, and (iv) continued to do so in the months that followed. Again, none of these actions falls within the scope of any powers afforded to the Parán Community, its *Rondas Campesinas*, or its members more generally.

[922] **CLA-0003**, ILC Articles, Art. 5.

[923] Claimant's Memorial, ¶¶ 105–07.

458. As discussed above, in carrying out their functions, *Rondas Campesinas* must act within the limits of general law, must not infringe fundamental rights.[924] Accordingly, acts of violence, detention of individuals, damage to property, and blocking roads are not acts that *Rondas Campesinas* are authorised under Peruvian general law to undertake. Such actions would infringe on fundamental rights enshrined in the Peruvian Constitution, such as the rights to physical integrity, property, liberty and security of the person.[925] They also would go well beyond the scope of *Rondas Campesinas*' statutory objectives of "defence of [rural communities'] lands, the care of their livestock and other assets."[926]

459. More generally, the alleged actions would also go well beyond the scope of the overall authority of the Parán Community and that of its members. As discussed above, the scope of such authority is limited to the administration of rural community affairs and property, and the promotion of rural communities' cultural identity.[927] Moreover, all of the actions of which Claimant complains took place in their entirety not on the Parán Community's lands, but on the lands of two other rural communities: the Lacsanga Community and the Santo Domingo de Apache Community. Thus, even if such actions had been authorised as a general matter (which they were not), they would fall outside the territorial scope of the powers of the Parán Community, including the jurisdictional prerogatives of the authorities of the Parán Community and of its *Rondas Campesinas*—all of which prerogatives, as noted above, apply only within the Parán Community's "territorial scope."[928] Such actions would also go beyond the subject matter scope of the conciliatory powers of the *Rondas Campesinas* described above. Such powers apply only to rights of possession, usufruct and use of a rural community's communal property and resources;[929] they do not extend to

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[924] *See, e.g.*, **Ex. C-0023**, the Constitution, Art. 149; **Ex. R-0103**; Supreme Decree No. 025-2003-JUS, 29 December 2003, Art. 13.

[925] **Ex. C-0023**, the Constitution, Arts 2(1), 2(16), 2(24).

[926] **Ex. R-0100**, Law No. 24571, 6 November 1986.

[927] *See supra* Section III.A.3.

[928] **Ex.C-0023**, the Constitution, Art. 149.

[929] **Ex. R-0103**; Supreme Decree No. 025-2003-JUS, 29 December 2003, Art.13.

coercive action with respect to property and resources belonging to other private parties, in this case Claimant and/or Invicta.

(i) Claimant cannot rely on ILC Article 7 to salvage its position on the issue of attribution

460. Perhaps recognising the fundamental weakness in its case in relation to ILC Article 5—namely, that the Parán Community and its members were, in any event, acting *outside* the scope of their authority—Claimant argues that the Parán Community "**abused [their] authority** and played an important role in 19 June 2018 Invasion and the Blockade"[930] (emphasis added). This appears to be a veiled reference to the principle enshrined in ILC Article 7, although Claimant does not even cite that provision—and rightly so, because that provision has no application to the instant case, given that the Parán Community did not exercise governmental authority. Nevertheless, for the sake of completeness, Peru will explain below (i) the content and application of the principle enshrined in ILC Article 7; and (ii) why such Article does not apply to the actions of the Parán Community.

(ii) Ultra vires acts of a person or entity empowered to exercise governmental functions are not attributable if undertaken in a private capacity

461. ILC Article 7 provides that, with respect to the actions of organs or persons or entities that are empowered to exercise governmental authority, a State is not entitled to evade responsibility for such actions merely on the basis that they were carried out *ultra vires*. ILC Article 7 provides as follows:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[931]

[930] Claimant's Memorial, ¶ 248.

[931] **CLA-0003**, ILC Articles, Art. 7.

462. ILC Article 7 concerns situations in which an organ or entity exceeds the authority conferred on it by the State, but nonetheless acts in a governmental capacity. Accordingly, in assessing the applicability of ILC Article 7, a distinction must be made between (i) acts that are *ultra vires*, but are nonetheless "official" acts attributable to the State, and (ii) acts that are "purely private" in nature, which are not attributable.[932] The key issue in determining into which of these two categories an act falls is whether or not the acts in question were carried out under the cloak of State authority. As Professor Crawford explains, "a State is not responsible for every act done by an individual in its service, but **only when the individual purports to act on behalf of the State**"[933] (emphasis added).

463. The application of the above principles is illustrated in the relevant case law. For example, the *Caire* case before the French-Mexican Mixed Claims Commission concerned the actions of two Mexican soldiers who had extorted money from a hotel owner, stripped him in a local Mexican army barracks, and then shot him in a nearby village. The Commission held that the acts of the two Mexican soldiers were attributable to Mexico because the soldiers had "acted under cover of their status as officers and used means placed at their disposal on account of that status."[934]

464. Two factors in that case tipped the balance between whether the acts were (i) *ultra vires*, but nonetheless official, or (ii) purely private in nature: *first*, the fact that the soldiers had carried out the relevant acts in uniform, and *second* the fact that they had used State property (i.e., the local barracks) to perpetrate such acts.[935] Based on these factors, Professor Crawford distinguishes the situation in the *Caire* case from a

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[932] **RLA-0024**, Crawford, p.137.

[933] **RLA-0024**, Crawford, p.137.

[934] **RLA-0031**, *Estate of Jean-Baptiste Caire (France) v. United Mexican State*, Reports of International Arbitral Awards, Decision No. 33, 7 June 1929, p. 529. *See also* **RLA-0031**, *Estate of Jean-Baptiste Caire (France) v. United Mexican State*, Reports of International Arbitral Awards, Decision No. 33, 7 June 1929, p. 530 ("But in order to accept this so-called objective liability of the State for acts committed by its officials or bodies outside the limits of their competence, it is necessary that they have acted at least to all appearances as competent officials or bodies, or that in acting they have used powers or means appropriate to their official capacity.").

[935] **RLA-0024**, Crawford, p.137.

hypothetical situation in which one of the soldiers "merely shot Caire with his service pistol."[936] In the latter scenario, Mexico would *not* have been responsible for the conduct of the soldier in question.

465. The case of *Mallén v. U.S.A.*, which was heard before the United States-Mexico Claims Commission, concerned two separate categories of conduct allegedly attributable to the State: (i) a violent attack by a U.S. police officer on a Mexican national, Mr. Mallén, on a street in the U.S.; and (ii) the same police officer's arrest of Mr. Mallén a few weeks later, which involved further violence towards Mr. Mallén, and transportation by the police officer of Mr. Mallén to the county jail in El Paso, Texas. The Commission held that the first of these acts was not attributable to the United States since it did not involve the use of any actual or apparent State authority—it was a purely private act. Rather, in the words of the Commission, it was "a malevolent and unlawful act of a private individual who happened to be an official; **not the act of an official**" (emphasis added).[937] By contrast, the second incident (i.e., the arrest and transportation to jail) was held to be attributable to the U.S., since it was carried out under the cloak of governmental authority. Amongst other things, the police officer showed his badge to Mr. Mallén, and purported to carry out an arrest. Based on the evidence, the Commission concluded that the U.S. police officer

> could not have taken Mallén to jail if he had not been acting as a police officer. Though his act would seem to have been a private act of revenge which was disguised, once the first thirst of revenge had been satisfied, as an official act of arrest, the act as a whole can only be considered as the act of an official.[938]

466. As illustrated in the above two cases (*Caire* and *Mallén*), the determining factor for purposes of the analysis of attributability is whether the relevant acts were (i) carried

[936] **RLA-0024**, Crawford, p. 139.

[937] **RLA-0032**, *Francisco Mallén (United Mexican States) v. United States of America*, Reports of International Arbitral Awards, Decision, 27 April 1927, ¶ 4.

[938] **RLA-0032**, *Francisco Mallén (United Mexican States) v. United States of America*, Reports of International Arbitral Awards, Decision, 27 April 1927, ¶ 7.

out "by persons cloaked with governmental authority"[939] (i.e., acting with real or apparent authority), in which case they will be deemed attributable; or (ii) were "so removed from the scope of [the individuals'] official functions that [they] should be assimilated to that of private individuals, not attributable to the State."[940]

(iii) ILC Article 7 does not apply to the actions of the Parán Community or its members

467. In the instant case, the relevant actions of the Parán Community members were private acts rather than official *ultra vires* acts. This is so, for at least the following five reasons.

468. *First*, Claimant has provided no evidence that at any point the Parán Community members, including the *Rondas Campesinas*, held themselves out as acting in an official or governmental capacity when staging the 18 June 2018 Protest and the Access Road Protest. Indeed, none of Claimant's witnesses characterise the actions of the Parán Community members as official actions of Peruvian State authorities, or suggest that such members held themselves out as agents of the State.

469. To the contrary, in the contemporaneous documentation, Claimant's CEO Mr. William Ansley described the continuing dialogue with the Parán Community as "engaging in dialogue and negotiation with terrorists, and people who have attempted murder."[941] Claimant therefore clearly did not believe that the Parán

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[939] **CLA-0018**, ILC Commentary, commentary on Art. 7, ¶ 7 (*citing Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). *See also* paragraph (13) of the commentary to ILC Article 4.).

[940] **CLA-0018**, ILC Commentary, commentary on Art. 7, ¶ 7. *See also* **RLA-0033**, *Kenneth P. Yeager v. The Islamic Republic of Iran*, IUSCT Case No. 10199, Award, 2 November 1987 (Böckstiegel, Holtzmann, Mostafavi) ("***Yeager* (Award)**"), ¶¶ 64–67 (finding that the actions of an Iran Air official in extorting a bribe for an air ticket were not attributable to Iran, because they were undertaken purely for private gain, whereas the actions of Revolutionary Guardsmen in seizing money belonging to the claimant *were* attributable, because they were carried out in exercise of purported governmental authority to carry out the functions of immigration, customs or security officers).

[941] **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Isomodes), 6 February 2019, p. 2.

Community members were acting in any official capacity; rather, he viewed them a "terrorists" and criminals.[942]

470. *Second*, even if the actions of the Parán Community members could be deemed to be undertaken in an official function, they were "so removed from the scope of official functions that [such actions] should be assimilated to [those] of private individuals, not attributable to the State."[943] The acts at issue here took place outside the territorial scope of the Parán Community's jurisdiction, on another community's lands, and involved actions that would have been well outside the scope of any authority with which the Parán Community and its members could have been endowed. Moreover, unlike the circumstances in the *Caire* and *Mallén* cases discussed in **Section IV.A.2** above, the relevant actions did not involve the use of any official premises, or the use of insignia, badges, or other indications of authority.

471. *Third*, the relevant actions did not require the use of any governmental authority. Rather, and leaving aside the alleged unlawfulness of such conduct, any private individual "could have acted in a similar manner."[944] For example, any group of private citizens would have been able to enter private property and block a roadway.

472. To the extent that Claimant relies on the fact that members of the Parán Community used weapons (allegedly given to them by the Peruvian military, not in connection with any of the alleged acts and omissions in this case), this fact is irrelevant to the analysis. As noted above, Professor Crawford specifically distinguishes the facts of the *Caire* case—where soldiers acted under cover of official authority and used State property to cause harm to an individual—from a hypothetical situation in which one of the soldiers "merely shot Caire with his service pistol."[945] In other words, the mere

[942] **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Isomodes), 6 February 2019, p. 2.

[943] **CLA-0018**, ILC Commentary, commentary on Art. 7, ¶ 7.

[944] **RLA-0025**, *Jan de Nul* (Award), ¶ 170.

[945] **RLA-0024**, Crawford, p. 139.

fact that a person uses a government-provided weapon to perpetrate an act of violence is not sufficient to convert a private action into an official one.

473. *Fourth,* Claimant itself asserts in its Memorial that the Parán Community members were acting for private, personal gain, rather than any governmental purpose. As the legal authorities establish, actions carried out "for no other reason than personal profit," such as bribery or extortion with no intention to pass on the proceeds of such actions to the State, will not be attributable under ILC Article 5.[946] Here, for example, Claimant's witness, Mr. Bravo states that: "[t]he Parán Community had indicated that it wished to steal the mine and exploit it."[947] Claimant and its witnesses also refer to alleged attempts by the Parán Community to "extort money" from Claimant.[948] There is no suggestion in either case that the Parán Community's intention was to pass on the proceeds of any alleged "steal[ing]" or "extort[ion]" to the Peruvian State. Thus, if Claimant's allegations are correct, this only serves to illustrate that the Parán Community's actions were taken in a private capacity, rather than for any official, governmental purpose.

474. *Fifth and finally*, many of the actions that form the basis of Claimant's claim are properly characterised as forming part of a private law dispute between Claimant and the Parán Community.[949] For example, it is common ground between the Parties that one of the key aspects of the dispute between the Parán Community and Claimant was a disagreement over the correct interpretation and application of the 26 February

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[946] **RLA-0033**, *Yeager* (Award), ¶ 65 ("Acts which an organ commits in a purely private capacity, even if it has used the means placed at its disposal by the State for the exercise of its function, are not attributable to the State . . . The critical question here, then, is whether the Iran Air agent was acting in his official capacity as an organ of Iran Air when he demanded the extra payment. **There is no indication in this case that the Iran Air agent was acting for any other reason than personal profit**, or that he had passed on the payment to Iran Air. He evidently did not act on behalf or in the interests of Iran Air. The Tribunal finds, therefore, that this agent acted in a private capacity and not in his official capacity as an organ for Iran Air (emphasis added)). *See also* **RLA-0024**, Crawford, p. 138.

[947] **CWS-0004**, Bravo Witness Statement, ¶ 31.

[948] *See, e.g.*, Claimant's Memorial, ¶ 171.

[949] *See supra* Section II.E.

2019 Agreement.[950] Claimant (wrongly) asserts that the Parán Community breached that agreement by failing to allow access to the Invicta mine site through the Lacsanga access road.[951] The Parán Community, on the other hand, asserted that Claimant failed to comply with its obligation to conduct a topographical survey.[952] Actions taken by parties pursuant to a disagreement regarding the terms of a private law agreement, such as that between Claimant and the Parán Community, do not provide a basis to attribute conduct to a State.

475. In sum, the Parán Community members did not carry out any of the actions that form the basis of Claimant's grievance in anything other than a private capacity. Claimant is thus incorrect in asserting that the Parán Community members were exercising governmental authority or that they "abused [their] authority."[953] The Tribunal should reject Claimant's argument that the actions by the Parán Community and/or its members are attributable to Peru.

476. In the remainder of this **Section IV**, Peru (i) will identify the legal standards that are applicable under each of the three Treaty provisions that, according to Claimant, Peru has breached, and (ii) will explain that Peru abided fully by such standards. The relevant claims are the following: (i) "full protection and security" in accordance with the customary international law minimum standard of treatment of aliens, Treaty Article 805 (addressed in **Subsection B** below); (ii) fair and equitable treatment in accordance with the customary international law minimum standard of treatment of aliens, also Treaty Article 805 (**Subsection C** below); and (iii) expropriation, Treaty Article 812 (**Subsection D** below).

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[950] *See supra* Section II.E.4; Claimant's Memorial, ¶¶ 156–62.

[951] Claimant's Memorial, ¶ 156.

[952] **RWS-0003**, León Witness Statement, ¶ 43.

[953] Claimant's Memorial, ¶ 248.

B. Peru has fulfilled its obligation to accord full protection and security to the investment under the customary international law minimum standard of treatment of aliens

477. Claimant's claim is that Peru violated its obligation under Article 805 of the Treaty, which is captioned "Minimum Standard of Treatment,"[954] to accord to its investment "full protection and security" (FPS).[955] Paragraphs 1 and 2 of Article 805 expressly limit the FPS obligation to the minimum standard of treatment (MST) under customary international law (CIL):

> Each Party shall accord to covered investments treatment in accordance with the **customary international law minimum standard of treatment of aliens, including** fair and equitable treatment and **full protection and security**.
>
> The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (Emphasis added)

1. *Claimant has not fulfilled its burden to prove the customary international law minimum standard of treatment, including full protection and security*

a. Claimant failed to produce any relevant evidence of the legal standard applicable to "full protection and security" in accordance with the customary international law minimum standard of treatment

478. In the Memorial, Claimant addressed neither customary international law in general, nor the specific legal standard for "full protection and security" under MST.[956] Instead, it presented only three very brief quotes by investment tribunals on FPS, without analyzing such quotes or their context.[957] Based on those decisions, Claimant

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[954] Claimant's Memorial, § 4.2.

[955] **CLA-0001**, Canada-Peru Free Trade Agreement, 2009, Art. 805.

[956] *See* Claimant's Memorial, ¶¶ 250–266.

[957] Claimant's Memorial, ¶¶ 252–255 (*quoting* **CLA-0022**, *American Manufacturing & Trading, Inc. v. Republic of Zaire,* ICSID Case No. ARB/93/1, Award, 21 February 1997 (Mbaye, Golsong, Sucharitkul) ("***AMT v. Zaire* (Award)**") ("[T]he tribunal in *AMT v. Zaire* noted that the obligation to provide full

posits simply that the legal standard for FPS is "broad"[958] and "first and foremost attaches to actions by representatives of the host State."[959] That, however, is an incomplete and inaccurate representation of the legal standard under MST.

479. As a threshold matter, Claimant neglected two important issues concerning MST: (1) Claimant has the burden of proving the existence and content of any rules of customary international law on which it relies, including "full protection and security"; and (2) decisions by investment tribunals cannot establish the existence or content of customary international law.

480. *First*, the International Court of Justice ("**ICJ**") has confirmed that "[t]he Party which relies on a custom [of international law] must prove that this custom is established in such a manner that it has become binding on the other Party."[960] In applying this principle, the ICJ has in many instances dismissed claims on the basis that a party

protection and security required the host State to 'take all measures necessary to ensure the full enjoyment of protection and security of [a covered] investment […]'"); **CLA-0023**, *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007 (Lew, Lalonde, Lévy) ("'A violation of the standard of full protection and security could arise in case of failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury. The injury could be committed either by the host State, or by its agencies or by an individual.'"); **CLA-0025**, *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya,* ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018 (Fernández-Armesto, Mayer, Khairallah) ("***Cengiz* (Final Award)**") ("[T]he [*Cengiz*] tribunal described the obligation to provide full protection and security as 'an obligation of result and an obligation of means,' which comprised two parts: '-A negative obligation to refrain from directly harming the investment by acts of violence attributable to the State, plus - A positive obligation to prevent that third parties cause physical damage to such investment.'").

[958] Claimant's Memorial, ¶ 252.

[959] Claimaint's Memorial, ¶ 255.

[960] **RLA-0080**, *Asylum Case (Colombia v. Peru)*, ICJ, Judgment, 20 November 1950, p. 276; *see also* **RLA-0085**, *Case of the S.S. Lotus (France v. Turkey)*, PCIJ Case No. 9, Judgment, 7 September 1927 (Huber, Weiss, Loder), p. 18 ("This way of stating the question is also dictated by the very nature and existing conditions of international law. International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will . . . . Restrictions upon the independence of States **cannot therefore be presumed**.") (emphasis added).

failed to adduce sufficient evidence to establish that an alleged rule has attained the status of customary international law.[961]

481. In addition, Canada—which is the sole Contracting Party to the Treaty other than Peru—has expressly confirmed that "[t]he burden of proving a rule of customary international law under [Treaty] Article 805 rests with the party invoking the provision."[962] The reason that is so was explained by the tribunal in *Glamis Gold v. United States*, which recognized that "[a]scertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions."[963] Because ascertaining customary international law is a factual inquiry, "in accordance with the well-established principle of *onus probandi actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts."[964]

482. The ICJ and international tribunals have consistently ruled that, to prove the existence and content of a rule of customary international law, a party must prove (i) that such

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[961] *See, e.g.*, **RLA-0081**, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ, Merits Judgment, 16 March 2001 ("***Qatar v. Bahrain* (Judgment)**"), ¶ 205 ("Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations"); **RLA-0081**, *Qatar v. Bahrain* (Judgment), ¶ 209 ("The Court, consequently, is of the view that in the present case there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevations . . . or for recognizing Qatar as having such a right. The Court accordingly concludes that . . . such low-tide elevations must be disregarded."); **RLA-0082**, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, ICJ, Judgment, 20 February 1969 ("***North Sea Continental Shelf* (Judgment)**"), ¶ 79 ("[The Court] simply considers that [the alleged evidence of customary international law is] inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law. . . .").

[962] **RLA-0002**, *Bear Creek Mining Corp. v Republic of Peru*, ICSID Case No. ARB14/21, Non-Disputing Party Submission of Canada, 9 June 2016, (Bockstiegel, Pryles, Sands) ("***Bear Creek* (Canada's Submission)**"), ¶¶ 8–10. *See also* **RLA-0003**, *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Non-Disputing Party Submission of the United States, 19 November 2021, (van den Berg, Tawil, Vinuesa) ("***Mamacocha* (United States' Submission)**"), ¶ 23 ("The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.").

[963] **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard) ("***Glamis Gold* (Award)**"), ¶ 607.

[964] **RLA-0086**, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ, Judgment, 20 April 2010, ¶ 162 (citing four prior ICJ judgments upholding same principle).

rule has crystallized into widespread and consistent State practice, and (ii) that such State practice flows from a sense of legal obligation (i.e., *opinio juris*).[965] It is within this framework of customary international law that Claimant bears the burden to prove the FPS legal standard under Treaty Article 805.

483. *Second*, given the two definitional elements of customary international law (viz., widespread and consistent State practice, plus *opinio juris*), decisions by investment tribunals cannot alone establish the existence or content of customary international law. The *Glamis Gold* tribunal affirmed this point: "Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law."[966]

484. At most, in instances where a tribunal decision has compiled the necessary (direct) evidence of widespread and consistent State practice and *opinio juris*, such decision can serve as *indirect* evidence of the relevant rule of customary international law.

485. Importantly, Canada has confirmed that "[t]he decisions and awards of international courts and tribunals do not constitute instances of State practice for the purpose of proving the existence of a customary norm and are only relevant to the extent that they include an examination of State practice and *opinio juris*."[967] Rather, arbitral awards can "serve as illustrations of customary international law if they involve an

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[965] *E.g.*, **RLA-0087**, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ, Judgment, 3 February 2012, ¶ 55 ("[T]he existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*."); **RLA-0082**, *North Sea Continental Shelf* (Judgment), ¶¶ 77–78; **CLA-0078**, *Glamis Gold* (Award), ¶ 602. *See also* **RLA-0002**, *Bear Creek* (Canada's Submission), ¶ 9.

[966] **CLA-0078**, *Glamis Gold* (Award), ¶ 605; *see also* **RLA-0050**, *Obligation to Negotiate Access to the Pacific Ocean*, ICJ, Award, 1 October 2018, ¶ 162 (rejecting an alleged principle of customary international law as unproven, despite references to such principle in international arbitral awards).

[967] **RLA-0002**, *Bear Creek* (Canada's Submission), ¶ 10. *See also* **RLA-0003**, *Mamacocha* (United States' Submission), ¶ 22 ("A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law.").

examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation."[968]

486. In the Memorial, however, Claimant presented no evidence whatsoever of State practice or *opinio juris* to establish the content of FPS under MST.[969] Furthermore, Claimant made no showing that the three investment tribunal decisions from which it extracted brief excerpts (viz., *AMT v. Zaire, Parkerings v. Lithuania*, and *Cengiz v. Libya*) were based on direct evidence of State practice or *opinio juris* (or that such decisions otherwise constitute indirect evidence of customary international law).[970]

487. Thus, Claimant has failed to prove the existence and content of "full protection and security" under MST, and its FPS claims must therefore be dismissed.

b. "Full protection and security" under the customary international law minimum standard of treatment requires states to act with "due diligence," as reasonable in the circumstances

488. Notwithstanding Claimant's failure to identify the correct legal standard for FPS under MST, Peru recognizes that such standard requires States to act with *due diligence* with respect to the physical security of a covered investment, but only *as is reasonable in the circumstances*.

489. Under customary international law, the concept of "full protection and security" is nearly synonymous with "due diligence," as illustrated by a treatise on international investment law written by two respected figures in the field, which describes what FPS requires and does not require:

> There is broad consensus that the [FPS] standard **does not provide absolute protection against physical or legal infringement**. In terms of the law of state responsibility, the host state is not placed under an obligation of strict liability to prevent such violations. Rather, **it is generally accepted that the host state will have to exercise "due diligence"** and will have

[968] **CLA-0078**, *Glamis Gold* (Award), ¶ 605.

[969] *See* Claimant's Memorial, ¶¶ 250–55.

[970] *See* Claimant's Memorial, ¶¶ 252–54.

> to take such measures to protect the foreign investment as are **reasonable under the circumstances**.[971] (Emphasis added)

490. International tribunals have applied a standard that is consistent with Peru's (and Canada's) understanding of the state of customary international law with respect to FPS. For instance, the tribunal in *AAPL v. Sri Lanka* held that FPS pursuant to MST requires a claimant to "establish the State's responsibility for not acting with 'due diligence.'"[972] The *AAPL* tribunal expressly rejected the claimant's simplistic argument that a treaty clause providing for investors to "enjoy" the "full" protection and security of their investments implied that those investors would have "a 'guarantee' against all losses suffered due to the destruction of the investment for whatever reason."[973] Even under an autonomous FPS clause,[974] the tribunal in *Rumeli v. Kazakhstan* observed that, "the full protection and security obligation is one of 'due diligence' and no more."[975]

491. Also applying an autonomous FPS clause,[976] the tribunal in *Tulip Real Estate v. Turkey* underscored that "the State cannot insure or guarantee the full protection and security of an investment," and that "[t]he question of whether the State has failed to ensure [FPS] is one of fact and degree, responsive to the **circumstances of the particular case**"[977] (emphasis added).

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[971] **RLA-0001**, R. Dolzer, *et al*., "*Chapter VII: Standards of Protection*," PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), p. 161.

[972] **CLA-0100**, *Asian Agricultural Products* (Final Award), ¶ 53.

[973] **CLA-0100**, *Asian Agricultural Products* (Final Award), ¶¶ 45–46; *see also* **CLA-0100**, *Asian Agricultural Products* (Final Award), ¶ 49 ("[B]oth the oldest reported arbitral precedent and the latest I.C.J. ruling confirms that the language imposing on the host State an obligation to provide "protection and security" or "full protection and security required by international law" . . . could not be construed according to the natural and ordinary sense of the words as creating a "strict liability.'").

[974] *See* **CLA-0033**, *Rumeli Telekom (*Award), ¶¶ 575, 668 (applying an FPS clause from the United Kingdom-Kazakhstan investment treaty (per agreement of the claimant and respondent) according to rules of treaty interpretation, rather than according to the CIL MST).

[975] **CLA-0033**, *Rumeli Telekom (*Award), ¶ 668.

[976] *See* **RLA-0004**, *Tulip Real Estate* (Award), ¶ 419 (quoting the FPS provision of the applicable treaty as imposing "an obligation to 'make every reasonable effort to ensure the physical protection and security of foreign investments'").

[977] **RLA-0004**, *Tulip Real Estate* (Award), ¶ 430.

492. Indeed, tribunals consistently have confirmed that determining what constitutes "due diligence" under the FPS legal standard requires "taking account of the circumstances of the case."[978] For instance, in *Lauder v. Czech Republic*, the tribunal concluded that FPS requires only "such due diligence in the protection of foreign investment as reasonable under the circumstances."[979] Likewise, the tribunal in *Strabag SE v. Libya* held that "the [FPS] duty of due diligence **cannot be viewed in the abstract** and in isolation from the **conditions prevailing in [the host State]**"[980] (emphasis added). In *Cengiz v. Libya*—a decision upon which Claimant relies for its construal of the FPS legal standard[981]—the tribunal observed that "the [autonomous[982] FPS] standard requires the State to exercise reasonable care."[983] It further observed that such reasonableness "must be measured **taking into consideration** the State's means and resources and **the general situation of the country**"[984] (emphasis added).

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[978] **CLA-0097**, *South American Silver* (Award), ¶ 687; *see also* **CLA-0097**, *South American Silver* (Award), ¶ 685 (applying an autonomous FPS clause); **CLA-0060,** *CME Czech Republic B.V. v. the Czech Republic*, Partial Award, 13 September 2001 (Kühn, Schwebel, Hándl), ¶ 353 ("A government is only obliged to provide protection which is reasonable in the circumstances."); **RLA-0008**, A. Newcombe, *et al*., LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009). , p. 310 ("Although the host state is required to exercise an objective minimum standard of due diligence, **the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question**. This suggests that due diligence is a modified objective standard—the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, **tribunals will likely consider the state's level of development and stability as relevant circumstance** in determining whether there has been due diligence. **An investor investing in an area with endemic civil strife** and poor governance **cannot have the same expectation of physical security** as one investing in London, New York or Tokyo.") (emphasis added).

[979] **RLA-0083**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (Briner, Cutler, Klein) ("***Lauder* (Award)**"), ¶ 308.

[980] **RLA-0084,** *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 19 June 2020 (Crook, Crivellaro, Ziadé) ("***Strabag* (Award)**"), ¶ 234; *see also* **RLA-0084**, *Strabag* (Award), ¶ 235 ("As Dolzer and Schreuer maintain, the standard of liability under the full protection and security standard requires a host State 'to take such measures to protect the foreign investment as are reasonable in the circumstances.'").

[981] Claimant's Memorial, ¶ 254.

[982] *See* **CLA-0025**, *Cengiz* (Final Award), ¶ 401.

[983] **CLA-0025**, *Cengiz* (Final Award), ¶ 406.

[984] **CLA-0025**, *Cengiz* (Final Award), ¶ 406.

493. Significantly for present purposes, various international tribunals—including the ICJ—have applied the above FPS standard specifically to factual situations involving protest activity. For example, in *ELSI (United States v. Italy)*, the claimant based its FPS claim on allegations that the respondent State had given "tacit approval"[985] to workers on strike who had occupied investment premises to protest against layoffs.[986] Interpreting an FPS clause that stated that investors shall receive "the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law,"[987] the ICJ held that "the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed."[988] Even though local courts had ruled the workers' occupation of the worksite to be "unlawful,"[989] the ICJ held that "[t]he dismissal of some 800 workers could not reasonably be expected to pass without some protest."[990]

494. In the context of claims based on "a situation not so different from" the *ELSI* case,[991] the tribunal in *Noble Ventures v. Romania* noted that violations of the FPS standard "are not easily to be established."[992] That tribunal went on to conclude that, even if the claimant's factual allegations were accepted as framed, "it [was] difficult to identify

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[985] **RLA-0006**, *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, (Ruda *et al.*) ("***ELSI* Judgment**") ¶ 105.

[986] **RLA-0006**, *ELSI* Judgment, ¶ 16.

[987] **RLA-0006**, *ELSI* Judgment, ¶ 103.

[988] **RLA-0006**, *ELSI* Judgment, ¶ 108; *see also* **CLA-0025**, *Cengiz* (Final Award), ¶ 406 ("This [FPS] obligation of vigilance does not grant an insurance against damage or a warranty that the property shall never be occupied or disturbed").

[989] **RLA-0006**, *ELSI* Judgment, ¶ 108 ("[T]he occupation was referred to by the Court of Appeal of Palermo as unlawful.").

[990] **RLA-0006**, *ELSI* Judgment, ¶ 108.

[991] **RLA-0007,** *Noble Ventures* (Award), ¶ 165 ("[I]n its ELSI judgment, the ICJ had to deal with a situation not so different from the present case.") (internal citation omitted).

[992] **RLA-0007,** *Noble Ventures* (Award), ¶ 165 ("The [International Court of Justice] found that the protection provided by Italy could not be regarded as falling below the full protection and security required by international law which, considering the facts of that case, indicates that violations of protection standards are not easily to be established. Comparing the facts of the *ELSI* case with the situation in the present case, it is difficult to see in what respect the conduct of the Respondent in the present case was more harmful than that of Italy in the *ELSI* case, so as to justify a different result.").

any specific failure by the Respondent to exercise due diligence in protecting the [c]laimant."[993] In addition, the tribunal noted that, "even if one concluded that there was a certain failure on the side of the Respondent sufficiently grave to regard it as a violation, it has not been established that non-compliance with the obligation prejudiced the Claimant, to a material degree."[994] Specifically, the claimant had "failed to prove that its alleged injuries and losses could have been prevented had the Respondent exercised due diligence in this regard."[995] Thus, the *Noble Ventures* tribunal confirmed that a plaintiff has the burden of proving not only that customary international law obligated a State to carry out certain "due diligence" measures, but also that such measures would in fact have prevented the claimant's alleged losses.

495. The tribunal in *Tecmed v. Mexico* adjudicated an FPS claim based on allegations that "[State] authorities, including the police and the judicial authorities, did not act as quickly, efficiently and thoroughly as they should have to avoid, prevent or put an end to the adverse social demonstrations expressed through disturbances in the operation of the [investment] or access thereto, or the personal security or freedom to move about of the members of [investor's local subsidiary] staff related to the [investment]."[996] However, the tribunal in that case rejected the investor's claim, noting that "the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it."[997] The tribunal concluded on the facts before it that "there is no sufficient evidence supporting the allegation that the Mexican authorities, whether municipal, state, or federal level, have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the [investment]."[998]

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[993] **RLA-0007,** *Noble Ventures* (Award), ¶ 166.

[994] **RLA-0007,** *Noble Ventures* (Award), ¶ 166.

[995] **RLA-0007,** *Noble Ventures* (Award), ¶ 166.

[996] **CLA-0074**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States,* ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Naón, Fernández, Bernal) ("***Tecmed* (Award)**"), ¶ 175.

[997] **CLA-0074**, *Tecmed* (Award), ¶ 177.

[998] **CLA-0074**, *Tecmed* (Award), ¶ 177.

2. Peru acted with "due diligence," as was reasonable in the circumstances, and thus fulfilled its FPS obligation

496. Claimant alleges that Peru violated the FPS obligation in Article 805.1 of the Treaty by not protecting its investment from "physical and non-physical harm."[999] Specifically, Claimant contends that Peru: (i) failed to prevent the 19 June 2018 Protest;[1000] (ii) failed to remove the protestors who participated in the 19 June 2018 Protest;[1001] (iii) failed to sanction the protestors who participated in the 19 June 2018 Protest;[1002] (iv) failed to prevent the Access Road Protest;[1003] (v) failed to remove the protestors who participated in the Access Road Protest;[1004] (vi) failed to sanction the protestors who participated in the Access Road Protest;[1005] and (vii) supported the actions of the Parán Community after the Access Road Protest commenced.[1006]

497. As demonstrated below, each of these claims is baseless, and Claimant has failed to establish that Peru violated its FPS obligation under the Treaty. Contrary to Claimant's claims and assertions, Peru acted *with due diligence* with respect to the physical security of Claimant's investment, *as reasonable in the circumstances*, and therefore complied with its FPS obligation under MST.

a. <u>FPS under the minimum standard requires taking into account the circumstances of the case</u>

498. As noted above, any application of FPS must be "responsive to the circumstances of the particular case."[1007] In *Cengiz v. Libya*—a case cited by Claimant itself—the tribunal recognized that such circumstances include "the general situation of the country," as

[999] Claimant's Memorial, ¶ 266.
[1000] Claimant's Memorial, ¶¶ 104, 109, 266(i).
[1001] Claimant's Memorial, ¶¶ 105–07, 266(ii).
[1002] Claimant's Memorial, ¶¶ 108, 266(iii).
[1003] Claimant's Memorial, ¶¶ 117–20, 266(iv).
[1004] Claimant's Memorial, ¶¶ 124–39, 266(v).
[1005] Claimant's Memorial, ¶¶ 133, 136, 168, 178, 266(vi).
[1006] Claimant's Memorial, ¶¶ 131,134, 143, 169, 180–81, 184, 266(vii).
[1007] **RLA-0004**, *Tulip Real Estate* (Award), ¶ 430.

well as "the State's means and resources."[1008] The "parameters inherent in a democratic state" also must be considered as circumstances under the FPS MST.[1009] In the present case, the "general situation of the country" is a fundamental circumstance, including the rightful place of rural communities and mining operators in the history, economy, and society of Peru.[1010] Peru's prioritization of dialogue in situations of social conflict in the mining sector is reasonable and diligent in light of Peru's history in that regard.

499. As described above in **Section II.A.1**, Peru has a long history of serious—and even deadly—social conflict between mining companies and local communities. Peru's return to democracy in the 1990s, following decades of military rule, opened its economy to new foreign direct investment in its extractive sector. However, as mining operations increased, so did expressions of protest from local communities who demanded that their interests be respected and their communities protected from environmental harm and other negative externalities of mining activity.[1011] This history and ongoing tension has shaped Peru's approach to the management and resolution of social conflict in the sector.

500. Opposition to mining activity has mainly come from indigenous and rural communities located in remote regions of the country, where mines tend to be situated. Rural communities, such as the Parán Community, have long held a special status in Peru.[1012] The Constitution and General Law on Rural Communities protects their status as organizations of public interest, with legal existence and legal personality.[1013] They are autonomous in their organization, and control decisions

[1008] **CLA-0025**, *Cengiz* (Final Award), ¶ 406; s*ee also* **RLA-0084**, *Strabag* (Award), ¶ 234 ("the [FPS] duty of due diligence cannot be viewed in the abstract and in isolation from the conditions prevailing in [the host State]").

[1009] **CLA-0074**, *Tecmed* (Award), ¶ 177.

[1010] **CLA-0025**, *Cengiz* (Final Award), ¶ 406; *see also supra* Section II.A.1.

[1011] *See supra* Section II.A.1.

[1012] **RER-0002**, Vela Expert Report, ¶¶ 42–48; *see supra* Section II.B.1.

[1013] **RER-0002**, Vela Expert Report, ¶¶ 45–48, 52.

concerning use of community territory and economic activity thereon.[1014] When rural communities feel excluded from the approval processes for mining activity that may impact or threaten their well-being, they frequently resort to protest—including the use of civilian blockades—to make their voices heard.[1015]

501. In the past, Peru had often relied on the use of force by police and military authorities to address social conflicts between mining operators and rural communities.[1016] However, this approach led to many violent encounters with tragic social costs—e.g., the 2009 conflict in Bagua, in which 33 people were killed and over 200 were wounded, and the 2015 conflict at the Las Bambas mining site, in which four people were killed and 50 others wounded.[1017]

502. These and many other violent incidents of social conflict steered Peruvian State policy away from the use of force as a way of resolving civilian protests in mining conflicts, as Peru concluded (i) that unleashing security forces against rural communities in the mining context risks inciting renewed cycles of violence, and fomenting distrust between rural communities and the State; (ii) that using force not only can result in the loss of life, but almost always ends up entrenching rather than defusing local community opposition to a mining project; and (iii) that for those reasons, the use of force is ultimately counter-productive in resolving mining sector conflicts.[1018]

503. Against this background of historical tensions and violence stemming from conflicts between State security forces and rural and indigenous communities during the 1990s, and in line with international norms, Peru thus gradually developed and implemented a legal and administrative framework that sought to secure the participation of local communities as relevant stakeholders in mining activity; that

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[1014] **RER-0001**, Meini Expert Report, ¶¶ 47–50; **RER-0002**, Vela Expert Report, ¶¶ 47–48, 72–73.

[1015] *See supra* Section II.A.1; **RWS-0002**, Incháustegui Witness Statement, ¶¶ 34–39 .

[1016] **RWS-0002**, Incháustegui Witness Statement, ¶¶ 35, 45.

[1017] **Ex. R-0025**, Ombudsman's Office Report, "*Actuaciones Defensoriales en el marco del conflicto de Bagua*," March 2017, pp. 39-40; **Ex. R-0144**, A. Leon, *et al.*, "*Peru protesters lift blockade at China-funded mine in hope of talks*," LATIMES, 30 September 2015, p. 2; *see also* **RWS-0002**, Incháustegui Witness Statement, ¶¶ 35, 45.

[1018] **RER-0001**, Meini Expert Report, ¶¶ 190, 193–99, 203-04.

emphasized dialogue as the means to prevent social conflicts from escalating into violence and instead to propitiate durable, peaceful solutions.[1019] Peru accomplished these goals by, among other means: (i) ratifying ILO convention 169, which requires that indigenous communities be allowed to fully participate in policy development processes that could impact them;[1020] (ii) enacting legislation that exempts rural communities from domestic laws in the context of land easements for private investments;[1021] (iii) enacting legislation that augmented citizen participation rights in mining projects;[1022] (iv) enacting the Decentralization Framework Law, which mandated that regional and local governments promote greater citizen participation in the mining sector[1023]; (v) enacting legislation that required citizen participation throughout the environmental study approval process[1024]; (vi) establishing a framework for mining companies to manage the social and environmental impacts of their mining activities on rural communities[1025]; (vii) creating the OGGS, an office within the MINEM dedicated to promoting harmonious relationships between mining operators and rural communities[1026]; and (viii) enacting legislation requiring that the State consult with indigenous communities before making any decisions that might affect them.[1027]

504. The above legal framework is critical not only for addressing social conflict in the extractive sector, but also essential to strengthening Peru's democratic institutions and building a more representative political system in accordance with international norms. As explained in **Sections II.B.2**, Peru has ratified the ILO Convention 169 and

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[1019] *See supra* Section II.A.1 and II.B.2.

[1020] **RER-0002**, Vela Expert Report, ¶¶ 65–67, 97, fn. 68.

[1021] **RER-0002**, Vela Expert Report, ¶ 97; **Ex. R-0027**, Law No. 26505, 17 July 1995 ("**Land Law**").

[1022] **RER-0002**, Vela Expert Report, ¶¶ 76–85; **Ex. R-0143**, Ministerial Resolution No. 728-99-EM/VMM, 30 December 1999.

[1023] **Ex. R-0010**, Law No. 27783, 17 July 2002.

[1024] **Ex. R-0140**, Ministerial Resolution No. 596-2002-EM/DM, 20 December 2002.

[1025] **Ex. R-0098**, Supreme Decree No. 042-2003-EM, 12 December 2003.

[1026] **Ex. R-0012**, Supreme Decree No. 021-2018-EM, 18 August 2018, Art. 50.

[1027] **RER-0002**, Vela Expert Report, ¶¶ 97, fn. 68.

endorsed the UNDRIP, which call for the full participation of indigenous and tribal communities in development processes that could impact them. In addition, Peru's legal and policy framework reflect international norms of corporate social responsibility, and in particular the industry-wide acceptance of the social license to operate in the mining sector.[1028] Knowledge and awareness of these standards, including the concept of the social license to operate, were readily accessible to Claimant through a variety of toolkits for mine operators from a variety of sources, including inter-governmental organizations,[1029] world-leading policy institutes,[1030] industry associations,[1031] mining consultancy firms,[1032] mining companies with operations in Peru,[1033] the MINEM,[1034] and Claimant's own home state of Canada.[1035]

(i) Peru's prioritization of dialogue is reasonable and diligent in light of the pervasive history of social conflict in Peru's extractive industries

505. Social conflict in Peru's mining sector is a risk that all mining companies face, and that they must therefore prevent and adequately manage.[1036] In 2012, Peru registered over 200 ongoing social conflicts, a majority of which pertained to socio-environmental

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[1028] *See supra* Section II.B.2; **RER-0002**, Vela Expert Report, ¶¶ 86–95.

[1029] *See, e.g.*, **Ex. R-0088**, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 2017; *see also* **Ex. R-0084**, The United Nations Interagency Framework Team for Preventive Action, "Toolkit And Guidance For Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict," 8 October 2012.

[1030] *See, e.g.*, **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013.

[1031] *See, e.g.*, **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015; *see also* **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration, "*Principles and Guidance Notes*," 2014.

[1032] *See, e.g.,* **Ex. R-0087**, BDO, Social License to Operate in Mining: Current Trends & Toolkit, 2020.

[1033] **Ex. R-0141**, OXFAM, "*La Participación ciudadana en la minería peruana: concepciones, mecanismos y casos*," 8 September 2009, p. 16.

[1034] *See* **Ex. R-0028**, Joint Publication between Canadian Embassy in Peru and MINEM, "*Kit De Herramientas De Relacionamiento y Comunicación*," 2018; **Ex. R-0138**, Joint Publication between ACDI and MINEM, "Guía para el Manejo de Crisis y la Comunicación de Crisis," 2003–2008; **Ex. R-0128**, MINEM, "Guía De Participación Ciudadana En El Subsector Minero," December 2010.

[1035] *See* **Ex. R-0089**, 2014 CSR Strategy, 2014.

[1036] **RER-0002**, Vela Expert Report, ¶¶ 96–107.

concerns arising from mining or other natural resource extractive activity.[1037] Between 2010 and 2020, Peru registered an estimated 658 *new* social conflicts within its territory.[1038] Given the pervasiveness of social conflict in the country, and especially in the extractive sector, Peru's Government policy has focused strategically on conflict prevention, conflict monitoring, and conflict management.

506. As discussed in **Section II.E**, Peru has also shaped its response to social conflicts on the basis of its institutional means and resources. Peru has established and equipped certain key government agencies, such as the PCM, the Ombudsman's Office, the OGGS, the MININTER, as well as other regional entities, to address social conflict in the mining sector.[1039] Together, these agencies (i) have configured a framework for conflict prevention, conflict monitoring, and conflict management responses, and (ii) implemented relevant protocols.[1040]

507. Drawing on Canada's extensive experience with such issues, Peru has also welcomed the direct assistance and collaboration of the Canadian Government in building and strengthening Peru's institutional capacity to address social conflict in the mining sector over the last three decades. For example, the Canadian International Development Agency has worked closely with the MINEM through a program known as the PERCAN initiative, with the aim of strengthening Peru's framework for managing social and environmental issues.[1041] Through this initiative, the MINEM has published numerous guides, toolkits, and training material to assist mining companies that wish to operate in Peru in managing community relations. Moreover, Peru's current regulations on citizen participation reflecting socio-environmental considerations were established pursuant to the PERCAN program. Not surprisingly, therefore, Peru's conflict prevention, management, and resolution framework bears a

[1037] **Ex. R-0082**, Ombudsman's Office Report No. 104 on Social Conflicts, October 2012, pp. 11–12.

[1038] **RWS-0002,** Incháustegui Witness Statement, ¶ 34.

[1039] *See supra* Section II.E.1.

[1040] **RER-0001**, Meini Expert Report, ¶¶ 191-192.

[1041] *See supra* Section II.B.2.

certain resemblance to Canada's own national framework for responding to social conflict in the mining sector.

(ii) Peru's prioritization of dialogue is reasonable and diligent in light of Peru's institutional means and resources

508. Claimant's main allegation is that Peru should have responded with immediacy and aggressive force to prevent the Parán Community from setting up their Access Road Protest starting on 14 October 2018. Claimant makes this claim notwithstanding the fact that it had notified PNP authorities of the Parán Community's plan only the day before the protest commenced.[1042] Claimant's demand thus ignores (i) the reality of the significant distance between the nearest police precincts and the remote region where the Invicta mine is located, and (ii) Peru's limited institutional capacity to intervene, given the overwhelming police deployment required to prevent protests or civilian blockades of the magnitude of the Access Road Protest. The following circumstances must therefore be taken into account in assessing the reasonableness of Peru's response, and of its due diligence, in connection with the facts that form the basis of Claimant's claims.

509. *First*, the closest PNP authority with jurisdiction over the relevant zones was the Sayán Police, which was based at least two hours away from the Invicta Mine. Reaching the site is only possible by travelling over a one-way, rugged, and unpaved road.[1043] Such travel can only be safely attempted under favorable weather conditions, and thus cannot be done during seasonal rains. Travel to the Invicta Project zone therefore required significant time and planning, as well as securing appropriate vehicles.[1044]

510. *Second*, the police of Sayán has limited human and institutional resources, as it responsible for guarding a rural territory of 1,630 square kilometers.[1045] By 2018, the Sayán Police only had 15 police officers assigned to respond to all matters in its

[1042] Claimant's Memorial, ¶ 117; [redacted]

[1043] **RWS-0003**, León Witness Statement, ¶ 13 (explaining how the Invicta Project was difficult to access).

[1044] **RWS-0003**, León Witness Statement, ¶¶ 13-14.

[1045] **Ex. R-0169**, Map of LIMA/HUAURA/SAYAN, CPNP SAYAN, May 2020.

geographical area of responsibility.[1046] Thus, even if a few members of the Sayán police could have arrived at the Invicta Mine before the arrival of the Parán Community protestors (quod non), it is unlikely they would have been able to prevent 100 or more members of the community from blocking the road, let alone to do so without considerable risk of endangering their own safety and that of the protestors as well.

511. In light of such resource constraints and limitations, for Peru to have responded pre-emptively before the Parán could establish their Access Road Protest, the CPO of Sayán would have required far more advance notice to have successfully planned and executed an operational plan similar to the one that was prepared and implemented for the September 2018 intervention. As explained above in **Section II.E**, the latter intervention had thwarted the Parán Community's planned protest scheduled for 11 September 2018. However, even if Peru had had enough time and the wherewithal to design and execute an operational plan to prevent the Access Road Protest from taking place (quod non), Claimant's position is tantamount to a demand for the establishment of a sizeable, bespoke, and permanent police presence to secure Invicta Mine to protect Claimant's investment.[1047] However, Peru neither had the resources to sustain such a presence, nor was it under any legal obligation to provide Claimant with its own dedicated PNP security force.

512. As the next section will demonstrate, given the limited institutional means and resources of the Sayán Police, and the impossibility of intervening to prevent the Parán Community members from establishing their Access Road Protest, Peru took reasonable actions to manage the conflict and to steer both the Claimant and the Parán Community towards dialogue to resolve their differences.

[1046] **Ex. R-0130**, Police Report RPL-DIVPOL HUACHO, 10 May 2018.

[1047] **RER-0001**, Meini Expert Report, ¶ 199.

b. Peru acted with due diligence with respect to Claimant's investment, as was reasonable under the circumstances

513. As noted above, FPS does not imply absolute protection against physical or legal infringement of an investment, nor does it involve a strict liability standard.[1048] Rather, "the full protection and security obligation is one of 'due diligence' and no more,"[1049] and the relevant measures of due diligence must be "responsive to the circumstances of the particular case."[1050] The FPS standard accordingly "requires the State to exercise reasonable care."[1051] It is within this framework that Claimant has the burden of proving that Peru failed to satisfy the FPS MST. As previously mentioned, establishing a breach of the FPS MST also requires that Claimant "prove that its alleged injuries and losses could have been prevented" but for the alleged FPS breach.[1052]

514. In this case, Peru not only fulfilled its due diligence obligation under the FPS MST, but in fact it exceeded what was required of it in that regard, by undertaking extra efforts aimed at catalyzing an enduring solution to the conflict between Invicta and the Parán Community.[1053]

515. As explained in detail in **Section II.E.2** above, Peru was responsive and proactive in addressing Claimant's conflict with the Parán Community.[1054] From the time that Claimant acquired Invicta through the date of its divestment, Peru continuously exercised due diligence and "reasonable care."[1055] Numerous illustrations of that are identified below.

[1048] **RLA-0001**, R. Dolzer, *et al.*, "*Chapter VII: Standards of Protection*," PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), p. 161; **CLA-0074**, *Tecmed* (Award), ¶ 177.

[1049] **CLA-0033**, *Rumeli Telekom (*Award), ¶ 668.

[1050] **RLA-0004**, *Tulip Real Estate* (Award), ¶ 430.

[1051] **CLA-0025**, *Cengiz* (Final Award), ¶ 406.

[1052] **RLA-0007,** *Noble Ventures* (Award), ¶ 165 ("[I]n its ELSI judgment, the ICJ had to deal with a situation not so different from the present case.").

[1053] *See supra* Section II.E.

[1054] *See supra* Section II.E.2; **RER-0001**, Meini Expert Report, ¶¶ 39-46; **RER-0002**, Vela Expert Report, ¶¶ 41, 138–47.

[1055] **CLA-0025**, *Cengiz* (Final Award), ¶ 406.

516. From 2012 through 2018, Peru considered and granted Claimant several regulatory approvals necessary for the mine's exploitation.[1056] Peru regularly and diligently engaged with Invicta during this process, often granting Invicta extension requests needed to give it adequate time to seek, amend, and obtain its permits.[1057]

517. Claimant first involved Peru in its emerging conflict in June 2018, when Mr. Miguel Angel Mariños and Mr. Marco Estrada went to the Sayán Police Station to report a protest at the mine.[1058] This initial protest began on 19 June 2018 and ended the same day.[1059] Peru responded to it by promptly taking written statements from the Invicta representatives who were at the Invicta Mine when the protest took place, and by launching an investigation into the protest within 24 hours of Invicta's complaint.[1060]

518. The OGGS then became involved in the emerging conflict, and during July and August 2018, it diligently and persistently assessed, monitored, and facilitated dialogue between Claimant and the Parán Community. It did so, for example, by convening meetings with the Parán Community in the latter's own territory (which required that the OGGS officials travel to the distant Parán Community territory to carry out the relevant consultations), as well as by contacting Claimant representatives and inviting them to engage in dialogue with the community.[1061] As

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[1056] *See supra* Sections II.C.2.

[1057] *See supra* Sections II.C.2 and II.F.1.

[1058] *See supra* Section II.E.2; **Ex. R-0063,** Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, p. 2; **Ex. C-0193**, Lima Police Department Operational Plan No. 002-2019-Region Political Lima/DIVPOL-H-CS.SEC, Plan to Lift Blockade, 9 February 2019, p. 2. **Ex. C-0160**, Inspection Report of Invicta Project Site, Sayán Police Station, 20 June 2018.

[1059] *See supra* Section II.E.2; **Ex. R-0063**, Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, p. 2; **Ex. C-0193**, Lima Police Department Operational Plan No. 002-2019-Region Political Lima/DIVPOL-H-CS.SEC, Plan to Lift Blockade, 9 February 2019, p. 2. **Ex. C-0160,** Inspection Report of Invicta Project Site, Sayán Police Station, 20 June 2018**.**

[1060] *See supra* Section II.E.2; **Ex. C-0129**, Special Report: Seizure of Invicta Mine Camp and Facilities, SOCIAL SUSTAINABLE SOLUTIONS, 19 June 2018, p. 3; *see also* **Ex. C-0160**, Police Inspection Report of Invicta Mine, Sayán Police Station, 20 June 2018; **Ex. R-0064**, Official Letter No. 350-2018-REGION POLICIAL LIMA/DIVPOL-H.CS-SEINCRI, 20 June 2018; **RER-0001**, Meini Expert Report, ¶¶ 186, 187.

[1061] **RWS-0003**, León Witness Statement, ¶¶ 21-23; *see supra* Section II.E.2; **Ex. R-0065,** Meeting Minutes, Meeting between the Parán Community and MINEM, 11 August 2018; **Ex. R-0066**, Meeting Minutes, Meeting between the Parán Community and MINEM, 22 August 2018.

detailed in **Section II.E.2**, during these meetings, the Parán Community expressed its environmental concerns with the Project.[1062]

519. In September 2018, rumors reached Claimant of another protest that was to be held on 11 September 2018.[1063] Claimant contacted Peru, and in response, as Claimant acknowledges,[1064] the CPO of Sayán, the Huaura Prosecutor, and the Huaura Sub-Prefect (i) organized a meeting with the Parán Community on 7 September 2018; (ii) proactively advocated that the Parán Community engage in dialogue with Claimant, and (iii) succeeded in convincing the community to abandon its plan to occupy the Invicta Mine.[1065] Although it was Claimant's own responsibility to secure a good relationship with the Parán Community,[1066] the Sayán Police Station requested authorization to set up a police contingent at the Invicta Mine to prevent another confrontation.[1067] Despite its limited human resources, the Sayán police force actively deployed its personnel to the Invicta Mine, and such police contingent remained on the site from 10 to 12 September 2018.[1068]

520. This temporary measure by Peru could and should have been utilized by *Claimant* to take immediate and adequate measures to de-escalate the conflict with the Parán Community, and to reach an agreement with it or at least pursue a policy of rapprochement. However, Claimant failed to do that. Instead, Claimant ignored the clear warning signs of a deepening social conflict that could lead to a more permanent and entrenched opposition by the Parán Community to the Invicta Project. At such a

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[1062] *See supra* Section II.E.2; **Ex. R-0066,** Meeting Minutes, Meeting between the Parán Community and MINEM, 22 August 2018.

[1063] *See supra* Section II.E.2.

[1064] Claimant's Memorial, ¶ 112.

[1065] **Ex. C-0138**, Monthly Report on Invicta Mining, SOCIAL SUSTAINABLE SOLUTIONS, September 2018, pp. 4–5; [redacted]

[1066] **RWS-0001**, Trigoso Witness Statement, ¶¶ 24-30; **RER-0002**, Vela Expert Report, ¶¶ 77–85.

[1067] **Ex. R-0068**, Official Letter No. 494-2018-REGION POLICIAL LIMA/DIVPOL-H-CS-SBNCRI, 4 September 2018; **Ex. C-0136**, Order No. 1035-2018-REGPOL LIMA/DIVPOL-H-OFIPLO, Police Approval of Plan to Avoid the Parán Community Invasion, 8 September 2018; Claimant's Memorial, ¶ 113.

[1068] Claimant's Memorial, ¶ 113; [redacted] *see supra* Section II.E.2.

juncture, industry best practices clearly advise that mining operators should immediately cease all attempts to continue with mining operations, and instead should prioritize the resolution of the social conflict.[1069] As the Canada-Peru CSR Toolkit warns, protests (and in particular civilian blockades) are a natural consequence of failures in a mining operator's community relations efforts.[1070] Claimant therefore could have welcomed the opportunity of the September 2018 incident and meetings to reassess its community relations shortcomings, and to enhance its own crisis prevention and conflict management protocols going forward. Unfortunately, however, Claimant's insistence on conducting business as usual only increased the risk of escalation of the conflict into more violent expressions of opposition.

521. After Claimant failed to make any meaningful progress in reconciling with the Parán Community, the latter commenced its Access Road Protest on 14 October 2018. Peru once again responded promptly: The CPO of Sayán immediately deployed a patrol, which left early that same morning (14 October 2018), and arrived at the Invicta Mine at 8:30 AM, remaining at the scene until 5:45 PM.[1071] During that time, the CPO of Sayán interviewed members of the Parán Community to understand the reasons that were prompting their protest.[1072] The Parán Community explained that they were protesting, inter alia (i) Claimant's failure to resolve outstanding environmental concerns; and (ii) Claimant's decision not to execute an agreement with their community.[1073]

522. On the first day of the Access Road Protest, Claimant and the Parán Community negotiated an agreement whereby the Parán Community could maintain their protest indefinitely while the parties negotiated towards a more comprehensive and

[1069] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 60.

[1070] **Ex. R-0028**, Canada-Peru CR Toolkit, p. 71.

[1071] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018 (explaining the logistical steps taken to address Claimant's requests).

[1072] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018.

[1073] **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 3.

permanent agreement.[1074] Claimant and the Parán Community also agreed to formally commence a formal negotiation process through Dialogue Tables, which would be overseen and facilitated by various Peruvian entities.[1075] At the end of the first day of the Access Road Protest, having contained the situation and observing that the circumstances did not require nor justify the use of force, the PNP left the site.

523. In light of Peru's history of violent clashes over mining disputes, Peru took affirmative steps to help position Invicta and the Parán Community to reach an agreement that could channel the parties to a sustainable, long-term resolution.[1076] For example, Peru featured discussions that were held between October 2018 and February 2019 to establish the Dialogue Table between Invicta and the Parán Community.[1077] Various government officials traveled during that period from Lima to the Invicta Mine — including in some instances on weekends — to meet with Parán Community leaders to mediate the conflict.[1078] In addition, during this time officials from the OGGS facilitated meetings between Invicta and the Parán Community with several officials from the PCM, Ombudsman's Office, Prosecutor's Office, and Sub-prefectures so that such offices could contribute their respective expertise to the efforts to resolve the conflict.[1079] During these meetings, the Peruvian officials emphasized the importance of dialogue for reaching consensus and of resolution of the conflict through a long-

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[1074] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1; *see also* **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C, and Sayán Police Station, 14 October 2018.

[1075] **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C, and Sayán Police Station, 14 October 2018, pp. 1–2.

[1076] *See supra* Sections II.A.1 and II.E.

[1077] *See supra* Section II.E.3; *see* **Ex. C-0173**, Report on Meeting between Invicta, *et al.*, 24 October 2018; Claimant's Memorial, ¶¶ 125, 127; [redacted]

[1078] **RWS-0003**, León Witness Statement, ¶¶ 26-38

[1079] *See, e.g.*, **Ex. C-0173**, Report on Meeting between Invicta Mining Corp. S.A.C., *et al.*, 24 October 2018; **Ex. C-0182**, Summary Report of Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018; **Ex. C-0183**, Summary Report of 2017 Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018; **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019 p. 2; **Ex. C-0016**, Letter from Invicta (L. Bravo) to MININTER (E. Saavedra), 19 February 2019 (outlining that government authorities have attended several meetings to assist in negotiating with the Parán).

lasting agreement and were repeatedly praised by Claimant for their experience and skill.[1080] Such praise includes:

a. Comments in a report summarizing a government-facilitated meeting on 24 October 2018, wherein Claimant asserted:

> Anthropologist [and representative from the OGGS] Daniel Amaro also attended and **streamlined very well the meeting due to his experience**; He managed to do so even when the community members turned against him, arguing he was siding with the company. He was blunt and very harsh with the radical community members . . .
>
> **The prosecutor played an important role**, explaining at all times what his role as prosecutor entailed and that the community's stance was wrong. He also explained the proceedings for criminal complaints and that it was impossible to withdraw such complaints. He **maintained a firm stance** and identified the main radical opposition community members.[1081] (Emphasis added)

b. Commendations of Mr. León following a government-facilitated meeting on 7 November 2018:

> Dr Nilton León was in attendance, **who with his considerable experience and impetus, managed the meeting, allowing time for all items on the agenda to be discussed**. He was rather tolerant when the community members stated that the ministry was pressuring them to accept the company's conditions and that he was siding with the company. Dr León was **direct and professional with his answers and the way in which he led the meeting**.[1082] (Emphasis added)

524. The various agency officials that led these meetings not only steered mediation efforts, but also acted as neutral sources of information, responding to questions or

[1080] *See supra* Section II.E.

[1081] **Ex. C-0173**, Summary Report, Meeting between Invicta Mining Corp. S.A.C., the Parán Community, the MEM and the Mayor of the District of Leoncio Prado, 24 October 2018, pp. 2, 8.

[1082] **Ex. C-0182**, Summary Report of Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018, p. 2.

demands.[1083] For example, when the Parán Community insisted that Claimant withdraw the criminal complaints that Claimant had filed in response to the protests of June and October 2018, the Prosecutor's Office representative explained how it processed criminal complaints, and confirmed the legal impossibility of withdrawing complaints at that stage.[1084]

525. As expressly recognized by Claimant, Peruvian officials never acquiesced in, accepted, or expressed agreement with the Parán Community's chosen tactics. To the contrary, the Peruvian authorities repeatedly emphasized the Project's importance, the ways in which it could benefit the Parán Community, and how the Access Road Protest would place the Project at risk.[1085] In addition, the OGGS firmly urged the Parán Community to cease its protest so that negotiations could progress constructively.[1086] For example, in a letter sent from the OGGS to the Parán Community on 18 February 2019, Peru "urge[d] [the Parán Community] to lift [their] coercive measure [i.e., the Access Road Protest] in order to restart the process of dialogue and to continue in a climate of peace and peaceful coexistence with the mining company Invicta Mining Corp S.A.C."[1087] Notably, Peru did not support the Parán Community's continued blockade of the Invicta Mine and instead actively advocated on behalf of Claimant to the Community.

[1083] *See, e.g.*, **Ex. C-0173**, Report on Meeting between Invicta Mining Corp. S.A.C., *et al.*, 24 October 2018, **Ex. C-0182**, Summary Report of Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018; **Ex. C-0183**, Summary Report of 2017 Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018, **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019.

[1084] *See* **Ex. C-0173**, Report on Meeting between Invicta Mining Corp. S.A.C., *et al.*, 24 October 2018, p. 1.

[1085] *See, e.g.*, **Ex. C-0173**, Report on Meeting between Invicta Mining Corp. S.A.C., *et al.*, 24 October 2018, p. 2; **Ex. C-0183**, Summary Report of 2017 Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018, p. 2.

[1086] **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to the Parán Community (A. Torres), 18 February 2019, pp. 1–2.

[1087] **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to the Parán Community (A. Torres), 18 February 2019, pp. 1–2.

526. Rather than succumb to Claimant's insistent demands to remove the protesters by force,[1088] Peruvian authorities worked tirelessly to bring both parties to dialogue.[1089] Thanks to those efforts, the Parán Community agreed to reinstate discussions with Claimant,[1090] and as a result of such discussions, Claimant and the Parán Community reached the 26 February 2019 Agreement, in which both committed to engage in a formal process of dialogue and negotiation.[1091]In response to this, Claimant thanked Peru for its efforts when former Lupaka CEO and President Will Ansley publicly announced:

> We are very pleased to announce the positive conclusion of the illegal blockade and **would like to thank our employees, the authorities, and our community partners that worked together to reach this successful result.** We can now get back to executing on our plan to bring Invicta into production. We look forward to continuing to work to build strong relationships with Invicta's local communities, including Parán.[1092]

527. This agreement was short-lived, however, as in the ensuing weeks both parties alleged breaches of their respective obligations thereunder.[1093] Specifically, there was a dispute over which community access road Claimant would be allowed to use to access the Invicta Mine. Claimant demanded access to the Project through the Lacsanga road, which the Parán Community had blocked, despite Claimant's apparent consent in the 26 February 2019 Agreement to access the Invicta Mine *only*

[1088] **Ex. C-0240**, Letter No. 168-2018-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to Invicta Mining Corp. S.A.C. (D. Kivari), 22 November 2018, p. 3; *see* **Ex. C-0240**, Letter No. 168-2018-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to Invicta Mining Corp. S.A.C. (D. Kivari), 22 November 2018, p. 1.

[1089] **RWS-0003**, León Witness Statement, ¶¶ 26-38; **RWS-0001**, Trigoso Witness Statement, ¶¶ 32–44 .

[1090] **Ex. C-0198**, Official Letter No. 005 from the Parán Community (A. Torres) to MINEM (F. Ismodes), 20 February 2019.

[1091] *See supra* Section II.E.4.

[1092] **Ex. R-0171**, Lupaka Gold Corp., "Lupaka Announces End of Illegal Demonstration at Invicta: Access to Site Restored," 4 March 2019.

[1093] *See supra* Section II.E.4.

through the Parán Community road.[1094] In response to this disagreement, OGGS officials once again traveled to Sayán and the Invicta Mine, and confirmed that the Parán Community had granted Claimant access to the Invicta Mine in the manner specified under the 26 February 2019 Agreement.[1095]

528. In addition to the above, the OGGS officials also took note of Claimant's sudden and inexplicable refusal to pay for a topographical survey for detection of environmental damage.[1096] Although the 26 February 2019 Agreement did not specify who would pay for the topographer, Mr. León explains that Claimant had agreed to cover this cost.[1097] It seemed obvious (including to the OGGS) that the burden of payment could fall only on Claimant, as the Parán Community lacked the resources to pay for such a survey.[1098]

529. In response to the disagreement between Claimant and the Parán Community over implementation of the 26 February 2019 Agreements, Peru promptly scheduled several meetings to try to mediate between the parties and bring them back to the Dialogue Table.[1099] When Claimant failed to appear at a government-led meeting with the Parán Community on 1 April 2019, the Parán Community perceived that as yet another expression of disdain by Invicta, and tensions escalated.[1100]

530. On 14 May 2019, the conflict took a violent turn when Claimant hired a private, independent security contractor—ominously called "War Dogs"—that later

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[1094] *See* Section II.E above. *See also* **Ex. C-0206**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MININTER Director, 20 March 2019, p. 2; **Ex. C-0207**, Email from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigoso), 21 March 2019, pp. 2–3**; Ex. C-0209**, Letter from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM Vice Minister, 29 March 2019, p. 3; *also* **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019, p. 2.

[1095] **RWS-0003**, León Witness Statement, ¶ 44.

[1096] **RWS-0003**, León Witness Statement, ¶¶ 45, 65.

[1097] **RWS-0003**, León Witness Statement, ¶¶ 40, 64-67.

[1098] **RWS-0001**, Trigoso Witness Statement, ¶ 48.

[1099] *See supra* Section II.E.4; **Ex. C-0209**, Letter from Invicta (L. Bravo) to MINEM (Vice Minister), 29 March 2019.

[1100] **Ex. R-0026**, Official Letter No. 006-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 21 March 2019 p. 1; **RWS-0003**, León Witness Statement, ¶ 49

attempted to remove the protestors and end the Access Road Protest.[1101] Unfortunately, this use of force resulted in physical violence, one death, and moreover was predictably unsuccessful in resolving the conflict.[1102] Peru promptly investigated the violent War Dogs intervention, and undertook efforts to reinstate communication channels between Invicta and the Parán Community.[1103]

531. On 20 May 2019, high-level government officials held a meeting with the Parán Community, and a few days later (on 27 May 2019), they held another meeting separately with Claimant, to analyze alternatives to resolve this social conflict.[1104] The Peruvian officials proposed that Claimant adopt some good faith measure, such as restructuring the community relations team that would negotiate with the Parán Community, to signal a constructive approach. However, Claimant flatly rejected any such measure, or even the government's invitation to negotiate, insisting that the Parán Community withdraw its Access Road Protest as a pre-condition to any dialogue.[1105]

532. At a further high-level meeting held on 2 July 2019, additional Peruvian State entities (including the Ministry of Health and the Ministry of Agriculture, amongst others), proposed carrying out additional interventions and awareness-raising campaigns with the Parán Community members, to persuade them of the benefits of reaching an agreement with Claimant.[1106]Although the relevant Peruvian agencies remained

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[1101] *See supra* Section II.E.5.

[1102] *See supra* Section II.E.5; **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, pp. 5, 7; **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, pp. 2–3; **RWS-0003**, León Witness Statement, ¶¶ 51, 84.

[1103] **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, pp. 3–4.

[1104] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p.1.

[1105] **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 6.

[1106] **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019, p. 4.

ready to act on these plans, they were never executed because Claimant refused to resume negotiations with the Parán Community.[1107]

533. The forceful removal of the protesters, which Claimant persistently demanded from the Peruvian authorities, was both impracticable and legally unfeasible.[1108] As explained by Peru's criminal law expert, Dr. Meini, Peruvian and international law prescribe that the use of force is absolutely exceptional and requires the prior exhaustion of any and all alternative means available to address and resolve a particular situation.[1109]

534. The use of force by the PNP is heavily regulated, and failure to abide by such regulations is a criminal offense.[1110] Dr. Meini explains that the use of force by the PNP is neither discretional nor arbitrary.[1111] Peruvian law sets forth three scenarios potentially relevant to this case under which use of force may be warranted, viz, (i) in the event of flagrancy; (ii) to enforce a judicial order; and (iii) upon a licit order from a competent authority.[1112] As Dr. Meini explains none of these scenarios was present in this case.[1113]

[1107] *See supra* Sections II.E.4-5; **RWS-0003**, León Witness Statement, ¶ 54.

[1108] **RER-0001**, Meini Expert Report, ¶ 15.

[1109] **RER-0001**, Meini Expert Report, ¶¶ 134, 136; *see also* **Ex. IMM-0042**, Plenary Agreement No. 05-2019/CJ-116, 10 September 2019, fn. 55–56; **Ex. R-0118**, The United Nations OHCHR, "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials," 1990, ¶ 4; **Ex. R-0119**, International Committee of the Red Cross, INTERNATIONAL RULES AND STANDARDS FOR POLICING, 2014, pp. 34–35; **Ex. R-0120**, The United Nations OHCHR, "Code of Conduct for Law Enforcement Officials," 17 December 1979, Art. 3; **Ex. R-0167**, The United Nations OHCHR, "Human Rights Standards and Practice for the Police," April 2003, p. 3.

[1110] **RER-0001**, Meini Expert Report, ¶ 72.

[1111] **RER-0001**, Meini Expert Report, ¶ 134, 147–52; **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Arts. 4.1, 8.2.

[1112] *See* **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2. (a) (b).

[1113] **RER-0001**, Meini Expert Report, ¶¶ 72–76, 101–08. Dr. Meini rejected as inapplicable three remaining scenarios described in Legislative Decree No. 1186, i.e., (i) use of force necessary to prevent perpetration of a crime; (ii) use of force to protect the life, physical integrity and/or freedom of any person/s; and (iii) use of force to restrain a person resisting arrest. **RER-0001**, Meini Expert Report, ¶¶ 74–76.

535. *First*, Dr. Meini examines the legal implications of the crime of "*usurpación* " (i.e. , the illegal taking of real property) over the Invicta Mine, and explains that the criminal act would have been completed on 14 October 2018.[1114] Dr. Meini explains further that force can and should be used within the first twenty four (24) hours of a crime being committed (i.e., during "flagrancy").[1115] Once the state of "flagrancy" has lapsed, the PNP cannot take forceful action in the absence of a court order.[1116] Here, Dr. Meini explains, the PNP was accordingly precluded from acting *ex oficio* and attempting to remove the protesters via the use of force after 15 October 2018. From that date on, the forceful removal of the Access Road Protest would have required an order of a court with specific instructions to that effect.[1117]

536. *Second*, Dr. Meini explains that Peruvian law afforded Claimant a number of legal avenues to secure a court order instructing the removal of the Access Road Protest.[1118] Dr. Meini notes that attempting to recover possession of the Invicta Mine through the channels available within the criminal justice realm would take substantially longer than doing so through certain civil actions specifically designed to seek restitution of real property.[1119] Dr. Meini does, however, explain that Claimant could have sought a form of preliminary injunctive relief ("*medida cautelar de desalojo preventivo*") during the course of the preliminary investigation of any one of Claimant's criminal complaints, or even at any stage of the investigative process concerning the crime of "*usurpación.*"[1120]

537. But as Dr. Meini points out, there is no evidence that Claimant had ever sought this kind of injunctive relief in the context of any of the criminal complaints it filed

[1114] **RER-0001**, Meini Expert Report, ¶ 101.

[1115] **RER-0001**, Meini Expert Report, ¶ 92

[1116] **RER-0001**, Meini Expert Report, ¶ 98, 101.

[1117] **RER-0001**, Meini Expert Report, ¶ 101.

[1118] *See* **Ex. R-0060**, Legislative Decree No. 1186, 15 August 2015, Art. 8.2. (a); **RER-0001**, Meini Expert Report, ¶¶ 72–76, 102–08.

[1119] **RER-0001**, Meini Expert Report, ¶¶ 110, 111, 116–26.

[1120] **RER-0001**, Meini Expert Report, ¶¶ 105, 106.

following the Access Road Protest.[1121] Nor has Claimant availed itself of any of the civil actions specifically designed to seek restitution of a piece of real property.[1122] Dr. Meini described no less than three of those courses of action in his report.[1123]

538. Claimant chose instead to continue pressing the various authorities involved for a forceful intervention of the PNP through implementation of the Operational Plan.[1124] As Dr. Meini explains, however, implementation of the Operational Plan not only would have been illegal but also it would have triggered criminal liability for anyone involved in the process of approval and actual implementation of such plan.[1125]

539. Even if Peru could have acquiesced in Claimant's insistent demands that it forcibly remove the Parán Community members who were participating in the Access Road Protest (quod non), doing so likely would have yielded only a fleeting respite, and assuredly would have exacerbated the conflict.[1126] Peru's policy of prioritizing dialogue over force is based on years of experience dealing with social conflict and violent conflicts between mining operators, rural communities, and Peruvian authorities.[1127] Such experience has consistently shown that the use of force ultimately does not serve the end goal of the parties to social conflicts—namely, reaching a lasting resolution that responds to the interests and concerns of both parties.[1128] Accordingly, much the tribunal did in Tecmed, the Tribunal should find that Peru's reasonable actions in response to the conflict between Claimant and the Parán do not breach the Treaty FPS standard.[1129]

[1121] **RER-0001**, Meini Expert Report, ¶¶ 107.
[1122] **RER-0001**, Meini Expert Report, ¶¶ 125.
[1123] **RER-0001**, Meini Expert Report, ¶¶ 117–126.
[1124] **RER-0001**, Meini Expert Report, ¶¶ 158–166.
[1125] **RER-0001**, Meini Expert Report, ¶¶ 150, 168–174.
[1126] **RER-0001**, Meini Expert Report, ¶¶ 17, 199, 203–04.
[1127] *See supra* Section II.A.1.
[1128] **RER-0001**, Meini Expert Report, ¶ 201–05.
[1129] **CLA-0074**, *Tecmed* (Award), ¶ 177.

540. In the counterfactual scenario in which Peru would have forcibly removed the Parán Community protestors, such actions would needlessly have placed civilian and police lives at risk, without in any way contributing to a definitive resolution of the conflict.[1130] As Claimant's own witness, Mr. Castañeda, acknowledged in his witness statement:

> **[Claimant] knew that the Parán representatives would not be deterred for long and that once the Police had left, the Site would again be at risk of invasion**. For this reason, [Claimant] persisted in [its] efforts to secure an agreement with the Parán Community.[1131] (Emphasis added)

The PNP could not have remained at the Invicta Mine indefinitely, and the State's security forces cannot act as a private security force.[1132]

541. Even if, however, the Tribunal considered that due diligence required an exercise of force (quod non), Claimant's FPS claim must still fail because, like the investor in *Noble Ventures*, Claimant has "failed to prove that its alleged injuries and losses could have been prevented had [Peru] exercised due diligence in this regard."[1133] Rather than resolve the conflict, police intervention likely would have escalated it, risking further and potentially more violent opposition by the Parán Community against Claimant. As several catastrophic incidents in the past suggest,[1134] the Parán Community would have been more likely to reject dialogue with Claimant, and also more likely to reject efforts by Peruvian officials to broker a resolution to the conflict, if the State had removed the protestors by force.

542. Rather than undertake a futile and counterproductive use of force against the Parán Community members, Peru consistently directed its efforts toward catalyzing a durable, long-term solution. By continuously engaging with Claimant as well as with

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[1130] **RER-0001**, Meini Expert Report, ¶ 203–05.

[1131] **CWS-0003**, Castañeda Witness Statement, ¶ 74.

[1132] **RER-0001**, Meini Expert Report, ¶ 199.

[1133] **RLA-0007,** *Noble Ventures* (Award), ¶ 166.

[1134] **RWS-0002**, Incháustegui Witness Statement, ¶¶ 35, 45; *see also* **RWS-0001**, Trigoso Witness Statement, ¶¶ 20, 29, 49.

the Parán Community, Peru worked diligently to facilitate the dialogue needed to secure an agreement between Claimant and the Parán Community that could render the Project viable over the long run. For all of the foregoing reasons, Peru acted not only in accordance with, but well above, the established standard of due diligence and reasonableness.

543. Claimant cites *Tatneft v. Ukraine* and *Biwater v.Tanzania* as examples of instances in which a respondent state has breached its FPS obligation to refrain from directly harming the investment by acts of violence attributable to the State.[1135] The facts of those cases, however, are fundamentally different from those of the instant case. Whereas in *Tatneft* state security forces themselves participated in the forcible entry into the investor's oil refinery, and in *Biwater* Tanzanian State representatives were themselves responsible for ousting the claimant's representatives from their own offices, the relevant acts of hostility in the present case were conducted not by State authorities but rather by Parán Community members, whose actions are not attributable to Peru.[1136] In fact, Peru's police officers and government representatives not only did not aid the Parán Community in its protests at the Invict Mine, but rather consistently sought to defuse the conflict by encouraging the Community to reach an agreement with Claimant.[1137]

[1135] Claimant's Memorial, ¶¶ 257–58; *see also* Claimant's Memorial, ¶ 254 ("[T]he [*Cengiz*] tribunal described the obligation to provide full protection and security as 'an obligation of result and an obligation of means,' which comprised two parts: '-A negative obligation to refrain from directly harming the investment by acts of violence attributable to the State, plus - A positive obligation to prevent that third parties cause physical damage to such investment.'"); **CLA-0025**, *Cengiz* (Final Award) ¶¶ 403–04.

[1136] *See supra* Section IV.A; **RER-0001**, Meini Expert Report, ¶¶ 49–52, 61–67; **RER-0002**, Vela Expert Report, ¶¶ 24–25, 28–29, 59–60.

[1137] *See supra* Section II.E; **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to the Parán Community (A. Torres), 18 February 2019, p. 2 ("In this context, we urge you to lift your coercive measure in order to restart the process of dialogue and to continue in a climate of peace and peaceful coexistence with the mining company Invicta Mining Corp S.A.C.").

544. Further, Claimant cites several cases as examples of instances in which respondent states have breached their positive FPS obligation to prevent third parties from causing physical damage to investments.[1138] These cases include:

a. *AMT v. Zaire*, where the tribunal found that Zaire had not been sufficiently "vigilant" in protecting the claimant's investment from looting, and concluded that "Zaire ha[d] breached its obligation by taking no measure[s] what[so]ever that would serve to ensure the protection and security of the investment in question";[1139]

b. *Wena Hotels v. Egypt*, where the tribunal found that Egypt had breached its FPS obligations because there was substantial evidence that Egyptian authorities were aware that a company that was wholly-owned by the Egyptian Government (EHC) intended to seize the investor's hotels, and took no action to prevent the seizures or to restore the investor's control over the targeted hotels;[1140]

c. *Pezold v. Zimbabwe*, where the tribunal found that Zimbabwe had violated its FPS obligations by being "nonresponsive" to various incidents, failing to prevent the occupation of claimants' farmland, and failing to remove the occupiers once they entered claimant's farm;[1141]

d. *MNSS v. Montenegro*, where the tribunal found Montenegro breached its FPS obligations by taking "no action to dislodge the occupiers [from the claimant's steelworks site] during the seven days that the [first] occupation lasted," and by failing to intervene to prevent a second occupation;[1142]

[1138] Claimant's Memorial, ¶¶ 260–65.

[1139] **CLA-0022**, *AMT v. Zaire* (Award), ¶ 6.08.

[1140] **CLA-0028**, *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award, 8 December 2000 (Leigh, Fadlallah, Wallace) ("***Wena Hotels* (Award)**"), ¶¶ 84–95.

[1141] **CLA-0027**, *von Pezold* (Award), ¶¶ 596–97.

[1142] **CLA-0029**, *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro,* ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016 (Sureda, Gaillard, Stern) ("***MNSS* (Award)**"), ¶¶ 352–53.

e. *Ampal-American v. Egypt*, where the tribunal found that Egypt breached its FPS obligations by its response to attacks on a gas pipeline, which the tribunal described as follows: "[A]n attack is perpetrated, to which [Egypt] reacts months later and then adopts some measures to heighten the security of the pipeline, those measures are seldom implemented (or there is no evidence on the record that they were), another attack happens, and so on";[1143]

f. *Copper Mesa v. Ecuador*, where the tribunal found Ecuador in breach of its FPS obligations because it had not made any attempt to assist a mining company that was unable to complete its environmental impact study due to a blockade at its mining site.[1144]

545. Each of these cases presented a unique set of circumstances with material differences from this case. Namely, in each of those cases, the respondent State was charged with being wholly nonresponsive, failing to respond for long periods of time, or responding in some fashion but refusing to protect the claimant and/or its investment.[1145] Peru's actions in this case stand in stark contrast to the actions of Zaire, Zimbabwe, Egypt, Montenegro and Ecuador in the cases identified above. As discussed in detail above, and unlike those other States, Peru acted promptly, continuously, and persistently—at all levels of government and across various State agencies—to prevent and peacefully resolve the opposition by the Parán Community to the Invicta Project.

546. For the reasons summarized above, Peru has not breached its obligation to accord Claimant with full protection and security under the Treaty.

[1143] **CLA-0030**, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017 (Fortier, McLachlan, Vicuña) ("***Ampal-American* (Decision)**"), ¶ 287.

[1144] **CLA-0031**, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016 (Cremades, Simma, Veeder) ("***Copper Mesa* (Award)**"), ¶ 6.83.

[1145] *See, e.g.*, **CLA-0022**, *AMT v. Zaire* (Award), ¶ 6.08; **CLA-0028**, *Wena Hotels* (Award), ¶¶ 84–95; **CLA-0027**, *von Pezold* (Award), ¶¶ 596–97; **CLA-0029**, *MNSS* (Award), ¶¶ 352–53; **CLA-0030**, *Ampal-American* (Decision), ¶ 287; **CLA-0031**, *Copper Mesa* (Award), ¶ 6.83.

C. Peru has fulfilled its obligation to accord fair and equitable treatment to the investment in accordance with the customary international law minimum standard of treatment of aliens

547. Claimant also claims that Peru violated the Treaty Article 805 ("Minimum Standard of Treatment") by allegedly failing to accord to Claimant's investment "fair and equitable treatment" (FET), in accordance with the MST under CIL.

548. Claimant has failed to prove the content of MST with respect to the "fair and equitable treatment" standard—just as it failed to prove that standard in relation to the "full protection and security" standard.[1146] In addition, Claimant has not met its burden of proof concerning the alleged breach of the MST standard; in particular, Claimant has not demonstrated that Peru breached the CIL standard for FET.

549. To the contrary, the evidence in the present case (recalled in **Section IV.C.2** below) demonstrates that Peru accorded treatment to Claimant's investment in *excess* of MST under CIL, as required by Article 805.

550. Claimant's claim under the Article 805 provision for FET therefore should be dismissed.

1. Claimant has not fulfilled its burden to prove the customary international law minimum standard of treatment, including fair and equitable treatment

551. As noted previously,[1147] Paragraphs 1 and 2 of Treaty Article 805 provide expressly and unequivocally that "fair and equitable treatment" must be understood as part of MST, and that the Article 805 "fair and equitable treatment" standard shall not require treatment in excess of that standard under CIL:

> Each Party shall accord to covered investments treatment **in accordance with the customary international law minimum standard of treatment of aliens**, including **fair and equitable treatment** and full protection and security.
>
> The concepts of "**fair and equitable treatment**" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the **customary**

[1146] *See supra* Section IV.B.1.

[1147] *See also supra* Section IV.B.

> **international law minimum standard of treatment of aliens**.[1148]
> (Emphasis added)

552. Despite the express and unequivocal reference in Article 805 to the applicable legal standard (i.e., "customary international law minimum standard of treatment of aliens"), Claimant attempts to dismiss that standard as irrelevant.[1149] For instance, it asserts that FET under MST is "not materially different"[1150] from other, treaty-specific ("autonomous") interpretations of FET. Because Claimant's interpretation of the content of the FET obligation fails to give any effect (*effet utile*)[1151] to the text of Article 805 (in particular, to the express reference therein to MST under CIL), Claimant's interpretation of Article 805 must be rejected.

553. As explained in the following sections, proving the FET standard under CIL requires Claimant to produce specific evidence, which Claimant has not done. As a result, the legal standard that Claimant proposes is unfounded and inaccurate. Although Claimant alone bears the burden of proving the standard under CIL, and has failed to

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[1148] **RLA-0010**, Peru-Canada FTA, Arts. 805.1–805.2.

[1149] *See* Claimant's Memorial, ¶¶ 267–68.

[1150] Claimant's Memorial, § 4.3.1 ("The customary international law minimum standard of treatment and the [autonomous] FET standard are not materially different"); *see also* Claimant's Memorial, ¶ 268.

[1151] *See, e.g.*, **RLA-0044**, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (Nariman, Bernardini, Torres Bernárdez), ¶ 165 ("Nothing is better settled as a common canon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. This is simply an application of the wider legal principle of effectiveness which requires favouring an interpretation that gives to every treaty provision an '*effet utile*.'"); **RLA-0011**, *Ceskoslovenska* (Decision), ¶ 39 (stating that an investment treaty provision "must be deemed to have some meaning as required under the principle of effectiveness (*effet utile*)."); **RLA-0045**, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award, 21 August 2007 (von Wobeser, Zalduendo, Reisman), ¶ 240 ("Based on the principle of . . . effet utile, all provisions of a treaty should be interpreted in a manner that gives them full effect, with the understanding that they were introduced into the text for a specific reason."); **RLA-0046**, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, WTO AB-1996-1, 20 May 1996, p. 23 ("One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.") (*citing Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania),* 1949 I.C.J. Reports, p. 24); *Territorial Dispute Case* (*Libyan Arab Jamahiriya v. Chad*), 1994 I.C.J. Reports, p. 23; YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1966) p. 219; OPPENHEIM'S INTERNATIONAL LAW (1992), pp. 1280–1281; P. Dallier, *et al.*, DROIT INTERNATIONAL PUBLIC (1994), ¶ 17.2; D. Carreau, DROIT INTERNATIONAL (1994), ¶ 369).

carry that burden, Peru nevertheless will address the content of CIL in respect of FET, as articulated and confirmed in the jurisprudence of the ICJ and of investor-State arbitration tribunals. Peru does so without prejudice to its rights, and without relieving Claimant of its burden of proof.

a. Claimant failed to produce any relevant evidence of the legal standard applicable to "fair and equitable treatment" in accordance with the customary international law minimum standard of treatment

554. Claimant purported to identify the content of the FET standard under Article 805 solely by reference to decisions of investor-State arbitration tribunals.[1152] It relies mainly on *Waste Management v. Mexico*,[1153] *Merrill & Ring Forestry v. Canada*,[1154] *Pope & Talbot Inc. v. Canada*,[1155] and *Pezold v. Zimbabwe*.[1156] Based on its construction of the legal standard adopted by those tribunals, Claimant asserts that FET under Article 805 "protected Lupaka's legitimate expectations and guaranteed its investment transparency, due process and freedom from arbitrary or discriminatory conduct,"[1157] and prohibited "arbitrary as well as grossly unreasonable, unfair, and unjust"[1158] treatment. However, Claimant's assertion is misplaced, and inconsistent with the content of MST.

[1152] *See* Claimant's Memorial, ¶¶ 268–272, 278, 286–89. In Memorial paragraphs adjacent to those cited herein, there are additional references to investor-State arbitration tribunal decisions, but those concern Claimant's arguments on most-favored-nation treatment and the concept of a composite act, rather than interpretation of FTA Article 805. *See* Claimant's Memorial, ¶¶ 275–85.

[1153] **CLA-0037**, *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (Crawford, Civiletti, Magallón Gómez) ("***Waste Management* (Award)**"), ¶ 98.

[1154] **CLA-0035**, *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, Award, 31 March 2010 (Orrego Vicuña, Dam, Rowley) ("***Merrill & Ring* (Award)**"), ¶ 210.

[1155] **CLA-0045**, *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 (Dervaird, Greenberg, Belman) ("***Pope & Talbot* (Award)**"), ¶ 118.

[1156] **CLA-0027**, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, (Fortier, Williams, Hwang) ("***von Pezold* (Award)**"), ¶ 546.

[1157] Claimant's Memorial, ¶ 278; *see also* Claimant's Memorial, ¶¶ 291–92 (alleging Peru frustrated "legitimate expectations").

[1158] Claimant's Memorial, ¶¶ 274, 293.

555. As explained with respect to Claimant's claim concerning full protection and security (also under the Treaty Article 805),[1159] decisions of arbitral tribunals cannot establish the existence or content of customary international law, unless those decisions have compiled, and are based on, the evidence necessary to prove CIL.[1160] The latter must be established based on specific evidence showing (i) that an alleged rule of law has crystallized into widespread and consistent State practice, and (ii) that such State practice flows from a sense of legal obligation (i.e., *opinio juris*).[1161] The burden of proving each of these two essential elements of CIL is on Claimant.[1162] However, Claimant has not alleged, much less demonstrated, that any of the arbitral decisions that it invokes compiled evidence sufficient to prove State practice and *opinio juris* with respect to the legal standard for FET proffered by Claimant. The latter is not part of MST, and therefore cannot form the basis of Claimant's claims under Article 805.

556. Furthermore, in two of the four decisions that Claimant cites as support for its argument on the FET legal standard under the CIL MST, *Pope & Talbot*[1163] and *Pezold*,[1164] each tribunal applied an *autonomous* FET standard, rather than an FET standard under the CIL MST. Therefore, neither the *Pope & Talbot* decision nor that in *Pezold* is instructive for determining the legal standard under Treaty Article 805.

[1159] *See* Section IV.B.

[1160] **CLA-0078**, *Glamis Gold* (Award), ¶ 607; **RLA-0002**, *Bear Creek* (Canada's Submission), ¶ 10. *See also* **RLA-0003**, *Mamacocha* (United States' Submission), ¶ 22 ("A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law.").

[1161] **RLA-0002**, *Bear Creek* (Canada's Submission), ¶ 9.

[1162] **CLA-0078**, *Glamis Gold* (Award), ¶ 607; **RLA-0002**, *Bear Creek* (Canada's Submission), ¶¶ 8–10. *See also* **RLA-0003**, *Mamacocha* (United States' Submission), ¶ 22 ("The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.").

[1163] **CLA-0045**, *Pope & Talbot* (Award), ¶¶ 113–18.

[1164] **CLA-0027**, *von Pezold* (Award), ¶¶ 522, 542–46.

557. Shortly after issuance of the award in *Pope & Talbot* —indeed, "[p]robably as a direct result of [the *Pope & Talbot*] decision"[1165]—the NAFTA Free Trade Commission issued a binding interpretation clarifying that NAFTA provides for FET under the MST, not for the autonomous FET standard.[1166] This was a clear sign that the three NAFTA governments consider the autonomous and CIL standards of FET to be *materially different*, despite Claimant's argument to the contrary in this case.

558. As support for its proposed FET legal standard under the CIL MST, Claimant also cites an excerpt from the decision in *Merrill & Ring v. Canada*,[1167] where the tribunal stated that FET under CIL "protects against all such acts and behavior that might infringe a sense of fairness, equity or reasonableness."[1168] However, the *Merrill & Ring* tribunal expressly declined to define what it believed "fairness, equity or reasonableness" means in the context of FET under CIL,[1169] and the tribunal never examined (i) which component elements might exist as a matter of State practice and *opinio juris* under the customary international law standard of FET; or (ii) the legal standards that would apply to any such component elements of FET under CIL.[1170]

559. On the other hand, as explained in the following section, the fourth decision that Claimant has invoked, *Waste Management II*, articulates the MST accurately and with greater specificity than the decision in *Merrill & Ring*. Certain decisions by the ICJ and

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[1165] **RLA-0047**, D. Gantz, "*Pope & Talbot, Inc. v. Canada*," AMERICAN JOURNAL OF INTERNATIONAL LAW (2003), p. 945; **RLA-0047**, D. Gantz, "*Pope & Talbot, Inc. v. Canada*," AMERICAN JOURNAL OF INTERNATIONAL LAW (2003), p. 944 ("This result [in *Pope & Talbot*] was surely distressing to the governments of both Canada and the United States.").

[1166] **RLA-0076**, NAFTA, "*Notes of Interpretation of Certain Chapter 11 Provisions*," NAFTA COMMISSION, 31 July 2001, Art. 1105.

[1167] Claimant's Memorial, ¶ 271.

[1168] **CLA-0035**, *Merrill & Ring* (Award), ¶ 210.

[1169] **CLA-0035**, *Merrill & Ring* (Award), ¶ 210 ("Of course, the concepts of fairness, equitableness and reasonableness cannot be defined precisely: they require to be applied to the facts of each case. In fact, the concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behavior of a sort, which while difficult to define, may still be regarded as unfair, inequitable or unreasonable.") (*quoted in* Claimant's Memorial, ¶ 271).

[1170] *See* **CLA-0035**, *Merrill & Ring* (Award), ¶¶ 182–213 (wherein tribunal did not examine whether discrimination, arbitrariness, legitimate expectations, or any other alleged component element of FET is part of the MST).

by investor-State arbitration tribunals also have explained accurately the component elements of FET under MST, as well as the respective legal standards applicable to such elements.

b. "Fair and equitable treatment" in accordance with the customary international law minimum standard of treatment is materially narrower than an autonomous standard

560. Although Claimant (not Peru) bears the burden to prove the legal standard for FET under MST, and has failed to meet that burden, Peru refers herein to the content of that MST under CIL (which is the standard expressly and unequivocally required by Treaty Article 805).

561. The legal standard articulated by the tribunal in *Waste Management II* reflects contemporary State practice and *opinio juris*:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant **if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic**, **is discriminatory** and exposes the claimant to sectional or racial prejudice, **or involves a lack of due process leading to an outcome which offends judicial propriety**—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[1171] (Emphasis added)

562. Claimant quoted with approval (most of) this same excerpt from *Waste Management II*,[1172] commenting that "[i]nvestment tribunals have endorsed extensively this definition in the NAFTA context and otherwise."[1173] For instance, the award in *RDC*

[1171] **CLA-0037**, *Waste Management* (Award), ¶ 98.

[1172] Claimant's Memorial, ¶ 269 (*quoting* **CLA-0037**, *Waste Management* (Award), ¶ 98).

[1173] Claimant's Memorial, ¶ 270, fn. 444; *see also* **RLA-0048**, *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016 (Kaufmann-Kohler, Brower, Landau) ("***Mesa Power* (Award)**"), ¶ 501 ("Having considered the Parties' positions and the authorities cited by them, the Tribunal is of the opinion that the decision in *Waste Management II* correctly identifies the content of the customary international law minimum standard of treatment found in Article 1105.").

v. Guatemala noted that "*Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment [MST]."[1174]

563. In *GAMI Investments v. Mexico*, the tribunal identified certain key implications of *Waste Management II's* articulation of the CIL standard of FET:

> Four implications of *Waste Management II* are salient even at the level of generality reflected in the passages [of *Waste Management II*] quoted above. (1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole — not isolated events — determines whether there has been a breach of international law. It is in this light that [claimant's] allegations with respect to Article 1105 fall to be examined.[1175]

564. In addition, the tribunal in *Glamis Gold* observed that, as an inherent characteristic,

> [t]he customary international law minimum standard of treatment [MST] is just that, a minimum standard. It is meant to serve **as a floor, an absolute bottom, below which conduct is not accepted** by the international community.[1176] (Emphasis added)

565. Without evidence of State practice or *opinio juris*, Claimant seems simply to presume that MST imposes a legal obligation on States to (i) respect or protect an alien's legitimate expectations, (ii) guarantee transparency, (iii) observe due process, and (iv) abstain from arbitrariness (or gross unreasonableness or unfairness) and

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[1174] **CLA-0040**, *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 July 2012 (Sureda, Eizenstat, Crawford) ("***Railroad Development* (Award)**"), ¶ 219 (*quoted in* Claimant's Memorial, fn. 444).

[1175] **RLA-0049**, *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004 (Reisman, Lacarte Muró, Paulsson), ¶ 97 (*referring to* **CLA-0037**, *Waste Management* (Award), ¶ 98).

[1176] **CLA-0078**, *Glamis Gold* (Award), ¶ 615.

discrimination.[1177] However, Claimant has not met its burden of proof concerning the content of MST under CIL, and Peru demonstrates below that several of the purported elements of FET according to Claimant are in fact *not* part of MST under CIL.

566. *Legitimate expectations*. FET under MST does not include any legal obligation to protect or act in accordance with an investor's legitimate expectations. In 2018, the ICJ ruled precisely on the question of whether or not the protection of legitimate expectations is part of CIL, and concluded as follows:

> The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. **It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation**. Bolivia's argument based on legitimate expectations thus cannot be sustained.[1178] (Emphasis added)

567. In a recent NAFTA arbitration, *Mesa Power v. Canada*, the tribunal reached the same conclusion. After endorsing *Waste Management II* as an accurate articulation of the FET standard in accordance with MST, the *Mesa Power* tribunal held that this standard does not include among its component principles a requirement to protect legitimate expectations:

> [T]he Tribunal shares the view held by a majority of NAFTA tribunals that **the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach** of [the obligation of fair and equitable treatment], ...[1179] (Emphasis added)

[1177] *See* Claimant's Memorial, ¶¶ 273–74

[1178] **RLA-0050**, Obligation to Negotiate Access to the Pacific Ocean, ICJ, Award, 1 October 2018, ¶ 162.

[1179] **RLA-0048**, *Mesa Power* (Award), ¶ 502; *see also* **CLA-0078**, *Glamis Gold* (Award), ¶ 620 ("Merely not living [up] to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA."); **CLA-0040**, *Railroad Development* (Award), ¶ 219 (expressly adopting the *Waste Management II* articulation of MST).

568. That tribunal added that a host State's failure to respect an investor's legitimate expectations merely constitutes "**an element to take into account** when assessing whether **other** components of the standard are breached"[1180] (emphasis added).

569. The tribunal in *Cargill v. Mexico* recognized that, even if autonomous FET standards might in some cases offer protection of legitimate expectations, this is not the case under the FET standard under MST:

> The Tribunal notes that there are at least two BIT awards, both involving a clause viewed as possessing autonomous meaning, that have found an obligation to provide a predictable investment environment that does not affect the reasonable expectations of the investor at the time of the investment. **No evidence, however, has been placed before the Tribunal that there is such a requirement in the NAFTA or in customary international law**, at least where such expectations do not arise from a contract or quasi-contractual basis.[1181]

570. These determinations by the *Mesa Power* and *Cargill* tribunals are consistent with the *Waste Management II* formulation of the CIL standard of FET, according to which a host State's representations that were reasonably relied upon by the claimant are *not* an integral component of the legal standard of MST. Instead, in a sentence from the *Waste Management II* award—a sentence omitted by Claimant from its Memorial[1182]—that tribunal explained that in applying the CIL standard of FET, a breach of such representations by the host State is merely a "relevant" factor.[1183] In other words, a State's non-adherence to earlier representations does not without more arise to the level of a violation of MST.

[1180] **RLA-0048**, *Mesa Power* (Award), ¶ 502; *see also* **CLA-0078**, *Glamis Gold* (Award), ¶ 620 ("Merely not living [up] to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA."); **CLA-0040**, *Railroad Development* (Award), ¶ 219 (expressly adopting the *Waste Management II* articulation of MST).

[1181] **RLA-0051**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (Pryles, Caron, McRae) ("***Cargill* (Award)**"), ¶ 290.

[1182] Claimant's Memorial, ¶ 269.

[1183] **CLA-0037**, *Waste Management* (Award), ¶ 98 ("In applying this [customary international law FET] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.").

571. The United States also has confirmed the foregoing, when it stated: "The concept of 'legitimate expectations' is not a component element of 'fair and equitable treatment' under customary international law [CIL] that gives rise to an independent host State obligation."[1184]

572. *Transparency*. Like the claimant in *Cargill v. Mexico*, Claimant has not demonstrated that MST includes an obligation of transparency. The tribunal in *Cargill v. Mexico* held that the

> **[c]laimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment** owed to foreign investors per Article 1105's requirement to afford fair and equitable treatment.[1185] (Emphasis added)

573. There is no duty of transparency under MST. Notably, the award in *Metalclad v. Mexico* was annulled specifically because, in applying the NAFTA FET provision—which the NAFTA Parties later clarified prescribes MST—the tribunal "misstated the applicable law to include transparency obligations and it then made its decision on the basis of the concept of transparency."[1186]

574. *Due process (or unjust treatment)*. To the extent that due process can be considered part of MST, establishing a violation of MST requires showing a violation of due process that is so extreme that it "offends judicial propriety":

[1184] **RLA-0003**, *Mamacocha* (United States' Submission), ¶ 27; *see also* **RLA-0003**, *Mamacocha* (United States' Submission), ¶ 27 ("The United States is aware of no general and consistent State practice and opinio juris establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.").

[1185] **RLA-0051**, *Cargill* (Award), ¶ 294; *see also* **RLA-0003**, *Mamacocha* (United States' Submission), ¶ 28 ("The concept of 'transparency' also has not crystallized as a component of 'fair and equitable treatment' under customary international law giving rise to an independent host-State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host State transparency under the minimum standard of treatment.").

[1186] **RLA-0052**, *United Mexican States v. Metalclad Corp.*, Supreme Court of British Columbia, Reasons for Judgment of the Honorable Mr. Judge Tysoe, 2 May 2001, ¶ 70.

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant **if the conduct . . . involves a lack of due process leading to an outcome which offends judicial propriety — as might be the case with a manifest failure of natural justice in judicial proceedings** or a complete lack of transparency and candour in an administrative process.[1187] (Emphasis added)

575. The tribunal in *International Thunderbird v. Mexico* articulated a similar standard for FET claims under MST that are based on due process or unjust treatment:

> [T]he Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a **gross denial of justice or manifest arbitrariness falling below acceptable international standards**.[1188] (Emphasis added)

576. *Arbitrariness (or gross unreasonableness or unfairness)*. In *Siemens v. Argentina*, the tribunal observed that "the most authoritative interpretation of international law"[1189] on arbitrariness appears in the ICJ Judgment rendered in the *ELSI (United States v. Italy)* case, where the ICJ held that

> [a]rbitrariness is not so much something opposed to a rule of law, as **something opposed to the rule of law**. . . . It is a wilful disregard of due process of law, an act which **shocks, or at least surprises, a sense of juridical propriety**.[1190] (Emphasis added)

577. Other investment tribunals have recognized similarly stringent standards of arbitrariness under CIL. For example, in *Cargill v. Mexico*, the tribunal concluded that to be "arbitrary" under CIL, a measure must be "arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure

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[1187] **CLA-0037**, *Waste Management* (Award), ¶ 98.

[1188] **RLA-0053**, *International Thunderbird Gaming Corporation v. United Mexican States,* UNCITRAL, Arbitral Award, 26 January 2006 (van den Berg, Ariosa, Wälde), ¶ 194.

[1189] **CLA-0071**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (Sureda, Brower, Janeiro), ¶ 318.

[1190] **RLA-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, ICJ, Judgment, 20 July 1989, ¶ 128.

so as to constitute **an unexpected and shocking repudiation of a policy's very purpose and goals"**[1191] (emphasis added).

578. For its part, the tribunal in *Flughafen Zürich v. Venezuela* also addressed the legal standard for arbitrariness under MST[1192]:

> The fundamental idea of arbitrariness consists in legality, due process, the right to judicial review, objectivity and transparency being replaced in the management of public property by privilege, preference, bias, estoppel and concealment.[1193]

579. The *Flughafen* tribunal cited approvingly to the decision in *EDF v. Romania*, which in turn quoted Professor Schreuer as defining arbitrariness under MST as

> a measure that inflicts damage on the investor without serving any apparent legitimate purpose; a measure that is not based on legal standards but on discretion, prejudice or personal preference; a measure taken for reasons that are different from those put forward by the decision maker; a measure taken in willful disregard of due process and proper procedure.[1194]

580. *Non-discrimination*. International tribunals have held that, to establish a violation of international law resulting from discriminatory treatment, a claimant must show

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[1191] **RLA-0051**, *Cargill* (Award), ¶ 296.

[1192] **RLA-0103**, *Flughafen Zürich, et al., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014 (Fernández-Armesto, Alvarez, Vinuesa) ("***Flughafen Zürich* (Award)**"), ¶ 573 (concluding that the applicable treaties provided for FET under the MST).

[1193] **RLA-0103**, Flughafen Zürich (Award), ¶ 585 ("The fundamental idea of arbitrariness consists in legality, due process, the right to judicial review, objectivity and transparency being replaced in the management of public property by privilege, preference, bias, estoppel and concealment").

[1194] **RLA-0103**, *Flughafen Zürich* (Award), ¶ 585 (*quoting* C**LA-0044**, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (Bernardini, Rovine, Derains) ("***EDF v. Romania* (Award)**"), ¶ 303; *see also, e.g.*, **RLA-0104**, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No ARB/07/12, Award, 7 June 2012 (Van Houtte, Schwebel, Moghaizel)("***Toto* (Award)**"), ¶ 157 ("An unreasonable or discriminatory measure is defined in this case as (i) a measure that inflicts damages on the investor without serving any apparent legitimate purpose; (ii) a measure that is not based on legal standards but on discretion, prejudice or personal preference, (iii) a measure taken for reasons that are different from those put forward by the decision maker, or (iv) a measure taken in wilful disregard of due process and proper procedure."); **RLA-0105**, *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (Fernández-Armesto, Paulsson, Voss) ("***Lemire* (Decision)**"), ¶ 262 (*quoting* **CLA-0044**, *EDF v. Romania (Award)*, ¶ 303).

more than mere differential treatment. As the tribunal in *El Paso v. Argentina* explained,

> a differential treatment based on the existence of a different factual and legal situation does not breach the BIT's standard. Here the Tribunal is in line with the approach of other tribunals already cited and finds itself in agreement with the tribunal in *Enron [v. Argentina]*, which found **no discrimination between different sectors of the economy, although they were indeed treated differently, as there was no "capricious, irrational or absurd differentiation** in the treatment accorded to the Claimant as compared to other entities or sectors." The Tribunal finds that the Claimant has not proved any improper differentiation.[1195] (Emphasis added)

581. The tribunal in *Flughafen Zürich v. Venezuela* articulated the following legal standard for discrimination under MST:

> Discrimination for its part requires an investment to be treated differently from other investments, without there being any objective cause to justify it; for a measure to affect a foreign investor and not others, precisely due to his nature as a foreigner, or due to the fact that he belongs to a certain ethnic, religious or national group.

582. Even under an autonomous treaty clause barring discrimination, a claimant must meet its burden to prove each of the following three elements:

> [M]easures affecting an investor are discriminatory if they are [1] clearly less favourable tha[n] those accorded to other

[1195] **CLA-0052**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (Caflisch, Bernardini, Stern), ¶ 315. *See also* **RLA-0003**, *Mamacocha* (United States' Submission), ¶ 30 ("Similarly, the customary international law minimum standard of treatment set forth in [U.S.-Peru Trade Promotion Agreement] Article 10.5 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently. To the extent that the customary international law minimum standard of treatment incorporated in Article 10.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings, access to judicial remedies or treatment by the courts, or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife. Accordingly, general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Ten that specifically address that subject, and not Article 10.5.1.").

> investors operating under the same or similar circumstances, [2] they intend to harm the foreign investor and cause actual damage, and if [3] they are not justified by sufficient reasons.[1196]

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583. In conclusion, the Treaty expressly declares that Article 805 provides for FET in accordance with the customary international law (CIL) minimum standard of treatment (MST). Claimant bears the burden of proving the content of FET under this standard, which requires establishing widespread and consistent State practice and *opinio juris*. Claimant has not met this burden (or even *attempted* to do so). Claimant likewise bears the burden of proving that Peru's alleged conduct breached the FET under MST. Even though Peru does not bear the burden to prove it did not commit such breach, and reserving its rights, Peru demonstrates further below that it did not breach its obligation to accord FET under MST to Claimant or its investment.

2. Claimant failed to identify the applicable legal standard for composite acts

584. Claimant argues that measures by Peru should be deemed a "composite act,"[1197] such that the Tribunal "should examine Peru's conduct as a whole"[1198] when considering Claimant's claim.

585. The concept of a "composite act" is defined in ILC Article 15(1), in the following terms:

> The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the

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[1196] **RLA-0055**, *Urbaser S.A., et al., v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016 (Bucher, Martínez-Fraga, McLachlan) ("***Urbaser* (Award)**"), ¶ 1088; *see also* **RLA-0106**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019 (Derains, Hanotiau, Fernández Rozas) ("***Belenergia* (Award)**"), ¶ 631 ("[D]ifferentiated treatment is by no means based on the national or foreign origin of producers, but on their capacity, size, economic and commercial dimension. Thus, differentiated treatment based on legitimate grounds leading to special protection of smaller plants is easily justifiable so far as it seeks to guarantee free competition in the energy sector.") (*quoted with approval in* **RLA-0107**, *SunReserve Luxco Holdings SRL, et al., v. Italian Republic*, SCC Case No. 2016/32, Final Award, 25 March 2020 (van den Berg, Sachs, Giardina) ("***SunReserve* (Award)**"), ¶ 956).

[1197] *See* Claimant's Memorial, §§ 4.3.3, 4.3.4.

[1198] Claimant's Memorial, ¶ 285.

> other actions or omissions, is sufficient to constitute the wrongful act.[1199]

586. However, not every "series of actions or omissions"[1200] can be deemed to be a composite act. As explained by Professor Crawford, "a composite act is more than a simple series of repeated actions, but, rather, a legal entity the whole of which represents more than the sum of its parts."[1201] Indeed, the ILC Commentary explains that, to be a composite act, the acts or omissions in a series must be "sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system."[1202] Tribunals in investor-State arbitrations have recognized and applied this legal standard. For example, after analyzing multiple measures invoked as the basis for an expropriation claim, the tribunal in *RosInvestCo v. Russia* concluded that

> the totality of Respondent' [sic] measures were structured in such a way to remove Yukos' assets from the control of the company and the individuals associated with Yukos . . . In the view of the Tribunal, they can only be understood as **steps under a common denominator in a pattern** to destroy Yukos and gain control over its assets.[1203] (Emphasis added)

587. In addition to being inter-connected and having a common denominator, for a series of actions or omissions to constitute a composite act, "each step must have an adverse effect" on the investment.[1204]

[1199] **CLA-0018**, ILC Commentary, Art. 15(1) (*quoted in* Claimants Memorial, ¶ 281).

[1200] **CLA-0018**, ILC Commentary, Art. 15(1).

[1201] **RLA-0024**, Crawford, p. 266.

[1202] **CLA-0018**, ILC Commentary, Art. 15(1), cmt. 5 (*quoting Ireland v. United Kingdom* European Court of Human Rights, Application No. 5310/71, Award, 18 January 1978, ¶ 159).

[1203] **RLA-0056**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V(079/2005), Final Award, 12 September 2010 (Böckstiegel, Steyn, Berman), ¶ 621. *See also* **CLA-0044**, *EDF v. Romania* (Award), ¶ 308 (requiring evidence of a "coordinated pattern adopted by the State for [] implementation [of the measures]"); **RLA-0057**, *Renta 4 S.V.S.A. et al., v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009 (Paulsson, Brower, Landau), ¶ 147 (referring to a series measures as being part of an "an overall confiscatory scheme").

[1204] **CLA-0071**, *Siemens* (Award), ¶ 263 (*quoted in* Claimant's Memorial, ¶ 309) (quoted approvingly in **CLA-0082**, *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (Lévy, Gotanda, Boisson de Chazournes), ¶ 670).

588. Thus, to base any claim on an alleged composite act by Peru, Claimant must prove that specific alleged actions or omissions by Peru are "sufficiently numerous and inter-connected" to amount to a "pattern or system,"[1205] and that "each step" had an adverse effect."[1206]

3. Claimant cannot invoke the MFN Clause to "import" an autonomous standard of fair and equitable treatment from a different treaty

589. Claimant attempts to circumvent the high legal standard under CIL—expressly articulated in Treaty Article 805—by invoking the most-favored nation clause in Treaty Article 804 ("**MFN Clause**") as a means to "import"[1207] a less demanding FET standard from a different treaty. Specifically, Claimant attempts to substitute MST under CIL with the *autonomous* FET standard under the 1993 Peru-United Kingdom investment treaty.[1208] However, as explained below, the MFN Clause does not enable Claimant to modify the content of Article 805, or to disregard the express will of the Treaty Parties.

590. Claimant offers nothing more than a cursory, two-paragraph discussion in its Memorial to justify its attempt to import into the Treaty an autonomous FET clause from a different treaty. Claimant relies on the following two arguments: (i) other arbitral tribunals have used most-favored-nation clauses to import into one treaty an FET clause from a different treaty,[1209] and (ii) the Treaty "implicitly approves the

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[1205] **CLA-0018**, ILC Commentary, Art. 15(1), cmt. 5 (*quoting Ireland v. United Kingdom* European Court of Human Rights, Application No. 5310/71, Award, 18 January 1978, ¶ 159). The resulting "pattern or system" must constitute "a legal entity the whole of which represents more than the sum of its parts." **RLA-0024**, Crawford, p. 266.

[1206] **CLA-0071**, *Siemens* (Award), ¶ 263 (*quoted in* Claimant's Memorial, ¶ 309) (*quoted approvingly in* **CLA-0082**, *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (Lévy, Gotanda, Boisson de Chazournes), ¶ 670).

[1207] Claimant's Memorial, ¶ 275.

[1208] Claimant's Memorial, ¶ 275. Article 2(2) of the Peru-United Kingdom BIT provides: "Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party." **CLA-0046**, Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Peru, 4 October 1993, p. 4, Art. 2(2).

[1209] Claimant's Memorial, ¶ 276.

importation of substantive obligations since it excludes only the importation from other treaties of dispute resolution provisions."[1210] Neither of Claimant's arguments justifies importing into the Treaty any provision from any other treaty. Tellingly, Claimant does not even attempt to interpret the MFN Clause in accordance with the rules of treaty interpretation under CIL, codified in the Vienna Convention.[1211]

a. The MFN Clause, as interpreted under the VCLT CIL rule of treaty interpretation, does not enable Claimant to "import" into the Treaty provisions from different treaties

591. Most-favored-nation treatment clauses are not uniform across treaties and must be interpreted pursuant to their particular terms, as required by the Vienna Convention, rather than "rely on general concepts of what the invocation of such clauses may achieve or may not achieve." [1212] The analysis in this case therefore must be based on the precise terms of the MFN Clause, contained in Paragraphs 1 and 2 of Treaty Article 804, which provides as follows:

> 1. Each Party shall accord to investors of the other Party **treatment** no less favourable than **that it accords, in like circumstances**, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments **treatment** no less favourable than **that it accords, in like circumstances**, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.[1213] (Emphasis added)

[1210] Claimant's Memorial, ¶ 277.

[1211] **RLA-0128**, United Nations, 1969 Vienna Convention on the Law of Treaties ("**VCLT**"), Art. 31(1) (a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

[1212] **RLA-0120**, *Krederi, Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018 (Reinisch, Wirth, Griffith), ¶ 289.

[1213] **RLA-0010**, Peru-Canada FTA, Art. 804.1–804.2.

592. The scope of the MFN Clause is expressly limited to "treatment . . . that [each Treaty Party] accords, in like circumstances"[1214] to "investors of a non-Party[1215]" or to "investments of investors of a non-Party."[1216] Any claim under the MFN Clause therefore requires, as a starting point,[1217] that Claimant identify: (i) an investor or investment of a non-Party, (ii) the circumstances of such investor or investment, (iii) the "likeness" of those circumstances with those of Claimant or Claimant's investment; and (iv) "treatment" accorded by a Treaty Party to the identified investor or investment of a non-Party.[1218]

593. When interpreted under the CIL rule of treaty interpretation in Vienna Convention Article 31, the MFN Clause precludes importing into the Treaty a provision from a different treaty. In *Sirketi v. Turkmenistan*, the tribunal interpreted a most-favored-nation clause that is analogous to the Treaty MFN Clause,[1219] in accordance with Vienna Convention and concluded that "differences between applicable legal standards cannot be said to amount to 'treatment accorded in similar situations.' "[1220]

[1214] **RLA-0010**, Peru-Canada FTA, Art. 804.1–804.2.

[1215] **RLA-0010**, Peru-Canada FTA, Art. 804.1.

[1216] **RLA-0010**, Peru-Canada FTA, Art. 804.2.

[1217] In addition to satisfying the threshold requirements, completing any claim under the MFN Clause requires proving that Claimant or its investment was accorded "less favourable" treatment than the identified investor or investments of a non-Party "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory"; **RLA-0010**, Peru-Canada FTA, Art. 804.1–804.2.

[1218] *See* **RLA-0010**, Peru-Canada FTA, Art. 804.1–804.2; *see also* **RLA-0003**, *Mamacocha* (United States' Submission), ¶¶ 38–40.

[1219] The most-favored-nation clause in *Sirketi v. Turkmenistan* stated: "Each Party shall accord to these investments [i.e., investments permitted into its territory pursuant to Article II(1)], once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable."). **RLA-0121**, *Içkale Inşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016 (Heiskanen, Lamm, Sands) ("***Sirketi* (Award)**"), ¶ 326.

[1220] **RLA-0121**, *Sirketi* (Award), ¶¶ 328–29; *see also* **RLA-0122**, *Bankrupt Sehil Inşaat Endustri Ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (Lew, Boisson de Chazournes, Hanotiau) ("***Sehil* (Award)**"), ¶ 793 ("The Tribunal has concluded that the MFN provision in Article II(2) BIT applies to *de facto* discrimination where two actual investors in a similar situation are treated differently. That is not the case here. Further, the wording of Article II(2), requiring such factually

That tribunal noted that to conclude otherwise, "would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or *effet utile*, which requires that each term of a treaty provision should be given a meaning and effect."[1221]

594. Canada (the other Treaty Party) has confirmed that if a most-favored-nation clause requires "treatment" of non-party investors or investments in "like circumstances"—as the MFN Clause does in the present case—such clause cannot be used to import provisions of a different treaty. With respect to the NAFTA most-favored-nation clause, which includes both requirements (i.e., treatment and like circumstances), Canada observed that

> **nothing in the terms of [the NAFTA most-favored-nation clause] suggests that it can be invoked to import a standard provided for in a different treaty** that may potentially or theoretically result in a more favorable treatment of an investor from another Party or of a non-Party. **The provision is concerned with "treatment" accorded to investors**. In addition, **the requirement that the treatment be accorded "in like circumstances" must be given meaning** and take into account the circumstances relevant to the treatment at issue.[1222] (Emphasis added)

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similar situation, does not entitle Claimants to rely on the MFN provision to import substantive standards of protection from a third-party treaty which are not included in the BIT, and to rely on such standards in the present Arbitration.").

[1221] **RLA-0121**, *Sirketi* (Award), ¶¶ 328–29; *see also* **RLA-0122**, *Sehil* (Award), ¶ 793 ("The Tribunal has concluded that the MFN provision in Article II(2) BIT applies to *de facto* discrimination where two actual investors in a similar situation are treated differently. That is not the case here. Further, the wording of Article II(2), requiring such factually similar situation, does not entitle Claimants to rely on the MFN provision to import substantive standards of protection from a third-party treaty which are not included in the BIT, and to rely on such standards in the present Arbitration.").

[1222] **RLA-0123**, *Chemtura Corp. v. Government of Canada*, UNCITRAL, Rejoinder Memorial, 10 July 2009 (Kaufmann-Kohler, Brower, Crawford), ¶¶ 232, 238–239; *see also* **CLA-0041**, *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award, 2 August 2010 (Kaufmann-Kohler, Brower, Crawford), ¶ 235 ("[Canada] as well as the United States and Mexico in their [non-disputing party] interventions . . . firmly oppose the possibility of importing an FET clause from [an investment treaty] concluded by Canada. The [t]ribunal can dispense with resolving this issue as a matter of principle. Indeed, even if it were admissible to import [an investment treaty] FET clause, the conclusions reached by the

595. Likewise, the United States has explained—with respect to a most-favored-nation clause that is analogous[1223] to the Treaty MFN Clause—that existence of an autonomous FET provision in a different treaty does not, on its own, constitute "treatment" of an investor or investment of a non-Party, and emphasized that "[i]f the claimant does not identify treatment that is actually being accorded with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of [the most-favored-nation clause] can be established."[1224]

596. Moreover, pursuant to the Vienna Convention Article 31, the terms of the Treaty MFN Clause must be interpreted "in their context,"[1225] which includes the rest of the Treaty text.[1226] Treaty Article 805, setting forth the obligation to accord FET under the CIL MST, is therefore part of the context that must inform an interpretation of the MFN Clause.[1227] Claimant's argument that the Treaty MFN Clause can be used to import an autonomous FET clause would render nugatory the Treaty Article 805 provisions for

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[t]ribunal on the basis of the facts would remain unchanged."); *see also* **RLA-0124**, Z. Douglas, "*The MFN Clause in Investment Arbitration*," JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2010), p. 105 ("The MFN clause does not, in truth, operate automatically to 'incorporate' provisions of a third treaty so that all that remains for a tribunal to do is to interpret the amended text of the basic treaty"); **RLA-0124**, Z. Douglas, "*The MFN Clause in Investment Arbitration*," JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2010), p. 107 ("The MFN clause does not automatically incorporate the terms of a third treaty into the basic treaty. It secures the treatment afforded by the host state to investors with the requisite nationality under a third treaty for the benefit of investors with the requisite nationality under the basic treaty. The more favourable treatment must be identified and then compared with the treatment afforded to the particular claimant.").

[1223] **RLA-0125**, Free Trade Agreement between the United States of America and Peru, 4 December 2006, Art. 10.4 ("1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.").

[1224] **RLA-0003**, *Mamacocha* (United States' Submission), ¶ 42 ("Moreover, a Party does not accord treatment through the mere existence of provisions in its other international agreements such as umbrella clauses or clauses that impose autonomous fair and equitable treatment standards.").

[1225] **RLA-0128**, VCLT, Art. 31(1).

[1226] *See* **RLA-0128**, VCLT, Art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . .").

[1227] **RLA-0010**, Peru-Canada FTA, Art. 805(1)–(2).

FET under the CIL MST, contrary to well-established principle that each Treaty provision must be given effect.[1228]

597. Claimant invokes Annex 804.1 to argue that the Treaty "implicitly approves the importation of substantive obligations since it excludes only the importation from other treaties of dispute resolution provisions."[1229] Claimant's assertion is wrong. Annex 804.1 is not relevant in this case, other than perhaps to highlight that the Treaty Parties deliberately gave the MFN Clause a limited scope. A footnote to the MFN Clause states that such clause shall be interpreted in accordance with Treaty Annex 804.1,[1230] which provides as follows:

> For greater clarity, treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments" referred to in paragraphs 1 and 2 of Article 804 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international treaties or trade agreements.[1231]

598. Annex 804.1 actually confirms Peru's (as well as Canada's and the United States') interpretation as set out above. That Annex clarifies that the MFN Clause does not encompass treatment in the abstract (as is the case of dispute resolution mechanisms

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[1228] *E.g.*, **RLA-0126**, *Canfor Corp. v. United States of America* and *Terminal Forest Products Ltd. v. The United States of America*, UNCITRAL, Decision on Preliminary Questions, 6 June 2006 (de Mestral, Robinson, van den Beg), ¶ 324 ("every provision of an international agreement must have meaning, because it is presumed that the State Parties that negotiated and concluded that agreement intended each of its provisions to have an effect."); **RLA-0044**, *Wintershall* (Award), ¶ 165 ("Nothing is better settled as a common cannon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. This is simply an application of the wider legal principle of effectiveness which requires favouring an interpretation that gives to every treaty provision an '*effet utile.*'") (internal citations omitted); *see also* **RLA-0127**, *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Objection under Arbitration Rule 41(5), 16 January 2013 (Rovine, Lalonde, McRae), ¶¶ 73–74 ("MFN clauses are not and should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties. . . . The Tribunal is of the view that an investor may properly rely only on rights set forth in the basic treaty, meaning the BIT to which the investor's home state and the host state of the investment are directly parties, but not more than that.").

[1229] Claimant's Memorial, ¶ 277.

[1230] **RLA-0010**, Peru-Canada FTA, Art. 804, fn. 2.

[1231] **RLA-0010**, Peru-Canada FTA, Annex 804.1.

under a treaty), but rather applies to treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory."[1232]

b. Past arbitral decisions do not support Claimant's attempt to "import" into the Treaty a provision of any different treaty

599. Claimant also asserts that in two investor-State arbitrations (*MTD Equity v. Chile* and *Rumeli Telekom v. Kazakhstan*) the tribunals allowed the claimant to import a "more favourable"[1233] FET provision from a different treaty.[1234] However, Claimant did not consider the specific language of the most-favored-nation clauses of the treaties that those two tribunals applied, nor the reasoning that led those tribunals to import FET provisions from different treaties.

600. In the first case, *MTD Equity v. Chile*, the tribunal applied a most-favored-nation clause from the Chile-Malaysia investment treaty:

> 1. Investments made by investors of either Contracting Party in the territory of the other Contracting Party **shall receive treatment which is fair and equitable, and not less favorable than that accorded to investments made by investors of any third State**.[1235] (Emphasis added)

601. The clause quoted above is materially different—both in wording and structure—from the MFN Clause in the present case. Among other distinctions, the clause in the Chile-Malaysia treaty (i) expressly includes fair and equitable treatment; (ii) lacks any limitation to "treatment . . . with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments"[1236];

[1232] **RLA-0010**, Peru-Canada FTA, Annex 804.1.

[1233] Claimant's Memorial, ¶ 276.

[1234] Claimant's Memorial, ¶ 276, fn. 449 (*citing* **CLA-0047**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 28 May 2004 (Sureda, Lalonde, Oreamuno) ("***MTD Equity* (Award)**"), ¶ 104; **CLA-0033**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (Sureda, Lalonde, Oreamuno) ("***Rumeli Telekom* (Award)**"), ¶ 575).

[1235] **CLA-0047**, *MTD Equity* (Award), ¶ 101.

[1236] **RLA-0010**, Peru-Canada FTA, Art. 804.1–804.2.

and (iii) lacks any limitation concerning other investors or investments "in like circumstances."[1237]

602. Furthermore, the same Chile-Malaysia treaty already contained an *autonomous* FET clause,[1238] and the tribunal in that case noted that the respondent State (Chile) had not argued against the incorporation by reference of provisions of other bilateral investment treaties.[1239] The tribunal therefore undertook only a cursory examination, *proprio motu*, of the most-favored-nation clause in the Chile-Malaysia investment treaty.[1240]

603. In the other case cited by Claimant, *Rumeli Telekom v. Kazakhstan*,[1241] the tribunal applied a most-favored-nation clause from the Turkey-Kazakhstan investment treaty, which provided as follows:

> '(1) Each Party shall permit in its territory investments, and activities associated therewith, on a basis no less favorable than that accorded in similar situations to investments of investors of any third country, within the framework of its laws and regulations.
>
> (2) Each Party shall accord to these investments, once established, treatment no less favorable than that accorded in similar situations to investments of its investors ('National

[1237] **RLA-0010**, Peru-Canada FTA, Art. 804.1–804.2.

[1238] **CLA-0047**, *MTD Equity* (Award), ¶¶ 110–11 ("The [NAFTA] Free Trade Commission has interpreted 'fair and equitable treatment' as not requiring treatment in addition to or beyond that which is required by the international law minimum standard. The Tribunal notes that Chile has not argued that this is how 'fair and equitable treatment' should be understood under the [Chile-Malaysia] BIT. . . . The Tribunal further notes that there is no reference to customary international law in the [Chile-Malaysia] BIT in relation to fair and equitable treatment.").

[1239] **CLA-0047**, *MTD Equity* (Award), ¶ 101 ("The Claimants have based in part their claims on provisions of other bilateral investment treaties and have alleged that these provisions apply by operation of the MFN clause of the BIT. **The Respondent has not argued against the application of these provisions** but . . . the Respondent has qualified its arguments by stating that, even in the event that the [imported] clause concerned would apply, the facts of the case are such that it would not have been breached.") (emphasis added).

[1240] **CLA-0047**, *MTD Equity* (Award), ¶ 101.

[1241] Claimant's Memorial, ¶ 276, fn. 449.

> Treatment clause') or to investments of investors of any third country, whichever is the most favorable ('MFN clause').'[1242]

604. The most-favored-nation clause in the Turkey-Kazakhstan investment treaty also has a materially different wording and structure from the MFN Clause in the present case, insofar as (i) it expressly provides for admission of investments "on a basis" no less favorable than that accorded in similar situations to investments of other foreign investors; (ii) in the case of established investments, it lacks any limitation of the sort contained in the MFN Clause, concerning "treatment . . . with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."[1243]

605. Furthermore, as in *MTD*, in *Rumeli* the respondent State had not expressed any objection to the incorporation by reference of FET provisions from different treaties.[1244] The tribunal therefore did not assess at all whether such incorporation was justified under the most-favored-nation clause.[1245]

606. In addition to citing *MTD* and *Rumeli* as examples of arbitral decisions in which tribunals have imported into one treaty a "more favourable"[1246] FET legal standard from a different treaty, Claimant cites in a footnote—without any explanation or discussion—four[1247] other cases in which tribunals allegedly imported "an FET provision in its entirety." However, Claimant acknowledges that those cases were ones in which "an FET provision was missing under the applicable treaty."[1248] Such being the case, those cases are manifestly different from the present one, because the Treaty not only already contains an FET provision, but also expressly identifies the

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[1242] **CLA-0033**, *Rumeli Telekom* (Award), ¶ 558 (*quoting* Turkey-Kazakhstan investment treaty, Art. II).

[1243] **RLA-0010**, Peru-Canada FTA, Art. 804.1–804.2.

[1244] **CLA-0033**, *Rumeli Telekom* (Award), ¶ 572.

[1245] *See* **CLA-0033**, *Rumeli Telekom* (Award), ¶ 575.

[1246] Claimant's Memorial, ¶ 275.

[1247] One of the four cases is *Rumeli Telekom v. Kazakhstan*, which Claimant also cited as a decision in which a tribunal imported through an MFN provision a more favourable FET regime. *See* Claimant's Memorial, ¶ 275, fns. 449–50 (*each citing* **CLA-0033**, *Rumeli Telekom* (Award)).

[1248] Claimant's Memorial, ¶ 275, fn. 450.

applicable legal standard (viz., "the customary international law minimum standard of treatment of aliens"). In case there was any doubt about the will of the Treaty Parties, the Treaty expressly noted that its FET provision *does not require* treatment "in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[1249]

607. In sum, Claimant's attempted reliance on past arbitral decisions and on Treaty Annex 804.1 fails to support its assertion that the MFN Clause enables Claimant to import into the Treaty a provision of a different treaty.

c. Even if the MFN Clause itself could be interpreted as enabling the incorporation by reference into the Treaty of a provision from a different treaty (quod non), Treaty Article 808 would preclude Claimant from doing so in this particular case

608. Even if the MFN Clause were construed as enabling a claimant to "import" into the Treaty a provision from a different treaty (quod non), Treaty Article 808 would operate to bar Claimant's attempt to import the FET provision from the 1993 Peru-United Kingdom investment treaty. In relevant part, Treaty Article 808 ("Reservations and Exceptions") provides the following:

> **Article**s 803, **804** [i.e., the MFN Clause], 806 and 807 **do not apply to any measure** that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out in its **schedule to Annex II**. (Emphasis added)

609. Treaty Article 808 thus expressly bars application of the MFN Clause to any measures that Peru included in its schedule to Treaty Annex II, which are the following:

Sector:	All Sectors
Sub-Sector:	_____
Industry Classification:	_____
Type of Reservation:	Most-Favoured-Nation Treatment (Articles 804, 904)

[1249] **RLA-0010**, Peru-Canada FTA, Art. 805.1–805.2.

> Description: Investment and Cross-Border Trade in Services
>
> Peru reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.[1250]

610. Thus, pursuant to Article 808 and Annex II, Peru entered a Treaty reservation enabling Peru to adopt or maintain any measure that accords differential treatment to countries under an international agreement—such as an investment treaty or trade agreement—that was in force or signed prior to the date that the Treaty entered into force, which was 1 August 2009.

611. Claimant has invoked the 1993 Peru-United Kingdom investment treaty as the sole basis for its attempt to use the MFN Clause to import into the Treaty an autonomous FET clause.[1251] However, that treaty clearly falls within the scope of Peru's reservation under Treaty Annex II, since it constitutes a "bilateral . . . international agreement" that was "in force or signed prior to the date of entry that the Treaty entered into force . . . "[1252] Thus, even if the existence of an FET provision in the 1993 Peru-United Kingdom investment treaty were deemed, on its own, to constitute "treatment" meeting all of the conditions set out in the MFN Clause (quod non), Treaty Annex II would preclude Claimant from using the MFN Clause as a mechanism to incorporate by reference into the Treaty the FET clause of the 1993 Peru-United Kingdom investment treaty.

4. Even if it were applicable in this case (quod non), the autonomous FET standard accords a high level of deference to States

612. Even if an autonomous FET standard were somehow applicable in the present case (which it does not), such standard sets a high threshold for claimants, and grants a

[1250] **RLA-0010**, Peru-Canada FTA, Annex II, Schedule of Peru, p. 1.

[1251] Claimant's Memorial, ¶ 275.

[1252] Claimant's Memorial, ¶ 275, fn. 448 (*citing* **CLA-0046**, Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Peru, 04 October 1993).

high level of deference to States. In *AES v. Hungary*, the tribunal described that standard as follows:

> It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, **manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety)** . . . that the standard can be said to have been infringed.[1253]

613. The tribunal in *Toto v. Lebanon* observed that the autonomous FET standard "does not depend on the perception of the frustrated investor,"[1254] but rather, that it

> **has to be interpreted with international and comparative standards of domestic public law as a benchmark**. The investor is certainly entitled to expect that the host State will not act capriciously to violate the rights of the investors. . . . However, [the claimant] did not submit any proof that **[the State] acted in a discriminatory or capricious way, or** that it **did not comply with the applicable international minimum standards**.[1255] (Emphasis added)

614. In *Electrabel v. Hungary*, the tribunal explained that applying an autonomous FET provision requires a balancing exercise:

> [T]he application of [an autonomous[1256]] FET standard allows for a balancing exercise by the host State in appropriate circumstances. **The host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance.** As was decided by the tribunals in *Saluka v Czech Republic* and *Arif v Moldova*, an

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[1253] **RLA-0058,** *AES Summit Generation Ltd. y AES-Tisza Erömü Kft. v. Republic of Hungary,* ICSID Case No. ARB/07/22, Award, 23 September 2010 (von Wobeser, Stern, Rowley), ¶ 9.3.40.

[1254] **RLA-0104**, *Toto* (Award), ¶ 166.

[1255] **RLA-0104**, *Toto* (Award), ¶ 193.

[1256] **CLA-0062**, *Electrabel S.A. v. The Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (Kaufmann-Kohler, Stern, Veeder), ¶ 6.65 (*quoting* autonomous FET clause from Energy Charter Treaty).

> FET standard may legitimately involve a balancing or weighing exercise by the host State.[1257] (Emphasis added)

615. Under the autonomous FET standard, proving the existence and violation of legitimate expectations is a rigorous exercise. Claimant would need to establish that its alleged expectations developed within the following "well-defined limits"[1258]; namely, that such expectations: (i) were legitimate and reasonable, taking into account "all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State"[1259]; (ii) arose from the conditions that the State offered the investor; and (iii) were relied upon by Claimant when deciding to make its investment.[1260] For a State

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[1257] **RLA-0108**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2012 (Kaufmann-Kohler, Stern, Veeder), ¶ 165 (*citing* **CLA-0034**, *Saluka Investment BV v. Czech Republic*, UNICITRAL, Partial Award, 17 March 2006 (Watts, Fortier, Behrens), ¶¶ 304–08; **RLA-0109**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (Cremades, Hanotiau, Knieper), ¶ 537) (*quoted with approval in* **RLA-0110**, *AES Solar and others (PV Investors) v. Kingdom of Spain*, PCA Case No. 2012–14, Final Award, 28 February 2020 (Kaufmann-Kohler, Brower, Sepúlveda-Amor), ¶ 582).

[1258] **RLA-0111**, *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019 (Derains, Tawil, Vinuesa), ¶ 467 ("[T]he protection of legitimate expectations occurs within 'well-defined limits' and is relative to a 'promise or representation to an investor as to a substantive benefit on which the investor has relied in making its investment, and which later was frustrated by the conduct of the Administration.'") (*quoting* **CLA-0082**, *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (Lévy, Gotanda, Boisson de Chazournes), ¶ 547).

[1259] **RLA-0059**, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (Kaufmann-Kohler, Gómez Pinzón, van den Berg) ("***Duke Energy* (Award)**"), ¶¶ 340.

[1260] **RLA-0059**, *Duke Energy* (Award), ¶¶ 340, 347; *see also* **CLA-0035**, *Merrill & Ring* (Award), ¶ 150 ("Legitimate expectations are no doubt an important element of a business undertaking, but for such expectation to give rise to actionable rights requires [sic] there to have been some form of representation by the state and reliance by an investor on that representation in making a business decision."); **RLA-0060,** *Oko Pankki Oyj, et al. v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007 (de Witt Wijnen, Fortier, Veeder) ("***Oko Pankki Oyj* (Award)**"), ¶ 247 ("[T]he Tribunal considers that a breach of its FET standard can be established by reference (inter alia) to an investor's expectations of even-handed and just treatment by the host state induced by that state's unequivocal representation directed at that investor, provided that these expectations are reasonable and justifiable. It follows that, where such a representation is made by the host state under this BIT, the factual issue is whether in all the circumstances it was reasonable and justifiable for the investor to rely upon that representation; and, if so, whether there was in fact such reliance."); **RLA-0077**, *Suez,*

to generate legitimate expectations, its representations must be "definitive, unambiguous, and repeated,"[1261] and must be addressed specifically to the relevant investor, rather than generally to the world at large.[1262]

616. Transparency as part of autonomous FET is also subject to a legal standard that is deferential to States, and that requires the examination of the legal framework as a whole. Professor Schreuer articulated the transparency standard under autonomous FET as follows:

> Transparency means that the legal framework for the investor's operations is readily apparent and that any decision affecting the investor can be traced to that legal framework.[1263]

617. If it were applicable (quod non), the autonomous FET standard likewise sets a high threshold for proving a violation based on arbitrariness or discrimination. For example, in *Enron v. Argentina*, the tribunal stated that, under the autonomous FET standard,

> a finding of arbitrariness requires that some **important measure of impropriety is manifest**, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place.[1264] (Emphasis added)

Sociedad General de Aguas de Barcelona S.A., et al., v. Argentine Republic, ICSID Cases No. ARB/03/17 and *AWG Group v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010 (Salacuse, Kaufmann-Kohler, Nikken) ("***Sociedad General* and *AWG* (Decision)**"), ¶ 223 (*quoting* **CLA-0034**, *Saluka Investment BV v. Czech Republic*, UNICITRAL, Partial Award, 17 March 2006 (Watts, Fortier, Behrens)).

[1261] **RLA-0112**, *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, (Kerameus, Covarrubias Bravo, Gants), ¶ 148.

[1262] **RLA-0059**, *Duke Energy* (Award), ¶¶ 340, 347; *see also* **CLA-0035**, *Merrill & Ring* (Award), ¶ 150; **RLA-0060,** *Oko Pankki Oyj* (Award), ¶ 247; **RLA-0077**,*Sociedad General* and *AWG* (Decision), ¶ 223.

[1263] **RLA-0061**, C. Schreuer, "*Fair and Equitable Treatment in Arbitral Practice*," THE JOURNAL OF WORLD INVESTMENT AND TRADE (2005), p. 374.

[1264] **CLA-0105**, *Enron Corp. y Ponderosa Assets, L.P. v. República Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (Orrego Vicuña, van den Berg, Tschanz) ("***Enron Corp.* (Award)**"), ¶ 281; *see also* **RLA-0083** *Lauder* (Award), ¶ 232 ("The measure was arbitrary because it was not founded on reason or fact, nor on the law which expressly accepted 'applications from companies with foreign equity participation' . . . but on mere fear reflecting national preference."); **CLA–0071** *Siemens* (Award), ¶

618. The *Enron* tribunal further explained that under autonomous FET, the legal standard for discrimination requires a "capricious, irrational or absurd differentiation" in the State's treatment of the investor.[1265]

5. Peru accorded Claimant with fair and equitable treatment under the Treaty

619. In its Memorial, Claimant asserts that the "same acts and omissions by State authorities that amount to a failure to provide full protection and security (as well as other acts and omissions) amount to a failure by Peru to provide fair and equitable treatment to Lupaka's investment."[1266] Claimant's FET claim is therefore almost entirely duplicative of its FPS claim, which, as demonstrated in **Section IV.B** above, manifestly fails. While Claimant alleges that there are "other acts and omissions" by Peru that give rise to its FET claim,[1267] it has not identified them. Peru will therefore focus in this section on the allegations raised by Claimant in the context of its FPS claim (and rebutted by Peru above), and explain why those allegations do not establish a breach of the FET standard—whether assessed under CIL MST (which, as expressly set forth in Treaty Article 805, is the applicable legal standard here), or even under an autonomous FET standard.

620. To recall, the allegations that form the basis of both the FPS and FET claims herein are that Peru improperly failed:

a. failed to prevent 19 June 2018 Protest;

318–19 (applying an autonomous clause on arbitrary measures and concluding that "the definition [of 'arbitrary'] in *ELSI* is the most authoritative interpretation of international law and it is close to the ordinary meaning of the term emphasizing the willful disregard of the law"); **RLA-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, ICJ, Judgment, 20 July 1989, ¶ 128 ("Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.").

[1265] *See, e.g.*, **CLA-0105**, *Enron Corp.* (Award), ¶ 282; *see also* **RLA-0055**, *Urbaser* (Award), ¶ 1088 ("[M]easures affecting an investor are discriminatory if they are [1] clearly less favourable tha[n] those accorded to other investors operating under the same or similar circumstances, [2] they intend to harm the foreign investor and cause actual damage, and if [3] they are not justified by sufficient reasons.").

[1266] Claimant's Memorial, ¶ 286.

[1267] Claimant's Memorial, ¶ 286.

b. failed to remove the perpetrators of 19 June 2018 Protest from the Invicta mine site and prevent them from damaging Claimant's property and abusing Claimant's personnel;

c. failed to sanction the perpetrators of 19 June 2018 Protest;

d. failed to prevent the Access Road Protest;

e. failed to remove the perpetrators of the Access Road Protest from the Lacsanga access road;

f. failed to restore Claimant's access to the Invicta mine site via the Lacsanga access road; and

g. provided "tacit support" to the perpetrators of the Access Road Protest after 14 October 2018.[1268]

621. Finally, Claimant invokes actions by members of the Parán Community as FET violations. However, as discussed in **Section IV.A.2** above, such actions are not attributable to Peru, either under Peruvian law or public international law.

622. Contrary to Claimant's assertions, none of the above measures violate the applicable legal standard under Treaty Article 805. In the remainder of this section, Peru will demonstrate that:

a. as a threshold matter, the contested measures do not constitute a composite act; and

b. the contested measures did not breach Peru's FET obligation under the Treaty, whether under the CIL MST standard (which is the one that the Treaty expressly mandates), or even under an autonomous FET standard (via the MFN Clause). In particular, Peru's actions: (i) did not frustrate Claimant's legitimate expectations; (ii) were not arbitrary (or even unreasonable); and (iii) were transparent and consistent.

[1268] Claimant's Memorial, ¶ 266.

a. Claimant has not established any creeping violation of the FET standard

623. In its Memorial, Claimant invokes the concept of a "composite" or "creeping" violation of the FET standard.[1269] However, even on their face the alleged acts and omissions would not amount to any composite or creeping violation of Peru's obligation under Treaty Article 805 to accord FET to Claimant's investment.

624. As noted above, in order to establish a "composite" or "creeping" violation of the FET standard, Claimant must show that the relevant acts were "sufficiently numerous and **inter-connected** to amount not merely to isolated incidents or exceptions but to a **pattern or system**"[1270] (emphasis added) designed to harm the investor. Additionally, Claimant must show that "each step" in the pattern or system of behavior had an adverse effect on its investment.[1271] Claimant, however, has failed to make such a showing.

625. In fact, Claimant does not even attempt to demonstrate that the above requirements are met in this case. Rather, it confines its entire argument to the bare assertion that "the Tribunal should not limit itself to examining whether Peru's individual acts and omissions constitute a breach of the [FET] standard but should examine Peru's conduct as a whole."[1272] In other words, Claimant is putting the onus *on the Tribunal* to identify acts and omissions that considered together might arise to the level of a composite act under public international law. Furthermore, Claimant provides no rationale for deeming 26 August 2019 (specifically) as the Valuation Date, when the alleged composite act spanned several months.[1273]

[1269] Claimant's Memorial, ¶¶ 281–85.

[1270] **CLA-0018**, ILC Commentary, Art. 15(1), cmt. 5 (*quoting Ireland v. United Kingdom* European Court of Human Rights, Application No. 5310/71, Award, 18 January 1978, ¶ 159).

[1271] **CLA-0071**, *Siemens* (Award), ¶ 263 (*quoted in* **CLA-0082**, *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (Lévy, Gotanda, Boisson de Chazournes), ¶ 670).

[1272] Claimant's Memorial, ¶ 275.

[1273] *See* Claimant's Memorial, ¶ 325.

626. In any event, the evidence shows that Peru's actions were *not* part of any "pattern or system" to harm Claimant.[1274] On the contrary, as demonstrated above in relation to the FPS standard and as further elaborated in this section, Peru's actions were aimed at mediating the conflict between Claimant and the Parán Community, in order to (i) maintain social order; (ii) broker an amicable resolution of the dispute between Claimant and the Parán Community; (iii) enhance Claimant's chances of reaching a sustainable agreement with the Parán Community; and (iv) thereby allow Claimant to secure the required social license to operate and thus proceed with its mining activity.

627. Peru's actions thus were designed to *assist* rather than harm Claimant, since Claimant would not have been able to restart the Invicta Project until its conflict with the Parán Community was resolved.[1275] Accordingly, to the extent that there was any "pattern or system" behind Peru's actions, it was one that was designed to *protect* Claimant's investment.

628. Further, there is no evidence that any of the alleged acts or omissions actually had an adverse effect on Claimant's investment. Claimant relies on general statements concerning alleged harm to its personnel and mine site.[1276] However, it fails to explain how Peru's conduct caused any such harm. As was further explained above in **Sections II.D.2 and II.F.2**, whatever harm Claimant suffered as a result of the various protest measures can be traced back to (i) Claimant's own failures to artfully manage its community relationships, and/or (ii) actions taken by the Parán Community. None of those actions are attributable to Peru. Since Claimant has failed to establish a causal link between Peru's alleged acts and the harm it alleges, its suggestion that those acts constituted a composite act is baseless and must be rejected.

[1274] **CLA-0018**, ILC Commentary, Art. 15(1), cmt. 5 (*quoting Ireland v. United Kingdom* European Court of Human Rights, Application No. 5310/71, Award, 18 January 1978, ¶ 159).

[1275] **RER-0001**, Meini Expert Report, ¶¶ 17, 192–94 (explaining that any course of action other than a negotiated solution, *e.g.*, use of force, would have been inadequate, detrimental, and ephemeral at best).

[1276] Claimant's Memorial, ¶ 266.

b. Even if legitimate expectations were protected under the Treaty (quod non), and even if Claimant's expectations were legitimate (quod non), Peru did not breach any such expectations

629. As explained above, legitimate expectations are not part of MST, and therefore are not part of the applicable legal standard under Treaty Article 805.[1277] Nonetheless, even assuming that legitimate expectations were indeed protected under Article 805, whatever expectations Claimants may have held in the present case were not legitimate, and in any event none of the challenged measures could have frustrated any such expectations.

630. Claimant's alleges that it held the following legitimate expectations: (i) "that its representatives would be able to access and work safely at the Site, without interference, let alone violent interference";[1278] (ii) "that its representatives, facilities, and equipment would be safe from physical harm or damage by State authorities and/or third parties";[1279] and (iii) "that Peru would not fundamentally contradict basic principles of its own laws and regulations."[1280] Claimant further alleges that such expectations were frustrated by Peru's actions regarding Claimant's relations with the Parán Community.[1281]

631. Each of the above legitimate expectations claims is legally and factually flawed, for various reasons. *First*, Claimant has not identified *any* assurances or commitments given to it by Peru, let alone any that were sufficiently specific and unequivocal to give rise to a legally protected legitimate expectation. *Second*, Claimant has provided no evidence that it relied on any alleged assurances or commitments given by Peru when deciding whether or not to invest in Peru. *Third*, Claimant evidently formed the expectation that it would be insulated from all potential harm in the event that support from one or more of the Rural Communities were not forthcoming (an expectation

[1277] *See supra* Section III.C.1.a.

[1278] Claimant's Memorial, ¶ 291.

[1279] Claimant's Memorial, ¶ 291.

[1280] Claimant's Memorial, ¶ 291.

[1281] Claimant's Memorial, ¶ 292.

that was unreasonable in light of the investment environment in Peru, including (i) the legal framework, which imposes obligations on mining operators to obtain local support (i.e., the social license to operate);[1282] (ii) the history of social conflict in Peru in relation to operators in the extractive sector; and (iii) industry standards applicable to mining projects (which emphasize the importance of achieving harmonious relations with local communities)[1283]. *Fourth*, even if Claimant had established that it received and relied on reasonable assurances from Peru when it invested in the Invicta Project (quod non), such expectations were not breached in the instant case. Peru acted at all times (i) in good faith, (ii) within the bounds of its right to regulate domestic matters in the public interest, and (iii) in compliance with Peruvian law.

(i) Peru provided no specific assurance to Claimant with respect to use of force against rural communities

632. As noted above, representations by a State will engender legitimate expectations in an investor only if they are "definitive, unambiguous, and repeated,"[1284] and are addressed to the individual investor and not simply to the world at large.[1285] However, in its Memorial, Claimant does not even attempt to identify any representation by Peru that gave rise to its alleged expectations, let alone demonstrate that such representations met the required legal standard. Accordingly, Claimant's legitimate expectations claim fails at the outset.

633. In any event, Peru did ***not*** provide any representation or assurance to Claimant: (i) that Claimant would not encounter obstacles to its access to the Invicta Mine (let alone as a result of acts of third parties, including the three Rural Communities); or (ii) that Claimant's investment and personnel would be safe from physical harm at all times, regardless of the circumstances.[1286] On the contrary, public materials published

[1282] **RER-0002**, Vela Expert Report, ¶¶ 32–36, 77–94.

[1283] **RER-0002**, Vela Expert Report, ¶¶ 96–107.

[1284] **RLA-0112**, *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, (Kerameus, Covarrubias Bravo, Gants), ¶ 148.

[1285] **RLA-0059**, *Duke Energy* (Award), ¶¶ 340, 347; *see also* **CLA-0035**, *Merrill & Ring* (Award), ¶ 150; **RLA-0060,** *Oko Pankki Oyj* (Award), ¶ 247; **RLA-0077**, *Sociedad General* and *AWG* (Decision), ¶ 223.

[1286] Claimant's Memorial, ¶ 291.

by Peru (and in some cases by Canada and by Peru and Canada jointly) explain to mining operators the consequences of failing to adequately secure the support of local communities related to their projects.[1287] Chief among these consequences is interference and damage caused by local communities acting in protest against the mining operator's decisions and actions.[1288] Thus, Claimant was already on notice, at the time it invested, of the potential risks to its investment that could arise if it failed to obtain sufficient local community support.

634. As explained in more detail below, Claimant does not purport to identify any specific representation or commitment by Peru on the basis of which it decided to invest in Peru. Accordingly, whatever expectations Claimant may have formed were not legitimate. And in any event, contrary to Claimant's claim, Peru acted entirely in compliance with its legal framework, and did not act in any manner that would have contradicted any expectation—legitimate or otherwise—that Claimant may have formed at the time that it decided to invest in Peru.

(ii) Claimant has not shown that it relied on any representations made by Peru in deciding to invest in the Invicta Project

635. Even if Claimant had identified a specific commitment or assurance capable of giving rise to legitimate expectations (quod non), Claimant would still be required to

[1287] *See, e.g.*, **Ex. R-0088**, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 2017; *see also* **Ex. R-0084**, The United Nations Interagency Framework Team for Preventive Action, "Toolkit And Guidance For Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict," 8 October 2012; **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013; **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015; **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration, "*Principles and Guidance Notes*," 2014; **RER-0002**, Vela Expert Report, ¶¶ 96–104.

[1288] *See, e.g.*, **Ex. R-0084**, The United Nations Interagency Framework Team for Preventive Action, "Toolkit And Guidance For Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict," 8 October 2012; **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013; **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015.

demonstrate that it *relied* on such commitments or assurance when deciding whether to invest in Peru.[1289] However, Claimant has failed to meet this requirement as well.

636. In fact, Claimant has not even *attempted* to meet its burden of showing such reliance. Notably, it cites to no evidence—whether testimonial, documentary, or of any other nature—that it relied on any assurances by Peru in deciding whether to invest in Peru.

637. While Claimant's witness and CEO and President, Gordon Ellis, states that Claimant was "confident about investing in Peru because the country had a rare combination of a growing economy based on commodity exports and a stable federal government," he does not mention any specific alleged assurances given by Peru, let alone any reliance by Claimant on such assurances.[1290] Moreover, while Claimant's witness and former CEO and President Eric Edwards devotes seven pages of his witness statement to listing "factors" on which Lupaka "concluded that [it] should proceed with the acquisition" of the Invicta Project, none of those factors consists of any assurance made by Peru.[1291] The lack of such reference is telling, as it indicates that Claimant did not, in fact, rely on any assurances by Peru when deciding whether or not to invest in Peru. Accordingly, Claimant's legitimate expectations claim fails.

(iii) Claimant's alleged expectations were not objectively reasonable, or were disingenuous

638. As noted above, Claimant alleges that it expected (i) to have uninterrupted access to the Invicta Mine; (ii) to be kept safe from physical harm or damage from State authorities or third parties, regardless of circumstances; and (iii) that Peru would not "fundamentally contradict basic principles of its own law and regulations."[1292]

639. Regarding the first two of these alleged expectations, the import of Claimant's argument is that Peru guaranteed to the Claimant that it would have uninterrupted

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[1289] **RLA-0059**, *Duke Energy* (Award), ¶¶ 340, 347; *see also* **CLA-0035**, *Merrill & Ring* (Award), ¶ 150; **RLA-0060,** *Oko Pankki Oyj* (Award), ¶ 247.

[1290] **CWS-0002**, Ellis Witness Statement, ¶ 17.

[1291] **CWS-0001**, Edwards Witness Statement, ¶ 17.

[1292] Claimant's Memorial, ¶ 291.

use of, and access to, the Invicta Mine, as well as protection from harm, no matter what the circumstances (e.g., even if Claimant's relationship with the local Rural Communities broke down entirely). Such an expectation—even if it had genuinely been held by Claimant, which has not been proven—would not have been reasonable. It is well-established that investment treaties do not constitute an "insurance policy" against investment risks.[1293] Moreover, Claimant's expectations were especially unreasonable, for at least five reasons.

640. *First*, Claimant is involved in an industry that is known for being high-risk.[1294] One of the most prominent and widespread risks in the mining industry (on a worldwide basis) is resistance from local communities. Such resistance often stems in part from the adverse environmental impact that mining activity can have on the local area surrounding a mining project.[1295] Accordingly, any prudent mining operator must understand the importance of community relations when developing a mining project.[1296] Even with Claimant's limited experience in the Peruvian mining sector, the evidence (discussed in **Section II.C.3.d** above) shows that Claimant was well aware not only of the importance of developing strong relationships with the Rural Communities given the history of conflict of such communities with mining

[1293] *See, e.g.*, **RLA-0113**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 (Orrego Vicuña, Buergenthal, Wolf), ¶ 64 ("[T]he Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments."); **CLA-0047**, *MTD Equity* (Award), ¶ 178 ("The BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen.").

[1294] **Ex. R-0041**, Joint Disclosure Booklet, p. A-8 (describing the nature of Claimant's business as high-risk).

[1295] *See, e.g.*, **Ex. R-0088**, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 2017; *see also* **Ex. R-0084**, The United Nations Interagency Framework Team for Preventive Action, "Toolkit And Guidance For Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict," 8 October 2012; **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013; **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015; **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration, "*Principles and Guidance Notes*," 2014.

[1296] **RER-0002**, Vela Expert Report, ¶¶ 76, 105–116.

enterprises in Peru, but indeed that the social license was a requirement under Peruvian law.[1297]

641. Implicit in Claimant's acceptance of the need to establish positive relationships with local communities is the understanding that any failure to establish and maintain such relationships would carry significant risks[1298]. Such risks are particularly acute in Peru, which the already mentioned history of social conflict in the extractive industry shows, as described in **Section II.A.1** above. Where local communities disagree with the actions taken by a mining company, social conflicts are liable to arise, which can lead to a range of consequences for mining operators, from small-scale protest measures to violent confrontations, destruction of property, and even human casualties.[1299]

642. The *second* reason that the expectations alleged by Claimant would have been unreasonable is that Peruvian law emphasizes the critical importance of obtaining and maintaining amicable relationships with local and indigenous communities. As explained above in **Section II.A.2 and II.A.3**, Peru's legal framework in the mining industry requires that mining companies establish good relationships with rural communities within their mine's area of direct and indirect influence, and that they document such relations in an EIA, a Social Management Plan, and a Mine Closure Plan, all of which are submitted to the Peruvian Government.[1300] All Peruvian mining

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[1297] *See, e.g.*, **Ex. AC-0048**, Lupaka Gold Corp. 2012 Annual Report, p. 3 ("The importance of good community relations for long-term success cannot be overemphasized."). S*ee also* **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012; **Ex. C-0035**, Invicta Gold Project Optimized Feasibility Study, THE LOKHORST GROUP, July 2010, ¶ 1.10.7 ("Good community relations are an important part of a mining operation."); **Ex. R-0041**, Joint Disclosure Booklet, pp. A–9 ("The failure of the Combined Company to successfully negotiate and maintain surface rights access and purchase with respect to any of its projects could cause substantial delays in the development of its projects.").

[1298] **RER-0002**, Vela Expert Report, ¶¶ 95, 106–16.

[1299] *See supra* Section II.A.1 (describing the events in La Bagua and at the Las Bambas mine as examples of violent confrontations between Peruvian police and mining companies).

[1300] **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Art. 53; **Ex. R-0008**, Supreme Decree No. 033-2005-EM, 14 Agosto 2005, Art. 16; **RER-0002**, Vela Expert Report, ¶¶ 77–94.

companies should be abreast of these legal requirements and of the policy goals underlying them.

643. *Third*, Claimant's expectations were inconsistent with the prevailing norms in the mining industry. Because social conflicts between local communities and foreign mining companies are commonplace in the global extractive industry, the industry has adapted to that by establishing procedures and response protocols to address such conflicts.[1301] Generally, international corporate social responsibility (CSR) norms instruct that private companies must obtain community support before their mines can progress into the exploitation phase.[1302] Identical mandates are prescribed by Peruvian law.[1303] As described above in **Section II.B.2.b**, there are a number of resources available to mining operators to understand the community relations obligations that they must undertake to bring their mines into the exploitation phase.[1304] To cite just a few examples: (i) the ICMM Good Practice Guide outlines the specific responsibilities of mining operators, including coordinating with local communities at the earliest stages of a project's development, involving those communities in decision-making, and obtaining their free, prior, and informed consent;[1305] (ii) Canada's CSR Strategy explains how community relations mechanisms are crucial to the success of mining projects; [1306] and (iii) the Canada-Peru CR Toolkit provides examples of the types of mining company conduct that can result in disruptions to mining activity—including the very type of interference and damage

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[1301] *See supra* Section II.B.2 (providing a general overview of the CSR within the global mining industry).

[1302] *See, e.g.,* **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration, "Principles and Guidance Notes," 2014; *see also* **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013; *see also* **Ex. R-0087**, BDO, Social License to Operate in Mining: Current Trends & Toolkit, 2020; **Ex. R-0094**, ICMM, Understanding Company-Community Relations Toolkit, undated.

[1303] **RER-0002**, Vela Expert Report, ¶¶ 77–94.

[1304] *See supra* Section II.B.2.

[1305] *See* **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015.

[1306] **Ex. R-0089**, 2014 CSR Strategy, p. 3.

that Claimant now contends it legitimately expected would not threaten its mine.[1307] Thus, Claimant was—or at least ought to have been—aware that if it failed to achieve harmonious relations with the Rural Communities, there was a significant risk that its activities would be severely disrupted.

644. *Fourth*, various international law instruments underline the importance of ensuring that the rights and views of indigenous and rural communities are duly recognized and respected in the context of the exploitation of natural resources. As outlined in **Section II.B.2.a**, Peru is obligated through its international legal commitments under ILO Convention 169[1308] and UNDRIP[1309] (i) to ensure that Peruvian rural communities are consulted regarding mining projects that impact them; and (ii) to mandate that mining companies obtain rural community consent before engaging in mining activity that would infringe on those communities' rights. Disregarding these obligations, Claimant contends that its own commercial interests should have been prioritized over the interests of the Rural Communities in the Project's area of direct influence, and that when it failed to maintain amicable relations with local rural communities, it should have been insulated from all consequences of that failure. Such expectation was not reasonable in light of the international law framework on the rights of indigenous and rural communities.

645. *Fifth* and finally, Claimant should have known when it acquired the Invicta Project that there were specific community relationship risks in that project that predated Claimant's investment therein. In particular, as discussed in **Section II.C.3.d**, even prior to Claimant's investment, Invicta had (i) "made promises to the Lacsanga Community that [it] had not kept," (ii) agreed to compensate the Santo Domingo de Apache Community for past grievances concerning Invicta's improper usage of Community land between 2005 and 2010; and (iii) breached its commitments to the Parán Community in various ways, such as by constructing an explosives facility on

[1307] **Ex. R-0028**, Joint Publication between Canadian Embassy in Peru and MINEM, "*Kit De Herramientas De Relacionamiento y Comunicación*," 2018, p. 54.

[1308] **RLA-0028**, Indigenous and Tribal Peoples Convention 169, ILO, 1989, Art. 15.2.

[1309] **RLA-0030**, UNDRIP.

Parán land without the Community's approval, failing to make certain agreed payments, and failing to keep its promise to construct certain buildings.[1310] As a company that holds itself out as having extensive experience in mining investments in Peru, Claimant should have been aware of these risks, and should have understood that interference with, and damage to, the Invicta Project could arise in the event that Claimant failed to rehabilitate Invicta's relationship with the Rural Communities.[1311] In such circumstances, Claimant could not reasonably have expected to be insulated from such risks, or to be guaranteed protection from any damage that it might suffer as a result of its own failure to obtain local support for the Project.

646. Claimant's final alleged legitimate expectation, namely that Peru would not "fundamentally contradict basic principles of its own laws and regulations" is disingenuous. As described in detail in **Section II.A.2 and II.B.1**, the need for mining companies to obtain local support from local communities—and the rights of participation and consultation afforded to such communities (including rural and indigenous communities)—themselves constitute "basic principles" of Peruvian law. Thus, Claimant's suggestion that "basic principles" of Peruvian law dictated that it should have been guaranteed protection from harm in circumstances where Claimant failed to obtain local community support is patently incorrect. Rather, had Claimant properly comprehended the relevant "basic principles" of Peruvian law, it would have realized that it could not reasonably expect to be innoculated from the consequences of its own failure to achieve local support .

(iv) Peru did not breach any legitimate expectations held by Claimant

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[1310] *See supra* Section II.C.3.d.

[1311] *See, e.g.*, **Ex. R-0088**, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 2017; *see also* **Ex. R-0084**, The United Nations Interagency Framework Team for Preventive Action, "Toolkit And Guidance For Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict," 8 October 2012; **Ex. R-0085**, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013; **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015; **Ex. R-0029**, e3 Plus: A Framework for Responsible Exploration, "*Principles and Guidance Notes*," 2014.

647. Even if legitimate expectations were protected under Treaty Article 805 (which is not the case) and Claimant had satisfied the required standard for establishing a legitimate expectation (quod non), Claimant would still need to demonstrate that Peru breached such an expectation. Claimant has not done so. Rather, Peru has not breached any legitimate expectation held by Claimant because (i) Peru's conduct was well within the bounds of its right to regulate in the public interest and in accordance with Peruvian and international law; and, (ii) contrary to Claimant's allegations, Peru complied with the "basic principles" of its own laws.

648. Claimant's entire argument in relation to breach of legitimate expectations is contained in the solitary and unsupported statement that Peru "violated Lupaka's legitimate expectations, mainly by participating in and/or failing to address or sanction the repeated invasions of the Site and the Blockade, as well as [] the physical harm to the Claimant's personnel and damage to its facilities."[1312] While Claimant does not particularize its claim with any precision (electing instead to use vague language such as "mainly" and "and/or"), it appears that Claimant's legitimate expectations claim is based on Peru's response to 19 June 2018 Protest and Access Road Protest. However, when the evidence is properly and objectively examined, it is evident that each of Peru's actions between early June 2018 and August 2019 was well within its sovereign right to regulate and in accordance with Peruvian and international law, and thus cannot constitute a breach of Claimant's legitimate expectations. This is true both at a general level, and in terms of the specific actions that Peru took to seek to address the conflict between Invicta and the Parán Community, as explained in further detail below.

649. At a general level, for the reasons explained in **Section IV.B.2** above in relation to the FPS standard, Peru's prioritization of dialogue over the use of armed intervention in order to broker a resolution to the conflict between Invicta and the Parán Community was entirely justified. The Parán Community was within the area of direct influence of Claimant's mine, and accordingly Claimant needed to gain the support of that

[1312] Claimant's Memorial, ¶ 292.

Community before it could exploit its mine.[1313] Had Peru intervened forcefully, there was a significant risk of a violent confrontation—particularly given the history of social conflicts in Peru that have involved forceful police intervention against local opposition to mining projects.[1314] This would have had serious consequences not just for the Parán Community, but also for the relationship between Claimant and the Parán Community (which would have been further damaged) and the long-term viability of the Invicta Project.

650. Forceful intervention would also not have addressed the root causes of the breakdown in relations between Invicta and the Parán Community, which included inter alia the Community's concerns regarding the environmental impacts of the Invicta mine, and Claimant's failure to address such concerns.[1315] Thus, even if Peru had intervened with the use of force, such intervention would not resolved the conflict and led to a sustainable resolution.[1316] Dialogue with a view to reaching agreement offered a way forward for Claimant's relations with the Parán Community. In fact, the use of dialogue yielded an agreement between Claimant and the Parán Community in February 2019. While such agreement did not ultimately lead to reconciliation between Claimant and the Parán Community, as discussed in **Section II.E.4** above, this was due to Claimant's and the Parán Community's actions, and not any actions attributable to Peru.

651. Turning to the individual actions taken by Peru, these were all aimed at (i) investigating the circumstances surrounding 19 June 2018 Protest and Access Road Protest; and (ii) importantly, helping Claimant rebuild its relationship with the Parán Community, by seeking to foster an environment that gave Claimant the best possible chances of reaching agreement with that Community so that the Invicta Project could move forward. Such actions included:

[1313] *See supra* Sections II.B.1 and II.F.1.

[1314] *See supra* Section II.A.1; **RER-0001**, Meini Expert Report, ¶¶ 158–162, 199.

[1315] **RER-0001**, Meini Expert Report, ¶ 194.

[1316] **RER-0001**, Meini Expert Report, ¶¶ 17, 194.

a. efficiently responding to Claimant's complaints following the 19 June 2018 Protest, interviewing Claimant's representatives, visiting the Invicta Mine, and launching a criminal investigation into the actions of the Parán Community;[1317]

b. meeting with Parán Community members in August 2018 to better understand why the Community did not support the Invicta Project or have a fruitful relationship with Claimant;[1318]

c. preventing a Parán Community protest in September 2018, by meeting with Community members, listening to their concerns, and dissuading them from entering or blockading Claimant's Invicta Mine;[1319]

d. responding swiftly to the Access Road Protest by visiting the site on the day the Access Road Protest began,[1320] meeting with Claimant and the Parán Community members to assess their respective positions and needs,[1321] and assisting Claimant and the Parán Community to reach an initial agreement concerning the Access Road Protest.[1322]

[1317] *See supra* Section II.E.2.a; **Ex. C-0129**, Special Report: Seizure of Invicta Mine Camp and Facilities, SOCIAL SUSTAINABLE SOLUTIONS, 19 June 2018, p. 3; *see also* **Ex. C-0160**, Inspection Report of Invicta Project Site, SAYÁN POLICE DEPARTMENT, 20 June 2018; **Ex. R-0064**, Official Letter No. 350-2018-REGION POLICIAL LIMA/DIVPOL-H.CS-SEINCRI, 20 June 2018; **RER-0001**, Meini Expert Report, ¶ 32.

[1318] *See supra* Section II.E.2.a; *see also* **Ex. R-0065**, Meeting Minutes, Meeting between the Parán Community and MINEM, 11 August 2018; **Ex. R-0066**, Meeting Minutes, Meeting between the Parán Community and MINEM, 22 August 2018.

[1319] *See supra* Section II.E.2.b; *see also* Claimant's Memorial, ¶ 112; **Ex. C-0138**, Monthly Report on Invicta Mining, SOCIAL SUSTAINABLE SOLUTIONS, September 2018, pp. 4–5; [redacted]

[1320] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018.

[1321] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018; **Ex. C-0171**, Letter from Invicta (J. Castañeda) to MINEM (F. Castillo), 15 October 2018, pp. 1–2; **Ex. C-0166**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C, and Sayán Police Station, 14 October 2018.

[1322] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1.

e. hosting, mediating, and providing security for negotiations between Claimant and the Parán Community over the winter of 2018/2019, as Claimant and the Community worked to reach an amicable agreement;[1323]

f. facilitating the Dialogue Table on 26 February 2019 that yielded an agreement between Claimant and the Parán Community that the parties thought would be the basis of a lasting resolution and end the social conflict;[1324]

g. meeting with Claimant and the Parán Community after the 26 February 2019 Agreement was breached, in order to encourage their continued participation in dialogue with one another;[1325]

h. establishing further negotiations to be conducted at a meeting on 1 April 2019—which Claimant refused to attend;[1326]

i. deescalating tensions between the Parán Community and Claimant after violence broke out between the War Dogs, the Parán Community, and Claimant's representatives on 14 May 2019;[1327] and

j. continuing to push for amicable negotiations between Claimant and the Parán Community through and until Claimant lost its shares in Invicta,

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[1323] *See supra* Section II.E.3; *see also, e.g.*, **Ex. C-0173**, Report on Meeting between Invicta, *et al.*, 24 October 2018; **Ex. C-0182**, Summary Report of Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018; **Ex. C-0242**, Meeting Minutes, Meeting between Invicta Mining Corp S.A.C. and the Parán Community, 21 November 2018; **RWS-0002**, Incháustegui Witness Statement, ¶¶ 27–29; **RWS-0003**, León Witness Statement, ¶¶ 25–42 .

[1324] *See supra* Section II.E.4; *see also* **Ex. C-0200**, Meeting Minutes, Meeting between Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019, p. 1; **RWS-0001**, Trigoso Witness Statement, ¶ 38; **CWS-0004**, Bravo Witness Statement, ¶ 43; **Ex. R-0132**, "*We are very pleased to announce the… conclusion of the illegal blockade*," Mining Journal, 5 March 2019.

[1325] *See supra* Section II.E.4; *see also* **RWS-0003**, León Witness Statement, ¶¶ 44, 47–49 ; **CWS-0004**, Bravo Witness Statement, ¶ 53; Claimant's Memorial, ¶ 156.

[1326] *See supra* Section II.E.5; *see also* **Ex. R-0026**, Official Letter No. 006-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 21 March 2019, p. 1; **RWS-0003**, León Witness Statement, ¶ 49.

[1327] *See supra* Section II.E.5; *see also* **Ex. R-0111**, Official Letter No. 010-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 6 May 2019.

notwithstanding Claimant's repeated insistence that Peru forcefully remove the Community with which it needed support for its Invicta Project.[1328]

652. This series of actions (which is not an exhaustive list of Peru's actions to assist Claimant find a resolution to its conflict with the Parán Community) demonstrates that Peru was committed to helping Claimant and the Parán Community reconcile their differences and move forward in a manner that would have allowed Claimant to exploit the Invicta Mine. Such actions were appropriately tailored to the sensitive and potentially volatile situation at the Invicta Mine and were taken with a view to achieving a peaceful resolution to the dispute between the Parán Community, in the interests of both parties to that dispute. Such actions fell well within the range of reasonable responses that Peru could have taken in relation to the dispute between Claimant and the Parán Community.[1329]

653. Finally, Claimant's suggestion that Peru's actions somehow "fundamentally contradict[ed] basic principles of [Peru's] own laws and regulations" is incorrect.[1330] On the contrary, Peru was required by its own law—and by international law, which is incorporated automatically into Peruvian law[1331]—to exhibit restraint when dealing with rural communities and to prioritize dialogue and the peaceful, long-term resolution of the social conflict between Claimant and the Parán Community.[1332] It did

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[1328] *See supra* Section II.E.5; *see also* **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019.

[1329] **CLA-0082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (Lévy, Gotanda, Boisson de Chazournes), ¶ 583 ("[I]n matters where a government regulator and/or administration is called to make decisions of a technical nature. . . . those governmental authorities should enjoy a high level of deference for reasons of their expertise and competence (which is assumed to be present in those institutions called to make the relevant decisions) and proximity with the situation under examination. It is not for an investor-state tribunal to second-guess the substantive correctness of the reasons which an administration were to put forward in its decisions, or to question the importance assigned by the administration to certain policy objectives over others.").

[1330] *See* Claimant's Memorial, ¶ 291.

[1331] **Ex. C-0023**, the Constitution, Art. 55.

[1332] *See* **RER-0001**, Meini Expert Report, ¶ 13 ("According to the Peruvian legislative framework, as a totally general rule dialogue and other mechanisms of settling disputes are favoured over the use of force (use of force as a last resort).").

this by meeting regularly with each key actor in the social conflict, facilitating negotiations and Dialogue Tables between Claimant and the Parán Community, and emphasizing repeatedly and emphatically to all parties involved that the best path forward was for Claimant and the Parán Community to reach an agreement.[1333]

654. The above demonstrates that Peru did not frustrate any investment-backed legitimate expectation held by Claimant.

c. Peru did not subject Claimant or its investments to arbitrary, unfair, or unreasonable treatment

655. Claimant also alleges that Peru's actions were "arbitrary as well as grossly unreasonable, unfair and unjust."[1334] Claimant bases that claim on the same vague and unparticularized description of Peru's actions referred to in the previous section.[1335] Remarkably, however, Claimant has not even attempted to explain how Peru's actions met the high threshold that applies under international law to establish that Peru's actions were arbitrary, grossly unfair or unjust.[1336] Claimant has therefore manifestly failed to meet its burden of proof. In any event, the evidence shows that Peru's actions were *not* arbitrary, grossly unfair or unjust—to the contrary, they were reasonable, fair, and entirely appropriate under the circumstances.

656. As described in **Section IV.B.2**, Peru acted reasonably at all times in connection with Claimant's investment, consistently exceeding its obligations by engaging with Claimant and the Parán Community in a timely and diligent manner, to help them

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[1333] *See supra* Section II.E.

[1334] Claimant's Memorial, ¶ 293.

[1335] Claimant's Memorial, ¶¶ 266, 286, 291 ("The same acts and omissions by State authorities that amount to a failure to provide full protection and security (as well as other acts and omissions) amount to a failure by Peru to provide fair and equitable treatment to Lupaka's investment, in breach of the FTA . . . Furthermore, through their acts and omissions, State authorities frustrated Lupaka's legitimate expectations regarding the Project.").

[1336] *See supra* Section IV.C.1–4 (explaining that the standard for arbitrariness under FET covers conduct that is "grossly unreasonable, unfair, and unjust"); Claimant's Memorial, ¶ 293 ("These acts and omissions on the part of Parán's officials, Ministry representatives, the Police, prosecutorial authorities, and other central and local authorities were arbitrary as well as grossly unreasonable, unfair, and unjust.").

reach a lasting resolution to their social conflict.[1337] From the time of Claimant's acquisition of the Invicta Project through the 19 June 2018 Protest, various Peruvian entities engaged constructively with Claimant as the latter navigated the regulatory requirements of the Invicta Project.[1338] After the 19 June 2018 Protest, Peru took Claimant's representatives' statements at the Sayán Police Station, made arrangements to visit the Invicta Mine, inspected the mine, launched a criminal investigation into the actions of the Parán Community protestors,[1339] and began coordinating between various Peruvian entities to schedule and attend meetings with the Parán Community to better understand the brewing social conflict and assist in its resolution.[1340] Peru's fast response time and commitment to addressing the problems at the Invicta Mine was in no way "opposed to the rule of law;" rather, it was entirely lawful and thus cannot qualify as an FET violation, particularly in light of the high threshold required to establish such a violation.[1341]

657. Claimant alerted Peru of another potential Parán Community protest in early September 2018.[1342] In response, the CPO of Sayán, the Huaura Prosecutor, and the Huaura Subprefect met with the Parán Community on 7 September 2018 to urge the Community not to occupy the Invicta Mine and instead to engage in dialogue with

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[1337] *See supra* Section IV.B.2.

[1338] *See supra* Sections II.C.2 and II.F.1.

[1339] *See supra* Section II.E.2; **Ex. R-0063**, Order No. 02-REGPOL LIMA/DIVPOL-HUACHO-OFIPLO, 26 January 2019, p. 2; **Ex. C-0193**, Lima Police Department Operational Plan No. 002-2019-Region Political Lima/DIVPOL-H-CS.SEC, Plan to Lift Blockade, 9 February 2019, p. 2. **Ex. C-0160,** Inspection Report of Invicta Project Site, Sayán Police Station, 20 June 2018**.**

[1340] **RWS-0003**, León Witness Statement, ¶¶ 18–24; *see supra* Section II.E.2; **Ex. R-0065,** Meeting Minutes, Meeting between the Parán Community and MINEM, 11 August 2018; **Ex. R-0066**, Meeting Minutes, Meeting between the Parán Community and MINEM, 22 August 2018.

[1341] *See* **RLA-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, ICJ, Judgment, 20 July 1989, ¶ 128 ("Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.").

[1342] Claimant's Memorial, ¶ 112.

Claimant.[1343] Peru was successful in persuading the Parán Community members, and the rumored protest on 11 September 2018 never occurred in the end.[1344]

658. According to a number of the community relations guides prepared by Canada and Peru in the context of mining projects, Claimant should have seen the warning signs associated with the concerns expressed by the Parán Community about the Invicta Project.[1345] In keeping with such guides, good industry practice should have counseled Claimant to take additional measures at that stage to prevent escalation of the social conflict into a more long-term and acute—potentially even violent—form of opposition.[1346] Unfortunately, Claimant took no such measures, and the Parán Community initiated another, larger-scale protest on 14 October 2018—the Access Road Protest.[1347] This escalation was foreseeable, given Claimant's lack of engagement with the Parán Community regarding the environmental impact of the Invicta Project, which Claimant consistently ignored.[1348]

659. Claimant is incorrect that Peru's actions following the Access Road Protest constituted "tacit support" for the participants in such protest.[1349] As demonstrated in **Sections II.E.3 and IV.B.2**, Peru's response to the Access Road Protest was reasonable and demonstrated its commitment to helping Claimant achieve a lasting resolution to the conflict.[1350] Peru responded to the Access Road Protest on 14 October 2018—the very

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[1343] **Ex. C-0138**, Monthly Report on Invicta Mining, SOCIAL SUSTAINABLE SOLUTIONS, September 2018, pp. 4–5; [redacted]

[1344] **Ex. C-0138**, Monthly Report on Invicta Mining, SOCIAL SUSTAINABLE SOLUTIONS, September 2018, pp. 4–5; [redacted]

[1345] *See, e.g.*, **Ex. R-0086**, ICMM, Good Practice Guide: Indigenous Communities and Mining, 2015; Ex. R-0085, Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?," 4 June 2013; **Ex. R-0154**, 2009 CSR Strategy; **Ex. R-0089**, 2014 CSR Strategy; **Ex. R-0058**, PERCAN, Citizen Participation Manual; **Ex. R-0028**, Canada-Peru CR Toolkit; **Ex. R-0129**, The Equator Principles; **Ex. R-0041**, Joint Disclosure Booklet.

[1346] *See, e.g.*, **Ex. R-0028**, Canada-Peru CR Toolkit, pp. 14, 53.

[1347] *See supra* Section II.E.3.

[1348] *See, e.g.*, **Ex. R-0028**, Canada-Peru CR Toolkit, pp. 14, 53.

[1349] Claimant's Memorial, ¶ 266.

[1350] *See supra* Sections II.E.3 and IV.B.2.

same day it began—by immediately sending police officers to the Invicta Mine.[1351] On the same day, the CPO of Sayán facilitated an agreement between the representatives from Invicta and the Parán Community , pursuant to which the parties accepted to conduct negotiations while the Access Road Protest remained in place.[1352]

660. Over the months that followed the Access Road Protest, Peruvian officials worked relentlessly to mediate and foster an agreement to end the social conflict, among other things by instituting a government-facilitated Dialogue Table between the Claimant and the Parán Community, regularly travelling to meet with Claimant, the Community, and often both parties together.[1353] While Claimant participated in these meetings, it also consistently made demands that Peru intervene with force, describing the Parán Community members as "terrorists," even as those members worked with Claimant to reach an agreement that would allow Claimant to resume its work at the Invicta Mine and enable the Invicta Project to reach the exploitation phase.[1354]

661. As mentioned, Claimant and the Parán Community reached a written agreement on 26 February 2019. Such agreement could have led to the conflict's resolution.[1355] Unfortunately, however, Claimant breached its commitments (including to commission a survey by a topographer) of the area affected by the mining activity.[1356]

[1351] *See supra* Section II.E.3; **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 14 October 2018.

[1352] **Ex. R-0067**, Order No. 12718905 REGPOL-LIMA, 15 October 2018, p. 1; **Ex. C-0166**, Minutes of Meeting between the Parán Community, *et al.*, 14 October 2018.

[1353] **Ex. C-0173**, Report on Meeting between Invicta Mining Corp. S.A.C., *et al.*, 24 October 2018; **Ex. C-0182**, Summary Report of Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018; **Ex. C-0183**, Summary Report of 2017 Meeting between Invicta Mining Corp. S.A.C. and the Parán Community, *et al.*, 7 November 2018; **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019 p. 2; **Ex. C-0016**, Letter from Invicta (L. Bravo) to MININTER (E. Saavedra), 19 February 2019.

[1354] **Ex. C-0015**, Letter from Lupaka Gold Corp. (W. Ansley) to MINEM (F. Ismodes), 6 February 2019 ("We would like to point out that engaging in dialogue and negotiations with terrorists, and people who have attempted murder, is not a process that we will participate in. These people must abandon, or be removed, from the blockade before any meaningful discussions can occur.").

[1355] *See supra* Section II.E.4; **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C., and MINEM, 26 February 2019.

[1356] *See supra* Section II.E.4.

In response to the breakdown in relations between Claimant and the Parán Community that ensued, Peru again mobilized its agencies in response.[1357] For instance, Peru sent OGGS officials to the Invicta Mine, scheduled several additional meetings to resolve the developing tensions, and hosted a government-led session on 1 April 2019 that Claimant refused to attend.[1358] Again, Peru's response was consistent with sound governmental practice and due process.

662. In May 2019, Peru responded to heightened tensions between Claimant and the Parán Community precipitated by the ill-advised intervention of War Dogs, the third party security contractor hired by Claimant. Such intervention had triggered a violent confrontation between Claimant's representatives, the War Dogs team, and Parán Community members.[1359] After that incident, Peru met individually with Claimant and the Parán Community to discuss the evolving conflict, and to urge the parties to reconcile with one another.[1360] Such reconciliation never occurred, and Claimant ended up losing its shares in Invicta to its creditor in August 2019, as a result of Claimant's default under the loan commitments outlined in the PPF Agreement.[1361]

663. Under both international and Peruvian law, Peru was obligated to find a balance between respecting the rights of local, indigenous, and rural communities and working to promote Claimant's investments in Peru's extractive sector.[1362] From the moment of Claimant's acquisition of the Invicta Project all the way through to Claimant's loss of its shares in Invicta, Peru consistently and diligently employed numerous Peruvian agencies and sub-agencies to help place Claimant and the Parán Community in the best position to resolve the social conflict that developed out of

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[1357] *See supra* Section II.E.4.

[1358] **RWS-0001**, Trigoso Witness Statement, ¶ 48.

[1359] **Ex. R-0026**, Official Letter No. 006-2019-CCP from the Parán Community (Azarias Gilberto Torres Palomares) to MINEM (Francisco Ismodes Mezzano), 21 March 2019 p. 1; **RWS-0003**, León Witness Statement, ¶ 51.

[1360] *See supra* Section II.E.5; **Ex. C-0018**, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 6.

[1361] *See supra* Section II.F.4.

[1362] *See supra* Section II.B.

Claimant's own fundamental inability to manage its own community relationships. Peru's actions in this regard were reasonable, fair, even-handed, in accordance with due process, based on sound principles, and in no way reflected any improper "discretion, prejudice or personal preference."[1363] Accordingly, such conduct did not breach the Treaty MST standard.

d. Peru acted transparently and consistently

664. Claimant also alleges that Peru's actions "were not in any way consistent, even-handed, unambiguous, transparent, or candid," such that they "clearly amount to a failure to provide FET to Lupaka's investment, in breach of the FTA."[1364] Again, these threadbare allegations lack particularity and Claimant notably fails to identify any evidence in support of its assertions.

665. In any event, contrary to Claimant's unsupported allegations—which essentially amount to a glut of adjectives without substantiation—the record demonstrates that Peru's decisions were transparent and consistent. As detailed in **Section II.E** above, in connection with every decision that Peru made to assist in the Invicta-Parán social conflict, Peru:

a. solicited opinions from the various relevant agencies, including the MINEM, the OGGS, the MININTER, the PNP, the Public Prosecutor's Office, the Ombudsman's Office, the ANA, the MINAR, and the PCM;

b. faithfully followed the applicable domestic and international legal framework, including Peruvian constitutional requirements, mining-industry specific

[1363] **RLA-0103**, *Flughafen Zürich* (Award), ¶ 585 (*quoting* C**LA-0044**, *EDF v. Romania* (Award), ¶ 303); *see also, e.g.*, **RLA-0104**, *Toto* (Award), ¶ 157 ("An unreasonable or discriminatory measure is defined in this case as (i) a measure that inflicts damages on the investor without serving any apparent legitimate purpose; (ii) a measure that is not based on legal standards but on discretion, prejudice or personal preference, (iii) a measure taken for reasons that are different from those put forward by the decision maker, or (iv) a measure taken in wilful disregard of due process and proper procedure."); **RLA-0105**, *Lemire* (Decision), ¶ 262 (*quoting* C**LA-0044**, *EDF v. Romania* (Award), ¶ 303).

[1364] Claimant's Memorial, ¶ 293.

legislation, and international obligations under ILO Convention 169 and UNDRIP; and

c. consistently engaged with Claimant in a manner that permitted Claimant to ask questions and voice objections in meetings that various government officials held with Claimant's representatives from June 2018 through the end of the investment in August 2019.[1365]

666. As explained above, Peru's decision to promote dialogue with the local community was rooted in both international and Peruvian legal standards because rural communities have a right to self-determination and the PNP was fully justified in not forcefully intervening.[1366] It strains credulity to argue that such a process lacked transparency when Claimant had consistent access to, and maintained continuous communication with the various Peruvian authorities throughout Claimant's social conflict with the Parán Community, at all levels. Therefore this claim, too, fails.

D. Peru did not expropriate Claimant's investment

667. Claimant claims that Peru violated Treaty Article 812 ("Expropriation"), which in its first Paragraph provides as follows:

> Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except for a public purpose, in accordance with due process of law, in a nondiscriminatory manner and on prompt, adequate and effective compensation.[1367]

668. Claimant formulates two theories to argue that Peru violated Article 812.1. First, according to Claimant, actions by the Parán Community should be considered a *direct* expropriation that is attributable to Peru.[1368] Second, Claimant argues that, by acts of

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[1365] *See supra* Section II.E.

[1366] *See supra* Section II.E.

[1367] **RLA-0010**, Peru-Canada FTA, Art. 812.1 (internal citation omitted).

[1368] Claimant's Memorial, ¶ 312.

omission, Peru *indirectly* expropriated the investment. Contrary to both theories, Peru did not expropriate Claimant's investment, either directly or indirectly.

1. There was no direct expropriation of Claimant's investment, and the Parán Community's acts are not attributable to Peru

669. Claimant argues that actions by the Parán Community should be considered a direct expropriation of Claimant's investment, and that such expropriation by the Parán Community is attributable to Peru. Both arguments are wrong, and therefore cannot constitute the basis for a finding of liability against Peru.

670. *First*, as explained above in **Section IV.A**, under the customary international law rules on State responsibility, conduct by the Parán Community cannot be attributed to Peru because the Parán Community is not empowered with the exercise of governmental functions, and thus was not acting in a governmental capacity when carrying out the relevant acts. Actions by the Parán Community therefore could not have resulted in a direct expropriation by Peru.

671. *Second*, a direct expropriation occurs only when there is a "formal transfer of title or outright seizure."[1369] As the sole basis for its direct expropriation claim, Claimant invokes a so-called "take-over of the Site as of October 2018."[1370] However, Claimant has not explained on what basis the Access Road Protest (which took place on a road "leading to"[1371] the Invicta Mine) can constitute a "take-over" of the mine or could have effected a "formal transfer of title" or "outright seizure," within the meaning of Treaty Article 812.1.[1372]

[1369] *See* **RLA-0010**, Peru-Canada FTA, Annex 812.1 ("Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure."). Claimant articulates a similar legal standard for direct expropriation. *See* Claimant's Memorial, fn. 493 ("Direct expropriation is a State measure that removes the investor's legal title to the investment and/or results in a permanent physical seizure of an investment.").

[1370] Claimant's Memorial, ¶ 312.

[1371] Claimant's Memorial, p. viii (defining "Blockade" as "Blockade of the road through Lacsanga leading to the Site"); *see also* Claimant's Memorial, ¶ 101 (map depicting distance between Invicta Mine and Access Road Protest).

[1372] *See* Claimant's Memorial, § 4.4.

672. Because Claimant has failed to substantiate either of its two arguments on its direct expropriation claim, such claim should be dismissed. In fact, Claimant has manifestly failed to establish even a *prima facie* case of direct expropriation.

2. There was no indirect expropriation of Claimant's investment

673. Claimant also argues, "[i]n the alternative," that Peru carried out an "indirect expropriation"[1373] of Claimant's investment through acts of omission that constitute a "measure having an effect equivalent to nationalization or expropriation."[1374] But Claimant fails even to *identify* the applicable legal standard for an indirect expropriation—let alone to demonstrate that the alleged omissions that Claimant attributes to Peru meet the applicable legal standard.

674. Claimant also fails to apply legal criteria that the Treaty Parties expressly identified in the Treaty as factors that are "**require[d]**"[1375] (emphasis added) to establish an indirect expropriation. As a result of that alone, Claimant has manifestly failed to meet its burden of proof, and its claim of indirect expropriation must therefore be dismissed.

675. In any event, without prejudice to the above, the evidence demonstrates that Peru did not commit—either by affirmative acts or omission—an indirect expropriation of Claimant's investment.

[1373] The Treaty does not expressly define the term "indirect expropriation." *See* **RLA-0010**, Peru-Canada FTA, Art. 847 ("Definitions"); *see also* **RLA-0010**, Peru-Canada FTA, Arts. 105, 107 ("Definitions of General Application" and "Country-specific Definitions"). However, Treaty Article 812.1 refers to an indirect expropriation as "measures having an effect equivalent to nationalization or expropriation." **RLA-0010**, Peru-Canada FTA, Art. 812.1. And more specifically, Annex 812.1 states that indirect expropriation "results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure." **RLA-0010**, Peru-Canada FTA, Annex 812.1.

[1374] Claimant's Memorial, ¶ 313.

[1375] **RLA-0010**, Peru-Canada FTA, Annex 812.1 ("The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation ***requires*** a case-by-case, fact-based inquiry that considers, among other factors . . . .") (emphasis added).

a. Claimant failed to identify the applicable legal standard for indirect expropriation

676. Treaty Article 812 includes a footnote clarifying that, "[f]or greater certainty, paragraph 1 of Article 812 shall be interpreted in accordance with Annex 812.1 [of the Treaty]."[1376] Annex 812.1 in turn sets forth the Treaty Parties' shared understanding that determining whether a measure or series of measures constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that requires consideration of certain essential factors.[1377]

677. Treaty Annex 812.1 ("Indirect Expropriation") codifies Peru and Canada's "shared understanding" of what constitutes indirect expropriation for the purpose of Article 812,[1378] stating the following:

> The Parties confirm their shared understanding that:
>
> (a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
>
> (b) The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> > (i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
> >
> > (ii) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations, and

[1376] **RLA-0010**, Peru-Canada FTA, Art. 812, fn. 3.

[1377] **RLA-0010**, Peru-Canada FTA, Annex 812.1 ("Indirect Expropriation").

[1378] *See* **RLA-0010**, Peru-Canada FTA, Art. 812, fn. 3 ("For greater certainty, paragraph 1 of Article 812 shall be interpreted in accordance with Annex 812.1.").

> (iii) the character of the measure or series of measures;
>
> (c) Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, nondiscriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[1379]

678. Although it acknowledges that Annex 812.1 "clarifies the meaning of an indirect expropriation,"[1380] Claimant completely neglects Paragraphs (b)(ii), (b)(iii) and (c) of Annex 812.1, quoted above.[1381] The legal standard for indirect expropriation articulated by Claimant is therefore incomplete and inaccurate. In contrast, Peru below analyzes and applies to the case at hand each of the paragraphs of that Annex.

679. Annex 812.1, Paragraph (a) states that "[i]ndirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[1382] As the tribunal in *Glamis Gold v. United States* observed, "tantamount" or "equivalent" to (direct) expropriation necessarily implies that "the concept [of indirect expropriation] should not encompass *more* than direct expropriation."[1383] Similarly, in *Valores Mundiales v. Venezuela*, the tribunal held that,

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[1379] **RLA-0010**, Peru-Canada FTA, Annex 812.1.

[1380] Claimant's Memorial, ¶ 297.

[1381] *See* **RLA-0010**, Peru-Canada FTA, Annex 812.1; *see also* **RLA-0062**, *Carlos Ríos y Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021 (Kaufmann-Kohler, Garibaldi, Stern) ("***Ríos* (Award)**"), ¶ 252 ("Contrary to what the Claimants allege, the analysis of whether expropriation took place cannot focus just on the economic impact of the Measures. To classify as expropriatory, a measure must not only have caused substantial loss of value of the investment, but the other aspects listed in Annex 9-C must also be taken into consideration.").

[1382] **RLA-0010**, Peru-Canada FTA, Annex 812.1(1).

[1383] **CLA-0078**, *Glamis Gold* (Award), ¶ 355; *see also* **RLA-0066**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (Hunter, Schwartz, Chiasson) ("***S.D. Myers* (Partial Award)**"), ¶ 286 ("[S]omething that is "equivalent" to something else cannot logically encompass more.").

> in the context of an indirect expropriation, the deprivation of those fundamental rights must be of such magnitude that the [t]ribunal concludes that **maintaining the title to the investment does not represent any benefit to the investor**. Only in such scenario, and **considering all the circumstances of the case**, could the measure or measures at issue be considered to have **"similar characteristics and effects" to an expropriation** within the meaning of [the expropriation article] of the [treaty].[1384] (Emphasis added)

680. Paragraph (a) of Annex 812.1 recognizes that an indirect expropriation can result from "a measure or series of measures."[1385] Claimant asserts that an "indirect expropriation, which takes place through a series of measures over time, with the aggregate effect of destroying the value of an investment, is commonly referred to as a 'creeping expropriation'."[1386]

681. The concept of a creeping expropriation is premised on a series of measures constituting a composite act.[1387] The customary international law rules pursuant to which a series of measures can be deemed a "composite act,"[1388] which are explained above in **Section IV.C.2** in the context of fair and equitable treatment, apply with equal force in the context of an indirect expropriation claim. Pursuant to such rules, the measures that comprise a composite act must be "sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or

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[1384] **RLA-0099**, *Valores Mundiales, S.L., et a., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017 (Zuleta, Grigera-Naón, Derains) ("***Valores Mundiales* (Award)**"), ¶ 390.

[1385] **RLA-0010**, Peru-Canada FTA, Annex 812.1.

[1386] Claimant's Memorial, ¶ 307. In relation to "creeping expropriation," *see, e.g.*, **CLA-0071**, *Siemens A.G. v. The Argentine Republic,* ICSID Case No. ARB/02/8, Award, 6 February 2007 (Sureda, Brower, Janeiro) ("***Siemens* (Award)**"), ¶ 263.

[1387] *E.g.*, **CLA-0071**, *Siemens* (Award), ¶¶ 263–64 ("By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. . . . We are dealing here with a composite act in the terminology of the [ILC Commentary]."); **RLA-0008**, A. Newcombe, *et al.*, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009), § 7.15 ("State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the [ILC Commentary]."); *see also* Claimant's Memorial, ¶ 281 (referring to a "composite act" as "a series of acts and omissions which, on their own, may not constitute a breach of the applicable treaty"); Claimant's Memorial, § 4.4.1.2 ("An expropriation effected incrementally is a composite act").

[1388] **CLA-0018**, ILC Commentary, Art. 15, p. 62.

system."[1389] As the *Siemens v. Argentina* tribunal noted, across the series of sufficiently numerous and inter-connected measures, "each step must have an adverse effect."[1390] To prove a creeping expropriation based on an alleged composite act, Claimants bear the burden of proof, and resorting to a creeping expropriation claim cannot "expand the internationally accepted scope of the term expropriation."[1391]

682. Annex 812.1, Paragraph (b) consists of a chapeau and three provisions. The chapeau states that the determination of an indirect expropriation, whether by a measure or series of measures, "requires a case-by-case, fact-based inquiry."[1392] The three ensuing provisions of Paragraph (b) identify "require[d]" factors that must be part of any such case-by-case, fact-based inquiry into an alleged indirect expropriation. Such factors are in turn described below.

(i) Under Annex 812.1(b), the "economic impact" factor requires proving that State measures proximately caused a complete or nearly complete deprivation of the value of the investment

683. Under Annex 812.1(b)(i), the first factor that a Tribunal should consider is "the economic impact of the measure or series of measures."[1393] Tribunals have recognized that "the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken

[1389] **CLA-0018**, ILC Commentary, Art. 15, cmt 5 (*quoting Ireland v. United Kingdom*, European Court of Human Rights, Application No. 5310/71, Award, 18 January 1978 (Pallieri, *et al.*), ¶ 159); *see also* **RLA-0056**, *RosInvestCo* (Final Award), ¶ 621 (concluding that a series of measures could "only be understood as steps under a common denominator in a pattern to destroy [the investment] . . . .").

[1390] **CLA-0071**, *Siemens* (Award), ¶ 263 (*quoted in* Claimant's Memorial, ¶ 309).

[1391] **RLA-0066**, *S.D. Myers* (Partial Award), ¶ 286 ("[T]he drafters of the NAFTA intended the word 'tantamount' to embrace the concept of so-called 'creeping expropriation', rather than to expand the internationally accepted scope of the term expropriation."); *see also* **RL-0097,** *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 (Dervaird, Greenberg, Belman) ("***Pope & Talbot* (Interim Award)**"), ¶ 104.

[1392] **RLA-0010**, Peru-Canada FTA, Annex 812.1(2).

[1393] **RLA-0010**, Peru-Canada FTA, Annex 812.1(2)(i).

place."[1394] Annex 812.1, for its part, expressly cautions that "the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred."[1395] Therefore, although an adverse effect on the economic value of an investment is necessary to establish an indirect expropriation, it is insufficient without more.

684. In fact, as Claimant acknowledges, the "adverse economic effect" factor requires proving that an investment has been "deprived of virtually all value"[1396] or has been "effectively neutralized" by a measure or series of measures.[1397] This high threshold reflects the requirement that, to constitute an indirect expropriation, the relevant measure(s) must "have an effect equivalent to direct expropriation."[1398] Because of that requirement, the threshold for the adverse economic effect factor cannot be lower than a deprivation of virtually all value or an effective neutralization of the value. Thus, when Claimant elsewhere invokes the term "substantial deprivation,"[1399] ostensibly as an alternative threshold for the degree of adverse economic effect that a measure must have had—such term must be interpreted as meaning deprived of virtually all value, or effectively neutralized.

685. In the words of the *Vivendi II* tribunal, the weight of authority that has examined the degree of diminution in value of the investment to determine whether the contested measure is expropriatory, "appears to [have] draw[n] a distinction between only a

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[1394] **RLA-0067**, *Archer Daniels Midland Company, et al., v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (Cremades, Rovine, Siqueiros), ¶ 240 ("Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place.").

[1395] **RLA-0010**, Peru-Canada FTA, Annex 812.1(2)(i).

[1396] Claimant's Memorial, ¶ 300 (*quoting* **CLA-0057**, *PL Holdings S.a.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award, 28 June 2017 (Bermann, Lew, Schneider)).

[1397] Claimant's Memorial, ¶ 300 (*quoting* **CLA-0056**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (Vicuña, Lalonde, Rezek)).

[1398] **RLA-0010**, Peru-Canada FTA, Annex 812.1(1).

[1399] Claimant's Memorial, ¶ 300.

partial deprivation of value (not an expropriation) and a complete or near complete deprivation of value (expropriation)."[1400]

686. Tribunals have consistently emphasized that the investor that claims an indirect expropriation bears the burden of establishing that the measure or measures have deprived virtually all value from, or effectively neutralized, an investment. For example, the decision on jurisdiction in *Electrabel v. Hungary*, which has been cited approvingly by various other tribunals,[1401] summarized the applicable standard as follows:

> [T]he accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the **requirement under international law for the investor to establish** the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralization or factual destruction of its investment, its value or enjoyment.[1402] (Emphasis added)

687. Concerning the degree of adverse economic effect that is necessary to prove an indirect expropriation, Claimant quotes the award in *Santa Elena v. Costa Rica* in the context of its assertion that "control of a property include[s] the ability for 'the owner reasonably to exploit the economic potential of the property.'"[1403] However, the tribunal in *Santa Elena* did not undertake any analysis to identify an indirect

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[1400] **CLA-0069**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award, 20 August 2007 (Kaufmann-Kohler, Verea, Rowley), ¶ 7.5.11.

[1401] *See, e.g.*, **RLA-0095**, *BayWa r.e. Renewable Energy GmbH, et al., v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (Crawford, Naón, Malintoppi), ¶ 423, fn. 554; **RLA-0062**, *Ríos* (Award), fn. 480; **RLA-0100**, *InfraRed Environmental Infrastructure GP Ltd., et al., v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019 (Drymer, Dupuy, Park), ¶ 505; **RLA-0101**, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (Simma, Thomas, Cremades), ¶ 608.

[1402] **CLA-0062**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (Veeder, Kaufmann-Kohler, Stern), ¶ 6.62 (cited approvingly in Claimant's Memorial, fn. 475).

[1403] Claimant's Memorial, ¶ 301 (*quoting* **CLA-0063**, *Compañia del Desarollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000 (Fortier, Lauterpacht, Weil) ("***Santa Elena* (Final Award)**"), ¶ 76).

expropriation, because it was undisputed that the case concerned solely a *direct* expropriation,[1404] with the "sole issue" for the tribunal to determine being "the amount of compensation."[1405]

688. Proving that a measure or series of measures deprived an investment of virtually all value, or effectively neutralized the investment, is inherently subject to another essential requirement: establishing a *causal nexus* between the State measure(s) invoked and the adverse economic effect alleged. Merely invoking a State measure and establishing that there has been a virtual total loss to an investment are, on their own, insufficient to establish any expropriation, absent proof that the State measure was what caused the loss of value of the investment.

689. Arbitral jurisprudence has recognized "proximate causation" as the generally applicable standard for causation in the context of State responsibility for internationally wrongful acts, such as an alleged treaty breach.[1406] In the specific context of an indirect expropriation claim, in which a measure or series of measures must "have an effect equivalent to direct expropriation,"[1407] the tribunal in *El Paso v. Argentina* specified that establishing causation requires determining whether an alleged loss "was or was not the **automatic consequence**, i.e., the **only and**

[1404] *See* **CLA-0063**, *Santa Elena* (Final Award), ¶¶ 18, 34.

[1405] **CLA-0063**, *Santa Elena* (Final Award), ¶ 56.

[1406] *See* **RLA-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, ICJ, Judgment, 20 July 1989, ¶ 101; **CLA-0052**, *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (Caflisch, Bernardini, Stern) ("***El Paso* (Award)**"), ¶ 682; **RLA-0069**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Award, 27 September 2019 (Tomka, Kaplan, Thomas), ¶ 74; **CLA-0020**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (Hanotiau, Born, Landau), ¶¶ 785–87; **RLA-0070**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (de Maekelt, Rezek, van den Berg), ¶ 50; **RLA-0071**, *BG Group Plc v. Argentine Republic*, UNCITRAL, Final Award, 24 December 2007 (Aguilar Alvarez, van den Berg, Garro) ("***BG Group* (Final Award)**), ¶ 428; *see also* **RLA-0068**, *Jan Oostergetel y Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (Kaufmann-Kohler, Wladimiroff, Trapl), ¶ 319 (*quoting Azinian v. Mexico*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 90).

[1407] **RLA-0010**, Peru-Canada FTA, Annex 812.1(1).

unavoidable consequence, of the measures"[1408] (emphasis added). On the facts of the case, the *El Paso* tribunal concluded that although the investor had experienced a "quasi-total loss of [its] investment," this loss "was not an **unavoidable** and **direct consequence** of [the State's] measures, and cannot be the basis of a claim for expropriation"[1409] (emphasis added).

690. In addition, proximate causation between a State measure or measures and the destruction of an investment cannot be established if such destruction resulted from actions or omissions by the investor itself or by third parties, rather than by the State. This principle was stated and applied by the ICJ in *Elettronica Sicula (United States v. Italy) ("**ELSI**")*.[1410] In that case, the ICJ held that, although the alleged measure was *one* of the causes that resulted in the alleged harm to the investment, other factors also were responsible:

> There were several causes acting together that led to the disaster to ELSI. No doubt the effects of the requisition might have been one of the factors involved. But the underlying cause was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition.[1411]

691. For the economic impact of the measure or series of measures to "have an effect equivalent to direct expropriation,"[1412] tribunals consistently have held that the measure or measures must "**[i]rreversibly** and **permanently** deprive the owner of property of the effective use of the asset."[1413]

[1408] **CLA-0052**, *El Paso* (Award), ¶ 270; *see also* **CLA-0052**, *El Paso* (Award), ¶ 272 ("Only if the [alleged loss] was the **only possible consequence** of the [State] measures could one consider that these measures were expropriatory . . . .") (emphasis added).

[1409] **CLA-0052**, *El Paso* (Award), ¶ 279.

[1410] **RLA-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, ICJ, Award, 20 July 1989.

[1411] **RLA-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, ICJ, Award, 20 July 1989, ¶ 101.

[1412] **RLA-0010**, Peru-Canada FTA, Annex 812.1(1).

[1413] **RLA-0065**, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020

(ii) Annex 812.1(b) requires interference by the State with distinct, reasonable, and investment-backed expectations by the investor

692. Under Annex 812.1(b)(ii), the second factor in Annex 812.1, Paragraph (b) is "the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations."[1414]

693. In its award of early 2021, the tribunal in the *Ríos v. Chile* ICSID arbitration interpreted a treaty provision that is substantively identical[1415] to the (equally-authentic[1416]) Spanish version of this provision of Annex 812.1.[1417] In its award, the *Ríos* tribunal explained each of the three terms that describes the type of expectations that are relevant to determining an indirect expropriation. *First*, the tribunal in that case explained the requirement under Paragraph (b)(ii) that an expectation must be "distinct" (the equivalent of which in the treaty at issue in *Rios* was "*inequívoca*"). Accordingly, only if a State violates expectations that arise from obligations, commitments, or declarations that leave no doubt and no room for error ("*que no*

(Mapesbury, Knieper, Rees) ("***Hydro Energy* (Decision)**"),¶ 530; *see also* **CLA-0074**, *Tecmed* (Award), ¶ 116 (measures can be "an indirect *de facto* expropriation [only] if they are irreversible and permanent"); **RLA-0119**, *Quiborax S.A. & Non Metallic Minerals, S.A. v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Award, 16 September 2015, (Kaufmann-Kohler, Lalonde, Stern), ¶ 200 ("[A] State measure constitutes expropriation under the [t]reaty if (i) the measure deprives the investor of its investment; (ii) the deprivation is permanent . . . ."); **RLA-0051**, *Cargill* (Award), ¶¶ 348, 551; **CLA-0101**, *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014 (Guillaume, Kaufmann-Kohler, El-Kosheri), ¶¶ 286–87; **CLA-0055**, *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award (Award No. 141-7-2), 29 June 1984, ¶ 22 (holding that a taking must be "not merely ephemeral") (quoted approvingly in Memorial, ¶ 299).

[1414] **RLA-0010**, Peru-Canada FTA, Annex 812.1(2)(ii).

[1415] **RLA-0062**, *Ríos* (Award), ¶ 243 (*quoting* Annex 9-C of the Chile-Colombia Free Trade Agreement) (". . . (ii) the degree to which the government action interferes with unequivocal and reasonable investment expectations").

[1416] **RLA-0010**, Peru-Canada FTA, ch. 23 ("DONE in duplicate at ____, this ____ day of ____ 2008 in the English, Spanish and French languages, each version being equally authentic.").

[1417] **RLA-0010**, Peru-Canada FTA (Spanish Version), Annex 812.1(b)(ii) (". . . (ii) the extent to which the measure or series of measures interferes with distinct, **reasonable** investment-backed expectations. . .") (emphasis added).

admitan duda o equivocación") could there be an expropriation.[1418] The tribunal added that an implication of the foregoing is that "the obligation, undertaking or declaration must be expressed or, if it is implicit, that no doubt may exist over its existence or scope"[1419]

694. *Second*, an expectation under the second factor in Annex 812.1, Paragraph (b) must be "reasonable."[1420] The *Ríos* tribunal found that, in the context of an investment, the reasonableness must be objective; accordingly, merely subjective expectations of an investor are insufficient.[1421] The reasonableness of an expectation is a question of fact that must be determined on a case-by-case basis, as a function of the underlying State obligation, commitment, or declaration that generated the expectation, along with all relevant facts. [1422]

695. *Third*, an expectation must be "investment-backed."[1423] That means that the expectation must have served as a basis for the investment (i.e., the investment was made in reliance upon the State representation or commitment), such that, in the absence of such expectation, the investment would not have been made.[1424] The concept of "investment-backed expectations" is materially different from the concept of "legitimate expectations" that may arise in other contexts.[1425]

696. Pursuant to Paragraph (b)(ii), should an investor succeed in establishing that it had "distinct, reasonable investment-backed expectations," the next stage of the inquiry is

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[1418] **RLA-0062**, *Ríos* (Award), ¶ 254 ("In the Tribunal's opinion, an expectation is unequivocal when its grounds are unequivocal. In other words, only if the State violates expectations arising from obligations, undertakings or declarations that do not allow any doubt or misunderstanding can expropriation exist under the Treaty. That implies that the obligation, undertaking or declaration must be expressed or, if it is implicit, that no doubt may exist over its existence or scope and, in both cases, it must refer to specific parameters related to the investment.").

[1419] **RLA-0062**, *Ríos* (Award), ¶ 254.

[1420] **RLA-0010**, Peru-Canada FTA, Annex 812.1(2)(ii).

[1421] **RLA-0062**, *Ríos* (Award), ¶ 255.

[1422] **RLA-0062**, *Ríos* (Award), ¶ 255.

[1423] **RLA-0010**, Peru-Canada FTA, Annex 812.1(2)(ii).

[1424] **RLA-0062**, *Ríos* (Award), ¶ 256.

[1425] **RLA-0062**, *Ríos* (Award), ¶ 258.

to assess whether and to what extent the relevant State measure or measures in fact "interfere[d]"[1426] with such expectations.

(iii) Under Annex 812.1(b), the character of State measures must be considered

697. Under, Annex 812.1(b)(iii), the third and final provision within Paragraph (b) states that "the character of the measure or series of measures" must be "consider[ed]."[1427] Reflecting the fact that any inquiry under Annex 812.1 is "case-by-case" and "fact-based," the elements pursuant to which a tribunal can assess the "character" of a measure or measures are unlimited, and may depend on the circumstances of each case. For instance, in some cases, it will be relevant whether the measure invoked was sovereign or commercial in character.[1428] Other "character" attributes that State practice has highlighted as important to the indirect expropriation analysis have included the "object, context and intent"[1429] of the relevant measure(s), and "whether the [State] action is disproportionate to the public purpose"[1430] of the measures.

(iv) Under Annex 812.1(c), nondiscriminatory State measures taken for public welfare objectives are strongly presumed not to be expropriatory

698. Annex 812.1 concludes with Paragraph (c), which states:

> **Except in rare circumstances**, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, **nondiscriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as** health, **safety** and the environment, **do not constitute indirect expropriation**.[1431] (Emphasis added)

[1426] **RLA-0062**, *Ríos* (Award), ¶ 258.

[1427] **RLA-0010**, Peru-Canada FTA, Annex 812.1(2)(iii).

[1428] **RLA-0062**, *Ríos* (Award), ¶ 259.

[1429] **RLA-0064**, European Union-Singapore Investment Protection Agreement, 2018, Annex 1.

[1430] **RLA-0063**, ASEAN Comprehensive Investment Agreement, 2009, Annex 2, Article 3(c).

[1431] **RLA-0010**, Peru-Canada FTA, Annex 812.1(3).

699. Paragraph (c) provides that nondiscriminatory measures that are designed and applied to protect legitimate public welfare objectives shall not be deemed expropriatory under the Treaty. The only exception to this general exclusion from expropriation is when there are "rare circumstances."[1432] The article identifies as an example of such circumstances instances in which the measures at issue are "so severe" (in light of their purpose) that they "cannot be reasonably viewed as having been adopted and applied in good faith."[1433] Absent such rare circumstances, nondiscriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, including health and safety (e.g., such as preventing a violent confrontation in the context of a social protest, which could lead to loss of life), do not constitute indirect expropriation.

700. In sum, although Claimant failed to apply more than half the provisions of Annex 812.1,[1434] analysis of each of the "required"[1435] factors in Annex 812.1 is essential to any indirect expropriation inquiry under Treaty Article 812.[1436]

701. When the applicable legal standard under Article 812, as clarified by Annex 812.1 and summarized above, is applied to the facts of this case—even as asserted by Claimant—the conclusion must be that no indirect expropriation has resulted from acts or omissions that are attributable to Peru.

b. <u>The evidence and testimony on the record shows that Peru did not indirectly expropriate Claimant's investment</u>

702. Peru did not expropriate Claimant's investment. Although Claimant argues that Peru's alleged acts and omissions concerning the Access Road Protest "amount to a creeping, indirect expropriation of Lupaka's investment,"[1437] it did not substantiate its

[1432] **RLA-0010**, Peru-Canada FTA, Annex 812.1(3).

[1433] **RLA-0010**, Peru-Canada FTA, Annex 812.1(3).

[1434] *See* Claimant's Memorial, § 4.4 (not applying provisions (b)(ii), (b)(ii), or (c) of Annex 812.1).

[1435] **RLA-0010**, Peru-Canada FTA, Annex 812.1 ("The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation ***requires*** a case-by-case, fact-based inquiry that considers, among other factors . . . .") (emphasis added).

[1436] **RLA-0010**, Peru-Canada FTA, Annex 812.1.

[1437] Claimant's Memorial, ¶ 313.

claim. Contrary to Claimant's assertions, (i) Peru did not engage in a composite act that would support a claim for creeping expropriation; (ii) Claimant's investment retained significant value, and was lost through circumstances not proximately caused by Peru; (iii) Claimant's alleged expectations at the time that it invested were not distinct, reasonable, or investment-backed; (iv) the measures taken by Peru were of a character designed to prevent escalating the serious and potentially tragic social costs that often result from conflicts between mining operators and local communities; and (v) such measures were nondiscriminatory and promoted valid public welfare objectives.

703. Each of the foregoing factors is briefly analyzed below, *seriatim*.

(i) Claimant has failed to prove the existence of any "composite act" to support a "creeping" expropriation claim

704. To prove its claim that Peru carried out a "creeping, indirect expropriation of Lupaka's investment,"[1438] Claimant has acknowledged that it must demonstrate that "a series of measures over time [had] the aggregate effect of destroying the value of an investment."[1439] However, the legal analysis requires more. For a "series of measures" to constitute a creeping expropriation—as Claimant alleges in this case—the measures must constitute a "composite act."[1440] As discussed in **Section IV.C.2**, establishing a "composite act" requires demonstrating that the component measures are "sufficiently numerous and inter-connected to amount . . . to a pattern or system"[1441] where "each [measure] must have an adverse effect"[1442] on the investment.

[1438] Claimant's Memorial, ¶ 313.

[1439] Claimant's Memorial, ¶ 307.

[1440] *See supra* Section IV.D.2.

[1441] **CLA-0018**, ILC Commentary, Art. 15, cmt 5 (*quoting Ireland v. United Kingdom*, European Court of Human Rights, Application No. 5310/71, Award, 18 January 1978 (Pallieri, *et al.*), ¶ 159); *see also* **RLA-0056**, *RosInvestCo* (Final Award), ¶ 621 (concluding that a series of measures could "only be understood as steps under a common denominator in a pattern to destroy [the investment]").

[1442] **CLA-0071**, *Siemens* (Award), ¶ 263 (*quoted in* Claimant's Memorial, ¶ 309).

705. Claimant does not plead its creeping expropriation claim with particularity.[1443] Instead, it refers the Tribunal to "the acts and omissions [that] amount to a creeping, indirect expropriation of Lupaka's investment have [already] been set out above,"[1444] referring to the seven alleged actions and omissions by Peru that Claimant invoked as the basis for its FPS and FET claims.[1445] Claimant's assertion that those seven alleged acts and omissions constitute a "composite act" in the context of its creeping expropriation claim fails for the same reasons that Claimant failed to prove a composite act as part of its FET claim, namely that: (i) there is no set of actions or omissions by Peru that were "sufficiently numerous and inter-connected" to constitute any "pattern or system"; and (ii) the alleged relevant actions and omissions by Peru did not have any "adverse impact" on the investment.[1446]

706. Because Claimant has not established the existence of any composite act, Claimant's claim for creeping expropriation must be rejected. The analysis could stop there. Nevertheless, for the sake of completeness and without prejudice to its rights or Claimant's burden of proof, Peru further demonstrates that it has not indirectly expropriated Claimant's investment.

(ii) Alleged acts and omissions by Peru did not proximately cause Claimant's investment to be nearly or fully deprived of value

707. As noted above, under Paragraph (b) of Treaty Annex 812.1, the first factor that must be considered in an indirect expropriation inquiry is the "economic impact of the measure or series of measures."[1447] To satisfy this factor, Claimant must show a complete or nearly complete deprivation of the value of its investment,[1448] and that such deprivation was an "automatic consequence, i.e., the only and unavoidable

[1443] *See* Claimant's Memorial, § 4.4.

[1444] Claimant's Memorial, ¶ 313.

[1445] Claimant's Memorial, ¶¶ 266, 313.

[1446] *See supra* Section IV.D.2.

[1447] **RLA-0010**, Peru-Canada FTA, Annex 812.1(b)(i).

[1448] *See supra* Section IV.D.2.a.i (analyzing **RLA-0010**, Peru-Canada FTA, Annex 812.1(b)(ii)).

consequence, of the measures."[1449] If acts or omissions by Claimant itself and/or by third parties were causes of the complete or nearly complete deprivation of value of the investment, such deprivation cannot be deemed to have been proximately caused by actions or omissions by Peru.[1450] In addition, the deprivation of value of the investment must have been permanent and irreversible,[1451] which in the present case it was not (to the extent there was any deprivation in value at all).

708. No acts or omissions by Peru proximately caused a complete or nearly complete deprivation of the value of Claimant's investment. Claimant's damages expert asserts that Claimant first purchased the shares in AAG, the parent company of Invicta, for USD 10.5 million.[1452] Claimant's expert used a discounted cash flow methodology to allege that "the fair market value of the Claimant's Investment under 355 t/d scenario to be USD 44.2 million."[1453] Even using these number as benchmarks for the value that the investment would have had in the absence of the alleged State measures, there was neither a complete nor a near complete deprivation of value. Tellingly, Claimant admitted in its 2019 audited financial statements that its shares retained significant value even at the time that it lost such shares:

> [A]n independent valuation of [Invicta] (the "IMC Valuation") ordered by the independent trustee holding the IMC ownership shares under the PLI Financing Agreement's Security Agreement **produced a value of approximately US$13 million**

[1449] **CLA-0052**, *El Paso* (Award), ¶¶ 270, 272 ("Only if the [alleged loss] was the **only possible consequence** of the [State] measures could one consider that these measures were expropriatory . . . .") (emphasis added).

[1450] **RLA-0054**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, ICJ, Award, 20 July 1989, ¶ 101.

[1451] **RLA-0065**, *Hydro Energy* (Decision),¶ 530. *See also* **CLA-0074**, *Tecmed* (Award), ¶ 116. **CLA-0055**, *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award (Award No. 141-7-2), 29 June 1984 (Riphagen, Aldrich, Shafeiei), ¶ 22.

[1452] **CER-0001**, Accuracy Report, ¶ 8.26(a).

[1453] Claimant's Memorial, ¶¶ 356, 359 (Noting that had Claimant been able to access the additional capacity because of its acquisition of the Mallay Plant, which it was not, "Accuracy assesses the fair market value of the Claimant's Investment under the 590 t/d scenario to be USD 63.6 million").

> **for the IMC ownership shares seized by PLI**.[1454] (Emphasis added)

709. Accordingly, a valuation assessment commissioned by Claimant itself of the Invicta shares yielded an appraisal value of USD 13 million at the time that Claimant lost the shares. This value is greater than the acquisition price of the shares that Claimant purchased and just under one third of the fair market value estimated by Claimant's expert.[1455] That means at such time, any deprivation of the value of Claimant's investment was *far* from a nearly complete one (let alone a complete one). Because a complete or nearly complete deprivation of value is a *necessary* condition to any indirect expropriation claim (creeping or otherwise),[1456] the fact that Claimant's shares retained significant value on the date of valuation requires dismissal of Claimant's expropriation claim.

710. The behavior of Claimant and Lonely Mountain (which owned Claimant's lender, PLI Huaura) further demonstrates that the Invicta shares retained value at the time that Claimant forfeited them. Under the PPF Agreement, if Claimant was responsible for a default, PLI Huaura was authorized to "demand payment of the Early Termination Amount," "enforce against the Collateral" (i.e., shares in Invicta), or "fully or partially enforce the Peruvian Security Documents."[1457] On 2 July 2019, PLI Huaura demanded that Claimant pay the Early Termination Amount of approximately USD 15.6 million,[1458] while also reserving its right to "(i) enforce against the Collateral, in whole or in part, (ii) fully or partially enforce the Security Documents, and (iii) take any and

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[1454] **Ex. R-0142**, Lupaka Gold Corp., Consolidated Financial Statements For the years ended December 31, 2019 and 2018, p. 22.

[1455] **Ex. R-0142**, Lupaka Gold Corp., Consolidated Financial Statements For the years ended December 31, 2019 and 2018, p. 22; **CER-0001**, Accuracy Report, ¶8.26(a); Claimant's Memorial, ¶¶ 356, 359.

[1456] *See supra* Section IV.D.2.a.ii.

[1457] **Ex. C-0045**, Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 2 August 2017, § 14(4).

[1458] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, p. 1.

all enforcement actions in accordance with the terms of Applicable Laws."[1459] In response, Claimant "tried to negotiate with Lonely Mountain but [was] unsuccessful in convincing them to grant [Claimant] more time to pay."[1460]

711. The shares in Invicta retained value to such an extent that Claimant felt compelled to negotiate a payment schedule with Lonely Mountain rather than forfeit such shares. However, the latter opted instead to exercise its contractual option to foreclose upon the investment, rather than continue to seek payment of the Early Termination Amount of USD 15.6 million from Claimant. If the Invicta shares had retained no value, or close to no value, Claimant would not have strained to keep them, and Lonely Mountain would not have opted to take them in lieu of payment.

712. Further, the alleged acts and omissions of Peru were not the *proximate cause* of Claimant's loss. Intervening and superseding causes of the loss of Claimant's investment included: (i) Claimant's own poor management of its relationship with the Parán Community leading to the Access Road Protest; (ii) Claimant's own failure to resolve the Access Road Protest by means of dialogue; (iii) Claimant's own failure to resolve certain regulatory matters to be able to reach the exploitation phase at the Invicta Mine; (iv) Claimant's own inability to process ore extracted from the Invicta Mine; (v) Claimant's multiple events of default under the PPF Agreement additional to its failure to deliver gold; and (vi) Claimant's own failure to pay the Early Termination Amount and thus avoid forfeiture of its Invicta shares.[1461] Although these facts have been recounted in **Section II.F** above, each of these intervening causes is recalled briefly below.

713. *First*, before the Access Road Protest began, Claimant neglected its obligation to establish and maintain an amicable relationship with each of the Rural Communities.[1462] In Peru, as in other jurisdictions, mining companies are legally

[1459] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, p. 1.

[1460] **CWS-0002**, Ellis Witness Statement, ¶ 56.

[1461] S*ee supra* Section II.F.2.

[1462] *See supra* Section II.D.

required to secure amicable relationships with rural communities that are located within a mining project's area of direct or indirect influence.[1463] In this case, the Parán Community was in the Invicta Project's area of direct influence.[1464] Claimant nevertheless failed to develop a constructive relationship with that Community, instead allowing a conflict to materialize and escalate throughout 2018 and 2019.[1465] Claimant's failure to fulfill its legal obligation to establish amicable relations with the Parán Community caused Claimant's inability to exploit the Invicta Mine, its default under the PPF Agreement, and the loss of its investment.

714. *Second*, Claimant failed to bring about a resolution to the Access Road Protest by means of dialogue. Instead, Claimant simply insisted that Peru terminate the protest by use of force.[1466] Had Peru acted as Claimant wished and removed the Parán Community by force, the conflict between Claimant and the Parán Community would not have been resolved and instead would have been aggravated—thereby diminishing Claimant's likelihood of obtaining the necessary social license[1467] and preventing the Invicta Mine from reaching the exploitation phase before Claimant defaulted on the PPF Agreement. By failing to resolve the Access Road Protest though negotiation and dialogue, Claimant itself caused the demise of its investment.

715. *Third*, Claimant's failure to resolve outstanding regulatory matters caused the Invicta Project to fail. Before Claimant could progress its mine to the exploitation phase, Claimant needed to fulfill certain regulatory requirements, by: (i) arranging for an inspection of the Invicta Mine by the MINEM; (ii) obtaining the MINEM's approval of an amendment to the mine closure plan; and (iii) responding to deficiencies in

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[1463] *See supra* Section II.B.1.

[1464] *See, e.g.*, **Ex. R-0047**, 2009 EIA, p. 36.; **RER-0002**, Vela Expert Report, ¶ 38; **RWS-0001**,Trigoso Witness Statement, ¶¶ 24–30; **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to the Parán Community (A. Torres), 18 February 2019, p. 1.

[1465] *See supra* Sections II.D and II.E.

[1466] *See, e.g.*, **RWS-0003**, León Witness Statement, ¶ 52; **RWS-0002**, Incháustegui Witness Statement, ¶ 22.

[1467] *See supra* Sections II.A.1-2 and II.E.; **RWS-0001**,Trigoso Witness Statement, ¶ 49; **RWS-0004**, Saavedra Witness Statement, ¶ 28; **RER-0001**, Meini Expert Report, ¶¶ 17, 199, 201; **RWS-0002**, Incháustegui Witness Statement, ¶ 38. .

Claimant's third supporting technical report (Third ITS).[1468] Claimant's suggestion that it could have concluded each of these regulatory steps in time to (i) bring the mine into exploitation, (ii) extract and process the necessary ore to meet its contractual commitments, and (iii) deliver gold to PLI Huaura, is wholly speculative and unsubstantiated. The above-mentioned outstanding regulatory matters were thus additional barriers to the exploitation of the mine that caused Claimant to lose its investment.

716. *Fourth*, Claimant has not demonstrated that it had sufficient ore processing capacity to meet the gold delivery obligations that became due in December 2018.[1469] As of September 2018, Claimant was experiencing failures with the four ore processing mills with which it had contracted.[1470] The minutes from Claimant's September 2018 Board of Directors' meeting (a mere two weeks before the Access Road Protest began) indicate, for example, that permits for at least one of the mills did "not cover [Claimant's] processing requirements,"[1471] and that "out of the 4 toll mills selected, none are fulfilling their contracts."[1472] Even if Claimant had successfully brought the mine into the exploitation stage and had extracted sufficient ore (quod non), Claimant has not proven that the ore processing mills it was using would have been able to process extracted ore at a rate necessary to meet Claimant's gold delivery obligations, and thus to avoid default under the PPF Agreement.

717. *Fifth*, Claimant defaulted on the PPF Agreement not only on the basis of its inability to deliver gold, but also for failing to address five other "specified events of default" outlined by its creditor, PLI Huaura.[1473] Such events of default included: (i) Claimant's

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[1468] **CWS-0003**, Castañeda Witness Statement, ¶¶ 21–22; **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule H.

[1469] *See supra* Section II.F.1.c.

[1470] **Ex. C-0051**, Meeting Minutes, Lupaka Gold Corp. Board Meeting, 27 September 2018, p. 1.

[1471] **Ex. C-0051**, Meeting Minutes, Lupaka Gold Corp. Board Meeting, 27 September 2018, p. 1.

[1472] **Ex. C-0051**, Minutes of Lupaka Board Meeting, 27 September 2018, p. 1.

[1473] S*ee supra* Section II.F.4.

insolvency and general inability to pay its debts;[1474] (ii) failure to comply with "terms, covenants or agreements in the PPF Agreement or any other Transaction Document";[1475] (iii) the occurrence of an event that could reasonably be expected to have a "Material Adverse Effect";[1476] (iv) deviation from the "Initial Expense Budget," where such deviation had a "Material Adverse Effect";[1477] and (v) diversion from the "Initial Production Forecast," where such deviation had a "Material Adverse Effect."[1478] Thus, even if Peru were somehow responsible for Claimant's failure to deliver gold (quod non), Claimant committed five other events of default that it did not even specify in the Memorial or attempted to attribute to Peru.[1479] These additional events of default caused Claimant to lose its investment, and thus interrupt any chain of proximate causation between any action by Peru and the loss of the investment.

718. *Finally*, Claimant retained an option to pay an Early Termination Amount, at any point up to and after default, to avoid PLI Huaura's foreclosure on Claimant's shares in Invicta.[1480] Thus, even after Claimant defaulted under the PPF Agreement, Claimant

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[1474] **Ex. C-0045**, Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 2 August 2017, § 13(1)(m) ("Any Obligor (i) becomes insolvent or generally not able to pay its debts as they become due").

[1475] **Ex. C-0045**, Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 2 August 2017, § 13(1)(f) ("Any Obligor fails to perform, observe or comply with any term, covenant or agreement contained in this Agreement or any other Transaction Document").

[1476] **Ex. C-0045**, Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 2 August 2017, § 13(1)(n) ("There has occurred in the opinion of the Buyer an event or development that has or would reasonably be expected to have a Material Adverse Effect").

[1477] **Ex. C-0045**, Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 2 August 2017, § 13(1)(s)(i) ("Any (i) deviation from the Initial Expense Budget").

[1478] **Ex. C-0045**, Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holdings L.P., 2 August 2017, § 13(1)(s)(ii) ("Any . . . change between the Initial Annual Production Forecast and any updated Annual Production Forecast that has or would reasonably be expected to have a Material Adverse Effect, each determined in the sole and absolute discretion of the Buyer").

[1479] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019 (outlining the "Specified Defaults" in Schedule I).

[1480] *See supra* Section II.F.4.

could have paid PLI Huaura the Early Termination Amount and thereby have avoided PLI Huaura's foreclosure on its shares in Invicta.[1481]

719. In sum, when Claimant lost its investment to its creditor PLI Huaura in August 2019, that investment still retained significant value (viz., USD 13 million, according to Claimant's own consultants). Furthermore, Peru's acts and omissions were not the proximate cause of any alleged loss of value. To the contrary, Peru's efforts to promote dialogue and negotiations between Claimant and the Parán Community sought to help Claimant reach a long-term solution to its social conflict, which in turn would have allowed the Invicta Project to reach the exploitation stage.[1482] Claimant therefore has failed to establish—and cannot establish—that it was Peru's acts and omissions that deprived the value of Claimant's investment (let alone that such acts and omissions effected a complete or near-complete deprivation of value), as required by the first factor in the test for indirect expropriation under Annex 812.1(b).

(iii) Claimant did not have distinct, reasonable investment-backed expectations that Peru would forcibly remove protestors from its Invicta Project

720. As noted earlier, the second factor in Annex 812.1(b) is distinct, reasonable, investment-backed expectations. In this arbitration, Claimant has not even attempted to demonstrate that any of its alleged expectations were distinct, reasonable, or investment-backed under Treaty Annex 812.1,[1483] nor could any of Claimant's alleged expectations have had such characteristics. Indeed, Claimant's alleged expectations (i) were not based on distinct commitments made by Peru, (ii) were unreasonable in light of Peru's history of social conflicts, and (iii) were not relied upon by Claimant when it decided to invest in Peru.

[1481] *See supra* Section II.F.4.

[1482] *See, e.g.*, **Ex. C-0183**, Summary Report of 2018 Meeting between Claimant and the Parán Community, *et al.*, 7 November 2018, p. 2 (explaining that Mr. León "encouraged dialogue, stating that INVICTA MINING CORP. S.A.C. has the mining plan permit that obliges the company to comply with its execution of the approved schedule …"); **RER-0001,** Meini Expert Report, ¶¶ 191, 202.

[1483] *See* Claimant's Memorial, § 4.4.

721. *First*, Claimant's indirect expropriation claim is based entirely on an alleged "failure to act" by Peru, as opposed to any concrete, affirmative action.[1484] Accordingly, each action that Claimant alleges that it expected Peru to undertake must be based on a distinct obligation, commitment, or declaration made by Peru. For an expectation to be "distinct" under Annex 812.1(b), it must have its origin in a clearly articulated and identified obligation, commitment, or declaration by the State.[1485]

722. Claimant argues that its indirect expropriation claim is based on the asserted fact that Peru "tacitly allowed, through its acts and omissions a *de facto* possessor (Parán representatives) to occupy and use the Site."[1486] However, Claimant has not shown or even alleged that Peru ever communicated to Claimant any pledge or commitment that government authorities would forcibly remove protestors from the investment site.[1487] On the contrary, CSR toolkits published by Peru and Canada reveal precisely the opposite—that each mining company is itself responsible for managing its relationships with local communities, and that Peru (and Canada) would promote dialogue over force.[1488] Therefore, Claimant's alleged expectation that Peru would forcibly remove protestors cannot be deemed to constitute a "distinct" expectation within the meaning of Treaty Article 812.1(b). The same is true with respect to each alleged act or omission that Claimant invokes for its indirect expropriation claim: Claimant has produced no evidence of any distinct representation by Peru that Peru would carry out the affirmative acts (viz., use of force against the Parán Community) that Claimant alleges that it expected.

723. *Second*, Claimant failed to prove that its alleged expectations were reasonable. Whether an expectation is "reasonable" is a question of fact determined on a case-by-

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[1484] Claimant's Memorial, ¶ 313. Claimant also refers to "acts and omissions" as "amount[ing] to a creeping, indirect expropriation," yet Claimant does not identify any affirmative acts by Peru that it claims constituted part of the alleged indirect expropriation, beyond its assertion that Peru provided "tacit support" to the Parán Community. *See* Claimant's Memorial, ¶ 313.

[1485] **RLA-0062**, *Ríos* (Award), ¶ 254.

[1486] Claimant's Memorial, ¶ 313.

[1487] *See* Claimant's Memorial, ¶ 4.4.

[1488] *See supra* Section II.B.2.

case basis, and informed by the underlying State commitment, along with all relevant facts. [1489] Here, the evidence demonstrates that any expectation Claimant may have had that Peru would forcibly remove Parán Community protestors would in fact be *unreasonable*, for several reasons, including:

a. The fact that Claimant was legally obligated to obtain the Parán Community's support for the Invicta Project (because the Parán Community was situated within the Invicta Mine's area of direct influence);[1490]

b. The fact that Claimant knew or should have known that Peru had a history of violent encounters in the context of mining projects that fail to secure the required social license to operate,[1491] and, as a result, had enacted a transparent legal and regulatory framework that prioritized dialogue over force when dealing with conflicts between rural communities and mining operators;[1492]

c. Claimant's alleged expectations with respect to the celerity and magnitude of the PNP responses to protest events at the Invicta Mine site fail to appreciate the sensitive and potentially volatile nature of social conflicts between mining companies and local communities, as well as account for the distance and terrain that separated the Invicta Mine from the nearest police post, the Sayán Police Station;[1493] and

d. The PNP was entirely justified in not intervening with force under the circumstances, because a forceful intervention would have been (i) inadequate, given the opportunity for dialogue, (ii) unnecessary, because dialogue could

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[1489] **RLA-0062**, *Ríos* (Award), ¶ 255.

[1490] *See supra* Section II.B and II.D; **Ex. R-0006**, Supreme Decree No. 040-2014-EM, 5 November 2014, Arts. 53, 60.1-3; **Ex. R-0007**, Supreme Decree No. 028-2008-EM, 26 May 2008, Arts. 14, 15; **RWS-0001**, Trigoso Witness Statement, ¶¶ 24–30.

[1491] *See supra* Section II.A.1; **RER-0002**, Vela Expert Report, ¶¶ 76, 78–85; **RWS-0002**, Incháustegui Witness Statement, ¶¶ 35, 45.

[1492] *See supra* Section II.A; **RER-0001**, Meini Expert Report, ¶ 191; **RWS-0002**, Incháustegui Witness Statement, ¶¶ 37–40;

[1493] *See supra* Section II.E; ; **RWS-0004**, Saavedra Witness Statement, ¶¶ 22, 24–25, 28; **RER-0001**, Meini Expert Report, ¶¶ 203, 211.

still have achieve the ultimate goal of resolving the social conflict peacefully, fully, and permanently; (iii) counterproductive, because use of force would have aggravated rather than resolved the dispute; and (iv) disproportionate, because executing such a plan could have violated fundamental rights without effectively resolving the conflict.[1494]

724. *Third*, to establish an investment-backed expectation, Claimant must demonstrate that the relevant alleged expectation was essential to Claimant's decision to make the investment in the first place.[1495] However, Claimant has produced no evidence whatsoever that it acquired Invicta based on an expectation that Peru would forcibly remove local community protestors should stage a protests that would interfere with the Project. Claimant's witness and former Lupaka CEO and President outlines in detail in his witness statement the factors that prompted Claimant to acquire AAG, Invicta, and the Invicta Project,[1496] but such list of factors does not include the expectation that Peru would intervene with force against any rural community that expressed opposition to the Project, including through a protest that impeded access to the mine.[1497]

725. Because Claimant's alleged expectations were neither distinct, reasonable, nor investment-backed, Claimant's expropriation claim fails each of the elements that Claimant must established under Annex 812.1(b)(ii) to prove an indirect expropriation.

(iv) The character of Peru's measures does not support a finding of indirect expropriation

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[1494] **RER-0001**, Meini Expert Report, ¶¶ 13–14, 196–98, 201–02, 208, 211–17. As explained by Peru's criminal law expert, Dr. Meini, the operational plan (and the intelligence reports that informed it) had alerted the authorities to the serious risks and dangers that intervening forcefully would entail. In addition to these risks, Dr. Meini analyzed the PNP's decision not to intervene under the reasonableness test according to Peruvian law, which assesses decision-making on the use of force under three factors: (i) adequacy, (ii) necessity; and (iii) proportionality. A police intervention would have failed the test for use of force under Peruvian law.

[1495] **RLA-0062**, *Ríos* (Award), ¶ 256.

[1496] **CWS-0001**, Edwards Witness Statement , § 4.

[1497] **CWS-0001**, Edwards Witness Statement, § 4.

726. The third factor in Treaty Annex 812.1(b) is "the character of the measure or series of measures"[1498] invoked in the indirect expropriation claim. Relevant attributes of the character of a measure or measures are unlimited under Annex 812.1, and thus include, among other factors, the object, context, and intent of a measure or measures, as well as their proportionality to a public purpose.[1499] For the reasons explained below, the character of Peru's alleged "acts and omissions" (i.e., that Peru did not forcefully remove protesting members of a Rural Community) support the conclusion that the alleged acts and omission, even as pled by Claimant, do not amount to an indirect expropriation.

727. *First*, Peru's objective and intent in managing and mediating the conflict between Claimant and the Parán Community was to achieve a durable, sustainable resolution to the conflict, including to the benefit of Claimant.[1500] Refraining from escalating the conflict by using force against the protestors was integral to such objective and intent. Notably, Claimant has not alleged that Peru had any ulterior objective or intent, other than to facilitate a resolution of the dispute between Claimant and the Parán Community.

728. *Second*, assessing the character of the alleged acts and omissions by Peru requires a proper understanding of the context, both with respect to the specific situation between Claimant and the Parán Community as well as broadly with respect to social conflicts in the mining sector. Claimant requested that Peru intervene in Claimant's conflict with the Parán Community once tensions had already escalated in June 2018,[1501] after Claimant had failed to fulfill its obligation to establish amicable relations

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[1498] **RLA-0010**, Peru-Canada FTA, Annex 812.1.

[1499] **RLA-0063**, ASEAN Comprehensive Investment Agreement, 2009, Annex 2, Article 3(c).

[1500] **RER-0001**, Meini Expert Report, ¶¶ 16, 196.

[1501] **Ex. C-0193**, Lima Police Department Operational Plan No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, Plan to Lift Blockade, 9 February 2019, pp. 2–3; **Ex. C-0160**, Inspection Report of Invicta Project Site, SAYÁN POLICE STATION, 20 June 2018; **Ex. C-0126**; Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to MINEM (F. Ismodes), 20 June 2018; **Ex. C-0127,** Letter from Invicta Mining Corp. S.A.C. to OSINERGMIN, 20 June 2018.

with the Parán Community.[1502] As a result, the social conflict between Claimant and the Parán Community had already grown volatile. Peru recognized such situation as similar to that in other recent conflicts between mining operations and local communities, which had erupted into violence and had even resulted in the tragic loss of life. Such context of prior conflict informed the Peru's response to social conflict between mining companies and rural communities, including Claimant's conflict with the Parán Community and the latter's protests against the Invicta Project. This factor must be taken into account in assessing the character of Peru's response to such conflict.

729. *Finally*, Peru's measures in handling that conflict were also proportionate to the public purpose of (i) defusing a volatile conflict, (ii) avoiding violence and the loss of human lives, (iii) enforcing Peruvian laws and regulations, and (iv) facilitating a resolution that would enable the Invicta Project to go forward in context of harmonious relations with the Rural Communities. Indeed, despite Claimant's insistence on police intervention to forcefully remove the Parán Community protesters, Peru devoted significant human and material resources to the effort to resolve Claimant's conflict, and to catalyze a sustainable, longer-term solution.[1503] Such efforts included persistently organizing, hosting, and leading dialogue and negotiations, even after Claimant (i) aggravated the conflict by contracting with the War Dogs private security force, who was involved in a violent encounter at the Invicta Mine; and (ii) walked out of negotiations and labeled the Parán Community members "terrorists."[1504]

[1502] **Ex. C-0134**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to Sayán Police Station (A. Rosales), 2 September 2018**; Ex. C-0170**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to Lima Police Department (G. Rodríguez), 17 October 2018; **Ex. C-0014**, Letter No. 003-2018-INVICTA-L from Invicta Mining Corp. S.A.C. (D. Kivari) to MINEM (I. Palomares), 14 November 2018; **Ex. C-0184,** Letter No. 011-2018-INVICTA-L from Invicta Mining Corp. S.A.C. (R. Arrarte) to MININTER (C. Moran), 7 December 2018; **Ex. C-0245**, Letter No. 005-2018-INVICTA-L from Invicta Mining Corp. S.A.C. (W. Ansley) to MININTER (C. Morán), 12 December 2018; **Ex. C-0185,** Letter No. 010-2018-INVICTA-L from Invicta Mining Corp. S.A.C. (R. Arrarte) to MININTER, (G. Rodríguez), 7 December 2018.

[1503] **RER-0001**, Meini Expert Report, ¶¶ 136, 140, 172.

[1504] *See supra* Section II.E.4.

730. Peru's actions to catalyze a negotiated resolution to the social conflict were appropriate under the circumstances, and reasonably calculated to advance a commendable public purpose. The character of those actions thus confirms the non-expropriatory nature of Peru's conduct in this case.

(v) Peru's measures were taken to promote public welfare, health, and safety

731. Treaty Annex 812.1(c) creates a strong presumption that nondiscriminatory measures designed and applied to protect legitimate public welfare objectives (such as health, safety, and the environment) are *not* expropriatory. Here, Peru's decision to avoid forcibly removing protestors was (i) driven by public welfare objectives concerning health and safety, (ii) non-discriminatory in nature, and (iii) made in good faith.

732. *First*, forcibly removing protestors risks causing harm to human health and safety, especially in the context of social protests in the Peruvian mining sector.[1505] For example, in June 2009, Government security forces attempted a forceful removal of community protesters who, as part of their protest, had blocked access to mine sites.[1506] The violent encounter that ensured, known as *El Baguazo*, left 33 people dead (security forces and civilians) and over 200 wounded.[1507] In a similar incident in September 2015, four protestors were killed and 50 local residents and policemen were wounded as a result of a blockade of a street that led to the Las Bambas mine.[1508] This event also sparked outrage both within Peru and internationally, and strengthened Peru's commitment to use dialogue rather than force to resolve social conflicts between rural communities and mining operators.[1509] Such commitment was reflected in Peru's measures from June 2018 through August 2019 in connection with

[1505] *See supra* Section II.A.1; *see*, *e.g.*, **RWS-0002**, Incháustegui Witness Statement, ¶¶ 29–32; **RWS-0004**, Saavedra Witness Statement, ¶ 29, 34.

[1506] **RWS-0002**, Incháustegui Witness Statement, ¶¶ 35–37.

[1507] **RWS-0002**, Incháustegui Witness Statement, ¶¶ 35–37.

[1508] **Ex. R-0144**, A. Leon, *et al.*, "Peru protesters lift blockade at China-funded mine in hope of talks," LATIMES, 30 September 2015.

[1509] **RER-0001**, Meini expert report, ¶¶ 157, 191–92; **RWS-0002**, Incháustegui Witness Statement, ¶¶ 36–38.

Claimant's project; such measures were motivated by a desire to promote the safety and health of all of the individuals who were involved in the social conflict between Claimant and the Parán Community.

733. *Second*, nothing about the measures was discriminatory. Claimant makes a perfunctory allegation to the contrary by asserting in conclusory fashion that Peru's "measures were discriminatory in that Lupaka alone was the target and victim thereof."[1510] However, Claimant does not even attempt to explain what aspect of Peru's actions it considers discriminatory, nor does it purport to identify any similarly-situated investor that was subject to preferable or more favorable treatment,[1511] as is required to prove a discrimination claim.

734. *Third*, the only example in Annex 812.1(c) of the type of "rare circumstances" that could render public interest measures expropriatory is when such measures are "so severe," in light of their purpose, that they "cannot be reasonably viewed as having been adopted and applied in good faith."[1512] However, in the present case Peru acted in good faith throughout its engagement in conflict resolution efforts. It determined that the circumstances did not justify the use of force to remove protestors (which is the measure that was "adopted and applied"), including because using force could be contrary rather than conducive to the common goal of achieving a long-term sustainable solution between Claimant and the Parán Community—something that Claimant's own witnesses recognize would not have been achieved through police intervention.[1513] Conversely, declining to deploy force against protestors was in no way "so severe" that they could not reasonably be viewed as having been made in good faith, especially in light of Peruvian, Canadian, and international guidance on conflicts between mining operators and rural communities.[1514]

[1510] Claimant's Memorial, ¶ 317.

[1511] *See* Claimant's Memorial, ¶ 317.

[1512] **RLA-0010**, Peru-Canada FTA, Annex 812.1(c).

[1513] **CWS-0003**, Castañeda Witness Statement, ¶ 74; [redacted]

[1514] *See supra* Section II.A and II.B.2; **RER-0002**, Vela Expert Report, ¶¶ 76, 87, 88, 92–93.

735. Because the alleged acts and omissions that form the asserted basis for Claimant's expropriation claim satisfy all of the criteria of paragraph (c) of Annex 812.1, they are entitled to the strong presumption that they were not expropriatory.

736. In sum, none of the factors that must be applied pursuant to Annex 812.1 to assess an indirect expropriation claim under Treaty Article 812 (viz., economic impact;[1515] distinct, reasonable, investment-backed expectations;[1516] character of the measures;[1517] and nondiscriminatory public welfare objective[1518]) support the claim that Peru indirectly expropriated Claimant's investment. Claimant's indirect expropriation claim should therefore be dismissed.[1519]

[1515] **RLA-0010**, Treaty, Annex 812.1(b)(i).

[1516] **RLA-0010**, Treaty, Annex 812.1(b)(ii).

[1517] **RLA-0010**, Treaty, Annex 812.1(b)(iii).

[1518] **RLA-0010**, Treaty, Annex 812.1(c).

[1519] The fact that Peru did not expropriate Claimant's investment renders moot the criteria in Article 812 Paragraphs (2) to (4) for the requirement that an expropriation must be otherwise consistent with the Treaty.

V. CLAIMANT IS NOT ENTITLED TO ANY DAMAGES

737. Claimant seeks damages based on its inability to exploit the Invicta Mine, which it claims was caused by the alleged acts and omission of Peru. Claimant alleges that such damages total USD 47.7 million, plus interest.[1520]

738. Peru demonstrates in this section that, even if Peru were deemed to have breached the Treaty (quod non), Claimant is not entitled to any damages, for several reasons: (i) Peru's acts and omissions were not the proximate cause of any of the alleged damages; and (ii) Claimant's actions and omissions constitute contributory fault.

739. In addition, even if Claimant were entitled to any damages (quod non), Claimant could only recover damages for harm to its investment in the Invicta Project, not for any alleged harm to prospective investments that Claimant never actually made.

740. Lastly, even under Claimant's legal theories of breach and damages, the quantum measurements that Claimant and its experts propose have yielded figures that are erroneous, and upon which the Tribunal cannot rely, for a variety of reasons that are explained below, and in more detail in the expert report of AlixPartners ("**AlixPartners Expert Report**").[1521]

A. Claimant bears the burden to prove each element of its damages claim

741. Consistent with the general principle of *actori incumbit onus probandi*,[1522] Claimant has the burden to prove each element of its damages claim.[1523] Claimant accordingly must prove that: (i) its alleged damages were caused by a Treaty breach by the Respondent,

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[1520] Claimant's Memorial, ¶ 374(d).

[1521] **RER-0003**, AlixPartners Expert Report, 24 March 2022.

[1522] **RLA-0086**, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ, Judgment, 20 April 2010, ¶ 162 (*citing* four prior ICJ judgments upholding same principle).

[1523] **RLA-0096**, M. Kinnear, "*Damages in Investment Treaty Arbitration*," ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES, (2010), p. 556 ("The investor bears the burden of proving causation, quantum and the recoverability of the loss claimed."); *see also* **CLA-0051**, *Rompetrol* (Award), ¶ 190 ("[I]t must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach.").

rather than by other causes;[1524] (ii) the causal nexus between the Treaty breach and alleged damages is sufficiently close (i.e., that there is proximate causation);[1525] and (iii) the amount of damages claimed is accurate.[1526] If Claimant fails to prove any of the foregoing elements, it should not be awarded any damages. As the tribunal in *Gemplus v. Mexico* observed,

> [u]nder international law . . . the [c]laimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.[1527]

742. The standard of proof for damages is the balance of probabilities.[1528] Claimant must therefore prove the alleged damages with a reasonable degree of certainty; any alleged

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[1524] **CLA-0018**, ILC Commentary, Art. 36.1 ("The State responsible for an internationally wrongful act is under an obligation to compensate for the damage **caused thereby**") (emphasis added); *see also, e.g.*, **RLA-0066**, *S.D. Myers (Partial Award)*, ¶ 316 ("[T]he economic losses claimed by [the claimant] must be proved to be those that have arisen from a breach of the [treaty], and not from other causes.").

[1525] **CLA-0018**, ILC Commentary, Art. 31, cmt. 10 ("Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses 'attributable to [the wrongful] act as a proximate cause'. . ."); *see also* **CLA-0095**, *Lemire* (Award), ¶155 ("[I]t is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed *quantum* of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (i.e. not 'too remote')."); **RLA-0066**, *S.D. Myers (Partial Award)*, ¶ 316 ("[C]ompensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached.").

[1526] **RLA-0066**, *S.D. Myers (Partial Award)*, ¶ 316 ("[T]he burden is on [the claimant] to prove the quantum of the losses in respect of which it puts forward its claims."); **RLA-0096,** M. Kinnear, "*Damages in Investment Treaty Arbitration*," ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (2010), p. 556 ("The investor bears the burden of proving causation, quantum and the recoverability of the loss claimed."); **CLA-0051**, *Rompetrol* (Award), ¶ 190 ("[I]t must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms. . .").

[1527] **RLA-0018**, *Gemplus* (Award), ¶¶ 12–56.

[1528] *See, e.g.*, **CLA-0043**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (Bernardini, Dupuy, Williams), ¶ 685 ("[T]he appropriate standard of proof is the balance of probabilities. This, of course, means that damages cannot be speculative or merely 'possible.'").

damages that are speculative, contingent, or merely possible cannot form the basis of a damages award.[1529]

B. Even assuming that Peru breached the Treaty (quod non), Claimant is not entitled to any damages

743. Claimant is not entitled to any compensation in this arbitration because, even if a Treaty breach had occurred (quod non), the harm to its investment would not have been proximately caused by any act or omission by Peru. Rather, and as shown in **Section V.B.1** below, at least *six* intervening and superseding causes—none of which was an action or omission by Peru—precipitated the failure of Claimant's investment, and thus caused the asserted harm. Accordingly, any actions or omissions by Peru could not have been the proximate cause of Claimant's alleged damages. Even if actions or omissions by Peru could be deemed a proximate cause of any of the alleged damages (quod non), any such damages should be offset by contributory fault (*see* **Section II.B.2** below).

1. *Peru's alleged acts and omissions were not the proximate cause of Claimant's failed investment*

744. To prove any damages, Claimant must establish that a Treaty breach was the proximate cause of the alleged damages. The ILC Commentary explains the international law principle of proximate causation as follows:

> The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses 'attributable to [the wrongful] act as a **proximate cause**', or to damage which is 'too indirect, remote, and uncertain to be appraised' . . . . Thus, **causality in fact is a necessary but not a sufficient condition for reparation**. There is a further element,

[1529] **RLA-0094**, *Rudloff Case (interlocutory)*, Reports of International Arbitral Awards, Decision on Merits, 1903–1905, p. 258 (rejecting the damages claimed, on the basis that they were speculative, contingent, and conjectural, and explaining that, to be recoverable, damages "must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss"); *see also* **RLA-0071**, *BG Group* (Final Award), ¶ 428 ("Damages that are 'too indirect, remote, and uncertain to be appraised' are to be excluded.").

> associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation.[1530] (Emphasis added)

745. The ILC Commentary also confirms that, under the proximate causation standard, "the subject matter of reparation is, globally, the **injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act**"[1531] (emphasis added).

746. Proving proximate causation thus requires demonstrating that the alleged damages were not due to causes other than the State acts and omissions alleged to constitute Treaty breaches. In this respect, the tribunal in *Lauder v. Czech Republic* confirmed that,

> [e]ven if the breach [] constitutes one of several '*sine qua non*' acts, this alone is not sufficient. **In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage**. In our case the [c]laimant therefore has to show that [a circumstance other than the treaty breach] did not become a superseding cause and thereby the proximate cause.[1532]

747. In the present Arbitration, Claimant has failed to prove proximate causation between any alleged Treaty breach and the alleged damages. Claimant's entire damages case rests on the unproven and naïve notion that if Peru had forcibly removed Parán Community protestors from the protests at the Invicta Mine, Claimant's conflict with the Parán Community would have ended, and seven years of smooth and

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[1530] **CLA-0018**, ILC Commentary, Art. 31, cmt. 10; *see also* **CLA-0095**, *Lemire* (Award), ¶ 155 ("[I]t is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (i.e. not 'too remote')."); **RLA-0066**, *S.D. Myers* (Partial Award), ¶ 316 ("[C]ompensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached.").

[1531] **CLA-0018**, ILC Commentary, Art. 31, cmt. 9.

[1532] **RLA-0083**, *Lauder* (Award), ¶ 234; *see also* **RLA-0049**, *GAMI* (Award), ¶ 85 ("[N]o credible cause-and-effect analysis can lay the totality of [claimant's] disappointments as an investor at the feet of the [Respondent State]. . . . [The claimant] can assert only that maladministration of the [State] Program caused it *some* prejudice. But the prejudice must be particularized and quantified. [The claimant] has not done so. The [t]ribunal does not know if such a demonstration would even be possible in the circumstances . . . . At any rate the [t]ribunal would have been in no position to award damages even if it had found a violation of [the Treaty].").

uninterrupted mining operations would have ensued. Claimant's damages theory must fail for being speculative and uncertain[1533]—indeed, outright fanciful.

748. At least five causal circumstances, each unattributable to Peru, resulted in the failure of Claimant's investment, and thus in the alleged damages: (i) Claimant's failure to resolve its conflict with the Parán Community; (ii) Claimant pledge of its investment as loan collateral; (iii) Claimant's breach of the PPF Agreement; (iv) Claimant's failure to resolve pending regulatory requirements to operate the mine; and (v) Claimant's failure to secure sufficient ore processing capacity. Because these five circumstances caused Claimant's damages, rather than any alleged act or omission by Peru, Claimant is not entitled to a damages award.

a. Actions and omissions by Peru did not cause (much less *proximately* cause) Claimant's alleged damages

749. As demonstrated above, Peru's actions with respect to the Invicta Project were, at all times, supportive of its lawful development. Claimant acknowledges that Peru granted it regulatory permits and approvals when doing so was appropriate, and does not allege any discrimination or lack of even-handedness on Peru's part. Moreover, although Claimant occasionally refers to alleged "actions and omissions"[1534] by Peru, it does not appear to base any claim of a Treaty breach, or of any damages, on any act or acts that Peru *affirmatively* undertook, but rather only on a series of acts that Peru did *not* undertake (including, mainly, the use of force to quash the Parán Community protests. However, as explained above in **Section II.A.1**, the history and experience of social conflicts in the Peruvian mining sector shows that when local communities are concerned about mining operations that may have a direct or indirect influence on their territory, the use of force not only fails in resolving conflicts between those communities and mining operators, but often leads to conflict escalation and even

[1533] **RLA-0094**, *Rudloff Case (interlocutory)*, Reports of International Arbitral Awards, Decision on Merits, 1903–1905, p. 258 (rejecting claimed damages as speculative, contingent, and conjectural, and explaining that to be recoverable, damages "must be shown with a reasonable degree of certainty, and can not be recovered for an uncertain loss"); *see also* **RLA-0071**, *BG Group* (Final Award), ¶ 428 ("Damages that are 'too indirect, remote, and uncertain to be appraised' are to be excluded.").

[1534] Claimant's Memorial, ¶¶ 15, 326, 332.

deadly violence. Claimant has not proven that the latter would not have occurred in its dispute with the Parán Community had the authorities intervened with use of force, as demanded by Claimant. Indeed, Claimant's witness admits that

> [Claimant] knew that the Parán representatives would not be deterred for long and that once the Police had left, the Site would again be at risk of invasion. For this reason, we persisted in our efforts to secure an agreement with the Parán Community.[1535]

750. Far from causing *damage* to Claimant's investment, Peru's steadfast and relentless efforts to mediate Claimant's conflict had the objective of brokering a peaceful and long-lasting resolution of the dispute, and thus of *salvaging* Claimant's investment. Refraining from wielding force against Parán Community protestors was an integral and prudent element of that effort.

b. Claimant's own failure to resolve its conflict with the Parán Community caused Claimant's alleged damages

751. The obvious cause of Claimant's alleged damages was its own failure to resolve its conflict with the Parán Community (which, moreover, was a legal obligation that bound Claimant under Peruvian law) and, indeed, Claimant's own escalation of that conflict. **Section II.A.3** explains that Peruvian law requires mining operators to establish and maintain amicable relations with each of the rural community whose territory is within a mine's area of direct and indirect influence.[1536] Claimant was not exempt from this legal requirement.

752. As explained by Mr. Vela in his expert report, under Peruvian law, Claimant needed the support of the Lacsanga, Santo Domingo de Apache, and Parán Communities before it could exploit the Invicta Mine.[1537] However, as detailed above, Claimant failed to gain support from these three communities after it: (i) deployed for the task

[1535] **CWS-0003**, Castañeda Witness Statement, ¶ 74.

[1536] *See supra* Section II.A.2–3.

[1537] *See supra* Section II.A; **Ex. C-0034**, Technical Report on the Preliminary Economic Assessment for the Invicta Gold Project, SRK CONSULTING, 13 April 2018, pp. 6, 10; *see also* **RER-0002**, Vela Expert Report, ¶¶ 38, 75–85, 96–98, 114(d), n. 81.

a community relations team whose efforts were manifestly inadequate;[1538] (ii) disproportionately focused on the Lacsanga and Santo Domingo de Apache communities, marginalizing the Parán Community and creating a real and perceived disparity in its treatment of the different communities;[1539] (iii) failed to resolve the Parán Community's concerns that Claimant's mine had caused environmental harm to the water that the Community used for drinking and agriculture;[1540] (iv) insisted that the Peruvian Government use force against the Parán Community;[1541] (v) prematurely withdrew from conflict mediation and dialogue with the Parán Community;[1542] and (vi) escalated the conflict by hiring a private security contractor (War Dogs) that violently clashed with Parán Community members.[1543]

753. By shirking its legal obligation to establish and maintain amicable relations with the Parán Community, and instead demanding that Peru wield brute force against the Access Road Protest participants, Claimant escalated its conflict with the Parán Community. This in turn aggravated and prolonged the Access Road Protest that, under Claimant's theory, was what proximately caused the alleged damages.

754. However, even if Claimant were deemed to have fulfilled its legal obligation to establish and maintain amicable relations with the Parán Community, or to have been exempt from this obligation (quod non), Claimant still has failed to prove that any of its alleged damages were proximately caused by Peru.

c. Claimant's pledge of its investment as loan collateral and Claimant's own breaches of the PPF Agreement were an intervening cause of the alleged damages

755. Claimant's alleged damages were caused by Claimant's decision to pledge its Invicta shares as loan collateral to its creditor, PLI Huaura. Claimant admits that it lost its

[1538] *See supra* Section II.D.1–2, II.F.2.a.

[1539] *See supra* Section II.D.2.a.

[1540] *See supra* Section II.D.2.b.

[1541] *See supra* Section II.E.3–5.

[1542] *See supra* Section II.E.4–5.

[1543] *See supra* Section II.E.5.

investment only after PLI Huaura exercised its contractual right to seize those shares.[1544] Peru never coerced Claimant to pledge its investment as collateral to any creditor. Claimant was free to own and develop a mine in Peru without placing its investment at risk, yet Claimant chose to grant PLI Huaura the right to seize the Invicta shares if certain conditions were met (as, in the event, they were). Claimant's decision to sign over its investment as collateral to PLI Huaura was an action attributable solely to Claimant. Peru therefore cannot be held responsible for any alleged damages resulting from the foreclosure by PLI Huaura on Claimant's shares in Invicta.[1545]

756. Confronted with an analogous situation, the tribunal in *Inversión y Gestión de Bienes v. Spain* concluded that a State cannot be held liable for a creditor's foreclosure on an investment under a loan contract between the claimant investor and its creditor:

> The [r]espondent maintains that the foreclosure process stems from a contract entered into between two individuals: the [c]laimant and the banking entity . . . which is external to this international arbitration. The [c]laimants stopped making the mortgage payments, knowing that this constituted a breach of the signed contract, possibly leading to the initiation by [the banking entity] of an enforcement proceeding, as indeed happened.
>
> For the [t]ribunal, it is evident that by failing to honor his responsibilities with [the banking entity] [the claimant], he exposed himself to the creditor demanding her rights judicially, as indeed happened. From this legitimate action by a subject of private law, the Claimants cannot derive financial

[1544] *E.g.*, Claimant's Memorial, ¶¶ 14, 325.

[1545] *See, e.g.*, **CLA-0018**, ILC Commentary, Art. 31.1 ("The responsible State is under an obligation to make full reparation for the injury **caused by** the internationally wrongful act.") (emphasis added); **CLA-0018**, ILC Commentary, Art. 31, cmt 9 ("It is only '[i]njury . . . caused by the internationally wrongful act of a State' for which full reparation must be made. This phrase is used to make clear that **the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act**.") (emphasis added); *see also* **CLA-0018**, ILC Commentary, Art. 20 ("Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."); **CLA-0018**, ILC Commentary, Art. 20, cmt. 10 ("International law may also take into account the consent of non-State entities such as corporations or private persons.").

> responsibilities in their favor and at the expense of the [State].[1546]
> (Emphasis added)

757. Not only did Claimant pledge its investment as loan collateral under the PPF Agreement, but it also voluntarily undertook a contractual obligation to begin repaying the loan within a very short period of time (15 months).[1547] This repayment deadline exposed Claimant to significant risk because it still had several pending tasks before its mining operations could begin (including resolution of its conflict with the Parán Community). Peru never coerced Claimant to accept terms under the PPF Agreement that accorded only fifteen months for Claimant to obtain the social license to operate and fulfil its obligations to the Rural Communities, to resolve any social conflict that might arise (as it did, with the Parán Community), and to complete all other pending legal and operational tasks for lawful operation of the mine.

758. As observed by AlixPartners,[1548] the reason PLI Huaura had the bargaining power to impose rigorous loan terms on Claimant was at least in part that Claimant had foregone a feasibility or pre-feasibility study that would have generated greater confidence by potential lenders that the Invicta Project would be feasible from a technical, operational, and economic standpoint. In the absence of such a study, by lending to Claimant PLI Huaura was assuming a greater credit risk than if Claimant had commissioned such a study, and such study had yielded promising results. Claimant could have invested additional time and resources to complete a study of that nature, in an attempt to improve its creditworthiness and its bargaining power with lenders. Instead, Claimant made a business decision to (i) enter a loan agreement that included pledging the Invicta shares as collateral, and (ii) undertake a commitment to start repaying the loan after only fifteen months—a period of time that left no margin for errors or contingencies. Claimant cannot be awarded damages that

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[1546] **RLA-0018**, *Inversión y Gestión de Bienes v. Kingdom of Spain*, ICSID Case No. ARB/12/17, Award, 14 August 2015 (Oreamuno Blanco), ¶¶ 178–79.

[1547] *E.g.*, **CER-0001**, Accuracy Report, ¶ 3.20.

[1548] **RER-0003**, AlixPartners Expert Report, ¶ 194 ("The interest rate charged to Lupaka could be abnormally high due to the absence of a full feasibility study for the Invicta Project.").

resulted from the imposition, and subsequent enforcement, by a third party (viz., PLI Huaura) of contract terms that Claimant was ultimately unable to meet.[1549]

d. Claimant's multiple violations of the PPF Agreement were an intervening cause of the alleged damages

759. As described in **Section II.F.4** above, Claimant first defaulted under the terms of the PPF Agreement in January 2019.[1550] Lonely Mountain, which at the time owned Claimant's creditor PLI Huaura, accelerated Claimant's obligations under the PPF Agreement on 2 July 2019, citing six different bases of default: (i) failure to deliver gold;[1551] (ii) failure to comply with "terms, covenants or agreements in the PPF Agreement or any other Transaction Document";[1552] (iii) Claimant's insolvency and general inability to pay its debts;[1553] (iv) the occurrence of an event that could reasonably be expected to have a "Material Adverse Effect";[1554] (v) deviation from the "Initial Expense Budget," where such deviation had a "Material Adverse Effect";[1555]

[1549] *See, e.g.*, **CLA-0018**, ILC Commentary, Art. 31.1 ("The responsible State is under an obligation to make full reparation for the injury **caused by** the internationally wrongful act.") (emphasis added); **CLA-0018**, ILC Commentary, Art. 31, cmt 9 ("It is only '[i]njury . . . caused by the internationally wrongful act of a State' for which full reparation must be made. This phrase is used to make clear that **the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act**.") (emphasis added).

[1550] **Ex. C-0054**, Letter from PLI Huaura Holdings L.P. (S. Rodriguez) to Lupaka Gold Corp., Notice of Acceleration, 2 July 2019, p. 4 ("pursuant to Section 13(1)(a) of the PPF Agreement, the Seller's failure to Deliver or cause to be Delivered any amount of Gold as and when required by the PPF Agreement and the Seller's admission of such default in its press release re: Lupaka Provides Update on Illegal Demonstration at Invicta, Announces Non-Brokered Private Placement, and Management Changes, dated as of January 28, 2019").

[1551] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(a) ("The Seller fails to Deliver or cause to be Delivered any amount of Gold. . .").

[1552] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(f) ("Any Obligor fails to perform, observe or comply with any term, covenant or agreement contained in this Agreement or any other Transaction Document. . .").

[1553] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(m)(i) ("Any Obligor (i) becomes insolvent or generally not able to pay its debts as they become due.").

[1554] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(n) ("There has occurred in the opinion of the Buyer an event or development that has or would reasonably be expected to have a Material Adverse Effect.").

[1555] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(s)(i) ("Any (i) deviation from the Initial Expense Budget.").

and (vi) diverting from the "Initial Production Forecast," where such deviation had a "Material Adverse Effect."[1556]

760. Claimant asserts that "because of Peru's illegal acts and omissions . . . Lupaka could not bring the mine into production," and "was unable to service its obligations under the PPF Agreement."[1557] Mr. Gordon Ellis describes this inability to "service obligations" as an inability "to deliver gold in accordance with [Claimant's] obligations under the PPF Agreement."[1558] Accordingly, Claimant is attributing to Peru one of the asserted events of default. However, Claimant has not alleged that any of the other five events of default identified above were proximately caused by the Access Road Protest, much less by Peruvian authorities.

761. In fact, Claimant's audited financial statements for 2019 suggest that one or more of the above-referenced contractual breaches were *not* related to the Access Road Protest:

> On July 2, 2019, [Claimant] received a formal Notice of Acceleration ("Acceleration Notice") from PLI regarding the PLI Financing Agreement. The Acceleration Notice claims that as a result of existing specified claims of alleged default, PLI declared an early termination date of the loan . . . .
>
> . . . .
>
> The specified claims of default relate **primarily** to [Claimant's] inability to make scheduled repayments against the PLI Financing Agreement as a result of the ongoing illegal road blockade carried out by the community of Parán at Invicta.[1559] (Emphasis added)

762. Claimant's disclosure thus reveals that PLI Huaura's claims of default related *primarily* to the Access Road Protest—i.e., not *exclusively*. That implies that certain of

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[1556] **Ex. C-0045**, Second Amended and Restated PPF Agreement, § 13(1)(s)(ii) ("Any . . . (ii) change between the Initial Annual Production Forecast and any updated Annual Production Forecast that has or would reasonably be expected to have a Material Adverse Effect, each determined in the sole and absolute discretion of the Buyer.").

[1557] Claimant's Memorial, ¶ 193.

[1558] **CWS-0002**, Ellis Witness Statement, ¶ 54.

[1559] **Ex. R-0142**, Lupaka Gold Corp., Consolidated Financial Statements For the years ended December 31, 2019 and 2018, 12 June 2020, p. 22.

Claimant's defaults on the PPF Agreement were unrelated to the Access Road Protest.[1560] Given that PLI Huaura evidently had grounds *unrelated to the Access Road Protest* to foreclose on the Invicta shares, Claimant was required to prove that each of those other grounds was somehow proximately caused by Peru. Claimant, however, has proven no such thing, and in fact has not even *alleged* that the various grounds invoked by PLI Huaura were exclusively related to the Access Road Protest.

763. Since Claimant has not proven that the only reason that PLI Huaura was able to exercise its contractual right to foreclose on Claimant's Invicta shares was an alleged Treaty breach by Peru, and since PLI Huaura apparently had grounds unrelated to the Access Road Protest to seize the Invicta shares, no alleged act or omission by Peru could have caused—let alone proximately caused—any of the alleged damages.[1561]

e. Claimant's failure to resolve each pending regulatory requirement to operate the mine was an intervening cause of Claimant's alleged damages

764. Claimant could not have lawfully operated the mine until it completed at least three regulatory requirements that were still outstanding. As described in **Section II.F.1.a**, to bring its mine into the exploitation stage, Claimant needed to: (i) pass an inspection of the Invicta Mine, (ii) obtain the MINEM's approval of amendments to the Invicta Project's Mine Closure Plan, and (iii) resolve deficiencies to its third supporting ITS technical report.[1562]

765. Claimant provides no evidence for its suggestion that, had Peru forcefully removed the protestors from the Access Road Protest, it would have not only successfully completed each of the pending regulatory steps, but then also would have managed

[1560] **Ex. R-0142**, Lupaka Gold Corp., Consolidated Financial Statements For the years ended December 31, 2019 and 2018, 12 June 2020, p. 22.

[1561] *See also* **CLA-0018**, ILC Commentary, Art. 31, cmt. 10 ("[C]ausality in fact is a necessary but not a sufficient condition for reparation.").

[1562] **CWS-0003**, Castañeda Witness Statement, ¶ 21; **Ex. C-0050**, Draft Amendment and Waiver No. 3 to the Second Amended and Restated Pre-Paid Forward Gold Purchase Agreement between Lupaka Gold Corp. and PLI Huaura Holding L.P., 26 September 2018, Schedule H.

somehow to bring the mine into production in a period of less than two months.[1563] Claimant simply assumes (but does not prove) that it would have been able to resolve in time all of the outstanding regulatory matters that required resolution before Claimant could lawfully exploit the mine.[1564]

f. Claimant's failure to secure sufficient processing capacity to produce marketable ore was an intervening cause of Claimant's alleged damages

766. Even if Claimant had resolved all of the obstacles identified above, Claimant has acknowledged that in the end it failed to secure adequate processing capacity to convert ore into marketable metals.[1565] For example, less than three weeks before the Access Road Protest began, Claimant's CEO confirmed to Claimant's Board of Directors that "out of the 4 toll [processing] mills selected, none are fulfilling their contracts."[1566]

767. Claimant argues that, had Peru forcefully removed the Access Road Protest, Claimant would have (i) finished negotiating an agreement to acquire a separate processing plant (viz., the Mallay processing plant); (ii) secured the financing needed to execute that purchase; and (iii) put that plant into operation with sufficient celerity to deliver processed gold to its creditor on time with the deadline established under the PPF Agreement. That is a significant number of conditions, none of which Claimant was in a position to comply with. Claimant has failed to support, let alone prove, that its compliance with any of the foregoing conditions was feasible—let alone that it would have been able to satisfy all three of them cumulatively. As noted by AlixPartners, the timeline required for Claimant to acquire the Mallay processing plant under the

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[1563] *See, e.g.*, Claimant's Memorial, ¶ 193.

[1564] *E.g.*, Claimant's Memorial, ¶ 354 ("[Claimants' damages experts] assume that by the Valuation Date, 26 August 2019, IMC would have obtained all outstanding authorisations.").

[1565] **Ex. C-0051**, Meeting Minutes, Lupaka Gold Corp. Board Meeting, 27 September 2018, p. 1; *see also* Claimant's Memorial, ¶ 87; **CWS-0003**, Castañeda Witness Statement, ¶¶ 88–89 ("Based on the unsatisfactory results and experiences with Coriland, San Juan Evangelista and Huancapati [*sic*] II, we decided to restart negotiations with Buenaventura.").

[1566] **Ex. C-0051**, Meeting Minutes, Lupaka Gold Corp. Board Meeting, 27 September 2018, p. 1.

proposed additional loan from PLI Huaura was not feasible,[1567] and Claimant has provided no evidence of alternative financing arrangements or remedies that would have enabled it to fund the prospective acquisition.[1568]

2. *Even if actions or omissions by Peru could be deemed a proximate cause of any of the alleged damages (quod non), any such damages should be offset by contributory fault*

768. If, notwithstanding all of the above, any actions or omissions by Peru could be deemed to have proximately caused Claimant's alleged damages (quod non), the harm caused by the intervening and superseding causes discussed above should be deducted from Claimant's alleged damages, as a matter of contributory fault.

769. The ILC Articles codify the contributory fault principle as follows:

> In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.[1569]

770. Deductions from damages awards to reflect contributory fault by a claimant (including reduction of damages to nil) are a well-established practice in investor-State arbitration.[1570] For example, in *Occidental v. Ecuador*, the tribunal determined that,

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[1567] **RER-0003**, AlixPartners Expert Report, ¶ 128.

[1568] **RER-0003**, AlixPartners Expert Report, ¶ 128(b); *see also* **RER-0003**, AlixPartners Expert Report, ¶¶ 118, 124–41.

[1569] **CLA-0018**, ILC Commentary, Art. 39.

[1570] *E.g.*, **RLA-0088**, M. Kantor, "*Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence*," KLUWER LAW INTERNATIONAL (2008), p. 106 ("[E]ven though the breaching party did in part cause the damage, the injured party too may bear responsibility for the injury in part, and thus contributory fault may reduce or eliminate the claimed compensation."); **RLA-0089**, S. Ripinsky, *et al.*, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 314 ("International law also recognizes the relevance of contributory fault . . . [which] fits within discussion on 'causation' and in particular on 'concurrent causes,' as a circumstance reducing the amount of compensation."); **RLA-0096**, M. Kinnear, "*Damages in Investment Treaty Arbitration*," ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (2010), pp. 565–66 ("[I]nvestment cases have reduced the damages otherwise payable by a percentage intended to reflect the investor's role in the events leading to the loss.").

> an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility.[1571]

771. The *Occidental* tribunal noted that it had "a wide margin of discretion in apportioning fault"[1572] and reduced its damages award by 25% based on the claimants' commission of "an unlawful act which contributed in a material way to the prejudice which [the claimant] subsequently suffered."[1573]

772. In *MTD v. Chile*, the tribunal deducted *half* of the claimants' damages on account of their "business judgment," finding that the claimants made "decisions that increased their risks in the transaction and for which they [bore] responsibility, regardless of the treatment given by [the State]."[1574] The 50% deduction from the damages award due to contributory fault of the claimants was upheld by an ICSID Annulment Committee.[1575]

C. Even if Claimant were entitled to any damages, Claimant only could recover damages to its investment in the Invicta Mine, not to merely *prospective* investments

773. Even if Claimant had proven proximate causation between a Treaty breach and its alleged damages (quod non), and even if contributory fault were not grounds to deny

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[1571] **RLA-0090**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/111, Award, 5 October 2012 (Fortier, Williams, Stern), ¶ 678.

[1572] **RLA-0090**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/111, Award, 5 October 2012 (Fortier, Williams, Stern), ¶ 670.

[1573] **RLA-0090**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/111, Award, 5 October 2012 (Fortier, Williams, Stern), ¶¶ 680, 686–87; *see also* **RLA-0131**, *Occidental Petroleum, et al., v. Republic of Ecuador,* ICSID Case No. ARB/06/111, Dissenting Opinion of Professor Brigette Stern, 5 October 2012 (Fortier, Williams, Stern), ¶¶ 7–8.

[1574] **CLA-0047**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 28 May 2004 (Sureda, Lalonde, Oreamuno), ¶ 242–43.

[1575] **RLA-0132,** *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007 (Guillaume, Crawford, Ordóñez Noriega), ¶¶ 99–101.

damages (quod non), Claimant could only recover damages to the investment it actually made in Peru, and not to any merely prospective investments.

774. Claimant presents two counterfactual scenarios for its damages claim: (i) one in which it would have produced ore at a rate of 355 t/day; and (ii) a second in which it would have produced ore at the higher rate of 590 t/day.[1576] The scenario with production at 590 t/day is premised on Claimant's prospective acquisition of the Mallay Plant to increase its production capacity.[1577] However, Claimant never acquired the Mallay Plant.[1578] Without the Mallay Plant, Claimant acknowledges that its business plan contemplated production at a rate of only 335 t/day.[1579]

775. Claimant offers no legal justification for claiming damages based on an investment in the Mallay Plant that Claimant never actually made.[1580] Claimant also seems to base its damages claim on future modifications to the Mallay Plant that Claimant would not be entitled to implement unless it were the owner of the plant, such as adding a copper treatment function and modifying the chemicals used in the mineral recovery process.[1581]

[1576] Claimant's Memorial, ¶ 351; **CER-0001**, Accuracy Report, ¶ 2.7.

[1577] *E.g.*, Claimant's Memorial, ¶ 342 ("[A]cquisition of the entire Mallay mining production unit . . . would have allowed IMC to increase its daily production from 355 t/d to 590 t/d."); **CER-0001**, Accuracy Report, ¶¶ 4.41, 6.5.

[1578] *See* Claimant's Memorial, ¶¶ 90–94.

[1579] **CER-0001**, Accuracy Report, ¶¶ 2.5–2.6, 4.39; *see also* Claimant's Memorial, ¶¶ 345, 351.

[1580] *See* Claimant's Memorial, § 5.

[1581] **CWS-0003**, Castañeda Witness Statement, ¶ 83 ("The Mallay option required installing a copper concentrate functionality to treat the copper present in the polymetallic mineral. We obtained quotations to add this processing line for a cost of between USD 350,000 (without gravity separation) to USD 470,000 (with gravity separation). We were also testing modifications to the chemical reagents and flow sheets that would allow the recovery of the same concentrate value without having to install the copper processing circuit."); **CWS-0003**, Castañeda Witness Statement, ¶ 94 ("[H]aving its own processing plant would have allowed IMC to tailor the processing circuits and chemicals to the specific characteristics of its mineral. This would have saved costs, improved the quality of the concentrates and optimised production in the long-term.").

776. The Treaty provisions that Claimant alleges Peru violated apply only to "covered investments,"[1582] which the Treaty defines as,

> with respect to a Party, an **investment in its territory of an investor** of the other Party **existing** on the date of entry into force of this Agreement, **as well as investments made or acquired thereafter**.[1583] (Emphasis added)

777. Even assuming, for the sake of argument, that Peru had violated any of the Treaty provisions that Claimant has invoked, such violation could apply only with respect to Claimant's single "covered investment."[1584] The Mallay Plant was never a "covered investment," for the simple reason that it was never acquired by Claimant. It was thus neither an investment *of an investor of Canada* (in this case, Claimant) *existing* when the Treaty entered into force, nor an investment that Claimant "*made or acquired thereafter*."[1585]

778. The Treaty therefore does not obligate Peru to accord FPS or FET to any *hypothetical* or *merely prospective* investments, and accordingly Peru cannot be held responsible under the Treaty's FPS, FET, or expropriation-related obligations for lost income that would have been generated by the Mallay Plant, had Claimant actually acquired such plant.

779. In *Gold Reserve v. Venezuela*, the tribunal rejected an argument by the claimant based on certain property use rights that the claimant asserted "would be acquired in the

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[1582] **RLA-0010**, Peru-Canada FTA, Art. 805.1 ("Each Party shall accord to **covered investments** treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.") (emphasis added); **RLA-0010**, Peru-Canada FTA, Art. 812.1 ("Neither party may nationalize or expropriate a **covered investment** either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation . . . except for a public purpose, in accordance with due process of law, in a nondiscriminatory manner and on prompt, adequate and effective compensation.") (emphasis added); *see also* Claimant's Memorial, ¶ 275 (quoting Peru-United Kingdom BIT, Article 2.2 as applying to "[i]nvestments **of nationals or companies of each Contracting Party**") (emphasis added).

[1583] **RLA-0010**, Peru-Canada FTA, Art. 847 ("covered investment").

[1584] **RLA-0010**, Peru-Canada FTA, Arts. 805.1, 812.1; *see also* Claimant's Memorial, ¶ 275.

[1585] *See* **RLA-0010**, Peru-Canada FTA, Art. 847 ("covered investment").

future."[1586] The claimant contended that the tribunal could safely presume that the claimant would have obtained the relevant property use rights in due course, citing as purported evidence the fact that third-party valuations and the claimant's stock exchange filings had made that assumption.[1587] However, the *Gold Reserve* tribunal rejected this argument, reasoning that it would be inappropriate to "compensate Claimant for the deprivation of a right that it never possessed."[1588]

780. Likewise, in the present arbitration, ownership, modification, and use of the Mallay Plant are rights that Claimant simply "never possessed."[1589] Claimant therefore should not be compensated for any alleged losses predicated on Claimant's purely hypothetical future ownership of the Mallay Plant.

D. The damages figures proposed by Claimant and its experts are fundamentally unsound, even under Claimant's own damages theory

781. Even under Claimant's legal theories of breach and damages, the quantum measurements that Claimant and its experts propose yield figures that are erroneous, and upon which the Tribunal cannot rely. The AlixPartners Expert Report identifies at least *four* fundamental flaws in Claimant's damages case that, once accounted for, lead to the conclusion that "IMC's shares in the Invicta Project [were] worthless."[1590] The report then identifies and corrects defects in damages calculations under each of the two scenarios presented by Accuracy: 590 t/day and 355 t/day production.[1591] AlixPartners concludes, in the light of the fundamental flaws in Claimant's case, that the amount of damages that would be owed to Claimant is nil.[1592] If, however, those flaws were assumed not to exist (quod non), the 590 t/day scenario would yield maximum damages of USD 21.3 million (rather than USD 47.7 million claimed),[1593]

[1586] **CLA-0043**, *Gold Reserve* (Award), ¶ 819.
[1587] **CLA-0043**, *Gold Reserve* (Award), ¶ 820.
[1588] **CLA-0043**, *Gold Reserve* (Award), ¶ 829.
[1589] **CLA-0043**, *Gold Reserve* (Award), ¶ 829.
[1590] **RER-0003**, AlixPartners Expert Report, ¶ 16; *see also* **RER-0003**, AlixPartners Expert Report, § V.
[1591] **RER-0003**, AlixPartners Expert Report, §§ VI, VII.
[1592] **RER-0003**, AlixPartners Expert Report, ¶¶ 16, 24, 135.
[1593] **RER-0003**, AlixPartners Expert Report, ¶ 19.

while the 355 t/day scenario would yield maximum damages of USD 23.2 million (rather than USD 28.3 million claimed).[1594]

782. The four flaws in Claimant's damages case are the following: *First*, the use of force by the PNP to remove the Access Road Protest would not have resolved Claimant's social conflict with the Parán Community or its protest; instead, the conflict would remain an obstacle to operation of the Invicta Mine.[1595] *Second*, the investment would be subject to social license risk with all three Rural Communities and, under the 590 t/day scenario, also with the Mallay Community, which could materialize into delays or a cessation of operations.[1596] *Third*, the investment's performance *prior* to the Access Road Protest indicates that Claimant was already on track to default on the PPF Agreement—even if the Access Road Protest had not occurred.[1597] *Fourth*, Claimant simply assumed away financing risks with respect to amounts due under the PPF Agreement and for a hypothetical purchase of the Mallay Plant.[1598] As explained in the AlixPartners Expert Report, each of these fundamental flaws leads to a fair market value estimate of Claimant's investment, for purposes of an award of damages, of nil.[1599]

783. Without accounting for the four fundamental flaws,[1600] Claimant claims damages based on a but-for scenario in which it allegedly operates the Invicta Mine at a production rate of 590 t/day.[1601] Claimant argues that, in this scenario, the investment would have a fair market value of USD 47.7 million.[1602] However, AlixPartners shows that Claimant's valuation is based on unrealistic assumptions. For instance, AlixPartners identified that Claimant's valuation "ignores Claimant's obligation to

[1594] **RER-0003**, AlixPartners Expert Report, ¶ 22.
[1595] **RER-0003**, AlixPartners Expert Report, ¶¶ 16(a), 109–15.
[1596] **RER-0003**, AlixPartners Expert Report, ¶¶ 16(b), 116–23.
[1597] **RER-0003**, AlixPartners Expert Report, ¶¶ 16(c), 124–30.
[1598] **RER-0003**, AlixPartners Expert Report, ¶¶ 16(d), 134–34.
[1599] **RER-0003**, AlixPartners Expert Report, ¶¶ 16, 24, 135.
[1600] **RER-0003**, AlixPartners Expert Report, ¶¶ 17, 19.
[1601] Claimant's Memorial, ¶ 360.
[1602] Claimant's Memorial, ¶¶ 360–63.

pay back the debt that would have been used to fund the acquisition of the Mallay Plant," leading Claimant's valuation to "overstate[] the damages to Claimant by US$13.0 million."[1603]

784. Claimant also assumes, unrealistically, that it would settle the early termination of its PPF Agreement with PLI Huaura by obtaining new financing on more favorable terms than it had under the PPF Agreement, despite the emergence of heightened business risks since the time Claimant entered the PPF Agreement.[1604] AlixPartners notes that, "[i]n reality, a hypothetical, rational lender would demand terms more favorable to the lender . . . if any lender were willing to expose its capital to such risk at all."[1605]

785. In addition, Claimant's valuation lacks evidence of a realistic and substantiated financing arrangement to fund its operations[1606] and suffers from several technical defects that further inflate Claimant's valuation.[1607]

786. Accuracy, Claimant's valuation expert, also presents a but-for scenario in which Claimant allegedly operates the Invicta Mine at a production rate of 355 t/day.[1608] Claimant, however, does not adopt this scenario as a basis to claim damages.[1609]

787. In any event, Accuracy's valuation of Claimant's investment under this scenario also ignores the four fundamental flaws[1610] and suffers additional defects. Notably, Accuracy assumed, unrealistically, that Claimant would find a third-party processing company to process ore at 355 t/day.[1611] In fact, Claimant's attempts to use third-party ore processing were so unsuccessful[1612] that, from June to October 2018, (i.e., prior to

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[1603] **RER-0003**, AlixPartners Expert Report, ¶ 146.

[1604] **RER-0003**, AlixPartners Expert Report, ¶ 139.

[1605] **RER-0003**, AlixPartners Expert Report, ¶ 139.

[1606] **RER-0003**, AlixPartners Expert Report, ¶ 141.

[1607] **RER-0003**, AlixPartners Expert Report, ¶¶ 142–47; *see also* **RER-0003**, AlixPartners Expert Report, ¶¶ 167–71.

[1608] **CER-0001**, Accuracy Report, § 5.

[1609] *See* Memorial, ¶¶ 360–63, 374(d).

[1610] **RER-0003**, AlixPartners Expert Report, ¶¶ 21(b), 22.

[1611] *See* **CER-0001**, Accuracy Report, ¶ 3.38; **RER-0003**, AlixPartners Expert Report, ¶ 20.

[1612] *See supra* Section V.B.1.f; **RER-0003**, AlixPartners Expert Report, ¶¶ 74–79, 151–58.

the Access Road Protest), Claimant processed "only 28.8% of the monthly Contract Quantity of gold required [under the PPF Agreement] to Sell starting December 2018, and 16.5% of the monthly Contract Quantity of gold required to Sell starting March 2019."[1613]

788. Accuracy also arbitrarily reduced the projected mine closure costs,[1614] among other unsupported technical defects that required correction and resulted in a lower damages calculation.[1615]

789. The AlixPartners Expert Report also demonstrates that the purported "other indicators of [] value"[1616] that Accuracy presents are likewise "inaccurate or do not demonstrate the reasonableness of Accuracy's quantification of damages[.]"[1617]

790. Lastly, Claimant asserts, incorrectly, that "[i]n the Actual Scenario, the Respondent's [alleged] breaches resulted in the loss of Claimant's entire interest in the Project, [and] [t]herefore, the value [of Claimant's investment in] the Actual Scenario is nil."[1618] Based on this unsupported assumption, Claimant argues that, "[s]ince the fair market value of the Actual Scenario is nil, the losses caused by Peru's [alleged] wrongful conduct amounts [sic] to the [full] fair market value of the Project (less liabilities to creditors) at the Valuation Date."[1619]

791. In fact, Claimant has disclosed in its audited financial statements that an independent appraiser examined Claimant's investment near the Valuation Date and concluded

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[1613] **RER-0003**, AlixPartners Expert Report, ¶ 81; *see also* **RER-0003**, AlixPartners Expert Report, ¶ 153 ("Lupaka had budgeted that by October 2018, 60,500t of ore would be processed, but only 6,654t were actually processed, equivalent to 11.0% of the budget."); **RER-0003**, AlixPartners Expert Report, ¶ 154 ("Prior to the Access Road Protest, and due to the technical problems with the third-party processing plants, the Invicta Project only produced 269oz of gold in the seven months from April to October 2018 equivalent to 3.5% of the 7,747oz budgeted over the same period by SRK.").

[1614] **RER-0003**, AlixPartners Expert Report, ¶ 160(d).

[1615] **RER-0003**, AlixPartners Expert Report, ¶¶ 159–65; *see also* **RER-0003**, AlixPartners Expert Report, ¶¶ 167–70, 172.

[1616] **CER-0001**, Accuracy Report, ¶ 8.1.

[1617] **RER-0003**, AlixPartners Expert Report, ¶ 175.

[1618] Claimant's Memorial, ¶ 327.

[1619] Claimant's Memorial, ¶ 328.

that its value was not nil, but rather approximately USD 13 million.[1620] Because Claimant's investment retained a value of USD 13.0 million—i.e., the "fair market value of the Actual Scenario" is *not* nil, as Claimant asserted[1621]—any damages calculation needs to be adjusted to correct for Claimant's erroneous assertion.[1622] Thus, the maximum damages calculations by AlixPartners (viz., USD 21.3 million under the 590 t/day scenario[1623] and USD 23.2 million under the 355 t/day scenario) would require a further deduction of USD 13 million to account for the value of the investment near the Valuation Date.[1624]

[1620] **Ex. R-0142**, Lupaka Gold Corp., Consolidated Financial Statements For the years ended December 31, 2019 and 2018, 12 June 2020, p. 22 ("[A]n independent valuation of IMC (the 'IMC Valuation') ordered by the independent trustee holding the IMC ownership shares under the PLI Financing Agreement's Security Agreement produced a value of approximately US$13 million for the IMC ownership shares seized by PLI.").

[1621] Claimant's Memorial, ¶ 328.

[1622] *See* **RER-0003**, AlixPartners Expert Report, ¶¶ 97, 150, 166, 173.

[1623] **RER-0003**, AlixPartners Expert Report, ¶ 19.

[1624] **RER-0003**, AlixPartners Expert Report, ¶ 22.

VI. REQUEST FOR RELIEF

792. For the reasons set forth in this Counter-Memorial, the Republic of Peru respectfully requests that the Tribunal:

a. dismiss all of Claimant's claims for lack of jurisdiction and/or inadmissibility of such claims;

b. dismiss for lack of merit any and all claims in respect of which the Tribunal may find that it has jurisdiction;

c. reject Claimant's request for compensation, should the Tribunal find that it has jurisdiction and that there is merit to one or more of Claimant's claims; and

d. order Claimant to pay all costs of the arbitration, as well as the totality of Peru's legal fees and expenses, plus compounded interest on such amounts until the date of payment, calculated on the basis of a reasonable interest rate.

Respectfully submitted,

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