

THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

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In the Matter of Arbitration :
Between: :
:
LUPAKA GOLD CORP., :
:
Claimant, : Case No. ARB/20/46
and :
:
THE REPUBLIC OF PERÚ, :
:
Respondent. :
:
- - - - -x Volume 1

HEARING ON THE MERITS

Monday, March 26, 2023

The World Bank Group
1125 Connecticut Avenue, N.W.
Conference Room C3-150
Washington, D.C.

The hearing in the above-entitled matter
came on at 9:27 a.m. before:

PROF. JOHN R. CROOK, President

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DR. GAVAN GRIFFITH KC, Co-Arbitrator

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1 P R O C E E D I N G S

2 PRESIDENT CROOK: Good morning, Ladies and
3 Gentlemen.

4 All right. Well, I think you all know who
5 we are and perhaps, at this point, we can go on the
6 record and formally open this hearing, and I will then
7 invite each party to identify those who will have
8 speaking roles with us this morning.

9 So let us open this hearing in ICSID Case
10 ARB/20/46, Lupaka Gold Corporation versus the Republic
11 of Perú.

12 The Panel has done a good deal of
13 preparation and consultation, but we do look forward
14 to hearing from you.

15 I wonder if we--we have got big teams here
16 and I don't know that we need to introduce everybody,
17 but I wonder if we could get on the record sort of
18 who's going to be doing the speaking, beginning with
19 the Claimants.

20 Over to you, sir.

21 MR. GALLEGGO: Thank you very much. Good
22 morning, Members of the Tribunal.

1 I am Jaime Gallego.

2 Next to me is Marc Veit.

3 After that is Mr. Tim Foden.

4 After that is Luis Miguel Velarde Saffer.

5 They will be speaking.

6 At the end is Mr. Gordon Ellis.

7 PRESIDENT CROOK: We greet you, and greet
8 the other members of your team as well.

9 All right. On the Respondent's side.

10 MR. GRANÉ: Good morning, Mr. President,
11 Members of the Tribunal, esteemed colleagues.

12 My name is Patricio Grané, on behalf of the
13 Republic of Perú.

14 Next to me, Ms. Vanessa Rivas Plata, the
15 President of the Special Commission that represents
16 Perú in investment arbitration.

17 To my left, my partner, Paolo Di Rosa.

18 To his left, Timothy Smyth.

19 And to his left, Mr. Brian Bombassaro.

20 All of us will be having speaking roles
21 today.

22 PRESIDENT CROOK: Very good. We look

1 forward to working with you and we greet all of the
2 others on your team. In the interest of time, perhaps
3 you will forgive us, we are not introducing everybody.
4 We can perhaps come back and get the rest of you
5 tomorrow.

6 All right. Now, in terms of procedure
7 today, I think we indicated that for medical reasons,
8 it may be necessary for us to take brief breaks. We
9 have built in time for that in the schedule. We will
10 just see how that goes, but we would appreciate your
11 understanding and forbearance if that may be something
12 that we need to do.

13 Now, let me ask: From either side, are
14 there any more administrative matters we need to
15 attend to?

16 Claimants, anything on your side?

17 MR. GALLEG0: Yes, sir, just a few points.

18 PRESIDENT CROOK: All right.

19 MR. GALLEG0: As to the witnesses, it would
20 be a convenience if they are ready at least one slot
21 before to testify. We see that there is a distinct
22 possibility that Mr. Saavedra may be needed one slot

1 before, so that would mean that he possibly could
2 testify on Thursday night. We would just flag it so
3 that he be available.

4 PRESIDENT CROOK: On that, I guess we could
5 encourage the parties to work that out as best you can
6 before you come to us to sort it out, but you will
7 keep in contact on that, I'm sure.

8 MR. GALLEGO: Thank you, sir.

9 For our opening statement, we may be
10 slightly longer for the first bit, it's split in two
11 parts, around an hour 40 we have seen, and slightly,
12 therefore, shorter for the second part.

13 PRESIDENT CROOK: I think the answer will be
14 that we will probably interrupt your first bit if it's
15 that long, but we'll see how that goes.

16 MR. GALLEGO: Okay.

17 I also wanted to raise that Mr. Bravo
18 obviously will be testifying in English. His English
19 is good, but it's not his mother tongue; therefore, if
20 he really needs to, he may speak in Spanish with the
21 help of the interpreters now and again. He doesn't
22 intend to do it throughout, obviously, but he may need

1 that.

2 PRESIDENT CROOK: All right. We'll do what
3 we need to do.

4 MR. GALLEG0: Okay.

5 As to Mr. Retuerto, he will be
6 cross-examined remotely, as we know. We are concerned
7 about the technical difficulties that have been raised
8 by the Respondent. We'd just like to know if these
9 have been fixed.

10 And then if they have been fixed, well, then
11 it's been sorted, but we'd just like an update on
12 that.

13 PRESIDENT CROOK: Okay. Anything further on
14 Claimant's side?

15 MR. GALLEG0: For the moment, that's it.
16 Thank you.

17 PRESIDENT CROOK: All right. Thank you,
18 sir.

19 On Respondent's side?

20 MR. GRANÉ: Thank you, Mr. President.

21 A couple of housekeeping issues. They do
22 not pertain to the opening, so I'm happy to address

1 them now or...

2 PRESIDENT CROOK: Let's do it now.

3 MR. GRANÉ: Perfect.

4 The first issue concerns the number of
5 bundles, PO-6 Section 23 calls for 12 copies. We
6 understand that the court reporters do not require
7 their two hard copies, and we understand that the
8 interpreters, instead of three copies, would only need
9 two.

10 With the Tribunal's indulgence, we would
11 request, therefore, that we reduce the number of
12 bundles that may be used so that we don't kill as many
13 trees.

14 PRESIDENT CROOK: I'm all for not killing
15 excessive trees. I see a positive reaction from the
16 reporters, and I trust that we will get the same from
17 the interpreters. So if that's the case, that's fine.
18 We can save trees.

19 MR. GRANÉ: Thank you. Therefore, we will
20 prepare only nine copies instead of 12.

21 The second issue concerns experts. We have
22 approached opposing counsel to suggest that experts be

1 allowed to bring in their notes with them, both on the
2 presentation and their expert reports. As the
3 Tribunal knows, that's not unusual. And that is the
4 request that we put to the Tribunal.

5 Obviously, fact witnesses will not be
6 allowed to bring anything into the room, but again,
7 experts tend to be different in that respect, so
8 that's our request.

9 PRESIDENT CROOK: We'll revert to that, but
10 are there any other administrative things you want to
11 raise?

12 MR. GRANÉ: I can respond to the question
13 from opposing counsel as to Mr. Retuerto.

14 PRESIDENT CROOK: Okay. Well, let's do the
15 question of experts bringing in supporting material.

16 Claimant's view on that is.

17 MR. GALLEGO: Thank you, Mr. President.

18 Our view on that is that it's slightly
19 troubling that they need their notes. Speaking notes,
20 of course, are fine, but anything else than that we
21 don't think is appropriate.

22 If there is an insistence for them to have

1 their own notes, then they should be shared with us.

2 PRESIDENT CROOK: Perhaps I don't understand
3 the issue.

4 I thought the issue was that the experts
5 wanted to bring in their supporting materials,
6 reports, matters of that kind that they referred to in
7 their reports.

8 Is that what we're talking about or are we
9 talking about something different?

10 MR. GRANÉ: No, that's correct, but in
11 preparation for their presentation and their
12 cross-examination, experts usually will make notes on
13 the margins of their reports, and we are requesting
14 that experts be allowed, again, in conformity with not
15 unusual practice in investment arbitration.

16 PRESIDENT CROOK: Okay.

17 MR. GRANÉ: But having said that, we would
18 object to the proposal from the other side that those
19 expert notes be shared with the other side before
20 their presentation.

21 ARBITRATOR GARIBALDI: May I make a comment?

22 PRESIDENT CROOK: Please.

1 ARBITRATOR GARIBALDI: If the expert
2 presentations are going to take the form of PowerPoint
3 presentations, the PowerPoint presentations are
4 themselves a guide to what the expert is going to say,
5 so that would obviate the notes.

6 If the notes take the form of aiding the
7 expert in the cross-examination, I don't think they
8 are appropriate. That's my own view. It's not the
9 Tribunal's view. That's my own view.

10 PRESIDENT CROOK: Okay.

11 ARBITRATOR GARIBALDI: So one thing is notes
12 that are in aid of the initial presentation in view of
13 direct examination, which I can understand that are
14 useful, unless the expert uses a PowerPoint
15 presentation, in which case, they are not necessary.
16 But I don't think that notes for cross-examination
17 are--I don't think they're appropriate.

18 PRESIDENT CROOK: All right. We will
19 attribute the appropriate comments to the appropriate
20 Arbitrator.

21 Let me just see if I understand clearly what
22 the issue is here.

1 As I understand it, the experts will have
2 prepared their reports on the basis of focused reports
3 by others. They will, in all likelihood, have
4 annotated those with their personal notes, and the
5 issue is whether they can bring in those reports with
6 their personal notes; is that the issue?

7 MR. GRANÉ: That's correct, Mr. President.

8 MR. GALLEGO: That's how we understand it.

9 PRESIDENT CROOK: All right. The Tribunal
10 will take this up and be back to you. We don't have
11 to decide this today, I don't think.

12 All right. Any other matters that we need
13 to attend to? Hearing none...

14 MR. GRANÉ: Well, there is the issue that--

15 PRESIDENT CROOK: Sorry, we need the
16 clarification on the technical situation.

17 MR. GRANÉ: Of course.

18 Mr. President, the background to this is
19 that we indicated last week to opposing counsel when
20 we were conducting certain tests that there had been
21 some technical issues, that we were solving them. We
22 did this, of course, in the interest of efficiency and

1 transparency.

2 The next day, those issues were resolved.

3 We also indicated that to opposing counsel.

4 At the moment, we do not anticipate any
5 connectivity issues with Mr. Retuerto.

6 I take the opportunity to invite opposing
7 counsel to raise these issues with us. I don't think
8 we need to take up the time of the Tribunal. I think
9 the coordination so far has been quite cooperative,
10 and I expect it to stay that way.

11 If any issues arise, we will let you know as
12 soon as possible. Thank you.

13 PRESIDENT CROOK: I welcome that spirit as
14 we move forward.

15 Remind me, when will we be doing the remote,
16 that comes up Thursday, Friday?

17 SECRETARY: It's Wednesday, sir.

18 PRESIDENT CROOK: Oh, Wednesday, okay.

19 SECRETARY: It's Wednesday.

20 And, sir, if I may?

21 PRESIDENT CROOK: Please.

22 SECRETARY: We are planning--and this is a

1 formal invitation to both parties. We're planning to
2 conduct a test, and we invite a test on tomorrow at
3 the end of the day.

4 So for counsel to have whoever is managing
5 the connection on the remote side for the witness, we
6 would plan on doing it after the hearing concludes
7 tomorrow. And for counsel for the Claimant, if
8 somebody wants to stay at the end of the day and see
9 the conduct of that test, we will welcome you to.

10 PRESIDENT CROOK: Okay. Well, thank you for
11 that invite for the parties to work with the secretary
12 to tend to the arrangements that are required.

13 Anything further on the administrative side?

14 Okay. If not, let us turn to the Claimant's
15 opening. You have three hours available.

16 At this point, do you assess, will you be
17 using the full time allocated? If so, that's fine,
18 but just for our planning purposes.

19 MR. GALLEGOS: Yes.

20 PRESIDENT CROOK: Okay. Very good. Then we
21 are standing by.

22 OPENING STATEMENT BY COUNSEL FOR THE CLAIMANT

1 MR. FODEN: Good morning. My name is
2 Timothy Foden, and I'll be starting today's
3 presentation.

4 Now, I'm sure that the experienced members
5 of this Tribunal have sat on commercial arbitration
6 cases before. So I'd like the Members of the Tribunal
7 to imagine for a moment that you're hearing a
8 commercial case regarding a breach of contract. And
9 in this imaginary case, the Respondent turns up to the
10 hearing with the primary defense that it didn't breach
11 the contract because it was unable to fulfill the
12 relevant obligation in the first place.

13 Now, you'd be sitting here thinking, how did
14 a case where the Respondent has effectively admitted
15 to a breach even make it to hearing? Shouldn't this
16 case have been settled ages ago?

17 Well, you don't have to imagine it, because
18 that is the case before you today, except it's an
19 investment treaty case.

20 Perú signed a free trade agreement just a
21 few years ago, in 2009, that required it not to
22 expropriate foreign investments and to provide those

1 investments with full protection and security.

2 Today, you're going to hear from our friends
3 opposite that Perú's breaches are somehow excused for
4 a variety of reasons, but predominantly owing to
5 nebulous concepts of social license and its own
6 inability to stem a growing tide of local unrest in
7 relation to mining projects.

8 But that's not how treaty obligations work.
9 In fact, this is precisely what these obligations are
10 there for in the first place.

11 Think of how hollow and meaningless treaty
12 standards would be if states simply shrugged their
13 shoulders and said, in effect, we're unable to provide
14 the protections for a treaty that we freely negotiated
15 14 years ago. We just can't do it.

16 Like I said, if the Respondent here was a
17 commercial party, the award would write itself.

18 But even Perú's attempts to clothe the
19 inaction that resulted in its breaches of the FTA with
20 some fashionable sense of ESG and social license
21 simply don't marry with reality.

22 The local Community of Parán, of which you

1 will hear so much this week, didn't blockade the
2 Claimant's mind because it had legitimate grievances
3 or environmental concerns; rather, this is a
4 municipality with a long track record of criminality,
5 which took my client's mind at gunpoint to both mine
6 and sell its valuable ore and to protect its thriving
7 marijuana business from police scrutiny; and in so
8 doing, people were injured and a life was lost.

9 That's worth repeating.

10 In the course of their legal takeover of the
11 mine, Parán killed a subcontractor of Lupaka gangland
12 style in a restaurant. So don't be fooled when Perú
13 tells you this afternoon that it was some innocent
14 rural community abused by a multinational mining
15 company.

16 On the contrary, Parán's conduct towards
17 Lupaka could be described as both extortionate and,
18 sadly, murderous.

19 And what's more, Parán didn't actually have
20 any legitimate claim to the area in which the Claimant
21 had actually built its mine infrastructure. And it's
22 for that reason that the Claimant was under no legal

1 obligation to come to an agreement with the Parán
2 Community for land surface rights, but try it did,
3 anyway.

4 The Claimant made scores of good faith
5 efforts to ensure a broad social license with Parán.

6 Truly, Lupaka wanted to be a good neighbor.
7 To that end, the Claimant attended an endless series
8 of meetings, even after it became clear that Parán had
9 no real intention of negotiating, and systematically
10 reneged on each and every commitment it made to the
11 Claimants in the presence of government officials.

12 Now, I hope you'll indulge me in one of a
13 couple of analogies this morning. See, I have twin
14 eight-year-old boys; one is bookish and small, and the
15 other is aggressive and big. Obviously, they're
16 fraternal.

17 Over the years, when the bigger one picks on
18 the little one, as he inevitably does, he'd never do
19 it in my presence, and he'd always promise that he
20 would stop. But as soon as I would leave the room,
21 I'd hear the little one yelling, "Ouch!"

22 In this case, Parán is the bigger boy, and

1 Lupaka was the smaller one. The difference between me
2 and the central Peruvian authorities in this analogy
3 is that, after a while, I stopped believing that the
4 bigger boy would honor his commitments, and I took
5 action, I put him in time-out.

6 Perú never took any action. Either because
7 it didn't care or it was incapable, Perú never took
8 any steps to contain Parán's bullying. All they ever
9 did was keep telling the Claimant that they had to
10 keep engaging in dialogue, engaging in dialogue. Of
11 course, that didn't work.

12 Perú has a monopoly on police power within
13 its borders. So sooner or later, it had to deploy its
14 coercive power and put Parán in time-out.

15 What Perú will tell you is that it couldn't
16 justify the use of force in the circumstances, not
17 only because it would have been inconsistent with
18 Peruvian law and policies, but because historically,
19 and even now, in the midst of what is effectively a
20 national emergency in Perú, its use of force has only
21 exacerbated conflict.

22 But how Perú uses its coercive power isn't

1 for the Claimant or even the Tribunal to decide. It's
2 not the investor's concern that the clear, obvious
3 need for force is one that the sovereign state can't
4 meet effectively because it has a history of using
5 that force excessively.

6 Of course, the Claimant never wanted Perú to
7 use excessive force. It simply wanted the central
8 government to exercise its police powers in a
9 responsible manner.

10 And Perú is obligated under the treaty to do
11 so. It can't excuse that obligation now by simply
12 saying, sorry, we're really bad at it.

13 To deploy another analogy, when the Los
14 Angeles police department--they didn't stop policing
15 in the wake of the unfortunate Rodney King episode 30
16 years ago in which several police officers beat
17 Mr. King savagely in public view in a grim reflection
18 of that department's long history of brutality.

19 Following that episode, when Los Angelenos
20 called 9-1-1, they weren't met with the response,
21 sorry, we won't come out to investigate your home
22 invasion because we might use excessive force on the

1 intruder. They did their jobs. Yet, that's what Perú
2 is telling you. They didn't come to my client's aid
3 because historically, they were really bad at doing
4 so.

5 That's simply not good enough, and the
6 Tribunal should dismiss it for what it is. It's the
7 kind of balderdash that Respondent states have come up
8 with when they've clearly breached their obligations,
9 and they just have nothing else to say about it.

10 Lupaka, and any foreign investor, has to be
11 able to trust that Perú was going to exercise its
12 police powers in an effective, responsive and
13 proportionate manner. The FTA's protections, they're
14 not conditional in this regard. They provide
15 protections, and the investor is allowed to expect
16 that those protections will be deployed in a
17 responsible manner.

18 But in a sense, how Perú would have acted is
19 immaterial because they didn't act at all. And who
20 has benefited from Perú's intransigence?

21 Well, since 2019, the Huaura province of the
22 Lima region has a new mining company. It's Parán

1 itself. See, for three years now, Parán has mined the
2 Invicta project.

3 Now, remarkably, in yet another
4 manifestation of Perú's ceaseless victim-blaming, it
5 argues that the Claimant effectively got what it had
6 coming to it; specifically, Perú contends that Lupaka
7 mismanaged its relationship with Parán by disregarding
8 the community's environmental concerns. According to
9 Perú, this prompted Parán's opposition to the project
10 and its subsequent taking of the mine.

11 Now, this is simply untrue, and the pictures
12 that you're going to see on the screen in a moment,
13 hopefully, make that falsehood abundantly clear.

14 If Parán had environmental concerns, it
15 would have made those concerns clear during the
16 protracted discussions that it had with the Claimant.
17 It didn't.

18 At no point did Parán flag concerns about
19 environmental degradation. No, its concerns were far
20 more base and selfish than that. And if Parán
21 actually did harbor such environmental concerns, it
22 certainly wouldn't be mining the mine itself, using

1 extraction methods that are plainly environmentally
2 hazardous, but that is apparently the case, as can be
3 seen on the photos on the slide in front of you.

4 So while Parán never flagged those concerns,
5 it did raise its flag over the project, as you can see
6 there on the slide.

7 Now, maybe this afternoon, Perú will tell
8 you that Parán isn't exploiting the mine some three
9 years after it first began doing so, four years in
10 fact. But I seriously doubt it, and that's because
11 they can't. They can't issue such a denial.

12 See, just last year, Parán opposed Perú's
13 attempts to close the mine on three separate
14 occasions. Do these seem like the actions of an
15 aggrieved local community? No. This opposition just
16 reflects only Parán's desire to keep exploiting the
17 mine that it took at gunpoint from my client.

18 None of this is in dispute. In fact, Perú
19 didn't even address this illegal exploitation at all
20 in its Counter-Memorial. It only did so in its
21 Rejoinder.

22 Think about that for a moment. The

1 Claimant's entire case theory here is that Parán took
2 the Invicta project to mine it for itself, and Perú
3 did nothing to stop them. Yet, Perú didn't think it
4 was necessary to address that case theory until some
5 18 months into this dispute.

6 And when it did, Perú contended that we, as
7 the Claimant, haven't established that Parán planned
8 all along to mine Invicta.

9 Pardon me, but that is entirely besides the
10 point.

11 The Claimant doesn't have to establish some
12 mens rea component to prove a treaty breach, and
13 evidence speaks for itself. Parán is mining the
14 Invicta project. You'll hear that this week from some
15 of the witnesses.

16 Now, this Tribunal has to decide what it
17 wants to do about that.

18 Does it want to ignore or excuse the brazen
19 theft of my client's project because Perú's lawyers
20 have sought to mask a clear treaty breach behind some
21 factually hollow social license defense, or does it
22 want to give meaning to the FTA and fulfill its

1 mandate by compensating Claimant for the loss of its
2 investment?

3 I think it's pretty clear where we stand on
4 that.

5 Now, it remains for me to do two thing
6 things. First is to explain to the Tribunal that when
7 we speak of the Claimant or my client or IMC or
8 Lupaka, we're using those expressions interchangeably,
9 though Mr. Velarde will explain to you the corporate
10 structure of the Claimant to make it clear.

11 And second, I'd like to set out for you the
12 order of our proceedings over the next two-and-a-half
13 hours and change.

14 First, you're going to hear from my friend,
15 Luis Miguel Velarde, on the status of the Invicta
16 project at the time of Parán's takeover and Lupaka's
17 good faith efforts to reach an agreement with Parán.

18 Then you're going to hear from Mr. Jaime
19 Gallego on Perú's failure to protect Lupaka's
20 investment and the resulting breaches of the FTA.

21 Then you're going to hear from me again on
22 the mine's mineral resources and the Claimant's

1 ability to meet its repayment obligations under the
2 loan agreement that it had in place with a company
3 called Pandion.

4 And finally, you're going to hear from my
5 old friend, Dr. Marc Veit, who's going to explain to
6 you the compensation to which the Claimant is entitled
7 as a result of Perú's breaches of the FTA.

8 So with that, I will hand it over to
9 Mr. Velarde.

10 MR. VELARDE: Good morning, Mr. President,
11 Members of the Tribunal. My colleague, Jaime Gallego,
12 and I will address the factual part of our opening
13 presentation.

14 As we delve into the facts, please bear in
15 mind that the main facts of this case are not in
16 dispute. Where the parties disagree is on the
17 implication of these facts.

18 As Mr. Foden just said, I will first
19 describe the Invicta mine and its status when the
20 Parán Community decided to take the mine, and I will
21 then describe Lupaka's efforts to engage and reach an
22 agreement with Parán; such efforts having failed

1 because Parán did not want an agreement with Lupaka.

2 I will then start with the first part.

3 In October 2012, Lupaka acquired 100 percent
4 of the shares of Andean American Gold Corp., and as a
5 result, Invicta Mining Corp. or IMC, owner of the
6 Invicta mining project and various mining concessions.

7 At the time of Lupaka's acquisition in 2012,
8 Andean had planned to develop a very ambitious mining
9 project on the Victoria Uno concession. Essentially,
10 Andean's mine plan assumed open pit or extraction to
11 process 5100 tons per day of ore by means of an onsite
12 processing plant.

13 In 2014, two years after acquiring the
14 Invicta project, Lupaka conducted mining and
15 methodological studies with a view to revising the
16 project's mine plan.

17 Based on these studies, Lupaka decided to
18 substantially modify the Invicta mining plan. In
19 particular, it decided that mining at Invicta would be
20 conducted entirely underground. The production rate
21 would be significantly lower than forecasted by
22 Andean, and that ore processing would be done fully

1 offsite.

2 These changes entailed a significant
3 reduction in the social and environmental footprint of
4 the project. Perú's Ministry of Energy and Mines
5 approved the revised mine plan on 11 December 2014.

6 The revised project remained focused on the
7 Victoria Uno concession. The map you have on the
8 screen shows the territorial boundaries of the
9 Lacsanga Community shaded in green in the upper half
10 of the map, the Santo Domingo community shaded in blue
11 in the bottom right and in the center, and the Parán
12 Community shaded in yellow.

13 These are the official boundaries of the
14 rural communities which have been plotted using the
15 coordinates from Perú's public registry known as the
16 SUNARP.

17 The box in dark red is the surface on which
18 the Lacsanga Community authorized IMC to conduct its
19 mining activities, to build the mine infrastructure,
20 and to use an access road to the project.

21 The small elements in red represent Lupaka's
22 mine infrastructure, some of which is also located on

1 land belonging to Santo Domingo, with whom Lupaka also
2 had an agreement signed in October 2010.

3 As you can see, there was no mining activity
4 or infrastructure on Parán's land. The Claimant
5 submitted this map with its Memorial, and Perú did not
6 challenge it--challenged it in its Counter-Memorial.

7 Perú's contemporaneous documents confirm
8 that the project was located on land belonging to
9 Lacsanga and Santo Domingo.

10 This was clearly stated in the operational
11 plan prepared by the Sayán police in February 2019,
12 the police force with jurisdiction over the area of
13 the project.

14 As you can see on the top of the screen,
15 this plan acknowledges that 70 percent of the project
16 is in Lacsanga, and 30 percent in Santo Domingo.

17 Let me open up our emphasis here.

18 The Respondent has argued for the first time
19 in its Rejoinder that three of the mining components
20 of the project were located on Parán's land; namely, a
21 water reservoir, a water well and a pump house.

22 The Claimant has not had the chance to

1 respond to this belated argument, which is
2 opportunistic.

3 Indeed, Peruvian authorities never told
4 Lupaka that some of the project's mining components
5 were located on Parán's land; and therefore, that
6 Lupaka needed to reach an agreement with this
7 community to develop the project. Never.

8 Instead, Peruvian authorities repeatedly
9 requested Parán to leave the blockade, as is clear
10 from the witness statements of Mr. Trigoso and
11 Mr. León provided by Perú. This was because they knew
12 that IMC had the necessary surface rights to develop
13 the project.

14 Perú's claim is not even supported by its
15 own regulatory expert, Ms. Dufour.

16 As you can see on the bottom of the slide,
17 Ms. Dufour concedes in Paragraph 330 of her report
18 that, "It is not an objective of this report to
19 determine who is the owner of the land where the
20 Invicta project components are located."

21 Perú's belated allegation is also incorrect.
22 One of the mining components Perú refers to is a water

1 well located in Huambo, specifically on land
2 belonging to Mr. Marcos Tena, a former IMC employee.
3 As stated in an administrative resolution issued by
4 Perú's Water Authority in 2009, this well is drilled
5 on property belonging to Mr. Marcos Tena, who, by
6 means of an agreement, has ceded his land for the
7 construction and operation of this well to IMC.

8 As to the other two mining components,
9 Perú's claim ignores that they were not necessary to
10 develop the project.

11 Mr. Julio Castañeda, IMC's former general
12 manager, will be here with us this week to explain
13 this issue further.

14 With this, I close the parentheses regarding
15 these three mining components.

16 ARBITRATOR GRIFFITH: Counsel, can I
17 interrupt you for a second?

18 The map on page 14 that we have in our print
19 doesn't include the box in part of Lacsanga lands
20 which came up on our screen. We don't have that box
21 part on our print.

22 MR. VELARDE: We can update the map. It is

1 on the record with the box, it's just a printing
2 issue.

3 ARBITRATOR GRIFFITH: Perhaps it could be
4 scrolled in our prints that you handed up. Not now,
5 of course.

6 PRESIDENT CROOK: Yeah, perhaps most
7 efficiently, you can just provide us a corrected print
8 of this map with the missing data shown.

9 MR. VELARDE: Yeah, happy to do so. Thank
10 you.

11 As I noted before, the authorities approved
12 IMC's revised mine plan in December 2014.

13 From that point onwards, Lupaka invested
14 time and resources to develop the project. The
15 Claimant addressed these developments in Section 3.1
16 of its Reply, and Perú has not denied them.

17 Let me mention three milestones.

18 First, Lupaka had the key permits and
19 approvals to develop the project, including an
20 Environmental Impact Assessment study and a Mine
21 Closure Plan, both updated in 2015 and 2016 as
22 required by Peruvian law. These are the key

1 environmental instruments of any mining project. You
2 can see other permits and approvals listed on the
3 screen.

4 Second, as I mentioned before, Lupaka had
5 the necessary surface rights from the communities of
6 Lacsanga and Santo Domingo to develop the project.

7 The surface rights agreements with Lacsanga
8 have led to Lupaka building an access road to the
9 project site. You can see on the screen an official
10 map taken from the website of the Ministry of
11 Agriculture of Perú, which the Claimant submitted with
12 its Memorial.

13 This official map shows the borders between
14 the three rural communities, which, to be clear, are
15 part of the original map. The Claimant did not add
16 them. The Claimant only added the boxes with the
17 names of the communities corresponding to each
18 territory. In this official map, one can see the
19 Lacsanga access road to the site, and that it does not
20 enter Parán's land.

21 Third, Lupaka had funding to develop the
22 project. In June 2016, Lupaka signed a financing

1 agreement with PLI Huaura, providing Lupaka with \$7
2 million to develop the project. Lupaka used these
3 funds in its mine preparation and development works
4 which were completed before the blockade.

5 So Lupaka had the land, Lupaka had the
6 permits, and Lupaka had the funding to develop the
7 project by October 2018 when Parán blocked the
8 Lacsanga access road to the site.

9 There were only two outstanding issues
10 before Lupaka could exploit the mine at the time of
11 the invasion by Parán, which I will address in a
12 moment.

13 Perú agreed on these two issues as being the
14 only ones that were pending in its Counter-Memorial.
15 It also referred to the amendment of the project's
16 mine closure plan, but then it agreed it was not
17 necessary.

18 In its Rejoinder, however, the State added
19 new requirements, in its Rejoinder. I will also
20 address them.

21 The first pending issue was the final
22 inspection of the mine by the Ministry of Energy. As

1 you can see on the screen, on 6 September 2018, that
2 is one month before the blockade, Lupaka informed the
3 Ministry that it had concluded its mine preparation
4 and development works, and requested that the final
5 inspection be conducted.

6 This inspection could not take place due to
7 the blockade. Had this inspection been conducted,
8 Lupaka would have passed it.

9 The second pending issue was the
10 certification of Lupaka's water management system.
11 Lupaka built this system in mid-2018 in response to
12 the findings from Perú's Environmental Enforcement
13 Agency, the OEFA, that some of the Invicta mine
14 effluents exceeded the maximum permissible limits.

15 The purpose of Lupaka's water system was
16 twofold: First, to ensure that the mine effluents
17 complied with the maximum permissible limits, and
18 second, to ensure that all mine effluents were reused
19 in IMC's, Invicta's, activities.

20 To achieve this, Lupaka's water system
21 consisted of two ponds excavated in the rock and
22 located inside the mine tunnels next to each other.

1 The effluents from the mine entered the first pond,
2 which you can see on the right, where it was purified,
3 and then transferred through three pipelines to the
4 second pond, from where it was then pumped to the
5 upper levels of the mine to be reused in IMC's mining
6 activities.

7 Lupaka's water system proved to be effective
8 before the blockade.

9 The first document you have on the screen is
10 a directorial resolution issued by Perú's
11 Environmental Enforcement Agency, the OEFA.

12 This Resolution refers to laboratory tests
13 conducted on 20 June 2018, that is some four months
14 before the blockade, which confirmed that the Invicta
15 mine effluents "have values within the Maximum
16 Permissible Limits." Perú has never contested these
17 findings.

18 The next document on the screen is a
19 technical report issued by the water authority in the
20 area of the project, the Huaura Water Authority, in
21 July 2018, some three months before the blockade.

22 In Paragraph 5.3 of this report, the water

1 authority confirms, after conducting an inspection at
2 the Invicta mine, that, "There is no evidence of
3 off-mine wastewater discharge."

4 Then Paragraph 6.3 states that, "No direct
5 impact on the water resources of the Community of
6 Parán and surrounding areas has been found."

7 In other words, as of July 2018, Lupaka's
8 water system was up and running, and Perú's water
9 authority had confirmed its effectiveness. Lupaka
10 should have had no difficulties in certifying its
11 water system in the second semester of 2018.

12 Now, you will hear Perú take an extremely
13 formalistic view here to delay the start date of
14 exploitation at Invicta. Even though Lupaka built its
15 water management system to comply with the maximum
16 permissible limits as requested by the OEFA, and even
17 though Perú's own water authority confirmed that
18 Lupaka's water system prevented any impact on the
19 water sources of the Parán Community, Perú will tell
20 you, further to the expert opinion of Ms. Dufour, that
21 Peruvian law does not admit the possibility of
22 building or operating first a mining component, and

1 certifying it later.

2 Hence, Perú's case is that Lupaka needed to
3 destroy its fully functional water system, obtain its
4 environmental certification, and then rebuild that
5 same system from scratch.

6 This, of course, makes no sense. You will
7 be hearing from Mr. Castañeda on this this week.

8 PRESIDENT CROOK: Counsel, let me just
9 interrupt you briefly.

10 Is there any evidence on that point other
11 than the report, the expert report?

12 MR. VELARDE: On that point, you mean which
13 point?

14 PRESIDENT CROOK: The point that the system
15 had to be destroyed so that it could be rebuilt.

16 MR. VELARDE: No. This is only addressed in
17 Ms. Dufour's expert report submitted with the
18 Rejoinder, and nowhere else.

19 These were the only pending requirements
20 addressed in Perú's Counter-Memorial; however, as
21 mentioned, Perú changed its position in the Rejoinder.

22 As you can see on the bottom of the screen,

1 further to Ms. Dufour's expert report, Perú argued for
2 the first time in its Rejoinder, for the first time in
3 its Rejoinder, that Lupaka also needed to obtain
4 additional water licenses and other permits, and also
5 to obtain registration on the Hydrocarbons Registry
6 before it could start exploiting at Invicta.

7 These new requirements were not raised
8 contemporaneously, and the Claimant, of course, has
9 had no chance to address them. They should,
10 therefore, be disregarded.

11 Just as the Claimant has had no chance to
12 address these new requirements, it has also not been
13 able to address the unreasonably long time that Perú's
14 regulatory expert assumes it would have taken Lupaka
15 to comply with these requirements.

16 As you can see on the screen, Perú's
17 regulatory expert assumes that Lupaka would have taken
18 much longer than the maximum legal time frames to
19 obtain these new permits and approvals, sometimes four
20 times as much, based on what the expert calls "the
21 actual time frames."

22 This is unreasonable for at least two

1 reasons:

2 First, because Perú's case is premised on
3 conduct of its public officials being in breach of the
4 mandatory deadlines provided in Perú's own law. The
5 Respondent cannot rely on its own turpitude.

6 Second, Perú's expert only relies on a very
7 small sample of cases to support the actual time
8 frames she uses.

9 Therefore, even if the Tribunal were to
10 conclude that Lupaka needed to comply with these new
11 requirements, "none," the Tribunal should use the
12 legal time frames and dismiss Ms. Dufour's so-called
13 "actual time frames."

14 It should be noted in any event that even
15 under all these unreasonable assumptions, Perú's
16 regulatory expert concludes that Lupaka could have
17 started processing Invicta's ore with the Mallay plant
18 in January 2020.

19 This is the very same date on which
20 Mr. Gordon Ellis, Lupaka's founder and President, has
21 testified that Lupaka would have had to start making
22 gold repayments to PLI Huaura further to the

1 acquisition of the Mallay plant.

2 My colleagues will refer to this acquisition
3 later.

4 However, the point now is that the analysis
5 of Perú's regulatory expert is moot as she concedes
6 that the permits would have been granted by the time
7 the processing was due to start.

8 I will now move on to the second part of my
9 presentation where I will describe the many actions
10 that Lupaka undertook to engage with Parán, and why an
11 agreement was not reached.

12 Let me start with a preliminary comment. As
13 I showed earlier, the project was located on land
14 belonging to Lacsanga and Santo Domingo, not on
15 Parán's land. This is important because Peruvian law
16 only required Lupaka to reach an agreement with the
17 owners of the land where the project was located,
18 which Lupaka did.

19 You have on the screen Article 23 of Perú's
20 Mining Regulations. This article establishes the
21 requirements that Lupaka needed to comply with before
22 it could start exploiting the Invicta mine.

1 The requirement in a) was complied with when
2 the National Institute of Culture issued certificates
3 of absence of archaeological ruins in 2009 and 2010.
4 This is Exhibit C-0059.

5 The requirement in b) is to "have the
6 environmental certification issued by the competent
7 authority, subject to the rules of citizen
8 participation." The project also complied with this.
9 Its Environmental Impact Assessment study was approved
10 by the Ministry of Energy in 2009, after IMC conducted
11 the citizen participation activities mandated by law
12 in the area of influence of the project, and was then
13 modified in 2015 and 2016, and approved by the
14 authorities.

15 Perú disputes that the social obligations
16 contained therein were complied with. I will address
17 this in a moment.

18 The requirement in c) is to "obtain
19 permission for the use of land by prior agreement with
20 the owner of the terrain." Lupaka complied with this
21 by signing surface rights agreements with Lacsanga and
22 Santo Domingo.

1 And the requirement in d) is to "obtain any
2 other licenses, permits and authorizations required by
3 the legislation." These are the specific pending
4 requirements that I discussed before, and which relate
5 to Ms. Dufour's opinion.

6 As you can see, nowhere in Article 23 is
7 there a requirement for Lupaka to reach an agreement
8 with Parán to develop the project.

9 While Perú's position on this issue is
10 nebulous, it appears to concede that there is no
11 express legal obligation in this regard. However,
12 Perú and its witnesses tried to fill this void by
13 resorting to the notion of social license to operate.
14 Perú's witness, Mr. Trigoso, states that, "Beyond the
15 legal obligation... experience shows that for a mining
16 project to be successful, the mining company must
17 obtain and maintain the approval and support of the
18 communities in the area" (as read), including the
19 Parán Community.

20 The Claimant is, of course, aware of the
21 notion of social license to operate, but this notion
22 cannot be discussed in the abstract.

1 Peruvian mining law is sophisticated and
2 regulates what a mining company must do to obtain a
3 social license to operate from the surrounding
4 communities. This is reflected in the specific social
5 obligations that mining operators must comply with in
6 relation to mining projects.

7 One of the social obligations is to conduct
8 citizen participation activities within rural
9 communities in the area of influence of the mining
10 project, which is mentioned in the Article 23.b) of
11 Perú's mining regulations that we just saw, and which
12 Lupaka complied with.

13 The Claimant addressed the citizen
14 participation activities conducted by IMC in Section
15 3.2.1 of its Reply.

16 Another social obligation under Peruvian law
17 is to prepare and execute the social programs provided
18 in a mining project's Environmental Impact Assessment
19 study. Lupaka, again, complied with this, which is
20 not a minimum, as Perú contends. This is an
21 obligation that Peruvian law imposes on mining
22 companies.

1 On these social obligations, Perú will tell
2 you that Lupaka did not comply with all of them,
3 because in 2016 and 2017, the OEFA found that Lupaka
4 had not implemented some education and health-related
5 programs, among others.

6 But this criticism is unwarranted, because,
7 as we explained in Section 4.3.3 of the Reply, during
8 this period, Lupaka's activities at the project were
9 suspended, as the company was in critical negotiations
10 with Lacsanga and Parán to secure an access road to
11 the project. The State was informed about this.

12 Without an access road, the project could
13 simply not be developed. There would be no project.

14 Lupaka secured the right to build this
15 access road and started executing these social
16 commitments, including the Parán Community and all
17 social activities planned for 2018.

18 Perú and its witnesses adopt a notion of
19 social license to operate that goes beyond Peruvian
20 law, and that assumes that a mining company is obliged
21 to reach an agreement with a local community at any
22 price, even if the community even is clearly acting in

1 bad faith. This is not reasonable.

2 Perú would also tell you that Lupaka's view
3 that it was not obliged to reach an agreement with
4 Parán confirms its disregard for this community. This
5 is false.

6 Lupaka strived to engage with Parán, as it
7 knew it was important to have a good understanding
8 with surrounding communities. Lupaka also wanted to
9 secure an alternative route to the project through
10 Parán.

11 Let me refer to some of the efforts that
12 Lupaka made in this regard.

13 Lupaka started engaging with Parán shortly
14 after it acquired the project in October 2012. For
15 example, from 2013 to 2015, as you can see on the
16 upper part of the screen, Lupaka supported
17 infrastructure projects for the benefit of Parán.

18 In the next excerpt on the slide, you can
19 see that Lupaka engaged with a large number of
20 individual members of the Parán Community, visiting
21 their farmland and providing technical assistance on
22 agricultural practices. Lupaka knew this would be of

1 interest as Parán is an agricultural community.

2 The next excerpt on the bottom of the screen
3 is taken from the witness statement of Mr. Eric
4 Edwards, CEO and President of Lupaka between 2011 and
5 2015, and witness for the Claimant in this case.

6 In paragraph 64.c), Mr. Edwards also refers
7 to IMC "onetoone interactions with individual
8 community members," but also discusses, you can see
9 this in paragraph b), IMC's engagement with the rural
10 communities as a whole, referring to the frequent
11 meetings held by IMC's Community Relations team with
12 the rural communities to discuss the project.

13 Mr. Edwards also refers to Lupaka's opening
14 of a local office to allow members of the rural
15 communities, including, of course, Parán, to stop by,
16 ask questions about the project, and share concerns.

17 You have this in paragraph 64.a) of
18 Mr. Edwards' witness statement.

19 Confidential information.

20 (End open session.)

1 O P E N S E S S I O N

2 MR. VELARDE: Importantly, Perú's
3 authorities never complained about Lupaka's engagement
4 efforts. Never.

5 Perú will tell you that this was the case
6 because the State entity on the ground in charge of
7 fostering dialogue does not have a preventive role.
8 This runs contrary to common sense and is obviously an
9 excuse made up for the arbitration.

10 Building on these engagement efforts, Lupaka
11 and Parán entered into discussions in 2016 with a view
12 to concluding an agreement. On 6 October 2016, Lupaka
13 sent Parán a detailed proposal for an agreement, which
14 included an investment of \$200,000 per year or \$2
15 million over a 10-year period in projects related to
16 water infrastructure, the development of agricultural
17 techniques, and others to be defined by Parán.

18 I will not go into the details of this
19 proposal, which you can see on the screen, and which
20 Mr. Julio Castañeda addresses in Section 5.4 of his
21 first witness statement.

22 In exchange for Lupaka's commitments, Parán

1 would commit to allow Lupaka to use an access road to
2 the site through Parán, among other things. Perú has
3 not criticized Lupaka's good faith proposal in any
4 way.

5 Parán made a counter-proposal to Lupaka in
6 November 2016. Again, I will not go into the details
7 of this counter-proposal in the interest of time,
8 which Mr. Julio Castañeda also addresses in Section
9 5.4 of his first witness statement.

10 I will just say that Lupaka made an effort
11 to accommodate a large part of Parán's
12 counter-proposals, including, as you can see on the
13 left side of the screen, by increasing the amount of
14 the yearly investments, and by accepting to contract
15 all companies in Parán to provide services to the
16 project. You have this on the lower part of the
17 screen.

18 Confidential information.

19 (End open session.)

1 O P E N S E S S I O N

2 MR. VELARDE: Lupaka was making every effort
3 to reach an agreement with Parán, so it accepted to
4 pay the 300,000 soles before an agreement was signed,
5 just as Parán requested. Lupaka paid this in two
6 installments; the first on 18 December 2017, and the
7 second on 31st January 2018.

8 Note that Lupaka paid this debt and
9 continued negotiations with Parán when Lupaka had
10 already secured an access road to the project site
11 through Lacsanga. The agreement with Lacsanga was
12 signed in July 2017.

13 If Lupaka's only interest was to secure an
14 access road to the site, as Perú will tell you, Lupaka
15 would not have paid Parán, because it had already
16 secured such an access road. Lupaka paid because it
17 wanted to reach an agreement with the Parán Community.

18 Bear this in mind when Perú tells you that
19 Lupaka disregarded or marginalized Parán. This is
20 simply false.

21 PRESIDENT CROOK: Counsel, let me interrupt
22 you. I think it would be timely at this point if we

1 could take a five-minute break on the scheduled break
2 time. Would that be convenient for you? Are you--and
3 is this a suitable time? We need to do this very
4 quickly, though.

5 MR. VELARDE: This is fine. I have two more
6 pages to go, but this is fine.

7 PRESIDENT CROOK: Let's just rise for just
8 five minutes.

9 MR. VELARDE: Okay.

10 (Whereupon, there was a recess in the
11 proceedings, 10:33 a.m. - 10:40 a.m.)

12 PRESIDENT CROOK: All right. Counsel, over
13 to you.

14 MR. VELARDE: Thank you, Mr. President.

15 Before the break, I told you that Lupaka
16 paid the 300,000 soles, some \$88,000 requested by the
17 Parán Community.

18 Lupaka expected to resume dialogue regarding
19 an agreement with Parán shortly after paying these
20 300,000 soles.

21 As you can see in the first excerpt on the
22 screen, which is a monthly report prepared by IMC's

1 community relations team, Parán told Lupaka that
2 dialogue with the company would begin once the company
3 had paid the 300,000 soles. And the second excerpt
4 shows that the Parán leadership confirmed this when it
5 received this payment.

6 Lupaka expected to rapidly reach an
7 agreement, because, as we saw, 90 percent of Parán's
8 members agreed with Lupaka's revised proposal. Yet,
9 Parán disregarded its commitment and imposed new
10 conditions before resuming negotiations.

11 Specifically, Parán refused to resume
12 negotiations, first, until Lupaka paid a penalty that
13 Parán had unilaterally imposed in relation to the same
14 300,000 soles debt.

15 While contemporaneous documents show there
16 was some back and forth in relation to this penalty,
17 Parán finally agreed to set it aside.

18 On the screen, you have the letter that IMC
19 sent to Parán summarizing the agreements reached after
20 a meeting with the president of Parán, its governing
21 committee and legal advisors, which leaves no doubt
22 about this.

1 And second, Parán also required compensation
2 for exploration works carried out on Parán's land.
3 Note that the letter sent to Lupaka requesting this
4 compensation is dated 19 December 2017, but it was
5 only delivered to Lupaka two months later, when Lupaka
6 had already paid Parán the full 300,000 soles.

7 Lupaka could not accept this new payment
8 request. Parán was asking that Lupaka continue making
9 significant payments in the hope of resuming
10 negotiations at some point, something that Lupaka was
11 no longer sure would happen.

12 If anything, Parán's behavior showed that it
13 was trying to extract money out of the company without
14 a real interest in reaching an agreement.

15 This was in the first quarter of 2018, and
16 things only got worse thereafter. Parán started
17 taking active measures against the project.

18 Let me give you two examples, which are not
19 in dispute. First, on the left of the screen, you
20 have an excerpt of a report prepared by IMC's
21 community relations team in March 2018. There, you
22 can see that Parán proposed to Santo Domingo to form

1 an alliance against the project, offering in exchange
2 to give up on its territorial dispute with Santo
3 Domingo.

4 You will hear Perú refer to territorial
5 disputes between Parán and the other communities, and
6 how that supposedly obliged Lupaka to reach an
7 agreement with Parán.

8 Well, here, as you can see, Parán was
9 offering to give up on its land claims if Santo
10 Domingo agreed to block the project.

11 Second example, in May 2018, the President
12 of Parán tried to convince the President of Santo
13 Domingo to demand 4 million soles more from Lupaka,
14 this is some \$1.3 million, for the use of the Santo
15 Domingo land, proposing to split that money in equal
16 parts.

17 But Parán wasn't just taking actions against
18 Lupaka. It was also taking actions against the other
19 communities.

20 In the interest of time, I will just say
21 that Parán insisted, over time, on its request that
22 Lupaka transport all its ore exclusively through

1 Parán.

2 Lupaka informed the State that this request
3 blocked any possibility of an agreement, because,
4 first, it was unfair to the other communities, and
5 also ignored that Lupaka was obliged to make
6 significant annual payments to Lacsanga for the use of
7 its road.

8 Members of the Tribunal, I have just
9 described the reasons why Lupaka could not reach an
10 agreement with Parán. It was not because Lupaka had
11 an inexperienced community relations team, as Perú
12 wants you to believe. No.

13 Parán did not want an agreement with Lupaka.
14 Why it did not wish to do so is not material; however,
15 the State's own internal documents show that this was
16 because the Parán Community believed the project would
17 interfere with the drug business on Parán's territory.
18 Perú says this doesn't make sense; yet, its own civil
19 servants were stating this at the time.

20 Perú cannot criticize the terms of the
21 proposals that Lupaka made to Parán to reach an
22 agreement, because, as we saw, 90 percent of Parán

1 accepted Lupaka's proposal. Instead, Perú tries to
2 confuse matters by saying that Lupaka gave preference
3 to Lacsanga.

4 But let us recall that to get the project
5 off the ground, Lupaka needed to have an agreement
6 with Lacsanga in whose territory the project was
7 located. But even after Lupaka reached an agreement
8 with Lacsanga, Lupaka continued making efforts to
9 reach an agreement with Parán, to no avail.

10 Before giving the floor to Mr. Gallego, I
11 just realized that in the transcript when I was
12 discussing about the water management system, which
13 consists of two--which consists of two ponds, I think
14 that the transcript shows points instead of ponds, so
15 just to clarify that.

16 With this, I give the floor to Mr. Gallego
17 to address the last part of our factual presentation.
18 Thank you.

19 ARBITRATOR GRIFFITH: Counsel, could I ask
20 you what the word "bocamina" means? I'm sorry, I'm
21 not a Spanish speaker. "Bocamina" in the box on Page
22 40, what's that?

1 MR. VELARDE: That's the mine at it, if I--

2 ARBITRATOR GRIFFITH: At it.

3 MR. GALLEGGO: It's the entrance to the mine.

4 ARBITRATOR GRIFFITH: It's the entrance,

5 thank you.

6 MR. GALLEGGO: Members of the Tribunal, I

7 will be taking about 45 minutes for the remainder

8 of--for this part of the presentation.

9 PRESIDENT CROOK: We are scheduled, I think,

10 for an official break at 10 minutes after the hour.

11 Perhaps--sorry, quarter after the hour.

12 Perhaps, as you draw near to that, you'll

13 let us know an appropriate point to--for us to take

14 that break.

15 MR. GALLEGGO: Thank you, Mr. Chairman.

16 I'll now address the State's failure to

17 restore law and order despite Parán's illegal actions.

18 As Mr. Velarde just explained, Parán was not

19 negotiating in good faith, and its menacing discourse

20 only grew worse despite Lupaka's efforts.

21 On 4 May 2018, Parán sent a letter to IMC

22 falsely claiming that IMC has taken possession of our

1 land, installing a camp and contaminating our springs.

2 Based on these false accusations, Parán gave
3 Lupaka an ultimatum. As can be seen from the letter,
4 Parán stated, "We ask you to vacate the territory of
5 our rural community within 15 calendar days;
6 otherwise, we will proceed to evict you." (As read.)

7 This was the prelude to the violent invasion
8 of June 2018.

9 IMC's community relations team met with
10 Parán leadership on 15 June 2018, in an attempt to
11 avoid the invasion by Parán. This was to no avail.

12 During this meeting, Parán's leadership
13 informed IMC that Mr. Soyman Retuerto, then Subprefect
14 of the Leoncio Prado District and one of Perú's
15 witnesses in this arbitration, had authorized Parán to
16 invade the mine. This was memorialized in the report
17 for the month of June 2018, prepared by IMC's
18 community relations team.

19 Confidential information.

20 (End open session.)

1 O P E N S E S S I O N

2 MR. GALLEGO: On 23 July 2018, Parán wrote
3 to the Minister of Energy and Mines to give its
4 version of these events, and this is what Parán said.

5 "Recently, in an ordinary assembly, we
6 decided to carry out a peaceful inspection inside the
7 facilities of the mining company with the intention of
8 verifying for ourselves what they have been denying,
9 that they are working, the case being that we found
10 that they are, indeed, working..."

11 And then the letter goes on to say that
12 there are environmental violations.

13 This is just another example of Parán's
14 false accusations. Not only had the armed invasion
15 been brutally violent, but IMC was not exploiting the
16 mine, nor were there contamination in the way they
17 alleged. None of this is in dispute.

18 Parán planned a new invasion of the site for
19 11 September 2018; however, on 10 September 2018, the
20 police did intervene in view of Parán's announced
21 invasion for the next day. The Order for the police
22 intervention is at C-0136, and projected on the

1 screen.

2 The first highlighted portion of the extract
3 shows that police had a wide mandate to ensure that
4 public order was maintained. The second highlighted
5 portion further shows that the role of the police was
6 and is to guarantee compliance with the law and
7 reestablish public order.

8 Doing so was not discretionary for the
9 police, as is Perú's case. It is required to do so,
10 and it was going to counter the use of force or
11 violence by Parán with appropriate means.

12 On 10 October 2018, Parán sent a letter to
13 the Minister of Energy and Mines, again, making a new
14 series of false acquisitions against Invicta about the
15 exploitation of the mine and the supposed
16 environmental breaches.

17 This letter was a clear attempt by Parán to
18 justify the invasion that would take place only four
19 days later, and is another example of Parán's bad
20 faith.

21 Confidential information.

22 (End open session.)

1 O P E N S E S S I O N

2 MR. GALLEG0: Yet, Perú states that its
3 response to this invasion was, and I quote,
4 "reasonable." It also blames Lupaka for not seeking
5 help early enough, which, of course, makes no sense.

6 Perú states that because in October--because
7 of the October invasion, Parán was already on the
8 ground and armed. The police's decision not to
9 intervene was, and I quote, "entirely consistent with
10 Peruvian law."

11 This is obviously mistaken. Peruvian law is
12 clear that there should be police intervention in the
13 circumstances.

14 First, the Constitution's basic tenet on law
15 enforcement found in Article 166 of the Constitution
16 says, "the fundamental purpose of the National Police
17 is to guarantee, maintain and reestablish internal
18 order. It provides the protection and assistance to
19 the persons and the community. It ensures compliance
20 with the law and the security of public and private
21 property. It prevents, investigates and combats
22 crime".

1 Even under this basic tenet, it is clear
2 that the State should have intervened to redress
3 Parán's criminal conduct, and thereby, allow IMC to
4 continue with its mining project at Invicta.

5 Second, there is Article 920 of the Civil
6 Code.

7 Three days after the invasion, on 17 October
8 2018, Invicta sent a letter to the police requesting
9 police support to recover possession of the site.

10 The police were obliged to assist Invicta in
11 recovering control of the site.

12 Indeed, Article 920 of the Peruvian Civil
13 Code, which regulates the so-called "Extra Judicial
14 Possession Defense," leaves no room for any doubt in
15 this regard.

16 As can be seen from the last extract at the
17 bottom of the slide, the National Police of Perú "must
18 provide necessary support to guarantee strict
19 compliance with this article under penalty of the
20 law".

21 Perú has said on this that Article 920 only
22 requires that the police play a supporting and

1 supervisory role with respect to a dispossessed
2 property owner's own efforts to regain their property.
3 It also states that the police's assistant [recte:
4 assistance] or support could not have taken the form
5 of use of force as a result of this article.

6 This is worth a brief comment.

7 As the Tribunal is well aware, the situation
8 is that Parán had invaded the site and set up a
9 roadblock with 100 of its members who were heavily
10 armed and had proven to be very violent.

11 Perú seems to be suggesting that Lupaka had
12 the right to organize a security force in the
13 circumstances, to evict the Parán invaders, and that
14 if it had done so, Perú's police would have stood by
15 and watched.

16 It is ironic that Perú is suggesting this,
17 when it criticizes the intervention of WDS, Lupaka's
18 private security force, a few months later.

19 Perú's position is also contrary to the
20 reality in Perú. In the case of Las Bambas, which is
21 a major copper mine in Perú whose operations have also
22 been blocked by communities, the police did carry out

1 a forceful intervention in 2022 precisely on the basis
2 of this Article 920 of the Civil Code, as one can see
3 from a report of the ombudsman that is on file and
4 that is on the screen.

5 Perú also says that Lupaka did not comply
6 with the requirements of Article 920, and that's at
7 Rejoinder Paragraph 185, and tries to create confusion
8 by referring to regulations that apply to the recovery
9 of State-owned land.

10 Yet, a simple reading of this provision,
11 that is 920, shows that Lupaka only had to inform the
12 police about the dispossession and request support,
13 which it did, as we have seen. No Peruvian authority
14 ever told Lupaka that it would not receive police
15 support because of protocol requirements.

16 Third, Perú's own defense in this
17 arbitration confirms that the police must intervene in
18 circumstances such as these. Perú's criminal law
19 excerpt, Mr. Meini, explained, and I open quote, "The
20 use of force is never discretionary," and that the
21 police "can and should" use force in any of the
22 situations listed in Article 8.2 of Legislative

1 Decree 1186.

2 Here, we are at least in two of the
3 situations, if not more, specified in Article 8.2.
4 That is, namely, to detain a person committing a
5 crime, and to protect or defend protected legal
6 interests.

7 Indeed, Parán were on Lacsanga's land
8 continuously, and were blocking IMC from accessing its
9 own site, and its right to exploit the mine. In the
10 words of Perú's criminal expert, Mr. Meini, the police
11 "can and should use force" in these circumstances.

12 But the Tribunal does not need to decide
13 this matter under Peruvian law. It is making a
14 decision under international law.

15 It is clear that under international law,
16 Perú had an obligation to protect foreign investors
17 from criminals. Already at this point, there was, at
18 the very least, a breach of the obligation under
19 international law to afford FPS to Lupaka's
20 investment.

21 Aware of its duty to intervene, the police
22 initially responded positively. Indeed, on 25 October

1 2018, eight days after Lupaka's letter, the police
2 informed IMC that the "PNP Colonel Chief of Huacho
3 Police Division, has ordered that the respective order
4 of operations be formulated in order to be able to
5 provide the police support and thus maintain public
6 law and order."

7 However, ultimately, the police did not
8 intervene. As we will see as we go through the
9 chronology, this was only one of several instances
10 where the police made it clear that it believed that
11 forceful intervention should take place in order to
12 allow IMC to recover access to the mining site.

13 Parán was armed at the time, because Perú's
14 Army provided arms to it in the 1990s when it created
15 the Rondas Campesinas. This is confirmed by Perú in
16 this arbitration. You can also see this referenced in
17 an internal PCM document at the top of the screen; PCM
18 is an organ of the Peruvian State.

19 The Police Operational Plan states that
20 Parán's Rondas Campesinas had some 16 rifles provided
21 by the army. On the slide is an extract from the
22 Police Operational Plan confirming this.

1 Parán was also in possession of other arms,
2 as the Police Operational Plan also confirms, and
3 which you can see on the second extract confirming
4 that other than the rifles, they held pistols,
5 revolvers and carbines.

6 Parán was also in control of Invicta's
7 explosives magazine which contained various tons of
8 explosives. This is also confirmed by the report
9 attached to the Police Operational Plan.

10 In response, Perú states, and I quote,
11 "There is no evidence to suggest that, during the
12 Access Road Protest, or during the encounter with the
13 [WDS] on 14 May 2019, the Parán's Ronda Campesina
14 actually used any of the firearms that had been
15 distributed to it decades earlier by the Peruvian
16 military."

17 ARBITRATOR GARIBALDI: A quick question,
18 counsel.

19 What is the Spanish word used for "rifles"
20 here in the original?

21 MR. GALLEGOS: I think it's "retrocargas."

22 ARBITRATOR GARIBALDI: Retrocargas.

1 MR. GALLEG0: Which is a bit of an
2 old-fashioned word, in my opinion, but I would
3 translate it as rifles.

4 ARBITRATOR GARIBALDI: But it says
5 12-gauge--16 12-gauge rifles. I thought a 12-gauge
6 refers to a shotgun. Anyway, it doesn't matter, but
7 it is interesting that--retrocargas. Retrocargas
8 could be a shotgun that is--never mind.

9 PRESIDENT CROOK: As one who wandered around
10 the field as a misspent boy carrying a 12-gauge, it is
11 a shotgun.

12 MR. GALLEG0: Thank you, Mr. President.

13 I think there is a discussion about
14 long-range weapons and short-range weapons, and that's
15 reflected in the evidence. In any event, whether
16 there were given shotguns or rifles, the point stands,
17 there were 16 of them provided to the Parán Community
18 by the army.

19 So Perú says that there's no evidence that
20 they actually had these weapons provided by the army
21 during the Access Road Protest, or during the incident
22 of 14 May 2019.

1 Now, if you see the letter on the screen
2 from 25 January 2019 from the Huacho police department
3 to the head of the Lima Region, General Arata,
4 requesting that General Arata order that the arms
5 provided by the army to Parán's Ronda Campesina be
6 confiscated as it is misusing them. Now, that is in
7 the first highlighted portion.

8 In its reasoning, it explains how a Lacsanga
9 inhabitant has received multiple wounds as a result,
10 and that the Parán Community has been carrying out the
11 forceful blockade since October of 2018. And that's
12 in the second and third highlighted portions.

13 Now, this is obviously contrary to Perú's
14 position.

15 Sadly, this plea from the police in January
16 2019 fell on deaf ears at the time. And Perú also
17 ignores this letter in this arbitration, despite the
18 Claimant having referred to it in the Reply.

19 As to the events of 14 May 2019, it is
20 undisputed that approximately 100 heavily armed
21 members of Parán entered the site, opened fire against
22 the WDS guards, and Mr. Estrada, as well, and that is

1 IMC's employee.

2 Parán's members would have likely been
3 carrying all the arms they had, including those
4 provided by the State.

5 Now, Perú's response is that, I quote,
6 "Importantly, Claimant has not shown that a forceable
7 stripping of such weapons, had it taken place, would
8 have dampened the community's opposition, prevented
9 the road access protest or in any way helped to
10 resolve the conflict."

11 That's in Paragraph 268 of the Rejoinder.

12 Now, this is wholly disingenuous and defies
13 any logic.

14 It is not the same to confront--it is not
15 the same to confront a heavily armed mob than to
16 confront one that is not. The police should have been
17 able to lift the blockade in such wholly different
18 circumstances, and WDS would have been able to hold
19 its ground at the site in May 2019.

20 Now, I'll come back to this event later.

21 Now, I've just been informed that it's
22 actually escopetas, which is rifles in the original.

1 ARBITRATOR GARIBALDI: Sorry. Escopeta is
2 not rifle. Escopeta is shotgun.

3 MR. GALLEGO: Okay.

4 By this point, it was entirely clear--I
5 respectfully disagree with that, Mr. Garibaldi, and
6 I'm sorry, we'll have a look at that. But anyway,
7 I'll carry on for the sake of time.

8 ARBITRATOR GRIFFITH: If you want to attach
9 the word 12-gauge, I think you're stuck with the
10 shotgun, unless you're very convincing.

11 MR. GALLEGO: Thank you, sir. Take note.

12 By this point, it was entirely clear that
13 Perú's police forces should intervene, this with the
14 view not only of Lupaka, but also of the police.

15 Following Lupaka's further requests for
16 police intervention in early December 2018, the police
17 had been assessing an intervention. This was
18 not--this has not been contested by Perú.

19 On the slide is an internal police document
20 showing the various approvals obtained relating to
21 such intervention. The document shows approvals by
22 the general staff office for operational plans in

1 Lima, the legal department of the police in Lima, and
2 the police division in Huacho.

3 Now, this is why the police had finalized an
4 operational plan dated 9 February 2019, which is at
5 C-0193, and which CPO Soria sent to his superior in
6 Huacho for approval and onward transmission to Lima.
7 The operational plan is a very detailed account, of
8 which 55 pages are on file out of 105 pages which CPO
9 Soria sent to his superior on 9 February 2019, as can
10 be seen from the slide.

11 The plan provided for 280 police officers to
12 be on the ground, 280, of which 200 would be from the
13 specials operations unit in Lima, and the rest from
14 other police units. It is clear that this plan had
15 been prepared over a significant period of time and
16 had been finalized.

17 Indeed, the operational plan had been
18 carefully prepared. It mapped out a phase strategy,
19 as you can see from the points that have been put on
20 the slide.

21 The operational plan also had an
22 intelligence report, as well as a report evaluating

1 the risk attached to the same.

2 And as Mr. Bravo testifies, the police
3 authorities also took the time to meet with IMC and
4 coordinate critical aspects of the operational plan.

5 On 20 February 2019, Mr. Bravo coordinated
6 further with Colonel Arbulú to suggest that he approve
7 the plan. Mr. Bravo received confirmation of this on
8 14 February 2019.

9 Also on 14 February 2019, Mr. Bravo
10 coordinated with CPO Soria to tie off any remaining
11 points before the plan went ahead.

12 And he received oral confirmation, Mr. Bravo
13 received oral confirmation that all the police
14 hierarchy had approved a plan.

15 Mr. Bravo then received confirmation that 19
16 February 2019 was set as the date for its execution.
17 Despite all this, the plan did not go ahead.

18 Now, Perú has not contested any of this
19 evidence; however, Perú does make the general
20 allegation that the police act autonomously, and that
21 if the plan did not go ahead, it is because the police
22 decided that they should not and that they are

1 entitled to do so under Peruvian law.

2 Yet, this story does not match Perú's
3 internal documents, nor Mr. Bravo's understanding at
4 the time. All the evidence points to the fact that it
5 was Mr. Saavedra or other high-ranking officials
6 within the Ministry of the Interior who blocked the
7 implementation of the operational plan.

8 Now, for example, as can be seen on the
9 slide, Mr. Saavedra candidly stated in a WhatsApp
10 message to Mr. Bravo on 15 February 2019, that the
11 implementation of the operational plan could not go
12 ahead because, he said, if we do not adhere to the
13 protocol on the use of public force and there are
14 consequences, these will fall back on the country, and
15 the national and international press will do their
16 thing, which is why we must be scrupulous.

17 The inference here is clearly that
18 Mr. Saavedra feared negative political consequences.
19 Mr. Saavedra comments on this very briefly in
20 Paragraph 23 of his statement. He says that it is
21 untrue that unfavorable publicity in the media was the
22 only consideration; yet, he does not give any further

1 explanations.

2 Ultimately, the Tribunal does not need to
3 decide whether it was the Ministry of the Interior or
4 another instance that blocked the Police Operational
5 Plan. What matters is that there was no good reason
6 not to proceed, given the circumstances.

7 Parán was acting criminally by taking
8 Lupaka's mining site with violence; its members were
9 brandishing firearms; they were using them against
10 Lacsanga members, and they had taken control of IMC's
11 explosive magazine.

12 Parán had also been so bold as to impede an
13 inspection of the explosives magazine by the
14 prosecutor, accompanied by the police on two
15 occasions, in December 2018, and February 2019, and
16 had also shown repeatedly and without exception that
17 they were not willing to enter into any reasonable
18 dialogue to come to an agreement.

19 It is for this reason that the Police
20 Operational Plan at C-0193 was a finalized document,
21 which had been prepared and approved by numerous
22 police instances. It is--its implementation made

1 sense to many within the police forces, not least of
2 which those officers on the ground and those not
3 focusing on a political agenda.

4 PRESIDENT CROOK: Counsel, I see from your
5 slides that we're about to move to the 26 February
6 agreement. Perhaps this would be a time for us to
7 take our break?

8 MR. GALLEG0: Yes, it would. Thank you.

9 PRESIDENT CROOK: Let me invite you when you
10 come back, could you briefly clarify for us the
11 relevance, as a matter of international law, of all we
12 have heard about who did or did not block the
13 performance of the intervention plan.

14 How is that relevant to your international
15 law argument that there was a failure of full
16 protection and security? Just very briefly. Thank
17 you.

18 ARBITRATOR GRIFFITH: Counsel, could I also
19 flag, perhaps not for your opening, but I note on page
20 60 of the slides, the last point in the first box is
21 the guarding of the site by the police for a maximum
22 of 72 hours.

1 Perhaps at some time before the final
2 addresses--we're not having a final address, but
3 sometimes might we have submissions on the
4 relationship between the police intervention for 72
5 hours and the capacity to conduct the mining
6 operations?

7 PRESIDENT CROOK: All right. Let's convene
8 in ten minutes.

9 (Whereupon, there was a recess in the
10 proceedings, 11:17 a.m. - 11:28 a.m.)

11 PRESIDENT CROOK: Okay. We can start.

12 MR. GALLEGO: I'll just address the two
13 questions in order.

14 First, as to the relevance as to who blocked
15 as a matter of international law, it is not for us to
16 say who blocked the Police Operational Plan. The
17 evidence that we are marshalling shows that numerous
18 individuals within the police and also outside the
19 police in other State organs thought that the police
20 should intervene.

21 Now, that is a clear demonstration that this
22 should have happened, if you needed it, given the

1 circumstances of Perú's actions.

2 As to the second question on 72 hours and
3 the capacity to conduct the mining operations, it is
4 Lupaka's submission that what should have happened
5 here is that the Parán Community should have been
6 disarmed. They-Lupaka precisely was contracting WDS,
7 as a security force, to enter with the police and to
8 be able to secure its own site once the police had
9 left after 72 hours-.

10 In any event, the police should have
11 provided sufficient security to protect them against a
12 further invasion by Parán.

13 The Claimant has provided evidence that the
14 Ministry of Energy and Mining's team in charge of
15 mediating negotiations with the community, the OGGS,
16 knew that further negotiations were going to be
17 unproductive by early 2019.

18 The evidence here is again directly from
19 Perú's internal documents and where officials are
20 stating in no uncertain terms that there is no point
21 in continuing the negotiations.

22 For example, let us see C-0468 of 20

1 February 2019, which was already shown by Mr. Velarde.
2 The author, Mr. León, one of Perú's witnesses in this
3 arbitration, states as follows: "The social process
4 that the mining company maintains with the community
5 is affected by the presence--is affected by the
6 presence of interests outside the State (producers of
7 local marijuana plantations). The MININTER is aware
8 of this problem and is activating the corresponding
9 mechanisms. Also, it is known that the local police
10 is preparing an operations plan in the community,
11 having identified long-range weapons among community
12 members."

13 "Recommendations: Coordination at the
14 highest intersectoral level between the MEM and the
15 Ministry of the Interior in order to activate as soon
16 as possible the mechanisms for the re-establishment of
17 public order in the area by the MININTER. Dialogue
18 mechanisms are not appropriate in the case because the
19 community leadership manages a double discourse with
20 the State and with its population, evidencing with it
21 the presence and active participation of local actors,
22 who, with an economy outside the law, subsidize

1 activities contrary to public order against the mining
2 project."

3 Now, what does Perú say to this? It says
4 that these are just the opinions of a civil servant at
5 a particular time, but not the institution's opinion.
6 That is, the institution thought it reasonable for
7 dialogue to proceed.

8 Now, this is highly questionable on the face
9 of this document and others like it.

10 In any event, even if Perú's position was
11 correct, these documents are devastating for Perú's
12 case, because it shows that the opinion of several
13 people from the OGGS, who attended meetings on the
14 ground, with Parán, was that further negotiations were
15 not going to yield any results in light of the fact
16 that Parán had among its ranks drug traffickers who
17 would not see the benefit of an agreement with Lupaka.

18 Following the decision by a higher authority
19 in the State, the police should not intervene, there
20 were negotiations with Parán on 26 February 2019.
21 These led to a preliminary agreement with Parán, with
22 obligations for both Parán and Lupaka.

1 But the agreement was only a first step. It
2 merely started what in Perú is called a dialogue
3 table, a formal setting in which the parties would
4 further negotiate with the intermediation of the State
5 to reach a further agreement.

6 Now, Perú heavily relies on this 26 February
7 2019 Agreement for two main points. First, it says it
8 is proof that there could be agreements with Parán;
9 and therefore, that it was right not to order
10 forceable intervention.

11 Second, that the events subsequent to this,
12 particularly concerning the topographer mentioned in
13 the agreement, showed that Lupaka was the problem, not
14 Parán.

15 Yet, the facts show that Perú is yet
16 clutching at straws in both instances. While the 26
17 February 2019 Agreement was encouraging the day it was
18 signed, it proved to be a smokescreen for Parán's bad
19 faith shortly thereafter.

20 Indeed, the Parán Community did not lift the
21 blockade on the Lacsanga road at all.

22 Now, this is undisputed. Yet, as can be

1 seen from the screen, point 5 of the agreement is
2 unambiguous that this was required immediately. It
3 says the parties agree that the rural Community of
4 Parán will suspend all, all coercive measures as of
5 this date, which will be ratified by the community
6 assembly.

7 Now, the community assembly did ratify this,
8 as Mr. León testifies. So while the Parán Community
9 signed an agreement, it showed absolutely no
10 willingness to comply with it, even if it allowed
11 Lupaka's personnel to access the site for a few days
12 on foot, through Parán's precarious road.

13 Now, that's the first point.

14 Now, as to the topographer referred to at
15 point 4 of the agreement, he or she was to be used,
16 and I quote, "to identify and locate the affected
17 land, rural Community of Parán."

18 Now, this is in line with Parán's
19 long-standing claim that there was environmental
20 damage on its land, which was discussed during the 26
21 February 2019 meeting, and at the meeting, immediately
22 preceding this, as well, on 29 January 2019, as

1 Mr. Bravo has testified.

2
3 Parán's demand that a unilaterally appointed
4 topographer conduct a survey to build a useable road
5 on Parán's land and to be paid an amount of \$9,000
6 came on 15 March 2019.

7 Now, that's two-and-a-half weeks after Parán
8 still failed to lift the blockade on the Lacsanga
9 road.

10 Lupaka denied that this was the purpose of
11 the topographic survey in the letters to Parán and to
12 the MEM in the following days.

13 Now, despite Parán's unreasonable demand,
14 Mr. Ansley and Mr. Bravo met with Parán officials on
15 19 March 2019. They offered to consider it and make
16 enhancements on the Parán road over time. Perú has
17 not made any comment on these conciliatory offers,
18 even though Mr. Bravo referred to them in his witness
19 statements.

20 Perú was also informed about this meeting
21 contemporaneously.

22 In response to Lupaka's offers at that

1 meeting on 19 March 2019, Parán's president demanded
2 that the agreements with Lacsanga and Santo Domingo be
3 canceled, which was, of course, impossible, and
4 expressly stated that Parán had no intention of
5 lifting the blockade.

6 Again, Perú has not reacted to this. The
7 following day, on 20 March 2019, Parán forcefully
8 re-evicted Lupaka's employees, who had recently been
9 allowed on-site. Perú hardly refers to this except to
10 say that it was a demonstration or a protest by Parán.

11 Now, just stepping back for a moment: Even
12 if Perú is entirely correct that Lupaka's breached its
13 obligations regarding the topographer, and just
14 ignoring that Lupaka offered to abide by Parán's
15 demands, as we have seen, Lupaka's supposed breach
16 could hardly be an excuse for Parán's reaction on 20
17 March 2019. Its renewed aggression could only have
18 made it patently clear again that Parán would never be
19 willing to negotiate reasonably.

20 Lupaka was not going to continue to spend
21 its time attending sham dialogue meetings after this
22 unless Parán showed some goodwill and lifted the

1 blockade, as it made patently clear.

2 The Respondent, in its desperation, places
3 enormous significance on the events of 14 May 2019 by
4 which WDS entered the site; yet, Perú has not
5 correctly portrayed one key detail of these events and
6 which shows that Lupaka did nothing wrong here.

7 Now, let me briefly revisit the facts in
8 relation to this event.

9 The Claimant has shown that IMC retained WDS
10 as a plan to secure the site after police had entered
11 the site.

12 Indeed, as testified by Mr. Bravo, the
13 police continued to consider that an operation plan
14 was required, and he and other IMC staff were
15 coordinating with the police to carry it out.

16 The Respondent has not contested this.
17 Mr. Bravo obtained confirmation from Colonel Arbulú,
18 the head of the Huacho police division that the plan
19 was going ahead. Again, this has not been contested
20 by the Respondent.

21 Yet, on 14 May 2019, the day the police were
22 supposed to intervene and remove the blockade, they

1 did not show up. Again, uncontested.

2 WDS entered the site unimpeded. There were
3 no Parán members at the site of the blockade, as shown
4 by a video shot on that day. Let us see a short clip
5 of this video with Marco Estrada, who, as I said, was
6 IMC's employee, and he's speaking to the interviewer
7 in this video.

8 (The video was played.)

9 So this is the only point that the
10 Respondent contests. It ignores the video. Instead,
11 it provides a police report from February 2020 as
12 evidence to support its case that WDS removed five
13 members of the Parán Community while approaching the
14 mine.

15 Yet, the police were not there, so they
16 couldn't have seen this. They did, however, record
17 Parán's account of the event shortly after it
18 occurred.

19 Now, a few hours later, Parán members
20 arrived with full force to the mining site, which, by
21 the way, is not on Parán's land, as we have seen.
22 Parán was shooting their guns, leading to the flee of

1 WDS personnel, as well as Mr. Estrada. They did not
2 return fire.

3 Two WDS guards were shot, one receiving a
4 bullet wound in the mouth. The next day, another WDS
5 employee was shot dead by a Parán Community member.
6 There were no injuries to anyone at Parán. Again,
7 Perú does not contest any of this.

8 To the best of the Claimant's knowledge, the
9 police still did nothing in respect of Parán's
10 egregious conduct.

11 Perú states that the incident with WDS
12 forever buried any hopes that Lupaka could have had to
13 enter into an agreement with Parán; that the incident
14 was squarely Lupaka's fault, and that it marked a
15 point of no return in the relations with the
16 community. At least Perú is consistent in this
17 arbitration with the position it took at the time;
18 yet, it is completely flawed given the facts that I
19 have just rehearsed.

20 As Mr. Foden demonstrated at the beginning
21 of this presentation, in July 2019, Parán decided to
22 take Lupaka's stockpiled ore at the site. Mr. León

1 confirms that he knew that Parán was exploiting the
2 mine during the third quarter of 2019.

3 Furthermore, a few months later, in November
4 2019, the police confirmed during a site inspection
5 that Parán was exploiting the mine. The police
6 intercepted various trucks loaded with ore that month
7 near the project site.

8 Parán has continued exploiting the mine to
9 the present day, as other contemporaneous documents
10 show, including some authored by Perú's own witness,
11 Mr. Nilton León.

12 I will not show you this evidence again in
13 the interest of time. I just wish to refer to the
14 meeting that Mr. Bravo held on 15 July 2019 with
15 Mr. Augusto Cauti, then Deputy Minister of the MEM.

16 During this meeting, Mr. Bravo explained to
17 Mr. Cauti that Parán was already exploiting the mine;
18 in response to which, Mr. Cauti said that if that was
19 the case, he would call the Deputy Minister at the
20 MININTER to ask for a police intervention.

21 Now, Mr. Bravo has testified on this, and
22 Perú has not contested his testimony. Even if late,

1 because this came in July 2019, this could still have
2 been Lupaka's salvation if the police had intervened
3 then; yet, as we know, this didn't happen.

4 As I noted earlier, the police did intervene
5 on 14 December 2021, after this arbitration was
6 started. Perú points to various other supposed
7 differences in a submission as compared to the
8 situation when Lupaka held the Invicta mine, namely
9 that the intervention in December 2021 has as its
10 objective the closure of the mine that's stopping
11 Parán's illegal mining activities, and that the
12 intervention did not occur during a period of active
13 State-facilitated dialogue, among other things.

14 Yet, Perú's arguments are unsupported by any
15 evidence that this was the true reason for the
16 difference. Indeed, as is clear from the evidence,
17 Parán took Lupaka's ore as from July 2019.

18 And in addition, Mr. León has testified that
19 as from the third quarter of 2019, they were actually
20 exploiting.

21 Even on Perú's case, therefore, it is as of
22 this time that the conditions were fulfilled for there

1 to be a police intervention. Yet, there was no police
2 intervention until more than two years later, on 14
3 February 2021. By then, it was, of course, too late.

4 To the best of the Claimant's knowledge,
5 Parán continues to exploit the mine, as Mr. Foden
6 said. This puts to rest any of the Respondent's
7 arguments that Lupaka's financing agreements are at
8 the root of its loss. Indeed, if Lupaka was still
9 holding title to the mine today, it would be in
10 exactly the same position.

11 Now, with that, I come to the end of the
12 factual part, and I will now move on to jurisdiction
13 and the other legal arguments.

14 Just a few words on jurisdiction, then.

15 The Claimant has established that it has met
16 the standards in the relevant Articles of the FTA and
17 the ICSID convention. This is undisputed except for
18 two points that Perú raises.

19 First, Perú alleges that the Claimant lost
20 standing by disposing of its investment prior to the
21 initiation of the arbitration. However, as we have
22 shown, the relevant time to assess whether a Claimant

1 is a protected investor is when the State breached its
2 obligations. At that time, Lupaka held its
3 investment.

4 In any event, the parties agree that a
5 tribunal would retain jurisdiction in special
6 circumstances, as the Aven and Costa Rica tribunal
7 formulated, even if the investment is lost prior to
8 the proceedings being initiated. Such special
9 circumstances exist where the State's actions and
10 omissions have directly caused this loss; and indeed,
11 this is what happened here.

12 Indeed, the State's actions and omissions
13 led Lupaka to be forced to transfer its interests in
14 IMC and the mine to PLI Huaura in August 2019.

15 My colleague will elaborate further on this
16 when addressing causation.

17 In the Rejoinder, the Respondent states that
18 there is an exception to the special circumstances
19 principle that applies; and hence, there is no
20 jurisdiction.

21 It states that Lupaka's subsidiary, Andean
22 American Corporation, transferred to PLI Huaura not

1 only the shares in IMC but also all of its rights
2 pertaining to IMC, which it states would include
3 treaty rights.

4 The Respondent also states that PLI Huaura
5 is a potential investor under the FTA because of its
6 Canadian nationality.

7 Yet, a private agreement could not affect
8 the rights of Lupaka under the FTA. Also, PLI Huaura
9 would not be able to bring a claim on the basis--on
10 the same basis as Lupaka, as the breaches would have
11 occurred before its supposed investment, and PLI
12 Huaura would not have incurred a loss under them.

13 Hence, the Tribunal should reject this
14 argument.

15 And on this point, I refer the Tribunal to
16 Paragraphs 6 to 8 of Canada's nondisputing party
17 submission, which shows that Canada is in line with
18 the Claimant's position here.

19 Second, the Claimant has met all the
20 relevant conditions precedent, including the waiver
21 requirements. Perú alleges that Lupaka should have
22 submitted a separate waiver to file claims on behalf

1 of IMC. This is wrong, because the Claimant stands
2 within the scope of the exception at Article 823.5,
3 which is set out at the bottom of this slide.

4 With that, I now move on to the merits.

5 First, on attribution. The applicable
6 principles are found in the ILC articles.

7 Article 4 notes that the conduct of any
8 State organ shall be considered an act of that State
9 under international law.

10 We have just referred to the many actions
11 and omissions of State organs and government officials
12 over the years. These include the actions of
13 Mr. Retuerto, one of Perú's witnesses whom you will
14 hear from this week, as well as the actions and
15 omissions of the various ministries and the police.
16 There is no dispute that the conduct of these State
17 organs is attributable to Perú.

18 The Claimant's case is also based on the
19 actions of Parán, as being attributable to the State.

20 Now, this is because Parán forms a
21 "territorial unit of the State," as referred to by
22 Article 4, as we have developed in our pleadings.

1 On this point, Perú invokes inapposite
2 arguments to evade its responsibility. For instance,
3 Perú argues that Parán is an indigenous community
4 which enjoys a special status akin to that of a
5 non-State actor under international law.

6 However, the evidence unequivocally shows
7 the contrary.

8 As you can see in the excerpt of Article
9 [recte: Exhibit] C-0009, the MEM stated that Perú
10 (sic)[recte: Parán] does not meet the criteria to
11 qualify as an indigenous people. Importantly, the
12 Respondent, in its Rejoinder does not contest the
13 correctness of this determination by the MEM. (As
14 read.)

15 In any event, whether it is an indigenous
16 community or not under Peruvian law, the analysis
17 should focus on a case-by-case assessment of the legal
18 status afforded to the community by the State.

19 Parán qualifies as a territorial unit
20 because it was empowered with autonomous jurisdiction
21 and police authority over its territory. I will come
22 back to these powers in a moment.

1 Perú disputes this conclusion by stating
2 that it was not responsible because Parán was granted
3 full autonomy; yet, it cannot evade its international
4 responsibility in this way.

5 Nor can Perú rely on Mr. Meini for the
6 proposition that the other State organs could not
7 interfere with the autonomy of Parán as a rural
8 community. To state the obvious, rural communities do
9 not stand above the law. As you can see from the
10 excerpts of Peruvian law on this slide, including
11 Article 1 of the General Law of Rural Communities,
12 like all Peruvian citizens, members of rural
13 communities must comply with Peruvian laws.

14 Moving to the next basis for attribution,
15 Parán's actions are also attributable under Article 5
16 of the ILC articles. The legal test under this
17 article is undisputed, but the parties disagree
18 whether it was factually met.

19 The first prong requires that the personal
20 entity be empowered by law to exercise elements of
21 governmental authority. Parán, and its Ronda
22 Campesina, met this requirement as a rural community

1 under Peruvian law.

2 We respectfully invite the Tribunal to
3 carefully review the relevant Peruvian legal
4 provisions on the following slides for your ease of
5 reference.

6 Here are a few excerpts from the
7 Constitution at Exhibit C-0023 and the reference to
8 the General Law on Rural Communities at
9 Exhibit C-0024, which shows that Parán enjoyed wide
10 jurisdictional powers.

11 Such powers are further set out in the
12 General Law on Rondas Campesinas at R-0116, which also
13 shows that Parán enjoys wide administrative and police
14 powers over the territory they control.

15 On the next two slides, you have excerpts
16 from other regulations at Exhibits R-0103 and C-0025
17 and C-0609, granting jurisdictional and police powers
18 to the Ronda Campesina to maintain peace and security,
19 and intervene in the peaceful resolution of conflicts.

20 The following slides focus specifically on
21 the Rondas' police powers with the Regulations on
22 Committees of Self-Defense, for example, allowing them

1 to carry and use weapons in accordance with the law,
2 including shotguns and ammunitions provided by the
3 army.

4 The Peruvian Supreme Court further confirms
5 that the special status under criminal law of Ronderos
6 when acting within the scope of their authority. In
7 doing so, the decision that's shown on the screen
8 eloquently sets out the scope of the Rondas
9 Campesinas' jurisdictional and police powers, which
10 confirms that they were empowered by law to exercise
11 elements of governmental authority.

12 Now, Perú attempts to minimize the scope of
13 these powers, but this must fail. Perú emphasizes
14 that it did not delegate governmental powers, but
15 merely sought to ensure respect for the relevant
16 communities' customs, traditions and institutions, but
17 clearly, the legal provisions we have just set out go
18 a lot further and show that Parán was granted
19 exceptional powers which are normally reserved to
20 State organs.

21 Turning to the second prong of the test
22 under Article 5 of the ILC articles, the Claimant

1 showed that the community and its Rondas Campesinas
2 were effectively exercising governmental authority
3 during the key events.

4 The evidence summarized somewhat busily here
5 shows that the community as a whole was involved. You
6 can see here references to its president, governing
7 committee and Rondas Campesinas. The individuals
8 involved were acting under the direct instructions and
9 orders of Parán's self-governing organs. Parán also
10 carried out these acts using the rifles or shotguns
11 provided by the army, as we saw previously.

12 Indeed, Perú's position that the acts that
13 Parán undertook were the work of isolated individuals
14 is contradicted by the record. In addition, Perú has
15 failed to put forward a witness from the Parán
16 Community that would corroborate its theory.

17 Now, a few words on the last basis for
18 attribution; that is that Parán's actions are also
19 attributable to Perú under Article 7 of the ILC
20 articles.

21 This article covers acts carried out with
22 ostensible governmental authority. The parties agree

1 that the actions at the heart of this case are illegal
2 under Peruvian law, but Parán's conduct was not so far
3 removed from the scope of the authority granted to it
4 under Peruvian law. Nor can the actions in dispute be
5 characterized as private acts. As a result, these
6 acts remain within the scope of governmental authority
7 granted to Parán.

8 For these reasons, Perú cannot escape the
9 conclusion that Parán's conduct is attributable to the
10 State.

11 I will now turn to Perú's breaches of the
12 FTA, and start with our claim that Perú unlawfully
13 expropriated Lupaka's investment in breach of Article
14 812.

15 Applying the principles set out under
16 Article 1 on this slide to the facts of the case, this
17 leads to the conclusion that Parán directly
18 expropriated the Claimant's investment.

19 Indeed, if you decide that the acts of Parán
20 are attributable to Perú, there is no question that
21 there has been a direct taking. Parán holds the mine
22 even today.

1 And irrespective of attribution, Perú
2 directly expropriated the investment because similarly
3 to Wena v. Egypt and Amco v. Indonesia, Perú did
4 nothing to prevent the seizure of the mine or restore
5 it to the Claimant, despite knowing that its omissions
6 would lead to the loss of the property.

7 Alternatively, Perú indirectly expropriated
8 the Claimant's investment.

9 Annex 812.1 provides additional guidance to
10 determine what constitutes indirect expropriation. We
11 will briefly address these factors, which are listed
12 in this article.

13 First, there has been a substantive
14 deprivation of the value of the investment, as well as
15 of Lupaka's rights as an investor. Now, you will hear
16 from our experts at Accuracy that the value of the
17 Claimant's investment was brought to a negative by
18 Perú's actions and omissions.

19 Second, Perú violated Lupaka's distinct,
20 reasonable and investment-backed expectations. Perú
21 should have disarmed Parán, addressed the illegal
22 marijuana business, ejected it from the blockade,

1 which was on Lacsanga's land. Perú should also have
2 ejected Parán from the mining site.

3 Indeed, while there, Parán took IMC's
4 explosives, stockpiled ore, and used machinery to
5 exploit the mine itself. Instead, Parán was given a
6 de facto blanket immunity for all its illegal actions.

7 Third, on the character of the measures,
8 there were unjust--these were unjustified and
9 unreasonable. Perú's intent to promote dialogue and
10 diffuse the conflict is not relevant where the effect
11 of the measure was expropriatory.

12 And finally, we are far removed from any
13 legitimate public welfare objection that are set out
14 in Paragraph C of Annex 812.1; nor can there be any
15 doubt that any consideration given to the possible
16 harm which would be inflicted on Parán if police were
17 to intervene was disproportionate and discriminatory,
18 notably considering the other examples where Perú did
19 use force in the face of opposition to mining and
20 other projects.

21 We have also shown and you will hear during
22 the testimonies and explanation of the witnesses that

1 there clearly was a pattern, an entrenched policy
2 decision not to intervene, and therefore, to give
3 carte blanche to Parán.

4 As a result, even if you decide against
5 attributing the acts of Parán to the State, the
6 State's actions and omissions form a composite act
7 constituting an indirect expropriation.

8 As to FET, you will have seen the
9 differences in opinion between the parties as to the
10 boundaries of this standard.

11 However, in our submission, you need not
12 make a ruling on the outer limits of the FET standard
13 since Perú's treatment of Lupaka's investment fell
14 below the narrowest conception of FET under
15 international law.

16 It is evident that at the very core of this
17 FET standard stands an obligation for a State to
18 enforce its own laws; yet, Perú continuously breached
19 these.

20 The Claimant is not complaining about
21 individual breaches of Peruvian law, but about Perú's
22 systematic failure to act in accordance with its own

1 laws, and indeed, to act fairly and equitably in the
2 circumstances.

3 In response, Perú emphasizes a series of
4 affirmative actions that its authorities took,
5 essentially, encouraging dialogue; yet, this is no
6 response where Perú was asking that the Claimant
7 continue to negotiate with a gun to its head, and
8 thus, let Parán coerce and harass the Claimant in
9 breach of its own laws.

10 Lastly, as to FPS, under Article 805.1 of
11 the FTA, it is clear that Perú breached this
12 obligation, too.

13 The same set of facts is relevant to
14 establish a breach of FET and FPS. We would direct
15 the Tribunal to our written pleadings here as Perú has
16 not raised anything new in its Rejoinder, save for
17 overemphasizing the State authorities' wide discretion
18 to decide whether to use force.

19 (Clarification requested by the Realtime
20 Stenographer.)

21 SPANISH COURT REPORTER: I'm not hearing the
22 interpretation.

1 MR. GALLEGGO: With this, I end my
2 presentation of the legal arguments and hand over to
3 my colleague, Mr. Foden.

4 MR. FODEN: Hello again, Members of the
5 Tribunal. I'm going to now focus on the project's
6 significant economic potential, potential that IMC was
7 on the eve of realizing when Perú breached its
8 obligations under the FTA.

9 I'm then going to address IMC's advanced
10 plans to acquire the Mallay plant, which would have
11 increased its daily production from 355 tons to 590
12 tons per day, plans that were, of course, cut short by
13 the blockade.

14 I'm going to also explain Lupaka's strong
15 capacity to service the PPF Agreement, both with or
16 without the Mallay plant.

17 Now, all of this has been supported by the
18 report submitted by Micon, the Claimant's expert on
19 mining operations. You're not going to hear from
20 Micon this week, nor has Perú submitted a report to
21 rebut the evidence adduced by Micon.

22 It's worth pausing here to consider the

1 Respondent's curious approach to this crucial expert
2 evidence.

3 See, Perú knows that Micon's evidence is
4 that not only was the project likely to produce
5 significant volumes of gold during a time of high gold
6 prices, but it can't challenge that evidence; and in
7 so doing, it has made two tactical blunders.

8 The first is that it's chosen not to test
9 Micon's evidence via cross-examination. You heard
10 that right.

11 The Respondent has chosen not to challenge
12 the technical evidence that fortifies the assumptions
13 made by Accuracy in their quantum report. As such,
14 that evidence stands unchallenged.

15 To the extent that Perú relies on
16 AlixPartners, its quantum expert, to challenge mine
17 production estimates, that reliance is seriously
18 misplaced. AlixPartners just simply don't have the
19 expertise to question Micon's conclusions.

20 And while it's one thing not to
21 cross-examine a technical expert, it's another thing
22 altogether not to rebut that evidence with evidence of

1 your own.

2 And that's the second thing: Perú has
3 chosen not to submit an expert report who can
4 undermine Micon's conclusions. Again, that means that
5 Micon's evidence stands unrefuted.

6 Instead, with its last written submission,
7 Perú submitted the report, the legal report, of
8 Ms. Dufour, which barely engages with Micon's mining
9 report, and shifts Perú's case from one of technical
10 improbability to one full of novel arguments
11 concerning regulatory approval deadlines and permits
12 allegedly outstanding before exploitation could
13 commence.

14 Now, this is remarkably convenient. Perú
15 decided in the last submission to change its case and
16 not meet the Claimant's rebuttal evidence head-on, but
17 shift the goalposts by bringing in a new expert who
18 the Claimant is unable to rebut by adducing similar
19 evidence in the short window between the Rejoinder and
20 this hearing; all the while simply moving on from the
21 submissions that prompted the Claimant to retain Micon
22 to submit a report in the first place.

1 In any event, Ms. Dufour's report is an
2 exercise in confirmation bias. Perú has simply asked
3 her to come up with timelines for the issuance of
4 permits, albeit timelines that contravene Perú's own
5 laws, to suggest that IMC would not have been able to
6 meet its payment obligations in time under the PPF
7 Agreement.

8 Now, of course, she doesn't say that. She
9 doesn't say that's what her report is for, but it's
10 pretty clear that's what she set out to do.

11 Now, unlike Micon, you will hear from
12 Ms. Dufour this week, because although Tribunals often
13 decline to hear from legal experts during a hearing,
14 we consider that her conclusions are particularly
15 cynical, and that's clearly suggested by their belated
16 timing.

17 What's more, Perú's last-minute effort to
18 suggest that its own failure to meet its regulatory
19 deadlines would have meant that Pandion would
20 foreclose on its agreement with Lupaka suffers from a
21 lack of commercial sense that is often typified of
22 Respondents in these proceedings.

1 If Perú considers that a lender would rather
2 refuse forbearance on a lucrative gold streaming loan
3 agreement because of permit delays that would last a
4 few weeks, months, maybe even a year in favor of
5 proceeding on foreclosing on a debt for pennies on the
6 dollar, then you also have to take its quantum
7 submissions on the but-for scenario with a grain of
8 salt, because they're just simply out of touch with
9 commercial reality.

10 Also, Ms. Dufour's conclusions just ignore
11 the facts. The Claimants establish that when Parán
12 set up the blockade, IMC was operationally ready to
13 commence mining.

14 Now, as Mr. Ellis explained in his witness
15 statements, by early October 2018, IMC had all of its
16 mining infrastructure in place and had excavated at
17 the 3400 meter and the 3430 meter levels and had
18 planned--and had even identified the stopes that it
19 intended to blast first under its mining sequence.

20 Of course, these allegations, too, have to
21 be accepted by the Tribunal because the Respondent has
22 remarkably chosen not to cross-examine the Claimant's

1 lead witness, Mr. Ellis, who's at the end of this
2 table.

3 ARBITRATOR GRIFFITH: I've never seen a
4 slide like that, I must say.

5 MR. FODEN: Now, we've spoken before about
6 tactical blunders, but in my 15 years of practice in
7 international arbitration, I've never seen a
8 Respondent choose not to examine the chairman of the
9 Claimant company. As an advocate, I hanker for
10 opportunities to cross-examine chairmen and CEOs. Our
11 friends don't seem to share that similar affinity.

12 But we can all surmise the reason for their
13 reluctance, they know that Mr. Ellis is a vastly
14 experienced and successful mining executive with a
15 credible story of an earnest foreign investor that was
16 bullied by a local municipality without any assistance
17 from Perú, notwithstanding its obligations under the
18 FTA.

19 In short, the Respondent knew that
20 Mr. Ellis's testimony could hurt them, so he's not
21 here, even if he is here.

22 Now, let me guide you through the geological

1 data that supports the project scope which, of course,
2 didn't become a reality because of the blockade.

3 In 2012, prior to actually acquiring the
4 project, Lupaka obtained an NI-43-101 mineral resource
5 estimate from SRK. We call this the 2012 SRK Report.

6 Now, you might be familiar with it, but
7 NI-43-101 is the name of the Canadian regulation that
8 governs the reporting of mineral resource estimates
9 and exploration results.

10 They form--they come in the form of a really
11 lengthy technical report. And because the purpose of
12 the Canadian regulation is to protect investors from
13 potentially misleading reporting, those reports have
14 to be prepared by an independent, qualified
15 consultant, and those consultants are operating in
16 issuing that report under potential civil or criminal
17 penalties for misstatement.

18 And the preparer of this particular report,
19 SRK, is arguably--excuse me--the world's foremost
20 mining consultant, and it's an industry leader by
21 reputation.

22 The 2012 report showed that the primary

1 mineralized zone was located in what's called the
2 Atenea vein and it had a mineral resource of 5,827
3 kilotons with an average grade of 3.89 of gold in the
4 measured and indicated categories.

5 Now, as explained by Mr. Edwards in his
6 witness statement, that report noted that the overall
7 gold recovery was 84.8 percent. This recovery rate is
8 very high, and it aligned with previous independent
9 studies, which, of course, made this project very
10 attractive.

11 Of course, you won't hear this from
12 Mr. Edwards this week, because, again, the Respondent
13 has forfeited the opportunity to examine him.

14 Now, as I believe Mr. Velarde explained, in
15 2014, the Claimant made the strategic decision to
16 reduce the scope of the project from 5,100 tons per
17 day to 355, and it was going to outsource the
18 processing of the project's ore to a third-party
19 processing plant.

20 And on this basis, the Claimant obtained a
21 preliminary economic assessment, a PEA, again from
22 SRK, and this was in April of 2018.

1 Now, PEA is a study that includes, amongst
2 other things, an economic analysis of the potential
3 viability of a project's mineral resources, and it
4 takes place typically before a feasibility study. The
5 PEA helps mining companies understand the risks and
6 the uncertainties associated with a mining project,
7 and it helps move them along towards an investment
8 decision.

9 The 2018 PEA relied on the 2012 SRK Report,
10 but it also relied on contemporaneous bulk sampling
11 results from the Atenea vein. The results of that PEA
12 were highly promising. It confirmed the mineral
13 resource estimates that SRK had established in 2012,
14 and it concluded that the project was not only, of
15 "considerable merit," but also that gold could be
16 economically extracted.

17 In 2018, the Claimant went and hired a
18 company called Red Cloud. Red Cloud is a
19 Toronto-based consultancy and investment bank, and it
20 focuses primarily on junior mining companies. It
21 updated the 2018 PEA to reflect an increase in
22 production capacity to 590 tons per day, based on the

1 prospective purchase of the Mallay plant.

2 Now, as explained by Mr. Castañeda in his
3 first witness statement, the Mallay plant was a nearby
4 and relatively modern plant, and it had a capacity of
5 600 tons per day.

6 The Red Cloud model, therefore, envisaged a
7 higher production rate compared to the 2018 PEA, lower
8 unit processing costs, an in-house processing plant,
9 and significantly lower transport costs.

10 Now, since the Red Cloud model wasn't
11 supported by a detailed mine plan, in these
12 proceedings, the Claimant has gone and engaged that
13 consultancy Micon to perform a detailed review of all
14 of these underlying documents, and assess
15 independently the various inputs into accuracies DCF
16 analysis.

17 In many ways, Micon's report serves as a
18 feasibility study, because the Claimant did not do a
19 feasibility study. Instead, it relied on the PEA and
20 the Red Cloud model.

21 Now, I say this because Micon developed an
22 updated mine layout, a development schedule and a

1 production plan that identified the specific sections
2 of the resource that were to be mined in each year
3 under this 590-ton-per-day scenario. This is what
4 mine engineers typically do in a feasibility study.

5 Micon's update to the Red Cloud model
6 confirmed the feasibility of a mine plan for 590 tons
7 per day. It extended the production schedule from six
8 to ten years, and it raised confidence in the
9 resulting production plan and cost estimate to a level
10 that was comparable with the 2018 PEA.

11 Now, as explained earlier, the Claimant's
12 primary position is that the acquisition of the Malla
13 plant would have allowed it to reach this operational
14 capacity of 590 tons per day.

15 And as you'll see this week, the evidence on
16 the record corroborates that Lupaka would have
17 acquired the Malla plant in March 2019 but for the
18 blockade.

19 Now, you're going to hear Perú label the
20 Claimant's acquisition of Malla as hypothetical, but
21 the evidence shows differently.

22 The Claimant effectively needed two things

1 to finalize its acquisition of the Mallay plant.

2 First, it had to finalize the draft agreement with the
3 then-owner, Buenaventura, and second, it had to get
4 funding for the purchase; and both of these tasks were
5 within hand.

6 By the time of the blockade, Buenaventura
7 and Lupaka, through IMC, had agreed on the terms of a
8 ready-for-execution-draft Mallay purchase agreement,
9 which reflected a purchase price of \$10.4 million US,
10 plus VAT.

11 What's more, that purchase agreement
12 actually granted the Claimant the right to process up
13 to 8,000 tons per month at a rate of 600 tons per day
14 from the signing of the agreement through the close of
15 its transaction. So they could have used Mallay
16 before they were--even had finished the deal to buy
17 it.

18 Now, concurrently, Pandion, the lender, and
19 Lupaka had agreed the final terms of the Amendment and
20 Waiver Number 3 to the Second Amended and Restated PPF
21 Agreement. We just called this the draft amendment to
22 the PPF Agreement, and that agreement was going to

1 fund the Mallay acquisition.

2 At the closing of the purchase agreement,
3 Pandion was going to unlock a further tranche of the
4 loan for approximately \$13 million, and it would have
5 granted Lupaka a nine-month extension, during which no
6 gold repayments were required.

7 Now, this ready-for-execution amendment is
8 not just for the Mallay purchase--it's significant not
9 just for the Mallay purchase, but it's also
10 demonstrative of Pandion's willingness to be flexible
11 about repayment terms where its economic interests
12 were going to be served. And I'm going to return to
13 that point shortly.

14 Now, as explained by Mr. Ellis in his second
15 witness statement, Pandion, Buenaventura, and Lupaka
16 had all agreed that they would sign the two agreements
17 on the 15th of October 2018. That date should
18 resonate with you, because it's the day after the
19 blockade went into place. Indeed, Lupaka had board
20 approval to do just that, they were going to issue a
21 press release the very next day.

22 The only outstanding steps to close the

1 Mallay purchase agreement was for Buenaventura to
2 obtain the formal approval of the Mallay community to
3 transfer the surface rights to Lupaka.

4 Now, despite some delay due to the renewal
5 of Mallay's governing committee in the community, the
6 Mallay's community consent was finally approved and
7 granted in March of 2019.

8 So, as you can see, the deal for Mallay
9 would have gone through but for the blockade. Indeed,
10 Buenaventura issued--expressed its disappointment with
11 the blockade and Lupaka's resulting inability to
12 follow through with the deal.

13 Now, since Lupaka had obtained the Mallay
14 community's consent in March 2019, this meant that the
15 first gold repayment would have been due in January
16 2020.

17 Now, you're going to hear Perú say that
18 Schedule P-2 to the draft amendment to the PPF
19 Agreement provided for Lupaka's gold repayments to
20 start in September 2019.

21 Our friends opposite, their view is that
22 even if the Mallay transaction would have crystallized

1 following the community's consent, the Claimant would
2 have equally defaulted on its repayment obligations.

3 Now, this is just wrong. Perú's theory
4 doesn't make any commercial sense. Pandion would have
5 benefited far more from implementing the PPF Agreement
6 than from enforcing its rights and selling the debt.

7 No matter what Perú says, Pandion was
8 supportive of the project and, as a financial
9 institution, had no interest in taking over the IMC
10 and operating the mine itself.

11 Now, as you can see on the screen and as I
12 mentioned moments ago, Pandion had shown a similar
13 degree of flexibility in the past with respect to
14 other obligations under various iterations of the PPF
15 Agreement, and there's no reason to believe that this
16 forbearance wouldn't have been present in the face of
17 mere short-term delays to obtaining certain approvals
18 or permits, as Ms. Dufour suggests.

19 As you saw earlier, Pandion only sold its
20 interest in PLI Huaura in July of 2019. That's nine
21 months after the blockade. That's the point at which
22 it saw that there was no hope for the occupied and

1 inaccessible Invicta project.

2 Let's now turn to the terms of the draft
3 amendment to the PPF, which again would have been in
4 place but for the blockade.

5 Now, as you can see on the screen, Lupaka's
6 gold repayment obligations under the draft amendment
7 would have increased from a total of 64,630 ounces to
8 be repaid by November 2023.

9 Now, as forecasted by Micon, Lupaka had to
10 mill a minimum monthly tonnage of 7,200 tons per month
11 during the first four months, and 11,343 tons per
12 month at its peak to meet the obligations under the
13 PPF.

14 Now, with the Mallay plant, Lupaka would
15 have met those obligations with plenty of room to
16 spare each month.

17 Both of the targets were readily achievable.

18 And even if ore processing at the Mallay
19 plant was delayed, Lupaka would have been able to meet
20 its payment obligations by engaging a third-party
21 processing plant, or even simply paying Buenaventura
22 to process ore at Mallay before the purchase was

1 completed.

2 The Claimant had also entered into a
3 one-year contract with Huancapeti II, which is a
4 nearby processing plant, to which it started to
5 already send large shipments of ore right before the
6 blockade in October of 2018. And as I just mentioned,
7 it was making arrangements to already process ore at
8 Mallay before it took ownership.

9 You're going to hear Perú say that the
10 Claimant's problems with potential ore processing
11 options were insurmountable. Well, to steal a phrase
12 from the Profumo Affair, they would say that, but it
13 just doesn't make it true.

14 As explained by Mr. Castañeda in his witness
15 statement, it's normal to identify obstacles and risks
16 at the outset of processing operations. And in any
17 case, Lupaka could have solved any technical issues by
18 refining internal procedures without incurring high
19 costs or further delays.

20 What is more, in order to secure adequate
21 toll processing capacity and give a margin for
22 potential contingencies, Micon has conservatively

1 provided for a three-month ramp-up period in which the
2 production schedule increased gradually, in line with
3 the Claimant's gold repayment obligations under the
4 PPF Agreement.

5 Lastly, even if the Claimant wouldn't be
6 able to meet the initial production schedules, and
7 that Pandion, for some economically irrational reason,
8 insisted on immediate repayment, the Claimant could
9 still make those payments in cash rather than physical
10 gold, if necessary.

11 Indeed, the Claimant had a very strong track
12 record of raising financing. And Mr. Ellis set out
13 that track record at a table in his witness statement.

14 Now, Perú's experts, AlixPartners, they
15 tried to undermine the Claimant's ability to raise
16 capital by relying on an example from March 2019,
17 where the Claimant only obtained 66 percent of the
18 capital raise it was seeking to perform.

19 Now, the Tribunal will note that this
20 attempt to raise financing happened five months after
21 the blockade, when the Claimant had no access to its
22 own project.

1 Good luck to anyone trying to raise capital
2 in those circumstances.

3 The Claimant's ability to raise financing
4 before the blockade, though, shows a different
5 picture.

6 Between March of 2014, when the Claimant
7 shifted its focus to this project, and until May of
8 2018, when the last round of financing took place
9 before the blockade, the Claimant hit 102.67 percent
10 of its fundraising goals through both debt and equity.

11 MR. GRANÉ: Mr. Foden, sorry to interrupt, I
12 am informed that the remote transcript is not working.

13 SECRETARY: Yeah, I have to circulate a new
14 link, but I didn't want to interrupt.

15 PRESIDENT CROOK: Sorry, I'm not clear where
16 we are.

17 So do we have remote transcript or not?

18 SECRETARY: We do, sir. The link shifted
19 between the one that I had circulated and the one that
20 is being used at the moment, so I will circulate it in
21 a moment.

22 But the transcript is working in the room,

1 so...

2 PRESIDENT CROOK: Okay. All right.

3 MR. GRANÉ: Ms. Torres, do you have an
4 estimate of how long it will take to determine whether
5 we just continue and then we fill the gap or we pause?

6 SECRETARY: The transcript is working right
7 now for the room, and it will take me a minute to go
8 and circulate the link to you.

9 MR. GRANÉ: We don't want to interrupt
10 Claimant's presentation, so I think that we can
11 continue.

12 MR. FODEN: Thank you, Patricio.

13 So the Claimant's ability to meet its
14 fundraising goals make sense. Investors in TSX
15 companies are practically salivating to invest in
16 projects that are on the verge of production, as was
17 the case with Invicta.

18 Now, Perú takes--makes like two further
19 attempts to dismiss the reliability of the geological
20 data and the production forecasts, and these are
21 equally baseless.

22 You're going to hear AlixPartners question

1 the reliability of the average gold grade assumed in
2 the 2018 PEA, given the low gold grade observed in
3 some of the predevelopment material that the Claimant
4 obtained in October of 2018, but this criticism is
5 very misplaced.

6 In the first instance, it lacks credibility.
7 AlixPartners are just unqualified to opine on matters
8 of gold grade. Had Perú gone to the trouble, as the
9 Claimant did, of appointing a mining expert to provide
10 such input, perhaps that criticism would bear some
11 weight. But Perú chose not to do so, and this
12 Tribunal has to be pretty leery of a testifying
13 valuation expert getting out ahead of their skis on
14 issues of metallurgy.

15 Alix Partners' lack of expertise in this
16 area is particularly laid bare by the rather simple
17 explanation, untested explanation, that Mr. Ellis
18 provides in his witness statement, where he states
19 that there's nothing surprising about the fact that
20 the anticipated gold grade under the 2018 PEA was
21 higher than the one found during the preproduction
22 phase.

1 That's because the 2018 PEA was derived from
2 ore samples that were representative of the entire
3 deposit to be mined; whereas those samples in October
4 2018 relate to pre-development material that wasn't
5 necessarily extracted from the stopes that SRK had set
6 out to be mined.

7 Put simply, Perú points to grades based on
8 ore that was pulled out of the mine when they were
9 digging tunnels rather than ore from the actual ore
10 body. Now, a resource geologist would be fired for
11 making such a schoolboy error.

12 Now, you're also going to hear Perú say that
13 Micon's extended production period was never
14 considered before and, in any case, it was beyond the
15 approved mining plan. But Perú, again, misses the
16 point here.

17 As explained earlier, Micon's extended
18 production schedule is actually based on the measured
19 and indicated resources defined in SRK's geological
20 block model and contemporaneous reports.

21 By contrast, the SRK and Red Cloud studies
22 had no bearing on the optimal mine plan that the known

1 resource could actually support.

2 Now, compared with the 2018 PEA, the higher
3 production rate in Micon's report results a lower cost
4 per unit, allowing for the application of a lower
5 cut-off grade, which then consequently leads to
6 greater volumes of economically profitable material.
7 The net result is a 10-year lifespan of the mine.

8 Now, put simply, absent the blockade, the
9 Claimant could have continued to explore and expand
10 the mineral resource base, which would have likely
11 resulted in even longer mine life.

12 This, of course, is relevant to determining
13 the fair market value of the project.

14 Now, Perú doesn't contest the project's
15 mining potential or the technical possibility to
16 extend the life of the mine as per Micon's report, and
17 it can't contest those findings because it didn't
18 appoint an expert to do so.

19 It's with that, I'm going to hand it over to
20 Dr. Veit to discuss the Claimant's case on quantum,
21 but I did notice that it seemed like there might be a
22 suggestion that we need a five-minute break.

1 PRESIDENT CROOK: Yeah, I think that would
2 be appropriate. And then when we come back, if we
3 could have just a very brief indication from the
4 Claimant of what they say we should do about the
5 Dufour report. We were told in an earlier
6 presentation that we should disregard it.

7 Is that the position, or is it--I detected a
8 slightly more nuanced position recently. So if you
9 can just clarify that for us when we come back.

10 MR. FODEN: We'll happily address that, sir.

11 PRESIDENT CROOK: All right. It's 12:28.
12 Let's be back at--12:29, let's be back at 12:34. And
13 I'd invite you not to leave the room for this short
14 break, unless you need to.

15 (Whereupon, there was a recess in the
16 proceedings, 12:29 p.m. - 12:34 p.m.)

17 PRESIDENT CROOK: Are we ready to resume,
18 Respondent?

19 MR. FODEN: Yes, Mr. President. We would
20 ask this Tribunal to disregard Ms. Dufour's report.
21 And should it issue a ruling to that effect, we will
22 opt not to cross-examine Ms. Dufour.

1 MR. GRANÉ: Mr. President, may I?

2 We would, of course--it comes as no
3 surprise--object to that request, and if what Claimant
4 is asking the Tribunal to do is make a ruling in the
5 context of this arbitration, we would like to be heard
6 about that--I'm sorry, in the context of this hearing,
7 we would like an opportunity to be heard about that.

8 We would object to that request, and also,
9 we would make submissions in regard to the
10 introduction of the Micon report with a Reply.

11 Thank you.

12 PRESIDENT CROOK: Understood. We
13 don't--wouldn't propose to make any ruling right now.
14 I'm simply trying to clarify what the situation is.
15 It's been clarified, and the Tribunal will consult and
16 determine how to go forward.

17 All right, back to Claimant's presentation.

18 Just to check with the secretary, how much
19 do they have remaining of their three hours?

20 SECRETARY: About 37 minutes.

21 PRESIDENT CROOK: Okay. Thank you.

22 SECRETARY: 36-and-a-half.

1 DR. VEIT: Thank you.

2 We'll now turn to quantum, but before
3 getting into the actual quantum of losses, let me deal
4 with the question whether or not Perú's acts and
5 omissions caused the Claimant's loss and whether
6 Claimant contributed to its losses.

7 You will hear Perú say this afternoon that
8 it has not caused the Claimant's loss for various
9 reasons, but a quick look at the legal standards for
10 causation resolves this issue in favor of the
11 Claimant.

12 As you know, under Article 31, ILC, the
13 responsible State is under an obligation to make full
14 reparation for the injury caused by their wrongful
15 act.

16 The commentary to this Article 31 explains
17 that there needs to be a finding of factual and legal
18 causation.

19 To establish factual causation, the Tribunal
20 should use a but-for test. The question the Tribunal
21 needs to answer is whether Lupaka would have lost its
22 investment but-for Perú's wrongful conduct.

1 To establish legal causation, the loss must
2 not be too remote. It must be proximate to the
3 State's conduct. Simply put, the Tribunal needs to
4 decide whether the Claimant's loss was a normal and
5 foreseeable consequence of Perú's wrongful conduct.

6 Lupaka established that loss--that the loss
7 was proximate, caused by Perú's breaches. Now, this
8 creates the rebuttable presumption that causation is
9 established. This then shifts the burden of proof to
10 the Respondent to prove that intervening event which
11 could break the cause of--the chain of causation;
12 however, Perú failed to do so.

13 The chain of causation in this case is very
14 simple: Lupaka lost access to its mine due to Parán's
15 blockade and Perú's failure to reinstate Lupaka's
16 possession of its mine. This was the factual cause of
17 the Claimant's loss: But-for the blockade and Perú's
18 failure to act, Lupaka would have been able to access
19 the mine and to extract ore. However, it was--as it
20 was not able to do so, the Claimant defaulted on the
21 repayments under the PPF Agreement, and PLI Huaura
22 foreclosed on the IMC shares.

1 Now, Lupaka's loss of its investment was a
2 normal, foreseeable and proximate consequence of
3 Perú's wrongful conduct.

4 Perú failed to establish that any of its
5 alleged intervening events broke the chain of
6 causation. We'll get into those in a moment because
7 you will hear Perú argue that those were all
8 attributable to Lupaka and, hence, Lupaka contributed
9 to its loss.

10 But first, let us briefly go over the legal
11 standards for finding contributory fault.

12 To establish the investor's contributory
13 fault, the investor's conduct needs to be willful and
14 negligent, and there needs to be a material and
15 significant contribution to the loss.

16 The parties agree on the first limb of this
17 test.

18 Perú, however, denies that the contribution
19 needs to be material even though it acknowledges that
20 this requirement is stipulated in the ILC articles as
21 well as in case law.

22 Now, to the facts of the case.

1 Perú asserts that five causal circumstances
2 have either broken the chain of causation or they
3 amount to contributory fault by the Claimant. Neither
4 of the assertions are correct, and we'll now look at
5 them in turn.

6 First, Perú argues that the Claimant is to
7 blame for the loss of its investment because it did
8 not obtain a social license. According to Perú, it is
9 Lupaka's fault that the Parán Community acted
10 illegally, and that Perú did not reinstate law and
11 order.

12 First, Perú says that it was the Claimant's
13 breaches of its own obligations under the Social
14 Management Plan that incited Parán's illegal behavior.
15 This is wrong.

16 However, even if the Claimant had breached
17 the previously approved Social Management Plan, it
18 could have been sanctioned by OEFA, according to the
19 laws, and not left by itself in the face of Parán's
20 criminal behavior.

21 Second, as you have already heard, the
22 Claimant was under no obligation to obtain Parán's

1 agreement to continue with the exploitation of the
2 mine because the project was not on Parán's land.
3 Peruvian law only required the Claimant to reach an
4 agreement with the communities of Lacsanga and Santo
5 Domingo, which it did.

6 Third, even though the Claimant was not
7 obliged to reach an agreement with the Parán
8 Community, it did conduct negotiations in good faith.
9 Alas, the negotiations were futile because Parán
10 continuously demanded more from the Claimant seemingly
11 being uninterested in a reasonable outcome from the
12 parties. The unsuccessful negotiations with Parán
13 were not the Claimant's fault and cannot amount to
14 contributory fault or an intervening event breaking
15 the chain of causation.

16 Perú's second argument is that the
17 Claimant's pledge of its investment as loan collateral
18 amounted to an intervening event which broke the chain
19 of causation. Again, this is not true.

20 First, the Claimant's investment lost the
21 entirety of its value as a result of Parán's blockade
22 and Perú's failure to restore the Claimant's access to

1 the mine.

2 Even if Lupaka had not pledged its
3 investment as a collateral two years before the
4 blockade, the fact that the Claimant was unable to
5 access it, its project, extract ore and process it,
6 rendered the investment worthless.

7 Once Pandion realized that there was no hope
8 for the Claimant to regain possession and make gold
9 repayments, it sold PLI Huaura to Lonely Mountain.
10 And Lonely Mountain then foreclosed on Lupaka's IMC
11 shares.

12 Perú compares the present case with
13 Inversión y Gestión de Bienes versus Spain. However,
14 in Inversión, the Claimants willfully stopped making
15 mortgage payments knowing what the consequence will
16 be. In Lupaka's case, the pledge of its investment as
17 a loan collateral is standard practice in the mining
18 industry and, more importantly, Lupaka did not
19 willfully default on repayments, it simply could not
20 make repayments as Perú destroyed the investment.

21 As we just discussed, PLI Huaura's
22 foreclosure was a foreseeable consequence of Perú's

1 wrongful acts. It occurred after and, more
2 importantly, because the Claimant lost the entire
3 value of its investment.

4 Even the Respondent acknowledges that the
5 default events listed in PLI Huaura's Notice of
6 Acceleration primarily related to the blockade. Perú,
7 nonetheless, continues to argue that even in the
8 but-for scenario, Lupaka would have defaulted under
9 the PPF Agreement.

10 Fantastically, it makes this argument for
11 two of the events which occurred directly due to the
12 blockade.

13 As Mr. Ellis explains, PLI Huaura would not
14 have foreclosed because of the remaining events of
15 default, which contained mainly reporting obligations
16 with which Lupaka materially complied at all relevant
17 times, and then previously waived requirements to have
18 a mineral offtake agreement in place.

19 Mr. Ellis is here with us today, but Perú
20 doesn't cross-examine him on these and other material
21 facts.

22 Now, the next argument that you will hear

1 from Perú is that outstanding regulatory approvals in
2 October 2018 were the Claimant's fault, and that this
3 contributed to or even caused the Claimant's loss.

4 Perú bases these arguments on the expert
5 report of Ms. Dufour, but even if Ms. Dufour's opinion
6 were correct, the outstanding approvals would not
7 destroy the entirety of the investment. At worst,
8 they would have slightly delayed production.

9 However, as Mr. Foden explained, the
10 optimistic scenario set out by Ms. Dufour would allow
11 the Claimant to start making repayments in January
12 2020, which is the date when the first repayments were
13 due under the Third Amendment and Waiver of the PPF
14 Agreement.

15 The Third Amendment allowed for a
16 nine-months grace period for repayments after the
17 Mallay Purchase Agreement was signed. Had the deal
18 closed in March 2019, Lupaka would only have been
19 obliged to start with the repayment obligations in
20 January 2020.

21 Perú's last argument on causation is that
22 Lupaka did not have satisfactory ore processing

1 capacity to make its repayments under the PPF
2 Agreement. Again, this allegation is not true.

3 Even taking at its highest, Perú's argument
4 would only affect quantum, rather than causation. The
5 alleged lack of processing capacity is not an
6 intervening event even capable of destroying the
7 entire investment.

8 As Mr. Foden has explained, the Claimant had
9 a number of very good options for processing ore, the
10 Mallay plant or the third-party ore processors with
11 whom the Claimant already contracted.

12 Instead, but for the blockade, Lupaka would
13 have proceeded to extract the ore, processed it at its
14 Mallay plant under Buenaventura's ownership or the
15 third-party processors and continued processing the
16 estimated tonnages itself once it had fully acquired
17 Mallay.

18 But even if using the Mallay plant and the
19 third-party processors were not possible during the
20 relevant period before Lupaka acquired the Mallay
21 plant, Lupaka would have easily been able to repay any
22 shortfall in cash.

1 Lupaka could have made the initial
2 repayments by processing only 30 to a day of ore, or
3 less than three days of full production, or by raising
4 funds, which it had previously done successfully, as
5 Mr. Foden has shown.

6 As Mr. Ellis has explained, Pandion would
7 have been willing to reschedule the repayments until
8 the Claimant was able to meet them because it
9 supported the project. Perú's assertion that the
10 actual turn of events proves otherwise is without
11 base. Pandion only sold its interest in PLI Huaura
12 when it no longer saw any hope for the occupied and
13 inaccessible project.

14 To conclude on causation and contributory
15 fault, none of the five alleged intervening causes
16 broke the chain of causation or constitute
17 contributory fault; therefore, the Claimant needs to
18 be compensated for its losses in full.

19 Next, you will hear Perú argue that the
20 Claimant is claiming compensation for its business
21 plan, which is not a covered investment according to
22 the FTA. This is a position that Perú developed in

1 its Rejoinder after alleging that Lupaka is claiming
2 compensation for the Mallay plant as a prospective
3 investment.

4 Now, with all due respect, this is
5 nonsensical. Lupaka is not asking to be compensated
6 for the expropriation of the Mallay plant or for the
7 business plan itself. The Mallay plant acquisition
8 simply supports the Claimant's business plan in which
9 the Claimant was able to process ore at 590 tons a
10 day, which is the basis for the but-for scenario put
11 forward by the Claimant.

12 To assess the damages, the Tribunal will
13 have to decide which business plan to consider as the
14 basis for the Claimant's counterfactual scenario. For
15 that, the Tribunal should use the but-for test
16 supported by contemporaneous evidence before the
17 breaches of the FTA, consistent with the Lemire and
18 Tethyan jurisprudence.

19 As you will see over the course of the next
20 few days, but for Perú's failure to remove Parán's
21 blockade and reinstate the Claimant's possession,
22 Lupaka would have acquired the Mallay plant and

1 processed ore at 590 tons a day.

2 Now, let's turn to the actual valuation of
3 Lupaka's investment.

4 Accuracy assessed the Claimant's damages at
5 41 million for the 590 tons a day scenario as at the
6 valuation date plus interest. Alternatively, the
7 damages for the 355 tons a day scenario amount to \$32
8 million US plus interest.

9 The parties agreed that the DCF approach is
10 the appropriate valuation method for preproduction
11 mines such as the one at hand; however, they disagree
12 on a number of input variables and assumptions.

13 AlixPartners identifies what it calls four
14 fundamental flaws in Accuracy's analysis. The four
15 flaws advocated by AlixPartners, however, are mostly
16 another iteration of Perú's ill-formed causation
17 arguments. Most importantly, the four fundamental
18 flaws are instructions on which Ms. Kunsman relies,
19 not facts or opinions within her own expertise.

20 The first two relate to the dispute with
21 Parán, namely whether the police intervention would
22 have resolved the problem, and whether the Claimant

1 needed to obtain a social license.

2 We have been through that and Mr. Gallego
3 has explained how Perú would have gotten rid of the
4 bandits and criminals from Parán, and should have
5 restored law and order.

6 The project was not on Parán land, so there
7 was no need for Lupaka to reach an agreement with the
8 Parán Community even though it did negotiate in good
9 faith, as Mr. Velarde has explained.

10 The third alleged fundamental flaw is that
11 but for Perú's breaches, the Claimant would still have
12 defaulted on the PPF Agreement due to a poor
13 performance of operations. As we discussed earlier,
14 this is not the case.

15 Finally, Perú's alleged fourth fundamental
16 flaw is that Accuracy disregarded financing risk.
17 Now, as Accuracy explained, this financing would not
18 be needed to settle debts owed to PLI Huaura, because
19 in the but-for scenario and absent the blockade, the
20 Claimant would have been able to start production in
21 time, and thus repay the PPF Agreement in installments
22 based on the agreed schedule.

1 Now, in relation to the financing of the
2 Mallay plant, the Claimant's intention was clear. It
3 would have obtained through additional financing from
4 PLI Huaura needed for the acquisition and indeed, it
5 had already finalized the third amendment to the PPF
6 Agreement to that effect in October 2018.

7 Now, Accuracy updated its valuation for both
8 scenarios based on Micon's analysis and AlixPartners'
9 comments on the operational and technical assumptions.

10 First, Accuracy adopted Micon's revised
11 start date for commercial production, which Micon
12 confirmed to be November 2018. This revised start
13 date, regardless of Perú's allegations, is realistic
14 as contemporaneous evidence shows. The Claimant was
15 operationally ready to start production immediately
16 before the blockade and had various options for
17 processing its ore.

18 Accuracy further adjusted its valuation on
19 Micon's review of the relevant data that showed that
20 the Claimant would have operated the mine for ten
21 years. Perú's quantum expert claimed that Micon was
22 wrong, but as Mr. Foden highlighted, Perú did not

1 provide a technical mining expert that would have been
2 able to review the data and opine on the extended
3 production schedule.

4 Accuracy further adjusted the ore rates
5 using Micon's input. Now, Micon explains in their
6 report the reasons for the anomaly in gold grades
7 experienced during the 2018 ramp-up period, and that
8 it is likely that the grade shortfalls would have been
9 overcome in early 2019.

10 In addition, supervising the ore processing
11 would allow for higher recovery. This would not have
12 been a--had a financial impact on the Claimant, as the
13 processing would be done in-house, at the Mallay
14 plant, which the Claimant would own but-for Perú's
15 breaches.

16 Accuracy then increased average operating
17 costs to account for various additional expenses
18 identified by Micon, AlixPartners, and it also adopted
19 its model to Micon's estimate for capital expenditure.

20 Finally, Accuracy decreased the discount
21 rate in line with the lower project-specific premium
22 that it applied in light of Micon's report.

1 Accuracy and Micon both consider the project
2 to be at the feasibility stage. Even though the
3 Claimant never obtained a formal feasibility study, it
4 did not need to do so because it accessed--its access
5 to mineralization largely reduced a key geological
6 risk. Additionally, feasibility studies are necessary
7 for financing, which the Claimant already secured. So
8 the Claimant also materially completed all development
9 works and was ready to start production before the
10 blockade.

11 However, as explained and due to the
12 uncertainties in the Red Cloud model for the
13 590-day--ton-a-day scenario, Accuracy initially
14 adopted a higher project-specific premium in the first
15 report. Accuracy then reduced this premium on the
16 basis of Micon's mine plan. Micon concluded that the
17 certainty of the 590-ton-a-day scenario equals that of
18 the 355-tons-a-day scenario, and that the same
19 discount rate was appropriate. As a result, Accuracy
20 decreased the project-specific premium in line with
21 the appropriate premium for projects at feasibility
22 level.

1 Now, AlixPartners further complain why--or
2 that Accuracy did not account for social license risk,
3 explicitly. Again, there was no need to obtain
4 Parán's agreement to continue and exploit the mine,
5 but if AlixPartners was referring to a general social
6 license risk, which Perú alleges has not been
7 accounted for, then this general risk--general risk
8 for social license is included in the Perú-specific
9 country-risk premium. This country-risk premium
10 accounts for additional risks of conducting business
11 in Perú when compared to other risk-free
12 jurisdictions.

13 PRESIDENT CROOK: Excuse me, counsel, can
14 you recall off the top of your head, what was the risk
15 premium they used? If not, we'll look it up.

16 DR. VEIT: The country risk premium, I'm
17 sorry, I can't recall that.

18 PRESIDENT CROOK: That's all right. We'll
19 look it up. Thanks.

20 DR. VEIT: The project specific risk
21 premium, however, was 3.3 percent.

22 Perú claims that the--that any compensation

1 owed to the Claimant should be reduced by the 13.3
2 million, which was the residual value of the
3 Claimant's investment. Now, this is incorrect.

4 PWC in August 2019 valued IMC at \$13.4
5 million US, but excluding the debt owed to PLI Huaura.
6 This valuation was made by PWC to determine whether
7 the value of IMC's pledged shares exceeded the 15.9
8 million US dollar debt, which the Claimant owed to PLI
9 Huaura, which was not the case.

10 ARBITRATOR GARIBALDI: Counsel, would you
11 please remind us if this loan was with or without
12 recourse, the loan--the loan to--

13 DR. VEIT: The PLI Huaura loan, well, that
14 was the loan-that- was the loan that--

15 ARBITRATOR GARIBALDI: The loan that was
16 given on the pledge of the shares, was it with or
17 without recourse?

18 DR. VEIT: Recourse in what sense?

19 ARBITRATOR GARIBALDI: Well, in the sense
20 that if the value of the shares is not enough to pay
21 the debt, if the loan is without recourse, that ends
22 the transaction, and so the debtor doesn't owe

1 anything else.

2 If it is with recourse, then the debtor is
3 still obligated to pay the difference.

4 DR. VEIT: Yes, there was a dispute on that.
5 And to the extent I understand, that question was
6 settled between Pandion and Lupaka after the-after the
7 pledge was foreclosed and sold-.

8 ARBITRATOR GARIBALDI: And there was no
9 further recourse as a result of that.

10 DR. VEIT: Exactly, there was no further
11 recourse.

12 ARBITRATOR GARIBALDI: Okay, thank you.

13 DR. VEIT: Now, ignoring the net value of
14 the Claimant's investment-or to put it the other way,
15 just to finish that off, -the-comparing the 15.9
16 million of debt with the value at that time of 13.4
17 million, the value of the Claimant's investment was
18 nil, because it was without recourse, or negative-.

19 But ignoring the net value of the Claimant's
20 investment, you will hear Perú argue that PLI Huaura's
21 foreclosure means that the investment held value.
22 This is wrong. Lonely Mountain wanted to operate the

1 mine itself, hiring Mr. Goyuzeta, who believed himself
2 to be the best placed person to operate and extract
3 value from the project. However, as we heard this
4 morning, Parán continues to illegally mine the
5 Claimant's project, and Lonely Mountain was ultimately
6 proven wrong, as it is still not able to access the
7 mine.

8 To test the damages assessment at the
9 valuation date, Accuracy compares its DCF-based
10 valuation to four different indicators of value.

11 First, Accuracy finds that using a market
12 capitalization approach leads to an illustrative
13 valuation in the but-for scenario of \$33.4 million US.
14 Accuracy simply extrapolated Lupaka's market cap from
15 25 October 2018 onwards, using a junior gold miners
16 index plus a control premium.

17 As you can see in the chart before you,
18 Lupaka's share price and the index showed a
19 significant correlation, at least until late 2017.
20 And even if one were to assume that an
21 underperformance of Lupaka's share price compared to
22 the index from March 2018 onwards when Lupaka

1 announced that it no longer held the Josnitoro project
2 to October was permanent, and you see that in
3 the--I've highlighted this period in green on your
4 chart in front of you.

5 Even if one were to assume that this
6 underperformance was permanent, the indicative market
7 cap would still amount to some \$28 million US at the
8 valuation date.

9 Now, this market valuation is in line with
10 Accuracy's estimate of the fair market value of the
11 Invicta project in the 355-tons-a-day scenario, and
12 quite a bit below the 590-tons-a-day scenario.

13 Why is this? It is because the Claimant's
14 share price at the time would not have reflected the
15 additional value of the project, which would have
16 resulted from the Mallay transaction that was not
17 announced to the market at that time.

18 Second, Accuracy looked at Lupaka's sunk
19 costs incurred between the acquisition date and the
20 valuation date, and applying interest as a proxy for
21 the expected minimum return on the basis of the
22 implied interest rate in the PLI loan. Accuracy's

1 sunk cost assessment resulted in a value of \$43
2 million US. After deducting the debt under the PLI
3 loan of 15.9 million, Accuracy finds a benchmark for
4 the project at \$27 million US. This is, again, lower
5 than Accuracy's assessment of the 590-tons-a-day
6 scenario. And while sunk costs may not be an
7 appropriate valuation for preproduction properties,
8 sunk costs can certainly serve as a minimum floor for
9 the valuation.

10 Now, the third cross-check is based on
11 transaction multiples. Accuracy used 26 transactions
12 valued at over a million US dollars for a controlling
13 stake for companies in the gold industry, and which
14 closed within five years before the valuation date.

15 Based on the transaction multiples, Accuracy
16 arrived at post-tax NPV of 33.3 million under the
17 lower scenario, and some \$47 million US under the
18 590-tons-a-day scenario.

19 Excuse me.

20 Which is very close to Accuracy's primary
21 valuation.

22 Finally, Accuracy looks at other

1 contemporaneous evidence of valuation; specifically,
2 the Red Cloud model and the SRK PEA mine plan for the
3 355-tons-a-day scenario, and the Red Cloud for the
4 higher scenario at 590 tons a day, which both produce
5 significantly higher values.

6 Let's just reflect for a moment. What if
7 Lupaka had kept the mine, taking into account actual
8 metal prices over the last three years, and taking
9 into account hindsight. The fair market value of the
10 project as of today would have been over \$85 million
11 US. Again, we are not claiming the 85 million, but it
12 shows how conservative Accuracy's assessment of
13 Lupaka's loss is at \$41 million US, plus interest, and
14 the Tribunal should have no hesitation to award this
15 amount to the Claimant.

16 Now, lastly, let's look at pre-award
17 interest. I know that Tribunals think interest is not
18 the most interesting of topics. So in the interest of
19 time, I'll keep this brief.

20 Under Article 812, Paragraph 3 of the FTA,
21 interest needs to be paid at the commercially
22 reasonable rate. The Claimant in its Memorial put

1 forward LIBOR plus a margin of 2 percent, compounded
2 annually, as commercially reasonable, and the
3 Respondents' experts seem to agree.

4 However, as LIBOR will no longer be used
5 from June '23 onwards, AlixPartners presented two
6 alternatives: A one-year US Treasury Bill, UST, or a
7 180-day moving average based on the secured overnight
8 financing rates, the SOFR rates, both with a 2 percent
9 premium.

10 Now, UST and SOFR are not comparable with
11 LIBOR, nor are they commercially reasonable rates, as
12 required by the FTA. The two interest rates, unlike
13 LIBOR, are risk-free rates. One therefore needs to
14 apply a credit spread of at least 1 percent to account
15 for the additional credit risk that you would
16 compensate in LIBOR.

17 In addition, the current market conditions
18 have significantly changed over the last two years,
19 with inflation rates hitting a 40-year high. For the
20 last 20 years, these rates offered in--the rates
21 offered in the interbank market, in LIBOR, closely
22 follow the low inflation rates. However, as you can

1 see in the chart before you, LIBOR has become
2 decoupled from inflation since 2020. As a result,
3 even LIBOR plus 2 percent would be significantly below
4 the current inflation rate.

5 The same is true for the two interest rates
6 that Perú relies on. Applying LIBOR plus 2 percent,
7 or even more so SOFR plus 2 and UST plus 2, would
8 result in a negative real interest rate which
9 incentivizes Perú to delay any payment of the award,
10 as the value of the amount owed to the Claimant would
11 decrease over time in real terms.

12 Therefore, the Claimant has instructed
13 Accuracy to recalculate pre-award interest
14 rates--pre-award interest based on LIBOR plus 4
15 percent, which is more in line with the current
16 inflation rate. And if LIBOR is discontinued whilst
17 compensation to the Claimant is still outstanding, an
18 interest rate based on UST plus 5 percent should be
19 used. As shown in the slide before you, both these
20 rates closely follow the inflation rate.

21 Additionally, LIBOR plus 4, or an equivalent
22 UST plus 5 percent, is consistent with the past

1 Arbitral practice even in a low-inflation environment.

2 You can see this from the examples on your slide.

3 And that, Members of the Tribunal, concludes
4 our opening statement.

5 PRESIDENT CROOK: Thank you, counsel.

6 Let me ask, do my colleagues have any
7 questions?

8 ARBITRATOR GARIBALDI: No.

9 PRESIDENT CROOK: I'm not seeking an answer
10 now, but I would invite you to reflect. I'm wondering
11 how this hypothetical, well-informed, future borrower
12 of the--the basis on which that well-informed,
13 future--future purchaser, rather, should assume that
14 they would be able to carry forward the business free
15 of any social interruption.

16 Is the premise that Perú would, going
17 forward in the future, do whatever is required
18 whenever is required to assure that result; is that
19 the premise?

20 DR. VEIT: Yes, Mr. President, that's the
21 premise. The premise is that Perú would reinstate law
22 and order and see to it that law and order can be

1 maintained, as any government would do.

2 PRESIDENT CROOK: In that case, if there are
3 no further questions, any administration we need to
4 tend to?

5 SECRETARY: No, sir.

6 PRESIDENT CROOK: All right. We're
7 scheduled for 40 minutes, so we're running just a bit
8 ahead of schedule. So let's resume at--I have to do
9 the math here.

10 SECRETARY: 1:48.

11 PRESIDENT CROOK: I was going to do 1:47,
12 but 1:48. Let's resume at 1:48. Okay. See you then.

13 (Whereupon, there was a recess in the
14 proceedings, 1:08 p.m. - 1:49 p.m.)

15 PRESIDENT CROOK: Okay. Good afternoon,
16 Ladies and Gentlemen.

17 Are we ready? Good? Claimant's ready?
18 Respondent is ready?

19 Okay. We very much appreciate all of the
20 cooperation so far. We will now hear the Respondent's
21 opening.

22 And at some point, I hope there will be some

1 brief mention of the Rejoinder, because the Tribunal
2 was sort of struck, but the Rejoinder did appear to
3 raise some issues that had not--that varied from the
4 positions previously taken, and raised some new issues
5 and at a point where, just as a procedural matter,
6 Claimants did not have a written opportunity to
7 Respondent to that, and I just wonder, is that
8 something that should concern us, or do we regard that
9 as quite appropriate?

10 I see a nodding head, and you'll explain to
11 us why that's so.

12 All right, over to Respondent.

13 MR. GRANÉ: Thank you, Mr. Chairman, for
14 that question, and we can certainly address that more
15 at length.

16 I think the preliminary reaction,
17 Mr. Chairman--the preliminary reaction, Mr. Chairman,
18 that this is perfectly normal. It's the dynamic in
19 any arbitration where each side will respond to the
20 arguments that are being made by the other party in
21 its previous submission.

22 We have heard Claimant argue in the skeleton

1 that Perú has submitted new arguments. We disagree
2 with that. We have been responsive--

3 PRESIDENT CROOK: I don't want to argue the
4 thing with you now.

5 But it used to be the case that there are
6 only two or three regulatory requirements left to be
7 addressed. That was the state of play after the
8 Memorial, Counter-Memorial, Rejoinder, and then we get
9 to the final pleading, and suddenly, we have a whole
10 raft of new regulatory requirements that had not been
11 previously been discussed.

12 And you will tell us why you think that's
13 appropriate.

14 MR. GRANÉ: Okay, thank you.

15 OPENING STATEMENT BY COUNSEL FOR THE RESPONDENT

16 MR. DI ROSA: Good afternoon, Mr. President
17 and Members of the Tribunal. My name is Paolo
18 Di Rosa, and I will be introducing Perú's opening
19 argument by giving a brief overview of the reasons why
20 Claimant's case must be dismissed.

21 Claimant's claims revolve around two main
22 sets of actions. The first is the actions of the

1 Parán Community, a--the poor, rural community that
2 we've been talking about that was in the direct area
3 of influence of Claimant's mine in Perú.

4 The second set of actions relates to the
5 Peruvian Government's response to the social conflict
6 between Claimant and the Parán Community.

7 That social conflict culminated in a series
8 of incidents, including at the mine in June of 2018,
9 and the--at the main access road to the mine in
10 October 2018.

11 Claimant ultimately was unable to reach
12 commercial exploitation, leading it to default on its
13 financial obligations to its lender. As a result of
14 that default, Claimant forfeited its project company,
15 Invicta, to Claimant's lender.

16 At its core, this case centers on the issue
17 of what constitutes an appropriate government response
18 when a social conflict has erupted between a foreign
19 investor and local communities.

20 As events in Perú and other countries have
21 shown, such conflicts are delicate and often volatile.
22 A State's response to such a situation involves a

1 careful balancing of public policy considerations of
2 the sort that are classically within the realm of a
3 State's sovereign prerogatives.

4 Perú submits, very respectfully, that the
5 Tribunal should not second-guess Perú's decision to
6 forego the use of force against the Parán Community
7 members. Equally, the Tribunal should not
8 second-guess Perú's decision, instead, to favor
9 dialogue as a way to achieve a peaceful and definitive
10 resolution of the social conflict.

11 Perú had already resorted to force in prior
12 mining projects, in many instances with disastrous and
13 long-lasting consequences.

14 By contrast, dialogue had been productive at
15 different times, even in the Parán conflict itself,
16 such that a negotiated--successful negotiated outcome
17 was entirely within the realm of the possible.

18 Perú has demonstrated in its pleadings, and
19 we will recall in this presentation, the various
20 fundamental flaws that warrant dismissal of Claimant's
21 claims and arguments. Specifically, Perú has shown
22 that the Tribunal lacks jurisdiction, that the

1 Claimant's claims lack merit, and that, in any event,
2 no damages would be due.

3 My colleagues will discuss each of these
4 grounds for dismissal in more detail, but by way of
5 introduction, I will provide a high-level overview,
6 starting with jurisdiction.

7 The first of Perú's objections is that the
8 Tribunal lacks jurisdiction *ratione personae*. The
9 basis for this objection is that when it transferred
10 its shares in Invicta to its creditor, PLI Huaura, in
11 August 2019, Claimant failed to retain the
12 corresponding claim rights.

13 As a result, Claimant no longer qualifies as
14 a, quote/unquote, investor under Treaty Article 847.

15 The case law establishes certain key
16 principles that are relevant here.

17 First, an investor standing must be assessed
18 as of the time that the relevant Arbitral proceedings
19 were instituted. Second, and subject only to two
20 exceptions that I will discuss, the general rule is
21 that tribunals lack jurisdiction if an investor has
22 already disposed of its investment before the relevant

1 Arbitral proceedings are commenced.

2 The two exceptions are, first, when the
3 investor has expressly retained its right to pursue
4 claims, and second, when there are special
5 circumstances such as when it is precisely the State's
6 actions that cause the investor to dispose of the
7 investment in the first place. However, neither of
8 those exceptions applies here.

9 Perú's second jurisdictional objection is
10 that the Tribunal lacks jurisdiction *ratione*
11 *voluntatis* because it is an undisputed fact that
12 Claimant failed to provide a waiver from Invicta as
13 required under Article 823.1(e) of the Treaty.

14 Turning now to the merits, Claimant's claims
15 fail for several reasons.

16 As Claimant itself has acknowledged, it
17 could not commence commercial production without
18 resolving its social conflict with the Parán
19 Community. A fatal problem for Claimant's merits case
20 is that the social conflict was caused by Claimant's
21 own actions, not by any actions or omissions by Perú.
22 Not only did Claimant create the problem itself, but

1 it was also within the Claimant's power and ability to
2 resolve that social conflict.

3 Instead, Claimant opted to resort to the use
4 of force, and insisted that the State clean up the
5 mess that Claimant itself had created.

6 Ultimately, Claimant's failure to reach
7 commercial exploitation by the contractual deadline
8 established under its financing agreement led it to
9 forfeit its investment.

10 Now, Claimant has openly acknowledged,
11 including in its pleadings in this arbitration, the
12 significant and sustained efforts that were undertaken
13 by various Peruvian State organs to find a resolution
14 to the social conflict. Multiple agencies and
15 government officials of Perú bent over backwards over
16 a prolonged period of time to broker an agreement
17 between Claimant and the Parán Community.

18 The evidence shows that Perú acted
19 diligently and reasonably at all times. Cognizant of
20 the fact that Perú did not create the conflict and
21 that, to the contrary, Perú had strenuously attempted
22 to resolve it, Claimant attempts to impute the actions of

1 the Parán Community to the State.

2 But the Parán's community's actions are not
3 attributable to Perú under either domestic or
4 international law, and therefore, cannot form the
5 basis for responsibility under the treaty.

6 Finally, much of Claimant's merits case is
7 founded on baseless, made-for-arbitration conspiracy
8 theories, including new ones that they advanced for
9 the first time in their Reply.

10 We will briefly address each of these issues
11 in turn.

12 It is not in dispute between the parties
13 that unless and until the social conflict with the
14 Parán Community was resolved, Claimant would not have
15 been able to commence commercial exploitation of the
16 Invicta mine.

17 The conflict in turn caused the Claimant to
18 default on its financing agreement, as I mentioned,
19 and given that, and since the Parán Community's
20 actions are not attributable to Perú, there is no
21 basis to impose responsibility under the Treaty on
22 Perú.

1 Claimant failed to design and implement an
2 adequate community relations strategy. They simply
3 failed to obtain what is known in the mining industry
4 as a social license to operate. Under relevant
5 international law principles, worldwide industry
6 standards, and Peruvian law, mining companies are
7 required to develop relationships of trust with the
8 local communities.

9 They are required to obtain adequate support
10 from those communities both before and during the
11 lifetime of the mining project. Importantly, and
12 contrary to Claimant's apparent position, this entails
13 more than just meeting minimum legal requirements.
14 Without with a social license, a mining project simply
15 cannot succeed.

16 In this case, Claimant failed to obtain
17 sufficient community acceptance of the Invicta mine.
18 They mismanaged the relations with all three of the
19 rural communities that were in the area of direct
20 influence of the project. And its failures were
21 especially acute with respect to the Parán Community,
22 especially after, at some point, Claimant erroneously

1 concluded that it no longer needed the acceptance of
2 the Parán Community, and therefore, progressively
3 began to marginalize that community.

4 Now, given the Invicta mine's location, the
5 buy-in of the local communities was critical. It was
6 critical because of the potential environmental,
7 social and economic impact of the project,
8 particularly on the Parán Community, given its
9 proximity, as well as the ongoing territorial disputes
10 between the various communities.

11 A key threshold problem in Claimant's
12 handling of its investment in Perú, as well as in its
13 pleadings and in its presentation this morning, is
14 that the Claimant has consistently dismissed this
15 concept of the social license.

16 ARBITRATOR GARIBALDI: Counsel, I'd like to
17 ask a couple of questions about that, but this is an
18 overview, right, there will be more detail?

19 MR. DI ROSA: Yes. We'll come back to this.
20 Yes.

21 ARBITRATOR GARIBALDI: All right. Thanks.

22 MR. DI ROSA: The social license was an

1 affirmative requirement, and the reality is that
2 Claimant's community relations strategy was
3 insufficient for the purpose. It's engagement was
4 particularly inadequate with the Parán Community, and
5 it progressively began to marginalize that community
6 in favor of the other two communities.

7 Claimant had inherited certain agreements
8 with the Parán Community when it took over the
9 project, but it then discarded them as unnecessary,
10 refusing to abide by prior commitments that it had
11 made to the community, or to honor community
12 expectations.

13 In the end, as you know, they chose to
14 resort to the use of force by deploying the War Dogs
15 to expel the community members forcibly from the mine
16 site. That was what caused this confrontation that
17 yielded the fatality that the Claimants referred to
18 earlier today. That aggressive step and the ensuing
19 violent confrontation with the Parán members destroyed
20 any prospect of an amicable resolution to the social
21 conflict.

22 As a result of that unresolved conflict,

1 Claimant was unable to commence commercial
2 exploitation of the mine. As a result of the
3 violation that that entailed of the PPF Agreement,
4 Claimant forfeited its shares in Invicta and lost its
5 investment in Perú.

6 Now, as you can see on the screen, Claimant
7 itself has acknowledged in its Reply at Paragraph 351
8 that, "Lupaka lost its investment on 26 August 2019,
9 when Lonely Mountain," which was PLI Huaura's owner,
10 "seized IMC's shares following Lupaka's failure to
11 service its obligations under the PPF Agreement."

12 One of the fatal flaws in Claimant's legal
13 position is its hypothesis that the actions of the
14 Parán Community are attributable to Perú for purposes
15 of State responsibility under international law. That
16 hypothesis is entirely wrong under the principles of
17 attribution under the ILC articles, as we will discuss
18 in more detail later in this presentation.

19 Now, tellingly, the contemporary
20 documentation shows that at the time of the Parán
21 Community conflicts, even Claimant itself did not
22 consider the community to be a State organ or to be

1 empowered with State functions or to be acting in the
2 exercise of government functions or State authority.

3 To the contrary, Claimants consistently
4 viewed and characterized the Parán Community
5 protesters as private actors who were acting
6 illegally. That inconsistency between the evidence
7 and Claimant's position reveals the
8 made-for-arbitration nature of Claimant's attribution
9 arguments.

10 Now, turning now to Perú's response to the
11 social conflict. None of Perú's actions violated any
12 obligation under the Treaty.

13 First, Article 805 of the treaty provides
14 that the fair and equitable treatment and full
15 protection and security obligations are limited to the
16 minimum standard of treatment under customary
17 international law. And it is well-established that a
18 Claimant alleging a breach of the minimum standard
19 must meet quite a high threshold.

20 With respect to full protection and
21 security, which lies at the core of Claimant's claim,
22 Professors Dolzer and Schreuer have noted that the

1 relevant standard requires that a State "exercised due
2 diligence and...take such measures to protect the
3 foreign investment as are reasonable under the
4 circumstances."

5 Claimant has not challenged that this is the
6 applicable standard, although there are certain
7 differences in the parties' interpretation of that
8 standard.

9 With respect to fair and equitable
10 treatment, we have placed on the screen the well-known
11 articulation of the minimum standard threshold that
12 was offered by the Tribunal in Waste Management II.
13 According to that formulation, State conduct will only
14 breach the minimum standard if it is "arbitrary,
15 grossly unfair, unjust or idiosyncratic" or
16 "discriminatory," or if it involves "a lack of due
17 process leading to an outcome which offends judicial
18 propriety." Claimant has accepted this as the
19 relevant standard, and that's at Claimant's Prehearing
20 Skeleton Paragraph 90.

21 The core allegation in Claimant's merits
22 case is that the Peruvian Government should have used

1 force to resolve Claimant's social conflict with the
2 Parán Community. But Perú's decision not to use force
3 and instead to try to mediate a peaceful and durable
4 resolution to the dispute was entirely reasonable
5 under the circumstances. It did not breach the
6 minimum standard of treatment.

7 The Tribunal's analysis of Perú's actions
8 must take into account the relevant circumstances,
9 which in this case included:

10 The history of social conflict in the
11 Peruvian mining sector.

12 The catastrophic consequences of the use of
13 force by the State in Perú and elsewhere in prior
14 mining projects.

15 And the success that had already been
16 achieved in negotiations between these particular
17 conflicting parties. For example, the negotiations
18 yielded the 26 February 2019 Agreement, which is
19 Exhibit C-0200.

20 All of these circumstances weighed heavily
21 against the use of force to address this particular
22 social conflict.

1 The Claimant argues, however, that Peruvian
2 law obligated the authorities to use force against the
3 Parán Community. They repeated that again this
4 morning.

5 But Peruvian law imposes no such
6 requirement, as we have shown, including on the basis
7 of an independent expert report.

8 But perhaps more importantly, there were
9 good reasons not to use force in this case.

10 First of all, a forceful eviction of the
11 protesters who were involved in the Access Road
12 Protest would have succeeded only in ending that
13 particular protest. It would not have resolved the
14 dispute for good, and it would not have prevented
15 similar protests in the future. Those were bound to
16 continue until the underlying issues were adequately
17 addressed.

18 Second, dialogue appeared to be the most
19 promising avenue for a lasting resolution to the
20 social conflict, given the prior successes that the
21 parties had already achieved through negotiations.

22 The bottom line is that Perú's actions in

1 seeking a negotiated solution to the social conflict
2 were reasonable and justified under the circumstances,
3 and there was, therefore, no breach by Perú of its FET
4 or FPS obligations under the treaty.

5 Claimant's expropriation claims similarly
6 fail.

7 First, there was no direct expropriation in
8 this case. Not only because the Access Road Protest
9 was not attributable to Perú, but also because there
10 was no transfer of title or outright seizure by the
11 State of Claimant's investment.

12 Nor was there an indirect expropriation.
13 Treaty Annex 812 expressly identifies the elements of
14 an indirect expropriation, but none of those are
15 present here.

16 For these reasons, the Tribunal should honor
17 the presumption established under Treaty Annex 812
18 that good faith, nondiscriminatory measures in the
19 public interest are nonexpropriatory.

20 Our final observation on the merits issues
21 is that Claimant attempts to distract from the defects
22 in its case by conjuring up a series of fanciful

1 conspiracy theories. These include, for example, that
2 the community actions were motivated by a desire to
3 protect an alleged community-wide marijuana business,
4 that the Parán Community staged its protests to steal
5 the mine for itself, and that a government official,
6 Mr. Román Retuerto, had spearheaded the June 2018
7 protest and had generally fueled opposition to the
8 project, and you will hear from Mr. Retuerto later
9 this week.

10 However, as Perú has demonstrated, and will
11 recall again today, there is zero credible evidence to
12 support any of these conspiracy theories.

13 We turn now to the final prong, which is
14 damages.

15 Even if Claimant had established
16 jurisdiction and liability, which it has not, its
17 damages claim would fail for several reasons. Those
18 are summarized on the screen just for reference, but
19 in the interest of time, we will not read them since
20 we will address them briefly sequentially.

21 The first reason is that there's no causal
22 link between Perú's conduct and the loss of Claimant's

1 investment. Claimant lost its investment because the
2 social conflict, which Claimant itself precipitated,
3 prevented Claimant from reaching commercial
4 exploitation in the time required under its financing
5 agreement. That, in turn, caused it to forfeit its
6 investment to its creditor, and none of that had
7 anything to do with Perú.

8 Claimant, for its part, argues that it was
9 Perú's decision not to use force that caused the loss
10 of the investment, as I mentioned. Claimant has
11 focused heavily on this throughout the arbitration,
12 including in the presentation this morning; however,
13 as we have stated, an operation by the Peruvian police
14 to terminate the protest by force would not have
15 resolved the conflict permanently.

16 This is something that even Claimant's own
17 witness, Mr. Julio Castañeda, acknowledges at
18 Paragraph 74 of his witness statement, which we have
19 on the screen, where he said, "We knew that the Parán
20 representatives would not be deterred for long and
21 that once the police had left, the site would again be
22 at risk of invasion. For this reason, we persisted in

1 our efforts to secure an agreement with the Parán
2 Community."

3 So the bottom line is that having the police
4 forcefully quash the protest would not have enabled
5 Claimant to resolve the social conflict or otherwise
6 to reach commercial exploitation any sooner.

7 In any event, even absent the Access Road
8 Protest, Claimant would not have avoided a fatal
9 violation of its financing agreement with its creditor
10 and the resulting loss of its investment.

11 The PPF Agreement required commercial
12 exploitation by December 2018, which was only two
13 months after the Access Road Protest. That means that
14 even if the Access Road Protest had been quashed by
15 force by the State, or indeed, even if the Access Road
16 Protest hadn't happened at all, Claimant would still
17 not have been able to reach commercial exploitation in
18 time, and that's because at that point, Claimant still
19 lacked key permits and adequate ore processing
20 facilities to commence exploitation.

21 And another reason why Claimant's damages
22 fail is that their damages model is defective and

1 unreliable. It includes a number of flawed
2 assumptions and defective calculations, and we've
3 listed those on the slide. We'll discuss them later
4 in this--in presentation.

5 Now, even if Claimant did not face the
6 causation, contractual and methodological problems
7 that I just alluded to, any damages awarded in this
8 case would need to be reduced sharply to account for
9 Claimant's contributory fault. Claimant contributed
10 to the loss of its investment with numerous failings
11 of its own, including defective due diligence, failure
12 to obtain the social license, acceptance of risky
13 financing arrangements, failure to obtain requisite
14 permits, failure to obtain adequate ore processing
15 facility, and its own breaches of the PPF Agreement
16 with its creditor.

17 Mr. President, Members of the Tribunal, this
18 concludes our introductory overview. I will now yield
19 the floor to my colleagues to present the remainder of
20 Perú's opening arguments, starting with my colleague,
21 Patricio Grané, who will identify the key disputed and
22 undisputed factual issues.

1 Then my colleague to my left, Timothy Smyth,
2 will explain why the Tribunal lacks jurisdiction and
3 why the Parán Community actions are not attribute to
4 Perú.

5 Then Mr. Grané Labat will return to explain
6 why Claimant's claims fail on the merits. My
7 colleague, Brian Bombassaro will demonstrate that no
8 damages should be awarded in any event. And finally,
9 Mrs. Vanessa Rivas Plata Saldarriaga, the President of
10 Perú's Special Commission for International Disputes,
11 will conclude our presentation with a few closing
12 remarks.

13 Thank you very much for your consideration.

14 MR. GRANÉ: Members of the Tribunal, the
15 parties agree that much of the factual record in this
16 arbitration is undisputed, but they disagree about the
17 characterization, the significance, and the legal
18 implications of certain key facts, particularly in
19 relation to the following key issues.

20 One is the context surrounding the
21 Claimant's investment. Second is the Claimant's
22 mismanagement of its community relations. The third

1 is Perú's reasonable response to the conflict, the
2 social conflict, between Claimant and the Parán
3 Community.

4 The fourth is the breakdown of Claimant's
5 relationship with the Parán Community due to
6 Claimant's own conduct. And the fifth is the
7 Claimant's loss of its investment to its creditor, PLI
8 Huaura.

9 In the present segment of this opening, I
10 will address the key facts pertaining to those issues.

11 Now, I do not anticipate raising any
12 confidential information, but following the hearing,
13 Perú will work with the Claimant to confirm that any
14 reference to such confidential information, in
15 particular that referring to one specific witness, is
16 redacted in conformity with Section 476 of Procedural
17 Order Number 6.

18 I will begin by addressing the context
19 surrounding Claimant's investment, which is the first
20 issue that I identified.

21 Now, mining in Perú, as in much--as much in
22 Latin America has often given rise to social conflict

1 between mining companies and the local communities.
2 This is not new. Communities located in remote,
3 impoverished rural areas of Perú often feel harmed by
4 the environmental impact of mining activity, and the
5 fact that they are denied the opportunity to share in
6 the economic benefit of such activity.

7 Where forceful police intervention has been
8 used to try to quell community opposition or protests,
9 devastating consequences have followed, including the
10 intervention in Bagua in 2009 where scores of local
11 residents and police officers died and hundreds were
12 wounded.

13 Now, given that reality, Perú has developed
14 practices, regulations, and standards that call for
15 community engagement by mining companies with the
16 local communities, and to prioritize dialogue over the
17 use of force.

18 Now, contrary to what you have heard from
19 Claimant, the social license is acknowledged by the
20 mining community as a critical requirement for mining
21 projects. At its core, it consists of a mining
22 company's need to obtain acceptance and trust of

1 relevant communities and stakeholders even before
2 commencing mining activity.

3 Without a social license, mining projects
4 are exposed to high risk and often violent opposition
5 from local communities.

6 Now, Perú and Canada, parties to the Treaty
7 invoked by the Claimant, jointly published a
8 communities and--I'm sorry, communications and
9 community relations toolkit for responsible mining
10 exploration. This is in R-0028.

11 Now, this toolkit expressly contemplates the
12 consequences of a mining company's failure to manage
13 its community relationships, including blockades, as
14 you see on your screen, which is an excerpt, a graph
15 that's contained in this toolkit.

16 And you'll see--and we will revisit this
17 graph throughout our presentation because it largely
18 tracks the facts of the present case.

19 Now, contrary to Claimant's argument in this
20 arbitration, including in its opening statement today,
21 the concept of social license is also reflected in
22 Perú's legal framework. Now, some examples are

1 highlighted on the screen and described in more detail
2 in Section II.A.1 of Perú's Rejoinder.

3 Now, as the record--

4 ARBITRATOR GARIBALDI: I think that this is
5 the appropriate time to ask a couple of questions on
6 social licensing.

7 As I understand your briefs, the assertion
8 is made that a mining company like--as in the position
9 of Invicta, has an obligation to obtain and maintain
10 social licensing from the communities in the area of
11 influence of the project beyond the specific
12 obligations imposed by the law in connection with the
13 environmental impact statement. Right. That's the
14 way I understand your argument to be.

15 Let's put aside the question of what the
16 origin of that obligation is, but you have asserted
17 that there is an obligation of the mining company.

18 So my first question is: Is this an
19 obligation of result or is this an obligation of
20 means?

21 MR. GRANÉ: Thank you, Mr. Garibaldi, for
22 that question. It is an obligation of result in the

1 sense that the lack of that social license will have
2 consequences.

3 ARBITRATOR GARIBALDI: Okay. So it is an
4 obligation of result, fine.

5 MR. GRANÉ: I'm sorry, if I may, it is an
6 obligation of result in the sense that the failure to
7 obtain that will have the consequences that have been
8 identified by the mining industry and this toolkit.

9 Now, as to means, the Peruvian regulations,
10 including the ones that you have on the screen, are
11 created precisely to determine the ways in which
12 mining companies should try to obtain that social
13 license.

14 So we cannot divorce the result aspect from
15 the means.

16 ARBITRATOR GARIBALDI: No, I understand
17 that, but we are talking about an obligation of
18 result, which goes beyond the means expressly
19 established by Peruvian law; is that right?

20 MR. GRANÉ: No, Professor Garibaldi, again,
21 if I may, it's very tempting to try to reduce the
22 social license to a single provision, and that's,

1 indeed, what Claimant has tried to do in this
2 arbitration by saying, you cannot point to any
3 specific law that has the term "social license."

4 Social license asks of the evidence--

5 ARBITRATOR GARIBALDI: I'm not talking about
6 that. I'm not talking about that.

7 I'm trying to understand your own argument.

8 Your argument is that there is--there are
9 certain specific obligations imposed by the law--let's
10 put them aside. But you also say that beyond those
11 obligations, there is social license, which
12 goes--which is more than that, and there is an
13 obligation to obtain and maintain that social license,
14 from the affected communities.

15 So with regard to that, I am asking: Is
16 that an obligation of result or an obligation of
17 means?

18 MR. GRANÉ: I couldn't answer that question,
19 Mr. Garibaldi, without providing the explanation about
20 the concept of social license and how it is reflected.

21 It's not a simple concept that has a single
22 reflection in any provision. It is a complex, broad

1 concept that has different manifestations at different
2 times, both in the exploration and exploitation. So
3 I'm afraid that I cannot provide an answer that
4 chooses between--

5 ARBITRATOR GARIBALDI: So you cannot tell me
6 if--you cannot tell me if the obligation that you
7 call--so this obligation to obtain and maintain a
8 social license is an obligation of means or an
9 obligation of result.

10 MR. GRANÉ: I would say that it's both. If
11 I am forced to provide an answer, I would say that
12 it's both, because of this conflict's broad concept of
13 social license.

14 ARBITRATOR GARIBALDI: Okay. All right.
15 Fine.

16 So you maintain that it is an obligation of
17 result, at least?

18 MR. GRANÉ: In the sense that the
19 consequences of not obtaining that social license will
20 have the consequences that we have seen in this case
21 of the mining industry warrants companies would result
22 from not obtaining the social license.

1 ARBITRATOR GARIBALDI: Fine.

2 Second question: This is an obligation of
3 the mining company; is that right?

4 MR. GRANÉ: It is an obligation of the
5 mining company, yes.

6 ARBITRATOR GARIBALDI: There is--there is
7 not--there isn't a reciprocal obligation of the local
8 communities; is that right?

9 MR. GRANÉ: There is no--no, there is no
10 reciprocal obligation by the local communities.

11 ARBITRATOR GARIBALDI: So in other words--

12 MR. GRANÉ: To grant--when you say
13 obligation, do you mean to grant the social license?

14 ARBITRATOR GARIBALDI: Exactly.

15 MR. GRANÉ: No, there's no reciprocal
16 obligation to grant the social license.

17 ARBITRATOR GARIBALDI: All right. Well,
18 that will do for the time being. I wanted to clarify
19 your own opinion about this obligation.

20 Okay. Go ahead.

21 MR. GRANÉ: Thank you. And I restate that
22 it's not a binary option of saying results or means

1 because of the nature of the social license.

2 PRESIDENT CROOK: Let me just briefly follow
3 up with a question.

4 I mean, I'm struck by the sort of geographic
5 breadth of what we're talking about. We had the
6 testimony of one witness that 55 percent of the
7 mountain areas of Perú were covered by rural
8 communities or indigenous communities, so we're
9 talking about a great deal of real estate here. So it
10 seems to have quite broad consequences.

11 Would it be acceptable, in your view, if a
12 social license could not be obtained because, for
13 example, a community didn't like Canadians?

14 MR. GRANÉ: No, Mr. President.

15 PRESIDENT CROOK: But, you know, you told us
16 there's no obligation on their part. Presumably,
17 whatever factors they regard relevant to--can go into
18 their decision.

19 MR. GRANÉ: Well, there's no obligation by
20 the communities to grant the social license, but I
21 understood your question to refer to the justification
22 that a community may have to reject a project.

1 PRESIDENT CROOK: Right.

2 MR. GRANÉ: And, of course, it wouldn't be
3 justified to, you know, reject the project on the
4 basis merely of discrimination.

5 PRESIDENT CROOK: Well, but on the other
6 hand, we are told that it is entirely up to the
7 community to determine whether to grant social
8 license.

9 MR. GRANÉ: It's entirely up to the
10 community to decide whether the factors are in place
11 for the project to be acceptable to that community,
12 which does not mean that any opposition can be simply
13 disregarded.

14 You have to look at the nature behind--

15 PRESIDENT CROOK: Let us--I mean, humor me
16 here.

17 Let's suppose that the objection of a
18 community was that, we don't like Canadians and we,
19 therefore, do not think your project should go
20 forward.

21 What consequence in the real world then
22 happens, if any?

1 MR. GRANÉ: Well, I think that in that case,
2 the mining company would understand that the rejection
3 of the mining project has, at its core, something that
4 cannot be addressed; and therefore, the engagement
5 with the community has to be such that the local
6 community understands that it's not in the interest of
7 that community to simply resort to nationality, for
8 instance, as a reason to reject the project.

9 And this is where the communication comes
10 in. The mining company--

11 PRESIDENT CROOK: So it's incumbent
12 upon--it's incumbent upon them to somehow go in and
13 persuade the community that Canadians are very nice
14 people and they should not persist in this objection?

15 MR. GRANÉ: To engage the community to
16 persuade them that Canadians are very nice people,
17 which indeed they are, but all--but more importantly,
18 Mr. Chairman, that the mining project does not pose a
19 threat to their well-being, the environment, and that
20 it could contribute to the social and economic
21 development. And this is where the engagement of the
22 communication is--

1 PRESIDENT CROOK: All right. And at the end
2 of the day, the engagement and communication does not
3 succeed; what then?

4 MR. GRANÉ: Well, what then, you find the
5 consequences that you see in this case.

6 Now, how you deal with that--

7 PRESIDENT CROOK: All right. At that point,
8 then the investor--the investment fails because
9 they're Canadians, to use my hypothesis.

10 MR. GRANÉ: It's a hypothesis,
11 Mr. President, that, you know, unfortunately, is one
12 that is not quite so simple in the real world. I
13 don't think that there can be a mining project that
14 can simply be dismissed because, you know, the
15 community considers that the originality of the--

16 PRESIDENT CROOK: But I'm just a little
17 concerned because we have representations by the
18 Claimants. I know you don't accept them and you
19 regard them as ill-founded, but they are representing
20 that at least certain people, influential in the
21 community, worked to block agreement for what we'll
22 call improper reasons.

1 MR. GRANÉ: We dispute the facts and the
2 implications that they're trying to draw from that.

3 PRESIDENT CROOK: All right. But let us
4 assume that the facts are as they assert; what
5 consequence then?

6 MR. GRANÉ: Well, the consequence is what
7 you have seen where the insistence of the Claimant to
8 find a quick solution ignores the concept of social
9 license that requires a long-term engagement to gain
10 that acceptance by the local community.

11 PRESIDENT CROOK: Okay. Thank you very
12 much.

13 MR. GRANÉ: And I think that this should
14 show us, again, that the risk of having this very
15 narrow understanding or interpretation of social
16 license, it is not a box-ticking exercise, as Claimant
17 has attempted to argue before this Tribunal.

18 And at the end of the day, the ignorance
19 behind the concept of social license leads to the
20 consequences that we have seen and that are identified
21 in that toolkit that you saw on screen.

22 Now, to obtain the social license to

1 operate, the Claimant needed to obtain and maintain,
2 as Mr. Garibaldi has said, the acceptance and trust of
3 each of the three rural communities in Invicta's area
4 of the direct influence; and as you know, those three
5 communities are Parán, Lacsanga and Santo Domingo.

6 Now, originally, Claimant admitted--and this
7 is important. Originally, it admitted that it needed
8 the Parán Community's support, but later, it wrongly
9 concluded that it did not. And it reached that
10 conclusion on the basis of a change in the Invicta's
11 project scope in 2004. That is what they have said.

12 But it--I'm sorry, 2014, not 2004.

13 But that 2014 change neither significantly
14 altered the physical location of the mine's
15 infrastructure, nor rendered the Parán Community
16 immune from the mine's negative impact.

17 Now, this morning, opposing counsel said
18 that's, and I quote, "Significant reduction in the
19 social footprint of the project."

20 Now, that is untrue. There was no
21 significant reduction in the social footprint of the
22 project in 2014. When Perú approved a supplement to

1 the Invicta's mine Environmental Impact Assessment in
2 2015, after that scope change, it noted that, and I
3 quote, "The mining components will be located within
4 the area of direct and indirect environmental
5 influence approved in 2009 without any modification."
6 This is in C-0040, page 4.

7 Further, Claimant's dismissal of the Parán
8 Community's support is formalistic and wrong for at
9 least three primary reasons.

10 First, the Parán Community's crops and
11 villages lay within the mine's area of direct
12 influence, mostly downstream and downhill of the mine
13 where they would be more exposed to the effects of
14 water pollution.

15 Second, several of Claimant's water
16 management facilities and an access road to the
17 Invicta mine were located on Parán territory.

18 And third, the rural communities disputed
19 the ownership of the territory where the Invicta's
20 mine infrastructure was located.

21 And contrary to Claimant's argument in the
22 skeleton, such argument was not new when it was raised

1 in the Rejoinder; rather, it was responsive to
2 Claimant's argument that an agreement with the Parán
3 Community was not needed because the mine was not
4 located in the Parán territory, according to Claimant.

5 And this is a Memorial. If you want to
6 track the evolution of that particular argument, you
7 can look at Memorial Paragraph 72, Counter-Memorial
8 Paragraphs 133 to 138, and Reply Section 3.2.2.

9 Now, for these and several other reasons,
10 obtaining acceptance by the Parán Community was
11 essential to the successful development of the mine,
12 as later events have confirmed.

13 ARBITRATOR GARIBALDI: Counsel, are you
14 going to come back to the question of this disputed
15 ownership of the land?

16 MR. GRANÉ: We certainly will,
17 Mr. Garibaldi, and I believe that it will be--I
18 believe not--I am sure that it will be the subject of
19 cross-examination in the questioning.

20 ARBITRATOR GARIBALDI: No, no, in your
21 opening, are you going to come back?

22 MR. GRANÉ: Not in great detail.

1 ARBITRATOR GARIBALDI: Okay. I'm going to
2 have a question then. I want to go quickly because I
3 don't want to take a lot of time, and time is golden
4 here.

5 The question is this: There is a dispute,
6 you say, between Parán and Lacsanga and Santo Domingo
7 about the ownership of--about a claim by Parán that it
8 owned the area where the mine is located.

9 Okay. And how is that dispute to be solved
10 under Peruvian law?

11 MR. GRANÉ: There's a process of
12 registration of the Parán communities and its
13 boundaries.

14 Now, at the time--at this moment, that
15 dispute has not been resolved. But, for instance, and
16 we will see the evidence, and evidence is on the
17 record, about, for instance, agreements between the
18 communities that have settled part of that dispute,
19 but not entirely.

20 Now, again, it's a process under Peruvian
21 laws and regulation that takes time and leads to the
22 registration of boundaries in a public--

1 ARBITRATOR GARIBALDI: All right. In the
2 case, then, the dispute continues, what is the agency
3 of the Peruvian State with authority to resolve that
4 dispute?

5 MR. GRANÉ: I will have to come back to you
6 on that question, Mr. Garibaldi.

7 ARBITRATOR GARIBALDI: All right, thank you.

8 MR. GRANÉ: Now, as I was saying--now,
9 obtaining the--this acceptance by the Parán Community
10 was essential; but however, Claimant didn't obtain
11 that. And, in fact, it mismanaged its relationship
12 with the Parán Community.

13 Throughout its engagement with the rural
14 communities, Claimant outsourced its community
15 relations to a company that lacked the necessary
16 experience and resources.

17 Now, most of the project cited by Claimant
18 as evidence that it had a qualified and experienced
19 team referred to projects not yet in their
20 exploitation stages, and nearly every relevant project
21 involved significant social conflict and protests by
22 the local communities.

1 In any event, Claimant dismissed this
2 community relations team in November of 2018, which is
3 shortly before the start of the Access Road Protest in
4 October of that same year.

5 Now, this left Claimant without its
6 allegedly experienced team during the most critical
7 point of its conflict with the Parán Community.

8 Now, Claimant had a poor communications
9 relations strategy from the outset. It delayed
10 engaging with the Parán Community about the project
11 until four years after it acquired the project. In
12 fact, it was only after Claimant was approached by the
13 Parán Community that it began to negotiate with them.

14 And even then, such engagement was focused
15 primarily on Claimant's attempt to secure the
16 community's permission to use an access road through
17 its territory, which it later abandoned, and in the
18 process planted yet another seed of the conflict that
19 came later.

20 Now, meanwhile, as Perú first addressed in
21 the Counter-Memorial, and it reemphasized in the
22 Rejoinder in Section II.B.2.b, Claimant prioritized

1 relationships with the other two neighboring
2 communities.

3 Now, Claimant consistently ignored the Parán
4 Community's request for an agreement. It failed to
5 keep the Parán Community informed of the process
6 of--of the progress of the project, and contributed
7 only nominally to that community, to the Parán
8 Community.

9 But in contrast, the Claimant reached
10 agreements with--and continuously engaged and make
11 contributions to Lacsanga and Santo Domingo, the
12 neighboring communities.

13 And as noted in the toolkit, that graph that
14 I presented earlier, adopting selective relationships
15 with local communities leads to blockades that result
16 in the shutdown of operations.

17 PRESIDENT CROOK: Counsel, a quick question.

18 How do you relate your argument that they
19 had a wholly inadequate outreach capacity with the
20 fact that they seem to have reached rather substantial
21 agreements with at least two of the communities?

22 MR. GRANÉ: Those agreements with those

1 other communities were reached at a different moment
2 in time. And the conflict with those communities,
3 because there were certain conflicts with those
4 communities that we will address, and we have
5 addressed in the record, are nowhere near the
6 complexity of the conflict that they had with the
7 Parán Community, which called for an experienced team
8 that were--that would be able to deal with the
9 situation at that moment.

10 It's very different to engage with the
11 communities at an early stage and offer something.
12 It's very different to deal with communities much
13 later when there's already distrust and lack of
14 communication and resentment towards the company.

15 At that stage of a conflict, you need an
16 experienced team as opposed to simply putting
17 something on the table and waiting for acceptance.

18 PRESIDENT CROOK: Now, when you say, "at
19 that stage," chronologically, what period are you
20 talking about?

21 MR. GRANÉ: Well, the conflict with the
22 Parán Community started early, but it was in 2018 that

1 you start to see the conflict escalating.

2 In early 2018--

3 PRESIDENT CROOK: Thank you. We're talking
4 2018, essentially?

5 MR. GRANÉ: Yes.

6 PRESIDENT CROOK: Okay. Thank you.

7 ARBITRATOR GRIFFITH: Is it Perú's position
8 that the discriminatory treatment of Parán compared
9 with the other two communities was based on the fact
10 that it wasn't sought to engage in the mining
11 activities on the Parán land?

12 MR. GRANÉ: I knew that discrimination,
13 Mr. Griffith, has different manifestations. And
14 again, we have to track this, and we will through the
15 chronology, that engagement had at different moments
16 different components.

17 They have to comply with the social
18 obligations that by law are required. Now, those
19 social obligations, which are part of the
20 environmental impact assessment, have different
21 components.

22 There's employment, there's social, there

1 are economic contributions that need to be made.

2 Now, throughout this relationship, the
3 company and the community engage in a dialogue, and
4 different offers are made to that community about how
5 that community can become a stakeholder in the
6 project.

7 So there are different aspects to that
8 relationship, that communication, that later will lead
9 to Parán feeling that they had been cheated, that the
10 things that were offered to them early on later did
11 not materialize, and they're seeing their neighbors
12 obtaining some of the benefits.

13 So, for instance, the access road is one
14 example. Early on in the conflict, Parán was told
15 that they would be given an access road. Later, they
16 discovered that the access road had been given to
17 Lacsanga, to their neighbors, which led Parán at some
18 point to tell Claimant, when the conflict had erupted,
19 to say, I want the access road, but Claimant reacted
20 late and rejecting that offer because they already had
21 the Lacsanga access road.

22 So that's an example of how this engagement

1 has different components. And in this case, that
2 engagement with Parán was poor in comparison to Santo
3 Domingo and Lacsanga, which led to this conflict.

4 But it cannot be reduced to only one item.
5 Water pollution was another concern. Again, the
6 engagement has to take into account social and
7 economic development, but also, you know,
8 health/environmental issues.

9 Now, you heard--and now that we are on the
10 issue of the different things that the company said to
11 the communities and that I mentioned environmental
12 concern, that's an important part of the conflict that
13 later on erupted.

14 And you heard Claimant's counsel this
15 morning state that at no point did Parán flag concerns
16 about environmental degradation. That is patently
17 false, as shown by evidence on the record, including
18 Claimant's own witnesses.

19 As one of the many examples of the evidence
20 on the record about Parán's raising water
21 contamination as a concern is Exhibit R-0077 from
22 April 2018.

1 And here, you go back to your question,
2 Mr. President, here's an indication early in 2018 that
3 the Parán Community was concerned about what the
4 company was doing and the lack of engagement and the
5 lack of information.

6 Again, this is not a simple conflict where,
7 at one given moment, it suddenly erupts. It's a
8 buildup. It's an escalation. And here, we see the
9 seeds of that conflict.

10 Early in 2018, April 2018, the community is
11 telling the company, we are concerned about what we're
12 seeing in the water, about water contamination.

13 And later on, this is something that was
14 continued to be raised and was the object of
15 inspections by the regulatory agency that did find
16 contamination, and I will get to that issue.

17 So the Parán Community did raise
18 environmental concerns repeatedly, but Claimant simply
19 dismissed the Parán Community's environmental concerns
20 over the adverse impact that water contamination from
21 the Invicta mine could have on its Ministry of
22 Agriculture, which is the community's main source of

1 livelihood.

2 Now, Claimant initially disregarded these
3 concerns, and continues to do so today as you heard,
4 including in this arbitration, arguing that they are
5 unfounded because, according to Claimant, the Invicta
6 mine was not located in the territory of the Parán
7 Community, as if water contamination knew boundaries.

8 Now, Claimant's arguments ignore the
9 undisputed fact that the Parán Community's villages
10 and agricultural zones are closer to the mine than any
11 other community, and they're downhill and downstream
12 from its infrastructure, from the mine infrastructure,
13 and within the area of the environmental impact of the
14 project.

15 And they are within that area, as recognized
16 by the Environmental Impact Assessment.

17 And it is also undisputed, as I mentioned a
18 few minutes ago, that Claimant was contaminating the
19 water and was duly sanctioned by OEFA, which is the
20 Peruvian environmental authority. And this is in
21 Exhibit R-0074. It's a resolution from OEFA dated 27
22 September 2018 where OEFA confirmed that the Invicta

1 mine was discharging toxic chemicals above permissible
2 limits into the ground and water sources.

3 And you can see the percentages on the
4 screen of how much they were exceeding the tolerable
5 levels of some of these chemicals.

6 So this is-remember, Parán in April 2018 was
7 saying we're concerned about the water. Claimant
8 brushes aside that concern. And then in September,
9 the regulator comes in and confirms the concerns that
10 the community had-.

11 And it is hardly surprising that the Parán
12 Community had a legitimate and well-founded
13 environmental concern, which, again, Claimant has
14 dismissed offhandedly.

15 Now, Claimant also boldly asserts that, and
16 I quote, it did not breach its social commitments.
17 And this is covered in the Reply Section 4.3.3.

18 Again, that is patently false. It is
19 undisputed that Claimant did not satisfy several of
20 its social commitments to the communities and,
21 accordingly, was sanctioned by the regulator. And we
22 address this in Reply including--or starting in

1 Paragraph 182, and I refer you to Exhibit R-0061.

2 Now, a nonexhaustive list of Claimant's
3 breaches are listed on this slide.

4 Perhaps they're not. We'll find the correct
5 slide.

6 I'm sorry, here it is. That's R-0061. I
7 had moved too quickly.

8 So essentially, Claimant has fostered the
9 perfect incubation conditions for a social conflict
10 leading to the blockade and the shutdown of the
11 operations, which, again, is the consequences of what
12 you see on the left, the blockade, and ultimately what
13 the blockade causes.

14 And recalling from that--from this graph,
15 from the toolkit, now, Claimant created unclear
16 communication channels by outsourcing its community
17 relationships, allowing its community relations
18 team--contract to lapse, failing to consistently
19 engage with the communities, and deliberately
20 misleading the Parán Community, saying, for instance,
21 that there was no water contamination, promising
22 things that it later did not deliver but delivered to

1 its neighbors.

2 Claimant and Parán Community also held
3 different agendas, which is another of the causes of
4 the opposition and the blockade. The Parán Community
5 wanted its environmental grievances addressed and to
6 reach an agreement with the Claimant on terms that
7 were similar to those secured by the neighboring
8 communities.

9 Now, Claimant, on the other hand, saw Parán
10 as a nuisance, as a problem to either ignore or
11 neutralize.

12 It thought that simply saying, your water is
13 not being contaminated because it's not in the area or
14 that your territory does not include the
15 infrastructure of the mine means that there are
16 no--there is no water contamination. That is simply
17 not an acceptable explanation from the perspective of
18 the community who is seeing the color of its water
19 being unnatural because of the presence of the
20 chemicals that were later confirmed by OEFA to be
21 present in the ground and water sources.

22 Now, Claimant also engaged in selective

1 relationships by prioritizing Lacsanga and Santo
2 Domingo over the Parán Community.

3 PRESIDENT CROOK: Sorry, counsel.

4 So if we go back and dig in the record, we
5 will find evidence to support the statement you just
6 made, that the discoloration of the water--

7 MR. GRANÉ: Yes, sir.

8 PRESIDENT CROOK: --was attributable to
9 these excessive discharges of heavy metals?

10 MR. GRANÉ: Yes, sir. It's the--the only
11 possible source of that discoloration of the
12 water was--

13 PRESIDENT CROOK: I'm asking, is there
14 evidence in the record to support your argument?

15 MR. GRANÉ: Yes, R-0074 is one such piece of
16 evidence.

17 PRESIDENT CROOK: R-0074, okay.

18 MR. GRANÉ: Now, finally, the Claimant
19 failed to address the community grievances, as I said,
20 by not reaching an agreement with the Parán Community,
21 disregarding its legitimate environmental concerns,
22 delay the settlement of its debt to the community and

1 blatantly failing to satisfy other social and monetary
2 commitments.

3 Another exhibit in addition to the one I
4 mentioned would be C-0408.

5 So the Parán Community's opposition was
6 hardly surprising. In fact, it was entirely
7 foreseeable and it led to the blockade, but while it
8 was foreseeable, it was not inevitable. Claimant
9 could and should have averted the opposition that led
10 to the blockade if it had not completely ignored the
11 concept of social license.

12 Instead, and to this day, it has treated
13 that fundamental concept with utter contempt.

14 ARBITRATOR GARIBALDI: I find something very
15 strange here.

16 You seem to be treating the blockade, which
17 is an act of force against the law--against Peruvian
18 law, as something inevitable, something like an act of
19 God, something that is caused by certain actions and
20 inactions of the mining company, but it's something
21 that is inevitable.

22 MR. GRANÉ: Quite the contrary. We are not

1 treating it as an act of God, Mr. Garibaldi. We're
2 saying that the blockade is the result of the conduct
3 of the Claimant that could and should have been
4 avoided.

5 ARBITRATOR GARIBALDI: Okay. Let me
6 rephrase that.

7 The blockade is an act of a group of people,
8 right?

9 MR. GRANÉ: Correct.

10 ARBITRATOR GARIBALDI: Which is against the
11 law; isn't that right?

12 MR. GRANÉ: Correct.

13 ARBITRATOR GARIBALDI: So isn't there
14 something in--isn't there an agency in between this
15 causal relationship that you're talking about?

16 MR. GRANÉ: If what you mean by that is
17 agency from the State, absolutely not--

18 ARBITRATOR GARIBALDI: No, no, no, not
19 State. I'm talking about the Community of Parán. I'm
20 not addressing now the question of whether the
21 Community of Parán is the State or not.

22 MR. GRANÉ: Mr. Garibaldi, there's no

1 submission from Perú that the Parán Community was not
2 directly responsible for the blockade. It is the
3 members of the Parán Community that erected the
4 blockade.

5 ARBITRATOR GARIBALDI: All right.

6 MR. GRANÉ: Now, what we are addressing,
7 Mr. Garibaldi, are the causes that led to that
8 blockade. And what I have just stated about the
9 inevitability of that goes to the conduct of Claimant,
10 and it goes to the concept of the social license.

11 And social license is recognized by mining
12 communities because if it's not--the community is not
13 engaged in a positive, constructive way, it leads to
14 these situations.

15 ARBITRATOR GARIBALDI: Okay, let me--one
16 final question.

17 Would it be possible--assuming everything
18 else is the same, same conduct from the mining
19 company, would it have been possible for the Parán
20 Community to refrain from an act of force?

21 MR. GRANÉ: It would have been possible,
22 yes.

1 ARBITRATOR GARIBALDI: Thank you.

2 MR. GRANÉ: Now, we have established that
3 the mismanagement of the community relations by the
4 mining company led to the blockade. But what's
5 important--and we will get to the issue of
6 attribution. What's important is what the Peruvian
7 authorities did to address that social conflict, of
8 which it was not a party and which it had not created.

9 Now, the evidence shows that Perú's
10 authorities acted reasonably and in accordance with
11 Peruvian law in attempting to mediate a lasting
12 solution to Claimant's conflicts with the Parán
13 Community. And this notion of the lasting solution is
14 critical to understand the measures that can be taken
15 in that type of situation where there is a forceful
16 opposition by the local community.

17 Now, in the months before the first Parán
18 Community protest in 19 June 2018, Claimant had ceased
19 dialogue with that community and was not performing
20 its social obligations under the Social Management
21 Plan; again, which is a formal document that is
22 required by Peruvian law, and for which it

1 was--sanctioned the company for not complying with
2 that Social Management Plan.

3 Now, these actions were in direct violation
4 of the company's obligations under Peruvian law.

5 Now, two months before the June protest, the
6 Parán Community once again explicitly expressed to
7 Claimant its desire to reach an agreement with the
8 mining company that would recognize that community as
9 a stakeholder in the development of the project.

10 Now, the community made it clear that it was
11 open to receiving any proposal from Invicta, and this
12 is Exhibit C-0430.

13 In May, the Parán Community sent Claimant
14 another letter explicitly expressing its alarm that
15 Claimant had stopped dialogue with the community and
16 was pushing ahead with its plans to develop the mine.

17 And in particular, the Parán Community was
18 concerned about the possible activity at the mine that
19 was already causing this contamination of water and
20 land. And again, this is--the second letter in May is
21 Exhibit C-0121.

22 But Claimant made no attempt to engage in a

1 constructive dialogue, as I said, and build community
2 relations.

3 In a three-letter paragraph dated 30 March
4 2018, which is C-0122, Claimant callously dismissed
5 the community's concerns as misinformed and its
6 territorial claims as lies.

7 Now, that's hardly a constructive and
8 forward-looking response to a community that is
9 expressing concerns about what they're seeing the
10 company do in what they consider to be their
11 territory.

12 But Claimant sits here today and they spin a
13 different story, but the evidence demonstrates that
14 the Parán Community felt ignored and marginalized by
15 Claimant, and decided to express its discontent, its
16 repudiation of that conduct by Claimant.

17 Now, in the absence of that positive
18 engagement by Claimant, the Parán Community's concerns
19 intensified, and particularly based on what its
20 members were witnessing, which included a visible
21 discoloration of the water, especially after heavy
22 rainfalls; the use of explosives due to the general

1 works at the mine; the presence of heavy equipment
2 to--again, to the general works; and the sight of
3 trucks filled with ore leaving the Invicta mine, which
4 is the result of the testing that was being conducted
5 by the mining company.

6 Now, mind you, the testing resulted in at
7 least seven tons of ore being extracted from the site,
8 and the Parán Community was witnessing this. And they
9 were, of course, you know, rightly concerned, and
10 understandably concluded that the mine was being
11 exploited at that point by the mining company.

12 Now, on 19 June 2018, approximately 215
13 members of the Parán Community appeared at the mine to
14 conduct an inspection. And in the course of that
15 inspection, tempers flared and some property was
16 destroyed, and--but Claimant here grossly exaggerates
17 what happened that day. And this also will be the
18 subject of further discussion this week.

19 But in any event, Perú responded diligently
20 and appropriately to this protest by leading a police
21 patrol. And throughout our presentation, we will
22 refer to the police sometimes as the PNP, the Peruvian

1 National Police.

2 So a PNP patrol inspected the site following
3 that protest of 19 June 2018, and Claimant was
4 grateful for this response by the PNP, and this is
5 discussed in the pleadings.

6 But unable to deny those facts, Claimant
7 offered several new theories in the Reply to attempt
8 to recast blame on Perú, even though, again,
9 contemporaneously, they were grateful for the PNP's
10 intervention that day.

11 Now, first and here we start with conspiracy
12 theories. Claimant introduces a new and baseless
13 conspiracy theory here in relation to the June 2019
14 protest.

15 According to Claimant, a low-level regional
16 government official, Mr. Román Retuerto, conspired and
17 led the community's opposition against the project
18 that day. Claimant's new argument was introduced
19 after Perú demonstrated that its original claim that
20 is based on the Parán Community's actions being
21 attributable to Perú was hopeless and failed at the
22 threshold.

1 So Claimant sought to plug that gaping hole
2 in its case theory, and it desperately sought a
3 government official on which it could pin the blame.

4 And this is where Claimant falsely accuses
5 Mr. Román Retuerto of participating in and leading the
6 19 June 2018 protest.

7 When Mr. Román Retuerto learned of the
8 planned 19 June protest, he alerted the proper
9 authorities, and he requested their action be taken to
10 prevent the conflict from escalating, and he called
11 dialogue, and this is in C-0550.

12 Notwithstanding this letter, Claimant
13 asserts that Mr. Román Retuerto led the protest, but
14 there's no evidence to support that allegation.

15 And you heard this morning Claimant
16 says--saying that it relies on an internal report and
17 the fact that someone saw Mr. Retuerto present at the
18 site on 19 June 2018, just as police went to the site
19 on the date of the protest.

20 And yet, Claimant does not accuse the police
21 of leading the protest because the police was present,
22 because it knows that it would be absurd to do so.

1 And yet, that's exactly what it argues Mr. Retuerto
2 was doing. The presence of Mr. Retuerto on the site
3 on that day, Claimant says that it's evidence of him
4 leading the protest. That is not what the evidence
5 shows.

6 Far from leading the protest, with the Parán
7 Community's opposition to the project, Mr. Retuerto
8 was considered a persona non grata by the Parán
9 Community, because the community believed that he was
10 biased against the community, and thus was turned away
11 twice from participating in any dialogue or mediation
12 efforts between members of the Parán Community and the
13 Claimant's representatives.

14 Claimant's second accusation against
15 Mr. Román Retuerto is that he engaged in a defamatory
16 campaign against Invicta, but that, too, is
17 unsupported.

18 And Claimant bases this argument on a series
19 of letters that Mr. Román Retuerto sent in his
20 capacity as Subprefect to various Peruvian
21 authorities.

22 An examination of the letters show that

1 Mr. Retuerto was dutifully informing the agencies of
2 information he had received, including reports of
3 suspected contamination of the Parán Community's water
4 resources.

5 And I urge the Tribunal to look again at
6 that evidence. R-0076, R-0081, and R-0165.

7 Instead of welcoming Mr. Román Retuerto's
8 solution or seek--pursuit for a solution through State
9 supervised dialogue, Invicta attempted silence Mr.
10 Román Retuerto from carrying out his duties as a
11 public official, as is evidenced by a letter that
12 Claimants sent to authorities, which is C-0455.

13 But at no point did Mr. Román Retuerto state
14 or insinuate that the Parán Community should carry out
15 protests or that Invicta should be shut down or that
16 Claimant should stop its operations. There's not a
17 shred of evidence in the record of this arbitration
18 that would establish that, Members of the Tribunal.

19 And you will have an opportunity this week
20 to hear from Mr. Román Retuerto. You will see that he
21 is an honest, a humble, and a soft-spoken man who was
22 simply doing his job, and now stands accused by

1 Claimant because he dared to report to other State
2 agencies what he was seeing.

3 Claimant's argument in this respect is
4 nothing short of frivolous.

5 But let us return to Claimant's
6 mismanagement of community relations, and the State's
7 efforts to clean up Claimant's mess.

8 After Peruvian law enforcement authorities
9 intervened to avoid a potentially violent
10 confrontation between the parties in September 2018,
11 Claimant had an opportunity to reassess the way it had
12 managed its relationship with the Parán Community and
13 to address the community's grievances.

14 But Claimant deliberately squandered this
15 opportunity, because it believed that the Parán
16 Community's grievances and demands stood in the way of
17 its own goal of moving quickly towards exploitation of
18 the mine.

19 So this was in September 2018. Weeks later,
20 on 14 October 2018, approximately 90 members of the
21 Parán Community established the Access Road Protest,
22 which is a civilian blockade roughly 300 meters from

1 the entrance to the Invicta mine, the bocamina, on the
2 Lacsanga access road.

3 The authorities responded immediately and
4 deescalated a tense situation. The Peruvian
5 authorities also brokered an initial agreement between
6 the parties to bring them closer towards dialogue.

7 Over the months that followed, Perú
8 actively--I'm sorry, activated a panoply of State
9 agencies and resources to proactively and diligently
10 mediate Claimant's conflict with the Parán Community.

11 Perú's efforts in mediating constructive
12 dialogue yielded the 26 February 2019 Agreement, which
13 is C-0200.

14 At the time that this agreement was signed,
15 Claimant's CEO publicly celebrated it, and explicitly
16 manifested Claimant's gratitude to the Peruvian
17 authorities for their assistance in brokering the
18 agreement. And this is in R-0071 and R-0132.

19 Claimant also highlighted the OGGS--

20 PRESIDENT CROOK: Counsel, on that point,
21 I'm looking at R-0132, and the gravamen of their press
22 release was that they were happy because the blockade

1 had been lifted, and of course, it hadn't.

2 So what do we make of that?

3 MR. GRANÉ: We will hear, Mr. President,
4 that the blockade was lifted from the Parán sector,
5 and their internal communications that evidence the
6 fact that there's a recognition that the Parán
7 blockade was lifted through the Parán.

8 PRESIDENT CROOK: So they could go up the
9 Parán road, but not the Lacsanga road.

10 MR. GRANÉ: Correct.

11 And, in fact, we'll also see that they
12 couldn't even go up the Lacsanga road if they wanted
13 because of the heavy rainfalls had damaged--

14 PRESIDENT CROOK: I know. I'm familiar with
15 all of that, okay. Thank you.

16 MR. GRANÉ: But unfortunately, after this
17 agreement of February 2019 was signed, it became
18 evident that the Claimant and the Parán Community had
19 different interpretations of what they had agreed to,
20 and each accused the other of breaching that
21 agreement.

22 Now, Claimant seeks to portray the Parán

1 Community's interpretation as being preposterous or in
2 bad faith, but it was not. But it has demonstrated
3 the Parán Community's interpretation was reasonable
4 and consistent with the needs and expectations that it
5 had--that the community had expressed to Claimant from
6 the outset, and repeatedly, which is, I want an access
7 road through the Parán territory, and we will get to
8 the topographical survey and what was behind that.

9 And indeed, let's go there now. The
10 agreement reflected two key demands of the community.
11 One was that Invicta invest in a mine access road
12 through the Parán territory, which, remember, it was
13 something that the company had promised the Parán
14 Community early on, but later abandoned.

15 And second, that a topographical survey be
16 carried out, which the community believed would
17 confirm that certain components of the mine were
18 located within its territory.

19 Now, Claimant, on the other hand, argues
20 that the text of the agreement provides that the Parán
21 Community would lift the blockade of the Lacsanga
22 access road, and perhaps this goes also to your

1 question, Mr. President.

2 While Claimant wishes for this, the plain
3 text of the agreement makes no explicit mention of
4 access through Lacsanga.

5 In fact, Lacsanga is not mentioned at all in
6 that agreement. Parán is. The Parán access road is
7 mentioned in that agreement.

8 PRESIDENT CROOK: No, I take that point,
9 counsel, and I don't have the agreement in front of
10 me, but there is also language to the effect that all
11 coercive measures would be ended.

12 Is that relevant?

13 MR. GRANÉ: It is relevant, Mr. Chairman, in
14 the sense that Claimant has taken that phrase and has
15 taken the phrase out of context to suggest that the
16 agreement was to lift the blockade both from Parán and
17 from Lacsanga.

18 Now, the reading of the community was that
19 the lifting of the coercive measures would cover the
20 Parán access road or access to the mine through the
21 Parán access road, but not through Lacsanga, and the
22 reason is evident. At that stage, they were also at

1 that moment waiting for the topographical study to be
2 conducted, and Parán felt that it was a compromise
3 that had been reached where they would cede by giving
4 access through the Parán; meanwhile, they would carry
5 out the topographical study or survey on 20 March to
6 determine how that road could be enhanced to provide a
7 more permanent access to the mine.

8 ARBITRATOR GARIBALDI: Counsel, okay, you
9 are interpreting from the standpoint of the Parán
10 Community.

11 Now, does Perú have an interpretation of the
12 agreement or not? Because Perú has adopted the
13 interpretation of Parán; is that right?

14 MR. GRANÉ: No, Mr. Garibaldi, we haven't
15 adopted the interpretation of Parán in the sense that
16 we are--Perú is not a party to an agreement.

17 What we are saying is that the
18 interpretation of the Parán Community is not
19 preposterous, it's not in bad faith, which is the
20 Claimant's position.

21 We are saying that there's reasons in that
22 agreement to believe--to believe that the community's

1 interpretation of the agreement is reasonable from the
2 perspective of the community, and the history that had
3 led to that agreement.

4 ARBITRATOR GARIBALDI: All right, let me ask
5 you: The reference in the agreement to the medidas de
6 fuerza, I think that was the term used, what does it
7 refer to?

8 MR. GRANÉ: From the community's
9 perspective, it's the lifting of access to the mine.
10 From the community's perspective, that access to the
11 mine has to be provided to through the Parán.

12 ARBITRATOR GARIBALDI: Well, there was no
13 blockade on the Parán road.

14 MR. GRANÉ: There was no blockade through
15 the--

16 ARBITRATOR GARIBALDI: There was no blockade
17 on the Parán road. The only blockade was the blockade
18 on the Lacsanga road.

19 So the reference to lifting the medidas de
20 fuerza was to what, in your interpretation? How do
21 you see that?

22 MR. GRANÉ: My interpretation is to

1 provide--well, my interpretation.

2 The interpretation of the community that we
3 argue is reasonable is to grant access to the mine,
4 which is what the company wanted.

5 ARBITRATOR GARIBALDI: And where
6 is--what--what are the medidas de fuerza to be lifted?

7 MR. GRANÉ: Access to the mine.

8 ARBITRATOR GARIBALDI: Only from Parán?

9 MR. GRANÉ: Yes.

10 ARBITRATOR GARIBALDI: There was no--

11 MR. GRANÉ: That was the interpretation of
12 the--

13 ARBITRATOR GARIBALDI: But there was
14 nothing. I mean, it's not a question of
15 interpretation. It's a question of what are the
16 facts. We cannot deal with interpretations. We have
17 to deal with the facts, you see?

18 MR. GRANÉ: Mr. Garibaldi, there was no
19 access to the mine at that moment because of the
20 blockade on the Lacsanga road. The Parán Community
21 was saying, you can access the mine and continue the
22 work, provided that you access the mine through the

1 Parán, and we're facilitating that. We are allowing
2 you to go through our territory into the mine.

3 ARBITRATOR GARIBALDI: And you have no
4 opinion about that?

5 MR. GRANÉ: My--again, I cannot speak in the
6 first person.

7 The opinion of the Republic of Perú that
8 it's a reasonable interpretation on the part of the
9 community.

10 ARBITRATOR GARIBALDI: All right. Thanks.

11 MR. GRANÉ: Now, going back to the issue,
12 Claimant does not dispute the fact that the community
13 did, in fact, lift the blockade. The evidence shows
14 that the company knew what it was agreeing to through
15 the agreement, and that is in C-0353, C-0576, R-0132.

16 It agreed--the Community did, in fact, lift
17 the blockade through the Parán's territory, and thus
18 complied with the agreement from the interpretation of
19 the community of what it had committed to under that
20 agreement.

21 Now, the second disagreement between the
22 parties concerned the 26 February 2019 Agreement,

1 provision for a topographical survey.

2 The text of that agreement states that the
3 "Invicta mining company, together with the Rural
4 Community of Parán, will identify and locate the
5 affected land (the rural Community of Parán) through a
6 topographical survey; and such survey will take place
7 on 20 March 2019." (As read.)

8 Claimant contends in this arbitration that
9 the purpose of that study or that survey was to assess
10 alleged environmental damage to the Parán Community's
11 lands.

12 The Parán Community, by contrast, argued
13 that the topographical study was meant to analyze
14 whether any mine components were located on land that
15 the community considered to be part of its territory,
16 and for assessing necessary improvements to the access
17 road to the mine.

18 Now, this was consistent with the
19 community's territorial claims and its desire to have
20 a road through its territory to service the mine.

21 And that evidence is on C-0344, C--now, I'll
22 just say this quickly so that the transcript reflects

1 it: C-0344, C-0213, C-0264, and C-0121.

2 And the drafting history of the relevant
3 provision of the agreement contradicts Claimant's
4 interpretation of environmental assessment being the
5 scope, or what had been agreed in February 2019, and
6 that is reflected in C-0344.

7 And to be specific, an earlier version did
8 reference OEFA and environmental assessment, but that
9 was not agreed--it did not make it into the final
10 version of the agreement because it was rejected,
11 because that was not what the community meant when it
12 said that it wanted a topographical survey.

13 And so, it is hardly surprising that the
14 Parán Community accused the Claimant of breaching that
15 agreement when it later flatly refused the company to
16 pay for the topographer.

17 In any event, Claimant's argument that an
18 access road through Parán was off the table, again,
19 exposes Claimant's contradictory positions and the
20 duplicity in engaging with the Parán Community from
21 the very beginning.

22 Because as a reminder, Claimant alleges that

1 Invicta had remained open and interested in an
2 alternative access road to the site through the Parán
3 territory, but the Parán Community refused to give
4 Claimant such an access road in earlier negotiations.

5 And this is something that's addressed in
6 Castañeda, Paragraph 19.

7 But in the Reply, Claimant alleges that it
8 had--had no use for the access road through Parán,
9 earlier saying access road, and now in the Reply
10 they're saying it had no use for access road through
11 Parán, arguing that it was inadequate. But to its
12 shareholders, Claimants celebrated that it had gained
13 partial access to the mine that was possible from
14 Parán, Mr. Garibaldi, thanks to this February 2019
15 agreement that had just been reached by the parties.

16 And this is in R-0171.

17 So the company was hailing that agreement as
18 a way to gain partial access to the mine through
19 Parán, and it was saying that to its shareholders.

20 But Claimant's conduct following the
21 agreement's execution shows that it only saw such
22 agreement as a means of lifting the blockade, and no

1 intention of following through its commitments. And
2 true to form, Claimant said one thing and then did
3 another.

4 But under such circumstances, it is
5 impossible not to appreciate why the Claimant [sic]
6 felt cheated by Claimant yet again.

7 And you may disagree about the
8 interpretation that the community had of the
9 agreement, but we have to put ourselves in the shoes
10 of the community, and the discussions that had been
11 had previously about access through Parán and what was
12 signed on that day, which references only lifting of
13 the blockade through the Parán Community.

14 Now, Mr. Garibaldi, you're a sophisticated
15 lawyer. You have an interpretation of the agreement,
16 but here we're talking about the Parán Community
17 negotiating what they thought was the first step in
18 the resolution of the dispute.

19 Remember, the 26 February 2018 agreement was
20 the first step in a process of dialogue between the
21 parties. It was called the mesa de diálogo, the
22 negotiating table, that it was formally launched that

1 day through the efforts of the State to bring the
2 parties together. And as a sign of good faith, that's
3 where the community says, I will lift access to the
4 mine through Parán. You conduct topographical study.

5 Again, it is not the permanent resolution of
6 the dispute, but it's the first step to reaching that
7 resolution of the dispute.

8 PRESIDENT CROOK: Counsel, we are scheduled
9 for a break right about now. I don't know if this is
10 a time that's convenient for you; or if not, can you
11 identify a time in the near future?

12 MR. GRANÉ: Mr. President, we will take the
13 break whenever the Tribunal tells us that the break is
14 necessary.

15 PRESIDENT CROOK: Well, we're not that
16 authoritarian, really.

17 MR. GRANÉ: We're happy to take the break
18 now.

19 PRESIDENT CROOK: Okay. The schedule
20 decrees a break right now, so let's do a 10-minute
21 break, please.

22 (Whereupon, there was a recess in the

1 proceedings, 3:17 p.m. - 3:27 p.m.)

2 PRESIDENT CROOK: All right. Let's resume.
3 Thank you all for being so punctual. We're being a
4 bit compulsive about timing here today for very good
5 reasons, we're trying to keep these hearings from
6 extending unduly into the evening, so forgive me if I
7 seem a little bit compulsive, but we have a good
8 reason for it.

9 Luisa, can you give us a rundown on where we
10 stand on the Respondent's use of time.

11 SECRETARY: Yes. Respondent has used one
12 hour and three minutes of their time.

13 PRESIDENT CROOK: Okay. So they have
14 essentially two hours to go.

15 Okay. Well, we--the Tribunal will promise
16 not to ask lengthy questions.

17 All right. Back to you.

18 MR. GRANÉ: Thank you, Mr. President.

19 Can I have one minute to check how--what
20 that means in terms of our planning?

21 PRESIDENT CROOK: Of course.

22 MR. GRANÉ: Because I understand that--Ms.

1 Torres, that means that the responses given to the
2 Tribunal's questions are being deducted from our time?

3 SECRETARY: That is the time already--your
4 time that you've used. The time that you have
5 invested in questions and answers to the Tribunal is
6 on a different clock, so the time I read is your time.

7 MR. GRANÉ: Thank you. So if I could just
8 have one minute, please.

9 (Pause in the proceedings.)

10 MR. GRANÉ: Thank you, Mr. President.

11 So let's move on to a different stage of the
12 conflict. We've established that there was
13 disagreement about the February 2019 agreement and its
14 implementation, both parties accusing each other of
15 not having complied with that agreement.

16 And so, this brings us to the 14 May 2019
17 incident where Claimant took matters into its own
18 hands, this time with fatal consequences.

19 Claimant does not dispute that it hired this
20 obscure and inexperienced private security company,
21 War Dogs, whose armed intervention produced a violent
22 confrontation with the community on 14th May 2019, and

1 that intervention tragically resulted in one fatality.

2 Now, Claimant desperately tries to downplay
3 the actions of the War Dogs, and the disastrous impact
4 that it had on the dispute.

5 Now, Claimant asserts that the War Dogs
6 peacefully entered the site. Now, that account is
7 false, and it's directly contradicted by the
8 contemporaneous police reports that indicate that five
9 members of the Parán Community were forcibly removed
10 by the War Dogs and that--

11 PRESIDENT CROOK: Counsel, just to be clear,
12 that document did not reflect firsthand observation by
13 the police, but rather what they were told by the
14 Parán Community; is that correct?

15 MR. GRANÉ: I believe that's correct,
16 because the police were not present at the moment
17 that--

18 PRESIDENT CROOK: All right. So they were
19 reporting what they were told in that document?

20 MR. GRANÉ: Yes, sir.

21 This is R-0262 in the record.

22 And Claimant's own internal records further

1 confirm that it had actively sought out a "powerful"
2 and intimidating security company, well beyond any old
3 "regular security company." This is R-0259. That is
4 precisely what it got when it hired the War Dogs.

5 Now, Claimant knows this, but is now
6 embarrassed to admit it. It even refuses to call that
7 outfit by its name, War Dogs, and instead, it hides
8 behind a bland acronym, WDS. I'm sorry.

9 But they were War Dogs. They wanted a
10 powerful security company. That's what they got.

11 They entered the site guns blazing on 14 May
12 2019.

13 PRESIDENT CROOK: Excuse me. Your evidence
14 for the proposition they entered the site guns blazing
15 is what?

16 MR. GRANÉ: The police report saying that
17 the War Dogs fired shots when they went into the
18 property to remove those protesters.

19 PRESIDENT CROOK: Okay. Well, you will give
20 me the cite to that because I don't remember having
21 seen that exhibit.

22 MR. GRANÉ: Yes. We'll give you the cite to

1 the exhibit where, again, it's indicated that the War
2 Dogs fired first, not--

3 PRESIDENT CROOK: Again, that's reflecting
4 what they were told by Parán?

5 MR. GRANÉ: Yes, sir.

6 PRESIDENT CROOK: Okay.

7 ARBITRATOR GRIFFITH: So you accept the
8 police were not there?

9 MR. GRANÉ: The police were not there. The
10 police were supposed to be there in coordination with
11 the War Dogs. This is something that Mr. Bravo said
12 in his witness statement. The police were going to
13 accompany the security company going to the site. But
14 the security company did not wait for the police. It
15 went ahead without the police, resulting in that
16 event.

17 Now, you heard Claimant's counsel today
18 earlier say that the police weren't there, but it's
19 not because the police were not prepared to go, it's
20 because the War Dogs did not wait for the police to
21 accompany them up to the site.

22 There was a call that was placed by the War

1 Dogs security to Mr. Bravo on that day, and Mr. Bravo
2 asked, is the police with you? And the security
3 company said, no. They said that they would follow,
4 but we went ahead without them.

5 ARBITRATOR GRIFFITH: Counsel, it would seem
6 from that we know that the police weren't there, but
7 wouldn't it be the only direct evidence that should
8 come to us would be someone who was there?

9 It's not much help saying that the police
10 say that they were told no one was there. That
11 doesn't establish it, does it? It's called hearsay in
12 common law.

13 MR. GRANÉ: Correct. It's the same hearsay
14 that Claimant uses in respect of Mr. Retuerto, when
15 they say that someone saw him being there in a
16 meeting.

17 ARBITRATOR GRIFFITH: And that must be
18 right. It's not like a negative and a negative makes
19 a positive. It's two negatives, and there's nothing
20 there.

21 MR. GRANÉ: So Claimant alleges that the
22 entry of the War Dogs to the mine on 14 May had been

1 coordinated with the PNP. Again, this is what we are
2 discussing.

3 But again, we know that the War Dogs entered
4 the mine unilaterally without the PNP escort, and
5 without allowing the police to execute the operational
6 plan that was prepared for that day. Those rash
7 actions eroded that already frailed relationship with
8 the community.

9 Now, the evidence that is described in
10 detail in Perú's pleadings shows that from the start,
11 the conflict with the Parán Community, Claimant was
12 never seriously about pursuing dialogue or a long-term
13 agreement with the community because those efforts
14 required both willingness and time, but Claimant had
15 neither, given that it cared only about meeting the
16 ambitious PPF Agreement repayment schedule, which
17 we'll come to.

18 The only real quick fix solution that
19 Claimant ever seriously considered was to lobby the
20 Peruvian authorities to use force, no matter the cost
21 or the risk to the human life, public safety, or even
22 and importantly, the long-term viability of a project

1 that was openly rejected by the community that was in
2 closest proximity to the mine.

3 So let's turn now to that PPF Agreement that
4 was putting that time pressure on Claimant that led it
5 to simply seek that quick fix.

6 It's the PPF Agreement that required
7 Claimant to begin commercial exploitation before
8 December 2018, and thereafter, Claimant owed PLI
9 Huaura the following repayments that you see. But
10 Claimant did not satisfy these commitments on the PPF
11 Agreement.

12 On 2 July 2019, PLI accelerated Claimant's
13 PPF Agreement obligations citing 14 instances where
14 Claimant has defaulted. Due to such defaults, in
15 August 2019, PLI initiated foreclosure proceedings to
16 seize Claimant's Invicta shares which would be used to
17 satisfy Claimant's unpaid debt. Again, PLI seized
18 those shares on 26 August 2019.

19 ARBITRATOR GARIBALDI: Please remind us, PLI
20 is a mining company; right?

21 MR. GRANÉ: I believe that PLI is only a
22 special vehicle for investing in the Invicta mine, PLI

1 Huaaura.

2 ARBITRATOR GARIBALDI: But it is in the
3 mining business or in the banking business?

4 MR. GRANÉ: I will come back to that point.
5 My understanding, Mr. Garibaldi, subject to
6 confirmation, is that PLI was not in the mining
7 business, it was not an active mining company, it's a
8 special investment vehicle for the purpose of
9 purchasing.

10 And then Pandion owned the PLI, and then
11 Pandion sold that.

12 ARBITRATOR GARIBALDI: To? To someone in
13 the mining business or someone in the banking
14 business?

15 MR. GRANÉ: I will come back to that
16 question, Mr. Garibaldi.

17 ARBITRATOR GARIBALDI: Thank you.

18 MR. GRANÉ: The relationship--this is,
19 again, reflected in the pleadings. Lonely Mountain,
20 Pandion, PLI, that was the chain that reached Invicta,
21 but I'll come back to the question about the nature of
22 Pandion and Lonely Mountain.

1 So the special purpose vehicle of Pandion
2 created to hold Pandion's interests is PLI, and Lonely
3 Mountain is a Peruvian mining company.

4 Now, you--so we know that Claimant blames
5 Perú for its loss, and the reality is that even in the
6 absence of the alleged measures or omissions, Claimant
7 would not have reached commercial exploitation of the
8 mine in time to meet its contractual obligations to
9 PLI, and therefore, would have lost its shares in any
10 event.

11 Now, this morning, you heard Claimant tell
12 you that Lupaka had the permits, that was what they
13 said, they had the permits, but that is not true.

14 Contrary to what you heard, in its own
15 submissions in this arbitration, Claimant conceded, as
16 it should, that it required additional permits to
17 commercially exploit the mine.

18 Instead of saying that it had all the
19 permits, Claimant argued that the missing permits
20 could have been obtained in a matter of weeks, but
21 Claimant is incorrect.

22 July 2020 is the earliest date by which

1 Claimant could have obtained the approvals needed to
2 begin full commercial exploitation of the mine.

3 According to the legal mining expert,
4 Ms. Miyanou Dufour, Claimant needed to complete at
5 least four additional regulatory steps before it could
6 legally exploit the mine:

7 Claimant needed to obtain authorization to
8 purchase and store hydrocarbons at the Invicta mine.

9 It needed an environmental certification of
10 an alternative water management system.

11 It needed a MINEM authorization to begin
12 commercial exploitation.

13 And it needed licenses to use water from
14 sources not contemplated in Claimant's 2009 EIA,
15 Environmental Impact Assessment.

16 Now, Ms. Dufour is the only independent
17 legal mining expert in this arbitration, and she will
18 address each of these issues or requirements in more
19 detail during her presentation.

20 Now, Claimant has incorrectly suggested in
21 its skeleton, and again today, that Perú's assertions
22 based on Ms. Dufour's conclusion represents new

1 arguments, but Claimant first alleged that this mine
2 was on the, and I quote, "cusp of the exploitation
3 stage" at Paragraph 5 of the Memorial.

4 Now, Perú responded in Subsection II.F.1 of
5 the Counter-Memorial citing evidence that the mine
6 could not have begun exploitation before Claimant's
7 PPF Agreement obligations began.

8 Claimant then reintroduced a new mining
9 expert report in the Reply with Micon, which expounded
10 Claimant's position on the Invicta mine's permitting
11 status.

12 Now, I can, Mr. Chairman, respond to the
13 question about some of the permits that addressed and
14 the sequence. I'm concerned about the time. I'm
15 happy to go through that table now, and I would seek
16 the Tribunal's indulgence if this can be treated part
17 of a response to the question that you asked earlier.

18 PRESIDENT CROOK: I think our own time has
19 about elapsed, so perhaps you should just drive on.

20 MR. GRANÉ: Okay. Can we come back to this
21 point because it seems, Mr. Chairman, based on the
22 question, that there is a concern on the part of the

1 Tribunal? I'll bow to the basis for us saying that we
2 are responding to Claimant's arguments and submissions
3 in the Reply with Ms. Dufour's expert report.

4 If you're satisfied that we have done so, we
5 can move on. If not...

6 PRESIDENT CROOK: I can't tell you we're
7 satisfied. We haven't really had the opportunity to
8 deliberate on this question, but if we feel we need to
9 hear more, we'll get back to you.

10 MR. GRANÉ: Thank you very much,
11 Mr. President.

12 Therefore, I will not address the table, but
13 I will just make an observation based on what we heard
14 today, and the request that Claimant has made.

15 Now, again, Perú engaged Ms. Dufour to
16 evaluate the conclusions of that new evidence
17 submitted by the Claimant in the Reply.

18 Ms. Dufour also addressed the issue of
19 social license, as you know, as part of her report
20 based on her ample experience in the mining sector in
21 representation of mining companies. And surely,
22 Claimant cannot argue that a social license is a new

1 argument. It was one of the central arguments raised
2 by Perú, including on the basis of other expert
3 evidence.

4 But yet, Claimant has doubled down in the
5 Reply on its argument that the--doubled down on its
6 argument in the Counter-Memorial saying that the
7 social license is a hollow defense, were the words
8 that were used today by the Claimant's counsel.

9 But yet, Claimant is now asking you for the
10 first time this morning to make an interim ruling to
11 disregard Ms. Dufour's expert testimony. And Perú has
12 objected to that request. It's baseless. There's no
13 procedural rule, you know, why the expert evidence
14 submitted by Ms. Dufour should be disregarded.

15 But second, Claimant's request is improper
16 and untimely. Claimant has had Ms. Dufour's report
17 since 25 January 2023; yet, it has chosen to ambush
18 Perú and this Tribunal by making that request today.
19 And Claimant's counsel unwittingly revealed why they
20 have made that request.

21 It stated that they would consider--or they
22 would decline to cross-examine Ms. Dufour if the

1 Tribunal grants Claimant's request. Claimant doesn't
2 want you to hear from Ms. Dufour, and that's why it's
3 asking you to disregard that expert evidence, because
4 it knows that it's fatal to its case on causation.

5 But as I stated, Perú firmly objects to
6 Claimant's request.

7 In any event, if the Tribunal is prepared to
8 even entertain Claimant's extemporaneous request, Perú
9 requests that the Micon report, which was introduced
10 in the Reply, be disregarded.

11 PRESIDENT CROOK: Counsel, perhaps this
12 isn't really the time to argue this issue. I mean,
13 our concern is just whether what's being done here is
14 consistent with Procedural Order Number 1, 14-4, where
15 we say, in the second round of submissions, the
16 parties will limit themselves to responding to facts
17 and legal arguments made in the first round, and
18 whether we're falling within that ambit, but I don't
19 think it's really a good investment of anybody's time
20 for us to argue the issue now on the basis of the
21 position we have got now.

22 MR. GRANÉ: Understood. Thank you,

1 Mr. Chairman, for that guidance.

2 If the Tribunal decides we can, then I'll
3 make submissions at that point in the interest of your
4 order, but we will move on pursuant to your
5 instructions, Mr. President.

6 So in addition to the above permits,
7 Claimant needed to secure a reliable ore processing
8 plant capacity to meet its repayment obligations, but
9 as of October 2018, Claimant did not have such
10 capacity, either at offsite plants or at the plant
11 operated by Claimant.

12 Now, Claimant witnesses, including
13 Mr. Castañeda, acknowledge that the three plants at
14 which Claimant conducted preproduction testing
15 provided it with, and I quote, "unsatisfactory results
16 and experiences." This is Castañeda first witness
17 statement, Paragraph 89. Now, the processing plants
18 lacked the capacity to meet Claimant's needs, were
19 unreliable, and/or lacked the permit needed to
20 lawfully process ore.

21 I'm coming to the end of my presentation,
22 Mr. President, my portion.

1 Now, in October 2018, Will Ansley,
2 Claimant's CEO, summarized the impact of these issues
3 to Claimant's co-founder, Gordon Ellis, present in the
4 room, saying--or declaring that, and I quote, "As a
5 result of milling being significantly behind the mine
6 development, I have suspended all development
7 activities and sent the contractors away."

8 This is Exhibit MI-0007.

9 ARBITRATOR GRIFFITH: Can you remind us of
10 the date of that?

11 MR. GRANÉ: I will in a minute,
12 Mr. Griffith.

13 PRESIDENT CROOK: You say October 2018.

14 MR. GRANÉ: 19 October 2018, Mr. Griffith.

15 So these issues were not, as Claimant now
16 argues, and I quote, "easy to remedy," end of quote.

17 Now, Claimant also asserts that its
18 acquisition of the Mallay Plant would have enabled it
19 to meet its commitments to PLI. That, too, is
20 incorrect.

21 And Ms. Dufour will explain in her
22 presentation that even if Claimant had executed the

1 draft agreement with PLI and closed on the Mallay
2 plant transaction with Buenaventura, which it did not,
3 significant time was needed before ore processing
4 could begin at such a plant.

5 And so, Ms. Dufour demonstrates that
6 Claimant could not have begun such processing before
7 July 2020, which would have been way past the
8 commercial exploitation deadline of December 2018
9 under the PPF Agreement and even Claimant's most
10 optimistic prediction of its PPF Agreement delivery
11 scheduled of January 2020.

12 I will, in the interest of time, move
13 forward and skip certain parts.

14 Mr. President, with your indulgence, I will
15 now cede the floor to Mr. Tim Smyth, who will recall
16 Perú's jurisdictional objections and then issues on
17 attribution.

18 I thank you for your patience, and
19 unfortunately, you will hear again from me later on in
20 this presentation. Thank you.

21 PRESIDENT CROOK: Thank you.

22 Mr. Smyth.

1 MR. SMYTH: Thank you, Mr. President. Good
2 afternoon, Mr. President, and Members of the Tribunal.

3 My name is Tim Smyth, and I will be
4 addressing Perú's jurisdictional objections in this
5 case, as well as the attribution issues.

6 Now, Perú has demonstrated in its pleadings
7 that the Tribunal lacks jurisdiction to hear
8 Claimant's claims for two reasons.

9 The first reason is that Claimant disposed
10 of its investment along with its right to bring a
11 treaty claim prior to instituting proceedings. It did
12 so when it transferred its shares in Invicta to PLI
13 Huaura on 26th of August 2019. Consequently, the
14 Tribunal lacks jurisdiction *ratione personae*.

15 The second reason is that Claimant has
16 failed to provide a waiver on behalf of Invicta, the
17 enterprise to whom its claims relate, as was required
18 under the Treaty. As a result, the Tribunal lacks
19 jurisdiction *ratione voluntatis*.

20 Starting with the first objection, I'll
21 begin by summarizing the applicable legal principles.

22 The relevant jurisprudence, including that

1 of the International Court of Justice, instructs that
2 the critical date for assessing the Tribunal's
3 jurisdiction is when proceedings were instituted.
4 This is confirmed, for example, in the Arrest Warrant
5 case in the extract that appears on the slide, and
6 that's RLA-159, Paragraph 26.

7 Second, there is a general rule that an
8 investor must hold a qualifying investment at the time
9 proceedings are instituted; otherwise, the Tribunal
10 will lack jurisdiction. This was confirmed by the
11 Tribunal in the case of Aven v. Costa Rica, a case
12 which is directly on point for two reasons. First,
13 the claimant in that case had disposed of certain
14 investments prior to instituting proceedings. And
15 second, the treaty in that case, the DR-CAFTA, has
16 almost identical definitions of investor and
17 investment to the Treaty in this case.

18 PRESIDENT CROOK: Counsel, let me--I know I
19 promised not to ask questions. I read Aven, and I was
20 struck that the language they used to describe the
21 circumstances that might justify the exception was a
22 little broader than has been used in some settings

1 here.

2 It was not confined to actions by the State.
3 It suggested that actions by third parties might be
4 sufficient. And they quoted a celebrated case, which
5 doesn't seem to be of record here, that would seem to
6 support that proposition.

7 I wonder if you have a thought on that.

8 MR. SMYTH: Sure, Mr. President.

9 The Aven Tribunal, indeed, did refer to the
10 Mondev case, which I think is the one that you're
11 referring to. And the Tribunal distinguished that
12 case on the basis that in the Aven case, there was no
13 direct causation between the actions of the State and
14 the loss of--and the disposal of the claimant's
15 investments.

16 Whereas in that case, while it's correct
17 that they referred to third parties in one of the
18 paragraphs, if you look more closely, the basis of the
19 distinction is this issue of direct causation between
20 State actions and the disposal of the investment.

21 And actually, the Tribunal notes that in the
22 Mondev case, that the disposal of the investment

1 resulted from a foreclosure on the part of the City of
2 Boston, which, of course, would be a local
3 municipality of State agency.

4 PRESIDENT CROOK: Thank you.

5 MR. SMYTH: So the Aven Tribunal examined
6 the relevant case law and concluded that there was "a
7 general rule that an investor must own the investment
8 at the date of the Notice of Arbitration to benefit
9 from treaty protection." And that's RLA-17, Paragraph
10 298.

11 And the justification for that general rule
12 is quite simple.

13 PRESIDENT CROOK: Counsel, I wonder if it
14 would be acceptable to the parties to put Mondev into
15 the record. Would that be agreeable?

16 MR. SMYTH: Sure, yeah.

17 PRESIDENT CROOK: We don't need to have yet
18 another drive, but in due course, if you could put
19 that in, please.

20 MR. SMYTH: Yeah. Of course, Mr. President.
21 I'm sure that won't be a problem.

22 But standing back for a second to focus on

1 the justification for this general rule that was
2 expressed by the Aven Tribunal, it's really that it
3 avoids the State facing a proliferation of claims from
4 successive owners of an investment.

5 And now, moving on, the general rule
6 elucidated by the Aven Tribunal is subject to only two
7 exceptions, which also emerge from the case law.

8 The first is where an investor retains the
9 right to bring a claim against the State in the
10 contract through which it disposes of the investment.
11 This was the case, for example, in the cases of
12 National Grid v. Argentina, and Gemplus v. Mexico,
13 which are in the record as RLA-12 and RLA-18.

14 The second exception was directly referenced
15 for the Aven Tribunal, and this is what we were
16 referring to in our discussion just now, which is
17 where special circumstances are present. And as I
18 said, if you take a close reading of the Aven
19 Tribunal's ruling, it's clear that the Tribunal was
20 talking about direct causation between the State's
21 actions and the loss of the investment. And I'd refer
22 the Tribunal to RLA-17, Paragraphs 299 and 301.

1 When those principles are applied to the
2 facts of this case, the conclusion that must be drawn
3 is that this Tribunal lacks jurisdiction.

4 There is no dispute that the proceedings
5 were instituted on the 30th of October 2020, when
6 ICSID registered Claimant's request for arbitration.

7 There is also no dispute that the disposal
8 of Claimant's shares in Invicta was prior to that, on
9 26th of August 2019. And so, the general rule in Aven
10 applies.

11 The facts likewise show that neither of the
12 two exceptions to the general rule apply.

13 So turning to the first exception, it is an
14 undisputed fact that Claimant transferred its shares
15 to PLI Huaura under the Share Allocation Agreement,
16 and that's in the record at R-0193. And there is no
17 provision in that agreement retaining Claimant's right
18 to bring a claim in relation to the Invicta project.
19 Far from it, the Share Allocation Agreement actually
20 disposes of those same rights.

21 Clause 2.2 of that agreement provided that
22 Andean American, the subsidiary through which Claimant

1 held its shares in Invicta, transferred not only its
2 shares in Invicta, but also a broad, unlimited suite
3 of matters and rights comprising "all matters of fact
4 or of law pertaining to the encumbered shares, [i.e.,
5 the shares in Invicta, without reservation or
6 limitation, and these included, but were not limited
7 to, all economic, ownership and information rights
8 related to the incumbent shares without limitation of
9 any nature." (As read.)

10 And that's at Clause 2.2 of Exhibit R-0193.

11 The rights--sorry--

12 ARBITRATOR GARIBALDI: Excuse me, is that an
13 outright transfer or a pledge?

14 MR. SMYTH: That's in the Share Allocation
15 Agreement, but there is similar language in the pledge
16 agreement which shows that --the wording isn't exactly
17 the same, but a similar suite of rights was pledged to
18 PLI Huaura under the pledge agreement.

19 ARBITRATOR GARIBALDI: Can you give me the
20 reference in the record to both agreements?

21 MR. SMYTH: Share Allocation Agreement is
22 R-0193.

1 And if you indulge me with one minute, I
2 should be able to find the reference for the other.

3 PRESIDENT CROOK: Mr. Smyth, because of the
4 time, perhaps you could provide it after the--

5 MR. SMYTH: Understood. Apologies for the
6 slow retrieval of the reference.

7 PRESIDENT CROOK: No, that's fine. Get it
8 to us later.

9 MR. SMYTH: One of my colleagues has piped
10 up and told me it's R-0097.

11 ARBITRATOR GRIFFITH: This is Tribunal time,
12 but I'm just trying to follow your argument about the
13 exceptions. Is it basically the case that if the
14 Claimant makes out its case on causation, then at the
15 same time, it would have come within the second
16 exception; and if it's unsuccessful on that, it would
17 seem it might fall on the second exception, as well.
18 So it's a chicken and egg somewhat, but if the
19 Claimant is right on its case on its merits, it would
20 seem to overcome the exceptions. If it fails on the
21 merits, it will fail on the exception, as well.

22 MR. SMYTH: Yes. I understand the question,

1 sir. There is--clearly, there is some overlap between
2 the jurisdiction and merits issues when it comes to
3 this particular type of--

4 ARBITRATOR GRIFFITH: I'm just trying to
5 sort out the logical order. If there's two hurdles,
6 and if it falls on the first, on jurisdiction, you
7 don't have to go to the second. Perhaps we can't see
8 it clearing the first hurdle until we answer the
9 second one.

10 MR. SMYTH: As I say, there's certainly
11 overlap, but it's not--that's sort of--if you play out
12 the consequences of a finding of the Tribunal, that
13 there was no deprivation or no direct causation, that
14 would lead to a lack of jurisdiction, of course.

15 And then the same is true, obviously, that
16 the Tribunal could dismiss the expropriation claims on
17 the same basis because that's an expropriation--that's
18 an element of the expropriation.

19 ARBITRATOR GRIFFITH: Basically, you either
20 clear both hurdles or you clear neither.

21 MR. SMYTH: It's sort of--yeah, it's sort of
22 an all-or-nothing situation. So if the Tribunal finds

1 there's no direct causation, it lacks jurisdiction, it
2 would also lead to the dismissal of the expropriation
3 claims.

4 The claims that do not require direct
5 causation, which would probably--potentially include
6 FET or FPS, would perhaps fall into a different
7 category, but I will proceed unless you have further
8 questions on that point.

9 So turning to the second exception, which I
10 think we've already discussed to some extent, so
11 perhaps we can go through it quite quickly.

12 Perú has demonstrated that there is no
13 direct causation between actions of Perú and the loss
14 of the investment. Instead, such loss resulted from
15 Claimant's own actions, both in failing to achieve
16 amicable community relations, and in entering into
17 overly ambitious repayment terms under the PPF
18 Agreement that it could not meet, and would not have
19 met even in the absence of local opposition from the
20 Parán Community.

21 Claimant has not substantively challenged
22 the existence of the above general rule or the two

1 exceptions that I have mentioned. Nor has Claimant
2 cited any case law, examined a Share Allocation
3 Agreement, or indeed the pledge agreements, or refuted
4 Perú's interpretation of those agreements.

5 Instead, Claimant focuses on the definition
6 of an investor under Treaty Article 847, which
7 includes a "national or an enterprise of Canada that
8 seeks to make, is making or has made an investment."
9 And Claimant argues that the words "has made" in such
10 definition demonstrates that the definition
11 encompasses an investor who no longer holds their
12 investment.

13 But that Treaty language actually supports
14 Perú's position, not Claimant's.

15 Now, I don't want to give the Tribunal too
16 much of a grammar lesson here, but the text uses the
17 present perfect "has made." It thus refers to an
18 investment that was made in the past, but has
19 continued through to the present time. And this is
20 confirmed by Sidney Greenbaum's seminal work on
21 English grammar, which notes that "the state present
22 perfect refers to a state that began before the

1 present time of speaking or writing and continues
2 until that time, perhaps including it." And that's
3 RLA-170, page 270.

4 ARBITRATOR GRIFFITH: Counsel, does that
5 include the past pluperfect and future imperfect?

6 MR. SMYTH: Pluperfect is "had," right? So
7 that's--the past perfect would be "I had," "had an
8 investment." Whereas this is sort of, "I have an
9 investment" or "I have made an investment." "Had
10 made" would be the past perfect.

11 ARBITRATOR GARIBALDI: One other thing, you
12 know, I learned English as a second language, but one
13 of the things I learned, and I learned from good
14 teachers, is that the--is that the present perfect can
15 refer also to actions that happened in the past, but
16 that have an importance in the present.

17 So is that something that Greenbaum refers
18 to and is not quoted here, or not.

19 MR. SMYTH: I mean, I'd have to look in
20 detail at the page from the grammar in question, but
21 as I recall, the examples that are used by Greenbaum
22 focus on an action that is started in the past and

1 continues through to the present.

2 So to take an example, if I say, I have
3 bought a house in Washington, DC, it means I still
4 hold--I still own that house, right?

5 ARBITRATOR GARIBALDI: But I tell you--

6 MR. SMYTH: Whereas, if I say, I bought--if
7 I just use the simple past, I bought a house in
8 Washington, DC--

9 ARBITRATOR GARIBALDI: I know, but if I
10 take--that's fine. That's correct usage, but if I
11 tell you I have studied Latin, it doesn't mean that I
12 am still studying Latin. It means that I have studied
13 it in the past, and it is relevant for the--to the
14 present.

15 MR. SMYTH: It has to have some connection
16 through to the present, so you've studied Latin and
17 you still retain that knowledge from your studies, I
18 think is how I would look at it.

19 But also, I think the primary use of the
20 present perfect would be an action that starts in the
21 past, then continues through to the present. And if
22 the parties--if I could just add one thing--if the

1 parties had wanted to make it clear that it included a
2 completed action, they could have just used the simple
3 past. They could have just said an investor who made
4 an investment, they wouldn't have used the present
5 perfect. That would have been their purpose.

6 ARBITRATOR GARIBALDI: I think that we
7 should not debate this anymore. Okay.

8 MR. SMYTH: Understood. Thank you,
9 Mr. Garibaldi.

10 So I think in the interest of time, I will
11 conclude on that first objection and move to the
12 second, just very briefly, which is based on Article
13 823.1(e) of the Treaty, which requires that where a
14 claim is brought with respect to an interest in an
15 enterprise that is owned by a Claimant, that a waiver
16 must be provided, not just on behalf of the Claimants,
17 but also on behalf of that enterprise, and there's no
18 dispute that Claimant failed to provide that waiver in
19 this case, and the Claimant instead relies on an
20 exception under Article 823.5, which provides that
21 there is no waiver requirement where the State has
22 deprived the investor of the relevant enterprise.

1 And so, with this exception, the reliance on
2 this exception fails for quite similar reasons to
3 those discussed in the first jurisdictional objection;
4 namely, Perú has not deprived Claimant of its
5 investment; rather, Claimant lost its investment as a
6 result of its own failings and contractual breach.

7 Accordingly, due to Claimant's failure to
8 provide a waiver from Invicta, the Tribunal lacks
9 jurisdiction to hear Claimant's claims.

10 And so, unless the Tribunal has any further
11 questions, I will now move to the attribution issues.

12 Yes, and if I could just refer the Tribunal,
13 in the response to Mr. Griffith's question, in the
14 Rejoinder of Paragraph 474, we address the issue of
15 the overlapping jurisdiction and merits issues, and
16 the consequences of that.

17 ARBITRATOR GRIFFITH: Thank you.

18 MR. SMYTH: So, turning to the attribution
19 issues, Claimant has argued in this arbitration that
20 the actions of the Parán Community are attributable to
21 Perú under customary international law. Before moving
22 to the specifics of Claimant's arguments, there are

1 two important threshold considerations that bear
2 emphasis at the outset.

3 The first is the outlandish and
4 unprecedented nature of the proposition that Claimant
5 advances: That the actions of a rural or indigenous
6 community should be attributable to a State under
7 public international law.

8 Claimant had two opportunities, in its
9 Memorial and its Reply, to provide precedent to
10 support its hypothesis on attribution, but it did not
11 do so. The reason for this is simple, there is no
12 such precedent. In fact, the only comparable findings
13 of investment Tribunals indicate that rural and
14 indigenous communities cannot be assimilated with the
15 State.

16 In *Bear Creek v. Perú*, for example, a case
17 under the same treaty as the present one and also
18 involving the actions of rural communities, the
19 Tribunal distinguished between the actions of such
20 communities and the State.

21 It noted that, "The indigenous communities,
22 irrespective whether they were in favor of or against

1 the project, are not Respondent party in this
2 arbitration. Rather, the State of Perú and its
3 government are Respondent, and it is their conduct
4 which the Tribunal has to decide upon."

5 And that is at CLA-86, Paragraph 666.

6 Perú submits that exactly the same
7 conclusions should apply in this case in relation to
8 that issue.

9 The second overarching point is that were
10 Claimant's argument to be upheld, this would have
11 far-reaching consequences for the international
12 community. States all over the world will be deemed
13 responsible and potentially liable under international
14 law for any actions of rural communities deemed to
15 have damaged foreign investors. Not only that, but as
16 we shall see, Claimant's arguments are based on the
17 very same legal instruments that Perú has put into
18 effect in order to respect the rights, autonomy and
19 traditions of rural communities. If a state were to
20 be held liable as a result of such instruments, this
21 would provide a powerful incentive to cease
22 recognizing rural and indigenous rights.

1 So moving now to the specific arguments,
2 Claimant bases its attribution theory on ILC Articles
3 4, 5 and 7, but none of the principles of customary
4 international law enshrined in those articles supports
5 Claimant's contention. I'll address each in turn.

6 Claimant argued, for the first time in its
7 Reply, that the Parán Community's actions are
8 attributable to Perú under ILC Article 4. This
9 Article embodies what is often referred to as the
10 structural test for attribution. We've shown the
11 wording this article on the slide. For the sake of
12 brevity, I won't read it, but this article connotes
13 two requirements: First, that the entity is an organ;
14 and second, as the commentaries to the ILC Articles
15 confirm, that the actions in question were carried out
16 in an official capacity.

17 And that's at CLA-18, page 41, Paragraph 7.

18 Neither requirement is met in respect of the
19 Parán Community.

20 Regarding the first requirement, Claimant
21 latches on to the final part of Subparagraph 1 of
22 Article 4 to argue that rural communities are

1 territorial units of the Peruvian State. But that
2 argument is simply wrong.

3 The concept of a territorial unit under
4 international law refers to the political subdivisions
5 of the State; in other words, the constituent,
6 provincial, regional or geographical administrations
7 of which a State is comprised.

8 Indeed, all of the cases cited in the ILC
9 commentaries in relation to territorial units which we
10 have listed on the slide relate to such decentralized
11 administrations. That's at CLA-18, page 41, Paragraph
12 9.

13 Rural communities in Perú, which are
14 communal organizations with separate legal personality
15 from the State, do not fall within this category.

16 And Peruvian law does not support Claimant's
17 proposition. This is important. As confirmed by the
18 Tribunal in Jan de Nul v. Egypt, "To determine whether
19 an entity is a State organ, one must first look to
20 domestic law." That's at RLA-25, Paragraph 160.

21 Rural communities under Peruvian law are not
22 included within the structure of the State under

1 Title IV of the Constitution. And that's important
2 given that Article 4 is the structural test for
3 attribution. Nor are they included under Chapter 14
4 of the Constitution which relates to decentralized
5 regions and municipalities. And this really puts pain
6 to Claimant's argument which it repeated in the
7 presentation this morning, that the Parán Community is
8 a municipality. Rural communities are simply not
9 included in any of those provisions, which you can
10 find at Exhibit C-23, Articles 189 to 199.

11 Even if Claimant had established that the
12 Parán Community was a territorial unit, and therefore,
13 an organ of Perú, it would still have failed to
14 establish that the actions of the community were
15 carried out in an official capacity.

16 Claimant has thus failed to meet the second
17 requirement of ILC Article 4. In fact, Claimant has
18 not even tried to demonstrate that the Parán Community
19 as a whole acted in an official capacity; in any
20 event, the facts and evidence demonstrate otherwise.
21 And notably, at the time, Claimant never believed that
22 the Parán Community acted in an official capacity. I

1 will come back to this point when addressing ILC
2 Article 7.

3 Now, importantly, Claimant has not cited a
4 single legal authority that even remotely supports its
5 contention that rural communities in Perú should be
6 treated as an organ of the Peruvian State. The fact
7 is that not a single legal source or lawyer would
8 seriously argue that rural communities in Perú are
9 organs of the State.

10 This explains why the Claimant did not
11 submit an independent expert opinion in support of its
12 attribution theory.

13 It is also telling that Claimant decided not
14 to call Mr. Vela, the independent legal expert offered
15 by Perú, who, in his expert reports, addressed the
16 standing of rural communities in Perú.

17 Unfortunately, I didn't have time to create
18 an empty chair slide for Mr. Vela, but we can imagine
19 it.

20 So I move now to ILC Article 5.

21 There are two requirements under this
22 principle of attribution: First, the relevant person

1 or entity must be "empowered by the law of that State
2 to exercise elements of the governmental authority,"
3 and second, as with Article 4, the person or entity
4 must be "acting in that capacity in the particular
5 instance."

6 Regarding the first requirement, the ILC
7 commentaries emphasize that the analysis "depends on
8 the particular society, its history and tradition,"
9 which in this case, would include the historical
10 existence of indigenous and rural communities since
11 pre-colonial times in Perú.

12 The commentaries also set out the following
13 four non-exhaustive factors to consider: The content
14 of the relevant powers, the manner of their conferral,
15 the purpose of the conferral, and the level of
16 accountability the person or entity has to the State.
17 You can find this at CLA-18, page 43, Paragraph 6.

18 Now, in Claimant's presentation earlier, you
19 heard a lot about the Rondas Campesinas on whom
20 Claimant's ILC Article 5 arguments focus almost
21 exclusively. Contrary to Claimant's arguments, the
22 Rondas Campesinas are not empowered with governmental

1 authority.

2 Under Peruvian law, rural communities have
3 the right to establish Rondas Campesinas to exercise
4 those communities' traditional rights of self-defense
5 over their territory and property, and also cooperate
6 with the authorities of the Peruvian Government, where
7 necessary. And this much is clear from the law on the
8 Rondas Campesinas, which is at Exhibit R-0116, Article
9 1.

10 Applying the four factors I just mentioned
11 to the Rondas Campesinas, all of these weigh against
12 attribution in the instant case.

13 First, regarding the content of the relevant
14 powers, the Claimant makes much of the fact that the
15 Rondas Campesinas exercise certain conciliation
16 functions pursuant to Article 149 of the Constitution
17 and related laws. And you can find that article at
18 Exhibit C-23, Article 149.

19 However, such functions are not governmental
20 in nature. Article 1 of the Rural Patrols law
21 expressly states that Rondas Campesinas carry out
22 "extrajudicial conciliation functions." That's

1 Exhibit R-0116, Article 1.

2 The Rondas only have power to apply
3 customary law of rural communities, not Peruvian law.
4 That's at Exhibit C-23, Article 149.

5 The right to establish Rondas Campesinas
6 does not reflect an extension of State power. As the
7 Supreme Court has confirmed in its decision of 3
8 November 2009, which Claimant also cited this morning,
9 they "constitute a form of communal authority in the
10 places or rural areas of the country where they
11 exist." That's at Exhibit C-599, page 4, Paragraph 7.

12 That's communal authority, not State
13 authority.

14 Regarding the second factor, the manner of
15 conferral, such powers are not conferred as such;
16 rather, they constitute a recognition of the inherent
17 and historical rights and prerogatives of rural
18 communities. This was, again, confirmed by the
19 Supreme Court in its decision. That's at Exhibit 599,
20 page 5, Paragraph 7.

21 Similarly, in relation to the third factor,
22 the purpose of the relevant powers is not to further

1 the exercise or extend the reach of the State, but to
2 recognize the inherent rights of rural communities.
3 This is consistent with various international law
4 instruments regarding the recognition of indigenous
5 rights such as the ILO Convention 169, to which Perú
6 is a party.

7 Article 2.2(b) of that Convention provides
8 that States must take "measures for...promoting the
9 full realization of the social, economic and cultural
10 rights of these peoples with respect for their social
11 and cultural identity, their customs and traditions,
12 and their institutions." That's at RLA-28,
13 Article 2.2(b).

14 Now, Claimant mentioned in passing during
15 its presentation this morning a MINEM determination
16 that the Parán Community did not meet the requirements
17 for qualifying as an indigenous people for the
18 purposes of the prior consultation requirements under
19 Law 29785. That was the law that looked to implement
20 that same prior consultation requirement under ILO
21 Convention 169.

22 Really, this is a red herring, in our

1 submission. It doesn't change the fact that rural
2 communities can be considered to be indigenous people
3 under Peruvian law, and the fact that, really, when
4 you take a step back, their legal status and the
5 protections afforded to them and their treatment under
6 Peruvian law is analogous to indigenous communities,
7 regardless of the, you know, precise modalities that
8 were cited in the document cited by Claimants this
9 morning.

10 So the international conventions that Perú
11 has cited in its submissions continue to be relevant
12 for the Tribunal's consideration.

13 With respect to the last factor, namely, the
14 level of accountability, pursuant to Article 89 of the
15 Peruvian Constitution, the rural communities are
16 autonomous in their organization. In fact, much like
17 indigenous communities, as they're defined under
18 international law.

19 In fact, as Professor Meini confirms in his
20 unchallenged testimony, empty chair slide again, were
21 Perú to interfere with rural communities' internal
22 affairs, the State could face liability. That's at

1 the Meini report at Paragraph 50.

2 Oddly, Claimant seems to dismiss the
3 relevance of this evidence, despite accepting the fact
4 that accountability is indeed one of the factors for
5 consideration under ILC Article 5.

6 Now, even if the Rondas Campesinas were
7 imbued with governmental authority, which is not the
8 case, Claimant has not satisfied the second limb of
9 the test, namely, that the relevant acts were carried
10 out in exercise of governmental authority. The
11 Claimant has not satisfied that criteria.

12 Claimant, again, relies heavily on the
13 conciliatory role or jurisdictional function of the
14 Rondas Campesinas under Article 149 of the
15 Constitution; however, a closer look at that rule--at
16 the role under that article is strictly limited by
17 subject matter and territorial scope.

18 Article 149 provides that, "The authorities
19 of the Rural and Native Communities, with the support
20 of the [Rural Patrols]," that's the Rondas Campesinas,
21 "may exercise jurisdictional functions within their
22 territorial scope in accordance with customary law,

1 provided that they do not violate the fundamental
2 rights of the individual." That's C-23, Article 149.

3 So this provision implies at least three
4 limitations on the powers of Rondas Campesinas. The
5 relevant functions must be exercised (1) in the rural
6 community's territory; (2) in accordance with
7 customary law; and (3) in conformity with fundamental
8 rights.

9 Supreme Decree Number 25-2003 then imposes a
10 further limit on the disputes in relation to which
11 Rondas Campesinas may act as conciliators.

12 Those disputes are limited to only disputes
13 related to the possession, use of rights of communal
14 property, and the use of different communal resources.
15 That's at R-103, Article 13.

16 The actions of which Claimant complains, the
17 forceable entry to the mine site, detention of
18 individuals, destruction of property and obstruction
19 of an access road, fall well outside the scope of
20 those limits.

21 The Claimant itself stresses that such
22 actions took place outside the community territory,

1 including in its presentation this morning where they
2 said, and I quote, "Parán were on Lacsanga's land
3 continuously."

4 Such actions did not concern use of rights
5 or communal property, and would have violated any one
6 of a number of several fundamental rights, including
7 the right to physical integrity, property, liberty and
8 security of the person. Again, that's from the
9 Constitution, Exhibit C-23, Article 2.

10 The actions of the Parán Community
11 ultimately were the actions of private individuals
12 acting in a private capacity. The principle of
13 attribution under ILC Article 5 is, therefore, simply
14 not met.

15 Lastly, the Claimant belatedly relied on ILC
16 Article 7 in its Reply, which provides that: "The
17 conduct of an organ of a State or of a personal entity
18 empowered to exercise elements of the governmental
19 authority shall be considered an act of the State
20 under international law if the organ, person, or
21 entity acts in that capacity, even if it exceeds its
22 authority or contravenes instructions."

1 Confusingly, Claimant seemed to allege in
2 its skeleton at Paragraph 77, and indeed in its
3 presentation this morning, that this Article provides
4 a separate ground of attribution to ILC Articles 4 and
5 5. That is not the case.

6 The wording of the article plainly
7 references ILC Articles 4 and 5, and it still requires
8 that the relevant person or entity act in an official
9 capacity. However, the article simply clarifies that
10 those acts were not per se fall outside such capacity
11 just because they are ultra vires.

12 The key issue here that Claimant still fails
13 to grasp is that, for Article 7 to apply, the relevant
14 acts must be carried out in exercise of ostensible
15 authority; that is, under cloak of authority. As
16 Judge Crawford explains, "A State is not responsible
17 for every act done by an individual in its service,
18 but only when the individual purports to act on behalf
19 of the State." And that's at RLA-24, page 137.

20 There is, therefore, a distinction between,
21 on the one hand, official but ultra vires acts, which
22 are attributable, and on the other hand, acts that are

1 not carried out in exercise of any ostensible
2 authority, which are not attributable.

3 And there's a consistent line of
4 jurisprudence to this effect, which was cited by Perú
5 in its pleadings. And I would respectfully refer the
6 Tribunal to the discussion of such jurisprudence at
7 Paragraphs 461 to 466 of Perú's Counter-Memorial, and
8 the cases of Mallen, Caire, and Yeager addressed
9 therein, which are at RLA-31, 32, and 33.

10 And just briefly on an issue that Claimant
11 referred to this morning in its presentation, which
12 was the use of weapons by the Parán Community that
13 were allegedly provided by the Peruvian State, in the
14 context of combatting terrorism, just one point that
15 I'll highlight in relation to this for the purpose of
16 attribution is that there's never been a suggestion at
17 any point that those weapons were used for the purpose
18 for which they were, they were provided, which
19 ultimately was historical, around 30 years ago, and is
20 effectively obsolete.

21 So even if you got to the point where you
22 considered that the provision of those weapons is some

1 sort of conferral of State authority, it has no
2 relevance for the--or it has no bearing on the
3 ultimate conclusion in relation to attribution.

4 Claimant has provided no credible evidence
5 that the Parán Community was acting or even purporting
6 to act in exercise of official authority.

7 In fact, Claimant's position is belied by
8 its own contemporaneous correspondence, which shows
9 that it did not consider that the Parán Community or
10 its Ronda Campesina were organs, or that they were
11 empowered with governmental authority, or that they
12 were acting in an official capacity.

13 In fact, in a letter to MINEM dated 6
14 February 2019, Claimant described the Parán Community
15 members as, and I quote, "terrorists."

16 That's at Exhibit C-15, page 2. It's a
17 classic non-State actors.

18 And in all of its contemporaneous
19 discussions with State organs, including MINEM,
20 Claimant not once argued or even suggested that the
21 Parán Community had exercised elements of governmental
22 authority.

1 Moreover, in its letter to its creditor, PLI
2 Huaaura, dated the 19th of August 2019, Claimant argued
3 that a provision in the PPF Agreement obliged PLI
4 Huaaura to negotiate to resolve repayment obligations
5 in the event of force majeure or an act of State.

6 And that's at R-218, page 3.

7 Had Claimant genuinely believed that the
8 actions of the Parán Community were imbued with
9 official authority, it surely would have relied on
10 such wording in relation to act of State to argue that
11 these actions qualified as an act of State.

12 However, it did not, and instead, argued
13 that such actions constituted continuing force
14 majeure.

15 And the inconsistencies that I've just
16 identified really are emblematic of Claimant's
17 attribution arguments in general. Such arguments
18 ignore the legal standard, are formulated on the hoof
19 out of expediency, and are entirely contradicted by
20 the evidence. The Tribunal should therefore have no
21 difficulty dismissing them and concluding that the
22 actions of the Parán Community are not attributable to

1 Perú under international law.

2 And with that, I pass to my colleague,
3 Patricio Grané Labat, to discuss Claimant's merits
4 claims.

5 MR. GRANÉ: Mr. President, should we proceed
6 or is this time for a break? We're in your hands.

7 PRESIDENT CROOK: Let's do five minutes.

8 MR. GRANÉ: And before we break, may we ask
9 Ms. Torres to give us an update on time?

10 SECRETARY: You are up to one hour and 48
11 minutes.

12 MR. GRANÉ: Thank you.

13 (Whereupon, there was a recess in the
14 proceedings, 4:27 p.m. - 4:31 p.m.)

15 PRESIDENT CROOK: All right. An hour and 12
16 minutes remaining; is that right?

17 SECRETARY: Yes, sir.

18 PRESIDENT CROOK: Okay. All right. To the
19 Respondent.

20 MR. GRANÉ: Thank you, Mr. President. I
21 will now address the three substantive claims raised
22 by Claimant under the Treaty.

1 And I begin by noting that for the most
2 part, there is no disagreement between the parties
3 concerning the applicable legal standard under the
4 Treaty. However, Claimant fails to apply those
5 standards to the facts.

6 And Claimant's briefs are mostly devoted to
7 presenting a self-serving and partial accounting of
8 the facts and then slapping a label on such facts, and
9 it did the same thing this morning. It is telling
10 that this morning Claimant spent five minutes of its
11 three-hour-long presentation addressing the merits.
12 And I had to check that fact with my team.

13 And I did so because when the facts are
14 properly assessed under the relevant and
15 well-established legal standards, the conclusion is
16 that Perú did not breach its obligations under
17 international law.

18 And I will begin by addressing the first and
19 the main claim advanced by Claimant concerning full
20 protection and security.

21 Now, Article 805 of the Treaty provides that
22 each party shall accord to covered investment

1 treatment in accordance with the customary
2 international law minimum standard of treatment of
3 aliens, including... full protection and security.

4 And then that same provision further
5 specifies that the concept of FPS and FET does not
6 require treatment in addition to or beyond that which
7 is required by customary international law minimum
8 standard of treatment.

9 Now, Claimant acknowledges, as it must, that
10 the applicable standard of FPS is that under customary
11 international law MST.

12 Now, the parties are also in agreement that
13 the FPS standard requires a host State to exercise a
14 reasonable due diligence.

15 And you have the quotes, and you find the
16 sources for all of these in our Reply 626 to 627, and
17 then 682.

18 Now, the parties also are in agreement that
19 that FPS standard does not impose strict liability on
20 the host State to prevent physical or legal
21 infringement of the investment or provide any
22 guarantee or warranty.

1 And in general terms, Claimant also agrees
2 with Perú that the State is expected to take, and I
3 quote, "such measures to protect the foreign
4 investment as are reasonable under the circumstances."
5 And also that the Tribunal, and I quote, "must take
6 into account the circumstances of the particular
7 case." And finally, that the FPS standard is an
8 objective one, one that does not vary from State to
9 state or investor to investor.

10 Now, despite Claimant agreeing that the
11 reasonability of the State's measures to protect
12 investment must take into account circumstances of the
13 case, Claimant incorrectly argues that any
14 consideration of the particular circumstances of the
15 case would render the FPS obligation less objective
16 and therefore inappropriate.

17 But Claimant's position is inconsistent with
18 the case law. The jurisprudence, some of which is
19 accepted by Claimant itself, demonstrate the following
20 points: One, that the FPS obligation under customary
21 international law is an obligation of means rather
22 than of results.

1 Claimant concedes this point in its Reply
2 Paragraph 626, but fails to respect it. Claimant also
3 recognizes that the State undertook affirmative steps
4 to protect the investment, but nonetheless demands
5 compensation because such steps did not achieve
6 Claimant's desired result of quashing the Parán
7 Community's opposition to the Invicta project.

8 The jurisprudence also demonstrates that the
9 due diligence standard requires a State to take such
10 measures to protect the foreign investment as are
11 reasonable, again, under the circumstances.

12 And Claimant concedes this point in Reply
13 Paragraph 626, but argues that Perú's decision not to
14 use force against the rural community when Claimant
15 demanded it was unreasonable. And it is established
16 by case law, including by the Tribunal in Strabag v.
17 Libya, that the FPS duty of due diligence cannot be
18 viewed in the abstract and in isolation from the
19 conditions prevailing in the host State.

20 This is RLA-84, Paragraph 234.

21 Thus, in contrary to Claimant's argument, in
22 assessing Claimant's claim of violation by Perú of the

1 FPS obligation, the Tribunal is indeed required to
2 consider whether the State's conduct was reasonable
3 under the relevant circumstances and conditions
4 prevailing in this particular case.

5 Now, the legal authorities cited by the
6 parties recognize that the circumstances found to have
7 been relevant include, inter alia, the general
8 situation within the State, that's CLA-an authority
9 submitted by Claimant 25, Paragraph 406; the State's
10 development, means and resources, also circumstances
11 relevant, same authority, CLA-25; and the existence of
12 civil strife, RLA-0008, Paragraph 310.

13 Now, Perú explained in the Counter-Memorial
14 and again in the Rejoinder that the circumstances
15 giving rise to and surrounding the conflict included
16 the following:

17 Both within and outside of Perú, there is a
18 long history of social conflict between mining
19 companies and the local communities.

20 These conflicts are multidimensional because
21 they implicate a balancing of rights that the State
22 must carefully manage between the territorial and

1 human rights of certain--I'm sorry, between the
2 territories and the human rights of certain protected
3 communities and the rights of investors.

4 Both within and outside of Perú, free and
5 democratic societies permit the use of force by law
6 enforcement, but only under limited and exceptional
7 circumstances. And the competent authority bears
8 ultimate responsibility and discretion to decide if,
9 when and how to deploy those resources, mindful of the
10 potential consequences of doing so.

11 Both within and outside of Perú, law
12 enforcement agencies are not designed or equipped to
13 serve as private security forces for companies and
14 their investments.

15 When force has been used by State actors in
16 the context of social conflicts, it has proved
17 counterproductive to long-term solutions in this
18 context of social conflict between mining companies
19 and rural communities.

20 And notably, Claimant distorts, not for the
21 first time, Perú's explanation and ignores many of
22 these circumstances, dismissing them as aggravating

1 factors or excuses, and therefore not relevant.

2 That's what they said at the skeleton prehearing brief
3 in Paragraphs 98 to 99.

4 Now, like many other democratic States with
5 this history of social conflict with rural and
6 indigenous communities in the extractive sector, Perú
7 developed a legal and policy framework that reflects
8 both international treaty law and the protected status
9 of certain communities; establish corporate social
10 responsibility norms, ESG standards, and
11 industry-imposed practices.

12 The law and policy of other democratic
13 states, including Canada, which directly assisted Perú
14 in developing the applicable framework for both
15 prevention and management of social conflict and the
16 lessons learned from Perú's own history of social
17 conflict in the mining sector.

18 Now, on the whole, Perú's legal framework
19 and institutions aim to ensure the active and
20 constructive participation of local communities,
21 encouraging mining companies to obtain the acceptance
22 of their mining projects by local communities, and

1 promote a dialogue as the best means of resolving any
2 disputes that may arise with the view to obtaining a
3 long-lasting, durable, sustainable resolution to that
4 conflict.

5 And all of what I have mentioned are
6 circumstances that must be taken into consideration
7 when assessing Perú's conduct in the present case.

8 Now, the Tribunal will recall that Claimant
9 began this arbitration alleging that Perú took no
10 action, and I quote, "in relation to Claimant's social
11 conflict with the Parán Community."

12 In the Counter-Memorial, Perú provided a
13 detailed account of Perú's--can we go back one slide,
14 please. Thank you.

15 These are some examples of Claimant arguing
16 in its memorial that Perú took no action, but in the
17 Counter-Memorial, Perú provided a detailed account of
18 Perú's consistent, affirmative and multi-pronged
19 effort throughout the course of the conflict to help
20 Claimant find a lasting resolution. As illustrated in
21 this slide with some concrete examples, Perú activated
22 a panoply of State agencies, including--and I'll give

1 some acronyms. In the interest of time, I will not
2 spell them out, but they're all included in the
3 glossary to our submissions.

4 The OGGs, the office within the Ministry of
5 Energy and Mines that deals with social conflicts, the
6 Office of the Ministry and Vice Ministry, again, of
7 Energy and Mines, the Peruvian National Police, the
8 Ministry of the Interior, the PCM, which is the
9 president, council, or the cabinet, the Ombudsman
10 Office, the General Directorate of Internal
11 Government, the Public Prosecutor's Office, the Huaura
12 Subprefecture, Leoncio Prado Subprefecture, and the
13 OEFA, the regulator on environmental issues.

14 Perú took immediate action to investigate
15 the relevant facts and potentially legal actions after
16 the June 2018 protest, and prevented the September
17 2018 protest.

18 In total, Perú held nearly 30, 3-0, meetings
19 with Claimant and the Parán Community, and conducted
20 seven mediations between the parties.

21 Perú's efforts proved fruitful and led to
22 the February 2019 agreement.

1 Perú continued efforts to bring the parties
2 together to resolve their differences even after
3 Claimant aggravated the conflict when it unleashed the
4 War Dogs.

5 These actions were designed to encourage
6 dialogue and to grant Claimant an opening to try to
7 rehabilitate its reputation and relationship with the
8 Parán Community and rebuild that trust that is a
9 critical ingredient for resolving the dispute,
10 obtaining that acceptance of the mining project.

11 When these actions taken by Perú are
12 assessed under the applicable legal standard,
13 including in the light of the circumstances prevailing
14 at the time, and the conditions and this long history
15 that I have alluded to, the conclusion must be
16 drawn--that must be drawn is that Perú exercised
17 reasonable due diligence, and thus complied with
18 obligations of FPS under customary international law.

19 But seeing its original case theory
20 debunked, Claimant no longer argues that Perú took no
21 action. Instead, it now insists that the action that
22 Perú took was insufficient and inadequate because Perú

1 did not quash local opposition and forcibly put an end
2 to the Parán Community's protests in opposition to the
3 project.

4 Claimant is thus arguing before this
5 Tribunal that anything short of use of force against
6 the rural community in late 2018 and early 2019 was
7 unreasonable and constitutes an international wrongful
8 act. And in the process, Claimant has made clear that
9 it does not agree with Perú's public policy of
10 prioritizing dialogue over the use of force to resolve
11 social conflict in its mining sector, such as the one
12 that is the subject of this arbitration.

13 In an attempt to offer some legal support
14 for its new theory, Claimant invents a set of alleged
15 obligations that it posits are contained or subsumed
16 within the FPS standard.

17 Claimant argues that Perú, through the PNP,
18 should have preemptively used force against the Parán
19 Community and provided the equivalent of a private
20 security service thereafter.

21 And Claimant's position is wrong for many
22 reasons.

1 First, FPS, under customary international
2 law, does not include an obligation to take, and I
3 quote--obligation to, and I quote, "take all necessary
4 measures to prevent harm," end of quote. The standard
5 is one, as we saw, due diligence by taking measures to
6 protect Claimant's investment that are reasonable
7 under the circumstances; not take all necessary
8 measures to prevent harm, which is Claimant's
9 submission.

10 The second, FPS, under customary
11 international law, does not include a guarantee or
12 warranty against all possible harm. Thus, Claimant's
13 incessant position that Perú should have prevented all
14 possible harm to its investment does not satisfy its
15 burden, showing that Perú failed to take reasonable
16 action.

17 And third--in the circumstances.

18 And third, it would not have been reasonable
19 or even legal under Peruvian law for Perú to
20 preemptively use force against the Parán Community as
21 Claimant has suggested on a number of occasions.

22 For example, Claimant has not bothered to

1 explain why, when or how Perú should have singled out
2 the Parán Community from all the rural communities in
3 the country to forcibly confiscate the weapons that
4 remained in circulation as part of a--of this
5 historical counter-insurgency fight against terrorism
6 and the Shining Path.

7 But even this is another red herring
8 argument, because Claimant has not demonstrated that
9 confiscation of weapons held by certain members of the
10 community would have prevented any of the Parán
11 Community's protests or opposition to the project.

12 Neither has--and I'll come back to this
13 point and the relevance for the legal analysis and
14 standard that must be applied.

15 Neither has Claimant proven that Perú had an
16 obligation to use force. Perú and Mr. Meini have
17 demonstrated that Claimant's arguments on Peruvian law
18 concerning the use of force are simply wrong. The
19 arguments submitted by Claimant are simply wrong. In
20 fact, they are so far-fetched that Claimant was
21 evidently unable to find any legal expert in Perú that
22 would agree with this interpretation of Peruvian law

1 on this issue. Instead, Claimant relies solely on the
2 legal interpretation advanced by its international
3 counsel.

4 Members of the Tribunal, Claimant's claims
5 are based mainly on the decision of Perú not to use
6 force. Mr. Meini is the only Peruvian criminal law
7 expert in this arbitration that addresses the issue of
8 the use of force under Peruvian law.

9 And the Claimant decided not to call him for
10 cross-examination. Another empty chair. Another
11 slide. We can put up Claimant's slide with the empty
12 chair. In my 20 years of practicing investment
13 arbitration, I have never seen an opposing party that
14 has not offered a single independent legal expert on
15 the law of the host State, particularly on an issue
16 that is central to its case theory. Nor have I seen
17 that party not call the only independent legal expert
18 that addresses a central legal issue.

19 Not only has Claimant not been able to find
20 a criminal law expert that could challenge Mr. Meini's
21 explanations and expert evidence, and that it chose
22 not to call Mr. Meini, but clearly now resorts to a

1 grossly--a gross distortion of what Mr. Meini says.

2 And you heard counsel say this morning that
3 Mr. Meini stated that the police has no discretion
4 under Article 8.2 of Legislative Decree 1186. That is
5 not what Mr. Meini has said in his expert report.

6 And we respectfully invite the Tribunal to
7 read again Mr. Meini's report, including Paragraph
8 134, which is the paragraph that Claimant's counsel
9 has knowingly misrepresented this morning.

10 What Mr. Meini explained is that the use of
11 police force is regulated, not arbitrary or entirely
12 discretionary. And he explains the situations in
13 which that use of force can be deployed. There is an
14 element of discretion within the regulation that is
15 provided by the provisions that we have cited,
16 including Article 8.2 of Legislative Decree 1186.

17 But stripped to its core, Claimant's claim
18 is that Perú's decision not to use force against a
19 poor, rural community constitutes an internationally
20 wrongful act for which Perú must be ordered to pay
21 tens of millions of US dollars.

22 In the process, Claimant is asking the

1 Tribunal to second-guess the decision by the national
2 police that using force against that community at that
3 time in the prevailing circumstances was neither
4 required nor advisable. And specifically, Claimant is
5 asking each of you to condemn the State's decision to
6 promote a peaceful and long-lasting resolution of the
7 conflict. Neither the FPS nor any other standard
8 under customary international law could possibly
9 support that finding.

10 International law stresses the deference to
11 be afforded to States regarding decisions taken based
12 on the weighing of sensitive public policy factors,
13 including in matters of security.

14 And this morning, Claimant unwittingly
15 recognized that it is not for International Tribunal
16 to dictate to a sovereign State how to use its force.

17 Claimant's counsel said that how Perú uses
18 force is not for the Tribunal to decide. Perú agrees.

19 Now, concerning the operational plan to
20 which Claimant devotes so much attention, Claimant
21 focuses obsessively on who decided not to execute an
22 operation--a police operation plan in mid-February

1 2019, and surely there will be many questions about
2 this in the cross-examination of Mr. Saavedra.

3 Now, Mr. President, you asked what is the
4 relevance--you asked Claimant's counsel, what is the
5 relevance as a matter of international law of all we
6 have heard about who did or did not block the
7 performance of the intervention plan.

8 Now, Claimant said in response that it is
9 not for us--and I--I--maybe this is not verbatim, but
10 it's fairly close.

11 Claimant said in response that it is not for
12 us to say who blocked the Police Operational Plan.
13 Now, there are two problems with that answer.

14 First, it is yet another change of position
15 by Claimant. Because in the Reply in Paragraph 29, it
16 did purport to say who blocked the operational plan.
17 It said, I quote, "The facts show that the police were
18 ready to implement the operational plan on 19 February
19 2019 at 9:00 a.m., but the MININTER, the Ministry of
20 the Interior, blocked its implementation," end of
21 quote. So it did purport to tell you who blocked it.

22 But in any event, that theory is baseless.

1 It is sheer and unsupported speculation by Claimant
2 and its witnesses. And Mr. Saavedra has explained
3 this in his witness statement and no doubt you will
4 hear from him again this week in response to the
5 questions that the Claimant's counsel will ask on this
6 issue.

7 The second problem with that answer is that
8 it does not answer the question that Mr. President
9 posed.

10 The answer is that it does not matter. What
11 matters is that, contrary to Claimant's contention,
12 the police decided not to implement that operational
13 plan, and it did so for good reason, which Perú has
14 spent much time explaining in its submissions, but
15 which Claimant continues to ignore.

16 But in any case, Claimant's allegation that
17 the use of force would have prevented the loss of its
18 investment is simply not true; again, speculation.

19 This is legally relevant and material to the
20 outcome of this case because the Claimant concedes
21 that to establish a breach of the FPS obligation, it
22 must demonstrate that if the State had acted with due

1 diligence, it would, and I quote, "in fact have
2 prevented the Claimant's alleged losses." Reply
3 Paragraph 626, Counter-Memorial 494, which is citing
4 RLA-0007, Paragraph 166.

5 Consistent with the previous conduct and
6 practice, it is all but certain that even if the PNP,
7 the police, had violently crossed the Access Road
8 Protest, the Parán Community would simply have
9 returned not long after their forceful removal, and
10 reestablished its civilian blockade because that
11 forceful removal did not solve the underlying social
12 conflict, and we've seen this time and again in Perú
13 and elsewhere, and we will again look at the copious
14 amounts of evidence on the record that demonstrates
15 that. That's not something that Claimant can
16 challenge.

17 As you will recall, even Claimant's witness,
18 Mr. Castañeda, admits this in Paragraph 74 of his
19 first witness statement, which you have on the screen.

20 Now, examples of police intervention that
21 Claimant invokes prove this point. For instance,
22 Claimant invokes Las Bambas as a success. That's how

1 Claimant presents Las Bambas, a success, and proffers
2 it as evidence that forceful removal of protesters is
3 the correct response to such conflicts.

4 Claimant is wrong and the facts demonstrate
5 that, including those that are evidenced on the
6 annexes, the exhibits, in the record.

7 Now, the timeline that you have on your
8 screen, unfortunately, because of timing constraints,
9 we'll not be able to go back to discuss this timeline
10 today, but this timeline shows a series of
11 confrontations between police and local community at
12 Las Bambas nearly every year starting in September
13 2015 through July 2022.

14 After each police intervention to remove a
15 blockade, the local community restored the blockade in
16 greater numbers at a later point, and with each
17 forceful intervention, additional violence, injuries
18 and deaths were reported.

19 Now, this is important: The mining company
20 in Las Bambas belatedly recognized that the use of
21 force had been counterproductive after all, and did
22 not address the underlying social conflict, and the

1 rejection by the local community of that mining
2 project.

3 In November 2022, after four deaths and 97
4 injuries, and after the police's repeated
5 interventions failed to resolve the dispute, the
6 mining company itself requested that the State help
7 to, and I quote, "solve the problem through dialogue."
8 Exhibit R-0227.

9 The situation with fair and equitable
10 treatment is not dissimilar.

11 The Claimant's FET claim largely overlaps
12 with the FPS claim and fails for similar reasons. And
13 as a threshold matter, we recall that Claimant's
14 alleges that Perú breached the FET obligation through
15 a composite act.

16 Now, that means the Claimant recognizes that
17 the individual actions of which it complains do not,
18 in and of themselves, constitute a breach of the FET
19 standard.

20 Also, Claimant's FET claim has narrowed
21 significantly throughout this arbitration. Now,
22 Claimant's accusation rests on the assertion that Perú

1 failed to apply its own legal framework.

2 Not only is that accusation baseless as a
3 matter of fact, but it is also manifestly insufficient
4 to meet the legal standard. As I mentioned earlier,
5 the parties in this case agree that the treaty
6 prescribes the minimum standard of treatment under
7 customary international law. And the applicable
8 standard under customary international law was
9 articulated, as the Tribunal well knows, by Waste
10 Management II, which reflects a high threshold under
11 which a breach occurs only where State measures are,
12 and you have the quote which the Tribunal, experienced
13 as it is, has seen many times.

14 Claimant has agreed that this is the
15 relevant standard or that it reflects the standard
16 under customary international law minimum standard of
17 treatment. The Claimant has not and cannot
18 demonstrate that Perú's conduct breached this standard
19 as articulated by Waste Management II.

20 Among other things, a mere breach of
21 domestic law is insufficient to meet the high
22 threshold contemplated by the treaty, and articulated

1 by the Waste Management II standard.

2 So the Claimant seeks to circumvent this by
3 arguing that Perú's alleged noncompliance amounted to
4 a repudiation of its laws. So it seems to be
5 recognizing that a mere noncompliance with domestic
6 law would not be sufficient to meet the standard, and
7 so it tries to characterize that alleged
8 nonimplementation of Peruvian law as a repudiation of
9 Peruvian law. Another label.

10 Claimant bases its composite FET claim on
11 five alleged acts or omissions.

12 First, the Claimant alleges that Perú's
13 decision to not forcefully intervene in the Access
14 Road Protest violates Article 920 of the Peruvian
15 Civil Code or Article 8.2 of Legislative Decree 1186,
16 which I mentioned earlier.

17 Claimant is incorrect on both accounts as
18 demonstrated by Perú, including on the basis of the
19 expert report of Mr. Meini, the only legal expert on
20 this issue in this arbitration.

21 Perú demonstrated that Article 920 of the
22 Peruvian Civil Code does not require forceful police

1 intervention. This is in R-0005. Rather, it requires
2 only that the law enforcement play a supporting and
3 supervisory role with respect to a dispossessed
4 property owner's own efforts to regain their property.
5 It is a different situation.

6 Likewise, Article 8.2 of Legislative
7 Decree 1186 does not require forceful police
8 intervention; instead, it provides that "the personnel
9 of the National Police of Perú may use force" in a
10 series of narrow circumstances, none of which apply in
11 this case. That is R-0060.

12 In particular, under Article 8.2(c), the
13 PNP, the police, may forcefully intervene to prevent a
14 crime.

15 Under 8.2(e), may forcefully intervene to
16 control any person resisting authority.

17 Claimant's position that Perú's response to
18 the Access Road Protest was unlawful is incorrect
19 because it rests on the premise that the police were
20 obligated or required to use force, but it has not
21 demonstrated that to be the case.

22 Claimant alleges that Perú should have

1 brought charges for contempt--this is the second, by
2 the way.

3 So one of the bases on which they say that
4 there's been a repudiation of Peruvian law is the one
5 that I just addressed. I'll address the second one.

6 They say that Perú should have brought
7 charges for contempt of authority against the Parán
8 Community for its breach of the September 2018
9 commitment, which you find on C-0139, and the
10 interference with attempted mine inspections.

11 But as the Tribunal may recall, on 18
12 September 2018, the Subprefect of Huaura, Ms. Bertila
13 González, convened a mediation hearing with Claimant's
14 representatives and the Parán Community. During that
15 meeting, both sides committed to, and I quote,
16 "reach[ing] a long-term agreement that would allow
17 them to resolve their disagreements."

18 However, Claimant failed to address the
19 Parán Community's concerns, and the latter undertook
20 the Access Road Protest several weeks later on the
21 14th of October 2018.

22 But Claimant argues on that basis in the

1 Reply that the Subprefect violated Peruvian law by
2 failing to file criminal complaint against the Parán
3 Community for contempt of authority, is what they're
4 arguing, based upon all of the--on the alleged breach
5 of the 18 September 2000 commitment by the Parán
6 Community.

7 But Perú explained in the Rejoinder that
8 Claimant is wrong for at least four reasons, including
9 the fact that under the directive that governs such
10 process, this process that led to the commitment,
11 which is the Protective Measures Directive, Exhibit
12 566, proceedings for contempt of authority may only be
13 filed in the event of a breach of a government
14 resolution.

15 But here, there was no government resolution
16 in connection with the September 2018 commitment that
17 was not complied with by the Parán Community.

18 Third basis: Claimant argues that Perú's
19 approach to the Parán Community's firearms possession
20 shows Perú's repudiation of its loss. And to dispel
21 the confusion created by Claimant this morning, what
22 we are talking about are 16 shotguns, 12-gauge. This

1 is clear from C-0193, page 30. They are not
2 long-range weapons, as Claimant states in its Reply.

3 Now, the approach concerning these 16
4 shotguns shows that Perú adhered to the legal
5 framework for reclaiming the firearms that the State
6 had provided, the Rondas Campesinas, in the context of
7 the countermeasures against the Shining Path, the
8 terrorist movement in the 1990s.

9 That legal framework that Perú has and
10 implements follows the UN recommended approach of
11 incentivizing the voluntary surrender of arms. This
12 is RLA-184.

13 As explained by Perú in the Rejoinder, the
14 PNP had good reason, including for the long-term
15 resolution of the social conflict, not to act on the
16 margins of that legal framework.

17 Claimant's position is shortsighted and
18 ignores the history and legal framework that Perú has
19 enacted to address this issue. We refer the Tribunal
20 to Exhibits R-0264 and 265 that are relevant for this
21 issue.

22 Finally, Claimant asserts that Perú breached

1 its FET obligation because it failed to intervene to
2 stop alleged marijuana cultivation in the region, and
3 after Claimant forfeited its shares in Invicta to its
4 creditor, to stop the illegal mining operation or
5 exploitation by the Parán Community.

6 Now, this is important, Members of the
7 Tribunal. After.

8 Barely referencing these issues in the
9 Memorial, Claimant dedicated the first full section of
10 the Reply to its baseless conspiracy theory that the
11 community opposed the Invicta mine because with of its
12 alleged desire to protect what Claimant presents as a
13 community-wide marijuana business from increased
14 attention by the authorities and to steal the mine.

15 Now, this morning, Claimant again stated
16 that the reason why Parán opposed the project was to
17 protect "its thriving marijuana business."

18 As explained previously, the theory of
19 marijuana business not only lacks factual support, but
20 it's also nonsensical. And by me--let me be clear.
21 The marijuana business, as a community-wide thriving
22 business, lacks support. The evidence does show that

1 there are or there were marijuana cultivations. I
2 don't know whether they have been completely
3 eradicated, but there is evidence on the record that
4 there were some marijuana cultivations in the region.
5 But even Claimant's own evidence shows that it was not
6 community-wide, as it now argues.

7 But that theory is also nonsensical, as
8 we've explained. The opposition of the Parán
9 Community was designed to have the opposite effect,
10 and that is to attract attention to the Invicta
11 project, and that is exactly what it did. And this
12 theory which counsel now argues is--or this business,
13 the thriving business, which is nothing but sophistry
14 is irresponsible and reckless, and we've said this in
15 our submissions, and they still today insisted on
16 presenting that reckless theory.

17 Because in addition to being false, it shows
18 that Claimant has no reservation about accusing an
19 entire rural community of criminal conduct.

20 The tone that you heard this morning from
21 Claimant shows the contempt and disrespect with which
22 it holds and always held the Parán Community as a

1 whole.

2 As for the legal exploitation of the mine by
3 local residents after Claimant lost its investment, it
4 is simply irrelevant and immaterial, and like the
5 marijuana conspiracy theory, was barely mentioned in
6 the Reply. In fact, it was buried in two paragraphs
7 in that submission.

8 And yet, this morning, you heard Claimant
9 state that its entire case theory is that Parán took
10 the Invicta project to mine it for itself. Again, I
11 think it's perhaps not verbatim but very close to what
12 we heard this morning.

13 Claimant's case theory is being made up as
14 Claimant goes.

15 Those two paragraphs are Memorial 191 and
16 192.

17 And the fact that these conspiracy theories
18 are made for arbitration is evidenced by the fact that
19 contemporaneously, Claimant never argued that the
20 illegal crops, which were known to exist at the time,
21 or the threat to legally exploit the mine were the
22 reasons behind the Parán Community's opposition to the

1 mining project. They were not.

2 The evidence shows and Claimant acknowledges
3 that the opposition was motivated instead by concerns
4 for the environment, the territorial dispute with
5 Lacsanga and the desire to obtain the same benefits
6 that Claimant had offered to neighboring communities.
7 This is reflected in the evidence, not the conspiracy
8 theory.

9 Claimant has simply fabricated that theory
10 in attempt to distract from the fact that it was
11 Claimant's own actions that prompted that opposition
12 from the community, based on that mismanagement of
13 community relations that we discussed earlier today.

14 But in any event, the evidence shows that
15 Perú intervened by seizing and destroying marijuana
16 plants, making arrests and planning and executing an
17 operational plan to end the exploitation of the
18 Invicta mine.

19 Now, that evidence acknowledged and
20 un rebutted by Claimants shows that law enforcement
21 authorities in Perú did, in fact, take action against
22 that illegal activity.

1 In sum, the evidence and expert opinion on
2 the record shows that it is manifestly false that
3 Perú's conduct constitutes a repudiation of its laws.
4 There simply was no breach of customary international
5 law or of the Treaty by Perú.

6 But Perú's actions are also not arbitrary by
7 component of the FET standard. As demonstrated by
8 Perú in this arbitration, including on the basis of
9 Mr. Meini's expert report, under Peruvian law, the
10 Peruvian National Police has discretion to decide
11 whether force is necessary under the circumstances.
12 Its decision not to use force in this case was
13 justified and reasonable as the PNP was concerned
14 about the violent confrontations, the loss of life and
15 the durability of the resolution to the conflict.

16 The results of the police December 2021
17 intervention to remove members of the Parán Community
18 from the mine shows that such concern was justified.

19 The Peruvian authorities justifiably
20 concluded that force was not justified, and that
21 dialogue should be favored to secure a peaceful and
22 lasting resolution to the social conflict. Far from

1 arbitrary, this is reasonable and prudent.

2 In addition to the above--and I'll try to be
3 brief with respect to this component of their theory.

4 In addition to the above--and the above
5 amply justifies dismissal of Claimant's FET claim, but
6 if more reasons were needed to dismiss that claim,
7 there's another reason why such claim must be
8 dismissed, and it's the following:

9 Claimant has failed to establish the
10 existence of a composite act. As explained by
11 Professor Crawford, and I quote, "A composite act is
12 more than a simple series of the repeated actions, but
13 rather, a legal entity, the whole of which represents
14 more than the sum of its parts."

15 Claimant has not established the existence
16 of a legal entity, nor has Claimant demonstrated that
17 each of the individual acts constituted the alleged
18 composite act were, and I quote, "sufficiently
19 numerous and interconnected to amount to a pattern or
20 a system."

21 The Claimant has not met this standard for
22 several reasons expounded in Perú's briefs, which, in

1 the interest of time, I will not repeat, but instead,
2 I respectfully refer the Tribunal to Sections IV.C of
3 the Counter-Memorial and also IV.C of its Rejoinder.

4 And likewise, Claimant has not demonstrated
5 that each of the individual acts constituting this
6 alleged composite act had an adverse effect on the
7 investment, which is a relevant factor. And for that,
8 I refer to the Tribunal to the CLA-71, Paragraph 263,
9 and CLA-82, Paragraph 670.

10 Thus, Claimant has failed to meet its burden
11 of proving a composite act under international law.
12 And accordingly, we respectfully submit that the
13 Claimant--Tribunal must reject Claimant's FET claim.

14 Now, I will go into the last claim on
15 expropriation, but before I do so, let me turn to my
16 team to see if we are doing okay with time.

17 I'm advised that I may not have time to go
18 over the entirety of the presentation that we had
19 about expropriation. I will be brief. Before I do
20 so, I again respectfully refer the Tribunal to our
21 pleadings. The fact that we're not able to address
22 them today does not mean that we have in any way lost

1 confidence in the submissions that we have made in
2 those pleadings.

3 Now, Claimant's expropriation case is
4 unusual. It rests entirely on the actions of the
5 third parties; namely, the Parán Community and PLI
6 Huaaura, its creditor.

7 Now, Claimant does not argue that any
8 affirmative action by Perú expropriated Claimant's
9 investment; rather, Claimant alleges that Perú's
10 decision not to use force to try to remove the Access
11 Road Protest and silence the Parán Community
12 protesters affected a direct and indirect
13 expropriation. And Claimant, of course, is wrong on
14 both counts.

15 For its direct expropriation, it argues that
16 Perú's--that the Parán Community's Access Road Protest
17 was attributable to Perú, and that this protest led
18 PLI to seize Claimant's investment. And according to
19 the Claimant, Perú therefore directly expropriated its
20 investment, but that claim is based on wrong premises
21 and flawed logic.

22 And, you know, first and foremost, the

1 direct expropriation claim rests on this Claimant's
2 outlandish theory that the Parán Community committed
3 an outright seizure of the investment through the
4 protest, and that the action of that rural community
5 is attributable to Perú under international law. But
6 we've demonstrated that the actions of the members of
7 that rural community cannot--are not attributable to
8 Perú under international or even domestic law.

9 And in addition, that claim fails because
10 the forfeiture of Claimant's shares in Invicta does
11 not constitute a direct expropriation.

12 I will, in the interest of time, skip over
13 the discussion of formal seizure of title and how that
14 is understood in international law.

15 I will emphasize again that the only conduct
16 that--by Perú that Claimant invokes for its direct
17 expropriation claim is Perú's alleged omissions,
18 specifically that Perú did not forcefully remove the
19 Access Road Protest.

20 And here I mention that, according to
21 Claimant, when a State knowingly allows by its
22 omissions a third party to take possession of that

1 property, such State can be liable for direct
2 expropriation, and they rely on Wena Hotels and Amco.

3 And I was surprised to hear this morning
4 that Claimant's counsel, in passing, again, relied on
5 those two legal authorities because we explained in
6 our Rejoinder why those legal authorities were in
7 opposite and did not support their case.

8 Because in those cases, the States played a
9 much more active role. They affirmatively enabled the
10 expropriations; and of course, that's not the case in
11 the present arbitration.

12 And Perú demonstrated this in Rejoinder,
13 including in Paragraph 743 and 474.

14 But Claimant simply ignored that argument
15 and that distinction of those cases from the present
16 case, but they still relied on those authorities this
17 morning.

18 In any event, we demonstrated that Perú did
19 not knowingly allow any third party to take
20 possession.

21 And here, I refer the Tribunal to--and if we
22 can skip ahead to the Rejoinder, Table 6, it's a table

1 that spans ten pages of our submission, of our
2 Rejoinder. You will not find it in the slides because
3 it's such a long table, but that Table 6 in our
4 Rejoinder includes the numerous affirmative steps that
5 Perú took to support, to support Claimant and broker a
6 resolution to the social conflict, repeatedly urging
7 the Parán Community to lift the Access Road Protest.

8 Okay, in the very few minutes that I have
9 left, on direct expropriation, Claimant argues that
10 it's a composite act and a creeping expropriation and
11 alleges that a clear pattern of acts by Perú, which
12 Claimant never specifies, it says that that
13 unspecified pattern amounts to creeping expropriation
14 that Perú--I'm sorry, that Claimant characterizes as
15 Perú letting the Parán Community act with impunity.

16 But however, similar to its FET claim,
17 Claimant has not even proven the existence of a
18 composite act by Perú. And also, Claimant treats
19 composite act and creeping expropriation as one and
20 the same.

21 I've already addressed the composite act and
22 how it's understood and defined by Professor Crawford.

1 Let me, in the interest of time, skip ahead.
2 Once again, and I've explained this, the record
3 contradicts Claimant's allegations that Perú
4 consistently took no action. In fact, Perú intervened
5 early on and often to mediate Claimant's social
6 conflict. And again, we respectfully refer you to
7 Table 6 of the Rejoinder. And this was not only by
8 one entity or a State organ, but by many, including
9 the police.

10 The Claimant's indirect expropriation claim
11 fails for so many reasons, including that it does not
12 meet the fundamental and decisive effects test that is
13 widely recognized by international law, and that
14 jurisprudence, again, as being, you know, decisive in
15 determining whether an expropriation has occurred.

16 And this is also reflected under Treaty
17 Annex 812, which is very important when assessing
18 whether an indirect expropriation has been committed.

19 Claimant must prove that Perú's measures had
20 an expropriatory economic impact on its investment.
21 And to be expropriatory, the economic impact must
22 amount to the complete or near complete deprivation of

1 Claimant's investment. But that factor is simply not
2 met in this case, including for two basic reasons.

3 And I will go quickly over these reasons,
4 and then I will cede the floor to my colleague,
5 Mr. Brian Bombassaro.

6 First, the measures that Claimant attributes
7 to Perú did not result in a complete or near-complete
8 deprivation of the value of Claimant's investment.

9 And to recall, PLI, Claimant's creditor,
10 seized the investment as a direct result of Claimant's
11 decision to pledge its shares as collateral in the PPF
12 agreement. Claimant's failure to secure a social
13 license from the Parán Community. Claimant's failure
14 to secure the necessary regulatory approvals to
15 commercially exploit the Invicta mine in time to meet
16 its PPF obligations. Claimant's failure to secure
17 reliable ore processing. And Claimant's 14 events of
18 default under the PPF Agreement, including failure to
19 achieve commercial exploitation by the contractual
20 deadline. And even Claimant admits that not all of
21 those 14 instances of default are related or can be
22 linked to the blockade.

1 And second, far from having suffered a
2 complete or near-complete loss of value, Claimant
3 investment held significant value at the time Claimant
4 lost its PLI--it's investment to PLI.

5 And with this, this is the last comment that
6 I make, shortly before PLI Huaura seized Invicta
7 shares, PWC conducted an independent appraisal of the
8 investment and valued it at 13.4 million US dollars,
9 far from zero or even negative, as Claimant alleges.

10 Further, a mining consortium--and this goes,
11 Mr. Garibaldi, to your question about the corporate
12 chain.

13 A mining consortium called Lonely Mountain
14 indirectly acquired PLI Huaura's right to seize the
15 Invicta mine, thereby demonstrating that the mine did
16 have value as an investment.

17 And this is C-0053, and C-0055.

18 In STEAG v. Spain, the Tribunal held that,
19 and I quote, "when an investor from the same market is
20 willing to invest in a project, it is clear that the
21 economic value of that project has not been
22 eliminated," end of quote. This is RLA-0192.

1 ARBITRATOR GARIBALDI: How much did they
2 pay?

3 MR. GRANÉ: Is it the--I'm confirming
4 whether it's on the record, Mr. Garibaldi. It's not
5 on the record.

6 It's not on the record, but again, we know
7 that shortly before the shares were seized by PLI, PWC
8 valued the investment at \$13.4 million. And this is
9 in C-0055, page 2, and R-0193, Clause 3.

10 And with that, Mr. President, and with your
11 indulgence, I cede the floor to my colleague,
12 Mr. Brian Bombassaro, to address the Tribunal on the
13 issue of damages.

14 MR. BOMBASSARO: Okay.

15 Good afternoon, Mr. President, and Members
16 of the Tribunal. My name is Brian Bombassaro, and I
17 will address Claimant's damages claim.

18 As Perú showed in the pleadings, Claimant is
19 not entitled to any compensation from Perú. Any
20 damages Claimant may have suffered based on its
21 investment in Invicta were not caused by Perú. In any
22 event, Claimant's claim for \$41 million, and the

1 calculations by Accuracy that produced that sum, are
2 flawed and grossly overstated.

3 To calculate its alleged damages, Claimant
4 set the valuation date as 26 August 2019. The
5 significance of this date, according to Claimant, is
6 that it is the date on which "Lonely Mountain seized
7 the Claimant's shares in IMC." That's in Memorial
8 Paragraph 325.

9 Claimant's selected valuation date is not a
10 date on which Claimant alleges any wrongful action by
11 Perú. It's not even a date on which Claimant alleges
12 any wrongful omission by Perú.

13 Nevertheless, Claimant argues that on 26
14 August 2019, Perú became responsible for \$41 million
15 of alleged damages.

16 The fact that Claimant has not even alleged
17 wrongful conduct by Perú on the date when Claimant
18 asserts that Perú became responsible for the lost
19 investment is emblematic of a broader disconnect
20 between Claimant's alleged damages and the alleged
21 causes of those damages.

22 Claimant's alleged damages were not caused

1 by Perú.

2 As Perú has demonstrated, Claimant's alleged
3 damages were caused by the actions of Lonely Mountain,
4 or more accurately, by the actions of PLI Huaura,
5 which Lonely Mountain eventually owned.

6 Claimant also bears responsibility for any
7 damages caused by the Parán Community and for any
8 damages caused by Claimant's own decisions and
9 Claimant's own actions.

10 The lack of a causal link between Claimant's
11 alleged damages and any alleged wrongful conduct by
12 Perú should be dispositive and result in an award for
13 zero damages. If, however, the Tribunal were to
14 ascribe any damages to Perú, such damages would need
15 to account for Claimant's contributions to its own
16 injury.

17 Furthermore, in no circumstance should
18 Claimant be awarded or otherwise credited with any
19 alleged damages that are based on a merely future or
20 prospective investment, and Claimant has requested
21 such damages in this case. Claimant's request for
22 those damages should be denied, because the Treaty

1 explicitly applies only to investments made or
2 acquired in Perú.

3 Lastly, any damages award would need
4 deductions to account for the errors and unfounded
5 assumptions in the calculations that generated the
6 amount of Claimant's damages claim.

7 I will discuss in turn each of these defects
8 in Claimant's damages case, starting with causation
9 and then Claimant's contributory fault, Claimant's
10 merely prospective investment in the Mallay plant, and
11 lastly, quantum.

12 First, as the Tribunal knows, Claimant is
13 not entitled to any damages unless Claimant proves it
14 had an injury that was caused by the internationally
15 wrongful act. The ILC commentary explains that this
16 condition requires a Claimant to prove both causality
17 and fact, as well as proximate causation.

18 In the damages context, factual causation
19 means that if the wrongful act had not occurred, then
20 the alleged injury would not have occurred. At least
21 conceptually, causality and fact is relatively
22 straightforward and uncontroversial.

1 With respect to proximate causation,
2 Claimant wrongly argues that Claimant simply must show
3 that damages were "a normal, foreseeable or intended
4 consequence of the State's wrongful act." That's from
5 Claimant's skeleton argument at Paragraph 101 and
6 Reply Paragraph 892.

7 This attempt by Claimant to reduce proximate
8 causation to attest for any one of those three
9 criteria is squarely refuted by the ILC commentary.
10 Where the ILC discusses proximate causation in Comment
11 10 to Article 31, the ILC expressly warns that "in
12 international as in national law, the question of
13 remoteness of damage is not part of the law, which can
14 be satisfactorily solved by search for a single,
15 verbal formula."

16 In fact, the source that Claimant cited for
17 its proposed three-prong test, which is the Ripinsky
18 and Williams treatise, itself indicates that the ILC
19 rejected that same three-prong test in favor of a
20 "more cautious approach." That's at pages 136 to 138
21 of CLA-151.

22 In addition to the ILC commentary,

1 international jurisprudence has examined and explained
2 proximate causation. Perú presented this in Rejoinder
3 Section 5.A.1. The legal analyses in those decisions
4 identified the following criteria for proving
5 proximate causation:

6 1, Claimant must prove that an uninterrupted
7 and proximate logical chain leads from the initial
8 cause to the final effect.

9 2, when there are several causes acting
10 together to injure an investment, the underlying cause
11 is the legally dispositive one.

12 3, Claimant must prove the State's measures
13 were the operative cause of the investment's failure.

14 4, Claimant must prove that its losses have
15 arisen from a breach of the treaty and not from other
16 causes.

17 These are the benchmarks for identifying
18 proximate causation, and Claimant has not met them.

19 In fact, in the Memorial, Claimant did not
20 submit any analysis at all on damages causation.

21 Then, in the Reply, Claimant ignored the
22 vast, factual record in this case, arguing

1 superficially that the causal chain from the alleged
2 Treaty breach to the alleged damages comprises just
3 two simple links: The Parán Community's Access Road
4 Protest and Perú's decision not to use force to
5 annihilate that protest. Claimant even says in Reply
6 Paragraph 918 that, "No other factors contributed to
7 the Claimant's loss of its investment."

8 Claimant deliberately omits from its
9 purported causal chain the genesis of the Access Road
10 Protest, essentially treating that protest as if it
11 had originated spontaneously, through no fault of
12 Claimant's own. Claimant wants you to ignore its
13 responsibility for its broken relationship with the
14 Parán Community. Claimant also wants to you ignore
15 the contract in which Claimant signed away its
16 ownership rights to the Invicta mine as loan
17 collateral, and Claimant's 14 breaches of that same
18 contract, and the outstanding regulatory requirements
19 for operation of the Invicta mine, and Claimant's
20 failed pursuit of reliable ore processing, which
21 Claimant needed to convert any raw ore into marketable
22 minerals.

1 Claimant wants you to ignore all these facts
2 because each one reveals Claimant's superficial causal
3 chain to be removed from reality and insufficient to
4 establish proximate causation or even
5 causality-in-fact. Perú demonstrated those failures
6 in Counter-Memorial Section 5.B.1 and Rejoinder
7 Sections 2.D and 5.A.2.

8 Nevertheless, Claimant insinuates that its
9 two-link causal chain should suffice to flip the
10 burden of proof over to Perú to prove an intervening
11 or superseding cause. That's in Reply Paragraph 927.
12 Claimant is incorrect given that Claimant failed to
13 make a credible case on but-for causation or on
14 proximate causation.

15 But in any event, Perú has satisfied any
16 such burden of proof through the evidence and the
17 analyses that Perú presented in the pleadings I just
18 mentioned, Counter-Memorial Section 5.B.1 and
19 Rejoinder Sections 2.D and 5.A.2.

20 To recall, the causes of Claimant's alleged
21 damages under any of the relevant legal standards,
22 such as the initial cause, the underlying cause, the

1 operative cause, the proximate cause, the but-for
2 cause, the underlying cause, the intervening or
3 supervening causes are those facts that I just
4 referred to moments ago, and which Claimant wants you
5 to ignore.

6 1, Claimant's botched relations with the
7 Parán Community that was the genesis of the Access
8 Road Protest; 2, Claimant's contract pledging its
9 investment as loan collateral; 3, Claimant's 14
10 breaches of that same contract; 4, the outstanding
11 regulatory requirements for the Invicta mine; and 5,
12 Claimant's failure to secure any reliable ore
13 processor.

14 In the pleadings, besides simply ignoring
15 these facts when Claimant posits a two-link causal
16 chain, Claimant also relabels these facts as
17 "concurrent causes" and criticizes Perú for not
18 "making any references in its Counter-Memorial to the
19 principles on concurrent causes." That's Reply
20 Paragraph 899. However, this relabeling maneuver by
21 Claimant distorts Perú's causation analysis.

22 In fact, Perú never referred to concurrent

1 causation principles because they are not relevant to
2 this case. Because no alleged breach by Perú was a
3 proximate cause of any alleged damages, Perú simply is
4 not responsible for any damages.

5 Whether acts by Claimant, by PLI Huaura or
6 by the Parán Community might be concurrent causes
7 would have no bearing on Claimant's claims against
8 Perú.

9 Moreover, even if a Treaty breach were
10 deemed a proximate cause of any alleged damages,
11 contributory fault principles would apply, as Claimant
12 has acknowledged in Reply Paragraph 901 in the first
13 sentence.

14 Specifically, in a scenario where the
15 Tribunal deems an alleged Treaty breach to be the
16 but-for and proximate cause of any alleged damages,
17 the Tribunal would need to make deductions from those
18 damages for Claimant's contributory fault.

19 As summarized in Rejoinder Paragraphs 822,
20 858 and 860, this is a case where the Claimant was
21 hoisted by its own petard. Claimant's entire case is
22 an attempt to deflect blame onto the government for

1 not doing even more to try to save Claimant from the
2 results of Claimant's own mistakes and Claimant's
3 duplicitous conduct toward the rural communities.

4 That's a textbook case for applying
5 contributory fault and for doing so with 100 percent
6 of any damages. Perú explained this in
7 Counter-Memorial Section 5.B.2 and Rejoinder
8 Section 5.B.

9 Based on the foregoing, Claimant's damages
10 claim should be rejected entirely based on causation
11 or alternatively based on contributory fault. A
12 portion of Claimant's damages claim, \$8.9 million of
13 it, should be rejected for a third reason, which is
14 that this portion is impermissibly based on a
15 prospective or future investment in the Mallay plant
16 that Claimant never made.

17 As shown in Section 5.C of both the
18 Counter-Memorial and the Rejoinder, the Treaty applies
19 only to covered investments. To be a covered
20 investment, the text of Treaty Article 847 requires
21 that an investment must have been made or acquired in
22 Perú. Claimant admits it never made or required any

1 investment in the Mallay plant. That's in Reply
2 Paragraph 1020.

3 Yet, Claimant's claim for \$41 million is
4 expressly based on Claimant hypothetically investing
5 in the Mallay plant. Without an investment in the
6 Mallay plant, Claimant's own experts calculate
7 Claimant's damages to be a maximum of only \$32.1
8 million.

9 The difference between those two alleged
10 amounts, \$41 million with the Mallay plant and \$32.1
11 million without the Mallay plant, is \$8.9 million. As
12 a matter of law, Claimant cannot be awarded this extra
13 \$8.9 million that is based on an investment in the
14 Mallay plant that Claimant never made or acquired.

15 Furthermore, even if any damages were due to
16 Claimant, the Tribunal should not rely on the \$41
17 million amount or even the \$32.1 million amount that
18 Claimant's experts estimated as damages. Those
19 estimates are overstated for many reasons that are
20 summarized in Rejoinder Section 5.D and which are
21 explained in details in the AlixPartners second
22 report.

1 AlixPartners will present its reports next
2 Monday, but for now, I wish to emphasize two points.
3 First, those corrected amounts proposed by
4 AlixPartners, which are \$20.5 million and \$22.5
5 million under the alternative ore production scenarios
6 posed by Claimant, reflect only the corrections that
7 AlixPartners could quantify based on available
8 information. But there are several additional errors
9 in Accuracy's damages calculations, such that the two
10 corrected amounts by AlixPartners require further
11 downward adjustments.

12 Second, AlixPartners' corrected calculations
13 are without prejudice to the legal barriers to any
14 damages award that I have summarized today, such as
15 Claimant's failure to prove causation and Claimant's
16 contributory fault. Those legal barriers to
17 Claimant's claims should be dispositive and result in
18 zero damages. Thank you.

19 PRESIDENT CROOK: Thank you.

20 Thank you very much, counsel. Does that
21 conclude or--I'm sorry. Does--we have an important
22 speaker.

1 MS. RIVAS PLATA: Thank you, Mr. President.

2 Good afternoon, Mr. President and members of
3 the Tribunal.

4 I respectfully request your indulgence to
5 make some initial remarks on behalf of the Republic of
6 Perú.

7 "Water is like gold in the Parán Community,"
8 is a common phrase chanted by locals in Parán, a
9 Peruvian rural community located in the direct area of
10 influence of the mining project at stake in this
11 investment arbitration. In Perú, Parán is known for
12 two things: Nearly 75 percent of its population is
13 blind due to retinitis pigmentosa, a genetic mutation
14 inherited across generations, and the reputation as
15 home of the sweetest peaches in the country. It is
16 said that "despite blindness, peaches are sweet in
17 Parán." It may sound contradictory, but blindness and
18 sweetness coexist in Parán.

19 Perú is a global leader in the mining
20 industry and is recognized as having one of the
21 largest and most diversified mineral reserves on the
22 planet. It is among the world's top producers of

1 copper, silver, lead, zinc, gold and other precious
2 metals. Perú's mining industry is one of the most
3 important sectors of its economy, and views foreign
4 investment in that sector as a key driver to advance
5 the development of the country.

6 Perú's mining industry accounts for 8.3
7 percent of GDP, while mineral exports represent 58.9
8 percent of the country's total exports. The country
9 is among the major producers of mineral commodities in
10 the world.

11 The mining tradition in Perú dates to the
12 pre-Inca times, and continues through the Inca,
13 colonial and republica periods. In each of those
14 historical stages, mining has been one of the major
15 activities in the country's development.

16 Hand in hand with the need to provide a
17 stable and predictable framework conducive to attract
18 foreign investment in the mining industry to its
19 shores, Perú has recognized the need to strike a
20 balance between two policy objectives: Advancing the
21 development of its extractive industries; and ensuring
22 that the social and environmental impacts of such

1 industries are appropriately addressed.

2 The Canada-Perú Free Trade Agreement can be
3 considered as pioneer in pursuit of the goal of
4 achieving the right balance between the protection of
5 foreign investments on one hand and the recognition of
6 the right to regulate in the public interest on the
7 other hand. These two policy objectives enshrined in
8 the Canada-Perú Free Trade Agreement are equally
9 compelling and urgent, equally legitimate and genuine,
10 equally essential and inescapable. It would be
11 erroneous to consider investment treaties as mere
12 texts in a vacuum, ignoring the fact that they are
13 shaped and influenced by the political, economic and
14 social context in which they are anchored.

15 This balance is reflected in the provisions
16 on corporate social responsibility of the Canada-Perú
17 Free Trade Agreement. Paradoxically, the investment
18 treaty Claimant has invoked to bring a
19 multimillionaire claim against the Republic, is the
20 same investment treaty that reminds investors like
21 Claimant in this present arbitration of the importance
22 of incorporating internationally recognized standards

1 of corporate social responsibility in their internal
2 policies.

3 Through international corporate social
4 responsibility norms, the extractive industry widely
5 recognizes the vital need for private companies to
6 obtain community support before commencing mining or
7 other extractive industries.

8 In accordance with the OECD Guidelines for
9 Multinational Enterprises, and the OECD Due Diligence
10 Guidance for Responsible Business Conduct, a
11 stakeholder engagement with the communities that
12 investors interact with is characterized by a two-way
13 communication. It involves the timely sharing of
14 relevant information needed for stakeholders to make
15 informed decisions in a format that they can
16 understand and access.

17 To be meaningful, engagement involves the
18 good faith of all parties. Meaningful engagement with
19 the relevant stakeholders is important throughout the
20 life of an investment project in the mining sector; in
21 particular, when the enterprise may cause or
22 contribute to or has caused or contributed to an

1 adverse impact in the area of influence in which it
2 plans to operate.

3 As counsel for the Republic has explained
4 over the course of this investment arbitration, in
5 light of relevant, customary international law,
6 Peruvian law, and in those two principles, Claimant
7 should have been aware that it was required to obtain
8 community support before developing the Invicta mine.

9 The constitutional rights of rural
10 communities in Perú are enshrined in Articles 2 and 89
11 of the Constitution. Article 2 includes amongst the
12 list of fundamental freedoms the right to ethnic and
13 cultural identity. Article 89 for its part
14 specifically relates to rural native communities and
15 provides that the State respects the cultural identity
16 of rural and native communities.

17 That same article establishes protection for
18 the rights of rural communities to autonomy and free
19 disposition of their lands. Mandating that such
20 commitments are autonomous in their organization, in
21 communal work, and in the use and free disposal of
22 their lands, as well as in economic and administrative

1 matters within the framework established by law.

2 Members of the Tribunal, Claimant had the
3 opportunity to engage in a meaningful dialogue with
4 all the stakeholders in the area of influence of its
5 mining project, including the Parán Community, and to
6 seek to prevent any adverse impacts directly linked to
7 its operations.

8 It failed to do so.

9 Like blindness and sweetness that cohabit in
10 the Community of Parán, like gold and water that cross
11 paths, mining industry and rural communities can
12 coexist if measures adopted to address environmental,
13 health and community concerns are appropriately
14 implemented with due diligence.

15 Perú forcefully advocates for policies to
16 further advance its mining--

17 PRESIDENT CROOK: Ma'am, excuse me, but
18 we're past our appointed ending time, and I don't want
19 to cut off an important statement, but do you have a
20 sense of how much longer you will need?

21 MS. RIVAS PLATA: Probably less than one
22 minute.

1 PRESIDENT CROOK: Okay.

2 MS. RIVAS PLATA: Forcefully--Perú
3 forcefully advocates for policies to further advance
4 its mining industry as an engine to economic growth,
5 and it incessantly urges mining companies to engage in
6 a constructive dialogue with all the relevant
7 stakeholders in the area of influence in which they
8 operate.

9 The seeming dichotomy between two apparent
10 opposite interests vanishes if one considers that the
11 twofold policy objectives at the heart of this
12 investment dispute coexist as two sides of the same
13 coin: Perú's path towards its own development.

14 In summing up, Members of the Tribunal, "it
15 is the Constitution of it Perú, it is customary
16 international law, and it is justice."

17 Having said that, I would like to conclude
18 my remarks by extending the deepest respect and
19 appreciation to the Members of the Tribunal on behalf
20 of the Republic of Perú.

21 PRESIDENT CROOK: Thank you very much for
22 that, ma'am, and we thank the Respondents for a very

1 interesting and wide-ranging introductory
2 presentation. I take it we're now done, okay.

3 Is there any last administrative business,
4 anything we need to tend to? If not, we will see
5 you--wish you a pleasant evening, and we'll see you
6 tomorrow at the same time.

7 Thank you.

8 This session is adjourned.

9 (Whereupon, at 5:49 p.m. the Hearing on the
10 Merits was adjourned until 9:30 a.m. the following
11 day.)

POST-HEARING REVISIONS
CERTIFICATE OF REPORTER

I, Marjorie Peters, FAPR, RMR-CRR, Court Reporter, do hereby attest that the foregoing English-speaking proceedings, after agreed-upon revisions submitted to me by the Parties, were revised and re-submitted to the Parties per their instructions.

I further certify that I am neither counsel for, related to, nor employed by any of the Parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

MARJORIE PETERS

MARJORIE PETERS