

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

**ICSID CASE NO. ARB/20/46**

**LUPAKA GOLD CORP.**

Claimant

**VS.**

**REPUBLIC OF PERU**

Respondent

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**CLAIMANT'S PRE-HEARING SKELETON**

13 March 2023

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**LALIVE**

**BSF**

## **TABLE OF CONTENTS**

1	INTRODUCTION.....	1
2	FACTUAL MATTERS IN DISPUTE .....	1
2.1	Parán's disincentives to reach an agreement with IMC .....	1
2.2	Lupaka was on the brink of exploitation when Parán set up the Blockade .....	2
2.3	Lupaka was not required to enter into an agreement with Parán to develop the Project.....	3
2.4	The other communities supported the Project.....	4
2.5	Lupaka adequately managed its relationship with Parán .....	4
2.6	The Subprefect of the Leoncio Prado District authorised and participated in the 19 June 2018 invasion.....	7
2.7	Peru failed to comply with its obligations under Peruvian law .....	7
2.8	Parán used weapons provided by the State in its aggressions against IMC .....	9
2.9	The Police were ready to intervene to lift the Blockade but did not do so, contrary to its obligation.....	10
2.10	By early 2019, the MEM-OGGS did not believe negotiations should continue and recommended that the Police intervene.....	12
2.11	The 26 February 2019 Agreement is clear; Parán immediately breached it, again showing that further negotiation was futile .....	12
2.12	Lupaka's initial refusal to pay for Parán's unilaterally imposed topographer did not warrant an invasion of the Site .....	13
2.13	The renewed invasion of 20 March 2019 again showed that the State had to act with force – yet it only insisted that negotiations continue	14
2.14	WDS did not forcibly enter the Site on 14 May 2019; the entry had been coordinated with the Police .....	14

2.15	The Police intervention of 14 December 2021 should have taken place shortly after October 2018.....	15
2.16	Peru has shown that it can use force in other situations of social conflict .....	15
2.17	The Claimant would have met its gold repayment obligations under the PPF Agreement .....	16
2.17.1	The Claimant would have met its repayment obligations under the 590 t/d Scenario.....	16
2.17.2	The Claimant would have met its repayment obligations under the 355 t/d Scenario.....	17
2.17.3	But-for the Blockade and Peru's failure to act, PLI Huaura would not have foreclosed on Claimant's share in IMC .....	18
2.18	The 2018 PEA's average ore grades are reliable and do not require adjustment .....	18
2.19	The Claimant could have extended the production schedule to ten years .....	19
3	LEGAL STANDARDS IN DISPUTE .....	19
3.1	The Tribunal has jurisdiction over the Claimant's claims.....	19
3.1.1	Jurisdiction <i>ratione personae</i> : Lupaka is a protected investor that made a qualifying investment under the FTA .....	19
3.1.2	Jurisdiction <i>ratione materiae</i> : Lupaka duly satisfied the waiver requirements under the FTA.....	20
3.2	Attribution under international law .....	20
3.2.1	The conduct of the Subprefect of the Leoncio Prado District is attributable to Peru .....	21
3.2.2	The acts and omissions of the Parán Community and its <i>Ronda Campesina</i> are attributable to Peru .....	21
3.3	Peru breached its obligations under the FTA .....	22

3.3.1	Peru unlawfully expropriated Lupaka's investment in breach of Art. 812 of the FTA .....	23
3.3.2	Peru breached its obligation to provide FET to Lupaka's investment under Art. 805.1 of the FTA.....	25
3.3.3	Peru breached its obligation to provide FPS to Lupaka's investment under Art. 805.1 of the FTA.....	26
3.4	Peru's violations of the FTA caused the Claimant's loss of its investment, and the Claimant did not contribute to its loss .....	28
3.4.1	Causation.....	28
3.4.2	Contributory fault.....	28
3.5	The Claimant is not claiming compensation for prospective investments .....	29

## 1 INTRODUCTION

- 1 This is a case where, with a few exceptions, the facts are not in dispute. They are established and agreed upon between the Parties. The real debate between the Parties is on the implication of these facts.
- 2 The Respondent has belatedly raised many new arguments in its Reply on Jurisdiction and Rejoinder on Merits (the “**Rejoinder**”) as the Claimant explained in its letter of 20 February 2023.<sup>1</sup> This is contrary to articles 14.3 and 14.4 of Procedural Order No. 1.<sup>2</sup> In this skeleton, the Claimant will identify the Respondent’s new arguments for the Tribunal’s benefit but will not advance a response given the scope of this skeleton.
- 3 The Claimant sets out below the important matters of fact in dispute (**Section 2**) and the legal standards in dispute (**Section 3**) as per paragraph 21.7 of Procedural Order No. 1.

## 2 FACTUAL MATTERS IN DISPUTE

### 2.1 Parán’s disincentives to reach an agreement with IMC

- 4 **Parán’s exploitation of the Mine:** The Claimant has established that Parán ejected all of IMC’s personnel permanently from the Site in October 2018 (except for a short interval in March 2019). In late January 2019, Parán communicated its intention to exploit the Mine to IMC and to the MEM; in July 2019 Parán appropriated Lupaka’s stockpiled ore at the Site (some seven tonnes); Parán then proceeded to exploit the Mine as reported in Peru’s internal documents. It is clear that the Parán Community opposed the Project because it sought to exploit the Mine for itself.<sup>3</sup> This conduct puts paid to Peru’s social license defence.

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<sup>1</sup> Throughout its Skeleton Arguments, the Claimant adopts the defined terms from its Memorial and Reply.

<sup>2</sup> Procedural Order No. 1, p. 12 (para. 14.3) (“[i]n the first exchange of submissions (Memorial and Counter-Memorial), the Parties shall set forth all the facts and legal arguments on which they intend to rely. Allegations of fact and legal arguments shall be presented in a detailed, specified, and comprehensive manner.”) and (para. 14.4) (“[i]n their second exchange of submissions (Reply and Rejoinder), the Parties shall limit themselves to responding to allegations of fact and legal arguments made by the other Party in the first exchange of submissions, unless new facts have arisen after the first exchange of submissions which justify new allegations of fact and/or legal arguments.”)

<sup>3</sup> Memorial, p. 3 *et seq.* (paras. 10, 117-123, 143-146, 148, 188-189, 191-192); Reply, p. 1 *et seq.* (paras. 3, 21-33, 157-160, 168); [REDACTED] First Witness Statement of Julio F. Castañeda, p. 23 (para. 63); First Witness Statement of Luis F. Bravo, p. 30 (paras. 95-96); [REDACTED] Second Witness Statement of Luis F. Bravo, p. 10 *et seq.* (paras. 16-20 and 158); C-0013, p. 1 *et seq.*; C-0469; C-0222, p. 3 (paras. 21-22); R-0113 (corrected translation), p. 11 *et seq.* (para. 30); [REDACTED] C-0624, p. 3.

- 5 The Respondent concedes that Parán has exploited the Mine since at least the third quarter of 2019 but argues that this was not its plan “all along”. Instead, the community opposed the Project because it had allegedly legitimate environmental concerns and further felt disregarded and marginalised with respect to the Lacsanga and Santo Domingo communities.<sup>4</sup>
- 6 **Marijuana business:** The Claimant has shown that the cultivation and trade of marijuana was a major influencing factor in the Parán Community’s opposition to the Project. The press has continuously reported on marijuana cultivation on Parán’s territory. A year prior to the Blockade, Peruvian authorities, in recognition of the expansion of marijuana cultivation in Parán, trained and provided the Lacsanga community members with the means to fight this criminal industry. Subsequent internal State documents recognise that Parán would not accept the Project because of its interest in this illegal business.<sup>5</sup>
- 7 The Respondent argues that the Parán Community as a whole was not influenced by the interests of any individual members in the trade of marijuana. It contends that the actions of Parán’s members through “protests”, requests for an agreement, requests for an access road through its territory and the signature of the 26 February 2019 Agreement, contradict any alleged objective of hiding an illegal business. According to the Respondent, its internal documents do not show that the whole community had interests in the marijuana business and, in any event, do not reflect the opinion of the State as a whole. The internal PCM memorandum of December 2021 does not explain how it concluded that Parán had not accepted Lupaka’s proposals because of the “illegal activities in the same area”.<sup>6</sup>

## 2.2 Lupaka was on the brink of exploitation when Parán set up the Blockade

- 8 The Claimant has established that the Invicta Project was ready to start commercial production in October 2018. IMC had completed all the necessary pre-production

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<sup>4</sup> Counter-Memorial, p. 90 *et seq.* (Section D.2.a and Section D.2.b); Rejoinder, p. 12 *et seq.* (para. 24, Section II.E.2 and Section II.E.3); First Witness Statement of Nilton César León Huerta, p. 6 *et seq.* (paras. 20 and 60–62); Second Witness Statement of Nilton César León Huerta, p. 23 *et seq.* (paras. 59 and 62).

<sup>5</sup> Reply, p. 14 *et seq.* (paras. 34–44); C-0475; C-0414, p. 6; C-0104; C-0105; C-0106; C-0107; C-0108; C-0109; C-0476; C-0477; C-0478; C-0103, p. 2; [REDACTED] C-0394, p. 6; C-0444, p. 2; C-0479, p. 1; C-0481; C-0426, p. 2; C-0468, p. 3; [REDACTED]. For further evidence of the Narvasta clan instigating the Blockade and aggressions against IMC throughout 2018-2019, see R-0077; R-0133; C-0458, p. 1; R-0063, p. 2; Iván F. Meini Report, p. 64 (para. 178); IMM-0053.

<sup>6</sup> Rejoinder, p. 210 *et seq.* (paras. 407–413, 427, 430); Witness Statement of Soymán Román Retuerto, p. 10 (paras. 31–33); Second Witness Statement of Andrés Fernando Trigos Alca, p. 22 *et seq.* (Section V); Second Witness Statement of Nilton César León Huerta, p. 23 (paras. 60–61); [REDACTED]

development works and was ready to commence exploitation by extracting stopes.<sup>7</sup> The Respondent does not deny this. However, the Parties disagree on the outstanding regulatory requirements that Lupaka needed to comply with before it could begin exploitation.

- 9 The record demonstrates that when Parán set up the Blockade, there were two pending regulatory requirements that Lupaka needed to comply with to begin exploitation: the MEM's final pre-exploitation inspection and the DEAR certification of its water management system.<sup>8</sup> The Respondent agrees with the above, but argues in its Rejoinder for the first time that Lupaka was also required to (i) obtain a license for the use of groundwater, (ii) obtain licenses for the use of water from the Ruraycocha and Tunanhuaylaba springs and (iii) register before the Hydrocarbons Registry prior to mining at Invicta. It adds that Lupaka needed to obtain other permits and approvals before it could start processing ore, which vary depending on whether processing was done at Mallay or at the offsite plants IMC was considering in mid-2018.<sup>9</sup>

### **2.3 Lupaka was not required to enter into an agreement with Parán to develop the Project**

- 10 The Claimant has established that Parán's agreement was not necessary. Peruvian law only required Lupaka to reach an agreement with the owners of the land where it was to develop the Project, namely Lacsanga and Santo Domingo, which Lupaka did.<sup>10</sup>
- 11 The Respondent denies this, but is unable to point to any Peruvian law or regulation to support Lupaka's obligation to reach an agreement with Parán. Instead it resorts to the notion of "social license to operate" to support its position.<sup>11</sup> The Respondent argues in its Rejoinder for the first time, that Lupaka was required to reach an agreement with Parán

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<sup>7</sup> First Witness Statement of Gordon Ellis, p. 11 *et seq.* (paras. 35-40); Second Witness Statement of Gordon Ellis, p. 32 *et seq.* (paras. 72-74); Witness Statement of Eric Edwards, p. 11 (paras. 37-73); First Witness Statement of Julio F. Castañeda, p. 7 *et seq.* (paras. 15-27); Second Witness Statement of Julio F. Castañeda, p. 37 (paras. 87-98); **C-0081**; **C-0297**, p. 2 and 13.

<sup>8</sup> Memorial, p. 28 (para. 86); Reply, p. 36 *et seq.* (Section 3.3.1 and Section 3.3.2); First Witness Statement of Julio F. Castañeda, p. 7 *et seq.* (paras. 15-27); Second Witness Statement of Julio F. Castañeda, p. 37 (paras. 87-98); **C-0081**; **C-0011**; **C-0082**, p. 2; **C-0492**; **C-0231 (corrected translation)**; **C-0232**; **R-0168**, p. 3 (Section III); **C-0226**, p. 24; **C-0399**, p. 16 (para. 42); **C-0408**, p. 8 (paras. 5.2 and 6.3).

<sup>9</sup> Counter-Memorial, p. 148 *et seq.* (Section II.F.1.a); Rejoinder, p. 161 *et seq.* (Section II.D.1); Miyanou Dufour von Gordon Report, p. 28 *et seq.* (of PDF) (Section II.B).

<sup>10</sup> Memorial, p. 1 *et seq.* (paras. 3, 64, and 77-78); Reply, p. 32 (Section 3.2.2); First Witness Statement of Julio F. Castañeda, p. 9 *et seq.* (paras. 23 and 30); **C-0228**, p. 22 *et seq.* (Art. 23); **C-0043**; **C-0063**; **C-0064**; **C-0065**.

<sup>11</sup> Counter-Memorial, p. 18 *et seq.* (Section II.A); Rejoinder, p. 16 *et seq.* (Section II.A); Miyanou Dufour von Gordon Report, p. 125 *et seq.* (of PDF) (Section III.D.3); First Witness Statement of Andrés Fernando Trigos, p. 7 *et seq.* (paras. 24 and 28-29); Second Witness Statement of Luis Miguel Incháustegui Zevallos, p. 2 *et seq.* (Section II); Second Witness Statement of Andrés Fernando Trigos Alca, p. 2 *et seq.* (Section II).

because the company knew there were territorial disputes between the communities and three of the Project's mining components – namely, the Huamboya well, a water reservoir and a pump house – would have been located on Parán's land.<sup>12</sup> These are opportunistic arguments, as shown by the fact that Peruvian authorities never told IMC that it was required to reach an agreement with Parán to develop the Project; instead, they continuously requested Parán to lift the Blockade because they knew that IMC complied with all legal requirements to advance the Project. In any event, IMC had the necessary land rights to use the Huamboya well and could have developed the Project without the other two components.<sup>13</sup>

## 2.4 The other communities supported the Project

- 12 The Respondent refers to some disagreements between IMC and these two communities to argue, for the first time in its Rejoinder, that the Project was endangered by their opposition.<sup>14</sup>
- 13 As the Claimant has shown, this is not true. Lacsanga's assembly expressed support for the Project in 2015, and in July 2017 the community signed an agreement with IMC authorising the use of an access road to the Site through Lacsanga land. IMC also had a cooperative relationship with Santo Domingo, as shown by the fact that both parties were virtually ready to sign an addendum to their 2010 Framework Agreement in early 2018.<sup>15</sup>

## 2.5 Lupaka adequately managed its relationship with Parán

- 14 The Respondent contends that IMC had an inexperienced community relations team.<sup>16</sup> The Claimant denies this, having shown that IMC's community relations team was an experienced and capable team with a track record. Peru's authorities never complained about IMC's team, which secured agreements with Lacsanga and Santo Domingo to

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<sup>12</sup> Rejoinder, p. 3 (para. 5); Miyanou Dufour von Gordon Report, p. 10 *et seq.* (of PDF) (paras. 14, 311, 324, 329, 385, 409, 412).

<sup>13</sup> C-0060, p. 3 (clause 2.6); MD-0043, p. 1.

<sup>14</sup> Rejoinder, p. 45 *et seq.* (paras. 82 and 146-150).

<sup>15</sup> Memorial, p. 15 *et seq.* (Section 2.2.3.1 and Section 2.2.3.2); Reply, p. 61 *et seq.* (Section 4.2.1 and Section 4.2.2); [REDACTED] First Witness Statement of Julio F. Castañeda, p. 14 (Section 5.2 and Section 5.3); Second Witness Statement of Julio F. Castañeda, p. 8 *et seq.* (Section 3.1 and Section 3.2); C-0380, p. 3; C-0042; C-0043; C-0090; C-0091; C-0063; C-0064; C-0065; C-0092; C-0093; C-0094.

<sup>16</sup> Counter-Memorial, p. 156 *et seq.* (paras. 310-311); First Witness Statement of Nilton César León Huerta, p. 23 *et seq.* (Section II.C(i)); First Witness Statement of Andrés Fernando Trigoso, p. 17 *et seq.* (paras. 46-49); Rejoinder, p. 47 *et seq.* (Section II.B.1); Witness Statement of Soymán Román Retuerto, p. 4 *et seq.* (paras. 14 and 33); Second Witness Statement of Nilton César León Huerta, p. 7 (para. 17).



develop the Project. An agreement with Parán was impossible because of the community's ulterior motives addressed above.<sup>17</sup>

- 15 The Respondent contends that IMC did not comply with some of its commitments *vis-à-vis* Parán, including the payment of a PEN 150,000 penalty linked to an old debt held by IMC's prior owner and the implementation of social projects in the community in the period 2016-2017.<sup>18</sup> The Claimant denies this; Parán agreed to eliminate the penalty and IMC could not undertake the agreed social projects at the time because it was in critical negotiations with Lacsanga and Parán to secure an access road to the Site. IMC began implementing its various social projects with the Rural Communities shortly after securing an access road to the Site.<sup>19</sup>
- 16 The Respondent contends that IMC prioritised its relationship with Lacsanga and Santo Domingo over Parán, marginalising the latter. It argues that IMC delayed its engagement with Parán for four years, made fewer contributions to this community and engaged less frequently with it than with Lacsanga and Santo Domingo.<sup>20</sup> The Respondent further contends that IMC pitted Lacsanga and Santo Domingo against Parán. It argues that IMC requested Lacsanga and Santo Domingo to take legal action to evict the Parán invaders and also requested Lacsanga to prevent some of its members from continuing to provide logistical support to the Parán invaders.<sup>21</sup> The Respondent raised these arguments for the first time in its Rejoinder.
- 17 The Claimant denies these allegations. As the Claimant established in its Reply, IMC engaged with Parán as from 2013 and undertook multiple projects to engage with and reach an agreement with this community.<sup>22</sup> IMC's community relations team was primarily focused on negotiating an agreement with Parán from late 2015 until early 2017,

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<sup>17</sup> Reply, p. 50 (Section 4.1); [REDACTED] Second Witness Statement of Julio F. Castañeda, p. 14 *et seq.* (para. 33); C-0505; C-0042; C-0043; C-0090; C-0091; C-0063; C-0064; C-0065; C-0092; C-0093; C-0094; C-0018.

<sup>18</sup> Counter-Memorial, p. 85 *et seq.* (paras. 173 - 177 and 185-187); Rejoinder, p. 75 *et seq.* (paras. 135-139 and 141-145); Miyanou Dufour von Gordon Report, p. 120 *et seq.* (of PDF) (paras. 363-366, 370 and 402); Daniel Vela Report, p. 37 *et seq.* (paras. 113-122); C-0436, p. 7; C-0120.

<sup>19</sup> Reply, p. 74 *et seq.* (Section 4.3.3); Second Witness Statement of Julio F. Castañeda, p. 14 *et seq.* (Section 3.3.2 and Section 4); [REDACTED] C-0397; C-0430, p. 5 *et seq.* (Section II and Section III); C-0520, p. 4 (items 1.1.1 - 1.1.); C-0521, p. 11 *et seq.* (item B); C-0440; C-0438; C-0442; C-0428, p. 1 *et seq.*; C-0115 (first and third bullet points).

<sup>20</sup> Counter-Memorial, p. 90 *et seq.* (Section II.D.2.(a) and Section II.F.2(b)); Rejoinder, p. 49 *et seq.* (Section II.B(2)); Miyanou Dufour von Gordon Report, p. 91 (of PDF) (para. 270); C-0114; C-0121; C-0122.

<sup>21</sup> Rejoinder, p. 84 *et seq.* (Section II.B.8).

<sup>22</sup> Memorial, p. 21 *et seq.* (Section 2.2.3.3); Reply, p. 64 (Section 4.2.3); [REDACTED] Second Witness Statement of Julio F. Castañeda, p. 14 *et seq.* (Section 3.3.2); Witness Statement of Eric Edwards, p. 18 *et seq.* (Section 5.4). See e.g., C-0382; C-0384; C-0380; C-0386; C-0388; C-0389; C-0422; C-0509; C-0123.

making detailed proposals to Parán and accepting many of the community's counterproposals in an attempt to reach an agreement. IMC again focused on reaching an agreement with Parán as from late 2017, once it received the necessary funds to pay an old debt from Invicta's prior owner for PEN 300,000, payment of which Parán requested as a condition to resume negotiations. IMC paid the PEN 300,000 to Parán between December 2017 and January 2018, and further included Parán in all its social activities for 2018, as provided in its Annual Operations Plan, including in terms of acquisition of local products, temporary hiring of personnel and environmental monitoring activities. Despite this, IMC could not reach an agreement with Parán because of its unreasonable stance.<sup>23</sup>

- 18 The Respondent further contends that IMC mishandled Parán's water pollution concerns. It argues this would be the case because IMC initially denied any pollution of Parán's water sources and waited until mid-2018, after an OEFA investigation, to take remedial actions.<sup>24</sup>
- 19 However, it is clear that IMC addressed Parán's water pollution concerns. Parán raised these concerns with IMC for the first time in May 2018, *i.e.*, three months after Lupaka had resumed its mine preparation and development activities. Two months later, IMC implemented a water management system that ensured that no mine effluents reached Parán's water sources. Peru's local water authority confirmed that no Mine effluents reached Parán in July 2018. IMC also proposed to create an environmental monitoring committee for the Project and sought to monitor Parán's water sources, but the community blocked both initiatives.<sup>25</sup>
- 20 The Parties agree that the OEFA found certain environmental infringements by IMC, including while IMC's activities at the Site were suspended, which were remediated rapidly. The Respondent's reference to these infringements is opportunistic because they were remediated rapidly and Parán never complained about them.<sup>26</sup> The Respondent

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<sup>23</sup> Reply, p. 67 *et seq.* (paras. 163-172); [REDACTED] Second Witness Statement of Julio F. Castañeda, p. 18 *et seq.* (paras. 41-43). See *e.g.*, C-0113; C-0116; C-0117; C-0397; C-0438; C-0440; C-0430, p. 5; C-0162, p. 5; C-0430, p. 8.

<sup>24</sup> Counter-Memorial, p. 6 *et seq.* (paras. 14, 194-196 and 321-327); Rejoinder, p. 69 *et seq.* (paras. 124-127, 130, 218 (b)); Daniel Vela Report, p. 43 (para. 129); Witness Statement of Esteban Saavedra Mendoza, p. 5 *et seq.* (para. 19); First Witness Statement of Nilton César León Huerta, p. 6 *et seq.* (para. 22); R-0077; R-0080; C-0139.

<sup>25</sup> Reply, p. 89 *et seq.* (Section 5.2); Second Witness Statement of Julio F. Castañeda, p. 21 *et seq.* (Section 4.1); [REDACTED] See *e.g.*, C-0121; C-0226, p. 25; C-0399, p. 16 (para. 42); R-0091, p. 10 (para. 6.3); C-0533, p. 492; C-0111, p. 8; C-0488, p. 8 *et seq.* (item 2.5); C-0157, p. 8; C-0407; C-0408, p. 8 *et seq.* (paras. 5.2 and 6.3).

<sup>26</sup> Reply, p. 95 *et seq.* (Section 5.3); Second Witness Statement of Julio F. Castañeda, p. 22 *et seq.* (paras. 52-53 and 62-73); R-0061; R-0072; R-0074; R-0062.

disagrees, arguing that these infringements impacted Parán even if Parán did not complain about them at the time.<sup>27</sup>

## **2.6 The Subprefect of the Leoncio Prado District authorised and participated in the 19 June 2018 invasion**

- 21 The Claimant has shown that Mr Retuerto authorised and participated in the invasion by Parán on 19 June 2018. Contemporaneous documents show that Parán informed IMC's community relations team on 15 June 2018 that Mr Retuerto had authorised the invasion, and a statement rendered under oath by [REDACTED] on 20 June 2018 reveals that Mr Retuerto took part in the invasion.<sup>28</sup>
- 22 The Respondent argues that the evidence submitted by the Claimant is based on hearsay and submits a witness statement by Mr Retuerto to support its stance.<sup>29</sup>

## **2.7 Peru failed to comply with its obligations under Peruvian law**

- 23 The Claimant has established that the Huaura Subprefect failed to file a criminal complaint against Parán following the breach of the September 2018 Commitment. By virtue of this Commitment, which Ms Bertila González signed in her capacity as Huaura Subprefect, Parán was obliged to refrain from all acts of violence, threats, or harassment against IMC. Parán immediately breached the agreement by creating the Blockade, of which IMC informed Ms González on 9 November 2018. Ms González was obliged to file a criminal complaint against Parán pursuant to Article 326(2) of the Procedural Criminal Code, but did not.<sup>30</sup>
- 24 The Respondent denies that Ms González was obliged to file a criminal complaint against Parán, arguing that the breach of the September 2018 Commitment by Parán did not constitute a crime and thus did not entail criminal liability. The Respondent adds that even if it was a crime, IMC was obliged to file the criminal complaint itself.<sup>31</sup>

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<sup>27</sup> Counter-Memorial, p. 87 *et seq.* (Section II.D.1(b)); Daniel Vela Report, p. 41 *et seq.* (para. 123-129); Rejoinder, p. 71 *et seq.* (paras. 128-130).

<sup>28</sup> Reply, p. 109 (para. 269); [REDACTED] **R-0127 (corrected translation)**, p. 3; **C-0157**, p. 4; **C-0550**.

<sup>29</sup> Rejoinder, p. 111 *et seq.* (Section II.C.3.a(ii)); Witness Statement of Soymán Román Retuerto, p. 2 *et seq.* (Section II).

<sup>30</sup> Reply, p. 114 *et seq.* (Section 6.3); First Witness Statement of Julio F. Castañeda, p. 27 (para. 77); [REDACTED] **C-0139**; **C-0237**, p. 2; **C-0555**, p. 107 (Art. 326(2)).

<sup>31</sup> Rejoinder, p. 117 *et seq.* (Section II.C.3(c)); **IMM-0011 (corrected translation)**; **C-0566**, p. 7 *et seq.* (Arts. 7.4.8, 7.5.1 and 7.5.7); **C-0555**, p. 107 (Art. 326(1)).

- 25 The Claimant has established that the Police failed to lift the Blockade within fifteen days of its installation, despite being obliged to do so under Peruvian law. Three days after the Blockade, on 17 October 2018, Lupaka sent a letter to the Lima Chief of Police requesting support to recover the Site. The Police were obliged to provide such support under article 920 of the Civil Code and started preparing an operational plan to that effect, which, however, they failed to implement.<sup>32</sup>
- 26 The Respondent argues that Peruvian law *authorises* but does not oblige the Police to use force under certain circumstances and that the operational plan for 30 October 2018 was prepared by IMC, not the Police. It adds that IMC did not take appropriate steps under article 920 of the Civil Code to request the support of the Police and that, in any event, such support could not be provided through the use of force because this is a measure of last resort that was not justified in the circumstances.<sup>33</sup>
- 27 The Claimant has established that the Police failed to lift the Blockade in the months following the taking, despite being obliged to do so under Peruvian law. Article 8.2 of Legislative Decree 1186 provides that force can be used to “prevent the perpetration of crimes” and to “control anyone resisting authority”.<sup>34</sup>
- 28 As to the “prevention of crimes”, contemporaneous documents show that the Parán invaders were armed, that the Police headquarters in Huacho requested its ultimate superior in Lima (General Arata) to confiscate those arms because they were being misused, that the PCM insisted in May 2019 on the need for the Police to confiscate these arms and that the Parán invaders were in control of 5,675 kilos of explosives. These circumstances obliged the Police to intervene to prevent the perpetration of crimes. As to the “resistance of authority”, contemporaneous documents show that the Parán members frustrated the two inspections of IMC’s explosives magazine that the Huaura Prosecutor ordered be conducted on 21 December 2018 and 9 February 2019, which obliged the Police to arrest those Parán members.<sup>35</sup> However, the Police failed to do so.
- 29 The Respondent denies that the Police was obliged to lift the Blockade or confiscate Parán’s firearms, arguing that articles 8.2(c) and 8.2(e) grant discretion to the Police to use force as those provisions use the word “*may*”. In relation to the arms held by the Parán

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<sup>32</sup> Reply, p. 118 *et seq.* (Section 6.4); Iván F. Meini Report, p. 42 *et seq.* (para. 118); **C-0170; C-0173; R-0005 (corrected translation)**, p. 226 (Art. 920).

<sup>33</sup> Rejoinder, p. 86 *et seq.* (paras. 157-158 and 173-187); Iván F. Meini Report, p. 10 *et seq.* (paras. 15-17 and 117-118); **IMM-0020**, p. 3 (Art. 920).

<sup>34</sup> **IMM-0040**, p. 4.

<sup>35</sup> Memorial, p. 34 (paras. 106, 138 and 151); Reply, p. 6 *et seq.* (paras. 15, 280, 299, 344, 346-347, 353, 360-361, 368-370); Second Witness Statement of Luis F. Bravo, p. 19 *et seq.* (paras. 41, 47 and 150); **C-0016**, p. 4; **C-0193**, p. 30 (paras. H and I); **C-0338; C-0552; C-0574; C-0129**, p. 2; **C-0338; C-0468**, p. 3; **C-0578**, p. 3; **C-0341; C-0342; IMM-0053**.

members, the Respondent argues that confiscating such arms would have been counterproductive to the social conflict as it would have resulted in a violent confrontation and that the State put in place a programme to incentivise the voluntary surrender of weapons that proved effective. Finally, the Respondent argues that force can only be used with those resisting authority if there is an order issued by an authority which has been disobeyed or if certain police actions were resisted and required the use of force to be carried out, requirements that would not be met in this case.<sup>36</sup>

- 30 The Claimant has established that the Huaura Prosecutor's Office failed to process the six criminal complaints filed by IMC against Parán members in accordance with Peruvian law. Between June 2018 and March 2019, IMC filed six criminal complaints against Parán concerning the invasions of the Site, the failed inspections of IMC's explosives magazine and the theft of IMC's explosives. The Claimant has established that in all these cases, the Huaura Prosecutor's Office failed to comply with the time limits imposed by Peruvian law to conduct the criminal investigations and that none of these criminal complaints resulted in the arrest or conviction of Parán members.<sup>37</sup>
- 31 The Respondent denies the above arguing that the criminal investigations and court proceedings were conducted by the Prosecutor's General Office and the Peruvian Courts in accordance with Peruvian law and within the normal and reasonable timeframes. IMC never filed any complaint against any public authority for the mishandling of its complaints. Further, IMC has not proven that the decisions rendered by the State authorities amounted to a violation of Peruvian law or Peru's obligations under international law. Finally, the Claimant has not proven the exceptional circumstances required to justify a preventive arrest, namely evidence of flight risk or reasonable grounds to believe that the accused will interfere with the criminal investigations if not incarcerated.<sup>38</sup>

## **2.8 Parán used weapons provided by the State in its aggressions against IMC**

- 32 The Respondent contends that "there is no evidence to suggest that, during the Access Road Protest, or during the encounter with the War Dogs on 14 May 2019, Parán's *Ronda*

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<sup>36</sup> Counter-Memorial, p. 102 *et seq.* (paras. 208, 534 and 536); Rejoinder, p. 95 *et seq.* (paras. 172, 188-198 and 690) and p. 144 *et seq.* (paras. 281-286); Iván F. Meini Report, p. 26 *et seq.* (paras. 74, 76 and 147-152); **R-0060**, p. 5 (Art. 8.2(e)); **IMM-0040**, p. 4 (Art. 8.2(e)).

<sup>37</sup> Memorial, p. 41 (paras. 126-129, 133 and 178); Reply, p. 17 *et seq.* (paras. 39, 277-278, 285-286, 327, 329, 333-334, 368-370, 455, 674 (b), 678-681, 771 (a)); **IMM-0054**; **IMM-0049**; **IMM-0050**; **IMM-0051**; **IMM-0052**; **IMM-0053**; **C-0125**; **C-0167**; **C-0176**; **C-0208**; **C-0248**; **C-0458**, p. 1; **C-0342**; **C-0246**.

<sup>38</sup> Counter-Memorial, p. 108 *et seq.* (paras. 217, 238, fn 520, 262, 536-237); Rejoinder, p. 148 *et seq.* (Section C.3(g)); Iván F. Meini Report, p. 66 (paras. 175-187); **R-0261**.

*Campesina* used any of the firearms that had been distributed to it decades earlier by the Peruvian military.”<sup>39</sup>

- 33 This statement is directly contradicted by a letter dated 25 January 2019 from the Huacho police department to General Arata in Lima, requesting that he order that the arms provided by the State be taken back from Parán’s *Ronda Campesina*. The letter reasons that the weapons were being misused not only by shooting directly at Lacsanga community members, but also in the context of the Blockade.<sup>40</sup> The Operational Plan also directly references Parán’s *Ronda Campesina* misusing the firearms provided by the army against IMC and any Lacsanga member who would approach the mining camp.<sup>41</sup> An internal PCM note of 27 May 2019 refers to the events of 14 and 15 May 2019 and states that “in relation to the possession of weapons in the community, it is known that they have weapons that were handed over in the 1990s to the *Rondas Campesinas* and Self-Defence and others that have not been registered.”<sup>42</sup>

## **2.9 The Police were ready to intervene to lift the Blockade but did not do so, contrary to its obligation**

- 34 The Parties agree that the PNP prepared an Operational Plan to lift the Blockade dated 9 February 2019 and that the Police did not implement such plan.<sup>43</sup>
- 35 The Claimant has established that the Police were ready to intervene to lift the Blockade as from October 2018.<sup>44</sup> In addition, the Claimant has submitted the complete Operational Plan from February 2019, which the Police would implement on 19 February 2019, as the police hierarchy had approved it.<sup>45</sup> The Police did not implement it in February 2019 as a result of the MININTER’s disagreement for political reasons.<sup>46</sup> As a matter of Peruvian

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<sup>39</sup> Rejoinder, p. 146 *et seq.* (para. 285); **C-0552**.

<sup>40</sup> Reply, p. 122 *et seq.* (paras. 299, 347, 361, 499, 670 (a) and 771 (b)); Second Witness Statement of Luis F. Bravo, p. 19 *et seq.* (para. 41); **C-0338**; **C-0574**; **C-0578**, p. 3.

<sup>41</sup> Memorial, p. 34 (para. 106); Reply, p. 211 *et seq.* (paras. 535, 595, 660 (a)); **C-0193**, p. 8 *et seq.* (para. 14); **C-0016**, p. 4; **C-0458**, p. 12; **C-0618**, p. 19; **C-0619**, p. 5.

<sup>42</sup> Reply, p. 149 *et seq.* (para. 361); **C-0578**, p. 3; **C-0574**.

<sup>43</sup> Memorial, p. 48 *et seq.* (paras. 147-151); Reply, p. 120 *et seq.* (paras. 294, 296-310, 332, fn 629, 340-342, 388, 670(a)); Counter-Memorial, p. 102 (paras. 208 and 256); Rejoinder, p. 225 (para. 437); Iván F. Meini Report, p. 15 (paras. 40-45 and 161-168); **C-0193**.

<sup>44</sup> Reply, p. 120 (para. 294); [REDACTED]

<sup>45</sup> Memorial, p. 60 *et seq.* (paras. 150-151); Reply, p. 121 *et seq.* (paras. 296, 301, 310 and 674 (c)); First Witness Statement of Luis F. Bravo, p. 13 (para. 34); Second Witness Statement of Luis F. Bravo, p. 24 *et seq.* (paras. 53, 64-65, 68-70); **C-0192**, p. 2 *et seq.*

<sup>46</sup> Memorial, p. 49 *et seq.* (para. 150); Reply, p. 126 (paras. 309-310); First Witness Statement of Luis F. Bravo, p. 13 *et seq.* (paras. 33-38); Second Witness Statement of Luis F. Bravo, p. 9 *et seq.* (paras. 14 and 35-37); **C-0192**, p. 3.

law, the Police were obliged to intervene.<sup>47</sup> Even if the Police were not obliged under Peruvian law, its decisive intervention made sense in the circumstances, as it had in other instances.<sup>48</sup> Peru was clearly obliged to intervene firmly (and not just mediate a “dialogue”) to protect Lupaka’s investment.

- 36 The Respondent’s position is that it was solely for the Police to decide whether to implement the Operational Plan, not the MININTER, which did not block it in practice either.<sup>49</sup> This is despite several internal governmental documents on record to the contrary.<sup>50</sup> For example, an internal MEM memorandum of 20 February states: “[t]he PNP has prepared an operational plan to effect the unblocking of the access roads, the approval of which is pending by the Ministry of Interior’s senior officials.”<sup>51</sup> The Respondent claims this internal memorandum was wrong,<sup>52</sup> that the Police decided not to intervene of its own volition, which they were entitled to do as a matter of Peruvian law, and that this was reasonable in the circumstances.<sup>53</sup> Although Peru stated in the Counter-Memorial that it would have been illegal for the Police to do so in the circumstances;<sup>54</sup> in the Rejoinder, Peru resiles from this position and states that it would have been counterproductive.<sup>55</sup> The Respondent also states that there is no evidence that Mr Saavedra, then Vice Minister for Internal Order at the MININTER, blocked Police intervention.<sup>56</sup>

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<sup>47</sup> Reply, p. 146 *seq.* (paras. 355-371 and Section 6.4); Iván F. Meini Report, p. 10 *et seq.* (paras. 18, 72, 118, 119, 120, 121, 122 and 123); **R-0005**, p. 226 (Art. 920); **IMM-0040**, p. 4 (Art. 8.2).

<sup>48</sup> Reply, p. 153 *et seq.* (Section 7.2); Second Witness Statement of Luis F. Bravo, p. 6 *et seq.* (paras. 9-13); **C-0304**; **C-0305**; **C-0306**; **C-0307**; **C-0311**; **C-0312**; **C-0313**; **C-0579**; **C-0580**; **C-0581**; **C-0584**; **C-0585**; **C-0586**; **C-0587**; **C-0588**; **C-0589**; **C-0591**.

<sup>49</sup> Counter-Memorial, p. 131 (para. 256); Rejoinder, p. 121 *et seq.* (paras. 237-240); Witness Statement of Esteban Saavedra Mendoza, p. 9 *et seq.* (para. 25 (d) and 33); Iván F. Meini Report, p. 15 *et seq.* (paras. 42 and 158-159).

<sup>50</sup> Memorial, p. 56 *et seq.* (173 and 174); Reply, p. 134 *et seq.* (paras. 331, 386-390); First Witness Statement of Luis F. Bravo, p. 24 *et seq.* (paras. 76-77); Second Witness Statement of Luis F. Bravo, p. 29 *et seq.* (Section 4.5 and paras. 111-112); **C-0213**; **C-0214**; **C-0215**; **C-0353**; **C-0576**, p. 2; **C-0577**.

<sup>51</sup> Reply, p. 124 *et seq.* (paras. 306-310); **C-0468**, p. 3.

<sup>52</sup> Rejoinder, p. 122 *et seq.* (para. 240 (e)); Second Witness Statement of Nilton César León Huerta, p. 16 *et seq.* (paras. 41- 47); Second Witness Statement of Andrés Fernando Trigos Alca, p. 10 (para. 23-24).

<sup>53</sup> Rejoinder, p. 91 (para. 165); Second Witness Statement of Andrés Fernando Trigos Alca, p. 9 (paras. 20-22); Second Witness Statement of Nilton César León Huerta, p. 17 *et seq.* (paras. 44-46).

<sup>54</sup> Counter-Memorial, p. 255 *et seq.* (paras. 533-540); Iván F. Meini Report, p. 54 *et seq.* (paras. 150, 168-174); **IMM-0038**.

<sup>55</sup> Rejoinder, p. 127 *et seq.* (paras. 242-246).

<sup>56</sup> Rejoinder, p. 127 *et seq.* (paras. 242-246).

**2.10 By early 2019, the MEM-OGGS did not believe negotiations should continue and recommended that the Police intervene**

- 37 The Claimant has shown that after the failed meetings from October 2018 to January 2019 between representatives of the OGGS-MEM, Parán and Lupaka, the OGGS-MEM believed that further dialogue would be fruitless and was in favour of a Police intervention. This position continued until the MININTER blocked the Police Operational Plan, namely in mid-February 2019.<sup>57</sup>
- 38 The MEM-OGGS' view at the time belies Peru's allegation that Police intervention was unwarranted. The Respondent agrees that an internal document of the MEM-OGGS dated 20 February 2019 concluded that the "dialogue with the Parán Community had reached an impasse".<sup>58</sup> It also notes in its Rejoinder that two internal MEM-OGGS documents "recommended that the public order mechanisms be activated by the MININTER" and that "the reestablishment of public order through the corresponding channels, MININTER, PNP, DGOP, should proceed."<sup>59</sup> However, the Respondent states, implausibly, that these were mere recommendations and that these did not necessarily imply that the MEM-OGGS was in favour of a Police intervention.<sup>60</sup>

**2.11 The 26 February 2019 Agreement is clear; Parán immediately breached it, again showing that further negotiation was futile**

- 39 The Claimant has shown that the 26 February 2019 Agreement is unambiguous; it required Parán to lift the Blockade immediately.<sup>61</sup> The Claimant has also demonstrated that Parán immediately and continuously breached this commitment thereafter.<sup>62</sup>
- 40 The Respondent alleges that there was no commitment by Parán to lift the Blockade on the Lacsanga Road and that even if there was, Parán's interpretation of it in the sense that

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<sup>57</sup> Memorial, p. 48 (Section 2.2.7); Reply, p. 121 *et seq.* (Section 6.5); First Witness Statement of Luis F. Bravo, p. 11 (Section 4.2); Second Witness Statement of Luis F. Bravo, p. 27 *et seq.* (Section 4.5); C-0191; C-0192, p. 3; C-0341, p. 2; C-0353; C-0468, p. 3; C-0576, p. 2.

<sup>58</sup> Rejoinder, p. 91 (para. 165); C-0468, p. 3.

<sup>59</sup> Rejoinder, p. 122 *et seq.* (para. 240 (f)); C-0576, p. 2; C-0353, p. 2.

<sup>60</sup> Rejoinder, p. 122 *et seq.* (para. 240 (f)); Second Witness Statement of Nilton César León Huerta, p. 16 (para. 41); Second Witness Statement of Andrés Fernando Trigoso Alca, p. 12 (para. 23).

<sup>61</sup> Memorial, p. 51 (Section 2.3.8); Reply, p. 127 *et seq.* (paras. 313-317); First Witness Statement of Luis F. Bravo, p. 15 *et seq.* (Section 4.3); Second Witness Statement of Luis F. Bravo, p. 31 (Section 5); C-0200, p. 1; C-0572, p. 2 (para. 2.3); C-0573, p. 3; C-0574, p. 3.

<sup>62</sup> Memorial, p. 51 (Section 2.3.8); Reply, p. 127 *et seq.* (Section 6.6.1); First Witness Statement of Luis F. Bravo, p. 17 *et seq.* (Sections 4.4 and 4.5); Second Witness Statement of Luis F. Bravo, p. 38 *et seq.* (Section 5.3); C-0017; C-0201; C-0202; C-0204.



it was not required to do so was reasonable.<sup>63</sup> The plain language of the 26 February 2019 Agreement, as well as Lupaka's and Peru's contemporaneous understanding of the import of the agreement, contradicts this.<sup>64</sup>

## **2.12 Lupaka's initial refusal to pay for Parán's unilaterally imposed topographer did not warrant an invasion of the Site**

- 41 The Respondent relies on Lupaka's refusal to pay for a topographer in March 2019 as supposed evidence of Lupaka's breach of the 26 February 2019 Agreement; it also notes Lupaka's alleged "parsimonious posture towards Parán". The Respondent further argues that even if the topographical survey relating to Parán's road had not been part of the 26 February 2019 Agreement, Lupaka's refusal to pay for it was unreasonable and that predictably, it caused another "demonstration" (*i.e.*, armed invasion) at the Site on 20 March 2019.<sup>65</sup>
- 42 The Claimant denies that Lupaka breached the 26 February 2019 Agreement by initially refusing to pay for the unilaterally imposed topographer on 15 March 2019; indeed, it had been agreed that the topographer was to focus on identifying any existing damage on Parán's land and not carrying out a survey for the purpose of upgrading Parán's road.<sup>66</sup> In addition, at the meeting of 19 March 2019 between Lupaka and Parán's representatives, Lupaka offered to reconsider paying the topographer's fees and building a road through Parán, among other things.<sup>67</sup> This was hardly a mark of disrespect. Parán failed to accept and demanded that the agreements with the other communities be terminated, among other matters. The next day it invaded the Site again. Parán's conduct was clearly in bad faith, showing that further dialogue would lead nowhere.<sup>68</sup> Parán's reaction was disproportionate to Lupaka's initial refusal to pay for the topographer.

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<sup>63</sup> Counter-Memorial, p. 138 (para. 270); Rejoinder, p. 131 *et seq.* (paras. 254- 257) ; First Witness Statement of Nilton César León Huerta, p. 12 *et seq.* (paras. 40-42); **R-0258; R-0171**.

<sup>64</sup> Reply, p. 127 *et seq.* (Section 6.6.1); Second Witness Statement of Luis F. Bravo, 38 *et seq.* (Section 5.3); **C-0200**, p. 1; **C-0572**, p. 2 (para. 2.3); **C-0573**, p. 3; **C-0574**, p. 3.

<sup>65</sup> Counter-Memorial, p. 8 *et seq.* (paras. 20, 271, 272, 528 and 661) ; Rejoinder, p. 65 *et seq.* (paras. 117, 258- 268); First Witness Statement of Nilton César León Huerta, p. 21 *et seq.* (paras. 64-68); First Witness Statement of Andrés Fernando Trigoso, p. 16 (para. 43).

<sup>66</sup> Memorial, p. 53 *et seq.* (paras. 162-163) ;Reply, p. 131 *et seq.* (para. 323- 325); First Witness Statement of Luis F. Bravo, p. 20 *et seq.* (paras. 59-61); Second Witness Statement of Luis F. Bravo, p. 35 *et seq.* (paras. 85-87, 114-117).

<sup>67</sup> Memorial, p. 53 *et seq.* (paras. 163-165) ;Reply, p. 131 *et seq.* (para. 325); First Witness Statement of Luis F. Bravo, p. 21 *et seq.* (paras. 63-68); Second Witness Statement of Luis F. Bravo, p. 47 *et seq.* (paras. 121-122); **C-0354**, p. 2.

<sup>68</sup> Memorial, p. 54 *et seq.* (paras. 164-166) ; Reply, p. 131 *et seq.* (para. 325); First Witness Statement of Luis F. Bravo, p. 21 *et seq.* (paras. 63-68); Second Witness Statement of Luis F. Bravo, p. 46 *et seq.* (paras. 116-130); **C-0205; C-0206; C-0207; C-0354; C-0359**.

**2.13 The renewed invasion of 20 March 2019 again showed that the State had to act with force – yet it only insisted that negotiations continue**

- 43 After the 20 March 2019 invasion by Parán, Lupaka and Canadian Embassy officials met with the Deputy Minister of Mines, MININTER representatives and OGGS representatives met with Lupaka on 28 March 2019. Tellingly, Lupaka was not reprimanded for not complying with the 26 February 2019 Agreement. While recognising that the agreement required lifting the Blockade, the State representatives reiterated that negotiations should continue. This made no sense in the circumstances.<sup>69</sup>
- 44 The Respondent alleges instead that it made sense to re-establish the mediation process after the 20 March 2019 invasion, given the “significant successes (including notably the 26 February 2019 Agreement).”<sup>70</sup>

**2.14 WDS did not forcibly enter the Site on 14 May 2019; the entry had been coordinated with the Police**

- 45 The Claimant has shown that Lupaka retained WDS to secure its Site after the Police lifted the Blockade.<sup>71</sup> Indeed, as explained by Mr Bravo, the Police considered that an operational plan was required, and he and other IMC staff (namely, Mr Estrada) coordinated with the Police to carry it out.<sup>72</sup> Mr Bravo confirmed with Colonel Arbulú, the head of the Huacho Police Division, that the plan would proceed.<sup>73</sup> Yet on the day, the Police were to intervene, namely on 14 May 2019, they did not show up. WDS entered the Site unimpeded; there were no Parán members at the Site of the Blockade as shown by a video shot on that same day.<sup>74</sup> A few hours later, Parán members arrived and opened fire, leading WDS to flee without returning fire.<sup>75</sup>

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<sup>69</sup> Memorial, p. 55 *et seq.* (paras. 169-171); Reply, p. 133 (Section 6.7); First Witness Statement of Luis F. Bravo, p. 23 *et seq.* (paras. 71-73); Second Witness Statement of Luis F. Bravo, p. 51 *et seq.* (paras. 134-140); **C-0209; C-0354; C-0359**.

<sup>70</sup> Counter-Memorial, p. 140 *et seq.* (paras. 276-277); Rejoinder, p. 140 *et seq.* (paras. 271-272); First Witness Statement of Nilton César León Huerta, p. 15 (para. 47); **R-0026; R-0014; R-0111**.

<sup>71</sup> Memorial, p. 57 (para. 175) Reply, p. 138 *et seq.* (paras. 339-340); First Witness Statement of Luis F. Bravo, p. 25 (para. 78); Second Witness Statement of Luis F. Bravo, p. 53 (paras. 141-142); **C-0354; C-0361**, p. 2 *et seq.* (Clauses 3 and 5(1)).

<sup>72</sup> Memorial, p. 56 (Section 2.3.10); Reply, p. 139 *et seq.* (paras. 340 and 342); First Witness Statement of Luis F. Bravo, p. 25 (para. 79); Second Witness Statement of Luis F. Bravo, p. 53 *et seq.* (paras. 143-145); **C-0211; C-0212; C-0213; C-0214; C-0215; C-0216**, p. 2.

<sup>73</sup> Second Witness Statement of Luis F. Bravo, p. 54 (para. 145); **C-0360**.

<sup>74</sup> Memorial, p. 58 (para. 177); Reply, p. 138 *et seq.* (paras. 336-344); First Witness Statement of Luis F. Bravo, p. 26 (para. 81); Second Witness Statement of Luis F. Bravo, p. 55 *et seq.* (para. 149); **C-0362; C-0363**.

<sup>75</sup> Memorial, p. 58 (para. 177); Reply, p. 149 *et seq.* (para. 344); First Witness Statement of Luis F. Bravo, p. 26 (para. 82); Second Witness Statement of Luis F. Bravo, p. 56 (para. 150).

- 46 The Respondent does not deny these facts except that it contends that WDS forcibly removed five members of the Parán Community in the process of approaching the Invicta Mine.<sup>76</sup> The Respondent does not mention the video provided by the Claimant; nor does it comment on the murder of one of the WDS guards at the hands of Parán.<sup>77</sup> It submits a Police report from February 2020 as evidence.<sup>78</sup> Yet, as Peru acknowledges, the Police were not at the Site in the early morning of 14 May 2019, when relevant events occurred. Parán gave its account to the Police shortly after the events while defiantly impeding access to the Site to the Police.<sup>79</sup>

## **2.15 The Police intervention of 14 December 2021 should have taken place shortly after October 2018**

- 47 The Claimant has proven that a major Police operation took place on 14 December 2021 with a view of stopping the Parán Community's illegal mining of ore; it has also been proven that the Police are planning to undertake a further intervention.<sup>80</sup> This shows that Peru does consider that Police intervention is required in the face of Parán's blatant disrespect for the law. This is contrary to its stance in this arbitration.<sup>81</sup> Yet such intervention came too late as Lupaka had already lost its investment.
- 48 The Respondent alleges that the 14 December 2021 Police intervention at the Invicta Mine is irrelevant and does not support the claim that Peru should have forcefully intervened to lift the Blockade when Lupaka held its investment.<sup>82</sup>

## **2.16 Peru has shown that it can use force in other situations of social conflict**

- 49 The Claimant has shown that in numerous situations of social conflict and invasion of private property, whether in the mining industry or otherwise, Peru's Police have intervened forcefully where the local populations are acting illegally.<sup>83</sup>

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<sup>76</sup> Rejoinder, p. 90 (para. 164).

<sup>77</sup> Memorial, p. 58 (para. 177); Reply, p. 211 (paras. 535 (d) and 679); First Witness Statement of Luis F. Bravo, p. 26 (para. 83); **C-0018**, p. 5 (item 11); **C-0221**, p. 3 (item 6); **R-0019**, p. 2; **C-0552**, p. 3; **C-0578**, p. 2; and **C-0574**, p. 3.

<sup>78</sup> **R-0113 (corrected translation)**, p. 3 (para. 23)

<sup>79</sup> Rejoinder, p. 143 (para. 279); **R-0262**.

<sup>80</sup> Reply, p. 13 *et seq.* (paras. 32, 353, 378 and 380); [REDACTED] **C-0326**.

<sup>81</sup>; Counter-Memorial, p. 9 *et seq.* (para. 24 and fn. 480); Rejoinder, p. 95 *et seq.* (Section II.C.1); Reply, p. 156 *et seq.* (paras. 381-382).

<sup>82</sup> Rejoinder, p. 223 (paras. 433-445); **C-0255**.

<sup>83</sup> Reply, p. 153 *et seq.* (Sections 7.2.1 and 7.2.2); Second Witness Statement of Luis F. Bravo, p. 6 *et seq.* (paras. 9-13); **C-0304**; **C-0305**; **C-0306**; **C-0307**; **C-0308**; **C-0311**; **C-0312**; **C-0313**; **C-0326**; [REDACTED] **C-0581**;  
[REDACTED]

- 50 The Respondent seeks to distinguish the 13 examples referred to by the Claimant on the facts and notes that, in any event, they show that using force tends to aggravate them.<sup>84</sup>

## **2.17 The Claimant would have met its gold repayment obligations under the PPF Agreement**

- 51 The Parties disagree on whether the Claimant would have been able to meet its gold repayment obligations under the PPF Agreement absent Peru's breaches of the FTA.

### **2.17.1 The Claimant would have met its repayment obligations under the 590 t/d Scenario**

- 52 The Claimant has demonstrated that, but for the Blockade, it would have acquired the Mallay Plant in March 2019 and began processing ore by December 2019, in time to meet its payment obligations under the PPF Agreement, assuming that Pandion would have even enforced the payment deadline.
- 53 By October 2018, Lupaka had agreed on terms for the Mallay Purchase Agreement and the third amendment to the PPF Agreement, which would have unlocked the third tranche of the PLI loan and granted Lupaka a nine-month grace period to meet its gold repayment obligations. The only outstanding step was obtaining the Mallay Community's consent, which was granted in March 2019. As explained by Mr Ellis, given the previous amendment to the PPF Agreement and that production was imminent, it was highly likely that Pandion would have shown flexibility regarding its financing for the Project, but for the Blockade.<sup>85</sup> This makes sense as Pandion stood to benefit far more from a gold stream than from enforcing its rights and selling the debt.
- 54 Moreover, the Claimant had entered into a one-year contract with Huancapeti, a nearby processing plant, to which it started sending large shipments of gold in October 2018. Further, it had agreed with Buenaventura to allow Lupaka to process ore at the Mallay Plant prior to taking ownership. Moreover, the Claimant's mining expert, Mr Jacobs, provided for a conservative three-month ramp-up period in which the production schedule increased gradually in line with the Claimant's gold repayment obligations under the PPF Agreement. In any event, the Claimant could have also met its obligations under the PPF Agreement in cash, if necessary. Therefore, in the unlikely scenario of not having enough processing capacity, it could have financed any shortfalls.<sup>86</sup>

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<sup>84</sup> Rejoinder, p. 152 *et seq.* (paras. 299-304).

<sup>85</sup> Reply, p. 379 (para. 1035); Second Witness Statement of Gordon Ellis, p. 18 *et seq.* (paras. 40-48).

<sup>86</sup> Reply, p. 371 *et seq.* (paras. 1009-1014); Second Witness Statement of Gordon Ellis, p. 37 *et seq.* (paras. 85-101 and the Annex). MICON Report, p. 32 (para. 103(N)) and p. 39 *et seq.* (Section 6.1); **C-0045**, p. 22 (Section 5(5)).

- 55 The Respondent labels the Mallay Plant acquisition as “hypothetical” and contends that even if it were successful, the Claimant would not have been able to lawfully exploit the Mine given the lack of regulatory approvals. The Respondent argues further that these options would not have been sufficient and its expert now belatedly contends that, even if they were, obtaining the regulatory approvals to begin extracting ore from the Mine would have delayed the ore processing until January 2020 in an optimistic scenario.<sup>87</sup> Notably, had Lupaka acquired the Mallay Plant in March 2019, its repayment obligations under the third amendment to the PPF Agreement would not have started until December 2019, merely a month away from Ms Dufour’s optimistic scenario.

### **2.17.2 The Claimant would have met its repayment obligations under the 355 t/d Scenario**

- 56 The Claimant also showed that, even without Mallay, it would have met its gold repayment obligations under the PPF Agreement. The Claimant has established that Lupaka had produced sufficient mill-feed tonnage over the course of August, September and October 2018 to comply with its gold repayment obligations. The Claimant could have arranged for its ore material to be processed at third-party toll-treatment plants, including Huancapeti, Coriland, Huari and Mallay, and ship the resulting concentrates to market in time to meet its obligations under the PPF Agreement.<sup>88</sup> Further, Mr Jacobs similarly anticipated a conservative three-month ramp-up period under the 355 t/d scenario.<sup>89</sup>
- 57 The Respondent argues that the Claimant’s production plans assumed that failures by the various third-party processors would have been resolved immediately before the commencement of production without explaining how these issues would have been resolved or quantified in terms of time and cost. It further refers to outstanding regulatory approvals to begin commercial exploitation, which the Respondent belatedly contends would have been obtained by January 2020 at the earliest.<sup>90</sup> The Respondent is wrong. In addition, even if it were correct, there is no reason why any of these delays would have led to forfeiture by Pandion.<sup>91</sup>

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<sup>87</sup> Rejoinder, p. 425 *et seq.* (paras. 837-841). Miyanou Dufour von Gordon Report, p. 8 *et seq.* (of PDF) (paras. 9(a), 219).

<sup>88</sup> C-0087, p. 10 (Section 5). MICON Report, p. 40 (paras. 123-124).

<sup>89</sup> MICON Report, p. 22 (para. 86).

<sup>90</sup> AlixPartners Second Report, p. 7 *et seq.* (paras. 18-19); Miyanou Dufour von Gordon Report, p. 74 *et seq.* (of PDF) (para. 219); Rejoinder, p. 161 *et seq.* (paras. 308-333, 338-376).

<sup>91</sup> Second Witness Statement of Gordon Ellis, p. 42 *et seq.* (paras. 100-103).

### **2.17.3 But-for the Blockade and Peru's failure to act, PLI Huaura would not have foreclosed on Claimant's share in IMC**

- 58 The Parties disagree on whether PLI Huaura's foreclosure on Claimant's Invicta shares resulted from the Respondent's FTA breaches.
- 59 The Claimant showed that it lost its investment before PLI Huaura's foreclosure, and thus, the foreclosure is not relevant to its damages claim. Nonetheless, the Claimant has established that eight out of the fourteen default events listed in PLI Huaura's Notice of Acceleration arose directly as a result of the Blockade. The remaining six events were never notified to the Claimant as a breach under Pandion's ownership.<sup>92</sup>
- 60 In its Counter-Memorial, the Respondent acknowledged that the default events identified by PLI Huaura "related primarily to the [Blockade]". However, the Respondent continues to baselessly argue that it was the Claimant's own failure that led to the foreclosure, ignoring that the Claimant could not perform under the PPF Agreement because it could not regain access to its Mine.<sup>93</sup>

### **2.18 The 2018 PEA's average ore grades are reliable and do not require adjustment**

- 61 The Parties disagree on the reliability of the average gold grades assumed in the 2018 PEA and relied upon by Accuracy for its damages calculation.
- 62 The Claimant has established that the gold grades assumed in the 2018 PEA were higher because SRK's analysis was based on samples representative of the *entire* deposit to be mined in accordance with the 2018 PEA's mining plan. By contrast, the pre-development material extracted as of October 2018 was not representative of the mineralisation area included in the 2018 PEA's mining plan.<sup>94</sup> Further, the Claimant's mining expert, Mr Jacobs, identified other technical reasons for the anomalies in gold grades and concluded that Lupaka would have been able to redress the shortfalls by early 2019 through systematically collecting sulphide-enriched sludge and closely supervising the toll-processing operations.<sup>95</sup>
- 63 The Respondent dismisses Mr Jacobs' technical explanations for the shortfalls as a mere hypothesis. Nevertheless, it provides no technical rebuttal of Mr Jacobs' findings.<sup>96</sup>

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<sup>92</sup> Reply, p. 359 (paras. 972-978); Second Witness Statement of Gordon Ellis, p. 22 *et seq.* (Section 4.4); C-0054, p. 4 *et seq.*

<sup>93</sup> Counter-Memorial, p. 357 *et seq.* (paras. 761-763); Rejoinder, p. 431 (paras. 849-850).

<sup>94</sup> Second Witness Statement of Gordon Ellis, p. 28 *et seq.* (paras. 60-70).

<sup>95</sup> MICON Report, p. 44 *et seq.* (paras. 139-149).

<sup>96</sup> Rejoinder, p. 457 (para. 906)

## **2.19 The Claimant could have extended the production schedule to ten years**

- 64 The Parties disagree on the Project's lifespan under the 590 t/d production schedule.
- 65 Mr Jacobs, the Claimant's mining expert, has demonstrated that Lupaka could have extended the 590 t/d production schedule to ten years based on the measured and indicated resource defined in SRK's geological block and contemporaneous reports. This is the first time a detailed, independently engineered, mine exploitation plan has been prepared for the 590 t/d scenario, raising the confidence in the production and cost estimates of the Red Cloud Model. By contrast, the 2018 PEA aimed specifically at a six-year period with no bearing on the optimal mine plan the known resource could support. Therefore, had the Project gone ahead, the Claimant could have continued to explore and expand the resource as production progressed, which would have likely resulted in a longer lifespan of the mine.<sup>97</sup>
- 66 The Respondent argues that Micon's extended production schedule was prepared for this arbitration, was never considered by Lupaka and was incompatible with the 7-year production plan that Lupaka had obtained approval for.<sup>98</sup> The Respondent does not contest the Project's mining potential and the feasibility of extending the Project's lifespan as per Mr Jacob's analysis. Lupaka's proven potential to extend the production schedule is relevant for the Tribunal's determination of the full market value of the Project.

## **3 LEGAL STANDARDS IN DISPUTE**

### **3.1 The Tribunal has jurisdiction over the Claimant's claims**

- 67 Apart from the two jurisdictional objections addressed in this section, Peru does not challenge that Lupaka meets the requirements of Articles 819, 822, 823 and 847 of the FTA and the ICSID Convention.<sup>99</sup>

#### **3.1.1 Jurisdiction *ratione personae*: Lupaka is a protected investor that made a qualifying investment under the FTA**

- 68 The Claimant has shown that jurisdiction *ratione personae* under Art. 847 of the FTA must be assessed at the time the State breached its obligations towards an investor.<sup>100</sup> At such

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<sup>97</sup> MICON Report, p. 33 *et seq.* (paras. 105, 157-158).

<sup>98</sup> Rejoinder, p. 456 *et seq.* (para. 904); AlixPartners Second Report, p. 28 (paras. 91- 96).

<sup>99</sup> Memorial, p. 64 *et seq.* (Section 3); Reply, p. 161 *et seq.* (paras. 394-395); Counter-Memorial, p. 177 *et seq.* (Section III); Rejoinder, p. 227 *et seq.* (para. 446).

<sup>100</sup> Reply, 163 *et seq.* (paras. 398-405) (referring to Canada's Non-Disputing Party Submission, p. 1 *et seq.* (para. 5)).

time, Lupaka was a Canadian investor holding a qualifying investment (which Peru does not challenge)<sup>101</sup> and suffered loss resulting from these breaches.<sup>102</sup> The Respondent denies that this is the applicable standard, arguing that jurisdiction must be assessed on the date an arbitration is registered and that Lupaka was not a protected investor then.<sup>103</sup>

- 69 In any event, the Parties agree that when an investment is lost prior to the institution of proceedings, a tribunal retains jurisdiction where “special circumstances” arise, namely when the investment was lost as a direct consequence of the host State’s actions and omissions (as formulated in *Aven v. Costa Rica*).<sup>104</sup> The Claimant has shown that the “special circumstances” are directly applicable.<sup>105</sup> The Respondent denies this by arguing that the transfer of Lupaka’s interests was caused by its failed relationships with the local communities and its conclusion of a high-risk financing arrangement.<sup>106</sup>

### **3.1.2 Jurisdiction *ratione materiae*: Lupaka duly satisfied the waiver requirements under the FTA**

- 70 Peru does not contest the validity of Lupaka’s waiver submitted pursuant to Art. 819 of the FTA.<sup>107</sup> Peru argues that pursuant to Art. 823.1(e) of the FTA, Lupaka should have also submitted a waiver on behalf of IMC because Lupaka is claiming compensation for losses related to IMC.<sup>108</sup> This is incorrect as Art. 823.5 of the FTA sets out an exception to this waiver requirement when the actions or omissions of the host State led to the loss of the investor’s control over its local enterprise, as was the case here.<sup>109</sup> The Respondent denies this, arguing that Lupaka lost control of IMC as a result of its own actions and those of its creditor, PLI Huaura.<sup>110</sup>

### **3.2 Attribution under international law**

- 71 It is undisputed that the ILC Articles set out the applicable attribution principles.<sup>111</sup>

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<sup>101</sup> Reply, p. 163 (para. 400).

<sup>102</sup> Reply, p. 163 *et seq.* (paras. 398-404).

<sup>103</sup> Counter-Memorial, p. 178 *et seq.* (paras. 352-359, 363-372); Rejoinder, p. 228 *et seq.* (paras. 448, 452-462).

<sup>104</sup> Counter-Memorial, p. 179 (para. 354); Reply, p. 165 (paras. 408-409); Rejoinder, p. 228 *et seq.* (paras. 448, 451); **RLA-0017** (*Aven v. Costa Rica*).

<sup>105</sup> Reply, p. 166 (para. 411).

<sup>106</sup> Counter-Memorial, p. 182 *et seq.* (paras. 361-364); Rejoinder, p. 230 *et seq.* (paras. 451, 463-466).

<sup>107</sup> Memorial, p. 70 *et seq.* (paras. 219-221); Reply, p. 167 (para. 414); Rejoinder, p. 239 (para. 467); **C-0021**.

<sup>108</sup> Counter-Memorial, p. 187 *et seq.* (paras. 376, 378); Rejoinder, p. 239 (paras. 467-468).

<sup>109</sup> Reply, p. 166 *et seq.* (paras. 412-417).

<sup>110</sup> Rejoinder, p. 240 *et seq.* (paras. 469-474).

<sup>111</sup> Memorial, p. 75 *et seq.* (para. 238); Counter-Memorial, p. 190 (para. 385).



### **3.2.1 The conduct of the Subprefect of the Leoncio Prado District is attributable to Peru**

- 72 There is no dispute that the actions of the Leoncio Prado Subprefect, a government official who authorised and participated in the 19 June 2018 Invasion, are attributable to Peru under Art. 4 of the ILC Articles.<sup>112</sup> The Respondent only challenges that this State official encouraged or contributed to Parán's illegal activities.<sup>113</sup>

### **3.2.2 The acts and omissions of the Parán Community and its *Ronda Campesina* are attributable to Peru**

- 73 The Parties disagree on whether the acts and omissions of Parán can be attributed to Peru under Articles 4, 5 and 7 of the ILC Articles.
- 74 First, in relation to **Art. 4 of the ILC Articles**, the Claimant has shown that Parán forms a "territorial unit of the [Peruvian] State" because it is vested with governmental functions, including general powers of administration and regulation over part of its territory, regardless of its degree of autonomy.<sup>114</sup> The Claimant has also shown that the acts at issue followed decisions taken by Parán's President, Governing Committee, or Assemblies and are thus those of the Parán Community as a whole.<sup>115</sup> The Respondent denies this, arguing that a "territorial unit" under Art. 4 refers to "political subdivisions of a State", which Parán is not,<sup>116</sup> and that the actions at issue were merely taken by individuals.<sup>117</sup>
- 75 Second, regarding **Art. 5 of the ILC Articles**, the Parties agree that this provision contains a functional test which assesses whether (i) the powers conferred to the community involved elements of governmental authority and, separately, (ii) if those powers were effectively used in the particular instance.<sup>118</sup> On the first prong, the Parties also agree on the four relevant criteria (outlined by Professor Crawford), namely the content, manner, purpose and accountability relating to such powers.<sup>119</sup>
- 76 The Parties also disagree on whether Peru needs to exercise any degree of control over Parán to be responsible for the community's actions under Arts. 4 and 5. The Claimant

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<sup>112</sup> Reply, p. 107 *et seq.* (paras. 263-269, 289, 419-420); see Rejoinder, p. 248 (para. 488).

<sup>113</sup> Rejoinder, p. 325 *et seq.* (paras. 640-641).

<sup>114</sup> Reply, p. 172 *et seq.* (paras. 425-448); **CLA-0018**, p. 40 *et seq.* (Art. 4, Commentaries 9 and 10); **CLA-0108**, p. 161; **CLA-0109**, p. 239, 243; **CLA-0110**; **CLA-0111**, p. 32 *et seq.*

<sup>115</sup> Reply, p. 180 *et seq.* (paras. 449-457).

<sup>116</sup> Rejoinder, p. 250 *et seq.* (paras. 495-518).

<sup>117</sup> Counter-Memorial, p. 216 *et seq.* (para. 448).

<sup>118</sup> Counter-Memorial, p. 192 *et seq.* (paras. 390-395); Reply, p. 184 *et seq.* (paras. 462, 470, 475, 512-513); Rejoinder, p. 245 (para. 480); see also Canada's Non-Disputing Party Submission, p. 3 *et seq.* (paras. 12-13).

<sup>119</sup> Reply, p. 203 *et seq.* (paras. 512-513).

has shown this not to be the case and that Peru's reliance on Parán's separate legal personality is irrelevant.<sup>120</sup>

- 77 Third, the acts of Parán are also attributable to Peru under **Art. 7 of the ILC Articles**. While Arts. 4 and 5 do not apply to acts that exceed an entity's authority or instructions, a State remains responsible for such acts pursuant to Art. 7, which distinguishes "official, though ultra vires" acts (which are included within its scope) from "purely private" acts (which are excluded).<sup>121</sup> The acts in this case were official, even if they were *ultra vires*, acts of the Parán Community as a whole, acting in concert, pursuant to one chain of command, instructions and direct orders of the community's self-governing organs.<sup>122</sup>
- 78 The Respondent contends that the Claimant misstates the relevant test, which it claims to be whether the community's acts were "carried out in the exercise of official authority, be it actual or ostensible".<sup>123</sup> According to Peru, these were illegal acts under Peruvian law committed by individual community members.<sup>124</sup>
- 79 In any event, the Claimant has shown that Peru remains indirectly internationally responsible for the failure of its own state organs to address Parán and its *Ronda Campesina*'s illegal actions over a prolonged period.<sup>125</sup> Peru is thus wrong when it states that the Claimant can only be successful if the Tribunal finds that the relevant actions of members of Parán are attributable to Peru as a matter of public international law.<sup>126</sup>

### 3.3 Peru breached its obligations under the FTA

- 80 As a preliminary point, Peru disputes that the Claimant has discharged its burden of proof as to the existence of the FPS and FET obligations as part of the minimum standard of treatment under customary international law and wrongly considers this to be fatal for its claims.<sup>127</sup> However, the Claimant does not have a burden to prove the existence of these standards because of the clear language of Art. 805.1 of the FTA and the principle *iura*

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<sup>120</sup> Reply, p. 170 *et seq.* (paras. 423, 444, 466, 473); **CLA-0109**, p. 239 *et seq.*; Rejoinder, p. 248 *et seq.* (paras. 489-491, 502).

<sup>121</sup> Reply, p. 212 *et seq.* (paras. 539-547); **CLA-0018**, p. 45 (Art. 7); **CLA-0115**.

<sup>122</sup> Memorial, p. 78 (para. 248); Reply, p. 212 *et seq.* (paras. 537, 548-554); **CLA-0117**, p. 517, 531-532; **RLA-0033**, p. 13 (para. 61); **CLA-0120**, p. 116 (para. 14).

<sup>123</sup> Rejoinder, p. 273 *et seq.* (paras. 551, 558-568).

<sup>124</sup> Counter-Memorial, p. 221 *et seq.* (paras. 460-474); Rejoinder, p. 272 *et seq.* (paras. 549-557, 569-581).

<sup>125</sup> Reply, p. 229 *et seq.* (paras. 599-601); **CLA-0018**, p. 46 (Art. 7, Commentary 8).

<sup>126</sup> Rejoinder, p. 244 *et seq.* (para. 479).

<sup>127</sup> Counter-Memorial, p. 228 *et seq.* (paras. 478-487 (FPS), 551-583 (FET)); Rejoinder, p. 289 *et seq.* (paras. 589-596 (FPS), 666-667 (FET)).

*novit curia*; in any event, the Respondent ultimately appears to agree on the existence of the standards.<sup>128</sup>

### **3.3.1 Peru unlawfully expropriated Lupaka's investment in breach of Art. 812 of the FTA**

- 81 While the Parties broadly agree on the general formulation of the relevant standards contained in Art. 812 of the FTA (and related Annexes), they disagree on their specific components.
- 82 First, in relation to **direct expropriation**, the Parties agree that it occurs where there is a “formal transfer of title or outright seizure”.<sup>129</sup>
- 83 Second, the Parties agree that Annex 812.1(b) of the FTA lists the relevant factors to assess whether an **indirect expropriation** has taken place, namely (i) the economic impact of the measure(s), (ii) the interference with the investor's reasonable expectations, and (iii) the character of the measure(s).<sup>130</sup> The Parties also agree that a composite act involves a “coordinated pattern or scheme of conduct by the State”.<sup>131</sup> However, the Parties disagree on how the State's conduct must be assessed. The Claimant has shown that the Tribunal should assess the conduct as a whole. However, the Respondent argues that each individual measure “‘must have [had] an adverse effect’ on Claimant's investment”.<sup>132</sup>
- 84 On the **first prong** (economic impact), the Claimant has shown that an indirect expropriation is found where there is “a substantial deprivation or the complete or near complete deprivation of an investment”,<sup>133</sup> which is not “merely ephemeral”<sup>134</sup> and which can result from the cumulative effect of the relevant acts taken together (creeping expropriation).<sup>135</sup> The Claimant has also shown that no formal transfer of title is required, that it is irrelevant whether the State currently owns or possesses the land or rights thereto

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<sup>128</sup> Reply, p. 232 *et seq.* (paras. 610-624, 723-726). See below paragraphs 90 and 94.

<sup>129</sup> Reply, p. 307 *et seq.* (paras. 813-823); Counter-Memorial, p. 316 (para. 671); Rejoinder, p. 370 *et seq.* (para. 738); **CLA-0001**, p. 172 (Annex 812.1(a)).

<sup>130</sup> **CLA-0001**, p. 172 (Annex 812.1(b)); Memorial, p. 96 *et seq.* (para. 297); Reply, p. 311 *et seq.* (paras. 828-829); Counter-Memorial, p. 318 *et seq.* (paras. 676-678); Rejoinder, p. 379 *et seq.* (para. 756).

<sup>131</sup> Reply, p. 329 *et seq.* (para. 880); Counter-Memorial, p. 276 (para. 586); Rejoinder, p. 374 *et seq.* (paras. 746-749, 755).

<sup>132</sup> Rejoinder, p. 375 (para. 748); Reply, p. 277 *et seq.* (paras. 734-736, 878-880); **CLA-0010**, p. 87 (para. 20.22).

<sup>133</sup> Memorial, p. 98 (para. 300); Reply, p. 315 *et seq.* (para. 839); **CLA-0001**, p. 172 (Annex 812.1(b)); **CLA-0057**, p. 128 *et seq.* (para. 320).

<sup>134</sup> Memorial, p. 100 (para. 305); **CLA-0028**, p. 915 (para. 99).

<sup>135</sup> Memorial, p. 101 *et seq.* (paras. 307-311); **CLA-0071**, p. 81 (para. 263); **CLA-0072**, p. 80 *et seq.* (para. 311); **CLA-0076**, p. 19 (para. 84).

and that it suffices that the State tacitly allowed a third party to remain an adverse possessor thereof.<sup>136</sup>

- 85 The Respondent denies that interference with an investor's legal rights (including loss of access, possession, and title) is relevant and improperly heightens the test to establish the "economic impact of the measure" by focusing on the severity of the impact of the measures on the investment's net market value.<sup>137</sup>
- 86 The Parties agree on the content of the **second prong**, namely whether the State's conduct "interfere[d] with distinct, reasonable, investment-backed expectations".<sup>138</sup>
- 87 The Parties agree that the **third prong** involves assessing the "character" of the measures. This term is not defined in Annex 812.1(c) of the FTA, and the Parties agree that it may cover an unlimited number of factors, including the object, context or objectives (including proportionality to a public purpose) of the measures.<sup>139</sup> While the Respondent also considers the intent of the measures as a relevant factor,<sup>140</sup> the Claimant has shown that the host State's ulterior motives or intent are irrelevant.<sup>141</sup>
- 88 Third, the Claimant has shown (and Peru does not dispute) that expropriation is lawful if it meets the requirements of Art. 812 of the FTA, namely that it was for a public purpose, not discriminatory, in accordance with due process and providing "prompt, adequate and effective" compensation.<sup>142</sup> The Respondent refers to Annex 812(c) to argue that its actions and omissions are not expropriatory because they were taken in the promotion of public welfare, health and safety.<sup>143</sup> While the Parties disagree on whether this provision applies to the case at hand and, if it is, whether it includes an obligation for the State to act proportionately,<sup>144</sup> they agree that it prohibits discriminatory measures.<sup>145</sup>

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<sup>136</sup> Memorial, p. 97 *et seq.* (paras. 299, 303); Reply, p. 312 *et seq.* (paras. 830-838); **CLA-0001**, p. 172 (Annex 812(a)); **CLA-0055**, p. 5 (para. 21); **CLA-0028**, p. 911 *et seq.* (paras. 82, 99).

<sup>137</sup> Counter-Memorial, p. 321 *et seq.* (paras. 683-687, and 707); Rejoinder, p. 381 *et seq.* (paras. 759-763, and 771).

<sup>138</sup> Reply, p. 320 (para. 850); Counter-Memorial, p. 326 *et seq.* (paras. 692-698, 720); Rejoinder, p. 395 *et seq.* (paras. 786-789).

<sup>139</sup> Reply, p. 322 (para. 858); Counter-Memorial, p. 328 *et seq.* (paras. 697, 726); Rejoinder, p. 398 *et seq.* (paras. 790-791(b and c)).

<sup>140</sup> Counter-Memorial, p. 342 (paras. 726-727); Rejoinder, p. 398 *et seq.* (paras. 790-791(a)).

<sup>141</sup> Reply, p. 323 (para. 861); **CLA-0069**, p. 229 *et seq.* (para. 7.5.20).

<sup>142</sup> Memorial, p. 104 (paras. 314-318); Reply, p. 330 (para. 881).

<sup>143</sup> Counter-Memorial, p. 334 (para. 731); Rejoinder, p. 401 (para. 794).

<sup>144</sup> Reply, p. 325 *et seq.* (paras. 867-869, 873-874); Rejoinder, p. 401 (paras. 795-799).

<sup>145</sup> Reply, p. 328 (para. 875-876); Rejoinder, p. 403 *et seq.* (para. 800).

### **3.3.2 Peru breached its obligation to provide FET to Lupaka's investment under Art. 805.1 of the FTA**

- 89 The Parties disagree on the content of the applicable FET standard.
- 90 First, the Parties accept the definition of the core FET standard formulated in *Waste Management II*, namely a prohibition of “arbitrary, grossly unfair, unjust or idiosyncratic” State conduct.<sup>146</sup> The Claimant has shown that at its very core, this obliges a State to uphold its laws, irrespective of the costs or difficulties of doing so, and thereby comply with the prohibitions against arbitrariness and against coercion/harassment, which both form part of the minimum standard.<sup>147</sup> Peru argues that the Claimant misrepresents the scope of the standard, arguing that a State cannot be held strictly liable for ensuring compliance with its domestic laws at all times.<sup>148</sup> In relation with the prohibition of arbitrary treatment, Peru disagrees with the Claimant's definition and refers instead to the ICJ's interpretation of this prohibition in the *ELSI* case.<sup>149</sup>
- 91 Second, the Claimant has established that the customary international law minimum standard prescribed in the FTA is, in substance, equivalent to the modern, autonomous standard of FET, which includes the obligation to accord due process, not to act arbitrarily, unfairly, discriminatorily, grossly unreasonably or in contravention of an investor's legitimate expectations.<sup>150</sup> The Respondent denies that the Treaty includes a higher standard of FET, which includes the protection of legitimate expectations.<sup>151</sup> According to Peru, a high level of deference must be accorded to the State.<sup>152</sup>
- 92 Third, should the Tribunal not find a breach of Art. 805.1 of the FTA, the Claimant has demonstrated that it can rely on the standard of treatment provided in Art. 2(2) of the Peru-UK BIT by importing this clause through the MFN provision included in Art. 804.<sup>153</sup> The

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<sup>146</sup> Reply, p. 272 *et seq.* (paras. 716, 738-739); Counter-Memorial, p. 267 (para. 561); Rejoinder, p. 337 *et seq.* (para. 668); **CLA-0037**, p. 35 *et seq.* (para. 98).

<sup>147</sup> Reply, p. 280 *et seq.* (paras. 742-766); **CLA-0035**, p. 75 (para. 195); **CLA-0129**, p. 440 *et seq.*; **CLA-0139**, p. 311; **RLA-0049**, p. 36 *et seq.* (paras. 94, 103, 105, 108); **RLA-0105**, p. 79 (para. 385); **CLA-0074**, p. 61 *et seq.* (para. 154); **CLA-0140**, p. 79 (para. 267); **CLA-0044**; **CLA-0038**.

<sup>148</sup> Rejoinder, p. 338 *et seq.* (paras. 670-673, 677-710).

<sup>149</sup> Rejoinder, p. 358 *et seq.* (paras. 711-720); **RLA-0054**, p. 65 (para. 128).

<sup>150</sup> Reply, p. 272 *et seq.* (paras. 716, 748, 778, 781-794). Contrary to Peru's allegation (Rejoinder, p. 341 *et seq.* (para. 675)), the Claimant has not abandoned its claims for breach of legitimate expectations and that Peru did not act consistently and transparently.

<sup>151</sup> Counter-Memorial, p. 269 *et seq.* (paras. 566-582); Rejoinder, p. 363 *et seq.* (paras. 723-725).

<sup>152</sup> Counter-Memorial, p. 287 *et seq.* (paras. 612-618); Rejoinder, p. 363 *et seq.* (paras. 723-725).

<sup>153</sup> Reply, p. 273 *et seq.* (paras. 717, 779, 795-809).

Respondent denies that the MFN clause allows the importation of substantive provisions from other treaties, as this would be barred by Art. 808 and its Annex II.<sup>154</sup>

- 93 Fourth, the Claimant has shown that Peru's conduct as a whole can be characterised as a composite act which amounted to a failure to provide FET to the Claimant.<sup>155</sup> The Respondent denies that the Claimant established a creeping violation of the FET standard, alleging instead that Peru's actions were designed to assist/protect the Claimant.<sup>156</sup>

### **3.3.3 Peru breached its obligation to provide FPS to Lupaka's investment under Art. 805.1 of the FTA**

- 94 The Parties agree on the general characteristics of the FPS minimum standard of treatment under Art. 805.1 of the FTA: Peru was required to act with reasonable due diligence under the circumstances to protect Lupaka's investment from physical damage.<sup>157</sup> In addition to this "positive obligation", the Claimant has shown (and Peru does not challenge)<sup>158</sup> that the FPS standard also contains "a negative obligation to refrain from directly harming the investment by acts of violence attributable to the State".<sup>159</sup> Peru denies that the FPS standard provides for legal protection (as well as physical) but admits that it is ultimately irrelevant.<sup>160</sup>
- 95 The Parties disagree on the specific content of the FPS minimum standard of treatment.<sup>161</sup>
- 96 First, the Claimant has shown that the positive and negative FPS obligations translate into four core obligations for the host State,<sup>162</sup> namely the obligation (i) not to cause harm to aliens' investments directly,<sup>163</sup> (ii) to take all reasonable steps to prevent third parties from

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<sup>154</sup> Reply, p. 273 *et seq.* (paras. 717, 779, 795-809) ; Counter-Memorial, p. 277 *et seq.* (paras. 589-611); Rejoinder, p. 365 *et seq.* (paras. 726-736).

<sup>155</sup> Reply, p. 273 *et seq.* (paras. 718, 727-737, 770-776).

<sup>156</sup> Counter-Memorial, p. 275 *et seq.* (paras. 584-588, 623-627); Rejoinder, p. 332 *et seq.* (paras. 655-664).

<sup>157</sup> Reply, p. 236 *et seq.* (para. 626); Memorial, p. 80 *et seq.* (paras. 255-257); Counter-Memorial, p. 232 *et seq.* (paras. 488-495, 498, 543-545); Rejoinder, p. 293 *et seq.* (paras. 597-600, 644); **RLA-0001**, p. 161.

<sup>158</sup> Peru merely seeks to distinguish the case law on which the Claimant relied: Counter-Memorial, p. 259 *et seq.* (paras. 543 (as regards the negative FPS obligation), 544-545 (as regards the positive FPS obligation)); see also Reply, p. 241 (para. 635).

<sup>159</sup> Memorial, p. 80 (para. 254); Reply, p. 229 *et seq.* (paras. 602-604, 634); **CLA-0025**, p. 81 (paras. 403-404).

<sup>160</sup> Rejoinder, p. 298 (para. 605); Canada's Non-Disputing Party Submission, p. 8 (paras. 23-24).

<sup>161</sup> Memorial, p. 81 *et seq.* (paras. 258, 266); Reply, p. 230 *et seq.* (paras. 603-604, 615, 656-715); Rejoinder, p. 299 *et seq.* (paras. 606-638).

<sup>162</sup> Reply, p. 231 *et seq.* (paras. 608, 636-655).

<sup>163</sup> Reply, p. 242 *et seq.* (paras. 638-641); **RLA-0031**, p. 531; **CLA-0066**, p. 48 (para. 172); **CLA-0025**, p. 86 (para. 435).

causing harm to investors and their investments,<sup>164</sup> (iii) to take all necessary steps to restore the investor to the enjoyment of its rights over its investment,<sup>165</sup> and (iv) to punish any offenders.<sup>166</sup>

- 97 The Respondent argues for the first time in its Rejoinder that the FPS standard under Art. 805.1 of the FTA applies to investments but not to investors.<sup>167</sup> It further denies that the FPS standard translates into the four obligations identified above, either under CIL, the relevant jurisprudence or the Treaty;<sup>168</sup> however, this is contradictory to their admission that Peru was required to act with reasonable due diligence. According to Peru, these “invented” obligations are all premised on the notion that it was required to use force, whereas this was neither legally required nor opportune for Peru.<sup>169</sup>
- 98 Second, while the Parties ultimately agree that the standard is an objective one,<sup>170</sup> they disagree on what it means to “objectively” take into consideration the “circumstances of the case” when assessing the State’s compliance with its obligation to provide FPS to Lupaka’s investment. The Claimant has shown that the means and resources of a State are not relevant for this assessment as they could otherwise lower the minimum standard itself. It is undisputed that this standard is the floor below which States’ conduct is not acceptable.<sup>171</sup> Rather, the Tribunal should consider the circumstances of the case to assess the precise protection the State should have provided.<sup>172</sup> The circumstances on which Peru relies are aggravating factors which underline the State’s breaches rather than provide any excuse.<sup>173</sup>
- 99 The Respondent denies this, arguing that the host State’s specific circumstances are relevant when assessing reasonableness. Notably, Peru argues that it was diligent and reasonable when it prioritised dialogue over the use of force to address the Claimant’s

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<sup>164</sup> Reply, p. 243 *et seq.* (paras. 642-648); **CLA-0127**, p. 51 *et seq.* (paras. 16-17); **CLA-0128**, p. 634; **CLA-0022**, p. 18 (para. 6.05); **CLA-0028**, p. 911 *et seq.* (para. 84); **CLA-0034**, p. 98 (para. 484); **CLA-0020**, p. 215 (para. 724); **CLA-0074**, p. 72 (para. 176).

<sup>165</sup> Reply, p. 246 *et seq.* (paras. 649-651); **CLA-0022**, p. 18 *et seq.* (paras. 6.04-6.11); **CLA-0028**, p. 911 *et seq.* (paras. 84-95); **CLA-0027**, p. 195 (para. 596); **CLA-0029**, p. 121 *et seq.* (paras. 352-353); **CLA-0030**, p. 72 (paras. 286-289); **CLA-0031**, p. 221 *et seq.* (paras. 6.82-6.84).

<sup>166</sup> Reply, p. 247 *et seq.* (paras. 652-655); **CLA-0028**, p. 914 (para. 94).

<sup>167</sup> Rejoinder, p. 298 (para. 603).

<sup>168</sup> Rejoinder, p. 296 *et seq.* (paras. 599-604).

<sup>169</sup> Rejoinder, p. 287 *et seq.* (paras. 585-586, 616-625).

<sup>170</sup> Reply, p. 237 *et seq.* (paras. 627-628); Rejoinder, p. 293 *et seq.* (para. 597(e)).

<sup>171</sup> Reply, p. 238 *et seq.* (paras. 628-631, 683).

<sup>172</sup> Reply, p. 240 (para. 632).

<sup>173</sup> Reply, p. 231 *et seq.* (paras. 609, Section 9.3.5).

social conflict with the Parán Community<sup>174</sup> in light of its institutional means and resources.<sup>175</sup>

### **3.4 Peru's violations of the FTA caused the Claimant's loss of its investment, and the Claimant did not contribute to its loss**

#### **3.4.1 Causation**

100 Article 31 of the ILC Commentary states that to find a causal link between State's wrongful act and the investor's loss, factual and legal causation must exist.<sup>176</sup> However, the Parties disagree on the exact formulation of the two limbs and the burden of proof.

101 The Claimant has shown that for the factual limb, the investor must prove that the loss would not have happened but-for the State's wrongful conduct, regardless of any concurrent events which do not break the chain of causation. Once the factual limb is satisfied, the legal limb requires the Claimant to establish that the loss was a normal, foreseeable or intended consequence of the State's wrongful act. The Claimant further notes that satisfying both of these limbs creates a rebuttable presumption that causation is established and the burden shifts to the State to prove that the chain of causation was broken by an intervening event.<sup>177</sup>

102 The Respondent seems to agree on the broader principle of the two-limb test for causation but incorrectly represents the standard of the first limb. In its Rejoinder, the Respondent argues that the onus is on the investor to prove that its injury was caused by the State's breach and not by other causes, alleging that concurrent causes will always break the chain of causation. The Respondent further denies that the burden shifts to the State to prove the occurrence of an intervening event.<sup>178</sup>

#### **3.4.2 Contributory fault**

103 The Parties agree that for the contributory fault to arise, the investor's conduct must be wilful or negligent.<sup>179</sup> However, the Claimant has shown that contributory fault also

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<sup>174</sup> Counter-Memorial, p. 234 *et seq.* (paras. 505-507); Rejoinder, p. 294 *et seq.* (paras. 598-599, 609-625, 644-649).

<sup>175</sup> Counter-Memorial, p. 243 *et seq.* (paras. 508-512).

<sup>176</sup> **CLA-0018**, p. 91 (Art. 31 and Commentary 10); Reply, p. 332 (paras. 888-890); Counter-Memorial, p. 347 *et seq.* (para. 741).

<sup>177</sup> Reply, p. 332 *et seq.* (paras. 891-895); **CLA-0151**, p. 135-139; **CLA-0095**, p. 50 *et seq.* (paras. 163, 169); **CLA-0018**, p. 91 (Art. 31 and Commentary 10); **CLA-0060**, p. 163 *et seq.* (paras. 584-585). The tribunals often use varied wording, such as "proximate", "not too remote", "sufficient", "adequate".

<sup>178</sup> Counter-Memorial, p. 347 *et seq.* (para. 741); Rejoinder, p. 406 *et seq.* (paras. 806-811).

<sup>179</sup> Reply, p. 338 *et seq.* (paras. 909-911); Rejoinder, p. 433 (para. 853); **CLA-0018**, p. 109 (Art. 39).



requires the contribution to be material and significant. The Respondent denies this without providing any support and effectively dismisses the ILC Commentary to Article 39, which clarifies it. The Respondent nonetheless seemingly accepts the need to comply with this requirement and proceeds to apply the facts of the current case to it.<sup>180</sup>

- 104 The Respondent argues that the Claimant imposes a third requirement: the illegality requirement. This is false. The Claimant instead states that the two requirements cumulatively impose a high threshold for establishing contributory fault. The Claimant points to tribunals which found contributory fault where the investor's conduct was contrary to the host State's laws, including some of the caselaw on which the Respondent relies.<sup>181</sup>

### **3.5 The Claimant is not claiming compensation for prospective investments**

- 105 The Parties agree that injury to a prospective investment is not compensable.<sup>182</sup>
- 106 The Claimant's clear position is that the imminent acquisition of the Mallay Plant only supports the Claimant's counterfactual scenario based on which damages should be awarded because the acquisition would allow the Claimant to process ore at a rate of 590 t/d.<sup>183</sup>
- 107 The Respondent, however, argues that damages should not be based on the Claimant's counterfactual scenario, which includes the production of ore at a rate of 590 t/d by first misrepresenting it as a prospective investment, and now classifying it as a business plan which, it argues, under the FTA is not a covered investment. As shown above, the Respondent's criticism is baseless because the Claimant is not asking to be compensated for the Mallay Plant or the business plan itself.<sup>184</sup>
- 108 The Tribunal does not need to decide on whether the Mallay Plant or the business plan are covered investments. The Tribunal merely needs to decide whether, but-for Peru's breaches, the Claimant would have been able to realise its business plan, *i.e.* acquire the

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<sup>180</sup> Reply, p. 339 (para. 912); **CLA-0018**, p. 109 (Art. 39, Commentary 1); **CLA-0154**, p. 502 (para. 1600); Rejoinder, p. 437 *et seq.* (paras. 860-866 and fn. 1971).

<sup>181</sup> Rejoinder, p. 440 (para. 867); Reply, p. 339 *et seq.* (paras. 913-915).

<sup>182</sup> Reply, p. 374 *set seq.* (para. 1020); Rejoinder, p. 443 (para. 875).

<sup>183</sup> Reply, p. 374 *et seq.* (para. 1018-1020).

<sup>184</sup> Counter-Memorial, p. 361 *et seq.* (paras. 773-777); Rejoinder, p. 443 *et seq.* (paras. 875-876); Reply, p. 374 *et seq.* (paras. 1018-1020).

Mallay Plant and process ore at 590 t/d.<sup>185</sup> If the answer is affirmative, then the Tribunal should award damages based on the Claimant's counterfactual scenario.

Respectfully submitted,

For and on behalf of the Claimant,

**Lupaka Gold Corp.**

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<sup>185</sup> Reply, p. 374 *et seq.* (paras. 1020-1027); **CLA-0095**, p. 53 *et seq.* (paras. 171, 191); **CLA-0094**, p. 126 *et seq.* (paras. 402, 415-417).