International Centre for Settlement of Investment Disputes
(ICSID)

LUPAKA GOLD CORP.,
Claimant,

v.

REPUBLIC OF PERU,
Respondent.

ICSID Case No. ARB/20/46

Republic of Peru's Skeleton Argument

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13 March 2023

Arnold & Porter

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I. INTRODUCTION

1. Claimant alleges that Peru breached international law by declining to use force to resolve Claimant's social conflict with a local rural community—the Parán Community—that was opposing Claimant's mining project, including through a road blockade.[1] Claimant's claim fails, for at least six principal reasons.

2. *First,* **Claimant itself is to blame for the social conflict that led to the loss of its investment**. The evidence shows that the breakdown of Claimant's relationship with the Parán Community was entirely of Claimant's own making **(**Rej., § II.B). Claimant disregarded the critical importance of obtaining and maintaining the support of all local communities in the area of influence of its mine (i.e., social license). Claimant first delayed engaging with the Parán Community, then marginalized such community before ultimately abandoning any attempt to reach an agreement, and instead resorted to the use of force.

3. Having failed to secure the community's support, and facing local opposition to the mining project, Claimant ill-advisedly decided to take matters into its own hands. It unleashed War Dogs, a private security firm, to expel the opposition by brute force **(**Rej., § II.B.10). Such action triggered a violent confrontation, and ended any prospect of reaching an amicable resolution in time for Claimant to comply with its financial obligations to its creditor, PLI Huaura, and to avoid forfeiting its shares in the local mining company, Invicta, pursuant to the Pledge Agreement **(**Rej., § II.D).

4. *Second*, **Peru behaved diligently, reasonably, and in accordance with its obligations under domestic and international law**. Peru made every effort to mediate a lasting resolution to Claimant's social conflict with the Parán Community and allow Claimant to continue its mining activities **(**Rej., § II.C). Peru understood that dialogue was the only realistic means of arriving at such a solution, and thus refrained from using force, as force would only have aggravated the situation. Claimant, by contrast, stubbornly demanded that the State quash the Parán Community's opposition by force. Claimant insisted on the use of force rather than dialogue because it realized that it had painted itself into a corner from which it could not extricate itself quickly enough to meet its financial

[1] Unless otherwise indicated, the abbreviations and defined terms used in the present Pre-hearing Skeleton Argument are defined in Peru's previous written submissions: Counter-Memorial, 24 March 2022 ("**C-M**"); Rejoinder, 25 January 2023 ("**Rej.**").

obligations to PLI Huaura—i.e., in time to begin ore extraction, milling, and delivery (Rej., § II.D).

5. *Third*, **the actions of the Parán Community are not attributable to Peru under international law**. Knowing that the conduct of Peru was at all times consistent with its obligations under international law, Claimant argues that the actions of members of the Parán Community were attributable to Peru. Claimant's position is flatly contradicted by Peruvian law and international law. The Parán Community is not a State organ for purposes of ILC Article 4, or an entity empowered to exercise elements of governmental authority for purposes of ILC Article 5. In addition, none of the actions of the Parán Community of which Claimant complains—which included acts of violence and the obstruction of a public road outside the Community's territory—were carried out in an official capacity, either actually or ostensibly (Rej., § IV.A).

6. *Fourth*, **Claimant has failed to show any causal link between actions or omissions by Peru and the loss of its investment**. Claimant incorrectly assumes that a forcible removal of the Parán Community by the PNP would have somehow ended the conflict, and that there would be no similar future disruptions of Claimant's activities by community protesters. Moreover, and in any event, Claimant would not have been able to obtain the key permits it needed to reach the exploitation stage in time to fulfil its obligations to its creditor, PLI Huaura, under the PPF Agreement (Rej., § V.A).

7. *Fifth*, **Claimant raises irrelevant issues in an attempt to distract the Tribunal from the failings in its case**. Such red herrings include a baseless conspiracy theory that the Parán Community staged the June 2018 Protest and Access Road Protest to protect a community-wide illegal marijuana business. No such activity or motive has been proven (Rej., § II.E).

8. *Sixth and finally*, **Claimant's damages claim is riddled with deficiencies**. Claimant's counterfactual scenario fails to account for the ongoing effects of the social conflict, falsely assuming that police intervention would have resolved such conflict definitively. Claimant's damages model also ignores financing risks, and incorrectly assumes that a hypothetical lender to Claimant would have ignored the heightened risks associated with the Invicta Project, such as failure to obtain and maintain community acceptance; adequate project execution; and regulatory risks (Rej., § V).

9. In the remainder of this Pre-Hearing Skeleton Argument, pursuant to paragraph 21.7 of Procedural Order No. 1, Peru will: (i) summarize the *witness and expert testimony*

submitted by Peru in support of its case (**Section II**); (ii) list the *key facts* that are in dispute, and those that are not (**Section III)**; (iii) address the Parties' disputes as to the *legal standards* the Tribunal is to apply, and the proper application thereof (**Section IV**); and (iv) address the *damages* issues in dispute (**Section V**).

II. PERU'S FACT WITNESS AND EXPERT EVIDENCE

10. Peru has submitted extensive witness testimony and independent expert evidence to demonstrate that its handling of the social conflict between Claimant and the Parán Community was in conformity with the Treaty. Specifically, Peru has submitted:

    a. The witness statement of **Mr. Nilton León**, a Social Specialist in the OGGS who facilitated dialogue and mediation efforts between Claimant and the Parán Community starting in July 2018 and throughout the conflict. Mr. León's testimony demonstrates that (i) Claimant had a deficient community relations team and negotiation strategy (León 1, ¶¶ 57–79; León 2, ¶¶ 5–18); (ii) the OGGS responded adequately to resolve the differences in interpretation of the 26 February 2019 Agreement (a key agreement reached between Claimant and the Parán Community) (León 1, ¶¶ 37–72; León 2, ¶¶ 19–36); and (iii) Claimant aggravated the conflict by insisting on the use of force to quell the protests (León 1, ¶¶ 80–84; León 2, ¶¶ 50–57).

    b. The witness statement of **Mr. Fernando Trigoso**, who held various functions in the OGGS starting from April 2012 through the time period relevant to the facts at issue. Mr. Trigoso's testimony demonstrates that (i) the OGGS responded appropriately in mediating the social conflict (Trigoso 1, ¶¶ 17–23, 31–45; Trigoso 2, ¶¶ 18–40); (ii) mining companies are expected to reach agreement and maintain harmonious relations with the communities within a project's area of influence (Trigoso 1, ¶¶ 24–30; Trigoso 2 ¶¶ 5–17); and (iii) Claimant's community relations and negotiation strategy was flawed (Trigoso 1, ¶¶46–49; Trigoso 2, ¶¶43–53).

    c. A witness statement by **Mr. Miguel Incháustegui**, Vice Minister of Mines within the MINEM from April 2018 through May 2019. Mr. Incháustegui's testimony explains (i) the role of the MINEM and OGGS in mediating the social conflict (Incháustegui 1, ¶¶ 14–31); (ii) the evolution of Peru's institutional response to the resolution of social conflicts in the mining sector (Incháustegui 1, ¶¶ 32–45; Incháustegui 2, ¶¶ 12–19); and (iii) the expectation that mining companies will

obtain a social license to operate, to minimize the risk of social conflict (Incháustegui 2, ¶¶ 5–11).

d. The witness statement of **Mr. Esteban Saavedra Mendoza**, who served as Vice Minister of Internal Order of the Ministry of the Interior from October 2018 and throughout the relevant time period. Mr. Saavedra's testimony establishes that (i) the PNP is an autonomous body under the MININTER (Saavedra, ¶ 25(d)); (ii) the use of force is a measure of last resort that can aggravate a social conflict (Saavedra, ¶ 28); and (iii) the PNP sometimes devises operational plans that it opts not to execute in the end, depending on the prevailing circumstances (Saavedra, ¶¶ 30–34).

e. The witness statement of **Mr. Soymán Román Retuerto**, former Subprefect of the Leoncio Prado region, who informed the relevant authorities about concerns communicated to him by the Parán Community regarding operations at the Invicta Mine, and who requested that the State intervene to commence a Dialogue Table mediation process. Mr. Retuerto's witness statement demonstrates that (i) Claimant's accusation that he participated and led the Parán Community's opposition of Claimant's Project is downright false (Retuerto, ¶¶ 8–22); (ii) Claimant's community relations had serious shortcomings (Retuerto, ¶¶ 23–30); and (iii) Claimant aggravated the social conflict through its actions (Retuerto, ¶ 34).

f. The independent expert report of **Mr. Daniel Vela**, one of the preeminent practitioners in the field of rural communities law and the management of social conflicts by operators in the Peruvian extractive industries. Mr. Vela's expert opinion addresses (i) the history and legal status of rural communities in Peru (Vela, § II); (ii) the legal framework and good practices applicable to the relationship of extractive industry operators with rural and indigenous communities (Vela, § III.A); and (iii) the prevention and management of social conflicts in the mining sector. Mr. Vela is the only independent legal expert in rural communities law in this arbitration.

g. The independent expert report of **Professor Ivan Meini**, a Peruvian criminal law expert. Prof. Meini provides an expert opinion on the rules, principles and authorities under Peruvian criminal law that are relevant to the present dispute. In particular, Prof. Meini (i) analyzes from a criminal law perspective the implications of the events that occurred between 2018 and 2019 in connection with

the Invicta Project; and (ii) provides his expert opinion on the actions taken by the Peruvian authorities to prevent and manage the social conflict between Claimant and the Parán Community (Meini, § IV-VI). Mr. Meini is the only independent legal expert in Peruvian criminal law in this arbitration.

h. The independent expert report of **Ms. Miyanou Dufour**, a Peruvian legal expert with extensive experience in mining law, the development of mining projects, and regulatory and environmental compliance. In her expert report, Ms. Dufour (i) analyzes the relevant laws and regulations governing Peru's mining sector (Dufour, § II.A); (ii) explains the need for mining operators to obtain a social license to operate (Dufour, § III); and (iii) identifies the various other requirements that Claimant still needed to fulfill, and permits that it needed to obtain, for the Invicta Project to reach the exploitation stage and be able to process ore into marketable minerals (Dufour, § II.B). Ms. Dufour is the only independent legal expert in Peruvian mining law in this arbitration.

i. Two independent expert reports of **AlixPartners**, a financial advisory and global consulting firm, regarding the quantum issues in relation to Claimant's claim. AlixPartners concludes that Claimant is not entitled to any damages at all (let alone the USD 41 million it claims) because (i) Peru did not cause Claimant's loss; and (ii) Claimant's damages case contains numerous flawed assumptions, calculations, technical defects.

III. DISPUTED AND UNDISPUTED FACTUAL ISSUES

11. Most of the key facts giving rise to this arbitration are undisputed. Rather, the dispute centers on the *characterization* of those facts by each Party. Below, Peru briefly summarizes (i) the relevant measures in this case; (ii) the key undisputed facts; and (iii) the few key facts that *are* disputed between the Parties.

A. Summary of the measures

12. Claimant alleges breaches of: Article 805.1 of the FTA, which requires that each party "accord to covered investments…**fair and equitable treatment** and **full protection and security**" (emphasis added); and Article 812 of the FTA, which states that "[n]either Party may nationalize or **expropriate** a covered investment either directly, or indirectly . . ." (emphasis added) (**CLA-1**).

13. *First*, Claimant's treaty claim centers on one main action, *taken by the Parán Community*, that affected Claimant's operations at the Invicta Mine: the establishment of a civilian blockade on 14 October 2018 ("**Access Road Protest**"). Such blockade restricted Claimant's access to the Invicta Mine. Claimant also makes reference to certain other actions, also of the Parán Community, such as: (i) a protest at the Invicta Mine on 19 June 2018 ("**June 2018 Protest**"); (ii) a protest at the Invicta Mine on 20 March 2019; and (iii) actions on 14 May 2019 in response to Claimant's unilateral attempt to forcefully take back control of Invicta Mine from the Parán Community protesters on that same day.

14. Claimant (wrongly) argues that the actions of the Parán Community are attributable to Peru under international law, and that such rural community's opposition to the Invicta Project violated Peru's obligations not to harm Claimant's investment (C-M, § IV.A; Rej., § IV.A).

15. *Second*, Claimant impugns Peru's reasonable decision *not* to forcibly remove, arrest, and prosecute the hundreds of Parán Community members who participated in the Access Road Protest that commenced in October 2018. Instead of executing a PNP operational plan to forcefully remove the local protesters, Peru encouraged, facilitated and supervised a mediation and a formal dialogue between Claimant and the Parán Community, while actively entreating the latter to discontinue its protest and refrain from forceful opposition to the Invicta Project (C-M, ¶ 383; Rej., §§ II.C, IV).

B. Undisputed facts

16. **Violent social conflicts between rural communities and mining companies are common in Peru.** Mining in Peru has often given rise to social conflict between mining companies and local communities, including after Peru opened its mining sector to foreign investment in the 1990s (C-M, § II.A.1). This history led to the development of State practices, domestic regulations, and industry standards that call for community engagement and collaboration, and prioritize dialogue over use of force (C-M, § II.A.2; Rej., § II.C.2; Incháustegui 2, ¶¶ 12–19). Claimant does not deny the pervasive history of social conflict in Peru's extractive industries, but rather characterizes this fact as irrelevant (Reply, § 9.3.5.1). However, Claimant expressly concedes that "[i]t is Respondent's responsibility to decide how to strike the balance between interests of local communities and investors in the mining sector" (Reply, ¶ 686). In the instant case, Peru

struck that balance by following international, domestic, and industry best practices in an effort to help the parties secure a lasting solution to the conflict, and by insisting that dialogue was the most productive means of achieving that end (C-M, § II.B.2; Rej., § II.C.2, ¶ 613).

17. **The Parán Community was at risk of being adversely impacted by the Invicta mine**. The Parán Community's villages and agricultural zones were in the area of environmental impact of the Invicta Mine, and therefore stood to be affected by Claimant's activities if not properly managed (Rej., § II.B.4; León 2, ¶¶ 17, 61; Retuerto, § IV).

18. **Invicta had previously breached its social commitments to the Rural Communities.** The relevant Peruvian authorities fined Claimant for not complying with various social obligations, including its obligations to: (i) implement a program to hire local personnel; (ii) support the Rural Communities' health and nutrition campaigns; (iii) assist the Rural Communities' educational and scholarship programs; and (iv) assist with sustainable development programs through a series of workshops and partnerships with the Rural Communities (Rej., § II.B.5–6; Retuerto § III).

19. **The dialogue process encouraged and facilitated by Peru yielded the 26 February 2019 Agreement.** Peru's tireless mediation efforts between Claimant and the Parán Community brokered the 26 February 2019 Agreement—a key agreement that laid the foundation for a potential long-term resolution to the conflict (C-M, ¶¶ 261–262; Rej., § II.C.3.d).

20. **Claimant had no community relations team in the period following the Access Road Protest.** Just days after the Parán Community commenced the Access Road Protest on 14 October 2018, Claimant allowed its contract with its SSS community relations team—to whom it had outsourced its community relations activities—to expire (C-M, ¶ 520; Rej., ¶¶ 155–156; León 2, § II.A–B; Trigoso 2, § IV.A). Claimant concedes that it thus had no external community relations team from November 2018 through the critical period of State-mediated dialogue and the loss of its investment ([redacted]).

21. **Claimant's use of War Dogs led to a violent confrontation and materially damaged the prospects of an amicable resolution to the social conflict.** Peru explained that Claimant mishandled its social conflict with the Parán Community when it decided to deploy the armed private security group called "War Dogs" to seize control of the Invicta Mine in May 2019 (C-M, § II.F.1.f). While Claimant seeks to downplay the role and actions of War

Dogs, it does not deny that a violent confrontation between War Dogs and the Parán Community ensued, or that this resulted in the tragic loss of human life (Reply, ¶ 344). Moreover, although Claimant insists that War Dogs entered the Site peacefully and did not shoot their guns against the Parán Community, Peru demonstrated through evidence that the armed War Dogs engaged in hostilities with the protesters and forcibly removed a group of them (Rej., ¶278; Retuerto § V).

22. **Claimant failed to meet its repayment obligations under the PPF Agreement, which led its creditor, PLI Huaura, to enforce its security over Claimant's shares in Invicta, resulting in the loss of Claimant's investment**. It is not in dispute that Claimant forfeited its shares in Invicta pursuant to the Pledge Agreement, due to its default on its obligations to PLI Huaura under the PPF Agreement. Nor is it in dispute that Claimant argued at the time that PLI Huaura's actions in enforcing its security over the shares—which are plainly not attributable to Peru—were unlawful (Rej., ¶¶ 451, 464; **Ex. R-230**, p.3)**.**

23. **At the time that Claimant lost its investment, it still lacked the required permits to commence exploitation of the Invicta mine.** At the time of the alleged measures, Claimant had not yet fulfilled key regulatory requirements, including mandatory procedures, inspections, and permits, before it could begin commercial ore extraction (Rej., § II.D.1). Claimant does not deny that it had not yet obtained the following permits: (i) authorization to purchase and store hydrocarbons at the Invicta Mine; (ii) approval of modifications to the Invicta Mine's EIA; (iii) MINEM authorization to begin commercial exploitation of the Invicta Mine; and (iv) licenses to use water from sources not contemplated in Claimant's 2009 EIA (Rej., ¶ 310; Dufour, ¶¶ 64–66, 83–87, 138, 247).

C. Disputed factual issues

24. Peru has presented evidence demonstrating that Claimant's claims in this arbitration distort a number of key facts and issues relevant to the merits of its case. Peru summarizes below the main facts disputed by the Parties, and explains why Claimant's characterization thereof is erroneous.

1. Claimant lacked an adequate community relations strategy

25. Claimant's responsibility for the social conflict with the Parán Community was inexcusable but unsurprising, given Claimant's brazen dismissal of the need to obtain a social license and its lack of an adequate community relations strategy (C-M, § II.D; Rej., § II.A). Claimant argues that its CR Team had a track record of effective engagement with local communities (Reply, § 4.1). However, Claimant's actions with respect to all three

Rural Communities belie its claim that it had a "qualified and experienced" CR Team (Reply, ¶ 122).

26. *First*, Claimant's CR Strategy intentionally de-prioritized and delayed engaging with the Parán Community on the Project for four years after Claimant acquired the Project, and selectively favored the Lacsanga and Santo Domingo Communities by offering agreements to those two communities (Rej., § II.B.2). Claimant's actions wilfully ignored the following key facts: (i) the expectations that the Parán Community had formed, including on the basis of prior agreements with Invicta; (ii) the Parán Community had been at the center of the Invicta Project's development plans under prior ownership; and (iii) the Parán Community claimed ownership of the land within the Invicta Mine site (Rej., § II.A.2).

27. *Second*, Claimant ill-advisedly disregarded the Parán Community's environmental concerns. The Parán Community was anxious about the adverse impact that water contamination linked to the Invicta Project could have on their agriculture—their main source of livelihood—given the Parán Community's proximity to the Invicta Mine (Rej., § II.B.4; Retuerto, §§ II.A, III, IV). In this arbitration, Claimant continues to dismiss the legitimate concerns of the Parán Community, arguing that such concerns are unfounded and opportunistic because, according to Claimant, the Invicta Mine was not technically located in the territory of the Parán Community (Reply, § 5, ¶ 213). However, Claimant's argument ignores the undisputed fact that the Parán Community's villages and agricultural zones were within the area of environmental impact of the Invicta Mine (Rej., § II.A.2).

28. *Third*, Claimant failed to satisfy monetary and social commitments to the Rural Communities, and in particular to the Parán Community (Rej., § II.B.5–6). With respect to the monetary obligations, Claimant delayed making payments to the Parán Community as compensation for Invicta's breach of commitments, and failed to pay certain required late fees to the Community (Rej., § II.B.5).

29. *Fourth*, Claimant seemingly had no real community relations strategy—or even a specialized team—shortly after the 14 October 2018 Access Road Protest started (León 2, § II.A–B; Trigoso 2, § IV.A). Instead, from that point on its strategy centered exclusively on lobbying Peruvian authorities to forcefully remove the Parán Community protesters. When Peru did not do as Claimant demanded, the latter unilaterally opted to unleash the

War Dogs private security group to seize control of the Site on 14 May 2018 (Rej., § II.B.9–10).

2. Claimant ignores the relevance of social licensing requirements

30. Claimant brazenly dismisses as irrelevant the critical and internationally recognized obligation of mining companies to obtain a social license to operate (i.e., social acceptance by a community of a mining project) (Reply, § 3.2.2; Rej., § II.A.1; Dufour, § III).

31. Claimant also ignores that the social license concept is reflected in the explicit terms and stated objectives of the Peruvian mining law framework, and that Claimant was therefore responsible for managing its social relationship with local communities—not Peru (Rej., § II.A.1; Trigoso 2, § II; Incháustegui 2, § II). Under Peruvian law, titleholders to a mining concession are required to conform with a number of social commitments and obligations vis-à-vis local communities located within the "area of direct social impact" (Rej., ¶ 60; Dufour, § III.B). Failings in this regard triggered formal investigations which led to findings of violations by Invicta, and ultimately resulted in Claimant's failure to obtain the local communities' acceptance (Rej., ¶ 63, § II.B.6; Dufour, § III.D).

32. Claimant wrongly alleges that its legal obligation to reach agreement with the Rural Communities was limited only to obtaining surface right agreements, and only with the Rural Communities of Lacsanga and Santo Domingo (Reply, § 3.2.2; Rej., § II.A.1).

*3. Contrary to what Claimant argues, the use of force was **not** required under Peruvian law, and it would **not** have resolved the social conflict*

33. Claimant's initial thesis was that Peru took no action to protect Claimant's investment (Mem., ¶¶ 161, 170, 190–191; Rej., ¶ 169). It then downgraded its argument to the accusation that Peru should have used force against the Parán Community to stop opposition to the Project (Reply, §§ 6.2.2, 6.4–6.5, 6.7). Claimant's argument fails for several reasons. *First*, Peruvian law in fact did *not* obligate Peru to use force against the Parán Community members. Rather, Peruvian law *authorizes* force only in certain specific circumstances, and when there are no other means to achieve the relevant objective (Rej., § II.C.1; **Ex. IMM-39**, p.51). *Second*, Peru took reasonable and proactive steps to facilitate a resolution to the social conflict, in line with prevailing State practices and applicable industry standards, which prioritize dialogue over the use of force (Rej., §§ II.C.2–3). Peru's policy approach for resolving social conflict reflects both industry-wide and country-specific experience of social conflicts within the extractive sector, and those experiences confirm that Peru was justified in not using force against the Parán Community (Rej., §§ II.C.4, IV.B.3; Incháustegui 2, § III). Although Claimant lobbied

incessantly for the use of force from the start of the Access Road Protest, Peru's prioritization of dialogue and appropriate caution in eschewing the use of force—except when there existed a low probability of violence or harm to life—created opportunities for Claimant to rehabilitate its relationship with the Parán Community over the course of the conflict (Rej., § II.C.3). For example, Peru executed a peaceful police operation in September 2018 designed to facilitate a pacific solution and avoid violent confrontation (Rej., ¶¶ 224–225); and, to promote the mediated and constructive dialogue that ultimately yielded the 26 February 2019 Agreement, Peru declined to execute any new operational law enforcement plans. (Rej., § II.C.3.d). Claimant squandered those opportunities.

34. Claimant also raises the argument that Peru acted arbitrarily in this case because it had used force in other social conflicts (Reply, ¶¶ 380-381). However, an objective analysis of the facts of the prior social conflicts identified by Claimant demonstrates that, far from supporting Claimant's thesis, those situations *confirm* that (i) Peru's consistent policy has been to facilitate constructive dialogue, and use force only as a last resort; and (ii) the use of force tends not to resolve social conflicts and, to the contrary, often aggravates them (Rej., § II.C.4; Incháustegui 2, § III). Claimant's own witnesses admit that forcible removal of the Parán Community protesters would have been short-lived, and that the risk of future protests would have persisted (C-M, ¶ 749; Castañeda 1, ¶ 74).

4. Claimant mischaracterizes the events surrounding the 26 February 2019 Agreement

35. Soon after Claimant and the Parán Community signed the 26 February 2019 Agreement, it became evident that the parties had different interpretations of their respective commitments thereunder (Rej., § II.C.3.e). Consequently, both assigned fault to the other for breaching the terms of the Agreement (Rej., ¶¶ 247–248).

36. The first disagreement concerned the access route to Invicta Mine. Claimant insisted the Parán Community had agreed to lift the Access Road Protest and thereby allow access via the Lacsanga Access Road; the Parán Community insisted that it had agreed only to guarantee Claimant's access to the Mine through the Parán Community's access path (Rej., § II.C.3.e). Claimant assigns blame to Peru for not enforcing Claimant's interpretation of the Agreement, by forcefully removing the Parán Community protesters

from the Lacsanga Access Road (Reply, § 6.6). However, Peru acted reasonably when it encouraged the parties to resolve their differences through dialogue (Rej., § II.C.3.e).

37. Claimant's position also ignores several key facts that support the reasonableness of the Parán Community's interpretation of the 26 February 2019 Agreement, including (i) the Parán Community's long-held expectation that a primary access path to the Mine would be through their territory, as had been agreed with Invicta's prior owners (Rej., ¶¶ 76, 91; **Ex. C-60**, **C-61**); and (ii) the Community's territorial claims to the surface lands on which Invicta Mine was located (lands that Invicta itself had previously recognized belonged wholly to the Parán Community) (Rej., II.A.2).

38. The second disagreement over the interpretation of the 26 February 2019 Agreement concerned the payment for a topographical survey. Specifically, Claimant refused to pay for the topographical survey envisaged under the aforementioned Agreement, purportedly due to a dispute with the Parán Community regarding the scope of such survey. Under Claimant's interpretation, the surveyor's purpose was to assess environmental damage to Parán Community lands (Reply, ¶¶ 323–324). Under the Parán Community's interpretation, the surveyor was to assess (i) whether Invicta Mine had already built infrastructure within Parán Community territory; and (ii) whether land conditions were suitable for future construction or improvements to the Parán Community's access road (Rej., ¶ 259). Claimant's position in relation to this disagreement similarly ignores the reasonableness of the Parán Community's interpretation, and the Community's long-held desire to enter into an agreement with Invicta for an access path through its territory. Also, importantly, Claimant's position ignores the function of a topographical surveyor, which does not involve assessing environmental damage, but rather the physical and geological characteristics of an area and its relevant boundaries (Rej., ¶¶ 262–263; León 2, ¶ 29; Trigoso 2, ¶ 51).

5. Claimant resorts to a conspiracy theory with respect to a Peruvian official's role in the conflict between Claimant and the Parán Community

39. Unable to advance genuine arguments, Claimant resorts to a baseless conspiracy theory, according to which a regional government official, Mr. Soymán Román Retuerto (who is a witness in this arbitration), himself incited and/or led the 19 June 2018 Protest (Reply, ¶ 264). Claimant relies on nothing more than hearsay provided by its own witness (and former employee of Invicta), [redacted]. However, the facts and Mr. Retuerto's witness testimony debunk Claimant's theory. In fact, far from leading any opposition by the Parán Community to the Project, Mr. Retuerto was considered *persona non grata* by that rural community due to his strong connection to the Santo Domingo

Community (of which he had previously served as President) (Rej., ¶ 215; Retuerto, ¶ 20). It was for that reason that Mr. Retuerto was asked on at least one occasion to leave mediated discussions between Claimant and the Parán Community (Retuerto, ¶ 21). Claimant also accuses Mr. Retuerto of engaging in a defamatory campaign against Invicta, basing its accusation on letters sent by Mr. Retuerto, in his capacity as Subprefect, to various Peruvian agencies (Rej., ¶ 218). However, a simple review of the letters in question reveals that Mr. Retuerto was merely dutifully and appropriately informing the relevant agencies of environmental concerns raised by the Parán Community, and of the need to initiate dialogue processes to avoid a social conflict (Rej., ¶ 218; Retuerto, ¶¶ 10–17).

6. Claimant falsely asserts that the Parán Community was negotiating in bad faith to protect illicit activities

40. Claimant accuses the entire Parán Community of opposing the Project for ulterior purposes; namely, (i) protecting an illicit marijuana business; and (ii) enabling future exploitation of the mine by the Community itself (Reply, ¶ 22). Both accusations are unfounded and opportunistic.

41. With regard to the marijuana cultivation, Claimant's accusation is reckless and speculative, as it is based merely on reports suggesting discrete incidents of cultivation of marijuana by specific individual actors in the region. Claimant accuses five such individuals of engaging in this illicit economy (Reply, ¶ 39; Rej., ¶ 409), and then purports to extrapolate from that to extend the accusation to the entire Parán Community (Reply, ¶¶ 34–44).

42. Furthermore, Claimant's argument that the Parán Community opposed the Project to avoid drawing the attention of law enforcement authorities to its marijuana cultivation is nonsensical on its face. If anything, forcibly entering a mine site and blocking a road would logically serve to *increase* law enforcement activity, and to draw *greater* attention on the Community by the authorities (Rej., ¶¶ 406–413). In any event, with their persistent protests the Community did, in fact, attract the attention of numerous Peruvian agencies and authorities. (Rej., ¶¶ 410–413; Retuerto, ¶¶ 31–33; León 2, § VI; Trigoso 2, § V). The Parán Community did not oppose the project to protect alleged marijuana crops. Rather, what they had consistently demanded was that Claimant involve their

community in the development of Invicta Mine, including by constructing an access road through undisputed Parán territory.

43. With respect to its theory that the Parán Community protested the Project as part of a plan that it had all along to "steal" the mine for themselves, Claimant provides no evidence whatsoever to substantiate such theory, or the allegation that the Parán Community had ulterior motives for opposing the Project (Rej., ¶ 417).

7. In any event, at the time of the alleged measures, Claimant lacked the necessary authorizations to commence exploitation

44. Claimant alleges that, had it not been for the Access Road Protest, it would have started commercial extraction of ore in time to meet the obligations to its creditor, PLI Huaura, and thus avoid the loss of its investment. However, the evidence on record—including the expert testimony of Ms. Dufour—demonstrates that, even in the absence of the measures and omissions that it challenges in this arbitration, Claimant would have failed to commercialize ore on time. That means that, irrespective of the conduct by Peru that it alleges, Claimant would have forfeited its shares to its creditor for default of its obligations under the PPF Agreement. As noted above, Claimant does not deny that it had not yet obtained several key permits that were required before it could commence exploitation. Claimant nevertheless insists that the Invicta Mine was "on the brink of production" and that, but for the Access Road Protest, "from an operational perspective, IMC was ready to start commercially extracting ore in October 2018." (Reply, ¶¶ 2, 62–63; Ellis 2, ¶ 74). However, as Ms. Dufour's expert report demonstrates, even if the Access Road Protest had never occurred, the Mine would not have been ready for lawful commercial exploitation until July 2020, i.e., more than *a year and a half after* the start date of Claimant's repayment obligations to PLI Huaura (Dufour, ¶¶ 7, 159).

8. Claimant lacked ore processing services

45. Even if Claimant had managed to bring the Invicta Mine to commercial exploitation by late 2018, it would have lacked sufficient ore processing capacity to satisfy its repayment obligations under the PPF Agreement in a timely fashion (Rej., ¶ 338). Claimant argues that it could have processed sufficient ore to meet its obligations either through third-party processing plants or acquisition of the Mallay Plant (Reply, § 3.4.2). However, none of the ore processing plants identified by Claimant were actually capable of processing ore for Claimant: (i) the San Juan Evangelista Plant was inadequate and lacked the requisite permits (Rej., ¶¶ 344–346; Dufour, ¶¶ 224–226); (ii) the Altagracia Plant breached its contract with Claimant and was legally prohibited from processing

Claimant's ore (Rej., ¶¶ 347–351; Dufour,¶¶ 229–236); (iii) the Huancapeti II Plant, which Claimant alleges experienced "unexpected mechanical failures", was unreliable and similarly could not have met Claimant's ore processing needs, (Rej., ¶¶ 352–360; Castañeda 1, ¶ 88); and (iv) the Mallay Plant was likewise not an option because Claimant never possessed any right to own, modify, or use the Mallay Plant for processing (Rej., ¶¶ 361–365). Even if Claimant had acquired the Mallay Plant, such plant would not have provided sufficient ore processing capacity to service Claimant's PPF Agreement obligations (Rej., ¶¶ 366–376).

IV. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMANT'S CLAIMS

46. The Tribunal lacks jurisdiction over Claimant's claims, for two reasons. The *first* reason is that Claimant does not qualify as an "investor" under Article 847 of the Treaty, as it sold not only the investment it had in Peru (which is the subject of this arbitration), but also the litigation rights associated with such investment (C-M, ¶¶ 349-373; Rej., ¶¶ 448-466).

47. The relevant time for assessing a Tribunal's jurisdiction is the date on which the claimant instituted the arbitral proceeding, which in this case is when ICSID registered Claimant's request for arbitration, on 30 October 2020 (**RLA-11**, ¶ 31; ICSID Rules, Rule 6(2)). The relevant case law has underscored the general rule that in order to establish jurisdiction an investor must hold its investment at the time that proceedings are instituted (C-M, ¶¶ 353–359; Rej., ¶¶ 448–449). There are two exceptions to this general rule, namely if either (i) the investor has retained its right to bring a claim (**RLA-12**, ¶ 121; **RLA-18**, ¶¶ 5-33; **RLA-19**, ¶ 145); or (ii) special circumstances apply, viz., if there is direct causation between the actions of the State and the loss of the investment prior to the filing of a claim (**RLA-17**, ¶¶ 298–299). Neither of the above exceptions applies in this case.

48. Claimant did not retain its right to bring a claim against Peru when it transferred its investment to PLI Huaura on 26 August 2019 (C-M, ¶ 365). In fact, it affirmatively relinquished such right. Pursuant to the Pledge Agreement, Claimant pledged to PLI Huaura "any right, title and interest that may derive from" its shares in Invicta, as well as "all voting and economic rights pertaining to" them (**Ex. R-97**, Cls. 6.1, 6.4; C-M, ¶¶ 367–368; Rej., ¶ 454). Claimant then transferred such rights to PLI Huaura under the Share Allocation Agreement, which provided that Claimant was transferring "all matters of fact or of law pertaining to the Encumbered Shares, without reservation or limitation, including but not limited to the following rights: (a) All economic, ownership and information rights related to the Encumbered Shares, without limitation of any nature."

(**Ex. R-193**, Cl. 2.2). Claimant's right to bring a claim with respect to its erstwhile investment in Invicta constitutes an "economic . . . right" or "matter of fact or law pertaining to" its shares in Invicta. Such rights therefore transferred to PLI Huaura (another Canadian investor) under the Share Allocation Agreement, which in turn means that Claimant divested itself of its right to pursue any claim in relation to the Invicta shares (Rej., ¶¶ 452–454).

49. The second exception does not apply either. There is no "direct causation" between Peru's actions and the Claimant's disposal of its investment, and therefore no "special circumstances" exist that would supplant the general rule that Claimant was required to maintain ownership or control of its investment when instituting arbitration proceedings. On the contrary, the transfer of Claimant's investment to PLI Huaura resulted from (i) Claimant's own failure to properly manage its community relations, in particular with the Parán Community; (ii) Claimant's voluntary entry into risky financing arrangements; (iii) Claimant's own failure to obtain the necessary permits and ore processing capacity to exploit the mine in time to comply with its obligations under those financing arrangements; and (iv) the enforcement by PLI Huaura of its security over the shares in Invicta (C-M, ¶¶ 361–364, §II.F.1; Rej., ¶¶ 463–466, § II.D).

50. The *second* reason the Tribunal lacks jurisdiction is that Claimant failed to provide on behalf of Invicta the waiver required by Treaty Article 821(e). Such provision requires that where an investor claims "for loss and damage to an interest in an enterprise", both the investor and the "enterprise" must provide a waiver of claims before other administrative tribunals or courts (C-M, ¶¶ 375–376; Rej., ¶¶ 467–469). Claimant did not provide such a waiver, and accordingly the Tribunal lacks jurisdiction.

51. Treaty Article 825 contemplates an exception to the above waiver requirement, but such exception does not apply here, because Peru did not "deprive" Claimant of its investment. Rather, as noted, Claimant lost control of Invicta due to its own actions and those of PLI Huaura (C-M, ¶ 380; Rej. ¶ 472).

V. CLAIMANT'S CLAIMS LACK MERIT

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

52. In addition to arguing that the actions of the Peruvian authorities breached the Treaty, Claimant has advanced the outlandish argument that the actions of a rural community (namely, the Parán Community) are attributable to Peru under international law. Both Parties agree that the relevant principles of attribution are summarized in the ILC Articles (Mem., ¶ 238; C-M, ¶ 385). Claimant relies on two of these Articles: (i) Article 4, which

applies to State organs; and (iii) Article 5 which applies to persons or entities who are "empowered by the law of that State to exercise elements of the governmental authority"(**CLA-3**, Arts 4–5). Neither of these Articles supports Claimant's case.

1. The actions of the Parán Community are not attributable to Peru under ILC Article 4

53. ILC Article 4—relied upon by Claimant for the first time in the Reply—has no application in the instant case. Claimant's case under ILC Article 4 relates to the alleged actions of the Parán Community as a whole (as opposed to its individual community members such as the Community's rural patrols (*Rondas Campesinas*), whose actions are the subject of Claimant's ILC Article 5 allegations) (Reply, ¶¶ 449–457). In order for Claimant to establish its attribution case in relation to such actions, it must establish (i) that the Parán Community is a State organ; and (ii) that the Parán Community's actions were carried out in an official capacity (Rej., ¶ 550; **CLA-18**, p. 43, ¶ 3; **CLA-3**, Art. 4(1)). Neither of these requirements is met in the case of the Parán Community.

54. Regarding the first requirement, an entity will be a *de jure* State organ if it has the status of a State organ under domestic law (Rej., ¶ 488). If a person or entity is not a *de jure* organ, it may nonetheless fall within the scope of ILC Article 4 if it is a *de facto* organ, but only if there is a relationship of "complete dependence" between the person or entity and the State (Rej., ¶ 489; **RLA-162**, ¶ 392). Where an entity has a separate legal personality from the State—as is the case with the Parán Community—, there is a strong presumption that it is *not* a State organ (either *de jure* or *de facto*) (Rej., ¶ 491).

55. The Parán Community is not a *de jure* or *de facto* State organ under Peruvian law. Consistent with international law principles and jurisprudence in relation to indigenous communities, rural communities are non-State actors and do not form part of the State (Rej., ¶¶ 497–499). The Parán Community has separate legal personality from the Peruvian State, and is not encompassed within the Peruvian government structure (Rej., ¶¶ 503–504; Meini, ¶¶ 62–64). The Parán Community does not have "complete dependence" on the Peruvian State; rather, it acts autonomously and the Peruvian State cannot interfere with its activities (Rej., ¶ 517).

56. The sole basis of Claimant's argument under ILC Article 4 is its claim that the Parán Community is a "territorial unit" of the Peruvian State (Reply, ¶¶ 425–448). However, the term "territorial unit" refers to political subdivisions of a State, such as its provincial, regional or geographical administrations (Rej. ¶ 495, **CLA-18**, Art. 4, ¶ 8, **RLA-166**, ¶ 168; **RLA-1**, p. 218). Rural communities do not fall within such categories. Article 189 of Peru's

Constitution lists certain decentralized political subdivisions which could potentially constitute territorial units of the Peruvian State, but rural communities are not included in such list (Rej., ¶ 505; **Ex. C-23**, Chapter XIV title and Art. 189).

57. Regarding the second requirement, Claimant has not even attempted to argue that the actions of the Parán Community as a whole were carried out in the exercise of official authority (Rej., ¶ 570). In any event, as discussed below, none of the actions of the Parán Community's members were carried out in exercise of actual or ostensible authority (§ V.A.2 below).

2. The actions of the Parán Community are not attributable to Peru under ILC Article 5

58. Claimant's argument under ILC Article 5 relates solely to the actions of the Parán Community's *Rondas Campesinas* (rural patrols) (Rej., ¶ 522). In order to establish attribution of the *Rondas Campesinas'* conduct under ILC Article 5, Claimant must establish that: (i) the *Rondas Campesinas* are empowered to exercise governmental functions; and (ii) the conduct of which Claimant complains was carried out in exercise of such governmental functions (**CLA-3**, Art. 5; C-M, § IV.A; Rej., IV.A.3–4). Neither requirement is met in this case.

59. Regarding the first requirement, the powers of *Rondas Campesinas* are not governmental in nature. Rather, they are established by a rural community in order to exercise the community's rights of self-defense over its territory and property, and to coordinate with governmental authorities where necessary (C-M, ¶ 425; Rej., ¶ 526; **Ex. R-116**, Art. 1). While Claimant makes much of the fact that *Rondas Campesinas* carry out certain conciliation activities pursuant to Article 149 of the Peruvian Constitution, such activities are expressly "extrajudicial" as a matter of Peruvian law, and therefore do not connote the exercise of any governmental power (**Ex. R-116**, Art. 1; **R-103**, Art.3; C-M, ¶¶ 425–426; Rej., ¶ 528). *Rondas Campesinas* have no authority or mandate to apply, administer, or enforce Peruvian law (Rej., ¶ 529; **Ex. C-23**, Art. 149) and may only act with respect to (i) a narrow category of property dispute, namely in relation to the "possession, usufruct of communal property, property, and the use of the different communal resources" (**Ex. R-103**, Art. 13); and (ii) certain issues arising within a rural community's territory (C-M, ¶ 430, **Ex. C-23**, Art. 149). Finally, rural communities are not organizationally or politically accountable to the Peruvian State (Rej., ¶ 535).

60. The Peruvian Supreme Court has confirmed that *Rondas Campesinas* exercise "communal authority" (**Ex. C-599**, p. 4, ¶ 7), as opposed to State authority. The power of rural

communities to form *Rondas Campesinas* reflects the recognition by the Peruvian State of the inherent right of rural communities to administer their affairs, and the State's respect for such communities' traditional institutions, rather than any conferral of governmental power (Rej., ¶ 534).

61. Even if *Rondas Campesinas* were empowered to exercise governmental authority (quod non), the relevant conduct in this case did not fall within the scope of such authority. Claimant's allegations with respect to attribution focus on two specific incidents: (i) the 19 June 2018 Protest; and (ii) the Access Road Protest. Such actions did not entail the exercise of any governmental authority. Leaving aside the legality of such actions, any private individual could have acted in a similar manner (C-M, ¶ 471; Rej., ¶ 571; **RLA-25**, ¶ 170). Moreover, the *Rondas Campesinas* were not authorized to carry out any of the actions in those protests, which included acts of violence, detention of individuals, damage to property and blocking roads (C-M, ¶ 458). While Claimant points to the fact that the Parán Community used weapons that had been given to them by the Government (in the 1990's, to defend themselves against the *Sendero Luminoso* terrorist group), the use of such weapons bore no relation to the purposes for which such weapons were provided (Rej., ¶ 557).

62. Claimant belatedly sought to rely on ILC Article 7, which provides that unauthorized *ultra vires* acts are nonetheless attributable to the State. (Reply, ¶¶ 530–541). However, ILC Article 7 does not apply, because the *Rondas Campesinas* did not act with ostensible State authority (C-M, ¶¶ 462–466; Rej.,¶¶ 561–568; **RLA-24**, pp. 137–139; **RLA-31**, p. 530; **RLA-32**, ¶ 4; **RLA-33**, ¶¶ 64–67). The alleged actions of the *Rondas Campesinas* go so far beyond the scope of any proper power of the *Rondas Campesinas* that they cannot be said to have been carried out in exercise of any governmental authority, be it actual or ostensible (C-M, ¶ 470; Rej., ¶ 575; **CLA-18**, commentary on Art. 7, ¶ 7).

63. Claimant's arguments are also contradicted by the fact that, at the time, it did not assert that the relevant conduct was carried out in the exercise of governmental authority, but rather *in defiance of* such authority (**Ex. IMM-53**, p. 1; **Ex. R-218**) and/or constituted *force majeure* (**Ex. R-218**, p. 3; Rej., ¶ 573).

B. Peru has fulfilled its obligation of FPS under the CIL MST

1. The relevant legal standard

64. The Parties agree on the following elements of the FPS obligation under the CIL MST (C-M, ¶ 489–494; Reply, ¶ 626; Rej., ¶ 597):

a. The FPS standard "requires the host State to exercise reasonable due diligence";

b. The State is expected "to take 'such measures to protect the foreign investment as are reasonable under the circumstances;'"

c. "tribunals must take into account 'the circumstances of the particular case;'"

d. The FPS obligation does not "impose strict liability on the host State to prevent physical or legal infringement of the investment," or provide any "guarantee" or "warranty;"

e. The FPS standard is an objective one (i.e., one that does not vary from State to State, or investor to investor); and

f. To succeed with a claim for breach of the FPS standard, a claimant must demonstrate that if the State had acted with "due diligence," it would "in fact have prevented the claimant's alleged losses."

65. The Parties disagree on the extent to which the Tribunal may take into account the specific prevailing circumstances in the host State. Contrary to case law, Claimant argues that any consideration of the particular circumstances of a case would render the FPS obligation less objective, and therefore would be inappropriate (Reply, ¶ 626). Case law establishes that the Tribunal is indeed required to consider whether the State's conduct was reasonable *under the relevant circumstances* in the particular case (Rej., ¶ 599; **CLA-25**, ¶ 406; **RLA-8**, p. 310).

66. Claimant seeks to raise the FPS standard by arguing that it entails the following obligations: (1) "not to cause harm to investors and their investments;" (2) "to take all reasonable steps to prevent harm to investors and their investments;" (3) "to take all necessary steps to restore the investor to the enjoyment of its rights over its investment;" and (4) "to punish offenders committing crimes against investors and their investments" (Reply, ¶ 636). However, these purported obligations are *not* part of the CIL MST (Rej., ¶ 601). In addition, Claimant's proposed obligations apply to *investors*, but the obligation

under the Treaty is to only provide FPS under CIL MST to "investments"— not to "investors"(Treaty, Art. 805.1).

2. Peru exercised due diligence in accordance with its FPS obligation under the Treaty

67. Peru fulfilled its obligation to exercise due diligence by taking action that was reasonable under the circumstances. Such circumstances included:

a. The long history of social conflicts between mining companies and local communities in Peru (C-M, § II.A.1; Rej., ¶ 609), and the risk that the use of force by State actors would lead to inflamed tensions, violence and even fatalities, hindering progress towards long-term solutions (C-M, ¶ 501; Rej., ¶ 609; **Ex. R-25**; **R-85**; **R-144**; Incháustegui 2, § III);

b. The multi-dimensional nature of social conflicts between mining companies and local communities, which often involve considerations of the social, environmental, and economic effects of mining, as well as the rights of investors (C-M, § II.A.1; Rej., ¶ 609; **RLA-182**, pp. 15–23); and

c. That law enforcement's interactions with, and operations in respect of, specially protected communities must be carefully managed (Rej., ¶ 609). Any State action in this context must balance competing interests, avoid violence, and create lasting solutions by promoting negotiation and dialogue (**RLA-28**, Arts. 7.1, 15.2; **RLA-30**).

68. In line with the above, Peru developed a legal and policy framework that was consistent with international law, international accepted corporate social responsibility principles, and the law and policy of other States, including Claimant's host State of Canada (C-M, § II.A; Rej., ¶ 609(k); Vela, ¶¶ 65–67; **Ex. R-85**; **R-87**; **R-94**; **R-86**). Such legal and policy framework aims to ensure the active and constructive participation of local communities, obtain their acceptance, and promote dialogue and mediation as the best means of resolving any disputes that may arise with the mining company (C-M, § II.B.1–2; Rej., ¶ 609(k)). In addition, in common with other States, the use of force by law enforcement agencies is permitted only in limited and exceptional circumstances (Rej., § II.C.1, ¶ 609; **Ex. IMM-32**; **IMM-33**; **IMM-34**; **R-250**).

69. Peru's actions in this case were reasonable and entirely consistent with its obligation to act with due diligence. Peru undertook diligent, affirmative action throughout the course of Claimant's conflict with the Parán Community. Such action was reasonable under the circumstances. Among other things the Peruvian authorities: (i) worked proactively with

Invicta personnel in October 2017 to investigate and anticipate conflict, following rumors of discontent amongst Parán Community members; (ii) convened and mediated numerous meetings between Claimant and the Parán Community in 2018-2019 to broker a lasting solution between the parties once the social conflict had erupted; (iii) met with both parties separately over the same period to bring Claimant and the Parán Community to the negotiating table and to discourage further protest activities by such community; (iv) took pre-emptive action to prevent a further protest at the Invicta mine site in September 2018; and (v) mediated a short-term agreement in October 2018 for the parties to collaborate to reach a permanent solution to the social conflict (C-M, § II.E; Rej., ¶¶ 611–615, Table 6 and the evidence cited therein; Léon 1, ¶¶ 18–73). Such actions involved a panoply of State agencies, including the OGGS, PCM, MININTER, and the Ombudsman's Office.

70. The above efforts appeared to be bearing fruit in early 2019, with the signing of the 26 February 2019 Agreement, through which Claimant and the Parán Community agreed to settle their differences (C-M, ¶¶ 263–266; **Ex. C-200**). However, a dispute arose between the parties regarding interpretation of that agreement (C-M, ¶¶ 267–280). Peru refrained from taking sides in that dispute, and instead continued to work towards assisting the parties in reaching a peaceful end to the Access Road Protest and a lasting resolution of their social conflict , holding numerous further meetings with the parties and attempting to re-establish the Dialogue Table (C-M, ¶¶ 281–288; Trigoso 1, ¶¶ 43–45).

71. The evidence of the above actions is extensive, and largely uncontested (*see, e.g.,* **Ex. R-63**, **C-191**, **C-200**, **R-258**, **R-114**, **R-262**, **R-113**, **C-18**, **C-21**, **C-221**, **C-222**). Peru's extensive efforts to reach a lasting solution to the social conflict are also recounted in the testimony of Peru's witnesses, Messrs León, Trigoso, Incháustegui, and Saavedra (León 1, ¶¶ 11–56; León 2, ¶¶ 19–57; Trigoso 1, ¶¶ 31–49; Trigoso 2, ¶¶ 18–40, Incháustegui 1, ¶¶ 21–31; Incháustegui 2, ¶¶ 20–29 ; Saavedra, ¶¶ 18–28).

72. Claimant argues that Peru was obliged under the FPS standard to "take all necessary measures" to (i) "prevent harm to the Claimant's employees and investment" (Reply, ¶ 665); and (ii) "restore the Claimant to the full enjoyment of its investment" (Reply, § 9.3.4.3). These allegations boil down to the proposition that Peru should have used force to dismantle the Access Road Protest and essentially acted as a private security force thereafter. (Reply, § 9.3.4.2; Rej., ¶ 617). That submission is wrong, for several reasons. *First*, the FPS standard does not entail an obligation to "take all necessary measures" to protect investments from harm, as that would imply a strict liability standard for the

State, which is inconsistent with the jurisprudence (Rej., ¶ 618). Nor does the FPS standard require a State to restore property to an investor—that would convert the FPS obligation from merely an obligation of means to an obligation of result (which it is not) (Reply, ¶ 627).

73. *Second*, Claimant has not satisfied the burden of showing that it would have been reasonable, or even possible, for Peru to use force against the Parán Community to pre-empt the June 2018 Protest (Rej., ¶ 619). Nor has Claimant shown that any use of force subsequently would have led to the restoration of its rights. In fact, it is more likely that using force would have *aggravated* the social conflict. Even if force had been used and had succeeded in dismantling the Access Road Protest, such protest likely would have been re-instituted after the departure of the police forces (C-M, ¶ 235).

74. *Third*, the Peruvian legal framework mandates that force only be used in strictly delineated circumstances, and when all other avenues of potential resolution have been exhausted (Rej., § II.C.1). This was not the case in relation to the Parán Community's protest actions, as demonstrated by the fact that Claimant and the Parán Community were willing to enter into the 26 February 2019 Agreement, and thereafter the Community remained willing to resume dialogue under certain conditions (even after Claimant resorted to the use of the War Dogs) (C-M, ¶ 267–289; Meini, § VI.C; León 2, § V).

75. *Fourth*, Claimant invokes past instances in which Peru has used force with respect to social conflicts in its territory, but such examples are inapposite (Rej., ¶ 629). In those instances—for example in relation to the *Las Bambas* mine—force was used only as a last resort, after several years of aggravating circumstances, and moreover in the end it did *not* succeed in resolving the relevant social conflict (Incháustegui 2, § III).

76. Claimant's allegation that the Parán Community members should have been "punished" for their actions is similarly flawed (Rej., ¶¶ 633–638). The FPS standard imposes no requirement for the State to punish, without due process, individuals whom investors consider have committed a crime (Rej., ¶ 634). Claimant has not shown that Peru committed an international delict in the manner in which it conducted the criminal investigations and prosecutions against the Parán Community members involved in the June 2018 Protest and Access Road Protest. In fact, the evidence shows that Peru diligently investigated the relevant events and concluded—based in part on testimony

from Claimant's own witnesses—that no specific individual could be identified as responsible for damage or coercive behavior (Rej., ¶¶ 636–637).

77. Finally, Claimant's allegation that Peru should have confiscated the weapons held by certain Parán Community members is a red herring. Claimant has not shown that with such a confiscation, the Claimant would not have forfeited its investment. The Parán Community used a variety of tactics to express opposition to the Invicta Project, most of which did not involve the use of weapons (Rej., ¶ 623). Moreover, the Parán Community could have staged the June 2018 Protest and Access Road Protest without using firearms.

C. Peru has fulfilled its obligation to accord FET to Claimant's investment under the CIL MST

78. Claimant's allegations of a breach of FET under the CIL MST have materially narrowed over the course of this arbitration. Claimant has abandoned its former claims for alleged breach of legitimate expectations and alleged failure to act transparently and consistently (Reply, § 9.4.3.3; Rej., ¶ 675). Claimant's FET allegations now rest instead on the allegation that Peru failed to apply its own legal framework (Reply, § 9.4.3.3; Rej., ¶ 677). Such allegation is largely duplicative of Claimant's FPS arguments, and is similarly baseless.

79. As a threshold matter, Claimant has failed to prove its allegation that Peru's actions constitute a composite act (Mem., §§ 4.3.3, 4.3.4). Oddly, Claimant denies that there is any legal standard for a composite act, despite the clear line of commentary and jurisprudence showing that to form a composite act, measures must be "sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system" (**CLA-18**, Art. 15(1); **RLA-24**, p. 266; Rej., ¶ 656). Claimant fails to meet that standard. Instead, it merely asserts various alleged omissions of Peruvian authorities, while ignoring the numerous affirmative actions taken by such authorities to resolve the social conflict (Rej., ¶ 662).

80. Claimant also fails to address the correct legal standard in relation to the substantive content of the FET standard under the CIL MST. Despite agreeing with Peru that the relevant standard is that articulated by the *Waste Management II* tribunal (Reply, ¶ 724), Claimant advances the baseless theory that Peru is obliged under the CIL MST to "enforce its own laws vis-à-vis third parties causing damage to protected investments" (Reply, § 9.4.3). FET under the CIL MST includes no such obligation. While non-compliance with domestic law could in some instances be relevant to an FET claim, the State conduct "must be sufficiently egregious and shocking" to constitute a breach of the CIL MST (**CLA-78**, ¶ 616; **RLA-186**, ¶ 390). In this context, tribunals have considered whether the

failure of a State to apply its laws amounts to an "'outright and unjustified repudiation'" of the relevant legal framework (Rej., ¶ 672; **RLA-49**, ¶ 103). Claimant has not demonstrated that Peru failed to enforce its laws, let alone that Peru repudiated the relevant legal framework or that its conduct was "sufficiently egregious and shocking" (**CLA-37**, ¶ 98). Thus, Claimant has not proven that the conduct of which it complains breached the applicable legal standard (Rej., ¶ 669; **CLA-37**, ¶ 98).

81. Claimant's arguments in relation to FET share a common denominator with those relating to FPS: that Peru was required to use force to extinguish the Access Road Protest (Rej., ¶ 680). Claimant is incorrect, however. Peruvian law—and specifically Article 8.2 of Legislative Decree No. 1186, which Claimant invokes—provides that the police "**may** use force" (emphasis added) under limited circumstances (Rej., § II.C.1, ¶ 684; **Ex. R-60**, Art. 8.2). In the instant case, there were good reasons *not* to use force, including (i) the importance of avoiding a violent escalation of the conflict; (ii) the likelihood that use of force would hinder the achievement of any long-term agreement between the parties; (iii) the reasonably encouraging prospect of resolution (or at least deescalation) of the dispute through dialogue (as evidenced by the milestone 26 February 2019 Agreement); and (iv) the flexibility of the Peruvian legal framework, which allowed Peruvian officials to give dialogue an opportunity to succeed (Rej. ¶ 691).

82. Claimant also alleged breaches by Peru of its own law, none of which has any merit:

a. Claimant alleges that Peru was obliged under Article 920 of Peru's Civil Code to lift the Access Road Protest by force (Reply, ¶¶ 291–293; **Ex. R-5**). However, Article 920 of the Civil Code only requires that the police play a supporting and supervisory role with respect to a dispossessed property owner's own efforts to regain their property. It decidedly does *not* require that the police intervene forcefully every time a person is dispossessed of property. In any event, Claimant did not take any of the requisite steps to activate a repossession process under Article 920 of the Peruvian Civil Code (Rej. § II.C.1, ¶ 689; Meini ¶ 172–174).

b. Claimant alleges that the Huaura Subprefect was obliged to file a complaint for contempt of authority against the Parán Community members for breach of the September 2018 Commitment and for alleged interference with governmental inspections (Reply, ¶ 770, 771(d)). However, an action for contempt of authority would not have been applicable in either case (Rej., ¶¶ 694–695).

c. Claimant alleges that Peru was obliged to confiscate firearms from the Parán Community (Reply, ¶ 771). However, Claimant ignores the fact that (i) Peru has

implemented a nationwide program for the voluntary surrender of firearms by rural communities, in line with UN guidelines (Rej., ¶ 699; **RLA-184**); (ii) the issue of firearms remaining in circulation within rural communities is a nationwide issue that cannot be dealt with on an *ad hoc* basis with respect to a single community; and (iii) a forceful confiscation of firearms from the Parán Community would have done nothing to quell the Parán Community's fierce opposition to the Invicta Mine, and in fact likely would have aggravated the dispute (Rej., ¶¶ 698–702).

d. Claimant argues that Peru allowed members of the Parán Community to cultivate marijuana with impunity (Reply, ¶ 771). However, Claimant itself acknowledges and submits evidence of the fact that the Peruvian authorities made extensive efforts to combat marijuana cultivation in the Huaura region in which the mine was located (Reply, ¶ 35; **Ex. C-104, C-105, C-106, C-107, C-108, C-478, C-479**). In any event, the alleged marijuana cultivation is immaterial to Claimant's loss of its investment.

e. Finally, Claimant argues that Peru refrained from taking action in relation to the Parán Community's alleged theft of ore from the Invicta mine site (Reply, ¶ 771). This is a red herring. Claimant only reported the alleged theft of ore mere weeks before it forfeited its investment and at a time when Claimant still lacked the necessary permits to exploit the mine (Rej. ¶ 709; Dufour, ¶¶ 7–8, 126, 128). The alleged theft of ore is therefore immaterial to Claimant's loss of its investment. In any event, the PNP did, in fact, take action in relation to the alleged theft of ore from the Invicta mine, for example by conducting a raid in December 2021 (Rej., § II.F).

D. Peru did not expropriate Claimant's investment

83. Claimant raises two expropriation claims—one for direct expropriation and one for indirect expropriation—both of which fail (C-M, § IV.D; Rej. § IV.D).

1. Peru did not directly expropriate Claimant's investment

84. Claimant argues that its investment was directly expropriated as a result of the Access Road Protest. Such protest was conducted by the Parán Community, but Claimant contends that it is attributable to Peru (Mem., § 4.4; Reply, § 9.5). Claimant's direct expropriation claim fails for three primary reasons (C-M, IV.D.1; Rej., § IV.D.1). *First*, the Parán Community's Access Road Protest is *not* attributable to Peru (*Supra* § V.A; C-M, § IV.A; Rej., § IV.A). *Second*, there was no "formal transfer of title" or "outright seizure" of

Claimant's investment (Rej., ¶ 740). *Third*, even under Claimant's construal of certain direct expropriation jurisprudence, Peru did not "knowingly allow" any transfer or seizure of Claimant's investment (Rej., ¶¶ 742–44).

2. Peru did not indirectly expropriate Claimant's investment

85. Claimant claims that the Access Road Protest is also an indirect expropriation (Mem., ¶ 313; Reply, § 9.5.2).

86. Claimant incorrectly alleges that a "pattern" of non-intervention by Peru caused the loss of its investment, and should be deemed a "composite act" under customary international law (Reply, ¶ 880). However, Claimant has not proven that Peru's acts and omissions qualify as a composite act under the applicable criteria under customary international law (Rej., ¶¶ 747–755), since it has not proven that Peru's acts were "sufficiently numerous and inter-connected to amount . . . to a pattern or system" (**CLA-18**, Art. 15; **RLA-56**, ¶ 621).

87. Claimant's conclusory assertion that Peru "followed a clear pattern" of taking no action is contradicted by the array of State resources that Peru dedicated to addressing Claimant's social conflict over many months, including those expended to (i) deploy police to Invicta Mine within hours of the inception of the Parán Community's protest on 19 June 2018; (ii) pre-emptively execute a police operational plan to secure the Invicta Mine from another threatened protest by the Parán Community; (iii) deploy police on the day of the establishment of the Access Road Protest to de-escalate and neutralize tensions between the Parán Community and Claimant; (iv) conduct mediations between the parties, including at least 28 *ex parte* meetings and the brokering of the 26 February 2019 Agreement; (v) deploy police to respond to the violent confrontation between the War Dogs and the Parán Community; and (vi) advocate on Claimant's behalf to urge the Parán Community to cease its hostilities and negotiate with Claimant (Reply, ¶ 880; Rej., § II.C). The foregoing squarely contradicts Claimant's allegation of a pattern of inaction by Peru, and to the contrary, shows a pattern of useful *action* by Peru (Rej., ¶¶ 747–755).

88. In addition, Claimant has not established any indirect expropriation, including under the factors required by Annex 812 of the Treaty for analyzing an indirect expropriation claim. *First*, Peru's alleged measures did not have an adverse economic impact on Claimant's investment (*see* Annex 812.1(b)(i)). To be expropriatory, a State measure must result in the complete or near complete destruction of the investment's value. (**CLA-69**, ¶ 7.5.11; **CLA-62**, ¶ 6.62); the circumstances of Claimant's loss show that this factor has not been met. For example, shortly before PLI Huaura foreclosed on Claimant's shares in Invicta,

the investment was valued by an independent appraiser, PwC, at USD 13.4 million (**Ex. C-625**, ¶ 1.7). This valuation and Lonely Mountain's commercial acquisition of the investment indicate that the latter retained significant value at the time that Claimant lost it (Rej., ¶¶ 759–772). Additionally, Peru did not cause Claimant's loss—rather, it was the loan agreement terms (knowingly and willingly accepted by Claimant), and Claimant's own mismanagement of the Invicta Project, that caused Claimant to default and thus forfeit its investment (Rej., ¶¶ 773–785).

89. *Second*, Peru did not interfere with any distinct, reasonable investment-backed expectations (*see* Treaty Annex 812.1(b)(ii)). Claimant has not explained how it could have had any expectations that were distinct (i.e., tied to a specific State commitment) or investment-backed (i.e., relied upon when Claimant invested) (Rej., ¶¶ 786–789). Rather, Claimant's argument rests on the general proposition that Peru should have forcibly removed and detained protestors engaged in the Access Road Protest. That alleged expectation does not meet any of the criteria under Treaty Annex 812.1(b)(ii) (Rej., § II.C.1; Meini, ¶ 134).

90. *Third*, Peru's alleged measures had a non-expropriatory character (*see* Treaty Annex 812.1(b)(iii)). Their object, context, and intent were each non-expropriatory, and each alleged measure was taken for a public purpose (Rej., ¶¶ 790–793).

91. *Fourth and finally*, Peru's conduct was non-discriminatory and undertaken in pursuit of legitimate welfare objectives. Therefore, pursuant to Treaty Annex 812.1(c), such conduct is presumed to be non-expropriatory. Specifically, Peru's measures were taken in pursuit of the public welfare objectives of promoting public health and safety, and of deescalating the social conflict between Claimant and the Parán Community (Rej., ¶¶ 794–801).

VI. CLAIMANT IS NOT ENTITLED TO ANY DAMAGES

92. In any event, Claimant would not be entitled to any damages.

93. *First*, Peru's alleged measures were not the cause of the Claimant's loss of its investment (Rej., ¶¶ 812–819); to the contrary, they were designed to *prevent* such loss. From the time Peru first intervened in Claimant's social conflict with the Parán Community through to the time of PLI Huaura's seizure of the investment, Peru's actions consistently were aimed at helping Claimant reach a long-term reconciliation with the Parán Community (Rej., § II.C.3). In many instances, Peru successfully mediated the dispute and mitigated tensions between Claimant and the Parán Community. At no point was Peru *required* to wield force against the Parán Community protesters. To the contrary, Peruvian law sets

strict conditions for when Peruvian authorities *may* use force, and it never requires that force be deployed against civilians (Rej., § II.C.1–2; Meini, ¶ 134).

94. *Second*, if any damages were to be awarded to Claimant, they would need to be offset by Claimant's contributory fault. Claimant contributed to its loss by: (i) failing to obtain a social license to operate the Invicta Mine from the impacted rural communities; (ii) willingly accepting risky loan obligations and ceding rights over its investment to PLI Huaura; (iii) failing to complete necessary regulatory steps and obtain the requisite permits to begin commercial exploitation of the Invicta Mine; (iv) failing to secure reliable ore processing capacity; and (v) committing breaches of more than a dozen express obligations in the PPF Agreement (several of which Claimant concedes were unrelated to Peru's conduct) (Rej., § II.D). Also, Claimant's lack of due diligence proximately caused its default on the PPF Agreement and the forfeiture of its investment to PLI Huaura. Accordingly, any damages awarded to Claimant would need to be reduced to account for all of these contributions by Claimant.

95. *Third*, the Mallay Plant was merely a *prospective* investment that never qualified for any protection under the Treaty, and thus cannot be considered in any damages calculations. Claimant's damages must reflect harm to the fair market value only of such investments as Claimant actually made in Peru (C-M, § V.C; Rej., ¶¶ 874-877). Claimant concedes—as it must—that the Mallay Plant was merely a prospective investment, as it acknowledges that the purchase and sale contract it negotiated with Buenaventura (the Mallay Plant's owner) was never executed, and that Claimant never actually purchased the Mallay Plant (Reply, ¶ 998; **Ex. MI-07**; **C-287**).

96. *Fourth,* Accuracy assumes that Invicta would have obtained all the necessary permits to begin commercial exploitation by the deadline under the PPF Agreement, viz., December 2018. As demonstrated by the testimony of Ms. Dufour, a leading expert on Peruvian mining law, that assumption is unrealistic; Invicta had a significant number of regulatory hurdles still to clear prior to commencing exploitation, which would have delayed exploitation to at least July 2020 (Rej., ¶ 895; Dufour, ¶¶ 7, 158).

97. *Fifth and finally*, any damages awarded to Claimant would need to be reduced to account for fundamental defects in the assumptions and calculations by its damages experts, Accuracy, including: (i) failure to account for Claimant's conflict with the Parán Community and the Access Road Protest as continuing obstacles to commercial operation of the Invicta Mine; (ii) failure to incorporate social license risk with respect to the

impacted rural communities; (iii) failure to consider the poor performance of Invicta Mine operations prior to the Access Road Protest (as a result of which Claimant was on track to default on the PPF Agreement, even absent the Access Road Protest); and (iv) failure to account for risks with respect to the financing that Claimant needed to pay amounts due under the PPF Agreement and to pay for a hypothetical purchase of the Mallay Plant (Rej., § V.D.1; AlixPartners 2, § IV).

98. In addition to the above fundamental flaws, Accuracy improperly (i) accelerated the project start date; (ii) assumed that Claimant would have had reliable ore processing immediately upon starting commercial exploitation and at no additional cost; (iii) lengthened the Invicta Project's term of operation from seven to ten years; (iv) underestimated Claimant's operating expenses and capital expenditures; (iv) assumed that Claimant could have repaid the PPF Agreement in timely instalments, rather than as a lump sum settlement; (v) reduced the applicable discount rate; and (vi) failed to account for the USD 13.4 million value of the Invicta shares at the time of their forfeiture (Rej., § V.D.2). Any damages awarded to Claimant must be adjusted to correct these errors.

99. In sum, Claimant's damages claims, like its merits claims, are without foundation and should be dismissed.

Arnold & Porter