International Centre for Settlement of Investment Disputes
(ICSID)

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**LUPAKA GOLD CORP.,**
*Claimant,*

*v.*

**REPUBLIC OF PERU,**
*Respondent.*

ICSID Case No. ARB/20/46

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# Republic of Peru's Post-hearing Submission

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30 June 2023

Arnold&Porter

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# I. INTRODUCTION

1. Peru hereby submits its Post-hearing Submission.[1] For the reasons Peru has explained throughout this arbitration and further elaborates herein, Claimant's claims should be dismissed for lack of jurisdiction and/or merit, and in any event no damages should be awarded.

2. This Post-hearing Submission is structured as follows:

   a. In **Section II**, Peru summarizes the specific findings that it respectfully submits the Tribunal should make;

   b. In **Section III**, Peru addresses the questions posed by the Tribunal and communicated in the Secretary's email of 10 April 2023;

   c. In **Section IV**, Peru addresses additional matters of significance that it submits the Tribunal should consider in relation to the merits and quantum; and

   d. In **Section V**, Peru sets forth its request for relief.

# II. REQUEST FOR SPECIFIC FINDINGS

## A. Jurisdiction

3. Peru respectfully requests that the Tribunal dismiss Claimant's claims in their entirety for lack of jurisdiction *ratione personae* and/or *ratione materiae*.

4. Claimant disposed of its right to bring a claim against Peru with respect to its investment when it transferred (without reservation) its shares in Invicta to PLI Huaura on 26 August 2019, pursuant to the Share Allocation Agreement. The general rule, recognised by case law, is that a tribunal will lack jurisdiction unless the investor has expressly retained the right to bring a claim, or there are "special circumstances."[2] Claimant did not expressly retain such right, and the "special

[1] Save where otherwise indicated, Peru uses the same defined terms in this Post-hearing Submission as in its other written submissions.

[2] **RLA-0017**, ¶301.

circumstances" exception does not apply because there is no "direct causation" between actions of Peru and the loss of Claimant's investment.[3]

5. The Tribunal also lacks jurisdiction *ratione materiae* because: (i) Claimant was required to provide a waiver on Invicta's behalf pursuant to Treaty Article 821(e), but failed to do so; and (ii) the sole exception to the above requirement (contained in Treaty Article 823.5) does not apply because Peru did not deprive Claimant of "control" over Invicta.

**B. Merits**

6. Claimant's Treaty claims center on Peru's decision not to forcibly remove, arrest, or detain hundreds of Parán Community members who participated in the Access Road Protest. Claimant also argues that forcible action was required in light of the following other events: (i) the 19 June 2018 inspection of the Invicta Mine by Parán Community members ("**June 2018 Inspection**"); (ii) the 20 March 2019 Protest; and (iii) the violent encounter instigated by Claimant's hired guns, the War Dogs, on 14 May 2019.

7. Peru has demonstrated that all of Claimant's Treaty claims must be dismissed for lack of merit. Specifically, Peru respectfully requests that the Tribunal reach the following findings.

*1. Attribution*

8. The Parán Community's actions are not attributable to Peru.

9. Claimant's arguments in relation to ILC Articles 4, 5 and 7 fail. Concerning **ILC Article 4**, Claimant has not established that (i) the Parán Community is a "territorial unit" of the Peruvian State; or that (ii) the Parán Community's actions were carried out in an official capacity. Regarding **ILC Article 5**, Claimant has relied solely on the actions of the Parán Community's *Rondas Campesinas* to argue attribution. But Claimant has not proven that the *Rondas Campesinas* are empowered to exercise governmental functions, or that their actions were carried out in exercise of any such

[3] **RLA-0017**, ¶¶299–301.

functions. Finally, Claimant's reliance on **ILC Article 7** fails because Claimant has not established that the *Rondas Campesinas* acted with ostensible State authority.

*2. Claimant's FPS claims lack factual and legal support*

10. Peru accorded Claimant full protection and security under Treaty Article 805.1.[4]

11. The FPS obligation under CIL MST requires the State to exercise *due diligence* by taking action that is *reasonable under the particular circumstances of the specific case*.[5]

12. The relevant circumstances include the history of social conflict between mining investors and local communities and the potentially catastrophic effects of forceful intervention in such conflicts. Prioritizing dialogue over the use of force was objectively reasonable in light of those circumstances. Such affirmative actions—the evidence for which is largely uncontested—included:

a. activating a panoply of agencies to de-escalate and neutralize the conflict;

b. reasonably using police force to pre-empt a potential confrontation;

c. facilitating and mediating numerous meetings between the parties; and

d. brokering a key agreement during the dialogue process.

13. Claimant has not satisfied its burden to demonstrate that the use of force would have ended the Parán Community's opposition to the Project and averted a similar blockade by that Community.

*3. Claimant's FET claims lack factual and legal support*

14. Peru accorded Claimant FET under Treaty Article 805.1, which is limited to the CIL MST.[6]

15. The Parties largely agree on the content of such standard—which establishes an *exceedingly high threshold* for breach. Where enforcement of municipal law is

[4] Rejoinder, §IV.C.

[5] Rejoinder, §IV.B. *See, e.g.,* **RLA-0084**, ¶235

[6] Rejoinder, §IV.C.

concerned, a State must commit an "outright and unjustified repudiation" of the relevant legal framework to breach the Treaty.[7]

16. Claimant has not demonstrated that Peru repudiated its relevant legal framework—let alone in an outright or unjustified manner. Claimant has also failed to demonstrate that Peru's acts constitute a composite act.[8]

17. Under the specific circumstances of this case, Peru was not *required* by Peruvian law to use force against the Parán Community. Peru acted reasonably when it prioritized dialogue, because doing so:

    a. was in accordance with Peruvian law;

    b. would avoid violently escalating the conflict;

    c. would increase the likelihood of long-term agreement between Claimant and the Parán Community; and

    d. was reasonable given the progress made through dialogue.[9]

18. Thus, Claimant's FET claim should fail.

*4. Peru did not expropriate Claimant's investment*

19. With regards to Claimant's direct expropriation claim:

    a. neither the actions of the Parán Community nor PLI Huaura are attributable to Peru; and

    b. Peru's alleged acts and omissions did not "formal[ly] transfer" or "outright seiz[e]" Claimant's investment.[10]

20. With regards to Claimant's indirect expropriation claim:

    a. Peru's acts do not constitute a composite act;

[7] Rejoinder, ¶672; **RLA-0049**, ¶103; **CLA-0037**, ¶98.
[8] Rejoinder, ¶¶655–664.
[9] Rejoinder, ¶691.
[10] Rejoinder, ¶740.

b. Peru's actions were taken to promote public health and safety objectives and are presumptively non-expropriatory;

c. Peru did not cause Claimant's loss;

d. Claimant's investment held USD 13.4 million in value at the time of loss;[11]

e. Claimant has not even alleged legitimate, investment-backed expectations; and

f. Peru's conduct was non-expropriatory in character.

21. Accordingly, the Tribunal should find that Peru neither directly nor indirectly expropriated Claimant's investment.

**C. Quantum**

22. In any event, Claimant would not be entitled to any damages. Peru did not cause the alleged damages to Claimant's investment.[12]

23. Furthermore, any damages would need to account for Claimant's contributory fault,[13] including Claimant's failure to obtain and maintain a social license, poor business judgment, and duplicitous conduct toward the Rural Communities.[14]

24. In no event may any damages be based on an investment that Claimant never made or acquired in the Mallay Plant; this fact alone eliminates Claimant's claim for USD 41 million.[15]

25. Lastly, the Tribunal should not rely on Accuracy's damages calculations, as they suffer from fundamental flaws. Testimony revealed a flagrant lack of due diligence by Accuracy—and by Claimant in instructing and informing Accuracy (and Micon)—

[11] **R-0193**, Clause 3.

[12] D1-342:18–344:18.

[13] D1-344:19–348:8.

[14] *See, e.g.*, Rejoinder, ¶¶822,858–860, §V.B.

[15] D1-349:9–350:14.

regarding basic limitations to lawful operation of the Invicta Mine.[16] Flawed premises render Accuracy's calculations invalid.

## III. ANSWERS TO TRIBUNAL QUESTIONS

### A. Are the definitions of "investor of a Party" in Article 847 in the three official languages of the FTA consistent? If not, what principles or rules should the Tribunal apply to address any discrepancy? What should be the result?

26. The definition of an "investor of a Party" in Article 847 is consistent in all three official language versions of the Treaty. The Treaty specifies that the "English, Spanish and French languages…[are] equally authentic."[17]

27. VCLT Article 33 summarizes the principles that apply to the "[i]nterpretation of treaties authenticated in two or more languages."[18] Article 33.3 codifies a rebuttable presumption that "the terms of the treaty...have the same meaning in each authentic text."[19] Article 33.4 notes that "when a comparison of the authentic texts discloses a difference of meaning, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."[20]

28. The International Law Commission commentary to Article 29 of the Draft Articles on the Law of Treaties explains that:

> The unity of the treaty and of each of its terms is of fundamental importance...and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text.[21]

29. The most pertinent issue in this arbitration with respect to the definition of an "investor of a Party" under Article 847 is whether such definition includes an investor who made an investment in the past but no longer holds that investment. As Peru

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[16] D6-1623:11–1628:8.

[17] **RLA-0010**, p.152.

[18] **RLA-0128**, Art.33.

[19] **RLA-0128**, Art.33.3.

[20] **RLA-0128**, Art.33.4.

[21] **RLA-0181**, Art.29, ¶7.

explained in its pleadings and at the Hearing, the answer is no.[22] The English version of Article 847 refers (in relevant part) to an "investor...that...has made an investment."[23] It therefore uses the present perfect tense. Such tense describes an action started in the past that *is still happening* or is closely connected to a state of affairs in the present.[24] This contrasts with the simple past (i.e., "made") and past perfect ("had made")—which were not used in the Treaty—which describe an action that began *and was completed* in the past.

30. The fact that the Treaty uses the present perfect indicates that the Treaty parties intended the definition of an "investor of a Party" not to include investors who make an investment and then subsequently dispose of it. This intention is consistent with the relevant case law, which establishes a general rule that where an investor has disposed of its investment, it may no longer bring a claim under an investment treaty with respect to that investment.[25]

31. The Spanish and French versions of the definition of an investor under Treaty Article 847 are consistent with the English version. The Spanish version uses the *pretérito perfecto compuesto*, "*ha realizado,*" which is equivalent to the present perfect in English and describes an action that started in the past and is still happening or holds a connection with the present. By contrast, the *pretérito perfecto simple*, "*realizó*" —which is equivalent to the simple past in English ("made")—commonly describes an action completed in the past. The French version of Article 847 uses the *passé composé*, which is equivalent to the present perfect in English and the *pretérito perfecto compuesto* in Spanish. Hence, there is no discrepancy between the three versions of the Treaty— all

[22] Counter-Memorial, ¶¶353–373; Rejoinder, ¶¶448–466.

[23] **RLA-0010**, ¶847.

[24] **RLA-0170**, p.270; Rejoinder, ¶457; D1-274:15–277:7. The definition of an investor also includes a national or enterprise who "is making" an investment, the use of the present continuous indicates that this refers to a national or enterprise who is in the process of making an investment, not an investor who has already made an investment, or made an investment in the past. It is therefore not relevant in this case. Likewise, the reference to an investor who "seeks to make" an investment is irrelevant because it refers to an investor who has not yet made an investment (but is looking to do so).

[25] Counter-Memorial, ¶¶353–359; Rejoinder; ¶448.

three languages require that an investor still have an investment at the time the arbitration is commenced.[26]

32. There are two differences between the various language versions of the definition of "investor of a Party" under Article 847 of the Treaty, but such differences are not relevant here: (i) the English and French versions specify that "investor of a Party...in the case of Peru" includes a "national or enterprise "of Peru," but the Spanish version (apparently inadvertently) omits the term "Perú;" and (ii) with respect to the nationality of a "natural person," the English and Spanish versions evaluate such nationality based on the person's dominant and effective nationality, but the French version evaluates the link ("*lien*") of that person to the relevant country.

### B. Official letters or similar formal documents in the record prepared or sent by the Parán Community setting out the Community's views, concerns or positions

33. There are at least 43 exhibits on the record (a majority of them Claimant's own exhibits) which record the Parán Community making its views, concerns, or expectations known to Invicta and its representatives. Such exhibits include (i) agreements between the Parán Community and Invicta; (ii) letters from the Parán Community to Invicta; (iii) minutes of meetings between the Parán Community and Invicta; (iv) a record of an administrative hearing in which the Parán Community formally declared its concerns in Invicta's presence; and (v) letters from the Parán Community to various Peruvian officials. **Table 1** below lists these exhibits.

34. The Parán Community's concerns were also recorded in Claimant's CR Team's reports. Such reports—of which there are over 50 on the record—documented the outcome of numerous interviews and verbal communications with Parán Community members and the Community's leadership. Such documents are shaded yellow in the same **Table 1** below.

[26] Counter-Memorial, ¶¶351–359; Rejoinder, ¶¶448, 457–461.

35. The evidence identified in **Table 1** demonstrates that the Parán Community:

a. expected, since at least 2008, that the Invicta Mine would be accessed through Parán Community territory;

b. believed that, because the Community was situated in the area of direct social and environmental influence, Invicta needed (and indeed originally intended) to secure an agreement with that Community before exploiting the Invicta Mine;

c. believed that the Invicta Mine was polluting its water sources, thereby risking harm to the Community's health and agricultural activities;

d. believed that the Invicta Mine was on its territory;

e. desired a long-term and mutually beneficial relationship with Invicta, and thus expected to play a role in (and benefit from) development of the Invicta Project;

f. grew frustrated when Claimant significantly delayed paying Invicta's debts to the Parán Community and refused to pay the corresponding late fees under prior agreements;

g. considered Claimant to have breached the 26 February 2019 Agreement when Claimant refused to pay (a mere USD 9,000) for the topographical survey; and

h. was aggravated by Claimant's use of the War Dogs security force in May 2019 and consequently lost all remaining trust in Claimant's representatives.

36. The following table lists the evidence chronologically and identifies in the right-hand column which of the abovementioned issues each relevant document relates to.

**Table 1**

| | Date | Document | Exhibit | Issue(s) |
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| 1. | 04/2008 | <u>Agreement between Parán Community and Invicta:</u><br>Agreement indicates that there was no dispute that the Pishcupampa territory (the top of the hill where the Mine was | **C-0060** | (a)<br>(c)<br>(d)<br>(e) |

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| | | located) belonged to the Parán Community. Community unanimously agreed to allow Invicta to open and develop several access roads to the Mine, including the "opening of a tunnel at the Pishcupampa point [of] the Mine Camp," and to receive other social and economic benefits.<br><br>Parties agreed to take measures regarding the access road through Parán Community territory to prevent environmental damages. | | |
| 2. | 05/2008 | <u>Agreement between Parán Community and Invicta:</u><br><br>Community accepted economic and social benefits (construction of classrooms) from Invicta and allowed construction of a road through its territory to where Invicta planned to build a processing plant. | **C-0061** | (e) |
| 3. | 08/2008 | <u>Amendment to the Agreement between Parán Community and Invicta:</u><br><br>The parties restated their commitment to open an access road to the Mine using a Parán Community road. Invicta promised to build classrooms, and to prefer Parán community members for civil construction works. Amendment also indicates there was no dispute that the Pishcupampa territory belonged to the Parán Community.<br><br>Parties again agreed to take measures regarding the access road through Parán Community territory to prevent environmental damage. | **C-0062** | (a)<br>(c)<br>(d)<br>(e) |
| 4. | 12/2011 | <u>Minutes of Parán Community General Assembly:</u><br><br>Assembly agreed to renegotiate Invicta's debt of PEN 300,000 and the construction of two classrooms. | **C-0113** | (e)<br>(f) |

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| 5. | 08/2015 | Letter from Parán Community to Invicta:<br>Community expressed environmental concerns regarding commencement of works, including perforation and extraction activities by Invicta, without having first reached an agreement with their Community. | **C-0531** | (b)<br>(c) |
| 6. | 06/2016 | Letter from Parán Community to Invicta:<br>Requesting meeting to discuss an agreement with Invicta. | **C-0508** | (b) |
| 7. | 07/2016 | Letter from Parán Community to Invicta:<br>Requesting voluntary contributions to build community church. | **C-0510** | (e) |
| 8. | 08/2016 | Letter from Parán Community to Invicta:<br>Community authorized Invicta to conduct a topographical study to survey access to the mining camp through its territory, and to map communal boundaries. | **C-0511** | (a) |
| 9. | 10/2016 | Letter from Parán Community to Invicta:<br>Requesting voluntary monetary contributions to community football team. | **C-0513** | (e) |
| 10. | 10/2016 | Letter from Parán Community to Invicta:<br>Requesting voluntary monetary contributions for community festival. | **C-0512/C-0514** | (e) |
| 11. | 10/2016 | Letter from Parán Community to Invicta:<br>Inviting Invicta's representatives to community celebration. | **C-0422** | (e) |
| 12. | 10/ 2016 | Letter from Parán Community to Invicta:<br>Notifying Invicta of a change in the Community secretariat. | **C-0098** | (e) |
| 13. | 10-11/2016 | SSS Report:<br>Parán Community informed Invicta that its main concern was water scarcity and its impact on their crops. Community leadership either favored the Project or | **C-0393/C-0394** | (b)<br>(c) |

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| | | was neutral. A minority of Community members was concerned about a perceived risk of contamination of their crops and prior experiences of "bad mining practices." | | |
| 14. | 12/2016 | SSS Report:<br>Narvasta family members were open to the Project and helped to organize several informational meetings with Invicta. | **C-0457** | (b) |
| 15. | 02/2017 | SSS Report:<br>Parán Community wished to discuss proposal for long-term agreement and demanded payment of Invicta's debt. Invicta cancelled the meeting *to avoid* discussion of the Community's proposal. | **C-0429/C-0479** | (b)<br>(f) |
| 16. | 07/2017 | Letter from Parán Community to Invicta:<br>Requesting voluntary contributions to community celebration. | **C-0515** | (e) |
| 17. | 09/2017 | SSS Report:<br>Reports conflict between Parán and Santo Domingo communities concerning land delimitation, and the Parán President is dismayed that Invicta has not paid its debts. | **C-0446/C-0480** | (b)<br>(d)<br>(f) |
| 18. | 10/2017 | SSS Report:<br>Parán Community had grown resentful that Claimant had begun works without paying its debts or reaching agreement with the Community. Parán President requested discussions with Invicta. | **C-0460** | (b) |
| 19. | 10/2017 | SSS Report:<br>Notes a possible Parán legal action relating to disputed territory at the location of Invicta's mine opening. | **C-0456** | (d) |
| 20. | 10/2017 | SSS Report:<br>Parán President was concerned that Invicta had not paid its debts, and | **C-0425/C-0426** | (f) |

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| | | requested to meet with corporate management to schedule payment. | | |
| 21. | 11/2017 | SSS Report:<br>Notes Parán Community's intention to file complaint with Santo Domingo Community to begin legal demarcation of land. | **C-0521** | (d) |
| 22. | 11/2017 | SSS Report:<br>Parán Board explained that threats by small group of members to protest against the Invicta Mine do not have Community approval, but cautioned that Invicta needed to reach an agreement with the Community and pay its debt to avoid escalation. | **C-0414** | (b)<br>(f) |
| 23. | 12/2017 | SSS Report:<br>Meeting with Parán President to discuss Invicta's failure to pay its debts. Demand by Community that Invicta pay penalty for non-compliance with 45-day payment schedule. Parán lawyer claimed that 90% of Victoria I Project was located on Parán territory, and that Claimant must reach agreement with that Community. | **C-0391** | (d)<br>(f) |
| 24. | 12/2017 | SSS Report:<br>Parán Community members (including Narvasta family members) stated that the Community expected to sign an agreement with Invicta. | **C-0392** | (b) |
| 25. | 12/2017 | Letter from Parán Community to Invicta:<br>Community complained about Invicta's non-compliance with its commitments and asked to meet with Invicta's general manager to discuss the company's debt. | **C-0119** | (f) |
| 26. | 12/2017 | Minutes of meeting between Invicta and Parán Community:<br>Parties recognized Invicta's payment of PEN 100,000 for debt from construction of two classrooms. | **C-0116** | (f) |

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| 27. | 01/2018 | Letter from Parán Community to Invicta:<br>Community complained about Invicta's non-compliance with commitments, and asked to meet with Invicta's general manager to discuss company's debt and interest on that debt. | **C-0120** | (f) |
| 28. | 01/2018 | Minutes of meeting between Invicta and Parán Community:<br>Invicta paid PEN 200,000 to Parán Community. | **C-0117** | (f) |
| 29. | 02/2018 | Letter from Parán Community to Invicta:<br>Requesting meeting with Invicta's general manager to discuss the company's debt. | **C-0123** | (f) |
| 30. | 02/2018 | SSS Report:<br>Parán Community demanded penalty payment as interest accumulated over a two-year period of non-payment of Invicta's debts. | **C-0436** | (f) |
| 31. | 03/2018 | SSS Report:<br>Invicta noted: "It is important to inform that the board and community members of Parán want to make an agreement with the company and not be left without any benefits from the project. The community is willing to listen to any proposal from the company." | **C-0430** | (e) |
| 32. | 04/2018 | SSS Report:<br>Invicta reported visit on 13 April by Parán rural patrol members to inspect alleged water contamination from mine entrance. | **C-0488** | (c) |
| 33. | 04/2018 | Letter from Parán Community to Huaura Local Water Authority:<br>Community requested Project site inspection, reporting visible discolorations of water coming from the Mine and potentially contaminating peach production and risking harm to | **R-0077** | (c) |

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| | | human health and livestock for several Parán villages. | | |
| 34. | 05/2018 | Minutes of Site Visit:<br>Representatives of Huacho ANA, Mr. Retuerto, and Parán Community members inspect the mine for possible contamination of springs. Witnesses noted greenish discoloration of soil along banks of Yana Pasca Fraile water source, downstream from the Mine. | **C-0550** | (c) |
| 35. | 05/2018 | Minutes of Site Inspection:<br>Local water authority and Parán Community visit the mine and identify possible water contamination. | **R-0080** | (c) |
| 36. | 05/2018 | Letter from Parán Community to Invicta:<br>Asking Invicta to remove equipment and personnel as they were carrying out works in Parán's territory without consent and were "significantly contaminating" water sources and peach plantations. | **C-0121** | (b)<br>(c)<br>(d) |
| 37. | 05/2018 | SSS Report:<br>Community monitored its water sources with assistance from ALA to prepare report for ANA. | **C-0452/C-0435/C-0518** | (c) |
| 38. | 06/2018 | SSS Report:<br>Parán Community claimed Site was on its territory and causing water contamination. Leaders insisted that Invicta must reach agreement with the Community, or the Community would protest. | **C-0433** | (b)<br>(c) |
| 39. | 07/2018 | Letter from Parán Community to MINEM:<br>Requesting MINEM to intercede in conflict since Invicta was operating on Community's land without an agreement and was contaminating water sources. | **C-0523** | (b)<br>(c)<br>(d)<br>(e) |

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| 40. | 08/2018 | Minutes of meeting between Parán Community and MINEM:<br><br>Parán President explained the Community's environmental and social concerns related to Invicta's conduct and requested on-site visit to verify Project mining activity. | **R-0065** | (c)<br>(e) |
| 41. | 08/2018 | Minutes of meeting between Parán Community and MINEM:<br><br>Parán President explained the Community's environmental and social concerns from Invicta Project. | **R-0066** | (c)<br>(e) |
| 42. | 08/2017 | SSS Report:<br><br>Parán Community warned Invicta that opposition within the community was growing, and pressed for dialogue. | **C-0162** | (b) |
| 43. | 09/2018 | SSS Report:<br><br>Parán Community requested work for its members and reiterated desire for dialogue and an agreement with Invicta. | **C-0138** | (b)<br>(e) |
| 44. | 09/2018 | Minutes of Subprefect meeting between Invicta and Parán Community:<br><br>After June 2018 Protest, the Community explained that Invicta's actions were harming the Community—"with rocks falling and the water we drink being contaminated, the problem is that the mine is at the top and the [C]ommunity is on the bottom and it causes harm to us." | **C-0139** | (c) |
| 45. | 10/2018 | Letter from Parán Community to MINEM and Ombudsman's Office:<br><br>Community explained to Ombudsman and MINEM that Invicta was not complying with environmental law, due to possible water contamination, which was a concern to the Community due to its dependence on water sources for agriculture.<br><br>Community also complained about not having an agreement with Invicta despite | **R-0134/C-0163** | (b)<br>(c) |

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| | | being in the Project's zone of direct influence. Community expressed alarm that Invicta was ramping up operations with seemingly no intention of reaching an agreement with the Community. | | |
| 46. | 10/2018 | Minutes of meeting between Parán Community, Invicta, and Chief of Sayán Police:<br><br>Community explained it had commenced the Access Road Protest because Invicta was operating on its land without having first signed an agreement with the Community. | **C-0166** | (b)<br>(d) |
| 47. | 10/2018 | SSS Report:<br><br>Invicta noted establishment of the Access Road Protest, that the Lacsanga Board "reacted very peacefully to the Parán Community," and that "there was no strong interest in evicting them" from the Invicta Mine. | **C-0165** | (e) |
| 48. | 11/2018 | Invicta Report:<br><br>Parán Community insisted on access road to the mine and expressed need to resolve the conflict with Invicta and reach an agreement. | **C-0182/C-0482** | (a)<br>(e) |
| 49. | 11/2018 | Minutes of meeting between Invicta, Parán Community, and MINEM:<br><br>Community stated desire to initiate dialogue. | **C-0242** | (e) |
| 50. | 01/2019 | Letter from Parán Community to MINEM:<br><br>Community was within zone of direct influence, the project was operating within the Community's jurisdiction, and Invicta was working without the Community's consent. | **R-0104** | (b)<br>(d) |
| 51. | 02/2019 | Letter from Parán Community to MINEM:<br><br>Notifying MINEM that Invicta continued to operate on its territory without | **R-0013** | (b) |

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| | | Community's consent, and expressed Community's desire to commence a dialogue and reach an agreement with Invicta. | | |
| 52. | 02/2019 | Letter from Parán Community to MINEM:<br><br>Notifying MINEM of desire to pursue dialogue and reach agreement with Invicta. | **C-0198** | (b) |
| 53. | 02/2019 | 26 February 2019 Agreement:<br><br>The parties reached agreement to formally start dialogue process. Consistent with 2008 agreements and **C-0511**, Parán Community agreed to guarantee "the development of the activities of the mining company through the access road of the Parán Community" and to conduct a topographical study. | **C-0200**, pp.1-2 | (a)<br>(b)<br>(d) |
| 54. | 03/2019 | Letter from Parán Community to MINEM:<br><br>Alleging that Invicta was still contaminating Parán's land after having breached the 26 February 2019 Agreement by not conducting topographical survey. | **C-0357** | (c)<br>(g) |
| 55. | 03/2019 | Letter from Parán Community to MINEM:<br><br>Reporting that Invicta breached the 26 February 2019 Agreement by refusing to pay for topographical survey. | **R-0026** | (g) |
| 56. | 04/2019 | Minutes of meeting between Parán Community and Invicta:<br><br>Community reported that after breaching the 26 February 2019 Agreement by not funding topographical survey, Invicta showed unwillingness to participate in dialogue by refusing to attend a scheduled joint meeting. | **R-0114** | (g) |
| 57. | 05/2019 | Letter from Parán Community to MINEM: | **R-0111** | (g) |

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|---|---|---|---|---|
| | | Informing MINEM of Invicta's unwillingness to participate in dialogue and refusal to participate in a scheduled joint meeting. | | |
| 58. | 05/2019 | Invicta Report:<br>Acknowledging that Parán Community had lost trust in Invicta's CR team after Invicta deployed War Dogs and had asked Invicta to investigate the incident and restructure its CR team. | **C-0018/C-0364** | (h) |
| 59. | 06/2019 | Letter from Parán Community to MINEM:<br>Informing MINEM that War Dogs attacked its members and a majority of the Community voted in favor of closing the Invicta Mine as a result. | **R-0110** | (h) |
| 60. | 06/2019 | PNP interview of Parán Community leaders:<br>Interview report reflects statements from Parán Community's Vice-President and the *Rondas Campesinas* President confirming that the protest was reinitiated due to War Dogs attack. The leaders stated that War Dogs arrived at the Site firing guns. | **R-0262** | (h) |
| 61. | 07/2019 | Invicta Report:<br>Peru informed Invicta that War Dogs incident broke the Parán Community's trust and advised Invicta to replace CR team. | **C-0221** | (h) |
| 62. | 07/2019 | Invicta Report:<br>Invicta refused to fund topographic survey, and as a consequence protest resumed. | **C-0222** | (g) |
| 63. | 09/2019 | Letter from Parán Community to MINEM:<br>Informing MINEM that the Community was still willing to reach an agreement with Invicta through dialogue. | **R-0107** | (g) |

### C. Additional legal authorities concerning a claim for expropriation or other breach of the FTA or another similar investment treaty arising from the investor's loss of ownership or control of its investment on account of actions by a third party

37. Following extensive research, Peru identified only three legal authorities not already on the record that address an investor's claims under an investment treaty arising from loss of ownership or control of its investment on account of actions by a third party: *Frontier v. Czech Republic*; *Interocean v. Nigeria*; and *Panamericana Televisión S.A. v. Peru*. These are discussed below and submitted as **RL-0194**, **RL-0195**, and **RL-0196**, respectively.

38. The dearth of legal authorities that address loss of an investment due to conduct by third parties is unsurprising and reflects the fact that States are not responsible for conduct of third parties that is not attributable to the State under international law. In this case, Claimant's loss of ownership and control of its investment was entirely due to its own actions and those of third parties, namely (i) the Parán Community; and (ii) PLI Huaura. The fact that Claimant lost ownership and control of its investment on account of the actions of third parties is fatal to its claims, including its case on expropriation and quantum.

39. That an investor's claims will fail where its losses are on account of its own actions or those of a third party is confirmed by rulings by tribunals in the three cases mentioned above.

40. In *Frontier v. Czech Republic*, the investor had entered into contractual arrangements with a privately-owned Czech company ("**MA**") to purchase certain aviation assets through a joint venture company that would be co-owned by the claimant and MA. However, MA failed to fulfill its obligations—including an obligation to transfer shares in the joint venture company to the claimant. The joint venture company subsequently went bankrupt. The claimant brought a claim against the Czech Republic, challenging, *inter alia*, actions of bankruptcy trustees appointed to oversee the joint venture company, as well as actions of State officials and the Czech courts.

The tribunal rejected the claim, noting that "[t]he mere fact...that the investor lost its investment is insufficient to demonstrate a breach."[27] The tribunal held that the primary cause of the claimant's loss was its own decision to advance funds to MA without seeking adequate contractual protections or security.[28] Thus, it was the claimant's own failure to protect itself from the consequences of a *third party*'s actions (viz., MA's failure to fulfil its contract obligations) that led the claimant to lose its investment—not any actions of the State.

41. In *Interocean v. Nigeria*, the claimant had invested in an oil and gas exploitation lease through a Nigerian company ("**Pan Ocean**").[29] The claimant lost its investment in Pan Ocean due to the actions of Pan Ocean's director, Mr. Fadeyi, who diluted the claimant's shareholding and took control of the company. The claimant alleged that Nigeria had conspired with Mr. Fadeyi to deprive the claimant of its investment. However, the tribunal disagreed and concluded that the claimant's loss was entirely due to the actions of Mr. Fadeyi, a third party whose conduct was not attributable to Nigeria.[30] The tribunal therefore dismissed the claimant's expropriation claim.

42. The case of *Panamericana Televisión S.A. v. Peru* is also instructive. Based on a petition by Mr. Delgado Parker, an indirect minority shareholder of Panamericana Televisión S.A. ("**Pantel**"), Peruvian courts granted interim measures that named Mr. Delgado Parker as court-appointed administrator of Pantel.[31] According to the claimant, Mr. Delgado's actions in that capacity damaged Pantel, and resulted in a judicial expropriation attributable to Peru.[32] The tribunal dismissed the claimant's claims and concluded that "the Interim Measures Resolution relates solely to a conflict between private parties in which Peru had no part, and that no evidence has been provided of

[27] **RLA-0194**, ¶261.
[28] **RLA-0194**, ¶415.
[29] **RLA-0195**, ¶7.
[30] **RLA-0195**, ¶¶191-192.
[31] **RLA-0196**, ¶¶62–65.
[32] **RLA-0196**, ¶¶73,289.

what the [c]laimant describes as a 'judicial expropriation'."[33] The Tribunal thus concluded that no expropriation had taken place.

43. In this case, like in the cases discussed above, Claimant lost its investment on account of third parties' actions, with no collusion or participation from Peru. Claimant's own conduct, such as its failure to obtain a social license and its acceptance of high-risk financing terms—including a pledge of its investment as collateral—are also responsible for Claimant's loss.

**D. Is the FTA part of Peru's internal law? If so, what are the implications?**

44. Yes, the Treaty is part of Peru's internal law. Article 55 of the Peruvian Constitution provides that treaties concluded by Peru and in force—such as the Treaty—are part of its internal law.[34]

45. The Treaty was signed by Peru and Canada on 29 May 2008 and ratified by Peru on 30 July 2009 (through Supreme Decree No. 044-2009-RE).[35] It entered into force on 1 August 2009 pursuant to Article 2304 of the Treaty, following the parties' exchange of communications that confirmed the completion of their respective domestic procedures for the entry into force of the Treaty.[36]

46. Peru does not see any material implications for adjudication of the present dispute resulting from the manner in which the Treaty entered into force and became part of Peru's internal law.

[33] **RLA-0196**, ¶477.

[34] **C-0023**, Art.55 ("Treaties concluded by the State and in force are part of its national law.").

[35] **R-0271**.

[36] **CLA-0002**.

### E. Is there any evidence in the record of any action taken by any Peruvian government authority to mediate or adjudicate the dispute between the Parán Community and the Lacsanga and/or Santo Domingo Communities concerning the limits of their respective territories?

47. Peru has explained that rural communities' territories are not administered or established by governmental authorities.[37] No governmental agency has authority to set forth or decide the territorial boundaries between rural communities. Instead, as explained by Peru during the Hearing and supplemented below,[38] disputes between neighbouring rural communities concerning their boundaries can be submitted for adjudication by a competent Peruvian court, upon application by the interested rural community.

48. Claimant attempted to mislead the Tribunal on this issue. During the Hearing, Claimant hastily introduced a new legal authority that is not applicable to territorial demarcation of rural communities and related disputes. Claimant argued that Law No. 27795 establishes the jurisdiction of the Presidency of the Council of Ministers ("**PCM**") for demarcation of territorial boundaries among rural communities.[39]

49. That is incorrect. As Peru pointed out, Article 2.4 of Law No. 27795 defines the term "territorial boundaries" as the political-administrative areas that are duly identified in Peru's official map ("*Carta Nacional*"). But Article 2.4 expressly clarifies that these territorial boundaries are different in nature, and therefore must be distinguished from, the "communal, native or other boundaries."[40]

50. The law that *does* pertain to rural communities' boundaries is Law No. 24657, which provides that the relevant authority to resolve boundary disputes between rural communities is the "competent Judge" of the Peruvian Judiciary.[41] Articles 8-15 of

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[37] Counter-Memorial, ¶¶63–64; Rejoinder ¶¶493–507; D1-281:20–283:10.

[38] D4-974:21–975:13.

[39] D4-1082:9–1083:5,1085:2–21; **C-0648**.

[40] **C-0648**, Art.4; *see* D4-1098:20–1100:10.

[41] **R-0276**, Art.2 ("In the event of a dispute over said title [property rights], the competent Judge will review said instruments").

Law No. 24657 set out the rules governing resolution of such disputes by Peruvian courts.[42] Article 13 establishes that, "[i]n the event that the adjoining owner is another Community and does not agree with the boundary line indicated by the Community whose plan has been drawn up, the measures provided for by Articles 8, 9 and 10 of this Law, where relevant, will be carried out **and the file will be sent to the respective Judge to declare the right of ownership** only over the areas in dispute" (emphasis added).[43]

51. Law No. 24657 thus affords rural communities a right to initiate legal proceedings to resolve any boundary disputes with their neighboring communities.[44] It does not allow the State to compel or act on behalf of a rural community to initiate such judicial proceedings.

52. Neither the Parán Community nor the Lacsanga Community initiated a legal proceeding to determine the specific boundaries between said communities. They also did not request any governmental authority to intervene or mediate in the demarcation of their territories. Peru could not unilaterally intervene to resolve the territorial dispute between those two rural communities.

53. Pursuant to Law No. 24657 and its Regulations, the corresponding Regional Government may intervene upon request from a rural community to promote an amicable resolution.[45] Only *after* such request has been submitted and a demarcation proceeding before the competent authority has been instituted by an interested party,[46] can the Regional Government invite the parties to reach a settlement agreement through a voluntary conciliation proceeding and thus discontinue litigation.

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[42] **R-0276**, Arts.11–15.

[43] **R-0276**, Art.13.

[44] **R-0276**, Art.4.

[45] **R-0278**, Art.5.1,5.9(e)(1).

[46] **R-0278**, Art.4.1.

54. Pursuant to one such conciliation proceeding, the Lacsanga and Santo Domingo communities amicably settled their boundaries in 2001, after the Lacsanga Community had commenced a judicial proceeding.[47] The Lacsanga Community subsequently registered that agreement with SUNARP.[48]

55. Notably, Claimant has not argued during this proceeding that the Peruvian authorities should or could have intervened to resolve the boundaries dispute before or even during the relevant period of its investment. Even if Claimant had made such an argument, it would fail for all the reasons stated above.

56. Invicta could have attempted to file a boundaries demarcation claim before the Peruvian courts *as an interested third party*, and requested that the courts notify the Rural Communities involved in the boundary dispute to try to resolve it.[49] Invicta never attempted any such action, presumably because—as admitted by Claimant—it had sided with Lacsanga and Santo Domingo, and had decided that it did not need to reach agreement with the Parán Community.[50]

## IV. ADDITIONAL MATTERS OF SIGNIFICANCE

### A. Neither the Treaty nor CIL nor Peruvian law required Peru to use force against the Parán Community

57. Claimant has repeatedly misconstrued the legal standards relevant to the use of force against civilians. In particular, Claimant erroneously asserts that Peruvian law required Peru to forcefully remove, arrest, and detain protesting members of the Parán Community. Even assuming arguendo that Peruvian law required this, Peru's prioritization of dialogue in the circumstances does not constitute a Treaty violation.

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[47] **R-0232**.

[48] **R-0232**.

[49] **IMM-0019**, Art.504(3).

[50] Reply, ¶¶50,175; D1-32:13–33:6.

58. Below, Peru summarizes: (i) the high thresholds for breach under the Treaty; (ii) the appropriateness of Peru's prioritization of dialogue; and (iii) Claimant's fanciful conspiracy theories on drug cultivation and mine theft.

*1. The Treaty imposes a high threshold for breach*

59. Notwithstanding that Claimant bears the burden of proving its Treaty claims, Claimant calculatedly spent less than five minutes of its opening at the Hearing analyzing the facts of the case under the applicable legal standards under the Treaty.[51] Claimant glosses over those legal standards because it knows that it cannot possibly establish a breach.

a. <u>The FPS standard requires "reasonable due diligence under the circumstances"</u>

60. Treaty Article 805.1 provides that Peru's obligation to provide FPS "do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[52]

61. The Parties agree on several key aspects of the FPS standard, including that the FPS obligation under the CIL MST is an obligation of means, not result.[53] The Parties also agree that the FPS standard does not "impose strict liability on the host State to prevent physical or legal infringement of the investment," or provide any "guarantee" or "warranty."[54]

62. Claimant also agrees with Peru that the FPS standard only "requires the host State to exercise **reasonable due diligence**" (emphasis added),[55] and that assessing the reasonableness of the State's measures to protect the investment "must take into account the '**circumstances of the [particular] case**'" (emphasis added).[56] Thus, the

[51] D1-298:9–12.

[52] **RLA-0010**, Art.805.

[53] **CLA-0100**, ¶77; Reply, ¶626.

[54] Reply, ¶626. *See also* Counter-Memorial, ¶¶490–493.

[55] Reply, ¶626; Counter-Memorial, ¶¶488–490.

[56] Reply, ¶¶629–632; Counter-Memorial, ¶491.

"due diligence" standard requires a State "to take such measures to protect the foreign investment as are **reasonable under the circumstances**" (emphasis added).[57] As stated by the tribunal in *Strabag SE v. Libya*, "the [FPS] duty of due diligence cannot be viewed in the abstract and in isolation from the conditions prevailing in [the host State]."[58]

63. Peru has identified the relevant conditions and circumstances that should be considered to determine whether Peru acted with reasonable due diligence in the present case, when it decided to prioritize dialogue over the use of force. Those conditions and circumstances include the following:

a. The long history of social conflicts between mining companies and local communities, which Claimant acknowledges.[59]

b. Social conflicts in the mining sector implicate the balancing of interests of local communities and investors.[60]

c. International law recognition of the rights and protected status of certain vulnerable communities in the context of development projects that may impact them.[61]

d. Recognition within the mining industry and among States that the use of force by State actors is likely to aggravate rather than resolve conflicts between mining companies and local communities, and has proved counter-productive to long-term solutions.[62]

e. Law enforcement agencies, both within and outside Peru, are not designed to serve as private security forces for companies and their investments.[63]

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[57] **RLA-0001**, p.161; **CLA-0100**, ¶77.

[58] **RLA-0084**, ¶234.

[59] Counter-Memorial, §II.A.1; Rejoinder, ¶609; Reply, §7.2.

[60] Counter-Memorial, §II.A.1; Rejoinder, ¶609; **RLA-182**, pp.15–23.

[61] Rejoinder, ¶47.

[62] Rejoinder, ¶680.

[63] Reply, ¶¶667–670; Rejoinder, ¶609.

f. Free and democratic societies permit the use of force by law enforcement only under limited and exceptional circumstances. The competent authorities are accountable and have responsibility—and discretion—regarding how to wield force.[64]

g. Industry-accepted CSR norms, ESG standards, and best practices emphasize the use of non-adversarial methods for resolving social conflicts with local communities and explicitly eschew physical force.[65] Industry norms underscore a company's obligation to secure community acceptance of a project (i.e., a social license) *before* operations commence.

64. Claimant has failed to specify any other relevant "circumstances" that the Tribunal should consider. Instead, it has wrongly sought to dismiss the above specific circumstances, characterizing them as "aggravating factors" or "excuses" or treating them as irrelevant.[66]

65. Claimant wrongly appears to characterize the FPS standard as one of absolute security or warranty that its investment shall never be occupied or disturbed under any circumstances.[67] Remarkably, when plainly asked by the President of the Tribunal whether Claimant expected to "carry forward the business free of any social interruption," and whether it also expected Peru would "do whatever is required to assure that result," Claimant answered emphatically, "Yes, Mr. President, that's the premise."[68] This directly contradicts the FPS standard, as an obligation of means and not result.

66. Claimant recognizes that, under the FPS standard, a claimant must demonstrate that if the State had acted with "due diligence," the State would "have prevented the

[64] Rejoinder, §II.C.1.

[65] Counter-Memorial, §II.B.2.b.

[66] Reply, ¶609; Rejoinder,¶¶4–7.

[67] Memorial, ¶266.

[68] D1-167:22-168:1.

claimant's alleged losses."[69] Claimant has not even attempted to demonstrate that forcibly removing the Access Road Protest would have resolved the conflict or averted future disruptions by the Parán Community.

b. The FET standard under the Treaty is tethered to MST and mere breaches of domestic law (if any) do not breach that standard

67. Treaty Article 805.1 requires that Peru accord to Claimant "treatment in accordance with the customary international law minimum standard of treatment."[70] The Parties agree that the MST under CIL's high standard was accurately summarized by the *Waste Management II* tribunal.[71]

68. In its opening, however, Claimant argued that "at the very core of this FET standard stands an obligation for a State to enforce its own laws."[72] That is a misstatement of the FET legal standard. Article 805.1 does not create a strict liability standard. Ordinary breaches of domestic law by a host State—which in any event did not occur in this case—are insufficient to violate the MST. Instead, a breach of domestic law must amount to an "'**outright and unjustified repudiation**' of the relevant regulations" (emphasis added).[73]

69. Claimant argues that it "is **not complaining about individual breaches** of Peruvian law, but about [a] **systematic failure** to act in accordance with its own law" (emphasis added).[74] Further, Claimant acknowledged that it must prove that, but for Peru's decision not to use force, the Invicta Mine would have been successful.[75]

70. However, as explained in Peru's pleadings and elaborated in **Section IV.A.2** below, Claimant has failed on both counts: it has not—and cannot—demonstrate that by declining to use force against Parán Community members, Peru incurred in an

[69] Reply, ¶626. *See also* Counter-Memorial, ¶494.

[70] **RLA-0010**, Art.805.1.

[71] Claimant's Skeleton, ¶90. *See also* **CLA-0037**, ¶98.

[72] D1-115:16–19.

[73] **RLA-0049**, ¶103.

[74] D1-115: 20-116:2.

[75] Claimant's Skeleton, §3.4.1.

unjustified and outright repudiation of, or a systematic failure to act in accordance with, Peruvian law.

71. In fact, Claimant failed to demonstrate even a simple breach of Peruvian law. Claimant chose not to offer expert testimony on Peruvian law or to call Professor Meini, the only independent legal expert on Peruvian law in this arbitration.

c. Claimant misinterprets the applicable law on expropriation

*(i) Claimant's standard for direct expropriation is incorrect*

72. The Parties agree that direct expropriation occurs where there is a "formal transfer of title or outright seizure" of an investment by the State.[76]

73. Claimant does not argue that any affirmative action by Peru expropriated Claimant's investment. Instead, it relies on *Wena v. Egypt* and *Amco v. Indonesia* to argue that a State's inaction leads to a *direct* expropriation if a "State knowingly allows by its omissions that the investor lose its property."[77] Claimant oversimplifies such tribunals' conclusions:

a. In *Wena*, the tribunal only found Egypt in breach because it did "nothing to prevent" the seizure of the investment by a public company and "nothing to restore" the investment for roughly a year—leading the tribunal to conclude that Egypt "approved" the seizure.[78]

b. In *Amco*, Indonesia did not simply "knowingly allow" an investment's seizure. Rather, it provided both guidance and State assistance to the company that enacted the seizure, and later revoked the investor's license to conduct business.[79]

74. It is thus wrong for Claimant to suggest that where a State refrains from a particular form of intervention (e.g., force), this would amount to a direct expropriation. Rather,

[76] Claimant's Skeleton, ¶82.

[77] Reply, ¶¶821–823. *See also* D1-113:1–6.

[78] **CLA-0028**, ¶82.

[79] **CLA-0066**, ¶¶100,127–128,155,164,169–170.

it is the lack of *any* action by the State to assist the investor, coupled with acts taken to advance the loss, that arguably may result in direct expropriation.

*(ii) The Treaty's indirect expropriation standard requires evaluation of the Annex 812.1 factors and presumptions*

75. The Parties agree that the Tribunal should evaluate Claimant's indirect expropriation claim pursuant to the factors and presumptions specified in Annex 812.1:[80]

a. Annex 812.1(b)(i) calls for an inquiry into the economic impact of the State's measures on the investment[81]—i.e., whether State measures caused a complete or nearly complete deprivation of the value of the investment.[82] An alleged deprivation of rights or adverse impact on the value of an investment, without more, will not meet this standard.

b. Annex 812.1(b)(ii) requires considering whether an investor had reasonable, legitimate, investment-backed expectations that were interfered with.[83] Claimant has established no such expectations or interference thereof.

76. Under Annex 812.1(b)(iii) the character of a State measure includes the intent of the host State.[84]

77. Annex 812.1(c) creates a strong presumption that measures designed and applied to protect "legitimate public welfare objectives, such as health, safety and the environment"[85] are not expropriatory. Preventing violence against and between Peruvian citizens, police, and foreign investors is a perfect example of such a legitimate public welfare objective.

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[80] Claimant's Skeleton, ¶83; Counter-Memorial, §IV.D.2.a; Rejoinder, §IV.D.2.b.

[81] **RLA-0010**, Annex 812.1(b)(i).

[82] **CLA-0069**, ¶7.5.11.

[83] **RLA-0010**, Annex 812.1(b)(ii).

[84] **RLA-0010**, Annex 812.1(b)(iii).

[85] **RLA-0010**, Annex 812.1(c).

### 2. *The Peruvian Government's response to the social conflict between Claimant and the Parán Community was lawful and appropriate*

78. Initially, Claimant's central thesis was that Peru took *no* action to protect Claimant's investment.[86] Faced with Peru's refutation of that baseless thesis,[87] Claimant shifted to an equally extreme and baseless theory in its Reply, claiming that Peru was required—under both international law and Peruvian law—to crush the Community's opposition to the Project through the use of force.[88]

79. Claimant is wrong. There is nothing in international law that requires use of force to resolve a dispute between a business and a local community. And Peruvian law employs *dialogue* as the primary and preferred mechanism for the resolution of active social conflict in the mining sector, and authorizes the use of force only in exceptional cases, when the specific circumstances justify and require it.

80. Peru's decision not to use force against the local community comported with Peruvian law and with its policy of prioritizing *dialogue* as the primary and preferred mechanism to resolve social conflict in the mining sector. Thus, Claimant would need to show that Peru's policy and legal framework governing the use of force *itself* constitutes a Treaty violation. This would be a dangerous proposition, which Claimant in any event cannot establish.

#### a. Mining companies—not the State—are responsible for managing their own social risk

81. A diligent investor would have been aware that social conflict between local communities and mining companies constitutes the highest known risk for mining investors within Peru, and indeed globally. Thus, investors are expected to know that social conflicts are bound to arise and to mitigate that risk and its impact on their business.[89]

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[86] *See, e.g.*, Memorial, ¶¶13,132,156,161,170,190–191.

[87] Counter-Memorial, §II.E.

[88] Rejoinder, §II.C.

[89] Dufour, ¶271; D5-1554–:3–18.

82. Claimant's own witness Mr. Castañeda, admitted that rural communities "always have boundary problems" and that community relations must therefore be carefully managed.[90] Indeed, as Mr. Castañeda also acknowledged, in its 2009 EIA, the company had identified a boundary dispute among the three Rural Communities and a significant risk of social conflict being "exacerbated with the implementation of the project."[91] Notwithstanding Claimant's knowledge, it was not prepared to mitigate the risk—and in fact exacerbated it through its own conduct that pitted the communities against each other.

b. Claimant was aware of Peru's legal mining framework for preventing and resolving social conflict when it invested in Peru

83. Peru's policy of prioritizing dialogue over use of force to resolve social conflicts was apparent and known to Claimant when it invested. Because of Peru's long history with the fatal consequences of responding to civilian resistance with the use of force,[92] its legal mining framework expects mining operators not only to employ principles of participation, consent, and continuous dialogue to prevent social conflict, but also to engage in State-facilitated dialogue to resolve those conflicts.[93] Peru's legal mining framework is consistent with State practice—including Canada's—and global industry ESG and CSR standards.[94]

84. Treaty Article 810 provides that Peru and Canada should encourage investors to conform with internationally recognized CSR standards through their domestic policies.[95] In that vein, Peru requires all mining operators to sign a sworn affidavit

[90] D2-407:1–13.

[91] **R-0047**, p.367 ("a recurring theme to date, that may be capable of generating greater disagreements and conflicts, is the border-related conflict between the communities of Parán, Lacsanga and Santo Domingo de Apache. This circumstance may be exacerbated by the implementation of the project as a source of benefits and job opportunities.").

[92] *See* Counter- Memorial, ¶¶50–52; Rejoinder, ¶¶609,683.

[93] Counter-Memorial, ¶53.

[94] Counter-Memorial, §§II.A.3.b,II.B.; Rejoinder, §II.A.1.

[95] **RLA-0010**, Art.810.

pledging to fulfill social obligations and participate in dialogue facilitation mechanisms towards dispute resolution whenever necessary.[96]

85. However, as discussed further in **Section IV.B.3.b** below, Claimant has brazenly denied any requirement to obtain and maintain a harmonious relationship with the Parán Community. Claimant's argument is that Peru was obligated to use force from the beginning of the conflict to implement Claimant's preferred (and misinformed) "parallel strategy" of using force while simultaneously attempting to bring the parties closer through dialogue.[97] But as explained by Peru's witness Mr. Saavedra, that position is inherently contradictory.[98] It also finds no support under international law, Peru's legal mining framework, or industry standards.

c. <u>The dialogue process could have yielded fruitful results, but Claimant derailed it</u>

86. Claimant's argument ignores that the Parán Community remained willing to reach a long-term agreement with Claimant. The Parán Community's protests stemmed from their expectation and desire to have a mutually beneficial partnership, and from (justifiably) feeling ignored by the mining company.[99] The Parán Community viewed itself as a key stakeholder given that it—more than any other community—would be directly impacted by the Project. These views were known to Claimant.[100]

87. Peru explained that local communities protest when they do not feel respected or heard.[101] Claimant's witness Mr. Castañeda conceded that it is not unreasonable for rural communities to threaten protests that intentionally disrupt mining operations as a "call to attention" when a company has not fulfilled social obligations.[102] He testified

[96] Rejoinder, ¶62.

[97] D5-1327:4–8. *See also* D4-1001–1002:5–17.

[98] D5-1131:4–12.

[99] Rejoinder, §II.B.

[100] *See supra* Section III.B. *See also* Claimant's CR Reports *e.g.*, **C-0390**, **C-0100**, **C-0424**, **C-0425**, **C-0430**, **C-0129**.

[101] Counter-Memorial, ¶500.

[102] D2-495–496:19–2.

that this was what occurred when the Santo Domingo Community voted to shut down the Invicta Mine after Claimant failed to perform agreements with that community.[103] In that conflict, and conflicts with members of neighboring Lacsanga, however, Claimant did not solicit forceful State intervention, but instead resolved those conflicts through dialogue.

88. In contrast, Claimant pursued and relied on forceful police intervention as early as 2017 to tackle simmering tensions with the Parán Community—because it had neither the resources nor the time necessary to resolve that dispute through dialogue:

a. In 2017, Claimant ceased having *any* direct communication with the Parán Community and began significant works at the Mine.[104]

b. This communication void, coupled with increased activity at the Mine, resulted in some Community members understandably speculating that Claimant had commenced commercial exploitation, and threatening to shut down the project if their concerns were not addressed.[105]

c. Rather than re-engage the Parán Community in dialogue, as it did when similar threats were made by the other neighboring communities, Claimant's *modus operandi*—confirmed by Mr. Saavedra—was to immediately demand police intervention.[106] Claimant would continue to insist on forceful intervention going forward.

89. Claimant's resistance to dialogue went so far as to malign Mr. Román Retuerto, a local official who dared to send letters to the authorities urging for formal dialogue to commence, including *before* the Parán Community carried out its planned 19 June 2018 Inspection.[107]

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[103] D2-495–496:19–2.

[104] Rejoinder ¶100; **C-0111**.

[105] **C-0414**; **C-0431**; **C-0459**. *See also* Rejoinder, ¶¶207–209.

[106] Rejoinder, ¶210; Reply ¶¶257–259. *See also* D5-1330:4-7.

[107] Rejoinder, ¶¶213–220.

90. The Parán Community was not only open to but also eager for dialogue. It was the Parán Community who requested Peru to intercede and facilitate formal dialogue with Claimant in 2018.[108] The Parán Community also acted peacefully during active dialogue, and only undertook new protest actions when Claimant did not appear to seek a long-term agreement with that Community.

91. Immediately after the Parán Community established the Access Road Protest, Claimant agreed that the Community could maintain its protest while dialogue commenced. Dialogue efforts continued through the 26 February 2019 Agreement, which consisted of an *initial* set of commitments and established the formal Dialogue Table. Although the parties had conflicting interpretations of certain terms under that Agreement, it was Claimant's obstinate and petty refusal to pay USD 9,000 for a topographical survey that provoked the Parán Community's protest on 20 March 2019—the date when the topographical survey was expected to occur.[109]

92. Claimant's witness, Mr. Bravo, admitted during the Hearing that USD 9,000 for the topographical survey "was nothing," and Claimant refused to pay for it because Claimant wanted to avoid committing to *any* future improvements to the Parán Community's road.[110] This striking admission exposes the hypocrisy of Claimant's stated "official position" that the "Parán never had any intention to come to an agreement."[111] In reality, Claimant never intended to reach a long-term agreement involving investment in the Parán Community. While the Community had consistently expected an access road for Claimant's project, Claimant expected the Parán Community simply to cease its opposition and endure the Mine's impact.

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[108] **C-0523**; **R-0065**; **R-0134**. *See also* León 1, ¶¶18–20.

[109] Rejoinder, ¶268.

[110] D4-1056:11-8. ("30,000 soles for a survey. It was nothing. It would probably have a couple of papers, and a couple of maps. But it won't solve anything...Even though that if we may agree to make a topographical survey for a road, it won't be enough. So it was a waste of money, and a waste of time for everybody.").

[111] D4-1056:9–11.

93. In Mr. Bravo's own words, Claimant considered investing in a Parán road a "waste of money" and a "waste of time"[112]—even as it used the Parán road after the Lacsanga road had been damaged by rainfall following the 26 February 2019 Agreement.[113]

94. Claimant's rejection of a meager investment to survey improvements to the Parán's access road thus exposed divergent objectives: (i) the Parán Community's consistent desire to secure a long-term collaborative partnership through an access road to the Invicta Mine, and (ii) Claimant's myopic desire to eliminate the protesters without committing to a long-term partnership with the Parán Community.[114]

95. Nevertheless, the Parán Community remained hopeful for a mutual agreement through the Dialogue Table established under the 26 February 2019 Agreement.[115] As Peru's witness Mr. Trigoso explained, Peruvian authorities assessed that the gap between the parties could be bridged through dialogue with help from OGGS and other State agencies.[116]

96. Claimant, however, refused to move forward with dialogue and instead argued that the social conflict was a purely "police issue,"[117] because Claimant did not want to accept that the conflict was a community relations disaster of its own making. Claimant let its contract with its community relations consultant, SSS, lapse in November 2018, retained only a skeletal community relations team thereafter, and lacked even a general manager between October 2018 and February 2019.[118] Claimant emphasized force as the only viable option to continue operating, without investing in a long-term relationship with the Parán Community. Claimant thus paid USD 135,000 (an amount that dwarfs the USD 9,000 Claimant refused to pay for a

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[112] D4-1056: 7-8.

[113] Rejoinder, ¶256.

[114] D4-1000:5–17,1001:5-18,1008–1009:5-21,1012-1013:15–21. *See also* D3-789–796:12–21.

[115] Rejoinder, ¶271.

[116] D4-1184–1185:21–12; *see also* D4-1139–1140:21–17,1150–1151:21–17,1138:11–22.

[117] D3-789–796:12–8; *see also* D4-1000:5–17,1001:5–13,1008–1009:5–21,1012-1013:15–21.

[118] D2-391–394:6–16,398–399:2–22. *See also* D3-782–783:11–20.

topographical survey) to hire the War Dogs private security force—who acted with disastrous consequences on 14 May 2019.[119]

d. Peru was not required to respond to the conflict with forceful police intervention

97. The Peruvian legal framework mandates that force be considered only in strictly delineated circumstances, and when all other avenues of potential resolution have been exhausted.[120] Despite asserting that Peruvian law mandated the use of force, Claimant elected not to call Prof. Meini, the only independent legal expert in this arbitration to testify regarding the use of force to resolve conflicts under Peruvian law. As Prof. Meini explains and Peru has shown, Peru was not required to use force in relation to the Parán Community's protests:

a. In relation to the 19 June 2018 Inspection, the PNP and Prosecutor's Office promptly initiated an investigation into Claimant's criminal complaints.[121] The Prosecutor found that none of Claimant's criminal allegations against the Parán Community could be substantiated by the evidence.[122] Claimant never challenged the Prosecutor's reasoned decision under domestic or international law.[123]

b. In relation to the Access Road Protest, Peru was not required to use force under Article 920 of the Civil Code of Peru and/or Article 8.2 of Legislative Decree 1186.[124] The PNP promptly arrived at the Access Road Protest on the day it commenced, and successfully neutralized a tense situation, brokering a peaceful agreement between the parties and averting the use of force.[125] Claimant then agreed that the Parán Community could "continue to protest

[119] Rejoinder, ¶¶271–274; D4-1061:4–7.
[120] Rejoinder, §II.C.1.
[121] Rejoinder, ¶288.
[122] Rejoinder, §II.C.2.g.
[123] Rejoinder, ¶296.
[124] Rejoinder, ¶689.
[125] Counter-Memorial, §II.E.3.

until a solution is found between the Community of Parán and the Invicta company."[126]

c. Nor was Peru required to use force on 20 March 2019, when the Parán Community protested Claimant's breach of the 26 February 2019 Agreement. As Mr. Trigoso explained, the OGGS and other authorities immediately intervened to attempt to return the parties to the Dialogue Table.[127] The Parán Community agreed to resume formal dialogue with Claimant.[128]

d. On 14 May 2019, Claimant unleashed the War Dogs and unilaterally attempted to wrest back control of the Site—in contravention of specific PNP directives to wait until the PNP had first secured the Mine for a maximum of 72 hours.[129] The PNP arrested members of the War Dogs for instigating violence.[130] The OGGS and other authorities immediately intervened to help resuscitate talks between the parties. Although Claimant's actions seriously exacerbated the dispute, the Parán Community agreed to recommence dialogue if Claimant replaced its negotiators—which Claimant refused to do.[131]

e. As Mr. Saavedra explained, at no point was the PNP obligated to single out the Parán Community to confiscate shotguns or other firearms in their possession.[132] Peru has implemented a nationwide program for the voluntary surrender of firearms by rural communities, in line with UN guidelines.[133] Singling out the Parán Community notwithstanding this context would have exacerbated the conflict. Importantly, forceful confiscation of firearms from the

[126] **C-0166**.

[127] D4-1222:5–22. *See also* Rejoinder, ¶¶276–278.

[128] Counter-Memorial, ¶279.

[129] Rejoinder, ¶164.

[130] Rejoinder, ¶¶276–280.

[131] **C-0365**.

[132] D5-1303–1305:16–1.

[133] Rejoinder ¶699; **RLA-184**.

Parán Community would not have ended the Parán Community's opposition to the Project, or prevented it from carrying out any of its protest measures.[134]

98. Notwithstanding Claimant's argument that Peru was legally obligated to use force under Peruvian law, Claimant acknowledges that under international law, Peru "has the responsibility to decide **how to strike the balance** between the interests of local communities and investors in the mining sector" (emphasis added).[135] Peru, like any State, had *authority and discretion* pursuant to its police powers to determine whether, when, and how the use of force would have been appropriate and justified in light of well-known risks and realities of social conflict in the mining sector.[136]

99. In this case, for the reasons explained in this submission, Peru's previous pleadings, and at the Hearing, Peru's exercise of its discretion not to use force was entirely reasonable and does not constitute an internationally wrongful act.

e. <u>The use of force would not have guaranteed the result Claimant sought</u>

100. A fatal flaw in Claimant's arguments—which it has consistently ignored—is that it has not demonstrated that police intervention would have ended the Access Road Protest and the Parán Community's opposition to the Project. Rather, as explained by Mr. Trigoso, experience shows that forceful removal of civilian protesters in these contexts is short-lived, because it exacerbates rather than resolves the underlying conflict.[137] Indeed, Claimant's own witness Mr. Castañeda has acknowledged the merely temporary effect of using police force and the "urgency of reaching an agreement with Parán" to resolve the conflict.[138]

101. Claimant offered *no* example of an instance when the use of force succeeded in resolving a social conflict with mining operators in Peru, because none exist. Claimant

[134] Rejoinder, ¶¶698–702.

[135] Reply, ¶686.

[136] Rejoinder, § I.C.1. *See also* D5-1346:1347:14–9.

[137] D4-1153:8–13. *See also* Rejoinder, ¶283.

[138] D2-488:22. Castañeda 1, ¶74.

invoked the Las Bambas case as a "success," but as Peru demonstrated, every forceful police intervention in that case was followed by the local community later restoring a blockade in greater numbers and an ensuing escalation of violence.[139] After repeated police interventions failed to resolve the conflict, the mining operator finally determined that dialogue—not force—would end the cycle of violence and opposition.[140]

102. In contrast, Claimant has thus far failed to acknowledge the importance of dialogue. This attitude led it to squander opportunities to resolve the conflict with the Parán Community. For example, the PNP's pre-emptive intervention in September (which did not require forcible removal of protesters), coupled with Peruvian authorities meeting with the Community, helped create the peaceful conditions for Claimant to establish dialogue. Unfortunately, as Claimant's key witnesses openly admit,[141] the company instead lobbied Peruvian authorities to deploy force on the protesters. When Claimant then failed to reach an agreement with the Parán Community, the latter established the Access Road Protest four weeks later. This demonstrates that without meaningful engagement to resolve the underlying grievances, local communities will execute their protests at a later point.

103. Claimant squandered yet another opportunity to restabilize relations with the Parán Community when it deliberately missed a joint mediation to address the parties' different interpretations of the 26 February Agreement.[142] Instead, Claimant remained narrowly focused on force.

104. Ultimately, Claimant's argument—that the PNP should have intervened as many times as necessary to *prevent* any protest and to use force as many times as necessary to *remove* protesters—exposes Claimant's lamentable understanding of the dynamic of social conflict, community relations, and the viability of a mining project. Such

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[139] Rejoinder, ¶300.

[140] **R-0227**.

[141] [redacted] Bravo 1, ¶¶16–38.

[142] Rejoinder, ¶271; **R-0114**.

action would not have addressed the Parán Community's underlying grievances and instead would have exacerbated the conflict and potential for violence.

*3. Claimant's conspiracy theories on drug cultivation and illegal mining by Parán Community members are unsupported*

105. Claimant has tried to divert the Tribunal's attention away from Claimant and Invicta's own obligations and serious shortcomings by raising the following baseless conspiracy theories: (i) that the Parán Community as a whole was engaged in an "illegal drug business;" and (ii) that the Parán Community opposed the Invicta Project to "steal" the Invicta Mine.[143]

106. Claimant's arguments would require that the Tribunal conclude that:

a. the Parán Community as a whole was engaged in an illegal marijuana business and was intent on stealing the Invicta Mine;

b. such alleged objectives were the true motivation for the Community's objection to the Invicta Mine;

c. the Community's efforts to reach an agreement with Claimant were disingenuous;

d. Peru's various agencies were aware that such efforts were disingenuous;

e. Peru considered that such efforts made it impossible for Claimant and the Community to reach an agreement; and

f. Peru knowingly wasted significant State resources towards brokering a peaceful resolution.

107. None of the above conclusions is supported by the evidence on the record. Rather, the evidence shows that (i) the Parán Community's protests were prompted by legitimate environmental concerns and by Claimant's alienation of the Community;[144] (ii) at most, only a handful of individuals from the Community were involved in marijuana

[143] Reply, §II.

[144] Rejoinder, §II.C.3. *See also infra* Section IV.B.3.b-c.

cultivation; (iii) portions of Claimant's limited evidence regarding alleged marijuana cultivation relate to communities other than the Parán Community; and (iv) there is no indication whatsoever that any illegal business by a few Community members was connected to the Community's objection to Claimant's development of the Invicta Mine.[145] Nor is there any evidence that the Parán Community considered exploiting the Invicta Mine before January 2019, or that such desire motivated its opposition to the Invicta Project.[146] The Tribunal should therefore disregard Claimant's fanciful conspiracy theories.

### B. Claimant did not lose its investments on account of any actions by Peru

#### *1. The Parán Community's actions are not attributable to Peru*

108. Peru demonstrated in its pleadings and at the Hearing that the actions of the Parán Community members are not attributable to Peru under international law.[147] Claimant, on the other hand, has presented a series of ever-changing and increasingly far-fetched and baseless arguments, in a hopeless attempt to advance its case. Claimant's own lack of confidence in its attribution arguments became evident at the Hearing, as it: (i) elected not to call Mr. Vela, the only rural communities expert who has testified in this arbitration; and (ii) provided only a perfunctory repetition of its attribution arguments from its pleadings, which Peru had already rebutted.[148]

109. Peru has demonstrated that Claimant's attribution arguments must fail, for at least the following three reasons.[149] *First*, the Parán Community is not a "territorial unit" of Peru under ILC Article 4. As Claimant acknowledged at the Hearing, the starting point of the ILC Article 4 analysis is the status of the relevant entity under domestic law.[150] Peru's Constitution describes the decentralized territorial units of the Peruvian

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[145] *See* Rejoinder, §II.E.1. *See also infra* Section IV.B.3; D3-880:3–884:6; D5-1383:12–21; D3-868:4–7.

[146] Rejoinder, §II.E.2.

[147] Counter-Memorial, ¶¶382–475; Rejoinder, ¶¶475–583.

[148] D1-106:5–112:10.

[149] D1-278:18–297:1.

[150] **CD-0001**, slide 79; Rejoinder, ¶488.

State and regulates their relationship with Peru's central government.[151] Fatally for Claimant's attribution theory, the relevant provisions of the Constitution do not establish or classify rural communities—such as the Parán Community—as decentralized territorial units.

110. *Second*, neither the Parán Community as a whole nor its *Rondas Campesinas* are "empowered…to exercise elements of the governmental authority,"[152] within the meaning of ILC Article 5. *Rondas Campesinas* merely exercise a rural community's rights of self-defense over the community's territory and property.[153] They may also act as conciliators, but such role is expressly "extrajudicial" in nature and only applies to a narrow category of matters arising in the community's territory, none of which is relevant to the instant case.[154]

111. *Third*, it is incontrovertible that the acts of the Parán Community were not carried out in exercise of official authority,[155] which is a requirement for attribution under both ILC Article 4 and 5.[156]

112. Claimant cannot rely on ILC Article 7 (which relates to the unauthorized acts of organs or parastatal entities) to argue otherwise, because such article requires that the relevant acts be carried out with ostensible authority, i.e., "cloaked by the authority provided to the entity by the state."[157] Claimant continued to gloss over this key requirement at the Hearing, relying on conclusory statements that "Parán's conduct was not so far removed from the scope of the authority granted to it under Peruvian law. Nor can the actions in dispute be characterized as private acts."[158] Those cursory assertions are incorrect and contradicted by the contemporaneous evidence, which

[151] **C-0023**, Art.189.

[152] **CLA-0003**, Art.5.

[153] **R-0116**, Art.1; **R-0103**, Art.12(a)

[154] **R-0116**, Art.1; **R-0103**, Art.3.

[155] Counter-Memorial, ¶¶449–459; Rejoinder, ¶¶549–557.

[156] D1-281:13–16,284:21–285:5.

[157] **RLA-0024**(bis), p.137.

[158] D1-112:2-–4.

shows that Claimant itself considered the actions of the Parán Community to be criminal and terrorist acts—and thus evidently not cloaked by any conceivable authority provided to the entity by the State.[159] In fact, Claimant maintained that characterization at the Hearing, repeatedly describing the Parán Community members as "drug traffickers," "criminals," and a "mob."[160] Notably, *none* of Claimant's witnesses suggested in their testimony at the Hearing that the Parán Community members purported to act with official authority—neither did Claimant in *any* contemporaneous communication with *any* State entity or public official.

113. All of the above reinforces the conclusion that Claimant's attribution arguments are devoid of factual and legal basis.

*2. Claimant's conspiracy theory concerning Mr. Román Retuerto must be rejected*

114. Claimant's conspiracy theory that Mr. Soymán Román Retuerto, a regional government official, incited and/or led the June 2018 Inspection has been completely debunked.

115. Claimant admits that it has relied on nothing more than hearsay provided by its own witness (and former employee of Invicta), [redacted], to support a serious allegation against a government official.[161] But [redacted] testified at the hearing that he did not even see Mr. Retuerto during the relevant events.[162] [redacted] also admitted that the only basis for his allegation was that the Lacsanga Community claimed they saw Mr. Retuerto in the area and assumed that, because Mr. Retuerto was a government official, he must have been leading the Parán Community's opposition movement more generally, as well as directing the June 2018 Inspection.[163] That is a flawed, baseless, and incorrect assumption.

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[159] **C-0015**, p.2; **IMM-0053**, ¶1; **C-0125**, p.1; Counter-Memorial, ¶¶467–475; Rejoinder, ¶¶569–582.

[160] D1-83:14-16,93:16,57:4,56:16; D4-1178:8–19.

[161] D1-69:13–18.

[162] D2-613:20–614:4.

[163] D2-613:2–19.

116. Likewise, Mr. Retuerto did not engage in defamation against Invicta. Instead, the documentary evidence and Mr. Román Retuerto's written and oral testimony confirms that:

a. he dutifully carried out his role as the Subprefect of Leoncio Prado;[164]

b. he truthfully reported to the relevant authorities the Parán Community's concerns regarding (i) Claimant's lack of appetite for dialogue,[165] and (ii) possible water contamination;[166]

c. he urged the authorities to initiate a formal dialogue process with the relevant agencies, precisely to avoid a social conflict;[167]

d. his sole objective was to ensure that Claimant followed Peruvian law and received State assistance to re-engage a key stakeholder community, address that community's concerns, and avoid an escalation of the conflict;[168] and

e. far from leading any opposition to the Parán Community, he was considered *persona non grata* by that rural community—due to his former ties to the neighboring rural community of Santo Domingo.[169]

117. Claimant's cross-examination of Mr. Retuerto attempted to mislead the Tribunal on the facts. Claimant insinuated several times that Mr. Retuerto *misinformed* the authorities that the Invicta Mine was on the brink of exploitation.[170] But, ironically, the argument that the Invicta Mine was on the brink of exploitation is one made and relied upon by Claimant in this arbitration.[171] Claimant also argues that the information provided by Mr. Retuerto to the authorities was so far from the truth that

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[164] D3-820:9–21.

[165] D3-832:8–18.

[166] D3-853:6-854:19.

[167] *E.g.*, D3-856-857:7–1.

[168] **C-0550**; **R-0076**; **R-0081**; **R-0165**; **C-0525.** *See also* Román Retuerto, ¶¶13–14; D3-832:8–18,856-857:7–1,860:8–17.

[169] D3-907–909:4–22.

[170] *E.g.*, D3-829:10–18.

[171] Reply, ¶¶2,62–63.

he should have rectified his statement.[172] But Mr. Retuerto explained that his concern was that Claimant was advancing towards exploitation "without having an agreement" or dialogue with a key stakeholder community.[173]

118. In any event, Mr. Retuerto explained that he believed Invicta had commenced exploitation because he witnessed the extraction and accumulation of mined ore.[174] Such perceptions were reasonable because at the time Invicta Mine had started extracting significant quantities of ore for metallurgical testing, eventually extracting seven tons of ore.[175] Yet Claimant accused Mr. Retuerto of misinforming the public about the Invicta Mine commencing exploitation, when in fact the cause of the misinformation was Claimant's inexcusable—but avoidable—lack of community engagement and adequate communication.

119. Neither Mr. Retuerto nor the Parán Community can be expected to have the expertise to determine whether a mine is technically in the exploitation phase or not. Regardless, the Parán Community had witnessed for itself an increase in activity at the mine, and grew alarmed when it appeared Claimant had no intention of involving the Community in the Project.[176]

120. Claimant's unwarranted attacks against Mr. Retuerto are reproachful. Instead of welcoming Mr. Retuerto's efforts to avert an escalation of the social conflict by engaging in dialogue to address the local community's legitimate concerns, Invicta took a hostile and disdainful approach and accused the government official then (as Claimant does now) of orchestrating the social conflict. Claimant's transparent ploy to pin the conflict on a low-level regional official who was trying to faithfully discharge his duties, is nothing short of arrogant, irresponsible, and frivolous. It is illustrative of the nature of Claimant's entire case.

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[172] D3-831:4–7.

[173] D3-832:8–18.

[174] D3-832–833:19–7.

[175] D1-227:6–11.

[176] Rejoinder §II.B.

*3. Claimant's own actions resulted in the loss of its investment*

121. Claimant's investment failed as a result of its own actions, namely its (i) commitment to an ambitious and unrealistic repayment schedule, (ii) failure to obtain a social license to operate, (iii) failure to secure the necessary permits for exploitation, and (iv) failure to contract with reliable ore processors.

a. Claimant committed to an ambitious and unrealistic repayment schedule

122. It is undisputed that the latest executed version of the PPF Agreement required Claimant's repayment obligations to begin in *December 2018*.[177] While Claimant represents that the Invicta Mine was "on the brink" of lawful commercial exploitation in October 2018 and had access to reliable ore processing capacity, such statements do not reflect the Invicta Mine's true status as of October 2018. The December 2018 repayment date would have been unachievable for the various reasons outlined in the sections that follow, and Claimant has *not* shown that PLI Huaura would have agreed to modify Claimant's commitments had PLI Huaura been duly informed of the critical defects summarized below.

b. Claimant failed to obtain a social license

123. No serious mining company can deny that the industry concept of the social license requires mining companies to obtain and maintain the support of local communities for any mining activity.[178] Such requirements are solely the responsibility and risk of the mining company, not local communities or the State.[179]

124. Mining companies must undertake due diligence of the relevant social complexities and risks before making their investments. As Ms. Dufour, an experienced adviser to mining companies and expert in mining law in Peru, noted in her testimony at the Hearing, obtaining a social license can take years. It is a risk well known to mining

[177] **C-0045**.

[178] D6-1679:12–1680:11; Counter-Memorial, §II.B.2.b.; Rejoinder, §II.A.1. *See also, e.g.*, **R-0087**; **R-0029**; **R-0094**.

[179] D5-15601562-:10-01.

companies, and, if unaddressed or mismanaged, it can lead to significant delays or even frustrate the project.[180]

125. Mining companies must be prepared to invest adequate time and resources to build trust, obtain the social license, and, if necessary, repair any reputational damage. This is a key part of the risk calculus faced by investors in the mining industry.[181]

126. As confirmed by experts Ms. Dufour and AlixPartners at the Hearing, when a company faces local opposition, it should weigh whether it can invest the time and resources necessary to change local perceptions in its favor, or else divest the project.[182]

127. It is undisputed that Claimant failed to obtain the Parán Community's acceptance of its Project, and thus failed to obtain the social license to operate. However, Claimant attempts to deflect responsibility by accusing that community of negotiating in bad faith—allegedly because it had ulterior and criminal motives (e.g., marijuana cultivation and illegal mining).

128. The overwhelming evidence does not support Claimant's false narrative. Rather, the record establishes that the Parán Community: (i) consistently asserted its desire and expectation to have a long-term and mutually beneficial agreement with Claimant; (ii) wanted to play a material role in the development of the Project with an access road through its territory; and (iii) grew increasingly frustrated with Claimant's belief that

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[180] D5-1553:21–1554:18; D6-1683:13–1684:2; D5-1557:7-16 ("I have clients who…reached the conclusion that it's not worthwhile, but it's the same risk that a mining--the social license is one risk, but also the risk of finding ore, it's a high risk. But it is a risk that all of the mining companies are familiar with, not only in Perú...This is a risk of the top five established in all risk assessments that there are, in mining.").

[181] D6-1679:12–1680:10 ("A social license from a valuation perspective is required...you do need a social license to operate for a project to be successful...it is not an assumption. For example...not obtaining a social license can destroy the value of your mine. So... a social license is critical...You need to obtain acceptance by the community of your project."); D6-1739:21–1740:11.

[182] D5-1555:20–1556:1 "If [a mining company] considers that it doesn't have the time or resources, it can also decide to not go forward with the project."; D5-1556:16–1557:17; D6-1735:2-13 ("The investors have three choices, right: Wait, walk out, or sell"). *See also* Counter-Memorial, ¶115; Rejoinder, ¶¶32–33; **R-0085**; **R-0087.**

it could exploit the Mine without having first secured an agreement with the community—a position that Claimant openly admits but seeks to justify.[183]

129. Respect and mutual trust are pillars of the social license.[184] Yet, Claimant has made no attempt to conceal its disdain for the Parán Community—characterizing its members as "terrorists,"[185] "criminals," "thug[s],"[186] and "drug traffickers,"[187] and even comparing them to poorly-behaved children.[188] Claimant's prejudicial attitude and sense of entitlement are part and parcel of its callous dismissal of the local community's needs and concerns, which resulted in Claimant's failure to obtain a social license.

130. Claimant's chronic mishandling of relations with the Parán Community was thrown into sharp relief by the testimony of Claimant's own witnesses during the Hearing. Mr. Castañeda, Claimant's former country manager in Peru, who was responsible for community relations from February 2013 to October 2018 admitted that Claimant:

a. was aware that, of the three Rural Communities, the Parán Community's population centers were the closest to the mine;[189]

b. was aware of the existing community boundary dispute between the Rural Communities, and that community relations would therefore need to be handled carefully;[190]

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[183] *See supra* Section III.B; Rejoinder §II.B.

[184] Dufour, ¶¶265,293–296; Rejoinder §II.A.1.

[185] **C-0015**, 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.")

[186] **C-0133**, p.1.

[187] *See, e.g.*, D1-57:04–08; D4-1178:08–19.

[188] D1-22–23:12–11.

[189] D2-412:13–414:15.

[190] D2-405:13–407:16.

c. deliberately sided with the Lacsanga Community in the boundary dispute between the Rural Communities, including by "work[ing] with Lacsanga Community during those early years to set the boundaries of their territory;"[191]

d. disregarded obligations under the agreements with the Parán Community for several years;[192]

e. used such obligations as "leverage" to try to force an access road agreement with the Parán Community;[193]

f. in contrast to its approach with the Parán Community, made "great effort" to satisfy the company's obligations to the Lacsanga Community;[194]

g. inflamed tensions by urging the Lacsanga Community to forcefully defend their lands;[195] and

h. failed to secure the financial resources to meet its community obligations—even before the Access Road Protest.[196]

131. Despite being the key negotiator on behalf of Claimant at a critical point of the dispute, Mr. Bravo admitted to having no awareness of basic facts of the dispute and the Parán Community's concerns,[197] and could not even identify or locate the three main Parán villages within the direct area of influence of the Project.[198] Mr. Bravo also admitted that:

[191] D2-408:16–21.

[192] D2-459:21–462:20.

[193] D2-44:16–46:11.

[194] D2-464:2–20.

[195] D2-481:12–482:21.

[196] D2-396:3–5,463:15–19.

[197] D4-967:5–968:3,972:16–22,978:19-983:8.

[198] D4-966:1–9.

a. neither he nor Claimant thought it necessary to have or maintain a relationship with the Parán Community—contrary to Peruvian law and Claimant's own EIA;[199]

b. Claimant saw no value to having an experienced and dedicated CR Team engaged in critical negotiations with the Parán Community, or to devoting the necessary resources to repair community relations;[200]

c. Claimant was not interested in committing itself to a longer-term relationship that would require investing in the Parán Community's access road—exposing Claimant's bad faith efforts in the dialogue process;[201]

d. Claimant viewed the social conflict as a "police issue" and "not a community relationship situation."[202] Thus, Claimant focused almost entirely on lobbying Peruvian officials for the use of force and other adversarial methods as a matter of priority—in direct contradiction to principles underlying the ultimate aim of the dialogue process (i.e., to help Claimant obtain and maintain the social license); and

e. Claimant instructed lawyers to act on Lacsanga's behalf against the Parán Community—thereby deliberately taking sides in a territorial dispute between rural communities and further inflaming tensions.[203]

132. All of these circumstances resulted in Claimant's failure to obtain a social license and subsequent loss of its investment.

[199] D3-794–796:20–08.

[200] D3-794–796:14–08 ("A. At that point in time, before the October '18 events, there was no need for a relationship.").

[201] D4-1054–1056:19–13.

[202] D3-791:08–796:08; D4-1001:05–17.

[203] D4-1073:4–1075:9.

c. Claimant failed to secure the necessary permits for the Invicta Mine

133. During its opening presentation at the Hearing, Claimant asserted that by October 2018, "Lupaka had the land, Lupaka had the permits, and Lupaka had the funding to develop the project."[204] Claimant's assertion is a deliberate misrepresentation of the facts. It is an established fact that Claimant *lacked* the necessary permits and could not have obtained them in time to comply with its obligations to its creditor. Thus, Claimant would have defaulted on its obligations to its creditor even in the absence of the acts and omissions that it (wrongly) attributes to Peru.

134. When Peru exposed Claimant's brazen attempt to cozen the Tribunal, Claimant raised the spurious argument that the evidence submitted by Peru to expose Claimant's falsehood was introduced belatedly. Peru has demonstrated that the evidence on the record—which Claimant is incapable of rebutting—was timely introduced.

*(i) Claimant grossly neglected the permitting process*

135. In his First Witness Statement, Mr. Castañeda declared that he "overs[aw] all aspects of [Invicta's] development works, including securing permits."[205] However, at the Hearing, Mr. Castañeda testified that "Mr. [Daniel] Kivari was in charge of...dealing with these permits, amongst other things,"[206] whereas Mr. Bravo testified that Mr. Ansley was responsible for the Invicta Mine's permitting before Mr. Bravo came onboard.[207]

136. Once Mr. Bravo was appointed Invicta's General Manager in early February 2019, he became the sole member of the Invicta team responsible for securing permits for the

[204] D1-38:05–08.

[205] Castañeda 1, ¶8.

[206] D2-509:3–6.

[207] D3-937:2–11. *See also* D4-986:15 (noting that "[t]here was nobody in charge" of permitting at the point of the Third ITS filing); D3-934:16–936:5 (stating that "when [Mr. Bravo] started at the company...[a]ll the things about the environmental permitting were kind of stopped").

Invicta Mine.[208] But Mr. Bravo was, by his own admission, "not really concerned"[209] about the permitting situation at the Invicta Mine and claimed during his cross examination that "[t]he only pending permit was the operating permit,"[210] which is untrue and contradicted by Claimant's own pleadings.[211]

*(ii) Claimant failed to certify its alternative mine water treatment system or secure water licenses needed to exploit the Invicta Mine*

137. It is uncontested that Claimant was required to implement an "alternative mine water management system...[with] the corresponding environmental certification."[212] It is also undisputed that Claimant did not seek approval to build such a system before constructing it.[213] This was in contravention of the law.

138. Article 17 of Supreme Decree No. 040-2014-EM requires that "**[p]rior to the commencement of mining activity, including the construction stage**, the holder must have the corresponding Environmental Certification" (emphasis added).[214] If a mining company constructs a mining component before receiving such certification, that component cannot be environmentally certified and will be declared "inadmissible."[215] Such was the case when Claimant built its water treatment system in mid-2018 and subsequently tried to obtain certification. Claimant's Third ITS was therefore rejected because "the ITS is not a management tool for certifying constructed mine components."[216]

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[208] D3-805:14–22.

[209] D3-935:05-12.

[210] D3-806:20–22.

[211] Reply, §3.1. *See also* Rejoinder, §II.D.1; Dufour, §II.B.2.

[212] **R-0168**, p.3. *See also* D2-507:6–12.

[213] **R-0047**; **C-0040**; **MD-0035**.

[214] **MD-0004**, Art.17.

[215] **MD-0004**, Art.17 ("If, during the processing of environmental studies or amendments thereto, the competent environmental authority or the monitoring body establishes the performance of the activity or the total or partial construction of any component described in the study or amendment submitted, the procedure shall be declared inadmissible.").

[216] **C-0226**, p.66.

139. Moreover, the ITS was the wrong form of environmental certification for a component such as Claimant's water system. Articles 130, 131, and 132 of Supreme Decree No. 040-2014-EM explain how a mining company can modify its environmental certifications.[217] Only in limited circumstances may a mining company seek to update its environmental certifications through the use of an ITS. A component cannot be approved through an ITS if it is "situated on or impact[s] bodies of water...or water sources or any other fragile ecosystem."[218] Claimant's water management system would not have met this criterion, as it was using groundwater from the mine.[219]

140. Thus, Claimant would have needed to deconstruct the water system, request a modification to its EIA, and build the approved water management system in line with the approved parameters. Ms. Dufour explained that "as long as the component was there, it was impossible to certify it. If it couldn't be certified, it was impossible to have authorization for exploitation, and if [Invicta] exploited, it would have been an illegal miner."[220]

141. Further, and contrary to Mr. Bravo's testimony, Claimant could *not* have "regularized" this component.[221] As Ms. Dufour explained in her testimony at the Hearing, Claimant could *not* have regularized the system through a process known as the PAD Procedure, because: (i) such procedure was not introduced until May 2019, (ii) Claimant did not make an application under that procedure; and (iii) even if it had done so, it would not have received approval until mid-2020, at the earliest.[222]

142. Even if Claimant had successfully certified its water management system, Claimant was still required to secure the water licenses needed to lawfully draw water through

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[217] **C-0499**, Arts.130,131,132.

[218] **MD-0011**, p.2.

[219] **C-0406**, pp.1,12.

[220] D5-1532:2–13. *See also* D5-1433-1434:20–3 (Ms. Dufour explained that "you have to have the environmental certification for the alternative system before you begin exploitation. It is a requirement imposed by the authority, and that requirement was not called into question by Invicta at any time over these years.).

[221] D5-1530-1531:12–06.

[222] D5-1533:7–1534:10. *See also* D5-1536:13–1538:21.

that system. As Peru highlighted in the Counter-Memorial, Claimant was sanctioned for unlawfully relying on additional water sources in July 2018, and needed to "obtain the necessary approvals" before it could begin drawing water from previously unapproved sources.[223] Documents submitted with the Reply demonstrate that there are three such unapproved sources, namely: groundwater from the Invicta Mine, water from the Tunanhuaylaba stream, and water from the Ruraycocha stream.[224]

143. In light of the above, Claimant needed to (i) modify its EIA, a process that Mr. Castañeda accepted would take at least *seven months*,[225] and then (ii) secure the necessary water licenses to lawfully use these water sources.[226] Thus, Claimant could not have begun lawful exploitation of the Invicta Mine until **July 2020**—more than a year and a half after its PPF Agreement repayment obligations became due.[227]

*(iii) Ms. Dufour's Report is responsive to arguments raised in the Counter-Memorial or introduced for the first time in the Reply*

144. The regulatory status of the Invicta Mine as of October 2018 is a key issue in this arbitration and played a prominent role in the recent Hearing. Notwithstanding that Claimant is best placed to know the Invicta Mine's regulatory status and has made repeated submissions as to the permitting status of the Invicta Mine (most prominently in the Reply), Claimant refused to engage with the evidence raised by Peru in the Counter-Memorial and Rejoinder, as well as in Ms. Dufour's expert testimony.

145. Having no substantive answer to the evidence that shows its failure to obtain the necessary permits, Claimant was invited by the Tribunal to clarify whether it was requesting (at the Hearing) that portions of the Dufour Report that addressed those very issues be disregarded. As Peru explained at the Hearing, Ms. Dufour's Report develops arguments that Peru presented in the Counter-Memorial, that came to its

[223] Counter-Memorial, ¶326. *See also* **R-0090**.

[224] **C-0406**, §2.1.

[225] D2-514:11–515:7.

[226] Dufour, ¶¶103,130–142.

[227] Dufour, ¶¶7,139.

attention through document production, or that Claimant raised for the first time in the Reply.[228]

146. As explained by Peru,[229] Claimant deliberately omitted from the Memorial any mention of its pending environmental certifications regarding its alternative water management system, even when providing a list of "all outstanding items."[230] Instead, Claimant falsely represented to the Tribunal that the Invicta Mine was "on the verge of exploitation."[231]

147. Only in the Reply did Claimant address—for the first time—the environmental certifications, asserting that "even accounting for some delay, [Invicta] should have been able to obtain this certification [of its alternative water treatment system] in one month."[232] Alongside the Reply, Claimant submitted the Micon Report—a report that Ms. Dufour describes as being "of a technical nature," but based on "regulatory premises."[233] Based on those (unfounded) premises, Micon concluded that the Project Start Date in the But-For scenario would have been *November 2018*.[234] Such conclusions fell outside the scope of Micon's expertise and prompted significant changes to Accuracy's damages model, which Peru and its own damages expert were then required to rebut in the Rejoinder.[235] Ms. Dufour's Report represents an important component of such rebuttal.[236] To be clear, the November 2018 estimated start date offered by Claimant was introduced (for the first time in this arbitration) in the Reply.[237]

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[228] D3-678:19–686:18

[229] *See, e.g.*, Peru's Skeleton, ¶44; D1-255:1–257:7.

[230] Memorial, ¶343.

[231] Memorial, ¶193.

[232] Castañeda 2, ¶89.

[233] D5-1512-1513:21–1.

[234] Micon, ¶86.

[235] *See, e.g.*, Accuracy 2, ¶¶1.43,1.47,1.49,2.7,2.9,3.20,3.21,6.7.

[236] *See* D5-1511:10–1514:09 (Ms. Dufour explained during the hearing that her report is "exactly a comment on Micon's premise[s] on [] regulatory issues[s]").

[237] Reply, ¶1011 (*citing* Micon, §6.1).

148. Peru firmly believes that the exclusion of any portions of Ms. Dufour's expert testimony—and Peru's submissions based on such testimony—is unwarranted and unjustified, and would violate fundamental rights of due process. Peru has demonstrated that Ms. Dufour's expert testimony *is* responsive to the Reply and the Micon Report, and relates to arguments raised by Peru in the Counter-Memorial or based on documents obtained from Claimant during the document production phase of this proceeding.[238] Peru (again) reserves all its rights in that respect.

d. Claimant never acquired access to adequate ore processing facilities

149. Neither the third party toll processing facilities nor the Mallay Plant could have provided Claimant with adequate ore processing necessary to service its commitments to PLI Huaura and thus avoid defaulting on the PPF Agreement.

150. In October 2018, Claimant considered that the third party tolling facilities were not equipped to process ore for Invicta Mine as "out of the 4 toll mills selected, **none [we]re fulfilling their contracts**'" (emphasis added).[239] Claimant confirmed this fact in the Memorial, calling such mills "unsatisfactory,"[240] and attributing "shortfalls in volumes mined and processed up to October 2018…to challenges experienced with third-party toll processing."[241] Mr. Castañeda confirmed at the Hearing that the above matched his contemporaneous recollection.[242]

151. Belatedly in the Reply, Claimant alleged that it could have *resolved* the issues with these facilities.[243] However, neither Claimant nor its witnesses have addressed the means through which it could have purportedly resolved the practical and legal

[238] D3-678:19–686:18.

[239] **C-0051**, ¶2.

[240] Castañeda 1, ¶89.

[241] Accuracy 1, ¶3.37.

[242] D2-541:4–542:14.

[243] Reply,¶¶114-115; Micon, ¶149.

barriers affecting the use of these plants.[244] In fact, Claimant itself considered these barriers insurmountable in 2018.[245]

152. Claimant also could not have avoided default under the PPF Agreement by relying on the Mallay Plant. It is undisputed that Claimant's repayment obligations under the executed versions of the PPF Agreement became due in December 2018.[246] Claimant has conceded that the purchase of the Mallay Plant was contingent on Buenaventura obtaining approval of an easement agreement from the Mallay Community.[247] But that approval was only obtained on 14 March 2019—five months *after* Claimant hoped to sign the Mallay Plant purchase agreement and, critically, three months *after* it had already *defaulted* on its repayment obligations to PLI Huaura.[248]

153. Further, even under the Draft Third Amendment to the PPF Agreement, the Mallay transaction would need to close *before* any of Claimant's repayment obligations could be deferred—but that did not occur.[249]

154. In addition, Claimant would need to (i) begin lawfully exploiting the Invicta Mine, which would require obtaining the environmental certifications referred to above; *and* (ii) successfully complete the steps necessary to process ore at the Mallay Plant.[250] Claimant could not have achieved those goals in time to meet the revised timetable

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[244] *See, e.g.*, D4-996:5–997:8 (Mr. Bravo noted that "[Invicta] had the discussions, and we were not happy with the [processing] plants that we were sending the ore to"); Castañeda 2, ¶¶105,110. *See also* **C-0051**, p.1; **C-0421**, p.1; **MD-0055**; **MD-0059**; **MI-0007**, pp.1–2; **R-0197**, p.1; **R-0199**, pp.1–2; **R-0206**, p.1; **R-0208**, pp.1–2.

[245] *See* **R-0201**, p.3 (listing the Huari—also known as San Juan Evangelista—and Coriland plants as "out"); **C-0421**, p.1 (noting that the "Coriland chapter of [Claimant's] toll-milling strategy [was] over."); **MI-0007**, p.2 (noting that "[a]s a result of milling [at the Huancapeti plant] being significantly behind the mine development [Claimant] suspended all development activities and sent the contractors away"). *See also* Castañeda 1, ¶89 ("Based on the unsatisfactory results and experiences with [Altagracia], San Juan Evangelista and Huancap[e]ti II, we decided to restart negotiations with Buenaventura").

[246] **C-0045**. *See also* Accuracy 2, ¶A2.6.

[247] Accuracy 2, ¶A2.16; *see also* D4-990:1–992:22.

[248] **C-0289**.

[249] *See* **MI-0007**; **C-0289**; **C-0050**; **C-0287**.

[250] **C-0050**.

that Claimant put forth in this arbitration—but which was never agreed to by PLI Huaura.

*4. Consequences of overlap between jurisdictional, merits, and quantum issues*

155. As Peru explained in the Rejoinder, there is a degree of overlap and interconnectedness between the jurisdictional, merits, and quantum issues, which may have important legal implications for the final adjudication of the present dispute.[251]

156. For example, due to Claimant's disposal of its investment, the Tribunal would lack jurisdiction *ratione personae*, *unless* the Tribunal finds that the Claimant has demonstrated that there is "direct causation" between actions of Peru and Claimant's loss of its investment.[252] Similarly, the Tribunal would lack jurisdiction *ratione materiae* due to Claimant's failure to provide a waiver from Invicta, *unless* it finds that Peru has "deprived" Claimant of its investment.[253]

157. Regarding the merits, a factual finding that Peru did not deprive Claimant of its investment would also be dispositive of Claimant's expropriation claim—because to establish that claim Claimant must show that it suffered a "complete" or "nearly complete" deprivation of the value of the investment resulting from conduct attributable to Peru.[254]

158. In addition, a factual finding that Peru did not deprive Claimant of its investment would require the dismissal of Claimant's other claims (e.g., claims under Treaty Article 805), even if such claims do not require a showing of deprivation. This is so because a finding that Peru did not deprive Claimant of its investment would mean, as discussed above, that the Tribunal would lack jurisdiction.

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[251] *See* Rejoinder, ¶¶466,474; D1-272:-27310–03.

[252] Counter-Memorial, ¶354; Rejoinder, ¶448.

[253] Counter-Memorial, ¶¶379–381; Rejoinder, ¶469.

[254] Counter-Memorial, ¶¶683–691; Rejoinder, ¶763.

159. In sum, a finding that Peru did not deprive Claimant of its investment would lead to the dismissal of all of Claimant's claims.[255]

### C. Claimant's fact witnesses are not credible

160. Claimant bears the burden of proving the facts necessary to support its claims,[256] but has failed to do so, including through witness testimony. The Hearing confirmed that the witnesses on whom Claimant relies are not credible.

#### *1. Mr. Castañeda is not a credible witness*

161. Mr. Castañeda began work as Invicta's General Manager in early 2013 but sought to conceal why he "left [Invicta] at the end of October 2018."[257] At the Hearing it was revealed that he was fired because he had "repeated the unauthorized use of Company funds" for which he had been previously "reprimanded…in April 2015."[258] In October 2018, Mr. Castañeda was terminated as Invicta's General Manager.[259]

162. Notwithstanding this termination, Mr. Castañeda continued to serve as "the legal representative of the company until early 2019."[260] This was another fact which Mr. Castañeda did not disclose to this Tribunal—and which demonstrates further that Claimant lacked a competent and capable team on the ground to develop the Project, and instead relied on an individual who had been dismissed for a serious offense.

163. Mr. Castañeda describes his responsibilities as including "overseeing all aspects of [the Invicta Mine's] development works, including securing permits."[261] In his First Witness Statement, Mr. Castañeda asserted that "two [permits] were outstanding"[262] in October 2018. However, Mr. Castañeda has since admitted that Claimant also

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[255] D1-272-273:10–03.

[256] **RLA-0086**, ¶162.

[257] Castañeda 1, ¶¶6,9.

[258] **AC-0011**, p.4; *see also* D2-391:11–399:5.

[259] **MI-0007**, p.1; *see also* D2-399:6–400:9.

[260] D2-401:11-12; *see also* D2-555:7–556:15.

[261] Castañeda 1, ¶8.

[262] Castañeda 1, ¶21.

needed to secure environmental certification of its water treatment system, among other requirements.[263]

164. With respect to that requirement, he claimed that "[i]n [his] experience, even accounting for some delay, [Invicta] should have been able to obtain this certification in one month, approximately."[264] But he provided no legal basis for such proposition. Instead, he wrongly relied on Invicta's First and Second ITS, claiming that both documents were approved "in less than a month."[265] However, the evidence demonstrates that Claimant's Second ITS took *five months* to be approved.[266] Further, Claimant's Third ITS was submitted in August 2018 and *rejected three months later*, in November 2018.[267]

165. When confronted with the above incontrovertible evidence undermining his original time estimate, Mr. Castañeda asserted that his opinion was based on advice from certain unnamed "environmental experts" and/or Mr. Kivari.[268] But none of those individuals are witnesses in this arbitration, nor is their alleged advice included on the record, nor is there any legal authority to support the alleged advice.

166. Finally, when Mr. Castañeda's attention was drawn to the draft Amendment and Waiver No. 3 to the PPF Agreement—*an exhibit cited in Mr. Castañeda's own First Witness Statement* to support of the proposition that funding would have been available for the purchase of the Mallay Plant—Mr. Castañeda testified that he had "not seen" such document before and "didn't have access to it."[269] This casts doubt on

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[263] D2-507:6–12.

[264] Castañeda 2, ¶89.

[265] D2-516:15–16.

[266] **MD-0035**, p.1.

[267] **C-0226**, pp.1,50.

[268] D2-516:16. *See also* D5-1420:21–1422:08 (Ms. Dufour explained that "in effect an environmental consulting company draws up the record or the report, but **it is the mining title holder who is responsible for it** and for what's established, and is the one who is subject to inspection and oversight") (emphasis added).

[269] D2-546:12–16.

whether Mr. Castañeda reviewed or even authored the contents of his witness statements and the documents cited therein prior to signing such statements.

167. As a result of the above issues, little to no weight should be placed on Mr. Castañeda's testimony.

*2.* [redacted]

168. [redacted]

[270] D2-584:1–5.

[271] D2-596:10–11.

[272] D2-610:4–12.

[273] D2-621:2–623:13.

d. [redacted]

e.

f.

g.

[274] D2-630:17–21,644:20–650:2.

[275] D2-630:17–631:16. *See also* D2-644:20–650:2.

[276] D2-630:5–8.

[277] **C-0129**.

[278] **C-0124**.

[279] D2-594:2–7.

[280] D2-595:10–598:11.

[281] D2-625:1–626:12.

169. [redacted]

170. [redacted]

*3. Mr. Bravo is not a credible witness*

171. Mr. Bravo noted in his First Witness Statement that "[s]ince September 2019 [he has] been involved in providing consulting services relating to the mining industry, including on legal matters."[288] On cross-examination, Mr. Bravo admitted that he has been a *paid consultant for Claimant* since September 2019, including in regard to this specific arbitration.[289] Neither Mr. Bravo nor Claimant disclosed this fact, which calls into question Mr. Bravo's independence.

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[282] D2-655:2–657:1.

[283] D2-642:7–21.

[284] **C-0129**.

[285] D2-647:2–648:2.

[286] D2-648:8–21.

[287] D2-648:22–650:2.

[288] Bravo 1, ¶9.

[289] D3-778:13–779:15.

172. Mr. Bravo also failed to disclose the fact that he was granted 500,000 incentive stock options when he joined Invicta.[290] While Mr. Bravo did not exercise such options, they provided him with a personal monetary incentive for seeking hasty removal of the Parán Community through force, rather than by engaging in the more time-consuming but ultimately beneficial process of building strong community relations.

173. Mr. Bravo described many aspects of the Invicta Mine's development and regulatory status that are simply wrong and contradicted by the record. For example, after confirming that he was the only Invicta employee responsible for reviewing and securing permits for the Invicta Mine after his hiring,[291] Mr. Bravo showed his lack of expertise and the misguided approach adopted by Claimant concerning the critical issue of permitting. He stated that "[t]he only pending permit was the operating permit,"[292] but even Claimant admits that there were other permits that were outstanding at the time, including in respect of the water treatment.[293]

174. Mr. Bravo repeatedly contended that Claimant could have retrospectively regularized its alternative mine water treatment system, an argument that neither Claimant nor its witnesses had previously made.[294] However, as Ms. Dufour explained, the regularization theory advanced by Mr. Bravo is legally untenable under Peruvian law.[295]

175. Mr. Bravo also misrepresented the environmental impact of the Invicta Mine on the Parán Community. In his First Witness Statement, Mr. Bravo described telling the Parán Community that "there could not have been nor had there been any

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[290] **C-0264**, p.2; *see also* D3-788:5–14.

[291] D3-805:14–22.

[292] D3-806-807:20-03.

[293] *See, e.g.*, Reply, §3.3.2 (noting that "[t]he Project's water management system **was ready to be certified**"—i.e., not certified (emphasis added)).

[294] *See* D3-943:16–22,944:19–22,945:5–11.

[295] D5-1533:07–1534:10.

[environmental] damage and that there was no risk of water pollution."[296] However, an OEFA Resolution from September 2018 had concluded that:

a. the water surrounding the Invicta Mine had 3925.6% over the maximum permissible limit ("**MPL**") of total cadmium; 811.2% over the MPL of total copper; and 1122.6% over the MPL of total zinc;[297]

b. "[t]he excess of the MPLs…may cause the vegetation and fauna in contact with this flow to be affected;"[298] and

c. "[c]admium is also one of the major toxic agents associated with environmental and industrial pollution."[299]

176. OEFA required that Invicta take a "corrective measure" and submit the request for environmental certification of the Invicta Mine's water system.[300] Claimant never submitted that request for certification or complied with OEFA's corrective measure.

177. Mr. Bravo also contended that Claimant appealed the September 2018 OEFA resolution, claiming that "it was resolved after we were not in possession of the mine."[301] This is incorrect—no appeal to this resolution was ever submitted.[302]

178. Finally, Mr. Bravo's testimony regarding the 26 February 2019 Agreement contradicts contemporaneous evidence of his understanding of that Agreement. Documents from early 2019 establish that Mr. Bravo understood that the terms of that Agreement provided that:

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[296] Bravo 1, ¶¶24–25.

[297] **R-0074**, ¶17; *see also* D3-926:13–929:22.

[298] **R-0074**, ¶46.

[299] **R-0074**, ¶47. *See also* **C-0408**; D3-913:8–917:2 (Mr. Retuerto explained during the Hearing that the ANA directed Invicta to remove solid waste that was at risk of flowing into Parán Community water sources); D5-1540:2–1545:21 (Ms. Dufour explained during the Hearing that such environmental impacts could be expected to negatively impact Claimant's relationship with the Parán Community).

[300] **R-0074**, p.18.

[301] D3-930:11–17,938-939:12–2.

[302] **MD-0039**.

a. the Parán Community would grant access to the Invicta Mine through the *Parán* access road—not the Lacsanga access road;[303] and

b. the topographic survey was intended to evaluate the Parán access road for potential improvements, not to judge whether there was environmental damage to Parán territory.[304]

179. For all of these reasons, the Tribunal should place little or no weight on Mr. Bravo's testimony.

### D. Quantum issues

180. To be entitled to compensation, Claimant must establish a *causal link* between the alleged breach by Peru and Claimant's alleged losses.[305] However, Claimant has failed to do so. Peru on the other hand has demonstrated that it did not cause any of Claimant's alleged losses.[306] The Tribunal therefore should reject Claimant's damages claim.

181. Peru has demonstrated that Claimant's own conduct contributed to its alleged losses, and that Claimant's *contributory fault* precludes it from any damages award.[307] Claimant never addressed contributory fault at the Hearing. The Tribunal therefore should not award Claimant any damages on contributory fault grounds.

182. Even if quantum were relevant (*quod non*), Peru has shown that quantum analysis also precludes Claimant from being awarded any damages.[308] Peru reiterates in full its submissions on quantum.

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[303] *Compare* Bravo 1, ¶45 *with* **C-0200**, p.2; **C-0182**, p.1; **C-0619**, pp.16–17,21; **R-0171**; **AC-0006**, p.3.

[304] *Compare* Bravo 1, ¶60 *with* **C-0200**, ¶4 (which includes neither the reference to OEFA, Peru's environmental agency, nor the need to assess certain negative impacts on the community territory—references that were included and removed from a previous draft agreement (**C-0199**)); **C-0354**.

[305] Rejoinder, §V.A.1.

[306] D1-342:9–348:5.

[307] Rejoinder, §V.B; D1-348:9–349:8.

[308] Rejoinder, §V.D.

183. The Hearing confirmed that the arguments and calculations by Claimant and its experts at Accuracy are tainted by flawed assumptions and errors. Among other defects, Claimant's damages calculations: (i) fail to account for the "fundamental flaws" identified by AlixPartners; (ii) ignore PLI Huaura's incentives to enforce its contractual rights to seize Claimant's investment; (iii) fail to model fair market value ("**FMV**"), despite purporting to do so; (iv) fail to account for the USD 13.4 million residual value of the investment near the Valuation Date; (v) grossly inflate sunk costs by adding 12.0% annual interest to them; and (vi) apply an excessive pre-award interest rate. The damages figures that Claimant and Accuracy submitted therefore cannot be the basis for a damages award, which instead should be nil.

*1. Claimant is not entitled to the damages it seeks from Peru*

184. Much of the testimony on quantum during the Hearing centered on whether Accuracy's damages calculations accounted for the four "fundamental flaws" AlixPartners identified in Accuracy's reports. The testimony confirmed that Accuracy purportedly accounted for the fundamental flaws only through (i) Accuracy's discount rate, and (ii) Accuracy's three-month ramp-up period.[309] However, these two aspects of Accuracy's calculations do not address or correct the flaws identified by AlixPartners.

185. *First*, Accuracy's discount rate did not account for the specific risks and problems faced by Claimant's investment. Rather, Accuracy's discount rate merely reflects the *average* risk of owning equity in an *average* mining company in the precious metals sector in Peru, at a pre-production stage with a feasibility study.[310] It does not reflect the *actual* risks and *specific* problems with the Invicta Mine.[311] Claimant did not

[309] *See, e.g.*, D6–1593:8–11,1604:8–1605:21,1639:10–1640:10.

[310] D6–1591:13–18,1609:1–1611:6,1693:10–1694:2,1695:12–17,1696:2–1699:14,1700:5–11,1701:21–1702:12,1780:3–7.

[311] D6-1658:13–1659:6.

demonstrate that the Invicta Mine was subject only to the average risks and problems of an average business in its sector in Peru with a feasibility study.[312]

186. *Second*, the three-month ramp-up period that Accuracy adopted, based on Micon's opinion, likewise fails to account for the *actual* risks and problems with Claimant's investment. The three-month ramp-up period does not even purport to account for Claimant's lack of a social license to operate the mine. Rather, Micon proposed modeling a three-month ramp-up period solely to provide Claimant with a period to resolve the latter's problems with third-party ore processors.[313]

187. Micon's proposed solution of providing a three-month ramp-up period is unsupported and in any event ineffective. As Peru documented with contemporary evidence,[314] the ore processors that Claimant sought as partners all had severe deficiencies. This left Claimant incapable of generating revenue to service its debt obligations.

188. Claimant's experts at Micon offered no explanation as to how Claimant might secure reliable third-party ore processing. Both Micon and Claimant utterly failed to identify: (i) *which ore processor* (if any) would be able to adequately serve Claimant; (ii) *which problems* with the processor would be resolved; (iii) *how* some combination of capital goods and technical expertise would overcome those problems; (iv) *where* those capital goods and/or technical expertise would be sourced; (v) *how* they would be acquired and deployed within three months; or (vi) at *what cost* each of these steps would be completed.[315]

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[312] Accuracy's use of a pre-production premium associated with a feasibility study is incongruent with the fact that Claimant's mine never underwent a feasibility study level of scientific examination, nor any equivalent scientific examination. *Cf.* D6–1640:3–1641:5,1704:19–1708:15,1711:11–1717:14.

[313] Micon, ¶154.

[314] Rejoinder, §II.D.3.

[315] *Compare* D6-1583:12–19 *with* Micon, ¶¶86–88.

189. As Peru has explained, Micon's conjecture—adopted by Accuracy—that Claimant would secure adequate ore processing within three months is not credible and is belied by the facts.[316]

190. A realistic accounting of Claimant's risks and problems would have entailed a much longer period of zero or near-zero production, which is fatal to Claimant's case: Claimant had no margin of error under the PPF Agreement, and PLI Huaura was ready and able to foreclose on the investment—as it in fact did.

191. Although Claimant argues that PLI Huaura had no incentive to foreclose because the PPF Agreement had a so-called "lucrative gold-streaming"[317] provision, Accuracy's testimony confirmed that PLI could have retained a comparable upside participation after re-selling the investment.[318] Transferring the mine to a new owner capable of resolving the dispute with the Parán Community and attendant delays also would have increased the value of PLI's upside participation.[319] Claimant's suggestion that the prospect of PLI seizing Claimant's investment "suffers from a lack of commercial sense"[320] is therefore wrong.

192. Accuracy's testimony at the Hearing also exposed two major defects in basic parameters of Accuracy's damages model. *First*, Accuracy failed to measure the FMV of the investment, despite purporting to do so. Measuring FMV of the investment would have required modeling a sale of the investment as a freestanding asset. Instead, Accuracy modeled a sale of the investment *bundled with the PPF Agreement*.[321] When Peru asked Accuracy whether they had accounted for the smaller pool of investors who would not only buy Claimant's investment but also would buy it while forced to enter into the PPF Agreement, Accuracy offered no examples of any such

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[316] Rejoinder, §II.D.3.

[317] D1-121:1–99.

[318] D6-1633:2–14. Claimant's allegation that PLI sold the PPF Agreement for "pennies on the dollar" is also unsubstantiated. *See* D1-121:5–7; D6-1630:2–3.

[319] *See* D6–1632:12–1633:6.

[320] D1–120:17–121:9.

[321] D6-1649:3–21–1650:4,1779:17–19.

accounting.[322] Accuracy's valuation is therefore flawed and not a reliable estimate of the investment's FMV.

193. *Second*, Accuracy's testimony contradicted the assumption in its own damages model according to which the "actual value" of the investment at the Valuation Date was nil.[323] In their reports, Accuracy treated the actual value of the investment as nil by asserting that "the Actual Situation prior to foreclosure would account for both (i) the value of Claimant's shares in IMC; **and (ii) the value of Claimant's liabilities towards PLI**" (emphasis added).[324] However, Accuracy admitted on cross-examination that, under the FMV standard, the hypothetical buyer does not adjust its offer price depending on the indebtedness of the seller—such as "Claimant's liabilities towards PLI" in this case.[325] Accuracy's confirmation that a seller's debt is irrelevant to FMV also requires dismissal of Claimant's expropriation claims.[326]

194. Because the "actual value" of the investment near the Valuation Date was confirmed by independent experts to be USD 13.4 million, rather than nil, any damages award would need to be reduced by this amount.[327]

*2. Claimant's sunk costs calculation is defective*

195. Even under a sunk costs approach, Claimant would be entitled to no damages. As Accuracy confirmed,[328] an investment's value can decline below the value of its sunk costs—as in this case, due to Claimant's errors and poor judgment.

196. Nevertheless, if the Tribunal were to consider basing an award on sunk costs, Accuracy's use of sunk costs (as an alleged benchmark) suffers a major defect: Accuracy "brought forward" Claimant's sunk costs from the time of their occurrence

[322] D6-1612:21–1615:8.

[323] D6-1579:19–1580:1.

[324] Accuracy 2, ¶4.62(a).

[325] D6-1618:7–13.

[326] Rejoinder, §§IV.D.1,IV.D.2.b.(i).(b).

[327] **C-0625**, ¶1.7; D6-1666:5–13.

[328] D6–1637:6–11.

to the Valuation Date, by unjustifiably adding interest at the PPF Agreement's interest rate (absent upside participation) of 12.0%, rather than applying a commercially reasonable rate of UST+2.0% or SOFR+2.0%.[329]

*3. Claimant's proposed pre-award interest rate is inflated*

197. Claimant proposes a pre-award interest rate of LIBOR+4.0% or UST+5.0%.[330] However, Accuracy's testimony confirmed that Peru's proposed pre-award interest rate of UST+2%, LIBOR+2%, or SOFR+2% would be appropriate, as these are market-determined variable rates that respond to prevailing economic conditions.[331] Accuracy agreed that such economic conditions include changes to U.S. Federal Reserve interest rate policies, and Accuracy did not contest that those policies are aimed at fostering low and stable inflation.[332]

198. Any interest rate that is engineered to require Peru to compensate Claimant for U.S. inflation based on hindsight would not be a "commercially reasonable rate."[333]

## V. REQUEST FOR RELIEF

199. For the reasons set forth in this Post-hearing Submission, at the Hearing, and in Peru's prior written submissions, the Republic of Peru respectfully requests that the Tribunal:

a. dismiss all of Claimant's claims for lack of jurisdiction;

b. dismiss for lack of merit any and all claims in respect of which the Tribunal may find that it has jurisdiction;

c. reject Claimant's request for compensation, should the Tribunal find that it has jurisdiction and that there is merit to one or more of Claimant's claims; and

[329] AlixPartners 2, ¶¶219–221.

[330] D1-166:12–20.

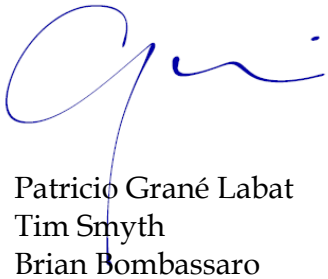
[331] D6-1616:5–1617:14.

[332] D6-1617:15–1618:3.

[333] D6-1756:9–1757:9.

d. order Claimant to pay all costs of the arbitration, as well as the totality of the legal fees and expenses incurred by Peru in the present proceeding, up to the date of the final award, plus compounded annual interest on such amounts until the date of effective payment, calculated on the basis of a reasonable interest rate to be determined by the Tribunal.

Respectfully submitted,



Vanessa Del Carmen Rivas Plata Saldarriaga
Jhans Panihuara Aragón
**Special Commission on International Investment Disputes, Republic of Peru**

Patricio Grané Labat
Tim Smyth
Brian Bombassaro
Ana Pirnia
Bailey Roe
Andres Alvarez Calderón*
Laura Arboleda

**Arnold & Porter Kaye Scholer LLP**

*Admitted in Peru only; not admitted to the practice of law in New York.