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

ICSID CASE NO. ARB/20/46

LUPAKA GOLD CORP.

Claimant

VS.

REPUBLIC OF PERU

Respondent

CLAIMANT'S POST-HEARING BRIEF

30 June 2023

LALIVE

BSF

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1 INTRODUCTION[1]

1 Peru's failure to re-establish law and order and to adopt other measures to address Parán's criminal behaviour is at odds with its obligations under its own laws and the FTA, and also with how it has acted in other cases of community conflict, as has been previously developed. Indeed, this week there was yet another example of Peru's use of force in the face of community opposition, which is precisely what should have occurred in Lupaka's case, but sadly did not. The Peruvian army intervened along a road used by mining majors to transport minerals, which has been the subject of multiple blockades by local communities, to protect these companies' mining rights.[2]

2 The Claimant's written submissions explained that even key central government officials concurred with the need for Police intervention contemporaneously. At the Hearing, the cross-examination of three government officials who were central to the facts (Messrs Saavedra, Trigoso and León) confirmed this fundamental tenet of the Claimant's case. For example, Mr Trigoso conceded that if Parán had been acting criminally (for which there is plenty of evidence on record), the Police had to intervene.[3] Mr Esteban Saavedra, Deputy Minister of the MININTER, confirmed that the State did not order Police intervention for fear of political consequences.[4]

3 The central government's passivity largely suffices to find that the State breached the FTA. However, the cross-examination of Mr Soyman Retuerto, the Subprefect of the Leoncio Prado District during the worst of the social conflict, confirmed that this MININTER official sowed mistrust and opposition to the Project in the Parán community, in addition to aiding and abetting this community to conduct criminal activities against Lupaka's investment.[5] Peru therefore also breached the FTA through his actions, as well as the actions of Parán, which as explained in previous submissions, are attributable to Peru.[6]

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[1] Capitalized terms not defined in this Post-Hearing Brief shall have the meaning ascribed to them in the Memorial and the Reply. References to the transcript within this brief take the following forms: English transcript is denoted with "Tr. Day" and Spanish transcript is denoted with "Tr. Día".

[2] https://www.bloomberglinea.com/english/why-is-peru-extending-military-presence-on-roads-used-for-copper-shipments/

[3] Section 5.1.2.

[4] Section 5.1.3.

[5] Section 5.1.1.

[6] Reply, p. 169 (Section 9.2).

4 The Hearing also confirmed the lack of merit of Peru's defences on liability. The cross-examinations conducted by Peru were not aimed at advancing the State's defences, but at hiding its weaknesses. Peru argues that IMC mishandled its relationship with Parán, yet did not ask [redacted], a single question on this. Peru also argues that IMC failed to address Parán's water pollution concerns, yet did not ask Mr Castañeda, IMC's general manager up until the Blockade, a single question on IMC's water management system which fully addressed those concerns well before the Blockade. And Peru also argues that it never considered that Police intervention was warranted in the circumstances, yet did not ask Mr Bravo, IMC's general manager since early 2019, a single question on the many discussions that he had with high-ranking officials within Peru's central government and the Police showing that they too believed that the Police should intervene, as per his witness statements.

5 Peru's decision not to cross-examine Mr Ellis, Lupaka's co-founder and President, is particularly revealing, as he addresses in his witness statements issues that go to the heart of Peru's defences on causation and contributory negligence. Mr Ellis' statements, *inter alia*, on the reasonableness of the financing arrangements made by Lupaka, and Pandion's flexibility to accommodate gold repayment dates to the realities of the Project remain uncontested. As to Micon's Mr Jacobs, Lupaka's mining expert, Peru's decision not to cross-examine him can only mean that Peru accepts his conclusions which support Accuracy's calculations.

6 The Hearing highlighted Ms Dufour's close relationship with the State, which she failed to disclose. Her bias is apparent in numerous places in her report, including with respect to her unrepresentative and unverifiable "real" timeframes to estimate when IMC would have commenced exploitation, which are much longer than the mandatory timeframes set out in the law. Yet, as the Claimant's witnesses explained, the only pending issue for the Project to enter exploitation was the MEM's final inspection of the Mine, which would have allowed IMC to start commercial production in November 2018.

7 Had Peru restored law and order, Lupaka would be reaping the benefits of high metal prices in the current economy. These high prices support a significantly higher valuation of Lupaka's investment than that being claimed in this arbitration. However, the Claimant has conservatively estimated the compensation claimed based on the expected metal prices as at the Valuation Date, *i.e.*, August 2019, which the Tribunal should have no hesitation to award. Indeed, the Hearing further confirmed that Accuracy's valuation was reliable and that AlixPartners' "fundamental flaws" were baseless. Most significantly, Accuracy's valuation already includes social licence

costs both in the discount rate and the cash flows and its technical mining inputs remain unchallenged due to AlixPartners' lack of expertise in that field.

8 Almost five years ago, in late 2018, the Project was about to go into production. Instead, Peru has an illegal mine operated by Parán since 2019 that is likely a significant source of pollution and environmental damage. It is clear that Parán did not install the Blockade due to environmental or health concerns, contrary to Peru's allegations. Peru's heavy reliance on Parán's false claims of prejudice in mounting its defence shows the baselessness of its case.

9 In the following sections, the Claimant will begin by identifying the findings it requests the Tribunal to make (**Section 2**) and by answering the questions posed by the Tribunal to the Parties on 10 April 2023 (**Section 3**). It will then provide an overview of the testimony of the Parties' witnesses and experts who appeared at the Hearing (**Section 4**) and will comment on other relevant matters that surfaced at the Hearing (**Section 5**).

2 FINDINGS THE CLAIMANT REQUESTS THE TRIBUNAL TO MAKE

10 The Claimant sets out below the findings it requests the Tribunal to make in line with the Claimant's request for relief set out in its Reply, which is incorporated by reference, subject to the small reduction in the total amount of compensation claimed.[7]

2.1 Jurisdiction

11 The Claimant requests the Tribunal to find that all requirements relating to the Tribunal's jurisdiction over the Claimant's claims pursuant to the FTA have been satisfied.[8]

12 In relation to jurisdiction *ratione personae*, Lupaka is a protected investor that made a qualifying investment under the FTA. Neither Article 819(1) nor 847 of the FTA require the investor to hold the investment when instituting the claim.[9] In the alternative, "special circumstances" apply, as described in *Aven v. Costa Rica*.[10] The *Mondev* case, among others, is on point.[11]

13 Moreover, Lupaka did not relinquish any rights to bring a claim against the State by transferring its shares in IMC to PLI Huaura because a private agreement cannot affect its rights under the FTA. Indeed, Lupaka was a protected investor that held a covered investment under the FTA at the time of Peru's breaches and has the right to be compensated for the losses suffered as a result of those breaches.[12]

14 In relation to jurisdiction *ratione materiae*, Lupaka satisfied all the waiver requirements under the FTA. Lupaka did not need to provide a waiver on behalf of IMC under Article 823.5 of the FTA because Peru's acts and omissions resulted in the Claimant's loss of control over IMC.[13]

2.2 Merits

15 The Claimant requests a declaration that the State has breached the FTA, namely by a) illegally expropriating the Claimant's investment; b) failing to accord FPS and FET to the Claimant's investment; and c) failing to accord MFN treatment to the Claimant.

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[7] Reply, p. 390 (Section 11); **CD-0003**, p. 40; see below Section 5.4.

[8] Memorial, p. 64 (Section 3); Reply, p. 161 (Section 8).

[9] Reply, p. 162 (Section 8.1.1); **RLA-0016**, p. 37 (paras. 131-132); **RLA-0019**, p. 53 (paras. 141-142).

[10] See Reply, p. 165 (Section 8.1.2).

[11] See paras. 23 *et seq*. below. **CLA-0161**, p. 12 (paras. 39-40, 53 and 91); **Tr. Day 1**, 104:4-14; 143:13-22; Reply, p. 165 (Section 8.1.2).

[12] Reply, p. 163 (para. 401); Claimant's Pre-Hearing Skeleton, p. 19 (para. 68).

[13] Reply, p. 167 (paras. 415-417).

16 In this context, the Claimant requests that the Tribunal find that:

- Under Peruvian law, Lupaka only needed to reach an agreement with Lacsanga and Santo Domingo to develop the Project; it did so.[14]
- To the extent the Tribunal finds it relevant, Lupaka made reasonable efforts to engage and reach an agreement with Parán prior to the Blockade. These efforts failed for reasons unrelated to IMC.[15]
- The Subprefect of the Leoncio Prado District authorised and participated in the 19 June 2018 Invasion and arbitrarily supported Parán.[16]
- Parán's acts are directly attributable to Peru.[17]
- Parán used firearms – some of them provided by the State – in its aggressions.[18]
- In the face of Parán's invasions of the Site and the Blockade, Peru's central authorities failed to comply with their obligations under Peruvian law and the FTA. Indeed, in the circumstances: a) Peru's authorities were required to disarm Parán;[19] b) Peru should have used appropriate and effective means (including force) to prevent Parán from stopping the development of the Project;[20] and c) Peru's authorities could not simply insist that Lupaka continue to engage in "dialogue" with Parán until Lupaka lost its investment.[21]
- As from the Blockade, Lupaka acted reasonably in its relationship with the State, including Parán.[22]

[14] Memorial, p. 15 (Sections 2.2.3.1-2.2.3.2); Reply, p. 32 (Sections 3.2.2, 4.2.1-4.2.2); Claimant's Pre-Hearing Skeleton, p. 3 (Sections 2.3-2.4); **Tr. Day 1**, 37:4-20; 45:12-50:10; **CD-0001**, p. 18, 27-28.

[15] Memorial, p. 22 (paras. 67-72); Reply, p. 66 (Section 4.3); Claimant's Pre-Hearing Skeleton, p. 4 (Section 2.5); **Tr. Day 1**, 50:11-65:9; **CD-0001**, p. 29-41.

[16] Reply, p. 109 (paras. 269-270, Section 9.1); Claimant's Pre-Hearing Skeleton, p. 7 (Section 2.6); **Tr. Day 1**, 67:9-18; 69:13-18; **CD-0001**, p. 43, 45.

[17] Memorial, p. 75 (Section 4.1); Reply, p. 169 (Section 9.2); Claimant's Pre-Hearing Skeleton, p. 21 (Section 3.2.2); **Tr. Day 1**, 106:3-112:10; **CD-0001**, p. 77-89.

[18] Memorial, p. 34 (para. 106); Reply, p. 198 (paras. 498, 534-535, 771(b)); Claimant's Pre-Hearing Skeleton, p. 9 (Sections 2.8); **Tr. Day 1**, 79:13-83:4; **CD-0001**, p. 44-45, 56-57.

[19] Reply, p. 114 (paras. 280 and 353); **Tr. Day 1**, 74:6-79:12; 113:19-114:6; **CD-0001**, p. 51-55.

[20] Reply, p. 103 (Sections 6, 7.2); **Tr. Day 1**, 91:2-12; 113:19-114:20; **CD-0001**, p. 48 and 93.

[21] Reply, p. 158 (Section 7.2.3); **Tr. Day 1**, 91:13-93:17; 115:20-116:9.

[22] Reply, p. 103 (Section 6); Second Witness Statement of Luis F. Bravo, p. 11 (Sections 4-6).

2.3 Quantum

17 The Claimant requests compensation for the loss sustained as a result of Peru's breaches of the FTA in an amount of USD 40,400,000 plus an interest rate of LIBOR +4% until 30 June 2023, and from 1 July 2023 when LIBOR will be discontinued, at a rate of UST +5%, compounded annually. In this context, the Claimant requests that the Tribunal find that:

- Peru's acts and omissions led to the Claimant's loss: loss of access to its investment meant that it was precluded from operating the Project, which caused it to default under the PPF Agreement, as was foreseeable. There is no intervening event which breaks causation.
- DCF is the appropriate valuation method of the Claimant's losses, as agreed by both Parties' valuation experts.[23]
- The appropriate scenario for quantum purposes is the Claimant's counterfactual 590 t/d scenario. But-for Peru's breaches, the Claimant would have been able to implement its business plan, acquire the Mallay Plant and process ore at a rate of 590 t/d.[24]
- The Claimant's valuation experts adequately considered the risk and costs of acquiring and maintaining a social licence to operate in their valuation.[25] In the alternative, the Tribunal should deduct no more than USD 1.6 million.[26]
- The Claimant's technical mining assumptions, *i.e.* the operating period, metal grades, operating expenses and capital expenditures remain unchallenged and are reasonable.[27]
- The Claimant would have begun commercial exploitation by November 2018. In the alternative, commercial exploitation would have begun by January 2019, or in the further alternative, by March 2019.[28] Any potential delay caused by a need to comply with regulatory requirements would have had only minimal financial impact on the Project.[29] Both Parties' experts agreed that for each month of delay, the valuation would decrease by approximately USD 435,000.
- There is no contributory fault by the Claimant.

[23] See Section 5.4; Memorial, p. 109 (Section 5.1.2); **Tr. Day 6**, 1642:12-1644:9.

[24] Reply, p. 374 (Section 10.2); Claimant's Pre-Hearing Skeleton, p. 29 (Section 3.5).

[25] See Section 5.4; **Tr. Day 6**, 1605:4-1607:15, 1696:2-18, 1700:5-11, 1701:18-1702:7.

[26] See paras. 169-174.

[27] See Section 5.4.

[28] See Section 5.3.

[29] Reply, p. 21 (Section 3). See Section 5.4.

3 ANSWERS TO THE TRIBUNAL'S QUESTIONS

18 On 10 April 2023, the Tribunal sent six questions to the Parties. The Claimant addresses these questions below (**Sections 3.1-3.6**).

3.1 Question 1

"*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?*"

19 The FTA was concluded in three official and "equally authentic" languages.[30] Article 847, which defines an "investor of a Party", states in the relevant part:

- In English: "an enterprise […] that seeks to make, is making or has made an investment";[31]
- In Spanish: "una empresa […] que intenta realizar, está realizando o ha realizado una inversión";[32]
- In French: "une entreprise […] qui cherche à effectuer, effectue ou a effectué un investissement".[33]

20 Pursuant to Articles 33(1) and (3) of the VCLT, each of the three authentic languages is "equally authoritative".[34] In the Claimant's view, these definitions are consistent with each other.

21 The term "investor" in Article 847 covers an enterprise which "has made" an investment in the past, without the need for it to hold the investment at the time the arbitration is initiated.[35] This interpretation stands in line with Canada's authoritative interpretation.[36]

22 The Respondent has argued that a grammatical interpretation of the words "has made" means that an investment is only protected if it "has continued through to the present time".[37] The Respondent has provided no case law supporting this position.

[30] **CLA-0001**, p. 386.
[31] **CLA-0001**, p. 168.
[32] **RLA-0010-SPA**, p. 71.
[33] **CLA-0162**, p. 171.
[34] **RLA-0128**, p. 13.
[35] Reply, p. 162 (Section 8.1.1).
[36] Canada's Non-Disputing Party Submission, p. 1 (para. 5).
[37] Rejoinder, p. 234 (para. 457); **Tr. Day 1**, 274:5-277:18.

23 To the contrary, the case law on the record (including in cases involving treaties containing the very same language as the FTA, such as NAFTA) supports the Claimant's interpretation, which does not include any such added, implied, requirement. For example, in the *Mondev v. USA* case under NAFTA, the USA made the same argument as Peru is making in this arbitration.[38] Yet, the tribunal rejected it by stating:

> "a person remains an investor for the purposes of Articles 1116 and 1117 even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation. The point is underlined by the definition of an 'investor' as someone who 'seeks to make, is making or has made an investment'. Even if an investment is expropriated, it remains true that the investor 'has made' the investment."[39]

24 In *EnCana v. Ecuador*, the tribunal denied that the Canada-Ecuador BIT[40] imposed a continuous ownership requirement during the pendency of a claim, but rather found that:

> "[p]rovided loss or damage is caused to an investor by a breach of the Treaty, the cause of action is complete at that point; retention of the subsidiary (assuming it is within the investor's power to retain it) serves no purpose as a jurisdictional requirement […]"[41]

25 Other cases on the record also involved investments that had been adversely affected by actions of third parties and lost prior to the initiation of the arbitration proceedings, but none of these tribunals saw this as an issue affecting their jurisdiction.[42] For example, in *Mondev*, the tribunal accepted jurisdiction where the investor lost its investment because a private entity foreclosed the mortgage over it due to wrongdoings of the municipality of Boston under a separate agreement.[43]

26 Indeed, an analysis of Article 847 of the FTA further to Articles 31 and 32 of the VCLT,[44] can only lead to the conclusion that there is no requirement to hold the investment until the time the claim is instituted. Such interpretative rules require that the provision be interpreted "in good

[38] **CLA-0161**, p. 25 (para. 77).

[39] **CLA-0161**, p. 26 (para. 80).

[40] The relevant provision is similar to Art. 847(1) of the FTA, as it defines "investor […] in the case of Canada:" as "any enterprise […] who makes the investment in the territory of the Republic of Ecuador".

[41] **RLA-0016**, p. 37 (para. 131); see also p. 35 (paras. 125, 129, and 132).

[42] See Memorial, p. 80 (paras. 254 and 260-265) and p. 99 (paras. 303-305). See also the case law introduced in Section 3.3.

[43] **CLA-0161**, p. 12 (paras. 39-40, 53 and 91).

[44] **RLA-0128**, p. 12 (Arts. 31, 32).

faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[45]

27 **Ordinary meaning**. The sentence "that seeks to make, is making or has made an investment" covers three simple scenarios with regard to the investment: future, present and past, respectively.

28 **Context**. Article 847 needs to be interpreted taking into consideration other provisions of the FTA. This includes Articles 819 and 820, which set out that an investor can bring a claim for a breach if there was loss or damage resulting from that breach, and refer back to Section A which sets out the measures that amount to breaches.[46] None of these articles require an investor to hold the investment at the time the dispute is submitted to arbitration. Indeed, the FTA is a very precise and detailed text. As further examples of this, when referring to dispute settlement specifically, the FTA sets out detailed condition precedents before a claim can be submitted to arbitration, including specific forms and annexes, under the sanction of nullity of the Parties' consent.[47] The Treaty also contains detailed wording to clarify any uncertainty that may arise.[48] Had the Contracting Parties wished to include a requirement of continuous ownership of the investment, they would have done so.

29 **Object and purpose**. The Respondent has not explained why its interpretation stands in line with the object and purpose of the FTA. It does not. The FTA's object and purpose is to protect qualified investors against wrongful State conduct.[49] The *Mondev* tribunal (ruling under identical language in NAFTA) eloquently held:

> "[t]o require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to **provide protection to investors against wrongful conduct** including uncompensated expropriation of their investment and to do so **throughout the lifetime of an investment up to the moment of its 'sale or other disposition**' (Article 1102(2))."[50]

[45] **RLA-0128**, p. 12 (Art. 31(1)).

[46] See Reply, p. 162 (Section 8.1.1).

[47] **CLA-0001**, p. 143 (Art. 823).

[48] See *e.g.*, **CLA-0001**, p. 123 (Arts. 801.2, 804.3, 812) ("for greater certainty") and p. 171 (Annex 804.1) ("for greater clarity").

[49] **CLA-0001**, p. 138 (Arts. 819-820).

[50] **CLA-0161**, p. 30 (para. 91) (emphasis added).

30 The *EnCana* tribunal quoted this position with approval, agreeing "both on the basis of the actual language of the BIT and its object and purpose" that "a 'dispute' arises upon the taking of measures in breach of the Treaty which cause loss and damage to an investor, and that this is sufficient to found jurisdiction."[51]

31 The Tribunal should follow the Claimant's and Canada's interpretation of the definition of "investor" in Article 847 of the FTA.

3.2 Question 2

"*Please identify (list) all 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*."

32 The Claimant lists these letters below:

Exhibit	Date	Referenced at
C-0531	24/08/2015	Reply, p. 87 (para. 213, fn. 393)
C-0508	Before 04/06/2016[52]	Reply, p. 65 (para. 158, fn. 289)
C-0511	03/08/2016	Reply, p. 65 (para. 158, fn. 290)
C-0512	05/10/2016	Reply, p. 65 (para. 158, fn. 290)
C-0098	06/10/2016	First Witness Statement of Julio F. Castañeda, p. 20 (para. 56, fn. 60)
C-0422	07/10/2016	Reply, p. 65 (para. 158, fn. 289)
C-0513	10/10/2016	Reply, p. 65 (para. 158, fn. 290)
C-0514	16/10/2016	Reply, p. 65 (para. 158, fn. 290)
C-0509	12/01/2017	Reply, p. 65 (para. 158, fn. 289)
C-0515	12/01/2017	Reply, p. 65 (para. 158, fn. 290)
C-0119	19/12/2017	First Witness Statement of Julio F. Castañeda, p. 23 (para. 64, fn. 80)
		CD-0001, p. 39

[51] **RLA-0016**, p. 37 (para. 131).

[52] The letter is undated but refers to a meeting to be held on 4 June 2016.

C-0120	03/01/2018	Memorial, p. 25 (paras. 73, 101, fns. 118, 165)
		Reply, p. 81 (paras. 201, 207, fns. 368, 378)
		First Witness Statement of Julio F. Castañeda, p. 23 (para. 64, fns. 80, 81)
		[redacted]
C-0123	15/02/2018	Reply, p. 65 (para. 158, fn. 289)
		First Witness Statement of Julio F. Castañeda, p. 23 (para. 65, fn. 83)
		[redacted]
R-0077	10/04/2018	Reply, p. 93 (para. 227, fn. 425)
		Second Witness Statement of Julio F. Castañeda, p. 21 (paras. 47, 59, fns. 63, 81)
		[redacted]
C-0121	04/05/2018	Memorial, p. 25 (paras. 73, 103, fns. 117, 118, 168)
		Reply, p. 81 (paras. 201, 207, 213, fns. 368, 380, 395, 399)
		First Witness Statement of Luis F. Bravo, p. 7 (para. 13, fn. 6)
		First Witness Statement of Julio F. Castañeda, p. 23 (para. 64, fn. 81)
		Second Witness Statement of Julio F. Castañeda, p. 17 (paras. 37, 46, fns. 50, 60)
		[redacted]
		[redacted]
		CD-0001, p. 43
C-0523	23/07/2018	Reply, p. 85 (para. 207, fn. 384)

		CD-0001, p. 47
R-0134	10/10/2018	Reply, p. 85 (para. 207, fn. 382)
C-0163	10/10/2018	Reply, p. 85 (para. 207, fns. 382, 384)
		[redacted]
		CD-0001, p. 49
C-0169	15/10/2018	[redacted]
R-0104	15/01/2019	Counter-Memorial, p. 128 (paras. 250, 253, fns. 526, 536)
R-0013	12/02/2019	Reply, p. 12 (paras. 29, 364, fns. 28, 718)
		Second Witness Statement of Luis F. Bravo, p. 28 (paras. 66, 69, fns. 82, 89)
C-0198	20/02/2019	First Witness Statement of Luis F. Bravo, p. 15 (para. 39, fn. 27)
		Second Witness Statement of Luis F. Bravo, p. 32 (para. 76, fn. 94)
C-0357	21/03/2019	Second Witness Statement of Luis F. Bravo, p. 50 (para. 132, fn. 168)
R-0026	21/03/2019	Counter-Memorial, p. 141 (paras. 278, 529, 651(h), 662, fns. 601, 1100, 1326, 1359)
		Rejoinder, p. 140 (paras. 271(b), 613, fns. 526, 1321)
R-0111	06/05/2019	Counter-Memorial, p. 142 (paras. 280, 331, 651(i), fns. 606, 607, 608, 741, 1327)
		Rejoinder, p. 135 (paras. 261, 271(c), 822(i), fns. 500, 527, 1865)
R-0110 (corrected translation)	04/06/2019	Reply, p. 143 (para. 348, fn. 678)

3.3 Question 3

"*Without prejudice to the issue whether acts of the Parán community are attributable to the state, please identify any additional legal authority 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.*"

33 The Claimant has already produced several cases in which third parties caused the claimant's loss of ownership or control of its investment and a breach of an investment agreement was found.

34 One such case is *Pezold v. Zimbabwe*. In this case, one of the claimants' claims related to the occupation of the claimants' estates by the settlers and war veterans. The tribunal found that, by failing to prevent and remove the settlers and war veterans from the claimants' properties, Zimbabwe breached the non-impairment provision and the FPS standard in the BITs.[53]

35 Similarly, in *Houben v. Burundi*, squatters occupied the claimant's land and erected personal dwellings, preventing the claimant from developing and enjoying the land. Burundi failed to engage the police and evict the squatters even though it was aware of the issue. The tribunal found that Burundi violated the FPS standard in the BIT by not taking the necessary steps to protect the claimant's investment against the squatters. The tribunal further found that this measure amounted to indirect expropriation as the measure had an effect equivalent to measures depriving or restricting property.[54]

36 In *AMT v. Zaire*, soldiers of the armed forces destroyed and otherwise took property and other valuable objects belonging to a company in which the claimant was a majority shareholder. The tribunal found a breach of the FPS standard as the DRC failed "to take every measure necessary to protect and ensure the security of the investment made by AMT in its territory."[55] Importantly, the tribunal clarified that it did not matter whether these acts of violence were committed by the DRC's army or any other person and found that the DRC was responsible for the damages and losses sustained by the claimant.[56]

[53] **CLA-0027**, p. 192 (paras. 579, 581, 597).

[54] **CLA-0163**, p. 1 (paras. 171-179, 212-215).

[55] **CLA-0022**, p. 18 (paras. 6.05-6.11).

[56] **CLA-0022**, p. 19 (para. 6.13). See also Reply, p. 309 (paras. 821-826); **CLA-0028**, p. 911 (paras. 82, 84, 99-101).

37 In *Wena Hotels v. Egypt*, the tribunal found there had been expropriation after an entity over which Egypt could have exercised control, but did not do so, seized and illegally possessed the claimant's hotels for nearly a year.[57]

3.4 Question 4

"*To Claimant: please identify the specific portions of its pleadings in which Claimant identifies its investment*."

38 The Claimant identifies its investment in the Memorial at paragraph 209, as follows (other references are provided in the notes): [58]

i) "a 99.999% interest in IMC through AAG (acquired in October 2012)";[59]

ii) "six mining Concessions in Peru held by IMC";[60]

iii) "surface rights in the Project area held by IMC allowing for mining activities to be undertaken";[61]

iv) "Lupaka's attendant equipment and infrastructure including, among other things, moveable and immoveable as well as tangible and intangible property";[62] and

v) "the expenses incurred by Lupaka for exploration drilling, assaying and metallurgical tests among others."[63]

39 The Mallay Plant is not part of the investment and the Claimant does not seek damages for its value. The high probability of acquisition of the Mallay Plant serves to support the Claimant's counterfactual scenario in which it would have processed its ore at the rate of 590 t/d.[64]

[57] **CLA-0028**, p. 915 (paras. 99-101).

[58] See Memorial, p. 67 (para. 209); see also Reply, p. 163 (para. 400).

[59] See also Memorial, p. 7 (para. 22); **C-0036**; Accuracy Report, p. 63 (paras. 8.26 and 8.29 and Table 8.1).

[60] See also Memorial, p. 7 (para. 23); **C-0028**; **C-0029**; **C-0030**; **C-0031**; **C-0032** and **C-0033**.

[61] See also Memorial, p. 9 (paras. 30-31, 50-51, 58-64, 77-78, 82); **C-0042**; **C-0043**; **C-0063**; **C-0065**; **C-0088**; **C-0089**.

[62] Memorial, p. 9 (paras. 28, 34 and 96); **C-0036**; **C-0234**, p. 16 (para. 1.8); Accuracy Report, p. 63 (paras. 8.27 and 8.29 and Table 8.1).

[63] Memorial, p. 11 (Section 2.2.1); Accuracy Report, p. 63 (paras. 8.27 and 8.29 and Table 8.1).

[64] Reply, p. 374 (Section 10.2); Claimant's Pre-Hearing Skeleton, p. 29 (Section 3.5).

3.5 Question 5

40 "*Is the FTA part of Peru's internal law, either because Peru is a monist State or pursuant to legislation or other similar implementing legal measures by Peru's authorities? If so, what are the implications?*"

41 Article 55 of the Peruvian Constitution provides that "[t]reaties concluded by the State and in force are part of [the State's] national law".[65] The FTA was signed by Peru and Canada on 29 May 2008 and entered into force on 1 August 2009,[66] thus being part of Peru's internal law.

42 Accordingly, the same actions and omissions that violate the FTA also violate Peru's internal law. Independently of this the Claimant has further shown that Peru's omissions violated other rules of its internal law.[67] The Claimant had the expectation that Peru would comply with both international law and its own internal law, but Peru failed to do so.

3.6 Question 6

"*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?*"

43 This question is closely linked to the question posed by Mr Garibaldi, on Day 4 of the Hearing, as to the competent Peruvian authorities to mediate and adjudicate boundary disputes between rural communities.[68] Hence, the Claimant will first comment on this last point and then address Question 6.

44 During his re-direct examination, Mr Bravo explained that the PCM is the lead State agency of the national system for territorial demarcation.[69] This is provided for in Article 5.1 of Law No. 27795, which the Claimant introduced to the record at the Tribunal's request.[70] The Parties subsequently agreed to also introduce Law No. 24657, Ministerial Resolution No. 0468-2016-

[65] **C-0023 (corrected translation-Memorial)**, p. 21 (Art. 55).

[66] Request for Arbitration, p. 4 (para. 1); **CLA-0002**.

[67] See *e.g.* Reply, p. 118 (Sections 6.4, 7.1), **R-0005 (corrected translation)**, p. 2 (Art. 920); **R-0060**, p. 5 (Art. 8.2).

[68] **Tr. Day 4**, 1079:13-1081:12; **Tr. Day 6**, 1796:5-10.

[69] **Tr. Day 4**, 1078:16-1079:1, 1082:19-1083:12, see also 1085:2-21.

[70] **Tr. Day 4**, 1078:16-1080:7; **C-0648**, p. 5 (Art. 5.1).

MINAGRI and a Supreme Court decision to the record,[71] which Peru argued are also relevant to the mediation and adjudication of boundary disputes between rural communities.[72]

45 Law No. 27795, enacted in July 2002, is the Law of Demarcation and Territorial Organization. It establishes the technical criteria and procedures for territorial demarcation actions.[73] As the lead State organ on this matter, the PCM must ensure a rational organisation of the territory and the regularisation of territorial boundaries.[74] The PCM fulfils this mandate with the support of regional governments[75] and local authorities.[76] Territorial demarcation actions are initiated at the request of citizens[77] or *ex officio* by regional governments.[78]

46 For its part, Law No. 24657, enacted in April 1987, regulates the demarcation and titling of the territory of rural communities. It is a *lex specialis* to the preceding law. Articles 3 to 13 set out the applicable procedure when a rural community does not have title to the land it owns or when it claims that the rural communities actual communal land is different from that indicated in the title deeds.[79] The procedure is commenced by the community concerned, which requests the competent Regional Agrarian Directorate to draw up a map of its territory.[80] The Agrarian Directorate notifies the neighbouring communities of the request and conducts a survey to prepare the map.[81] In the event that an adjoining community disagrees with the boundaries indicated by the requesting community, the Agrarian Directorate invites the parties to a conciliation.[82] If the parties do not reach an agreement, the Agrarian Directorate submits the dispute to the competent court,[83] which renders a decision within 60 days.[84] This procedure is regulated in more detail in Ministerial Resolution No. 0468-2016-MINAGRI, enacted in September 2016.[85]

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[71] Email sent by Peru to the Tribunal on 11 April 2023; **R-0276**; **R-0278** and **R-0277**.
[72] **Tr. Day 4**, 1084:2-1085:1.
[73] **C-0648**, p. 2 (Art. 1).
[74] **C-0648**, p. 6 (Art. 5.1).
[75] **C-0648**, p. 6 (Art. 5.2).
[76] **C-0648**, p. 7 (Art. 5.3).
[77] **C-0648**, p. 7 (Art. 6).
[78] **C-0648**, p. 8 (Art. 10).
[79] **R-0276**, p. 2 (Art. 3).
[80] **R-0276**, p. 2 (Art. 4).
[81] **R-0276**, p. 2 (Art. 5).
[82] **R-0276**, p. 3 (Art. 8).
[83] **R-0276**, p. 4 (Art. 11).
[84] **R-0276**, p. 4 (Art. 12).
[85] **R-0278**.

47 There is no evidence in the record of any action taken by any Peruvian government authority to mediate or adjudicate the boundary disputes between Parán and the other communities, either under the above statutes or others. Parán also never filed any formal action to this effect, as confirmed by Mr Bravo during cross-examination.[86]

4 OVERVIEW OF THE TESTIMONY OF THE WITNESSES AND EXPERTS WHO APPEARED AT THE HEARING

48 The Claimant provides an overview of the testimony of the witnesses and experts who appeared at the Hearing with a brief comment as to their credibility and some of the implications of their testimonies for the resolution of this case below (**Sections 4.1-4.10**).

4.1 [redacted]

49 [redacted]

50

51

[86] **Tr. Day 4**, 972:16-973:7.

[87] [redacted]

[redacted]

52

4.2 Julio Castañeda (IMC's general manager, February 2013-October 2018)

53 Mr Castañeda was general manager when IMC obtained the vast majority of the necessary permits to enter exploitation. He also supervised the CR team's efforts to engage with the local communities.[91] He testified in writing on several key issues for this case, including the status of the Project when Parán installed the Blockade and the actions taken by IMC to address Parán's supposed water pollution concerns.

54 The Respondent tried to undermine the credibility of Mr Castañeda during cross examination, to no avail. It tried to show that Mr Castañeda had used the company's funds for personal purposes and that this was the reason his contract was terminated by IMC. But Mr Castañeda explained that all the expenses he made with his personal credit card related to IMC's business and therefore that he had the right to be reimbursed for them.[92] Indeed, this was specified in his contract with the company.[93] Mr Castañeda decided to leave IMC because of his disagreement with Mr Ansley on this matter.

55 As to matters of substance, Mr Castañeda's cross-examination confirmed the shortcomings of Peru's case.

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[88] **Tr. Day 3**, 737:1-741:3; **Tr. Día 3**, 774:13-779:4; **R-0127-ENG (updated corrected translation)**, p. 4.

[89] **Tr. Day 3**, 761:17-763:5; **Tr. Día 3**, 800:12-802:3; **C-0125**; **C-0159**; **C-0129**, p. 3.

[90] See **R-0064**, p. 1 and **Tr. Day 3**, 743:15-744:22; 764:1-766:1; **Tr. Día 3**, 781:17-783:2, 802:21-805:1; **C-0193**, p. 2; **R-0275-ENG**, p. 2; **C-0160**; **R-0261**, p. 10 and **Tr. Day 3**, 759:4-11; **Tr. Día 3**, 797:19-798:5. See also cross examination of Mr Castañeda, **Tr. Day 2**, 476:21-477:18; **Tr. Día 2**, 500:11-501:12.

[91] First Witness Statement of Julio F. Castañeda, p. 8 (Sections 4.3, 5.4); Second Witness Statement of Julio F. Castañeda, p. 12 (Section 3.3).

[92] **Tr. Day 2**, 395:10- 397:22; **Tr. Día 2**, 416:20-419:11.

[93] **Tr. Day 2**, 397:15-21; **Tr. Día 2**, 419:4-10.

56 *First*, as explained at Section 5.3 below, Peru strategically decided not to question Mr Castañeda on Parán's water pollution concerns; yet, as Mr Castañeda would have explained, all water pollution issues had been resolved through IMC's water management system.[94]

57 *Second*, in relation to the status of the Project when Parán commenced the Blockade, Peru only asked Mr Castañeda about the procedure to certify its water management system. This highlighted the dearth of Peru's arguments to support its case that absent the Blockade, exploitation would not have commenced by October 2018 (further comments on Peru's erroneous legal position regarding this single certification are at Section 5.3.3 below).[95]

58 *Third*, the remainder of Peru's cross examination was mostly focused on topics on which Mr Castañeda did not have direct knowledge [redacted] namely, IMC's dealings with Parán. For example, Peru asked Mr Castañeda whether IMC prioritised negotiations on the ground with Lacsanga over the other communities,[96] and whether IMC ceased paying attention to Parán after signing a surface rights agreement with Lacsanga.[97] among others. These are issues that Peru should have addressed with [redacted], but did not. In any event, Mr Castañeda's comments confirmed that he was informed and able to supervise IMC's good faith dealings with Parán.

59 Mr Castañeda came across as a competent professional and an honest and trustworthy witness.

4.3 Luis Felipe Bravo (IMC's general manager, January 2019-August 2019)

60 Mr Bravo was central to the events that occurred in 2019 and testified in detail on them in his two witness statements. This included his meetings with high-ranking central government officials and Parán's representatives in January and February 2019, the negotiation of the 26 February 2019 Agreement and its immediate breach by Parán, the central government's failure to react to Parán's breach, in particular after the renewed invasion of the Site on 20 March 2019, Parán's violent reaction to WDS' peaceful entry into the Site (including murder) on 14 May 2019, the unwillingness of high-ranking State officials to order Police intervention despite Lupaka's continued pleas for help; all this despite the clear view of numerous key officials, not least within the Police, that the State should intervene forcefully to reinstate law and order.

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[94] Second Witness Statement of Julio F. Castañeda, p. 24 (paras. 55-57, 88-89); **C-0399**, p. XVI (para. 42); **C-0408**, p. VIII (paras. 5.2 and 6.3).

[95] **Tr. Day 2**, 540:8-14; **Tr. Día 2**, 565:21-566:7.

[96] **Tr. Day 2**, 431:4-432:1; **Tr. Día 2**, 453:10-454:8.

[97] **Tr. Day 2**, 449:16-450:20; **Tr. Día 2**, 472:10-473:15.

61 Yet, the Respondent only cross-examined Mr Bravo on:

a) The negotiation on 26 February 2019 with Parán, the agreement reached and its immediate aftermath (Section 5.2.2 below); and

b) the contracting of WDS and the events of 14 May 2019 (Section 5.2.2 below).

62 All else stands uncontested. Other than the two discrete points referred to above, Peru's cross-examination turned on matters which predated Mr Bravo's entry on the scene. In particular, he was cross-examined on:

a) Matters relating to permitting.[98] Mr Bravo did not testify on this in his written statements in any detail because the related facts occurred before he joined IMC and also because, as he noted during his oral testimony, the focus after he joined was on resolving the conflict with Parán rather than the very few permitting issues which remained.[99] This was not only because the larger issue of Parán's use of force (which blocked the entire Project) had to be resolved, but also because any outstanding permitting requirements needed access to the Site and could not therefore be resolved.[100] Factual matters of permitting should have been put to Mr Castañeda who testified on this extensively.[101] In any event, Mr Bravo was able to offer his general expertise on the matter as a mining professional and a lawyer.

b) Third party processing facilities, on which Mr Castañeda testified, as IMC tested these while minerals could be extracted.[102] During Mr Bravo's time, such facilities were not used due to the Blockade.

63 Mr Bravo came across as a candid, honest and competent businessman; he had nothing to hide.

4.4 Soyman Retuerto (Subprefect of the Leoncio Prado District, March 2017-March 2022)

64 Mr Retuerto was the subprefect of the Leoncio Prado District between 2017 and 2022, *i.e.*, covering the worst of the social conflict at issue. His written testimony referred to IMC's alleged

[98] **Tr. Day 4**, 983:10-988:8.

[99] **Tr. Day 3**, 786:22-787:5.

[100] **Tr. Day 3**, 935:9-936:5.

[101] First Witness Statement of Julio F. Castañeda, p. 8 (Section 4.3); Second Witness Statement of Julio F. Castañeda, p. 20 (Sections 4.1, 7).

[102] **Tr. Day 4**, 992:12-998:22.

mishandling of relations with Parán and the community's alleged willingness to reach an agreement with IMC.[103] He also denied that Parán's marijuana business was behind its opposition to the Project.[104]

65 The hearing confirmed that Mr Retuerto's testimony is not credible:

66 *First*, as demonstrated during his cross examination, Mr Retuerto was personally against the Project. This is apparent from the letters he sent to Peru's central authorities in January[105] and May[106] 2018 asserting that IMC was about to enter exploitation and that its mine effluents were contaminating Parán's water sources. He conceded that these letters were inaccurate, but still did not rectify them when it became clear that they were wrong,[107] and instead went on to make these same inaccurate statements publicly thereafter.[108] Mr Retuerto's actions aggravated the social conflict, creating mistrust and undue concerns within Parán.

67 *Second*, Mr Retuerto confirmed that he was not aware of the many actions undertaken by IMC to engage with Parán, including by paying the PEN 300,000 owed by IMC's prior owner and submitting various proposals for an agreement, 90% of Parán's assembly having accepted one of them.[109] The criticisms he made in his witness statement of IMC's engagement efforts are opportunistic and merely aimed at advancing Peru's case.

68 *Third*, during cross-examination, Mr Retuerto initially denied the obvious, *i.e.*, that marijuana cultivation is a matter of serious concern in Parán.[110] However, he ended up conceding this reality,[111] and also agreed that the Narvasta family, which had several members in leadership roles in Parán, were involved in this illegal business.[112] This was a confirmation that Parán's marijuana business was behind its opposition to the Project, as Mr León acknowledged in internal MEM-OGGS documents.[113]

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[103] Witness Statement of Soymán Román Retuerto, p. 7 (Sections III and IV).

[104] Witness Statement of Soymán Román Retuerto, p. 10 (Section IV).

[105] **R-0076-ENG (corrected translation)**.

[106] **R-0081**, p. 1.

[107] **Tr. Day 3**, 831:4-833:7, 856:1-856:10; **Tr. Día 3**, 869:15-872:4, 896:8-18.

[108] **C-0527**, p. 1.

[109] **Tr. Day 3**, 842:11-843:22; **Tr. Día 3**, 881:18-883:11.

[110] **Tr. Day 3**, 867:4-868:16; **Tr. Día 3**, 908:8-910:3.

[111] **Tr. Day 3**, 882:1-882:11; **Tr. Día 3**, 924:14-925:7.

[112] **Tr. Day 3**, 879:2-879:13; **Tr. Día 3**, 921:8-20.

[113] **C-0468**, p. III; **C-0553**, p. 2; **Tr. Day 5**, 1359:14-16; **Tr. Día 5**, 1427:11-15.

4.5 Andrés Fernando Trigoso (MEM-OGGS August 2018-March 2019)

69 Mr Trigoso was an important witness given the positions he held at the time. He was the Director of the Office of Dialogue Management and Citizen Participation (*Oficina de Gestion de Dialogo y Participación Ciudadana*) from August 2018 to the end of March 2019; this was the office within the MEM-OGGS in charge of managing social conflicts.[114] In this position, his immediate superior was the director of the OGGS as a whole.[115] Yet Mr Trigoso was also the director of the OGGS as a whole from 6 December 2018 to 26 January 2019.[116] After such time, the director of the OGGS was Mr Carbajal Briceño according to Mr Trigoso.[117] The immediate superior of the director of the OGGS was the Minister of the MEM.[118] This was Mr Francisco Ísmodes Mezzano.[119] Indeed, the MEM-OGGS is an organ set up to advise the Minister of the MEM.[120]

70 Mr Trigoso still works for the State today. His testimony in this arbitration reflects the official position of the State which Lupaka also faced at the time, namely that dialogue had to continue, that the State was engaging its best efforts, that it was Lupaka's fault that the Blockade had not been lifted and that Lupaka was required to enter into an agreement with Parán.

71 Mr Trigoso had no credibility whatsoever at the Hearing. He proved unable to answer straightforward questions without giving longwinded, evasive and in many instances false answers.

72 For example: i) Mr Trigoso was unable to concede that his letter of 18 February 2019 to Parán, required the lifting of the Blockade before dialogue could continue and that he warned Parán that the Police would intervene in the circumstances;[121] and ii) he was unable to concede that Mr León's interpretation of the 26 February 2019 Agreement contained in an internal memo, reflected the OGGS' view that the Blockade of the "access road**s**" had to be lifted, including the Lacsanga road,[122] and that this had not been complied with by Parán.[123] On the latter point, he

[114] **Tr. Day 4**, 1107:22-1108:16; **Tr. Día 4**, 1149:2-21.
[115] **Tr. Day 4**, 1247:2-9; **Tr. Día 4**, 1302:2-11.
[116] **Tr. Day 4**, 1108:17-21; **Tr. Día 4**, 1149:22-1150:5.
[117] **Tr. Day 4**, 1237:11-14; **Tr. Día 4**, 1291:22-1292:4.
[118] **Tr. Day 4**, 1156:1-1156:4, 1247:2-1247:20, 1108:12-16; **Tr. Día 4**, 1202:14-19, 1302:2-3, 1149:15-21.
[119] **Tr. Day 4**, 1179:16-21; **Tr. Día 4**, 1228:17-1229:1.
[120] **Tr. Day 4**, 1161:12-15; **Tr. Día 4**, 1208:5-11.
[121] **Tr. Day 4**, 1140:5-1143:19; **Tr. Día 4**, 1185:10-1189:8.
[122] **Tr. Day 4**, 1205:15-1209:4, 1218:15-1223:1, 1228:17-1229:4; **Tr. Día 4**, 1257:2-1260:21, 1271:12-1276:9, 1282:19-1283:5.
[123] **Tr. Day 4**, 1218:15-1223:1; **Tr. Día 4**, 1271:12-1276:9.

noted that it was not for the OGGS to interpret the agreement (despite his prior statements referring to the supposed compliance by Parán with the agreement and also the internal documents precisely offering an interpretation of the agreement). This made no sense given that it is for the MEM to determine whether dialogue is to continue; if the MEM determines that it should not, then it would need to coordinate with other State authorities, including the Police.[124]

73 What happened in reality (as discussed in Section 5.1.2 below) is that after Mr Trigoso's department assessed Parán's conduct and the surrounding facts, it determined that there was no point in continuing with dialogue and that the Police had to intervene. Yet the Police did not do so.

4.6 Nilton César León (MEM-OGGS June 2018-September 2019)

74 Mr León's role in the facts at issue was important as he was involved in practically all the State mediated negotiations with Parán since the time of the Blockade until Lupaka lost the investment as an OGGS representative assigned to the Parán conflict from June 2018 to September 2019.[125] He was likely on the ground more than anybody else from the central authorities.

75 His written testimony and his testimony at the Hearing was mostly in line with Mr Trigoso's. Yet, as was the case with Mr Trigoso, he had no credibility and was unable to acknowledge what his own true position had been at the time, as reflected in the internal documents that he authored. Namely, his view that because Parán's members were heavily armed, had marijuana plantations, had blocked the Lacsanga road, taken the Site and were showing no willingness to negotiate, further dialogue was pointless and Police intervention was necessary to solve the situation.

76 Indeed, his *aide mémoires* are clear on the fact that the Police had prepared operational plans and were ready to implement them once the MININTER gave the green light.[126] Yet, as one of the many examples of his inability to testify truthfully, he stated instead that there was no concrete operational plan to his knowledge and that the MININTER was going to intervene through further dialogue.[127]

77 Mr León continues to work at the OGGS today. He clearly was not free to speak his mind when cross-examined.

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[124] **R-0012**, p. 3 (Art. 51(b)-(d)).

[125] **Tr. Day 5**, 1384:20-1385:3; **Tr. Día 5**, 1455:14-1456:1.

[126] **C-0576**; **C-0351**; **C-0468**; **C-0553**.

[127] **Tr. Day 5**, 1369:8-1394:22; **Tr. Día 5**, 1437:19-1467:19.

4.7 Esteban Saavedra Mendoza (Deputy Minister of the MININTER October 2018-November 2020)

78 Mr Saavedra was a high ranking official at the time of the events and would certainly have been involved in, or at least been privy to, the decision that the Police should not intervene. He was Deputy Minister of Internal Order at the MININTER between 31 October 2018 and 19 November 2020.[128] He was also Deputy Minister of Public Security from November 2018 through to April 2019 (he did not mention this in his witness statement).[129] Hence, he occupied both deputy ministerial positions in the MININTER at the relevant time. Mr Saavedra had had a long career within the MININTER. Indeed, he has also been a Police officer for 32 years and had ascended to a high rank within the force, thereby making him intimately aware of the workings of the Police.[130]

79 Mr Saavedra's only witness statement was provided with Peru's Counter-Memorial,[131] where he states that dialogue had not been exhausted and hence that it was correct for the Police not to intervene as this was a measure of last resort; that he did not have any power to order that the Police intervene; and that the Police would make such decision autonomously. This was in line with his testimony at the Hearing.

80 Yet, despite his seniority, this witness had no credibility. He was evasive and clearly not telling the truth.

81 For example, he was unable to admit that he had been in direct contact with the highest echelons of the Police on numerous occasions at Mr Bravo's request in early 2019, even when confronted with his WhatsApp exchanges with Mr Bravo which confirmed this.[132] Mr Saavedra also denied knowing whether Parán had firearms.[133] He even denied knowing about a police operational plan to lift the Blockade,[134] despite this being the subject of numerous WhatsApp exchanges with Mr Bravo.

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[128] First Witness Statement of Nilton César León Huerta, p. 1 (para. 2); **Tr. Day 5**, 1268:20-22; **Tr. Día 5**, 1328:10-12.

[129] **Tr. Day 5**, 1277:5-1278:15; **Tr. Día 5**, 1337:15-1339:6.

[130] Witness Statement of Esteban Saavedra Mendoza, p. 2 (para. 10).

[131] Mr Saavedra did not provide a second witness statement despite Mr Bravo's challenge to his testimony in Mr Bravo's second witness statement.

[132] **Tr. Day 5**, 1307:10-1310:7, 1310:15-1311:12, 1312:6-1315:5, 1321:2-1322:12; **Tr. Día 5**, 1371:1-1373:22, 1374:8-1375:9, 1376:5-1379:6, 1385:16-1387:6.

[133] **Tr. Day 5**, 1302:9-10; **Tr. Día 5**, 1365:8-9.

[134] **Tr. Day 5, 1322:16-20**; **Tr. Día 5**, 1387:11-15.

82 Mr Saavedra was also very reluctant to discuss the instances in which the Police have an obligation to intervene, stating repeatedly that he is not a lawyer, despite spending his entire career in the public order sector.[135] In any event, Mr Meini's report shows that the Police had a duty to intervene to put an end to Parán's criminal actions.[136]

83 Mr Saavedra continues to be a civil servant today,[137] and was shown to be another messenger for the State's official position rather than somebody able to help the Tribunal with the facts of the case.

4.8 Miyanou Dufour von Gordon (Respondent's mining law expert)

84 Ms Dufour's independence from Peru and impartiality in this case is highly questionable; the Tribunal should disregard her evidence. During cross-examination, Ms Dufour acknowledged that as a partner of the law firm *Hernández & Cía. Abogados*, she shares her firm's profits, and that when she accepted the engagement to act as expert for Peru in this case, Peru was a key client of her firm. Indeed, her firm recently advised Peru on a USD 5 billion bond issue and is also representing Peru in two ongoing ICSID cases.[138] Ms Dufour failed to disclose these engagements despite having an obligation to do.[139]

85 In addition, Ms Dufour's cross-examination showed that she has opined on matters outside her expertise. Half of her report was devoted to address matters related to social licence to operate, an area in which she has no academic credentials.[140] Nor did Ms Dufour conduct a site visit to Parán or interview any of Parán's members to support her opinions.[141] She also opined on technical mining issues such as processing and mine construction times, another area in which she has no training, to support her arbitrary "real" time estimates.[142]

86 The other half of Ms Dufour's report addresses the permits that Lupaka supposedly needed to obtain to commence exploitation. As explained in Section 5.3, the Tribunal excluded from the record most of this analysis given its lateness,[143] and, in any event, her cross-examination

[135] **Tr. Day 5**, 1292:20-21, 1294:13-15, 1295:20-21, 1339:5-8, 1344:15-19; **Tr. Día 5**, 1353:18-1355:4, 1355:21-22, 1356:20-21, 1358:8-9, 1405:7-10, 1411:10-11.

[136] Iván F. Meini Report, p. 25 (para. 72).

[137] **Tr. Day 5**, 1262:1-7; **Tr. Día 5**, 1321:8-18.

[138] **Tr. Day 5**, 1457:8-1464:9; **Tr. Día 5**, 1537:12-1544:14.

[139] **Tr. Day 5**, 1464:10-1473:22; **Tr. Día 5**, 1544:15-1553:18; **PO No. 1**, p. 12 (Art. 15.1).

[140] **Tr. Day 5**, 1540:2-6; **Tr. Día 5**, 1622:8-11.

[141] **Tr. Day 5**, 1540:17-1541:9; **Tr. Día 5**, 1623:1-13.

[142] **Tr. Day 5**, 1509:14-1514:9; **Tr. Día 5**, 1590:14-1595:12.

[143] **Tr. Day 4**, 961:5-964:14.

confirmed that Lupaka was virtually ready to enter exploitation when Parán installed the Blockade.[144]

4.9 Erik van Duijvenvoorde and Edmond Richards, Accuracy (Claimant's valuation experts)

87 The Claimant's valuation experts, Accuracy, were credible and helpful to the Tribunal. They answered all the questions directly and succinctly.

88 Peru seemingly could not find issues with Accuracy's valuation itself, so it tried to challenge Accuracy on issues of fact on which Accuracy are not able to opine, and on the technical mining assumptions set out by Mr Jacobs of Micon.[145] As the Tribunal will recall, Peru decided not to cross-examine Mr Jacobs; any questions on technical mining assumptions should have been posed to him instead.[146]

4.10 Isabel Kunsman and Alexander Lee, AlixPartners (Respondent's valuation experts)

89 Like Ms Dufour, AlixPartners' independence from its appointee and impartiality in this case is seriously in doubt. The cross-examination of Ms Kunsman revealed that Peru had engaged her in 12 out of a total of 43 cases where she has appeared as expert, more than 25%.[147] Additionally, Ms Kunsman acknowledged that she pitches for further work from Peru pertaining to arbitrations "all the time" and that her personal revenue from Peru places it within her top five clients.[148]

90 AlixPartners also purported to act as Peru's technical mining experts, criticising Micon's expert opinion.[149] However, Ms Kunsman acknowledged in cross-examination that she is not a technical mining expert and cannot opine on such matters.[150]

[144] **Tr. Day 5**, 1514:12-1516:4, 1521:14-1523:8; **Tr. Día 5**, 1595:13-1597:5, 1604:16-1606:10.
[145] **Tr. Day 6**, 1622:7-1628:2.
[146] **Tr. Day 6**, 1625:16-1626:7; 1627:1-13; 1638:16-1639:9.
[147] **Tr. Day 6**, 1667:15-1672:6; 1673:12-18.
[148] **Tr. Day 6**, 1672:10-1674:18.
[149] AlixPartners Second Report, p. 25 (Sections V.A.I-VI, VI.A.I-VI); **RD-0004**, p. 14-15, 18.
[150] **Tr. Day 6**, 1678:13-20; 1749:8-1750:12.

5 MATTERS CONFIRMED AT THE HEARING

5.1 The Claimant's case on liability was further confirmed: Peru violated its laws and the FTA through the actions of its representatives and by allowing Parán to continue enforcing the Blockade and occupying the Site

91 Further evidence came to light at the Hearing around three main points related to the Claimant's case on liability. Mr Retuerto, the MININTER's local representative, aided and abetted the Parán Community arbitrarily and acquiesced in Parán's illegal actions, which are also attributable to the State (**Section 5.1.1**). The internal view of the Central government's officials' most closely connected with the facts was that Parán was not willing to negotiate and believed that the Police should intervene, yet in the State's external communications with Lupaka, Peru insisted on dialogue (**Section 5.1.2**). The Police should have intervened in the circumstances, but it did not do so for political motives (**Section 5.1.3**)

92 The Claimant's case does not depend on the Tribunal accepting its description of Parán's motives to block the Project. The Tribunal also does not need to agree to the Claimant's explanation as to the reasons behind the State's decision against Police intervention. The Tribunal only needs to find that the State was required to, but did not, remove the Blockade given the facts at the time, and otherwise ensure that Parán did not impede the Project from going forward.

5.1.1 Mr Retuerto, the local MININTER representative, aided and abetted Parán arbitrarily

93 In his witness statement, Mr Retuerto states that he could not have participated in or led the 19 June 2018 Invasion because Parán considered him "*persona non-grata*" at that time.[151] Yet, when questioned about the date from which he was supposedly considered "*persona non-grata*" by Parán, Mr Retuerto was not able to give a credible answer. He said that he had that status because of his former role as president of the Santo Domingo community, held between 2009 and 2012, but that Parán only retaliated against him for this reason some 6 years later – quite conveniently, "10 or 15 days" before the 19 June 2018 Invasion.[152]

94 Mr Retuerto's testimony is also denied by the fact that Parán informed him about the invasion before carrying it out,[153] and because he did not inform any State authority that he was considered *persona non-grata*,[154] despite it interfering with his functions as Subprefect. Mr

[151] Witness Statement of Soymán Román Retuerto, p. 6 (para. 20).

[152] **Tr. Day 3**, 907:16-908:16; **Tr. Día 3**, 952:21-954:2.

[153] **Tr. Day 3**, 910:6-911:4; **Tr. Día 3**, 955:17-956:17.

[154] **Tr. Day 3**, 908:17-22; **Tr. Día 3**, 954:3-10.

Retuerto argued that his functions were not affected as he could still communicate in writing with Parán.[155] But this is a very narrow view of his duties as Subprefect, which include taking actions to solve the Parán conflict[156] – something he could only do if he was able to communicate freely with Parán on the ground. Mr Retuerto's testimony is also inconsistent with [redacted][157] and with the letter prepared by IMC, two months later, for OSINERGMIN,[158] both of which refer to Mr Retuerto's participation in the 19 June 2018 Invasion.

95 Mr Retuerto's actions against the Project were not limited to the 19 June 2018 Invasion. The Claimant questioned Mr Retuerto on the letter that he sent on 4 January 2018 to the PCM stating that IMC was about to enter exploitation, when this was not the case.[159] Mr Retuerto acknowledged that this letter was inaccurate and that he knew this at the time.[160] Yet Mr Retuerto did not rectify his communication[161] and went on to publicly declare in late 2018 that IMC had started exploiting the Mine.[162]

96 Mr Retuerto was also acutely aware that Parán blocked the Project to protect its illegal marijuana business[163] yet omitted this from his communications to the authorities in which he criticised IMC.[164] The lack of a balanced view from this MININTER representative who lived on the ground is patently clear.

5.1.2 The OGGS, among other authorities, believed Police intervention was required

97 As Mr Trigoso recognised, from the date the Blockade was set up (14 October 2018) until the end of 2018, the OGGS held a series of meetings with Parán in which the former unavailingly demanded that the latter lift the Blockade before dialogue with IMC take place; Parán refused to

[155] **Tr. Day 3**, 909:6-22; **Tr. Día 3**, 954:14-955:11.

[156] **C-0549**, p. 14, (paras. (d) and (l)).

[157] **R-0127-ENG (updated corrected translation)**, p. 3 (Item 6).

[158] **C-0130**.

[159] **R-0076-ENG (corrected translation)**, p. 1.

[160] **Tr. Day 3**, 828:4-9, 829:4-9, 840:7-841:3; **Tr. Día 3**, 866:10-15, 867:11-16, 879:7-880:8; **C-0451**, p. 1; **R-0061**, p. 1 (Section 1.1).

[161] **Tr. Day 3**, 829: 10-21; **Tr. Día 3**, 867:17-868:7.

[162] **Tr. Day 3**, 833:17-835:4; **Tr. Día 3**, 872:14-874:3; **C-0526**; **C-0527**, p. 1.

[163] **C-0104**; **C-0105**; **C-0108**; **Tr. Day 3**, 879:19-881:2, 882:1-882:11, 879:10-13; **Tr. Día 3**, 922:4-923:10, 924:14-925-7, 821:17-20; **Tr. Day 2**, 568:4-14; **Tr. Día 2**, 595:21-596:10.

[164] **Tr. Day 3**, 832:2-833:7, 856:1-856:10; **Tr. Día 3**, 870:16-872:4, 896:8-19; **R-0076-ENG (corrected translation)**; **R-0081-ENG (corrected translation)**; **R-0165-ENG (corrected translation)**; **C-0550**.

do so every time.[165] Mr Trigoso attended the next meeting with Parán and IMC on 29 January 2019. The OGGS required, again, that the Blockade be lifted and, again, Parán refused, as Mr Trigoso noted at the Hearing. To boot, Parán demanded the payment of USD 2 million for no valid reason.[166]

98 Parán's representatives were not just being unreasonable. Parán's leaders and many of its members are criminals: they took private property by force (the Site which was on Lacsanga and Santo Domingo's land), blocked access to the Site,[167] used their arms to threaten and attack anyone who tried to resist and had a significant marijuana business that they were seeking to protect. The documents that emanate from the OGGS from 18 February 2019 through to 20 March 2019 prove this beyond doubt.[168] These same documents also reflect the OGGS's understanding that there was no point in continuing any dialogue in the circumstances and the OGGS's consistent recommendation that the Police intervene to re-establish public order.[169]

99 As became clear during the testimony of Messrs Trigoso and León, while the OGGS and other authorities internally believed that the Police should intervene, the State's external and official position, after Mr Trigoso's letter of 18 February 2019, was contrary to this. It was based on a view that must have come from above, which dictated that dialogue should continue despite the circumstances. Messrs Trigoso and León were mouthpieces for this official view at the Hearing.

100 Even though Mr Trigoso denied on numerous occasions that he was "officially" aware of Parán's criminal conduct or the Police's plans to intervene,[170] he eventually conceded that he did know of this.[171] In addition, there is nothing on record showing that Mr Trigoso disagreed with the position taken by Mr León at the time in the internal *aide mémoires* (*i.e.*, that dialogue was of no use and the Police needed to intervene) except his word at the Hearing.[172] On the contrary, everything suggests that he agreed with Mr León's position. The fact that Mr León repeated this view in four internal communications (including three draft *aide memoires* destined to senior

[165] **Tr. Day 4**, 1124:8-1125:13; **Tr. Día 4**, 1168:10-1169:17; **C-0174**; **C-0182**; **C-0242**; **C-0344**; **R-0114**; **C-0191**; **C-0571**, p. 4; **C-0173**; **C-0183**; **C-0242**; **R-0161**.

[166] **Tr. Day 4**, 1125:14-1127:3; 1134:2-1135:17; **Tr. Día 4**, 1169:18-1171:9; 1178:18-1180:14.

[167] Mr León made it clear that this was a crime: **Tr. Day 5**, 1395:6-14; **Tr. Día 5**, 1468:6-10. See also, Mr Bravo's statement at **Tr. Day 4**, 1002:5-11 and **Tr. Día 4**, 4 1049:11-16.

[168] Reply, p. 149 (para. 361); **C-0468**; **C-0351**; **C-0353**; **C-0576**; **C-0338**; **C-0578**; **C-0574**.

[169] Reply, p. 134 (paras. 7, 16, 44, 331, 385-387, 673); **C-0353**; **C-0576**; **C-0468**.

[170] **Tr. Day 4**, 1163:9-12, 1170:5-17, 1171:9-1172:6; **Tr. Día 4**, 1210:5-9, 1218:8-20, 1219:16-1220:14.

[171] **Tr. Day 4**, 1172:18-1176:18, 1178:13-1179:7, 1181:4-1183:9; **Tr. Día 4**, 1221:7-1225:10, 1227:13 – 1228:6, 1230:8 – 1232:13.

[172] **Tr. Day 4**, 1216:22-1229:4, 1223:9-1223:11, 1227:20-1229:4; **Tr. Día 4**, 1269:16-1276:15, 1276:16-18, 1281:20-1283:5.

officials and one report directed to Mr Trigoso) running through to 20 March 2019,[173] must point to Mr Trigoso's agreement with such position. Mr León would not have done so if Mr Trigoso had told him that this recommendation was wrong or inappropriate.

101 Tellingly, Mr Trigoso conceded during his cross-examination that if Parán had marijuana plantations and was heavily armed, further dialogue could not take place. As Mr Trigoso said: "How were we going to dialogue with criminals?"[174] Indeed, as he noted, "the institutions that are in charge of eradicating such situations" needed to "step in", namely the Police.[175] If Mr Trigoso knew of Parán's criminal conduct, as he admitted, he logically would not have wanted the OGGS to engage in "dialogue with criminals", to use his own words.

102 Yet, further "dialogue with criminals" was required by the State. Mr Bravo held a meeting with Deputy Minister, Mr Gálvez (together with Mr Trigoso) on 28 March 2019, where he was told that dialogue should continue despite the fact that nothing had changed since Mr León's memo of 20 March 2019 recommending Police intervention.[176] After that, Mr Bravo met with various authorities on 27 May 2019, *i.e.*, two weeks after the incident with WDS. Again the internal and external communication was at odds. In the preparatory meeting held between officials of the PCM, the Ombudsman's office, the MININTER and the MEM, just before the meeting with Mr Bravo, the MININTER noted that the Police had provided a report to the judge, that Parán had marijuana plantations and that Parán had arms provided by the State, in relation to which it was suggested that the Police intervene. However, in the meeting with Mr Bravo, the authorities told him that dialogue should continue, and that IMC should stop insisting on the use of force.[177] Mr León was present at such meeting and was asked on cross-examination about the references that had been made to marijuana, to State-provided arms and to the suggested Police intervention. He maintained that such points were not relevant to the continuation of dialogue, despite the clarity of the document (as well as of the *aide memoires* he had authored).[178]

[173] **C-0351**; **C-0353**; **C-0576**; **C-0468**.

[174] **Tr. Day 4**, 1176:10-14; **Tr. Día 4**, 1225:2-10.

[175] **Tr. Day 4**, 1177:15-18; **Tr. Día 4**, 1226:8-10.

[176] Second Witness Statement of Luis F. Bravo, p. 51 (para. 134); **C-0576**.

[177] **C-0578**, p. 8.

[178] **Tr. Day 4**, 1378:6-1384:10; **Tr. Día 4**, 1449:15-1456:14; **C-0578**, p. 6-7; **C-0553**; **C-0569**; **C-0574**; **C-0351**; **C-0468**; **C-0193**.

5.1.3 The central government's decision against Police intervention was political

103 Mr Saavedra confirmed that, as Deputy Minister of the MININTER, he was constantly informed of the conflict with Parán, because the matter had to be considered from the angle of "public order so that it does not end up being a governance issue,"[179] *i.e.*, one that could have political consequences. Mr Saavedra further explained that he constantly coordinated with the Minister (in writing), including in relation to any decision that was to be taken by the State.[180] The Minister would in turn coordinate any matters at the weekly ministers' cabinet meetings,[181] and any decision would flow down to be implemented.[182] Peru has chosen not to submit any record of this decision process to the record. In any event, the description of the chain of decision making again points to the coordinated action that the State took in deciding against Police intervention.

104 Mr Saavedra was confronted with the WhatsApp exchanges he had with Mr Bravo during the first half of February 2019. In particular, Mr Saavedra was taken to the passage where he explained to Mr Bravo why Police intervention would not take place.[183] Mr Saavedra confirmed that he had stated that the decision not to intervene through a police operational plan was taken for political considerations.[184] The supposed autonomy of the Police to take a decision in this case, as argued by the Respondent, was therefore laid to rest. The Respondent's argument never made any sense in view of the record, but also because the popularity of the government can be affected through the actions of the Police. Indeed, the Police's action in relation to general unrest led to the toppling of the government of which Mr Saavedra was part on 15 November 2020, as he confirmed.[185]

105 Mr Trigoso also acknowledged that the decision regarding Police intervention was not a matter of the Police's discretion. He noted that the decision was taken by his superior, the director of the OGGS, who, in turn, would have taken such decision in consultation with the Minister.[186]

106 Further evidence of the political nature of the decision regarding the Police's intervention emerged when during his cross-examination, Mr Trigoso noted that after 20 March 2019,

[179] **Tr. Day 5**, 1269:9- 1270:16; **Tr. Día 5**, 1328:21-1330:7.
[180] **Tr. Day 5**, 1270:17-1271:20; **Tr. Día 5**, 1330:8-1331:13.
[181] **Tr. Day 5**, 1271:20-1272:16; **Tr. Día 5**, 1331:13-1332:10.
[182] **Tr. Day 5**, 1273:17-1276:9; **Tr. Día 5**, 1333:13-1336:13.
[183] **C-0192 (corrected translation)**, p. 3 (15/02/2019 7:47:27).
[184] **Tr. Day 5,** 1330:13-1332:17; **Tr. Día 5**, 1395:21-1398:8.
[185] **Tr. Day 5**, 1336:19-1337:2; **Tr. Día 5**, 1402:18-1402:12.
[186] **Tr. Day 4**, 1237:6-1237:18; 1247:10-1247:21; **Tr. Día 4**, 1291:18-1292:9; 1302:13-1303:3.

numerous other State organs intervened, but only to supposedly provide support in the dialogue process; this included the PCM, the Ombudsman, the MININTER and the MEM.[187] He noted that numerous emails had been exchanged on this (which Peru has failed to produce further to Procedural Order No. 4).[188]

107 Even the Police's internal reports denote that the decision not to intervene was political. During his cross-examination, Mr Saavedra was shown **R-0113** (**C-0640-ENG (corrected translation)**),[189] a report authored by the Police in 2020 which contains pertinent background information gathered by the Police as well as a history of its actions until that time. The report refers to the criminal activity in which Parán had engaged and notes that police operational plans had been prepared to lift the Blockade and were on the verge of being implemented on various dates, namely, on 18 November 2018, 9 February 2019 and 5 June 2019.[190] Every time, the report notes that the police operational plan was not implemented "to avoid the social cost". After much evasiveness, Mr Saavedra confirmed that, here, the Police was referring to the political consequences that could follow an intervention.[191]

5.2 Peru's defences were confirmed to be meritless

108 The Hearing confirmed that the defences that Peru decided to focus on at the Hearing to deny its liability under the FTA are meritless. IMC did not need to reach an agreement with Parán to develop the Project (**Section 5.2.1**) and complied with its obligation of means to make reasonable efforts to obtain a social licence to operate from Parán, assuming such obligation exists (**Section 5.2.2**). Peru's reliance on Lupaka's cash flows shortage in late 2018 to dispute the Project's prospects is ill-advised (**Section 5.2.3**) and Parán's continued exploitation of the Mine as of today confirms the Claimant's case (**Section 5.2.4**).

5.2.1 IMC did not need to reach an agreement with Parán to develop the Project

109 Peru's position as to any legal requirement to enter into an agreement with Parán was limited at the Hearing to stating that three of the Project's mining components were supposedly located on

[187] **Tr. Day 4**, 1233:22-1234:15; **Tr. Día 4**, 1288:11-1289:3.

[188] **Tr. Day 4**, 1234:13-15; 1237:14-18; **Tr. Día 4**, 1289:1-3; 1292:4-9; **PO No. 4**, p. 6 (para. 1).

[189] R-0113 was introduced into the record with the Respondent's Counter-Memorial. Subsequently, its English translation was supplemented in three instances (*i.e.*, **C-0640**; **C-0640-ENG (corrected translation)**; **R-0113-ENG (updated corrected translation)**).

[190] **C-0640-ENG (corrected translation)**, p. 5 (paras. 6, 15, 26).

[191] **Tr. Day 5**, 1342:2-19; **Tr. Día 5**, 1408:11-1409:5.

Parán land.[192] It also argued that an agreement with Parán was required due to "the ongoing territorial disputes between the various communities".[193] Peru's position is, on both these points, meritless.

110 *First*, IMC was not required by law to enter into an agreement with Parán.[194] This is because Parán did not have legal title over the land on which the Project was located, as evidenced by official contemporaneous evidence.[195]

111 Peru argued in its Rejoinder, for the first time, that three of the Project's mining components, namely a water well, a water reservoir and a pump house, were supposedly located in Parán. Although this belated argument was not the subject of the Tribunal's decision on Day 4 of the Hearing,[196] it should be excluded for the same reasons.

112 In any event, this argument is wrong and irrelevant. It is wrong because State documents show that the water well was located on land that IMC acquired from Mr Marco Tena, a former IMC employee.[197] With respect to the other two mining components, the water reservoir and the pump house, Peru's argument is irrelevant because they were not essential for the Project since the water from the water well could be transported in a cistern to the Site.[198] IMC did not use or perform any work on these components up to the date of the Blockade. Given the weakness of its argument, unsurprisingly, Peru did not to test it with any of Lupaka's witnesses.

113 *Second*, Peru also argued in its Rejoinder and at the Hearing that IMC needed to reach an agreement with Parán to develop the Project because of the latter's boundary dispute with the other communities. This argument is belated, opportunistic, and wrong.

114 It is belated because Peru raised this argument for the very first time in its Rejoinder. It should therefore not be given any weight.

115 It is opportunistic because, as explained in Section 3.6 above, neither the State nor Parán took any action to address Parán's land claims. The State also never suggested that IMC needed to reach an agreement with Parán to develop the Project.[199] The first time that the State mentioned

[192] **Tr. Day 1**, 235:15-18; Rejoinder, p. 42 (paras. 74-75).

[193] **Tr. Day 1**, 178:4-10; Rejoinder, p. 38 (para. 71).

[194] **C-0228**, p. 22 (Art. 23(c)).

[195] **C-0486**, **C-0193**, p. 31 (paras. B-C); Memorial, p. 32 (para. 101).

[196] **Tr. Day 4**, 963:2-964:1.

[197] **Tr. Day 1**, 34:21-35:7; **MD-0043**, p. 1; **CD-0001**, p. 16.

[198] See **C-0406**, p. 18-19, where IMC mentions this possibility in another context.

[199] **Tr. Day 1**, 34:3-13.

Parán's land claims to IMC was in a meeting held in May 2019, a few months before Lupaka lost its investment.[200] Yet, as Mr Trigoso acknowledged during cross-examination, the ownership of land – by one community or the other – was never included in the dialogue process fostered by the State.[201]

116 In any event, Parán's land claims are meritless. There is evidence in the record of a conciliation agreement signed in December 2001 by the communities of Parán, Lacsanga and Santo Domingo (plus a group of private individuals) to define the territorial boundaries of Lacsanga and Santo Domingo.[202] In this agreement, which the Respondent referred to during the Hearing in response to a question from Mr Garibaldi, Parán acknowledged that it does not hold property title to its land and did not contest the boundaries of the Lacsanga and Santo Domingo territories.[203] Parán only reserved rights with respect to the boundary between its land and that of the individuals who also signed the agreement.[204] This confirms that Parán's territorial claims against Lacsanga, 17 years after this agreement was signed, were a smokescreen to block the Project.

5.2.2 IMC did not mishandle its relationship with Parán

117 The Tribunal will recall the hypothetical case discussed at the Hearing of a local community that rejects a mining project due to the investor's nationality, which clearly showed that obtaining a social licence to operate can only constitute an obligation of means and cannot function as a veto.[205] The Claimant was only obliged to comply with the social requirements established by law, which it did.[206] Even assuming that an obligation of means to obtain a social license to operate exists (*quod non*), IMC complied with this obligation by making reasonable efforts in good faith to engage with Parán.

118 Mr Eric Edwards, one of Lupaka's witnesses, explained in his witness statement the projects that IMC carried out between 2013 and 2015 to engage with the rural communities, including Parán.[207] [redacted] the various agricultural and water projects that IMC put in place for the benefit of Parán as from 2016, none of which is in

[200] **C-0018**, p. 4 (para. 7).

[201] **Tr. Day 4**, 1172:8-17; **Tr. Día 4**, 1220:17-1221:6.

[202] **R-0232**, p. 1 (first and second). The conciliation agreement is not in the record, but was transcribed by the registrar in exhibits **R-0232**, **R-0233** and **MD-0090**.

[203] **Tr. Day 4**, 974:4-975:13; **R-0233**, p. 1 (fifth).

[204] **R-0233**, p. 1 (fifth).

[205] **Tr. Day 1**, 199:2-203:12.

[206] Reply, p. 28 (Section 3.2.1).

[207] **Tr. Day 1**, 50:11-51:22; Witness Statement of Eric Edwards, p. 18 (Section 5.4).

dispute.[208] These efforts bore fruit on 10 December 2016, when IMC was invited to present its agreement proposal at a Parán assembly and 90% of the attendees approved it.[209] The formal approval of the agreement ultimately did not materialise due to subsequent bad faith conduct by Parán's leaders and their increasing interest to monopolise the Project's benefits.[210] Peru did not deny any of this during the Hearing, nor did it call Mr Edwards [redacted] a single question on these topics.[211] Lupaka's reasonable efforts to reach an agreement with Parán are therefore not in doubt.

119 Peru tried to show at the Hearing that IMC mishandled its relationship with Parán or contributed to the conflict through other means – to no avail.

120 *First*, during the cross-examination of Mr Castañeda, Peru tried to show that IMC delayed the payment of the PEN 300,000 debt, thereby harming its relationship with Parán. Mr Castañeda explained this was wrong. He explained that IMC and Parán agreed in late 2016 that IMC would pay the PEN 300,000 as part of a surface rights agreement,[212] but Parán suddenly changed position in early 2017 and requested payment as a condition to resume negotiations of such agreement.[213] Despite this radical change, IMC made this payment in good faith in January 2018, after receiving the funds from PLI Huaura[214] and after Parán agreed in December 2017 that it would lift the penalty it had unilaterally imposed on the PEN 300,000 debt.[215] If anything, these facts show that Lupaka acted in good faith – after all, it was paying a debt from IMC's previous owner[216] – despite Parán's constantly changing demands. In any event, this whole issue is moot because Lupaka paid this supposed debt nine months before the Blockade.[217]

121 *Second*, Peru argues that Parán legitimately opposed the Project as it feared water pollution. Mr Retuerto states in his witness statement that when it rained, Parán's members "noticed a change in the colo[u]r of the water that ran from Invicta".[218] During the cross-examination of the

[208] **Tr. Day 1**, 52:1-20; [redacted] Second Witness Statement of Julio F. Castañeda, p. 7 (Section 3.2).
[209] **Tr. Day 1**, 56:2-22; **CD-0001**, p. 33.
[210] **Tr. Day 1**, 56:16-57:14.
[211] See Section 4.1.
[212] **Tr. Day 2**, 459:21-461:16, 551:12-553:1; **Tr. Día 2**, 482:11-484:6, 577:5-578:19.
[213] **Tr. Day 1**, 57:20-58:5; **CD-0001**, p. 35.
[214] **C-0116**; **C-0117**; **Tr. Day 1**, 59:2-7.
[215] **C-0115**; **Tr. Day 1**, 61:11-22; **CD-0001**, p. 38.
[216] **Tr. Day 1**, 58:6-11.
[217] **Tr. Day 2**, 552:17-553:1; **Tr. Día 2**, 578:12-19.
[218] Witness Statement of Soymán Román Retuerto, p. 4 (para. 14).

Claimant's witnesses, Peru also referred to OEFA's inspections conducted in 2017 and early 2018 that concluded that IMC's mine effluents exceeded the maximum permissible limits.[219]

122 Revealingly, Peru did not question Mr Castañeda on the measures taken by Lupaka to address Parán's water pollution concerns or the OEFA's observations, even though he testified at length on this in writing.[220] In his second witness statement, Mr Castañeda explained that after the approval of the Project's downsized mine plan in December 2014, IMC's activities at the Site were suspended as the company was negotiating an access road to the Site. IMC resumed its activities on the Site in February 2018 and only a few months later, in mid-2018, it implemented a water management system to address Parán's water pollution concerns and the OEFA's findings.[221] IMC's water system proved to be effective, as shown by laboratory tests conducted in June 2018[222] and the Huaura water authority's conclusion in July 2018 that there was no discharge of mine effluents from the Project to surrounding areas.[223] If this was a concern of Parán, the State had an obligation to communicate to Parán that it had been resolved as from mid-2018. In any event, Mr Bravo explained this directly to Parán at the January 2019 meeting.[224]

123 *Third*, Peru tried to show that Mr Castañeda requested Lacsanga to take action to protect its land from Parán's invasion in his letter of 30 August 2018, and that this was an invitation to violence.[225] But Mr Castañeda explained that this was not the case, as Lacsanga could take legal recourse, including by liaising with Police authorities.[226]

124 Relatedly, Peru asked Mr Bravo about the supposed exacerbation of the conflict between Parán and Lacsanga by Lupaka's financing of Lacsanga's legal actions to protect its territory. However, as Mr Bravo explained, Lacsanga had the right to defend its land as it thought fit and could well use the advances provided by Lupaka under the surface rights agreement for that purpose. Lupaka did not intervene in any of the legal actions taken by Lacsanga.[227]

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[219] **Tr. Day 3**, 925:21-929:9.

[220] Second Witness Statement of Julio F. Castañeda, p. 21 (Section 4.1).

[221] Second Witness Statement of Julio F. Castañeda, p. 21 (Section 4.1); First Witness Statement of Julio F. Castañeda, p. 7 (paras. 16-17, 64).

[222] **C-0399**, p. XVI (para. 42).

[223] **C-0408**, p. X (para. 6.3).

[224] First Witness Statement of Luis F. Bravo, p. 10 (paras. 24, 27).

[225] **C-0133**.

[226] **Tr. Day 2**, 483:16-484:9; **Tr. Día 2**, 507:16-508:10.

[227] **Tr. Day 4**, 973:8-22.

125 *Fourth*, Peru alleged in passing at the Hearing that IMC breached some of its social commitments in 2016-2017 with all three rural communities.[228] Yet the Claimant demonstrated at the Hearing that at that time its activities at the Project were suspended as it was in negotiations with Parán and Lacsanga to secure an access road to the Project, and that the company executed its commitments after securing such access.[229] Peru did not deny this or asked [redacted] about the social commitments carried out by IMC in 2018.

126 *Fifth*, Peru tried to show that the Claimant's decision to only maintain two community relations members post-Blockade was wrong. As Mr Bravo explained during his cross-examination, this criticism is baseless. Given the violence used by the Parán members during and after the Blockade and the fact that they were armed, the conflict could only be solved through Police intervention aimed at restoring law and order. The community relations team could not do much, thus making little sense to expand it.[230]

127 *Sixth*, Peru tried to show that it was IMC, and not Parán, that breached the 26 February 2019 Agreement, to no avail.

128 During his oral testimony, Mr Bravo explained convincingly that Mr Trigoso invited him to negotiate with Parán on 26 February 2019 because Parán's representatives were willing to lift the Blockade on the Lacsanga road.[231] This had been IMC's precondition to entering into an agreement with Parán and the text of the 26 February 2019 Agreement is clear that such lifting of the Blockade was included. Mr Bravo also willingly accepted the addition to the agreement of a right to pass through Parán's territory; it had no cost for IMC and the road could be used for the transit of smaller vehicles without much work.[232] However, as Mr León stated in his WhatsApp message to Mr Bravo during the meeting, using Parán's road for mining activity "was not possible technically".[233] Parán's failure to lift the Blockade, while only allowing access through the Parán road was therefore a clear breach of the agreement.

129 As to the topographer, Parán's demand that IMC pay USD 9,000 for a road survey made no sense and had not been discussed at the meeting while Mr Bravo was present.[234] The topographer was

[228] **Tr. Day 1**, 217:15-218:1.
[229] **Tr. Day 1**, 49:1-17.
[230] **Tr. Day 3**, 795:11-796:8.
[231] **Tr. Day 4**, 1016:22-1018:14; 1020:3-1024:6.
[232] **Tr. Day 4**, 1018:11-1020:1.
[233] **Tr. Day 4**, 1015:2-14; 1086:3-1087:19; **C-0347**, p. 1 (26/02/2019, 5:10:14 p.m.).
[234] **Tr. Day 4**, 1048:20-1049:13; 1054:2-14.

only supposed to identify the "affected land" as reflected in the agreement[235] and in line with the immediately prior discussions of January 2019.[236] Parán's position on the topographer showed that it was acting in bad faith.[237] Indeed, a real road survey would have cost USD 200-300,000.[238] In any event, Lupaka offered to pay USD 9,000 for the topographical survey as requested by Parán on 19 March 2019 and then again in July 2019, to no avail.[239]

130 *Seventh*, Peru failed to demonstrate that WDS personnel had violently entered the Site on 14 May 2019. Two points are worth highlighting from the Hearing.

131 On the one hand, it became clear that although Peru solely relies on the Police report at **R-0262** to state that Parán's representatives were forcibly removed from the entrance to the Site, it also concedes that such document is entirely sourced on Parán's declarations to the Police.[240]

132 On the other hand, Peru does not dispute the authenticity of the video shot on 14 May 2019 (**C-0362**) showing that there were no Parán community members at the Blockade.[241] As noted by Mr Bravo, there was nothing wrong with WDS' entry because it was akin to entering "our empty house"[242] – which WDS was entitled to do as it was on land covered by IMC's agreement with Lacsanga. The Tribunal should thus have no difficulty in finding that the events of 14 May 2019 unravelled as explained by Mr Bravo in his witness statements and at the Hearing, namely without any violence or any wrongdoing by WDS.[243] If anything, the events of 14 May 2019 show the aggressiveness and lawless conduct of the Parán members, who wounded by gunshot two members of WDS as they were peacefully withdrawing from the Site that day, and killed another member the next day. No member of Parán was injured and to the best of the Claimant's knowledge, no member of Parán has been arrested to date as a result of these actions.[244]

[235] **C-0200**, p. 1.
[236] **Tr. Day 4**, 1044:16-1046:21.
[237] **Tr. Day 4**, 1051:12-1052:9; 1053:6-19; 1055:10-1056:20.
[238] **Tr. Day 4**, 1054:20-1056:20.
[239] **Tr. Day 4**, 1069:16-1070:9.
[240] **Tr. Day 4**, 1065:15-1066:7.
[241] **Tr. Day 4**, 1067:10-18.
[242] **Tr. Day 4**, 1063:22-1064:9.
[243] **Tr. Day 4**, 1062:15-1065:13.
[244] Reply, p. 140 (para. 344).

5.2.3 Peru's reliance on Lupaka's cash flows shortage in late 2018 to dispute the Project's prospects is ill-founded

133 Peru argues that absent the Blockade, Lupaka would not have been able to meet its financial obligations under the PPF Agreement.[245] Peru tried to show this during the Hearing by questioning the Claimant's witnesses on the cash flow shortage that Lupaka was facing in late 2018;[246] it failed.

134 As a preliminary matter, Peru should have questioned Mr Ellis, not Messrs Bravo and Castañeda, on the company's financial situation in late 2018. Mr Bravo was not working at Lupaka in 2018 and Mr Castañeda left the company in October 2018. Also, the email on which Peru questioned Messrs Bravo and Castañeda was sent to Mr Ellis only (by Mr Ansley).[247] Peru's decision not to examine Mr Ellis only confirms the shortcomings of its case.

135 Mr Bravo explained that mining companies with projects at an early stage often face cash flow shortages, and that Lupaka was in a good position to resolve those shortages. Indeed, the Project was on the brink of production as of the Blockade and the company had large amounts of ore that it could rapidly sell, if needed.[248] Further, the email shown to Mr Bravo was sent when Parán had already installed the Blockade; the latter obviously impacted cash flows.[249]

136 This temporary issue of cash flows, however, would not have affected Lupaka's Project in the long term in the counterfactual scenario. As Mr Ellis explained in his witness statements, Pandion strongly supported the Project and showed flexibility on multiple occasions with the intention to realise major returns once commercial production started.[250] In the alternative, even if Pandion would not have rescheduled the payments for mere few months, Lupaka would have been able to meet its obligations using cash payments. Lupaka would have had no issue obtaining the cash considering its successful track record of raising finance.[251] None of this was contested at the Hearing.

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[245] Counter-Memorial, p. 173 (Section II.F.4); Rejoinder, p. 203 (paras. 390-396, 398-401).

[246] **Tr. Day 2**, 497:8-498:5; **Tr. Día 2**, 522:9-523:15; **Tr. Day 3**, 797:10-799:2.

[247] **Tr. Day 3**, 798:5-800:20; **MI-0007**.

[248] **Tr. Day 3**, 797:13-22.

[249] **MI-0007**, p. 2.

[250] Second Witness Statement of Gordon Ellis, p. 11 (Section 4 and para. 103); **Tr. Day 1**, 131:7-132:1; **Tr. Day 6**, 1587:3-11.

[251] Second Witness Statement of Gordon Ellis, p. 42 (paras. 99-103 and Annex); **Tr. Day 6**, 1587:12-22.

5.2.4 Parán's continued full control of the Mine today confirms that even if Pandion had not foreclosed, Lupaka would have entirely lost its investment; it also confirms that Parán never had legitimate concerns

137 As previously noted, Parán started illegally exploiting the Mine at least since November 2019.[252] Peru did not deny the Claimant's statement at the Hearing that Parán still has full control over the Mine to this day.[253] This situation further debunks at least three of Peru's defences.

138 First, Peru argues that Lupaka voluntarily entered a risky financing arrangement with Pandion that left no room for error and that forced the company to rush negotiations with Parán.[254] Peru's premise in making this argument is that if Lupaka had had more time to negotiate, the Project could have gone ahead. This is false, as evidenced by the current status quo.

139 Second, Parán's supposed environmental concerns raised in 2018-2019 are further shown to be baseless. Parán has been conducting an illegal mining operation which the State recognises is an environmental hazard.[255]

140 Third, Peru argues that IMC's inexperienced community relations team mishandled its relationship with Parán, marginalizing this community and failing to comply with its social commitments to this community. The status quo shows that these allegations are just a smokescreen to hide the true cause of the conflict.

5.3 The Project was virtually ready to enter exploitation when Parán set up the Blockade

141 After clarifying the portions of Ms Dufour's report that the Tribunal has excluded from the record **(Section 5.3.1)**, the Claimant will show that, absent the Blockade, the Project would have commenced exploitation in November 2018 **(Section 5.3.2)** or, in the alternative, in January 2019 **(Section 5.3.3)**.

5.3.1 The Tribunal's exclusions of Ms Dufour's new regulatory requirements

142 In her report, Ms Dufour referred to a number of regulatory requirements that Lupaka supposedly needed to comply with before it could enter exploitation, that had not been addressed in Peru's

[252] Reply, p. 9 (Section 2.1); **C-0640-ENG (corrected translation)**, p. 11 (para. 30)
[253] **Tr. Day 1**, 27:7-17.
[254] Counter-Memorial, p. 78 (Section II.C.4).
[255] [redacted]

first-round submission.[256] On Day 4 of the Hearing, the Tribunal decided to exclude these, as well as any associated evidence.[257] Therefore, in terms of regulatory requirements (allegedly) outstanding for IMC to be able to commence exploitation, only Ms Dufour's assessment – and, by extension, Peru's arguments – on the Mine Closure Plan, the certification of IMC's water system (with the below caveat), and the MEM's final inspection of the Mine (the "**Three Regulatory Requirements**"), which Peru addressed in its first round submission,[258] remain on record.

143 Should the Tribunal disagree with any of the foregoing, the Claimant respectfully requests to be given an opportunity to comment on any new requirements not excluded to preserve its right to due process.

144 Peru, in its Counter-Memorial, stated that IMC had failed to obtain the certification of IMC's water system through the ITS because it had not submitted sufficient technical information.[259] Only in its Rejoinder, basing itself on Ms Dufour's report, did Peru argue that the ITS cannot be used for the purposes of certifying the water treatment system because it impacts "bodies of water".[260] Peru's belated allegations on the supposed unavailability of the ITS process for the certification of IMC's water treatment system must therefore also be considered excluded from the record. The Claimant nevertheless addresses this point in Section 5.3.3.

5.3.2 Absent the Blockade, the Project would have commenced exploitation in November 2018

145 With respect to the Three Regulatory Requirements, the Hearing confirmed that IMC would have passed the MEM's final inspection and obtained its exploitation licence by November 2018 **(Section 5.3.2.1)**. IMC did not need to comply with the other two requirements to enter exploitation **(Sections 5.3.2.2 and 5.3.2.3)**.

[256] See *e.g.*, Miyanou Dufour von Gordon Report, p. 22 of PDF (paras. 60(i), 60(ii), 60(iii), 60(iv), 65(i-iii), 140-142, 181(ii), 181(iii), 192-193, 200, 203, 204-206 and 208).

[257] **Tr. Day 4**, 963:2-964:1.

[258] Counter-Memorial, p. 146 (Section II.F.1).

[259] Counter-Memorial, p. 151 (paras. 300-301).

[260] Rejoinder, p. 168 (para. 323); Miyanou Dufour von Gordon Report, p. 36 of PDF (paras. 104-106).

5.3.2.1 IMC would have passed the MEM's final inspection and obtained its exploitation licence by November 2018

146 As Ms Dufour acknowledged during cross-examination, on 6 September 2018, the Claimant requested the MEM to schedule its final inspection of the Mine, but the next month IMC requested that such inspection be suspended due to the Blockade.[261] Ms Dufour further acknowledged that absent the Blockade, the MEM would have been legally obliged to conduct its final inspection of the Mine within 15 business days from IMC's request, and to issue IMC's exploitation licence within 10 business days after the inspection, *i.e.*, by 12 October 2018.[262] Despite the foregoing, Ms Dufour insisted that IMC would not have obtained its exploitation licence in October 2018 for two reasons, both without merit.

147 *First*, because IMC only provided the MEM with the final report of the works and the certificate of quality assurance, two of the documents needed before the MEM could conduct its final inspection, on 21 December 2018.[263] But here Ms Dufour is relying on the actual world to draw conclusions for the but-for scenario. This is mistaken, because she ignores the intervening events that took place after IMC's request of 6 September 2018, including the planned invasion by Parán of 11 September 2018, which was deflected, and the Blockade as from 14 October 2018, both of which would have understandably slowed IMC in submitting the two missing documents. Absent these events, it is highly likely that IMC would have them shortly after its 6 September 2018 request as, according to the relevant decree, they were to be issued by IMC's consultant ACOMISA – who supervised the works – without any intervention of the State.[264] Indeed, the mine development works were complete.

148 *Second*, Ms Dufour argued that the Claimant cannot rely on the "legal" timeframes to estimate when IMC would have obtained its exploitation licence (or other permits) because such "legal" timeframes are not met in reality. She argued that IMC should instead rely on her so-called "real" timeframes.[265]

149 Yet, during Ms Dufour's cross-examination, the Claimant established that her sample of "real" timeframes does not implement any particular verifiable criteria, does not include precise averages, is not representative of a nation-wide study (it is based on a limited sample of cases to

[261] **Tr. Day 5**, 1515:3-14; **Tr. Día 5**, 1596:3-15; **Tr. Day 3**, 806:16-807:7; **C-0081**, p. 1.
[262] Miyanou Dufour von Gordon Report, p. 18 of PDF (para. 47).
[263] **Tr. Day 5**, 1518:20-1520:14; **Tr. Día 5**, 1599:21-1601:18; **C-0492**.
[264] **MD-0019**, p. 4 (Art. 3.6).
[265] Miyanou Dufour von Gordon Report, p. 12 of PDF (para. 22).

which Ms Dufour was able to access)[266] and includes assumptions in technical mining areas outside of her expertise.[267] In short, Ms Dufour's sample of "real" timeframes is statistically unrepresentative and inherently unreliable. These timeframes further disregard the General Administrative Procedure Law, which establishes that administrative agencies must comply with legal deadlines.[268]

150 The Tribunal should rely on the "legal" timeframes given the arbitrariness of Ms Dufour's analysis and her clear lack of independence and impartiality (see Section 4.8), which would have resulted in IMC obtaining its exploitation licence by mid-October 2018 and starting exploitation next month (which, as discussed in Section 5.4, is the basis of the Claimant's damages calculation).

151 In any event, the Claimant notes that under Ms Dufour's "real" timeframes, IMC would have received its exploitation licence on 16 November 2018, at the latest, on the assumption that IMC did not need to certify its water system beforehand. According to Ms Dufour's "real" timeframes, the MEM usually conducts its final inspection within 24 calendar days of receiving the corresponding request (*i.e.*, by early October 2018) and issues the exploitation licence within 40 calendar days of the inspection (*i.e.*, by mid-November 2018).[269]

5.3.2.2 IMC did not need to update its Mine Closure Plan to enter exploitation

152 During cross-examination, Ms Dufour acknowledged that IMC did not need to update its Mine Closure Plan to enter exploitation as of the Blockade.[270] The next update to this plan was due in December 2020.[271]

5.3.2.3 IMC did not need to certify its water management system to enter exploitation

153 Peru sought to show with Mr Bravo that IMC needed to certify its water system before it could enter exploitation. As Mr Bravo convincingly explained, this is wrong.

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[266] **Tr. Day 5**, 1498:6-1509:7; **Tr. Día 5**, 1578:5-1590:7.

[267] **Tr. Day 5**, 1509:14-1510:5; **Tr. Día 5**, 1590:14-1591:6.

[268] **Tr. Day 5**, 1486:13-1490:4; **Tr. Día 5**, 1566:7-1569:22; **C-0253**, p. 15 ("Art. 66: Rights of citizens. The rights of citizens with respect to the administrative procedure are the following: […] 7. To comply with the lead-times determined for each service or action and thus demand same from the authorities.").

[269] See Miyanou Dufour von Gordon Report, p. 18 of PDF (para. 47).

[270] **Tr. Day 5**, 1514:12-22; **Tr. Día 5**, 1595:13-1596:1.

[271] Miyanou Dufour von Gordon Report, p. 39 of PDF (para. 115).

154 Based on his knowledge of Peruvian mining regulations and his long experience in the Peruvian mining industry,[272] Mr Bravo explained that the issuance of IMC's exploitation licence following the MEM's final inspection would not have been conditioned on the certification of IMC's water system. He explained that this is the case because the purpose of the MEM's final inspection is to verify that the mine components are in place and have been built in accordance with the mine plan, which was the case at Invicta.[273] This understanding is confirmed by Article 2.2 of Supreme Decree No. 020-2012-EM.[274] Mr Bravo also pointed out that IMC's water system is a small mining component that was fully operational as confirmed by the ALA, the local water authority.[275]

155 Accordingly, Mr Bravo explained that in practice, IMC would have received its exploitation licence first, and certified its water system later, most likely through the regulations approved from time to time by the State that allow regularisation of non-certified mining components.[276] The draft bill of one such regulation was published in December 2017 and as Ms Dufour acknowledged, came into force only six months after the Blockade, in May 2019.[277]

156 At worst, IMC could have received a fine for operating a non-certified mining component up until the date of its regularisation.[278] Yet, even this would have been unfair because, as Mr Bravo explained, IMC built its water system to treat the mine effluents,[279] further to the requests by the OEFA following inspections conducted in June 2017 and early 2018, where it found that IMC's mine effluents exceeded the maximum permissible limits.[280] IMC was therefore acting in accordance with the principle that environmental damage must be avoided or remediated as

[272] **Tr. Day 3**, 777:4-779:4; First Witness Statement of Luis F. Bravo, p. 5 (Section 2); Second Witness Statement of Luis F. Bravo, p. 4 (Section 2).

[273] **Tr. Day 3**, 940:15-941:15; **C-0081**; First Witness Statement of Julio F. Castañeda, p. 9 (para. 22); Second Witness Statement of Julio F. Castañeda, p. 40 (para. 96).

[274] **C-0491**, p. 1 (Art. 2.2: "For authorisation to start operating activities. Upon completion of the development and preparation stage, the interested party shall notify the relevant Directorate General of Mining or regional government so that it can order an inspection to verify that the development and preparation activities have been carried out in accordance with the approved mining plan.").

[275] **Tr. Day 3**, 944:6-945:6.

[276] **Tr. Day 3**, 941:16-944:22.

[277] **Tr. Day 5**, 1532:14-1533:1, 1533:16-1534:7; **Tr. Día 5**, 1614:10-18, 1617:3-16; **Tr. Day 4**, 1077:11-1078:3. The 2019 regulations are **C-0497**, p. 3 (Title VI) and **C-0498**, p. IX. Similar regulations were enacted in 2014: see **C-0499**, p. 29 and **C-0500**, p. 2.

[278] **Tr. Day 3**, 941:16-944:22. This fine likely would not have been significant. See *e.g.* Reply, p. 102 (para. 149): the fine for using water without a licence was only about USD 2,500.

[279] **Tr. Day 3**, 931:13-21, 945:7-13.

[280] **C-0399**; **R-0062**.

soon as practicable, as Mr Bravo testified and as is reflected in the applicable mining regulation.[281]

157 During her cross-examination, Ms Dufour argued that it was unreasonable to assume that IMC would have used the regularisation procedure approved in May 2019, since it did not do so contemporaneously.[282] But Ms Dufour is again relying on the actual world to draw conclusions for the but-for scenario. As Mr Bravo explained, IMC did not make use of the regularisation procedure approved in May 2019 only because it was focused on lifting the Blockade.[283]

158 The Respondent's case is illogical. It makes no sense to halt a mining operation due to a missing certificate for a minor component where there is no danger of environmental damage. As explained in Section 5.2.2, the State's authorities had confirmed that the water management system worked.

5.3.3 If the Tribunal concludes that the MEM would have been justified in issuing the exploitation licence only after IMC certified its water system, the Project would have entered exploitation in January 2019

159 Peru tried to establish with Messrs Bravo and Castañeda that IMC could not have certified its water system through an ITS because that is only possible when the component is "not [] situated on, or impact bodies of water", as provided for in Article 132.5(c) of Supreme Decree No. 040-2014-EM.[284] According to Peru, this would not be possible in this case because the water system is fed by the Ruraycocha and Tunanhuaylaba water streams.[285] The Hearing confirmed that this argument, which is the only one raised by Peru to dispute the use of an ITS process to certify its water system (other than its argument that the ITS could only be used to certify a component that had no yet been built), fails for three reasons.

160 *First*, as mentioned above, on Day 4 of the Hearing, the Tribunal excluded this argument from the record as it is untimely.[286]

161 *Second*, as Mr Castañeda explained at the Hearing, Article 131(b) of Supreme Decree No. 040-2014-EM expressly authorised IMC to certify its water system through an ITS. Article 131(b)

[281] **MD-0079**, p. 6 (Art. VI); **Tr. Day 3**, 945:7-13.
[282] **Tr. Day 5**, 1534:13-15; **Tr. Día 5**, 1616:10-13.
[283] **Tr. Day 3**, 934:16-935:8; **Tr. Day 5**, 1533:12-21; **Tr. Día 5**, 1615:7-18.
[284] **MD-0004**, p. 31 (Art. 132.5(c)).
[285] **Tr. Day 2**, 537:16-539:8.
[286] See Section 5.3.1.

provides that an ITS may be used to certify a mining component – instead of following the ordinary EIA modification process – when there is a "change in the location of wastewater treatment plants or systems provided that the effluent receiving body unit does not change."[287] This was the case here, as IMC's water management system was implemented inside the Mine[288] *in lieu* of the acid water treatment plant initially envisioned in the EIA to be located outside the Mine[289] but which was subsequently removed through IMC's First ITS.[290] Article 131(b) was in force as of the date of the Blockade and there was no concern with the "effluent receiving body unit" because, as the ALA confirmed in July 2018, IMC's water management system prevented any off-mine wastewater discharge.[291]

162 *Third*, as explained by Mr Bravo and contrary to Peru's allegation, IMC's water system was not situated on, nor did it impact, bodies of water (one of the cases in which the certification of a mining component through an ITS is prohibited). The purpose of the water system was to recirculate the mine effluents, *i.e.*, the underground water coming out of the mine.[292] The system did this effectively, as no mine effluents were discharged.[293] The treatment of these effluents is a separate issue from the water sources that Peru referred to in order to contend that an ITS could not be used to certify IMC's water system.[294]

163 It should be noted that when DEAR issued its decision on IMC's Third ITS by which it refused to certify IMC's water system, it did so only because the system had already been built. It did not refer to Peru's defences raised belatedly with the aid of Ms Dufour.[295] Hence the Tribunal should have no difficulty in concluding that IMC could have rapidly dismantled its water system and applied for an ITS to certify it, and once approved, have rebuilt its water system. This would have allowed IMC to obtain its exploitation permit by **25 January 2019** applying the "legal" timeframes or by early March 2019 applying Ms Dufour's "real" timeframes, as explained below:

[287] **Tr. Day 2**, 548:5-551:10; **Tr. Día 2**, 574:8-577:3; **MD-0004**, p. 28 (Art. 131(b)).
[288] First Witness Statement of Julio F. Castañeda, p. 24 (para. 55).
[289] **C-0040**, p. 5 and 7; **R-0136**, p. 2; **C-0489**, p. 1 (Art. 2).
[290] **C-0040**, p. 2 (Section 3.4).
[291] **C-0408**, p. X (para. 6.3).
[292] **Tr. Day 4**, 985:18-21.
[293] **C-0408**, p. 10 (para. 6.3).
[294] **Tr. Day 4**, 988:6-16.
[295] **C-0226**, p. 25.

a) The Third ITS was rejected on 12 November 2018.[296] IMC could have rapidly dismantled its water system – as testified by Mr Castañeda, this only required removing some pipelines and a pump,[297] which IMC could have reasonably done in one day. It is also reasonable to assume that IMC could have submitted a new ITS for the water management system within two weeks, *i.e.*, by **26 November 2018**. Indeed, the preparation of an ITS would not have been time consuming as IMC had already included all relevant information on its water system in its Third ITS.

b) The DEAR would have had 15 business days according to the law,[298] *i.e.*, until **17 December 2018**, to approve the new ITS. At the latest, and according to the supposed "real" timeframe assumed by Ms Dufour, such approval could have taken up to 37 business days,[299] *i.e.*, until 18 January 2019 at most. Yet, the latter is not realistic because as Ms Dufour acknowledged, IMC's first ITS was approved in two weeks and a half, which is in line with the legal timeframe.[300]

c) Once its ITS was approved, IMC could have rapidly reinstalled the pipelines and the pump, which should not have taken more than one day in line with Mr Castañeda's testimony at the Hearing, *i.e.*, by **18 December 2018**.[301] The day after, IMC could have requested the MEM to conduct its final inspection.

d) Under the legal timeframes, the inspection has to be conducted within 15 business days of receiving the request, *i.e.*, by **11 January 2019**.[302] The Parties agree that by this date, IMC had submitted the certificate of quality assurance and the final report of the works, and would have submitted the financial guarantee pertaining to the mine closure plan.[303] In the actual scenario, the inspection was scheduled to take place from 23 to 25 January 2019.[304]

e) Under the legal timeframes, the MEM is obliged to issue IMC's exploitation licence within 10 business days of the inspection,[305] *i.e.* by **25 January 2019**. According to Ms Dufour's

[296] **C-0226**.

[297] **Tr. Day 2**, 383:4-17; **Tr. Día 2**, 403:20-404:15.

[298] Miyanou Dufour von Gordon Report, p. 15 of PDF (para. 32(i)).

[299] Miyanou Dufour von Gordon Report, p. 15 of PDF (para. 32(i)).

[300] **Tr. Day 5**, 1430:9-10; **Tr. Día 5**, 1507:9-11; **C-0040**, p. 1.

[301] **Tr. Day 2**, 383:4-17; **Tr. Día 2**, 403:20-404:15.

[302] Miyanou Dufour von Gordon Report, p. 18 of PDF (para. 47).

[303] **C-0492**, p. 3; Second Witness Statement of Julio F. Castañeda, p. 40 (para. 97); Miyanou Dufour von Gordon Report, p. 53 of PDF (para. 158, second bullet point).

[304] **C-0231**, p. 2

[305] Miyanou Dufour von Gordon Report, p. 19 of PDF (para. 47).

"real" timeframe, the MEM takes 40 calendar days to issue the exploitation licence,[306] *i.e.*, by 7 March 2019.

164 Under either of the three potential dates for the commencement of exploitation, *i.e.* November 2018, January 2019 or March 2019, Lupaka would have been able to meet its obligations under the PPF Agreement. The Claimant notes that the latest date based on Ms Dufour's arbitrary "real" timeframes (March 2019) is only four months later than the original planned start date and coincides with the Mallay Community's consent to IMC's acquisition of the Mallay Plant, which, in the but-for scenario, would have kicked-off the adjustment to the repayment schedule.[307] Indeed, as the Tribunal will recall, in October 2018, shortly before Parán installed the Blockade, Lupaka and Pandion agreed that loan repayments would be delayed by nine months counted from the date on which the Mallay transaction was completed.[308] In any event, as explained in Section 5.2.3, if necessary, Pandion would have delayed the payments for a few months in order to realise its returns under the PPF Agreement.

5.4 Peru must compensate the Claimant's losses of USD 40.4m plus interest

165 Parán's illegal Blockade and seizure of the Project followed by Peru's failure to ensure compliance with the law and to ensure that Lupaka could pursue its legitimate right to exploit the Project, led to Pandion's foreclosing under the PPF Agreement, thereby entailing the loss of the entire investment. Peru fails to prove the existence of an intervening event breaking the chain of causation and fails to show that the Claimant contributed to its losses. Peru therefore must compensate the Claimant for the entirety of its losses which amount to USD 40,400,000 plus interest. The Tribunal should have no hesitation to award the amount claimed given that developments since August 2019, including metal prices exceeding market expectations, would support a significantly higher valuation today. For example, the average gold price in August 2019 was around USD 1'500 per ounce and today it is USD 1'900.[309] This alone would have increased the damages by dozens of millions of dollars.

166 The Claimant's valuation experts, Accuracy, valued the Claimant's investment using the DCF method. As the valuation method recommended by the CIMVAL guidelines, both Parties'

[306] Miyanou Dufour von Gordon Report, p. 19 of PDF (para. 47).

[307] **Tr. Day 1**, p. 130:4-16.

[308] **Tr. Day 1**, p. 129:14-130:16; Reply, p. 46 (para. 110); Second Witness Statement of Gordon Ellis, p. 15 (para. 32).

[309] Accuracy Report, p. 40 (para. 5.19); Appendix 5 - Our damages model for the 355t per day Scenario (tab Figure 5.1).

experts agree that the DCF method is appropriate for valuing a pre-production mine at the stage of development of the Claimant's Project.[310]

167 However, the experts disagree on certain input parameters to the model. The main disagreements are the treatment of the social licence risk and production start date. In addition, AlixPartners dispute the length of the production period and other technical mining input parameters, the applicable pre-production premium included in the discount rate and finally, the applicable interest rate.

168 AlixPartners' main criticism is that Accuracy's valuation allegedly does not account for the **risk and costs of the social licence**. According to AlixPartners, the risk of not obtaining a social licence from Parán can allegedly bring the value of the project to nil. This claim, however, did not withstand scrutiny at the Hearing.

169 Both Party's experts agreed that the social licence risk and costs should be accounted for in the cash flows or the discount rate.[311] Accuracy adjusted both to take into account (i) the risk of not being able to obtain a social licence from Parán and (ii) to account for the costs of obtaining and maintaining social licences from the Communities. As the Hearing confirmed, when doing so one has to take utmost care not to duplicate social licence risk and costs.[312]

170 As to the discount rate, Ms Kunsman agreed that the **social licence risk**, at least to some extent, is included in the beta and country-risk premium, which Accuracy used to calculate the discount rate.[313] Accuracy confirmed that, in addition, their pre-production premium, which is also part of the discount rate, considers social licence risk.[314]

171 In addition, the 2018 PEA model included USD 1.2 million of capital expenditure related to community infrastructure and USD 3 million of operating costs for community relations, hence accounting for **the costs of obtaining and maintaining social licences** from Santo Domingo and Lacsanga and possibly from Parán.[315]

172 AlixPartners, in their Second Report, added the full additional costs for acquiring and maintaining a social licence from Parán in the cash flows. It calculated a reduction of the

[310] **Tr. Day 6**, 1642:12-1644:9; **AC-0022**, p. 19; AlixPartners Report, p. 37 (para. 102).
[311] **Tr. Day 6**, 1605:21-1606:7, 1678:21-1679:20.
[312] **Tr. Day 6**, 1607:6-11.
[313] **Tr. Day 6**, 1696:2-18, 1700:5-11, 1701:18-1702:7.
[314] **Tr. Day 6**, 1605:4-1607:15.
[315] **AC-0029** (tabs capex_inf, row 36 and opex, row 57), **CD-0003**, p. 13.

Project's NPV of USD 2.4 million on the basis of the averages of the requests made by all three Communities for one-time and recurring payments.[316] However, Ms Kunsman was not prepared to explain the details of her calculation at the Hearing.[317] Not only does AlixPartners' calculation ignore the impact on working capital and taxation,[318] and double counts amounts already paid,[319] but cross-examination revealed that Mr Lee significantly overestimated the costs of acquiring and maintaining a social licence from Parán.[320]

173 The procedural unfairness created by the belated introduction of AlixPartners' calculation of the costs for obtaining and maintaining a social licence from Parán is a further reason why the Tribunal should ignore AlixPartners' proposed reduction of USD 2.4 million.

174 There was no legal need to enter into an agreement with Parán, in any event, as explained in Section 5.2.1 above. However, should the Tribunal find it necessary to include additional costs of obtaining and maintaining a social licence from Parán in addition to those of the Communities in the 2018 PEA model, then Accuracy's figure should be taken, as presented at the Hearing. Accuracy modelled these amounts properly and accounted for working capital and taxation, on the assumption that no social licence costs had been included in the 2018 PEA model.[321] This would reduce the damages claimed by – at most – USD 1.6 million in the 590 t/d Scenario, and USD 1.2 million in the 355 t/d Scenario, respectively.[322]

175 AlixPartners' attempt to challenge the **production start date** equally failed. AlixPartners argue that a production start date in November 2018 would not have been feasible based on Ms Dufour's opinion on regulatory deadlines and allegedly missing explanations from Micon on how certain technical issues would have been resolved. This is wrong for the reasons explained in Section 5.3.2 and, in any event, as explained in Section 5.3.3, the Hearing showed that commercial production would at most be delayed until January 2019, or at the very latest, March 2019.

176 In either of those cases, the difference in damages would be relatively inconsequential and easy for the Tribunal to calculate. Indeed, Ms Kunsman agreed during cross-examination that the

[316] AlixPartners Second Report, p. 33 (paras. 113-115); Appendix 5 - Estimate of the Cost for Social License-ENG.
[317] **Tr. Day 6**, 1731:7-21.
[318] **Tr. Day 6**, 1730:1-1731:17.
[319] **CD-0003**, p. 47.
[320] **Tr. Day 6**, 1725:20-1728:21.
[321] **Tr. Day 6**, 1607:16-1608:3.
[322] **CD-0003**, p. 47.

delay in the start date for commercial production would reduce damages by approximately USD 435,000 per month in the 590 t/d Scenario and USD 300,000 in the 355 t/d Scenario.[323]

177 The disagreement of Peru's quantum experts with various **technical mining inputs** equally has no basis. AlixPartners disagree with Micon that Lupaka could have been exploiting the mine for 10 years and therefore simply disregard the last three years of Accuracy's DCF model, without any adjustment to the mine plan.[324] Yet, as Accuracy explained, a rational commercial operator with a shorter timeframe would extract the highest-grade mineral with a higher priority and at a lower capital expenditure.[325] When this was put to Ms Kunsman, she admitted that she is not a technical mining expert and therefore could not comment.[326]

178 Indeed, AlixPartners' criticism of the mine's life as well as other technical mining input parameters, such as metal grades, operating costs and capital expenditures can safely be disregarded considering that (i) neither Ms Kunsman nor Mr Lee are technical mining experts, (ii) Peru has not presented a technical mining expert and (iii) Peru has decided not to cross-examine Micon, the only technical mining expert giving evidence in this arbitration.

179 AlixPartners allege that **Accuracy's pre-production premium** of 3.3% applied as part of the discount rate is not appropriate, despite it being in line with the premium typically added to gold projects at the feasibility stage.[327] AlixPartners' only support for this argument is that Lupaka never commissioned a feasibility study; hence, so the argument goes, it cannot be considered to have reached the feasibility stage.[328] This does not make sense because even if Lupaka did not have a feasibility study, the main purpose of which the experts agree is to obtain financing,[329] Lupaka's Project was beyond this stage: it already had financing in place and it had a fully constructed mine in place that was ready to operate. On cross-examination, Ms Kunsman had to confirm that a project can be at a very advanced stage without ever commissioning a feasibility

[323] **Tr. Day 6**, 1741:15-1743:20; Accuracy broadly agree with these figures: **Tr. Day 6**, 1589:12-1590:1; **CD-0003**, p. 22.
[324] **Tr. Day 6**, 1748:6-20.
[325] **Tr. Day 6**, 1590:10-1591:1.
[326] **Tr. Day 6**, 1748:21-1749:17.
[327] **CD-0003**, p. 25; **AC-0047**, p. 55; **Tr. Day 6**, 1592:8-1593:2.
[328] AlixPartners Second Report, p. 39 (paras. 135-137); **Tr. Day 6**, 1662:1-8, 1704:15-1705:10, 1706:12-21; **Tr. Day 6**, 1714:19-1717:11.
[329] **Tr. Day 6**, 1592:14-22, 1640:11-18; AlixPartners Report, p. 14 (para. 42).

study.[330] In this case therefore, the Tribunal should be comfortable applying Accuracy's pre-production premium of 3.3%.[331]

180 The experts also disagreed as to the appropriate **interest rate**. While AlixPartners have argued in writing that LIBOR +2% or SOFR +2% are appropriate rates, at the Hearing, Ms Kunsman acknowledged that if those rates were applied, the real interest rate would be negative due to high inflation.[332] Peru would therefore have every incentive to delay payment due under the award as the outstanding amount would decrease over time in real terms. Additionally, the Hearing showed that even LIBOR +4% and UST +5% would result in a very low real interest rate in the current high inflation environment; they are highly conservative.[333]

181 It is important to note that in the current case all three breaches of the FTA – unlawful expropriation, breach of the FET standard and breach of the FPS standard – led to the complete destruction of the Claimant's investment. The *Chorzów Factory* standard is therefore applicable regardless of the breach.[334]

182 In order to ensure that the Claimant is afforded full reparation, both under the FTA and under customary international law, the Tribunal should award the Claimant damages amounting to USD 40,400,000 plus interest at the rate of LIBOR +4% from 26 August 2019 until 30 June 2023 and UST +5% from 1 July 2023 to the date of payment.

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[330] **Tr. Day 6**, 1712:14-22.

[331] **Tr. Day 6**, 1592:15-22; 1639:18-1641:5; 1662:15-16; Accuracy Second Report, p. 33 (paras. 4.43-4.45); AlixPartners Report, p. 37 (para. 102).

[332] **Tr. Day 6**, 1756:4-1757:8.

[333] **Tr. Day 6**, 1758:1-1759:1; Accuracy Second Report, p. 88 (Table A6.2).

[334] Memorial, p. 107 (paras. 322-323).

Respectfully submitted,

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