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

ICSID CASE NO. ARB/20/46

LUPAKA GOLD CORP.

Claimant

VS.

REPUBLIC OF PERU

Respondent

CLAIMANT'S REPLY

23 September 2022

LALIVE

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TABLE OF DEFINED TERMS

DEFINED TERM	DEFINITION
2009 EIA	Environmental Impact Assessment approved by the MEM on 28 December 2009 for the Project
2010 Optimised Feasibility Study	Optimised feasibility study for the Invicta Gold Project by the Lokhorst Group dated 26 July 2010
2010 SD Land Use Agreement	Surface rights agreement dated 22 October 2010 allowing IMC to carry out mining activities on Santo Domingo's territory over the life of the mine
2012 SRK Report	SRK NI 43-101 Technical Report on Resources for Invicta Project dated 6 April 2012
2014 Mining Plan	Revised mining plan submitted by Lupaka and approved by the MEM on 11 December 2014
2017 Lacsanga Agreement	Contract for the Usufruct, Surface and Easement of Land between IMC and Lacsanga dated 18 July 2017
June 2018 Invasion	Invasion of the Parán Community on the Project in June 2018
2018 PEA	Preliminary economic assessment of the Project prepared by SRK dated 13 April 2018
AAG	Andean American Gold Corp.
Actual Scenario	Lupaka's financial position as a result of the Respondent's breaches of the FTA

ALA	Huaura Local Water Authority (in Spanish, *Autoridad Local de Agua Huaura*)
Aminpro	Aminpro Mineral Processing Ltd.
AOP	Annual Operations Plan
Blockade	Blockade of the road through Lacsanga leading to the Site
Buenaventura	Compañía de Minas Buenaventura S.A.A.
But-For Scenario	Lupaka's financial position but for the Respondent's breaches of the FTA
CESEL	CESEL Ingenieros S.A.
CIMVAL	Canadian Institute of Mining, Metallurgy, and Petroleum on Valuation of Mineral Properties
CPP	Citizen Participation Plan
Concessions	The following six concessions held by the Claimant at all relevant times: Victoria Uno, Victoria Dos, Victoria Tres, Victoria Cuatro, Victoria Siete and Invicta II
CPO	Chief Police Officer
CR Team	Community relations team of IMC
DFAI	Directorate of Inspection and Application of Incentives under the Ministry of Environment (in Spanish, *Dirección de Fiscalización y Aplicación de Incentivos*)
DCF	Discounted Cash Flow

DIRANDRO	Special Anti-Drug Division (in Spanish, *Dirección Antidrogas*)
26 February 2019 Agreement	Agreement between IMC and Parán's representatives that Parán would lift the Blockade signed on 26 February 2019
FMV	Fair Market Value
FET standard	Fair and equitable treatment standard
FPS standard	Full protection and security standard
Framework Agreement	Agreement with Santo Domingo to promote the implementation of sustainable development projects within their community concluded on 22 October 2010
FTA	Free Trade Agreement between Canada and Peru (signed on 29 May 2008 and entered into force on 1 August 2009)
Huaura Prosecutor's Office	Prosecutor's Office for the Huaura Province
ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed on 18 March 1965
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts

IMC	Invicta Mining Corporation, a Peruvian subsidiary of Lupaka
Lacsanga Community	Rural Community of Lacsanga
Lonely Mountain	Lonely Mountain Resources S.A.C.
Lupaka	Lupaka Gold Corp.
Mallay	Mallay processing plant
March 2019 Invasion	Third invasion of the Parán Community of the Site, which took place on 20 March 2019
MEM	Ministry of Energy and Mines
MEM-OGGS	The MEM's General Office of Social Management (Spanish acronym for *Oficina General de Gestión Social*)
MININTER	Ministry of Internal Affairs
MPLs	Maximum Permissible Limits
NAFTA	North American Free Trade Agreement
OEFA	Supervisory and Environmental Assessment Agency
Operational Plan	The police's plan for the eviction of Parán invaders and the securing of the Site
Pandion	Pandion Mine Finance LLC
Pangea	Pangea Peru S.A.
Parán Community	Rural Community of Parán

PCM	Presidency of the Council of Ministers (Spanish acronym for *Presidencia del Consejo de Ministros*)
PEA Mine Plan	Six-year mine plan which is contemplated in the 2018 PEA and which uses a 4.0g/t AuEq cut-off grade
Peru	The Republic of Peru
PLI	PLI Huaura Holdings LP
PNP	Peru's National Police
PPF Agreement	Pre-Paid Forward Gold Purchase Agreement entered into between Lupaka and PLI on 16 March 2017 and subsequently amended on 2 August 2017
Project	The investments made by Lupaka for the purposes of mining gold and other minerals at the Victoria Uno concession
REINFO	Mining Formalisation Register (in Spanish, *Registro Integral de Formalización Minera*)
Respondent	The Republic of Peru
Rural Communities	Rural communities of Santo Domingo, Lacsanga and Parán
Santo Domingo Community	Rural Community of Santo Domingo de Apache
SCTR	Supplementary Risk Work Insurance (in Spanish, *Seguro Complementario de Trabajo de Riesgo*)

September 2018 Commitment	The commitment by Parán's President on 18 September 2018 to refrain from all acts of violence, threats or harassment towards IMC personnel
Site	Base of activities and infrastructure developed by Lupaka on the Victoria Uno concession area
SOFR	Secured overnight financing rate
SRK	SRK Consulting (Canada) Inc.
t/d	tonnes per day
UST	One-Year U.S. Treasury Bill
Valuation Date	The date of expropriation per the FTA – 26 August 2019
WDS	War Dogs Securities S.A.C.

1 INTRODUCTION

1 In accordance with Rule 31(c) of the ICSID Arbitration Rules and the Procedural Calendar appended to Procedural Order No. 1 dated 16 April 2021 (as per Revision No. 5), the Claimant submits this Reply in support of its claims against the Republic of Peru pursuant to the FTA and the ICSID Convention.[1]

2 In the Claimant's Memorial ("**Memorial**"), the Claimant demonstrated that after acquiring the Invicta Project in October 2012, Lupaka spent six years investing a significant amount of time and capital developing the Project, taking it to the brink of production. Lupaka secured funding, obtained the necessary land surface rights, negotiated binding commitments with the relevant neighbouring communities, built the mine infrastructure and agreed the purchase of a suitable offsite processing plant.

3 Just as the Project came to fruition, the Parán Community decided to violently seize it, impede any access and commence its own mining operations. Lupaka took all possible steps to save its investment. It engaged in discussions with Parán's leadership for many months with the involvement of the central authorities. Over time it became apparent that Parán was not acting in good faith. Lupaka also made multiple requests to Peru in 2018 and 2019 to restore law and order. The response was, for nine months, the same. High-ranked officials at the Ministry of Internal Affairs ("**MININTER**") pressured Lupaka to continue with fruitless "dialogue" with the Parán Community, even though a police operational plan to lift the Blockade and secure the Site ("**Operational Plan**") was ready to be implemented. Peru's refusal to intervene ultimately led to Lupaka losing its investment in Peru.

4 In its Memorial on Jurisdiction and Counter-Memorial on Merits "**Counter-Memorial**"), Peru shamelessly blames the victim. To hear Peru tell it, Lupaka had it coming. Peru claims that Lupaka marginalised the

[1] All defined terms included in the Claimant's Statement of Claim dated 1 October 2021 apply, except where otherwise stated.

Parán Community and ignored its allegedly legitimate environmental concerns. It adds that Lupaka should have known that reaching an agreement with Parán was required to develop the Project under Peruvian law.[2] Peru then argues that the State acted diligently and reasonably at all times. In particular, Peru contends that its insistence on perpetual dialogue in response to Parán's illegal taking of the Invicta mine was reasonable and consistent with its legal framework. According to Peru:

> "[t]he use of force not only was unjustified and would have been inconsistent with Peruvian law and policy, but it also would have been counter-productive, as it surely would have aggravated rather than resolved the dispute, rendering the mining project unviable."[3]

5 As this Reply will demonstrate, Peru's allegations are unsubstantiated and contradicted by contemporaneous evidence. The Tribunal must not be misled by Peru's attempt to blame the victim and excuse its failures to intervene on the basis of its own incompetence. This is not the case of a well-meaning rural community marginalised by an irresponsible mining company. This is also not the case of a community whose environmental concerns were ignored. Rather, this is the case of a community which violently opposed the Project because it sought to exploit the Invicta mine itself and to protect its illegal marijuana business and only fabricated environmental concerns when it suited its increasingly untenable bargaining positions. Put simply, this case is about violence, illegal mining and drugs, not about ESG or CSR.

6 Peru knew of the Parán Community's plan to exploit the Invicta mine from early January 2019. This was when Parán's leadership told State representatives that the community would exploit the mine if its demands were not satisfied.[4] Such a clear threat should have triggered a robust State response. It did not. With the Parán Community in control of the Site, it was a matter of time before the community would make good on its threat.

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[2] Counter-Memorial, 24/03/2022, p. 5 (para. 11).

[3] Counter-Memorial, 24/03/2022, p. 3 (para. 7).

[4] Witness Statement of Luis F. Bravo, 01/10/2021, para. 28; WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192 (corrected translation)**, p. 3.

Indeed, a few months later, the Parán Community took Lupaka's ore stockpiled at the Site and then proceeded to illegally exploit the mine, which it continues to do to the present day.

7 Peru also knew at the time that Parán's opposition to the Project was driven by its interest to protect its illegal marijuana business, which would be harmed by the increased attention that the Project would bring to the area surrounding the mine. Peru even knew that the Blockade was funded with money from this illegal trade. Yet, it failed to take any action to address Parán's illegal drug trade. Tellingly, the Claimant addressed these two issues – illegal mining and drug trafficking – in its Memorial, but Peru has conspicuously ignored them in its Counter-Memorial. It did so despite Peru's own internal documents showing not only that Peru was aware of Parán's criminality at the time, but that any further "dialogue" with the community was pointless as a result.

8 Lupaka developed the Project whilst complying with all social requirements. In particular, Lupaka and Invicta's prior owner ensured the participation of the rural communities of the Project's area of direct influence ("**Rural Communities**") in public consultation processes before, during and after approval of the Project's key socio-environmental management instruments. The Parán Community actively participated in these processes. But Lupaka was not obliged to reach an agreement with the Parán Community to develop the Project. Peruvian law is clear on the fact that mining concession holders, such as IMC, must only reach "[an] agreement with the owner of the terrain"[5] where mining activities are to be conducted – *i.e.*, the Lacsanga and Santo Domingo communities. Peru does not seriously contest that the Project was not on Parán's land. It cannot do so given that its internal documents confirm that it was not.

9 Lupaka's experienced community relations team ("**CR Team**") devoted time and resources from 2013 to 2018 to meaningfully engage with the Parán Community, despite not needing an agreement with this community to develop the Project. It did so because it was a good corporate citizen. Lupaka held briefings within this community to explain the downsized

[5] Supreme Decree No. 008-91-TR, Approval of the Regulation of Mining Procedures (SPA), at **Exhibit C-228**, p. 22 *et seq.* (Art. 23).

scope of the Project, participated in Parán's Assemblies to communicate IMC's proposals of mutually beneficial agreements, paid the debts of Invicta's prior owner, supported infrastructure, technological and agricultural projects to the benefit of this community, sought to involve its members in the environmental monitoring of the Project, among many other things. Lupaka never marginalised, much less disregarded, the Parán Community. Despite all these efforts, Lupaka was unable to reach an agreement with Parán because the community negotiated in bad faith with IMC and took active measures to hinder the Project – which was consistent with its plan to exploit the mine and protect its illegal marijuana business.

10 Aware of the illegality of the Parán Community's actions, Peru all too predictably seeks to deploy ESG as a sword, rather than a shield by arguing that Parán's opposition to the Project was the result of legitimate environmental concerns.[6] This is demonstrably false. If this were an ESG case, the Parán Community would not be exploiting the Invicta mine itself by using more rudimentary and environmentally harmful methodologies than Lupaka intended. Indeed, Peru's internal documents show that it is aware of the environmental danger that exists from Parán exploiting the mine. In addition, if this were an ESG case, Parán would not have recently violently opposed the closure of the Invicta mine by the Peruvian authorities. Tellingly, the Parán Community only raised alleged water pollution concerns with Lupaka for the first time in May 2018, when the Project was on the verge of production. The company addressed these concerns immediately by implementing, in mid-2018, a water management system that, as the authorities confirmed, ensured that no mine effluents reached Parán's water sources. Thus, given the timing, supposed water-related concerns were clearly not the trigger for the Blockade.

11 Peru attempts to further its ESG case by referring to environmental observations made by the Supervisory and Environmental Assessment Agency ("**OEFA**") to the Project during 2015-2018. As a preliminary matter, none of these observations was ever raised by the Parán Community as a source of discontent. More importantly, IMC promptly and systematically addressed all these observations, none of which

[6] Counter-Memorial, 24/03/2022, p. 1 (para. 1).

jeopardised the development of the Project – which, as noted, was on the verge of production when Parán took it. They are therefore red herrings.

12 IMC informed Peru's National Police ("**PNP**") and its intelligence service in October 2017, a full eight months before the June 2018 Invasion, of the risk of an invasion of the Site by Parán. From that point on, Peru's local Police authorities communicated regularly with IMC's CR Team to help IMC anticipate possible attacks by Parán. Despite this, Peru failed to prevent the June 2018 Invasion – which, disturbingly, was led by the Leoncio Prado Subprefect, the MININTER representative in the Project's area – and thereafter the Blockade as of October 2018. Parán's *Ronda Campesina* played a central role in these invasions, acting as a strike force and illegally using its firearms to prevent anyone from entering the Site. Lupaka requested Police support to recover control of the Site just three days after the Blockade. The Police were obliged to assist Lupaka under Peruvian law but failed to do so.[7] Peru also failed to prosecute or sanction any of the Parán invaders despite their violent actions and the various criminal complaints filed by Lupaka.

13 IMC and the Parán Community twice signed a basic agreement, brokered by Peru's central authorities, for Parán to stop its violent conduct against IMC. This would have then allowed Lupaka and the community to continue further discussions under more serene circumstances, even if there was no legal requirement for any agreement with the Parán Community. The Parán Community simply reneged on its commitments shortly thereafter. This made it all the more clear that any agreement with Parán was a dead letter. Despite witnessing this pattern of illegal behaviour firsthand, the State insisted that Lupaka continue to pursue endless dialogue with Parán. Peru's passivity emboldened Parán's members who continued to act with extreme violence and intransigence.

14 What is more, Peru's insistence on perpetual dialogue was contrary to its own legal framework and unreasonable in the circumstances. This is for two primary reasons:

[7] Civil Code, Legislative Decree No. 295, at **Exhibit C-467**, p. 226 (Art. 920).

15 First, Peruvian law provides that the Police are obliged to use force to prevent the perpetration of crimes and arrest those who resist authority. The Parán community members were in possession of firearms at all times and used them to perpetrate their illegal acts, with total impunity. Indeed, Peru's own documents show that its central and Police authorities knew full well that Parán was misusing firearms and recognised that they should be confiscated, yet inexplicably never took any action. The Parán Community was also in control of IMC's explosives magazine, which contained almost 6,000 kilos of explosives, and refused to authorise the Peruvian authorities to inspect such magazine. These circumstances made it apparent that the Police needed to act to restore law and order. It is precisely for this reason that the Police were prepared to intervene upon authorisation of the MININTER. There was no alternative to ensure that Lupaka could continue with the Project. Yet the MININTER did not approve the intervention for its own arbitrary, political reasons.

16 Second, Peru's own documents show that it knew dialogue with Parán was of no use. The MEM-OGGS, the Peruvian entity which was closely involved in the dialogue between IMC and Parán for many months ("**MEM-OGGS**"), contemporaneously stated that "[d]ialogue mechanisms are not appropriate in this case" and that "coordination at the highest inter-sectoral level between the MEM and the MININTER [is needed] in order to activate as soon as possible the mechanisms for the re-establishment of public order".[8] In other words, the Police needed to intervene to restore law and order, as it had done in multiple other projects in the face of unlawful behaviour by local communities. As the Minister of Internal Affairs of Peru declared after authorising a police intervention in the context of a different conflict in October 2019, two months after Lupaka lost its investment, "[w]e are committed to dialogue, but this cannot be confused with weakness. **We are going to do our job**".[9] When it came to protecting Lupaka's investment, however, the State chose not to do its "job" by enforcing the law. Peru cannot now hide behind the vagaries of its own law to shield itself from liability.

[8] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3.

[9] "Government Authorizes Armed Forces to Stop Protest Against Las Bambas Copper Mine", *Reuters* (SPA), 16/10/2019, at **Exhibit C-311**.

17 The actions and omissions of Peru's central and local authorities led the Claimant to lose its investment, for which the State must be held accountable. But Peru's responsibility can and must also be predicated on the basis of the actions of the Parán Community and its *Ronda Campesina*, which are an organ of the State or which otherwise acted with governmental authority. Peru vested Parán and its *Ronda Campesina* with jurisdictional and police powers to fill the absence of the State in the area of the Andes where this community resides, not only through its own laws but also by giving them firearms. Indeed, Peru's Army gave them military training and long-range weapons to exercise these powers. The Parán Community and its *Ronda Campesina* abused these elements of governmental authority during and after their multiple takings of the Site and the Blockade, for which the State is responsible under international law. Indeed, a State that grants an entity powers over part of its national territory and allows it to act with autonomy must be held accountable for such entity's actions.

18 Peru's actions and omissions therefore constitute breaches of its obligations under the FTA (i) to refrain from unlawfully expropriating Lupaka's investment; (ii) to provide full protection and security to Lupaka's investment; and (iii) to treat Lupaka's investment fairly and equitably. Peru's breaches of its FTA obligations entitle Lupaka to full compensation for the loss of its investment, which, the Parties agree, must be calculated based on the Project's fair market value ("**FMV**"). At the date of this Reply, Lupaka is entitled to the payment of **USD 41 million**, plus interest.

19 After this introduction, **Sections 2 through 7** set straight the distorted and unsupported factual account made by Peru in its Counter-Memorial. As demonstrated in **Section 8**, Peru's jurisdictional objections are meritless. Equally baseless is Peru's denial of its breaches of the FTA, as demonstrated in **Section 9**. The Claimant is entitled to the compensation set out in **Section 10** and to the relief requested in **Section 11**.

20 This Reply is accompanied by:

i) the second witness statement of **Mr Gordon Ellis**, co-founder of Lupaka and a director since its incorporation;

ii) the second witness statement of **Mr Julio Félix Castañeda Mondragón**, former General Manager of IMC from mid-2013 until October 2018;

iii) [redacted]

iv) the second witness statement of **Mr Luis Felipe Bravo García**, former General Manager of IMC between January and August 2019;

v) The second expert report of **Messrs Edmond Richards** and **Erik van Duijvenvoord** of Accuracy;

vi) The expert report of **Mr Christopher Jacobs** of Micon International; and

vii) Exhibits C-256 to C-636 and Legal Authorities CLA-106 to CLA-160.

2 THE PARÁN COMMUNITY BLOCKED THE PROJECT TO EXPLOIT THE MINE FOR ITSELF AND PROTECT ITS ILLEGAL MARIJUANA BUSINESS

21 In its Counter-Memorial, Peru attempts to portray the Parán Community as a reasonable and well-intended community that sought in good faith to reach a meaningful agreement with IMC in relation to the Project but whose legitimate concerns were ignored by the company.[10] Peru further contends that it was "[the] Claimant [who] failed to take a constructive approach to negotiations with [the Parán] Community".[11] This is a false narrative.

22 On the contrary, IMC made strenuous efforts to reach an agreement with the Parán Community, but this was not possible because the community had other plans: it sought to exploit the Invicta mine for itself (**Section 2.1**) and to protect its illegal marijuana business, which would be harmed by the increased attention that the Project would bring to the Parán area

[10] Counter-Memorial, 24/03/2022, p. 1 (para. 1).

[11] Counter-Memorial, 24/03/2022, p. 2 *et seq.* (para. 5).

(**Section 2.2**). The Claimant addressed both of these in its Memorial,[12] but Peru has conspicuously ignored them. Indeed, Peru makes no reference whatsoever to either of these activities in its Counter-Memorial.

2.1 The Parán Community planned to exploit the Invicta mine and is doing so

23 The Parán Community blocked the Project because it sought to exploit the mine. Parán openly communicated this to IMC and MEM representatives during a meeting held in Lima in late January 2019.[13] In July 2019, Parán's exploitation of Lupaka's stockpiled ore was photographed.[14] IMC communicated the community's illegal plan to other Peruvian authorities as it confirmed that dialogue was of no use in the circumstances and a police intervention was needed to lift the Blockade. This was to no avail. Peru did not authorize a police intervention and the Parán Community executed its illegal plan at least as from November 2019, *i.e.*, a few months after Lupaka lost its investment. Indeed, a police inspection conducted in November 2019 confirmed that the Parán Community was illegally extracting or allowing other companies to illegally extract ore from the mine, and further evidence collected by IMC in 2021 and 2022 shows that this activity continues to the present day.

24 Peru's silence on this issue is telling. Indeed, these facts contradict the State's case that the conflict with Parán was aggravated because the Claimant "ignored th[e] [Parán] Community's concerns, including in respect of the environmental impact of Claimant's mining project".[15] It is clear that Parán did not oppose the Project due to environmental concerns; the community sought to steal the mine. The best evidence of this is that, now that Parán is illegally exploiting the mine, it is requesting the

[12] See Memorial, 01/10/2021, p. 24 *et seq.* (paras. 71-72, 146 and 191-192); Witness Statement of Julio F. Castañeda, 01/10/2021, p. 21 (para. 59); [redacted] Witness Statement of Luis F. Bravo, 01/10/2021, p. 11 (para. 28).

[13] Witness Statement of Luis F. Bravo, 01/10/2021, p. 11 (para. 28).

[14] Email from Lupaka to Canadian Embassy with attachments, 11/07/2019, at **Exhibit C-469**; Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**.

[15] Counter-Memorial, 24/03/2022, p. 1 (para. 1).

authorities not to close the mine[16] and opposing Police action seeking to stop its activities.[17]

25 First, on 29 January 2019, *i.e.*, some three and a half months after initiation of the Blockade, IMC representatives, MEM-OGGS representatives, a MININTER representative, Mr Soyman Román Retuerto, the Leoncio Prado Subprefect, and Parán officials held a meeting to consider the opening of a formal dialogue process ("*mesa de diálogo*" in Spanish) to discuss the Parán Community's alleged grievances.[18] During this meeting, IMC requested the Parán Community to lift the Blockade to allow for constructive dialogue,[19] but the Community refused to do so. What is more, it demanded that IMC pay some PEN 2 million before any negotiations could take place and **threatened to exploit the Mine if its demands were not satisfied**.[20] This was extortion, pure and simple and Peru did nothing to break up the racket.

26 Second, on 8 July 2019, IMC sent a letter to the MEM reporting on the Parán Community's appropriation of Lupaka's ore stockpiled at the Site, which IMC had extracted for testing purposes.[21] IMC further alerted the MEM that trucks had been seen accessing the Site to inspect this ore (photographs were provided), and requested the State to take measures to prevent its removal from the Site:

> "In this regard, we have learned that, in its last assembly, held on Sunday, 7 July (2019), the Rural Community of Parán would have

[16] Ombudsman's Office, Report on social conflicts No. 215 (SPA), January 2022, at **Exhibit C-470**, p. 123; Ombudsman's Office, Report on social conflicts No. 219, May 2022 (SPA), at **Exhibit C-471**, p. 119; Ombudsman's Office, Report on social conflicts No. 221, July 2022 (SPA), at **Exhibit C-472**, p. 118.

[17] [redacted]

[18] Attendance List to the meeting between the Parán Community and Invicta Mining Corp. S.A.C., 29/01/2019, at **Exhibit R-0157**; Witness Statement of Luis F. Bravo, 01/10/2021, p. 10 (para. 24).

[19] Witness Statement of Luis F. Bravo, 01/10/2021, p. 10 (para. 25).

[20] Witness Statement of Luis F. Bravo, 01/10/2021, p. 11 (para. 28); WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192 (corrected translation)**, p. 3.

[21] Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**.

> resolved to **remove the ore that we have stockpiled in the field since the date of the illegal blockade, i.e., since 14 October 2018**.
>
> Accordingly, we have been alerted that **during last week up to three trucks with personnel that we do not know have entered the mine site, to inspect the sampling ore** located in our storage facilities […].
>
> It should be noted that, at the date of the mine takeover and blockade of the access road, **around 7,000 tonnes of ore containing gold and other metals were in these storage facilities**, in various quantities, as described in the attached tables and photographic panels. […].
>
> Finally, we demand that **the authorities of the government of Peru** take the necessary measures to defend and protect the interests of our company as a foreign investor in the country and to **defend the legality and the internal order in Peru, preventing the illegal removal of the mineral located in our storage facilities**."[22]

27 Three days later, on 11 July 2019, IMC sent photographs of the Parán Community's illegal ore extraction to Canadian embassy officials in Lima, who arranged a meeting with IMC and then Deputy Minister of the MEM, Mr Augusto Cauti.[23] During that meeting, which took place on 15 July 2019, IMC informed Mr Cauti of the Parán situation and the evidence of ore theft.[24] Mr Cauti stated that if Parán was indeed taking ore from the Site, he would ask for a police intervention.[25] Such intervention never took place.

[22] Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**, p. 1 *et seq.* (emphasis added).

[23] Email from Lupaka to Canadian Embassy with attachments, 11/07/2019, at **Exhibit C-469**; Witness Statement of Luis F. Bravo, 01/10/2021, p. 30 *et seq.* (paras. 96-97).

[24] Summary of the meeting between Deputy Minister of Mines and IMC with support of Canadian Embassy officials, 15/07/2019, at **Exhibit C-222**, p. 3 (paras. 21-22).

[25] Summary of the meeting between Deputy Minister of Mines and IMC with support of Canadian Embassy officials, 15/07/2019, at **Exhibit C-222**, p. 3 (para. 22).

28 Third, on 11 November 2019, the Police intercepted four trucks loaded with ore in the district of Sayán,[26] located some 22 kilometres from Parán,[27] thus confirming that the Parán Community was illegally extracting ore from the Site.

29 Fourth, the Police carried out an inspection of the Site on 13 November 2019, *i.e.*, two days after the interception of the trucks loaded with ore. During this inspection, which was conducted with the participation of the Huaura Crime Prevention Prosecutor, the Police reported the presence of a backhoe "at the entry of the mine adit" and a waste machine "at the exit of the mine adit, **where machine tracks were observed and it can be seen that part of the material in the waste machine has been removed, which seems to be mineralized material**".[28] Therefore, Peru's authorities confirmed that the community was illegally extracting or allowing other companies to illegally extract **additional** ore from the mine adit.

30 Fifth, Peru's own records show that Parán members have continued to illegally extract or to allow other companies to illegally extract ore from the Invicta mine in 2021 and through 2022 and that they have been doing so without government sanction.

31 The official MEM website displays the Mining Formalisation Register ("REINFO", which is the Spanish acronym for "*Registro Integral de Formalización Minera*"), a register listing all mining concessions located in Peru and all persons and companies engaged in exploitation or beneficiation in the small-scale industry. The REINFO website shows that the Victoria Uno concession, which IMC focused on developing until Parán installed its illegal Blockade, (i) was being exploited by a company named MWC San Vicente S.A.C. as of November 2021,[29] and (ii) had also been exploited by Mr Freddy Julio Rodriguez Sierra, whose status,

[26] Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, 22/02/2020, at **Exhibit R-0113**, p. 11 (para. 30 [redacted]

[27] Map, Distance from Parán to Sayán, 04/08/2022, at **Exhibit C-474**.

[28] Official Letter No. 004 from the Parán Community (A. Torres) to MINEM (F. Ismodes), 12/02/2019, at **Exhibit R-0013**, p. 12 (para. 30) (emphasis added).

[29] MEM, Official website of the Integral Registry of Mining Formalisation (REINFO) (SPA) (accessed on 11/11/2021), 11/11/2021, at **Exhibit C-465** (screenshot taken in November 2021).

however, was marked "suspended" as of June 2022. [redacted] the Parán Community allowed Mr Sierra to extract ore from the Invicta mine in for consideration:[30]

REINFO Website screenshot dated 11 November 2021 (**C-465**)

REINFO Website screenshot dated 17 June 2022 (**C-466**)

32 Parán's illegal exploitation of the mine is also confirmed by [redacted][31]

30 [redacted]

31 [redacted]

[redacted][33]

33 As the foregoing shows, the Parán Community sought to exploit the Invicta mine itself and made good on its plan. As noted, the Respondent does not even address the Claimant's allegations that Parán was mining Invicta for itself – yet this allegation is central to the Claimant's case and dispositive of the Respondent's hopeless defence that the Parán Community had legitimate environmental concerns about mining at Invicta. There is a simple reason for the absence of this discussion from Peru's Counter-Memorial – it completely undermines Peru's disingenuous "ESG" defence. Now that it is illegally exploiting the mine, Parán opposing the closure of the mine.[34] Parán's illegal exploitation of the mine does not meet the environmental requirements, and the authorities are simply unable to inspect the Site due to the continuing Blockade.

2.2 The Parán Community also blocked the Project to protect its illegal marijuana business

34 In addition to its plan to exploit the Invicta mine, the Parán Community also blocked the Project because it interfered with its illegal marijuana business.

35 The significant scale of the Parán Community's illegal marijuana business has been known by Peruvian authorities for a long time. The local press describes the Sayán District, located at just a 20-minute drive from the Community of Parán, as the "country of marijuana", and Parán's Huamboy area as a hotspot for drug traffickers to plant their crops as the local

[32] [redacted]

[33] [redacted] Ombudsman's Office, Report on social conflicts No. 215 (SPA), January 2022, at **Exhibit C-470**, p. 123; Ombudsman's Office, Report on social conflicts No. 219, May 2022 (SPA), at **Exhibit C-471**, p. 119; Ombudsman's Office, Report on social conflicts No. 221, July 2022 (SPA), at **Exhibit C-472**, p. 118.

authorities turn a blind eye to this illegal business.[35] Colonel Fernández, Chief of the Huacho Police Division (DIVPOL), described Parán's Huamboy area as a "red zone" due to drug smugglers living therein.[36] Massive seizures or incinerations ranging from 3,000 to 10,000 marijuana plants were reported in the area multiple times between 2014 and 2018 by the local press,[37] with some seizures valued at more than PEN 1,500,000 (approximately USD 400,000).[38]

36 In 2017, the local press noted the alarming increase in illegal marijuana cultivation, particularly in the Sayán and Leoncio Prado Districts (the Parán Community is located in the latter district), as a result of the suitable climate and lack of police oversight.[39] The gravity of the situation led the regional government in late 2017 to provide the Lacsanga rural patrol (*i.e*, "*Ronda Campesina*") with uniforms, shoes, torches and radios so that they could support the local police in curbing the expansion of the drug trade in the area and the resulting rise in crime rates.[40] The Special Anti-Drug Division ("**DIRANDRO**") has also held meetings with the local authorities and *Rondas Campesinas* to encourage them to guard their

[35] "Sayán is no longer the country of the sun, it is the country of marijuana", *Prensa al Día* (SPA), 12/01/2016, at **Exhibit C-475**.

[36] SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-414**, p. 6.

[37] "More than 3,000 marijuana plants incinerated in the highlands of Lima", *Andina - Agencia Peruana de Noticias* (SPA), 13/08/2014, at **Exhibit C-104**; "Nearly 10,000 marijuana plants seized in Huamboy - Leoncio Prado", *Diario Ecos Huacho* (SPA), 09/05/2017, at **Exhibit C-105**; "Nearly 10,000 marijuana plants found in Huaura", *Peru21* (SPA), 09/05/2017, at **Exhibit C-106**; "Hard blow to drug trafficking: Sierra of Huaura Province is the drug haven of the Norte Chico", *Agencia Digital de Noticias Huacho* (SPA), 11/04/2018, at **Exhibit C-107**; "5,000 marijuana plants valued at 1.5 million soles incinerated", *Litoral Noticias* (Vol. 193) (SPA), 12/04/2018, at **Exhibit C-108**; "More drugs seized in Huamboy", *Litoral Noticias* (Vol. 194) (SPA), 19/04/2018, at **Exhibit C-109**; "Peruvian National Police seizes 789 marijuana plants in the Sayán District", *Andina* (SPA), 19/09/2017, at **Exhibit C-476**; "Sayán is no longer the country of the sun, it is the country of marijuana", *Prensa al Día* (SPA), 12/01/2016, at **Exhibit C-475**.

[38] "Hard blow to drug trafficking: Sierra of Huaura Province is the drug haven of the Norte Chico", *Agencia Digital de Noticias Huacho* (SPA), 11/04/2018, at **Exhibit C-107**; "5,000 marijuana plants valued at 1.5 million soles incinerated", *Litoral Noticias* (Vol. 193) (SPA), 12/04/2018, at **Exhibit C-108**.

[39] "Marijuana production follows cocaine route", *Perú21* (SPA), 01/10/2017, at **Exhibit C-477**.

[40] SSS, Weekly Report, Project (SPA), 01/12/2017 to 09/12/2017, at **Exhibit C-446**, p. 6 *et seq*.

territories against the threat of the drug trade.[41] In mid-2018, the Chief of DIRANDRO reported that a new type of enhanced marijuana was being cultivated in the Huaura province,[42] which could have a value equivalent to cocaine hydrochloride.[43]

37 The Parán community members who most vocally opposed the Project belonged to three or four families heavily involved in the marijuana business. One such family was the Narvasta family. As IMC's CR Team reported to Mr Castañeda, then general manager of IMC, after participating in a Parán Assembly Meeting held on 5 November 2016:

> "[…] we have observed that **there is a group of opponents (Saul Narvasta and his family), who by all means misinform the population**, to confuse them and to prevent them from agreeing to dialogue with the company. **This opposition leader and his family have been supported by a group of opposition community members […] whose main activity is the cultivation of marijuana**."[44]

38 Other contemporaneous news articles confirm the involvement of the Narvasta family in the marijuana business run in Parán. For instance, the local press reported that in September 2017, the Police found and seized 789 marijuana seedlings in the Huamboy area that had been guarded by a member of the Narvasta family who was arrested by the Police.[45] In 2018, the Police reported other massive seizures of marijuana plants presumably belonging to the Narvasta clan.[46]

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[41] SSS, Weekly Report, Project (SPA), 20/11/2017 to 27/11/2017, at **Exhibit C-426**, p. 2 *et seq*.

[42] The Huaura province encompasses the Sayán and Leoncio Prado Districts.

[43] "PNP General Héctor Loayza: 'Marijuana 'cripy' costs about the same as cocaine'", *Perú21* (SPA), 23/05/2018, at **Exhibit C-478**.

[44] Internal Lupaka email (SPA), 14/11/2016, at **Exhibit C-103**, p. 2 (emphasis added).

[45] "Peruvian National Police seizes 789 marijuana plants in the Sayán District", *Andina* (SPA), 19/09/2017, at **Exhibit C-476**.

[46] "Hard blow to drug trafficking: Sierra of Huaura Province is the drug haven of the Norte Chico", *Agencia Digital de Noticias Huacho* (SPA), 11/04/2018, at **Exhibit C-107**; "5,000 marijuana plants valued at 1.5 million soles incinerated", *Litoral Noticias* (Vol. 193) (SPA), 12/04/2018, at **Exhibit C-108**.

39 Several members of the Narvasta family held leading positions in the Parán Community or were part of the Parán Dialogue Committee, *i.e.*, the committee in charge of conducting negotiations with IMC. This gave them weight in decisions and allowed them to lead discussions with IMC. Others, despite not holding such positions, had the means to influence other Parán community members. To name some of them:

i) **Saúl Torres Narvasta** was a member of the Parán Dialogue Committee and a staunch opponent of the Project.[47] IMC filed a first criminal complaint against him on 20 June 2018 due to his leading role in the 19 June 2018 Invasion,[48] and a second complaint on 7 January 2019 following the failed inspection of the company's explosives magazine by the Public Prosecutor's Office on 21 December 2018.[49]

ii) **Israel Narvasta** was part of the leadership of Huamboy, the Parán area where, as explained above, most of the marijuana crops are located.[50] He was against the Project and would threaten IMC saying that "he has the support of [Huamboy] to force the company to sign an agreement under whatever conditions they want."[51] Indeed, Mr Israel Narvasta would adopt a threatening and uncompromising attitude when discussing the terms of a possible agreement with IMC, while also encouraging other Parán members to invade the Site.[52]

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[47] [redacted] See also SSS, Monthly Report, Project, November 2016 (SPA), at **Exhibit C-394**, p. 6 ("A leader with regular influence within the community, he is very closed-minded and reluctant to talk about the project. His speech on the project is that this will pollute the local population's crops and that he knows of experiences of bad mining practices. He is one of the main opponents of the project.")

[48] Sayán Police, Report No. 002-2019-REGPOL.LIMA/DIVPOL-H-CS.SEC (SPA), 04/01/2019, at **Exhibit C-458**, p. 1; Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 64 (para. 178).

[49] Denuncia Ampliatoria, 07/01/2019, at **Exhibit IMM-0053**.

[50] [redacted]

[51] SSS, Weekly Report, Project (SPA), 14/08/2017 to 19/08/2017, at **Exhibit C-444**, p. 2.

[52] SSS, Special Report, IMC dealings with the Parán and Lacsanga Communities (SPA), 09/02/2017, at **Exhibit C-479**, p. 1 ("[h]aving coordinated a meeting […] with leaders of the Huamboy area and after analysing the position taken by Mr. Israel Narvasta (local President) and Absalon Narvasta (Leader of the [Huamboy area]), it was […] coordinated […] not to carry out this meeting to [avoid discussing] the proposal that both leaders wanted to make to the

iii) **Absalón Narvasta** was considered the leader of the marijuana business and a highly influential individual in the Huamboy area.[53] Although he initially portrayed himself as an IMC supporter,[54] he was eventually found to be solely interested in negotiating high contributions from the Claimant.[55] During the height of the conflict, he became a member of the Parán Dialogue Committee and served as one of the main opponents to the Project.[56]

iv) **Luis Narvasta Escudero** was one of the more radical members of the Parán Community and a staunch opponent of the Project.[57] IMC filed a criminal complaint against him on 20 June 2018 due to his leading role in the 19 June 2018 Invasion.[58]

v) **Wilber Narvasta** was first Vice-President and then acting President of the Parán Community.[59] In his capacity as Vice-President, he was also

company (request for S/2,000,000.00 soles), to start the dialogue for the signing of the agreement."); SSS, Weekly Report, Project (SPA), 18/09/2017 to 22/09/2017, at **Exhibit C-480**, p. 2 ("we encountered Mr. Israel Narvasta, local president of Huamboy, who intimidatingly […] informed us […]: […] [that] [a]ccording to information from a lawyer working in Brazil (a relative of the [Parán official]), the project will not be able to begin because there is no agreement with the [Parán] community. The company should negotiate with the Paran community in accordance with their expectations before work can begin."); SSS, Monthly Report, Project, August 2018 (SPA), at **Exhibit C-162**, p. 5 ("[…] but those present by majority did not accept the proposal that the [opponent] Israel Narvasta Claros [put forward] [to invade the Site]").

[53] IMC, Matrix of Local Stakeholders, Invicta Project (SPA), at **Exhibit C-481**, p. 4.

[54] SSS, Monthly Report, Project, November 2016 (SPA), at **Exhibit C-457**, p. 7; SSS, Monthly Report, Project, December 2016 (SPA), at **Exhibit C-424**, p. 7.

[55] IMC, Matrix of Local Stakeholders, Invicta Project (SPA), at **Exhibit C-481**, p. 4; SSS, Special Report, IMC dealings with the Parán and Lacsanga Communities (SPA), 09/02/2017, at **Exhibit C-479**, p. 1.

[56] Summary of the meeting between IMC and the Parán Community (SPA), 07/11/2018, at **Exhibit C-183**, p. 2; SSS, Monthly Report, Project, November 2018 (SPA), at **Exhibit C-482**, p. 6.

[57] Report on meeting between IMC, the Parán Community, the MEM and the Mayor of the District of Leoncio Prado (SPA), 24/10/2018, at **Exhibit C-173**, p. 3 (point 3).

[58] Criminal complaint filed with the Sayán Police by IMC representatives (SPA), 20/06/2018, at **Exhibit C-125**; Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 64 (para. 178).

[59] [redacted]

part of the Dialogue Committee and over time became a strong opponent of the Project.[60]

40 The Narvasta family and others involved in the marijuana business opposed the Project because it would bring more Police presence to the Parán area and thus disturb their illegal drug trade.[61] Indeed, the Project would bring suppliers, contractors, and private security to the area, generating more movement and, as a result, the need for enhanced Police checkpoints, patrols and surveillance for control purposes and to prevent or deal with possible theft incidents or accidents at the Site.[62] This, in turn, would disrupt the drug business as Parán had typically operated without police interference. The Narvasta family was aware of the threat the Project posed to their drug business and feared it would result in the seizure or incineration of thousands of marijuana plants.

41 Peruvian officials knew that the Parán Community's illegal marijuana business was a major driver of its opposition to the Project and that the Blockade was financed with funds coming from this illegal drug trade. The State also knew that the Parán community members were armed with long-range weapons. Indeed, as stated in a memorandum prepared by the MEM-OGGS on 20 February 2019, *i.e.*, four months after the Blockade:

> "The social process that the mining company maintains with the Parán Community, **is affected by [the] presence of interests outside the State (producers of local marijuana plantations)** the MININTER is aware of this problem and is activating the corresponding mechanisms. Also, it is known that the local [Police] is preparing an operations plan in the community, **having identified long-range weapons among the community members**.
>
> **RECOMMENDATIONS:**
>
> Coordination at the highest inter-sectoral level, between the MEM and the MININTER in order to activate as soon as possible the mechanisms for the re-establishment of public order in the area by

[60] SSS, Monthly Report, Project, December 2016 (SPA), at **Exhibit C-424**, p. 8.

[61] [redacted]

[62] [redacted]

> MININTER. **Dialogue mechanisms are not appropriate in this case because community leadership manages a double discourse, with the State and with its population, evidencing with it the presence and active participation of local actors who, with an economy outside the law, subsidize activities contrary to public order against the mining project**."[63]

42 Although the MEM-OGGS memorandum states that the MININTER planned to take action to address Parán's drug business and to seize Parán's weapons, this did not take place. If Peru had taken action by re-establishing law and order as this internal document recommended, Lupaka would not have lost its investment.

43 Subsequent official documents reconfirmed Peru's awareness that Parán's drug business was an obstacle to any potential agreement with IMC. [redacted][4]

44 Peru's internal documents therefore show that there was consensus among many of the higher authorities that Parán's drug business would make it impossible to reach an agreement and that only police intervention would

[63] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3 *et seq.* (emphasis added) (As early as November 2017, IMC's CR Team reported on a meeting hosted by both the Paccho District Committee for Citizen Security and the Anti-Drug Directorate of the PNP, during which these authorities acknowledged before representatives of the municipalities, the MININTER and local police the existing threat posed to the Project by Parán's marijuana business.) See also SSS, Weekly Report, Project (SPA), 20/11/2017 to 24/11/2017, at **Exhibit C-445**, p. 2 and SSS, Weekly Report, Project (SPA), 20/11/2017 to 27/11/2017, at **Exhibit C-426**, p. 1.

[64] [redacted] (emphasis added).

resolve the issue. Despite this, Peru required that Lupaka lose its time (and ultimately its investment) through pointless dialogue with the Parán Community while the latter held Lupaka hostage through a Blockade.

3 THE PROJECT WAS ON THE VERGE OF PRODUCTION WHEN THE PARÁN COMMUNITY SET UP ITS ILLEGAL BLOCKADE

45 Lupaka made significant investments in the six years following its acquisition of the Project, bringing it to the verge of production (**Section 3.1**) while complying with all legal requirements on citizen participation (**Section 3.2**). The mine was ready to enter production when Parán set up its illegal Blockade (**Section 3.3**), thus allowing IMC to comply with its gold delivery obligations under the PPF Agreement (**Section 3.4**).

3.1 Lupaka's Project was on the brink of production when Parán set up its illegal Blockade

46 In the six years following its acquisition of the Project (October 2012 – October 2018), Lupaka invested a significant amount of time and money to develop the Project, taking it to the eve of production before Parán installed the Blockade. Indeed, Lupaka secured the necessary land rights,[65] conducted various technical studies which confirmed the Project's prospects[66] and obtained key permits and approvals to move ahead with the Project.[67] It secured funding to develop the Project[68] and completed mine development works.[69] Lupaka further reached an agreement to purchase the Mallay processing plant, where Lupaka would process the Project's ore.[70]

[65] Memorial, 01/10/2021, p. 14 *et seq.* (Section 2.2.3).
[66] Memorial, 01/10/2021, p. 11 *et seq.* (Section 2.2.1).
[67] Memorial, 01/10/2021, p. 25 *et seq.* (Section 2.2.4).
[68] Memorial, 01/10/2021, p. 13 *et seq.* (Section 2.2.2).
[69] Memorial, 01/10/2021, p. 31 *et seq.* (Section 2.2.6).
[70] Memorial, 01/10/2021, p. 28 *et seq.* (Section 2.2.5).

47 The Claimant addressed all these key facts in its Memorial. As explained below, Peru has not refuted most of these facts and, when it has, its arguments are baseless.

48 First, Peru contends that the "Invicta Project was in fact within the Parán Community's territory", and thus IMC needed to secure an agreement with such community to develop the Project.[71] Peru relies on two statements in the Preliminary Economic Assessment of the Project (the "**PEA 2018**") to support its proposition, namely that "[t]he property is located within the boundaries of the Parán, Lacsanga and Santo Domingo de Apache [Rural] communities" and "Invicta Mining Corp plans to have an agreement with the Parán Community in the short term."[72]

49 None of these statements supports Peru's case. Indeed, the first statement is referring to the fact that that, taken as a whole, the Invicta Project comprises six mining concessions which are scattered throughout the Parán, Lacsanga and Santo Domingo rural communities, *i.e.*, the Victoria Uno, Victoria Dos, Victoria Tres, Victoria Cuatro, Victoria Siete and Invicta II mining concessions.[73] Indeed, as stated more fully in the same PEA 2018:

> "The Invicta Gold Project is in the province of Huaura, department of Lima, Peru, 120 kilometres northeast of the city of Lima. The property is located within the boundaries of the Paran, Lacsanga and Santo Domingo de Apache peasant communities. Santo Domingo de Apache and Paran are in the district of Leoncio Prado, while Lacsanga is in the district of Paccho. The Invicta Gold Project **comprises six mining concessions** held by Invicta Mining Corporation S.A.C (Invicta Mining Corp), a subsidiary of Lupaka. and comprises a total area of 4,700 hectares."[74]

50 However, IMC's revised mining plan, as approved by the MEM in 2014, only assumed exploitation of the Victoria Uno concession and, more

[71] Counter-Memorial, 24/03/2022, p. 82 (para. 166).

[72] Counter-Memorial, 24/03/2022, p. 82 (para. 166).

[73] Memorial, 01/10/2021, p. 7 (para. 23).

[74] 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. iv.

specifically, of the part of such concession which is located on land belonging to the Lacsanga and Santo Domingo communities. This is clearly shown by the community land boundaries recorded in the Peruvian Registry.[75] Therefore, contrary to Peru's contention, IMC was not going to carry out mining activities on Parán land.

51 The second statement relied on by Peru, which is part of Section 3.4 of the PEA 2018 on Permits and Authorization, provides that "Invicta Mining Corp. plans to have an agreement with the Parán Community in the short term".[76] This is true but does not support Peru's case. Indeed, IMC made strenuous efforts to reach an agreement with the Parán Community because it sought to build a lasting relationship with all the communities in the area of direct influence of the Project. However, the absence of such agreement did not prevent Lupaka from advancing the Project. Indeed, as explained in Section 3.2.2 below, under Peruvian law, IMC only needed to reach an agreement with the communities holding rights over the land on which IMC was to carry out its exploitation activities, *i.e.*, Lacsanga and Santo Domingo, which IMC did.

52 Contemporaneous documents confirm that IMC's mining activities were to take place on land belonging to Lacsanga and Santo Domingo, not Parán. Indeed, as stated in the Police document dated 9 February 2019 detailing an Operational Plan that the Police were ready to implement to evict the Parán members from the Blockade and secure the Site:

> "70 percent of the mining project of the Invicta Mining Company is located within the territory of the rural community of Lacsanga, Leoncio Prado district and 30 percent on the land of the Santo Domingo de Apache rural community, Leoncio Prado district".[77]

[75] IMC map - Community boundaries according to Peruvian registry (SPA), at **Exhibit C-486**.

[76] See 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. 10.

[77] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 31 (Conclusions).

53 This is further confirmed by other contemporaneous Police reports.[78] Of course, IMC had agreements with the Lacsanga and Santo Domingo Communities to develop the Project. Indeed, on 22 October 2010, Invicta's prior owner signed a Land Use Agreement with the Santo Domingo Community allowing IMC to conduct mining operations on Santo Domingo land.[79] Thereafter, on 31 March 2015[80] and 18 July 2017,[81] IMC signed agreements with the Lacsanga Community authorising the company to conduct mining activities, build mine infrastructure, and develop and use Lacsanga's road for the Project.

54 Therefore, the Tribunal can only conclude that IMC had all necessary land rights to develop the Project.

55 Second, it is not in dispute that IMC **conducted various technical studies which confirmed the Project's prospects**.[82] Indeed, in 2014, Lupaka commissioned SRK Consulting to conduct two conceptual studies of the Project,[83] and Aminpro to conduct metallurgical testing on the Project's ore.[84] These studies confirmed that the development of the Project was a

[78] Sayán Police, Report No. 002-2019-REGPOL.LIMA/DIVPOL-H-CS.SEC (SPA), 04/01/2019, at **Exhibit C-458**, p. 1 ("On the other hand, on 140CT18 at 06.30 hours, the undersigned, in command of the PNP Sayán Police Station, went to the mining camp of the mining company Invicta Corp. SAC, **which is located between the rural communities of Santo Domingo and Lacsanga**, between the districts of Leoncio Prado and Paccho") (emphasis added).

[79] Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**, Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64** and Contract for the Constitution of Mining Easement between IMC and the Santo Domingo Community (SPA), 22/10/2010, at **Exhibit C-65**. (An addendum to the Land Use Agreement increasing payments by IMC was ready in early 2018 but could not be signed due to the Blockade). See Draft Addendum to Framework Agreement between the Santo Domingo Community and IMC (SPA), 15/09/2017, at **Exhibit C-94** and SSS, Monthly Report, Project, May 2018 (SPA), at **Exhibit C-452**, p. 3.

[80] Agreement between IMC and the Lacsanga Community (SPA), 31/03/2015, at **Exhibit C-42**.

[81] 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**.

[82] Counter-Memorial, 24/03/2022, p. 70 (para. 142).

[83] SRK, Conceptual Study Invicta Project: 300 tpd Option, 03/02/2014, at **Exhibit C-37**; SRK, Conceptual Study Invicta Project: Preliminary Results (1,000 tpd), 22/01/2014, at **Exhibit C-67**.

[84] Aminpro, Lupaka Gold: Invicta Project, Test on Polymetalic (Pb/Zn/Cu) Sulphide Ore Phase II, 23/10/2014, at **Exhibit C-73**.

highly profitable venture.[85] Lupaka then prepared a revised mining plan to take into account the results of these technical studies, which was approved by the MEM on 11 December 2014.[86] In November 2017, Lupaka commissioned SRK Consulting to conduct a PEA 2018, which concluded that the Project "demonstrated positive PEA results" and had "considerable merit". The PEA 2018 further highlighted the prospect for expansion at the Project, indicating that the data "strongly suggest[s] the potential for mineral resource expansion along existing mineralised structures".[87] Neither Peru nor its experts have disputed the geology of the Project nor its prospects.

56 Third, it is not in dispute that IMC obtained **key permits and approvals to develop the Project**. Indeed:

i) IMC secured a certificate of absence of archaeological ruins from the Ministry of Culture on 25 May 2010.[88]

ii) The MEM approved IMC's revised mining plan on 11 December 2014, and the company was authorised to carry out mine preparation and development works.[89]

iii) The MEM approved IMC's EIA on 28 December 2009.[90] IMC revised its EIA following the MEM's approval of IMC's revised mining plan in December 2014. The MEM approved IMC's revised environmental instrument on 9 April 2015.[91]

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[85] Witness Statement of Eric Edwards, 01/10/2021, p. 13 (paras. 44-46); Witness Statement of Julio F. Castañeda, 01/10/2021, p. 6 (para. 13).

[86] MEM Report and Resolution approving the Mining Plan (SPA), 11/12/2014, at **Exhibit C-9 (corrected translation)**.

[87] 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. xi.

[88] Ministry of Culture, Certificates of Non-Existence of Archaeological Remains for IMC, 2009-2010 (SPA), at **Exhibit C-59**; Counter-Memorial, 24/03/2022, p. 71 *et seq.* (para. 144).

[89] MEM Report and Resolution approving the Mining Plan (SPA), 11/12/2014, at **Exhibit C-9 (corrected translation)**; Counter-Memorial, 24/03/2022, p. 72 (para. 145).

[90] MEM Resolution approving the EIA (SPA), 28/12/2009, at **Exhibit C-7 (corrected translation)**.

[91] MEM Report and Resolution approving ITS No. 1 (SPA), 09/04/2015, at **Exhibit C-40**; Counter-Memorial, 24/03/2022, p. 72 (para. 145).

iv) The MEM approved IMC's Mine Closure Plan in 2012.[92] IMC then revised its Mine Closure Plan following the MEM's approval of its revised mining plan in December 2014. The MEM approved IMC's revised Mine Closure Plan on 3 December 2015.[93] IMC was in the process of amending its Mine Closure Plan when the Parán Community set up its illegal Blockade – the approval of which, however, was not necessary to start exploitation.[94]

v) In 2016 and 2017, IMC obtained the necessary licenses to purchase, use and store explosives.[95]

vi) IMC secured various other authorisations to conduct its mine development activities, including water use permits and fuel usage authorisations.[96]

57 As shown by the foregoing, the Claimant had obtained all key permits and authorisations needed to develop the Project by the time the Parán Community set up its illegal Blockade.

58 Fourth, it is not in dispute that IMC **finished the mine preparation and development works** by mid-2018, which led to its request to the MEM on 6 September 2018 to carry out its final pre-production inspection to authorise IMC to proceed with exploitation.[97]

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[92] MEM Report and Resolution approving ITS No. 1 (SPA), 09/04/2015, at **Exhibit C-40**, p. 2 (Section 3.6); Counter-Memorial, 24/03/2022, p. 72 (para. 145).

[93] MEM, Directoral Resolution No. 467-2015/MEM-DGAAM (SPA), 03/12/2015, at **Exhibit C-418**.

[94] As explained in Section 3.3.3 below, IMC had made all updates required by Peruvian law to its Mine Closure Plan when the Parán Community set up its illegal Blockade. Indeed, IMC's Mine Closure Plan was approved on 17 February 2012 and updated for the first time on 3 December 2015. The next update was due 5 years thereafter, *i.e.*, in December 2020 at the earliest. IMC could have therefore entered exploitation any time before December 2020 without requiring amending its Mine Closure Plan.

[95] MEM, IMC mining operations certificate (SPA), 30/11/2017, at **Exhibit C-10**; SUCAMEC, Licence to operate explosive magazines (SPA), 06/05/2016, at **Exhibit C-80**; Counter-Memorial, 24/03/2022, p. 72 (para. 145).

[96] ANA, Administrative Resolution No. 0192-2009-ANA-ALA Huaura (SPA), 27/10/2009, at **Exhibit C-487**; Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 89 *et seq.* (Schedule H); Counter-Memorial, 24/03/2022, p. 72 (para. 145).

[97] Letter from IMC to MEM (SPA), 06/09/2018, at **Exhibit C-81**; Counter-Memorial, 24/03/2022, p. 72 (para. 145).

59 Fifth, it is not in dispute that Lupaka **secured funding to develop the Project**. Indeed, on 30 June 2016, Lupaka and PLI executed the PPF Agreement,[98] which, as subsequently modified,[99] provided Lupaka with gross proceeds of USD 7,000,000 to develop the Project in exchange for deliveries of gold.[100]

60 Sixth, Peru does not deny that Lupaka had reached an agreement with Buenaventura for the purchase of the Mallay processing plant, which had a capacity to process at least 600 t/d.[101] Peru however states that the Claimant "should not be compensated for any alleged losses predicated on Claimant's **purely hypothetical future ownership** of the Mallay plant."[102]

61 Peru's contention that the purchase of the Mallay plant was "purely hypothetical" is belied by the facts. Mr Ellis explains in his second witness statement how if it had not been for the Blockade, the purchase of the Mallay plant would have occurred.[103] Indeed, by early October 2018, Lupaka and Buenaventura had agreed on the terms of the purchase and sale agreement, which reflected a purchase price of USD 10.4 million, plus VAT.[104] Funding for this transaction would be provided by PLI through a third amendment to the PPF Agreement, the terms of which had also been agreed by early October 2018.[105] The Mallay transaction was contingent upon the Mallay Community's approval of the transfer of its easement

[98] PPF Agreement, 30/06/2016, at **Exhibit C-44**.

[99] The PPF Agreement was amended in 2017 and 2018. See Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45** and Amendment No. 2 to the Second Amended and Restated PPF Agreement, 06/02/2018, at **Exhibit C-46**.

[100] Witness Statement of Gordon Ellis, 01/10/2021, p. 11 (para. 33); Counter-Memorial, 24/03/2022, p. 78 *et seq.* (paras. 159-160).

[101] The Claimant's primary damages assessment is based on a production schedule of 590 t/d using the Mallay processing plant. For further details, see Section 10.3.3 below.

[102] Counter-Memorial, 24/03/2022, p. 364 (para. 780) (emphasis added).

[103] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 16 *et seq.* (paras. 34-38).

[104] Draft Mallay Purchase Agreement between Buenaventura and IMC (Final version) (SPA), 05/10/2018, at **Exhibit C-287**, p. 7 *et seq.* (Clause Fourth); Expert Report of AlixPartners on Damages, 24/03/2022, p. 31 (para. 84).

[105] Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement (Final version), 05/10/2018, at **Exhibit C-285**.

agreement with Buenaventura to IMC, which was obtained on 14 March 2019.[106]

62 These milestones attest to Lupaka's full commitment to the Project and its advanced stage of development – it was on the brink of production.

3.2 Lupaka developed the Project whilst complying with all social requirements

63 As explained above, Lupaka invested a significant amount of time and money to develop the Project in the six years following its acquisition, taking it to the brink of production by the time Parán set up its illegal Blockade. Importantly, **it is not in dispute that** Lupaka and IMC's prior owner complied with all legal requirements aimed at ensuring citizen participation before, during and after approval of the Project's key socio-environmental management instruments (**Section 3.2.1**). Contrary to Peru's contention, IMC was not obliged to reach an agreement with the Parán Community to develop the Project, but in any event made countless good faith efforts to do so (**Section 3.2.2**).

3.2.1 Lupaka and IMC ensured citizen participation before, during and after approval of the Project's key socio-environmental management instruments

64 In Section II.B.1.b of its Counter-Memorial, Peru describes at length the key socio-environmental management instruments that a mining company is required to have under Peruvian law to develop a mining project. Peru places emphasis on the EIA and the mine closure plan, and the fact that both have to go through consultation processes involving the local population and authorities before they can be approved by the competent authorities. However, it is not in dispute[107] that IMC (before and after it

[106] Email from Buenaventura to Lupaka, 11/03/2019, at **Exhibit C-233**; Notarized Addendum to the Easement Contract between Buenaventura and the Mallay Community (SPA), 14/03/2019, at **Exhibit C-289**.

[107] Indeed, Peru does not contend that IMC (before or after it was acquired by Lupaka) failed to conduct any of the consultation processes required by Peruvian law, nor that those processes were conducted in breach of said law.

was acquired by Lupaka) conducted these consultation processes in accordance with Peruvian law.

65 First, the "Citizen Participation Plan" ("**CPP**" – "*Proceso de Participacion Ciudadana*" in Spanish) is a relevant plan that a mine owner must submit. In it, there will be a proposal "to the competent authority [*i.e.*, the MEM] detailing and substantiating the mechanisms that will be developed during the environmental study procedure and during the execution of a mining project" to engage with the local communities in the area of influence of the mining project.[108] Specifically, Peruvian law requires a mine owner to include in its CPP citizen participation activities to be developed "**prior to** the preparation of the [EIA], **during the preparation** [of the EIA], [] **during the assessment procedure** [of the EIA] carried out by the competent authority",[109] and also "during the **execution of the mining project**".[110] IMC complied with these requirements.

66 The MEM approved IMC's CPP in December 2008,[111] and IMC carried out the activities provided therein before[112] and during the preparation [113] and evaluation of its EIA.[114] Indeed, IMC, together with its external consultant CESEL Ingenieros ("**CESEL**"), met on several opportunities with all three Rural Communities before and during the preparation and evaluation of IMC's 2009 EIA. CESEL reported that during these meetings, which took place between February-March 2007,[115] April and

[108] Supreme Decree No. 028-2008-EM, 26/05/2008, at **Exhibit R-0007**, p. 8 (Art. 14).

[109] Supreme Decree No. 028-2008-EM, 26/05/2008, at **Exhibit R-0007**, p. 8 (Art. 14) (emphasis added); Counter-Memorial, 24/03/2022, p. 40 (para. 82).

[110] *Id.*, p. 8 *et seq.* (Art. 15) (emphasis added); Counter-Memorial, 24/03/2022, p. 40 (para. 82).

[111] MEM Resolution approving the EIA (SPA), 28/12/2009, at **Exhibit C-7 (corrected translation)**, p. 5.

[112] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 58 (Table 10.4-1).

[113] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 59 (Table 10.4-2).

[114] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, 2009 EIA, p. 59 *et seq.* (Table 10.4-3 and Table 10.5.1-1).

[115] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 58.

September 2008,[116] "an atmosphere of dialogue and mutual respect prevailed among the participants", without incidents of any kind,[117] and that all stakeholders were able to present their views.[118] In September 2008,[119] November 2008[120] and April 2009,[121] IMC organized further participatory workshops and a public hearing with the communities of Lacsanga, Santo Domingo and Parán and with Peruvian authorities to discuss *inter alia* the Project's operations, social contributions, environmental impacts and employment opportunities.

67 IMC carried out further citizen participation activities following the MEM's approval of IMC's EIA on 28 December 2009. In this regard, IMC's EIA included two citizen participation schemes that would run in parallel during the mine preparation and development phase: (i) the Participatory Environmental Monitoring Scheme and (ii) the Consultation and Information Scheme.[122] IMC carried them out.

68 The Participatory Environmental Monitoring Scheme sought the participation of members of the Rural Communities in the Project's environmental monitoring activities. IMC included provisions within its agreements with the Santo Domingo and Lacsanga Communities to allow for a systematic implementation of such a scheme,[123] and started

[116] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 59.

[117] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 60.

[118] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 59 *et seq*.

[119] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 61.

[120] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 61.

[121] MEM Resolution approving the EIA (SPA), 28/12/2009, at **Exhibit C-7 (corrected translation)**, p. 4. Only the Lima Regional Mining Directorate did not show up for the hearing.

[122] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 554 (Chapter 10.6).

[123] Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64** (Art. 5.2); 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43** (Art. 8.6).

implementing it in February 2018, once it resumed its mine preparation and development activities.[124]

69 For its part, the Consultation and Information Scheme was intended to keep the Rural Communities abreast of the Project's activities and their development. IMC implemented this scheme throughout the mine preparation and development phase, regularly meeting and consulting with all three Rural Communities.[125]

70 Second, the Mine Closure Plan is another key socio-environmental management instrument which, according to Peruvian law, requires a separate CPP whereby the local population and authorities are given an opportunity to review and submit their views before a decision is made on its approval or disapproval.[126] IMC complied with this requirement.

71 Indeed, following the approval of its 2009 EIA, IMC prepared the corresponding CPP for its Mine Closure Plan, which the MEM approved on 14 March 2011.[127] IMC then conducted citizenship participation activities in the communities of Lacsanga, Santo Domingo and Parán to gather the local population's opinions in relation to its 2012 Mine Closure Plan, holding interviews and workshops with the participation of community leaders within the Project's area of direct influence.[128] Following these activities, and upon confirming that its comments had

[124] SSS, Monthly Report, Project, February 2018 (SPA), at **Exhibit C-436**, p. 5, p. 9, p. 10; SSS, Monthly Report, Project, March 2018 (SPA), at **Exhibit C-430**, p. 3; SSS, Monthly Report, Project, April 2018 (SPA), at **Exhibit C-488**, p. 5; SSS, Monthly Report, Project, May 2018 (SPA), at **Exhibit C-452**, p. 8; SSS, Monthly Report, Project, June 2018 (SPA), at **Exhibit C-157**, p. 8.

[125] SSS, Monthly Report, Project: Informative workshop on agricultural technologies, October 2016 (SPA), at **Exhibit C-149**; IMC, Monthly Report, April 2018, at **Exhibit C-235**.

[126] Counter-Memorial, 24/03/2022, p. 40 *et seq.* (para. 83); Supreme Decree No. 033-2005-EM, 14/08/2005, at **Exhibit R-0008**, p. 10 (Arts. 13 and 16).

[127] MEM, Report No. 154-2012-MEM-DGAAM/LCD/MPC/RPP (SPA), 08/02/2012, at **Exhibit C-417**, p. 1 *et seq*.

[128] MEM, Report No. 154-2012-MEM-DGAAM/LCD/MPC/RPP (SPA), 08/02/2012, at **Exhibit C-417**, p. 27.

been implemented,[129] the MEM approved the 2012 Mine Closure Plan on 17 February 2012.[130]

72 As explained in Section 3.1 above, IMC subsequently revised its 2012 Mine Closure Plan, again complying with its CPP obligations. The MEM approved IMC's revised Mine Closure Plan on 25 October 2015.[131]

73 As demonstrated above, Lupaka and IMC (before and after it was acquired by Lupaka) complied with all legal requirements for the participation of the members of the communities of Lacsanga, Santo Domingo and Parán. IMC further contemplated in its Annual Operations Plan ("**AOP**") for 2018, citizen participation activities such as public consultation and environmental monitoring.[132] However, the Parán Community refused to participate in these activities.[133] As the citizen participation activities carried out by Lupaka throughout the life of the Project show, the company was committed to complying with Peruvian law and was respectful of the rights of the Rural Communities.

3.2.2 Lupaka was not obliged to reach an agreement with the Parán Community to develop the Project

74 The Claimant explained in its Memorial that it did not need the Parán Community's agreement to develop the Project because (i) the Project was located on land belonging to the Lacsanga and Santo Domingo Communities, not on Parán, and (ii) IMC had secured an access road to the Site through Lacsanga.[134] As explained in Section 3.1 above, Peru cannot deny that the Project was located on land belonging to the Lacsanga and Santo Domingo (not on Parán), and does not deny that IMC had secured an access road to the Site through Lacsanga road.[135] Peru further concedes

[129] MEM, Report No. 154-2012-MEM-DGAAM/LCD/MPC/RPP (SPA), 08/02/2012, at **Exhibit C-417**, p. 30.

[130] MEM, Directorial Resolution No. 044-2012-MEM-AAM (SPA), 17/02/2012, at **Exhibit C-489**, p. 1 (Art. 1).

[131] MEM, Report 1005-2015 (SPA), 25/10/2015, at **Exhibit C-490**.

[132] SSS, Community Relations Annual Operating Plan, 2018 (SPA), at **Exhibit C-397**.

[133] [redacted]

[134] Memorial, 01/10/2021, p. 25 (para. 74).

[135] Counter-Memorial, 24/03/2022, p. 93 (para. 189).

that there is **no express** obligation under Peruvian law for mining companies (such as IMC) to reach an agreement with communities other than those holding rights over the land on which a mining project will be developed (such as Parán).[136]

75 Despite the foregoing, Peru insists that IMC was required to reach an agreement with the Parán Community to develop the Project. It does so by referring to the notion of social license to operate, which it defines as "obtaining the ongoing and long-term support of local communities that are located within the project's purview".[137] Peru argues that "[s]ocial license principles are reflected in the legal framework applicable to all mining projects in Peru […] **[because] mining companies are required to ensure local community engagement and participation at every stage of a mining project**".[138] On the basis of this, Peru then concludes that "[a]ccordingly, as a mining company operating in Peru, Claimant should have known that it would need to establish a long-term relationship, and secure agreements with all three of the rural communities affected by Claimants' mining project, including the Parán Community, in order to fulfil its obligations under Peruvian law".[139] Peru is clutching at straws.

76 Peruvian law does require that the EIA of a mining project contain certain social components for the benefit of the communities in the project's area of direct influence. *I.e.*, a community development plan, a community relations programme, a social concertation plan, a social investment schedule and a social impact monitoring schedule. Peruvian law also requires mining companies to carry out the consultation processes described in the previous Section. However, **nowhere does Peruvian law require that mining companies must reach an agreement with the communities in the area of direct influence of a mining project to be able to develop it**. Although Peru suggests that such a requirement is embodied in Peruvian law, it is not. That should be the end of the matter.

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[136] Counter-Memorial, 24/03/2022, p. 25 *et seq.* (para. 55); Witness Statement of Andrés Fernando Trigoso, 11/03/2022, p. 9 (para. 28).

[137] Counter-Memorial, 24/03/2022, p. 25 *et seq.* (para. 55).

[138] Counter-Memorial, 24/03/2022, p. 41 (paras. 84-85) (emphasis added).

[139] Counter-Memorial, 24/03/2022, p. 41 (para. 85).

77 Rather, Peruvian law only requires mining companies to reach an agreement with the communities **holding rights over the land on which a mining project is to be developed**. In this regard, Article 23 of the Mining Procedures Regulation states clearly that:

> "[…] The concession title does not authorise by itself to carry out exploration or exploitation mining activities, but previously the concessionaire must: […]
>
> c) **Obtain permission for the use of land by prior agreement with the owner of the terrain** or the completion of the administrative easement procedure, in accordance with the regulations on the matter."[140]

78 In other words, whether or not a mining company is required to reach an agreement with a certain community depends on whether it owns all or part of the land where the mining project is located. IMC complied with Peruvian law, as it signed surface agreements with the Lacsanga and Santo Domingo Communities to develop the Project.[141] Nevertheless, Lupaka tried relentlessly to obtain an agreement with the Parán Community, but in light of Parán's bad faith, was unable to do so.

79 Peru relies on almost identical statements included in (i) an SRK report prepared in April 2012[142] and (ii) a Joint Disclosure Booklet prepared by Lupaka and AAG in August 2012[143] to contend that Lupaka had

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[140] Supreme Decree No. 008-91-TR, Approval of the Regulation of Mining Procedures (SPA), at **Exhibit C-228**, p. 22 *et seq.* (Art. 23) (emphasis added).

[141] 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**; Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**; Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64**; Contract for the Constitution of Mining Easement between IMC and the Santo Domingo Community (SPA), 22/10/2010, at **Exhibit C-65**.

[142] Counter-Memorial, 24/03/2022, p. 64 *et seq.* (para. 133) ("[n]egotiations regarding surface rights agreements are ongoing with the communities of Parán and Lacsanga as agreements with all three communities are required to initiate construction and operation"); 2012 SRK Report, at **Exhibit C-58**.

[143] Counter-Memorial, 24/03/2022, p. 74 *et seq.* (para. 150) ("[n]egotiations regarding surface rights agreements are ongoing with the communities of Parán and Lacsanga as agreements with all three communities are required to initiate construction and operation of a mine."); Joint Disclosure Booklet between Lupaka Gold Corp. and Andean American Gold Corp. ("**Joint Disclosure Booklet**"), 22/08/2012, at **Exhibit R-0041**.

acknowledged the need to reach an agreement with Parán to develop the Project.[144] But these documents were prepared on the basis of AAG's original "business plan", which assumed that the Project would be developed on Parán's land and produce at a rate of 5,100 t/day.[145] The Project's scope was significantly reduced as per IMC's revised mining plan, which was approved by the MEM on 11 December 2014[146] and did not entail activities on Parán. Indeed, IMC's revised mining plan only assumed exploitation of the Victoria Uno concession and, more specifically, of the part of such concession which is located on land belonging to the Lacsanga and Santo Domingo communities.[147]

80 For the foregoing reasons, Peru's contention that IMC was required to reach an agreement with the Parán Community to develop the Project is baseless and should be dismissed.

3.3 Lupaka could have easily obtained the few outstanding regulatory approvals it needed to start exploitation

81 According to Peru, the Claimant's "suggestion that the mine was virtually ready to exploit [when the Blockade was set up] is […] unfounded and incorrect" because Lupaka was missing certain regulatory approvals needed to start exploitation.[148] Specifically, Peru contends that "there were still several outstanding regulatory steps that Invicta needed to take before [it] could bring the Invicta mine into its exploitation stage".[149] Peru lists these outstanding approvals as (i) passing the MEM's final inspection (**Section 3.3.1**),[150] (ii) implementing a water management system, which had to be certified by the Directorate of Environmental Assessment for

[144] Counter-Memorial, 24/03/2022, p. 65 (para. 134).

[145] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 13 (para. 26); Witness Statement of Julio F. Castañeda, 01/10/2021, p. 6 *et seq.* (paras. 12 and 15); 2012 SRK Report, at **Exhibit C-58**, p. ii and p. 129.

[146] MEM Report and Resolution approving the Mining Plan (SPA), 11/12/2014, at **Exhibit C-9 (corrected translation)**.

[147] See IMC map - Community boundaries according to Peruvian registry (SPA), at **Exhibit C-486**.

[148] Counter-Memorial, 24/03/2022, p. 72 (para. 146).

[149] Counter-Memorial, 24/03/2022, p. 148 (para. 292).

[150] Counter-Memorial, 24/03/2022, p. 148 *et seq.* (para. 293).

Natural and Productive Resource Projects (the "**DEAR**") (**Section 3.3.2**)[151] and (iii) obtaining the MEM's approval of the amendments to IMC's Mine Closure Plan[152] (**Section 3.3.3**). As explained below, some of these approvals were not required for the Project to enter the production phase, and IMC could have easily obtained the others.

3.3.1 The Invicta mine was prepared to pass the MEM's final inspection

82 The Claimant agrees with Peru's contention that the Invicta mine had to pass a final pre-exploitation inspection by the MEM before it could enter exploitation.[153]

83 On 6 September 2018, IMC requested the MEM to schedule such inspection as IMC had completed the mine preparation and development works.[154] Peru does not deny that IMC made this request, but contends that "[t]he reasons [sic] that Claimant's September 2018 request did not result in an inspection was because Claimant's submission was missing a critical certification and was therefore insufficient".[155] This is misleading.

84 The contemporaneous exchanges between IMC and the MEM clearly show that the MEM's final inspection could not be carried out due to the Blockade:

i) On 6 September 2018, IMC requested the MEM to conduct its final pre-exploitation inspection. Specifically, IMC "request[ed] the

[151] Counter-Memorial, 24/03/2022, p. 151 (para. 299).

[152] Counter-Memorial, 24/03/2022, p. 150 (para. 297). Peru only refers to these three issues as outstanding before IMC could obtain an exploitation license for the Project. Peru states **once** in passing that IMC required to have its Third ITS approved before it could move to exploitation. As explained in Section 3.3.2 below, this is wrong. See Supreme Decree No. 020-2012-EM (SPA), 06/06/2012, at **Exhibit C-491**, p. 2 *et seq.* (Art. 75(2)) and Supreme Decree No. 008-91-TR, Approval of the Regulation of Mining Procedures (SPA), at **Exhibit C-228**, p. 22 *et seq.* (Art. 23).

[153] Memorial, 01/10/2021, p. 28 (para. 86); Witness Statement of Julio F. Castañeda, 01/10/2021, p. 9 (para. 22).

[154] Letter from IMC to MEM (SPA), 06/09/2018, at **Exhibit C-81**; Counter-Memorial, 24/03/2022, p. 149 (para. 294).

[155] Counter-Memorial, 24/03/2022, p. 149 (para. 295).

General Mining Directorate to order an inspection of our INVICTA UEA in order to verify that our preparation and development work has been carried out in accordance with the approved Mining Plan".[156]

ii) On 17 October 2018, before the MEM responded to IMC's request, IMC informed the MEM that the Parán Community had set up the Blockade and requested the postponement of the final inspection "for reasons of force majeure".[157]

iii) On 23 October 2018, the MEM approved IMC's request for the postponement "due to [reasons of] force majeure" and indicated that before the inspection could take place, IMC must present a "certificate of quality assurance of the construction and/or installations".[158]

85 As these exchanges show, before the date of the inspection was scheduled, the MEM agreed to postpone it due to the Blockade. The MEM alerted IMC in the same letter that it had to submit the certificate of quality assurance. IMC sent this certification to the MEM on 20 December 2018.[159] A new date was set for the inspection *i.e.*, from 23 to 25 January 2019.[160] However, the real reason why it could not take place continued, namely the persistence of the Blockade.[161]

86 Tellingly, other than its focus on the certificate of quality assurance, Peru has not provided any reason to suggest that IMC would not have passed the MEM's final inspection.

3.3.2 The Project's water management system was ready to be certified

87 Peru contends that one of the "outstanding regulatory steps that Invicta needed to take before [it] could bring the Invicta Mine into its exploitation

[156] Letter from IMC to MEM (SPA), 06/09/2018, at **Exhibit C-81**, p. 1.

[157] Letter from IMC to MEM (SPA), 17/10/2018, at **Exhibit C-11**; MEM Resolution (SPA), 23/10/2018, at **Exhibit C-82**, p. 1 (para. 1.7).

[158] MEM Resolution (SPA), 23/10/2018, at **Exhibit C-82**, p. 2.

[159] Letter from IMC to MEM (SPA), 20/12/2018, at **Exhibit C-492**.

[160] MEM Report fixing a date and inspector to carry out the final audit to enter the exploitation phase (SPA), 17/01/2019, at **Exhibit C-231 (corrected translation)**, p. 2.

[161] Letter from IMC to MEM (SPA), 22/01/2019, at **Exhibit C-232**.

stage" was to implement a water management system, which had to be certified by the DEAR.[162] This requirement was first imposed by the MEM in August 2015,[163] and was confirmed by the Directorate of Inspection and Application of Incentives under the Ministry of Environment ("**DFAI**") following the Invicta mine inspection conducted from 27 February to 4 March 2018.[164] This inspection took place shortly after IMC resumed its mine preparation and development activities at the mine.

88 The MEM indeed instructed IMC that "[p]rior to the start of the mining activities of the 'Invicta' mining project, the company must implement the alternative mine water management system […], which must have the corresponding environmental certification".[165] The purpose of this water management system was to ensure that mine effluents were effectively reused for Invicta's mining activities and not discharged into nearby streams.[166] IMC built its water management system in mid-2018 and communicated the completion of this work to the DEAR on 29 August 2018.[167]

89 Indeed, as explained by Mr Castañeda:

> "in mid-2018 [IMC] implemented a water management system inside the mine. This system consisted of two ponds, the first one for sedimentation and the second next to it for storage. The effluent from the mine entered the first pond where it sedimented and then passed – clarified and through 3 pipelines – to the second pond, from where it was pumped to the upper levels of the mine to be reused in the development works. The ponds were located at the

[162] Counter-Memorial, 24/03/2022, p. 151 (para. 299).

[163] Counter-Memorial, 24/03/2022, p. 151 (para. 299); Report No. 099-2015-MEM-DGM-DTM/PM (*attaching* Resolution No. 0384-2015-MEM-DGM/V, 26 August 2015), 20/08/2015, at **Exhibit R-0168**.

[164] Counter-Memorial, 24/03/2022, p. 89 *et seq.* (para. 181).

[165] Report No. 099-2015-MEM-DGM-DTM/PM (*attaching* Resolution No. 0384-2015-MEM-DGM/V, 26 August 2015), 20/08/2015, at **Exhibit R-0168**, p. 3 (Section III).

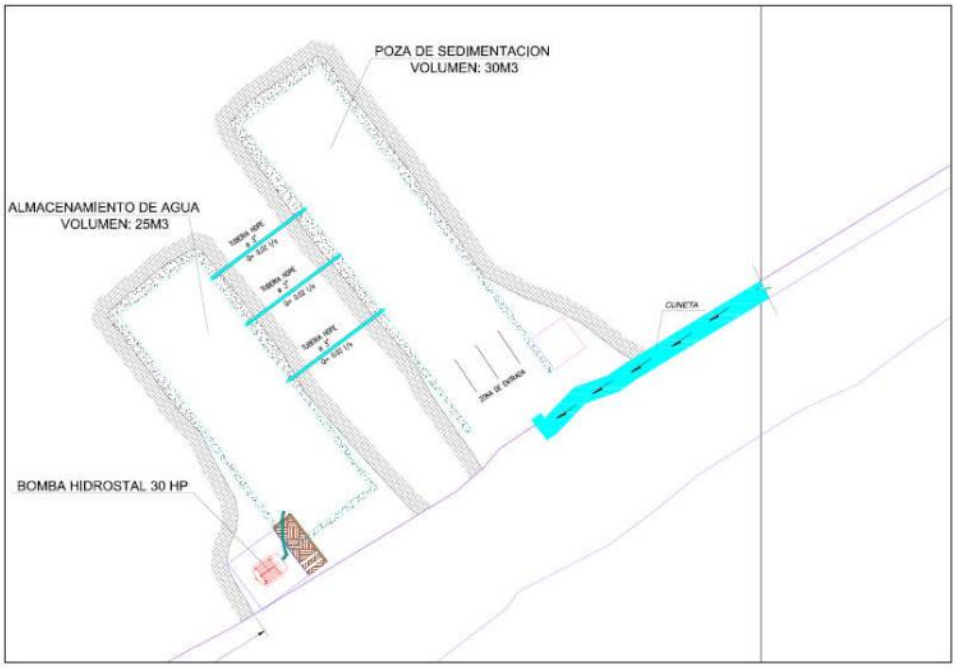
[166] Report No. 099-2015-MEM-DGM-DTM/PM (*attaching* Resolution No. 0384-2015-MEM-DGM/V, 26 August 2015), 20/08/2015, at **Exhibit R-0168**, p. 2 (Section II).

[167] MINAM, Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 24.

> 3400 level, which is the lowest level of the mine. The water was pumped to the upper levels as all the development was planned upwards."[168]

90 The structure of this system is shown in the image below:[169]

Figura 6: Vista en planta de las pozas



Fuente: Tercer ITS UM Invicta

91 IMC's water management system had two main purposes. First, to ensure that mine effluents complied with the Maximum Permissible Limits ("**MPLs**"), *i.e.*, the parameters to measure the concentration level of chemical and biological elements in the effluents.[170] IMC achieved this through a sedimentation process allowing for the removal of solid particles from the water (first pond). IMC regularly cleaned the ponds to remove the accumulated sludge which was then transported to a duly conditioned

[168] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 23-24 (para. 55).

[169] MINAM, Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 23.

[170] See MINAM website , Definition of Maximum Permissible Limit (MPL) (accessed on 16/09/2022) (SPA), at **Exhibit C-493**.

site.[171] Second, to ensure that all mine effluents were reused in Invicta's mining activities and not discharged into nearby streams.

92 After implementing its water management system, IMC requested external consultant J. Ramón del Perú S.A.C. to take samples of the mine effluents and run laboratory tests to confirm that they complied with the MPLs. In June 2018, J. Ramón confirmed this was the case, which IMC transmitted to the OEFA.[172] The Huaura Local Water Authority ("**ALA**") further conducted an inspection of the mine on 4 July 2018, confirming that no mine effluents reached the Parán Community's water sources,[173] and therefore that IMC's water management system effectively allowed for the reuse of all mine effluents in IMC's mining activities. On 29 August 2018, IMC informed the DEAR that it had implemented its water management system.[174]

93 As the above shows, contrary to Peru's allegation,[175] by August 2018, IMC had implemented its water management system and the ALA had confirmed that it was effective. The DEAR had also been informed that the water management system was in place. The only outstanding issue was to obtain the certification of such system from the DEAR, which was a mere formality considering that the Invicta mine effluents had been shown to comply with the MPLs and were fully reused in the Project's mining activities.[176]

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[171] IMC, Statement of Objections (SPA), 20/06/2018, at **Exhibit C-406**, p. 16.

[172] MINAM, Directorial Resolution No. 2203-2018-OEFA/DFAI (SPA), 27/09/2022, at **Exhibit C-399**, p. 16 (para. 42).

[173] ANA, Technical Report No. 048-2018-ANA-AAA.CF.-ALA H/KHR (SPA), 13/07/2018, at **Exhibit C-408**, p. 8 (paras. 5.2 and 6.3).

[174] MINAM, Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 24.

[175] Counter-Memorial, 24/03/2022, p. 152 (para. 301).

[176] Ministerial Resolution No. 527-2017-MEMDM, 21/12/2017, at **Exhibit C-494**; Draft Supreme Decree to Modify Supreme Decree No. 033-2005-EM, 21/12/2017, at **Exhibit C-495**; Draft Supreme Decree to Modify Supreme Decree No. 033-2005-EM (explanatory memorandum), 21/12/2017, at **Exhibit C-496**; Supreme Decree No. 013-2019-EM with annex (SPA), 29/05/2019, at **Exhibit C-497**; Supreme Decree No. 013-2019-EM (explanatory memorandum), 29/05/2019, at **Exhibit C-498**; Supreme Decree No. 040-2014-EM, 05/11/2014, at **Exhibit C-499**; Draft Supreme Decree No. 040-2014-EM (explanatory memorandum), 05/11/2014, at **Exhibit C-500**.

94 Peru contends that "[t]o receive the appropriate environmental certification from the [DEAR] [of its water management system], the Invicta mine needed approval of its Third ITS".[177] Peru adds that the DEAR found IMC's water management system to be deficient and further "rejected Invicta's Third ITS because [IMC] hadd [sic] not provided sufficient technical information to support the development and use of the new water management system."[178] These allegations are baseless.

95 As noted above, IMC built its water management system in mid-2018. IMC requested the certification of this system as part of its Third ITS, which it submitted to the DEAR on 29 August 2018.[179] IMC provided all technical details concerning its water system together with its Third ITS application.[180] The DEAR issued its report on IMC's Third ITS on 12 November 2018. With respect to the water management system, the DEAR stated that the ITS is not the appropriate management instrument for certifying mining components that had been **already built**,[181] thus making it clear that the certification of IMC's water management system was not within the scope of the approval process for the Third ITS.

96 The DEAR's decision shows that the certification of IMC's water management system was not linked to or impacted by the approval (or not) of IMC's Third ITS as both issues follow separate procedures. Therefore, contrary to Peru's contention, the certification of IMC's water management system was not conditioned to the approval of IMC's Third ITS.

97 Equally baseless is Peru's contention that the DEAR refused to certify IMC's water management system because it found that such system was

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[177] Counter-Memorial, 24/03/2022, p. 151 (para. 300).

[178] Counter-Memorial, 24/03/2022, p. 152 (para. 301).

[179] MINAM, Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 1 (para. 1.2); MEM website, Definition of ITS Assessment (accessed on 16/09/2022) (SPA), at **Exhibit C-501**.

[180] MINAM, Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 20 *et seq.* (Section 3.1.9.2.2).

[181] MINAM, Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 25 ("The information contained in the [Invicta] Third ITS […] describes activities that are already underway; therefore, [these] should not be evaluated in this ITS") and p. 66 ("[IMC] is required to specify and describe the current mining effluent management system. It should be noted that the ITS is not a management tool for certifying constructed mine components.") (emphasis added).

deficient or IMC had provided insufficient information. The DEAR did not conduct a detailed assessment of IMC's water management system because, as noted above, it concluded that the Third ITS was not the correct proceeding to certify such system. Peru's assertion that IMC's water management system was deficient is further contradicted by the contemporaneous evidence, which shows that such system ensured that mine effluents comply with the MPLs and were fully reused in the Project's mining activities.[182]

3.3.3 Lupaka did not need approval of the amendments to its Mine Closure Plan to start exploitation

98 Mr Castañeda explained in his first witness statement that one of the outstanding issues at Invicta when the Parán Community set up its illegal Blockade was to "secure the MEM's approval of an amendment to [IMC's] mine closure plan".[183] Peru relies solely on this statement to argue that Lupaka needed to obtain approval of the amendments to IMC's Mine Closure Plan "before [it] could bring the Invicta Mine into its exploitation stage".[184] This is incorrect.

99 Indeed, while it is true that the Claimant stated in its Memorial[185] that one of the outstanding issues before IMC could commence production was to obtain the MEM's approval of an amendment to IMC's mine closure plan, a closer look at the applicable regulations in Peru reveal that this was not the case.

100 According to Peru's Regulation of Mining Procedures (Supreme Decree No. 018-92-EM), mining concession holders such as IMC must have the MEM approve a Mine Closure Plan to secure an exploitation license from

[182] MINAM, Directorial Resolution No. 2203-2018-OEFA/DFAI (SPA), 27/09/2022, at **Exhibit C-399**, p. 16 (para. 42); ANA, Technical Report No. 048-2018-ANA-AAA.CF.-ALA H/KHR (SPA), 13/07/2018, at **Exhibit C-408**, p. 8 (paras. 5.2 and 6.3).

[183] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 9 (para. 21).

[184] Counter-Memorial, 24/03/2022, p. 148 (para. 292).

[185] Memorial, 01/10/2021, p. 114 *et seq.* (para. 343).

the same authority.[186] Peru does not dispute this.[187] As explained in Section 3.1 above, the MEM approved IMC's Mine Closure Plan in 2012.[188]

101 Furthermore, by the time of the installation of the Blockade, IMC had submitted and the MEM approved **all legally required amendments** to IMC's Mine Closure Plan, including to make it consistent with IMC's revised mining plan as approved by the MEM in 2014.[189]

102 The procedure and timeframe for updating a mine closure plan is set out in Peru's Mine Closure Regulations (Supreme Decree No. 033-2005-EM). Article 20.1 of these Regulations states that the mining concession holder must update its mine closure plan for the first time 3 years after its approval, and then subsequently every 5 years.[190] IMC complied with this requirement. Indeed, IMC's Mine Closure Plan was approved on 17 February 2012[191] and updated for the first time on 3 December 2015.[192] The next update was due 5 years thereafter, *i.e.*, in December 2020, at the earliest. IMC could have therefore entered exploitation any time before December 2020 without requiring amending its Mine Closure Plan.

103 Peru contends that "[…] by November 2018 Invicta had failed to respond to the concerns expressed by the Ministry of Environment regarding the Invicta Project's Third ITS (submitted by Invicta), and the impact of those concerns on the approval of any amendments to Invicta's Mine Closure

[186] Supreme Decree No. 008-91-TR, Approval of the Regulation of Mining Procedures (SPA), at **Exhibit C-228**, p. 22 *et seq.* (Art. 23); Memorial, 01/10/2021, p. 25 *et seq.* (para. 76).

[187] Counter-Memorial, 24/03/2022, p. 40 *et seq.* (para. 83).

[188] MEM Report and Resolution approving ITS No. 1 (SPA), 09/04/2015, at **Exhibit C-40**, p. 2 (Section 3.6); Counter-Memorial, 24/03/2022, p. 72 (para. 145).

[189] MEM Report and Resolution approving ITS No. 1 (SPA), 09/04/2015, at **Exhibit C-40**.

[190] Supreme Decree No. 033-2005-EM (SPA), 14/08/2022, at **Exhibit C-502**, p. 14 *et seq.* (Art. 20): ("**Amendments to the Mine Closure Plan**. The Mine Closure Plan shall be subject to review and amendment in the following cases: 20.1 A first update after three (3) years have elapsed since its approval and subsequently after every five (5) years from the last modification or update approved by the authority").

[191] MEM, Directorial Resolution No. 044-2012-MEM-AAM (SPA), 17/02/2012, at **Exhibit C-489**.

[192] Letter from MEM to Lupaka (SPA), 04/12/2015, at **Exhibit C-503**, p. 22.

Plan."[193] This is irrelevant for the same reasons explained above, but also because, as Peru's own case concedes, the Third ITS had not yet been approved by the time of the Blockade. Indeed, according to Peruvian law, a modification of the Mine Closure Plan would only be needed following **approval** of the Third ITS, and such modification can be made as part of the next legal update of the Mine Closure Plan.[194]

* * *

104 Based on the foregoing, the Tribunal shall conclude that the Project was ready to enter exploitation when the Parán Community set up its illegal Blockade. Indeed, IMC was ready to pass the final MEM inspection, which it had already requested the MEM to schedule, and its water management system met the conditions to be certified by the DEAR.

3.4 Absent the Blockade, Lupaka would have had sufficient processing capacity to comply with its gold repayment obligations under the PPF Agreement

105 Peru contends that:

> "[e]ven if Claimant had been successful at advancing the Invicta mining project to the exploitation phase, [it] still would have been unlikely to process ore at the rate necessary to satisfy the gold delivery obligations in the PPF Agreement […] [because it] was having ore processing problems at four toll mills [being tested in mid-2018]".[195]

106 Peru is incorrect.

107 Indeed, absent the Blockade, Lupaka would have acquired the Mallay processing plant from Buenaventura in March 2019, thus having sufficient

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[193] Counter-Memorial, 24/03/2022, p. 151 (para. 298).

[194] MINAM, Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 48 ("It is worth mentioning that according to Article 133 of the Mining Environmental Regulations, the [Third ITS] **with the approval of the competent authority** imply the consequent modification of the Closure Plan, which will be carried out **in the corresponding Mine Closure Plan update, according to the legislation on the matter**.") (emphasis added).

[195] Counter-Memorial, 24/03/2022, p. 155 (para. 307).

processing capacity to comply with its gold repayment obligations under the PPF Agreement (**Section 3.4.1**). Even assuming *arguendo* that Lupaka would have needed to make gold repayments to Pandion for a few months before purchasing the Mallay unit, it could have easily done so by fine-tuning and improving the performance of the offsite processing plants being tested in mid-2018 (**Section 3.4.2**).

3.4.1 Lupaka would have acquired the Mallay processing plant in March 2019

108 In its Memorial, the Claimant explained that at the date of the Blockade, Lupaka had already reached an agreement with Buenaventura to purchase the entire Mallay production unit, including its processing plant, and with PLI to fund that transaction. Only the Mallay community's approval was missing for the transaction to proceed, which was obtained in March 2019.[196] In its Counter-Memorial, Peru repeatedly argues that the purchase of the Mallay plant was nothing but "hypothetical",[197] without providing any evidence to suggest that this transaction would not have taken place absent the Blockade. This is clearly insufficient to rebut the Claimant's concrete demonstration that Lupaka would have purchased the Mallay processing unit in March 2019 absent the Blockade.

109 Mr Ellis provides an account of this in his second witness statement.[198] As already explained, by early October 2018, Lupaka had already reached an agreement with Buenaventura to purchase the entire Mallay production unit, including its processing plant, for a price fixed at USD 10.4 million plus VAT. A draft purchase and sale agreement had been prepared reflecting these terms.[199] Lupaka's purchase of the Mallay production unit was only contingent upon the transfer of the Mallay community's easement

[196] Memorial, 01/10/2021, p. 29 *et seq.* (paras. 91-94).

[197] Counter-Memorial, 24/03/2022, p. 364 *et seq.* (paras. 780 and 782).

[198] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 16-18 (paras. 34-39).

[199] Draft Mallay Purchase Agreement between Buenaventura and IMC (Final version) (SPA), 05/10/2018, at **Exhibit C-287**, p. 7 *et seq.* (Clause Fourth).

agreement with Buenaventura to IMC,[200] which the community approved on 14 March 2019.[201]

110 In parallel to its agreement with Buenaventura, Lupaka had also arranged for the financing of the Mallay transaction through a loan of approximately USD 13 million from PLI, a subsidiary of Pandion, which would be provided through a third amendment to the PPF Agreement.[202] By early October 2018, Lupaka and PLI had agreed on the financing terms of the Mallay transaction, which were reflected on a draft third amendment dated 5 October 2018.[203]

111 Hence, there can be no doubt that, absent the Blockade, Lupaka would have acquired the Mallay production unit, including its processing plant, from Buenaventura in March 2019, when the Mallay community approved the transfer of its easement agreement with Buenaventura to IMC.[204] The Blockade was the only obstacle in the way of this transaction. Indeed, on 14 August 2019 – *i.e.*, only a few days before Lupaka lost its investment – Buenaventura conveyed to Lupaka its disappointment about the Blockade and the ensuing failure of the Mallay transaction. As Mr Ellis reported in an internal memorandum prepared on the same day of his meeting with Buenaventura representatives:

> "They [Mr Ortiz de Zevallos and Raul Benavides, from Buenaventura] **expressed disappointment about the Paran blockade**. Repeated that a Mallay/Invicta deal would have been the best deal for both groups [Lupaka and Buenaventura]. **Would like to complete [the Mallay transaction] but must move**

[200] Email chain between Buenaventura, Pandion and Lupaka, 24/09/2018-09/10/2018, 09/10/2018, at **Exhibit C-286**.

[201] Email from Buenaventura to Lupaka, 11/03/2019, at **Exhibit C-233**; Notarized Addendum to the Easement Contract between Buenaventura and the Mallay Community (SPA), 14/03/2019, at **Exhibit C-289**, p. 2 (Second Clause).

[202] The PPF Agreement had been subject to two prior amendments. See Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**; Amendment No. 2 to the Second Amended and Restated PPF Agreement, 06/02/2018, at **Exhibit C-46**.

[203] Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement (Final version), 05/10/2018, at **Exhibit C-285**.

[204] Memorial, 01/10/2021, para. 94.

> **quickly as they [Buenaventura] will close with someone else if we cannot complete**."[205]

112 As explained by Micon, the Claimant's mining expert, the Mallay plant would have provided Lupaka with sufficient processing capacity to meet its gold repayment obligations under the PPF Agreement,[206] which would most probably not have been due before January 2020.[207]

3.4.2 Lupaka could have easily resolved any issues with the offsite processing plants tested in mid-2018

113 In its Counter-Memorial, Peru refers to the ore processing issues that IMC found while testing some toll mills in mid-2018.[208] It argues that absent the Blockade, these issues would have prevented Lupaka from securing enough ore processing capacity to start making gold repayments in December 2018, in accordance with the PPF Agreement's unamended schedule.[209] This is incorrect.

114 The issues found by IMC while testing the offsite plants in mid-2018 would not have affected Lupaka's compliance with its gold repayment obligations under the PPF Agreement. This is because, as explained above, Pandion and Lupaka agreed in early October 2018 that gold repayments would only start after the purchase of the Mallay plant (hence, Lupaka would be able to rely on this plant to meet its commitments).[210] In any event, even assuming *arguendo* that Lupaka had to begin making gold repayments to Pandion in December 2018 (*i.e.*, before the purchase of the Mallay plant), Lupaka would have been able to do so given that the issues found in the offsite processing plants being tested in mid-2018 – namely,

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[205] Memorandum of the Mallay Meeting between Buenaventura and Lupaka, 14/08/2019, at **Exhibit C-504** (emphasis added).

[206] Expert Report of Christopher Jacobs, 21/09/2022, p. 40 *et seq.* (Section 6.2).

[207] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 15 *et seq.* (paras. 32, 39); Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement (Final version), 05/10/2018, at **Exhibit C-285**.

[208] Counter-Memorial, 24/03/2022, p. 155 (para. 307).

[209] Counter-Memorial, 24/03/2022, p. 81 *et seq.* (para. 165); p. 146 *et seq.* (paras. 290-291); p. 173 (para. 341).

[210] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 15 (para. 32).

Coriland, San Juan Evangelista and Huancapeti II – could be solved with some basic remediation and without incurring high costs or delays.[211]

115 Mr Castañeda identified these limited issues in his first witness statement, namely operational errors, mechanical failures and adequate gold recovery.[212] IMC could have easily addressed these issues by conducting further testing and refining internal procedures at the offsite processing plants. As explained by Mr Castañeda:

> "We could have overcome the issues we identified when testing the offsite processing plants, *i.e.*, Huancapeti, Coriland and San Juan Evangelista. It was a matter of refining internal procedures to avoid operational errors, repairing mechanical failures, which would not have meant delays or high costs, and the like. It should be borne in mind that we were testing these plants for the first time. It is normal to identify some obstacles and risks at the beginning, which can be solved by further testing and adjustments until optimal ore processing is reached."[213]

116 For example, adding more cyanide to the flotation process to ensure the proper separation of gold from less valuable components and its recovery in the concentrates would not have been problematic.[214] Similarly, adding an additional step to the process to recover gold from the tailings was a simple and low-cost measure which did not require stopping plant operations.[215]

117 Lupaka carried out testing of these offsite processing plants in mid-2018. Absent the Blockade, Lupaka would have had enough time to fine-tune and improve their performance to ensure sufficient processing capacity was available, if needed, to meet its gold repayment obligations in the short term.

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[211] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 41 *et seq.* (para. 100); Expert Report of Christopher Jacobs, 21/09/2022, p. 40 (para. 125).

[212] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 31 (para. 88).

[213] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 41 (para. 100).

[214] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 43 (para. 107).

[215] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 43 (para. 108).

4 LUPAKA ACTED DILIGENTLY AND IN GOOD FAITH TO REACH AN AGREEMENT WITH THE RURAL COMMUNITIES

118 Unsurprisingly, Peru blames the Claimant for the loss of its investment in the Project. Specifically, it argues that IMC's CR Team lacked the requisite experience to adequately engage with the Parán Community and failed to take a constructive approach during its negotiations with this community.[216] Peru further contends that the Claimant should have known that reaching an agreement with the Rural Communities would be challenging given IMC's breach (before it was acquired by Lupaka) of its obligations with said communities.[217] These attempts to blame the victim are baseless.

119 As an initial matter, in its effort to avoid liability, Peru suggests to this Tribunal that it is legitimate for a local community to conduct multiple armed invasions of a mine owned by a foreign investor to mine it for itself. That crude suggestion only can operate in a "post-truth" world where a State not only subverts notions of ESG but also baldly denies its international obligations. If Peru seriously considers that local communities like Parán can hold foreign investors at gunpoint if all of their increasingly baseless demands are not met, it should, concurrently concede liability, because it has admitted a breach of its obligations under the FTA. What it should not do is point its finger at the victim of armed violence.

120 Lupaka had the experience and resources to effectively engage, as it did, with the Rural Communities and develop the Project (**Section 4.1**). Lupaka did not inherit a bad relationship with the Rural Communities when it acquired the Project in 2012 (**Section 4.2**). IMC made diligent and good faith efforts to reach a sustainable agreement with the Parán Community, which, however, was not possible due to the latter's plan to exploit the mine and protect its marijuana business (**Section 4.3**).

[216] Counter-Memorial, 24/03/2022, p. 2 *et seq.* (paras. 5, 310).

[217] Counter-Memorial, 24/03/2022, p. 73 *et seq.* (Section II.C.3.d.(i)).

4.1 Lupaka had the experience and resources to effectively engage with the Rural Communities

121 The Respondent's witness, Mr Nilton León, states that "Invicta's community relations team appeared to lack experience".[218] On the back of this alleged inexperience, the State argues that "[the] Claimant failed to adequately manage its resources or to engage effectively with the local communities"[219] in the other mining projects that it has operated in Peru, thus failing to advance them. Peru and its witness are wrong.

122 IMC's CR Team was both qualified and experienced (**Section 4.1.1**). Lupaka's experience in the Crucero and Josnitoro projects is irrelevant to this dispute and, in any event, contradicts Peru's case (**Section 4.1.2**).

4.1.1 IMC's CR Team was both qualified and experienced

123 When Lupaka acquired IMC in late 2012, Mr Javier Herrera, an experienced community relations professional, was IMC's CR manager.[220] Mr Herrera had been acting in that role for the prior owner for several years. Mr Herrera continued in this role until late 2014/early 2015, when he was gradually replaced by Mr Elías Vila. Mr Vila is a geological engineer who had over 15 years' experience working in social responsibility management and community relations in the extractive industry. Mr Vila had led community relations teams at the major mining company Hochschild, where he had successfully concluded surface agreements with local communities in the Selene, Pallancata and Inmaculada mining projects.[221]

124 Messrs Herrera and Vila led IMC's outreach to the Rural Communities in the period leading up to September 2016. During that period they engaged with these communities and implemented various community projects, including with the Parán Community. For example, in 2013 and 2014, IMC supported infrastructure projects for the benefit of the Parán

[218] Witness Statement of Nilton César León Huerta, 22/03/2022, p. 23 *et seq.* (Section II.C.(i)).

[219] Counter-Memorial, 24/03/2022, p. 56 *et seq.* (para. 118).

[220] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 14-15 (para. 33).

[221] Elías Vila Núñez CV, at **Exhibit C-505**.

Community, and donated food and medicine to the community.[222] In 2015 and 2016, IMC made further donations,[223] reached out to the authorities of the Parán Community and held briefings on the Project with community members.[224]

125 In September 2016, IMC hired SSS, a company specialised in social development and community relations to intensify community relations efforts at the Project.[225] The SSS team was led by Mr Rómulo Zarauz, a sociologist with significant experience in dealing with rural communities and sustainable development issues. [redacted]

126 Contrary to Peru's suggestion that "Invicta's community relations team appeared to lack experience",[227] the SSS was a capable and experienced team with a track record. Indeed, its members had worked together on several mining projects before working for IMC, some much larger than the Invicta project. On those projects the team had engaged effectively with local communities, signed agreements, and implement community relations plans. [redacted] these projects included:[228]

[222] Lupaka Gold Corp., 2013 Annual Report, at **Exhibit AC-49**, p. 38; Letter from IMC to the Parán Community and Parán Educational Institution (Jorge Basadre School) (SPA), 01/12/2014, at **Exhibit C-381**; Letter from IMC to the Parán Community, Educational Institution of Parán (Colegio Jorge Basadre) (SPA), 01/12/2014, 01/12/2014, at **Exhibit C-382**; Letter from IMC to the Parán Community (SPA), 17/11/2014, at **Exhibit C-383**; Letter from IMC to the Parán Community (SPA), 07/05/2015, at **Exhibit C-384**.

[223] IMC, CR Team Report No. 05-2015/RRCC, May 2015 (SPA), at **Exhibit C-386**, p. 1 *et seq*.

[224] Letter from IMC to the Parán Community (SPA), 12/03/2016, at **Exhibit C-387**; Letter from IMC to the Parán Community (SPA), 05/11/2015, at **Exhibit C-388**; Letter from IMC to the Parán Community (SPA), 30/06/2016, at **Exhibit C-389**; IMC, CR Team, Report No. 10-2015-RRCC, January 2015 (SPA), at **Exhibit C-390**, p. 2.

[225] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 14 (para. 30).

[redacted]

[227] Witness Statement of Nilton César León Huerta, 22/03/2022, p. 23 *et seq.* (Section II.C.(i)).

[228] [redacted] Mr Estrada participated in all these projects, while Mr Zarauz participated in two of them.

i) The Yauricocha mining project, located in the Lima – Yauyos – Alis – San Mateo region. In 2010 and 2011, the SSS team negotiated and signed agreements with the communities of Alis, Tomás, Huancachi and Tinco to comply with outstanding commitments from the mining company.

ii) The Chancay mega-port project, located in the Lima – Chancay region. In 2010 and 2011, the SSS team negotiated and signed agreements with three associations of informal pig producers for their resettlement. The area that was released was then used as a boarding or parking area for the project's units.

iii) The Mario project, located in the Junín – Chongos Altos region. In 2011 and 2012, the SSS team negotiated and signed agreements with the communities of Palmayoc and Llamapsillón for the execution of mining exploration works.

iv) The Accha, Dolores and Yanque projects, three different projects located in the Cusco – Accha – Colquemarca region. In the 2010 - 2013 period, the SSS team negotiated and signed agreements with the communities of Parcco, Yanque and Pfocorohuay for the execution of mining exploration works.

v) The Santo Domingo, Taucane and Quenamari projects, located in the Puno – Ayaviri – Carabaya – Azangaro region. In 2014 and 2015, the SSS team mapped the social actors in the areas of influence of the projects (ten districts), prepared three proposals for local economic development, carried out one socio-economic study and executed the mining company's community relations plan to facilitate the execution of mining exploration activities.

vi) In southern, northern, and central Peru, in 2016 and 2017, the SSS team negotiated and resolved the social problems of more than 30 stalled telecommunications projects, achieving the installation and commissioning of antennas.

127 The SSS team was well equipped to engage effectively with the Rural Communities, as it did, reaching agreements with the Lacsanga[229] and

[229] 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**.

Santo Domingo Communities.[230] The efforts of the SSS team to reach a similar agreement with the Parán Community failed because, as demonstrated in Section 2 above, this community sought to exploit the mine – which it continues to do to the present day – and protect its marijuana business.

128 Peru's authorities never complained of IMC's CR Team. The only time Peru conveyed a request to IMC in relation to its CR Team was after the WDS team accessed the Site on 14 May 2019. At that time, the State conveyed the Parán Community's request that IMC restructure its CR Team as a condition to "re-establish" the dialogue process[231] – a request which, of course, was made in bad faith as Parán was only trying to justify its continuing illegal Blockade. Peru's complaint that IMC's CR Team was inexperienced is thus opportunistic. No amount of experience on part of IMC's CR Team would have been able to sate the Parán Community's extortionate demands.

4.1.2 Lupaka's experience in the Crucero and Josnitoro projects is irrelevant to the present dispute and, in any event, contradicts Peru's case

129 Peru contends that Lupaka's experience in the Crucero and Josnitoro mining projects shows poor business judgement and mismanagement of community relations, which led to the failure of these projects. Specifically, Peru argues that the Claimant "failed [in these two projects] to adequately manage its resources or to engage effectively with the local communities, leading to (i) an USD 11 million loss in the case of the Crucero project, [and] (ii) a terminated joint venture agreement in the case of the Josnitoro project […]".[232] Peru is wrong in both respects.

130 *In limine*, Lupaka's experience in the Crucero and Josnitoro projects is irrelevant for this dispute, which pertains to the Invicta mining project.

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[230] Draft Addendum to Framework Agreement between the Santo Domingo Community and IMC (SPA), 15/09/2017, at **Exhibit C-94**.

[231] Summary of the meeting between MEM, PCM, MININTER, Ombudsman's Office and IMC, 27/05/2019, at **Exhibit C-18**, p. 6 (item 18 (b)).

[232] Counter-Memorial, 24/03/2022, p. 56 *et seq.* (para. 118).

Notwithstanding the foregoing, Peru's allegations are baseless. Lupaka's departure from the Crucero and Josnitoro projects was motivated by its decision to prioritise the Invicta project and does not reflect poor business judgment (**Section 4.1.2.1**). If anything, Lupaka's experience in the Crucero and Josnitoro projects shows that it effectively managed community relations (**Section 4.1.2.2**).

4.1.2.1 Lupaka's exit from the Crucero and Josnitoro projects was motivated by its decision to prioritise the Invicta project

131 By way of background, Lupaka acquired the Crucero project by means of two transactions executed in July 2010 and January 2012,[233] and subsequently the Invicta project in a transaction executed in October 2012.[234] In early 2013, Lupaka became interested in the Josnitoro project, an early exploration stage gold-copper project, executing in November 2013 a memorandum of understanding with the mining company Hochschild for 65% of the property,[235] and in March 2014 an option contract reflecting the same terms.[236]

132 IMC commissioned several technical studies on the Invicta Project in 2014, with promising results. Indeed, in early 2014, IMC commissioned SRK Consulting to conduct two conceptual studies of the Invicta project, the first under a 1,000 t/d production scenario[237] and the second under a 300 t/d scenario.[238] These studies were important to assess the economic and technical feasibility of the Invicta project, and constituted a major departure from the much higher production rate of 5,100 t/d assumed by

[233] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 4 (para. 4); Counter-Memorial, 24/03/2022, p. 57 (para. 119).

[234] Memorial, 01/10/2021, p. 7 (para. 22); Counter-Memorial, 24/03/2022, p. 63 (para. 130).

[235] Lupaka Gold Corp., "Lupaka Gold Announces Josnitoro Gold Project Option With Hochschild Mining PLC", 26/11/2013, at **Exhibit R-0038**; Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 4 (para. 4); Counter-Memorial, 24/03/2022, p. 58 (para. 121).

[236] Mining Assignment Agreement with Option to Purchase between Lupaka and Minera Ares S.A.C. (Hoschschild) (SPA), 31/03/2014, at **Exhibit C-368**.

[237] SRK, Conceptual Study Invicta Project: Preliminary Results (1,000 tpd), 22/01/2014, at **Exhibit C-67**.

[238] SRK, Conceptual Study Invicta Project: 300 tpd Option, 03/02/2014, at **Exhibit C-37**.

Invicta's prior owner.[239] These studies demonstrated that by reducing the daily production rate and thus the CAPEX of the Invicta project, IMC could develop Invicta profitably.[240] In early July 2014, IMC completed a resampling programme of mineralisation at the Invicta project, which also yielded promising results. As Lupaka expressed in a news release dated 10 July 2014, that "[t]his work confirms that the mineralization exposed in the existing workings is consistent with our understanding of the mineralization that we intend to initially target in our production plans for Invicta [….]"[241]

133 However, as explained by Mr Ellis, the results from the exploration works at Crucero were not as promising:

> "Although earlier studies had indicated that the mineralization was amenable to basic processing techniques, new metallurgical analyses carried out in 2013 revealed that a high percentage of the deposit consisted of "refractory" gold-bearing ores. This meant that the gold particles were encapsulated inside sulphide or arsenic minerals. In order to obtain a satisfactory recovery of these encapsulated gold particles, it was necessary to add an expensive step of very fine grinding before proceeding further with standard refining processes. In October 2013, we commissioned a conceptual study from SRK to determine the fundamental economics of what would now need to be a refractory project, including the feasibility of mining a portion of the defined Crucero mineralization. Unfortunately, the difficulties related to the low grade and high costs of processing the Crucero mineralization rendered it not economic to mine under the prevailing metal prices."[242]

[239] 2012 SRK Report, at **Exhibit C-58**, p. ii.

[240] Witness Statement of Eric Edwards, 01/10/2021, p. 15 (para. 50).

[241] Lupaka News Release, "Invicta Gold Project Mineralization Sample Results Include 6.38 Grams per Tonne Gold and 1.68% Copper at 6.4 Meters Width and over 105 Meters Length Exposed in Drift", 10/07/2014, at **Exhibit C-70**, p. 1.

[242] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 7-8 (para. 9).

134 As explained by Mr Castañeda, the promising results in the Invicta project also led Lupaka to prioritise it over the Josnitoro project:

> "We had signed the Josnitoro option contract in March 2014, but that same year we decided to prioritise the Invicta Project. This was not inconsistent with the Josnitoro contract, which gave us a period of two years to work on the social front and reach an agreement with the communities. This gave us leeway to prioritize the Invicta Project. Hochschild was aware of our decision to prioritize the Invicta Project – I met regularly with its representatives to keep them abreast of our progress – and they agreed with our strategy.
>
> As a consequence, our activities in the Josnitoro project were limited. In the exploration front, our geologists made visits to the Josnitoro site to confirm historical geologic mapping and conduct limited sampling programmes. "[243]

135 As Mr Castañeda further explains in his second witness statement:

> "The possibility of developing the Invicta Project with a low CAPEX and in a relatively short period of time led Lupaka to prioritise this project over Crucero and Josnitoro. It was a strategic business decision on where to direct the funds."[244]

136 Peru argues that Lupaka "failed to adequately manage its resources" in relation to the Crucero project,[245] and also criticises Lupaka's decision to sell its interest in this project in November 2017.[246] These criticisms are misguided, reflecting a lack of understanding of the business of junior mining companies and the context in which Lupaka decided to sell its interest in Crucero.

137 Indeed, one of the ways in which junior mining companies operate and develop their businesses is through the development of a portfolio of projects, which are evaluated over time and can be put aside, sold or

[243] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 6 *et seq.* (paras. 8-9).

[244] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 5 *et seq.* (para. 6).

[245] Counter-Memorial, 24/03/2022, p. 56 *et seq.* (para. 118).

[246] Counter-Memorial, 24/03/2022, p. 58 (para. 120).

developed. This is the case of Lupaka, a junior mining company which held interests in various mining projects in Peru and decided to dispose of some of them – specifically, its interest in the Crucero project – to further its focus on the Invicta project.[247]

138 As explained by Mr Ellis in his second witness statement, the decision to sell Crucero provided funds to Lupaka which in turn unlocked further financing from Pandion.[248] Mr Ansley, Lupaka's President and CEO, made the point as follows in November 2017, a few days after the sale of Crucero:

> "[the sale of Crucero] bolsters our treasury as we focus on putting our Invicta Gold Development Project into production. […] Proceeds from the sale of Crucero will be used to partially satisfy the remaining conditions precedent to receive Tranche 3 (US$ 2.5 million) of the Pre-Paid Forward Gold Purchase Agreement with PLI Huaura Holdings LP [to be used on the Invicta project] and to provide additional working capital flexibility as the Company proceeds with the development of the Invicta Gold Development Project".[249]

139 All in all, Peru's criticisms ignore that at all relevant times, Lupaka was led by individuals with extensive mining experience, including in Peru, such as Gordon Ellis, Eric Edwards and Julio Castañeda. Mr Ellis, Lupaka's founder and Chairman of its Board of Directors since 2011, has over 50 years' experience in corporate management and resource development and over 30 years' experience in the gold mining sector.[250] Mr Edwards, Lupaka's president and CEO from 2011 to 2015, has over 40 years' experience in the gold mining sector and has managed mining projects in Australia, Argentina, Canada, Greece, Myanmar, Peru, and the United States.[251] Finally, Mr Castañeda, Lupaka Peru's president and

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[247] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 7 (para. 8).

[248] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 10-11 (para. 17).

[249] *"Lupaka Gold Receives $5.7 Million in Cash and Securities From Sale of NonCore Asset to Goldmining"*, NEWSWIRE, 21/11/2007, at **Exhibit R-0035**, p. 1. See also Second Witness Statement of Gordon Ellis, 23/09/2022, p. 8 *et seq.f* (paras. 11-19).

[250] Witness Statement of Gordon Ellis, 01/10/2021, p. 4 (paras. 2, 7-12).

[251] Witness Statement of Eric Edwards, 01/10/2021, p. 4 (para. 8).

IMC's former general manager from 2013 to 2018, has over 35 years' experience in mining exploration and mining project management, having worked for leading mining companies such as Hochschild, Barrick Gold Corporation and Golden Minerals Company in different countries in the Latin American region.[252]

4.1.2.2 Lupaka effectively managed community relations at the Crucero and Josnitoro projects

140 Peru contends that Lupaka failed to "engage effectively with the local communities" [253] of the Josnitoro project, which would have led Hochschild to terminate the option agreement signed with Lupaka for this project in April 2018.[254]

141 It is true that Lupaka did not reach agreements with the communities of Huancabamba, Cceñuharan and Umamarca, the communities in the area of the Josnitoro project, but this was the case because, as explained above, Lupaka's priorities changed in 2014 – not because of an alleged mismanagement of social relations. Indeed, as from 2014, Lupaka prioritized the development of the Invicta project over its other mining projects, including Josnitoro. As a consequence, as explained by Mr Castañeda in relation to the Josnitoro project:

> "In the community relations front, we decided to keep only one person talking to the management, community members and artisanal miners of Huancabamaba, Cceñahuaran and Umamarca to maintain the relationship. We also held a few awareness-raising and informative meetings with those communities, including by participating in their assemblies. Our closest relationship was with the community of Huancabamaba, even coming to meet with some of its members in our Lima office. Our objective was to maintain

[252] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 4 (paras. 5-6).

[253] Counter-Memorial, 24/03/2022, p. 56 *et seq*. (para. 118).

[254] Counter-Memorial, 24/03/2022, p. 59 (para. 123).

some presence and contact in the area, but the funds were primarily earmarked for the development of the Invicta Project."[255]

142 The development of the Invicta Project extended beyond what was anticipated, which led Lupaka and Hochschild to sign a first addendum to the Josnitoro contract in November 2015 to extend by one year the deadline for Lupaka to reach an agreement with the local communities.[256] IMC and Hochschild signed a second addendum in early 2017, extending for one more year the contract term.[257] As noted by Mr Castañeda, Lupaka had established a close relationship with the community of Huancabamaba. Lupaka would be able to dedicate more time and resources to engage with the other communities of the Josnitoro project if it decided to pursue it, although it did not do so.[258]

143 When IMC secured an access road to the Invicta project through Lacsanga in July 2017, it cleared a major hurdle to exploitation.[259] IMC made a proposal to Hochschild in early 2018 to extend for one more year the contract term of the Josnitoro project. Hochschild did not accept IMC's proposal, which led to the termination of the option agreement.[260] Such a decision was not a reflection of bad management of community relations by Lupaka as the Respondent alleges, but the reality that Lupaka was focussing on the Invicta project instead at that time.[261]

144 Lupaka's ability to effectively engage with local communities is further confirmed by its track record with the Crucero project, where Lupaka was able to extend its exploration agreement for an additional 4 years (2013-

[255] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 6-7 (paras. 8-9).

[256] Mining Assignment Agreement with Option to Purchase between Lupaka and Minera Ares S.A.C. (Hoschschild), First Addendum (SPA), 20/11/2015, at **Exhibit C-370**, p. 5 (Clause 2.2); Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 7 (para. 10).

[257] Mining Assignment Agreement with Option to Purchase between Lupaka and Minera Ares S.A.C. (Hoschschild), Second Addendum (SPA), 28/04/2017, at **Exhibit C-371**, p. 2 *et seq.* (Clause 2.2).

[258] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 7 (para. 11).

[259] 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**.

[260] Lupaka Gold Corp., "Lupaka Provides Development Update; Commercial Production Expected in Q3/18", 17/04/2018, at **Exhibit R-0039**.

[261] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 6 (para. 8).

2017) following successful negotiations with the community of Oruro, the community in the project's area, and the families of ancestral land holders.[262] Unlike the Josnitoro project, on which Lupaka embarked only in March 2014, Lupaka was able to dedicate more time and resources to engage with the communities of the Crucero project since it had purchased the latter several years before, between 2010 and 2012.[263]

4.2 Lupaka did not inherit a bad relationship with the Rural Communities when it acquired the Project in 2012

145 Peru contends that "relations between Invicta and the Rural Communities at the time that Claimant acquired Invicta were not what Claimant would have the Tribunal believe. Rather, evidence demonstrates that Invicta seriously mismanaged, and to varying degrees damaged, its relationship with the Rural Communities",[264] which led Lupaka to inherit a bad relationship with these communities. On this basis, Peru concludes that when Lupaka acquired the Project, "[it] knew or should have known that developing strong relationships and agreements with the Rural Communities would be challenging".[265] This backward-looking statement is without foundation.

146 Lupaka did not inherit a bad relationship with the Rural Communities when it acquired the Project. Indeed, the Lacsanga Community supported the Project from the beginning of Lupaka's tenure of the mine (**Section 4.2.1**), the relationship with the Santo Domingo Community was friendly and cooperative (**Section 4.2.2**), and IMC was able to engage with the Parán Community from the beginning (**Section 4.2.3**).

[262] Lupaka News Release, "Lupaka Gold Completes Community Agreement and Provides Update on Community Relations and Government Developments", 23/07/2013, at **Exhibit C-76**, p. 1; Crucero Project, Exploration Campaign Results 2012 (SPA), at **Exhibit C-369**, p. 2 *et seq*.

[263] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 4 (para. 4); Counter-Memorial, 24/03/2022, p. 57 (para. 119).

[264] Counter-Memorial, 24/03/2022, p. 73 (para. 147).

[265] Counter-Memorial, 24/03/2022, p. 73 (para. 147).

4.2.1 The Lacsanga Community supported the Project from the beginning of Lupaka's tenure

147 Peru contends that:

> "Invicta's previous owners had made promises to the Lacsanga Community which they had not kept, […] [as a result of which] Invicta [under Lupaka's control] was forced to enter into a 'settlement agreement' with the Lacsanga Community on 31 March 2015, [accepting to pay PEN 500,000] in an attempt to repair its relationship with this community [….]"[266]

148 As already established in the Memorial, this is incorrect.

149 As Mr Castañeda explains in his second witness statement, when Lupaka acquired the Project in October 2012 there was, admittedly, not much of a relationship with the Lacsanga Community. This was the case because the Invicta project as conceived by its previous owner, AAG, was mostly on Parán land, and also because the company had wrongly assumed that land belonging to Lacsanga belonged to Santo Domingo.[267]

150 It is true that when IMC started negotiating with the Lacsanga Community in late 2014, the community demanded payment of PEN 500,000 (approximately USD 120,000) as compensation for the mining activities carried out by Invicta's prior owner before 2012.[268] The community said that this amount had been agreed with Invicta's prior owner but not paid. In March 2015, IMC agreed to make this payment as a sign of good faith and with the aim to strengthen its bonds with the Lacsanga Community in the long term.[269]

151 The fact that the Lacsanga Community requested this payment does not mean that Lupaka inherited a bad relationship with this community. In addition, Lupaka did not make this payment to "repair" the relationship

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[266] Counter-Memorial, 24/03/2022, p. 76 (para. 153).

[267] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 11 (para. 21).

[268] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 15 (para. 41).

[269] Agreement between IMC and the Lacsanga Community (SPA), 31/03/2015, at **Exhibit C-42**.

with this community. The reality was in fact quite the opposite. After participating in two Lacsanga General Assemblies held in November 2014[270] and in meetings with Lacsanga's leadership and community members in early 2015, IMC confirmed the community's good predisposition to reach an agreement with the company for the development of the Project. As IMC's CR Team reported in February 2015:

> "**[t]he majority of the Lacsanga community members are in favour of development of the exploitation stage of the mine and want to work harmoniously with the company**, they just require first to be paid what's owed to them to conclude that stage and only then meet to define the terms to start exploitation and once a mutually beneficial agreement is reached, a framework contract would be signed."[271]

152 Consistent with the above, IMC signed a surface agreement with the Lacsanga Community on 18 July 2017.[272]

4.2.2 IMC's relationship with the Santo Domingo Community was friendly and cooperative

153 Peru states that Invicta did not have a "strong relationship" with the Santo Domingo Community when Lupaka acquired the Project in 2012 because "it became necessary [for IMC] to renegotiate [its] agreement with the Santo Domingo de Apache Community in 2017 to increase the funds provided [] to that Community."[273] This is wrong and a *non sequitur*, as evidenced by the disconnection in the dates mentioned by Peru.

154 As Mr Castañeda explains in his second witness statement, from the moment Lupaka acquired the Project until 2017, the relationship with the

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[270] IMC, CR Team Report No. 011-2014-RRCC, November 2014 (SPA), at **Exhibit C-373**, p. 1.

[271] IMC, CR Team Report No. 011-2014-RRCC, February 2015 (SPA), at **Exhibit C-380**, p. 3 *et seq.* (emphasis added).

[272] 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**.

[273] Counter-Memorial, 24/03/2022, p. 75 (paras. 152 and 154).

Santo Domingo Community was friendly and cooperative.[274] Indeed, early on in Lupaka's tenure of the mine, IMC supported a pine plantation project to create a source of income for the Santo Domingo Community through the commercialisation of timber, and also a water management initiative which entailed the construction of irrigation canals and training on irrigation techniques.[275] The pine plantation project eventually evolved into a global forestry and agricultural initiative.[276] Thereafter, from 2014 to 2016, IMC donated medicines,[277] provided financial and logistical support for the Santo Domingo Community's traditional celebrations[278] and held informative meetings to keep the community's authorities abreast on Project developments.[279]

155 It is true that in 2017 there was some friction between IMC and Santo Domingo as some of the community members claimed that IMC had not fulfilled its obligations under the agreements signed with the community in October 2010. IMC disagreed with these allegations because the company's obligations under the Santo Domingo Framework Agreement were only triggered once the Project entered exploitation.[280] However, since IMC sought to avoid tensions with the Santo Domingo Community where part of the Site was located, and was close to signing a surface

[274] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 9-10 (para. 18).

[275] Lupaka Gold Corp., "Lupaka Gold Completes Community Agreement and Provides Update on Community Relations and Government Developments", 23/07/2013, at **Exhibit R-0051**.

[276] IMC, Internal Report on sustainable forestry development project in Santo Domingo Community (SPA), 21/08/2014, at **Exhibit C-372**.

[277] IMC, CR Team Report No. 011-2014-RRCC, November 2014 (SPA), at **Exhibit C-373**.

[278] IMC, CR Team Report No. 011-2014-RRCC, November 2014 (SPA), at **Exhibit C-373**; IMC, CR Team, Report No. 009-2014-RRCC, December 2014 (SPA), 31/12/2014, at **Exhibit C-506**; IMC, CR Team Report No. 05-2015/RRCC, May 2015 (SPA), at **Exhibit C-386**; Letter from Santo Domingo Community to IMC (SPA), 05/06/2015, at **Exhibit C-375**; Letter from Santo Domingo Community to IMC (SPA), 15/10/2016, at **Exhibit C-376**; Letter from IMC to Santo Domingo Community (SPA), 09/06/2017, at **Exhibit C-377**.

[279] IMC, Report on the meeting between IMC and Santo Domingo officials (SPA), 21/05/2017, at **Exhibit C-378**; Letter from IMC to Santo Domingo Community (SPA), 26/05/2017, at **Exhibit C-379**; IMC Memorandum, Training Programme Mining Project at Invicta Mining Camp (SPA), 08/07/2017, at **Exhibit C-154**.

[280] Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64**, p. 3 (Art. 4).

agreement with the Lacsanga Community[281] (thereby clearing a major hurdle to exploitation), IMC proposed to negotiate with Santo Domingo an addendum to the 2010 Framework Agreement to increase the annual payments once the Project entered exploitation. This proposal was approved by the community.[282]

156 Beyond this incident, IMC had a good relationship with the Santo Domingo Community, as evidenced by the constant cordial communication between 2012 and 2016, and the further agreement reached in 2017.

4.2.3 IMC was able to engage with the Parán Community from the beginning of its investment until early 2018

157 Peru contends that "after acquiring Invicta, [Lupaka] learned from the Parán Community that Invicta's [prior owner] had breached […] earlier Invicta-Parán agreements [….]"[283] Peru further contends that "Claimant submitted proposals to settle these breaches with the Parán Community in 2016 and ended up paying the Community for Invicta's former noncompliance" in an attempt to repair the relationship with this community.[284]

158 It is true that in late 2016, as part of its negotiations with IMC, the Parán Community claimed certain breaches by Invicta's prior owner. These breaches had in fact created some tension, but this does not mean that Lupaka inherited a bad relationship with the Parán Community or that it could not overcome the situation. Indeed, IMC's CR Team was able to engage with the Parán Community and undertake projects in coordination with its leadership from the beginning of Lupaka's tenure of the Project. For example, in 2013 and 2014, IMC supported infrastructure projects and

[281] The surface agreement with the Lacsanga Community was signed on 18 July 2017. 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**.

[282] Letter from IMC to the Santo Domingo Community (SPA), 04/05/2018, at **Exhibit C-93**.

[283] Counter-Memorial, 24/03/2022, p. 77 (para. 157).

[284] Counter-Memorial, 24/03/2022, p. 77 (para. 157).

donated food and medicine to the Parán Community.[285] In 2015 and 2016, IMC continued making donations to the community,[286] engaged with the community leaders[287] and also held briefings.[288] These activities and projects were welcomed by the Parán Community and its authorities, who would usually extend invitations to IMC's CR Team and management to participate in Parán assemblies and other meetings[289] or request further contributions when needed.[290]

159 As to the alleged breaches by Invicta's prior owner, IMC reached an agreement with the Parán Community to address them. Specifically, it was agreed that IMC would pay the community, as a sign of good faith, PEN 300,000 (approximately USD 80,000) to make up for such breaches, following which IMC and Parán would start negotiations to conclude an agreement in relation to the Project. IMC paid the PEN 300,000 in two instalments, the first one in December 2017 and the second one in January

[285] Lupaka Gold Corp., 2013 Annual Report, at **Exhibit AC-49**, p. 38; Letter from IMC to the Parán Community and Parán Educational Institution (Jorge Basadre School) (SPA), 01/12/2014, at **Exhibit C-381**; Letter from IMC to the Parán Community, Educational Institution of Parán (Colegio Jorge Basadre) (SPA), 01/12/2014, 01/12/2014, at **Exhibit C-382**; Letter from IMC to the Parán Community (SPA), 17/11/2014, at **Exhibit C-383**; Letter from IMC to the Parán Community (SPA), 07/05/2015, at **Exhibit C-384**.

[286] IMC, CR Team Report No. 05-2015/RRCC, May 2015 (SPA), at **Exhibit C-386**, p. 1 *et seq*.

[287] Letter from IMC to the Parán Community (SPA), 09/01/2015, at **Exhibit C-507**; IMC, CR Team Report No. 011-2014-RRCC, February 2015 (SPA), at **Exhibit C-380**, p. 3 (Section 3).

[288] Letter from IMC to the Parán Community (SPA), 12/03/2016, at **Exhibit C-387**; Letter from IMC to the Parán Community (SPA), 05/11/2015, at **Exhibit C-388**; Letter from IMC to the Parán Community (SPA), 30/06/2016, at **Exhibit C-389**; IMC, CR Team, Report No. 10-2015-RRCC, January 2015 (SPA), at **Exhibit C-390**, p. 2.

[289] See *.e.g.*, Letter from the Parán Community to IMC (SPA), 07/10/2016, at **Exhibit C-422**; Letter from the Parán Community to IMC (SPA), at **Exhibit C-508**; Letter from the Parán Community to IMC (SPA), 12/01/2017, at **Exhibit C-509**; Letter from the Parán Community to IMC (SPA), 15/02/2018, at **Exhibit C-123**.

[290] See *e.g.*, Letter from the Berea-Parán Church to IMC (SPA), 27/07/2016, at **Exhibit C-510**; Letter from the Parán Community to IMC (SPA), 03/08/2016, at **Exhibit C-511**; Letter from the Parán Community to IMC (SPA), 05/10/2016, at **Exhibit C-512**; Letter from the Parán Community to IMC (SPA), 10/10/2016, at **Exhibit C-513**; Letter from the Parán Community to IMC (SPA), 16/10/2016, at **Exhibit C-514**; Letter from the Parán Community to IMC (SPA), 12/01/2017, at **Exhibit C-515**.

2018. Upon completion of the second payment, IMC's CR Team reported the following:

> "During check delivery [to comply with the second and final payment] and signature of agreement with the community, much emphasis was put on what had been discussed and what is stated in the agreement, that the company is complying and PAYING the debt of the community, **with the acknowledgement of its leadership**. **As a result of this payment and discussions with the CR team, [Parán's] leadership should be sending us an invitation letter first to request a visit to the project and second [to] start dialogue for a future negotiation for signature of an agreement between company and community**".[291]

160 IMC hoped that the Parán Community would comply with its part of the deal, just as the Lacsanga Community had done after IMC paid compensation for the mining activities carried out by Invicta's prior owner.[292] Unfortunately, this was not the case. Indeed, IMC had a bitter surprise in May 2018, when it received a notarised letter from the Parán Community asking it to leave "their" lands – this, despite IMC's payment of the PEN 300,000 and that the company had repeatedly explained to Parán that the Project was not on its land.[293] This was clear evidence that the Parán Community had ulterior motives not to reach an agreement with IMC and block the Project, which it did only a few months later – namely, to exploit the Invicta mine and protect its marijuana business.

4.3 IMC sought a sustainable agreement with the Parán Community, despite its nefarious motives

161 Peru contends that "[the] Claimant disregarded the critical importance of securing harmonious relations with local communities",[294] in particular with the Parán Community. According to Peru, IMC mismanaged its

[291] SSS, Monthly Report, Project, January 2018 (SPA), at **Exhibit C-392**, p. 6 (emphasis added). See also SSS, Monthly Report, Project, October 2017 (SPA), at **Exhibit C-459**, p. 6.

[292] See *supra* Section 4.2.1.

[293] See *e.g.*, **C-122**.

[294] Counter-Memorial, 24/03/2022, p. 1 (para. 2).

relationship with this community, and further marginalised it upon reaching a surface agreement with the Lacsanga Community. These allegations are baseless.

162 Rather, IMC made strenuous efforts to engage and reach an agreement with the Parán Community (**Section 4.3.1**), adequately managing its relationship with this community (**Section 4.3.2**), complying with its social commitments (**Section 4.3.3**) and never excluding the Parán Community from the benefits of the Project (**Section 4.3.4**). However, Parán negotiated in bad faith and took active measures to obstruct the Project as it sought to exploit the mine itself and protect its marijuana business (**Section 4.3.5**).

4.3.1 IMC made strenuous efforts to reach a lasting agreement with the Parán Community

163 Peru contends that IMC disregarded the importance of securing a harmonious relationship with the Parán Community,[295] waiting until September 2016 to engage for the first time with this community[296] and failing to take a proactive approach in its subsequent interactions.[297] These allegations are false. As demonstrated below, IMC made strenuous efforts while held by Lupaka to engage in good faith with the Parán Community and build a lasting relationship.

164 First, Lupaka devoted time and resources to engage with the Parán Community after acquiring the Project. In 2013, IMC supported infrastructure projects for the benefit of the Parán Community, including the construction of a medical clinic facility within its territory.[298] Further, in 2014 and 2015, IMC:

[295] Counter-Memorial, 24/03/2022, p. 1 (para. 2).

[296] Counter-Memorial, 24/03/2022, p. 159 (para. 313 (b)).

[297] Counter-Memorial, 24/03/2022, p. 158 *et seq*. (para. 313 (a)).

[298] Lupaka Gold Corp., 2013 Annual Report, at **Exhibit AC-49**, p. 38.

- donated food and medicine to Parán,[299]
- engaged with its leadership to participate in Parán Assemblies and communicate IMC's intentions to work with the community and engage in meaningful dialogue,[300]
- held briefings with the community to explain the scope of the Project and reach mutually beneficial agreements,[301] and
- provided technical assistance to community members regarding their crops.[302]

165 Second, IMC continued to actively engage with the Parán Community in 2016, 2017 and 2018 to build a lasting relationship and reach a sustainable agreement.

166 In 2016, IMC:

- held briefings with members of the Parán Community to clarify its potential doubts on the Project's exploitation phase, make proposals for cooperation,[303] and consider the community's counterproposals,[304]

[299] Letter from IMC to the Parán Community and Parán Educational Institution (Jorge Basadre School) (SPA), 01/12/2014, at **Exhibit C-381**; Letter from IMC to the Parán Community, Educational Institution of Parán (Colegio Jorge Basadre) (SPA), 01/12/2014, 01/12/2014, at **Exhibit C-382**; Letter from IMC to the Parán Community (SPA), 17/11/2014, at **Exhibit C-383**; Letter from IMC to the Parán Community (SPA), 07/05/2015, at **Exhibit C-384**; IMC, CR Team Report No. 05-2015/RRCC, May 2015 (SPA), at **Exhibit C-386**, p. 1 *et seq*.

[300] IMC, CR Team Report No. 011-2014-RRCC, February 2015 (SPA), at **Exhibit C-380**, p. 3 (Section 3) (February 2015) ("Analyze new possibilities to make the project viable with the communities surrounding the project, such as Parán, which are showing that they want to resume dialogue with the company.")

[301] Letter from IMC to the Parán Community (SPA), 05/11/2015, at **Exhibit C-388**; IMC, CR Team, Report No. 10-2015-RRCC, January 2015 (SPA), at **Exhibit C-390**, p. 2.

[302] IMC, CR Team, Report No. 10-2015-RRCC, January 2015 (SPA), at **Exhibit C-390**, p. 2 ("At the initiative of the community members of the area, when visits are carried out to their cultivation plots, technical assistance is provided, achieving good acceptance and reception to the conversations and instructions that are given.")

[303] Letter from IMC to the Parán Community (SPA), 12/03/2016, at **Exhibit C-387**.

[304] Letter from IMC to the Parán Community (SPA), 12/03/2016, at **Exhibit C-387**; Letter from IMC to the Parán Community (SPA), 30/06/2016, at **Exhibit C-389**.

- developed a technological project that sought to ensure greater access to water resources and improved agricultural development techniques for the benefit of Parán,[305] and
- conducted several training workshops on agricultural issues, including on (i) technical crop management, (ii) installation of micro reservoirs, (iii) implementation of irrigation systems and (iv) organic fertiliser production modules.[306]

167 IMC's engagement with Parán continued throughout 2017. IMC:

- held meetings with Parán's leadership to advance an agreement[307] and keep them abreast of the Project's progress,[308]
- held informative meetings with the leaders of the Huamboy, Capia and Santa Ana areas to brief them on IMC's proposals,[309]
- held *in-situ* workshops on the Project status and the downsized mining plan,[310]
- made financial contributions as part of the Christmas festivities,[311] and
- supported community members with transport to and from Sayán to run errands.[312]

168 IMC's efforts to engage with the Parán Community continued throughout 2018. Despite the limited willingness of Parán's leadership to cooperate

[305] SSS, Monthly Report, Project, October 2016 (SPA), at **Exhibit C-393**, p. 3; SSS, Monthly Report, Project, November 2016 (SPA), at **Exhibit C-394**, p. 3 *et seq* (Sections I and VIII).
[306] *Id.*.
[307] SSS, Weekly Report, Project (SPA), 02/10/2017 to 07/10/2017, at **Exhibit C-425**; SSS, Weekly Report, Project (SPA), 13/11/2017 to 18/11/2017, at **Exhibit C-427**, p. 2; SSS, Weekly Report, Project (SPA), 11/12/2017 to 16/12/2017, at **Exhibit C-428**, p. 2.
[308] SSS, Weekly Report, Project (SPA), 20/11/2017 to 27/11/2017, at **Exhibit C-426**, p. 4.
[309] SSS, Monthly Report, Project, December 2016 (SPA), at **Exhibit C-424**, p. 4 *et seq.*; SSS, Monthly Report, Project, January 2017 (SPA), at **Exhibit C-429**, p. 4.
[310] IMC Memorandum, Training Programme Mining Project at Invicta Mining Camp (SPA), 08/07/2017, at **Exhibit C-154**.
[311] SSS, Monthly Report, Project, December 2017 (SPA), at **Exhibit C-391**, p. 4; SSS, Monthly Report, Project, December 2017 (SPA), at **Exhibit C-155**.
[312] [redacted]

with IMC, as had been acknowledged by OEFA's[313] and MEM-OGGS's[314] officials, IMC included the community in its AOP for 2018, which set the social activities that IMC would carry out in 2018 in terms of training workshops, public consultation, acquisition of local products, temporary hiring of personnel, environmental monitoring, etc.[315] Unfortunately, the community refused to take part in any of those activities.[316] IMC further requested Parán's leadership to create a committee to coordinate with the Parán community members interested in participating in the training programmes that IMC had planned to carry out in 2018, which included programmes on agricultural techniques,[317] strengthening of community management and organisation,[318] community relations[319] and health campaigns.[320] However, Parán's leadership refused to create the requested committee or to allow Parán members to participate in these training programmes.[321]

169 As shown by the foregoing, IMC undertook many actions and initiatives throughout the duration of the Project to engage with the Parán Community and reach a lasting agreement.

170 Peru's contentions that IMC disregarded the importance of securing a harmonious relationship with Parán or failed to take a proactive approach in its interactions with this community are baseless and should be

[313] SSS, Monthly Report, Project, March 2018 (SPA), at **Exhibit C-430**, p. 5.

[314] SSS, Monthly Report, Project, August 2018 (SPA), at **Exhibit C-162**, p. 5.

[315] SSS, Community Relations Annual Operating Plan, 2018 (SPA), at **Exhibit C-397**.

[316] [redacted]

[317] SSS, Training Plan, Agricultural Techniques Invicta Project (Lacsanga, Parán and Santo Domingo), April 2018 (SPA), at **Exhibit C-438**.

[318] SSS, Training Plan, Participatory Workshops on Development, Invicta Project (Lacsanga, Parán and Santo Domingo), April 2018 (SPA), at **Exhibit C-440**.

[319] SSS, Training Plan in Community Relationships and Code of Conduct, Invicta Project (Lacsanga, Parán and Santo Domingo), 2018 (SPA), at **Exhibit C-441**.

[320] IMC, Training plan for Health Promoters, Invicta Project (Lacsanga, Parán and Santo Domingo), April 2018 (SPA), at **Exhibit C-442**.

[321] [redacted]

dismissed.[322] Construed properly, Peru's argument is not that the Claimant failed to engage with Parán **at all**, but rather, that engagement did not meet some fabricated standard which Peru itself fails to articulate.

171 Equally misguided is Peru's contention that IMC had to rush negotiations with the Parán Community because of its tight financial schedule with Pandion.[323] IMC engaged with the Parán Community from the beginning of Lupaka's tenure of the mine in late 2012 as it sought to build a lasting relationship with this community. This was not possible because of Parán's ulterior plans to exploit the mine and protect its marijuana business.

172 The Claimant's good faith efforts to build a relationship with the Parán Community cannot be confused with a requirement to obtain this community's consent to advance the Project. While it may always be preferable to reach an agreement, and that is precisely what Lupaka vigorously attempted to achieve for several years, the absence of such agreement did not prevent Lupaka from advancing the Project. In fact, as explained in Section 3.2.2 above, Peruvian law only required IMC to reach an agreement with the communities holding rights over the land on which the Project was to be developed, *i.e.*, Lacsanga and Santo Domingo, which IMC did.

4.3.2 IMC adequately managed its relationship with the Parán Community

173 Peru contends that "[the] Claimant's community relations efforts were responsible for the disintegration of relations with the Parán Community",[324] pointing to specific instances of alleged mismanagement

[322] In para. 313 (a). of its Counter-Memorial, Peru contends that IMC's opening of a local office where members of the Rural Communities could drop by to enquire about the Project would show a passive approach. This criticism is absurd. Indeed, the opening of this office is consistent with IMC's CPP and Article 15 of Supreme Decree No. 033-2005-EM, which provides that "the mechanisms of citizen participation to be developed during the execution of the mining project should preferably consider the implementation of an Office of Permanent Information and/or a Participative Environmental Monitoring and Surveillance Committee […]". See Counter-Memorial, 24/03/2022, p. 158 *et seq*. (para. 313 (a)); Supreme Decree No. 028-2008-EM, 26/05/2008, at **Exhibit R-0007**, p. 8 *et seq.* (Art. 15).

[323] Counter-Memorial, 24/03/2022, p. 5 *et seq*. (paras. 13 and 158).

[324] Counter-Memorial, 24/03/2022, p. 158 (para. 312).

of social relations. Peru is wrong, and none of the instances it identifies supports its allegation.

174 First, relying on the report prepared by SSS for September 2017, Peru contends that "[the] Claimant's community relations team tersely and falsely declared [to Parán] that they had no need for rural community support before carrying out its mining activities".[325] Peru's contention is inaccurate and misleading as it suggests that IMC would have stated that it did not require the consent of any rural community to develop the Project, which is not the case. IMC did not require the consent of the Parán Community, even though, as shown in the prior Section, IMC made strenuous efforts to reach a lasting agreement with that community.

175 The SSS report relied on by Peru states that "[i]n the same way, it was explained to [the President of the Huamboy area] that the company has all the permits granted by the Ministry of Energy and Mines to start its exploitation and that **it does not depend on any community to start at this stage**".[326] This statement is accurate. Indeed, as of September 2017, date of the SSS report, IMC had already obtained the necessary land surface rights from the Santo Domingo and Lacsanga Communities, owners of the land in which the Project is located,[327] and did not need to reach an agreement with the Parán Community to advance the Project.[328] Hence, by September 2017, IMC did not depend "on any community" to start exploitation.

176 Second, Peru argues that IMC made "another false representation"[329] to the Parán Community in a letter sent on 31 May 2017. In this letter, IMC stated the following:

> "The main subject of this letter is to inform you that despite all the efforts made by Invicta (and Lupaka) to get the **Banks** to disburse us the money to fulfil our commitments and finance the mining

[325] Counter-Memorial, 24/03/2022, p. 159 *et seq.* (para. 313 (c)).

[326] SSS, Monthly Report, Project, September 2017 (SPA), at **Exhibit C-164**, p. 6 (emphasis added).

[327] IMC map - Community boundaries according to Peruvian registry (SPA), at **Exhibit C-486**.

[328] See *supra* Section 3.2.2.

[329] Counter-Memorial, 24/03/2022, p. 160 *et seq.* (para. 313 (d)).

> Operation in Invicta, they refuse to do so while the company does not have and submit an **Agreement** signed with the Community of Parán. In this regard, it is important to remember that in a first consultation in December 2016, the Community of Parán voted overwhelmingly to negotiate and sign an Agreement with Invicta, which we are willing to sign, and pay the amounts of money that have been owed for several years. This long-term Agreement is the only condition that the **Banks** place on Invicta to deliver the monetary funds. […]".[330]

177 Peru contends that IMC made "a false representation" when it stated that the bank was requesting IMC for an agreement with Parán as the sole condition to disburse the money. According to Peru, this would be false because the condition was to secure an access road to the Site, which could be done through an agreement "with *either* the Lacsanga Community or the Parán Community".[331] This criticism is unfounded.

178 The letter of 31 May 2017 is addressed to the Parán Community and there is nothing wrong or unsettling with IMC's statement that it needed to reach an agreement with Parán for the bank to disburse the money. It is true that IMC could also have obtained the funds through an agreement with Lacsanga, but IMC was negotiating with Parán and once it had secured an agreement with this community, the bank would disburse the funds.[332]

179 Peru further contends that IMC's engagement with Parán was opportunistic and only aimed at getting the bank to disburse the funds to develop the Project, and that this would be shown because, "once Claimant secured an agreement with the Lacsanga Community in July 2017 […], it quickly discontinued its efforts at reaching an agreement with the Parán Community."[333] This is plainly false. As demonstrated in Section 4.3.1 above, after signing the surface agreement with Lacsanga in July 2017, IMC continued to include Parán in all its social activities, including those

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[330] Letter from IMC to the Parán Community (SPA), 31/05/2017, at **Exhibit C-114** (emphasis in original).

[331] Counter-Memorial, 24/03/2022, p. 160 *et seq.* (para. 313(d)).

[332] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 18 (para. 40).

[333] Counter-Memorial, 24/03/2022, p. 160 *et seq.* (para. 313 (d)).

in its AOP for 2018. IMC also paid this community PEN 300,000 (approximately USD 80,000) between December 2017 and January 2018 to make up for Invicta's previous owner's alleged breaches and start negotiations for a future agreement. If IMC had not had a genuine interest in reaching an agreement with Parán, it would have not made this payment, nor those extensive efforts.

180 For the foregoing reasons, none of the instances identified by Peru demonstrate an alleged mismanagement of social relations by IMC.

4.3.3 IMC did not breach its social commitments

181 Peru contends that IMC failed to comply with its "social commitments contained in the Social Management Plan that Invicta had submitted as part of its 2009 EIA, […] [which] illustrate how Claimant (mis)managed the critical relationship with the Rural Communities (in particular, the Parán Community) and how it conducted business […]."[334] Specifically, Peru refers to the inspection carried out by the OEFA from 27 February to 4 March 2018, in which the authority concluded that IMC had failed to comply with its obligation to "(i) [implement] a programme for temporary hiring of local personnel; (ii) [undertake] actions to improve services, health equipment and campaigns on health and nutrition issues [for the benefit of the Rural Communities] […]; (iii) [undertake] actions to support or improve services, education equipment, school campaigns, teacher training and environmental education activities [for the benefit of the Rural Communities] […]; and (iv) [undertake] actions to support sustainable development through participatory development workshops or alliances with [the Rural Communities] […] [for 2016 and 2017]".[335]

182 It is true that the OEFA concluded that IMC had not complied with these social obligations in 2016 and 2017 and fined the company (for the breaches found in 2017), but this decision was unjustified in the

[334] Counter-Memorial, 24/03/2022, p. 85 (para. 174).

[335] Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17/12/2019, at **Exhibit R-0062**, p. 8 (para. 83); Counter-Memorial, 24/03/2022, p. 85 *et seq.* (paras. 174-177).

circumstances, as shown below. In any event, IMC complied with the social obligations noted by the OEFA shortly thereafter.

183 First, in 2016 and 2017, IMC was in critical negotiations with the communities of Lacsanga and Parán to secure an access road to the Site. This was obviously IMC's priority given that without access to the Site, the company would simply not be able to develop the Project. IMC's activities at the Project were suspended during these negotiations, which meant that the Project's needs in terms of manpower and supplies were minimal. The OEFA was aware of this predicament.[336] Notwithstanding the impossibility rendered by these negotiations and that IMC had not yet secured the land rights to develop the Project, the OEFA unreasonably sanctioned IMC for not carrying out certain social activities in 2017 and for not "[implementing] a programme for temporary hiring of local personnel".[337]

184 Second, the OEFA's decision is additionally unreasonable as it ignored that IMC's negotiations with the Rural Communities were also aimed at defining the specific commitments that IMC would assume on the hiring of personnel, education and health-related activities – *i.e.*, the same issues for which the OEFA sanctioned IMC. IMC would assume these commitments in exchange for the communities giving the company an access road to the Site. Following these negotiations, IMC signed on 18 July 2017 a surface rights agreement with the Lacsanga Community,[338] and in early 2018 finalised the terms of the draft addendum to the 2010 Framework Agreement with Santo Domingo.[339] These agreements, as well as the surface agreement with the Santo Domingo Community signed in

[336] Letter from IMC to OEFA (SPA), 27/03/2018, at **Exhibit C-402**; Letter from IMC to OEFA (SPA), 27/03/2018, at **Exhibit C-403**. Indeed, the OEFA was aware of this as early as September 2015 (OEFA, Minutes of Audit (SPA), 19/09/2015, at **Exhibit C-516**, p. 1; OEFA, Minutes of Audit (SPA), 30/11/2015, at **Exhibit C-517**, p. 1.

[337] Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17/12/2019, at **Exhibit R-0062**, p. 8 (para. 83).

[338] 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**.

[339] Draft Addendum to Framework Agreement between the Santo Domingo Community and IMC (SPA), 15/09/2017, at **Exhibit C-94**; Letter from IMC to the Santo Domingo Community (SPA), 04/05/2018, at **Exhibit C-93**, Letter from the Santo Domingo Community to IMC (SPA), 07/05/2018, at **Exhibit C-92**.

2010 – which would remain in force as long as it was not modified by the addendum – reflected IMC's commitments in terms of labour,[340] education and health issues to these communities.[341]

185 Third, the OEFA's decision ignores that IMC did "[undertake] actions to support sustainable development through participatory development workshops". As explained in Section 4.3.1 above, in 2016, IMC held workshops on agricultural related topics for the benefit of the Parán Community, including workshops on technical crop management, installation of micro reservoirs, implementation of irrigation systems and organic fertiliser production modules.[342]

186 But more importantly, IMC complied with the social commitments noted by the OEFA shortly after securing an access road to the Site. As IMC's AOP for 2018 shows, the company planned and implemented in 2018 – until the Parán invasions prevented IMC's CR Team from continuing – the following activities and projects:

- implemented a programme for temporary hiring of local personnel;[343]
- carried out health support and training activities to raise the quality of health services in the Rural Communities and reduce illnesses; these included equipment of health posts, improvement of medical

[340] 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 9 (Art. 8.7); Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**, p. 8 (Art. 5.3).

[341] Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64**, p. 2 *et seq.* (Arts. 2, 3.1, 5.3); 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 6 *et seq.* (Arts. 6.1, 6.2, 6.3 and 6.4 and 8.3, 8.4 and 8.5).

[342] SSS, Monthly Report, Project, October 2016 (SPA), at **Exhibit C-393** (full version of C-149); SSS, Monthly Report, Project, November 2016 (SPA), at **Exhibit C-394**.

[343] See SSS, Weekly Report, Project (SPA), 07/05/2018 to 13/05/2018, at **Exhibit C-518**, p. 3 *et seq.* (item 3); SSS, Monthly Report, Project, March 2018 (SPA), at **Exhibit C-430**, p. 8 (item 2.3); SSS, Weekly Report, Project (SPA), 19/03/2018 to 25/03/2018, at **Exhibit C-413**, p. 3 (item 3); SSS, Weekly Report, Project (SPA) 19/02/2018 to 25/02/2018, at **Exhibit C-519**, p. 4 (items 1.1.2 and 1.1.3); SSS, Weekly Report, Project (SPA) 12/02/2018 to 18/02/2018 (SPA), at **Exhibit C-520**, p. 4 (items 1.1.1 and 1.1.2).

infrastructure, carrying out trainings and health campaigns for disease prevention and control;[344]

- carried out activities to support and improve education in the Rural Communities; these included improving the basic conditions of educational institutions, providing educational material, setting up libraries, promoting access to information technologies and carrying out educational campaigns on care and conservation of the environment;[345] and
- carried out participatory development workshops for the benefit of the Rural Communities, including on sustainable development, community development and organizational strengthening.[346]

187 For the foregoing reasons, the Tribunal should dismiss Peru's contention that IMC breached its social commitments with the Rural Communities.

4.3.4 IMC did not marginalise the Parán Community

188 Peru contends that "[the] Claimant's focus on the Lacsanga and Santo Domingo de Apache communities isolated the Parán Community",[347] pointing to specific instances in support of its allegation. But, again, it must be reiterated that the Claimant was under no obligation to prioritise the Parán Community over the other local communities on whose land the Project was **actually** located. What is more, the Parán Community's hurt feelings does not justify its decision to take the Claimant's mine at

[344] See IMC, Special Report on OEFA Audit (SPA), 27/02/2018 to 04/03/2018, at **Exhibit C-437**, p. 2 (item 10); IMC, Training plan for Health Promoters, Invicta Project (Lacsanga, Parán and Santo Domingo), April 2018 (SPA), at **Exhibit C-442**.

[345] See SSS, Monthly Report Project, November 2017 (SPA), at **Exhibit C-521**, p. 11 *et seq.* (item B); IMC, Special Report on OEFA Audit (SPA), 27/02/2018 to 04/03/2018, at **Exhibit C-437**, p. 2 (item 11).

[346] See SSS, Training Plan, Participatory Workshops on Development, Invicta Project (Lacsanga, Parán and Santo Domingo), April 2018 (SPA), at **Exhibit C-440**; SSS, Training Plan, Agricultural Techniques Invicta Project (Lacsanga, Parán and Santo Domingo), April 2018 (SPA), at **Exhibit C-438**; SSS, Monthly Report, Project, March 2018 (SPA), at **Exhibit C-430**, p. 14 (item 9) ("Delivered. In execution").

[347] Counter-Memorial, 24/03/2022, p. 162 *et seq.* (Section II.F.2.b.).

gunpoint. In any event, none of the instances Peru identifies of alleged marginalisation supports its case.

189 First, Peru relies on a Lupaka press release dated 23 July 2013 to show that IMC assumed social commitments "to contribute to social and environmental development projects" for the Santo Domingo and Lacsanga communities.[348] It then argues, relying on the same document, that IMC did not assume similar commitments for the Parán Community because IMC did not take a genuine interest in such community.[349] This is false and ignores the long and tortuous negotiations that the Claimant conducted with the increasingly unreasonable Parán Community.

190 Peru cannot pick isolated social commitments made by IMC to some communities at a particular moment in time – in this case, on the sole basis of the Lupaka press release dated 23 July 2013 – to argue that they would show that IMC marginalised Parán. Conclusions on IMC's social engagement activities must be drawn in the round, as set out in Section 4.3.1 above, rather than relying on isolated instances. For instance, as noted, IMC undertook many activities and projects over the course of six years for the benefit of the Parán Community. In any event, it suffices to look at Lupaka's Annual Report for 2013 – the year referred to by Peru – to see that the company also supported social projects for the Parán Community at the time,[350] in addition to donating food and medicines to this community.[351]

191 Second, Peru contends that "[the] Claimant hired workers predominantly from the Lacsanga Community".[352] Specifically, Peru states that "[…] in February and March 2018, [the] Claimant had hired as many as 60 members from the Lacsanga Community and zero members of the Parán

[348] Counter-Memorial, 24/03/2022, p. 163 (para. 318 (a)).

[349] Counter-Memorial, 24/03/2022, p. 163 (para. 318(a)).

[350] Lupaka Gold Corp., 2013 Annual Report, at **Exhibit AC-49**, p. 46.

[351] Letter from IMC to the Parán Community and Parán Educational Institution (Jorge Basadre School) (SPA), 01/12/2014, at **Exhibit C-381**; Letter from IMC to the Parán Community, Educational Institution of Parán (Colegio Jorge Basadre) (SPA), 01/12/2014, 01/12/2014, at **Exhibit C-382**; Letter from IMC to the Parán Community (SPA), 17/11/2014, at **Exhibit C-383**; Letter from IMC to the Parán Community (SPA), 07/05/2015, at **Exhibit C-384**.

[352] Counter-Memorial, 24/03/2022, p. 163 *et seq.* (para. 318 (b)).

Community",[353] and that a similar pattern can be seen in the SSS reports prepared from July through October 2018.[354]

192 It is true that, in 2018, IMC hired more workers from Lacsanga than from Parán, but this was the case because Parán community members were not interested in working for IMC. IMC regularly probed if there was interest from Parán members to work with the company and the answer was negative.[355] As discussed above, Parán further refused to take part in the initiatives included in IMC's AOP for 2018, one of which sought to promote the "Temporary Hiring of Workers" from "the population of the communities in the Project's area of direct influence", including Parán.[356] The only Parán members who were keen to work for IMC were the members of the Tena family, Marco Tena, Edwin Tena and Maycol Tena, whom IMC hired in various positions such as driver, security and surveillance personnel, assistant and equipment operator.[357]

193 The situation with Lacsanga in 2018 was entirely different. Its members were eager to work for IMC.[358] IMC received multiple letters and CVs from Lacsanga community members expressing interest in working for the company.[359] Several Lacsanga families were also in the process of setting up their enterprises to provide services to IMC.[360] These circumstances made it easy for IMC to hire and work with Lacsanga community members.

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[353] Counter-Memorial, 24/03/2022, p. 163 *et seq.* (para. 318 (b)).

[354] Counter-Memorial, 24/03/2022, p. 163 *et seq.* (para. 318 (b)).

[355] [redacted]

[356] SSS, Community Relations Annual Operating Plan, 2018 (SPA), at **Exhibit C-397**.

[357] IMC, Yearly staff attendance list 2019 (SPA), at **Exhibit C-449**; IMC, Parán staff security task (SPA), at **Exhibit C-450**.

[358] SSS, Weekly Report, Project (SPA), 14/08/2017 to 19/08/2017, at **Exhibit C-444**, p. 3 *et seq.*; SSS, Weekly Report, Project (SPA), 20/11/2017 to 24/11/2017, at **Exhibit C-445**, p. 5.

[359] SSS, Weekly Report, Project (SPA), 13/11/2017 to 18/11/2017, at **Exhibit C-427**, p. 3; SSS, Weekly Report, Project (SPA), 01/12/2017 to 09/12/2017, at **Exhibit C-446**, p. 8; SSS, Weekly Report, Project (SPA), 11/12/2017 to 16/12/2017, at **Exhibit C-428**, p. 7; SSS, Weekly Report, Project (SPA), 15/01/2018 to 21/01/2018, at **Exhibit C-447**, p. 6 *et seq.*

[360] SSS, Weekly Report, Project (SPA), 20/11/2017 to 24/11/2017, at **Exhibit C-445**S, p. 5 *et seq.*; SSS, Weekly Report, Project (SPA), 14/08/2017 to 19/08/2017, at **Exhibit C-444**, p. 4.

194 Third, Peru contends on the basis of SSS reports for September 2017 and June-July 2018 that "[the] Claimant gave explicit preference to the Lacsanga Community for the purchase of goods and services, without a similar level of commercial engagement with the Parán Community."[361]

195 While it is true that IMC gave preference to Lacsanga for the contracting of certain goods and services (food, lodging, laundry, transport and fuel supply), this does not give the Parán Community carte blanche to make extortionate demands and resort to violence. In any event, this preference for Lacsanga's goods and services came from the fact that in July 2017 IMC signed a surface agreement with this community and committed to buying certain goods and contracting certain services.[362] This was one of the conditions that Lacsanga put forward in order to give IMC the surface rights over its land. The company accepted this condition, as it needed an access road to the Site and Parán was unwilling to engage or partner with IMC. In any event, Peru's criticism is unfounded considering that Parán refused to take part in the initiatives included in IMC's AOP for 2018, one of which sought to promote the "Acquisition of local products" from "the population of the communities in the Project's area of direct influence", including Parán.[363]

196 Fourth, Peru states that "[the] Claimant's community relations team tellingly failed to include the Parán Community in the title of its own monthly reports on the progress of the Invicta Project. […] Such omission suggests that Claimant did not even view the Parán Community as a relevant stakeholder in its community outreach efforts".[364] This is absurd.

197 Express reference (or not) to a community in the **title** of an SSS report says nothing about IMC's engagement efforts with that community. This is the type of omission only spotted by a disputes lawyer and says nothing of the substance of the Claimant's activities. But more importantly, it suffices to review the three SSS reports underlying Peru's contention – *i.e.*, the reports for September 2017, June 2018 and July 2018 – to confirm that each and

[361] Counter-Memorial, 24/03/2022, p. 164 (para. 318 (c)).

[362] 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 9 (Clauses 8.9 and 8.10).

[363] SSS, Community Relations Annual Operating Plan, 2018 (SPA), at **Exhibit C-397**.

[364] Counter-Memorial, 24/03/2022, p. 164 (para. 318 (d)).

every one of them has a subsection describing the actions undertaken by IMC to engage with Parán on the month of the report.[365]

198 For the foregoing reasons, Peru's contention that IMC marginalised the Parán Community is baseless.

4.3.5 Parán negotiated in bad faith with IMC

199 The Claimant demonstrated in the previous Sections that it did not marginalise, much less disregard, the Parán Community. When IMC strived to reach a lasting agreement with the Parán Community, the latter negotiated in bad faith and use violence and intimidation to obtain its twin goals of exploiting the mine and protecting its illegal marijuana business.

200 A few examples are provided below of Parán's bad faith during the negotiations.

201 One, as explained in Section 4.2.3 above, when IMC and the Parán Community started negotiating in late 2016, one of Parán's initial demands was that IMC pay a debt allegedly owed by Invicta's previous owner, amounting to PEN 300,000 (approximately USD 80,000).[366] IMC agreed to make this payment and Parán's leadership committed in exchange to negotiate an agreement with IMC in relation to the Project.[367] Having obtained this fee, the Parán Community simply disregarded its commitment.[368]

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[365] See SSS, Monthly Report, Project, September 2017 (SPA), at **Exhibit C-164**, p. 5 *et seq.*; SSS, Monthly Report, Project, June 2018 (SPA), at **Exhibit C-157**, p. 3 *et seq.*; SSS, Monthly Report, Project, July 2018 (SPA), at **Exhibit C-161**, p. 3 *et seq*.

[366] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 22 *et seq*. (paras. 61-63); Agreement between the Parán Community and IMC (SPA), 29/04/2008, at **Exhibit C-60**, p. 5 (item 2.2); Agreement between the Parán Community and IMC (SPA), 07/05/2008, at **Exhibit C-61**, p. 3 *et seq*. (item 2.1); Letter from IMC to the Parán Community (SPA), 21/08/2012, at **Exhibit C-522**.

[367] Internal Lupaka email with attachment (SPA), 25/01/2017, at **Exhibit C-113**, p. 3; SSS, Monthly Report, Project, January 2018 (SPA), at **Exhibit C-392**, p. 6; [redacted]

[368] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 23 (para. 64); Letter from the Parán Community to IMC (SPA), 03/01/2018, at **Exhibit C-120**; Notarised letter from the Parán Community to IMC (SPA), 04/05/2018, at **Exhibit C-121**.

202 Two, throughout its negotiations with IMC, the Parán Community sought to exclude the Santo Domingo and Lacsanga communities from the benefits of the Project. Parán repeatedly conditioned any agreement with IMC on a requirement that IMC transport all its ore exclusively through the Parán road. Parán imposed this condition on IMC during the early negotiations in 2016,[369] and persisted in its efforts to exclude the other two Rural Communities after the Blockade. As IMC informed the MEM in a letter dated 29 March 2019, following another failed meeting with Parán:

> "**It is the leaders of Parán themselves who point out with particular vehemence and intolerance that the only access road to the Mining Unit must be through the Community of Parán and that no vehicle or person can transit and enter the mining unit via the road built on lands of the Community of Lacsanga**, absurdly purporting not to be aware that our company has built its access road through these lands over which an easement has been granted by the Rural Community of Lacsanga".[370]

203 Parán's determination to exclude the other Rural Communities from the Project's benefits went so far as to guarantee IMC that if it accepted its demand, "nobody would bother [IMC]".[371] This is behaviour typical of mafias running protection rackets, not a local community concerned about alleged environmental degradation.

204 Three, the Parán Community breached the promises it made to IMC before and after installing the Blockade. As explained in Sections 6.3 and 6.6 below, the Parán President committed in September 2018 to refrain from

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369 [redacted] IMC, Draft Agreement between Lupaka and the Parán Community (SPA), October 2016, at **Exhibit C-464**.

370 Letter from IMC to MEM (SPA), 29/03/2019, at **Exhibit C-209**, p. 5 (para. 13) (emphasis added). See also: Summary of the meeting between IMC and the Parán Community (SPA), 07/11/2018, at **Exhibit C-183**, p. 1; Mr Marco Estrada showing the Blockade at the Lacsanga road (SPA) (Video), 14/05/2019, at **Exhibit C-362** (00:50 to 01.07), Mr Marco Estrada showing the Blockade at the Lacsanga road (Transcript) (SPA), 14/05/2019, at **Exhibit C-363**. In this video, recorded on 15 May 2019, Mr Estrada explains that Parán demanded IMC to transport all its ore through Parán's road and to stop using Lacsanga's road as a condition to reach an agreement.

371 [redacted]

all acts of violence, threats or harassment against IMC. [372] Notwithstanding that clear commitment, the Parán Community broke it shortly thereafter by setting up its illegal, armed Blockade on 14 October 2018.

205 In another broken promise, the Parán Community committed on 26 February 2019 to immediately "suspend all coercive measures" against IMC.[373] It is worth pausing here again to acknowledge that in making that promise the Parán Community had already admitted to previous acts of coercion – a far cry from the picture Peru attempts to paint in these proceedings of a peaceful community simply seeking to protect its rural way of life. Despite making this commitment, the Parán Community then refused to lift the Blockade and only allowed IMC's staff to access the Site through Parán's impassable road.

206 Aside from showing bad faith during the negotiations with Lupaka, Parán actively sought to turn the Santo Domingo and Lacsanga Communities against the Project. Parán contacted the leadership of these two communities to propose the creation of an opposition block against the Project.[374] Parán sought to convince the Santo Domingo Community to terminate its contract with IMC.[375] Parán even retained lawyers to provide

[372] Memorial, 01/10/2021, p. 38 (para. 115); Minutes of the Subprefect meeting between IMC and the Parán Community including September 2018 Commitment (SPA), 18/09/2018, at **Exhibit C-139**, p. 2.

[373] Minutes of the meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement (SPA), 26/02/2019, at **Exhibit C-200**, p. 1 *et seq*.

[374] SSS, Weekly Report, Project (SPA), 03/01/2018 to 14/01/2018, at **Exhibit C-398**, p. 3; SSS, Weekly Report, Project (SPA), 14/05/2018 to 20/05/2018, at **Exhibit C-435**, p. 2 *et seq*.

[375] SSS, Weekly Report, Project (SPA), 09/10/2017 to 14/10/2017, at **Exhibit C-456**, p. 2 *et seq*.; [redacted] The Leoncio Prado Subprefect, Mr Retuerto, assisted the Parán Community in these efforts. See SSS, Monthly Report, Project, July 2018 (SPA), at **Exhibit C-161**, p. 6 ("The new president of the Santo Domingo community, Adrián Román Mateo, has initiated efforts in the state institutions in company and advice from the sub-prefect of the Leoncio Prado district with the purpose of upsetting the company. This information was corroborated by Mr. Nilton León, representative of the Office of Social Management of the Ministry of Energy and Mines, who affirmed that this would not proceed.") The same document states that the Parán Community's authorities were being "manipulated by the subprefect of Leoncio Prado" (see p. 13 *et seq*.).

legal advice on how to obtain such annulment.[376] Parán further exerted pressure on the President of Santo Domingo to demand more money from IMC for any potential agreement, stating that he could charge up to PEN 4 million (approximately USD 1,350,000, *i.e.*, more than four times what IMC had agreed to pay Santo Domingo) to accept that its land be used for the Project, and proposing that said amount be split in equal parts by Parán and Santo Domingo.[377] In other words, Parán's extortion of IMC was not enough; it sought to persuade others to engage in similarly coercive behaviour.

207 Relatedly, Parán's authorities and influential community members actively misinformed the population of the Rural Communities and the central authorities on crucial aspects of the Project as a strategy to sew chaos and conflict. Indeed, no matter how many times IMC explained that the Project was not located on Parán land,[378] and the evidence supporting this,[379] the Parán authorities kept claiming without any support that the Project was on Parán territory.[380] No matter how many times IMC explained that the Project had not entered exploitation,[381] the Parán authorities kept claiming

[376] SSS, Weekly Report, Project (SPA), 09/10/2017 to 14/10/2017, at **Exhibit C-456**, p. 2 *et seq*.

[377] SSS, Weekly Report, Project (SPA), 14/05/2018 to 20/05/2018, at **Exhibit C-435**, p. 3.

[378] Letter from IMC to the Parán Community (SPA), 30/05/2018, at **Exhibit C-122**; [redacted] Letter from IMC to the Parán Community (SPA), 07/11/2017, at **Exhibit C-118**; Letter from the Parán Community to IMC (SPA), 03/01/2018, at **Exhibit C-120**.

[379] IMC map - Community boundaries according to Peruvian registry (SPA), at **Exhibit C-486**.

[380] Notarised letter from the Parán Community to IMC (SPA), 04/05/2018, at **Exhibit C-121**; SSS, Weekly Report, Project (SPA), 03/01/2018 to 14/01/2018, at **Exhibit C-398**, p. 4; SSS, Report on Social Intervention for signing of an agreement with the Parán Community, 2018 (SPA), at **Exhibit C-111**, p. 4.

[381] Letter from IMC to the Parán Community (SPA), 30/05/2018, at **Exhibit C-122**; IMC Memorandum, Training Programme Mining Project at Invicta Mining Camp (SPA), 08/07/2017, at **Exhibit C-154**; SSS, Weekly Report, Project (SPA), 09/04/2018 to 15/04/2018, at **Exhibit C-462**, p. 2 ("On Friday 04/13, there was an unexpected visit from a delegation of the Ronda Campesina of the Community of Paran. The purpose of this committee was to verify the work being carried out on the project and to verify the alleged contamination of the water coming out of the mine's adit. The visit was well managed by the RRCC team in coordination with the project's safety and environment[al] [team]. Finally, a minute of the visit was drafted and 04/30 was agreed as a tentative date to visit the project again.")

that it had.[382] No matter IMC's implementation of its water management system in mid-2018, which the Peruvian authorities confirmed ensured that no mine effluents reached Parán's water sources,[383] the Parán authorities kept claiming that the mine was polluting the community's water sources.[384] Tellingly, Parán's authorities did not allow IMC's external consultant J Ramon del Peru S.A.C. to monitor Parán's water sources after mid-2018.[385]

208 Parán brought in external advisors to assist in its "defamation campaign". One of these advisors was Mr Sabino Eusebio Samar Ugarte, president of the Oyón community, known by Peru's authorities for his active role in the social conflicts with mining companies Buenaventura (in charge of the "Uchucchacua" mining project) and Minsur (in charge of the "Raura" mining project) in the Oyón province. Peru's Police identified Mr Samar Ugarte, President of the Oyón Rural Community, as one of the "leaders of the rural community of Parán"[386] who participated in post-Blockade meetings between IMC and the community.[387] Parán's "defamation campaign" was further enhanced by MININTER officials, in particular Mr Soyman Retuerto, the Leoncio Prado Subprefect, who claimed falsely in

[382] Letter from the Parán Community (I. Palomares) to Ombudsman's Office (W. Camacho), 10/10/2018, at **Exhibit R-0134**; Letter from the Parán Community to MEM (SPA), 10/10/2018, at **Exhibit C-163**; SSS, Monthly Report, Project, October 2017 (SPA), at **Exhibit C-459**, p. 4 ("The company has been working at night")

[383] ANA, Technical Report No. 048-2018-ANA-AAA.CF.-ALA H/KHR, 13/07/2018, at **Exhibit R-0091**, p. 8 *et seq.* (paras. 5.2 and 6.3).

[384] Letter from the Parán Community to MEM (SPA), 23/06/2018, at **Exhibit C-523**; Letter from the Parán Community to MEM (SPA), 10/10/2018, at **Exhibit C-163**; Letter from PCM to MEM and MINAM (SPA), 18/10/2018, at **Exhibit C-524**; Minutes of the Subprefect meeting between IMC and the Parán Community including September 2018 Commitment (SPA), 18/09/2018, at **Exhibit C-139**; SSS, Weekly Report, Project (SPA), 18/06/2018 to 24/06/2018, at **Exhibit C-453**, p. 9.

[385] J. Ramón, Environmental Monitoring Report, September 2018 (SPA), at **Exhibit C-407**, p. 19 (item 6.1).

[386] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 29.

[387] Report on meeting between IMC, the Parán Community, the MEM and the Mayor of the District of Leoncio Prado (SPA), 24/10/2018, at **Exhibit C-173**, p. 1 (Item 1).

2018 that IMC had started production and was contaminating Parán's water sources.[388] There was and is no evidence of any such contamination.

209 As the foregoing shows, Parán negotiated in bad faith with IMC and actively sought to hinder the Project's progress. Parán never had a real interest in reaching a sustainable agreement with IMC or allowing the Project to move forward because it intended to exploit the mine itself – which, as demonstrated in Section 2.1 above, Parán continues to do to the present day. Peru's attempt in this arbitration to portray the Parán Community as a reasonable and well-intended community which was a victim of a socially irresponsible mining company is fantasy.

5 IMC ADDRESSED ALL ENVIRONMENTAL CONCERNS AND REQUIREMENTS IN RELATION TO THE PROJECT

210 Peru attempts to portray Lupaka as an environmentally irresponsible mining operator, arguing that it "ignore[ed] the concerns of the Parán Community about the environmental impacts of the Invicta Mine —which included concerns over potential contamination of the Community's water sources— […]",[389] and that this would have been "one key source of dispute between Invicta and the Parán Community".[390] This, of course, is

[388] Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Council of Ministries (M. Aráoz), 04/01/2018, at **Exhibit R-0076**; Official Letter No. 105-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Ombudsman's Office (W. Gutiérrez), 08/05/2018, at **Exhibit R-0081**; Official Letter No. 104-2018-DGIN-LMP-HUA from Huaura Subprefect (S. Retuerto) to MINEM (F. Ismodes), 08/05/2018, at **Exhibit R-0165**; Letter from MEM to OEFA (SPA), 28/05/2018, at **Exhibit C-525**; Interview with Leoncio Prado Subprefect (MININTER) (Video) (SPA), 21/12/2018, at **Exhibit C-526**, where the Subprefect claims that "[the OEFA] stated in the report that [the Project] was in a state of exploitation, but without activity. In other words, they were cleaning and doing things, but the works showed that [the mine] was already being exploited"; Interview with Leoncio Prado Subprefect (MININTER) (Video Transcript) (SPA), 21/12/2018, at **Exhibit C-527**; Interview with Leoncio Prado Subprefect (MININTER) (Video) (SPA), 08/07/2019, at **Exhibit C-528**, Interview with Leoncio Prado Subprefect (MININTER) (Video Transcript) (SPA), 08/07/2019, at **Exhibit C-529**, where the Subprefect claims that"[the conflict began] from May [2018] onwards, when a possible water contamination was found, I say possible, because there was no [] laboratory that determined it, then the ministries were immediately informed that the dialogue table was created."

[389] Counter-Memorial, 24/03/2022, p. 6 (para. 14).

[390] Counter-Memorial, 24/03/2022, p. 87 (para. 178).

untrue. This is not the ESG dispute that Peru would have the Tribunal believe. If it were, the Parán Community would not be mining Invicta itself and creating a much higher environmental risk that would have existed under Lupaka's stewardship of the Project.

211 Peru's focus on Parán's alleged environmental concerns is purely opportunistic (**Section 5.1**). In any event, IMC addressed Parán's water pollution concerns (**Section 5.2**) and systematically implemented all the requirements by the OEFA (**Section 5.3**).

5.1 Peru's focus on Parán's alleged environmental concerns is purely opportunistic

212 In its Counter-Memorial, Peru emphasises Parán's alleged environmental concerns hoping to convince the Tribunal that these concerns would have been "one key source of dispute between Invicta and the Parán Community",[391] and that Parán's opposition to the Project would have been justified in the circumstances. This entire line of argument is a red herring.

213 As the contemporaneous evidence shows, Parán's opposition to the Project was based for the most part on the false contention that the Project was located on Parán land, and that IMC was operating therein without authorisation. Put more simply, this was about money, not water. The "get off our property" argument was set out by Parán in 2014,[392] 2015,[393]

[391] Counter-Memorial, 24/03/2022, p. 87 (para. 178).

[392] CR Team Report No. 003/RRCC/IMC (SPA), at **Exhibit C-530**, p. 2 ("[…] A group of community members from Paran went to the area where the construction of the powder magazine is being carried out, arguing that they are the owners of the land and that [IMC] [has] no reason to be building without first negotiating with them.; […] Mr Tena […] told them that if they said they were the owners, they should bring their deeds to prove that the land was their property. Things calmed down and the community members left the area.")

[393] Letter from the Parán Community to IMC (SPA), 24/08/2015, at **Exhibit C-531**.

2017[394] and 2018,[395] to justify the Blockade[396] and also during the negotiations that followed the Blockade.[397] As nothing more than an arbitration tactic, Peru seeks to remove the focus from these allegations and put it on alleged environmental concerns. Peru does this because it knows that the Project was not on Parán land, but on Lacsanga and Santo Domingo land.[398] The Tribunal must not be misled. Indeed, Parán raised its alleged environmental concerns with IMC for the first time in May 2018,[399] this is, when the Project was on the verge of production.

214 Peru further refers to a letter sent on 7 September 2011 by a grassroots environmental advocacy organization to the Ministry of Environment expressing concerns about the risks posed by the Invicta project to the environment.[400] Peru refers to this isolated letter to suggest that environmental concerns arising from the Invicta project were long-standing.[401] But this letter is entirely irrelevant for the present dispute and does not support Peru's case. Not only does it not reflect **Parán's** concerns, but in addition this letter was sent in 2011, *i.e.*, before the Claimant acquired the Invicta mine and when the mine plan consisted of open-pit ore extraction, with an on-site processing plant to be built next to the mine to process 5,100 t/d of ore.[402] This ceased to be the case under

[394] SSS, Weekly Report, Project (SPA), 11/12/2017 to 16/12/2017, at **Exhibit C-428**, p. 2.

[395] SSS, Weekly Report, Project (SPA), 03/01/2018 to 14/01/2018, at **Exhibit C-398**, p. 4; Notarised letter from the Parán Community to IMC (SPA), 04/05/2018, at **Exhibit C-121**, p. 3 ("Fourth").

[396] Minutes of the meeting between the Parán Community, IMC and Chief of Sayán Police (SPA), 14/10/2018, at **Exhibit C-166**, p. 1 ("The reason for our climb to the gate, which borders the Community of Lacsanga, Melcopallan área [sic] for expropriating [sic] territory of Paran" […]).

[397] Letter from IMC to MININTER (SPA), 20/03/2019, at **Exhibit C-206**, p. 3 (para. 7).

[398] Minutes of the meeting between the Parán Community, IMC and Chief of Sayán Police (SPA), 14/10/2018, at **Exhibit C-166**; Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 31 (Conclusions); Map, Invicta Project, Rural Communities (SPA), at **Exhibit C-532**.

[399] Notarised letter from the Parán Community to IMC (SPA), 04/05/2018, at **Exhibit C-121**, p. 3 ("Fourth").

[400] Letter from Frente de Defensa del Medio Ambiente y Promoción (A. Román) to MINAM (R. Giesecke), 07/09/2011, at **Exhibit R-0071**.

[401] Counter-Memorial, 24/03/2022, p. 87 *et seq.* (para. 179).

[402] 2012 SRK Report, at **Exhibit C-58**, p. ii.

Lupaka's revised mining plan, which, as approved by the MEM on 11 December 2014,[403] established that exploitation at Invicta would be underground, the production rate ten times lower than initially planned[404] and ore processing would be done offsite.[405] In sum, this letter was stale and unrelated to the actual project as developed by the Claimant. It is only relevant insofar it demonstrates the lengths to which Peru will go to paint this dispute as environmental.

5.2 IMC addressed effectively Parán's water pollution concerns

215 Peru tries to portray IMC as an environmentally negligent operator,[406] arguing that it ignored Parán's "concerns over potential contamination of the Community's water sources and refused to cooperate with the authorities in the investigation of such issues."[407] This is false. IMC was an environmentally responsible operator (**Section 5.2.1**) which adopted active measures to address Parán's water concerns, including by implementing a water management system that ensured that no mine effluents reached Parán's water sources (**Section 5.2.2**). IMC did not obstruct the investigation of the authorities of Parán's water concerns (**Section 5.2.3**).

5.2.1 From the beginning, IMC was mindful of the impact of its activities on the surrounding environment and water resources

216 Lupaka acquired the Project in October 2012. Over the next two years, Lupaka focused its efforts on re-evaluating the Project's mining plan, obtaining conceptual studies from SRK Consulting and metallurgical studies from Aminpro to assess the Project's technical and economic

[403] MEM Report and Resolution approving Mining Plan (SPA), 11/12/2014, at **Exhibit C-9**; Counter-Memorial, 24/03/2022, p. 75 (para. 145).

[404] MEM Report and Resolution approving the Mining Plan (SPA), 11/12/2014, at **Exhibit C-9 (corrected translation)**, p. 9 (para. 7.1); IMC Memorandum, Training Programme Mining Project at Invicta Mining Camp (SPA), 08/07/2017, at **Exhibit C-154**, p. 1 (first paragraph).

[405] MEM Report and Resolution approving ITS No. 1 (SPA), 09/04/2015, at **Exhibit C-40**, p. 2.

[406] See *e.g.*, Counter-Memorial, 24/03/2022, p. 94 *et seq.* (Section II.D.2.b).

[407] Counter-Memorial, 24/03/2022, p. 6 (para. 14).

feasibility.[408] At that time, Lupaka did not carry out any works in the mine or in the tunnels, and therefore did not generate any effluents. The only effluent capable of being released was therefore minimal and occurring from a natural source, as it resulted from rainfall that filtered through the mountain to reach the mine tunnels.[409]

217 To address this natural run-off, IMC implemented a sedimentation pond outside the mine adit, at the 3400 level, into which it had channelled this natural effluent for sedimentation. The water entered this sedimentation pond, where it decanted and then came out at the other end of the pond clarified, *i.e.*, without solids or other particles that might have adhered to the water as it passed through the mine tunnels. As explained by Mr Castañeda:

> "I remember that we poured into the pond lime oxide (pure), *i.e.*, commercial lime without any chemical additives, to neutralise the natural acidity of the water that was coming through. The aim was to make the natural effluent as neutral as possible. We opted for lime because it has many advantages. It is not harmful to health – all the water we drink contains lime, sodium, magnesium, etc. in minimal doses – nor for cultivation. In fact, lime is favourable for cultivation as it helps to control the *pH* of the soil; this is precisely why it is used in agriculture."[410]

218 Despite the limited scope of its activities, in 2014, IMC asked its external consultant J. Ramón del Perú S.A.C. to carry out environmental testing at Invicta in terms of water, air, soil and sound pollution. The purpose of this testing was to understand the impact of IMC's very limited activities on these elements. The results were reassuring, confirming that the above elements materially complied with the MPLs.[411] Notably, the testing confirmed that IMC's sedimentation pond was effective, and that IMC's

[408] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 6 (paras. 13 and 82).

[409] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 22 (para. 50).

[410] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 22 (para. 51).

[411] J. Ramón, Environmental Monitoring Report, August 2014 (SPA), at **Exhibit C-401**, p. 26 *et seq.*

limited, natural mine effluents were within the MPLs. To date, Peru has never contested the result of these findings.

219 IMC then suspended its activities from June 2015 to February 2018 while it negotiated a surface agreement with the Lacsanga and Parán communities.

5.2.2 IMC implemented a water management system inside the mine to address Parán's water pollution concerns

220 Peru contends that IMC ignored "[Parán's] concerns over potential contamination of the Community's water sources […]",[412] and that therefore the community had "legitimate and well-founded reasons to be concerned about the […] impact of the Invicta Project".[413] This is not true and even if it was, it did not give Parán licence to resort to violence to take over the mine for its own exploitation.

221 As Peru explains in its Counter-Memorial, the OEFA conducted inspections of the Invicta mine from 10 to 12 June 2017 and 27 February to 4 March 2018. As a result of those inspections, the OEFA found that the Invicta mine effluents exceeded the MPLs for cadmium, copper and zinc.[414] As a result, the OEFA required IMC to implement a water management system to ensure that its mine effluents complied with the MPLs.[415]

222 As explained in Section 3.3.2 above, IMC complied with this requirement in mid-2018,[416] building a water management system inside the mine. This system consisted of two ponds, the first one for sedimentation and the second next to it for storage. The effluent from the mine entered the first

[412] Counter-Memorial, 24/03/2022, p. 6 (para. 14).

[413] Counter-Memorial, 24/03/2022, p. 90 (para. 182).

[414] Counter-Memorial, 24/03/2022, p. 89 *et seq.* (para. 181).

[415] Counter-Memorial, 24/03/2022, p. 89 *et seq.* (para. 181); Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27/06/2018, at **Exhibit R-0061** ("[…] improve its temporary system of treatment and control to ensure that the quality of the effluent from the [mine's] Adit the Level 3400 Pit meets the Maximum Permissible Limits.").

[416] IMC, Statement of Objections (SPA), 20/06/2018, at **Exhibit C-406**, p. 10; MINAM, Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 25.

pond where it sedimented and then passed – clarified and through 3 pipelines – to the second pond, from where it was then pumped to the upper levels of the mine to be reused in the development works.[417]

223 In June 2018, IMC's external consultant J Ramón del Peru S.A.C. confirmed that the mine effluents complied with the MPLs,[418] and the water authority (ALA) confirmed on 4 July 2018 that no mine effluents reached Parán's water sources.[419] Therefore, by early July 2018, *i.e.*, three and a half months **before** the Blockade, IMC's water management system was up and running, and official documents confirmed that no mine effluents reached Parán's water sources. Thus, as a temporal matter, it was not possible for supposed water concerns to give rise to the Blockade.

224 Although the implementation of IMC's water management system was the key measure to address Parán's water pollution concerns, IMC took further actions throughout time to ease Parán's concerns. For instance, IMC sought to involve the community in the environmental monitoring of the Project and test their periodically Parán's water sources. However, Parán actually **rejected** these proposals. Indeed:

- during the first quarter of 2018, the IMC CR Team visited the Parán Community several times to promote its proposal to create a Community environmental monitoring committee, the purpose of which was to allow active participation of the Parán community members in the socio-environmental monitoring of the Project;[420] Parán rejected this proposal every time;[421] and

[417] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 23-24 (para. 55); MINAM, Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 23.

[418] MINAM, Directorial Resolution No. 2203-2018-OEFA/DFAI (SPA), 27/09/2022, at **Exhibit C-399**, p. 16 (para. 42).

[419] ANA, Technical Report No. 048-2018-ANA-AAA.CF.-ALA H/KHR, 13/07/2018, at **Exhibit R-0091**, p. 10 (para. 6.3).

[420] CESEL Ingenieros, Invicta Project, EIA, December 2008 (SPA), at **Exhibit C-533**, p. 492.

[421] SSS, Report on Social Intervention for signing of an agreement with the Parán Community, 2018 (SPA), at **Exhibit C-111**, p. 8; SSS, Monthly Report, Project, April 2018 (SPA), at **Exhibit C-488**, p. 8 *et seq.* (item 2.5)

- in June[422] and September[423] 2018, IMC requested authorisation from Parán to monitor its water sources. However, Parán refused to provide such authorisation.

225 As the foregoing shows, IMC took active measures to address Parán's alleged water pollution concerns. IMC implemented the water management system required by the OEFA and further sought to involve Parán in the Project's environmental monitoring. Peru's contention that IMC ignored Parán's water pollution concerns is thus baseless.

5.2.3 IMC did not obstruct the investigation of Parán's water pollution concerns

226 Peru contends baselessly that IMC obstructed the ALA's investigation of Parán's water pollution concerns by refusing to allow an inspection of the Project's water sources on 7 May 2018.[424] This criticism is unwarranted.

227 By way of context, on 11 April 2018, the Parán Community requested the ALA to conduct a visual inspection to verify the quality of the Parán community's water sources.[425] A few days later, on 30 April 2018, the ALA requested that IMC participate in that inspection,[426] which took place on 7 May 2018 with the participation of ALA representatives, IMC's personnel, members of the Parán Community and the Leoncio Prado Subprefect, Mr Soyman Retuerto. The day of the inspection, once the Parán Community's water sources had been inspected, Mr Retuerto proposed accessing the mine adit to inspect the Project's water sources. However, as stated in the minutes of the inspection, IMC could not authorise this inspection as the participants did not have the requisite insurance to access the adit and thus, there was a significant risk to the participants and Invicta itself.[427] Indeed, the mine tunnels are excavated

[422] SSS, Monthly Report, Project, June 2018 (SPA), at **Exhibit C-157**, p. 8.

[423] J. Ramón, Environmental Monitoring Report, September 2018 (SPA), at **Exhibit C-407**.

[424] Counter-Memorial, 24/03/2022, p. 95 *et seq.* (para. 194).

[425] Letter from the Parán Community (W. Narvasta) to Huaura Local Water Authority, 10/04/2018, at **Exhibit R-0077**.

[426] MINAR, Multiple Citation No. 003-2018-ANA-AAA.CF.-ALA-H/KHR from ANA (V. Pineda) to Invicta Mining Corp. S.A.C. (J. Castañeda), 26/04/2018, at **Exhibit R-0078**.

[427] ANA, Record of Field Technical Verification, 07/05/2018, at **Exhibit R-0080**, p. 8.

in the hills, so once inside the mine adit there is a risk of landslides and rocks falling. Also, IMC was in the mine preparation and development phase, so there was vehicular traffic inside the mine.[428]

228 Contrary to Peru's contention, the fact that IMC was unable to authorise access to the mine adit does not evidence an attempt by IMC to obstruct the work of the ALA or a lack of collaboration.[429] First of all, blocking regulators from inspecting a mine on the verge of production would be counterproductive. But more importantly, allowing such access would have exposed IMC to serious civil and criminal liability. Mining companies in Peru are legally required to take out Supplementary Risk Work Insurance ("**SCTR**", which is the Spanish acronym for "*Seguro Complementario de Trabajo de Riesgo*"), which provides coverage for occupational accidents and illnesses to their employees and workers engaged in high-risk activities.[430] IMC's employees are covered by this insurance, but not the Project's occasional visitors, who are legally required to take out this insurance for safety purposes.[431] This is an important requirement which, if not respected, can lead not only to IMC's civil liability for any problems/damage that may arise in its facilities, but also to criminal liability in the event of an accident involving an occasional visitor to the Project.[432] The participants in the inspection conducted on 7 May 2018 had not taken out this insurance because the purpose of the

[428] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 26-27 (para. 60).

[429] Counter-Memorial, 24/03/2022, p. 6 (para. 14).

[430] Law No. 26790, Law on the Modernisation of Social Security in Health Care (SPA), 17/05/1997, at **Exhibit C-534**, p. 14 (Art. 19); Supreme Decree No. 009-97-SA, Regulation for the Law on the Modernisation of Social Security in Health (SPA), 09/09/1997, at **Exhibit C-535**, Annex 5.

[431] Supreme Decree No. 009-97-SA, Regulation for the Law on the Modernisation of Social Security in Health (SPA), 09/09/1997, at **Exhibit C-535**, p. 28 (Art. 82); Supreme Decree No. 003-98-SA, Normas Técnicas del SCTR (SPA), 14/04/1998, at **Exhibit C-536**, p. 5 (Art. 5).

[432] Law No. 29783, Law on Safety and Health at Work (SPA), 20/08/2011, at **Exhibit C-537**, p. 31 (Art. 103); Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 26 *et seq.* (para. 60).

inspection was to verify Parán's water sources, not those of the Invicta mine.[433]

229 In any event, as explained in the previous Section, the ALA was able to inspect IMC's water sources less than two months later, on 4 July 2018, confirming that no mine effluents reached Parán's water sources.[434]

230 Peru further contends that "[a] report on the findings of the inspection [carried out on 7 May 2018] indicate that the Parán Community's water sources, including basins from which children from the Parán Community drank, contained oxide residues which discoloured the water."[435] This is false. Nowhere in the inspection minutes is it stated that Parán's water contains oxide residues. The minutes only state that "it is observed that murky water with a whitish hue is observed to flow/run".[436] Even the Subprefect of Leoncio Prado, Mr Soyman Retuerto, who opposed the Project and participated in the mine invasions with the Parán community members, has confirmed there was no evidence of water pollution in Parán.[437]

5.3 IMC promptly and systematically addressed all environmental requirements by the OEFA

231 Peru and its community relations and environmental expert, Mr Daniel Vela, refer to OEFA findings of environmental infractions by IMC in the period 2015-2018, arguing that these infractions were a "key source of dispute between Invicta and the Parán Community", and that "the Parán

[433] MINAR, Multiple Citation No. 003-2018-ANA-AAA.CF.-ALA-H/KHR from ANA (V. Pineda) to Invicta Mining Corp. S.A.C. (J. Castañeda), 26/04/2018, at **Exhibit R-0078**; MINAR, Multiple Citation No. 003-2018-ANA-AAA.CF.-ALA-H/KHR from ANA (V. Pineda) to the Parán Community (W. Narvasta), 26/04/2018, at **Exhibit R-0079**.

[434] ANA, Technical Report No. 048-2018-ANA-AAA.CF.-ALA H/KHR, 13/07/2018, at **Exhibit R-0091**, p. 8 *et seq.* (paras. 5.2 and 6.3).

[435] Counter-Memorial, 24/03/2022, p. 95-96 (para. 194)

[436] ANA, Record of Field Technical Verification, 07/05/2018, at **Exhibit R-0080**, p. 4.

[437] See Interview with Leoncio Prado Subprefect (MININTER) (Video) (SPA), 08/07/2019, at **Exhibit C-528**; Interview with Leoncio Prado Subprefect (MININTER) (Video Transcript) (SPA), 08/07/2019, at **Exhibit C-529**.

Community's concerns regarding potential environmental damage were legitimate."[438]

232 *In limine*, Peru and its expert conflate Parán's alleged water pollution concerns (addressed in the prior Section) with the environmental infractions found by the OEFA to suggest that **all** these issues would have generated concern in Parán,[439] fuelling IMC's looming conflict with the community.[440] This is not the case. In fact, the only environmental concern voiced by the Parán Community related to the impact of the Project on the community's water sources, *i.e.*, the risk of water pollution. The specific infractions found by the OEFA were never the subject of complaint by Parán and thus were not, and could not have been, a cause of its rejection of the Project.

233 It is true that the OEFA found some specific infractions by IMC in the period 2015-2018, but IMC promptly and systematically remedied all of them, despite its disagreement with some of the OEFA findings[441] and the irregularities in the inspections leading to such findings, some of which were carried out without the presence of IMC staff.

234 For instance, Mr Vela, Peru's expert, refers to an inspection conducted from 19 to 20 February 2016 during which the OEFA found that IMC had failed to service the drainage ditches located on the access road to the

[438] Counter-Memorial, 24/03/2022, p. 87 (para. 178).

[439] Counter-Memorial, 24/03/2022, p. 87 (para. 178) ("However, the contemporaneous evidence demonstrates that Claimant failed to comply with its environmental obligations, and that the Parán Community's concerns regarding potential environmental damage were legitimate"); Expert Report of Daniel Vela, 22/03/2022, p. 42 (para. 124) ("The reiteration of [environmental] breaches [found by the OEFA] and the times when those were identified, investigated and penalized suggest a strong correlation with the opposition of the rural Parán Community to the Invicta project, and lend credibility to the obvious concern of the Parán Community about a perceived deterioration of the environment associated with the mining project.")

[440] Counter-Memorial, 24/03/2022, p. 156 *et seq.* (Section II.F.2.).

[441] For instance, some of the OEFA inspections were carried out between June 2015 and February 2018, when IMC was negotiating with the Lacsanga and Parán communities to secure an access road to the Project. IMC should not have been held liable for infractions found during this period as the company did not have regular access the Site. See Supreme Decree No. 006-2017-JUS, General Administrative Procedure Act (SPA), at **Exhibit C-538**, p. 2 (para. 1.4, principle of reasonableness).

Invicta mine. Mr Vela argues that this a sensitive "breach" due to the importance of the correct management of the mine's effluents.[442]

235 Mr Vela's assertion is inaccurate from a technical standpoint because, as explained by Mr Castañeda, the servicing of the drainage ditches located on the access road to the Invicta mine was aimed at diminishing the risk of landslides, which had nothing to do with the management of mine effluents.[443] In any event, and despite the irregularities that transpired during this OEFA inspection, such as the absence of IMC personnel,[444] IMC took prompt measures to address the OEFA's observations. Indeed, it took IMC only two months to service the drainage ditches[445] once it had been notified of the finding in August 2018.[446] Beyond this isolated incident, IMC would periodically service the drainage ditches, especially during the rainy season.[447]

236 Peru further refers to the inspection carried out by the OEFA between 18-19 September 2015, which concluded that IMC had failed to segregate its solid and non-solid waste and to properly dispose of sludge as well as installing a biodigester instead of septic tanks, contrary to its EIA.[448]

237 It is true that the OEFA found these discrepancies, but again IMC took prompt action to address them. On 4 January 2016, *i.e.*, three and a half months after this inspection, IMC sent a detailed report to the OEFA (with photographs) proving the implementation of corrective measures.[449] IMC only departed from the OEFA's requirements in relation to the implementation of septic tanks because, as IMC explained to the OEFA,

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[442] Expert Report of Daniel Vela, 22/03/2022, p. 43 (para. 128).

[443] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 27-28 (para. 63).

[444] Directorial Resolution No. 2203-2018-OEFA/DFAI, 27/09/2018, at **Exhibit R-0074**, p. 6 *et seq.* ("Analysis of Objections").

[445] Letter from IMC to OEFA (SPA), 06/11/2018, at **Exhibit C-410**.

[446] OEFA, Directoral Resolution No. 1924-2018-OEFA-DFAI (SPA), 24/08/2018, at **Exhibit C-409**. The inspection was conducted from 19 to 20 February 2016.

[447] Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 27-28 (para. 63).

[448] Directorial Resolution No. 2005-2018-OEFA/DFAI (SPA), 29/08/2022, at **Exhibit C-411**, 3 *et seq*. (Sections III.1, III. 2, and III.3).

[449] Letter from IMC to OEFA (SPA), 04/01/2016, at **Exhibit C-412**.

biodigesters are a much better system for disposing of human waste, virtually eliminating any soil and water pollution.[450]

238 The OEFA received IMC's 4 January 2016 report and said nothing in response. However, unexpectedly, on 28 August 2018, *i.e.*, more than **two and a half years later**, the OEFA issued Directorial Resolution No. 2005-2018-OEFA/DFAI, concluding that the corrective measures implemented by IMC were insufficient and ordering the company to implement further measures to remediate the three abovementioned infractions, failing which it would be fined.[451]

239 In stark contrast with the OEFA's belated resolution, on 2 October 2018, *i.e.*, only one month and one week after being notified with said Resolution, IMC informed the OEFA that it had implemented the corrective measures pertaining to the first breach (segregation of solid and non-solid waste).[452] On 19 October 2018, IMC requested a time extension to implement the corrective measures pertaining to the second (sludge disposal) and third (septic tanks) infractions due to the Blockade.[453] The authority acknowledged the Blockade as a *force majeure* event, granting the requested time extension.[454] IMC renewed its extension request on 13 November 2018[455] and 15 April 2019[456] given the persistence of the Blockade, being finally unable to comply with the OEFA requirements.

[450] Letter from IMC to OEFA (SPA), 04/01/2016, at **Exhibit C-412**, p. 16; Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 29 (para. 65). The biodigester existing at the Invicta mine was installed by Invicta's prior owner in 2011.

[451] Directorial Resolution No. 2005-2018-OEFA/DFAI, 29/08/2018, at **Exhibit R-0072**.

[452] MINAM, Directorial Resolution No. 2765-OEFA-DFAI (SPA), 19/11/2018, at **Exhibit C-539**, p. 2 (para. 6).

[453] MINAM, Directorial Resolution No. 2765-OEFA-DFAI (SPA), 19/11/2018, at **Exhibit C-539**, p. 2 (para. 7).

[454] MINAM, Directorial Resolution No. 2765-OEFA-DFAI (SPA), 19/11/2018, at **Exhibit C-539**, p. 7 (Art. 1).

[455] MINAM, Directorial Resolution No. 2765-OEFA-DFAI (SPA), 19/11/2018, at **Exhibit C-539**, p. 2 (para. 8).

[456] Letter from IMC to OEFA (SPA), 15/04/2019, at **Exhibit C-540**.

240 Peru further refers to the inspections conducted by the OEFA from 10 to 12 June 2017[457] and 27 February to 4 March 2018,[458] during which the OEFA found that Invicta's mine effluents contained cadmium, copper and zinc in excess of the MPLs.

241 As an initial matter, there were serious irregularities in these inspections and the ensuing OEFA Resolutions. The 10 to 12 June 2017 inspection was carried out without the participation of IMC personnel,[459] and the OEFA Resolution issued following the 27 February to 4 March 2018 inspection was declared null and void due to the violation of due process principles.[460] Unsurprisingly, Peru does not mention any of this when relying on these two OEFA inspections to build its artificial ESG case.

242 In spite of this, as explained in section 3.3.2 above, in mid-2018, IMC implemented its water management system to ensure that the Invicta mine effluents complied with the MPLs (which IMC's external consultant J. Ramón del Perú S.A.C. confirmed was the case in June 2018)[461] and do not reach Parán's water sources (which the ALA confirmed was the case in July 2018).[462]

243 Peru refers to two additional infringements found in the inspection conducted by the OEFA from 27 February to 4 March 2018, namely, that IMC improperly disposed of its non-hazardous solid waste by discharging it at the community of Quintay's landfill, and also failed to implement the waste rock deposit required by its 2009 EIA.[463] Again, IMC took prompt action to address these observations.

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[457] Directorial Resolution No. 2203-2018-OEFA/DFAI, 27/09/2018, at **Exhibit R-0074**, p. 1.

[458] Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17/12/2019, at **Exhibit R-0062**, p. 1.

[459] Directorial Resolution No. 2203-2018-OEFA/DFAI, 27/09/2018, at **Exhibit R-0074**, p. 7.

[460] Resolution No. 158-2021-OEFA-TFA-SE ("Resolución Núm. 158-2021-OEFA-TFA-SE"), 25/05/2021, at **Exhibit DV-0010**, p. 49 (point 1).

[461] Directorial Resolution No. 2203-2018-OEFA/DFAI, 27/09/2018, at **Exhibit R-0074**, p. 16 (para. 42).

[462] ANA, Technical Report No. 048-2018-ANA-AAA.CF.-ALA H/KHR, 13/07/2018, at **Exhibit R-0091**, p. 8 *et seq.* (paras. 5.2 and 6.3).

[463] MINAM, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27/06/2018, at **Exhibit C-404**, p. 37 *et seq.* (paras. 105-113).

244 This OEFA inspection took place when IMC had just resumed its mine development activities, which is why the amount of non-hazardous solid waste that IMC generated was moderate – and had been minimal until mid-February 2018. At the time of this inspection, IMC disposed of its non-hazardous waste at a sanitary landfill in the Quintay community, which had a license to receive and store non-hazardous waste.[464] This was not contrary to IMC's 2009 EIA, which required IMC to implement a sanitary landfill during the mine development phase but did not fix a specific deadline for doing so.[465] In spite of this, less than one month after the inspection, IMC informed the OEFA that it was evaluating the implementation of its sanitary landfill.[466] Ultimately, the OEFA's Tribunal for Environmental Auditing annulled the fine imposed on IMC due to the violation of its due process right, something which, again, Peru does not mention when relying on this OEFA inspection.[467]

245 In relation to IMC's waste rock deposit, the OEFA's finding was that, pursuant to its own 2009 EIA, IMC had to implement one waste rock deposit in a precise location but instead it was found to have two waste rock deposits located 50 metres and 430 metres from the correct location.[468] IMC explained to the OEFA that these two waste rock deposits pre-dated Lupaka's acquisition of the Project,[469] and that the company had impermeabilized one of them to avoid contact with rainwater.[470] IMC further committed to building the new waste rock deposit as per its 2009

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[464] SSS, Weekly Report, Project (SPA), 19/03/2018 to 25/03/2018, at **Exhibit C-413**, p. 11.

[465] MINAM, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27/06/2018, at **Exhibit C-404**, p. 37 (para. 107); Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 154 *et seq.* (item 3.11.1) and p. 396 (Table 5.3.1-1). The OEFA had not requested IMC in the past to implement its landfill, and IMC had just resumed operations after a suspension period of two and a half years.

[466] IMC, Statement of Objections (SPA), 26/03/2018, at **Exhibit C-405**, p. 6.

[467] Resolution No. 158-2021-OEFA-TFA-SE ("Resolución Núm. 158-2021-OEFA-TFA-SE"), 25/05/2021, at **Exhibit DV-0010**, p. 49 (Third).

[468] MINAM, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27/06/2018, at **Exhibit C-404**, p. 28 (para. 76).

[469] MINAM, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27/06/2018, at **Exhibit C-404**, p. 28 *et seq.* (paras. 77 and 83).

[470] MINAM, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27/06/2018, at **Exhibit C-404**, p. 32 (para. 90).

EIA,[471] which was ongoing when Parán set up its illegal Blockade and could not be completed as access to the Site remained obstructed. The fine imposed to IMC for this infraction was subsequently annulled due to the violation of its due process right.[472]

246 Peru's expert, Mr Vela, states that IMC would have failed to comply with its obligation to carry out water, air and noise quality testing during the first three quarters of 2018, a breach that he argues would project a negative image of IMC to the Rural Communities.[473] This allegation is largely incorrect.

247 IMC did not conduct environmental testing in the first quarter of 2018 because its development activities only resumed in mid-February 2018, after having been suspended for more than two and a half years due to IMC's negotiations with the Lacsanga and Parán communities to secure an access road to the Site. The OEFA was aware of this.[474] But IMC did conduct environmental testing for the second and third quarters of 2018. What is more, in June 2018, IMC sent the environmental testing report prepared by J. Ramón del Perú S.A.C. to the OEFA.[475] This same consultant conducted the testing for the third quarter of 2018.[476]

248 Peru refers to an inspection conducted by the water authority on 4 July 2018, where it was "concluded that Invicta was using water from Quebrada Ruraycocha, a creek belonging to the Lacsanga Community, without having obtained the legally-required water use rights".[477] Peru's choice of

[471] MINAM, Supervision Report No. 238-2018-OEFA/DSEM-CMIN, 27/06/2018, at **Exhibit C-404**, p. 32 (para. 94).

[472] Resolution No. 158-2021-OEFA-TFA-SE ("Resolución Núm. 158-2021-OEFA-TFA-SE"), 25/05/2021, at **Exhibit DV-0010**, p. 49 (Second).

[473] Expert Report of Daniel Vela, 22/03/2022, p. 43 (para. 127).

[474] Letter from IMC to OEFA (SPA), 27/03/2018, at **Exhibit C-402**; Letter from IMC to OEFA (SPA), 27/03/2018, at **Exhibit C-403**.

[475] Directorial Resolution No. 2203-2018-OEFA/DFAI, 27/09/2018, at **Exhibit R-0074**, p. 16 (para. 42).

[476] J. Ramón, Environmental Monitoring Report, September 2018 (SPA), at **Exhibit C-407**, p. 19 et *seq.* (Section Conclusions).

[477] Counter-Memorial, 24/03/2022, p. 167 (para. 326).

words suggests that IMC was using water from said creek without authorisation from the Lacsanga Community, which is not the case.

249 On 31 March 2015, IMC and the Lacsanga Community signed an agreement whereby IMC was authorised to lay a pipeline across Lacsanga land to collect water from the Ruraycocha creek in exchange for payment of PEN 17,000 (approximately USD 4,300) to the community.[478] Later in 2015, IMC paid this amount to Lacsanga,[479] hired Lacsanga community members to lay the pipeline[480] and started a procedure before the ALA to obtain a water use license for the Ruraycocha creek.[481] The Lacsanga Community authorities changed in late 2016[482] and the new authorities decided to disregard the agreement with IMC, which withdrew its water use license application on 22 May 2017 so as not to hinder its ongoing negotiations with Lacsanga of the surface agreement.[483] IMC and the Lacsanga Community signed the surface agreement on 18 July 2017 and, in early 2018, the Lacsanga authorities again authorised IMC to use the Ruraycocha creek.[484] On 4 July 2018, before IMC had resubmitted its water use license application, the ALA conducted an inspection finding that IMC was using water from the Ruraycocha Creek without a water license, for which it fined the company with PEN 8,715 (approximately USD 2,500).[485]

250 As the foregoing shows, IMC had an agreement with the Lacsanga Community to use water from the Ruraycocha Creek and timely paid the community for such use. IMC also started the corresponding procedure

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[478] Agreement between IMC and the Lacsanga Community (SPA), 31/03/2015, at **Exhibit C-42**, p. 2 (Second Clause).

[479] Minutes of Lacsanga Community Extraordinary General Assembly (SPA), 10/10/2015, at **Exhibit C-541**.

[480] IMC, CR Team Report No. 05-2015/RRCC, May 2015 (SPA), at **Exhibit C-386**; Letter from IMC to the Lacsanga Community (SPA), 21/08/2015, at **Exhibit C-542**.

[481] Letter from IMC to Huaura ALA (SPA), 15/07/2015, at **Exhibit C-543**.

[482] Letter from Lacsanga Community to IMC (SPA), 13/12/2016, at **Exhibit C-544**.

[483] Letter from IMC to ANA-ALA (SPA), 22/05/2017, at **Exhibit C-545**.

[484] IMC, Minutes of Lacsanga Community Social and Environmental Supervision (SPA), 26/02/2018, at **Exhibit C-546**.

[485] The ALA fined IMC with 2.1 UITs. In 2018, 1 UIT = PEN 4,150, so 2.1 UIT = PEN 8,715. See **C-547**.

before the ALA to obtain a water use license, which, however, had to be discontinued so as not to hinder IMC's ongoing negotiations with Lacsanga of the surface agreement. IMC's only failure was to delay its reapplication for a water use license, which IMC was to do shortly after the ALA's inspection. If anything, this incident shows that IMC was respectful of the rights of the Rural Communities and sought to comply with Peruvian law.

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251 While it is true that the OEFA found specific environmental infractions from time to time, IMC promptly and systematically addressed them, implementing the appropriate corrective measures. None of the OEFA's findings were the subject of a complaint by the Parán Community, and hence could not have fuelled its opposition to the Project – which, as explained in Section 2 above, was driven by Parán's plan to exploit the mine and protect its marijuana business. The infractions found by the OEFA did not jeopardise the development of the Project either, which was on the verge of production when Parán set up its illegal Blockade. They are therefore red herrings relied upon by Peru as a post hoc justification for its failure to protect the Claimant's investment.

6 PERU'S ACTS AND OMISSIONS DESTROYED THE PROJECT

252 Peru contends that it acted "with due diligence" in the face of IMC's conflict with the Parán Community. Specifically, Peru argues that "[its] reaction to [the conflict] […] was reasonable, even-handed, taken in accordance with due process, and based on sound principles of Peruvian law",[486] that "[it] took diligent and reasonable actions in relation to the [invasions carried out by the Parán Community]",[487] and that it made "numerous efforts to assist the Claimant".[488] As demonstrated in the remaining of this Section, these assertions are unsubstantiated.

[486] Counter-Memorial, 24/03/2022, p. 2 (para. 4).

[487] Counter-Memorial, 24/03/2022, p. 6 *et seq.* (para. 17).

[488] Counter-Memorial, 24/03/2022, p. 7 (para. 18).

253 Peru was aware at least since October 2017 of the risk of Parán invading the Site (**Section 6.1**), despite which it failed to prevent the June 2018 Invasion by the Parán Community and to subsequently prosecute and sanction accordingly (**Section 6.2**).

254 Parán committed in September 2018 to refrain from all acts of violence against IMC, but breached its commitment less than a month later by setting up the Blockade (**Section 6.3**). The Police failed to intervene and lift the Blockade shortly after Parán had set it up, despite being obliged to do so under Peruvian law (**Section 6.4**), and the MININTER refused to authorise a police intervention in mid-February 2019 for no valid reason (**Section 6.5**).

255 IMC persisted in its efforts to reach an agreement with Parán, which committed to lift the Blockade on 26 February 2019. However, Parán breached its commitment once again (**Section 6.6**), failing to lift the Blockade and only allowing IMC to enter the Site through Parán's territory on foot for two weeks, after which Parán violently evicted IMC's staff from the Site. Despite Parán's flagrantly illegal behaviour, Peru continued to refuse to authorise a police intervention (**Section 6.7**). Parán persisted to act violently in the following months, shooting at members of IMC's security team who had accessed the Site in May 2019 unimpeded (**Section 6.8**). Peru stood, again, as a mute witness, leading IMC to lose its investment in August 2019 and allowing Parán to illegally exploit the mine from then on (**Section 6.9**).

6.1 Peru was aware at least since October 2017 of the risk of an invasion by Parán

256 Peru contends that "[the] Claimant first involved Peru in its emerging conflict [with the Parán Community] in June 2018, [redacted] This initial protest began on 19 June 2018 and ended the same day."[489] This is demonstrably false. Indeed, Peru's Police and its

[489] Counter-Memorial, 24/03/2022, p. 246 (para. 517).

intelligence service were aware at least since October 2017 – a full eight months earlier – of the risk of an invasion of the Site by Parán.

257 In October 2017, [redacted] IMC's CR Team found out through [redacted] contacts in the Parán Community that a group of Parán members intended to access the Site without authorisation under the excuse that IMC was already extracting ore from the Invicta mine (they said they heard explosions during the night).[490] This was, of course, false, as all IMC activities at the mine were suspended at the time.[491] [redacted] informed Mr Castañeda, then IMC's general manager, of this situation, following which IMC contacted Major Andrés Rosales Andrade, Chief of Sayán Police, and Colonel Fernández, Chief of Huacho's Police Division (DIVPOL), to request them to prevent Parán's members from illegally accessing the Site.[492]

258 Following this first contact, IMC's CR Team held meetings with Major Andrés Rosales Andrade, Colonel Walter Fernández Martinez and Senior Police Officer Henrry Lezcano to discuss a plan to counter the potential invasion by Parán. As part of these meetings, Colonel Fernández instructed Major Rosales to conduct intelligence investigations in Parán's Huamboy area as it was considered a "red zone" due to former terrorists and drug smugglers operating in the area, and also pointed out that members of the Narvasta family living in the area had arrest warrants. It is understood that Colonel Fernández thought that these Parán community members were behind the potential invasion.[493] In parallel, IMC informed the Parán President about the risk of invasion, requesting him to take action to prevent it.[494] In the end, the Parán Community backtracked on its decision to access the Site.

259 [redacted] remained in contact with Major Rosales from November 2017 onwards. Indeed, Major Rosales was a key contact for IMC given the

[490] SSS, Monthly Report, Project, October 2017 (SPA), at **Exhibit C-459**, p. 4; SSS, Weekly Report, Project (SPA), 23/10/2017 to 29/10/2017, at **Exhibit C-460**, p. 1.

[491] Letter from IMC to OEFA (SPA), 27/03/2018, at **Exhibit C-402**; Letter from IMC to OEFA (SPA), 27/03/2018, at **Exhibit C-403**.

[492] SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-414**, p. 6.

[493] *Id.*

[494] Letter from IMC to the Parán Community (SPA), 07/11/2017, at **Exhibit C-118**.

intelligence work he was conducting in the Huamboy area,[495] and also because in his capacity as Chief of Police in Sayán, the nearest police station to the Site, he was regularly visited by members from the three Rural Communities. During the first semester of 2018, Major Rosales shared information [redacted] to help IMC anticipate possible attacks by Parán.[496] [redacted] relationship with Major Rosales was cordial as he was very receptive to IMC's concerns.[497]

260 As shown above, Peru was aware of the threat posed by the Parán Community to the Project since, at least, October 2017. Police officials regularly communicated with IMC's CR Team about this threat and were further aware of the danger presented by some of Parán's members. Peru's contention that "[the] Claimant first involved Peru in its emerging conflict [with the Parán Community] in June 2018"[498] is therefore provably false.

6.2 Peru failed to protect the Claimant's investment during the June 2018 Invasion

261 Peru contends that it "acted promptly, reasonably and diligently" in relation to the June 2018 Invasion. Furthermore, Peru argues that "Claimant's assertion that Peru should have adopted measures to *prevent* the 19 June 2018 Protest is unreasonable",[499] and that its **response** to said invasion "was entirely consistent with Peruvian law".[500] Not only are these allegations baseless, they are an express disavowment of Peru's international obligations under the FTA.

262 Indeed, Peru's contention that it acted "reasonably and diligently" in relation to the June 2018 Invasion is belied by the active role it played in inciting said invasion (**Section 6.2.1**). In any event, Peru could have

[495] SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-414**, p. 6.

[496] SSS, Weekly Report, Project (SPA), 20/11/2017 to 24/11/2017, at **Exhibit C-445**, p. 3; SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-461**, p. 3.

[497] SSS, Weekly Report, Project (SPA), 09/04/2018 to 15/04/2018, at **Exhibit C-462**, p. 7.

[498] Counter-Memorial, 24/03/2022, p. 246 (para. 517).

[499] Counter-Memorial, 24/03/2022, p. 106 (para. 212) (emphasis in the original).

[500] Counter-Memorial, 24/03/2022, p. 108 (para. 217)

prevented Parán's armed invasion, but failed to do so (**Section 6.2.2**) and also to sanction Parán's invaders (**Section 6.2.3**).

6.2.1 Peruvian officials actively incited and participated in the June 2018 Invasion

263 Peru attempts to distance itself from the June 2018 Invasion, arguing that it "acted promptly, reasonably and diligently" upon the invasion of the Site by "approximately 250 members of the Parán Community".[501] But this is an incomplete presentation of the facts that seeks to hide the fact that Peruvian authorities – such as the Leoncio Prado Subprefect – played an active role in inciting and carrying out said invasion.

264 Leading up to the June 2018 Invasion, the CR Team identified a controversial figure within the MININTER who seemed interested in pushing an anti-mining agenda among the Rural Communities. Indeed, as early as August 2017, Leoncio Prado's Subprefect, Mr Soyman Román Retuerto, stoked conflict between IMC and the Rural Communities for his own benefit.[502]

265 In Peru, District Subprefects act as the MININTER's direct representatives within the territorial scope of their jurisdiction (*i.e.,* the district). They are appointed by Resolution of the General Director of Interior Government of the MININTER, and their functions include "supervising compliance with the laws and regulations in force" within their jurisdiction, "preparing the Annual Work Plan based on the Operational Plan and Institutional Strategic Plan of the Ministry of Interior" and "promoting dialogue between the authorities within its jurisdiction to ensure an adequate coordination of the Government's action."[503]

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[501] Counter-Memorial, 24/03/2022, p. 105 *et seq.* (para. 211).

[502] [redacted] SSS, Weekly Report, Project (SPA), 14/08/2017 to 19/08/2017, at **Exhibit C-444**, p. 2; SSS, Monthly Report, Project, September 2017 (SPA), at **Exhibit C-164**, p. 4; IMC, Matrix of Local Stakeholders, Invicta Project (SPA), at **Exhibit C-548**, p. 7.

[503] Ministerial Resolution No. 1973-2019-IN (SPA), 28/11/2019, at **Exhibit C-549**, p. 13 (item g).

266 In early 2018, Subprefect Retuerto began a defamatory campaign against IMC, sending letters to various State authorities making unsubstantiated allegations against IMC. Indeed, the Subprefect sent letters to the PCM,[504] the Ombudsman Office,[505] and the MEM[506] stating that according to the information found "on social media (internet)", IMC was "[playing] with the faith of the people" and its representatives were not engaging in dialogue with the Parán Community.[507] Yet, this was shortly after IMC paid PEN 300,000 (approximately USD 80,000) to Parán to settle the alleged debt further to the agreements reached by IMC under control of the prior shareholders, a payment that should have paved the way for IMC to negotiate an agreement with the community.[508] The Subprefect would further convey that IMC was "at the beginning of the exploitation", which, of course, was false.

267 IMC flagged the Subprefect's misbehaviour to his superior, the Huaura Subprefect, noting his failure to fulfil his duties as the local authority responsible for promoting social peace and ensuring the safety of private investment. In its letter to the Huaura Subprefect, IMC stated that

> "[it] strongly reject[s] the attitude that [Subprefect Retuerto] has been assuming, who is taking advantage of his role as Subprefect, has been filing documents against [the Project], misinforming the state institutions such as the [MEM] and the [PCM], [and] using the rural communities of Parán and Santo Domingo de Apache […],

[504] Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Council of Ministries (M. Aráoz), 04/01/2018, at **Exhibit R-0076**; SSS, Weekly Report, Project (SPA), 03/01/2018 to 14/01/2018, at **Exhibit C-398**, p. 3.

[505] Official Letter No. 105-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Ombudsman's Office (W. Gutiérrez), 08/05/2018, at **Exhibit R-0081**.

[506] Official Letter No. 104-2018-DGIN-LMP-HUA from Huaura Subprefect (S. Retuerto) to MINEM (F. Ismodes), 08/05/2018, at **Exhibit R-0165**.

[507] Directorial Resolution No. 2203-2018-OEFA/DFAI, 27/09/2018, at **Exhibit R-0074**.

[508] Confirmation of payment from IMC to the Parán Community (SPA), 18/12/2017, at **Exhibit C-116**, see Confirmation of payment from IMC to the Parán Community (SPA), 31/01/2018, at **Exhibit C-117**.

> communities with which [IMC] maintains a transparent communication […]."[509]

268 The Huaura Subprefect did not respond to this complaint, allowing Mr Retuerto to continue inciting opposition against the Project.

269 On 15 June 2018, IMC's CR Team held a meeting with Parán's leadership where it was informed that the Subprefect Retuerto had authorised the Parán Community to carry out the June 2018 Invasion.[510] On that same day, Mr Retuerto sent a letter to the Regional Directorate of Energy and Mines notifying it of the upcoming invasion,[511] and four days later, on 19 June 2018, he led the invasion and seizure of the Site. [redacted] [12] Notably, in its Counter-Memorial, Peru **has not denied** that one of its officials authorised the June 2018 Invasion and even led the invasion himself.

270 But Peru's active participation in, and consequent responsibility for, the June 2018 Invasion is also predicated on the actions of the Parán Community and its *Ronda Campesina* during the invasion. That participation is undisputed and, as explained in Section 9.2 below, attributable to Peru under international law.

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[509] Letter from IMC to the Lima Prefect of Lima and the Huaura Subprefect (SPA), 24/01/2018, at **Exhibit C-455**.

[510] [redacted] SSS, Monthly Report, Project, June 2018 (SPA), at **Exhibit C-157**, p. 4.

[511] Letter from Leoncio Prado Subprefect (MININTER) to MEM (SPA), 15/06/2018, at **Exhibit C-550**. See also SSS, Monthly Report, Project, June 2018 (SPA), at **Exhibit C-157**, p. 4; SSS, Weekly Report, Project (SPA), 18/06/2018 to 24/06/2018, at **Exhibit C-453**, p. 7.

[512] [redacted]

271 [redacted] the role of the members of Parán's *Ronda Campesina* – all of whom were armed – during the invasion was to surround the areas adjacent to IMC's mining camp to prevent anyone from escaping and then to act as a strike force. The *Ronda Campesina* also escorted other Parán invaders to the premises, the camp and the main adit, and further expelled from the Site Lacsanga members who were working on the day of the invasion by shooting at them.[513]

272 The actions taken by Peru to incite and carry out the June 2018 Invasion belie its assertion that it acted "reasonably and diligently" in the circumstances.

6.2.2 Peru failed to prevent the June 2018 Invasion

273 Peru contends that "Claimant's assertion that Peru should have adopted measures to *prevent* the 19 June 2018 Protest is unreasonable."[514] According to Peru, "[t]he [Police] would have required considerable notice to pre-emptively intervene to stop the Parán Community from following through on its plan for that protest",[515] which it alleges it did not have. This is an interesting position for Peru to take, instead of quarrelling over whether it was obligated to exercise its police powers – which, of course, it was; it contends that it only has to do so if it has sufficient advanced notice. It is not for this Tribunal to decide **how much** notice is sufficient, but rather whether Peru was obliged to and effectively carried out its police powers – which it did not. In any event, Peru had ample notice of the June 2018 Invasion.

274 As explained in Section 6.1 above, Peru was aware of the risk of a Parán invasion since, at the latest, October 2017, some eight months before the invasion occurred. Since then, Peru had Police officials on the ground

[513] SSS, Special Report, seizure of the Invicta Mine Camp and Facilities (SPA), 19/06/2018, at **Exhibit C-129**, p. 2.

[514] Counter-Memorial, 24/03/2022, p. 106 (para. 212) (emphasis in original).

[515] Counter-Memorial, 24/03/2022, p. 106 (para. 212). SSS, Parán Community *Ronderos* Register (prepared by Marco A. Estrada) (SPA), at **Exhibit C-551**.

(such as Major Rosales, Superior PNP Lezcano[516] and Major PNP Salcedo[517]) investigating the Parán community members identified as opponents to the Project[518] as well as Parán's marijuana business – which, as official documents from Peru show, was a major driver of Parán's opposition to the Project.[519] These Peruvian officials also had regular exchanges with members of the Parán Community, who kept them abreast of the decisions of Parán's leadership and the actions being planned.[520] They were accordingly further aware of how dangerous some of Parán's members and their families were – including the Narvasta family, whose members had outstanding arrest warrants.[521] In these circumstances, Peru's allegation that its authorities could not take measures to **prevent** the June 2018 Invasion is simply not credible, and its failure to act reflects, at the very least, recklessness or gross negligence.

275 Peru further attempts to justify its passivity by stating that:

> "[t]he PNP authorities closest to the Invicta Mine were those of the Sayán Police Station, which is located at least a two-hour drive away. Reaching the Invicta Mine from the Sayán Police Station is difficult, requiring favorable weather conditions to travel across steep, unpaved terrain. Traveling to the Invicta Mine —particularly with a large contingent of officers—thus would have required a certain minimum amount of time and planning."[522]

276 It is not true that the Sayán Police Station is located "a two-hour drive away" from the IMC's mine camp. Indeed, [redacted]

[516] SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-414**, p. 5; SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-461**, p. 3 and 5; SSS, Monthly Report Project, November 2017 (SPA), at **Exhibit C-521**, p. 12 and 15.

[517] SSS, Weekly Report, Project (SPA), 20/11/2017 to 27/11/2017, at **Exhibit C-426**, p. 6; SSS, Weekly Report, Project (SPA), 20/11/2017 to 24/11/2017, at **Exhibit C-445**, p. 4.

[518] SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-414**, p. 5.

[519] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3; Internal PCM email with attachment (SPA), 21/05/2019, at **Exhibit C-552**, p. 4; Internal MEM email with attachment (SPA), 16/10/2019, at **Exhibit C-553**, p. 2.

[520] [redacted]

[521] SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-414**, p. 6.

[522] Counter-Memorial, 24/03/2022, p. 106 (para. 213).

the route from the Sayán Police Station to IMC's mine camp can be travelled in about a one-hour drive. That Peru feels the need to exaggerate these distances is telling. The first half of the journey is on the national road system, which is in good condition. The second half is on the Lacsanga road, which is wide and in good condition since it is where IMC's trucks, dump trucks and other machinery used to go through.[523] It is clear that this distance was not too far because when the Police sought to intervene in due time, it did so. This is exactly what happened in September 2018, when a contingent of 40 police officers acted pre-emptively to avoid what would have been, at the time, a second Parán invasion of the Site.[524] Furthermore, as noted above, Peru was aware at least since October 2017 of the risk of a Parán invasion. So to suggest that it did not have sufficient time to plan and prepare to prevent future invasions by the Parán Community – such as the June 2018 Invasion, which took place 8 months later – is simply not credible.

6.2.3 Peru failed to sanction the conduct of the Parán invaders

277 Peru contends that its response to the June 2018 Invasion was adequate and "entirely consistent with Peruvian law"[525] because, shortly after IMC filed its criminal complaint on 20 June 2018 reporting on the invasion, the Sayán Police inspected the Site, [redacted] and initiated a criminal investigation.[526] While it is true that Peru took these immediate and short-lived actions, it ultimately chose not to prosecute or sanction the Parán invaders. Such a sanction would have been crucial to deter further invasions and acts of aggression, which of course, took place just a few short months later.

278 By way of reminder, [redacted] IMC's CR Team filed a criminal complaint against several members and leaders of the Parán

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523 [redacted]

524 Police approval of plan to avoid the Parán Community's invasion (SPA), 08/09/2018, at **Exhibit C-136**; CR Team Report on the Police intervention 10-12 September 2019 at the Project Site (SPA), 13/09/2018, at **Exhibit C-137**.

525 Counter-Memorial, 24/03/2022, p. 108 (para. 217).

526 Counter-Memorial, 24/03/2022, p. 108 (para. 217).

Community on 20 June 2018, the day after the invasion of the Site. The complaint (as amended) was filed for the crimes of coercion, usurpation, and aggravated damages to IMC's property.[527] Indeed, the Parán invaders had beaten IMC's staff, shot at IMC's workers, damaged IMC's property and coerced [redacted] to sign fabricated minutes stating that Parán's invasion had been peaceful.[528] IMC expected Peru to process its criminal complaint diligently and in accordance with Peruvian law, to sanction the Parán offenders and to set a precedent of legality to deter future crimes. Unfortunately, the reality was the exact opposite.

279 The Prosecutor's Office for the Huaura Province ("**Huaura Prosecutor's Office**") blatantly disregarded Peruvian law when he acted with very significant delay and absolved the Parán offenders from any responsibility despite the grave crimes committed:

- Following the admission of the complaint on 23 July 2018,[529] the Huaura Prosecutor's Office had a maximum of 8 months to conduct its preliminary investigation ("*diligencias preliminares*" in Spanish) and render a decision on whether or not to launch a preparatory investigation ("*investigación preparatoria*" in Spanish).[530] This period began running on 23 July 2018, the date on which the complaint was admitted, and expired on 23 March 2019.[531] The Huaura Prosecutor's Office failed to comply with this mandatory legal period, as it only rendered its decision on 15 June 2022,[532] *i.e.*, more than three years

[527] Law Firm Lazo, de Romaña, Criminal Case Status Report for Lupaka (SPA), 09/07/2018, at **Exhibit C-159**; Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 3 (para. 1); Summary table of complaints filed by Invicta, at **Exhibit IMM-0047**, p. 1 (Item 1).

[528] Memorial, 01/10/2021, p. 32 *et seq.* (Section 2.3.1); SSS, Special Report, seizure of the Invicta Mine Camp and Facilities (SPA), 19/06/2018, at **Exhibit C-129**, p. 1-2.

[529] Summary table of complaints filed by Invicta, at **Exhibit IMM-0047**, p. 1 (Item 1)

[530] See Court of Cassation Decision No. 144-2012 "Ancash" (SPA), 11/07/2013, at **Exhibit C-554**, p. 10. This conservatively assumes that this was a complex case. The Prosecutor will launch preparatory investigations if he considers there is some evidence of the commission of a crime. See Criminal Code of Procedure, 2004 (SPA), at **Exhibit C-555**, p. 109 *et seq.* (Arts. 334(1) and 336(1)).

[531] Criminal Code of Procedure, 2004 (SPA), at **Exhibit C-555**, p. 109 (Art. 334(2)).

[532] Huaura Prosecutor's Office website, Case File No. 1006014500-2018-4336-0 (accessed on 11/08/2022) (SPA), at **Exhibit C-556**.

after its expiry and just a few months before the Claimant lodged this submission. This delay cannot be excused by the suspension of procedural deadlines decreed as a result of the COVID-19 sanitary emergency, which was effective for the first time on 16 March 2020, *i.e.*, one year after the expiry of the legal deadline.[533]

- In its 15 June 2022 decision, the Huaura Prosecutor's Office decided not to launch a preparatory investigation, closing the case file and freeing the Parán invaders from any responsibility.[534]

280 Peru's passivity and erratic behaviour in respect of enforcing its own laws emboldened Parán offenders, who saw that their criminal actions had no negative consequences. Peru also failed to disarm the Parán *Ronda Campesina* despite the evidence of misuse of their arms during the June 2018 Invasion, which would have gone a long way to preventing future invasions and acts of aggression.

6.3 Peru's acquiescence in the Parán Community's breaches of the September 2018 Commitment

281 In its Memorial, the Claimant referred to the September 2018 Commitment, whereby the Parán President committed to refrain from all

[533] Procedural terms in Peru were suspended from 16 March 2020 to 31 October 2020, and from 31 January 2021 to 28 February 2021, *i.e.*, a total of 257 days. See Resolution of the Attorney General's Office No. 588-2020 (SPA), 16/03/2020, at **Exhibit C-557**; Resolution of the Attorney General's Office No. 733-2020 (SPA), 29/06/2020, at **Exhibit C-558**; Public Prosecutors Office, Administrative Resolution No. 842-2020-MP (SPA), 15/07/2020, at **Exhibit C-637**; Public Prosecutors Office, Administrative Resolution No. 748-2020-MP (SPA), 30/06/2020, at **Exhibit C-638**; Resolution of the Attorney General's Office No. 953-2020 (SPA), 29/08/2020, at **Exhibit C-561**; Resolution of the Attorney General's Office No. 1066-2020 (SPA), 30/09/2020, at **Exhibit C-562**; Resolution of the Attorney General's Office No. 134-2021 (SPA), 29/01/2021, at **Exhibit C-563**; Resolution of the Attorney General's Office No. 167-2021 (SPA), 07/02/2021, at **Exhibit C-564**; Resolution of the Attorney General's Office No. 209-2021 (SPA), 14/02/2021, at **Exhibit C-565**.

[534] Huaura Prosecutor's Office website, Case File No. 1006014500-2018-4336-0 (accessed on 11/08/2022) (SPA), at **Exhibit C-556**. This information was obtained from the Prosecutor's website. The Claimant has not been able to access the Huaura Prosecutor's Office decision as it lost control of IMC on 26 August 2019.

acts of violence, threats or harassment against IMC.[535] As was also noted, Parán breached such commitment less than a month after making it by setting up its illegal Blockade. The Claimant further explained that despite being aware of this breach, "[t]he central authorities were unwilling to enforce the law against the Parán Community."[536]

282 Peru does not deny that the Parán Community breached the September 2018 Commitment, nor does it deny having been aware of that breach. However, Peru attempts to excuse its failure to act by stating that "Claimant does not identify what 'law' the referenced 'central authorities' were allegedly unwilling to enforce, or even what 'central authorities' it is referring to."[537] Peru's excuse is disingenuous as the State should know its own legal framework and the duties of its authorities thereunder. Nor should the invasion of private property by armed intruders be a cause for such pedantry. In any event, the Claimant clarifies this below.

283 Shortly after the June 2018 Invasion, Mr Castañeda filed before the Huaura Subprefect, Ms Bertila Hijar González, a request for protective measures for IMC personnel ("*Solicitud de Garantías Personales*" in Spanish).[538] In Peru, requests for protective measures are governed by Directive No. 0010-2015-ONAGI-DGAP, [539] which sets out the procedure that authorities must follow upon receipt of these requests. Further to this Directive, upon receipt of Mr Castañeda's request for protective measures, the Huaura Subprefect convened Mr Castañeda and the Parán President to a hearing, [540] which resulted in the signature of the September 2018 Commitment whereby the Parán President committed to refrain from all acts of violence, threats or harassment against IMC. This agreement was

[535] Memorial, 01/10/2021, p. 38 (para. 115); Minutes of the Subprefect meeting between IMC and the Parán Community including September 2018 Commitment (SPA), 18/09/2018, at **Exhibit C-139**, p. 2.

[536] Memorial, 01/10/2021, p. 38 (para. 116).

[537] Counter-Memorial, 24/03/2022, p. 114 *et seq.* (para. 227).

[538] Request by J. Castañeda to the Huaura Subprefect for protection (SPA), 26/06/2018, at **Exhibit C-128**.

[539] MININTER - ONAGI, Directive No. 0010-2015-ONAGI-DGAP (SPA), 27/11/2015, at **Exhibit C-566**.

[540] MININTER - ONAGI, Directive No. 0010-2015-ONAGI-DGAP (SPA), 27/11/2015, at **Exhibit C-566**, p. 5 (para. 7.3.1).

also signed by the Huaura Subprefect, acting in her capacity as "District Governor of the place where the events [underlying the request for protective measures] occurred".[541] Consistent with Directive No. 0010-2015-ONAGI-DGAP, the September 2018 Commitment stated that "[t]he signing of these Minutes has a decisive character and the failure of either party hereto to comply carries the responsibilities of the Law", namely **the commission of the crime of contempt of authority**.[542]

284 As stated above, Parán breached the September 2018 Commitment by setting up the Blockade. Hence, on 9 November 2018, IMC sent a letter to the Huaura Subprefect communicating Parán's breach and requesting the Subprefect to "fil[e] before the corresponding authority the complaint for **contempt of authority**".[543]

285 Upon receipt of IMC's letter, the Huaura Subprefect was obliged under Peruvian law to file a criminal complaint against Parán for the crime of contempt of authority. Indeed, Article 326(2) of Peru's Criminal Procedure Code provides that "[…] officials who, in the exercise of their powers, or by reason of their position, bec[o]me aware of the commission of any punishable act" are obliged to file a criminal complaint.[544] Had the Huaura Subprefect complied with her duty to file the criminal complaint against Parán, the Prosecutor's Office would have, in turn, been legally obliged to conduct an investigation and sanction Parán's members who had set up the Blockade.[545] But the Huaura Subprefect did not comply with her duty. In fact, she did not even respond to IMC's letter. Tellingly, Peru's criminal law expert, Mr Iván Meini, has omitted referring to the request made by

[541] MININTER - ONAGI, Directive No. 0010-2015-ONAGI-DGAP (SPA), 27/11/2015, at **Exhibit C-566**, p. 3 (para. 7.1.1).

[542] Minutes of the Subprefect meeting between IMC and the Parán Community including September 2018 Commitment (SPA), 18/09/2018, at **Exhibit C-139**, p. 2; MININTER - ONAGI, Directive No. 0010-2015-ONAGI-DGAP (SPA), 27/11/2015, at **Exhibit C-566**, p. 6 (para. 7.4.8).

[543] Letter from IMC to Huaura Subprefect (SPA), 09/11/2018, at **Exhibit C-237**, p. 2 (emphasis in original).

[544] Criminal Code of Procedure, 2004 (SPA), at **Exhibit C-555**, p. 107 (Art. 326(2)).

[545] Criminal Code of Procedure, 2004 (SPA), at **Exhibit C-555**, p. 108 (Art. 329(2)).

IMC to the Huaura Subprefect and the latter's duty to act upon such request.

286 Peru further contends that the "Claimant also provides no evidence that it exercised – let alone exhausted – any judicial remedies to enforce its bilateral agreement with the Parán Community [*i.e.*, the September 2018 Commitment]".[546] Peru does not explain what IMC should have done concretely in the circumstances. Yet, as noted, IMC filed a request before the Huaura Subprefect, which should have led to criminal sanctions against Parán for its breach of the September 2018 Commitment. This is more than sufficient to demonstrate Peru's passivity. In addition, IMC lodged numerous criminal complaints for Parán's egregious acts of violence, not just in relation to the June 2018 Invasion referred to at Section 6.2 above,[547] but also in relation to the Blockade referred to at Section 6.4 below[548] and to the March 2019 Invasion referred to at Section 6.7 below.[549] IMC further lodged criminal complaints against Parán following the failed inspections by the Huaura Prosecutor of IMC's explosives magazine on 21 December 2018[550] and 9 February 2019,[551] and for Parán's theft of IMC's explosives shortly thereafter.[552] Yet, nothing came of all these proceedings. Not once were any of Parán's members sanctioned in any way. To suggest therefore that Lupaka cannot complain because it did not exhaust every legal remedy available to it is highly cynical.

287 Equally misplaced is Peru's shallow contention that "Claimant has not provided any evidence to show that *it* performed its own obligations to the

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[546] Counter-Memorial, 24/03/2022, p. 114 *et seq.* (para. 227).

[547] Summary table of complaints filed by Invicta, at **Exhibit IMM-0047**, p. 1 (Item 1); Law Firm Lazo, de Romaña, Criminal Case Status Report for Lupaka (SPA), 09/07/2018, at **Exhibit C-159**.

[548] Summary table of complaints filed by Invicta, at **Exhibit IMM-0047**, p. 2 (item 3).

[549] Criminal complaints filed with the Sayán Police by IMC representative (SPA), 21/03/2019, at **Exhibit C-208**; Disposición Fiscal Nº 02, 24/02/2020, at **Exhibit IMM-0054**, p. 2 (Crime No. 56).

[550] Denuncia Ampliatoria, 07/01/2019, at **Exhibit IMM-0053**.

[551] IMC, Criminal complaint for aggravated theft and illegal possession of explosives (SPA), 20/02/2019, at **Exhibit C-342**.

[552] Criminal complaints filed with the Sayán Police by IMC representative (SPA), 21/03/2019, at **Exhibit C-208**; Disposición Fiscal Nº 02, 24/02/2020, at **Exhibit IMM-0054**, p. 2 (Crime No. 57).

Parán Community under this agreement".[553] Indeed, Peru does not point to any alleged breach by IMC, and Parán never alleged that IMC was in breach of its obligations under the September 2018 Commitment. This agreement was signed following a request for protective measures **filed by IMC** due to the Parán members' aggressions, not the other way around. IMC did not use violence, threats, or harassment against the Parán Community neither before nor after the September 2018 Commitment.

288 As the foregoing shows, Peru disregarded its own legal framework by failing to act against Parán following its breach of the September 2018 Commitment. Peru failed again to set a precedent of legality, sending a clear message to the Parán Community's leaders and members that their illegal behaviour would go unpunished.

6.4 Peru failed to lift Parán's Blockade shortly after its installation, despite being obliged to do so under Peruvian law

289 The Parán Community installed its illegal Blockade on 14 October 2018, cutting off access to the Site, expelling IMC's staff and taking control of the mine and camp facilities. Disturbingly, the Leoncio Prado Subprefect once again endorsed Parán's illegal taking of the mine.[554] Peru contends that its response to the Blockade was adequate, as "it relied on dialogue to broker a long-term, sustainable solution to the conflict between Claimant and the rural community."[555]

290 As the Claimant demonstrates in Section 7.2.3 below, Peru's attempt to excuse its failure to lift the Blockade on the basis that dialogue was the adequate solution is belied by its own internal contemporaneous documents. Those documents show that the State knew that dialogue was not a viable option in the circumstances because of Parán's plan to exploit the mine and protect its drug business. Notwithstanding the foregoing, the Police were obliged under Peruvian law to assist IMC in recovering control

[553] Counter-Memorial, 24/03/2022, p. 114 *et seq.* (para. 227).

[554] Interview with Leoncio Prado Subprefect (MININTER) (Video) (SPA), 21/12/2018, at **Exhibit C-526**; Interview with Leoncio Prado Subprefect (MININTER) (Video Transcript) (SPA), 21/12/2018, at **Exhibit C-527**.

[555] Counter-Memorial, 24/03/2022, p. 3 (para. 7).

of the Site because IMC so requested it within 15 days of dispossession. IMC put forward such request, to no avail.

291 Indeed, Article 920 of the Civil Code of Peru provides that:

> The possessor can repel the force that is used against him or the good and recover it, if he is dispossessed. **The action is carried out within fifteen (15) days after becoming aware of the dispossession**. […]
>
> **The National Police of Peru** as well as the respective Municipalities, within the framework of their powers provided for in the Organic Law of Municipalities, **must provide the necessary support in order to guarantee strict compliance with this article, subject to its own responsibility**.[556]

292 This Article regulates the so-called extrajudicial defence of possession (in Spanish, "*defensa posesoria extrajudicial*"), providing a possessor (such as IMC) who is dispossessed of an asset with the right to request the Police's assistance to regain possession within 15 days. Upon the filing of such a request, the Police are obliged to assist. Peru's criminal law expert, Mr Meini, agrees with this interpretation of the law.[557]

293 IMC requested Police support to recover control of the Site within 15 days of Parán's taking, in line with Article 920 of the Civil Code, to no avail. On 17 October 2018, *i.e.*, 3 days after Parán's taking of the Site, IMC sent a letter to the Lima Region Chief of Police stating that:

> "**Subject**: <u>We request Police Support to Enter, Recover, Avoid acts of vandalism and possible attacks against our facilities (Mining Camp) by community members of the Rural Community of Paran</u>
>
> It is our pleasure to greet you on behalf of Invicta Mining Corp. SAC, a company dedicated to the development of mining exploration and exploitation projects, we hereby respectfully and cordially request through its representative that you provide

[556] Civil Code of Peru ("**Civil Code**"), 24/07/1984, at **Exhibit R-0005**, p. 226 (Art. 920) (emphasis added).

[557] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 42 *et seq.* (para. 118).

> **POLICE SUPPORT to recover** and prevent acts of vandalism and the latent social conflict by the Paran Rural Community, **who have invaded, taken over our facilities and closed access to the INVICTA mining camp**, located in the Lacsanga Rural Community, Paccho district, Huaura Province, Lima Region."[558]

294 Peru knew that it was obliged to assist IMC in recovering control of the Site. On 24 October 2018, *i.e.*, seven days after IMC's request for Police support, IMC and Police representatives held a meeting where the Police stated that IMC's request had been approved, an operational plan to recover control of the Site was in the making and the police intervention would take place on either 30 or 31 October 2018.[559] However, ultimately, the Police did not intervene.

295 Peru's failure to assist IMC in regaining control of the Site is contrary to Peruvian law and IMC's rights thereunder. It is also inconsistent with the police interventions carried in the face of similar requests by mining investors. For instance, with respect to the Las Bambas mining project, on 28 April 2022, the Police deployed a 676-strong force[560] to recover control of the mine site upon the investor's exercise of its right to the extrajudicial defence of possession. The Police remained on the site guarding the project and were subsequently joined by a private security team retained by the mining company (just as IMC had planned to do so by hiring

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[558] Letter from IMC to Police Headquarters in Lima (SPA), 17/10/2018, at **Exhibit C-170**, p. 1 (emphasis added).

[559] Report on meeting between IMC, the Parán Community, the MEM and the Mayor of the District of Leoncio Prado (SPA), 24/10/2018, at **Exhibit C-173**, p. 4 (Section 4): "**Police Roadmap**. The Invicta request (Request for Police Support) **has been approved** by the Police Region of Lima and the Provinces. The PNP Major, Andrés Rosales, **has received the order to prepare the Police Operation Order for regaining access to the mine and Paran's eviction**. […] The police operation would take place **between Tuesday 30 or Wednesday 31 October**." (emphasis added).

[560] "Peruvian police evicts communities in Las Bambas mining", *teleSURtv* (SPA), 28/04/2022, at **Exhibit C-315**; "Police eviction in Peruvian mine leaves three injured and 11 arrested", *DW* (SPA), 28/04/2022, at **Exhibit C-316**; "Peruvian police carry out a new eviction of an indigenous community in the Las Bambas mine", *Euronews* (SPA), 28/04/2022, at **Exhibit C-314**; "Las Bambas: clashes between the police and community members left 14 injured and 11 detained", *Infobae* (SPA), 28/04/2022, at **Exhibit C-317**.

WDS).[561] The central government simultaneously decreed a state of emergency in the area for 30 days to allow the Police and the armed forces to take full control of the area.[562] Yet, Peru took no similar actions with respect to the Project.

6.5 Peru's refusal to authorise the Police to lift the Blockade in February 2019 was arbitrary

296 With its Memorial, the Claimant provided the document reflecting the Operational Plan to lift the Blockade dated 9 February 2019 as prepared by the Sayán Police.[563] Peru accepts that the document is authentic and was prepared by the Sayán Police, but argues that such Plan was prepared "on a contingency basis",[564] "as a way to get organized and be prepared",[565] and that the "PNP [police] took no position at that time on whether that particular Operational Plan should or would be implemented, or, if it were implemented, when that would occur."[566] None of these assertions are true. The facts show that the Police were ready to implement the Operational Plan on 19 February 2019 at 9 a.m., but that the MININTER blocked its implementation for no legitimate reason.

297 By way of background, the document dated 9 February 2019 reflecting the Operational Plan had been prepared further to IMC's 7 December 2018 requests before each of the Police and the MININTER for a police intervention to lift the Blockade, alerting these authorities of the danger

[561] "Las Bambas: mining conflict gets out of control and the crisis worsens due to attacks by community members", *Instituto de Ingenieros de Minas del Perú* (SPA), 29/04/2022, at **Exhibit C-318** ; "Las Bambas: they ask that assault and attempted rape of security personnel not go unpunished", *Instituto de Ingenieros de Minas del Perú* (SPA), 02/05/2022, at **Exhibit C-319**.

[562] "Peruvian government calls for dialogue in conflict over Las Bambas mine", *DW* (SPA), 30/04/2022, at **Exhibit C-320**.

[563] Memorial, 01/10/2021, p. 49 *et seq.* (para. 150).

[564] Counter-Memorial, 24/03/2022, p. 102 *et seq.* (para. 208).

[565] Counter-Memorial, 24/03/2022, p. 131 (para. 256).

[566] Counter-Memorial, 24/03/2022, p. 131 (para. 256).

posed by the Parán Community having access to the explosives on the Site.[567]

298 After submitting its request, IMC continued to coordinate with the MININTER on the lifting of the Blockade, and the company informed the MEM-OGGS of this during a meeting held on 16 January 2019.[568]

299 By 30 January 2019, IMC obtained internal Police information that its 7 December 2018 request was being processed favourably within the Police hierarchy[569] and that the Huacho Police had requested the seizure of the arms held by the Parán Community.[570] The CPO at Sayán, Major Soria, had also formally requested from his superiors that the special forces intervene to reinstate public order and guarantee "the security of public and private property and free transit."[571]

300 Shortly after, on 4 February 2019, the Huacho Police requested the Sayán Police[572] to prepare an Operation Plan to lift the Blockade, which was completed on 9 February 2019 and was signed by CPO Soria in Sayán on 11 February 2019.[573] The Operational Plan was a complete and final document only awaiting approval from the higher authorities. As outlined in this plan, the Police forces were to surround the Invicta mine camp, then defuse any resistance including through arrests of violent Parán members

[567] Letter from IMC to MININTER (SPA), 07/12/2018, at **Exhibit C-184**, Letter from IMC to Police Headquarters (SPA), 07/12/2018, at **Exhibit C-185**, Letter from IMC to Sayán Police (SPA), 07/12/2018, at **Exhibit C-186**; Memorial, 01/10/2021, p. 45 (para. 137).

[568] Internal MEM email, meeting (SPA), 16/01/2019, at **Exhibit C-567**; Internal MEM email, information (SPA), 16/01/2019, at **Exhibit C-568**; Internal MEM email (with attachment) (SPA), 16/01/2019, at **Exhibit C-569**, p. 2.

[569] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 20 (para. 42)

[570] Letter from Huacho Police to Chief of Lima Region Police (SPA), 25/01/2019, at **Exhibit C-338**.

[571] Huacho DIVPOL, Report No. 004-2019-REGPOL.LIMA/DIVPOL-H-CS.SEC. (SPA), 23/01/2019, at **Exhibit C-332**.

[572] Huacho DIVPOL, Decree No. 47-2019-REGIÓN POLICIAL LIMA/DIVPOL-H-OFIPLO (SPA), 04/02/2019, at **Exhibit C-340**.

[573] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**; Approval by Mayor Soria of the Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-195**.

and consolidate their position to regain control of the Site.[574] It also annexed a report by the intelligence services dated 6 February 2019 noting the situation on the ground,[575] and contained numerous issues which had been coordinated with IMC, as Mr Bravo notes.[576]

301 On 13 February 2019, the Sayán Police informed Mr Arévalo that the police intervention to lift the Blockade was scheduled to take place on 19 February 2019 at 9 a.m.[577]

302 Also on 13 February 2019, the MEM-OGGS agreed, at a meeting with Mr Bravo, that the Operational Plan should continue to be pushed forward, while the MEM-OGGS tried in parallel to engage with the Parán authorities to reinitiate dialogue with IMC.[578]

303 On 14 February 2019, the Huacho Police approved the Operational Plan, a copy of which was sent to Lima for approval.[579] Messrs Bravo, Arévalo and Estrada met with CPO Soria on that same day at 7 p.m. CPO Soria confirmed that the Operational Plan had been fully approved by the Police

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[574] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 13.

[575] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 40.

[576] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 23 *et seq.* (para. 48).

[577] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 24 (paras. 53).

[578] Email from Lupaka to LAVETA with attachment, 13/02/2019, at **Exhibit C-341**, p. 2. The MEM-OGGS' view that the Operational Plan should go ahead belies Peru's allegation in this arbitration that IMC's requests for police intervention in parallel to its attempts to dialogue with Parán would show bad faith. If anything, a Police intervention would have allowed IMC to resume its operations and guaranteed a level playing field to negotiate, a basic condition to any meaningful dialogue as the MEM-OGGS itself told Parán. See Letter from MEM to the Parán Community (SPA), 18/02/2019, at **Exhibit C-191**, p. 1 ("[…] **dialogue must be established on equal terms and on the basis of social peace**, consistent with public order. In this sense, such continuation will be exercised without any coercive measure. In this context, **the next session will be convened immediately after verifying that there is no blockade in the area, or resistance from the population against the company**") (emphasis added). Equally baseless is Peru's contention that IMC's request for police intervention was undue as it was contrary to the agreement signed by IMC and Parán on 14 October 2018, when the Blockade was set up (Minutes of the meeting between the Parán Community, IMC and Chief of Sayán Police (SPA), 14/10/2018, at **Exhibit C-166**). Indeed, this agreement was signed under coercion, just as the one signed on 19 June 2018. If Marco Estrada did not sign the agreement proposed by Parán on the day of the Blockade, his physical integrity would have been compromised. [redacted]

[579] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 25-26 (para. 57).

hierarchy and he coordinated with IMC's representatives on the final logistical details.[580]

304 A few days later, on 18 February 2019, the MEM-OGGS wrote to the Parán Community stating:

> "The time that has elapsed with the road blockade in place (more than 100 days) **will compel the relevant entities in charge to perform their duties**, within their powers and in accordance with public order and social peace. **I hereby put you on notice** for the relevant purposes."[581]

305 As this letter makes clear, the Parán Community had to lift the Blockade or otherwise the Police would use force imminently. The MEM-OGGS forwarded this letter on the same day to the Sayán Police with a request to follow up on the matter.[582]

306 Consistent with the foregoing, on 20 February 2019, the MEM-OGGS prepared an internal memorandum stating that dialogue had failed in this case because the Parán Community sought to protect its marijuana business. The community did not wish to negotiate, it wished to further its illegal marijuana business instead and was financing the Blockade with illicit drug money. As stated in the memorandum:

> "The social process that the mining company maintains with the Parán Community, **is affected by [the] presence of interests outside the State (producers of local marijuana plantations)** the MININTER is aware of this problem and is activating the corresponding mechanisms. Also, it is known that the local [Police] is preparing an operations plan in the community, **having identified long-range weapons among the community members**.
>
> RECOMMENDATIONS:

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[580] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 26 (para. 58).

[581] Letter from MEM to the Parán Community (SPA), 18/02/2019, at **Exhibit C-191** (emphasis added).

[582] Email from MEM to Chief of Sayán Police with attachment (SPA), 18/02/2019, at **Exhibit C-570**.

> Coordination at the highest inter-sectoral level, between the MEM and the MININTER in order to activate as soon as possible the mechanisms for the re-establishment of public order in the area by MININTER. **Dialogue mechanisms do not proceed in this case because community leadership manages a double discourse, with the State and with its population, evidencing with it the presence and active participation of local actors who, with an economy outside the law, subsidize activities contrary to public order against the mining project**."[583]

307 The MEM-OGGS's memorandum also refers to the fact that the Parán Community was armed with long-range weapons, which posed a major danger for the implementation of the Operational Plan. Although the memorandum states that the MININTER was planning to do something about Parán's illegal drug business and the Police would seize Parán's weapons, nothing ever occurred. Given the actions that the MININTER and the Police were planning to take, it is highly cynical for Mr Saavedra, Deputy Minister of the MININTER, to state that "[i]f Invicta considered a "criminal problem" to have existed, that should have been resolved through the appropriate police, prosecution and judicial mechanisms, according to the Peruvian legal framework."[584]

308 Having been approved by the Police hierarchy, the implementation of the Operational Plan was only contingent on the approval by the MININTER. As the memorandum referred to above states:

> "**ACTION TO BE IMPLEMENTED**: The PNP [Police] 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**. […]
>
> **RECOMMENDATIONS**: Coordination at the highest inter-sectoral level between the MEM and MININTER **in order to**

[583] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3 *et seq.* (emphasis added).

[584] Witness Statement of Esteban Saavedra Mendoza, 15/03/2022, p. 9 *et seq.* (para. 25 (d)).

> **activate as soon as possible the mechanisms for the re-establishment of public order in the area by MININTER**."[585]

309 Unfortunately, as the Deputy Minister of the MININTER, Mr Saavedra, told Mr Bravo in their WhatsApp exchanges, the MININTER did not approve the police intervention out of fear of bad press and political repercussions.[586] This was not a decision taken for legal reasons, as Peru contends in this arbitration.[587]

310 As the foregoing shows, the Operational Plan was ready to be implemented on 19 February 2019 further to the approval by the relevant Peruvian Police authorities. Only the MININTER, concerned by political optics, refused to authorise its implementation. The Parán Community was also informed that a police intervention was imminent by the MEM-OGGS. Therefore, Peru's contention that the Operational Plan was prepared "on a contingency basis"[588] and that "the PNP took no position at that time on whether that particular Operational Plan should or would be implemented"[589] is plainly false.

6.6 Peru's acquiescence in the Parán Community's breaches of the 26 February 2019 Agreement

311 It is not in dispute that on 26 February 2019, IMC and the Parán Community signed an agreement (the "**26 February 2019 Agreement**") whereby (i) the Parán Community committed to immediately "suspend all coercive measures", (ii) the Parán Community "guarantee[d] the development of the activities of the mining company [IMC] through the access road of the Parán Community" and (iii) the parties agreed "[to]

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[585] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 2 *et seq.* (emphasis added).

[586] WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192 (corrected translation)**, p. 3.

[587] Counter-Memorial, 24/03/2022, p. 3 (para. 7).

[588] Counter-Memorial, 24/03/2022, p. 102 *et seq.* (para. 208).

[589] Counter-Memorial, 24/03/2022, p. 131 (para. 256).

identify and locate the affected land (Rural Community of Parán) through a topographic survey" to be conducted on 20 March 2019.[590]

312 In its Memorial, the Claimant demonstrated that the Parán Community breached its obligations under the 26 February 2019 Agreement. Peru denies this, but its denials lack factual bases. The Claimant addresses these denials below, showing that Parán breached its obligation to lift the Blockade (**Section 6.6.1**) and to conduct the topographical survey agreed upon by the parties (**Section 6.6.2**). Despite these patent breaches, Peru supported Parán in allowing it to continue with the Blockade and to make additional claims for benefits which were not covered by the 26 February 2019 Agreement.

6.6.1 Parán breached its obligation to lift the Blockade

313 In its Memorial, the Claimant explains that the Parán Community breached its obligation to "suspend all coercive measures" as from 26 February 2019 since it refused to lift the Blockade.[591] The Parán Community only allowed IMC personnel to access the Site through the Parán road as from 4 March 2019, which had to be done on foot as such road was in an unusable condition.[592]

314 Peru denies Parán's breach, arguing that "no express condition to lift the Access Road Protest [*i.e.*, the Blockade] appears in the 26 February 2019 Agreement".[593] Peru further argues that the Parán Community only "guarantee[d] the development of the activities of the mining company […] through its territory, and not through the Lacsanga Community Access Road. Thus, […] the Parán Community's position […] is entirely

[590] Minutes of the meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement (SPA), 26/02/2019, at **Exhibit C-200**, p. 1 *et seq.*; Memorial, 01/10/2021, p. 51 (para. 154); Counter-Memorial, 24/03/2022, p. 135 *et seq.* (para. 264).

[591] Memorial, 01/10/2021, p. 51 (para. 154).

[592] Memorial, 01/10/2021, p. 52 (para. 159); Witness Statement of Luis F. Bravo, 01/10/2021, p. 18 (para. 53).

[593] Counter-Memorial, 24/03/2022, p. 138 (para. 270).

understandable […]".[594] Peru's attempt to purposefully misread the 26 February 2019 Agreement is unavailing.

315 First, the plain text of the 26 February 2019 Agreement demonstrates Peru's position to be wrong. That text **expressly** states that the Parán Community "will suspend all coercive measures" as from 26 February 2019.[595] The **only** coercive measure in place at the time of this agreement was the Blockade set up by the Parán Community on the Lacsanga road, a fact that was duly acknowledged by the relevant authorities.[596] The Parán Community was obliged to lift this Blockade and failed to do so. The fact that Parán had **also** guaranteed IMC access to the Site through Parán territory does not mean that it could fail to lift the Blockade. The agreement was for the access to be open through both the Lacsanga and Parán roads.

316 Peru's contemporaneous documents confirm Parán's obligation to lift the Blockade. A MEM report dated 28 February 2019, *i.e.*, two days after the 26 February 2019 Agreement was signed, states that "[a]t the last meeting on 26.02.2019, it was agreed, among other points, to suspend the protest measure **(abandonment of the blockade of access roads)**".[597] An internal memo of the MININTER dated 11 March 2019 further states:

> "The president of the Paran community, Mr. Azarías Torres Palomares, has stated that the workers have been allowed free access to the mining unit **[through the Parán road]** since 4 March to carry out an inventory, and that the presence of 16 to 18 community members **on the access road through the Lacsanga community has been done to prevent a conflict or attack from that community at its borders**. **Therefore, there seems to be a**

[594] Counter-Memorial, 24/03/2022, p. 137 (para. 268) (emphasis in original).

[595] Minutes of the meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement (SPA), 26/02/2019, at **Exhibit C-200**, p. 1 *et seq*.

[596] Letter from MEM to PCM (SPA), 04/01/2019, at **Exhibit C-571**, p. 4 ("[…] the coercive measure therefore **is still in place**.") (emphasis in original); Letter from MEM to PCM (SPA), 04/01/2019, at **Exhibit C-571**, p. 4.

[597] Internal MEM email with attachment (SPA), 28/02/2019, at **Exhibit C-572**, p. 2 (para. 2.3) (emphasis added).

> **willingness in the community to comply with the agreements adopted**."[598]

317 While Parán's explanations for maintaining the Blockade were not credible, this document shows that the MININTER had understood the 26 February 2019 Agreement to allow for access through both the Lacsanga and Parán roads. Other contemporaneous documents prepared by State entities confirm this understanding,[599] as did the discussions that Mr Bravo had with various central authorities at the time.[600]

318 Second, Peru's stance runs counter to common sense, as IMC would have never agreed to abandon exploiting the mine through the Lacsanga road. Indeed, IMC had invested substantial amounts of time and money to improve such road, and its agreement with the Lacsanga Community provided for yearly payments totalling PEN 80,000 for the use of its road during the full period of IMC's mining activities.[601] In fact, the whole point of IMC's insistent requests for the Blockade to be lifted was its interest in using the Lacsanga road, the only access road which had been made suitable for the transit of ore trucks and other vehicles.[602]

319 Peru did nothing to remedy the situation despite Lupaka's insistent call for assistance. Indeed, Mr Bravo explains how he sent letters, made calls and held meetings with the MEM and MININTER in the days and weeks following the 26 February 2019 meeting. Yet, nothing came of this; the State remained passive.[603]

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[598] MININTER, Report No. 00008-2019-IN_VOI_DGOP-HKRA (SPA), 11/03/2019, at **Exhibit C-573**, p. 3 *et seq.* (emphasis added).

[599] See Internal PCM *aide mémorie* (SPA), 10/07/2019, at **Exhibit C-574**, p. 2. This document, which was prepared by the Presidency of the Council of Ministers on 8 July 2019, further confirms the State's understanding that the Parán Community "committed to suspend its [force] measure".

[600] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 40-41 (paras. 101 and 103).

[601] 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 8 (Art. 8.2) ("INVICTA shall contribute the sum of S/ 80,000.00 (eighty thousand and 00/100 Soles) each year for the use of the road and for the necessary improvements to be carried out (widening, pairing, etc.)").

[602] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 31 (para. 73).

[603] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 38 *et seq.* (Section 5.3).

320 Based on the foregoing, Peru's contention that the Parán Community was not obliged to lift the Blockade, and that its failure to do so would be "entirely understandable" is baseless. It is also clear that while the State understood that there had been a serious breach of the 26 February 2019 Agreement at the time, it did nothing to remedy it.

6.6.2 Parán breached its obligation to conduct the topographic survey agreed with IMC

321 In its Memorial, the Claimant explained that the Parán Community also breached the 26 February 2019 Agreement through its refusal to conduct the topographic survey that had been agreed with IMC. Specifically, the Claimant explained that Parán refused to conduct a survey to identify the areas within its territory that had been allegedly affected by the Project, instead seeking to force IMC to pay for a survey in relation to a future access road to the Site through Parán (which had not been agreed).[604]

322 In its Counter-Memorial, Peru strategically removes the focus from the **scope** of the topographical survey and puts it on IMC's refusal to pay the topographer's fees in an attempt to shift blame. Indeed, Peru argues that the "Claimant's refusal to fund the topographical survey [at a cost of PEN 30,000 (approximately USD 9,000)] was unreasonable, and undermined the progress that had been brokered by Peru."[605] Peru's witness Mr Nilton León further states that "the progress achieved by the OGGS in the 26 February 2019 dialogue table [was] dismantled due to Invicta's radical objection to this request to pay the [topographic] surveyor."[606] Peru only refers once in passing to the scope of the topographic survey, stating that "a topographer [was] to analyze the Parán Community's land that might be adversely affected by the works that were planned for the access road through Parán Community territory."[607] Peru's contentions are baseless.

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[604] Memorial, 01/10/2021, p. 53 (para. 162); Letter from IMC to the Parán Community (SPA), 18/03/2019, at **Exhibit C-205**, p. 2 (para. 5).

[605] Counter-Memorial, 24/03/2022, p. 139 (para. 272).

[606] Witness Statement of Nilton César León Huerta, 22/03/2022, p. 22 (para. 68).

[607] Counter-Memorial, 24/03/2022, p. 138 *et seq.* (para. 271).

323 Indeed, the 26 February 2019 Agreement provides that "[t]he Invicta mining company, together with the Rural Community of Parán, **will identify and locate the affected land** (Rural Community of Parán) **through a topographic survey**".[608] The "affected land" was the Parán land that had supposedly been affected by IMC's mine preparation and development activities, which went back to Parán's claim that its land had been damaged by the Project. Parán's claim was discussed during the meetings held by IMC and State representatives in January and February 2019,[609] prior to the signing of the 26 February 2019 Agreement, and addressed in the draft agreements prepared in connection with those meetings by providing for both IMC and Parán "[to] identify and locate any negative impacts to which the Community refers".[610] As Mr Bravo explains, in none of these meetings was there a discussion on making improvements to the Parán road.[611]

324 As the foregoing shows, the agreement was not for a topographer to conduct a survey in relation to a future access road to the Site through Parán. IMC was right to refuse to pay the fees for a unilaterally appointed topographer who was **not** going to do what was stipulated in the 26 February 2019 Agreement. The stance taken by Parán at the time confirmed yet again how unreasonable it was.

325 Mr Nilton León states that "Invicta limited itself to complaining about the price [of the topographic survey] but did not seek a way to overcome this disagreement."[612] This is false. As the Claimant explained in its Memorial, upon learning on 15 March 2019 that Parán sought to change the scope of the topographic survey, IMC extended an invitation to the Parán President on 18 March 2019 to discuss and "reach an Agreement that

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[608] Minutes of the meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement (SPA), 26/02/2019, at **Exhibit C-200**, p. 1 *et seq.* (para. 4) (emphasis added).

[609] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 32 *et seq.* (Sections 5.1 and 5.2).

[610] Email from IMC to MEM with attachments (SPA), 25/02/2019, at **Exhibit C-199**, p. 4 *et seq*. See also MEM, Draft agreement between Parán, MEM and IMC (as drafted by the MEM during 29 January 2019 meeting) (SPA), at **Exhibit C-344**.

[611] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 37 (para. 92).

[612] Witness Statement of Nilton César León Huerta, 22/03/2022, p. 21 *et seq.* (para. 65).

meets the expectations of all parties".[613] Mr Bravo and Lupaka's CEO, Mr Ansley, travelled the next day to Huacho to meet with the Parán President, who raised demands different from those discussed on 26 February 2019, including that IMC cancel its agreements with the Lacsanga and Santo Domingo Communities.[614] IMC explained that this was not possible, offering as a sign of good faith to reconsider the topographic survey for the Parán road and to make enhancements to the Parán access road over time if the Blockade would be lifted.[615] However, the Parán President insisted on its demands and stated clearly that the Parán Community did not intend to lift the Blockade, making it impossible to reach an agreement.[616]

326 Peru further contends that "if [the] Claimant genuinely believed that the 26 February 2019 Agreement had been breached by the Parán Community, it should have considered possible legal recourses under Peruvian law (*e.g.,* civil law actions, including before the judiciary)."[617] This argument is disappointing.

327 By the time of the 26 February 2019 Agreement, Parán had occupied the Site for four months and a half, using wanton violence against IMC personnel and showing a total disregard for Peruvian law and its authorities. IMC had by this point filed **three** criminal complaints against Parán, none of which succeeded in prompting any reaction from the State. Indeed, while the investigations pertaining to two of these complaints were still ongoing by then (one of them after the expiry of the 8-month maximum legal period),[618] the other complaint had been dismissed by the

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[613] Letter from IMC to the Parán Community (SPA), 18/03/2019, at **Exhibit C-205**, p. 2 (last paragraph); Memorial, 01/10/2021, p. 53 *et seq.* (paras. 162-163).

[614] Memorial, 01/10/2021, p. 53 *et seq.* (paras. 163-165); Witness Statement of Luis F. Bravo, 01/10/2021, p. 21 *et seq.* (paras. 65-66); Email from Lupaka to Lupaka and Laveta, 27/03/2019, at **Exhibit C-354**.

[615] Email from Lupaka to Lupaka and Laveta, 27/03/2019, at **Exhibit C-354**, p. 2; Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 47-48 (para. 121).

[616] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 48 (para. 123); Email from Lupaka to Lupaka and Laveta, 27/03/2019, at **Exhibit C-354**, p. 2.

[617] Counter-Memorial, 24/03/2022, p. 140 (para. 275).

[618] Huaura Prosecutor's Office website, Case File No. 1006014500-2018-4336-0 (accessed on 11/08/2022) (SPA), at **Exhibit C-556**; **IMM-0047**, p. 1 *et seq.* (Item 1)) and Case 1006014500-2018-8034-0 (consolidating Case 1006014500-2018-7786-0) (**IMM-0047**, p. 1 *et seq.* (Item

Huaura Prosecutor's Office.[619] It is clear that legal action against Parán's members was totally useless to protect IMC's interests. IMC needed immediate Police action to restore law and order and recover control of the Site, which was not forthcoming despite being entirely justified in the circumstances.

328 Based on the foregoing, it should not be in dispute that the Parán Community breached its obligations under the 26 February 2019 Agreement. IMC sent numerous letters to Peruvian authorities reporting on Parán's breaches and requesting that the Police intervene and lift the Blockade given that any agreement with Parán was a dead letter.[620] There was no answer to these requests.[621] Mr Bravo was able to contact the Peruvian authorities in early March 2019 and the MININTER even said it would send over the Police, but nothing happened.[622] Indeed, Peru continued to refuse to authorise a police intervention, again showing Parán's leadership and its members that their illegal behaviour had no negative consequences, and that they were essentially above the law.

6.7 Peru remained passive despite the Parán Community's latest Site invasion on 20 March 2019

329 In its Memorial, the Claimant explained that on 20 March 2019, *i.e.*, only two weeks after Parán had started allowing IMC to enter into the Site through Parán territory, 150 hostile Parán members – many of whom were armed – invaded the Site a third time ("**March 2019 Invasion**"). Similar to what had happened during the 14 October 2018 invasion, the Parán

3)). For Case File 4336-0, this period is counted from 23 June 2018 (date of entry - "*fecha de registro*" in Spanish) until 27 February 2019, date in which Parán started breaching its obligations under the 26 February 2019 Agreement.

619 Case No. 1007010900-2018-192-0 (**IMM-0047**, p. 1 *et seq.* (Item 2)). More generally, none of the five complaints filed by IMC against Parán between 2018 and 2019 neither reached the trial stage nor yielded a judicial decision on the merits of the cases. See **IMM-0047**, p. 1 *et seq*. (items 1-3 and 6-7).

620 Letter from IMC to MININTER (SPA), 20/03/2019, at **Exhibit C-206**; Email from IMC to MEM with attachment (SPA), 21/03/2019, at **Exhibit C-207**; Letter from IMC to MEM (SPA), 29/03/2019, at **Exhibit C-209**.

621 "The importance of multi-stakeholder dialogue for the Peruvian mining sector", *BNamericas* (SPA), 20/09/2022, at **Exhibit C-575**.

622 Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 42-43 (para. 106).

invaders evicted IMC's staff (there were twelve workers onsite) and took control of the Site, including IMC's equipment, machinery and 5,675 kilograms of explosives.[623] The day after the invasion, IMC filed a criminal complaint against the Parán Community's President and members for the crime of coercion.[624] Yet, nothing came of this complaint. Indeed, as explained further below, the Huaura Prosecutor decided to close the investigation related to IMC's complaint and absolved the Parán offenders from any responsibility.

330 Peru makes no reference in its Counter-Memorial to the March 2019 Invasion, even though it refers to contemporaneous letters sent by IMC that expressly refer to this invasion. These letters include IMC's letter dated 29 March 2019 addressed to the MEM, the MININTER and the Canadian Embassy stating that "[…] since **21 March, we were again forcibly evicted from the camp** and we currently do not have access to the Mining Unit".[625] Peru's silence on the March 2019 Invasion is unwise, as this was the third Parán invasion of the Site after which IMC was never able to regain access to the Site. Peru's silence is also not accidental. If there was any doubt as to Parán's breaches of the 26 February 2019 Agreement, this doubt was completely dispelled by this new invasion, which took place on the same day that the topographical survey was due to be carried out and for which IMC had made arrangements.[626]

331 The March 2019 Invasion confirmed once again that dialogue with Parán was futile and a police intervention to lift the Blockade was necessary. The MEM-OGGS was convinced that the MININTER had to abandon its non-intervention policy and authorise a Police operation, as it noted in a draft memorandum prepared on the day of the March 2019 Invasion:

> "**Given this situation [*i.e.,* the March 2019 Invasion], it is recommended that the public order mechanisms be activated**

[623] Email chain between Lupaka to Canadian Embassy (SPA) - 20/02/2019 to 20/03/2019, at **Exhibit C-356**, p. 1.

[624] Memorial, 01/10/2021, p. 55 (para. 168).

[625] Letter from IMC to MEM (SPA), 29/03/2019, at **Exhibit C-209**, p. 3 (Item 7) (emphasis in original).

[626] Witness Statement of Luis F. Bravo, 01/10/2021, p. 22 (para. 68).

> **by the MININTER, which has an action plan for this, but not signed, given that the current policy is one of non-intervention**, **therefore requiring that dialogue be exhausted**, as in this case. However, since the beginning of the conflict to date, the policy of non-intervention has prevailed, in relation to which **a discussion at the highest level between the [Deputy Ministers] is proposed to enable the activation of this plan of action in the face of a scenario like the present one**".[627]

332 Consistent with the foregoing, on 9 April 2019, the Chief of Police Intelligence in Huacho, senior officer Otoya, informed Mr Estrada of IMC's CR Team that the Lima – Huacho Police Division had requested the Sayán police to prepare another Operational Plan to lift the Blockade.[628] This was the **third** operational plan since the Blockade.[629] However, on 25 April 2019, IMC was informed that the MININTER had instructed the Police not to implement the Operational Plan as the situation was not seen as sufficiently grave.[630]

333 But this was not all. Indeed, contrary to Peru's contention that the Prosecutor's Office "acted in accordance with [its] duties" upon receipt of IMC's criminal complaints,[631] the Huaura Provincial Prosecutor's Office

[627] MEM, *aide mémoire* (SPA), 20/03/2019, at **Exhibit C-576**, p. 2 (emphasis added). This was consistent with the MEM-OGGS internal memorandum prepared two days before, on 18 March 2019, which stated that "the re-establishment of public order through the corresponding channels, MININTER, PNP, DGOP, should proceed", and with another MEM-OGGS internal memorandum prepared the previous month, on 20 February 2019, which stated that opposition to the Project was being financed with funds coming from the Parán Community's illegal marijuana business and there was no use in continuing with dialogue. See Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**.

[628] Internal IMC email (SPA), 10/04/2019, at **Exhibit C-213**.

[629] Indeed, a first operational plan was being prepared as of 24 October 2018, following IMC's request for a Police intervention dated 17 October 2018 (see *supra* Section 6.4 and *infra* Sections 7.1 and 7.2.3), and a second plan was prepared on 9 February 2019 by the Sayán police upon request of the Colonel Arbulú of the Police Division in Huacho (see *supra* Section 6.5).

[630] Witness Statement of Luis F. Bravo, 01/10/2021, p. 24 *et seq.* (paras. 76-77); OGGS Weekly Report (SPA), 06/04/2019, at **Exhibit C-577**, p. 4.

[631] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 67 (paras. 186-187).

processed the complaint filed by IMC on 21 March 2019 (related to the March 2019 Invasion)[632] in total disregard of Peruvian law. Indeed:

- Following admission of the criminal complaint on 25 March 2019,[633] the Huaura Provincial Prosecutor's Office ordered the Huacho Criminal Investigation Department (DEPINCRI) to carry out preliminary investigations first for 30 days and then for an additional 80 days[634] in order to decide whether to launch a preparatory investigation.[635] This latter deadline was largely exceeded, as the Huaura Provincial Prosecutor's Office only rendered its decision on 24 February 2020 (*i.e.*, well over 300 days after the initial complaint).[636] This delay cannot be excused because of the suspension of procedural deadlines decreed as a result of the health emergency, which was effective for the first time on 16 March 2020.[637]
- Disturbingly, on 24 February 2020, the Huaura Provincial Prosecutor's Office decided to close the investigation resulting from IMC's complaint and absolve the Parán offenders from any responsibility.[638] The Huaura Provincial Prosecutor's Office closed the investigations pertaining to the 20 March 2019 Invasion arguing that the crime of coercion had not been proved, without opening an investigation for

[632] Criminal complaints filed with the Sayán Police by IMC representative (SPA), 21/03/2019, at **Exhibit C-208**.

[633] Disposición Fiscal Nº 02, 24/02/2020, at **Exhibit IMM-0054**, p. 10.

[634] Disposición Fiscal Nº 02, 24/02/2020, at **Exhibit IMM-0054**, p. 1 (Provision No. 1).

[635] Criminal Code of Procedure, 2004 (SPA), at **Exhibit C-555**, p. 108 (Art. 330 (1)).

[636] Disposición Fiscal Nº 02, 24/02/2020, at **Exhibit IMM-0054**.

[637] Procedural terms in Peru were suspended from 16 March 2020 to 31 October 2020, and from 31 January 2021 to 28 February 2021, *i.e.*, a total of 257 days. See Resolution of the Attorney General's Office No. 588-2020 (SPA), 16/03/2020, at **Exhibit C-557**; Resolution of the Attorney General's Office No. 733-2020 (SPA), 29/06/2020, at **Exhibit C-558**; Resolution of the Attorney General's Office No. 953-2020 (SPA), 29/08/2020, at **Exhibit C-561**; Resolution of the Attorney General's Office No. 1066-2020 (SPA), 30/09/2020, at **Exhibit C-562**; Public Prosecutors Office, Administrative Resolution No. 748-2020-MP (SPA), 30/06/2020, at **Exhibit C-638**; Resolution of the Attorney General's Office No. 167-2021 (SPA), 07/02/2021, at **Exhibit C-564**; Resolution of the Attorney General's Office No. 209-2021 (SPA), 14/02/2021, at **Exhibit C-565**; Public Prosecutors Office, Administrative Resolution No. 842-2020-MP (SPA), 15/07/2020, at **Exhibit C-637**.

[638] Disposición Fiscal Nº 02, 24/02/2020, at **Exhibit IMM-0054**.

another crime despite being aware that the invasion was ongoing and being empowered to do so.[639]

334 IMC filed a second complaint against Parán on 21 March 2019, *i.e.*, the same day in which it filed its complaint arising from the March 2019 Invasion, this time for theft of explosives.[640] The same breaches of mandatory legal deadlines discussed above in relation to the complaint for the March 2019 Invasion apply *mutatis mutandis* to the complaint for theft of explosives because the Huaura Provincial Prosecutor's Office jointly processed and decided both complaints. Additionally, and as with the complaint for the March 2019 Invasion, the Huaura Provincial Prosecutor's Office concluded that there was no sufficient evidence to prove the theft of explosives and ordered to close the investigations.[641]

335 Peru criticises IMC's refusal to continue dialogue with the Parán Community while the Blockade remained in place. Specifically, referring to a meeting convened by the MEM-OGGS on 1 April 2019 in which IMC did not participate, Peru contends that "[…] [this] intransigent attitude [by IMC] led to entrenchment by both parties in their respective positions, thereby rendering amicable resolution more elusive and unlikely."[642] This criticism is baseless. Indeed, the MEM-OGGS itself had told the Parán Community in February 2019 that dialogue could only resume once the Blockade was lifted.[643] Furthermore, it was apparent from the Parán Community's breaches of the September 2018 Commitment and the 26 February 2019 Agreement and the relentless violent behaviour of its members that the community could not be trusted to comply with its commitments. This could only change if law and order were restated, for which Peru had to lift the Blockade, confiscate Parán's weapons,[644]

[639] Criminal Code of Procedure, 2004 (SPA), at **Exhibit C-555**, p. 109 *et seq.* (Art. 334 (1)).

[640] Cuadro resumen de denuncias presentadas por Invicta, at **Exhibit IMM-0047**, p. 3 *et seq.* (item 7); Disposición Fiscal Nº 02, 24/02/2020, at **Exhibit IMM-0054**, p. 2 (Crime No. 57).

[641] Disposición Fiscal Nº 02, 24/02/2020, at **Exhibit IMM-0054**.

[642] Counter-Memorial, 24/03/2022, p. 115 *et seq.* (para. 279).

[643] Letter from MEM to the Parán Community (SPA), 18/02/2019, at **Exhibit C-191**, p. 1.

[644] PCM, *aide mémoire* (SPA), 27/05/2019, at **Exhibit C-578**, p. 3; see updated memo, Internal PCM *aide mémorie* (SPA), 10/07/2019, at **Exhibit C-574**.

address Parán's illegal drug business and prosecute and sanction the Parán offenders. However, the State did none of this.

6.8 Peru misrepresents the events of WDS's Site entry on 14 May 2019

336 In its Memorial, the Claimant explained that on 14 May 2019, members of WDS were able to access the Site and that, while they were waiting for the Police, Parán community members arrived by the hundreds, shooting at WDS personnel and Mr Estrada of IMC's CR Team. This led to WDS personnel and Mr Estrada fleeing the area through the hills, without returning fire.[645]

337 Peru refers repeatedly in its Counter-Memorial to WDS's entry of the Site and the events that transpired thereafter. Specifically, Peru argues that IMC's hiring of WDS shows its determination to use violence against the Parán Community,[646] that WDS physically attacked Parán members,[647] and that this incident significantly aggravated the conflict between IMC and Parán,[648] making future negotiations more difficult[649] and leading Parán to demand the closure of the Project.[650]

338 Peru significantly misrepresents and exaggerates what happened during the WDS access to the Site in an attempt to blame IMC for the conflict with the Parán Community and excuse the State's passivity in enforcing IMC's mining rights. The Tribunal must not be misled. The Claimant addresses Peru's contentions below.

339 First, Peru contends that IMC "resorted to the use of force and violence [against the Parán Community] by engaging and deploying a private security company called War Dogs Security S.A.C".[651] This is false. IMC did not retain WDS as part of an alleged plan to use force or violence

[645] Memorial, 01/10/2021, p. 58 (para. 177).

[646] Counter-Memorial, 24/03/2022, p. 2 *et seq.* (para. 5).

[647] Counter-Memorial, 24/03/2022, p. 169 *et seq.* (para. 333).

[648] Counter-Memorial, 24/03/2022, p. 9 (para. 22).

[649] Counter-Memorial, 24/03/2022, p. 143 *et seq.* (para. 282).

[650] Counter-Memorial, 24/03/2022, p. 144 (para. 284).

[651] Counter-Memorial, 24/03/2022, p. 2 *et seq.* (para. 5).

against Parán, but rather to join the Police forces upon their lifting of the Blockade to secure the Site and keep Parán from invading it again once the Police had done their job. This is common practice in dealing with illegal mine invasions in Peru, as evidenced by MMG's handling of Las Bambas and described in Section 6.4 above.

340 As explained in Section 6.5 above, the Operational Plan prepared by the Sayán Police on 9 February 2019 outlined the Police's strategy to recover control of the Site, stating that once such control had been regained, the Police would stay on the Site for a maximum of 72 hours.[652] This necessitated that IMC retain a private security firm to join the Police forces once the Blockade had been lifted and stay thereafter to prevent Parán from invading the Site again. This is exactly what IMC did, *i.e.*, it retained WDS to provide "security and surveillance services" of the Site 24 hours a day[653] once the Blockade was lifted.[654]

341 The strategy outlined in the 9 February 2019 document reflecting the Operational Plan, and IMC's hiring of WDS, were consistent with other police interventions, both in the mining sector and outside of it. Indeed, as explained above, in the Las Bambas mining project the State authorized the Police on 28 April 2022 to remove the invaders from the project site and was then joined by the private security hired by the mining company to secure the Site.[655] As another example, the Police also acted together with private contractors on 23 December 2016, when evicting more than

[652] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 13 (item d).

[653] Draft Contract between IMC and WDS (SPA), at **Exhibit C-361**, p. 2 *et seq.* (Clauses 2 and 5).

[654] Email from Lupaka to Lupaka and Laveta, 27/03/2019, at **Exhibit C-354**.

[655] "Peruvian police evicts communities in Las Bambas mining", *teleSURtv* (SPA), 28/04/2022, at **Exhibit C-315**; "Police eviction in Peruvian mine leaves three injured and 11 arrested", *DW* (SPA), 28/04/2022, at **Exhibit C-316**; "Peruvian police carry out a new eviction of an indigenous community in the Las Bambas mine", *Euronews* (SPA), 28/04/2022, at **Exhibit C-314**; "Las Bambas: clashes between the police and community members left 14 injured and 11 detained", *Infobae* (SPA), 28/04/2022, at **Exhibit C-317**.

100 invaders from privately-owned land where a real estate project was to be developed.[656]

342 As explained in the prior Section, IMC was informed on 25 April 2019 that the MININTER had instructed the Police not to implement the Operational Plan as the MININTER did not see the Blockade as sufficiently grave. However, the Police were well aware of the gravity of the situation, so they continued to investigate matters further in coordination with the WDS team, who had ex-police officers among its personnel.[657] As Mr Bravo explains, on 1 May 2019, the Police and WDS personnel went to a lookout to observe how many Parán members manned the Blockade, and WDS subsequently assisted the Police in preparing a new iteration of the Operational Plan.[658] The Police's close collaboration with the WDS personnel, and its receptiveness to IMC's concerns, gave the company hope that a police intervention to lift the Blockade could take place in the short term. This was furthered by the approval of the new iteration of the Operational Plan, which had been drafted by the Sayán Police, by the head of the Huacho Police Division, Colonel César Arbulú.[659]

343 Second, Peru contends that "War Dogs physically attacked the Parán Community protesters and sparked a violent confrontation."[660] This disturbing statement is false and disproved by the facts.

344 As the Claimant explained in its Memorial, when WDS accessed the Site on 14 May 2019,[661] no Parán members were manning the Blockade. The tents set up by Parán on the Lacsanga road were empty, as confirmed by a video recorded on the same day by Mr Estrada of IMC's CR Team.[662] This

[656] See "Ica: police evict more than 150 land invaders in Subtanjalla", *24 horas* (Video) (SPA), 23/12/2016, at **Exhibit C-579**; "Ica: police evict more than 150 land invaders in Subtanjalla", *24 horas* (Transcript) (SPA), 23/12/2016, at **Exhibit C-580**.

[657] Witness Statement of Luis F. Bravo, 01/10/2021, p. 54 (para. 144).

[658] Witness Statement of Luis F. Bravo, 01/10/2021, p. 54 (para. 144).

[659] Witness Statement of Luis F. Bravo, 01/10/2021, p. 54 (para. 145).

[660] Counter-Memorial, 24/03/2022, p. 169 *et seq.* (para. 333).

[661] Memorial, 01/10/2021, p. 57 *et seq.* (paras. 176-177).

[662] Mr Marco Estrada showing the Blockade at the Lacsanga road (SPA) (Video), 14/05/2019, at **Exhibit C-362**; Mr Marco Estrada showing the Blockade at the Lacsanga road (Transcript) (SPA), 14/05/2019, at **Exhibit C-363**.

was also consistent with the report given by WDS to Mr Bravo a few days before.[663] WDS's access to the Site was therefore made without any confrontation, much less by attacking Parán community members. It was only some three hours after WDS personnel had accessed the Site that Parán's members arrived in the hundreds, shooting their guns and the WDS team and Mr Estrada to flee. Notably, no WDS personnel returned fire against Parán, despite the danger to their personal safety.[664] This was a new and escalated instance of the abuse of firearms by the Parán community members, which resulted in members of WDS's team being wounded.[665] Parán's attacks continued the next day, with community members intercepting other members of the WDS team and, sadly, killing one of them.[666]

345 Peru's further contention that the WDS access to the Site "ma[d]e future negotiations [between IMC and] the Parán Community far more difficult"[667] together with Mr León's assertion that this "brought the conflict to a crisis point"[668] are both baseless and opportunistic. Indeed, the Parán Community had breached each and every one of its commitments to IMC by this date, including the September 2018 Commitment to refrain from all acts of violence against IMC[669] and the 26 February 2019 Agreement where it committed to suspend all coercive measures.[670] Several contemporaneous official documents from Peru also confirm that

[663] Witness Statement of Luis F. Bravo, 01/10/2021, p. 55 (para. 147).

[664] Witness Statement of Luis F. Bravo, 01/10/2021, p. 56 (para. 150). A few days later, on 20 May 2019, Parán's members also shot at certain Santo Domingo community members that were moving their cattle to graze to an area on their community land. See Summary of the meeting between MEM, PCM, MININTER, Ombudsman's Office and IMC, 27/05/2019, at **Exhibit C-18**, p. 5 (point 11).

[665] Internal PCM email with attachment (SPA), 21/05/2019, at **Exhibit C-552**, p. 3. Internal PCM *aide mémorie* (SPA), 10/07/2019, at **Exhibit C-574**, p. 2.

[666] *Id.*

[667] Counter-Memorial, 24/03/2022, p. 143 *et seq.* (para. 282).

[668] Witness Statement of Nilton César León Huerta, 22/03/2022, p. 16 *et seq.* (para. 51).

[669] Minutes of the Subprefect meeting between IMC and the Parán Community including September 2018 Commitment (SPA), 18/09/2018, at **Exhibit C-139**, p. 2.

[670] Minutes of the meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement (SPA), 26/02/2019, at **Exhibit C-200**, p. 2 (para. 5).

"dialogue mechanisms are not appropriate in this case"[671] because of the community's interest in exploiting the mine[672] and protecting its marijuana business, both of which were inconsistent with IMC developing the Project. Hence, it was crystal clear at the time WDS accessed the Site that dialogue was not a viable option with the Parán Community and a police intervention was necessary to lift the Blockade and restore order. If anything, Peru's contention that the WDS entry of the Site "brought the conflict to a crisis point"[673] ignores the previous acts of extreme violence by the Parán Community and Peru's failure to act.

346 Third, and consistent with the foregoing, the facts relating to the WDS access to the Site on 14 May 2019 show the double standard that Peru followed when dealing with IMC – or its contractors – and the Parán Community. Indeed, on 15 May 2019, *i.e.*, the day after WDS accessed the Site, the Police arrested certain members of the WDS team.[674] This arrest was made even though IMC's contractors, such as WDS, have every right to enter the Site and the WDS personnel did not shoot or injure any of Parán's members. In stark contrast, there is no publicly available information suggesting that the Police arrested any Parán members, nor has Peru asserted as much in these proceedings, even though they were illegally occupying the Site, misusing their arms, and had killed a member of the WDS team.

347 As the foregoing shows, it is false for Peru to contend that IMC planned to resort to violence when retaining WDS or that this security company attacked the Parán community members. If anything, this episode reveals a new instance of illegal behaviour by Parán's members, in the face of which the State did not take any action. Indeed, the Police did not arrest any Parán members nor confiscate any firearms, even though official documents from Peru going back to January 2019 show that such guns

[671] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3.

[672] [redacted]

[673] Counter-Memorial, 24/03/2022, p. 144 (para. 284).

[674] Memorial, 01/10/2021, p. 58 (para. 177).

were to be confiscated long ago.[675] Peru showed once again to Parán's leadership and members that their illegal behaviour had no negative consequences, and that they were essentially above the law.

348 In its Memorial, the Claimant referred to its continuous requests for the State to enforce its mining rights in the weeks and months that followed the events of 14 May 2019, which were made once again to no avail.[676] Indeed, Peru was more interested in asking IMC's representatives to explain the 14 May 2019 events, even proposing that IMC "display an act of good faith towards the Parán Community" to somehow make up for such events,[677] which were being used by Parán as an excuse to justify the continuity of the Blockade.[678] Peru further insisted that a "police intervention was not necessary or reasonable" in the circumstances,[679] and yet again stated that dialogue should continue. Peru does not deny any of these facts in its Counter-Memorial.[680]

349 Peru's misrepresentation of the events of 14 May 2019 and its apparent reproval of WDS's actions is shocking since IMC and its contractors had peacefully entered the Site. There was nothing wrong with how WDS had proceeded. The State also seemed oblivious to Parán's violent acts spanning many months. Peru's insistence on dialogue was also unjustified given that Parán had breached all its prior commitments and was clearly

[675] Indeed, on 25 January 2019, the Huacho police had requested General Arata, of the Lima Police Division, to confiscate these weapons, yet either he or other Government authorities did not approve this dramatic request. See Letter from Huacho Police to Chief of Lima Region Police (SPA), 25/01/2019, at **Exhibit C-338**. A PCM memorandum prepared on 27 May 2019 further insisted on the need for the Police to confiscate Parán's arms. See PCM, *aide mémoire* (SPA), 27/05/2019, at **Exhibit C-578**, p. 3; see updated memo, Internal PCM *aide mémorie* (SPA), 10/07/2019, at **Exhibit C-574**.

[676] Memorial, 01/10/2021, p. 58 *et seq.* (Section 2.3.11).

[677] Counter-Memorial, 24/03/2022, p. 143 *et seq.* (para. 282); Summary of the meeting between MEM, PCM, MININTER, Ombudsman's Office and IMC, 27/05/2019, at **Exhibit C-18**, p. 6 (para. 19).

[678] Memorial, 01/10/2021, p. 61 (para. 187); Official Letter No. 011-2019-CCP from the Parán Community (A. Torres) to MINEM (F. Ismodes), 04/06/2019, at **Exhibit R-0110**.

[679] Counter-Memorial, 24/03/2022, p. 144 (para. 283); Summary of the meeting between MEM, PCM, MININTER, Ombudsman's Office and IMC, 27/05/2019, at **Exhibit C-18**, p. 6 *et seq*.

[680] Counter-Memorial, 24/03/2022, p. 143 *et seq.* (Section II.E.5).

not willing to engage with IMC in any meaningful negotiation – simply put, the community's interests were incompatible with the Project.[681] In fact, as explained in the next Section, the Parán Community was already taking action to exploit the mine.

6.9 The Parán Community made good on its stated plan to exploit the mine shortly after Lupaka lost its investment

350 Since at least 29 January 2019, Peru was aware of Parán's plan to exploit the mine. It was on that date that Parán officials told expressly MEM-OGGS and MININTER representatives that they would exploit the mine if its demands were not satisfied.[682] This threat materialised some months later. On 8 July 2019, IMC alerted the MEM that the Parán Community was taking actions to appropriate the nearly 7,000 tons of Lupaka ore stockpiled at the Site and to exploit the mine.[683] This was not the first time IMC informed the State of Parán's plan to exploit the mine.[684] Peru did not respond to this letter nor did it change its stance that dialogue should continue.[685] Tellingly, in its Counter-Memorial, Peru refers to this letter as showing that the Claimant had no willingness to resume dialogue with the Parán Community, overlooking everything the letter states on the community's illegal exploitation of the mine[686] – a topic that Peru decided to ignore entirely in its Counter-Memorial.

351 Lupaka lost its investment on 26 August 2019, when Lonely Mountain seized IMC's shares following Lupaka's failure to service its obligations

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[681] See *supra* Sections 4.3.5, 6.3 and 6.6.

[682] Witness Statement of Luis F. Bravo, 01/10/2021, p. 11 (para. 28); WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192 (corrected translation)**, p. 3.

[683] Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**.

[684] Letter from Lupaka to MEM, 06/02/2019, at **Exhibit C-15**.

[685] Despite the commitment assumed by Mr Cauti, then Deputy Minister of the MEM, on a meeting held with Mr Bravo on 15 July 2019 that he would "call the Vice Minister of Internal Order at the [MININTER] to alert him [of Parán's illegal extraction of ore from the Site] and ask[] for a [P]olice intervention.". See Summary of the meeting between Deputy Minister of Mines and IMC with support of Canadian Embassy officials, 15/07/2019, at **Exhibit C-222**, p. 3 (para. 22).

[686] Counter-Memorial, 24/03/2022, p. 145 *et seq.* (para. 288).

under the PPF Agreement.[687] As explained in Section 2.1 above, the Parán Community made good on its plan to illegally exploit the mine once Lupaka lost its investment, and continues to do so to the present day.

* * *

352 Peru portrays the Claimant as having taken a "combative approach",[688] demanding that the State act violently against Parán community members to satisfy the Claimant's selfish interests, allegedly exacerbated by a project financing schedule that "left close to zero margin for error".[689] This is a highly distorted account of the facts. The Claimant repeatedly requested Peru to exercise its prerogative police power and reinstate law and order and enforce the Claimant's mining rights, which was fully justified in the circumstances. Put more succinctly, Lupaka only ever asked that Peru do its job.

353 Peru knew that there were obstacles that it had to tackle to reinstate public order. Indeed, as explained in Section 2.2 above, Peru knew that the Parán Community's marijuana business was a major driver in the opposition to the Project but failed to address this issue. It also knew that disarming the Parán community members, who had long-range firearms, would have gone a long way to de-escalating the conflict (as Parán's members would be deprived of their instruments of intimidation and violence), but also failed to do this. Despite being aware at least since January 2019 of the Parán Community's plan to exploit the mine, and that the community had effectively started exploiting the ore stockpiled at the Site in July 2019, Peru only authorised its long overdue police intervention on 14 December 2021, more than two years after Lupaka lost its investment. Peru's acts and omissions led to the loss of the Claimant's investment, for which the State must be held accountable.

[687] Memorial, 01/10/2021, p. 64 *et seq.* (Section 2.4).

[688] Counter-Memorial, 24/03/2022, p. 2 (para. 5).

[689] Counter-Memorial, 24/03/2022, p. 5 (para. 12).

7 PERU'S FAILURE TO LIFT THE BLOCKADE IS INEXCUSABLE

354 Peru submits various arguments in its Counter-Memorial to justify its failure to lift the Blockade, all of which are meritless. Indeed, contrary to Peru's contentions, the State was obliged under Peruvian law to lift the Blockade (**Section 7.1**) and doing so was consistent with its reaction to other social conflicts (**Section 7.2**).

7.1 Peru was obliged under Peruvian law to lift the Blockade

355 Peru relies on the criminal law expert report of Mr Meini to argue that a police intervention to lift the Blockade would have been illegal under Peruvian law. Specifically, Mr Meini argues that the use of Police force is justified in very limited circumstances, including (i) upon a request for police support made by a dispossessed party within 15 days of dispossession,[690] (ii) to prevent the perpetration of crimes[691] and (iii) in cases of "resistance of authority",[692] none of which existed in this case according to his analysis.[693] Mr Meini is wrong in his analysis of the facts and the law.

356 First, Mr Meini acknowledges that pursuant to Article 920 of the Civil Code of Peru, a dispossessed party (such as IMC) has the right to request Police support to recover possession within 15 days of dispossession, in which case the Police shall provide the requested support, under its own responsibility.[694] However, Mr Meini then goes on to say that "[i]n a criminal legal report such as this one, the details of these civil mechanisms are not examined. Nor does one speculate on the reasons Claimant might have considered **for not availing itself of them**. An opinion is issued on facts: the 15-day period for exercising the extrajudicial defense of

[690] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 10 *et seq.* (para. 18).

[691] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 25 *et seq.* (para. 72).

[692] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 25 *et seq*. (para. 72).

[693] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 26 (para. 73).

[694] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 42 *et seq.* (para. 118).

possession contemplated by Article 920 of the CC expired on October 29, 2018 […]."[695]

357 This statement demonstrates a profound misunderstanding of the record evidence. As explained in Section 6.4 above, IMC requested Police support to take back control over the Site on 17 October 2018, *i.e.*, three days after Parán's taking and twelve days before the expiry of the deadline to request such support. Accordingly, under Mr Meini's own analysis, the Police were obliged to assist IMC in recovering control of the Site. Peru's failure to provide such support is contrary to Article 920 of the Civil Code of Peru and IMC's rights thereunder, and also with police interventions in other cases in the face of similar requests by mining investors also grounded on Article 920 of the Civil Code of Peru – such as in the Las Bambas mining project, where the Police deployed a 676 contingent to recover control of the mine site upon the investor's exercise of its right to the extrajudicial defence of possession.[696]

358 Second, Mr Meini acknowledges that pursuant to Article 8.2(c) of Legislative Decree 1186, Regulating the Use of Force by the Peruvian National Police, the Police is also obliged to use force to "prevent the perpetration of crimes".[697] However, Mr Meini contends that this provision was not applicable in the circumstances because:

> "[t]he use of force by the [Police] as a **preventive** measure would require an analysis of the actions of the police officers at a time prior to that of the events that Lupaka considers to be harmful to its rights. In fact, preventive action by the [Police] could only have

[695] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 44 (para. 123) (emphasis added).

[696] "Las Bambas: mining conflict gets out of control and the crisis worsens due to attacks by community members", *Instituto de Ingenieros de Minas del Perú* (SPA), 29/04/2022, at **Exhibit C-318** ; "Las Bambas: they ask that assault and attempted rape of security personnel not go unpunished", *Instituto de Ingenieros de Minas del Perú* (SPA), 02/05/2022, at **Exhibit C-319**.

[697] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 25 *et seq* (para. 72); Decreto Legislativo Núm. 1186, 15/08/2015, at **Exhibit IMM-0040**, p. 4 (Art. 8.2) ("Officers of the Peruvian National Police may use force, in accordance with articles 4, 6 and point 7.2, in the following circumstances: […] (c) [t]o prevent the perpetration of crimes or misdemeanors.")

> taken place **before the occurrence of the events that took place in June and October 2018**."[698]

359 This is wrong. Mr Meini's analysis assumes that Police action would have only been relevant to prevent the June and October 2018 invasions, ignoring that Police action was also required to prevent the commission of further crimes **as from the time the Blockade was installed** – many of which materialised due to the Police's inaction. Importantly, the Police was aware at all times of Parán's illegal behaviour and the ensuing risk of commission of new crimes. The Claimant provides three illustrative examples below:

360 One, the Parán invaders were in possession of arms at all times during the invasions. They had misused those arms during the June 2018 Invasion, when they shot at the IMC workers who were on the Site.[699] They remained in possession of those arms after the Blockade, which in turn showed that there was a very real risk of commission of further crimes at any moment. Such risk materialised shortly thereafter:

- on 20 January 2019, after Chief Police Officer Soria visited the site of the Blockade, Parán members shot at Lacsanga members;[700]
- on 20 March 2019, Parán carried out another armed invasion of the Site, forcibly evicting IMC's staff and taking control;[701]
- on 14 May 2019, after WDS accessed the Site unimpeded, Parán members shot at WDS's team members and Mr Estrada;[702]

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[698] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 26 *et seq.* (para. 74) (emphasis added).

[699] SSS, Special Report, seizure of the Invicta Mine Camp and Facilities (SPA), 19/06/2018, at **Exhibit C-129**, p. 2.

[700] Huacho DIVPOL, Report No. 004-2019-REGPOL.LIMA/DIVPOL-H-CS.SEC. (SPA), 23/01/2019, at **Exhibit C-332**, p. 2.

[701] Email chain between Lupaka to Canadian Embassy (SPA) - 20/02/2019 to 20/03/2019, at **Exhibit C-356**, p. 1.

[702] Witness Statement of Luis F. Bravo, 01/10/2021, p. 26 (para. 82).

- on 15 May 2019, Parán members shot and killed one member of the WDS team:[703] and
- on 20 May 2019, Parán members shot at Santo Domingo community members that were moving their cattle to graze to an area within their community land.[704]

361 Peru's authorities were aware of the risk posed by Parán's possession of arms, which led the Huacho Police to request the Lima Police on 25 January 2019 to confiscate those arms. The request expressly stated that Parán members were threatening and even attacking Lacsanga's community members, causing serious injury.[705] On 20 February 2019, a MEM-OGGS memorandum stated that the Police were preparing an operational plan to seize these arms,[706] and a memorandum prepared by the PCM on 27 May 2019 insisted on the need for the Police to confiscate these arms.[707] However, the State took no action at any time before Lupaka lost its investment even though it was clear they had the power to do so, not least under Article 8.2(c) of Legislative Decree 1186, Regulating the Use of Force by the Peruvian National Police.

362 Two, the Parán Community controlled IMC's explosives magazine, which contained 5,675 kilos of explosives.[708] As IMC warned the State on numerous occasions, just such loss of control and adequate surveillance created a serious risk not only that the Project's facilities would be destroyed but also for the safety of the local civilian population and

[703] Internal PCM email with attachment (SPA), 21/05/2019, at **Exhibit C-552**, p. 3. Internal PCM *aide mémorie* (SPA), 10/07/2019, at **Exhibit C-574**, p. 2.

[704] See Summary of the meeting between MEM, PCM, MININTER, Ombudsman's Office and IMC, 27/05/2019, at **Exhibit C-18**, p. 5 (point 11).

[705] See Letter from Huacho Police to Chief of Lima Region Police (SPA), 25/01/2019, at **Exhibit C-338**.

[706] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3.

[707] See PCM, *aide mémoire* (SPA), 27/05/2019, at **Exhibit C-578**, p. 3; see updated memo, Internal PCM *aide mémorie* (SPA), 10/07/2019, at **Exhibit C-574**.

[708] Email chain between Lupaka to Canadian Embassy (SPA) - 20/02/2019 to 20/03/2019, at **Exhibit C-356**, p. 1.

security forces.[709] The risks posed by Parán's access to explosives were also acknowledged by the Police at the time.[710]

363 IMC also warned the State that Parán could steal those explosives,[711] which Parán did shortly thereafter. This was first confirmed on 8 February 2019, during a short inspection carried out by the Huaura Prosecutor and Colonel Arbulú where they saw that there had been an illegal entry into IMC's explosives magazine.[712] This was reconfirmed on 4 March 2019, when IMC's personnel were able to access the Site on foot and found that the explosives magazine had been forced open and several items were missing.[713] As Mr Bravo explains, the Peruvian authorities were informed of this.[714] The correct "preventive measure" would have been to lift the Blockade, expel Parán's members from the Site and allow IMC to regain control of the Site, including the explosives magazine.

364 Three, on 29 January 2019, Parán's members threatened IMC and the State to exploit the mine if its demands were not satisfied,[715] and then pursued its plan. Indeed, on 8 July 2019, IMC sent a letter to the MEM reporting on the Parán Community's appropriation of the Lupaka ore stockpiled at

[709] Letter from IMC to Sayán Police (SPA), 07/12/2018, at **Exhibit C-186**, p. 1; Letter from IMC to MININTER (SPA), 19/02/2019, at **Exhibit C-16 (corrected translation)**, p. 4 (para. 13); WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192 (corrected translation)**, p. 2; Witness Statement of Luis F. Bravo, 01/10/2021, p. 8 (paras. 17, 31 and 55).

[710] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 14 (para. 4 (e)).

[711] Letter from IMC to MININTER (SPA), 19/02/2019, at **Exhibit C-16 (corrected translation)**, p. 4 (para. 13); WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192 (corrected translation)**, p. 2.

[712] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 22 *et seq.* (para. 47).

[713] Witness Statement of Luis F. Bravo, 01/10/2021, p. 18 *et seq.* (paras. 54 and 55); IMC, Inventory on missing items from the explosive magazine, 08/03/2019, at **Exhibit C-203-ENG**; IMC, Internal Report on missing items from the explosive magazine (SPA), 08/03/2019, at **Exhibit C-247**.

[714] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 40 (para. 100).

[715] Witness Statement of Luis F. Bravo, 01/10/2021, para. 28; WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192 (corrected translation)**, p. 3.

the Site[716] and including photographic evidence.[717] Police reports dated November 2019 confirmed that Parán was illegally extracting or allowing other companies to illegally extract ore from the Invicta mine.[718] Nothing was done to prevent this illegal conduct.

365 Based on the foregoing, there is no doubt that the Police was obliged to lift the Blockade and expel Parán's members from the Site, thereby allowing Lupaka to take possession of its Project.

366 Third, Mr Meini acknowledges that pursuant to Article 8.2(e) of Legislative Decree 1186, the Police is also obliged to use force and arrest "anyone resisting authority".[719] However, Mr Meini contends that this possibility would be ruled out in this case because:

> "[t]he requisite context for such analysis would include either the existence of an order issued by any authority which had also been disobeyed and thus warranted the use of force; or a certain police action that was resisted and required the use of force to be carried out. This case, however, does not involve [any of these]."[720]

367 This statement is, again, inconsistent with the facts of this case.

368 Indeed, in its Memorial, the Claimant explained that on 21 December 2018, the Huaura Prosecutor escorted by fifteen police officers travelled to the Blockade site to inspect the explosives magazine.[721] However, these authorities were met at the Blockade by 50 Parán representatives, "who, in a bullying, threatening and defiant manner […] indicated […] that they

[716] Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**.

[717] Email from Lupaka to Canadian Embassy with attachments, 11/07/2019, at **Exhibit C-469**; Witness Statement of Luis F. Bravo, 01/10/2021, p. 30 *et seq.* (paras. 96-97).

[718] Official Letter No. 004 from the Parán Community (A. Torres) to MINEM (F. Ismodes), 12/02/2019, at **Exhibit R-0013**, p. 12 (para. 30) (emphasis added).

[719] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 25 *et seq.* (para. 72); Decreto Legislativo Núm. 1186, 15/08/2015, at **Exhibit IMM-0040**, p. 4 (Art. 8.2) ("Officers of the Peruvian National Police may use force, in accordance with articles 4, 6 and point 7.2, in the following circumstances: […] (e) [t]o control any person resisting authority.").

[720] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 27 *et seq.* (para. 76).

[721] Memorial, 01/10/2021, p. 45 *et seq.* (para. 138).

were not going to allow anyone to enter [IMC's] camp".[722] The authorities therefore could not conduct the inspection. On 7 January 2019, IMC filed a criminal complaint following this failed inspection.[723] This resistance by Parán's members warranted the use of force by the Police.

369 The Huaura Prosecutor scheduled a new inspection of IMC's explosives magazine for 9 February 2019. On this day, the Prosecutor travelled to the Blockade but was only allowed to perform a very short inspection of the explosives magazine as a result of the Parán community members' aggressiveness.[724] A few days later, IMC filed a criminal complaint concerning this failed inspection.[725]

370 These two failed inspections are clear examples of resistance to authority by the Parán members manning the Blockade. The Police were obliged to arrest the Parán offenders but failed to do so.

371 For the foregoing reasons, the Tribunal must conclude that Peru was obliged to authorise a police intervention to lift the Blockade, either in response to IMC's request for Police support dated 17 October 2018, to prevent the commission of further crimes or in the face of the Parán members' resistance of authority. Tellingly, while Peru's witness Mr Trigoso, General Director of the MEM-OGGS from December 2018 to March 2019, states that he was not competent to order a police intervention to lift the Blockade, he does not state that such intervention would have been illegal in the circumstances.[726] On the contrary, as Peru's internal documents show, Mr Trigoso and others at the MEM-OGGS recommended it, as did the Police.[727]

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[722] Public Prosecutor's Office, Inspection Report (SPA), 21/12/2018, at **Exhibit C-246**, p. 1.

[723] Denuncia Ampliatoria, 07/01/2019, at **Exhibit IMM-0053**.

[724] IMC, Criminal complaint for aggravated theft and illegal possession of explosives (SPA), 20/02/2019, at **Exhibit C-342**; Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 22-23 (para. 47).

[725] IMC, Criminal complaint for aggravated theft and illegal possession of explosives (SPA), 20/02/2019, at **Exhibit C-342**.

[726] Witness Statement of Andrés Fernando Trigoso, 11/03/2022, p. 12 *et seq.* (para. 36)..

[727] See *supra* Sections 6.5 and 6.7.

7.2 The use of Police force to lift the Blockade was consistent with the State's reaction to other social conflicts

372 The Respondent refers to the long history of social conflict in the mining sector in Peru, which allegedly came to a turning point in 2009 with the Bagua case.[728] According to Mr Incháustegui, Deputy Minister of the MEM from April 2018 to May 2019 and one of Peru's witnesses in this arbitration, after the Bagua case in 2009, which involved indigenous peoples of the Amazon and resulted in several deaths, the State has given prevalence to dialogue over the use of force in the face of conflict with a community.[729] On this basis, Peru contends that when Lupaka acquired the Project in late 2012, it knew or should have known that the State would "prioritize[] dialogue over force when dealing with conflicts between rural communities and mining operators."[730] These assertions are contradicted by the record evidence.

373 Indeed, in the past decade and even this year, the State has authorised multiple police interventions to dislodge invaders, both in the mining sector (**Section 7.2.1**) and outside of it (**Section 7.2.2**). In any event, Peru knew that dialogue with the Parán Community was of no use and that the use of Police force was required. Hence the Respondent cannot excuse its failure to lift the Blockade on an alleged attempt "to broker a long-term, sustainable solution to the conflict" through dialogue[731] (**Section 7.2.3**).

7.2.1 During the past decade, Peru has authorised numerous police interventions to dislodge invaders in mining conflicts

374 During the past decade, the press in Peru has reported numerous instances in which the Police removed invaders from mining sites. The Claimant provides below some examples.

375 First, Mr Bravo provides the example of Century Mining Perú S.A.C. As Mr Bravo explains in his second witness statement, he worked for the

[728] Counter-Memorial, 24/03/2022, p. 20 *et seq*. (Section II.A.1.).

[729] Witness Statement of Luis Miguel Incháustegui Zevallos, 06/03/2022, p. 12 *et seq.* (paras. 35-37).

[730] Counter-Memorial, 24/03/2022, p. 340 (para. 723 (b)).

[731] Counter-Memorial, 24/03/2022, p. 3 (para. 7).

company from 2006 to 2017, which exploited a gold mine called "Alpacay" in the Peruvian department of Arequipa. From 2010, the local community, through protest, tried to obtain better conditions than the company had agreed with them. These protests occurred every year, and the Police would invariably not hesitate to use force against the protesters, which successfully defused community participants.[732]

376 Second, as reported by the Peruvian press in May 2016, the Police dislodged 100 local community members who had invaded land owned by a mining company in the province of Pasco. The Police removed the protesters, dismantled the tents that had been installed, and arrested some of the invaders. As noted by the prosecutor in a press article, the Police would also arrest the organiser of the invasion "as he is the subject of a criminal complaint for the misappropriation of land".[733] By contrast, in Lupaka's case, there was no police intervention and IMC's criminal complaints against Parán's invaders led nowhere.

377 Third, various local communities in the Ayacucho region in Peru protested against mining projects in the area from 28 October 2019 onwards, arguing that the projects had contaminated their water – even though there was no evidence of this.[734] The protests rapidly escalated, with around 500 community members entering one of the mining companies' camps (Apumayo) and burning offices, vehicles and the processing plant, as well as stealing assets, including explosives. Other violent actions followed in relation to other mining companies in the area.[735] These illegal actions were met with a strong response.[736] The Police also arrested many of the protesters. The prosecutor was also involved in the arrests and thanks to

[732] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 6 (para. 9); "Arequipa: with pellets they try to evict protesters from the Plaza de Armas", *Diario Correo* (SPA), 14/08/2016, at **Exhibit C-304**.

[733] "Pasco: Police evicted invaders from private land of a mining company", *Andina* (SPA), 23/05/2016, at **Exhibit C-305**.

[734] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 7 (para. 11).

[735] "This was the invasion and burning of the Apumayo gold mine in Ayacucho", *El Comercio* (SPA), 30/10/2021, at **Exhibit C-306**; "Ayacucho: Apumayo mining camp and machinery were set on fire", *Noticias SER* (SPA), 30/10/2021, at **Exhibit C-307**.

[736] "At least ten injured and a mining camp destroyed in protests in Peru", *SWI swissinfo* (SPA), 30/10/2021, at **Exhibit C-581**.

the joint efforts with the Police, the stolen items were retrieved.[737] By contrast, none of this was done to protect Lupaka's investment.

378 Fourth, just last year, on 14 December 2021, the State authorised a belated police intervention at the Invicta mine to stop the Parán Community's illegal mining of ore. Indeed, as shown by [redacted][38] and press reports,[739] the Police deployed a very significant operation to stop the illegal mining. Although the operation was unsuccessful, the State has further confirmed in this arbitration that the Police are currently planning to carry out a new intervention.[740]

379 Fifth, the Las Bambas mining project has been the subject of recurring violent attacks by the local population for years. Following a police intervention in March 2019, the authorities decreed a State of emergency in the area. Later, in October of that same year, the State issued a decree authorising the intervention of the armed forces and the Police to unblock access to the Las Bambas project site. Regarding this measure, the Minister of Internal Affairs declared that "[w]e are committed to dialogue, but this cannot be confused with weakness. **We are going to do our job**".[741] In September 2021, the Police ousted the Las Bambas Blockade.[742] The next year, on 28 April 2022, the police deployed 676 officers to evict the community members that had once again taken the mine site.

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[737] "They capture agitators who stole equipment from a mining company", *Expreso* (SPA), 06/11/2021, at **Exhibit C-308**.

[738] [redacted]

[739] "Clash between community members and police leaves a deceased person as a result", *DIARIO ASI* (SPA), 14/12/2021, at **Exhibit C-326**.

[740] Peru's Reply to Claimant's 28 June 2022 Application, 05/07/2022, p. 5.

[741] "Government Authorizes Armed Forces to Stop Protest Against Las Bambas Copper Mine", *Reuters* (SPA), 16/10/2019, at **Exhibit C-311** (emphasis added); "Peruvian security forces unlock access to Las Bambas copper mine", *Minería en Línea* (SPA), 17/10/2019, at **Exhibit C-312**.

[742] See *e.g.*, "Las Bambas: all the blockades that were reported this year in the mining corridor", *El Comercio* (SPA), 28/09/2019, at **Exhibit C-313**.

380 These police interventions show that, contrary to Peru's contention, throughout Lupaka's tenure of the Invicta mine, the State remained committed to the use of Police force in the face of conflict with local communities. Tellingly, except for the police intervention in the Las Bambas mining project on 28 April 2022 and the belated police intervention at Invicta on 14 December 2021, the State does not refer to any of the other police interventions listed above.

381 These police interventions further show that Peru's allegation that the use of force "would likely have served only to harden the Parán Community's opposition to the Project"[743] is one put forward only for purposes of this arbitration. Indeed, in all the cases listed above, the same concern arguably existed yet did not prevent the State from authorising the police interventions – in most cases, successfully.

382 Peru further contends that a police intervention to lift the Blockade would have been disproportionate as it "could have violated fundamental rights without effectively resolving the conflict".[744] In making this argument, Peru appears to ironically forget its obligations to protect the Claimant's "fundamental rights" both as a matter of domestic law and under the FTA. What is more, in all the cases listed above the same concern arguably existed which did not prevent the State from authorising the police interventions.

7.2.2 During the past decade, Peru has also authorised numerous police interventions to dislodge invaders outside of the mining sector

383 Just as with conflicts in the mining sector, the local press has reported numerous instances during the last decade in which the Police dislodged invaders from privately-owned land. The Claimant provides below some examples:

[743] Counter-Memorial, 24/03/2022, p. 9 *et seq.* (para. 24).

[744] Counter-Memorial, 24/03/2022, p. 118 (fn. 480).

a) on 5 June 2014, 250 Police officers evicted more than 1000 invaders from privately-owned land located in Yurimaguas – Tarapoto, in the north of Peru,[745]

b) on 19 May 2015, the Police evicted invaders of an archaeological area located in Tablada de Lurín, Lima province. The Police used tear gas to defuse the invaders and arrested ten people. The major of the district stated that the principle of authority would be enforced,[746]

c) on 20 October 2015, two prosecutors escorted by the Police evicted 150 invaders from privately-owned land in El Tambo, in the province of Huancayo. The prosecutors warned the invaders that they were committing the crime of usurpation and that the Police would use force if they did not voluntarily leave the land.[747] Thereafter, the invaders peacefully left the land,

d) on 23 December 2016, more than 150 Police officers escorted by private forces evicted invaders from privately-owned land in Ica where a real estate project was to be developed. The police intervention resulted in ten people being arrested,[748]

e) on 26 February 2020, more than 200 Police officers escorted by members of citizen security of the Lima Municipality evicted invaders of privately-owned land in the district of Villa María del Triunfo.[749] The operation was carried out in a peaceful and orderly manner, and the Police also demolished dwellings built by the invaders,[750]

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[745] See "Yurimaguas: two policemen injured after eviction of land invaders", *RPP Noticias* (SPA), 05/06/2014, at **Exhibit C-584**.

[746] See "Police evict invaders from Tablada de Lurín archaeological site", *TVPerú* (SPA), 19/05/2015, at **Exhibit C-585**.

[747] See "Police and Prosecutor evict land invaders (VIDEO)", *Correo* (SPA), 20/10/2015, at **Exhibit C-586**.

[748] See "Ica: police evict more than 150 land invaders in Subtanjalla", *24 horas* (Video) (SPA), 23/12/2016, at **Exhibit C-579**; "Ica: police evict more than 150 land invaders in Subtanjalla", *24 horas* (Transcript) (SPA), 23/12/2016, at **Exhibit C-580**.

[749] See "VMT: Police evict squatters from Lomas del Paraíso", *El Comercio* (SPA), 26/02/2020, at **Exhibit C-587**.

[750] See "Villa María del Triunfo: invaders are evicted from Lomas del Paraíso", *La República* (SPA), 26/02/2020, at **Exhibit C-588**.

f) on 21 March 2021, hundreds of Police officers evicted invaders from a protected area in the district of Villa El Salvador,[751] and

g) on 21 March 2022, more than 200 policemen evicted invaders of land to be used as part of the ecological project Huaycan Verde, in the Lima region. Following the eviction, the police demolished the dwellings built by the invaders.[752]

384 While outside the mining sector, these police interventions reconfirm that, contrary to Peru's arguments in these proceedings, throughout Lupaka's tenure of the Invicta mine, the State remained committed to the use of Police force in the face of conflict with local communities.

7.2.3 Peru knew that dialogue was not an option to solve the conflict

385 Even assuming *arguendo* that, as Mr Incháustegui contends, Peru had transitioned to a dialogue-based model before Lupaka acquired the Project in late 2012 or even during Lupaka's tenure of the Invicta mine, this would not excuse Peru's failure to lift the Blockade as the State and its officials knew that dialogue was of no use in this case.

386 First, Peru knew that the Parán Community's illegal marijuana business was a major driver of its opposition to the Project and that the Blockade was being financed with funds from this illegal drug trade. Peru also knew that there was no use in insisting on dialogue to solve a conflict that in large part emanated from a desire on the part of Parán members to protect their illicit business. The MEM-OGGS, the Peruvian entity that had been closely involved in the dialogue between IMC and Parán for many months, stated in an internal memorandum dated 20 February 2019:

> "The social process that the mining company maintains with the Parán Community, **is affected by [the] presence of interests foreign to the State (producers of local marijuana plantations)** the MININTER is aware of this problem and is activating the

[751] See "Villa El Salvador: Police begin eviction of invaders in Lomo de Corvina", *TVPerú* (SPA), 28/04/2021, at **Exhibit C-589**.

[752] See "Ate: Police evict hill invaders in Huaycán", *TVPerú Noticias* (Video) (SPA), 21/03/2022, at **Exhibit C-590**; "Ate: Police evict hill invaders in Huaycán", *TVPerú Noticias* (Transcript) (SPA), 21/03/2022, at **Exhibit C-591**.

> corresponding mechanisms. Also, it is known that the local [Police] is preparing an operations plan in the community, **having identified long-range weapons among the community members**.
>
> **RECOMMENDATIONS**:
>
> **Coordination at the highest inter-sectoral level**, between the MEM and the MININTER in order to activate as soon as possible the mechanisms for the re-establishment of public order in the area by MININTER. **Dialogue mechanisms are not appropriate in this case because community leadership manages a double discourse, with the State and with its population, evidencing with it the presence and active participation of local actors who, with an economy outside the law, subsidize activities contrary to public order against the mining project**."[753]

387 Internal memoranda prepared by the MEM-OGGS the following, on 18 March 2019 and 20 March 2019, reconfirmed that the "public order mechanisms [needed to] be activated by the MININTER"[754] and "the re-establishment of public order through the corresponding channels, MININTER, PNP, DGOP, should proceed".[755]

388 Second, the Police also knew that dialogue was of no use in the circumstances. Indeed, as explained in Section 6.4 and 6.5 above, the Police approved IMC's 17 October 2018 request for Police support to lift the Blockade and fully drafted an Operational Plan on 9 February 2019, only awaiting approval from the higher MININTER officials to be implemented.

389 Furthermore, as reported by IMC's CR Team on 13 February 2019, Colonel Arbulú, Chief of the Huacho Police, was convinced of the need for a police intervention "because he has seen how these [Parán] people act" and that they were clearly refusing to come to a peaceful resolution of

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[753] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3 (emphasis added).

[754] MEM, *aide mémoire* (SPA), 20/03/2019, at **Exhibit C-576**, p. 2.

[755] MEM, Report No. 003-2019-MEM-OGGS/NCLH (SPA), 18/03/2019, at **Exhibit C-353**, p. 2.

the situation.[756] Intelligence officers in Huacho also conveyed to IMC's CR Team on 22 March 2019 that there was no point in entertaining further dialogue with Parán.[757]

390 Third, Mr Incháustegui also confirmed contemporaneously that further dialogue with the Parán Community was of no use and police intervention was necessary to lift the Blockade.

391 Specifically, on 23 January 2019, Mr Ansley, then Lupaka's CEO, held a meeting with Mr Incháustegui at the MEM offices in Lima.[758] At the meeting, Mr Ansley explained that meaningful negotiation with the Parán Community was not possible while the Blockade remained in place. The Blockade needed to be lifted before any further dialogue could be entertained. Mr Incháustegui agreed with this view as Mr Bravo noted in his statement.[759] This is why Mr Ansley could confidently relay the discussion in his subsequent letter to Mr Ismodes, then Minister of Energy and Mines and Mr Incháustegui's superior, on 6 February 2019:

> "We would like to express our sincere gratitude for the meeting held in Lima on January 22 [sic] at the Ministry of Energy & Mines with Miguel Inchaustegui, Vice-Minister of Mines. The meeting was very productive and **at the recommendation of Miguel Inchaustegui**, **we outlined an action plan comprised of the following steps to be taken sequentially (in order): 1) remove the illegal blockade demonstration and regain access to the project (with use of the police)**, 2) open negotiations and dialogue with the community of Paran, and 3) attempt to come to a reasonable economic agreement with Paran, on a level consistent and reasonable with the impact on Paran by the project."[760]

392 If what Mr Ansley stated in this letter was inaccurate, Mr Incháustegui would have pointed it out at the time. He did not. Mr Incháustegui neither

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[756] Email from Lupaka to LAVETA with attachment, 13/02/2019, at **Exhibit C-341**.

[757] Internal IMC email (SPA), 22/03/2019, at **Exhibit C-358**.

[758] Email from MEM to Lupaka, 23/01/2019, at **Exhibit C-592**.

[759] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 12 (para. 24).

[760] Letter from Lupaka to MEM, 06/02/2019, at **Exhibit C-15**, p. 1 (emphasis added).

denied nor challenged the statements made by Mr Ansley until this arbitration, where he acknowledges that he knew of the letter at the time but conveniently states that he never suggested "as an initial measure, using the police to remove the members of Parán from the area".[761] Mr Incháustegui's clarification, coming more than three years after the events, is not credible.

393 For the foregoing reasons, Peru's contention that "[its] prioritization of dialogue over the use of force was entirely reasonable and justified"[762] is baseless and must be dismissed.

8 THE TRIBUNAL HAS JURISDICTION OVER THE CLAIMANT'S CLAIMS

394 The Respondent raises two baseless objections to jurisdiction in its Counter-Memorial. First, the Respondent challenges the Tribunal's jurisdiction *ratione personae* by arguing that the Claimant lost standing to assert a claim under the FTA when it allegedly disposed of its investment before commencing this arbitration.[763] Second, the Respondent contends that the Tribunal does not have jurisdiction *ratione materiae* as the Claimant allegedly did not comply with the waiver requirements under Article 823.1 of the FTA.[764] The Respondent is wrong on both accounts.

395 As demonstrated in the Claimant's Memorial,[765] and further in this Reply, the Claimant satisfied all the jurisdictional requirements under the FTA. Specifically, the Claimant is a protected investor that made a qualifying investment within the meaning of the FTA and is protected under the FTA despite no longer holding the investment (**Section 8.1**). The Claimant has also duly satisfied the waiver requirements under the FTA (**Section 8.2**). The Tribunal should therefore declare that it has jurisdiction over this dispute.

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[761] Witness Statement of Luis Miguel Incháustegui Zevallos, 06/03/2022, p. 8 (para. 25).

[762] Counter-Memorial, 24/03/2022, p. 12 (para. 31).

[763] Counter-Memorial, 24/03/2022, p. 177 *et seq.* (Section III.A).

[764] Counter-Memorial, 24/03/2022, p. 186 *et seq.* (Section III.B).

[765] Memorial, 01/10/2021, p. 64 *et seq.* (Section 3).

8.1 The Tribunal has jurisdiction ratione personae as Lupaka is a protected investor that made a qualifying investment within the meaning of the FTA

396 As noted, the Respondent's argument on the Tribunal's lack of jurisdiction *ratione personae* is pinned to the allegation that the Claimant transferred its investment to PLI Huaura prior to commencing the arbitration.[766] This objection has no merit because the FTA does not require that the investment be held by the investor at the time the arbitration is commenced. For the purposes of jurisdiction *ratione personae*, the FTA requirements are satisfied if the investor held the qualifying investment in the past at a time when the State's breaches relating to the investment occurred and the loss is attributable to such breach (**Section 8.1.1**). Second, in any event, the Respondent's objection has no merit because it falls within the "special circumstances" exception it invokes. Indeed, the Respondent itself argues that there is an exception to its stated general rule requiring that an investor is required to hold the investment at the time it institutes arbitration proceedings. The exception to this general rule exists where there are "special circumstances" as identified by other investment tribunals, including where the investment has been disposed of under circumstances that are attributable to the State. As will be demonstrated below, the disposition of the investment is directly attributable to the State (**Section 8.1.2**).

8.1.1 The FTA provides standing to investors who have made an investment in the past, regardless of whether they continue to hold the investment

397 In its Counter-Memorial, the Respondent alleges that the Claimant lost standing to bring a claim under the FTA when it transferred its interest in IMC to PLI Huaura on 26 August 2019.[767] As such, according to the Respondent, on the date the ICSID Secretary-General registered the request for arbitration (*i.e.*, 30 October 2020),[768] the Claimant was no

[766] Counter-Memorial, 24/03/2022, p. 177 *et seq.* (Section III.A).

[767] Counter-Memorial, 24/03/2022, p. 177 (para. 349).

[768] ICSID Notice of Registration (ICSID Case No. ARB/20/46), 30/10/2020, at **Exhibit C-593**.

longer a protected investor under the FTA.[769] The Respondent's objection does not withstand scrutiny for the reasons outlined below.

398 As noted by Canada in its Non-Disputing Party Submission, to bring a claim on its own behalf, Article 819(1) of the FTA requires that a claimant must be: (1) an "investor of a Party", (2) who has allegedly suffered a breach of an obligation under Section A, and (3) who has allegedly suffered damage by reason of, or arising out of, that breach.[770] As long as these requirements are fulfilled, there is no requirement that the investor holds the investment on the date the arbitration is registered.

399 As to the first requirement, it is Article 847 of the FTA that defines an "investor of a Party". As the provision notes, "in the case of Canada" as "a national or an enterprise of Canada, that seeks to make, is making or **has made an investment** […]."[771] As Canada notes, in its Non-Disputing Party Submission, the definition in Article 847 "contemplates circumstances where an investor may have started and completed the relevant investment entirely in the past."[772]

400 It is undisputed that Lupaka is a corporation duly incorporated under the laws of British Columbia, Canada, which made an investment in Peru.[773] As demonstrated in the Claimant's Memorial,[774] since 2012, Lupaka invested significant financial resources in Peru for the evaluation, acquisition, exploration and development of the Project. As such, the Claimant is an investor which made a qualifying investment under the FTA.

401 Second, as to the breach, a claimant must have been protected under the Treaty when the alleged violation occurred. Article 801 of the FTA

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[769] Counter-Memorial, 24/03/2022, p. 178 (para. 352).

[770] Canada's Non-Disputing Party Submission, 26/05/2022, p. 1 (para. 4).

[771] Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 168 (emphasis added). See, also, Canada's Non-Disputing Party Submission, 26/05/2022, p. 1 *et seq.* (para. 5).

[772] Canada's Non-Disputing Party Submission, 26/05/2022, p. 1 *et seq.*(para. 5).

[773] Memorial, 01/10/2021, p. 65 (para. 202); Kcrok Enterprises Ltd., Certificate of Incorporation, 03/11/2000, at **Exhibit C-1**; Kcrok Enterprises Ltd., Certificate of change of name to Lupaka, 04/05/2010, at **Exhibit C-2**.

[774] Memorial, 01/10/2021, p. 67 (para. 209).

establishes the scope and coverage of the Treaty's investment protections, which "shall apply to measures adopted or maintained by a Party relating to: (a) investors of the other Party" and "(b) covered investments".[775]

402 In turn, Article 847 of the FTA defines "covered investment" as "with respect to a Party, an investment in its territory of an investor of the other Party existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter".[776] Therefore, for the purposes of jurisdiction *ratione personae*, the State's breach must pertain to an obligation towards an (i) investor of the other Party which, at the time of the breach, (ii) holds a covered investment. As demonstrated above,[777] the Claimant held a "covered investment" at the time of Peru's acts and omissions in breach of the FTA.

403 Third, as to the loss, the FTA requires that the investor bringing the claim be the same investor that suffered the "loss or damage" as a result of the breach. Indeed, Article 819(1) of the FTA makes clear that an investor of a Party may submit a claim to arbitration on its own behalf provided that "the investor has incurred loss or damage by reason of, or arising out of, that breach".[778] The concurrence between the investor bringing the claim and the investor suffering the loss or damage is further evident from the use of "the" in Article 819(1) when referring to "the investor", as opposed to "an investor".[779] As noted in its Memorial,[780] in the present case, the Claimant is the same person that suffered the loss of its investment as a result of Peru's actions and omissions with respect to the Project.[781]

404 As such, as is clear from the above three requirements and as Canada's Non-Disputing Submission also explains, Article 819 does not limit the ability to bring a claim on its own behalf, even if the investor no longer

[775] Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 123.

[776] Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 165.

[777] Memorial, 01/10/2021, p. 64 *et seq.* (Section 3).

[778] Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 138.

[779] Canada's Non-Disputing Party Submission, 26/05/2022, p. 2 (para. 7).

[780] Memorial, 01/10/2021, p. 72 (para. 224)

[781] See *infra* Section 9.

holds the investment.[782] Consequently, Lupaka qualifies as an investor within the meaning of the FTA and thus this Tribunal has jurisdiction *ratione personae*.

405 This is the only rational conclusion, as on Peru's logic, no investor could bring a claim for any investment that had been the subject of a taking because the investor would have lost title before bringing a claim.

8.1.2 Lupaka lost its investment under "special circumstances" referred to by the Respondent

406 The Respondent asserts that:

> "where an investor disposes of its investment *prior* to instituting proceedings, the general rule is that the investor will have lost standing to bring a claim (subject only to the two exceptions discussed further below; namely, where special circumstances exist, and where an investor has retained the right to assert a claim)."[783]

407 As noted above, this is not the general rule. Indeed, an investor can bring a claim where it held a qualifying investment, suffered a breach and the loss is attributable to that breach, regardless of whether it continues to hold the investment at the time proceedings are instituted.

408 In any event, even if the Respondent is correct as to the "general rule" (*quod non*), this case falls within the exception that the Respondent refers to as "special circumstances".

409 In defining the "special circumstances", the Respondent cites, amongst others, the decision in *Aven v. Costa Rica*. Specifically:

> "The tribunal explained that such 'special circumstances' arise only where there has been 'direct causation' between actions attributable to the State and the transfer of the claimant's investment."[784]

[782] Canada's Non-Disputing Party Submission, 26/05/2022, p. 1 *et seq.* (para. 5).

[783] Counter-Memorial, 24/03/2022, p. 178 *et seq.* (para. 353).

[784] Counter-Memorial, 24/03/2022, p. 179 (para. 354).

410 The Respondent claims that the Claimant lost its investment in Peru because of its own fault (*i.e.*, there was no causal link to Peru's actions) by (i) failing to establish an amicable relationship with the Parán Community, and (ii) entering into highly risky financial arrangements.[785] The Respondent's attempt to shift the responsibility for the loss of the investment onto the Claimant is wrong.

411 Contrary to the Respondent's assertions, as demonstrated in the Claimant's Memorial,[786] and in Section 9 below in further detail, there is a direct link between Peru's actions and omissions and the Claimant's loss of its investment in Peru. Therefore, given the direct causal link between Peru's actions and omissions, on the one hand, and the distressed transfer of IMC's shares to PLI Huaura in July 2019, on the other hand, the Claimant's right to bring a claim under the FTA falls within the Respondent's professed exception to its "general rule".

8.2 The Tribunal has jurisdiction ratione materiae as Lupaka duly satisfied the waiver requirements under the FTA

412 The Respondent argues that this Tribunal also lacks jurisdiction *ratione materiae* "because Claimant has not provided a waiver on behalf of Invicta, as required by Article 823.1(e) of the Treaty."[787] According to the Respondent, as a result, the Claimant failed to comply with a condition precedent to the submission of a claim to arbitration under the FTA.[788] This contention also fails.

413 Article 823 of the FTA sets out a series of conditions precedent to the submission of a claim to arbitration.[789] Specifically, Article 823.1(e) of the FTA provides as follows:

[785] Counter-Memorial, 24/03/2022, p. 182 (para. 362).

[786] Memorial, 01/10/2021, p. 75 *et seq.* (Section 4).

[787] Counter-Memorial, 24/03/2022, p. 186 (para. 374).

[788] Counter-Memorial, 24/03/2022, p. 186 (para. 374).

[789] Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 143 *et seq.* (Art. 823).

> "1. A disputing investor may submit a claim to arbitration under Article 819 [claim by an investor of a Party on its own behalf] only if: […]
>
> (e) the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."[790]

414 The Claimant has provided a waiver "as the disputing investor" and the Respondent does not contest its validity.[791]

415 In relation to IMC, however, Article 823.5 of the FTA provides for an exception to the above general rule. This provision provides as follows:

> "A waiver from the enterprise under subparagraphs 1(e) […] shall not be required only where a disputing Party has deprived a disputing investor of control of an enterprise."[792]

416 The Respondent accepts that a waiver on behalf of an enterprise is not required where the host State has deprived the Claimant's control over the said enterprise. As explained above,[793] Peru's acts and omissions *vis-à-vis* the Project resulted in the Claimant's loss of control over IMC and with it, its investment in Peru. The Claimant was unable to obtain a waiver from

[790] Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 143 *et seq.* (Art. 823.1.(e)).

[791] Lupaka, Consent and Waiver in accordance with Article 823 FTA, 27/09/2020, at **Exhibit C-21**.

[792] Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 145 (Art. 823.5).

[793] *Supra* Section 6.

IMC because of Peru's acts and omissions and is therefore exempted from providing a waiver on behalf of IMC pursuant Article 823.5 of the FTA.

417 The Claimant thus complied with the waiver requirements under the FTA by providing the requisite waiver pursuant to Article 819 in accordance with Articles 823.1(e) and 823.5 of the FTA. Accordingly, this Tribunal has jurisdiction *ratione materiae* over the dispute.

9 PERU'S ACTS AND OMISSIONS BREACHED THE FTA

418 In the following sections, the Claimant demonstrates that the conduct of the Leoncio Prado Subprefect, the Parán Community and its *Ronda Campesina* are attributable to the Respondent under international law (**Sections 9.1 and 9.2**). Through the actions and omissions of these organs as well as other State organs, the Respondent has breached its obligations under the FTA to accord full protection and security and fair and equitable treatment to the Claimant in accordance with the customary international law minimum standard of treatment and Peru's most-favoured- nation obligations (**Sections 9.3 and 9.4**). Furthermore, the Respondent's actions and omissions also amount to an illegal expropriation of the Claimant's investment without payment of prompt, adequate and effective compensation in violation of Article 812 of the FTA (**Section 9.5**).

9.1 The conduct of the Leoncio Prado Subprefect is attributable to the Respondent under Article 4 of the ILC

419 As described above in Section 6.2.1, the Leoncio Prado Subprefect, Mr Soyman Román Retuerto, took a leadership role in the various invasions of the Invicta Mine and the Blockade. As a government official from the MININTER, Mr Retuerto is a State agent and his conduct is therefore attributable to the Respondent under Article 4 of the ILC Articles.[794]

420 Moreover, there could be no doubt that Mr Retuerto acted in his official capacity – and not as a private citizen – as he repeatedly invoked his

[794] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 40 (Art. 4).

official status as he led the Parán Community's actions against Lupaka's investment and personnel.[795]

9.2 The acts and omissions of the Parán Community and its Ronda Campesina are attributable to Peru under international law

421 In its Memorial, the Claimant described the special status of rural communities as autonomous territorial units under Peruvian law vested with jurisdictional and police powers and applying their own customary law over the territory they control.[796] As set out in the Memorial, the rural communities have three distinct organs that are responsible for the administration and exercise of these powers over their territory, namely the President, the Governing Committee and the *Ronda Campesina*.[797] The Claimant demonstrated in its Memorial that in the case of the Parán Community, all these governing bodies played a central role in the June 2018 Invasion and the Blockade and that their illegal acts and omissions are attributable to the Respondent under international law.[798]

[795] Official Letter No. 79-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Council of Ministries (M. Aráoz), 04/01/2018, at **Exhibit R-0076**; Official Letter No. 105-2018-DGIN-LMP-HUA from MININTER (S. Roman) to Ombudsman's Office (W. Gutiérrez), 08/05/2018, at **Exhibit R-0081**; Official Letter No. 104-2018-DGIN-LMP-HUA from Huaura Subprefect (S. Retuerto) to MINEM (F. Ismodes), 08/05/2018, at **Exhibit R-0165**; Letter from MEM to OEFA (SPA), 28/05/2018, at **Exhibit C-525**; Interview with Leoncio Prado Subprefect (MININTER) (Video) (SPA), 21/12/2018, at **Exhibit C-526**; Interview with Leoncio Prado Subprefect (MININTER) (Video Transcript) (SPA), 21/12/2018, at **Exhibit C-527**; Interview with Leoncio Prado Subprefect (MININTER) (Video) (SPA), 08/07/2019, at **Exhibit C-528**; Interview with Leoncio Prado Subprefect (MININTER) (Video Transcript) (SPA), 08/07/2019, at **Exhibit C-529**.

[796] Memorial, 01/10/2021, p. 75 *et seq.* (Section 4.1).

[797] Memorial, 01/10/2021, p. 77 *et seq.* (paras. 244 and 246).

[798] Memorial, 01/10/2021, p. 78 (paras. 248-249).

422 In its Counter-Memorial, the Respondent denies that the actions and omissions of the Parán Community and its *Ronda Campesina* are attributable to it for three main reasons:

a) According to the Respondent, there is no precedent to support the attribution of conduct of indigenous communities to the State in which they reside;[799]

b) Public international law treatment of indigenous communities is inconsistent with attribution of their actions to the State, namely because indigenous communities (i) are considered to enjoy a special status, (ii) are non-State actors, (iii) are outside the traditional definition of States or governments, and (iv) do not rely for their self-government on delegated authority from the State or government within which they reside;[800] and

c) The autonomous legal status of rural communities and their *Ronda Campesina* under Peruvian law does not support the attribution of their conduct to Peru under international law.[801]

423 Each of these arguments revolves around the same concept, namely the existence of a considerable degree of autonomy both in law and in fact granted to the Parán Community. Yet, in contrast to Article 8 of the ILC Articles which does require proof of effective control on the part of the State,[802] there is no need to prove any degree of State control over the Parán

[799] Counter-Memorial, 24/03/2022, p. 197 *et seq.* (paras. 403-405).

[800] Counter-Memorial, 24/03/2022, p. 199 *et seq.* (paras. 406-417).

[801] Counter-Memorial, 24/03/2022, p. 204 *et seq.* (paras. 418-448).

[802] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 47 (Art. 8) ("The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."); see also, p. 47 *et seq.* (Art. 8, Commentary 4 and 8).

Community under Articles 4[803] and 5[804] of the ILC Articles.[805] Indeed, it is well established that the conduct both of a territorial unit of the State and of an entity empowered by law to exercise elements of governmental authority is attributable to the State, even when the entity acts with complete autonomy from other parts of the State, including its central authorities. As discussed further below, these rules are designed precisely for cases such as this one: a State cannot grant an entity significant powers over part of its national territory, allow that entity to act with complete autonomy (and even impunity), and yet claim that it can evade international responsibility on that basis. As clearly stated in the Report of the UN Secretary-General on the ILC Articles, citing the *Tadić* decision of the Appeals Chamber of the International Tribunal for the Former Yugoslavia:

> "[…] the whole body of international law on State responsibility is based on a realistic concept of **accountability**, which disregards legal formalities and aims at ensuring that **States entrusting some functions to** individuals or **groups of individuals must answer for their actions**, even when they act contrary to their directives."[806]

424 In this case, the actions and omissions of the Parán Community as a whole are attributable to the Respondent because it is a decentralised territorial unit of the Peruvian State under Article 4 of the ILC Articles (**Section 9.2.1**). Further, and in any event, the conduct of Parán's *Ronda Campesina* – as the body exercising the rural community's special jurisdictional and police powers over its territory – is also attributable to the Respondent under Article 5 of the ILC Articles (**Section 9.2.2**). Finally, Article 7 of

[803] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 40 (Art. 4).

[804] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 42 (Art. 5).

[805] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 41 *et seq.* (Art. 4, Commentary 9 and Art. 5, Commentary 3 and 7).

[806] United Nations, Report of the Secretary-General, *Responsibility of States for internationally wrongful acts Compilation of decisions of international courts, tribunals and other bodies*, A/62/62, 01/02/2007, at **Exhibit CLA-106**, p. 28 (emphasis added) (citing to International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Duško Tadić*, Judgement, Case No. IT-94-1-A, 15 July 1999, p. 49 *et seq*. (para. 121)).

the ILC Articles[807] makes it clear that the Parán Community and its *Ronda Campesina*'s conduct is attributable under Articles 4 and 5 of the ILC Articles, notwithstanding its illegality under Peruvian law – which the Respondent does not deny (**Section 9.2.3**).

9.2.1 The acts and omissions of the Parán Community are attributable to Peru under Article 4 of the ILC Articles

425 Article 4 of the ILC Articles specifically refers to a "territorial unit of the State" as part of the State. Its conduct is therefore attributable to the State regardless of the degree of autonomy with which it is vested under domestic law (**Section 9.2.1.1**). A "territorial unit of the State" includes a local community within the State which enjoys broad powers of self-government over part of the State's territory (**Section 9.2.1.2**). It is undisputed between the Parties that the Parán Community enjoys a high degree of self-administration. This in turn leads to the inevitable conclusion that the Parán Community is a "territorial unit of the State", rather than a "non-State" actor, as alleged by the Respondent (**Section 9.2.1.3**). Finally, the evidence on record leaves no room for the Respondent to argue that any of the acts complained of were committed by individuals acting on their own rather than the Parán Community as a whole (**Section 9.2.1.4**).

9.2.1.1 The conduct of a "territorial unit of the State" is attributable to the State under Article 4 of the ILC Articles regardless of its degree of autonomy

426 As noted in the Commentary to the ILC Articles, the rules on attribution are intended to reflect the basic principle that "international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision".[808]

[807] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 45 (Art. 7).

[808] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 39 (Chapter II, Commentary 7).

427 This principle finds clear expression in Article 4 of the ILC Articles, which extends the notion of State organ to that of any "territorial unit of the State":

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, **whatever position it holds in the organization of the State**, and **whatever its character as an organ** of the central Government **or of a territorial unit of the State**."[809]

428 Indeed, the Commentary on Article 4 confirms that "the reference to a State organ in article 4 is intended in the most general sense",[810] adding that "the principle in article 4 applies equally to organs of the central government and to those of regional or local units".[811]

429 The term "territorial unit of the State" covers a wide variety of legal concepts, from individual states within a federal State, protectorates, and dependent territories to provinces, departments, communes, counties, municipalities, districts, cities, etc.[812] As will be seen in the next sub-section, it also covers autonomous, self-governing communities.

430 Furthermore, the Commentary on Article 4 makes it clear that the degree of autonomy that the territorial unit enjoys under domestic law is irrelevant under Article 4:

> "It does not matter for [the] purpose [of Article 4] whether the territorial unit in question is a component unit of a federal State or

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[809] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 40 (Art. 4, "Conduct of organs of a State") (emphasis added).

[810] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 40 *et seq.* (Art. 4, Commentary 6).

[811] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 41 (Art. 4, Commentary 8).

[812] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 123; E. M. Borchard, *Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, American Journal of International Law, Vol. 23, No. 2 (CUP, 1929), at **Exhibit CLA-107**, p. 145 (Comment on Art. 3).

> a **specific autonomous area**, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations."[813]

431 Indeed, Professor Crawford recalls that this "rule is of long-standing and customary character."[814] As such, a consistent body of international decisions also illustrates the principle that the State is liable for the conduct of all its territorial units, even if these territorial units enjoy complete autonomy under the State's constitutional arrangements.[815] For instance, in the *LaGrand* case, the ICJ found that regardless of the autonomy of the State of Arizona under United States domestic law, the international responsibility of the United States would be engaged if the Governor of Arizona failed to comply with the order on provisional measures issued by the ICJ against the United States.[816]

432 Moreover, the ILC Commentary even confirms that this principle also applies in respect of autonomous territorial units with independent treaty-making powers: any acts carried out in connection with these powers are still attributable to the State under Article 4 of the ILC Articles.[817]

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[813] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 41 (Art. 4, Commentary 9) (emphasis added).

[814] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 123 *et seq.* (4.2.2.4 Federal and other internal subdivisions).

[815] *Héritiers de S.A.R. Mgr le Duc de Guise*, UN, Reports of International Arbitral Awards (Vol. XIII) (1950-1953) (FR), at **Exhibit CLA-108**, p. 161. ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 41 (Art. 4, Commentary 8).

[816] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 41. (Art. 4, Commentary 9).

[817] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 42 (Art. 4, Commentary 10) (The exception to this general principle being the situation where "the other party [to the treaty] [has] agreed to limit itself to recourse against the constituent unit [having signed the treaty] in the event of a breach").

9.2.1.2 A community with self-governing powers over part of the State's territory under domestic law is a "territorial unit of the State" under Article 4 of the ILC Articles

433 In its Counter-Memorial, the Respondent seeks to disclaim responsibility for Parán's illegal actions by relying on general considerations regarding the "special status" of indigenous people under international law. According to the Respondent, indigenous people are "non-State actors" of international law whose conduct cannot therefore be attributed to the State in which they reside.[818] These considerations are entirely inapposite to the present case.

434 First, none of the international legal instruments referred to by the Respondent in its Counter-Memorial – and especially not the ILO Convention 169 and the UNDRIP – contain any general rule against attribution of conduct of indigenous people to the State in which they reside.

435 Furthermore, even if any of these international instruments did establish such a rule against attribution (*quod non*), this rule would not find any application in the present case because the Parán Community does not qualify as indigenous people under Peruvian, nor under international law. Indeed, the Respondent's MEM expressly confirmed this in 2014.[819] Again, in its Counter-Memorial, the Respondent concedes – albeit implicitly – that rural communities, such as the Parán Community, are not to be regarded as indigenous people under Peruvian law but nonetheless suggests that these "rural communities constitute indigenous communities for the purposes of international law".[820] This is demonstrably wrong. The criteria for identifying indigenous people under Peruvian law – as set out for example by Peru's Ministry of Culture – are based on the rules and principles set out in the ILO Convention 169. These criteria are intended to ensure Peru's compliance with its international obligations deriving

[818] Counter-Memorial, 24/03/2022, p. 199 *et seq.* (paras. 406-417).

[819] MEM Report and Resolution approving the Mining Plan (SPA), 11/12/2014, at **Exhibit C-9 (corrected translation)**, p. 6 (para. 4.6).

[820] Counter-Memorial, 24/03/2022, p. 42 (para. 87).

from this Convention.[821] In light of the guidelines and criteria set out by Peru's Ministry of Culture, the MEM confirmed in its resolution approving IMC's updated mine plan in 2014 that neither the Parán Community nor any of the other rural communities in the Leoncio Prado District qualify as indigenous people under Peruvian law.[822] None of these international conventions relied upon by the Respondent in its Counter-Memorial therefore have any bearing on the issue of attribution in this present case.

436 There is no general rule under international law either in favour or against the attribution of conduct of local communities to the State in which they reside – this is dependent on the treatment accorded by the State in question. As a leading commentator notes:

> "the term 'State organ' is therefore to be understood in its widest meaning and encompasses organs that pertain directly to the structure of the State as well as **territorial communities** that have been **accorded** a **distinct but subordinate personality under domestic law**".[823]

437 As such, this issue has to be decided on a case-by-case basis in light of the legal status conferred upon these communities under the domestic legal framework of the State in question.[824]

438 In this respect, it is particularly striking that the Respondent itself emphasises that its legal regime pertaining to rural communities draws

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[821] Ministry of Culture, Methodological guide for the identification stage of indigenous peoples (SPA), June 2014, at **Exhibit C-594**, p. 6 ("In summary, it is expected that this document will constitute a useful tool for the official, which will ensure that the identification of indigenous or tribal peoples is based on the principles established by ILO Convention 169 and current national regulations.").

[822] MEM Report and Resolution approving the Mining Plan (SPA), 11/12/2014, at **Exhibit C-9 (corrected translation)**, p. 6 (para. 4.6).

[823] D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", in *The Law of International Responsibility* (OUP, 2010), at **Exhibit CLA-109**, p. 239 (emphasis added).

[824] D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", in *The Law of International Responsibility* (OUP, 2010), at **Exhibit CLA-109**, p. 243 ("The domestic law of the State is the starting point for the consideration of whether a person or entity constitutes an organ the conduct of which is attributable […]").

inspiration from "sovereignty and self-government models" pursuant to which it has "recogni[sed] an inherent indigenous authority to make laws over a defined territory".[825] Indeed, and contrary to the inferences the Respondent seeks to draw from this, granting local communities general powers of administration and regulation over part of its territory is in fact a clear indication of their status as "territorial units of the State" within the meaning of Article 4 of the ILC Articles.[826]

439 Several commentators have pointed out that where communities are vested with governmental functions over a specific autonomous area, these are akin to decentralised municipalities from the point of view of international law.[827] For this reason, with regard to the question of attribution to the United States of the conduct of Indian tribes, one author aptly remarked that in light of the ICJ decision in the *LaGrand* case:

> "[…] it would be remarkable if an international tribunal considering the question of attribution of a tribal human rights violation to the United States did not find the tribes to be **organs of the United States**. After all, the U.S. states – which are federated entities unlike tribes – function autonomously in their fields of exclusive competence. […] **An international tribunal should have no difficulty extending the general principle that the State is responsible for the acts of autonomous regions to the tribes as distinct governmental entities within the United States**."[828]

440 As demonstrated below, the same conclusion applies with equal force in respect of the Parán Community in light of its status under Peruvian law.

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[825] Counter-Memorial, 24/03/2022, p. 200 *et seq.* (para. 409) (citing to B. Richardson, *et al., "Chapter 11: Indigenous Self-Determination and the State"*, INDIGENOUS PEOPLES AND THE LAW (2009), at **Exhibit RLA-0029**, p. 293).

[826] J. Crawford, *et al*., "Non-state territorial authorities and international law of responsibility", Journée d'Etudes, Société Française pour le Droit International (2002) (FR), at **Exhibit CLA-110**, p. 1 *et seq.* ("1. Les collectivités territoriales dans l'Etat").

[827] K. Cowan, "International Responsibility for Human Rights Violations by American Indian Tribes", *Yale Human Rights & Developments L.J.,* Vol. 9, at **Exhibit CLA-111**, p. 34 *et seq.*

[828] K. Cowan, "International Responsibility for Human Rights Violations by American Indian Tribes", *Yale Human Rights & Developments L.J.,* Vol. 9, at **Exhibit CLA-111**, p. 32 *et seq.* (emphasis added).

9.2.1.3 The Parán Community is a "territorial unit" of Peru under Article 4 of the ILC Articles

441 In its Counter-Memorial, the Respondent emphasises heavily the prerogatives of self-governance and autonomy it has granted to rural communities, such as the Parán Community, under Peruvian law to give effect to what the Respondent considers their "right to self-determination".[829] It is not disputed that Peru has conferred on its rural and indigenous communities administrative, jurisdictional and police powers over part of its sovereign territory. Nor is it disputed that these are exercised through the "self-governing bodies of the rural community" – that is, its President, its Governing Committee and especially its *Ronda Campesina* which is discussed further in Section 9.2.2.2 below. The latter is charged with the Community's autonomous jurisdictional and police authority over its territory.

442 Indeed, as developed above, it is precisely these characteristics which demonstrate that such communities, including the Parán Community, fall within the definition of "territorial units of the State" under Article 4 of the ILC Articles. The arguments adduced by the Respondent to escape this conclusion are unavailing.

443 First, the Respondent in its Counter-Memorial, as well as its experts, repeatedly refers to the separate legal personality of the Parán Community under Peruvian law[830] or even possibly under international law.[831]

444 As noted above, the fact that the Parán Community has been "accorded a distinct, but subordinate personality under domestic law"[832] does not negate the "principle according to which the State is answerable for acts

[829] Counter-Memorial, 24/03/2022, p. 200 *et seq.* (para. 409).

[830] Counter-Memorial, 24/03/2022, p. 204 (para. 419), p. 215 (para. 445); Expert Report of Daniel Vela, 22/03/2022, p. 7 (para. 23), p. 15 *et seq.* (paras. 52, 56 and 59-60); Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 8 (paras. 7-9), p. 17 (paras. 47-49), p. 23 (para. 64).

[831] Counter-Memorial, 24/03/2022, p. 199 *et seq.* (paras. 406-410).

[832] D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", in *The Law of International Responsibility* (OUP, 2010), at **Exhibit CLA-109**, p. 239.

and omissions of organs of public territorial communities"[833] under Article 4 of the ILC Articles.[834] In addition, even if the Parán Community had a separate legal personality under international law and treaty-making powers (which it does not), this would not detract from its status as a "territorial unit of the State" under Article 4 of the ILC Articles.[835]

445 Second, in a desperate attempt to deflect responsibility for the Parán Community's illegal actions, the Respondent, relying on its Peruvian law expert, Mr Meini, even argues that there can be no attribution to the Respondent of the Parán Community's actions because "the Peruvian State would incur legal liability [under Peruvian law] if any of its organs or instrumentalities were to interfere with the autonomy of a rural community".[836]

446 This argument is patently wrong. It is a core principle of international law that "a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law", as reflected in Article 3 of the ILC Articles.[837] Moreover, as already noted, the ILC Commentary specifically states that "it is […] irrelevant whether the internal law of the State in question gives the [central government] **power to compel the component unit** to abide by the State's international obligations".[838]

447 In any case, the Repsondent's position is simply wrong as a matter of Peruvian law. It is unsurprising that the Respondent and its expert, Mr

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[833] D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", in *The Law of International Responsibility* (OUP, 2010), at **Exhibit CLA-109**, p. 241.

[834] D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", in *The Law of International Responsibility* (OUP, 2010), at **Exhibit CLA-109**, p. 239 *et seq.* (emphasis added).

[835] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 42 (Art. 4, Commentary 10).

[836] Counter-Memorial, 24/03/2022, p. 211 (para. 434) (citing to Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 18 (para. 50)).

[837] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 36 (Art. 3, Commentary 1).

[838] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 41 (Art. 4, Commentary 9) (emphasis added).

Meini, have not cited any authority under Peruvian law to suggest that Peru's central and local governments cannot compel rural communities, such as the Parán Community, to comply with Peruvian law – because none exist. Indeed, Article 38 of Peru's Constitution requires every Peruvian citizen to comply with the Constitution and Peru's laws and regulations.[839] There is no suggestion from the Respondent that the Parán Community's members are not Peruvian citizens. Furhter, Article 1 of the General Law on Rural Communities confirms that this principle applies equally to members of rural communities[840] – which are not exempt from complying the ordinary laws of Peru, especially in matters of public order as confirmed by the jurisprudence of Peru's Supreme Court.[841]

448 Based on the foregoing, it is clear that the Parán Community constitute a "territorial unit" of Peru within the meaning of Article 4 of the ILC Articles, and therefore its conduct is attributable to the Respondent.

9.2.1.4 The acts at issue in this arbitration were taken by the Parán Community as a whole

449 The Respondent argues in its Counter-Memorial that the "final flaw in Claimant's argument is that the vast majority of its arguments relate to the status of the rural community as a whole, **rather than to that of its individual members**".[842] The Respondent accordingly implies that the illegal actions complained of by the Claimant would not be those of the Parán Community as a whole, but simply those of individual community members. The facts of this case show otherwise.

450 The record demonstrates that, on the contrary, the Parán Community acted as one without exception, including during the June 2018 Invasion and during the Blockade. The Parán Community members were at all times acting under the direction of, and taking their orders from, the President

[839] Political Constitution of Peru, 1993 (SPA), at **Exhibit C-23 (corrected translation)**, p. 15.

[840] Law No. 24656, General Law of Rural Communities (SPA), 13/04/1987, at **Exhibit C-24 (corrected translation)**, p. 59 (Art. 1).

[841] Constitutional Tribunal Decision No. 0009/2018-PI/TC (SPA), 02/06/2020, at **Exhibit C-595**, p. 34 (paras. 93, 95).

[842] Counter-Memorial, 24/03/2022, p. 216 *et seq*. (para. 448) (emphasis added).

and other officials from Parán's Governing Committee and Parán's *Rondas Campesinas*.

451 For example, as to the June 2018 Invasion, the Police stated clearly that the mine site was taken over in the early hours of the morning by "a group of 250 to 300 community members from the Rural Community of Parán, **led by the President** of the Community Mr. Román Palomares **and its Treasurer** David Palomares Narvasta".[843]

452 The subsequent decision not to invade the mine site again, on 11 September 2018, was also a decision by the entire community at Parán's Assembly on 8 September 2018.[844]

453 Similarly, all the decisions concerning the Blockade were taken either by Parán's President and Governing Committee or by Parán's Assembly itself.[845]

454 The evidence also shows that the Parán Community members manning the Blockade were members of Parán's *Ronda Campesina* who were only responding to direct orders from the President, the Governing Committee or Parán's Assembly.[846]

455 For instance, on 21 December 2018, the Deputy Prosecutor, Alex León Moreno, who was carrying out investigations into IMC's criminal complaints, was denied access to the mine site by a group of 50 Parán Community members, mounting guard at the Blockade. They told him that he could not access the mine site without having first sought permission from the Lieutenant Governor of the Parán Community.[847]

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[843] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 40 (para. III. B.) (emphasis added).

[844] Memorial, 01/10/2021, p. 37 (para.112).

[845] Memorial, 01/10/2021, p. 44 *et seq.* (para. 135); Witness Statement of Luis F. Bravo, 01/10/2021, p. 16 *et seq.* (paras. 45, 49 and 95).

[846] SSS, Monthly Report, Project, August 2018 (SPA), at **Exhibit C-162**, p. 3; [redacted]

[847] Public Prosecutor's Office, Inspection Report (SPA), 21/12/2018, at **Exhibit C-246**, p. 2 (para. 2); Memorial, 01/10/2021, p. 45 *et seq.* (para. 138).

456 The Parán *ronderos* posted at the Blockade gave the same response on 27 February 2019 to members of IMC's staff requesting that they be granted access to the mine site further to the terms of the 26 February 2019 Agreement. Again, the Parán *ronderos* refused them access to the mine site because they said they had not been informed of this agreement by Parán's Governing Committee.[848] IMC's employees were only given access to the mine site through Parán's unusable after Parán's Assembly ratified the agreement on 2 March 2019[849] and Parán's President formally approved that they be given access on 3 March 2019.[850] Indeed, the Parán Community was constantly putting to vote each and every decision regarding its stance towards the Invicta Project and the individuals manning the Blockade acted accordingly on the orders and instructions of the executive organs of the Parán Community.[851]

457 Accordingly, none of the acts complained of in this arbitration were carried out by isolated members of the Parán Community, but rather involved the entire Parán Community acting as one. This is not a "few bad apples" situation. Furthermore, the contemporaneous evidence also confirms the central role played by Parán's *Ronda Campesina* during these events, as described in further detail in Section 9.2.2.4 below.

[848] Letter from Lupaka to MININTER (SPA), 28/02/2019, at **Exhibit C-17**, p. 1 (para. 3); Letter from IMC to MEM (SPA), 28/02/2019, at **Exhibit C-201**, p. 1 (para. 3). See also, Memorial, 01/10/2021, p. 51 *et seq.* (paras. 156-157); Witness Statement of Luis F. Bravo, 01/10/2021, p. 17 (paras. 47-48).

[849] Witness Statement of Luis F. Bravo, 01/10/2021, p. 17 (paras. 47-48).

[850] Memorial, 01/10/2021, p. 51 *et seq.* (paras. 156-157); Witness Statement of Luis F. Bravo, 01/10/2021, p. 18 (para. 50); Letter from IMC to MININTER (SPA), 05/03/2019, at **Exhibit C-202**, p. 1 *et seq.* (paras. 4-6).

[851] SSS, Monthly Report, Project, December 2016 (SPA), at **Exhibit C-424** , 9; SSS, Report on Social Intervention for signing of an agreement with the Parán Community, 2018 (SPA), at **Exhibit C-111**, p. 3; Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**;SSS, Monthly Report, Project, September 2018 (SPA), at **Exhibit C-138**, p. 5; [redacted]

9.2.2 In any event, the conduct of the Parán's Community and its *Ronda Campesina* is attributable to Peru under Article 5 of the ILC Articles

458 Even if the Parán Community is not considered an organ of the State under Article 4 of the ILC Articles, the conduct of the Parán Community and its *Ronda Campesina* is attributable to the State under Article 5. The Claimant has already explained in the Memorial that the Parán Community and its *Ronda Campesina* are vested with certain jurisdictional and police powers, including the lawful use of force and firearms, within Parán's communal territory under Peruvian law.[852] The Parán Community and its *Ronda* abused these elements of governmental authority entrusted to it under Peruvian law and played a central role in (i) the June 2018 Invasion, (ii) the Blockade which was in place as from October 2018 and (iii) the other acts of violence that are the subject of complaint in this arbitration.[853] Therefore, their acts and omissions are attributable to the Respondent under Article 5 of the ILC Articles.[854]

459 The Respondent wrongly contends in its Counter-Memorial that the acts of the Parán Community cannot be attributed to the Respondent under Article 5 of the ILC Articles because the Parán Community and its *Ronda Campesina* are not empowered under Peruvian law to exercise elements of governmental authority and, alternatively, were not acting in that capacity in relation to the conduct complained of by the Claimant. As demonstrated below, none of these arguments has any merit.

460 After setting out the applicable standard under Article 5 of the ILC Articles (**Section 9.2.2.1**), the Claimant will demonstrate that the State has vested the Parán Community with certain powers under Peruvian law (**Section 9.2.2.2**), which involve the "exercise of governmental authority" (**Section 9.2.2.3**) and that the Parán Community and its *Ronda Campesina* exercised such authority during the key events that ultimately caused Lupaka to lose its investment (**Section 9.2.2.4**).

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[852] Memorial, 01/10/2021, p. 77 *et seq.* (paras. 243 and 246).

[853] Memorial, 01/10/2021, p. 78 (paras. 248).

[854] Memorial, 01/10/2021, p. 78 (paras. 249).

9.2.2.1 The legal requirements for attribution under Article 5 of the ILC Articles

461 Article 5 of the ILC Articles provides as follows:

> "The conduct of a person or entity which is not an organ of the State under article 4 but which is **empowered by the law** of that State to exercise **elements of the governmental authority** shall be considered an act of the State under international law, provided that the person or entity **is acting in that capacity** in the particular instance."[855]

462 The language of Article 5 clearly set outs a three-prong test – none of which are disputed by the Respondent:

a) First, the phrase "empowered by the law of that State" requires, in the words of Professor Crawford, a "formal delegation" of certain powers under domestic law.[856] Professor Crawford further explains that this "requirement is of a formal character and requires only that the entity in question must have been empowered pursuant to some legal provision of the state".[857]

b) Second, the powers conferred under domestic law must involve the exercise of "elements of governmental authority".[858]

c) Third, the entity in question must have "acted in that capacity in the particular instance".[859]

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[855] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 42 (Art. 5) (emphasis added).

[856] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 126 *et seq.* ("[The text of the ILC Articles] analyses separately the case where sovereign or governmental authority is **delegated** to an entity which is not an organ, and cases where, without **formal delegation**, such an entity acts on state instruction, direction or control. The latter case is covered by Article 8 […]; the former case is dealt with in Article 5."). The Respondent refers to this requirement, without addressing it specifically, at Counter-Memorial, 24/03/2022, p. 192 *et seq.* (paras. 391 (b) and 396).

[857] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 132 (Section 4.3.3 'Empowered by the law' of the state).

[858] Counter-Memorial, 24/03/2022, p. 204 *et seq.* (paras. 419-448).

[859] Counter-Memorial, 24/03/2022, p. 204 *et seq.* (paras. 419-448).

463 These three elements and their application to the facts are discussed in **Sections 9.2.2.2**, **9.2.2.3** and **9.2.2.4**, respectively.

464 Before turning to the three elements that have to be established to prove attribution under Article 5 of the ILC Articles, the Claimant addresses three irrelevant considerations upon which the Respondent relies in an attempt to create confusion, namely:

a) the degree of autonomy and self-government that the Parán Community enjoys under Peruvian law;[860]

b) whether the members of the Parán Community and its *Ronda Campesina* can be classified as public officials under Peruvian law;[861] and

c) the alleged separate legal personality under international law of certain indigenous communities, including possibly the Parán Community, and their international law rights vis-à-vis the State in which they reside.[862]

465 The Claimant has already demonstrated that the first and third of these considerations are irrelevant for the purposes of attribution under Article 4 of the ILC Articles. As elaborated immediately below, these factors are equally irrelevant under Article 5 of the ILC Articles.

466 First, as to the high degree of autonomy enjoyed by the Parán Community, the Commentary to the ILC Articles expressly states that the origin and *raison d'être* of Article 5 is precisely to ensure "attribution to the State of conduct of **autonomous** bodies exercising public functions of an administrative or legislative character".[863] This rule ensures that a State cannot delegate some of its governmental authority and escape

[860] Counter-Memorial, 24/03/2022, p. 196 *et seq*. (para. 402) ; p. 199 (para. 406); p. 200 *et seq.* (paras. 409-410); p. 204 (para. 419); p. 211 (para. 434) ; p. 213 (para. 439). See also Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 6 *et seq*. (para. 6.b); p. 17 *et seq.* (paras. 47-54).

[861] Counter-Memorial, 24/03/2022, p. 211 *et seq.* (paras. 435-437); Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 22 *et seq.* (paras. 62-67).

[862] Counter-Memorial, 24/03/2022, p. 199 *et seq.* (paras. 406-417); Expert Report of Daniel Vela, 22/03/2022, p. 19 *et seq.* (paras. 65-68).

[863] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 43 (Art. 5, Commentary 4) (emphasis added).

international responsibility by granting complete discretion and autonomy to the entity so entrusted. The Commentary therefore makes it clear that the "the fact that [the entity] is **not subject to executive control** [is] not [a] decisive criteri[on]".[864] It also adds that "for the purposes of Article 5, an entity is covered even if its exercise of authority involves an **independent discretion** or power to act".[865]

467 It follows that the Respondent and its legal experts' extensive reliance on the degree of autonomy and self-government enjoyed by rural communities under Peruvian law is both misplaced and evasive.[866]

468 Second, the Respondent's argument that the members of the Parán Community are not considered public officials (*de jure* or *de facto*) under Peruvian law, and therefore the State would not incur criminal liability for their actions under Peruvian law is equally irrelevant.[867]

469 This argument is not only contrary to the principle recalled above that the State cannot invoke its domestic law to avoid international responsibility,[868] but also to the Commentary on Article 5, which specifically points out that:

> "[…] the fact that an entity can be classified as public or private according to the criteria of a given legal system [is] **not** a **decisive** criteri[on] for the purpose of attribution of the entity's conduct to the State".[869]

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[864] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 43 (Art. 5, Commentary 3) (emphasis added).

[865] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 42 (Art. 5, Commentary 7) (emphasis added).

[866] Counter-Memorial, 24/03/2022, p. 196 *et seq.* (para. 402); p. 199 (para. 406); p. 200 *et seq.* (paras. 409-410); p. 204 (para. 419); p. 211 (para. 434); p. 213 (para. 439). See also Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 3 (para. 6.b); p. 13 *et seq.* (paras. 47-54).

[867] Counter-Memorial, 24/03/2022, p. 211 *et seq.* (paras. 435-437); Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 22 *et seq.* (paras. 62-67).

[868] See *supra* Section 9.2.1.3.

[869] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 43 (Art. 5, Commentary 3) (emphasis added).

470 This follows clearly from the fact that Article 5 sets out a functional – and not structural – test according to which the emphasis is on the subject matter of the "formal delegation", *i.e.*, the nature of the functions performed and not the nature of the entity concerned.[870] As stated in the Commentary, the "true common feature [under Article 5 is] that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority".[871]

471 Therefore, it is legally irrelevant under Article 5 ILC that the members of the Parán Community may or may not "be classified as public officials according to the criteria of Peruvian law".[872]

472 By contrast, as demonstrated in Section 9.2.2.3 below, the fact that the Parán Community's jurisdictional and police powers are considered "public functions" under Peruvian law shows that the Parán Community is "empowered to exercise specified functions which are akin to those normally exercised by organs of the State" – which is, in the words of the ILC, the real common feature of the entities covered under Article 5.[873]

473 Third and finally, as discussed in Section 9.2.2.1 above, the fact that certain indigenous communities may have some form of limited legal personality under international law, including independent treaty-making powers, does not have any bearing on the issue of attribution. It is confirmed by the ILC Commentary which states that the rules regarding the capacity to enter into international agreements "have nothing to do with attribution for the

[870] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 127. See Counter-Memorial, 24/03/2022, p. 192 (para. 390) (the Respondent alludes to this distinction, but apparently fails to take into its implications).

[871] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 43 (Art. 5, Commentary 3).

[872] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 43 (Art. 5, Commentary 3).

[873] D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", in *The Law of International Responsibility* (OUP, 2010), at **Exhibit CLA-109**, p. 245 (citing to UN, *Yearbook of the International Law Commission,* Vol II(1) (1974), at **Exhibit CLA-112**, p. 282 (Commentary to draft Art. 7, para. 18).

purposes of State responsibility".[874] Furthermore, this argument is devoid of any relevance here because, as explained above, the Parán Community is not an indigenous or tribal community within the meaning the ILO Convention 169 and UNDRIP.[875]

474 The issue of attribution to the Respondent of the Parán Community's illegal acts falls to be considered in light of the special legal regime that rural communities enjoy under Peruvian law.

475 The Claimant will therefore describe below the legal regime applicable to the Parán Community and its *Ronda Campesina*, outlining the specific delegation of certain powers enshrined under Peruvian law (**Section 9.2.2.2**) and demonstrate that these powers involve the exercise of elements of governmental authority (**Section 9.2.2.3**). Finally, the Claimant will show that the illegal actions of the Parán Community and its *Ronda Campesina* were carried out in an apparent exercise of that authority (**Section 9.2.2.4**).

9.2.2.2 The first requirement: the Respondent has delegated powers to the Parán Community and its Ronda Campesina

476 As stated above, the first requirement under Article 5 of the ILC Articles is that "the entity in question must have been empowered pursuant to some legal provision of the state."[876] Such "formal delegation" may be granted by virtue of statutes, executive orders or even contracts.[877] Although the Respondent expressly acknowledges this requirement in its Counter-Memorial,[878] it ostensibly omits to discuss this requirement in any detail. On examination, the legislative framework reveals the extent to which the State has delegated sweeping powers to the *Rondas Campesinas* to fill the

[874] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 39 (Chapter II, Commentary 5).

[875] See *supra* Section 9.2.1.2.

[876] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 132 (Section 4.3.3).

[877] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 127.

[878] Counter-Memorial, 24/03/2022, p. 192 *et seq.* (paras. 391 (b) and 396).

institutional vacuum created by its near-total absence in the rural areas of the Andes region.

477 The formal recognition of the Rural Communities under Peruvian law, and especially their right to set up armed *Rondas Campesinas* with the support and supervision of the Peruvian military, was indeed integral to President Fujimori's counter-insurgency strategy to defeat the Maoist terrorist group, the Shining Path ("*Sendero Luminoso*" in Spanish).[879] At the time, the central authorities decided to rely heavily on the *Rondas Campesinas* in their fight against terrorism because the Shining Path had established its base and its main training camps in the Andean region to benefit from the near-total absence of State central authorities, including police and military personnel, in these remote areas.[880] The delegation of these police and military powers to the *Rondas Campesinas* proved a turning point as it culminated with the near eradication of the Shining Path in the mid-1990s.[881] Yet, these delegations of powers, which might seem a remnant of a distant past, are still in force today.

Peru's Political Constitution

478 Peru's current Political Constitution – promulgated at the behest of President Fujimori in 1993 – expressly refers to the Rural Communities and their *Ronda Campesina* in Chapter VIII "The Judicial Power" within Part IV entitled "The Structure of the State".[882] Article 149 sets out the "special jurisdiction" conferred upon the rural communities and their *Ronda Campesina* as follows:

> "Article 149 – Exercise of the jurisdictional function by the rural and native communities

[879] "The Rondas Campesinas of Peru: an alternative in administration of justice in the high andean rural areas, the case of Ocongate, a rural district of the Cusco Department 1992-2011", *Horizonte de la Ciencia* 10(18) (2020) (SPA), at **Exhibit C-596**, p. 3 *et seq*. (Section C)

[880] "Compensation to the Members of the Self-Defence Committees and Rondas Campesinas Victims of Terrorism", Ombudsman's Office, Report No. 54 (SPA), 30/11/2000, at **Exhibit C-597**, p. 3 *et seq*. (Section III)

[881] P. Maureci, *Military Politics and Counter-insurgency in Peru* (CUP, 1991), at **Exhibit C-598**, p. 102.

[882] Political Constitution of Peru, 1993 (SPA), at **Exhibit C-23 (corrected translation)**, p. 47.

> The authorities of the Rural and Native Communities, **with the support of the** [***Rondas Campesinas***], may exercise jurisdictional functions within their territorial scope in accordance with customary law, provided that they do not violate the fundamental rights of the individual. The law establishes the means of coordination of **this special jurisdiction** with the Peace Courts and with other bodies of the Judicial Power."[883]

The General Law on Rural Communities and the General Law on Rondas Campesinas

479 The General Law on Rural Communities does not make any references to the "special jurisdiction" of rural communities but instead confers to the General Assembly of such communities the power to establish a *Ronda Campesina* in accordance with the General Law No. 24751 on *Rondas Campesinas*.[884] As described in further detail below, the *Ronda Campesina* constitutes the main organ through which rural communities exercise their "special jurisdiction" enshrined in Article 149 of the Peruvian Constitution. As such, rural communities do not simply exercise these jurisdictional powers "with the support of the *Rondas Campesinas*" as the text of the Constitution suggests, but in fact mainly through them. The Supreme Court has also stated in a binding opinion on the special status of *Ronda Campesina* under Peruvian law that they can even exercise these powers independently from the rural communities from which they emanate.[885]

480 As outlined below, Peru has conferred three types of powers on the *Ronda Campesina* under its domestic law: (i) jurisdictional powers in accordance with customary law; (ii) police powers, including powers of arrest, detention and seizure, and (iii) the lawful use of force and firearms, including military weapons.

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[883] Political Constitution of Peru, 1993 (SPA), at **Exhibit C-23 (corrected translation)** (emphasis added), p. 47 (Art. 149).

[884] Law No. 24656, General Law of Rural Communities (SPA), 13/04/1987, at **Exhibit C-24 (corrected translation)**, p. 5 (Art. 18 (k)).

[885] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 4 (para. 7).

481 Article 1 of the General Law No. 27908 on *Rondas Campesinas* sets out in broad terms the jurisdictional and police powers conferred on the *Rondas Campesinas*:

> "The legal personality of the *Rondas Campesinas* is recognised as an autonomous and democratic form of communal organisation, they can establish dialogue with the State, **support the exercise of the jurisdictional functions of the rural and native communities**, collaborate in the resolution of conflicts, and carry out extrajudicial conciliation functions in accordance with the Constitution and the law, as well as **functions related to communal security and communal peace** within their territorial area. The rights granted to the indigenous peoples and rural and native communities apply to the *Rondas Campesinas* insofar as it relates to, and benefits, them."[886]

482 Article 7 of the General Law No. 27908 on *Rondas Campesinas* further defines the exact scope of the jurisdictional powers conferred upon them. Contrary to Mr Vela's suggestions in his expert report, the jurisdictional powers conferred upon the *Ronda Campesina* are not limited to "conflicts within the community"[887] but extend to conflicts with any entity or third party within its jurisdiction. As made clear by the text of Article 7:

> "The *Rondas* Campesinas, in accordance with their customs, may intervene in the peaceful resolution of **conflicts** arising between **members of the community** or **organisations within its jurisdiction and other external parties**, provided that the dispute arises out of events that occurred within its communal jurisdiction."[888]

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[886] Law No. 27908, 06/01/2003, at **Exhibit R-0116**, p. 1 (Art. 1) (emphasis added) The translation included in the text has been prepared by the Claimant's legal counsel on the basis of the original Spanish wording.

[887] Expert Report of Daniel Vela, 22/03/2022, p. 17 *et seq.* (paras. 59 and 61).

[888] Law No. 27908, 06/01/2003, at **Exhibit R-0116**, p. 2 (Art. 7) (emphasis added). The translation included in the text has been prepared by the Claimant's legal counsel on the basis of the original Spanish wording.

483 Tellingly, this article does not impose limits on the scope of *Ronda Campesina*'s subject-matter and personal jurisdiction, but simply confines its territorial jurisdiction to the communal territory. Contrary to the Respondent's and Mr Vela's arguments, the scope of the *Ronda Campesina*'s jurisdictional powers defined under Article 7 are clearly broad, and not limited to "disputes that may arise with respect to the [rural community's] property rights".[889] The Respondent's and its expert's unduly restrictive interpretation is premised on an incorrect, literal reading of Article 13 of the Regulations on *Rondas Campesinas* which seek to implement the General Law No. 27908 on *Rondas Campesinas*, and especially its Article 7.

484 More particularly, the Respondent relies on the second paragraph of Article 13 of the Regulations, which provides that "the matters which can be the subject of conciliation are only those that relate to possession, usufruct of the communal property, goods and the use of the various community resources".[890] The Respondent and its expert essentially contend that the use of the word "only" in a provision of subordinate legislation would somehow limit the jurisdictional powers of rural communities and their *Ronda Campesina* as defined under the Peruvian Constitution and Peru's laws. This is incorrect.

485 Peru's own Ombudsman's Office explains in a publication – cited with approval by Peru's Supreme Court in its leading opinion on the special status of *Ronda Campesina* under Peruvian law[891] – that Article 13 of the Regulations forms part of a body of subordinate legislation which cannot be construed so as to restrict the powers granted to the *Ronda Campesina* under primary legislation, especially those granted under Article 7 of the

[889] Counter-Memorial, 24/03/2022, p. 207 *et seq.* (paras. 425, 430 and 459); Expert Report of Daniel Vela, 22/03/2022, p. 19 (para. 64).

[890] Supreme Decree No. 025-2003-JUS, 29/12/2003, at **Exhibit R-0103**, p. 11 (Art. 13). The translation included in the text has been prepared by the Claimant's legal counsel on the basis of the original Spanish wording.

[891] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 5 *et seq.* (para. 8).

General Law on *Rondas Campesinas*.[892] Moreover, as shown in the next sub-section, this interpretation would clearly be at odds with the other provisions of the Regulations themselves which confer powers that go well beyond those listed in Article 13 of the Regulations.

486 The wide-ranging powers conferred to the *Rondas Campesinas* and their *ronderos* are in fact often the subject of fierce political debate in Peru's media. For instance, as part of its jurisdictional and police powers, *Rondas Campesinas* are lawfully entitled to use force, including to imposing customary forms of physical punishment (*e.g.*, plunging offenders in freezing water or flogging offenders with whips).[893] During the Covid pandemic, various *Rondas Campesinas* used their powers to regulate freedom to movement over their territory to impose strict lockdowns over their communal territory, punishing community members and outsiders alike with lashes.[894] However, the Peruvian media frequently report on incidents where members of *Rondas Campesinas* abuse their authority to commit extreme acts violence, illegally detaining, torturing and killing people they suspect of "crimes" ranging from marital infidelity to witchcraft.[895]

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[892] Supreme Decree No. 025-2003-JUS, 29/12/2003, at **Exhibit R-0103**, p. 4 (Art. 13); Ombudsman's Office, Defensoría del Pueblo, "State recognition of the Rondas Campesinas", Normas y Jurisprudencia (SPA), at **Exhibit C-600**, p. 19 (Section 5.3).

[893] "Ministry of Women urges elucidation of allegations of torture of women by Ronderos", *La Libertad* (SPA), 10/07/2022, at **Exhibit C-601**; J. Gitlitz, "Rondero justice and human rights in Cajamarca", *Boletín del Instituto Riva Aguero* 28 (2000) (SPA), at **Exhibit C-602**;"The Rondas Campesinas of Peru: an alternative in administration of justice in the high andean rural areas, the case of Ocongate, a rural district of the Cusco Department 1992-2011", *Horizonte de la Ciencia* 10(18) (2020) (SPA), at **Exhibit C-596**.

[894] "Rondas Campesinas that faced off against rebels in Peru are slowing down Covid with lashings", *Reuters* (SPA), 15/06/2022, at **Exhibit C-603**.

[895] "Ombudsman's Office: urgent investigation of alleged acts of torture against a family in Cajamarca", *Ombudsman's Office* (SPA), 12/02/2021, at **Exhibit C-604**; "Abuses by rondas campesinas", *El Montonero* (SPA), 03/08/2017, at **Exhibit C-605**;"Rondas campesinas reject being singled out as 'claiming not to protect the government'", *Infobae* (SPA), 07/07/2022, at **Exhibit C-606**;"Rondas de Pedro Castillo kidnap a journalist from Cuarto Poder", *Latin America News*, 07/07/2022, at **Exhibit C-607**;"Rondas campesinas reject being singled out as 'claiming not to protect the government'", *Infobae* (SPA), 07/07/2022, at **Exhibit C-606**.

The Regulations on Rondas Campesinas

487 The Regulations on *Rondas Campesinas* further confirm that the *Rondas Campesinas* – much like local sheriffs – are entitled to regulate all aspects of law and order within the community's territory.

488 The scope of the *Rondas Campesinas*' jurisdictional powers is necessarily congruent with the ambit of their police powers which are set out in further detail in the Regulations on *Rondas Campesinas*. Article 3 sets out the objectives for which the *Rondas* are established:

> "The purpose of the *Ronda Campesina* is to contribute to the development, **security**, **justice** and **social peace** within its territorial scope, without discrimination of any kind, in accordance with the Constitution and the laws. They collaborate in the resolution of conflicts and perform functions of extrajudicial conciliation.
>
> The *Rondas* established with Rural or Native Communities shall collaborate with them in the **exercise** of their **jurisdictional functions**."[896]

489 Article 12 of the Regulations sets out in detail the functions performed by the *Rondas Campesinas*:

> "The functions of the *Rondas Campesinas* […] are as follows:
>
> a) Contribute to the **physical integrity**, as well as moral and cultural, of the members of the Rural Community, the Native Community, village or other population centre, in order to **maintain the peace and security of the population**, as well as contribute to the progress of its people.
>
> b) Contribute to **ensure** the **exercise of the rights** and **the compliance with obligations** of members of the rural community, native community, village, or other population

[896] Supreme Decree No. 025-2003-JUS, 29/12/2003, at **Exhibit R-0103**, p. 2 (Art. 3) (emphasis added). The translation included in the text has been prepared internally by the Claimant's legal counsel on the basis of the original Spanish wording.

> centre to which they belong, **in accordance with the Constitution and the law**. […]
>
> d) Intervene in the **peaceful resolution** of **conflicts** arising between **members** of the community and **other third parties**, provided that the dispute arises out of events that occurred within their communal sphere. […]
>
> f) Participate in, control and supervise the development programmes and projects implemented within the territory, as well as to denounce functional misconduct by any authority, in accordance with the law.
>
> g) Contribute to the **preservation of the environment.**
>
> h) Coordinate within the framework set out in national legislation, with political, police, municipal and regional authorities, representatives of the Ombudsman's Office and other public administrative authorities. […]"[897]

490 These articles clearly show that the *Rondas Campesinas* are entrusted with jurisdictional and law enforcement powers within the communal territory, both in respect of community members and third parties.

491 Article 19 further provides for the rights and obligations of individual *ronderos* and includes, in particular, the duty "to assist, where appropriate, the members of the Rural Community […] in **need of protection**".[898]

The relations between the MININTER and the Rondas Campesinas

492 As pointed out by the Respondent's witness, Mr Esteban Saavedra Mendoza, Peru's MININTER has a special Directorate in charge of

[897] Supreme Decree No. 025-2003-JUS, 29/12/2003, at **Exhibit R-0103**, p. 3 *et seq.* (Art. 12) (emphasis added). The translation included in the text has been prepared internally by the Claimant's legal counsel on the basis of the original Spanish wording.

[898] Supreme Decree No. 025-2003-JUS (SPA), 03/01/2019, at **Exhibit C-608**, p. 7 (Art. 19) (emphasis added).

managing the relations between the MININTER and the *Ronda Campesina*.[899]

493 The Regulations on the Organisation and Functions of the Ministry of Interior (the "**MININTER Regulations**") further elucidates the relationship between the MININTER and the *Ronda Campesina*. For instance, Article 87 of the MININTER Regulations emphasises the "contribution" played by the *Ronda Campesina* to the maintenance of "public order" and "citizen security" in Peru.[900] More generally, the MININTER Regulations promote constant dialogue and engagement between the MININTER and the *Ronda Campesina* which takes the form of workshops and seminars between police officers and *ronderos* that are regularly organised under the auspices of the MININTER and reported on its webpage. The MININTER also promotes framework agreements with local *Ronda Campesina* to organise joint patrols with the police.[901]

494 It is clear that the legal status of the *Ronda Campesina* and their *ronderos* goes far beyond the rights of ordinary citizens to protect their property and self-defence. In the case of the Parán Community for instance, the local Chief of Police had exhorted Parán's *Ronda Campesina* several times to take steps to prevent the illegal cultivation of marijuana on Parán's territory – to no avail.[902] Contrary to the Respondent's suggestion in its Counter-Memorial,[903] such a close "partnership" and "co-operation" between *Ronda Campesina* and the State's MININTER shows that the *Rondas Campesinas* are embedded in Peru's law enforcement structure.

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[899] Witness Statement of Esteban Saavedra Mendoza, 15/03/2022, p. 4 (para. 16).

[900] Supreme Decree No. 004-2017-IN, Approval of Regulation on the Organization and Functions of the Ministry of the Interior (SPA), at **Exhibit C-609**, p. 49 *et seq.* (Art. 87).

[901] "Strengthening the articulation between National Police and rural patrols", *MININTER* (SPA), 01/10/2018, at **Exhibit C-610**; "Mininter strengthens coordination and cooperation with rural patrols", *MININTER* (SPA), 01/09/2021, at **Exhibit C-611**; "Coordination between police and rural patrols in seven regions strengthened", *MININTER* (SPA), 10/11/2020, at **Exhibit C-612**; "Strengthening of the articulated work between the National Police and the rural patrols", *MININTER* (SPA), 15/09/2018, at **Exhibit C-613**.

[902] SSS, Weekly Report, Project (SPA), 20/11/2017 to 27/11/2017, at **Exhibit C-426**, p. 2 *et seq.*

[903] Counter-Memorial, 24/03/2022, p. 203 (para. 415).

495 In the surrounding area of the Project, the *Rondas Campesinas* of the three neighbouring communities played an important role in ensuring public order and crime prevention. In particular, the *Rondas Campesinas* also boasted a sizeable patrol force, especially compared to the scant presence of local police in the area: for instance, the Parán Community's *Ronda Campesina* comprised more than 150 *ronderos* whereas Lacsanga's Ronda had some 70 *ronderos*.[904]

496 For this reason, the local police and other local authorities would rely heavily and collaborate closely with the local *Rondas Campesinas* in tackling drug trafficking in the region, especially within the Parán community.[905] To this end, the Sayán Police provided equipment and support to the *Ronda Campesina* of Lacsanga in December 2017 to assist in stamping out marijuana production in the area.[906] To ensure law and order, the *Rondas Campesinas* would also regularly set up checkpoints on certain roads crossing through their territory to run identity checks and control ingress and egress, often in coordination with the local Police.[907] For example, after the June 2018 Invasion, the *Rondas Campesinas* of the Lacsanga Community set up several security checkpoints manned day and night and asked for police assistance as they feared for the safety of their community.[908]

The relations between the Peruvian Army and the Rondas Campesinas

497 One of the most significant prerogatives granted to the *Rondas Campesinas* – which confirms the extraordinary nature of the powers

[904] SSS, Parán Community *Ronderos* Register (prepared by Marco A. Estrada) (SPA), at **Exhibit C-551**; SSS, Weekly Report, Project (SPA), 02/07/2018 to 08/07/2018, at **Exhibit C-614**, p. 2.

[905] SSS, Weekly Report, Project (SPA), 20/11/2017 to 27/11/2017, at **Exhibit C-426**, p. 2 *et seq.*.

[906] SSS, Monthly Report, Project, December 2017 (SPA), at **Exhibit C-391**, p. 15 *et seq.*.

[907] SSS, Weekly Report, Project (SPA), 02/07/2018 to 08/07/2018, at **Exhibit C-614**, p. 2; SSS, Monthly Report, Project, August 2018 (SPA), at **Exhibit C-162**, p. 4, 11 and 12; SSS, Monthly Report, Project, September 2018 (SPA), at **Exhibit C-138**, p. 19.

[908] SSS, Weekly Report, Project (SPA), 02/07/2018 to 08/07/2018, at **Exhibit C-614**, p. 2; SSS, Monthly Report, Project, August 2018 (SPA), at **Exhibit C-162**, p. 11.

conferred upon them – is the right to enrol voluntarily as a "Committee of Self-Defence" to assist the Peruvian Army and the Peruvian National Police in fighting against terrorism, drug-trafficking and other crimes.[909] This was offered to the *Rondas Campesinas* by President Alberto Fujimori in the context of the fight against the Shining Path.[910]

498 The Parán Community has availed itself of the right to arm its *Ronda Campesina*[911] and, as result, its *Ronda Campesina* have the right to carry and use firearms pursuant to Article 7 of the Regulations on Committees of Self-Defence.[912] As noted above, they have also received military training and military rifles from the Peruvian Army as set out Article 49 of the same Regulations, which they, of course, abused.[913] The right of rural communities to arm their *Ronda Campesina*, if they so choose, and this further delegation of police and military powers from the State to the *Ronda Campesina* has never been revoked, even though the fight against the Shining Path has long ended. An article in *The Economist* newspaper noted that, although it proved a successful counter-insurgency strategy at the time, the unintended consequences of such far-reaching delegation of sovereign powers have now erupted into plain view:

> "Although the Shining Path has long since faded, the [*Ronda Campesina*] are stronger than ever. In [some regions of Peru's Andes], they have turned into well-armed militias of coca growers.

[909] Supreme Decree No. 077-92-DE, Regulations on the Organisation and Functions of the Auto-Defence Committees (SPA), 08/11/1991, at **Exhibit C-615**, p. 2 (Art. 4). See also, Supreme Decree No. 077-92-DE, Regulations on the Organisation and Functions of the Auto-Defence Committees (SPA), 08/11/1991, at **Exhibit C-615**, p. 3 (Art. 16), p. 12 (Art. 64).

[910] P. Maureci, *Military Politics and Counter-insurgency in Peru* (CUP, 1991), at **Exhibit C-598**;"Compensation to the Members of the Self-Defence Committees and Rondas Campesinas Victims of Terrorism", Ombudsman's Office, Report No. 54 (SPA), 30/11/2000, at **Exhibit C-597**

[911] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 11 (paras. 3-4).

[912] Supreme Decree No. 077-92-DE, Regulations on the Organisation and Functions of the Auto-Defence Committees (SPA), 08/11/1991, at **Exhibit C-615**, p. 2 (Art. 7).

[913] Supreme Decree No. 077-92-DE, Regulations on the Organisation and Functions of the Auto-Defence Committees (SPA), 08/11/1991, at **Exhibit C-615**, p. 10 (Art. 49).

> […] [T]hey battle mining companies and are the real power in the land."[914]

499 The Parán Community epitomises this more recent trend. Fully aware of Parán's drug-trafficking and their illegal use of the weapons entrusted to them, the local Police had already advocated as early as January 2019 for the seizure of the Parán's *Rondas Campesina*'s weapons,[915] but it never received the requisite authorisations of the higher echelons of the MININTER while Lupaka held its investment.[916] To date, as described in detail in Section 2, the Parán Community remains the only "real power in the land" surrounding the mine site.

The special status of ronderos under Peruvian criminal law owing to their public functions

500 Finally, the jurisprudence of Supreme Court of Peru confirms the special status of *ronderos* under Peruvian law.

501 Indeed, as cited by Mr Meini in his expert report, in 2009 the Supreme Court of Peru issued a binding unanimous opinion on the extent to which *ronderos* can be held liable under Peruvian law for various crimes, including false imprisonment, battery, extorsion, homicide and usurpation of public authority, in light of the special status of rural communities and their *Rondas Campesinas* under Peru's Constitution and the ILO Convention 169.[917] The opinion is intended to provide a comprehensive restatement of the law based on the Supreme Court's precedents regarding the special status of *ronderos* under Peruvian criminal law.[918]

502 In its opinion, the Supreme Court recalls that the customary law of rural communities is recognised under Peruvian law as a "specific normative

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[914] "Dallying with a monster", *The Economist*, 15/03/2014, at **Exhibit C-616**, p. 2.

[915] Letter from Huacho Police to Chief of Lima Region Police (SPA), 25/01/2019, at **Exhibit C-338**.

[916] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 19 *et seq.* (para. 41).

[917] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 1 *et seq.* (paras. 3-4).

[918] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 1 *et seq.* (paras. 3-4).

system, consisting of a distinct set of norms and powers of regulation"[919] which is mainly enforced by the *Rondas Campesinas* within the community's territory.[920] The role played by *ronderos* in security and development necessarily involves the exercise of powers to control and regulate criminal behaviour in their territory in accordance with their customary law.[921] The Supreme Court also recalls that this special jurisdiction is intended to remedy the lack of access to the justice system in the remote areas of the Andes in which Peru's rural communities reside,[922] and is even reinforced by the "absence or almost non-existence of State presence" in the areas under the jurisdiction of *Ronda Campesina*.[923] The Supreme Court of Peru emphasises that the recognition of this special jurisdiction necessarily implies objective limits on the jurisdiction of other ordinary courts.[924]

503 For these purposes, the Supreme Court sets out clearly the scope of this special jurisdiction: *ronderos* are entitled to exercise their jurisdictional powers in respect of any conduct that occurs within the communal territory. The Supreme Court describes this territorial element as "essential for the recognition of the jurisdictional functions of the *Rondas Campesinas*".[925]

504 Most importantly, and contrary to the Respondent's and its legal experts' representations,[926] the Supreme Court of Peru confirms in its opinion that

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[919] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 3 (para. 6).

[920] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 4 *et seq.* (para. 7).

[921] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 4 *et seq.* (para. 7).

[922] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 4 *et seq.* (para. 7).

[923] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 5 *et seq.* (para. 8).

[924] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 6 *et seq*. (para. 9)

[925] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 7 (para. 9. D)

[926] Counter-Memorial, 24/03/2022, p. 220 *et seq.* (para. 459). See also Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 12 (para. 24), p. 18 *et seq.* (paras. 53-55); Expert Report of Daniel Vela, 22/03/2022, p. 7 (para. 26), p. 18 *et seq.* (para. 61-64).

the special jurisdiction of the *Rondas Campesinas* also extends to **third parties who are not members of any rural community**, provided that two additional conditions are met:

505 The conduct of the third party in question affects the interests of the community or one of its members, and such conduct is deemed to be contrary to the community's customary laws; and

506 Such third party was aware that its conduct was contrary to the interests and customary laws of the community.[927]

507 Notwithstanding the significant degree of autonomy conferred upon the rural communities and their *Rondas Campesinas*, the Supreme Court makes it clear that the exercise of this special jurisdiction is subject to review by Peru's ordinary courts, including, where appropriate, its ordinary criminal courts.[928]

508 For the purposes of criminal law, the Supreme Court emphasises at least two aspects of the special status of *ronderos* which set them apart from the ordinary citizenry:

a) The exercise of public functions: The Supreme Court identifies the following two criminal offences that are not applicable to *ronderos*:

   i) *Ronderos* **cannot be held liable** for "usurpation of **public functions**" under Article 361 of Peru's Criminal Code "insofar as the *rondero* in question acts in the exercise of the community's jurisdictional function, as recognised and guaranteed under the Constitution", which confirms that *ronderos* are deemed to exercise public functions under Peruvian law;[929] and

   ii) *Ronderos* cannot be held liable for false imprisonment and other criminal offences involving deprivations of liberty under Article

[927] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 7 *et seq.* (para. 10. C).

[928] Acuerdo Plenario Núm. 1-2009/CJ-116, 13/11/2009, at **Exhibit IMM-0006**, p. 8 *et seq.* (para. 12).

[929] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 9 *et seq.* (para. 13); Criminal Code, Legislative Decree No. 635 (SPA), 03/04/1991, at **Exhibit C-617**, p. 381 (Art. 361) (emphasis added).

152 of Peru's Criminal Code "because the *rondero* as a consequence of the exercise of its jurisdictional function, either as means of arrest or punishment".[930] This confirms that *ronderos* are vested with **powers of arrest and detention under Peruvian law** and are immune from criminal liability on that basis, provided their actions are considered a lawful exercise of these powers.

b) Distinctive cultural identity: *ronderos* may also be partially or completely exonerated from criminal responsibility based on a successful plea of "a misunderstanding of the law due to cultural factors" under Article 15 of Peru's Criminal Code.[931]

509 However, the Supreme Court emphasises that, outside the lawful exercise of their public functions, the latter provision may only apply in exceptional circumstances because the *ronderos* should, as a general rule, be expected to abide by the laws of Peru as any other citizen:

> "The ronderos, as a general rule, are **individuals which form part** – entirely or partially – **of the State** by virtue of which, since they have contacts with the "official" society as part of their way of life, even though it might only be to a limited extent, **it is reasonable to require that their conduct complies with the laws of the State**, and the State may seek to influence their conduct and, as a result, disprove of such conduct when it is contrary to the predominant interests of the society with which it interacts."[932]

510 In summary, the Supreme Court's opinion establishes the following principles regarding the special status of *Rondas Campesinas* and their *ronderos* under Peruvian law:

a) *Rondas Campesinas* exercise public functions under Peruvian law;

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[930] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 9 *et seq.* (para. 13); Código Penal del Perú, Decreto Legislativo 635, 03/04/1991, at **Exhibit IMM-0011**, p. 201 et *seq.* (Art. 152).

[931] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 10 *et seq.* (paras. 15-16): Código Penal del Perú, Decreto Legislativo 635, 03/04/1991, at **Exhibit IMM-0011**, p. 88 (Art. 15) (emphasis added).

[932] Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 10 *et seq.* (para. 15).

b) As part of these public functions, *Rondas Campesinas* have jurisdictional and police powers, including powers of arrest and detention;

c) *Rondas Campesinas* may exercise these powers vis-à-vis members of the rural community themselves as well as third parties (provided that the conduct of these third parties occur within the communal territory, adversely affects the interests of the community or one of its members, and such conduct is deemed to be contrary to the community's customary laws); and

d) *Rondas Campesinas* are subject to judicial review and are accountable for their actions under Peruvian law – they cannot act with impunity or operate outside the (ordinary) laws.

511 Although no one could reasonably doubt that these powers are inherently public in nature, the next section confirms that the powers conferred under Peruvian law to Parán's *Ronda Campesina* constitute "elements of the governmental authority" within the meaning of Article 5 of the ILC Articles.

9.2.2.3 The second requirement: The powers conferred upon the Parán Community and its Ronda Campesina involve the exercise of "elements of governmental authority"

512 In its Counter-Memorial, the Respondent refers to four criteria outlined by Professor Crawford to assess whether the powers at issue involve "elements of governmental authority" under international law.[933] Even though the Claimant does not agree with the Respondent's interpretation of the meaning of each of these criteria, the Claimant nonetheless agrees that these four criteria are relevant considerations in order to determine whether the powers in question falls within the scope of Article 5 of the ILC Articles.

513 They are as follows: (i) the content of the powers; (ii) the manner in which the powers have been conferred; (iii) the purpose for which the powers

[933] Counter-Memorial, 24/03/2022, p. 192 *et seq.* (paras. 391 and 398).

have been conferred; and (iv) the degree of accountability to, and supervision from, the State.[934]

The content of the powers

514 As discussed in Section 9.2.2.2 above, Peru's domestic legal system grants wide jurisdictional and police powers to the *Ronda Campesina* over their respective communities' territory.

515 As aptly put by Professor Crawford, the first and foremost criterion to determine the nature of the powers conferred is whether it is a function that "the state ordinarily reserves […] for itself" or conversely whether "a private person [could] perform the function without the government's permission".[935]

516 In this regard, the Commentary on the ILC Articles is particularly instructive as it reflects that the rule of attribution now codified under Article 5 of the ILC Articles first emerged precisely to address cases identical to the present case:

> "when, by delegation of powers, bodies act in a public capacity, *e.g.*, police an area […] the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, **it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or** [*sic*] **less extent, to autonomous bodies**."[936]

517 More generally, the Commentary refers to police powers, including powers of detention, seizure, and discipline, as inherently governmental in

[934] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 131 ("Criterion (d) refers to accountability, and the extent to which the government is entitled to supervise those on whom it has bestowed governmental authority.")

[935] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 130.

[936] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 43 (Art. 5, Commentary 4) (emphasis added).

nature.[937] As the analysis above has demonstrated, the Respondent has conferred such powers to the *Ronda Campesina* and those powers are deemed to be "public functions" under Peruvian law. Moreover, the special status of the *Ronda Campesina* under Peruvian criminal law suffices to prove beyond any doubt that these prerogatives are usually reserved to the State alone and that no private person could perform these functions without the State's approval.

518 As highlighted above, the Respondent in its Counter-Memorial misrepresents the scope of these powers under Peruvian law in several respects.

519 First, the Respondent argues that the role of the *Rondas Campesinas* "does *not* constitute a judicial function".[938] This is plainly incorrect. As noted above, the Constitution references the special jurisdiction of the rural communities and their *Rondas Campesinas* within the part of the Constitution devoted to the State's structure and, specifically, under the heading "The Judicial Power".[939] Furthermore, the Supreme Court of Peru in its leading opinion on *Ronda Campesina* emphasised that their special jurisdiction was entitled to due deference on the part of other ordinary courts in Peru's legal system.[940] The Supreme Court expressly mentions that the *Ronda Campesina* may legitimately impose a sentence of imprisonment as a penalty for infringing their communal norms.[941]

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[937] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 43 (Art. 5, Commentary 2 and 5); J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 128.

[938] Counter-Memorial, 24/03/2022, p. 209 *et seq.* (para. 430) (emphasis in original).

[939] Political Constitution of Peru, 1993 (SPA), at **Exhibit C-23 (corrected translation)**, p. 2 (Table of content "Judicial Power (Articles 138 to 149)") See also **Exhibit C-23 (corrected translation)**, p. 47 (Art. 149).

[940] See *supra* Section 9.2.2.2 ("*The special status of ronderos under Peruvian criminal law owing to their public functions*"). Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 9 *et seq.* (para. 13); Criminal Code, Legislative Decree No. 635 (SPA), 03/04/1991, at **Exhibit C-617**, p. 381 (Art. 361) (emphasis added)..

[941] See *supra* Section 9.2.2.2 ("*The special status of ronderos under Peruvian criminal law owing to their public functions*"). Supreme Court, Plenary Resolution No. 1-2009/CJ-116 (SPA), 03/11/2009, at **Exhibit C-599**, p. 9 *et seq.* (para. 13).

520 Second, the Respondent suggests that in any event the jurisdictional powers of the *Ronda Campesina* "relate[] only to specific categories of property dispute[s]".[942] As explained above, the Respondent's position is based on an incorrect interpretation of the import of Article 13 of the Regulations on *Rondas Campesinas*.[943] The proper scope of the jurisdictional power – and, as a corollary, the police powers – of the *Ronda Campesina* is defined in Article 7 of the General Law on *Rondas Campesinas*.[944]

521 Third, the Respondent suggest that these powers would only "relate to the exercise and administration by members of a rural community – who are also private citizens – of collective, private property rights".[945] The implication of this statement is that these powers would only apply in the internal affairs of the rural community, and *vis-à-vis* third parties. The opinion of the Supreme Court of Peru cited above clearly demonstrates that this is not the case.

The manner in which the powers are conferred

522 As noted by Professor Crawford, "[i]n most cases, **governmental authority** will be conferred by **statute** or by **executive order** […]".[946] Dr Hannah Tonkin further explains the rationale for considering the nature of the legal instrument effecting the delegation:

> "In relation to [this] factor, the instinctive **assumption** might be that a state would be **more likely** to **confer governmental authority** on

[942] Counter-Memorial, 24/03/2022, p. 209 *et seq.* (para. 430).

[943] See *supra* Section 9.2.2.2 ("*The special status of ronderos under Peruvian criminal law owing to their public functions")*.

[944] See *supra* Section 9.2.2.2 ("*The special status of ronderos under Peruvian criminal law owing to their public functions")*.

[945] Counter-Memorial, 24/03/2022, p. 208 *et seq.* (para. 428).

[946] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 130 (emphasis added).

> a private entity via **statute** rather than contract or executive order."[947]

523 In the present case, as discussed above in Section 9.2.2.2, the Respondent has delegated these jurisdictional and police powers to the *Ronda Campesina* under its Constitution and by way of primary and secondary legislation. The Respondent's philosophical considerations as to whether these powers are inherent in the customary nature of the community's institutions or are conferred upon it by the State are wholly beside the point.[948] As properly understood, this factor also points clearly to the governmental nature of the powers conferred to the rural communities and their *Rondas Campesinas*.

The purpose for which the powers have been conferred

524 As explained above, and expressly stated in the Supreme Court's opinion on *Rondas Campesinas*, the purpose for this formal delegation of powers from the State to the rural communities and their *Rondas Campesinas* was to fill the institutional vacuum left by the near-total absence of State institutions, such as the justice system, the police and the army, in the region of the Andes where Peru's rural communities reside.

525 It was precisely because of the absence of any meaningful law enforcement in these regions that the Shining Path was able to take over large swathes of the Andean region in the 1980s.[949] This in turn explains why the Peruvian State delegated to the rural communities and their *Rondas Campesinas* such extraordinary powers.

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[947] H. Tonkin, "State Control Over Private Military and Security Companies in Armed Conflict", Chapter 3, Cambridge Studies in International and Comparative Law (CUP, 2011), at **Exhibit CLA-113**, p. 102 (emphasis added).

[948] Counter-Memorial, 24/03/2022, p. 210 (para. 432).

[949] P. Maureci, *Military Politics and Counter-insurgency in Peru* (CUP, 1991), at **Exhibit C-598**, (p. 98-102); "Compensation to the Members of the Self-Defence Committees and Rondas Campesinas Victims of Terrorism", Ombudsman's Office, Report No. 54 (SPA), 30/11/2000, at **Exhibit C-597** , p. 3 *et seq*. (Section III); "The Rondas Campesinas of Peru: an alternative in administration of justice in the high andean rural areas, the case of Ocongate, a rural district of the Cusco Department 1992-2011", *Horizonte de la Ciencia* 10(18) (2020) (SPA), at **Exhibit C-596**, p. 3 *et seq.* (Section C).

526 As described above, the Peruvian legislation on *Rondas Campesinas* sets out clearly the objectives in furtherance of which such powers have been delegated to them: the administration of justice within their territory, the maintenance of "public order" and "citizen security", the fight against crime, terrorism and drug-trafficking, the protection of the environment – all of which, in the words of Professor Crawford, are "classically sovereign objectives".[950]

527 Contrary to the Respondent's absurd suggestion, these powers and their purpose go far beyond the mere promotion of their cultural heritage and administration of their internal affairs.[951]

Accountability and State supervision

528 In relation to this fourth factor, it has already been explained above that the "level of supervision exercised by the State" is not required to prove attribution under Article 5 of the ILC Articles. It follows from this that while a degree of considerable oversight and accountability to the State in the exercise of the powers delegated to the entity will often weigh in favour of the governmental nature of the powers, the reverse is not true. As noted above, the State cannot escape international responsibility for delegating away its powers and failing to supervise the entity thereby entrusted with governmental authority. As Dr Tonkin cogently puts it:

> "[…] the absence of effective accountability mechanisms should not exclude the attribution of conduct [of a private entity entrusted with military and security missions] to the state pursuant to Article 5, since it is precisely in those cases where the government authorises [an entity] to carry out a particular [military and security] function, and yet **fails to hold** that [entity] **accountable for its**

[950] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 131.

[951] Counter-Memorial, 24/03/2022, p. 210 *et seq.* (para. 433).

> **actions**, that **the rationale for the attribution of [such entity's] misconduct to the state is strongest**."[952]

529 Therefore, even assuming that the "Rural Communities […] conduct their affairs free from governmental supervision" as the Respondent suggests,[953] this supposed autonomy would not exclude attribution under Article 5 of the ILC Articles.

530 In any event, the Respondent again misrepresents the true position of the rural communities and their *Rondas Campesinas* under Peruvian law. As the opinion of Peru's Supreme Court clearly shows, rural communities and their *Rondas Campesinas* are not "free from government supervision" and may not act outside the reach of the law. Irrespective of their special jurisdiction and police powers, the rural communities and their *Rondas Campesinas* are still subject to judicial control and answerable for their conduct before the law.[954]

9.2.2.4 The third requirement: Parán's Ronda Campesina acted with apparent authority during the June 2018 Invasion and the Blockade

531 As explained above, the third requirement to establish attribution under Article 5 of the ILC Articles is that the entity was "acting in [its governmental] capacity in the particular instance."[955]

532 The Respondent's position in this respect is two-fold:

a) The Respondent first contends that the Claimant's allegation in its Memorial that Parán's *Ronda Campesina* "abused [their] authority and

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[952] H. Tonkin, "State Control Over Private Military and Security Companies in Armed Conflict", Chapter 3, Cambridge Studies in International and Comparative Law (CUP, 2011), at **Exhibit CLA-113**, p. 103 (emphasis added).

[953] Counter-Memorial, 24/03/2022, p. 211 (para. 434).

[954] See *supra* Section 9.2.2.2 (*The special status of ronderos under Peruvian criminal law owing to their public functions*)

[955] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 42 (Art. 5).

played an important role in the June 2018 Invasion and the Blockade" is "unsubstantiated"[956]; and

b) The Respondent further asserts that the Parán Community and their *Ronda Campesina* were not acting in a governmental capacity during these events because these actions would be illegal under Peruvian law and would "go well beyond the scope of [their] overall authority".[957]

533 The Respondent's second argument is addressed in Section 9.2.3 below in light of the principles set out in Article 7 of the ILC Articles.

534 Contrary to the Respondent's first argument, the record in this case is replete with evidence that Parán's *Ronda Campesina* played central role in the key events that led to the demise of the Claimant's investment. In relation to the June 2018 Invasion, the evidence confirms that:

a) Parán's *ronderos* were present and armed during the Invasion[958] as expressly acknowledged by the Respondent in its Counter-Memorial;[959]

b) Parán's *ronderos* illegally used their firearms and open fire on IMC employees which were fleeing through the hills;[960]

c) Parán's *ronderos* took part in ransacking the Claimant's mine site;[961] and

d) [redacted] 62

956 Counter-Memorial, 24/03/2022, p. 220 (para. 458).

957 Counter-Memorial, 24/03/2022, p. 220 *et seq.* (para.459).

958 SSS, Special Report, seizure of the Invicta Mine Camp and Facilities (SPA), 19/06/2018, at **Exhibit C-129**.

959 Counter-Memorial, 24/03/2022, p. 218 (para.454) ("[The] statement from the Operational Plan [according to which the Parán ronderos 'are using shotguns that were given to them by the army'] relates [] to [the] 19 June 2018 [Invasion]").

960 SSS, Special Report, seizure of the Invicta Mine Camp and Facilities (SPA), 19/06/2018, at **Exhibit C-129**, p. 2 ("The community members of **Paran's rural patrol** had identified, **chased with shots community workers** belonging to the rural community of Lacsanga.") (emphasis added).

961 [redacted]

962 [redacted]

535 In relation to the Blockade which was set up and maintained on Lacsanga's access road from 14 October 2018 onwards, the evidence also shows that:

a) Parán's *ronderos* manned the Blockade;[963]

b) Parán's *ronderos* illegally used their firearms to deter passers-by from trying to circumvent the Blockade and access the Site;[964]

c) Parán's *ronderos* were involved in the shooting of Claros Pacheco, a Lacsanga community member;[965] and

d) Parán's *ronderos* used their firearms causing severe injuries to personnel of IMC's security contractor, WDS, including the death of a WDS team member, on 14-15 May 2019.[966]

e) Even after the killing of one of IMC's security contractor's personnel, Parán's *ronderos* continued to be stationed on the Lacsanga access road, firing warning shots in the direction of whomever tried to access the Mine with impunity despite the Police's full knowledge of the situation.[967]

536 As discussed above and explained in Mr Bravo's second statement, the local Police were aware of the risk posed by Parán's *Ronda Campesina* and expressly required their hierarchy to intervene to take away their weapons from Parán's *Ronda Campesina* – to no avail.[968]

[963] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 12 and 28 *et seq*.

[964] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 12 *et seq*.

[965] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 8 and 44.

[966] Ombudsman's Office 23rd Annual Report, 2019, 29/05/2020, at **Exhibit R-0019**, p. 2.

[967] Police Information Note on Parán Conflict (SPA), 25/05/2019, at **Exhibit C-217**.

[968] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 19 *et seq.* (para. 41).

9.2.3 Article 7 of the ILC Articles confirms that the illegal conduct of the Parán Community and its *Ronda Campesina* is attributable to the Respondent

537 As foreshadowed in the Memorial,[969] the Respondent makes a desperate attempt in its Counter-Memorial to disavow the conduct of the Parán Community and its *Ronda Campesina* based on its illegality under Peruvian law.[970]

538 Although the Respondent correctly points out that this issue falls to be considered under Article 7 of the ILC Articles,[971] the Respondent fails to identify with precision in its Counter-Memorial the limited circumstances in which the acts of individuals who are members of a State organ or entity empowered by law to exercise governmental authority can be considered "purely private acts", thus not attributable to the State (**Section 9.2.3.1**). In light of the principles set out immediately below, it is clear that the arguments adduced by the Respondent to disclaim responsibility for the conduct of the members of the Parán Community and its *Ronda Campesina* are wholly unavailing (**Section 9.2.3.2**).

9.2.3.1 Attribution under Article 4 and 5 of the ILC Articles can only be excluded in case of "purely private acts"

539 Article 7 of the ILC Articles codifies the long-standing principle according to which attribution to the State of the conduct of State organs under Article 4, or entities with delegated powers under Article 5 of the ILC Articles, extends even to situations in which the organ or entity in question acts *ultra vires*:

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an **act of the State** under international law if

[969] Memorial, 01/10/2021, p. 78 (para. 248).

[970] Counter-Memorial, 24/03/2022, p. 219 *et seq.* (paras. 456-459 and 470).

[971] Counter-Memorial, 24/03/2022, p. 221 (para. 461).

> the organ, person or entity acts in that capacity, **even if it exceeds its authority or contravenes instructions**."[972]

540 The State cannot therefore evade international responsibility and distance itself from the conduct of entities covered under Article 4 and 5 of the ILC Articles by merely invoking the illegality of such conduct under its domestic law, as made clear by the ILC Commentary:

> "The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is **so even** where the **organ or entity in question** has **overtly committed unlawful acts** under the cover of its official status or has **manifestly exceeded its competence**. It is so **even if** other organs of the State have **disowned** the conduct in question. Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it."[973]

541 As noted, Article 7 enshrines the principle according to which illegality under domestic law is irrelevant for the purposes of attribution under Articles 4 and 5 of the ILC Articles. Article 7 nonetheless recognises that this principle is subject to one condition, namely that "the organ, person or entity acts in that capacity".[974] Professor Crawford in his treatise – to which the Respondent also refers approvingly – explains the rationale behind the limit placed on the general principle laid out in Article 7 as follows:

> "However, a state is not responsible for every act done by an **individual** in its service, but only when the individual purports to

[972] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 45 (Art. 7) (emphasis added).

[973] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 45 (Art. 7, Commentary 2) (emphasis added).

[974] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 45 (Art. 7).

> act on behalf of the state. Where an individual does something in his or her capacity as a **private citizen**, state responsibility will not arise. In the context of ARSIWA Article 7, the difficulty lies in distinguishing an **official, though ultra vires, act** from a **purely private one**."[975]

542 In the former case, the actions of the individual acting as a member of an organ or entity are considered acts of the organ or entity itself, in which case attribution will follow. In the latter case where the acts of the individual were taken in a "purely private" capacity, these actions will not be considered to be the conduct of the organ or entity to which the individual happens to belong. As such, there will be no attribution in this latter case.

543 Indeed, as stated by the ILC in its 1975 Report, one has to discern between "conduct of the offending organ" through the actions of the "persons constituting this organ" on the one hand, and the "actions of the same human beings" acting as "private individuals" on the other:

> "[The] provisions apply, of course, only to conduct which the **persons constituting the organs** have adopted in performing their functions as **members of those organs** and not as **private individuals**. […] There is **no exception** to this rule even in the case of manifest incompetence of the **organ perpetrating the conduct** complained of, and even if other organs of the State have disowned the conduct of the offending organ. It follows that, under the system adopted by the Commission, **no conduct of State organs** or of the **other entities** mentioned in [predecessor of Article 5] is **excluded from attribution** to the State *qua* subject of international law. **Only** those **actions** of the **human beings** constituting the organs in question, performed in their capacity as **private individuals**, are

[975] J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 137 (emphasis added).

> not regarded as acts of the State capable, as such, of incurring its international responsibility."[976]

544 It follows that the key consideration in the present case is whether the individuals from the Parán Community involved in the events underlying the present dispute acted merely "in their capacity as private individuals" or rather, acted as "members of the organ or entity in question" in the words of the ILC Commentary, *i.e.*, the Parán Community.[977] As expressly acknowledged by the Respondent in its Counter-Memorial[978] and stated by the ILC Commentary,[979] attribution will only be excluded if the acts of the individuals involved can be viewed as "**purely private** in nature". Attribution will not be excluded where the acts of the individuals are "*ultra vires*, but nonetheless official" conduct of the organ or entity they represent. In other words, to deny attribution, the Respondent would have to prove that the violent actions complained of by the Claimant cannot be viewed as the conduct of the Parán Community and its *Ronda Campesina* as a whole, but simply that of isolated individuals who happen to be members of a State organ or entity with delegated powers under Articles 4 and 5 of the ILC Articles, respectively.

545 The consistent use of the words "**purely private**" or "**strictly private**" by the ILC Commentary and adjudicative bodies when referring to the acts in question, is clearly intended to limit the ability of the State to disclaim responsibility to exceptional cases.[980] As noted by the ILC, this further

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[976] *Report of the International Law Commission on the work of its twenty-seventh session*, 5 May - 25 July 1975, Official Records of the General Assembly, Thirtieth session, Supplement No. 10, Extract from the Yearbook of the International Law Commission 1975, Vol. II, A/10010/Rev.1, at **Exhibit CLA-114**, p. 61 (Art. 10, paras. 1-2) (emphasis added).

[977] *Report of the International Law Commission on the work of its twenty-seventh session*, 5 May - 25 July 1975, Official Records of the General Assembly, Thirtieth session, Supplement No. 10, Extract from the Yearbook of the International Law Commission 1975, Vol. II, A/10010/Rev.1, at **Exhibit CLA-114**, p. 61 (Art. 10, paras. 1-2).

[978] See *e.g.*, Counter-Memorial, 24/03/2022, p. 222 *et seq.* (paras. 462 and 464) (emphasis added).

[979] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 42 (Art. 4, Commentary 13).

[980] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 42 (Art. 4, Commentary 13) ("The distinction

reflects that, since the rule first emerged in customary international law, the "majority of States [have been] in favour of the broadest formulation of the rule"[981] (*i.e.*, the rule attributing acts of individuals to the State where they are part of an organ) and subjecting it to limited exceptions because "a narrower rule would make it all too easy for the State to evade its international responsibility".[982] By contrast, adopting a broad rule in favour of attribution under Article 7 – excluding only acts of individuals acting in a purely or strictly capacity from the scope of Articles 4 and 5 of the ILC Articles – serves to "promote clarity and facilitate recovery".[983]

546 Hence why the ILC Commentary provides that the State will not be held liable only in circumstances where it can show that the illegal conduct of individuals who are also members of these organs or entities was "**so removed from the scope of their official functions**" that such conduct should be treated as purely private in nature.[984] Similarly, Special Rapporteur García-Amador considered in his Second Report on State Responsibility, that the notion of "purely private acts" only covers acts of officials that are "**wholly unrelated** to [their] **office or function**".[985] In the same vein, the *Caire* decision of the French-Mexican Claims

between unauthorised conduct of a State organ and **purely private conduct** has been clearly drawn in international arbitral decisions. […]. The case of **purely private conduct** should not be confused with that of an organ functioning as such but acting ultra vires or in breach of the rules governing its operation.") (emphasis added); J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 137 ("In the context of [] Article 7, the difficulty lies in distinguishing an official, though ultra vires, act from a **purely private** one. […] [T]he difference between an *ultra vires* act that invokes state responsibility and a **strictly private act** that does not is that the former is performed using and cloaked by the authority provided to the entity by the state.") (emphasis added).

[981] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 45 *et seq.* (Art. 7, Commentary 3).

[982] C. I. Keitner, "Categorizing Acts by State Officials: Attribution and Responsibility in the Law of Foreign Official Immunity", Duke Journal of Comparative & International Law, Vol. 26 (2016), at **Exhibit CLA-115**, p. 473.

[983] C. I. Keitner, "Categorizing Acts by State Officials: Attribution and Responsibility in the Law of Foreign Official Immunity", Duke Journal of Comparative & International Law, Vol. 26 (2016), at **Exhibit CLA-115**, p. 455.

[984] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 46 (Art. 7, Commentary 7).

[985] Special Rapporteur F. V. Garcia Amador, "Second Report on State Responsibility", Yearbook of the International Law Commission, Vol. II(1)A/CN.4/106, 15/02/1957, at **Exhibit CLA-116**, p. 110 (para. 11) (emphasis added).

Commission on which the Respondent also relies, held that the international responsibility of the State is not engaged only when the conduct of the individual in question has "**no connection with the official function**".[986]

547 These various definitions embody a restrictive approach to the notion of "purely private act" on which the State can place reliance to avoid responsibility. It is therefore sufficient that the facts of the case reveal some indicia or connection between the acts of the individuals concerned and their official functions within the organ or entity to which they belong for international liability to attach to the State. As noted by the Respondent, international courts and tribunals have relied, for instance, on such factors as whether the individuals concerned acted with apparent authority or used the means placed at their disposal on account of their functions to establish this connection.[987]

548 More importantly, in the case of various individuals – who all happen to be members of a given organ or entity – acting in concert in a particular instance, it will be highly unlikely that these individuals acted purely as private citizens and that it was a pure coincidence that all the individuals involved were all members of the same organ or entity. In fact, amongst all the legal authorities relied on by the Respondent, the only instance in which the tribunal rejected attribution is precisely in a situation of an official acting on his own, namely the illegal soliciting of a bribe by an Iran Air employee in the *Yeager* case.[988]

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[986] *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. V), 07/06/1929, at **Exhibit CLA-117**, p. 531 (emphasis added).

[987] Counter-Memorial, 24/03/2022, p. 222 *et seq.* (paras. 463 and 466) (citing to *Estate of Jean-Baptiste Caire (France) v. United Mexican State*, Reports of International Arbitral Awards, Decision No. 33, 07/06/1929, at **Exhibit RLA-0031**, p. 529 *et seq.* and "*American Bible Society*" incident, Statement of United States Secretary of State (Digest, Vol. VI), 17/08/1885, at **Exhibit CLA-118**; p. 743; G. H. Hackworth, "Shine and Milligen", *Digest of International Law*, Vol V (GPO, 1943), at **Exhibit CLA-119**, p. 575.

[988] *Kenneth P. Yeager v. The Islamic Republic of Iran*, IUSCT Case No. 10199, Award (Böckstiegel, Holtzmann, Mostafavi) ("***Yeager* (Award)**"), 02/11/1987, at **Exhibit RLA-0033**, p. 14 (para. 65).

549 By contrast, all the other cases cited by the Respondent found in favour of attribution and concerned a group of individuals acting in concert who also all belonged to the same organ or entity.[989] For example, the Iran-US Claims Tribunal in the *Yeager* case concluded that all the individuals involved in the seizure of cash from the claimant and his wife at the Mehrabad Airport in Tehran were Revolutionary Guards and, thus, were clearly acting in their capacity as organs of the new Government.[990] Similarly, in the *Youmans* case, the group of eleven soldiers involved in the illegal killing of three American citizens by a violent mob were not participating in the riot as purely private citizens, but rather as members of the local public security forces as reflected by the fact that they were led in their actions by a commanding officer.[991] Such a chain of command is clearly absent when individuals – who may also happen to be members of an organ or entity – act in a purely private capacity.[992]

550 In the same vein, the *Caire* decision concerned two soldiers from the same brigade who unlawfully arrested and subsequently killed Mr Caire.[993]

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[989] *Kenneth P. Yeager v. The Islamic Republic of Iran*, IUSCT Case No. 10199, Award (Böckstiegel, Holtzmann, Mostafavi) ("***Yeager* (Award)**"), 02/11/1987, at **Exhibit RLA-0033**, p. 13 (para. 61) (illegal acts of Revolutionary Guards); *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. V), 07/06/1929, at **Exhibit CLA-117**, p. 517 (two armed officers from the same brigade).

[990] *Kenneth P. Yeager v. The Islamic Republic of Iran*, IUSCT Case No. 10199, Award (Böckstiegel, Holtzmann, Mostafavi) ("***Yeager* (Award)**"), 02/11/1987, at **Exhibit RLA-0033**, p. 13 (para. 61).

[991] *Thomas H. Youmans (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 23/11/1926, at **Exhibit CLA-120**, p. 110 (headnote), p. 116 (para. 14) ("But we do not consider that the participation of the soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer.").

[992] *Thomas H. Youmans (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 23/11/1926, at **Exhibit CLA-120**, p. 116 (para. 14) (referring to J.B. Moore, *International Arbitrations to Which the United States Has Been a Party* (Vol. III, Washington: Government Printing Office, 1898), at **Exhibit CLA-121**, p. 2997 citing *Frederik A. Newton v. Mexico* for the robbery of property by Republican troops under Colonel Rijos and *Lanfranco v. Mexico* for the looting of a store at Tehuantepec by Mexican armed men under the command of the *jefe político* of the place).

[993] *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. V), 07/06/1929, at **Exhibit CLA-117**, p. 517.

Contrary to the Respondent's inaccurate description of this case,[994] the French-Mexican Claims Commission did not make any factual finding as to whether the two soldiers were in uniform, but simply referred to the fact that they were armed and from the same brigade.[995] However, the Commission in *Caire* clearly stated the general principle that the State is not responsible for the illegal acts of an official only in the event that the act in question had no connection whatsoever with his or her official function, which it found was not the case in *Caire*.[996]

551 Interestingly, the Commission also rejected an argument from Mexico according to which these two officers had acted for a purpose other than the discharge of their official duties which would thus preclude attribution.[997] Indeed, the Commission stated in no uncertain terms that, as a matter of general international law, "the international responsibility of States has never been contingent on the purposes which have motivated the harmful acts".[998]

552 It is therefore clear that, contrary to the Respondent's assertions in its Counter-Memorial, a State cannot escape international responsibility by alleging that the entity in question did not act "for any official, governmental purpose" in that instance.[999] Otherwise, as noted by the US-Mexico Claims Commission in *Youmans*, no *ultra vires* conduct would ever be attributed to the State and the principle enshrined in Article 7 would simply be devoid of any substance.[1000] For this reason, the ILC Commentary also confirms that "it is irrelevant for [the] purpose [of

994 Counter-Memorial, 24/03/2022, p. 222 *et seq.* (para. 464).

995 *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. V), 07/06/1929, at **Exhibit CLA-117**, p. 517.

996 *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. V), 07/06/1929, at **Exhibit CLA-117**, p. 531 *et seq*.

997 *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. V), 07/06/1929, at **Exhibit CLA-117**, p. 532.

998 *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. V), 07/06/1929, at **Exhibit CLA-117**, p. 532.

999 Counter-Memorial, 24/03/2022, p. 226 (para. 473).

1000 *Thomas H. Youmans (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 23/11/1926, at **Exhibit CLA-120**, p. 116 (para. 14).

attribution of *ultra vires* conduct] that the person concerned may have had **ulterior or improper motives** or may be abusing public power".[1001]

553 Hence, the fact that officials responsible for law and order are acting for purposes antithetical to their functions, directing and causing harm to the persons they are supposed to protect, cannot serve as a basis for excluding attribution. The Commission in *Youmans* made this clear when it endorsed the following statement from the US Department of State arguing for the direct responsibility of Mexico for the unlawful killings committed by its soldiers:

> "These troops, [acting] in **utter disregard of the obligations of their office as preservers of the peace** and with wanton and deliberate violation of law, opened fire on the three Americans, instantly killing one and joining with the infuriated mob in the inhuman slaughter of the other two […]. It seems almost needless to remark that **such conduct** on the part of soldiers or police, under orders to preserve the peace and protect the lives and property of peaceable inhabitants, on the plainest principles of international law **renders** […] **the Government** in whose service they are employed **liable**."[1002]

554 The Respondent also relies on the decision by the Commission in *Mallén* for its arguments on attribution. However, that case did not feature a decision on attribution[1003] contrary to the presentation given of this case by

[1001] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 42 (Art. 4, Commentary 13). See also, J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 137 ("**Notwithstanding** the **private motivations** of the perpetrators, the Commission held that [their acts] 'involved the responsibility of the State'.").

[1002] *Thomas H. Youmans (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 23/11/1926, at **Exhibit CLA-120**, p. 113 *et seq.* (para. 8) (emphasis added).

[1003] *Francisco Mallén (United Mexican States) v. United States of America*, Reports of International Arbitral Awards, Decision, 27/04/1927, at **Exhibit RLA-0032**, p. 175 (para. 5) (attribution was not alleged with respect to the first attack: "Direct responsibility of the United States for this first assault has not been alleged."), p. 177 *et seq.* (para. 7) (Attribution was not contested with respect to the second attack: "…both Governments consider Franco's acts as the acts of an official on duty…").

the Respondent.[1004] However such case is relevant to the issue of the indirect responsibility of the State for the failure of other organs in their duty to protect an alien where there have been repeated violations of its own domestic law by persons using the means at their disposal on account of their official status. Indeed, the Commission considered that Mr Franco's appointment as deputy sheriff responsible for law and order after the first attack was an **aggravating factor** that demonstrated the United States' indirect responsibility resulting from the failure of other organs to prevent the second attack.[1005]

555 It follows from the preceding discussion that in this case as well, it is irrelevant what motivations the Parán Community and its *Ronda Campesina* had in perpetrating their actions or whether they acted in an *ultra vires* fashion. As will be shown below, they acted in an manner which is not wholly unrelated to their function, and as such, Peru is responsible for their acts.

9.2.3.2 The illegal acts of the Parán Community and its Ronda Campesina are not wholly unrelated to their functions, and, as such, are attributable to the Respondent

556 In its Counter-Memorial, the Respondent makes the four following arguments to disclaim responsibility for the illegal actions of the Parán Community and its *Ronda Campesina*:

[1004] Counter-Memorial, 24/03/2022, p. 226 (para. 473).

[1005] *Francisco Mallén (United Mexican States) v. United States of America*, Reports of International Arbitral Awards, Decision, 27/04/1927, at **Exhibit RLA-0032**, p. 175 (para. 5) ("[The second attack] shows how imprudently and improperly the authorities acted in maintaining such a man, without any preventive measure, in a position in which he might easily cause great harm to peaceful residents. […] The authorities of Texas should have realized the risks they incurred by maintaining Franco in office and by not protecting Mallén from violence at the hands of Franco, and they must bear the full responsibility for their action."), p.178 (para. 12) ("Lack of protection on the part of the Texas authorities lies in the fact that so dangerous an official as Franco […] was reappointed [after the first attack] as deputy sheriff. This re-appointment means lack of protection in so serious a form that it amounts to a challenge; it is exactly the reverse from that protection due to all peaceful residents, whether aliens or nationals.") and p. 181 ("[Mr Franco's appointment as deputy sheriff] is clearly something of which the Commission may properly take cognizance in fixing the responsibility of the United States. It suggests a condonement of Franco's offense.").

a) The actions of the Parán Community and its Ronda Campesina would allegedly fall outside the scope of the jurisdictional and police powers entrusted to them under Peruvian law;[1006]

b) According to the Respondent, there is no evidence that the members of the Parán Community and its Ronda Campesina were holding themselves out as acting in an official capacity;[1007]

c) The fact that Parán's Ronda Campesina "use[d] a government-provided weapon to perpetrate an act of violence [would] not be sufficient to convert a private action into an official one";[1008] and

d) The Parán Community and its Ronda Campesina did not act in furtherance of "any official, governmental purpose" or their "statutory objectives", but simply for "private, personal gain" as "part of a private law dispute".[1009]

557 None of these arguments have merit.

558 First, the Respondent alleges that:

> "[Parán's illegal actions] **fall outside the territorial scope** of the powers of the Parán Community, including the jurisdictional prerogatives of the authorities of the Parán Community and of its *Rondas Campesinas* – all of which prerogatives […] apply only within the Parán Community's 'territorial scope'. Such actions would also **go beyond the subject matter scope** of [the jurisdictional] powers of [Parán's] *Rondas Campesinas* […]."[1010]

559 As noted above, the test for attribution under the ILC Articles is not whether the actions of the Parán Community and its *Ronda Campesina* fell within the scope of the powers conferred to them as a matter of Peruvian law, but rather whether these actions were so far removed from the scope

[1006] Counter-Memorial, 24/03/2022, p. 219 *et seq.* (paras. 456-459), p. 225 (para. 470).

[1007] Counter-Memorial, 24/03/2022, p. 224 *et seq.* (paras. 468-469).

[1008] Counter-Memorial, 24/03/2022, p. 225 *et seq.* (paras. 471-472).

[1009] Counter-Memorial, 24/03/2022, p. 226 *et seq.* (paras. 473-474).

[1010] Counter-Memorial, 24/03/2022, p. 220 *et seq.* (para. 459).

of the official functions entrusted to the Parán Community and its *Ronda Campesina* that they can be regarded as acts of a purely private nature.

560 In this regard, the case of the *Union Bridge Company* cited by Professor Crawford in his treatise is apposite.[1011] In that case, a British officer illegally seized property that did not fall within the categories of property he was authorised to seize, but the Commission still held the United Kingdom responsible for the illegal confiscation.[1012] Similarly, although the Parán Community and its *Ronda Campesina* do have vast police powers under Peruvian law such as powers of arrest, detention, search and seizure, carry weapons and used such powers illegally, it does not preclude attribution to the Respondent.

561 With regard to the "subject matter" scope of the powers vested in the Parán Community and its *Ronda Campesina*, the Respondent makes a detailed list of actions in its Counter-Memorial which, it alleges, "go well beyond the scope of *Rondas Campesinas*' statutory objectives".[1013] However, the table below shows that each of these actions are in fact closely related to powers conferred to the Parán Community's *Ronda Campesina* already enumerated in Section 9.2.2.2 above:

Actions cited by the Respondent	**"Not wholly unrelated" powers held by the Parán Community and its *Ronda Campesina* over its communal territory**
"Claimant alleges that on **19 June 2018** Parán Community members:	
(i) occupied the Invicta Mine;	Power to carry out inspection and conduct searches over their communal territory to ensure the preservation of the environment[1014]

[1011] *Union Bridge Company (United States) v. Great Britain,* UN, Reports of International Arbitral Awards (Vol VI), 08/01/1924, at **Exhibit CLA-122**, p. 171; J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 136.

[1012] *Union Bridge Company (United States) v. Great Britain,* UN, Reports of International Arbitral Awards (Vol VI), 08/01/1924, at **Exhibit CLA-122**, p. 171; J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 136.

[1013] Counter-Memorial, 24/03/2022, p. 220 (para. 458).

[1014] See *supra* Section 9.2.2.2 ("*The Regulations on Rondas Campesinas*").

(ii) detained Invicta personnel and members of Invicta's community relations team against their will;	Power of arrest and detention within their communal territory[1015]
(iii) threatened Invicta's community relations team with violence while conducting a search of the Invicta mine site;	Right to use force to carry out law enforcement duties and impose physical punishments inside their communal territory[1016] Power to effect search and seizure within their communal territory
(iv) knocked to the ground and beat certain of Invicta's staff; and	Right to use force to carry out law enforcement duties and impose physical punishments inside their communal territory
(v) created false minutes recording the events during the 19 June 2018 Protect and forced Invicta's community relations field manager to sign such minutes."[1017]	Part of general official duties
"Claimant alleges that on **14 October 2018** approximately 100 Parán Community members:	
(i) "converged" on the Invicta mine Site;	Power to carry out inspection and conduct searches over their communal territory to ensure the preservation of the environment[1018]
(ii) expelled Invicta's staff from the Site;	Power to regulate ingress and egress and, more generally, freedom of movement within their communal territory[1019]
(iii) blocked access to the road through Lacsanga land that led to the site, and	Idem
(iv) continued to do so in the months that followed."[1020]	Idem

[1015] See *supra* Section 9.2.2.2 ("*The General Law on Rural Communities and the General Law on Rondas Campesinas*").

[1016] See *supra* Section 9.2.2.2 ("*The General Law on Rural Communities and the General Law on Rondas Campesinas*").

[1017] Counter-Memorial, 24/03/2022, p. 219 (para. 456).

[1018] See *supra* Section 9.2.2.2 ("*The Regulations on Rondas Campesinas*")..

[1019] See *supra* Section 9.2.2.2 ("*The relations between the MININTER and the Rondas Campesinas*").

[1020] Counter-Memorial, 24/03/2022, p. 219 (para. 457).

585 To support its position, the Respondent incorrectly states in its Counter-Memorial that:

> "[the] powers [of the Parán Community and its *Ronda Campesina*] do **not** extend to **coercive action** with respect to property and resources belonging to other private parties, in this case Claimant and/or Invicta":[1021]

586 This assertion is manifestly wrong as *Rondas Campesinas* have the right to seize property as part of their police powers under Peruvian law. Indeed, as described above in detail in Section 9.2.2.2, *Rondas Campesinas* are more generally entitled to carry out coercive action and use force in order to discharge their law enforcement duties.[1022] Their powers further include the ability lawfully to use violence as a form of physical punishment.[1023] Moreover, these powers apply equally to community members and third parties provided that the powers are exercised in relation to conduct or events that took place on the community's territory.[1024] As such, the Parán Community and its *Ronda Campesina* could be seen as acting with apparent authority to carry out these above-mentioned actions.

587 In light of this, the actions taken by the Parán Community and its *Ronda Campesina* can hardly be seen as wholly unrelated or so far removed from the "subject matter" scope of their official duties as to be regarded as conduct of a purely private nature.

588 The same conclusion holds true for the "territorial scope" of the Parán Community and its *Ronda Campesina*'s powers. In this regard, the Respondent rightly notes that:

> "the **actions** [complained of in this arbitration] **took place in their entirety not on the Parán Community's lands**, but on the lands of [the] rural communities of [Lacsanga and Santo Domingo]. Thus, even if such actions had been authorised as a general matter (which they were not), they would fall outside the territorial scope

[1021] Counter-Memorial, 24/03/2022, p. 220 *et seq.* (para. 459).

[1022] See *supra* Section 9.2.2.2 ("*The Regulations on Rondas Campesinas*").

[1023] See *supra* Section 9.2.2.2 ("*The Regulations on Rondas Campesinas*").

[1024] See *supra* Section 9.2.2.2 ("*The Regulations on Rondas Campesinas*").

> of […] the jurisdictional prerogatives of the authorities of the Parán Community and of its *Rondas Campesinas* – all of which prerogatives […] **apply only within the Parán Community's 'territorial scope'**."[1025]

589 While it may be true, as a matter of Peruvian law, the actions of Parán Community and its *Ronda Campesina* took place outside the community's territory scope, this consideration is irrelevant for the purposes of attribution under international law, as noted above. The relevant consideration is whether these actions was so far removed from the Parán Community's territory scope, for instance, that they can only be regarded as purely private in nature.

590 The mere fact that the Parán Community carried out acts which fell outside its territorial scope is not "so removed from the scope of [its] official functions" that it should be viewed as a "purely private act". Indeed, the Invicta Mine was located within Lacsanga's and Santo Domingo's territories, a short distance away from the border with Parán's territory.[1026]

591 Accordingly, none of the Respondent's arguments on the Parán Community's subject matter or territorial jurisdiction alter the conclusion that the acts of the Parán Community and its *Ronda Campesina* are attributable to the Respondent.

592 Second, the Respondent's assertion that there is no evidence that the members of the Parán Community and its *Ronda Campesina* were acting in an official capacity – and thus their conduct should be treated as the conduct of purely private citizens – borders on the absurd. As noted above in Section 6.2.3, the Parán Community was able to perpetrate its illegal acts because it relied on the armed branch of the community, its *Ronda Campesina*. The evidence further shows that at all times the members of Parán's *Ronda Campesina* were acting under the instructions and direct orders of the self-governing organs of the Parán Community.

593 The legal authorities summarised in Section 9.2.3.1 above clearly show that the existence of such a chain of command belies any suggestion that

[1025] Counter-Memorial, 24/03/2022, p. 220 *et seq.* (para. 459) (emphasis added).

[1026] Memorial, 01/10/2021, p. 19 *et seq.* (para. 62).

the individuals concerned could have been acting in a purely private capacity. Whereas the cases cited above mostly concerned small groups of individuals, the facts at the heart of the present case involved tens, sometimes even hundreds, of Parán community members in the commission of illegal actions against the Claimant's investment. The Parán Community only has a few hundred inhabitants. It can hardly be argued that these private individuals who all happen to be members of the same organ or entity, namely the Parán Community, acted together by pure coincidence and without any connection to their functions as members of that organ.

594 It is therefore clear that these actions cannot be viewed as wholly unrelated to, having no connection with or so removed from the functions of these individuals as members of the Parán Community and its *Ronda Campesina*.

595 Third, the Respondent's attempt to whitewash the use by Parán's *Ronda Campesina* of military weapons supplied by the Peruvian Army and its own Police's repeated calls to take away these weapons is clearly disingenuous. Indeed, the Respondent goes as far as to say that this allegation is "unsubstantiated" even though it is based on multiple statements from the Peruvian Police's Operational Plan of 9 February 2019 drafted on the basis of multiple intelligence reports that the Respondent has refused to produce in document production.[1027] As noted above in Section 2.2, the limited evidence that the Respondent did agree to produce during the document production phase confirmed that the Police were aware of Parán's *Ronda Campesina*'s use of these military weapons supplied as part of Peru's extensive delegations of powers to the *Rondas Campesinas* in the Andes region.[1028] Therefore, the Respondent cannot

[1027] Claimant's Redfern Schedule, 23/05/2022; Correspondence between the Parties regarding Respondent's document production, at **Exhibit C-485**; Respondent's document production (collated), 14/06/2022 to 19/08/2022, at **Exhibit C-483**; [redacted]

[1028] Letter from IMC to MININTER (SPA), 19/02/2019, at **Exhibit C-16 (corrected translation)**; Sayán Police, Report No. 002-2019-REGPOL.LIMA/DIVPOL-H-CS.SEC (SPA), 04/01/2019, at **Exhibit C-458**; WhatsApp exchanges between Lupaka (Mr Bravo) and Mr Marco Estrada, 09/02/2019-23/12/2021 (SPA), at **Exhibit C-618**; WhatsApp exchanges

seriously dispute that the Parán Community's *Ronda Campesina* have been using such weapons as part of their functions.

596 As a matter of law, the Respondent further draws a mistaken analogy with the hypothetical provided by Professor Crawford in this treatise where one soldier acting alone would have "merely shot [his victim] with his service pistol".[1029] This analogy would be valid if the present case arose from the acts of a lone *rondero* using the weapon he received from the Peruvian Army to restrict access to the Invicta Mine. However, as noted above, the sheer number of members of the Parán Community and its *Ronda Campesina* acting in concert in all the events underlying this case shows that this analogy is not valid and the actions in question cannot be those of private citizens acting in a purely private capacity.

597 Fourth and finally, the Respondent's last argument that according to which the conduct of the Parán Community and its *Ronda Campesina* cannot be attributed to the Respondent because their actions were driven by "private, personal gain" as "part of a private law dispute" and not taken in the pursuit of "any official, governmental purpose" is equally misguided.[1030] As set out above in Section 9.2.3.1, the fact that the individuals concerned acted for purposes other than those set out in domestic law for the exercise of their powers is irrelevant to the issue of attribution under international law. Indeed, as noted above, the ILC clearly states in its Commentary on Article 7 that the existence of ulterior or improper motives is not a basis for excluding attribution.[1031] This argument should also be dismissed.

598 For all these reasons, the acts of the members of the Parán Community and its *Ronda Campesina* cannot be regarded as acts of private citizens acting in a purely private capacity. On the contrary, notwithstanding its illegality under Peruvian law, the conduct of the Parán Community and its *Rondas*

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between Lupaka (Mr Bravo) and Jorge (Coco) Arévalo (LAVETA SERVICE SAC), 23/01/2019-15/03/2021, at **Exhibit C-619**

[1029] Counter-Memorial, 24/03/2022, p. 222 *et seq.* (para. 464) (citing to the hypothetical discussed at J. Crawford, State Responsibility: The General Part ("**Crawford**") (2014), at **Exhibit RLA-0024**, p. 139.

[1030] Counter-Memorial, 24/03/2022, p. 226 *et seq.* (paras. 473-474).

[1031] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 42 (Art. 4, Commentary 13).

Campesinas should be attributed to the Respondent under Articles 4 and 5 of the ILC Articles.

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599 Finally, as noted by the French-Mexican Commission in the *Caire* case, the systematic and recurring nature of the illegal actions of the Parán Community and its *Ronda Campesina* over a prolonged period of time in any event evinces a grave failure on the part of the Respondent's other state organs, and thus the State's indirect international responsibility for Parán's actions. Indeed, as noted in the ILC Commentaries:

> "The problem of drawing the line between unauthorized but still 'official' conduct, on the one hand, and 'private' conduct on the other, may be avoided if the conduct complained of is **systematic** or **recurrent**, such that the State **knew** or **ought to have known** of it and **should have taken steps to prevent it**".[1032]

600 As discussed above,[1033] in the particular case of the Parán Community and its *Rondas Campesinas*, even before the invasion of the mine camp in June 2018, the Peruvian authorities had been perfectly aware of Parán's illegal activities and the threat posed by its *Ronda Campesina* for many years and consistently turned a blind eye to Parán's criminal behaviour.

601 In the words of the ILC Commentary and as demonstrated below, faced with such a "systematic" and "consistent" pattern of criminal behaviour, the Respondent "should have taken steps to prevent" Parán's further illegal acts, which it did not. Consequently, as elaborated in more detail below, the Respondent incurs international responsibility.

9.3 Peru breached its obligation to provide full protection and security to Lupaka's investment

602 The Claimant explained in the Memorial that the obligation to afford full protection and security to investors under customary international law, as

[1032] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 46 (Art. 7, Commentary 8) (emphasis added).
[1033] See *supra* Section 6.1.

embodied in Article 805 of the FTA, imposed two distinct obligations on Peru:

i) the negative obligation to refrain from directly causing harm to the Claimant's investment by acts of violence attributable to the State; and

ii) the positive obligation to prevent third parties from harming such investment.[1034]

603 The Claimant explained that, through the acts and omissions of Parán officials attributable to Peru, the Respondent breached its negative obligation not to cause damage to the Claimant's investment, and thereby failed to accord full protection and security to the Claimant's investment in accordance with Article 805.1 of the FTA.[1035]

604 Further, the positive element of the FPS obligation requires the State not only to take all reasonable measures to prevent third parties from causing damage to the investor's investment, but also – in case such harm does occur – to restore the investor to the full enjoyment of its investment and to investigate, prosecute and punish the persons responsible in accordance with its own law.[1036] Regardless of whether Parán's actions are attributable to the Respondent, it also breached that positive obligation.[1037] The Claimant also explained that the acts of State officials encouraging and providing tacit support to the Parán Community's illegal actions also breached the Respondent's obligation to provide full protection and security.[1038]

605 In its Counter-Memorial, the Respondent denies that it breached its obligation to provide full protection and security under Article 805.1 of the FTA.

[1034] Memorial, 01/10/2021, p. 80 (para. 254); *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 07/11/2018, at **Exhibit CLA-25**, p. 81 (paras. 403-404).

[1035] Memorial, 01/10/2021, p. 81 (para. 258).

[1036] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11/09/2007, at **Exhibit CLA-23**, p. 75 (para. 355). See also Memorial, 01/10/2021, p. 82 *et seq* (para. 261) (citing to *Wena Hotels*).

[1037] Memorial, 01/10/2021, p. 84 *et seq.* (para. 266 (i)-(vi)).

[1038] Memorial, 01/10/2021, p. 85 (para. 266 vii)).

606 First, the Respondent attempts to avoid scrutiny of its breach of Article 805.1 entirely, by arguing that the Claimant has "failed to prove the customary international law minimum standard of treatment, including full protection and security".[1039] The Claimant explains below in **Section 9.3.1** that this manoeuvre must fail. It is not in dispute that Peru owed the Claimant an obligation to provide full protection and security under Article 805.1 of the FTA. It is for each party to put forward its position on the scope of that obligation – there is no "burden" on the Claimant to "prove" that it exists.

607 Second, as for its position on the scope of the obligation, in the Counter-Memorial, the Respondent describes various broad-brush principles as to the application of the FPS standard.[1040] As explained below in **Section 9.3.2**, for the most part, the Claimant does not dispute the Respondent's description of the FPS standard as abstract statements of law.

608 However, the Claimant explains in **Section 9.3.3** that the Counter-Memorial fails to engage with the core elements of the FPS standard, as developed over time by an extensive body of decisions applying the customary international law minimum standard of treatment and that are at issue in this case. The Claimant further explains in **Section 9.3.4** that, applying those core elements of the FPS standard to the facts of this case, the only possible conclusion is that the Respondent's conduct breached that standard.

609 Finally, the Respondent emphasises that account should be taken of the circumstances in assessing whether the State has breached its obligation to provide full protection and security[1041] – the Claimant agrees. However, as demonstrated further below in **Section 9.3.5**, the circumstances on which the Respondent relies to excuse its systematic failure to enforce the law in the Project area constitute aggravating factors which, far from excusing it, reinforce the conclusion that the Respondent breached its

[1039] Counter-Memorial, 24/03/2022, p. 228 *et seq.* (Section IV.B.1).

[1040] Counter-Memorial, 24/03/2022, p. 232 *et seq.* (paras. 488-495).

[1041] Counter-Memorial, 24/03/2022, p. 232 *et seq.* (Section IV.B.1.b.).

obligation to provide full protection and security to the Claimant's investment.

9.3.1 The Respondent's burden of proof argument is a transparent attempt to resile from its obligations under the FTA

610 In its Memorial, the Claimant explained that, under Article 805.1 of the FTA, Peru was required to accord the Claimant's investment with full protection and security in accordance with the customary international law minimum standard of treatment.[1042] In its Counter-Memorial, the Respondent **does not dispute that it owed that obligation**.[1043]

611 Nevertheless, in a patent attempt to resile from its obligation, the Respondent tactically seeks to prevent an analysis of the Claimant's claim altogether by asserting that the Claimant has not discharged its burden of proof.[1044] For the reasons explained below, that tactic is fundamentally flawed as a matter of law and flouts procedural efficiency. It is also, in any event, moot. Despite the Respondent's lengthy legal submissions in its Counter-Memorial, the Parties are largely in agreement as to the existence and scope of the Respondent's obligations under Article 805.1 of the FTA.

612 First, the Respondent argues that "Claimant has the burden of proving the existence and content of any rules of customary international law on which it relies, including 'full protection and security'".[1045] That assertion is flawed in several respects.

613 The **existence** of the Respondent's obligation to provide full protection and security under Article 805.1 is not in dispute. Although the Respondent goes to great lengths to argue the Claimant has "neglected" to prove the existence of the FPS obligation under the customary international law minimum standard,[1046] in the immediately subsequent section of its Counter-Memorial it acknowledges the existence of that obligation and

[1042] Memorial, 01/10/2021, p. 79 (para. 251).

[1043] See, *e.g.*, Counter-Memorial, 24/03/2022, p. 228 *et seq.* (paras. 477 and 488-497).

[1044] Counter-Memorial, 24/03/2022, p. 228 *et seq.* (paras. 478-487).

[1045] Counter-Memorial, 24/03/2022, p. 229 (para. 479).

[1046] Counter-Memorial, 24/03/2022, p. 228 *et seq.* (paras. 478-487).

goes on to explain its own views as to its content and scope.[1047] Rightly so – the existence of the obligation is self-evident from Article 805.1, which acknowledges that the customary international law standard "includes" full protection and security:

> "Each Party shall accord to covered investments treatment in accordance with **the customary international law minimum standard of treatment of aliens**, **including** fair and equitable treatment and **full protection and security**."[1048]

614 The plain language of Article 805.1 should be the end of the matter. Since the existence of the Respondent's obligation to provide full protection and security under the customary international law minimum standard is not even in dispute, there is nothing further for the Claimant to prove.

615 It appears that there is, however, at least some disagreement between the Parties as to the **content** of the Respondent's obligation to provide full protection and security. The Respondent's attempt to place the burden of establishing the content of that obligation exclusively on the Claimant is misconceived.

616 The Respondent conflates **customary international law** with one of its two ingredients, *i.e.*, the underlying State practice. It is trite that customary international law is developed by consistent State practice accompanied by *opinio juris*, as the Respondent points out.[1049] The existence of a consistent State practice, as the Respondent notes, is an issue of fact to which the *onus probandi actori* principle applies.[1050] Therefore, a Party wishing to prove the **existence** of a particular customary rule from first principles will bear the burden of proving the existence of the State practice in question

[1047] Counter-Memorial, 24/03/2022, p. 232 *et seq.* (paras. 488-495).

[1048] Peru-Canada Free Trade Agreement ("**Peru-Canada FTA**"), 29/05/2008, at **Exhibit RLA-0010**, p. 51 (emphasis added).

[1049] Counter-Memorial, 24/03/2022, p. 230 *et seq.* (para. 482); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ, Judgement, 03/02/2012, at **Exhibit RLA-0087**, p. 27 *et seq.* (para. 55).

[1050] Counter-Memorial, 24/03/2022, p. 230 (para. 481).

and the *opinio juris* required to make it binding on the other party, as the ICJ held in the *Asylum Case*.[1051]

617 Customary international law, on the other hand, is not an issue of fact, but a question of law, to which the principle *iura novit curia* applies.[1052] It follows that, where the existence of the customary international law rule is not in question, there is no strict "burden of proof" on either party. As the tribunal in *Windstream v. Canada* explained in similar circumstances:

> "[I]n the present case the issue is not whether the relevant rule of customary international law exists; […] but rather how the content of a rule that does exist – the minimum standard of treatment in Article 1105(1) of NAFTA – should be established. The Tribunal is therefore unable to accept the Respondent's argument that the burden of proving the content of the rule falls exclusively on the Claimant. In the Tribunal's view, it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence."

618 Since it is not in dispute that there is an obligation under customary international law to provide full protection and security under the minimum standard, the tribunal **must** apply what it considers to be the law: "the Tribunal cannot simply declare *non liquet*."[1053] Accordingly, in this case, it is for each party to adduce legal authorities and evidence, as it deems appropriate, to support its position as to the content of the customary international law minimum standard of treatment.[1054]

[1051] *Asylum Case (Colombia v. Peru)*, ICJ, Judgment, 20/11/1950, at **Exhibit RLA-0080**, p. 14. See also Counter-Memorial, 24/03/2022, p. 229 *et seq.* (para. 480).

[1052] *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Merits Judgment, I.C.J. Reports 1974, 25/07/1974, at **Exhibit CLA-123**, p. 10 (para. 17); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, I.C.J Reports 1986, 27/06/1986, at **Exhibit CLA-124**, p. 14 *et seq.* (para. 29).

[1053] *Windstream Energy L.L.C. v. Government of Canada,* PCA Case No. 2013/22, Award, 27/09/2022, at **Exhibit CLA-125**, p. 99 (para. 351).

[1054] *Windstream Energy L.L.C. v. Government of Canada,* PCA Case No. 2013/22, Award, 27/09/2022, at **Exhibit CLA-125**, p. 231 (para. 350).

619 As to the **method** of proving the content of customary international law, the Respondent asserts that "decisions by investment tribunals cannot alone establish the existence or content of customary international law."[1055] It relies on the arbitral award in *Glamis Gold* to support its position as a matter of international law.[1056] The circularity of its argument is self-evident.

620 That argument again relies on a conflation between State practice and customary law. The Respondent's assertion that "ascertaining customary international law is a factual enquiry" is not correct.[1057] Ascertaining State practice is a factual enquiry. Ascertaining the customary international law that may have arisen from such State custom (and *opinio juris*) is a legal enquiry.

621 To establish a proposition of law, a party may of course submit whatever legal authorities or evidence it considers appropriate to prove the point in question. As per ICSID Arbitration Rule 34, paragraph 15.1 of Procedural Order No. 1 and Article 9(1) of the IBA Rules on the Taking of Evidence in International Arbitration, it is for the Tribunal to determine the relevance and weight of that evidence.

622 A party seeking to establish a customary international law rule from first principles would indeed need to adduce factual evidence of State practice and *opinio juris*.[1058] However, in most cases, it is not efficient or helpful to a tribunal for the parties to argue every proposition of law from first principles. Instead, as the Respondent acknowledges (and indeed does so itself throughout its Counter-Memorial) parties may cite to indirect evidence of the customary international law rule, including previous decisions of arbitral tribunals addressing such issues.[1059] Despite its argument that only factual evidence may prove a customary international law rule, the Respondent itself does not support any of its propositions of

[1055] Counter-Memorial, 24/03/2022, p. 231 (para. 483).

[1056] Counter-Memorial, 24/03/2022, p. 231 (para. 483).

[1057] Counter-Memorial, 24/03/2022, p. 230 (para. 481).

[1058] *Asylum Case (Colombia v. Peru)*, ICJ, Judgment, 20/11/1950, at **Exhibit RLA-0080**, p. 276; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ, Judgement, 03/02/2012, at **Exhibit RLA-0087**, p. 27 *et seq.* (para. 55).

[1059] Counter-Memorial, 24/03/2022, p. 231 (para. 484).

international law in its Counter-Memorial with an explanation of the state practice or *opinio juris* establishing such rules. Further, throughout its own section setting out its view of the FPS standard, the Respondent relies on tribunals applying the "autonomous" FPS standard as authority for how this Tribunal should interpret the customary international law FPS standard.

623 In this case, it would be particularly inefficient for the Parties to debate at length the historical state practice and *opinio juris* that led to the development of the modern minimum standard of treatment of aliens and the FPS standard. As explained in Section 9.3.2 below, it appears the Parties largely agree on the scope of the FPS standard under customary international law. Further, and in any event, the Respondent has breached the very core principles of that standard, such that an examination of its outer extremities is merely academic.

624 The result is that far from a "threshold matter",[1060] the Respondent's burden of proof argument can be safely ignored.

9.3.2 The Respondent's general statements as to the nature of the full protection and security standard are, for the most part, uncontroversial

625 In its Counter-Memorial, the Respondent asserts that the Claimant's description of the full protection and security standard in its Memorial is "incomplete and inaccurate".[1061] The Respondent goes on to describe certain general principles recognised by investment treaty tribunals when applying the full protection and security standard, both under customary international law and applying "autonomous" FPS standards.[1062]

626 Without addressing every arbitral award and quotation selectively chosen by the Respondent, it appears the Parties are, for the most part, in

[1060] Counter-Memorial, 24/03/2022, p. 229 (para. 479).

[1061] Counter-Memorial, 24/03/2022, p. 228 *et seq.* (para. 478).

[1062] In setting out its conception of the FPS standard under customary international law, the Respondent relies on cases where the tribunals in question applied customary international law, and where they applied "autonomous" standards in treaty provisions. See Counter-Memorial, 24/03/2022, p. 233 *et seq.* (paras. 490-495).

agreement as to the general characteristics of the FPS standard. In summary:

- The Respondent argues that the FPS standard requires the host State to exercise reasonable due diligence.[1063] The Claimant does not dispute that and agrees that the FPS obligation does not impose strict liability on the host State to prevent physical or legal infringement of the investment. In other words, the Parties appear to agree that the FPS obligation does impose an obligation to take "such measures to protect the foreign investment as are reasonable under the circumstances."[1064]
- The Claimant agrees, as the Respondent points out, that the FPS standard does not "insure [*sic*] or guarantee" security or provide a "warranty that property shall never in any circumstances be occupied or disturbed."[1065]
- The Respondent notes that, when applying the FPS standard, tribunals must take into account the "circumstances of the particular case."[1066] The Claimant agrees – although, as explained below, that does not make the minimum standard of treatment any less of an objective test.
- The Respondent also argues that, to succeed with a claim for breach of the FPS standard, a claimant must demonstrate that had the State acted with "due diligence", it would "in fact have prevented the claimant's alleged losses."[1067] The Claimant agrees: it is trite that it must establish both breach and causation.

627 One area in which the Parties do **not** agree is whether the FPS standard under customary international law is an objective standard. The Respondent argues that, in assessing the reasonableness of the host State's conduct, a tribunal must take into account that State's "means and

[1063] Counter-Memorial, 24/03/2022, p. 232 *et seq.* (paras. 488-490).

[1064] Counter-Memorial, 24/03/2022, p. 232 *et seq.* (para. 489); R. Dolzer, et al., *"Chapter VII: Standards of Protection"*, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), at **Exhibit RLA-0001**, p. 161.

[1065] Counter-Memorial, 24/03/2022, p. 233 *et seq.* (paras. 490, 491 and 493).

[1066] Counter-Memorial, 24/03/2022, p. 233 (para. 491).

[1067] Counter-Memorial, 24/03/2022, p. 235 *et seq.* (para. 494).

resources and the general situation of the country".[1068] The Respondent relies on the tribunal's award in *Cengiz v. Libya* as support, but as the Respondent itself points out, that tribunal was not applying the customary international law minimum standard of treatment, rather an autonomous standard under the Turkey-Libya BIT.[1069] It is of course open to tribunals applying **autonomous** treaty standards, which may provide greater levels of protection than the customary international law minimum standard, to consider the host State's specific circumstances when deciding what the treaty provision demanded of that State.

628 By contrast, under the customary international law minimum standard, the "protection and security" the host State is required to provide is measured objectively.[1070] To do so otherwise would eviscerate the standard of any meaning or effect. It is well established that the minimum standard of treatment of aliens is a floor below which States' conduct is not considered acceptable. Indeed, the Respondent itself concedes as much later in its Counter-Memorial, endorsing the following "inherent characteristic"[1071] of the minimum standard of treatment:

> "The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the circumstances of the case are of course relevant, **the standard is not meant to vary from state to state or investor to investor**."[1072]

[1068] Counter-Memorial, 24/03/2022, p. 234 (para. 492).

[1069] Counter-Memorial, 24/03/2022, p. 234 (para. 492); *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 07/11/2018, at **Exhibit CLA-25**, p. 81 (para. 401).

[1070] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21/02/1997, at **Exhibit CLA-22**, p. 18 (para. 6.06) ("It is thus an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law.")

[1071] Counter-Memorial, 24/03/2022, p. 268 (para. 564).

[1072] *Glamis Gold, Ltd. v. United States of America,* UNCITRAL, Award, 08/06/2009, at **Exhibit CLA-78**, p. 263 *et seq.* (para. 615). See also *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Hunter, Schwartz, Chiasson) ("***S.D. Myers* (Partial Award)**"), 13/11/2000, at **Exhibit RLA-0066**, p. 64 *et seq.* (para. 259).

629 It follows from the fact that the minimum standard is an objective one that it must be accorded to investors **throughout the territory of the host State**, not just in parts of it. Indeed, in the historic *Island of Palmas Case*, decided in 1928 and often considered the seminal decision on territorial sovereignty, arbitrator Max Huber held that an inherent aspect of territorial sovereignty was a State's duty to protect the rights of other States and their nationals within its territory.[1073] In Judge Huber's words:

> "Territorial sovereignty, as has already been said, involves the exclusive right to **display the activities of a State**. This right has as corollary a duty: the **obligation to protect within the territory** the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the **rights which each State may claim for its nationals in foreign territory**."[1074]

630 In this regard, in arguing that a tribunal applying the FPS standard should take into account the conditions prevailing in the host State, the Respondent refers to a commentary by Andrew Newcome and Lluís Paradell.[1075] They opine that the minimum standard of treatment is a "modified objective standard", according to which the standard of protection the State is required to accord to investors varies from State to State. They argue that "[a]n investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo."

631 However, the "modified objective standard" referred to by the aforementioned commentators is a contradiction in terms. The minimum standard of treatment cannot simultaneously be both "an absolute bottom, below which conduct is not accepted by the international community"[1076]

[1073] *Island of Palmas case (Netherlands, U.S.A.)*, UN, Reports of International Arbitral Awards (Vol. II), 04/04/1928, at **Exhibit CLA-126**, p. 839.

[1074] *Island of Palmas case (Netherlands, U.S.A.)*, UN, Reports of International Arbitral Awards (Vol. II), 04/04/1928, at **Exhibit CLA-126**, p. 839 (emphasis added).

[1075] Counter-Memorial, 24/03/2022, p. 234 (fn. 978); A. Newcombe, *et al.*, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009), at **Exhibit RLA-0008**.

[1076] *Glamis Gold, Ltd. v. United States of America,* UNCITRAL, Award, 08/06/2009, at **Exhibit CLA-78**, p. 263 *et seq.* (para. 615).

and depend entirely on the level of governance generally offered by the host State in question. If that were true, it would offer no more protection than that offered by the "national treatment" standard.[1077] Rather, it must be correct that a State in which there is "endemic civil strife and poor governance" breaches the minimum standard of treatment, rather than lowering the standard for itself.

632 In sum, as acknowledged above, applying the FPS minimum standard of treatment does, of course, require consideration of the circumstances of each case. However, the relevance of the "circumstances" is to determine what precise protection the State was required to provide, to the standards expected by the international community, in such circumstances. The **minimum standard itself**, to which all States are held, does not differ depending on the "means and resources and the general situation of the country."[1078]

9.3.3 The Respondent does not engage with the core elements of the FPS standard under the customary international law minimum standard

633 Notwithstanding the Respondent's elucidation of trite aspects of the FPS standard under international law, it fails to properly engage with the core elements of the FPS standard that are at issue in the present case.

[1077] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Hunter, Schwartz, Chiasson) ("***S.D. Myers* (Partial Award)**"), 13/11/2000, at **Exhibit RLA-0066**, p. 64 *et seq.* (para. 259) ("The minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs. The inclusion of a 'minimum standard' provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The 'minimum standard' is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner.)

[1078] Counter-Memorial, 24/03/2022, p. 234 (para. 492). See also, in this regard, *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Reisman, Lacarte Muró, Paulsson), 15/11/2004, at **Exhibit RLA-0049**, p. 36 (para. 94) ("It is no excuse that regulation is costly. Nor does a dearth of able administrators or a deficient culture of compliance provide a defence. Such is the challenge of governance that confronts every country. Breaches of NAFTA are assuredly not to be excused on the grounds that a government's compliance with its own law may be difficult.")

634 In its Memorial, the Claimant explained that, at its heart, the FPS obligation comprises: (i) a negative obligation not to harm an investor or its investment; and (ii) a positive obligation to prevent third parties from causing physical damage to such investment.[1079] It set out a series of investment treaty awards in which tribunals found breaches of the negative[1080] and positive[1081] obligations under the FPS standard in similar circumstances to the present case.

635 In its Counter-Memorial, the Respondent does not seriously engage with the principles underlying those cases; it merely asserts that the present case is distinguishable from them on its facts.[1082] Accordingly, for good measure, the Claimant expands below upon the core obligations underpinning the FPS standard applicable in this case, which ought not to be contested. It explains in Section 9.3.4 below that the Respondent's conduct breached those obligations.

636 Pursuant to Article 805.1 of the FTA, the Contracting Parties expressly recognise that protected investors are entitled to the same level of protection as that afforded to aliens generally under the customary international law standard. That standard of treatment imposes (*inter alia*) the following four obligations on the host State:

a) the obligation to ensure that persons and entities whose conduct is attributable to the State under international law do not inflict damage to protected investments (**Section 9.3.3.1**); and

b) the obligations to take all reasonable measures to:

   i) prevent third parties from causing damage to protected investments (**Section 9.3.3.2**);

[1079] Memorial, 01/10/2021, p. 80 (para. 254).

[1080] Memorial, 01/10/2021, p. 80 *et seq.* (paras. 256-258).

[1081] Memorial, 01/10/2021, p. 81 *et seq.* (paras. 259-265).

[1082] Counter-Memorial, 24/03/2022, p. 259 *et seq.* (paras. 543-545). See also *supra* Section 9.3.4.

ii) put an end to any interference from third parties with the investor's investment and restore the investor to the full enjoyment of its investment (**Section 9.3.3.3**); and

iii) investigate, prosecute and punish any person responsible for causing damage or otherwise interfering with the investor's investment in accordance with its domestic law (**Section 9.3.3.4**).

637 As explained in further detail in Section 9.3.5 below, the Respondent's full protection and security obligation applies across the Respondent's entire territory, even in decentralised or remote areas where the Respondent elected to delegate its police powers to local entities.

9.3.3.1 The host State's obligation not to cause harm to investors and their investments

638 At the very core of any conception of the FPS standard is the host State's negative obligation not to cause harm to investors and their investors. It has been a well-established part of that standard since the emergence of the minimum standard of treatment of aliens under international law. For example, in the early *Caire* case, relied on by the Respondent in its Counter-Memorial,[1083] Mexican soldiers had extorted, abused and killed a foreign hotel owner. The French-Mexican Mixed Claims Commission had no doubt in finding that, if the soldiers' acts were attributable to Mexico, then Mexico's international responsibility was engaged.[1084]

639 The host State's obligation not to cause harm to aliens' investments directly has formed part of the minimum standard of treatment since the emergence of investment treaty jurisprudence. The tribunal in *Amco v. Indonesia* explained in 1984:

> "[i]t is a generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, that a State has a **duty to protect aliens and their**

[1083] Counter-Memorial, 24/03/2022, p. 222 *et seq.* (paras. 463-464).

[1084] *Estate of Jean-Baptiste Caire (France) v. United Mexican State*, Reports of International Arbitral Awards, Decision No. 33, 07/06/1929, at **Exhibit RLA-0031**, p. 531.

> **investment against unlawful acts** committed by some of its citizens […]. **If such acts are committed with the active assistance of state-organs a breach of international law occurs**."[1085]

640 In the Memorial, the Claimant cites *Tatneft v. Ukraine*, *Biwater Gauff v. Tanzania* and *Cengiz v. Libya* as instances where modern tribunals have found a breach of the FPS standard in circumstances where State officials directly harmed the investment in question.[1086] The Respondent does not dispute that *Tatneft* and *Biwater* were correctly decided on those points; it merely argues that "the relevant acts of hostility in the present case were conducted not by State authorities but rather by Parán Community members, whose actions are not attributable to Peru."[1087] Similarly, the Respondent does not address the Tribunal's conclusion in *Cengiz* that Libya had breached the FPS standard after it "looted and caused physical harm" to the claimant's investment.[1088]

641 In sum, the Respondent (rightly) does not dispute the principle that it owed an obligation not to harm the Claimant's investment directly by unlawful acts, as part of its FPS obligation.

9.3.3.2 The host State's obligation to take all reasonable steps to prevent harm to investors and their investments

642 The FPS standard under customary international law also requires host States to take all reasonable steps to prevent third-party actors from causing harm to investors and their investments.[1089] This aspect of the FPS standard has also been a core aspect of the minimum standard of treatment under customary international law since (at least) the early twentieth century.

[1085] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20/11/1984, at **Exhibit CLA-66**, p. 48 (para. 172) (emphasis added).

[1086] Memorial, 01/10/2021, p. 80 *et seq.* (paras. 256-258).

[1087] Counter-Memorial, 24/03/2022, p. 259 (para. 543).

[1088] *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 07/11/2018, at **Exhibit CLA-25**, p. 86 (para. 435).

[1089] Memorial, 01/10/2021, p. 80 (para. 254).

643 The *Home Insurance Co.* case, decided by the United States-Mexico General Claims Commission in 1926, demonstrates that a State's obligation to protect aliens and their property forms part of the minimum standard of treatment, as originally conceptualised. In that case, Mexico was acting as the carrier of a shipment of coffee for the claimant. The Commission held that, in its private capacity, Mexico was not liable in negligence when revolutionary military forces seized the cargo. However, the Commission held that in its sovereign capacity, Mexico nevertheless had an obligation to protect persons and property within its jurisdiction by "such means as were reasonably necessary to accomplish that end."[1090]

644 Similarly, in the *Chapman* case in 1930, the Commission explained:

> "[t]his Commission and other international tribunals have often given application to the general principles (…) that a government is required to take appropriate steps to prevent injuries to aliens and to employ prompt and effective measures to apprehend and punish offenders who have committed such injuries."[1091]

645 Particularly relevant to the present case is the Commission's finding that "[i]t of course is an important point whether authorities have been put on notice with respect to apprehended illegal acts."[1092]

646 The above principles have been carried forward to the modern FPS standard under customary international law. In applying the "minimum standard of vigilance and care required by international law", the tribunal in *AMT v. Zaire* confirmed that the FPS standard required the host State to "take all measures necessary to ensure the full enjoyment of protection and

[1090] *The Home Insurance Co. (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 31//03/1926, at **Exhibit CLA-127**, p. 51 *et seq.* (paras. 16-17).

[1091] *William E. Chapman (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 24/10/1930, at **Exhibit CLA-128**, p. 634.

[1092] *William E. Chapman (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 24/10/1930, at **Exhibit CLA-128**, p. 635. See also p. 639, where the Commission noted that "A warning of imminent danger was communicated to Mexican authorities in the instant case. One official evidently took note of the warning and issued suitable instructions to meet the situation. These instructions were not carried out."

security of [the investor's] investment".[1093] It further confirmed that the minimum standard of FPS is an "objective obligation"[1094] and that Zaire "should not be permitted to invoke its own legislation to detract from any such obligation."[1095] These principles have been endorsed by numerous subsequent arbitral tribunals.[1096]

647 Accordingly, it ought not to be controversial that, notwithstanding that the FPS standard is one of "due diligence", the minimum standard of treatment contains a positive obligation on the host State to make every reasonable effort to ensure the physical protection and security of foreign investments. The Respondent appears to acknowledge this in its Counter-Memorial, citing to the award in *Tulip Real Estate v. Turkey*, which formulated the standard in those terms.[1097]

648 Finally, it should be noted that State officials not only have the duty to take all necessary measures to prevent such harm, but, by necessary implication, they shall also not "**encourage[], foster[] or contribute[] their support**" to the persons carrying out violent actions against the investor's investment.[1098]

[1093] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21/02/1997, at **Exhibit CLA-22**, p. 18 (para. 6.05).

[1094] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21/02/1997, at **Exhibit CLA-22**, p. 18 (para. 6.06).

[1095] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21/02/1997, at **Exhibit CLA-22**, p. 18 (para. 6.05).

[1096] See *e.g.*, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 911 *et seq.* (para. 84); *Saluka Investments BV v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17/03/2006, at **Exhibit CLA-34**, p. 98 (para. 484); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24/07/2008, at **Exhibit CLA-20**, p. 215 (para. 724).

[1097] Counter-Memorial, 24/03/2022, p. 233 (fn. 976).

[1098] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29/05/2003, at **Exhibit CLA-74**, p. 72 (para. 176) (emphasis added).

9.3.3.3 The host State's obligation to take all necessary steps to restore the investor to the enjoyment of its rights over its investment

649 A corollary of the obligation to prevent harm to foreign investors is a State's obligation to restore an investor to its rights where harm to the investment has already been suffered or is ongoing. In other words, the obligation to provide full protection and security applies not only before, but also during and after the acts of third parties subjecting the investor or its investment to harm.

650 In the Memorial, the Claimant cited various instances of cases where arbitral tribunals have found breaches of the FPS standard in such circumstances.[1099] For example, it cited to a decision taken by the tribunal in *MNSS v. Montenegro* where the treaty in question was considered to prescribe "the level of protection and security […] as understood under international law."[1100] As the Respondent points out in its Counter-Memorial, that tribunal found that Montenegro had failed to accord that standard of protection where it had taken no action to dislodge unlawful occupiers of the claimant's steelworks site.[1101] That tribunal specifically noted that it was "surprising that Minister Vujovic saw no reason to take steps in response to ZN's police protection request."[1102]

[1099] Memorial, 01/10/2021, p. 82 *et seq.* (paras. 250-265); *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21/02/1997, at **Exhibit CLA-22**, p. 18 *et seq.* (paras. 6.04-6.11); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 911 *et seq.* (paras. 84-95); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28/07/2015, at **Exhibit CLA-27**, p. 195 (para. 596); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 04/05/2016, at **Exhibit CLA-29**, p. 121 *et seq.* (paras. 352-353); *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21/02/2017, at **Exhibit CLA-30**, p. 72 (paras. 286-289); *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15/03/2016, at **Exhibit CLA-31**, p. 221 *et seq.* (paras. 6.82-6.84).

[1100] *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 04/05/2016, at **Exhibit CLA-29**, p. 121 (para. 351).

[1101] Counter-Memorial, 24/03/2022, p. 260 (para. 544.d.).

[1102] *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 04/05/2016, at **Exhibit CLA-29**, p. 122 (para. 355).

651 In its Counter-Memorial, as noted above, the Respondent rightly does not dispute that a failure by a host State to restore an investor to its rights may breach the FPS standard under customary international law. It acknowledges that a State may breach that standard by, for example, "failing to respond for long periods of time, or responding in some fashion but refusing to protect the claimant and/or its investment."[1103]

9.3.3.4 The host State's obligation to punish offenders committing crimes against investors and their investments

652 Finally, the host State's obligation to provide FPS includes an obligation to punish offenders for committing criminal acts against investors and their property. This element of the FPS standard is an established part of the minimum standard of treatment of aliens under international law.

653 For instance, various cases and commentaries addressing international law in the early twentieth century recognised a host State's duty to prosecute crimes against foreign nationals, a failure of which would amount to a breach of international law.[1104] In *Laura A. Mecham and Lucian Mecham,*

[1103] Counter-Memorial, 24/03/2022, p. 261 (para. 545).

[1104] *Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 02/04/1929, at **Exhibit CLA-129**; *Mary M. Hall (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 17/05/1929, at **Exhibit CLA-130**, p. 541, in particular the opinion of Commissioner Nielsen, who considered the applicable test to be whether "there was a failure to meet the requirements of the rule of international law that prompt and effective measures shall be taken to apprehend and punish persons guilty of crimes against aliens."; *Naomi Russell, In Her Own Right and As Administratrix and Guardian (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 24/04/1931, at **Exhibit CLA-131**, p. 832 ("With respect specifically to injuries committed by private individuals against aliens, the requirement of international law is that reasonable care must be taken to prevent such injuries in the first instance, and suitable steps must be taken properly to punish offenders. […] Before an international tribunal can assess damages for a failure to meet this requirement, there must of course be convincing evidence of a pronounced degree of improper governmental administration.") See also the *Case of the Mexican Shepherds*, reported in J. B. Moore, *A Digest of International Law,* Vol. IV, 1st ed., (Government Printing Office, 1906), Chapter XXI (VIII.1), at **Exhibit CLA-132**, p. 787 *et seq*. For contemporaneous commentaries on international law, see: E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims*, 1st ed., (The Banks Law Publishing Co., 1925), Part I, Chapter V, at **Exhibit CLA-133**, p. 213 *et seq.* (§ 86); A. V. Freeman, *The International Responsibility of States for Denial of Justice,* 1st ed., (London, 1938), p. 324-501, at **Exhibit CLA-134**, p. 367 *et seq*. (Chapter XIII).

Jr. (U.S.A.) v. United Mexican States, Mexico failed to pursue the robbers of the foreign claimants' store, and was found to have "[fallen] short of [its] duty to protect the claimants by providing appropriate means to prosecute and punish the offenders."[1105]

654 Similarly, in the *Case of the Mexican Shepherds*, following the killing of several Mexicans in Texas, the arbitral Commission noted that US and Mexican officials agreed there would have been grounds for a claim in international law "had the proper authorities then refused or neglected to prosecute the offenders" pursuant to the law.[1106] Further, as noted above, in the *Chapman* case the arbitral Commission held that the minimum standard required States to "employ prompt and effective measures to apprehend and punish offenders who have committed such injuries [against foreign nationals]."[1107]

655 These principles are still applied by modern investment treaty tribunals when applying the FPS standard. As the Respondent acknowledges in the Counter-Memorial, the tribunal in *Wena Hotels v. Egypt* held that Egypt had breached the FPS standard after a state-owned company (EHC) seized the investor's hotels.[1108] One of the reasons for that conclusion was the fact that "neither EHC nor its senior officials were seriously punished for their actions in forcibly expelling Wena and illegally possessing the hotels for approximately a year."[1109]

[1105] *Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 02/04/1929, at **Exhibit CLA-129**, p. 442.

[1106] *Case of the Mexican Shepherds*, reported in J. B. Moore, *A Digest of International Law,* Vol. IV, 1st ed., (Government Printing Office, 1906), Chapter XXI (VIII.1), at **Exhibit CLA-132**, p. 789.

[1107] *William E. Chapman (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 24/10/1930, at **Exhibit CLA-128**, p. 634.

[1108] Counter-Memorial, 24/03/2022, p. 260 (para. 544 (b)).

[1109] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 914 (para. 94).

9.3.4 The Respondent did not take all necessary measures to protect the Claimant's investment in accordance with Article 805.1 of the FTA

656 As the Claimant explained in the Memorial, the Respondent has breached the FPS standard under Article 805.1 of the FTA by failing to provide FPS to the Claimant's investment.[1110] In its Counter-Memorial, the Respondent denies this is the case, asserting that it acted "with due diligence", as it claims was "reasonable in the circumstances".[1111]

657 The Claimant explains below in further detail why the Respondent's assertions do not amount to a correct application of the FPS standard, of which the core elements were explained in the preceding Sections. Through the actions of Parán attributable to Peruvian State, Peru breached its negative obligation not to harm the Claimant's investment by directly and violently seizing the Invicta mine, resulting in the Claimant's complete loss of its investment (**Section 9.3.4.1**). In addition, and whether or not Parán's acts are attributable to Peru, it breached its positive obligation to prevent Parán from harming the Claimant's investment (**Section 9.3.4.29.3.4.2**), to put a stop to those harmful acts (**Section 9.3.4.3**), and to punish those responsible (**Section 9.3.4.4**).

9.3.4.1 The Respondent, through Parán, harmed the Claimant's investment directly via threats and acts of violence, and other State officials encouraged, fostered and contributed to those acts

658 In the Memorial, the Claimant explained that Parán's officials led the violent invasions of the Site in June and October 2018.[1112] Although in its Counter-Memorial the Respondent seeks to downplay the seriousness of Parán's actions, ultimately it does not dispute that those actions were violent and hostile to the Claimant's investment.

[1110] Memorial, 01/10/2021, p. 81 *et seq.* (paras. 258 and 266).

[1111] Counter-Memorial, 24/03/2022, p. 237 (para. 497) (emphasis in original).

[1112] Memorial, 01/10/2021, p. 80 *et seq.* (para. 256). See also Memorial, 01/10/2021, p. 32 *et seq.* (Sections 2.3.1-2.3.3 and 2.3.8-2.3.12).

659 The Respondent seeks to recharacterize Parán's invasion of the Site in June 2018 and the subsequent Blockade from October 2018 onwards as mere "protest actions". Throughout its Counter-Memorial, it refers to the invasion of the Site that took place on 19 June 2018 as the "19 June 2018 Protest".[1113] It also refers to the Blockade as the "Access Road Protest".[1114] Those descriptions are misleading.

660 As the Claimant explained in the Memorial, both intrusions of the Site by Parán, as well as Parán's subsequent retaking of the Site on 20 March 2019, were armed invasions, accompanied by the threat and use of violence against the Claimant's representatives and agents.[1115] The Respondent does not deny the Claimant's account of those events, it simply seeks to explain them away or pass them off as the Claimant's own fault.[1116] In particular, the following facts (at least) appear to be common ground between the Parties:

a) On 19 June 2018, hundreds of Parán Community individuals occupied the Site with no authority or permission to do so. Those individuals included members of Parán's "rural patrol" (or "*Rondas Campesina*") – armed guards with weapons supplied by the Peruvian Army, which they used.[1117]

b) The Parán Community members threatened and used violence against the Claimant's representatives, including threatening and harassing the CR Team [redacted][1118]

c) On 14 October 2018, approximately 100 Parán Community members, led by Parán officials, seized control of the Site and set

[1113] See Counter-Memorial, 24/03/2022, p. 6 (para. 16).

[1114] See Counter-Memorial, 24/03/2022, p. 6 (para. 16).

[1115] Memorial, 01/10/2021, p. 32 *et seq.* (Sections 2.3.1, 2.3.3, 2.3.9 and 2.3.10).

[1116] Counter-Memorial, 24/03/2022, p. 105 *et seq.* (Section II.E.2.a).

[1117] Memorial, 01/10/2021, p. 34 (paras. 105-106); Counter-Memorial, 24/03/2022, p. 105 *et seq.* (para. 211).

[1118] Memorial, 01/10/2021, p. 34 *et seq.* (para. 107); Counter-Memorial, 24/03/2022, p. 105 *et seq.* (para. 211).

up the Blockade, thereby denying access to and from the Invicta mine. Parán maintained the Blockade from that date onwards.[1119]

d) On 20 March 2019, approximately 150 Parán representatives again invaded the Site, armed and led by Parán's President, whilst maintaining the Blockade.[1120]

e) Parán representatives extorted IMC's contractors for cash payments to allow them to recover their equipment from the Site.[1121]

f) When the Claimant's security consultants, WDS, approached the Site on 14 May 2019, Parán representatives violently attacked them, shooting at them and forcing them to flee into the hills. These attacks continued the next day, with Parán community members intercepting other members of the WDS team and killing one of them.[1122]

661 The Respondent even relies on the violent nature of Parán's actions in its defence. In paragraph 1 of its Counter-Memorial, it describes the conflict the Claimant faced with Parán as "highly charged and volatile".[1123] In arguing that the acts of the *Ronda Campesina* were not attributable to the State (*quod non*), the Respondent relies on the fact that "violence, detention of individuals, damage to property, and blocking roads" were not acts they were authorised by law to undertake.[1124] A core theme of the Respondent's defence – that the Police's intervention would have been

[1119] Memorial, 01/10/2021, p. 39 (para. 119); Counter-Memorial, 24/03/2022, p. 116 (para. 230).

[1120] Memorial, 01/10/2021, p. 55 (para. 167). The Respondent does not dispute the Claimant's account of these events in its Counter-Memorial.

[1121] Memorial, 01/10/2021, p. 56 (para. 172). The Respondent does not dispute the Claimant's account of these events in its Counter-Memorial.

[1122] Memorial, 01/10/2021, p. 58 (para. 177); Counter-Memorial, 24/03/2022, p. 170 (para. 334).

[1123] Counter-Memorial, 24/03/2022, p. 1 (para. 1).

[1124] Counter-Memorial, 24/03/2022, p. 220 (para. 458).

counterproductive – rests on the premise that, if the Police attempted to lift the Blockade, Parán would have responded with violence.[1125]

662 If Parán's actions described above are found to be attributable to Peru, there cannot be any dispute that those actions breached Peru's obligation to provide FPS to the Claimant's investment, by causing it (and its representatives) direct and significant harm. Indeed, the Respondent appears to concede that this is the case, arguing that "the relevant acts of hostility in the present case were conducted not by State authorities but rather by Parán Community members".[1126]

663 Further, the Respondent argues that "Peruvian officials never acquiesced in, accepted, or expressed agreement with the Parán Community's chosen tactics" and that it "did not support the Parán Community's continued blockade of the Invicta Mine".[1127] This assertion further reveals the Respondent's acknowledgement that Parán's actions directly and wrongfully harmed the Claimant's investment.

664 However, that assertion is, in any event, factually inaccurate. As explained in Section 6.2.1 above, other Peruvian officials actively incited and participated in the 19 June 2018 Invasion by Parán, thereby further contributing to Peru's direct harm to the Claimant's investment. Specifically, the Leoncido Prado Subprefect, Mr Soyman Román Retuerto, incited opposition to the Project amongst other State authorities, and later authorised the Parán Community to carry out the June 2018 Invasion, which he himself led.[1128]

9.3.4.2 The Respondent failed to take all the necessary measures to prevent harm to the Claimant's employees and investment

665 As the Claimant explained in its Memorial, regardless of whether Parán's actions are attributed to the Peruvian State, the Respondent will be found to be in breach of its positive obligation under the FPS standard to prevent

[1125] See *e.g.*, Counter-Memorial, 24/03/2022, p. 304 *et seq.* (para. 649) ("Had Peru intervened forcefully, there was a significant risk of violent confrontation".)

[1126] Counter-Memorial, 24/03/2022, p. 259 (para. 543).

[1127] Counter-Memorial, 24/03/2022, p. 251 (para. 525).

[1128] See *supra* Section 6.2.1.

harm to the Claimant's investment by others.[1129] As explained in Section 9.3.3.2 above, that obligation required Peru to take all reasonable steps to prevent the acts of third parties, including Parán, that threatened and compromised the physical protection and security of the Claimant's investment. As demonstrated below, contrary to the Respondent's arguments in its Counter-Memorial that it acted with "due diligence",[1130] it completely failed to take the necessary steps to prevent harm to the Claimant's investment.

666 First, the Respondent paints a misleading picture as to when it first became aware of the danger Parán posed to the Claimant's investment. In the Counter-Memorial, the Respondent argues that "[the] Claimant first involved Peru in its emerging conflict [with Parán] in June 2018".[1131] As explained above in Section 6.1, that is incorrect. Peru's Police and intelligence services were aware of the risk of a Parán invasion of the Site since at least October 2017, and IMC [redacted] remained in contact with Major Rosales, Chief of the Sayán Police, from November 2017 onwards in relation to the threats posed by the Parán Community to the Project and how to anticipate possible attacks.[1132] Further, police officials were aware of how dangerous some of the Parán members were long before the June 2018 Invasion, some of whom had arrest warrants issued against them.[1133] Therefore, Peru's contention that it was unable to prevent the June 2018 Invasion or the Blockade is disingenuous. The State could have and should have taken preventative measures; it did not.

667 Peru attempts to rely on the fact that the Site was a "two-hour drive" from the Sayán Police Station to somehow excuse its passivity. This is

[1129] Memorial, 01/10/2021, p. 81 *et seq.* (paras. 259-266).

[1130] Counter-Memorial, 24/03/2022, p. 245 *et seq.* (Section IV.B.2.b).

[1131] Counter-Memorial, 24/03/2022, p. 246 (para. 517).

[1132] See SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-414**, p. 6; SSS, Weekly Report, Project (SPA), 20/11/2017 to 24/11/2017, at **Exhibit C-445**, p. 3; SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-461**, p. 3; SSS, Weekly Report, Project (SPA), 09/04/2018 to 15/04/2018, at **Exhibit C-462**, p. 7; [redacted]

[1133] See SSS, Weekly Report, Project (SPA), 06/11/2017 to 11/11/2017, at **Exhibit C-414**, p. 6; Letter from IMC to the Parán Community (SPA), 07/11/2017, at **Exhibit C-118**;

inaccurate: it was only one hour via the Lacsanga road.[1134] In any event, the length of the drive, be it one hour or two, is no excuse. Peru was aware of the risk that Parán would invade the Project. It could and should have implemented plans to provide adequate police protection that took into account the time it would take to reach the Site.[1135] Further, as explained above, Peru's obligation to accord the Claimant's investment the minimum standard of treatment, including FPS, applied throughout its territory.[1136] If Peru considered that a two-hour drive inhibited its ability to provide a police response from Sayán, it was incumbent on Peru to explore other means to prevent invasions of the Site by Parán.

668 Second, by early 2019, the danger Parán posed to the Project was obvious to all involved, Peruvian officials included. Parán had already invaded the Site twice and maintained the Blockade in place for months, preventing the Claimant's access to the Site entirely. It ought to have been clear, therefore, that IMC was at the mercy of the Parán Community.

669 As the Claimant explained in its Memorial, and further in Section 6.7 above, a further invasion of the Site came to fruition on 20 March 2019. Indeed, on this day, after allowing IMC's staff to access the Site only through Parán territory for roughly two weeks, 150 hostile Parán representatives once again invaded the Site, evicting IMC's staff and regaining control. The Respondent does not dispute that it failed to prevent this third invasion and, in fact, omits referring to it altogether in its Counter-Memorial.[1137]

670 Third, Peru's Counter-Memorial focuses entirely on explaining its failure to commit resources to prevent the June 2018 Invasion and subsequent Blockade as from October 2018, but does not address the various other crimes the Claimant suffered at the hands of Parán members as from the time the Blockade was established in October 2018.[1138] As explained in

[1134] See *supra* para. 276.

[1135] See *infra* Section 9.3.5.2.

[1136] See *supra* para. 629.

[1137] See *supra* Section 6.7.

[1138] See *e.g.*, Counter-Memorial, 24/03/2022, p. 257 (para. 539). See also generally Counter-Memorial, 24/03/2022, p. 245 *et seq.* (Section IV.B.2.b).

Section 7.1 above, aside from the Blockade itself, Parán incurred in other illegal behaviour that could have been prevented with police intervention. Specifically:

a) Peruvian officials at various levels of government were aware that Parán possessed weapons, and the risks this posed. Indeed, the State knew that Parán had misused these arms during the June 2018 Invasion by shooting at the Lacsanga community members onsite that day.[1139] Later, in January 2019, its own Police advocated that the State should take the weapons held by Parán's *ronderos*,[1140] and in February 2019 it drew up an Operational Plan for this purpose.[1141] However, Peru failed to confiscate Parán's weapons. This allowed Parán's members to shoot at Mr Estrada and members of the WDS team on 14-15 May 2019[1142] after WDS team's peaceful access to the Site, and at Santo Domingo community members on 20 May 2019.[1143] Parán's use of firearms on 14-15 May 2019 left several injured and one dead.

b) Peru was aware of the risk that Parán would steal the explosives in IMC's explosives magazine. In February 2019, the Claimant warned Peruvian officials of this danger but Peru did nothing to prevent it, and in March 2019 the Claimant confirmed several items had been forcibly taken from the magazine.[1144]

c) As explained in Section 2.1 above, on 8 July 2019, IMC sent a letter to the MEM reporting on the Parán Community's decision to appropriate the Lupaka ore stockpiled at the Site with photographs

[1139] SSS, Special Report, seizure of the Invicta Mine Camp and Facilities (SPA), 19/06/2018, at **Exhibit C-129**, p. 2; Criminal complaint filed with the Sayán Police by IMC representatives (SPA), 20/06/2018, at **Exhibit C-125**, p. 1 *et seq*.

[1140] Letter from Huacho Police to Chief of Lima Region Police (SPA), 25/01/2019, at **Exhibit C-338**.

[1141] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3.

[1142] Witness Statement of Luis F. Bravo, 01/10/2021, p. 26 (para. 82); Internal PCM email with attachment (SPA), 21/05/2019, at **Exhibit C-552**, p. 3; Internal PCM *aide mémorie* (SPA), 10/07/2019, at **Exhibit C-574**, p. 2.

[1143] See Summary of the meeting between MEM, PCM, MININTER, Ombudsman's Office and IMC, 27/05/2019, at **Exhibit C-18**, p. 5 (point 11).

[1144] See *supra* Sections 6.3, 6.5 and 6.7.

evincing Parán's illegal ore extraction.[1145] Mr Cauti, then Deputy Minister of the MEM, informed IMC during a meeting held on 15 July 2019 that he would ask for a police intervention if confirmed that Parán was indeed appropriating Lupaka's ore.[1146] However, nothing ever occurred.

671 Therefore Peru, even after it had failed to prevent the Blockade itself, should have intervened to prevent the various other criminal actions of Parán's members after the Blockade had started.

9.3.4.3 The Respondent has failed to take all necessary steps to restore the Claimant to the full enjoyment of its investment

672 As well as failing to **prevent** the harm caused by the Parán Community, Peru failed entirely to take the necessary steps to **restore** the Claimant's rights to access and to be able to operate in peace at the Site.

673 It is not in dispute that Peru chose not to intervene and lift the Blockade. Indeed, Peru's primary defence to that indictment is that intervention was unreasonable in the circumstances and that dialogue between IMC and the Parán Community was the only reasonable response. For the reasons explained in Sections 6.4 and 7 above, that defence is without merit. Indeed, the State was obliged by its own law to intervene and lift the Blockade,[1147] and doing so was consistent with the State's reaction to other social conflicts within the mining sector and outside of it.[1148] In any event, the State knew that dialogue was of no use in this case given Parán's plan to illegally exploit the mine and protect its drug business, so insisting on such a strategy was pointless.

674 However, even accepting the Respondent's position that it would have been unreasonable for the Police to intervene and lift the Blockade, the

[1145] Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**, p. 1-2 (emphasis added); see also Email from Lupaka to Canadian Embassy with attachments, 11/07/2019, at **Exhibit C-469**; Witness Statement of Luis F. Bravo, 01/10/2021, p. 30 *et seq.* (paras. 96-97).

[1146] Summary of the meeting between Deputy Minister of Mines and IMC with support of Canadian Embassy officials, 15/07/2019, at **Exhibit C-222**, p. 3 (para. 22).

[1147] See *supra* Section 7.1.

[1148] See *supra* Section 7.2.

Respondent's inaction is still inexcusable. Indeed, there were various other steps it could have taken that would have gone a long way in resolving the Parán Community's harm to the Claimant's investment. For instance:

a) As explained above in Section 6.2, Peru was aware of the fact that Parán's *Ronda Campesina*, some of the members of which stood guard at the Blockade, were armed with weapons; it was also aware of the need to seize those weapons.[1149] However, it took no steps to remove weapons from the Parán Community.

b) The Police could and should have arrested specific individual identified in the manifold criminal complaints filed in relation to the events underlying this case. Instead, as explained further in Sections 6.2, 6.3 and 6.7 above, Peru failed to arrest a single member of the Parán Community, despite various criminal complaints filed by IMC and investigations being initiated against individuals known to be dangerous.

c) As explained in Section 2.2 above, one of the Parán Community's key motivations for opposing the Project was to protect its illegal marijuana business. Peru was well aware of the scale of this business and that the Blockade was being financed with funds coming from it.[1150] Furthermore, in an internal memorandum dated 19 February 2019, the MEM-OGGS opined that further attempts at dialogue between IMC and the Parán Community were obsolete because of Parán's ulterior interests in the marijuana business.[1151] Despite this acknowledgement, Peru did nothing to stop the illegal marijuana business operated by the Parán Community.[1152]

[1149] See *supra* Section 6.2.

[1150] See *supra* para. 41.

[1151] See *supra* para. 41; Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3.

[1152] See *supra* Section 2.2.

675 In light of the foregoing, the Respondent's argument that promoting dialogue between the Claimant and Parán was the only reasonable option available to it does not hold water.[1153]

676 Finally, and as explained in Section 7.3 above, Peru's steadfast refusal to contemplate action other than dialogue is fundamentally flawed from a policy perspective. It forces mining investors to negotiate with a counterparty that faces no consequences if it violates its part of the bargain. As Peru's own former Minister of the Economy has stated recently, "[m]ining companies should not be obliged to enter conciliation with a gun to their head."[1154]

9.3.4.4 The Respondent has failed to exercise due diligence to investigate, prosecute and punish the persons responsible for the illegal actions that targeted the Claimant's workers and investment

677 In addition to preventing and addressing the harm suffered by the Claimant at the hands of Parán representatives, the Respondent also had an obligation to investigate, prosecute and punish those responsible. The Claimant explained above in Section 9.3.3.4 that the obligation to punish offenders for committing criminal acts against foreigners forms a core part of the FPS standard of treatment. For the reasons explained below, the Respondent manifestly failed to comply with that element of its duty.

678 Throughout the history of Parán's interference with the Project, IMC's staff and the Lacsanga Community filed several criminal complaints identifying with precision at least some of the many Parán community members involved in acts of violence. Whereas further investigations may have been required to identify all the other Parán members involved in those events, the Police could have – and should have – at the very least investigated these named individuals on the basis of the serious allegations raised in these criminal complaints. However, to the Claimant's knowledge, there has not been a single arrest of any Parán Community

[1153] Counter-Memorial, 24/03/2022, p. 258 *et seq.* (para. 542).

[1154] "Miguel Castilla: "Mining companies should not reconcile with a gun to their heads", *Instituto de Ingenieros de Minas del Perú* (SPA), 29/04/2022, at **Exhibit C-620**.

member in connection with the events at issue in this dispute, let alone any formal prosecution or conviction of those responsible:

a) On 20 June 2018, *i.e.*, the day after the June 2018 Invasion, IMC filed a criminal complaint against ten members[1155] of the Parán Community for the crimes of coercion, usurpation and aggravated damage to Invicta's property.[1156] After taking nearly four years, in breach of Peruvian law which required it to decide within eight months of admission of the complaint, the Huaura Prosecutor decided not to launch any preparatory investigation into those crimes and closed the case file.[1157]

b) After the Parán Community set up its Blockade, on 4 December 2018 IMC filed a criminal complaint against Parán's then President, Mr Isidro Román Palomares, for the crime of extortion.[1158] IMC extended its criminal complaint on 7 January 2019 to other identified Parán members and for other crimes, including those of illegal possession of explosives, aggravated theft and disobedience to authority.[1159] The preliminary investigations phase of this complaint remains open to this day,[1160] over three years after the expiry of the legal deadline for the Huaura Prosecutor to render a decision on whether or not to launch a preparatory investigation.[1161] None of the Parán offenders were ever prosecuted or arrested.

[1155] See Summary table of complaints filed by Invicta, at **Exhibit IMM-0047**, p. 1 (Item 1).

[1156] See *supra* Sections 6.2.3, 6.3, 6.6.2, and 6.7. See also Law Firm Lazo, de Romaña, Criminal Case Status Report for Lupaka (SPA), 09/07/2018, at **Exhibit C-159**; Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 2 *et seq.* (para. 1); Summary table of complaints filed by Invicta, at **Exhibit IMM-0047**, p. 1 (Item 1).

[1157] See *supra* Sections 6.2.3 and 6.6.2. See also Huaura Prosecutor's Office website, Case File No. 1006014500-2018-4336-0 (accessed on 11/08/2022) (SPA), at **Exhibit C-556**.

[1158] Summary table of complaints filed by Invicta, at **Exhibit IMM-0047**, p. 2 (Item 3).

[1159] Denuncia Ampliatoria, 07/01/2019, at **Exhibit IMM-0053**.

[1160] Huaura Prosecutor's Office website, Case File No. 1006014500-2018-8034-0 (consolidated with Case File No. 1006014500-2018-7786-0) (accessed on 11/08/2022) (SPA), at **Exhibit C-621**; Huaura Prosecutor's Office website, Case File No. 1006014500-2018-7786-0 (last accessed on 11/08/2022) (SPA), at **Exhibit C-622**

[1161] See Court of Cassation Decision No. 144-2012 "Ancash" (SPA), 11/07/2013, at **Exhibit C-554**, p. 10.

c) Following the first failed inspection, the Prosecutor scheduled a new inspection of IMC's explosive magazine for 9 February 2019. The authorities travelled to the Site on that day, but the inspection was once again disrupted by the Parán members' threatening stance.[1162] As a result of this, IMC filed a new criminal complaint against the Parán offenders.[1163] However, to the best of the Claimant's knowledge, none of these Parán members was ever prosecuted or arrested.

d) Following the March 2019 Invasion, IMC filed two further criminal complaints against the perpetrators, including Mr Azarías Torres Palomares, then President of the Parán Community, for crimes including coercion and aggravated theft of IMC's explosives.[1164] Again, far exceeding the time limits imposed by Peruvian law, the Huaura Prosecutor's Office rendered its decision on 24 February 2020, deciding to close the investigations on grounds that the crimes had not been proven – even though the Blockade was still ongoing to that day[1165] and there were missing items from IMC's explosive magazine.[1166]

679 In stark contrast, when it was the Claimant's contractors being accused, Peru's police sprung into action. Indeed, on 15 May 2019, just one day after WDS's peaceful access to the Site, the Police arrested some of the WDS personnel.[1167] The Police did not take any action against the Parán members that had acted violently following WDS's unperturbed access to the Site, including by killing a member of the WDS team.[1168] Remarkably,

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[1162] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 22 *et seq.* (para. 47); Email from Lupaka to LAVETA with attachment, 13/02/2019, at **Exhibit C-341**.

[1163] IMC, Criminal complaint for aggravated theft and illegal possession of explosives (SPA), 20/02/2019, at **Exhibit C-342**.

[1164] Criminal complaints filed with the Sayán Police by IMC representative (SPA), 21/03/2019, at **Exhibit C-208**.

[1165] See *supra* Section 6.2.3.

[1166] IMC, Criminal complaint for aggravated theft and illegal possession of explosives (SPA), 20/02/2019, at **Exhibit C-342**, p. 6; IMC, Inventory on missing items from the explosive magazine, 08/03/2019, at **Exhibit C-203-ENG**; IMC, Internal Report on missing items from the explosive magazine (SPA), 08/03/2019, at **Exhibit C-247**.

[1167] See *supra* Section 6.8. See also Memorial, 01/10/2021, p. 58 (para. 177).

[1168] See *supra* Section 6.8.

Peru seeks in this arbitration to rely on the death of the WDS team member to support its case.[1169] That lies particularly ill in the mouth of the Respondent where it has failed to investigate and prosecute those responsible for that unlawful killing.

680 Finally, and more generally, the Respondent does not dispute the Claimant's account of the flashpoints in the Project history. It does not dispute that Parán's members, on multiple occasions, subjected IMC, its representatives and contractors to violence and coercion and that they stole explosives from IMC's explosive magazine and the ore stockpiled at the Site.[1170] Peru does not dispute either that Parán's members attacked Lacsanga and Santo Domingo community members on multiple occasions. Peru's own expert agrees that Parán's Blockade amounted to a criminal offence.[1171] Indeed, in its Counter-Memorial, the Respondent appears to acknowledge the illegality of Parán's methods, stating (albeit incorrectly) that "Peruvian officials never acquiesced in, accepted, or expressed agreement with the Parán Community's chosen tactics."[1172]

681 Despite these acknowledgments, the State failed to punish the Parán Community members responsible for the illegal and harmful acts that ended up destroying the Claimant's investment.

9.3.5 The "circumstances" invoked by the Respondent do not constitute an excuse for its failure to enforce the law against Parán Community members

682 In its Counter-Memorial, the Respondent goes to great lengths to emphasise that the Tribunal must take into account the "circumstances of the case" when applying the FPS standard to the facts.[1173] As explained above, the Claimant does not dispute that, at the stage of applying the FPS

[1169] Counter-Memorial, 24/03/2022, p. 253 *et seq.* (para. 530).

[1170] See generally Counter-Memorial, 24/03/2022, p. 105 *et seq.* (Section II.E).

[1171] See *e.g.*, Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 35 (para. 101).

[1172] Counter-Memorial, 24/03/2022, p. 253 *et seq.* (para. 530).

[1173] Counter-Memorial, 24/03/2022, p. 237 *et seq.* (paras. 498-511).

standard, properly conceptualised, the Tribunal must of course consider the factual circumstances of the case in question.

683 However, as also explained above, the Respondent cannot rely on its own institutional means, resources or general situation to lower the threshold of the minimum standard of treatment.[1174] It must be held to the same standards as any other State would be held, in the circumstances of the present case.

684 The circumstances to which Respondent refers to justify its systematic failure to enforce the law *vis-à-vis* the Parán Community are characterised as two distinct factors, addressed in turn below:

a) the alleged "pervasive history of social conflict in Peru's extractive industries" (**Section 9.3.5.1**);[1175] and

b) Peru's "institutional means and resources", by which it refers to its own long-standing failure to command control over remote areas of the Andes (**Section 9.3.5.2**).[1176]

685 For the reasons explained below, these factors do not serve as an excuse for Peru's complete failure to apply the law in respect of the Parán Community members' criminal actions against the Claimant's protected investment.

9.3.5.1 Peru's pervasive history of social conflict in the extractive industries

686 The Respondent has established a clear legal framework for the mining industry in light of this history of social conflicts. It is the Respondent's responsibility to decide how to strike the balance between the interests of local communities and investors in the mining sector. On the one hand, the Respondent wants to attract foreign investment and foster economic growth and, on the other hand, there are political incentives for the

[1174] See *supra* Section 9.3.2.

[1175] Counter-Memorial, 24/03/2022, p. 12 (para. 31).

[1176] Counter-Memorial, 24/03/2022, p. 12 (para. 31).

Respondent to be seen as "empowering local communities". Making these policy decisions is, of course, an inherent part of the State's sovereignty.

687 That said, once the State has laid down a specific regime in its domestic law, the State must ensure that **investors and local communities alike follow the law**. The Claimant describes the main rules of this regime below and how it complied with them:

688 First, as explained in Section 3.2.2 above, a mining company is only obliged under Peruvian law to reach an agreement with the rural communities on which land mining activities are contemplated to take place.[1177] This was the case for the communities of Lacsanga and Santo Domingo, but not the case for the Parán Community. Indeed, IMC's revised mining plan, as approved by the MEM in 2014,[1178] only assumed exploitation of the Victoria Uno concession and, specifically, of the part of such concession which is located on land belonging to the Lacsanga and Santo Domingo communities.[1179]

689 IMC reached agreements with the Lacsanga and Santo Domingo Communities to develop the Project. Indeed, on 22 October 2010, Invicta's prior owner signed a Land Use Agreement with the Santo Domingo Community allowing IMC to conduct mining operations on Santo Domingo land.[1180] Thereafter, on 31 March 2015[1181] and 18 July 2017, [1182] IMC signed agreements with the Lacsanga Community

[1177] Supreme Decree No. 008-91-TR, Approval of the Regulation of Mining Procedures (SPA), at **Exhibit C-228**, p. 22 *et seq*. (Art. 23).

[1178] MEM Report and Resolution approving the Mining Plan (SPA), 11/12/2014, at **Exhibit C-9 (corrected translation)**.

[1179] IMC map - Community boundaries according to Peruvian registry (SPA), at **Exhibit C-486**.

[1180] Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**, Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64** and Contract for the Constitution of Mining Easement between IMC and the Santo Domingo Community (SPA), 22/10/2010, at **Exhibit C-65**. An addendum to the Land Use Agreement increasing payments by IMC was ready in early 2018 but could not be signed due to the Blockade. See Draft Addendum to Framework Agreement between the Santo Domingo Community and IMC (SPA), 15/09/2017, at **Exhibit C-94** and SSS, Monthly Report, Project, May 2018 (SPA), at **Exhibit C-452**, p. 3.

[1181] Agreement between IMC and the Lacsanga Community (SPA), 31/03/2015, at **Exhibit C-42**.

[1182] 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**.

authorising the company to conduct mining activities, build mine infrastructure, and develop and use Lacsanga's road for the Project.

690 Second, and as a result of the foregoing, a mining company is not required under Peruvian law to enter into an agreement with a neighbouring rural community when **no** mining activities will take place on its land, even if such community is part of the mining project's area of direct influence.[1183] This was specifically confirmed by the tribunal in Bear Creek v. Peru which stated in no uncertain terms that nearby "communities [do not have] veto power over a project" under Peruvian law.[1184] This was the case for the Parán Community.

691 Third, and notwithstanding the foregoing, the communities located within a mining project's area of direct influence have the following rights under Peruvian law:

i) The right to be consulted as part of the EIA process

692 As explained in Section 3.2.1 above, Peruvian law requires a mine owner to prepare a *Citizen Participation Plan* (CPP) "detailing and substantiating the mechanisms […] that [will] be developed during the environmental study procedure and during the execution of a mining project" to engage with the local communities in the area of influence of the mining project.[1185] The CPP must include activities to be developed "**prior to** [the] preparation of the [EIA], **during the preparation** [of the EIA], [] **during the assessment procedure** [of the EIA] carried out by the competent authority",[1186] and also "during the **execution of the mining project**".[1187] IMC complied with all these obligations.

[1183] See *supra* Section 3.2.2.

[1184] *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 62 (para. 241).

[1185] Supreme Decree No. 028-2008-EM, 26/05/2008, at **Exhibit R-0007**, p. 8 *et seq.* (Arts. 14 -15).

[1186] Supreme Decree No. 028-2008-EM, 26/05/2008, at **Exhibit R-0007**, p. 8 (Art. 14) (emphasis added); Counter-Memorial, 24/03/2022, p. 40 (para. 82).

[1187] Supreme Decree No. 028-2008-EM, 26/05/2008, at **Exhibit R-0007**, p. 8 *et seq.* (Art. 15).

693 Indeed, the MEM approved IMC's CPP in December 2008,[1188] and IMC carried out the activities provided therein before[1189] and during the preparation[1190] and evaluation of its EIA.[1191] IMC also carried out citizen participation activities during the execution of the mining project. IMC's EIA included two citizen participation schemes that would run in parallel during the mine preparation and development phase: (i) the Participatory Environmental Monitoring Scheme and (ii) the Consultation and Information Scheme.

694 The Participatory Environmental Monitoring Scheme was aimed to obtain the participation of members of the Rural Communities in the Project's environmental monitoring activities. IMC began implementing this scheme in February 2018, once it resumed its mine preparation and development activities.[1192]

695 For its part, the Consultation and Information Scheme aimed to keep the Rural Communities abreast of the Project's activities and their development. IMC implemented this scheme throughout the mine preparation and development phase, regularly meeting and consulting with all three Rural Communities.[1193]

ii) The right to be consulted as part of the Mine Closure Plan process.

696 The Mine Closure Plan is another key socio-environmental management which, according to Peruvian law, requires a separate CPP whereby the

[1188] MEM Resolution approving the EIA (SPA), 28/12/2009, at **Exhibit C-7 (corrected translation)**, p. 2.

[1189] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 58 (Table 10.4-1).

[1190] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 59 (Table 10.4-2).

[1191] Environmental Impact Assessment, Invicta Mining Corp. S.A.C. ("**2009 EIA**"), 06/10/2008, at **Exhibit R-0047**, p. 59 (Table 10.4-3) and p. 62 (Table 10.5.1-1).

[1192] SSS, Monthly Report, Project, February 2018 (SPA), at **Exhibit C-436**, p. 5 and p. 9-10; SSS, Monthly Report, Project, March 2018 (SPA), at **Exhibit C-430**, p. 3; SSS, Monthly Report, Project, April 2018 (SPA), at **Exhibit C-488**, p. 5; SSS, Monthly Report, Project, May 2018 (SPA), at **Exhibit C-452**, p. 8; SSS, Monthly Report, Project, June 2018 (SPA), at **Exhibit C-157**, p. 8.

[1193] SSS, Monthly Report, Project: Informative workshop on agricultural technologies, October 2016 (SPA), at **Exhibit C-149**; IMC, Monthly Report, April 2018, at **Exhibit C-235**.

local population and authorities are given an opportunity to review and submit their views before a decision is made on the approval or disapproval of the Mine Closure Plan.[1194] As explained in Section 3.2.1 above, IMC complied with these obligations.

697 Indeed, following approval of its 2009 EIA, IMC prepared the corresponding CPP for its Mine Closure Plan, which the MEM approved on 14 March 2011.[1195] IMC then conducted citizenship participation activities in the communities of Lacsanga, Santo Domingo and Parán to gather the local population's opinions in relation to its Mine Closure Plan.[1196] Following these activities, the MEM approved IMC's Mine Closure Plan on 17 February 2012.[1197]

698 IMC subsequently revised its 2012 Mine Closure Plan, again conducting citizen participation activities, which led the MEM to approve IMC's revised Mine Closure Plan on 25 October 2015.[1198]

iii) The right to protest in accordance with Peruvian law

699 Peruvian law recognizes the right to protest as a fundamental right. According to the Peruvian Constitutional Court, this right implies:

> "the power to question, temporarily or periodically, sporadically or continuously, **through the public space or through the media** […] individually or collectively the facts, situations, provisions or measures (including regulations) […] in order to obtain a change from the *status quo* […], **as long as** this is done on the basis of a legitimate purpose […] and that **in the exercise of the protest is**

[1194] Counter-Memorial, 24/03/2022, p. 40 *et seq*. (para. 83); Supreme Decree No. 033-2005-EM, 14/08/2005, at **Exhibit R-0008**, p. 13 (Arts. 13 and 16).

[1195] MEM, Report No. 154-2012-MEM-DGAAM/LCD/MPC/RPP (SPA), 08/02/2012, at **Exhibit C-417**, p. 1 *et seq*.

[1196] MEM, Report No. 154-2012-MEM-DGAAM/LCD/MPC/RPP (SPA), 08/02/2012, at **Exhibit C-417**, p. 27.

[1197] MEM, Directorial Resolution No. 044-2012-MEM-AAM (SPA), 17/02/2012, at **Exhibit C-489**, p. 1 (Art. 1).

[1198] MEM, Report 1005-2015 (SPA), 25/10/2015, at **Exhibit C-490**.

> **respected the legality that is in accordance with the Constitution**."[1199]

700 Indeed, as stated by the same Constitutional Court, the right to protest "cannot justify the violation of other fundamental rights such as property, physical integrity or even life […]."[1200] Article 88 of Peru's Constitution further provides that the State "guarantees the right of ownership of land, whether privately or communally [held] or in any other associative form."[1201]

701 As shown by the foregoing, Peruvian law provides that mining companies only need to reach an agreement with the local communities owning the land on which mining activities are to be developed, *i.e.*, in the present case, the Lacsanga and Santo Domingo communities. The neighbouring communities, such as the Parán Community, have the right to be consulted before, during and after the approval of a mining project's key environmental management instruments, namely the EIA and the Mine Closure Plan, and can also set up lawful protests to convey their concerns in relation to a mining project.

702 It is the State's responsibility to ensure that both mining companies and rural communities alike abide by the rules the State has set out in its legal framework. The Claimant complied with all its obligations under this regulatory framework. However, the Parán Community did not, and the State failed to take action to redress this situation despite the Claimant's clamorous requests for the State to act. Indeed, although the Blockade was clearly an unlawful measure that violated the property rights of the Lacsanga Community and IMC's mining rights, the State refused to lift the Blockade and restore law and order, and also failed to punish those responsible for breaching it.

[1199] Constitutional Tribunal Decision No. 0009/2018-PI/TC (SPA), 02/06/2020, at **Exhibit C-595**, p. 32 (para. 82) (emphasis added).

[1200] Constitutional Tribunal Decision No. 0012-2008-PI/TC (SPA), 14/07/2010, at **Exhibit C-639**, p. 37 (para. 14).

[1201] Political Constitution of Peru, 1993 (SPA), at **Exhibit C-23 (corrected translation)**, p. 27 (Art. 88).

703 The State is free to change and adapt its legal framework as it deems appropriate, but cannot now, in this arbitration, renege on its clear rules and purport to rely on toolkits, industry guides and other soft-law documents to override its own laws and impose a new obligation on the Claimant – namely, that of reaching an agreement with the Parán Community as a condition to develop the Project.[1202] By the same token, the State cannot purport to confer to the Parán Community more expansive rights than it truly has under Peruvian law.

704 The Respondent further rationalises that "[w]hen rural communities feel excluded from the approval processes for mining activity that may impact or threaten their well-being, they frequently resort to protest […] to make their voices heard."[1203] This may be the case but it does not change Lupaka's rights under Peruvian law or its right to the minimum standard of treatment, including full protection and security, under Article 805.1 of the FTA.

705 Indeed, it is the Respondent's responsibility to ensure that there are lawful means at the disposal of rural communities to voice the concerns they may have about mining activities and that these issues be analysed and adjudicated fairly and impartially. As noted above, these mechanisms do exist under Peruvian law. The fact that rural communities may still "*feel* excluded from the approval processes" is an element that Peru's policymakers have to take into account to assess whether or not to reshape the legal regime applicable to the mining sector. However, this is not a valid justification for any community to act outside the law nor for the State to condone such illegal conduct.

706 In any event, the evidence shows that Lupaka actually went above and beyond its obligations under Peruvian law to engage with the Parán Community. As such, there was nothing in the Claimant's interaction towards Parán that could make Parán "feel excluded from the approval processes" relating to the Invicta mine. Indeed, in addition to complying with all its consultation obligations in relation to the EIA and Mine Closure Plan, as explained in Section 3.2.1 above, IMC made strenuous efforts to

[1202] Counter-Memorial, 24/03/2022, p. 42 *et seq.* (Section II.B.2.)

[1203] Counter-Memorial, 24/03/2022, p. 238 *et seq.* (para. 500).

engage and reach a sustainable agreement with the Parán Community – even if IMC did not need such an agreement to advance the Project. This agreement was not possible because, as explained in Section 4.3.5 above, the Parán Community negotiated in bad faith with IMC and took active measures to hinder the Project as it sought to exploit the mine itself and protect its illegal marijuana business.

707 For the foregoing reasons, Peru cannot rely on the fact that social conflicts arise between mining companies and rural communities to abdicate its responsibilities towards foreign investors under the FTA. It is the State's responsibility to strike a balance between those competing demands. The State did so when defining its domestic legal framework for the mining sector. While the Claimant complied with its obligations under that framework, the Parán Community did not. Peru's failure to take action in the face of Parán's apparent illegal behaviour engages its international responsibility under Article 805.1 of the FTA.

9.3.5.2 Peru's long-standing failure to provide institutional resources in remote areas of the Andes

708 As described in Section 9.3.5.1 above, the State has traditionally been absent from the Andes, relying on extensive delegation of powers to rural communities and their *Rondas Campesinas* to exercise governmental authority at a local level, including to fight against terrorism, crime and drug-trafficking. As the Supreme Court of Peru recalled in a decision rendered in 2009, the special jurisdiction of these communities and their *Rondas Campesinas* is intended to remedy the lack of access to the justice system in the remote areas of the Andes in which these communities reside,[1204] and is reinforced by the "absence or almost non-existence of State presence" in these areas.[1205]

[1204] Acuerdo Plenario Núm. 1-2009/CJ-116, 13/11/2009, at **Exhibit IMM-0006**, p. 4 *et seq.* (para. 7).

[1205] Acuerdo Plenario Núm. 1-2009/CJ-116, 13/11/2009, at **Exhibit IMM-0006**, p. 5 *et seq.* (para. 8).

709 However, as has been regularly reported in local[1206] and international media,[1207] in the absence of any State supervision on the extensive powers entrusted to these rural communities, a number of them and their *Rondas Campesinas* have turned into criminal organisations, engaging in drug-trafficking, acts of violence and blackmail with *de facto* control over part of the Andes.

710 Regardless of whether the State is responsible under international law for the conduct of the Parán Community and its *Ronda Campesina*, the Respondent's obligation to provide full protection and security extends over its entire territory, as explained above in Section 9.3. The State, whether by delegation or omission, cannot abnegate responsibility over part of its territory.

711 Indeed, as explained by the Commentary to the ILC Articles on State Responsibility, a State cannot escape international responsibility by claiming that part of its territory is no longer under its control if the State has **voluntarily** relinquished control over this territory.[1208] The only situation cited by the ILC Commentary in which "loss of control over a portion of the State's territory" may preclude wrongfulness is if the requirements relating to force majeure set out in Article 23 of the ILC Articles are met.[1209] This Article provides:

> "**Force majeure**
>
> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is **precluded** if the act is due

[1206] "Abuses by ronderos alert Public Defender's Office and Prosecutor's Office", *El Comercio* (SPA), 16/02/2014, at **Exhibit C-623**; "Abuses by rondas campesinas", *El Montonero* (SPA), 03/08/2017, at **Exhibit C-605**; "Rondas campesinas reject being singled out as 'claiming not to protect the government'", *Infobae* (SPA), 07/07/2022, at **Exhibit C-606** "Ombudsman's Office: urgent investigation of alleged acts of torture against a family in Cajamarca", *Ombudsman's Office* (SPA), 12/02/2021, at **Exhibit C-604**

[1207] "Dallying with a monster", *The Economist*, 15/03/2014, at **Exhibit C-616**, p. 2 *et seq.*; "Rondas de Pedro Castillo kidnap a journalist from Cuarto Poder", *Latin America News*, 07/07/2022, at **Exhibit C-607**.

[1208] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 76 (Art. 23).

[1209] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 76 *et seq.* (Art. 23, Commentary 3).

> to *force majeure*, that is the occurrence of an **irresistible force** or of an **unforeseen event**, beyond the control of the State, making it **materially impossible** in the circumstances to perform the obligation.
>
> 2. Paragraph 1 does not apply if:
>
> *(a)* the situation of *force majeure* is **due**, either alone or in combination with other factors, **to the conduct of the State invoking it**; or
>
> *(b)* the State has **assumed the risk** of that situation occurring."[1210]

712 None of these conditions are met in this case. Indeed, as explained in further detail in Section 9.2.2.2 above, Peru made the **conscious policy decision** for many years to delegate policing powers to the *Rondas Campesinas*, even arming them so that they can execute the delegated powers. The State must assume the consequences of its decision.

713 In any event, there is no irresistible force or unforeseen event making it materially impossible for the State to comply with its obligations. On the contrary, the State admits that it could have deployed a police response to lift the Blockade and restore law and order at Invicta, but chose not to. Indeed, in its Counter-Memorial, Peru repeatedly concedes that it consciously prioritised dialogue over use of police force,[1211] despite knowing that dialogue was of no use in this case.[1212]

714 Peru further references other instances in which, contrary to the present case, it deployed police forces to address conflicts between mining operators and rural communities. For instance, the Respondent refers to the Las Bambas mining project, in which, on 28 April 2022, the State deployed more than 650 policemen to evict local community members that

[1210] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 76 (Art. 23).

[1211] Counter-Memorial, 24/03/2022, p. 3 (para. 7).

[1212] See *supra* Sections 7.2.3 and 6.5.

had taken the mine site.[1213] This was only the latest of various others police interventions authorised by the State to evict invaders of the Las Bambas mining site.[1214] Moreover, as the Claimant explains in Sections 7.2.1 and 7.2.2 above, in the past decade, Peru has authorised numerous police interventions to evict invaders in the context of conflicts in the mining sector and outside of it. The State could have authorised a police intervention to lift the Blockade, but chose not to.

715 For the foregoing reasons, the Respondent's attempt to rely on its alleged lack of control of remote areas of the Andes to excuse its failure to enforce the law against the Parán Community members must fail. Rather than exculpating the Respondent's failure to act, to the extent it was indeed unable to enforce law and order at the Project Site (*quod non*), this exacerbates the Respondent's failure to provide full protection and security to the Claimant's investment in accordance with Article 805.1 of the FTA.

9.4 Peru breached its obligation to provide fair and equitable treatment to Lupaka's investment

716 In the Memorial, the Claimant explained that the Respondent owed the Claimant an obligation to accord its investment fair and equitable treatment in accordance with the minimum standard of treatment under customary international law.[1215] The Claimant further explained that, although the FTA prescribes the customary international law minimum standard, in substance the abstract "fair and equitable treatment" standard contained in other treaties is applied no differently by arbitral tribunals to the minimum standard,[1216] and accordingly the Tribunal should apply the

[1213] Counter-Memorial, 24/03/2022, p. 239 (para. 501); "Las Bambas: mining conflict gets out of control and the crisis worsens due to attacks by community members", *Instituto de Ingenieros de Minas del Perú* (SPA), 29/04/2022, at **Exhibit C-318**.

[1214] See *supra* Section 7.2.1.

[1215] Memorial, 01/10/2021, p. 85 *et seq.* (Section 4.3).

[1216] Memorial, 01/10/2021, p. 86 *et seq.* (Section 4.3.1).

well-known definition of "fair and equitable treatment" set out in *Waste Management II*.[1217]

717 Alternatively, should the Tribunal consider that the minimum standard of treatment sets a lower standard of treatment (*quod non*), the Claimant is entitled to the treatment offered by Peru to U.K. investors in Article 2(2) of the Peru-United Kingdom BIT, by virtue of the Article 804 of the FTA, which obliges Peru to offer to provide the Claimant with "most favoured nation" (MFN) treatment.[1218]

718 Finally, the Claimant explained that, looking at the Respondent's conduct as a whole,[1219] the Tribunal should have no trouble concluding that the Respondent failed to accord that standard of treatment to the Claimant.[1220]

719 In its Counter-Memorial, the Respondent agrees that the definition of "fair and equitable treatment" in *Waste Management II* accurately summarises its obligation to accord FET to the Claimant's investment under Article 805.1 of the FTA.[1221] Nevertheless, on various grounds, it asserts that the Claimant's FET claim is without merit.[1222]

720 First, as it does for the Claimant's FPS claim, the Respondent seeks to avoid its obligations under Article 805.1 of the FTA altogether, by asserting that the Claimant has failed to discharge a "burden of proof".[1223] For the same reasons explained above, that tactic misses the mark (**Section 9.4.1**).

721 Second, the Respondent argues that the Claimant has failed to identify what it calls a "legal standard for composite acts" under international law. The Claimant explains below that this argument relies on basic

[1217] Memorial, 01/10/2021, p. 86 *et seq.* (para. 269); *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30/04/2004, at **Exhibit CLA-37**, p. 35 *et seq.* (para. 98).

[1218] Memorial, 01/10/2021, p. 89 *et seq.* (Section 4.3.2).

[1219] Memorial, 01/10/2021, p. 91 *et seq.* (Sections 4.3.3-4.3.4).

[1220] Memorial, 01/10/2021, p. 86 *et seq.* (paras. 269-274 and Section 4.3.4).

[1221] Counter-Memorial, 24/03/2022, p. 267 *et seq.* (paras. 561-562).

[1222] Counter-Memorial, 24/03/2022, p. 262 *et seq.* (Section IV.C).

[1223] Counter-Memorial, 24/03/2022, p. 262 *et seq.* (Section IV.C.1).

misunderstandings of international law and can safely be ignored (**Section 9.4.2**).

722 Third, as for the FET standard applicable under Article 805.1, the Respondent spends dozens of pages attempting to confine the outer limits of that standard, by arguing that the customary international law minimum standard is narrow, that the MFN provision cannot be used to import a higher standard from other treaties, and that the FET standard accords a "high level of deference" to States.[1224] This is an academic sideshow. In this case the Respondent's treatment of the Claimant's investment fell below even the narrowest conception of "fair and equitable treatment" under international law (**Section 9.4.3**). Nevertheless, for completeness the Claimant also responds to the Respondent's arguments as to the precise scope of the FET obligation (**Section 9.4.4**).

9.4.1 The Respondent cannot avoid its obligations under the FTA via its confused burden of proof argument

723 In its Counter-Memorial, just as it does with respect to the Claimant's FPS claim, the Respondent seeks to avoid its obligations under Article 805.1 of the FTA entirely, based on a confused burden of proof argument. The Respondent argues that "the Claimant alone bears the burden of proving the standard under [customary international law], and has failed to carry that burden".[1225] It also argues that the Claimant has not produced "specific evidence" of the FET standard.

724 For the same reasons explained above at Section 9.3.1 with respect to the Respondent's FPS obligation, its burden of proof argument fails. In addition, as is the case for the FPS standard, the Respondent **concedes** that it owed an obligation to provide fair and equitable treatment to the Claimant's investment under the minimum standard of customary international law.[1226] Not only that, but despite its lengthy criticisms of the Claimant's explanation of the FET standard, the Respondent actually endorses the **very same** definition of FET that the Claimant put forward in

[1224] Counter-Memorial, 24/03/2022, p. 267 *et seq.* (paras. 560-619).

[1225] Counter-Memorial, 24/03/2022, p. 263 *et seq.* (para. 553).

[1226] Counter-Memorial, 24/03/2022, p. 263 *et seq.* (paras. 553 and 559-583).

its Memorial: the definition expounded by the tribunal in *Waste Management II*.[1227]

725 In such circumstances, the Respondent's attempt to set out its position on the FET standard "without prejudice to its rights, and without relieving the Claimant of its burden of proof"[1228] is disingenuous. The Respondent has conceded that it owed the Claimant an obligation to accord its investment fair and equitable treatment, and has put forward its conception of that obligation. To the extent it intends to do so, the Respondent cannot later renege on that position on the basis of a purported reservation of rights.

726 As for the Respondent's criticisms of the Claimant's reliance on certain arbitral awards in its explanation of the FET standard, those will be addressed in the following subsections to the extent necessary. For present purposes, the Claimant merely notes that, as explained in Section 9.3.1 above, it is for each Party to adduce legal authorities and evidence as it sees fit to support its position on the law, and for the Tribunal to decide the weight to give to that evidence.[1229]

9.4.2 The Respondent's asserted "legal standard for composite acts" woefully misunderstands international law

727 In the Memorial, the Claimant explained what ought to be an uncontroversial aspect of the FET obligation under Article 805.1 of the FTA: that a breach of that standard may consist of a composite act, rather than only individual acts.[1230] In other words, even if the Tribunal finds that none of Peru's individual acts or omissions breached Article 805.1 of the FTA, it may find that Peru's conduct as a whole breached the required standard of treatment.[1231]

728 Curiously, the Respondent takes issue with this proposition, and argues that there is a specific "legal standard" under international law to determine

[1227] Counter-Memorial, 24/03/2022, p. 266 *et seq.* (paras. 559 and 561).

[1228] Counter-Memorial, 24/03/2022, p. 263 *et seq.* (para. 553).

[1229] See *supra* paras. 617-621.

[1230] Memorial, 01/10/2021, p. 91 *et seq.* (Section 4.3.3).

[1231] Memorial, 01/10/2021, p. 93 (para. 285).

what qualifies as a "composite act".[1232] That argument finds no basis in international law, and the authorities the Respondent cites to do not assist it.

729 There is no "legal standard" to determine what counts as a composite act by a State or another actor on the international plane. Rather, the relevance of composite acts is that the nature of certain obligations determines that they may be breached not by individual acts or omissions, but by "a series of acts and omissions defined in aggregate as wrongful",[1233] as explained in the Memorial.[1234] In other words, it is the nature of the obligation that determines whether it may be breached by an individual act (or omission), or a composite act, or either.[1235]

730 The ILC Articles commentary gives examples of such obligations:

> "Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc."[1236]

731 As the Claimant explained in its Memorial, the FET standard under Article 805.1 is a further example of that type of international obligation, meaning the Tribunal can and should look at Peru's conduct as a whole to determine it was in breach of that standard.[1237] Despite its confused argument on the

[1232] Counter-Memorial, 24/03/2022, p. 276 (para. 586).

[1233] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 62 (Art. 15, Commentary 2).

[1234] Memorial, 01/10/2021, p. 91 *et seq.* (para. 281).

[1235] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 62 (Art. 15, Commentary 2).

[1236] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 62 (Art. 15, Commentary 2).

[1237] Memorial, 01/10/2021, p. 92 *et seq.* (paras. 282-285). See also *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Reisman, Lacarte Muró, Paulsson), 15/11/2004, at **Exhibit RLA-0049**, p. 40 (para. 103) ("It is the record as a whole – not dramatic incidents in isolation – which determines whether a breach of international law has occurred.")

nature of composite acts, the Respondent does not appear to contest that characteristic of the FET standard under Article 805.1 of the FTA.[1238]

732 As for the "legal standard" the Respondent promulgates, it is completely unfounded. It cites to a quote from Professor Crawford that does not appear in the legal authority it has submitted, but in any event does not support the imposition of a "legal standard" restricting what may qualify as a composite act.[1239] Rather, Professor Crawford explains in other words what the Claimant explained above: certain obligations may characterise as wrongful a series of acts or omissions which taken individually might not be so.[1240]

733 It cites to the commentary on ILC Article 15, claiming that it states composite acts must be "sufficiently numerous and inter-connected" and amount to a "pattern or system".[1241] However, the quote on which the Respondent relies is from a judgment of the European Court of Human Rights discussing the elements of a breach of Article VII of the Genocide Convention.[1242] It was not describing the nature of composite acts in general.

734 Similarly, none of the arbitral awards the Respondent cites support the concept of a legal standard for composite acts.[1243] They are all simply examples of tribunals looking at a State's conduct as a whole to determine whether it breached the international obligation at issue. In other words,

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[1238] Counter-Memorial, 24/03/2022, p. 275 *et seq.* (paras. 584-588).

[1239] Counter-Memorial, 24/03/2022, p. 276 (para. 586).

[1240] J. Crawford, *State Responsibility* (CUP, 2013), Chapter 8, at **Exhibit CLA-135**, p. 266.

[1241] Counter-Memorial, 24/03/2022, p. 276 (para. 586)

[1242] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 63 (Art. 15, Commentary 5) citing *Ireland v. United Kingdom*, ECHR, Application No. 5310/71, Award, 18/01/1978, at **Exhibit CLA-136**.

[1243] Counter-Memorial, 24/03/2022, p. 276 (para. 586); *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V(079/2005), Final Award (Böckstiegel, Steyn, Berman) ("***RosInvestCo* (Final Award)**"), 12/09/2010, at **Exhibit RLA-0056**, p. 257 *et seq.* (para. 621); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 08/10/2009, at **Exhibit CLA-44**, p. 101 (para. 308). The Respondent also refers to the Award on Preliminary Objections in *Renta 4 et al. v. Russia* (**RLA-0057**, p. 61 *et seq.* (para. 147)), although it appears the intended reference was to the final Award: see *Quasar de Valores SICA V S.A. et al. v. The Russian Federation*, SCC, Award, 20/07/2012, at **Exhibit CLA-137**, p. 67 (para. 147).

they undermine the Respondent's asserted "legal standard" for composite acts, rather than supporting it.

735 For example, the tribunal in *RosinvestCo v. Russia*, from which the Respondent quotes selectively, did not opine that any composite act under international law must necessarily be formed of acts or omissions with a "common denominator".[1244] Rather, it held that, in that case, Russia's conduct **as a whole** amounted to an unlawful expropriation under the applicable treaty. Indeed, the remainder of the paragraph from which the Respondent quotes reveals that the tribunal considered "the totality of the Respondent's measures", that "they must be seen as elements in the cumulative treatment of Yukos", and that "even if the justification of a certain individual measure might be arguable", their "cumulative effect" was nevertheless relevant.[1245]

736 Further, the Respondent cites to *Siemens v. Argentina* to argue that in order to qualify as a composite act under international law, "each step must have an adverse effect".[1246] Again, that tribunal did not purport to set a "legal standard" for composite acts, rather, it explained that "[b]y definition, creeping expropriation refers to a process". To complete the sentence to which the Respondent cites: "each step must have an adverse effect **but by itself may not be significant or considered an illegal act**."[1247]

737 Accordingly, the Respondent's conclusion that the Claimant must prove each of Peru's alleged actions or omissions are (i) sufficiently numerous and inter-connected to amount to a pattern or system; and (ii) that each step had an adverse effect, is wrong in its entirety.

[1244] Counter-Memorial, 24/03/2022, p. 276 (para. 586).

[1245] *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V(079/2005), Final Award (Böckstiegel, Steyn, Berman) ("***RosInvestCo* (Final Award)**"), 12/09/2010, at **Exhibit RLA-0056**, p. 257 *et seq.* (para. 621).

[1246] Counter-Memorial, 24/03/2022, p. 276 *et seq.* (para. 587); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 06/02/2007, at **Exhibit CLA-71**, p. 81 (para. 263).

[1247] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 06/02/2007, at **Exhibit CLA-71**, p. 81 (para. 263).

9.4.3 Under even the narrowest conception of FET, the Respondent's treatment of the Claimant fell below the required standard

738 As explained in Section 9.4.1 above, the Respondent acknowledges in its Counter-Memorial that it had an obligation under Article 805 of the FTA to provide fair and equitable treatment to the Claimant. Although the Respondent criticises at length the Claimant's portrayal of the scope of that obligation, it eventually acknowledges that the description of the FET standard put forward by the Claimant in its Memorial – the description in *Waste Management II*[1248] – is an "accurate articulation of the FET standard in accordance with MST".[1249] Such articulation was as follows:

> "[...] the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[1250]

739 It appears, then, that despite the Respondent's pages-long recounting of arbitral awards in an attempt to narrow the outer limits of its FET obligation,[1251] the Parties are not so far apart in their interpretations of the content of that obligation.

740 However, to decide this case, the Tribunal need not concern itself with the precise boundaries of the FET obligation, whether under the customary international law "minimum standard", or (to the extent different, *quod*

[1248] Memorial, 01/10/2021, p. 86 *et seq.* (paras. 269-270).

[1249] Counter-Memorial, 24/03/2022, p. 269 (para. 567).

[1250] *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30/04/2004, at **Exhibit CLA-37**, p. 35 *et seq.* (para. 98).

[1251] Counter-Memorial, 24/03/2022, p. 267 *et seq.* (paras. 560-583).

non) an "autonomous" treaty obligation to provide "fair and equitable treatment". This case concerns a breach of the very core of the obligation under international law to provide fair and equitable treatment to aliens: the obligation on a host State to enforce its own law evenly and consistently vis-à-vis its own nationals and foreigners alike.

741 The Claimant explains below that the obligation of a host State to enforce its own laws forms a core thread of the obligation to provide fair and equitable treatment under international law. The Respondent cannot seriously deny that it forms part of its obligation under Article 805 to provide the customary international law minimum standard of treatment of aliens (**Section 9.4.3.1**). The Claimant will further explain below that the Respondent undoubtedly breached that core obligation, whether through the actions of the Parán Community or its other State officials' acts and omissions in response (**Sections 9.4.3.2 and 9.4.3.3**).

9.4.3.1 The minimum standard of treatment under customary international law, including FET, imposes a de minimis obligation on the host State to enforce its own laws vis-à-vis third parties causing damage to protected investments

742 A State's obligation to uphold and enforce its own law lies at the heart of the minimum standard of treatment of aliens under customary international law. Since the emergence of that doctrine in the early twentieth century, the departure by a State from the basic canons of the Rule of Law has amounted to a breach of international law.

A State's wilful neglect to enforce its own law amounts to a breach of FET under the minimum standard of treatment

743 The *Neer* case, decided by the United States-Mexico General Claims Commission in 1927, demonstrates the origins of the minimum standard of treatment under international law.[1252] It concerned the alleged failure of Mexican authorities to prosecute the murder of a U.S. national, and the Commission in that case applied customary international law, prior to the

[1252] See *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31/03/2010, at **Exhibit CLA-35**, p. 75 *et seq.* (para. 195).

emergence of investment treaties defining the FET standard.[1253] The Commission held:

> "the propriety of governmental acts should be put to the test of international standards, (…) the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to **wilful neglect of duty**, or to an **insufficiency of governmental action** so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[1254]

744 In addition to *Neer*, as already explained above,[1255] various other cases from the early twentieth century demonstrate clearly that a host State's failure to prosecute crimes against foreign nationals amounts to a breach of international law.[1256] For example, in *Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.) v. United Mexican States*, Mexico was found to have breached international law after a State official refused to pursue the

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[1253] *Neer and Neer (U.S.A.) v. United Mexican States,* General Claims US-Mexico, Decision, 15/10/1924, at **Exhibit CLA-138**, p. 1 *et seq.* (paras. 1 and 4).

[1254] *Neer and Neer (U.S.A.) v. United Mexican States,* General Claims US-Mexico, Decision, 15/10/1924, at **Exhibit CLA-138**, p. 1 *et seq.* (para. 4) (emphasis added).

[1255] See *supra* Section 9.3.3.4.

[1256] *Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 02/04/1929, at **Exhibit CLA-129**; *Mary M. Hall (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 17/05/1929, at **Exhibit CLA-130**. See in particular the opinion of Commissioner Nielsen, who considered the applicable test to be whether "there was a failure to meet the requirements of the rule of international law that prompt and effective measures shall be taken to apprehend and punish persons guilty of crimes against aliens."; *Naomi Russell, In Her Own Right and As Administratrix and Guardian (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 24/04/1931, at **Exhibit CLA-131**, p. 832 ("With respect specifically to injuries committed by private individuals against aliens, the requirement of international law is that reasonable care must be taken to prevent such injuries in the first instance, and suitable steps must be taken properly to punish offenders. […] Before an international tribunal can assess damages for a failure to meet this requirement, there must of course be convincing evidence of a pronounced degree of improper governmental administration.") See also the *Case of the Mexican Shepherds*, reported in J. B. Moore, *A Digest of International Law,* Vol. IV, 1st ed., (Government Printing Office, 1906), Chapter XXI (VIII.1), at **Exhibit CLA-132**, p. 787 *et seq.*, in which, following the killing of several Mexicans in Texas, U.S. and Mexican officials agreed there would have been grounds for a claim in international law "had the proper authorities then refused or neglected to prosecute the offenders" in accordance with the law (see **Exhibit CLA-132**, p. 789).

robbers of the foreign claimants' store without an arrest warrant.[1257] The Commission concluded that Mexico "fell short of [its] duty to protect the claimants by providing appropriate means to prosecute and punish the offenders" because there were alternative steps that the Mexican officials could have been taken to apprehend and punish the offenders, even in the absence of a formal arrest warrant.[1258]

745 Similarly, in *Noyes (U.S.A) v. Panama* the arbitral commission held that, to engage a State's liability under international law:

> "There must be shown special circumstances from which the responsibility of the authorities arises: either their behavior in connection with the particular occurrence, or a **general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals**."[1259]

746 Contemporaneous treatises on international law also expound at length the obligation of States under international law to apprehend, prosecute and punish persons guilty of crimes committed against aliens on their territory.[1260]

747 Building on the above-described early twentieth century doctrine, modern investment treaty tribunals have consistently found that a failure by a host State to apply or enforce its own law may amount to a breach of a State's obligation to accord fair and equitable treatment to investors.

748 First, modern tribunals consistently recognise that the sort of conduct described in *Neer*, and the related cases explained above, would breach

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[1257] *Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 02/04/1929, at **Exhibit CLA-129**, p. 440 *et seq*.

[1258] *Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 02/04/1929, at **Exhibit CLA-129**, p. 442.

[1259] *Walter A. Noyes (United States) v. Panama*, UN, Reports of International Arbitral Awards (Vol. VI), 22/05/1933, at **Exhibit CLA-139**, p. 311 (emphasis added).

[1260] See E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims*, 1st ed., (The Banks Law Publishing Co., 1925), Part I, Chapter V, at **Exhibit CLA-133**, p. 213 *et seq.* (§ 86); A. V. Freeman, *The International Responsibility of States for Denial of Justice,* 1st ed., (London, 1938), p. 324-501, at **Exhibit CLA-134**, p. 367 *et seq*. (Chapter XIII).

even the narrowest conceptions of FET under customary international law (notwithstanding the fact that many tribunals have found customary international law to have evolved since the *Neer* decision).[1261] Indeed, the Respondent relies on numerous arbitral awards addressing the customary international law minimum standard that acknowledge that is the case.[1262]

[1261] *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22/08/2016, at **Exhibit CLA-32**, p. 117 *et seq.* (paras. 520-521) (The customary international minimum standard "has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether […] the BIT incorporates or fails to incorporate the [customary international minimum] Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards."); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29/07/2008, at **Exhibit CLA-33**, p. 162 (para. 611) (The tribunal "shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law."); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14/07/2006, at **Exhibit CLA-19**, p. 130 *et seq.* (para. 361) ("[T]he minimum requirement to satisfy this standard [fair and equitable treatment] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law."); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24/07/2008, at **Exhibit CLA-20**, p. 176 (para. 592) ("[T]he Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law."); *Saluka Investments BV v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17/03/2006, at **Exhibit CLA-34**, p. 62 (para. 291) ("[I]t appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.").

[1262] See the following arbitral awards the Respondent refers to in Counter-Memorial, 24/03/2022, p. 267 *et seq.* (paras. 560-583): *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30/04/2004, at **Exhibit CLA-37**, p. 32 *et seq.* (para. 93); *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award (Kaufmann-Kohler, Brower, Landau) ("***Mesa Power* (Award)**"), 24/03/2016, at **Exhibit RLA-0048**, p. 116 *et seq.* (paras. 496-500); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29/06/2012, at **Exhibit CLA-40**, p. 82 *et seq.* (para. 218); *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Reisman, Lacarte Muró, Paulsson), 15/11/2004, at **Exhibit RLA-0049**, p. 36 *et seq.* (para. 95); *Glamis Gold, Ltd. v. United States of America,* UNCITRAL, Award, 08/06/2009, at **Exhibit CLA-78**, p. 262 (para. 612); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Pryles,

749 The tribunal's analysis in *GAMI Investments v. Mexico*, again a case on which the Respondent relies, is instructive of the modern approach. It confirmed that, under international law, "the inquiry is whether the state abided by or implemented" its regulatory programme. Further, it reasoned that, although not determinative, "a government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor" is capable of constituting a breach of the minimum standard of treatment under customary international law.[1263]

750 The *GAMI Investments v. Mexico* tribunal further confirmed that the "outright and unjustified repudiation" of a regulatory framework would amount to a breach of FET, but a lesser threshold could also amount to a breach.[1264] It concluded that an "abject failure to implement a regulatory program indispensable for the viability of foreign investments that had relied upon it" would breach the minimum standard of treatment.[1265] Importantly, it also held that "[b]oth action and inaction may fall below the international standard."[1266]

Caron, McRae) ("***Cargill* (Award)**"), 18/09/2009, at **Exhibit RLA-0051**, p. 74 *et seq.* (paras. 272 and 284); *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (van den Berg, Ariosa, Wälde), 26/01/2006, at **Exhibit RLA-0053**, p. 63 *et seq.* (para. 194); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 06/02/2007, at **Exhibit CLA-71**, p. 92 *et seq.* (para. 293). See also *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31/10/2011, at **Exhibit CLA-52**, p. 12 (para. 347). See also *Flughafen Zürich, et al., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (Fernández-Armesto, Alvarez,Vinuesa) ("***Flughafen Zürich* (Award)**"), 18/11/2014, at **Exhibit RLA-0103**, p. 112 *et seq.* (paras. 562-563) and *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Fernández-Armesto, Paulsson,Voss) ("***Lemire* (Decision)**"), 14/01/2010, at **Exhibit RLA-0105**, p. 51 *et seq.* (paras. 248-249) referring to the related *Roberts* case, which held the international minimum standard of treatment to be "whether aliens are treated in accordance with ordinary standards of civilization."

[1263] *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Reisman, Lacarte Muró, Paulsson), 15/11/2004, at **Exhibit RLA-0049**, p. 35 (para. 91).

[1264] *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Reisman, Lacarte Muró, Paulsson), 15/11/2004, at **Exhibit RLA-0049**, p. 40 *et seq.* (paras. 103, 105 and 108).

[1265] *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Reisman, Lacarte Muró, Paulsson), 15/11/2004, at **Exhibit RLA-0049**, p. 41 (para. 108).

[1266] *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Reisman, Lacarte Muró, Paulsson), 15/11/2004, at **Exhibit RLA-0049**, p. 41 (para. 108).

751 Similarly, in the decision in *Lemire v. Ukraine*, which the Respondent also appears to endorse,[1267] the tribunal found a breach of the FET standard where Ukraine had failed to apply its own laws. It held that the "blatant disregard of applicable tender rules, distorting fair competition among tender participants" was an "arbitrary or discriminatory measure under international law and a violation of the FET standard".[1268]

752 The tribunal in *Tecmed v. Mexico* also held the "basic expectations" of foreign investors in accordance with the "good faith principle established by international law" require that the host State apply its own law.[1269] In a passage often cited by subsequent arbitral tribunals applying FET standards,[1270] the *Tecmed* tribunal stated as follows:

> "The foreign investor expects the host State to **act in a consistent manner**, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may **know beforehand any and all rules and regulations that will govern its investments**, as well as the goals of the relevant policies and administrative practices or directives […]. The investor also expects **the State to use the legal instruments that govern the**

[1267] See Counter-Memorial, 24/03/2022, p. 273 (para. 578 and fn 1194).

[1268] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Fernández-Armesto, Paulsson,Voss) ("***Lemire* (Decision)**"), 14/01/2010, at **Exhibit RLA-0105**, p. 79 (para. 385).

[1269] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29/05/2003, at **Exhibit CLA-74**, p. 61 *et seq*. (para. 154).

[1270] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14/07/2006, at **Exhibit CLA-19**, p. 134 (para. 371); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 141 *et seq.* (para. 572); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12/05/2005, at **Exhibit CLA-56**, p. 81 (para. 279); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 06/02/2007, at **Exhibit CLA-71**, p. 95 (para. 298); *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan*, SCC Case No. V 116/2010, Award, 19/12/2013, at **Exhibit CLA-90**, p. 196 (para. 895).

> **actions of the investor or the investment in conformity with the function usually assigned to such instruments** […]".[1271]

753 The tribunal in *Zelena v. Serbia* reached a similar conclusion in applying the FET standard. Despite its finding that the claimant had demonstrated no specific promises or assurances giving rise to legitimate expectations protected by the FET standard,[1272] it nevertheless held that the claimant could legitimately expect Serbia to implement and enforce its own law. In the tribunal's own words:

> "it was reasonable and legitimate for the Claimants to **rely on a reasonable level of implementation and enforcement** of the Serbian ABP legislation **within a reasonable time** and that these legitimate expectations were frustrated by the Respondent's conduct."[1273]

754 In failing to enforce the law in breach of the minimum standard, it is no excuse that it would have been costly or difficult for the host State to do so. In the words of the tribunal in *GAMI Investments v. Mexico*:

> "It is no excuse that regulation is costly. Nor does a dearth of able administrators or a deficient culture of compliance provide a defence. Such is the challenge of governance that confronts every country. Breaches of NAFTA are assuredly not to be excused on the grounds that a government's compliance with its own law may be difficult."[1274]

[1271] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29/05/2003, at **Exhibit CLA-74**, p. 61 *et seq*. (para. 154) (emphasis added).

[1272] *Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia,* ICSID Case No. ARB/14/27, Award, 09/11/2018, at **Exhibit CLA-140**, p. 45 (para. 156).

[1273] *Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia,* ICSID Case No. ARB/14/27, Award, 09/11/2018, at **Exhibit CLA-140**, p. 79 (para. 267) (emphasis added).

[1274] *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Reisman, Lacarte Muró, Paulsson), 15/11/2004, at **Exhibit RLA-0049**, p. 36 (para. 94). See also *Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia,* ICSID Case No. ARB/14/27, Award, 09/11/2018, at **Exhibit CLA-140**, p. 69 (paras. 235-236).

755 Finally, as explained above in relation to the FPS standard,[1275] the obligation on a host State to accord the minimum standard of treatment to aliens applies throughout the host State's territory, not just in part of it. That principle applies equally to the FPS and FET aspects of the minimum standard of treatment under customary international law.

Arbitrary conduct by the State not based on applicable rules and standards constitutes a breach of the minimum standard of treatment, including FET

756 Modern tribunals applying the FET standard often address the failure of a host State to apply its law through the lens of arbitrariness. As the Respondent concedes, the prohibition against arbitrariness is a key component of the minimum standard of treatment, including FET.[1276] In particular, and as the Respondent also accepts,[1277] a State's conduct will be arbitrary and in breach of the minimum standard, where its actions are "not based on legal standards but on discretion, prejudice or personal preference".[1278]

757 For example, the tribunal in *Bilcon v. Canada* found that Canada had breached the minimum standard of treatment under customary international law because the investor "was not treated in a manner consistent with Canada's own laws".[1279] Instead, it found that the relevant authority had "effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by applicable law".[1280]

[1275] See *supra* para. 629.

[1276] Counter-Memorial, 24/03/2022, p. 272 *et seq.* (paras. 576-579).

[1277] Counter-Memorial, 24/03/2022, p. 273 (para. 579 and fn 1194).

[1278] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 08/10/2009, at **Exhibit CLA-44**, p. 99 (para. 303); *Flughafen Zürich, et al., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (Fernández-Armesto, Alvarez,Vinuesa) ("***Flughafen Zürich* (Award)**"), 18/11/2014, at **Exhibit RLA-0103**, p. 117 (para. 585).

[1279] *Bilcon of Delaware et al v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17/03/2015, at **Exhibit CLA-38**, p. 179 (para. 602).

[1280] *Bilcon of Delaware et al v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17/03/2015, at **Exhibit CLA-38**, p. 176 *et seq.* (para. 591).

758 The Claimant also agrees with the Respondent's position that "something opposed to a rule of law" or "a wilful disregard of due process of law" will amount to arbitrary conduct under international law.[1281] This accords, for example, with the conclusions of the tribunal in *TECO v. Guatemala*, which held, while assessing the minimum standard of treatment under international law:

> "[…] acted arbitrarily and in complete and willful disregard of the applicable regulatory framework […] such behavior would constitute a breach of the minimum standard."[1282]

759 In that regard, the same tribunal also held it was relevant that Guatemala had "entirely failed to provide reasons for its decisions or disregarded its own rules."[1283]

State actions or omissions subjecting a foreign investor to coercion or harassment is a breach of the minimum standard of treatment, including FET

760 Finally, a related strand of the FET standard under modern international law is the obligation to ensure that protected investors are free from coercion and harassment. A number of arbitral tribunals have found that a State's conduct subjecting an investor to coercion or harassment amounts to a breach of the FET standard and international law.

761 For example, in *Tecmed v.* Mexico, the tribunal found that Mexico had denied the claimant investor an environmental permit as a means to pressurise it to alter the course of its investment, to achieve the government's separate goal of placating social and political difficulties

[1281] Counter-Memorial, 24/03/2022, p. 272 (para. 576).

[1282] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19/12/2013, at **Exhibit CLA-39**, p. 97 (para. 465).

[1283] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19/12/2013, at **Exhibit CLA-39**, p. 96 (para. 457).

directly related to the relocation of the investment (a landfill site). The tribunal held:

> "Under such circumstances, such pressure involves forms of **coercion that may be considered inconsistent with the fair and equitable treatment** to be given to international investments under [the applicable autonomous FET standard] **and objectionable from the perspective of international law.**"[1284]

762 Further, in *Total v. Argentina*,[1285] the tribunal found that electricity generators, faced with a refusal by Argentina to pay sums they were owed, were offered the option of converting the receivables into equity participation in new power plants.[1286] The tribunal found that this scenario left the investors with no choice but to accept an inequitable debt-for-equity swap. It held that "[i]f not 'forced', it [the claimant] was certainly strongly induced" to accept the scheme not due to market conditions or a company crisis, but "due to governmental policy and conduct by Argentina."[1287] The tribunal considered such circumstances to be a "clear breach" of the applicable treaty standard,[1288] which required "fair and equitable treatment in conformity with the principles of international law".[1289]

[1284] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29/05/2003, at **Exhibit CLA-74**, p. 65 *et seq.* (para. 163) (emphasis added).

[1285] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27/12/2010, at **Exhibit CLA-141**.

[1286] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27/12/2010, at **Exhibit CLA-141**, p. 153 *et seq.* (Section 7.2.3).

[1287] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27/12/2010, at **Exhibit CLA-141**, p. 153 *et seq.* (paras. 337-338).

[1288] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27/12/2010, at **Exhibit CLA-141**, p. 154 (para. 338).

[1289] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27/12/2010, at **Exhibit CLA-141**, p. 55 (para. 125).

763 In the same vein, other tribunals have considered that where a State places the investor in a situation where it is forced to (re)negotiate a contract, the FET standard would be breached.[1290]

764 Under international law, a State's responsibility for breach of an obligation may be invoked by omissions, just as much as it may be invoked for the State's positive actions. Indeed, as noted in the ILC Commentary, there is "no difference in principle" between actions and omissions.[1291] Indeed, the ILC Commentary cites with authority the ICJ's judgment in *United States Diplomatic and Consular Staff in Tehran*, noting:

> "[…] the Court concluded that the responsibility of the Islamic Republic of Iran was entailed by the 'inaction' of its authorities which 'failed to take appropriate steps', in circumstances where such steps were evidently called for."[1292]

765 It follows from the foregoing that, if a State by its omissions or inaction causes an investor to suffer coercion or harassment, including by improperly failing to apply its own law (or the rule of law), it will constitute breach the FET standard under international law.

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[1290] See *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10/04/2013, at **Exhibit CLA-142**, p. 278 *et seq.* (paras. 938-941), citing to: *Pope & Talbot Inc v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10/04/2001, at **Exhibit CLA-45**, p. 87 (para. 181); *Pope & Talbot v. Government of Canada*, UNCITRAL, Award in Respect of Damages, 31/05/2002, at **Exhibit CLA-143**, p. 31 *et seq.* (paras. 67-69); *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29/05/2003, at **Exhibit CLA-74**, p. 65 *et seq.* (para. 163); *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (de Maekelt, Rezek, van den Berg), 03/10/2006, at **Exhibit RLA-0070**, p. 13 (para. 46). See also *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on reconsideration and award, 07/02/2017, at **Exhibit CLA-144**, p. 62 *et seq.* (paras. 170-172).

[1291] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 35 (Art. 2, Commentary 4).

[1292] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 35 (Art. 2, Commentary 4), citing *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),* Judgment, I.C.J. Reports 1980, 24/05/1980, at **Exhibit CLA-145**, p. 32 *et seq.* (paras. 63 and 67).

766 In conclusion, it is beyond doubt that a host State's obligation to enforce its laws against third parties causing harm to aliens forms part of the customary international law minimum standard of treatment. Especially, a State may not selectively accord the protection of its laws to some while leaving others at the mercy of criminal behaviour, as is the case here as described extensively in Section 7.2 above. In light of this, the Claimant explains in the following sections that the Respondent's acts and omissions clearly breached that standard of treatment. As explained above, the debate over the precise scope of the FET obligation contained in the FTA is therefore academic and irrelevant for present purposes.

9.4.3.2 The actions of Parán Community members undoubtedly breach the minimum standard of treatment

767 The Claimant explained in the Memorial that, through the acts of the Parán Community's members, Peru breached the FET standard prescribed by Article 805.1 of the FTA.[1293] In its Counter-Memorial, the Respondent does not dispute that the acts of Parán Community's members would breach the FET standard, if attributable to the Peruvian State.[1294]

768 As the Claimant further explained in the Memorial, the same conduct by which Peru breached the FPS standard under Article 805.1 also amounted to a breach of the FET standard under that provision.[1295] The Claimant refers to Section 9.3.4.1 above, in which it set out in further detail why Parán's actions breached the FPS standard. Those points apply *mutatis mutandis* to the Respondent's obligation to accord the Claimant FET under Article 805.1 of the FTA.

769 In short, if the Parán's Community officials and members actions are found to be attributable to the State, the Claimant's FET claim must succeed.

[1293] Memorial, 01/10/2021, p. 95 (para. 293).

[1294] Counter-Memorial, 24/03/2022, p. 292 (para. 621).

[1295] Memorial, 01/10/2021, p. 93 *et seq.* (paras. 287-290).

9.4.3.3 The Respondent has systematically failed to enforce the law against the Parán Community to prevent further damage to the Claimant's investment

770 To identify whether the State has systematically or blatantly failed to enforce the law against third parties causing harm to the Claimant's investment, it is necessary to assess the conduct of the State's authorities as a whole.[1296] Viewed as a whole, the State's actions and omissions clearly evince a firm political decision, which the Respondent itself admits throughout its Counter-Memorial,[1297] to refrain from intervening into the dealings of the Parán Community – whether they be related to its direct interference with the Project or to Parán's motivations for such interference, such as its illegal cultivation of marijuana.[1298]

771 The Respondent's policy to refrain from any forcible actions towards the Parán Community can be seen in the following illustrative examples:

a) **Unlawful occupation of Lacsanga's land**. It is not in dispute that Parán set up the Blockade in land belonging to the Lacsanga Community contrary to the latter's will. As explained in Section 9.3.5.1 above, this was unlawful: the right to protest "cannot justify the violation of other fundamental rights such as [the] property [rights of the Lacsanga Community] […]."[1299] The Lacsanga Community filed criminal complaints against Parán following the establishment of its illegal Blockade.[1300] Despite this, and the obvious interference of the Blockade with IMC's exercise of its mining rights, the State refused to authorise a police intervention to lift the Blockade, which lasted more than ten months and led to the loss of the Claimant's investment in Peru.

[1296] See Memorial, 01/10/2021, p. 91 *et seq.* (Section 4.3.3); *supra* Section 9.4.2.

[1297] See, *e.g.*, Counter-Memorial, 24/03/2022, p. 6 *et seq.* (para. 17).

[1298] See *supra* Section 2.2.

[1299] Constitutional Tribunal Decision No. 0009/2018-PI/TC (SPA), 02/06/2020, at **Exhibit C-595**.

[1300] As acknowledged by Peru's criminal law expert, Mr Ivan Meini, the criminal complaint filed by the Lacsanga Community was dismissed by the Public Prosecutor's Office. See Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 63 (para. 176).

b) **Unlawful use of firearms**. As explained in Section 7.1 above, the Peruvian authorities were aware of Parán's unlawful use of firearms, and the obvious risks posed by Parán's continued possession of said arms. Official State documents show that the State knew it should confiscate those firearms from Parán members.[1301] Instead of doing so, the Respondent allowed Parán to use those arms as it wished, and Parán did just that. Parán maintained its Blockade in place under the supervision of armed guards. In May 2019, Parán reacted violently to the WDS's peaceful access to the Site, shooting at Mr Estrada and the WDS team members, and ultimately killing one of them. Rather than punishing the Parán members responsible, the State arrested WDS team members instead.

c) **Illegal cultivation of marijuana**. As explained in Section 2.2 above, Peru knew that the Parán Community's illegal marijuana business was a major driver of its opposition to the Project and that the Blockade was being financed with funds coming from this illegal drug trade.[1302] However, the State failed to take the necessary actions to address Parán's illegal drug business, which has continued to grow and expand to the present date.

d) **Contempt of authority**. As explained in Section 6.3 above, the Parán President committed through the September 2018 Commitment to refrain from all acts of violence, threats or harassment against IMC.[1303] The agreement stipulated that "the failure of either party hereto to comply [with its obligations]" will

[1301] Letter from Huacho Police to Chief of Lima Region Police (SPA), 25/01/2019, at **Exhibit C-338**.

[1302] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3 (emphasis added). As early as November 2017, IMC's CR Team reported on a meeting hosted by Peruvian authorities during which these authorities acknowledged the threat posed to the Project by Parán's marijuana business. See SSS, Weekly Report, Project (SPA), 20/11/2017 to 24/11/2017, at **Exhibit C-445**, p. 2 and SSS, Weekly Report, Project (SPA), 20/11/2017 to 27/11/2017, at **Exhibit C-426**, p. 2.

[1303] Memorial, 01/10/2021, p. 38 (para. 115); Minutes of the Subprefect meeting between IMC and the Parán Community including September 2018 Commitment (SPA), 18/09/2018, at **Exhibit C-139**, p. 2.

configure the crime of contempt of authority.[1304] Parán breached its obligations by setting up its illegal Blockade the month after signing the September 2018 Commitment. As a result, on 9 November 2018, IMC sent a letter to the Huaura Subprefect communicating Parán's breach and requesting the Subprefect to "fil[e] before the corresponding authority the complaint for **contempt of authority**."[1305] Despite being obliged to file such complaint under Peruvian law, the Huaura Subprefect failed to do so.

Furthermore, as explained in Section 7.1 above, the Parán Community prevented the Huaura Prosecutor from inspecting IMC's explosive magazine on 21 December 2018 and 9 February 2019. These new instances of contempt of authority should have led the State to arrest the Parán offenders, and further obliged it under Peruvian law to lift the Blockade.[1306] However, nothing occurred.

e) **Theft of Lupaka ore stockpiled at the Site**. As explained in Section 2.1 above, on 8 July 2019, IMC sent a letter to the MEM reporting on the Parán Community's decision to appropriate the Lupaka ore stockpiled at the Site together with photographs evincing Parán's illegal ore extraction.[1307] Mr Cauti, then Deputy Minister of the MEM, informed IMC during a meeting held on 15 July 2019 that he would ask for a police intervention if confirmed

[1304] Minutes of the Subprefect meeting between IMC and the Parán Community including September 2018 Commitment (SPA), 18/09/2018, at **Exhibit C-139**, p. 2; MININTER - ONAGI, Directive No. 0010-2015-ONAGI-DGAP (SPA), 27/11/2015, at **Exhibit C-566**, p. 6 (para. 7.4.8).

[1305] Letter from IMC to Huaura Subprefect (SPA), 09/11/2018, at **Exhibit C-237**, p. 2 (emphasis in original).

[1306] Expert Report of Iván Meini - Corrected Version, 22/03/2022, p. 25 *et seq.* (para. 72).

[1307] Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**, p. 1 *et seq.*; see also Email from Lupaka to Canadian Embassy with attachments, 11/07/2019, at **Exhibit C-469**; Witness Statement of Luis F. Bravo, 01/10/2021, p. 30 *et seq.* (paras. 96-97).

that Parán was indeed appropriating of Lupaka's ore.[1308] However, no action was taken.

772 The Rule of Law requires that no one should be above the law and able to cause injury to others **with impunity** as did the Parán Community. As explained above in Section 9.2.2.2, Peruvian law **only** grants **special immunity** to the Parán Community in well-defined circumstances when Parán's *Rondas Campesinas* carry out their policing and jurisdictional functions and use their weapons for that purpose only. It is clear that the acts carried out by the Parán Community exceeded the authority conferred to them under Peruvian law and **should have faced prosecution for their crimes**. This, however, was not the case.

773 Rather, for historical, political, and cultural reasons, some of which have been explained in detail by the Claimant in Section 9.2.2.2 above, the Respondent elected to treat the Parán Community as *de facto* immune from its own laws and regulations to the detriment of the Claimant's investment. This is the common thread underpinning the entire conduct of the State in this case, which is contrary to Peru's duty to apply and enforce its own law throughout its territory and thus sufficient for the Tribunal to conclude that there is a composite breach of the minimum standard of treatment.

774 The same acts and omissions of the Peruvian State amount to **arbitrary treatment** of the Claimant's investment, which also breaches the minimum standard of treatment, as explained above.[1309] Rather than applying its own policy, designed to provide a balance between the interests of local communities and of mining investors, Peru chose to ignore that policy as well as its own criminal law.

775 The result of Peru's arbitrary decisions not to intervene in Parán's illegal Blockade, and not to impose any sanctions on Parán members for their illegal acts towards the Claimant, was that the Claimant was forced to negotiate with the Parán Community with a gun to its head. The Claimant was coerced time and time again to appease Parán's unreasonable and ever-

[1308] Summary of the meeting between Deputy Minister of Mines and IMC with support of Canadian Embassy officials, 15/07/2019, at **Exhibit C-222**, p. 3 (para. 22).
[1309] See *supra* Section 9.4.3.1.

changing demands, which Parán had no right to make. The Claimant had no leverage to push back, and no means to enforce the agreements reached in September 2018 and February 2019. Indeed, Parán swiftly resiled from both agreements with its Blockade as from October 2019 and subsequent March 2019 Invasion.

776 Peru's refusal to enforce its own law placed the Claimant in that position of **coercion and harassment**, further demonstrating its breach of the minimum standard of treatment.

9.4.4 Properly applied, the FTA obliged Peru to accord the Claimant's investment a higher standard of protection than the Respondent contends

777 The Claimant has already explained above that, under even the narrowest conception of the FET standard, the Respondent failed to treat the Claimant's investment fairly and equitably. Therefore, the Tribunal need not read any further to conclude that the Respondent breached Article 805 of the FTA. Nevertheless, for the sake of completeness, and in order to respond fully to the Respondent's Counter-Memorial, the Claimant explains below that the Respondent's obligation to accord FET to its investment was broader in scope than that described in Section 9.4.3 above.

778 First, the Claimant explains that the modern customary international law minimum standard of treatment requires more of the host State than the core obligation to enforce its own law *vis-à-vis* third parties that cause harm to foreigners' investments (**Section 9.4.4.1**). Second, the Claimant explains why, contrary to the Respondent's assertions in its Counter-Memorial, there is no practical difference between the customary international law and so-called "autonomous" standards of FET (**Section 9.4.4.2**).

779 Finally, even if the Tribunal considers that Peru's conduct does not fall foul of Article 805 of the FTA (*quod non*), as explained in the Memorial,[1310] the Claimant is entitled to rely on the FET standard set out in Article 2(2) of

[1310] Memorial, 01/10/2021, p. 89 *et seq.* (Section 4.3.2).

the Peru-United Kingdom BIT. The Respondent's arguments to the contrary do not hold water (**Section 9.4.4.3**).

780 Since the Claimant has already demonstrated that the Respondent breached a much narrower standard, it follows that *a fortiori*, it breached broader standard to which Peru committed under the FTA (**Section 9.4.4.4**).

9.4.4.1 The customary international law minimum standard requires a State to do more than just apply its own law

781 The Claimant explained above in Section 9.4.3.1 that the customary international law minimum standard of treatment, at its core, requires a State to enforce its own laws *vis-à-vis* third parties that cause harm to an investor or its investment. However, it is widely recognised that the FET standard under modern international law is much broader than that core obligation.[1311]

782 Indeed, as the Respondent itself acknowledges, the FET standard encompasses various other obligations on the host State, such as to accord **due process**,[1312] not to act in an **arbitrary**, **grossly unreasonable or unfair** way[1313] and not to treat the investor in a **discriminatory** manner.[1314] The Respondent argues that the Claimant "has not demonstrated that the [minimum standard of treatment] includes an obligation of

[1311] *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31/03/2010, at **Exhibit CLA-35**, p. 80 *et seq.* (paras. 207-213); *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30/04/2004, at **Exhibit CLA-37**, p. 32 *et seq.* (para. 93). See also R. Dolzer, et al., *"Chapter VII: Standards of Protection"*, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), at **Exhibit RLA-0001**, p. 139 *et seq.* ("(e) The evolution of the fair and equitable treatment standard") (emphasis omitted).

[1312] Counter-Memorial, 24/03/2022, p. 271 *et seq.* (paras. 574-575).

[1313] Counter-Memorial, 24/03/2022, p. 272 *et seq.* (paras. 576-579).

[1314] Counter-Memorial, 24/03/2022, p. 273 *et seq.* (paras. 580-582).

transparency",[1315] but the definition of FET in *Waste Management II*, which it expressly endorses, undermines that position.[1316]

783 Similarly, the Respondent is at pains to stress that contravention of an investor's **legitimate expectations** cannot found a claim for breach of the FET standard.[1317] In so doing, the Respondent misconstrues extracts from the ICJ's judgment in *Obligation to Negotiate Access to the Pacific Ocean* and the arbitral award in *Cargill v. Mexico*. Neither case supports that proposition.

784 In *Obligation to Negotiate Access to the Pacific Ocean*, Bolivia had argued that Chile's behaviour had given rise to a legitimate expectation on the part of Bolivia that its access to the sea would be restored.[1318] The ICJ simply noted that there is no principle of general international law **between States** whereby the legitimate expectations of one State give rise to obligations incumbent on another State.[1319] On the other hand, the ICJ noted that arbitral awards applying the FET standard in investment treaty cases often **do** refer to legitimate expectations.[1320] In other words, to the extent it is relevant, that judgment undermines, rather than supports the Respondent's position.

785 The quote cited by the Respondent from *Cargill v. Mexico* refers to a specific argument put forward by the claimant in that case, that the NAFTA imposed an obligation on the host State to provide a "stable and predictable environment in which reasonable expectations are upheld."[1321] The

[1315] Counter-Memorial, 24/03/2022, p. 271 (paras. 572-573) (emphasis added).

[1316] The *Waste Management II* definition refers to a "complete lack of transparency and candour in an administrative process" as an example of a breach of FET: *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30/04/2004, at **Exhibit CLA-37**, p. 35 *et seq.* (para. 98).

[1317] Counter-Memorial, 24/03/2022, p. 269 *et seq.* (paras. 566-571).

[1318] *Obligation to Negotiate Access to the Pacific Ocean*, ICJ, Award, 01/10/2018, at **Exhibit RLA-0050**, p. 56 (para. 160).

[1319] *Obligation to Negotiate Access to the Pacific Ocean*, ICJ, Award, 01/10/2018, at **Exhibit RLA-0050**, p. 56 (para. 162).

[1320] *Obligation to Negotiate Access to the Pacific Ocean*, ICJ, Award, 01/10/2018, at **Exhibit RLA-0050**, p. 56 (para. 162).

[1321] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Pryles, Caron, McRae) ("***Cargill* (Award)**"), 18/09/2009, at **Exhibit RLA-0051**, p. 81 (para. 289).

tribunal decided that the NAFTA and customary international law did not impose a general "obligation to provide a predictable investment environment that does not affect the reasonable expectations of the investor at the time of the investment."[1322] However, the tribunal did not determine that the FET standard offers no protection of legitimate expectations **at all**.

786 Indeed, despite its efforts to argue otherwise, the Respondent in fact acknowledges that an investor's legitimate expectations are at least a relevant factor in deciding whether a State accorded FET to the investor. It points out that, in its Memorial, the Claimant had omitted the last sentence of the *Waste Management II* definition of FET which, the Respondent notes, added the following:

> "In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied upon by the claimant."[1323]

787 In this regard, for its part, the Respondent also omits the end of a quotation from the award in *Mesa Power*:

> "[T]he Tribunal shares the view held by a majority of NAFTA tribunals that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of [the obligation of fair and equitable treatment], **but is an element to take into account when assessing whether other components of the standard are breached.**" (emphasis on omitted part in Counter-Memorial).[1324]

788 For completeness, the above position is also consistent with Canada's Non-Disputing Party Submission, which contends that the "mere fact" of a breach of an investor's legitimate expectations does not breach the

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[1322] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Pryles, Caron, McRae) ("***Cargill* (Award)**"), 18/09/2009, at **Exhibit RLA-0051**, p. 81 (para. 290).

[1323] Counter-Memorial, 24/03/2022, p. 267 *et seq.* (para. 562); *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30/04/2004, at **Exhibit CLA-37**, p. 35 *et seq.* (para. 98).

[1324] *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award (Kaufmann-Kohler, Brower, Landau) ("***Mesa Power* (Award)**"), 24/03/2016, at **Exhibit RLA-0048**, p. 119 (para. 502).

minimum standard of treatment under Article 805.1 of the FTA.[1325] That does not mean that an investor's legitimate expectations should be disregarded entirely when assessing a State's compliance with that standard.

789 Accordingly, it follows from the above – and for the most part, the Parties agree – that, in addition to the requirement of Peru to apply its own laws, to the extent necessary (*quod non*), the Tribunal should consider broader conceptions of fairness encapsulated by the modern FET standard. Those include legitimate expectations, transparency, due process, and protection from arbitrariness, gross unreasonableness or unfairness and non-discrimination.

9.4.4.2 The FET standard under Article 805.1 is equivalent to so-called "autonomous" treaty standards requiring "fair and equitable treatment"

790 Finally, the Claimant recalls that in its Memorial, it explained that, in substance, tribunals applying abstract "fair and equitable treatment" standards contained in other investment treaties (*i.e.*, so-called "autonomous" standards) apply that standard no differently than arbitral tribunals applying the customary international law minimum standard.[1326] In its Counter-Memorial, the Respondent disputes this, arguing that it "fails to give any effect (*effet utile*) to the text of Article 805" of the FTA.[1327]

791 For the reasons set out in Section 9.4.3 above, the Claimant considers that extensive consideration of the differences between the customary international law standard and "autonomous" standards is unlikely to assist the Tribunal. Under any conception of the FET standard, the Respondent clearly failed to accord fair and equitable treatment to the Claimant's investment.

792 Further, whichever standard the Tribunal wishes to apply, it will likely reach the same result, as a tribunal applying an "autonomous" standard

[1325] Canada's Non-Disputing Party Submission, 26/05/2022, p. 6 *et seq.* (Section IV.B).

[1326] Memorial, 01/10/2021, p. 86 *et seq.* (Section 4.3.1).

[1327] Counter-Memorial, 24/03/2022, p. 263 (para. 552).

prescribing "fair and equitable treatment" would in any event be required to do so in accordance with general rules of international law, including the customary international law on treatment of aliens.[1328] Accordingly, in practice, the distinction between the standards (if any, *quod non*) is purely academic. Indeed, describing the debate as "sterile",[1329] Professor Douglas KC explains in his commentary:

> "concepts such as 'fair and equitable treatment' are to be interpreted against the background of principles of general international law relevant to the treatment of foreign investments. Indeed, it might well be asked how else the fair and equitable standard of treatment in investment treaties should be interpreted if not by reference to relevant principles of international law."[1330]

793 Nevertheless, for the avoidance of doubt, the Claimant does not agree that its position denies the *effet utile* of Article 805, as the Respondent argues – quite the opposite. Article 805.1, by way of reminder, reads as follows:

> "Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard treatment of aliens, **including** fair and equitable treatment and full protection and security."[1331]

794 The doctrine of "fair and equitable treatment" did not exist when the minimum standard of treatment first emerged in customary international law at the turn of the twentieth century. It is only relatively recently in the practice of some States that the phrase "minimum standard of treatment, **including** fair and equitable treatment" has appeared in their investment treaties. The word "including" is express recognition by those States of

[1328] United Nations, 1969 Vienna Convention on the Law of Treaties ("**VCLT**"), 31/12/1969, at **Exhibit RLA-0128**, p. 12 *et seq.* (Art. 31(3)(c)). See also Z. Douglas, *The International Law of Investment Claims* (CUP, 2009), at **Exhibit CLA-146**, p. 86 *et seq.* (paras. 153-155).

[1329] Z. Douglas, *The International Law of Investment Claims* (CUP, 2009), at **Exhibit CLA-146**, p. 86 *et seq.* (para. 155).

[1330] Z. Douglas, *The International Law of Investment Claims* (CUP, 2009), at **Exhibit CLA-146**, p. 87 *et seq.* (para. 157).

[1331] Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 126 (emphasis added).

the now ubiquitous treaty standard of "fair and equitable treatment" under international law.

9.4.4.3 Under Article 804 of the FTA, the Claimant is also entitled to treatment no less favourable than the standard Peru accords to other foreign investors

795 In the Memorial, the Claimant explained that, to the extent necessary, by virtue of the MFN clause under Article 804 of the FTA, it may rely on the FET standard from Peru-United Kingdom BIT.[1332] In its Counter-Memorial, the Respondent refutes that proposition at length, arguing that Article 804 does not permit the Claimant to "import" that standard of treatment.[1333]

796 It will already be apparent from the foregoing sections that the Claimant considers debating such matters to be academic.[1334] Under any conception of the FET standard, the Respondent is in breach of Article 805.1 of the FTA, and the Claimant need not rely on more protective standards under others of Peru's BITs to succeed on its FET claim in this case. The Claimant therefore deals with these issues briefly.

The Claimant does not have to demonstrate "like circumstances" to rely on Article 804 of the FTA to import another FET standard, but in any event can do so

797 The Respondent argues that the wording of Article 804 shows it only covers preferential treatment accorded to other foreign investors in "like circumstances", and therefore alternative standards cannot be imported from other BITs.[1335] According to the Respondent, to rely on Article 804 of the FTA, a claimant must cite to actual instances of circumstances similar to its own in which an investor of a non-Party to the FTA was granted preferential treatment.[1336] According to the Respondent, the

[1332] Memorial, 01/10/2021, p. 89 (para. 275).

[1333] Counter-Memorial, 24/03/2022, p. 283 *et seq.* (Sections IV.C.3.a to IV.C.3.c).

[1334] See *supra* Sections 9.4.3, 9.4.4.1 and 9.4.4.2.

[1335] Counter-Memorial, 24/03/2022, p. 279 (para. 592).

[1336] Counter-Memorial, 24/03/2022

Claimant cannot rely on hypothetical treatment that Peru would accord to investors with the protection of other bilateral investment treaties in like circumstances.[1337]

798 That reading of Article 804 distorts the ordinary meaning of the terms of Article 804, taken in their context, contrary to Article 31.1 of the VCLT,[1338] and would lead to absurd or unreasonable results, contrary to Article 32 of the VCLT.[1339]

799 First, there is nothing in the ordinary meaning of the words "accords, in like circumstances" to suggest they limit the protection provided to actual instances of preferential treatment, as opposed to the treatment the State would accord in "like circumstances" to an investor with the protection of a more favourable BIT. The effect of the Respondent's meaning of those words would, in practice, mean the State could avoid its obligation under Article 804 simply by finding minor distinguishing facts to argue the circumstances are not "like".

800 Second, and as the Claimant explained in the Memorial, Annex 804.1 expressly excludes "dispute resolution mechanisms […] provided for in international treaties or trade agreements" from the operation of Article 804. By absence and therefore implication, substantive standards of treatment provided for in international treaties or trade agreements are not excluded. The Respondent argues that Annex 804.1 "does not encompass treatment in the abstract",[1340] but cannot explain why, if the contracting parties had wished to exclude the possibility of importing substantive standards of treatment from other "international treaties or trade agreements", they limited the exclusion in Annex 804.1 of the FTA expressly to "dispute resolution mechanisms".[1341]

[1337] Counter-Memorial, 24/03/2022, p. 277 *et seq.* (Section IV.C.3).

[1338] United Nations, 1969 Vienna Convention on the Law of Treaties ("**VCLT**"), 31/12/1969, at **Exhibit RLA-0128**, p. 12 (Art. 31.1).

[1339] United Nations, 1969 Vienna Convention on the Law of Treaties ("**VCLT**"), 31/12/1969, at **Exhibit RLA-0128**, p. 13 (Art. 32.

[1340] Counter-Memorial, 24/03/2022, p. 282 *et seq.* (para. 598).

[1341] Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 171 (Annex 804.1).

801 Further, the wording of Peru's reservation in its schedule to Annex II itself implies that Article 804 applies to "**treatment to countries under any bilateral** […] **treaties**", rather than treatment to **investors** in specific demonstrable instances of other "like circumstances".[1342]

802 In any event, should the Tribunal consider that the Claimant does need to demonstrate actual "like circumstances" in which Peru accorded preferential treatment to another foreign investor, then it can do so. As explained in Section 7.2.1 above, there are numerous recent examples of Peru using substantial Police force to remove invading protesters from mining investors' projects. In particular, as the Respondent itself points out in its defence, it sent hundreds of police officers and soldiers to the Las Bambas Mine in 2015, when protesters from local communities invaded that project site.[1343] It did so again in 2022. Mr Bravo also testifies about the treatment afforded to Century Mining S.A.C. where the Police invariably intervened successfully in the face of illegal protests by the local community.[1344] It is not in dispute that Lupaka received no such protection in this case.

Article 808 of the FTA does not prevent the Claimant from relying on a preferential standard of FET

803 In the Counter-Memorial, the Respondent argues that Article 808 of the FTA would "bar" the Claimant's importing of the FET provision from the Peru-United Kingdom BIT.[1345] That argument relies on a flawed interpretation of the FTA and Peru's reservation located at its schedule in Annex II.

804 The relevant part of Annex II reads as follows:

> "Peru reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or

[1342] Peru-Canada Free Trade Agreement ("**Peru-Canada FTA**"), 29/05/2008, at **Exhibit RLA-0010**, p. 156 (emphasis added).

[1343] A. Leon, *et al., "Peru protesters lift blockade at China-funded mine in hope of talks"*, LATIMES, 30/09/2015, at **Exhibit R-0144**, p. 2.

[1344] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 6 (para. 9).

[1345] Counter-Memorial, 24/03/2022, p. 286 (para. 608).

> multilateral international agreement in force or signed prior to the date of entry into force of this Agreement."[1346]

805 Reference to Annex II can be found in Article 808 of the FTA, which is entitled "Reservations and Exceptions". Articles 808.1 and 808.2 contain reservations to (among other articles) the MFN provision in Article 804. However, those reservations only relate to **existing and future non-conforming measures** that either Canada or Peru may have, may maintain, or may adopt. Those provisions do not contain a reservation or other limitation to Article 804 as it concerns importing more favourable substantive **standards of treatment**.

806 The intended effect of the reservation is clear when put into the context of Articles 804 and 805. Peru, under Article 805 of the FTA, was required to accord to Canadian investors a minimum standard of treatment. If Peru had agreed under another treaty to accord a higher standard to investors of a third-State, it also committed under Article 804 also to accord that treatment to Canadian investors. Under Annex II, it reserved for itself the right to adopt **specific measures** that might treat those third-State investors more favourably that instance, such that those specific measures would not breach Article 804 *vis-à-vis* the Canadian investor. However, with the exception of those measures, it was still required to accord the Canadian investors with the same overall level of treatment.

807 In the present case, as explained above,[1347] the Claimant's FET claim does not rely on any specific measure adopted by Peru that fell short of the required FET standard (although there were such instances). Rather, it was Peru's overall standard of treatment that fell short. Therefore, if Peru would have treated a U.K. investor more favourably in those circumstances, by virtue of Article 2(2) of the Peru-United Kingdom BIT, the Claimant was entitled to that level of treatment under Article 804 of the FTA.

[1346] Peru-Canada Free Trade Agreement ("**Peru-Canada FTA**"), 29/05/2008, at **Exhibit RLA-0010**, p. 156.

[1347] See *supra* Sections 9.4.3.2 and 9.4.3.3.

An imported FET standard, if applicable, would not grant a "high degree of deference" to Peru

808 In its Counter-Memorial, the Respondent argues that if the Tribunal does import an "autonomous" FET standard, any such standard must accord a "high level of deference to States."[1348] The Claimant does not agree, and the authorities the Respondent quotes in support of that proposition do not support it.

809 Naturally, the Claimant does not dispute that the FET standard "may legitimately involve a balancing or weighing exercise by the host State" and that "[t]he host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance."[1349] However, those are straightforward implications of the words "fair" and "equitable", not indications that the standard of "fairness" or "equity" are any less stringent. As the Respondent itself points out, when assessing whether a State accorded an investor "fair and equitable treatment", the State must be held to an objective standard "to be interpreted with international and comparative standards of domestic public law as a benchmark."[1350]

9.4.4.4 The Respondent breached Article 805 or, alternatively, Article 804 of the FTA

810 The Claimant explained above in Section 9.4.3 that the Respondent's acts and omissions constitute a clear and straightforward breach of the very core principles underlying the modern doctrine of FET. As further explained above in Sections 9.4.4.1 and 9.4.4.3, the Respondent's obligation to provide FET to the Claimant's investment was broader in scope than those core principles. Therefore, *a fortiori*, the Respondent breached Article 805 of the FTA, properly interpreted and applied. It also follows that, should it be necessary to import the autonomous FET obligation from the Peru-United Kingdom BIT, Peru also failed to accord

[1348] Counter-Memorial, 24/03/2022, p. 287 *et seq.* (Section IV.C.4).

[1349] Counter-Memorial, 24/03/2022, p. 288 *et seq.* (para. 614).

[1350] Counter-Memorial, 24/03/2022, p. 288 (para. 613).

the Claimant that standard of treatment, in breach of Article 804 of the FTA.

9.5 Peru unlawfully expropriated Lupaka's investment

811 In its Counter-Memorial, the Respondent denies that its actions and omissions could amount to either direct or indirect expropriation under the FTA.[1351] Furthermore, the Respondent suggests that its actions and omissions could be justified under Annex 812.1(c) as measures taken to promote public welfare, health, and safety.[1352] All of these arguments are meritless.

812 In this section, the Claimant demonstrates that, contrary to the Respondent's assertions, the Respondent's actions and omissions amount to a direct expropriation of the Claimant's investment (**Section 9.5.1**). Additionally, the Claimant establishes that the Respondent's conduct constitutes an indirect expropriation within the meaning of Article 812 and Annex 812.1 of the FTA (**Section 9.5.2**) as the Respondent's actions and omissions established a pattern that caused an "adverse impact" on Lupaka's investment (**Section 9.5.3**). Such expropriation was illegal as the Respondent failed to comply with any of the legal requirements set forth in Article 812 of the FTA (**Section 9.5.4**).

9.5.1 The Respondent's actions and omissions amount to a direct expropriation

813 In the Memorial, the Claimant demonstrated that the actions and the omissions of the Respondent resulted in the direct expropriation of the Claimant's investment. The Claimant and the Respondent agree that such a direct expropriation occurs when there is a "formal transfer of title" or "outright seizure" of a protected investment under the FTA.[1353] Here, the Respondent's actions and omissions resulted in both the outright seizure of the Claimant's investment and the Claimant's formal loss of legal title.

[1351] Counter-Memorial, 24/03/2022, p. 315 *et seq.* (Sections IV.D.1 and IV.D.2).

[1352] Counter-Memorial, 24/03/2022, p. 344 *et seq.* (Section IV.D.2.(v)).

[1353] Memorial, 01/10/2021, p. 103 (fn. 493); Counter-Memorial, 24/03/2022, p. 316 (para. 671).

814 In its Counter-Memorial, the Respondent argues that, in the event the Tribunal finds that the actions of the Parán Community and its *Ronda Campesina* are not attributable to the Respondent, it would follow that the "[a]ctions by the Parán Community therefore could not have resulted in a direct expropriation by Peru."[1354]

815 The Respondent's argument recognises *a contrario* that if the conduct of the Parán Community and its *Ronda Campesina* is attributable to the State, their actions would amount to a direct expropriation. As has been explained above at Section 9.2.2, the conduct of the Parán Community and its *Ronda Campesina* **is** attributable to the State.

816 The Respondent's only other defence in relation to the claim for direct expropriation is also misguided. The Respondent states:

> "[…] a direct expropriation occurs only when there is a 'formal transfer of title or outright seizure.' […] However, Claimant has not explained on what basis the [Blockade] (which took place on a road 'leading to' the Invicta mine) can constitute a 'take-over' of the mine or could have effected a 'formal transfer of title' or 'outright seizure,' within the meaning of Treaty Article 812.1."[1355]

817 This argument is misguided for at least two reasons.

818 First, if the acts of the Parán Community or its *Ronda Campesina* are attributed to the Respondent under Articles 4 and 5 of the ILC Articles, then these acts would undeniably constitute a "seizure" or "take-over" of the Invicta mine by Peru. Peru's argument seems to rely on an unduly restrictive interpretation of the term "seizure" as used in the FTA by making the case that it is not a seizure because there was "only" a Blockade.

819 Yet, the mere installation of the Blockade led to the seizure of the Site which materialised into a permanent taking when the investment was lost on 28 August 2019. Indeed, Lupaka **lost use and control** of the Site, which was entirely then available to the Parán Community. As such, this would

[1354] Counter-Memorial, 24/03/2022, p. 316 (para. 670).

[1355] Counter-Memorial, 24/03/2022, p. 316 (para. 671).

fall under the general definition of a direct expropriation as elucidated by, for example, the tribunal in *AWG v. Argentina*:

> "In the [case of direct expropriations], a host government uses its sovereign powers to seize assets by **depriving** an investor of its title to or **control over those assets**."[1356]

820 In addition, the Parán Community and its *Ronda Campesina* have gone far beyond setting up the Blockade. As the Claimant explained in its Memorial, the Parán Community, with the cooperation of its *Ronda Campesina*, has taken possession of the mine itself and is operating it illegally,[1357] thereby providing further proof of the seizure or taking. Indeed, IMC provided evidence of this to the MEM on 8 July 2019[1358] and an internal MEM report dated September 2021, stated that "there is evidence that the Parán community is **'extracting' ore** from the [Invicta mine] using heavy machinery belonging to the company Invicta Mining S.A.C."[1359]

821 Second, the acts of the Parán Community and its *Ronda Campesina* do not need to be attributable to Peru for there to be a finding of direct expropriation. For example, the tribunal in *Wena Hotels v. Egypt* considered that Egypt's actions constituted a direct expropriation "[by] allowing an entity (over which Egypt could exert effective control) to **seize** and **illegally possess** the hotels for **nearly a year**".[1360] In that case, both parties to the dispute agreed that the conduct of the entity in question, EHC,

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[1356] *Suez, Sociedad General de Aguas de Barcelona S.A., et al., v. Argentine Republic*, ICSID Cases No. ARB/03/17 and *AWG Group v. Argentine Republic*, UNCITRAL, Decision on Liability (Salacuse, Kaufmann-Kohler, Nikken) ("***Sociedad General and AWG (Decision)***"), 30/07/2010, at **Exhibit RLA-0077**, p. 48 (para. 132) (emphasis added).

[1357] Memorial, 01/10/2021, p. 62 (Section 2.3.12).

[1358] Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**.

[1359] MEM, Report No. 103-2021-MINEM/OGDPC/NCLH, September 2021, at **Exhibit C-624**, p. 3.

[1360] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 915 (para. 99) (emphasis added).

could not be attributed to Egypt.[1361] Notwithstanding this, the *Wena* tribunal reached its conclusion on the basis that:

> "[E]ven if Egyptian officials other than officials of EHC did **not participate** in the seizures of [Wena's hotels], Egypt was aware of EHC's intentions to seize the hotels and **did nothing to prevent those seizures** [and] for almost a year, Egypt […] **did nothing to restore the hotels** to Wena".[1362]

822 Similarly, the tribunal in *Amco v. Indonesia*, for example, observed that:

> "[an expropriation] also exists merely by the state **withdrawing** the **protection** of its courts from the owner expropriated, and tacitly **allowing** a ***de facto*** **possessor** to remain in possession of the thing **seized**."[1363]

823 These decisions reflect the principle that a State is responsible in circumstances in which the State **knowingly allows by its omissions** that the investor loses its property and that a third party take possession of that property.

824 In the present case, as in *Wena v. Egypt*, the Respondent could undoubtedly have taken steps either to prevent the seizure of the mine by the Parán Community or restore it to the Claimant. Nevertheless, Peru did not do so in full knowledge of the facts and the consequences of its omission, thereby leading to a direct expropriation of the Claimant's investment.

825 Peru knew perfectly well that the Parán Community wished to exploit the mine.[1364] It also knew perfectly well that the Parán Community was not interested in coming to an agreement with Lupaka given the Parán Community's interest in its marijuana business, as the [redacted]

[1361] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 05/02/2002, at **Exhibit CLA-147**, p. 942 *et seq.* (paras. 30, 33).

[1362] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 911 (para. 82) (emphasis added).

[1363] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20/11/1984, at **Exhibit CLA-66**, p. 44 (para. 158) (emphasis added).

[1364] Witness Statement of Luis F. Bravo, 01/10/2021, p. 11 *et seq.* (paras. 28 and 31); Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 10 *et seq.* (paras. 16-18).

[redacted][1365] Mr Bravo repeatedly warned the State that the Blockade had dire economic consequences for the Claimant's investment and that if it did not intervene, Lupaka would lose the investment.[1366] Yet, despite knowing this, as well as the futility of further negotiations, the central authorities opted on insisting that dialogue continue.

826 For these reasons, regardless of whether the actions of the Parán Community and its *Ronda Campesina* are attributable to the Respondent, the Respondent should be held liable for the direct expropriation of the Claimant's investment.

9.5.2 In any event, the Respondent's acts and omissions constitute an indirect expropriation

827 In its Memorial, the Claimant set out the relevant principles governing indirect expropriation under international law. As explained, an indirect expropriation occurs when the investor suffers a substantial deprivation which is not merely ephemeral.[1367] Further, an indirect expropriation may take place through a series of actions and omissions by the State, the aggregate effect of which is to deprive the investor in whole or in material part of the use or economic benefit of its investment.[1368]

828 While the Respondent does not take issue with the principles of international law on indirect expropriation set out in the Claimant's Memorial, the Respondent states that the factors listed (as "*numerus apertus*") in Annex 812.1 of the FTA would lead to the conclusion that the

[1365] Internal MEM email with attachment (SPA), 20/02/2019, at **Exhibit C-468**, p. 3; [redacted] See also *supra* Section 2.2; [redacted]

[1366] Witness Statement of Luis F. Bravo, 01/10/2021, p. 9 *et seq.* (paras. 22 and 92); Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 57 *et seq.* (Section 8); Letter from Lupaka to MEM, 06/02/2019, at **Exhibit C-15**, p. 2; Letter from IMC to MININTER (SPA), 19/02/2019, at **Exhibit C-16 (corrected translation)**, p. 4; Internal PCM email with attachment (SPA), 21/05/2019, at **Exhibit C-552**, p. 4 ("The company has invested $14 million in the project, has several tonnes of ore that it cannot remove and that the stoppage has put it on the verge of bankruptcy.") (emphasis added); PCM, *aide mémoire* (SPA), 27/05/2019, at **Exhibit C-578**, p. 3; Internal PCM *aide mémorie* (SPA), 10/07/2019, at **Exhibit C-574**, p. 4.

[1367] Memorial, 01/10/2021, p. 97 *et seq.* (paras. 299-301, and 305).

[1368] Memorial, 01/10/2021, p. 101 *et seq.* (paras. 307-311).

Respondent's actions and omissions have not resulted in the indirect expropriation of the Claimant's investment.[1369]

829 While Annex 812.1 is simply a restatement of international law, applying the facts of the case to the factors listed at Annex 812.1 leads to a determination that there has been an indirect expropriation as will be developed further below. Indeed, as per the factors enumerated, the Respondent's conduct had an economic impact on the Claimant's ownership rights over its investment (**Section 9.5.2.1**), interfered with the reasonable – and basic – expectation any investor would have that the Respondent guarantee law and order in the vicinity of its investment (**Section 9.5.2.2**) and an analysis of the "character" of the measures shows that they were unjustified and unreasonable in light of the circumstances (**Section 9.5.2.3**).

830 Furthermore, it should be noted that, in accordance with Article 812 and Annex 812.1 of the FTA, the overarching consideration – which the Respondent fails to address in its submission – is whether the State's acts and omissions had an effect "equivalent to a direct expropriation", *i.e.*, a formal transfer of title or outright seizure. In fact, it is no surprise that the Respondent does not even discuss this aspect because, as explained above, the Respondent's conduct effectively led to both an outright seizure and the loss of title by the Claimant of its investment.[1370]

9.5.2.1 Contrary to the Respondent's assertions, the "economic impact" of its violations of the FTA was to deprive Lupaka's investment of all its value

831 With respect to the first factor referred to in Annex 812.1 of the FTA, namely whether there has been an "economic impact", the Respondent's arguments are two-fold:[1371]

[1369] Counter-Memorial, 24/03/2022, p. 318 *et seq.* (paras. 676-678 and 682).

[1370] See *supra* Section 6.9.

[1371] Counter-Memorial, 24/03/2022, p. 331 *et seq.* (para. 707). The Respondent suggests in passing at the end of this paragraph that the deprivation suffered by the Claimant was not "permanent and irreversible", but does not even attempt to substantiate this point in light of the

a) The Respondent contends that the Claimant "must show [and failed to show] a complete or near complete deprivation of the value of its investment";[1372] and

b) The Respondent also argues that "such deprivation cannot be deemed to have been proximately caused by actions or omissions by Peru."[1373]

832 The Respondent's first contention is wrong both as a matter of law and a matter of fact.

833 The legal standard set out by the Respondent in its Counter-Memorial is inaccurate in two respects. First, the Respondent is wrong to suggest that this analysis of the "economic impact" should be limited to the "value of the investment". When analysing a claim of indirect expropriation, investment tribunals also consider the impact of the disputed measures on the **rights** that the investor holds with respect to its investment.[1374] Indeed, a careful review of the authorities cited by both Parties on this point confirms the view that an indirect expropriation may equally result from measures affecting either the investment or the investor's rights over its investment.

clear facts of this case. As shown in Section 10 below, the Respondent's actions and omissions directly allowed the Parán Community's illegal Blockade to paralyse the Claimant's mining activities from October 2018 onwards and ultimately caused the permanent loss of the Claimant's investment, when its shares in IMC were seized by its creditor, PLI Huaura.

[1372] Counter-Memorial, 24/03/2022, p. 331 *et seq.* (paras. 707). See also Counter-Memorial, 24/03/2022, p. 321 *et seq.* (paras. 683-687), p. 332 *et seq.* (paras. 708-711, 719).

[1373] Counter-Memorial, 24/03/2022, p. 331 *et seq.* (paras. 707). See also Counter-Memorial, 24/03/2022, p. 324 *et seq.* (paras. 688-690), p. 334 *et seq.* (paras. 712-719).

[1374] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award (Award No. 141-7-2), 29/06/1984, at **Exhibit CLA-55**, p. 5 (para. 21); *PL Holdings Sarl v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award, 28/06/2017, at **Exhibit CLA-57**, p. 128 (para. 320); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30/08/2000, at **Exhibit CLA-59**, p. 28 (para. 103); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13/09/2001, at **Exhibit CLA-60**, p. 170 *et seq.* (paras. 604-606); *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30/11/2012, at **Exhibit CLA-62**, p. 169 (para. 6.62); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20/08/2007, at **Exhibit CLA-69**, p. 226 (para. 7.5.14).

834 The tribunal in *Electrabel v. Hungary*, for example, in its decision on jurisdiction, applicable law and liability – which the Respondent cites as an accurate summary of the applicable standard[1375] – set out the two alternatives as follows:

> "[T]he accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the requirement under international law for **the investor** to establish the substantial, radical, severe, devastating or fundamental **deprivation** of **its rights or** the virtual annihilation, effective neutralization or factual **destruction** of its **investment**, its value or enjoyment."[1376]

835 Similarly, the Iran-US Claims Tribunal in *Tippetts* refers to the deprivation of rights as follows: "[a finding of indirect expropriation] is warranted whenever events demonstrate that the **owner** was deprived of **fundamental rights of ownership**".[1377]

836 In the same vein, the tribunal in *CMS v. Argentina* states that "[t]he essential question [to determine whether an indirect expropriation occurred] is therefore to establish whether the **enjoyment** of the property [by the investor] has been effectively neutralised."[1378] In its Counter-Memorial, the Respondent misrepresents this holding by suggesting that the *CMS* tribunal required "proving that an **investment** […] has been 'effectively neutralized' by a measure or series of measures", whereas the

[1375] Counter-Memorial, 24/03/2022, p. 323 (para. 686).

[1376] *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30/11/2012, at **Exhibit CLA-62**, p. 169 (para. 6.62) (emphasis added).

[1377] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award (Award No. 141-7-2), 29/06/1984, at **Exhibit CLA-55**, p. 5 (para. 21) (emphasis added) (cited in Memorial, 01/10/2021, p. 97 *et seq.* (para. 299)).

[1378] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12/05/2005, at **Exhibit CLA-56**, p. 76 (para. 262) (emphasis added) (cited in Memorial, 01/10/2021, p. 98 (para. 300)).

quote above confirms that the tribunal in fact referred to the "enjoyment of property".[1379]

837 The tribunal in *PL Holdings* also focused its analysis on the investor having been deprived of "the full benefit of its rights of ownership" and held that:

> "These restrictions [imposed on the investor by the host State] thus deprived the **[c]laimant** of the **full benefit of its rights of ownership** to such an extent as to constitute an [indirect] expropriation."[1380]

838 Finally, the tribunal in *Vivendi* II, citing with approval the decision in *CME*, aptly summarised that "**destruction** of the value or the **benefit of property** can constitute [an indirect] expropriation".[1381] In sum, all of the cases cited by the Parties support the Claimant's position that regard should be had to both the impact of the Respondent's actions and omissions on the value of the investment and the investor's enjoyment of its rights over the investment.

839 Second, it is also incorrect for the Respondent to suggest that the Claimant must show that it suffered a "complete or near complete deprivation" of its investment. The FTA does not provide for such a condition. Annex 812.1 of the FTA only contemplates that the "economic impact of the measure" should be taken into consideration when assessing a claim of indirect expropriation. Furthermore, the Respondent's proposed threshold of a "complete or near complete deprivation" not only does not have any basis in the FTA, but also does not accord with the standard in customary international law. It is well established in the case law of investment treaty tribunals that a finding of indirect expropriation requires simply a

[1379] Counter-Memorial, 24/03/2022, p. 322 (para. 684) (emphasis added).

[1380] *PL Holdings Sarl v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award, 28/06/2017, at **Exhibit CLA-57**, p. 128 *et seq.* (para. 320) (emphasis added) (cited in Memorial, 01/10/2021, p. 98 (para. 300) and Counter-Memorial, 24/03/2022, p. 322 (para. 684)).

[1381] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20/08/2007, at **Exhibit CLA-69**, p. 226 (para. 7.5.14) (emphasis added) (cited in Counter-Memorial, 24/03/2022, p. 322 et *seq.* (para. 685)).

"substantial deprivation"[1382] – whether of the value of the investment, or of Lupaka's rights as an investor. As explained below, both exist in this case; however, the Claimant need only prove one or the other.

840 As far as the Claimant's rights over its investment, it is undisputed that the Claimant has been deprived of the rights it lawfully had under Peruvian law to carry out mining activities at the Invicta mine. The Parán Community had no right to set up the Blockade on the Lacsanga road and prevent Lupaka's access to its investment. It was the Respondent's responsibility to ensure that Lupaka could enjoy the full benefit of its rights of ownership and therefore, the Respondent's failure to restore the Claimant to possession of the Invicta mine amounts to a substantial deprivation of the Claimant's rights over its investment.

841 The Respondent contends that, after the Blockade had deprived the Claimant of its rights to exploit the Invicta mine, the Claimant's investment was still worth USD 13 million.[1383] It accordingly argues that "any deprivation of the value of Claimant's investment was *far* from a nearly complete one (let alone a complete one)."[1384]

842 The Respondent derives the conclusion from the independent valuation performed by PwC Peru in August 2019 on the instructions of Servicios Conexos, who acted as the trustee holding Lupaka's shares pledged under the PPF Agreement.[1385] Servicios Conexos commissioned this valuation

[1382] *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, UNCITRAL, PCA Case No. 2012-07, Final Award, 23/12/2019, at **Exhibit CLA-61**, p. 63 *et seq.* (para. 225); *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V 2015/063, Final Award, 15/02/2018, at **Exhibit CLA-148**, p. 166 *et seq.* (para. 727); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29/07/2008, at **Exhibit CLA-33**, p. 183 (para. 685); *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31/03/2010, at **Exhibit CLA-35**, p. 49 (para. 123).

[1383] Counter-Memorial, 24/03/2022, p. 333 (para. 709).

[1384] *Id.*

[1385] Counter-Memorial, 24/03/2022, p. 333 (para. 709).

to determine whether the value of the pledged shares exceeded the value of debt claimed for by PLI Huaura (USD 15.9 million).[1386]

843 It is not in dispute between the Parties that PwC Peru concluded that the appraised value of the Claimant's shares in IMC was USD 13 million and that, shortly thereafter, Servicios Conexos proceeded to transfer title to these shares to PLI Huaura on 26 August 2019.[1387]

844 However, the Respondent fails to take into account that the net value of the Claimant's investment not only consisted of the value of the assets it held (*i.e.*, the shares in IMC), but also that of the liabilities that served to finance these assets, and, especially, the debt owed to PLI Huaura under the PPF Agreement. As confirmed by Accuracy in its second report, PwC Peru's valuation shows that, **even before PLI Huaura's foreclosure, the value of Claimant's investment was already negative** as a result of the Respondent's failure to restore the Claimant to possession of the Invicta mine.[1388]

845 In light of the above, there is clearly no basis in fact for the Respondent to deny that the Claimant has been substantially deprived of its rights of ownership as well as the value of its investment.

846 The Claimant rebuts fully the Respondent's second argument relating to causation (namely that "such deprivation cannot be deemed to have been proximately caused by actions or omissions by Peru"[1389]) in Section 10.1.3. For the purposes of this section, it is sufficient to make the following three observations.

847 First, as a factual matter, there is a clear causal link between Peru' s actions and omissions and Lupaka's loss of its investment contrary to the

[1386] PLI, Notices of enforcement of the Pledge over IMC's shares (SPA), 24/07/2019, at **Exhibit C-55**.

[1387] Contract between IMC and PLI Huaura, 26/08/2019, at **Exhibit C-625**; Counter-Memorial, 24/03/2022, p. 333 (paras. 709-710)

[1388] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 37 (para. 4.62a).

[1389] Counter-Memorial, 24/03/2022, p. 331 *et seq.* (paras. 707). See also Counter-Memorial, 24/03/2022, p. 324 *et seq.* (paras. 688-690), p. 334 *et seq.* (paras. 712-719).

Respondent's statement.[1390] The evidence demonstrates that Leoncio Prado's Subprefect directly led the June 2018 Invasion, which was followed by a further invasion in October 2018 and a Blockade set up and maintained by the Parán Community and with the approval of the same Subprefect and the tacit approval of Peru's other central and local authorities. As a result, Lupaka lost possession and all access to the Invicta mine almost without interruption from 14 October 2018 until its formal loss of title over its investment on 26 August 2019. The Parán Community had already commenced to exploit the mine before Lupaka lost title. As explained above in Section 9.3.4.4, the Parán Community had no legal right under Peruvian law to block Lupaka's access to the Invicta mine and prevent it from carrying out its mining activities, nor indeed to carry out mining activities itself. It was illegal for the Parán Community to carry out any "protests", as euphemistically described by the Respondent, on Lacsanga's territory without that community's consent. It was Peru's responsibility to ensure that the Parán Community complied with the law and confined its opposition to the Project to lawful protests. On those facts, it is clear that Peru's wilful failure to enforce the law against the Leoncio Prado Subprefect and the Parán Community directly caused the Claimant's deprivation of its fundamental rights of ownership over the investment and the investment's value.

848 Second, as a matter of law, the Respondent is wrong to argue that "proximate causation between a State measure or measures and the destruction of an investment cannot be established if such destruction resulted from actions or omissions by the investor itself or by third parties, rather than by the State."[1391] As the decisions in *Wena Hotels* and *Amco* referred to above demonstrate, it is not necessary for an affirmative action of the State to have caused the dispossession of the Claimant.[1392] Such dispossession may also result principally from the State's omissions, for example, where the State knowingly allows a third party to seize the

[1390] Counter-Memorial, 24/03/2022, p. 334 *et seq.* (paras. 712-719).

[1391] Counter-Memorial, 24/03/2022, p. 325 (para. 690).

[1392] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 911 (para. 82); *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20/11/1984, at **Exhibit CLA-66**, p. 44 (para. 158).

investment, even though the State had means at its disposal to prevent such seizure and restore the investor to possession of its investment.[1393] In these circumstances, as explained in further detail in Section 10.1.2 below, the investor's dispossession is the normal and foreseeable consequence of the State's failure to protect the investment from seizure and thus, the test for proximate causation is met.

849 Third and finally, the Respondent is mistaken to draw a parallel between the facts of this case and those in the *ELSI* case. In *ELSI*, the enterprise in relation to which the United States were bringing a claim against Italy had already lost almost all its value before the contested measures.[1394] Indeed, the ICJ noted that "the underlying cause [of ELSI's loss] was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition."[1395] The situation in *ELSI* therefore stands in stark contrast to the facts in this case where, in October 2018, Lupaka was on the verge of starting production at the Invicta mine. Moreover, in early October 2018, Pandion, the lender which had been backing the Project since 2016, certainly did not consider that Lupaka presented any default risk as it had just agreed to increase its investment in the Invicta mine by a further USD 13 million (in addition to the USD 7 million it had already invested).[1396] Contrary to the facts in *ELSI*, absent the Respondent's wilful decision to refrain from enforcing the law against the Parán Community and restoring to Lupaka's possession of its mine site, Lupaka would not have suffered the loss.

[1393] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 911 *et seq.* (paras. 82, 99); *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20/11/1984, at **Exhibit CLA-66**, p. 44 (para. 158).

[1394] Counter-Memorial, 24/03/2022, p. 325 (para. 690).

[1395] *Case Concerning Elettronica Sicula S.p.A.* (ELSI), ICJ, Judgment, 20/07/1989, at **Exhibit RLA-0054**, p. 51 (para. 101).

[1396] Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement, 26/09/2018, at **Exhibit C-50**, p. 5.

9.5.2.2 The Claimant's "distinct, reasonable investment-backed expectations" were violated

850 The Respondent's defence on this factor focuses on, first, mischaracterising Lupaka's expectations and then stating that these were not "distinct" or "reasonable" as required by the FTA.[1397] Yet, even by the Respondent's mischaracterised legitimate expectations standard, the Claimant's expectations were reasonable and were violated.

851 Indeed, the Respondent states that Lupaka's sole legitimate expectation was that it "would forcibly remove protestors from the investment site."[1398] While this was requested by Lupaka on many occasions in view of the events, it is an overly narrow construction of Lupaka's expectations at the time of making its investments. Indeed, as noted in the Claimant's Memorial, Lupaka legitimately expected that its representatives would be able to access and work safely at the Site, without interference, let alone violent interference. It expected that its representatives, facilities, and equipment would be safe from physical harm or damage by State authorities and/or third parties. More broadly, Lupaka expected that Peru would not fundamentally contradict basic principles of its own laws and regulations as well as maintain law and order.[1399]

852 Such expectations were distinct, reasonable and investment-backed. The Respondent cannot seriously question these legitimate expectations; indeed it does not do so in its Counter-Memorial. Instead, it tries to escape this point by framing Lupaka's legitimate expectation as an unduly narrow strawman, as noted, and then stating that Peru had no legal obligation to forcibly remove the Parán Community's members. This is demonstrably false under Peruvian law as addressed at Section 7.1.

853 But even if Peru was right (*quod non*), there were other ways in which Peru failed to ensure that Lupaka could pursue its investment. As developed at Section 6.9, this could have been done by disarming the Parán Community in light of their illegal and violent actions, a point which the regional Police

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[1397] Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 172 (Annex 812.1(b)(ii)).

[1398] Counter-Memorial, 24/03/2022, p. 339 (para. 722-724).

[1399] Memorial, 01/10/2021, p. 95 (para. 291); Witness Statement of Gordon Ellis, 01/10/2021, p. 6 (para. 17).

acknowledged in January 2019, but upon which no action was taken.[1400] If they had been disarmed, then it would have certainly been easier for either the Police to secure the Site or for Lupaka to hire personnel to do so. Peru should also have made sure that the Parán Community's marijuana business was eradicated, which the State knew was the driver of Parán's conduct as developed at Section 2.2 above.[1401]

854 The evidence in this case shows clearly that the Respondent accorded a *de facto* blanket immunity to the entire Parán Community – far beyond the narrowly defined immunity for community members discharging their public functions as *ronderos* as explained in Section 9.2.2.2 above. No investor could reasonably expect that Peru would give *carte blanche* to a group of individuals to engage in acts of extreme violence and depredation against its investment. To do so would make a mockery of the expropriation, fair and equitable treatment and full protection and security standards under the FTA. Peru's decision to abstain from taking any steps to ensure that the Parán Community desist from such actions therefore frustrated the Claimant's unequivocal and reasonable expectation of that the State would allow it to develop its investment.

855 As part of this expectation, Lupaka counted on Peru to uphold its own law (including, in particular, its criminal law). Indeed, as discussed above in Section 9.4.3.1, the obligation to uphold and apply the law to protect the property of aliens from illegal interference is – has always been – a key element of the minimum standard of treatment of aliens under customary international law since the standard emerged at the beginning of the twentieth century. As discussed in detail in Section 9.4.3.1, there cannot be any doubt or misunderstanding as to the existence of the rule. Furthermore, it cannot be seriously argued that such a fundamental obligation would be contingent upon specific assurances or representations by the host State.

[1400] Letter from Huacho Police to Chief of Lima Region Police (SPA), 25/01/2019, at **Exhibit C-338**.

[1401] See *supra* Section 2.2; [redacted]

856 For example, this was explained by the tribunal in *Zelena v. Serbia*. In that case, notwithstanding the fact that Serbia had not made any specific "promises or assurances that would create legal obligations of [Serbia] *vis-à-vis* the Claimants" at the time the claimants decided to invest in Serbia,[1402] the tribunal concluded that:

> "[…] it was reasonable and legitimate for the Claimants to **rely** on a **reasonable level of implementation and enforcement of [Serbian law] within a reasonable time** and that these legitimate expectations were frustrated by [Serbia's] conduct. In this regard, [Serbia] has breached its obligation to accord fair and equitable treatment to the Claimants' investment under Article 3(1) of the BIT and is under an obligation to make good the damage which would have been avoided but for its **unlawful failure to implement and enforce [Serbian law]**".[1403]

857 Contrary to the Respondent's arguments, this factor also leads to the conclusion that the Respondent's actions and omissions brought about the expropriation of the Claimant's investment.

9.5.2.3 The unjustified and unreasonable "character" of Peru's acts and omissions

858 The third and final factor included in the *numerus appertus* at Annex 812.1 of the FTA is the "character of the measure or series of measures".[1404] The issues to be considered here are unrestricted as the Respondent notes.[1405] However considered, the analysis of this factor leads to the conclusion that Peru's decision to refrain from enforcing the law against the Parán Community was unjustified and unreasonable in the circumstances.

859 As explained above in Sections 2 and 6, Peru's authorities were aware that:

[1402] *Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia,* ICSID Case No. ARB/14/27, Award, 09/11/2018, at **Exhibit CLA-140**, p. 115 (para. 402).

[1403] *Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia,* ICSID Case No. ARB/14/27, Award, 09/11/2018, at **Exhibit CLA-140**, p. 115 (para. 403) (emphasis added).

[1404] Counter-Memorial, 24/03/2022, p. 328 (para. 697).

[1405] Counter-Memorial, 24/03/2022, p. 328 (para. 697).

a) The Parán Community had no intention of reaching an agreement with Lupaka because it wanted to avoid the increased State presence that mining operations may bring which would disrupt their illegal cultivation of marijuana;

b) Instead, the Parán Community had clearly expressed its intentions to take over the mine and operate it for its own benefit;

c) The Parán Community's *Ronda Campesina* were armed and posed a threat to all the residents and workers in the area – several of whom had already been injured and even killed.

860 Yet despite this, Peru did not intervene to allow Lupaka to pursue its investment. In the circumstances, the "character" of the omission was clearly one that was unreasonable, unjustified and constituted wilful neglect.

861 The Respondent states that its "intent in managing and mediating the conflict between the Claimant and the Parán Community was to achieve a durable, sustainable resolution to the conflict, including to the benefit of Claimant."[1406] It then states that the "Claimant has not alleged that Peru had any ulterior objective or intent, other than to facilitate a resolution of the dispute between Claimant and the Parán Community."[1407] However, whatever Peru's intent was, it is not a determining factor as to whether there was an indirect expropriation. For example, in *Vivendi* II, the tribunal noted that:

> "While intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state's intent, is the critical factor."[1408]

[1406] Counter-Memorial, 24/03/2022, p. 342 (para. 727).

[1407] Counter-Memorial, 24/03/2022, p. 342 (para. 727).

[1408] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20/08/2007, at **Exhibit CLA-69**, p. 229 *et seq.* (para. 7.5.20); see also *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27/10/1989,

862 The Respondent also notes that the existence of conflict between Lupaka and the Parán Community in June 2018 led it to "recognize[] such situation as similar to that in other recent conflicts between mining operations and local communities, which had erupted into violence and had even resulted in the tragic loss of life."[1409] The Respondent's argument that the prior existence of conflict both in the specific case and at a national level provides the context that justifies its omission to uphold its own laws makes no sense. In this case, Peruvian law required it to act and to remedy the blatant illegalities highlighted above as recognised by its Police.[1410] Yet it did not do so because of the political impetus (to appease the unreasonable and extortionate demands of the Parán Community) as Mr Saavedra candidly acknowledged to Mr Bravo.[1411]

863 The same point applies to the Respondent's additional argument that:

> "Peru's measures in handling that conflict were also proportionate to the public purpose of (i) defusing a volatile conflict, (ii) avoiding violence and the loss of human lives, (iii) enforcing Peruvian laws and regulations, and (iv) facilitating a resolution that would enable the Invicta Project to go forward in context of harmonious relations with the Rural Communities."[1412]

864 Respondent here tries to create confusion by mixing various alleged public policy objectives, the legitimacy of which is denied as developed at Section 9.5.2.4 below. In any event, taking points (i), (ii) and (iv) together, the facts speak for themselves. Peru's actions did not diffuse the conflict or allow Lupaka to go forward with the Project. On the contrary, Parán

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at **Exhibit CLA-76**, p. 19 (para. 81); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30/08/2000, at **Exhibit CLA-59**, p. 30 (para. 111).

[1409] Counter-Memorial, 24/03/2022, p. 343 (para. 728).

[1410] See also, Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**; Letter from Huacho Police to Chief of Lima Region Police (SPA), 25/01/2019, at **Exhibit C-338**.

[1411] WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192 (corrected translation)**, p. 3 ("Esteban Saavedra: […] If we do not adhere to the Protocol on the use of public force and there are consequences, these will fall back on the country and the national and international press will do their thing, which is why we must be scrupulous.")

[1412] Counter-Memorial, 24/03/2022, p. 343 (para. 729).

continued to act violently and even murderously for many months and went on to exploit the Invicta mine itself. The measures taken cannot therefore have been proportionate to this alleged objective where they also resulted in the loss of Lupaka's investment. As to point (iii), Peru was acting contrary to its laws through its omissions as already developed.

865 In any event, acting proportionately to public policy objectives does not justify an uncompensated expropriation except where the State is enacting a non-discriminatory regulation (this does not apply either as will be developed below). As the tribunal in *Vivendi* II noted:

> "If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose."[1413]

866 This third factor in the Respondent's defence therefore does not assist the Respondent either.

9.5.2.4 Peru's omissions were not in pursuit of "legitimate public welfare objectives" in a non-discriminatory and proportional manner

867 The analysis immediately above also disposes of the Respondent's contention that its conduct is protected under paragraph (c) of Annex 812.1 of the FTA, which provides as follows:

> "Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non- discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation."[1414]

[1413] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20/08/2007, at **Exhibit CLA-69**, p. 230 (para. 7.5.21).

[1414] Peru-Canada Free Trade Agreement ("**Peru-Canada FTA**"), 29/05/2008, at **Exhibit RLA-0010**, p. 69 (Annex 812.1 (c)).

868 The Respondent states this provision is applicable because "Peru's decision to avoid forcibly removing protestors was (i) driven by public welfare objectives concerning health and safety, (ii) non-discriminatory in nature, and (iii) made in good faith." Accordingly, the Respondent argues, there is a "strong presumption that the measure was non-expropriatory."[1415]

869 This provision is not applicable to the circumstances at hand for the reasons set out below.

The measures were not designed and applied to protect legitimate public welfare objectives and were disproportionate

870 First, as stated, the measures complained of are not just a "decision to avoid forcibly removing protestors". Lupaka's complaint is that the State should have allowed Lupaka to exploit its investment.

871 Second, Peru's decision to treat the Parán Community as above the law – allowing it to invade a neighbouring community's territory, seize the mine and proceed with its exploitation as it is doing today – was not taken out of a concern for "health and safety", as the Respondent professes. Parán's community members were armed and highly dangerous, they acted defiantly against even the Police and public prosecutors as the events show.[1416] They were not afraid to use violence and shoot to kill, as they did to several Lacsanga community members [1417] and to a WDS employee.[1418] In such circumstances, of which Peru was fully aware, it cannot seriously argue that protecting the "health and safety" of Parán's community members (and also the Police on Peru's case) was a legitimate objective that should prevail not only over the investor's rights, but should also trump its own criminal law policy. Indeed, on Peru's reasoning, any person who is armed and dangerous could pursue criminal activity safely in the knowledge that the State will not intervene as it afraid of affecting

[1415] Counter-Memorial, 24/03/2022, p. 344 (para. 731).

[1416] See *supra* Section 6.3.

[1417] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 8 (para. 11); Police Information Note on Parán Conflict (SPA), 25/05/2019, at **Exhibit C-217**.

[1418] See *supra* Section 6.8. See also Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, 22/02/2020, at **Exhibit R-0113**, p. 11 (para. 25).

his/her "health and safety" and those of its law enforcement personnel. This reflects a complete derogation of Peru's duty to exercise its police powers [redacted][1419]

872 Instead, as Mr Saavedra, Deputy Minister at the MININTER, candidly recognised through his WhatsApp exchanges with Mr Bravo, he feared the political consequences of an intervention to remedy the situation in favour of the investor.[1420] Mr Saavedra's party considerations were therefore the priority in this particular instance, not any concern over the Parán Community's "health and safety".

The measures were disproportionate

873 Even if the measures were in pursuit of legitimate welfare objectives, they would still need to be proportionate. As noted in the FTA, when the measure is "so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith" - as expressed by Annex 812.1(c) - then it constitutes an indirect expropriation.

874 The proportionality to be assessed is between the effect on the investor's rights and investment (their annihilation in this case) and the pursuit of the welfare objective. Indeed, it would need to be assessed whether Peru could not have acted in a way that was consistent with its stated objectives but less detrimental to the investor. Such analysis quickly reveals that Peru could have carried out other measures which would have ensured that Lupaka also pursue its investment. This should have included disarming Parán's *ronderos* and suppressing the illegal marijuana trade. Indeed, these steps would have made it all the more likely that dialogue could be pursued

[1419] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**;Letter from Huacho Police to Chief of Lima Region Police (SPA), 25/01/2019, at **Exhibit C-338**; [redacted]

[1420] WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192 (corrected translation)**, p. 3 ("Esteban Saavedra: […] If we do not adhere to the Protocol on the use of public force and there are consequences, these will fall back on the country and the national and international press will do their thing, which is why we must be scrupulous.")

and an agreement reached with Parán in line with its stated objective. The Police and the MEM pushed these very measures as being not just reasonable, but required under Peruvian law. Hence, Peru's choice to force Lupaka to continue with "dialogue" in the circumstances where Parán continued holding the Blockade, was armed and continued with its marijuana business, would lead to the taking, as Peru knew full well. This was disproportionate.

The measures were discriminatory

875 The provision in Annex 812.1(c) of the FTA is intended to reflect that ordinary regulatory measures taken by the Contracting Parties will not lead to international liability except in rare circumstances. As noted by Canada, this provision is concerned with "regulatory measures" in light of the high degree of deference accorded to States in their "regulatory choices".[1421] By contrast, individual decisions taken in relation to a particular investment, as in the present case, are not covered by this exception.

876 In any event, Peru's failure to protect Lupaka was discriminatory. Peru has intervened with force to protect other investors, both national and international, in the face of opposition. It has done so both in the mining sector and in other sectors on countless occasions in the last decade, as noted at Section 7.2.1 and in Section 2 and in Mr Bravo's witness statement.[1422]

[1421] *Bear Creek Mining Corporation v. Republic of Peru*, ICSISD Case No. ARB/14/21, Non-disputing State party submission of the Government of Canada, 09/06/2016, at **Exhibit CLA-149**, p. 2 (para. 5) ("A State is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, **regulatory measure** designed and applied to protect legitimate public welfare objectives.") (emphasis added); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada, 27/02/2020, at **Exhibit CLA-150**, p. 4 *et seq.* (para. 11) ("The use of the phrase "except in rare circumstances" and the reference to measures that "cannot reasonably be viewed as having been adopted and applied in good faith" are consistent with the high degree of deference that States' **regulatory choices** should be accorded.") (emphasis added).

[1422] Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 4 *et seq.* (Section 2).

877 Peru was also very much aware that if it did not act, Lupaka would lose its investment thereby making it obvious that there was a requirement for immediate action by the State.[1423]

9.5.3 The Respondent's wrongful actions and omissions constitute a composite act and a creeping expropriation

878 The Respondent further denies that its conduct could amount to a "creeping expropriation" on the basis that its acts and omissions on which the Claimant's case is based would not be "'sufficiently numerous and inter-connected' to constitute any 'pattern'" and that these acts and omissions "did not have any 'adverse impact' on the [Claimant's] investment."[1424] As discussed in Section 9.4.2 above, the Respondent's assertions are demonstrably false.

879 As stated by the tribunal in *Generation Ukraine v. Ukraine*,

> "Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State **over a period of time culminate** in the expropriatory **taking** of such property."[1425]

880 This is precisely the effect that the repeated failures of the State to restore law and order in the vicinity of the Project had on the Claimant's investment in this case. Contrary to the Respondent's assertions, the conduct of Peru's central and local authorities followed a clear pattern that reveals an entrenched policy decision to let the Parán Community act with

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[1423] Witness Statement of Luis F. Bravo, 01/10/2021, p. 9 *et seq.* (paras. 22 and 92); Second Witness Statement of Luis F. Bravo, 23/09/2022, p. 57 *et seq*. (Section 8); Letter from Lupaka to MEM, 06/02/2019, at **Exhibit C-15**; Letter from IMC to MININTER (SPA), 19/02/2019, at **Exhibit C-16 (corrected translation)**; Internal PCM email with attachment (SPA), 21/05/2019, at **Exhibit C-552**, p. 4 ("The company has invested $14 million in the project, has several tonnes of ore that it cannot remove and that the stoppage has **put it on the verge of bankruptcy**.") (emphasis added); PCM, *aide mémoire* (SPA), 27/05/2019, at **Exhibit C-578**, p. 3; Internal PCM *aide mémorie* (SPA), 10/07/2019, at **Exhibit C-574**, p. 4.

[1424] Counter-Memorial, 24/03/2022, p. 331 (para. 705). See more generally, Counter-Memorial, 24/03/2022, p. 320 *et seq.* (para. 681), p. 330 *et seq.* (paras. 704-706).

[1425] *Generation Ukraine, Inc v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16/09/2003, at **Exhibit CLA-10**, p. 87 (para. 20.22).

impunity both within and in the vicinity of its communal territory.[1426] The area surrounding the mining camp had effectively become a lawless, no-go zone under the control of the Parán Community as result of Peru's central and local authorities' failure to take the necessary measures as to compel the Parán Community to abide by the law.[1427] In the absence of any steps taken to ensure the Parán Community's compliance with the law, one of the main objectives of criminal law – deterrence from committing criminal offences – was not achieved. Worse still, as described in Section 6.2.3 above, the evidence shows that the Parán Community was emboldened to take further illegal actions given the passivity of the authorities.[1428] The Respondent's actions and omissions described above are sufficiently interconnected to constitute a creeping expropriation under international law.

9.5.4 The Respondent's expropriation of the Claimant's investment was illegal

881 The Claimant demonstrated in the Memorial that the Respondent failed to comply with each of the four legal requirements set forth in Article 812.1 of the FTA.[1429] The Respondent does not deny that if the Tribunal finds its conduct to amount to expropriation under the FTA, then Peru failed to meet all the requirements for an expropriation to be legal under the FTA (especially, the payment of prompt, adequate and effective compensation as required under Article 812.1 of the FTA). Accordingly, and as discussed immediately below, the Claimant is therefore entitled to full compensation for the illegal expropriation of its investment.

10 LUPAKA IS ENTITLED TO FULL COMPENSATION

882 Contrary to the Respondent's litany of denials and obfuscations in its Counter-Memorial, the Claimant's loss was the direct and foreseeable result of the Respondent's violations of the FTA. As demonstrated below, the Respondent's arguments on causation are unavailing (**Section 10.1**).

[1426] See *supra* Section 6.

[1427] See *supra* Section 6.

[1428] See *supra* Section 6.2.3.

[1429] Memorial, 01/10/2021, p. 103 *et seq.* (Section 4.4.2).

Accordingly, the Respondent is under an obligation to make full reparation to the Claimant for the loss caused by its violations of the FTA.

883 In this respect, the Respondent's arguments regarding prospective investments developed in its Counter-Memorial are inapposite because the Claimant is not claiming in relation to any **future investment**, but simply for *future profits* that the Claimant has shown it was more likely than not to generate by operating the Invicta Mine at 590 t/d (**Section 10.2**).

884 Therefore, the measure of the Claimant's damages should be the fair market value of the Claimant's investment in light of the Claimant's contemporaneous production plan of 590 t/d, as accurately assessed by Accuracy in their two expert reports (**Section 10.3**).

10.1 The Respondent's violations of the FTA caused the Claimant's loss of its investment

885 The Respondent argues in its Counter-Memorial that the Claimant has failed to establish a causal link between the Respondent's unlawful conduct and the Claimant's loss of its investment.[1430] The Respondent further claims that some unspecified conduct by the Claimant contributed to its injury and would justify reducing the amount of compensation owed to the Claimant.[1431] None of these arguments have any merit.

886 In its Counter-Memorial, the Respondent only made a perfunctory effort to set out the international law on causation in five short paragraphs – which largely misstate the applicable rules in this area.[1432] Likewise, the Respondent also fails to articulate the test for contributory fault under Article 39 of the ILC Articles.[1433] The Claimant therefore explains below the applicable principles on causation and contributory fault relevant to the Tribunal's analysis in the present case (**Section 10.1.1**).

887 In light of these principles and the evidence on record, it is clear that the Respondent's illegal conduct alone was the 'actual' and 'proximate' cause

[1430] Counter-Memorial, 24/03/2022, p. 349 *et seq.* (Section V. B. 1.).

[1431] Counter-Memorial, 24/03/2022, p. 360 *et seq.* (Section V. B. 2.).

[1432] Counter-Memorial, 24/03/2022, p. 347 *et seq.* (paras. 741-742 and 744-746).

[1433] Counter-Memorial, 24/03/2022, p. 360 *et seq.* (Section V. B. 2.).

of the Claimant's loss of its investment (**Section 10.1.2**). The Respondent has failed to prove that any of the "five causal circumstances" alleged in its Counter-Memorial either break this chain of causation or amount to contributory fault of the Claimant (**Section 10.1.3**).

10.1.1 Legal principles on causation and contributory fault in international law

888 Article 31 of the ILC Articles provides that "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[1434] Accordingly, the existence of a causal link between the State's internationally wrongful act and the injury sustained is a necessary condition to the State's obligation to provide full reparation.

889 The ILC Commentary on Article 31 further explains that this inquiry is divided into two separate issues (usually referred to as 'factual' and 'legal' causation):

> "[C]ausality in fact [*i.e.*, 'factual' causation] is a necessary but not a sufficient condition for reparation. There is a further element [*i.e.*, 'legal' causation], associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation."[1435]

890 Even though the ILC Commentary stops short of defining these two concepts, they are well established in international law and arbitral practice.

891 In their seminal treatise on damages in international investment law, Sergey Ripinsky and Kevin Williams explain that "[u]nder the factual test of causation, the issue is whether the wrongful conduct played *some* part

[1434] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 91 (Art. 31).

[1435] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 92 *et seq.* (Art. 31, Commentary 10).

in bringing about the harm or injury or was irrelevant to its occurrence".[1436] To prove factual causation, it is thus sufficient to prove that the Claimant's loss would not have occurred *but for* the Respondent's internationally wrongful act.[1437]

892 Once factual causation is established, the second step is to determine whether the Respondent's wrongful conduct can be viewed as the "legal" or "proximate" cause of the Claimant's injury. It is generally accepted that there is a "sufficient link which is not too remote" between the injury and the breach[1438] when the investor's injury was a normal, foreseeable or intended consequence of the State's wrongful conduct.[1439]

893 For example, the tribunal in *Lemire v. Ukraine* – on which the Respondent also relies – stated that:

> "If it can be proven that in the **normal cause of events** a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the **proximate cause** of the other."[1440]

894 As noted by the tribunal in *Lemire v. Ukraine*, once the Claimant has established that its loss was the normal or foreseeable consequence of the State's breach (*i.e.*, was proximately caused by the State's breach), it creates a rebuttable presumption that causation is established between the breach and the investor's loss. The *Lemire* tribunal aptly summarised the allocation of the burden of proof between the injured investor and the State as follows:

[1436] S. Ripinsky, K. Williams, *Damages in International Investment Law*, British Institute of International and Comparable Law (2008), at **Exhibit CLA-151**, p. 135 (emphasis in original).

[1437] S. Ripinsky, K. Williams, *Damages in International Investment Law*, British Institute of International and Comparable Law (2008), at **Exhibit CLA-151**, p. 135.

[1438] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 92 *et seq.* (Art. 31, Commentary 10).

[1439] S. Ripinsky, K. Williams, *Damages in International Investment Law*, British Institute of International and Comparable Law (2008), at **Exhibit CLA-151**, p. 135 (emphasis in original).

[1440] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28/03/2011, at **Exhibit CLA-95**, p. 52 (para. 169) (emphasis added).

> "The causal link can be viewed from two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause (in our case the wrongful acts of Ukraine) to the final effect (the loss in value of [the claimant's investment]); while the negative aspect **permits the offender** [i.e., the State] to **break the chain** by **showing** that the effect was caused – either partially or totally – not by the wrongful acts, but rather by **intervening causes**, such as factors attributable to the victim, to a third party or for which no one case be made responsible (like force majeure)."[1441]

895 Accordingly, the burden lies with the Respondent to allege and establish the existence of an intervening event that breaks this chain of causation. As will be seen in Section 10.1.3 below, the Respondent in this case has not met this burden.

896 In its Counter-Memorial, the Respondent simply provides a cursory description of the two steps in the causation analysis as follows:

> "[The] Claimant accordingly must prove that: (i) its alleged damages were caused by a Treaty breach by the Respondent, **rather than by other causes**; [and] (ii) the causal nexus between the Treaty breach and alleged damages is sufficiently close (i.e., that there is proximate causation)"[1442]

897 While the Respondent's position on proximate causation is broadly in line with the principles articulated above, it clearly misstates the first limb of the test.

898 As can be gleaned from the quote above, Ripinsky and Williams placed particular emphasis on the fact that the wrongful conduct is only required to have "played **some** part in bringing about the harm or injury". This reflects the principle according to which the State's wrongful conduct can be deemed the 'factual' or 'actual' cause of the Claimant's loss even in circumstances where there are other contributing factors without which the

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[1441] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28/03/2011, at **Exhibit CLA-95**, p. 50 *et seq.* (para. 163) (emphasis added).

[1442] Counter-Memorial, 24/03/2022, p. 347 *et seq.* (para. 741) (emphasis added).

Claimant's loss would not have occurred. It is thus not accurate to say, as the Respondent does, that the investor must prove "[the investor's] damages were **caused** by a **Treaty breach** by the Respondent, **rather than by other causes**".[1443] Contrary to the Respondent's suggestion, the existence of "other causes" or contributing factors in and of itself does not preclude a finding of causation under international law.

899 Even though the Respondent alleges "various supervening causes" in this case, it conspicuously avoids making any references in its Counter-Memorial to the principles on "concurrent causes" laid out by the ILC and fails altogether even to mention to this concept.

900 In its Third Report on State Responsibility, Professor Crawford drew the attention of the ILC to this special issue which he defined as follows:

> "[T]he problem of concurrent causes [arises in] cases (very frequent in practice) where two separate causes combine to produce the injury. Both are efficient causes of the injury, without which it would not have occurred."[1444]

901 The ILC Commentary therefore addresses this issue and states clearly that "international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault".[1445] This entails that, as a general rule, the State is liable to pay full compensation even when the damage was caused by the State's wrongful conduct and some other "concurrent cause". The ILC summarises the applicable rule in the following terms:

> "[U]nless **some part of the injury** can be **shown** to be **severable** in causal terms from that attributed to the responsible Sate, the latter

[1443] Counter-Memorial, 24/03/2022, p. 347 *et seq.* (para. 741) (emphasis added).

[1444] Special Rapporteur J. Crawford, "Third Report on State Responsibility", Document of the 52nd session, A/CN.4/507 and Add. 1-4 (2000), at **Exhibit CLA-152**, p. 19 (para. 31).

[1445] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 93 (Art. 31, Commentary 12).

> is held responsible for **all** the consequences, **not being too remote**, of its wrongful conduct."[1446]

902 As made clear by the ILC, the general rule on "concurrent causes" is only subject to two exceptions, namely:

i) Where the responsible State can show that "some part of the injury" – which is the result of this other "concurrent cause" – is "severable in causal terms" from the injury caused by the responsible State.

ii) Where the responsible State can show that the alleged "concurrent cause" makes the damage sustained too remote and thus severs the causal link between the State's wrongful act and the damage claimed.

903 In the former situation, factual causation is simply lacking between the State's breach and that "part of the injury" which would have occurred even in the absence of the State's breach due to the "concurrent cause". In this arbitration, the Respondent has not sought to argue that some part of the Claimant's injury would be severable from the rest of its injury.

904 The latter situation illustrates the general principle articulated by the ILC which bars any "reduction or attenuation of reparation for concurrent causes".[1447] In such cases, the international court or tribunal cannot exercise discretion to apportion damages, but must take an "all or nothing" approach: (i) either the concurrent cause is considered a 'supervening' cause that interrupts the chain of causation between breach and injury and the investor receives no compensation or (ii) the concurrent cause is not "so compelling that it interrupts the causal link" and the investor is entitled to full compensation.[1448]

905 Faced with concurrent causes other than the State's breach, tribunals will only deny compensation in exceptional circumstances. In fact, in all the cases cited by the Respondent except one, the relevant tribunals found

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[1446] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 93 *et seq.* (Art. 31, Commentary 13) (emphasis added).

[1447] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 91 (Art. 31, Commentary 12).

[1448] *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award, 11/12/2013, at **Exhibit CLA-153**, p. 246 (para. 927).

there was a sufficient causal link between the injury and the breach, irrespective of other concurrent causes.[1449]

906 By contrast, the decision in *Lauder v. Czech Republic* is exceptional in several respects. After having found that the Czech Republic had breached its obligations towards the investor in 1993, the tribunal denied compensation for the harm suffered **six years later** by the investor through the intervening acts of third parties, namely CET 21 and Dr Železný.[1450] The tribunal considered that the Czech Republic's breach could not be treated as the proximate cause if these intervening acts were "**so unexpected** and **so substantial** as to have to be held to have superseded the initial cause and therefore become the main cause of the ultimate harm".[1451] In this regard, the tribunal found that:

> "[…] it was **completely impossible** at the time [of the breach in 1993] to **envisage** that the Claimant itself would actively participate in all those later steps which allowed Mr. Železný [to cause the loss of the claimant's investment in CNTS]"[1452]

907 While the *Lauder* tribunal ultimately rejected the investor's claim for compensation on the basis that the loss it had suffered was not foreseeable at the time of the breach, the tribunal in the parallel case of *CME v. Czech*

[1449] The tribunals in *SD Myers* (**RLA-0066**, p. 73 *et seq*. (paras. 296 and 325)), *Lemire* (**RLA-0105**, p. 99 *et seq*. (para. 486)), *Gemplus* (**RLA-0018**, p. 4 (Part XI, paras. 11.8, 11.14 and 11.16) (229 in the PDF) and *BG Group* (**RLA-0071**, p. 128 *et seq*. (paras. 427, 428, 442 and 444)) all held that there was a sufficient causal link between the breach and the injury, and the State was thus liable to pay full compensation whereas the tribunals in *Gami* (**RLA-0049**, p. 50 *et seq*. (paras. 132 and 133)) and *Rudloff* (**RLA-0094**, p. 258 *et seq*.) were satisfied that a causal link existed between the breach and injury but denied compensation because the claimant had failed to quantify its losses with reasonable certainty.

[1450] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (Briner, Cutler, Klein) ("***Lauder* (Award)**"), 03/09/2001, at **Exhibit RLA-0083**, p. 53 (para. 235) ("The alleged harm was, however, caused in **1999** by the acts of CET 21, controlled by Mr. Železný. The **1993 breach** of the Treaty was **too remote** to qualify as a relevant cause for the harm caused.") (emphasis added).

[1451] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (Briner, Cutler, Klein) ("***Lauder* (Award)**"), 03/09/2001, at **Exhibit RLA-0083**, p. 52 *et seq.* (para. 234) (emphasis added).

[1452] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (Briner, Cutler, Klein) ("***Lauder* (Award)**"), 03/09/2001, at **Exhibit RLA-0083**, p. 52 *et seq.* (para. 234) (emphasis added).

Republic came to the opposite conclusion in reliance on the same criterion of foreseeability and held the Czech Republic liable to pay full compensation to the investor.[1453]

908 As will be discussed in more detail in Section 10.1.3 below, none of the "five causal circumstances" relied on by the Respondent come close to the facts presented in the *Lauder* case. In particular, none of them are "so unexpected and so substantial" as to sever the causal link between the Respondent's breaches and the Claimant's loss of its investment.

909 In the alternative, the Respondent seeks to argue without any particularity that these "five causal circumstances" would constitute contributory fault on the part of the Claimant.[1454] In this respect, the Respondent refers to Article 39 of the ILC which provides as follows:

> "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[1455]

910 As noted by the ILC[1456] and as correctly pointed out by the Respondent,[1457] the victim's contributory fault constitutes an exception to the general rule against the apportionment of damages for "concurrent causes": if

[1453] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13/09/2001, at **Exhibit CLA-60**, p. 164 (para. 585).

[1454] Counter-Memorial, 24/03/2022, p. 360 *et seq.* (Section V. B. 2.).

[1455] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 109 (Art. 39).

[1456] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 93 (Art. 31, Commentary 12) ("Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, **international practice and the decisions of international tribunals do not support the reduction or attenuation for concurrent causes**, **except** in cases of **contributory fault**") (emphasis added).

[1457] Counter-Memorial, 24/03/2022, p. 360 *et seq.* (paras. 770-772).

contributory fault is established, international tribunals have a "wide margin of discretion in apportioning" damages.[1458]

911 By definition, as with any other "concurrent cause" or contributory factor, a causal link must be established between the conduct of the victim and the damage, *i.e.*, the conduct in question must be a factor without which the injury, or part thereof, would not have occurred.[1459] However, the ILC Commentary points out that "[n]ot every action or omission [of the victim] which contributes to the damage suffered is relevant" under Article 39 of the ILC Articles.[1460] The mere existence of a causal link between the investor's conduct and the State's breach is thus not sufficient.

912 Indeed, a finding of contributory fault requires proof of two further elements – which the Respondent ignores in its Counter-Memorial:

a) The victim's conduct must be considered "wilful or negligent" in the sense that they "**manifest** a **lack of due care** on the part of the victim of the breach for his or her **property** or **rights**";[1461] and

b) "The contribution [of the victim's conduct to the injury sustained] must be **material** and **significant**".[1462]

913 These two conditions cumulatively impose a high threshold before contributory fault can be established. To the best of the Claimant's

[1458] *Occidental Petroleum Corporation and Occidental Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/111, Award (Fortier, Williams, Stern), 05/10/2012, at **Exhibit RLA-0090**, p. 261 (para. 670) (cited by the Respondent at Counter-Memorial, 24/03/2022, p. 361 (para. 771)).

[1459] Special Rapporteur J. Crawford, "Third Report on State Responsibility", Document of the 52nd session, A/CN.4/507 and Add. 1-4 (2000), at **Exhibit CLA-152**, p. 19 (para. 31).

[1460] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 110 (Art. 39, Commentary 5).

[1461] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 110 (Art. 39, Commentary 5) (emphasis added).

[1462] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18/07/2014, at **Exhibit CLA-154**, p. 502 (para. 1600) (emphasis added). See also ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 109 (Art. 39, Commentary 1) ("Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State […] but where the […] victim of the breach has **materially contributed** to the damage by some wilful or negligent act or omission.") (emphasis added).

knowledge, in all the reported cases in which the tribunal reached a finding of contributory fault, the conduct of the investor was contrary to the laws and regulations of the host State.[1463]

914 For example, in *Occidental Petroleum v. Ecuador* – which is one of the only two cases cited by the Respondent on contributory fault – the tribunal found that the investor's failure to seek prior ministerial authorisation to the transfer of certain contractual rights was both a breach of its contract with the host State and the host State's hydrocarbon laws.[1464] In *MTD v. Chile*, the other case cited by the Respondent, the claimant's planned investment was contrary to the respondent State's existing zoning regulations.[1465]

915 The Respondent bears the burden to prove its allegations of contributory fault on the part of the Claimant. As explained in further detail in Section 10.1.3 below, the "five causal circumstances" fall undeniably short of the requirements for contributory fault.

916 In light of these principles set out above, the Claimant demonstrate below that the Respondent's violations of the FTA alone were the factual and legal cause of the Claimant's loss of its investment.

[1463] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18/07/2014, at **Exhibit CLA-154**, p. 504 *et seq.* (para. 1615) (abuse of tax laws); *Occidental Petroleum Corporation and Occidental Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/111, Award (Fortier, Williams, Stern), 05/10/2012, at **Exhibit RLA-0090**, p. 258 *et seq.* (paras. 662-663) (breach of contract and the hydrocarbons law); *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15/03/2016, at **Exhibit CLA-31**, p. 227 *et seq.* (para. 6.100) (violation of criminal laws); *Antoine Goetz & Consorts et S.A. Affinange des Métaux v. Republic of Burundi (II)*, ICSID Case No. ARB/01/2, Award (French), 21/06/2012, at **Exhibit CLA-155**, p. 83 (para. 258) (violation of exchange control and banking regulations).

[1464] *Occidental Petroleum Corporation and Occidental Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/111, Award (Fortier, Williams, Stern), 05/10/2012, at **Exhibit RLA-0090**, p. 258 (para. 662).

[1465] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (Guillaume,Crawford, Ordóñez Noriega), 21/03/2007, at **Exhibit RLA-0132**, p. 39 (para. 95).

10.1.2 The Respondent's violations of the FTA alone directly caused the Claimant's loss of its investment

917 Though the Respondent attempts to obfuscate this issue, the chain of causation leading the Claimant's loss of its investment simply consists of two contributory factors:

a) The Parán Community's illegal Blockade and seizure of the Claimant's Project; and

b) The Respondent's other state organs' subsequent failure to ensure compliance with the law in the vicinity of the Project and restore the Claimant to its rights over the Invicta Project.

918 No other factors contributed to the Claimant's loss of its investment. In particular, as already explained in Section 9.5 above, the evidence shows that, even before PLI Huaura foreclosed on IMC's shares on 26 August 2019, the Claimant's investment had already lost its entire value as a result of the Blockade. Indeed, as pointed out by the Respondent itself, the IMC shares on which PLI Huaura foreclosed to satisfy partially the Claimant's outstanding USD 15.9 million debt (Early Termination Amount) were valued at USD 13 million, shortly before the Valuation Date. As confirmed by Accuracy in their second report, this shows that the overall value of the Claimant's investment (assets and corresponding liabilities) was in fact nil, and even negative.

919 As shown below, irrespective of the question of attribution, the Respondent's breaches have caused the Claimant's damage and the Respondent should be liable to make full reparation to the Claimant for the loss of its investment.

920 Although the Respondent fails expressly to acknowledge this point in its Counter-Memorial, factual and legal causation are readily established in the event that the Tribunal finds that the conduct of the Parán Community and its *Ronda Campesina* is attributable to the Respondent. Indeed, it would mean that the two contributory factors outlined above are attributable to the Respondent. In such a case, the actions and omissions of the Parán Community and the Respondent's other State organs would be clear violations of the FTA and the sole factual and legal cause of the

Claimant's loss of its investment. As demonstrated below, none of the five "causal circumstances" alleged by the Respondent would detract from this conclusion.

921 Indeed, in its Counter-Memorial, the Respondent only addresses the issue of causation in the event that the Tribunal considers that the conduct of the Parán Community and its *Ronda Campesina* is not attributable to the Respondent. Even in the absence of attribution, the Respondent's failure to restore the Invicta mine to the Claimant would still be regarded as the factual and legal cause of the Claimant's loss of its investment.

922 Although the Respondent incorrectly refers to its arguments as relating to proximate or legal causation, the Respondent's main defence pertains to factual causation. The Respondent argues that, even if the Respondent "complied" with its obligations under the FTA, its actions taken by its law enforcement authorities against the Parán Community would have been ineffective and the Claimant would still not have been able to operate the Project peacefully. The Respondent's position is antithetical to the most basic principles of international law.

923 Indeed, contrary to the Respondent's assertion, the poor track record of its law enforcement authorities cannot serve as an excuse to evade its obligation to make full reparation under the FTA. The Respondent cannot assume or otherwise rely on the ineffectiveness of its law enforcement authorities to exclude or otherwise reduce its obligation to pay compensation for the Claimant's loss of its investment.

924 Furthermore, as noted above in Sections 9.3 and 9.4, the Parán Community had no right under Peruvian law to interfere with the Claimant's mining operations or block the Lacsanga's road. As clearly stated by the tribunal in *Bear Creek v. Peru*, local communities, and even indigenous communities (which the Parán Community is not), are "not grant[ed] veto power over a project" under Peruvian law.[1466] It must be assumed under the But-for Scenario that the Respondent would have ensured that the Parán Community complied with the law. As stated by the tribunal in

[1466] *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 250 *et seq.* (para. 664).

Amco (II) v. Indonesia, when the State has failed to ensure the protection of the claimant's investment, the State cannot construct a hypothetical scenario in which the harm would still have occurred to evade having to pay reparation.[1467] On that basis, the Respondent's failure to require the Parán Community to abide by the law is the factual cause of the Claimant's loss of its investment.

925 By the same token, although the Respondent fails to address this point directly, there is no doubt that the Claimant's loss of its investment was also the direct and foreseeable consequence of the Respondent's failure to afford the Claimant the protection of the law against the illegal actions of the Parán Community.

926 In summary, the facts clearly show that:

a) The Respondent's wrongful conduct was a necessary condition without which the damage would not have occurred, *i.e.*, the **factual cause** of the Claimant's loss; and

b) The Claimant's deprivation of the value and use of its investment was the normal and foreseeable consequence of the Respondent's wrongful conduct, which confirms that it was the 'proximate' or **legal cause** of the Claimant's loss).

927 As noted by the *Lemire* tribunal quoted above, once the Claimant has established (on the balance of probabilities) that the Respondent's wrongful conduct is both the actual and legal cause of its damage, it creates a presumption in favour of causation and it is for the Respondent to argue, adduce evidence and prove that the chain of causation is in fact interrupted by some intervening event.

928 As discussed in the next section, the Respondent has not put forward any credible evidence, much less demonstrated, that the five "causal circumstances" it alleges would somehow have broken the chain of causation between its wrongful conduct and the Claimant's deprivation of its investment.

[1467] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20/11/1984, at **Exhibit CLA-66**, p. 113 *et seq.* (para. 174).

10.1.3 The Respondent has not demonstrated that any of its alleged "five causal circumstances" would break the chain of causation or amount to contributory fault

929 In this section, the Claimant will address and respond in turn to the "five causal circumstances" that the Respondent claims sever the causal link between its breaches of the FTA and the Claimant's deprivation of its investment. In its Counter-Memorial, the Respondent relies on the following five "causal circumstances":

i) The Claimant's conduct and alleged failure to comply with its obligations under Peruvian law towards the Parán Community;[1468]

ii) The Claimant's grant of a pledge on its IMC shares to PLI Huaura in 2016;[1469]

iii) PLI Huaura's foreclosure on the Claimant's IMC shares for reasons allegedly unconnected to the Claimant's loss of control over its investment;[1470]

iv) The fact that the Claimant was still expecting final approvals from the Peruvian authorities in mid-October 2018 before it could start commercial production at Invicta;[1471] and

v) The performance of the toll mills during pre-production testing between June and October 2018.[1472]

930 As demonstrated below, Parán's criminal behaviour and the subsequent failure of the Respondent's other organs to act cannot be attributed or otherwise justified by the Claimant's conduct towards the Parán Community (**Section 10.1.3.1**). Furthermore, the Claimant suffered a complete deprivation of its rights and investment value **before** PLI Huaura's foreclosure on the IMC shares – which shows that both the Claimant's decision to pledge its shares and PLI Huaura's foreclosure are

[1468] Counter-Memorial, 24/03/2022, p. 352 *et seq.* (Section V.B.1.b.).

[1469] Counter-Memorial, 24/03/2022, p. 353 *et seq.* (Section V.B.1.c.).

[1470] Counter-Memorial, 24/03/2022, p. 356 *et seq.* (Section V.B.1.d.).

[1471] Counter-Memorial, 24/03/2022, p. 358 *et seq.* (Section V.B.1.d.).

[1472] Counter-Memorial, 24/03/2022, p. 359 *et seq.* (Section V.B.1.f.).

causally irrelevant to the damages claimed (**Sections 10.1.3.2 and 10.1.3.3**). In any case, any additional damage suffered as a result of PLI Huaura's foreclosure would be recoverable because this foreclosure was the direct and foreseeable consequence of the Respondent's failure to protect the Claimant against the Parán Community's illegal actions (**Section 10.1.3.3**). Finally, in the absence of the Respondent's violations of the FTA, the outstanding regulatory approvals and the performance shown by the toll mills in the summer of 2018 would not have prevented the Claimant from starting commercial production at the Invicta mine as planned and fulfilling its obligations towards PLI Huaura (**Sections 10.1.3.4. and 10.1.3.5**).

10.1.3.1 The Claimant acted reasonably in its dealings with the Parán Community and complied with its obligations towards it at all times

931 The Respondent tries to lay the blame for the Parán Community's illegal actions and the Respondent's subsequent inaction at the Claimant's door. This is particularly insulting because the Respondent in essence seeks to persuade the Tribunal that Claimant's conduct towards the Parán Community somehow justified that it be left at the mercy of Parán's criminal behaviour by the Respondent's law enforcement authorities. This is patently wrong as a matter of principle Peru is blaming the victim.

932 Moreover, as described below, the evidence clearly shows that the Claimant had a respectful and considerate attitude towards the Parán Community throughout the life of the Project and promptly complied with all its social and environmental obligations towards the community.

933 First, as described in more detail in Sections 4.2.3 and 4.3 above, the Claimant acted reasonably in its dealings with the Parán Community ever since it took over the Project. In particular, there is no good faith basis for the Respondent to argue that the Claimant "disproportionately focused on the Lacsanga and Santo Domingo de Apache communities, marginalising the Parán Community and creating a real and perceived disparity in its

treatment of the different communities".[1473] To recall just a few examples already set out in the Claimant's Memorial and in this Reply:

a) Even after the conclusion of the agreement with the Lacsanga Community in August 2017, the Claimant continued its negotiations with both the Santo Domingo de Apache and Parán Communities. Contrary to the Respondent's allegations, the Claimant did not marginalise or treat the Parán Community less favourably: the Claimant offered substantially the same terms to the Parán Community as those in its offer to the Santo Domingo Community – and even slightly more favourable as the Claimant had proposed a PEN 700,000 annual investment in community development programmes to the Parán Community[1474] as opposed to PEN 600,000 for the Santo Domingo on whose land the project was partly being carried out.[1475]

b) Even after the conclusion of the agreement with the Lacsanga Community in August 2017, Lupaka continued to engage with the Parán Community. For example, Lupaka agreed in December 2018 to pay PEN 300,000 to the Parán Community to settle AAG's outstanding debt incurred under the previous ownership in order to advance the negotiations about the terms of the community development investment programme set out by Lupaka.[1476]

934 The evidence clearly does not support the Respondent's contention that Lupaka's conduct towards the Parán Community could be somehow the "cause" or justification for the Parán Community's illegal actions. As explained above in Section 2, the real reasons behind the Parán Community's opposition to the Project and its illegal Blockade was to protect its illegal marijuana trafficking business.

[1473] Counter-Memorial, 24/03/2022, p. 352 *et seq.* (paras. 752).

[1474] IMC Presentation to the Parán Community, Invicta Project (SPA), 10/12/2016, at **Exhibit C-110**.

[1475] Draft Addendum to Framework Agreement between the Santo Domingo Community and IMC (SPA), 15/09/2017, at **Exhibit C-94**, p. 2 (Art. 2.1.3).

[1476] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 23 (para. 63).

935 Second, the Respondent further argues that the Claimant has failed to fulfil "its legal obligation to establish and maintain amicable relations with the Parán Community".[1477] This argument is completely devoid of any merit.

936 Although the Respondent refers to this alleged obligation no less than 30 times in its Counter-Memorial, nowhere does the Respondent provide a legal basis in domestic law for this alleged obligation, still less specify its content. In fact, this is not surprising because no such obligation exists under Peruvian law.

937 The only obligation to which the Respondent and its legal experts are able to refer is the obligation for mining companies to develop a Social Management Plan as part of their EIA for the Project pursuant to Article 53 of the regulations set out in Supreme Decree No. 040-2014-EM dated 5 November 2014 ("**Environmental Regulations**").[1478]

938 Article 60 of the Environmental Regulations further defines the content of the Social Management Plan as follows:

> "The Social Management Plan is the tool proposed by the owner to prevent, mitigate the negative social impacts and develop the positive social impacts of the mining project in the corresponding areas of social impact.
>
> […]
>
> The minimum contents of the Social Management Plan are the following ones:
>
> **60.1 Community Relations Plan**: Communications Plan, Social Relations Protocol, Workers' Code of Conduct, among others, proposed by the holder in order to achieve a harmonious relationship with the populations and their lifestyles.
>
> **60.2 Citizen Participation Plan**: is made according to the structure indicated in the Regulation of Citizen Participation in the mining

[1477] Counter-Memorial, 24/03/2022, p. 353 (para. 753).

[1478] Supreme Decree No. 040-2014-EM, 05/11/2014, at **Exhibit R-0006**, p. 10 (Art. 53).

> sector and in accordance with Supreme Decree No. 002-2009-MINAM and related regulations.
>
> **60.3 Social consultation plan**: this contains measures for the prevention and mitigation of the risk and social impact, such as the significant impact on natural resources, whenever it is a priority need of the population, or the material cultural heritage of the location as well as the mechanisms for assessing and consulting the various interests of the local populations.
>
> **60.4 Community development plan**: this must contain programs for local promotion and social inclusion, in order to improve their socioeconomic conditions, placing emphasis on their production activities, the creation of employment, health, nutrition and education. It must promote the strengthening of local skills, among other things, coordinating with the authorities and local population.
>
> **60.5 Social Investment Program**: this includes the estimated annual planning of investments planned for execution of the Social Management Plan.
>
> **60.6 Social impact monitoring program**: based on the indicators identified on the social baseline and the assessment of environmental impacts."[1479]

939 The Environmental Regulations further provide that, once the Social Management Plan is approved as part of the EIA, the Respondent's DGAAM and MEM-OGGS will be responsible for monitoring the mining company's compliance with its commitments throughout the life of the Project.[1480] Importantly, the Respondent has devised its mining framework so that the only social obligations incumbent upon mining companies are those commitments that they have voluntarily proposed as part of their EIA application to Peru's MEM and that have subsequently been approved by the same Ministry.

[1479] Supreme Decree No. 040-2014-EM, 05/11/2014, at **Exhibit R-0006**, p. 12 (Art. 60).

[1480] Supreme Decree No. 040-2014-EM, 05/11/2014, at **Exhibit R-0006**, p. 12 *et seq.* (Arts. 61.2 and 63).

940 By contrast, the Environmental Regulations do not impose on mining companies this open-textured, ill-defined obligation alleged by the Respondent to "establish and maintain amicable relations" with nearby communities. As demonstrated by the facts of this case, there will be many instances where, despite the mining company's best efforts, some rural communities will not be amenable to building a long-term, mutually beneficial relationship with the project owner. It stands to reason that it takes two to "maintain amicable relations" and it would be unreasonable to make it a binding obligation on mining companies when it could well be out of their control. It is therefore not surprising that, despite more than seven reforms to its mining legislation since the Claimant made its investment in 2012,[1481] the Respondent chose not to make any provision for this alleged obligation to "establish and maintain amicable relations" with local communities or the equally elusive notion of "social licence".

941 In the present case, the Peruvian authorities approved the EIA for the Invicta Project, including Social Management Plan, in December 2009.[1482] As explained in Section 3.2 above, Lupaka and IMC's previous owner complied at all times with the commitments made in the Social Management Plan and especially the Citizen Participation Plan.

942 Since the approval of the EIA in 2009, the MEM-OGGS and the DGAAM have been monitoring the compliance with the Project's Social Management Plan and have never raised any concerns that Lupaka had not complied with the obligations set out the Social Management Plan towards the Parán Community. The Respondent has only been able to refer to one instance where the OEFA fined Lupaka for having allegedly failed to implement certain commitments set out in its Community Relations Plan

[1481] Law No. 29785, Prior Consultation Act (SPA), 31/08/2012, at **Exhibit C-626**; Supreme Decree No. 014-92-EM, Ordered Text of the General Mining Law (SPA), 19/12/1992, at **Exhibit C-627**; Law No. 29968, Law creating the National Environmental Certification Service for Sustainable Investment (SENACE) (SPA), 19/12/2012, at **Exhibit C-628**; Supreme Decree No. 008-2013-MINAM (SPA), 21/08/2013, at **Exhibit C-629**; Law No. 30327, Law on the Promotion of Investments for Economic Growth and Sustainable Development (SPA), 20/05/2015, at **Exhibit C-630**; Supreme Decree No. 005-2016-MINAM (SPA), 18/07/2016, at **Exhibit C-631**; Ministerial Resolution No. 276-2017-MINAM (SPA), 02/10/2017, at **Exhibit C-632**.

[1482] MEM Resolution approving the EIA (SPA), 28/12/2009, at **Exhibit C-7 (corrected translation)**.

(one of the components of the Social Management Plan under the Environmental Regulations).[1483] These were commitments for the year 2016 regarding the hiring of local personnel and investing in community development programmes in 2016.[1484] As explained in more detail in Section 4.3.3 above, the decision from the OEFA failed to take into account the fact that the Project had virtually no labour needs in 2016 and that Lupaka was actively negotiating agreements with all three communities at the time, precisely in order to roll out development programmes in these communities. In any event, the Respondent does not even seek to argue these alleged shortcomings in hiring local labour or making community investments in 2016 could be deemed the "cause" or "justification" for the illegal actions the Parán Community took against the Project from October 2018 onwards. Therefore, these alleged breaches – which only led to a relatively small fine – do not have any bearing on causation in this case.

943 Third, the Respondent cannot seek to excuse or justify the Parán Community's illegal actions on account of the community's "concerns that [the] Claimant had caused environmental harm to the water that the Community used for drinking and agriculture". Any alleged environmental concerns that may have been raised by the Parán Community at the time do not provide any justification for acting, as Parán did, in clear violation of Peruvian criminal law. Further, the Parán Community's mining of Invicta – presumably using highly rudimentary methods – puts paid to the notion that their actions sprang from alleged environmental concerns. Moreover, as explained in detail in Section 5.2 above, the Parán Community only ever raised one environmental concern about the mine's water management system in May 2018. IMC actively cooperated with the OEFA to remedy the situation and less than two months after the Parán Community had raised this concern, the Respondent's water authority, ALA, confirmed that the water used at the mine was effectively contained and could not reach Parán's water sources. As explained in Section 5.2 above, there is no good basis for the

[1483] Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17/12/2019, at **Exhibit R-0062**, p. 23 (para. 83); Counter-Memorial, 24/03/2022, p. 85 *et seq.* (paras. 174-177).

[1484] Directorial Resolution No. 02050-2019-OEFA/DFAI, Invicta Mining Corp., 17/12/2019, at **Exhibit R-0062**, p. 23 (para. 83).

Respondent to argue that this environmental concern could have been the "cause" of the Parán Community's opposition, let alone justify its criminal conduct.

944 As a matter of law, it is clear that none of the factors set out above can be viewed as a "concurrent cause" – let alone a "supervening cause" – of the Claimant's damage. Indeed, the Respondent has not shown that these factors were a "concurrent cause", *i.e.*, a necessary condition for the occurrence of the Claimant's harm, [1485] nor explain why these circumstances would be so compelling as to break the direct causal link between the Respondent's wrongful conduct and the Claimant's loss of its investment set out in Section 10.1.1 above. The Respondent's allegations in this respect have no bearing on the Tribunal's analysis on causation and should therefore dismissed.

945 Furthermore, not only have these allegations no causal connection to the Respondent's own breaches of the FTA and the Claimant's ensuing damage, but the Respondent has not even tried to make out the two additional requirements for contributory fault. More specifically, the Respondent did not attempt to characterise any wilful or negligent action or omission on the part of the Claimant that would manifest a lack of due care for its property or rights – and rightly so, because, as described above, in all its dealings with the Parán Community, the Claimant has been nothing but reasonable and diligent.

946 In this regard, it is bewildering that the Respondent seeks to put the emphasis on the same elusive notion of "social licence" – on which it already relied upon to no avail in the *Bear Creek* case – to suggest that the Claimant caused or contributed to the Parán Community's illegal behaviour. To assess the Respondent's allegation of contributory fault, the key consideration for the tribunal in *Bear Creek v. Peru* was whether the investor had complied with its social obligations under Peruvian law:

[1485] See *supra* Section 10.1.1 referring to Professor Crawford's definition of a "concurrent cause" in its Special Rapporteur J. Crawford, "Third Report on State Responsibility", Document of the 52nd session, A/CN.4/507 and Add. 1-4 (2000), at **Exhibit CLA-152**, p. 19 (para. 31) as a circumstance "without which [the injury] would not have occurred".

> "[T]he relevant question for the Tribunal is whether **[Peru] can claim** that such further outreach was **legally required** and its absence **caused** or **contributed** to the social unrest […]."[1486]

947 Based on the evidence before it, the tribunal in *Bear Creek v. Peru* concluded that Peru's arguments on causation and contributory fault were without merit for three main reasons.

948 First, the tribunal in *Bear Creek* found that Peru had failed to prove that there was a "causal link between the [investor's social] activity in relation to its Santa Ana Project and [Peru's illegal measure] Supreme Decree 032".[1487] In particular, the Claimant's conduct did not provide any justification to Peru's illegal measure under Peruvian law and the FTA.[1488]

949 Second, the evidence showed on the contrary that the Peruvian authorities were aware of the investor's interactions with the communities, had never raised any objections to the investor's engagement with the local communities and in fact had approved and supported the investor's initiatives from the moment it started its investment to the inception of the dispute.[1489] In light of this, the *Bear Creek* tribunal concluded that:

> "[the claimant] could take it for granted to have **complied with all legal requirements** with regard to its outreach to the local communities. **[Peru]**, **after** its continuous **approval** and **support** of [the claimant]'s conduct, **cannot in hindsight claim** that this conduct was **contrary to the ILO Convention 169** or was

[1486] *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 138 (para. 408) (emphasis added). See also *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 135 (para. 402) ("In PO-10, the Tribunal requested that the Parties [] reply to the following question []: What actions were **legally required** of Claimant in seeking to obtain a Social License and did the Claimant take these actions?") (emphasis added).

[1487] *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 139 *et seq.* (para. 411).

[1488] *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 143 (paras. 414-415).

[1489] *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 139 *et seq.* (paras. 411-412).

> **insufficient**, and **caused** or **contributed to the social unrest** in the region."[1490]

950 Third, the *Bear Creek* tribunal also found in any event that the investor had not breached its obligations under Peruvian law because "the consultations were conducted in good faith, adjusted to the circumstances of the Project and the affected community, and conducted with the objective of reaching agreement".[1491]

951 In the present case, Peru's arguments on causation and contributory fault stand to be dismissed for precisely the same reasons.

952 First and foremost, the Respondent's wrongful decision to deprive the Claimant of the protection of the law against Parán's criminal behaviour cannot be justified under any circumstances. Peruvian law provides for appropriate sanctions (mostly administrative injunctions to take remedial measures and possibly fines) in case of breach of commitments set out in an EIA.[1492] To state the obvious, these sanctions do not include being left at the mercy of criminal behaviour. As in *Bear Creek*, there is no cognisable causal link between the breaches of the Respondent's organs, including the Parán Community, and the Claimant's conduct. In the absence of any causal link between the Claimant's conduct towards the Parán Community and the Respondent's subsequent breaches, the Respondent did not even venture to claim that the Claimant's conduct had a significant and material contribution to the Claimant's damage (which it did not).

953 Second, the Respondent's authorities never raised any serious concerns with the Claimant's implementation of its Social Management Plan during the life of the Project. As noted above, pursuant to Articles 61.2 and 63 of the Environmental Regulations, the DGAAM and the MEM-OGGS,

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[1490] *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 142 (para. 412) (emphasis added).

[1491] *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 250 *et seq.* (para. 664). See also *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 62 (para. 241).

[1492] Supreme Decree No. 040-2014-EM, 05/11/2014, at **Exhibit R-0006**, p. 4 *et seq.* (Arts. 8 and 61.1); Law No. 29325, Law of the National System of Assessment and Enforcement (SPA), at **Exhibit C-633**, p. 7 *et seq.* (Title IV).

amongst other governmental agencies, were responsible for monitoring the Claimant's compliance with its commitments set out in coordination with these authorities under its EIA's Social Management Plan.[1493]

954 Since the Claimant made its investment in 2012, these governmental authorities were fully aware of the Claimant's outreach activities and engagement and until the inception of this dispute they never raised any objections to the way the Claimant was following through on its commitments under its Social Management Plan.[1494] In fact, the evidence shows that the Respondent's central authorities approved, supported and even endorsed the Claimant's engagement with the local communities.[1495] On that basis alone, as in *Bear Creek v. Peru*, the Respondent should be estopped from arguing that the Claimant's alleged shortcomings in implementing its Social Management Plan somehow caused or contributed to the Parán Community's criminal behaviour.

955 Third and in any event, as in *Bear Creek v. Peru*, the facts summarised in Section 10.1.2 above also show that the Claimant "conducted [negotiations with the Parán Community] in good faith" and "with the objective of reaching agreement".[1496] The Respondent has not adduced any evidence to suggest that "reproachable behaviour" manifesting "a lack of due care for its property or rights" can be imputed to the Claimant.

956 For all these reasons, the Respondent's arguments on causation and contributory fault in this regard should be dismissed.

[1493] Supreme Decree No. 040-2014-EM, 05/11/2014, at **Exhibit R-0006**, p. 12 *et seq.* (Arts. 61.2 and 63).

[1494] MEM Resolution approving the EIA (SPA), 28/12/2009, at **Exhibit C-7**; MEM, Report 1005-2015 (SPA), 25/10/2015, at **Exhibit C-490**; IMC Memorandum, Training Programme Mining Project at Invicta Mining Camp (SPA), 08/07/2017, at **Exhibit C-154**.

[1495] MEM Resolution approving the EIA (SPA), 28/12/2009, at **Exhibit C-7 (corrected translation)**; MEM, Report 1005-2015 (SPA), 25/10/2015, at **Exhibit C-490**; IMC Memorandum, Training Programme Mining Project at Invicta Mining Camp (SPA), 08/07/2017, at **Exhibit C-154**.

[1496] *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 250 *et seq.* (para. 664).

10.1.3.2 The Respondent has not established that the Claimant's pledge of its investment as loan collateral was a supervening cause of its loss or otherwise amount to contributory fault

957 The Respondent further contends that the Claimant "plac[ed] its investment at risk" by "choos[ing] to grant PLI Huaura the right to seize the Invicta shares".[1497] The Respondent's reliance on a security contract that was concluded **more than two years before** the Claimant lost its investment is entirely misplaced.

958 As a matter of factual causation, the Claimant has already explained in Section 10.1.2 above that the Parán Community's illegal Blockade and the Respondent's failure to restore the Claimant's access to the mine, had already annihilated the entire value of the Claimant's investment by August 2019, even before PLI Huaura's foreclosure. Moreover, the Parán Community still occupies the mine to this day.[1498] As such, even assuming that the Claimant had retained legal title over the Project, its investment would still be valueless as a result of the continued occupation of the mine by the Parán Community. In other words, regardless of whether the Claimant had concluded this pledge agreement with PL Huaura, the Claimant would have still lost the entire value of its investment. As such, the Claimant's decision to enter into a pledge agreement with PLI Huaura in June 2016 cannot even be viewed as a "concurrent cause" of the Claimant's loss of its investment.

959 Furthermore, the Claimant has already demonstrated above in Section 10.1.2 that PLI Huaura's foreclosure was the **normal and foreseeable consequence** of the Respondent's failure to restore to the Claimant possession of the Invicta mine. It follows that neither the Claimant's decision to grant PLI Huaura a pledge over its shares in IMC, nor PLI Huaura's subsequent enforcement of the pledge can be seen as a "cause" – much less a "supervening cause" – of the Claimant's loss of its investment. These two "circumstances" alleged by the Respondent have therefore no bearing on the issue of proximate causation.

[1497] Counter-Memorial, 24/03/2022, p. 353 *et seq.* (para. 755).

[1498] See *supra* Section 2.1.

960 Finally, as explained by Mr Ellis in his second witness statement,[1499] it is standard practice in the mining industry, and in project finance more generally, to set up a special purpose vehicle, such as IMC, to hold the project's assets and secure any project financing against those assets as collateral.[1500] It follows that Lupaka's decision to pledge its shares in IMC cannot be viewed as a wilful or negligent act that manifests a lack of due care for one's property or rights.

961 This is the key distinction between the instant case and the allegedly "analogous situation" presented in *Inversión y Gestión de Bienes v. Spain* on which the Respondent relies.[1501] Indeed, this alleged analogy does not withstand scrutiny. In that case, the tribunal denied the investors' claims on the basis that they had **wilfully** decided to stop making mortgage payments after Spain's alleged interference with their investment, even though they knew that their failure to make these payments could possibly lead to their creditor foreclosing on the mortgage.[1502] By contrast, in the present case, the Respondent merely impugns the Claimant's decision to "grant PLI Huaura the right to seize the Invicta shares" some two years before the Respondent's breaches.[1503] Crucially, the Respondent does not – and cannot – argue that the Claimant wilfully decided not to make gold repayments to PLI Huaura. Accordingly, the Respondent's reliance on *Inversión y Gestión de Bienes v. Spain* to argue that the pledge of the IMC shares amounts to contributory fault or severs causation is clearly misplaced.

[1499] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 13 *et seq.* (Section 4.1).

[1500] See also Investopedia, "Project finance" (accessed on 22/09/2022), at **Exhibit C-634**, at **Exhibit C-529** ("Project financing is a loan structure that relies primarily on the project's cash flow for repayment, with the **project's assets**, rights, and interests held **as secondary collateral**.") (emphasis added); V. Rudenno, *The Mining Valuation Handbook,* Chapter 3*,* 4th ed. (2012), at **Exhibit CLA-156**.

[1501] Counter-Memorial, 24/03/2022, p. 354 (para. 756).

[1502] Counter-Memorial, 24/03/2022, p. 354 (para. 756) (citing to *Inversión y Gestión de Bienes v. Kingdom of Spain*, ICSID Case No. ARB/12/17, Award (Oreamuno Blanco), 14/08/2015, at **Exhibit RLA-0118**, p. 36 *et seq.* (paras. 178-179) ("The [c]laimants **stopped making** the mortgage payments, **knowing** that this constituted a breach of the signed contract, **possibly leading** to the initiation by [the banking entity] of an **enforcement** proceeding, as indeed happened.") (emphasis added).

[1503] Counter-Memorial, 24/03/2022, p. 355 *et seq.* (para. 755).

962 In any event, as the Claimant incurred the whole damage before the foreclosure, even assuming *arguendo* that the Respondent could prove that the Claimant's decision was somehow wilful or negligent, this decision could not have contributed, much less materially and significantly, in any way to the damage claimed.

963 For the above reasons, the Respondent's argument on causation and contributory fault in relation to the Claimant's decision to pledge its shares to PLI Huaura should be dismissed.

10.1.3.3 The Respondent has not established that PLI Huaura's foreclosure on the IMC shares was a supervening cause of the Claimant's loss or the result of the Claimant's contributory fault

964 Although the Respondent fails to clearly distinguish its arguments regarding PLI Huaura's foreclosure on the Claimant's shares, they appear to be two-fold:

965 On the one hand, the Respondent argues that, in the **Actual Scenario**, PLI Huaura's foreclosure on the Claimant's shares was a supervening event that broke the chain of causation between the Respondent's FTA violations and the Claimant's damage, and should therefore be considered as sole cause of the Claimant's damage.[1504]

966 On the other hand, the Respondent contends that, in the **But-for Scenario**, PLI Huaura would still have foreclosed on the Claimant's shares and, as such, the but-for value of the Claimant's investment should be considered nil at the Valuation Date.[1505]

967 The Respondent's first argument is flawed for two main reasons.

968 First, as already discussed in Sections 9.5 and 10.1.2 above, the Claimant had already lost the entire value of its investment prior to PLI Huaura's foreclosure. Therefore, the Claimant strongly disputes the Respondent's fallacious assertion according to which "[the] Claimant [allegedly] admits

[1504] See *e.g.*, Counter-Memorial, 24/03/2022, p. 353 *et seq.* (para. 755).

[1505] See *e.g.*, Counter-Memorial, 24/03/2022, p. 173 *et seq.* (paras. 342-347).

that it lost its investment **only after** PLI Huaura exercised its contractual right to seize [the Claimant's] shares".[1506] This assertion is plainly contradicted by the evidence. In fact, the Respondent itself refers to the fact that, **shortly before** the seizure, the Claimant's shareholding in IMC had been valued at USD 13 million.[1507] To recall, this valuation served to determine the resulting balance, if any, that would still be owed by Lupaka to PLI Huaura after transfer of the pledged shares on its obligation to pay the USD 15.9 million Early Termination Amount.[1508] Therefore, as explained by Accuracy in their second report, it follows from this contemporaneous valuation that, even before PLI Huaura's foreclosure, the overall value of the Claimant's investment was already nil, and even negative.[1509]

969 Accordingly, the Claimant sustained the whole of the damage it claims in this arbitration before PLI Huaura's foreclosure on its shares – which cannot therefore be even a "concurrent cause" of the Claimant's damage. Since the Claimant's loss of the value of its investment was solely caused by the illegal actions and omissions of the Parán Community and the Respondent's other organs, the Tribunal can award the damages claimed by the Claimant, without having to reach a decision on whether PLI Huaura's foreclosure on the Claimant's shares was proximately caused by the Respondent's violations of the FTA.

970 This issue would only arise and fall to be considered if the Claimant had brought a claim in relation to **additional losses** suffered as a result of PLI Huaura's foreclosure (*e.g.*, the value of inter-company loans that Lupaka never recovered from IMC) (which, for the avoidance of doubt, does not form part of the Claimant's claims) or if the Claimant's investment still **retained some value** before the foreclosure (which is not the case, as

[1506] See *e.g.*, Counter-Memorial, 24/03/2022, p. 353 *et seq.* (para. 755) (emphasis added).

[1507] See *e.g.*, Counter-Memorial, 24/03/2022, p. 333 (para. 709).

[1508] PLI, Notices of enforcement of the Pledge over IMC's shares (SPA), 24/07/2019, at **Exhibit C-55**.

[1509] The value of the Claimant's investment can be assessed as the sum of the Project's assets – approx. USD 13 million as estimated by PwC Peru – and its liability to PLI Huaura, approx. USD 15.9 million, *i.e.*, a negative value of 2.9 million overall. See Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 37 (para. 4.62(a)).

shown by the contemporaneous evidence). Neither of these situations are presented here, the issue is therefore irrelevant to the Claimant's claims.

971 For the sake of completeness, the Claimant demonstrates below that PLI Huaura's foreclosure was in any case a direct and foreseeable consequence of the Respondent's violations of the FTA and, therefore, any further losses resulting from PLI Huaura's foreclosure would be recoverable.

972 Second, assuming *arguendo* that it would be necessary for the Claimant to prove that PLI Huaura's foreclosure was caused by the Respondent's violations of the FTA (*quod non*), the relevant question is whether PLI Huaura's foreclosure was the direct and foreseeable consequence of the Respondent's breaches, as set out in Section 10.1.1 above. As already explained in the Memorial,[1510] it was publicly known that Lupaka had entered into the PPF Agreement with Pandion[1511] and that, unless it could resume possession of the mine and start its mining activities, Lupaka would be in default of its obligations under the PPF Agreement which would inevitably lead to the termination of this agreement, and possibly foreclosure.[1512] Lupaka also alerted the central authorities to this risk at the time.[1513]

973 Accordingly, the Claimant's inability to make gold repayments under the PPF Agreement and PLI Huaura's subsequent foreclosure on the pledged shares were the direct and foreseeable consequence of the Respondent's failure to restore to the Claimant possession of the Invicta mine.

974 In this regard, the Respondent does not contest that PLI Huaura foreclosed on the Claimant's shares due to the Claimant's continued inability to regain

[1510] Memorial, 01/10/2021, p. 63 (para. 195).

[1511] Lupaka News Release, "Lupaka Gold Completes Financing for Development of the Invicta Gold Project", 13/02/2018, at **Exhibit C-281**, p. 1; Lupaka News Release, "Lupaka Gold Executes Definitive Agreement to Finance Invicta Mine Development and Mining Operations", 30/06/2016, at **Exhibit C-282**; Lupaka Gold Corp., "Lupaka Gold Receives First Tranche Under Amended Invicta Financing Agreement", 09/08/2017, at **Exhibit R-0050**; Lupaka News Release, "Lupaka Gold Receives US$2 Million from Second Tranche of the Pre-Paid Forward Gold Purchase Agreement", 08/11/2017, at **Exhibit C-279**.

[1512] "Construction of Invicta has been paralysed for nine months", *Minera Andina* (SPA), 05/07/2019, at **Exhibit C-20**.

[1513] Letter from Lupaka to MEM, 06/02/2019, at **Exhibit C-15**, p. 2.

access to the mine and make gold repayments. The Respondent merely argues that:

> "[the] Claimant has not proven that the **only reason** that PLI Huaura was able to exercise its contractual right to foreclose on [the] Claimant's Invicta shares was an alleged Treaty breach by Peru [and] PLI Huaura apparently had **grounds unrelated** to the [Blockade] to seize the Invicta shares […]."[1514]

975 The Respondent's position is incorrect both as matter of law and fact. Even if it were true that PLI Huaura had foreclosed on the shares for reasons unconnected to the Claimant's continued loss of access to the Invicta mine, these other reasons would only be a "concurrent cause" of PLI Huaura's foreclosure which does not affect the Respondent's liability to pay full compensation, unless the Respondent is able to show contributory fault. Here, the Respondent has made no cogent argument to prove the elements to establish contributory fault.

976 More importantly, as explained by Mr Ellis in his second witness statement, all the alleged breaches relied on by PLI Huaura in its Notice of Acceleration were either a direct result of the Blockade or related to requirements that had been waived by PLI Huaura in the previous months.[1515] In his second witness statement, Mr Ellis summarises his observations on the various grounds invoked by PLI Huaura in the following table:

Table 1*[1516]*

No.	Lonely Mountain's Notice of Acceleration, Schedule I "Specified Defaults"[1517]	My observations
1.	(a) pursuant to Section 13(1)(a) of the PPF Agreement, the Seller's failure to Deliver or cause to be Delivered any amount of Gold as and when required by the PPF Agreement and the Seller's admission of such default in its	Directly related to Parán's illegal Blockade.

[1514] Counter-Memorial, 24/03/2022, p. 358 (para. 763) (emphasis added).

[1515] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 23 *et seq.* (paras. 52-54).

[1516] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 24 *et seq.* (Table 1).

[1517] PLI, Notice of Acceleration under PPF Agreement, 02/07/2019, at **Exhibit C-54**, p. 4 *et seq.*

	press release re: Lupaka Provides Update on Illegal Demonstration at Invicta, Announces Non-Brokered Private Placement, and Management Changes, dated as of January 28, 2019;	
	(b) pursuant to Section 13(1)(f) of the PPF Agreement, the Obligors' failure to comply with terms, covenants or agreements in the PPF Agreement or any other Transaction Document to which it is a party, and such failure remaining unremedied for thirty (30) days, with respect to:	Directly related to Parán's illegal Blockade.
2.	(i) the Seller's failure to timely Deliver, or cause to be Delivered, the Scheduled Monthly Quantity of Gold for each Monthly Delivery Date, pursuant to Section 5 of the PPF Agreement;	
3.	(ii) the Seller's failure to timely deliver monthly management reports, pursuant to Section 12(1)(a)(vi) of the PPF Agreement;	Lupaka provided all the relevant information to Pandion and/or Pandion waived this reporting requirement. Indeed, PLI Huaura under Pandion's control never notified a breach in relation to this.
4.	(iii) the Seller's failure to timely deliver Capital Expenditure Reports, pursuant to Section 12(1)(a)(viii) of the PPF Agreement;	Lupaka provided all the relevant information to Pandion and/or Pandion waived this reporting requirement. Indeed, PLI Huaura under Pandion's control never notified a breach in relation to this.
5.	(iv) the Seller's failure to timely deliver Monthly Reports, pursuant to Section 12(1)(a)(ix) of the PPF Agreement;	Lupaka provided all the relevant information to Pandion and/or Pandion waived this reporting requirement. Indeed, PLI Huaura under Pandion's control never notified a breach in relation to this.
6.	(v) the Seller's failure to timely deliver notice of any anticipated failure to Deliver as required on such Monthly Delivery Date, pursuant to Section 12(1)(c)(i) of the PPF Agreement;	This reporting requirement relates to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade. Lupaka provided all the relevant information to Pandion and/or Pandion waived this reporting requirement. Indeed, PLI Huaura under Pandion's

		control never notified a breach in relation to this.
7.	(vi) the Seller's failure to timely deliver statements of the chief financial officer of the Seller setting forth the details of Seller Default or Events of Default, pursuant to Section 12(1)(c)(ii) of the PPF Agreement;	This reporting requirement relates to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade. Lupaka provided all the relevant information to Pandion and/or Pandion waived this reporting requirement. Indeed, PLI Huaura under Pandion's control never notified a breach in relation to this.
8.	(vii) the Seller's failure to timely maintain a fully executed and enforceable Mineral Sales Contract/Refining Agreement containing terms substantially similar to those set forth in Schedule E of the PPF Agreement, pursuant to Section 12(1)(r) of the PPF Agreement;	Pandion had waived this requirement.[1518]
9.	(viii) the Seller's failure to perform and cause all other Obligors to perform, all of its and their obligations under all Material Agreements in all material respects, pursuant to Section 12(1)(w) of the PPF Agreement; and	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.
10.	(ix) the Seller's failure to timely cure funding deficits, pursuant to Section 12(1)(aa) of the PPF Agreement;	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.
11.	(c) pursuant to Section 13(1)(m) of the PPF Agreement, the insolvency and general inability of the Seller to pay its debts as they become due;	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.
12.	(d) pursuant to Section 13(1)(n) of the PPF Agreement, the occurrence, in the opinion of the Buyer, of an event or development that would reasonably be expected to have a Material Adverse Effect;	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.
13.	(e) pursuant to Section 13(1)(s)(i) of the PPF Agreement, the deviation by the Obligors from the Initial Expense Budget, where such deviation has had, in the sole and absolute discretion of the Buyer, a Material Adverse Effect; and	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.

[1518] Lupaka, MD&A for the period ended 30 June 2018 and 30 June 2017, at **Exhibit C-293**, p. 29.

14.	(f) pursuant to Section 13(1)(s)(ii) of the PPF Agreement, the changes by the Obligors from the Initial Production Forecast and updated Annual Production Forecasts, where such deviation has had, in the sole and absolute discretion of the Buyer, a Material Adverse Effect.	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.

977 Mr Ellis explains that, apart from several reporting requirements and a covenant relating to offtake agreements (all of which had been waived by PLI Huaura under Pandion's ownership), all the breaches set out in PLI Huaura's Notice of Acceleration related directly to the Blockade. In other words, the only grounds on which PLI Huaura could rely to justify its termination of the PPF Agreement and subsequent foreclosure on the pledged shares were those directly connected to the Blockade.

978 None of the Respondent's arguments therefore alter the conclusion that PLI Huaura's foreclosure on the Claimant's shares was a direct and foreseeable consequence of the Respondent's violations of the FTA. Accordingly, even assuming *arguendo* that some part of the Claimant's claimed damages – the complete loss of the value of its investment – was only incurred after PLI Huaura's foreclosure, these residual damages would also be recoverable.

979 The Respondent's second argument – according to which PLI Huaura would have foreclosed on the Claimant's shares in the But-for Scenario – is premised on the two other "causal circumstances" alleged by the Respondent:

a) the Invicta mine's entry into production would have been delayed due to outstanding regulatory approvals (the Respondent's "fourth causal circumstance"); and

b) Lupaka would not have had sufficient processing capacity to meet its gold repayment obligations under the PPF Agreement (the Respondent's "fifth causal circumstance").

980 For this reason, the Claimant addresses this second argument relating to the value of the Claimant's investment in the But-for Scenario in Sections 10.1.3.4 and 10.1.3.5 below which deal with the Respondent's fourth and fifth "causal circumstances", respectively.

10.1.3.4 The final regulatory approvals for production still pending in October 2018 did not cause the Claimant's loss of its investment in August 2019

981 The Respondent argues, contrary to the evidence, that the fact that the Claimant were still waiting for final approvals from the Peruvian authorities to start production in October 2018 is a further "causal circumstance" which "resulted in the failure of [the] Claimant's investment, and thus its alleged damages".[1519]

982 These allegations ignore the evidence on record. The fact that Lupaka was still expecting final approvals from the Peruvian authorities to start production has nothing to do with the *actual* loss suffered by the Claimant. As explained above in Section 10.2, despite the Respondent's efforts to obfuscate this issue, the chain of causation is straightforward in this case and simply consists of two "concurrent causes": (i) the criminal conduct of the Parán Community which deprived of the Claimant of the use and enjoyment of its investment and (ii) the Respondent's failure to protect the Claimant and restore to the Claimant possession of the Invicta mine. These two factors alone caused the Claimant's entire damage.

983 The Respondent's argument does not alter this conclusion and does not go to the issue of proximate causation. Indeed, the Respondent cannot seriously claim that these pending regulatory approvals *actually* caused the Claimant's loss of its investment, nor that they can be viewed to break the direct chain of causation set out above.

984 Here, the Respondent is merely claiming that some hypothetical alternative "cause" **could** have caused the same damage to the Claimant in the But-for Scenario. This in turn means that this argument, properly construed, only relates to the **quantum** of the Claimant's damages, **not causation**.

985 To argue, as the Respondent does, that the Tribunal should award no compensation to the Claimant, the Respondent would have to show that, in the absence of its violations of the FTA, this "causal circumstance" – *i.e.*, the fact that the Claimant was still expecting final approvals to start production in October 2018 – would somehow have led to the complete

[1519] Counter-Memorial, 24/03/2022, p. 351 (para. 748).

destruction of the value of the Claimant's investment at the Valuation Date in the But-for Scenario.

986 The Respondent's argument rests on four equally implausible assumptions, namely that:

e) the Respondent's own authorities would have unnecessarily delayed – beyond December 2018 – granting IMC the final two approvals to start production;

f) Lupaka would been under an obligation to 'deliver gold' in December 2018;

g) Lupaka would not have been able to meet this obligation; and

h) PLI Huaura would have relied on this default to foreclose on the Claimant's shares.

987 To succeed in its contention, the Respondent would have to prove each of these assumptions on the balance of probabilities. As demonstrated below, there is no basis in evidence to support any of these four assumptions.

988 First, as demonstrated above in Section 3.3, although the Respondent alleges that IMC still had to comply with three requirements to receive a mining certificate allowing it to start production, the issuance of this certificate was in fact **only subject to two final approvals** in October 2018:

- the final MEM's inspection to certify that the mine development works had been completed in accordance with the approved mine plan;[1520] and
- the DEAR's certification of the new water management system that IMC had built in accordance with the MEM requirements.[1521]

989 On the contrary, the Claimant has already demonstrated in Section 3.3.3 above that, contrary to the Respondent's allegation, the approval of an

[1520] See *supra* Section 3.3.1.

[1521] See *supra* Section 3.3.2.

amended Mine Closure Plan was not a condition to the issuance of a mining certificate under Peruvian law.[1522]

990 In relation to the two outstanding conditions to receive its mining certificate, IMC had completed all the works required to start production and it was only waiting for the formal approval of the Peruvian authorities:

a) As explained in Section 3.3.1 above, IMC had already completed the works set out in its approved mine plan and was simply waiting for the MEM's final inspection of the mine site.

b) As explained in Section 3.3.2 above, IMC had also built a new water management system in accordance with the required by the MEM and this new water management system had already been successfully tested by the Respondent's own water authority, ALA. In this respect, IMC will only waiting for the DEAR to certify the new water management system.

991 In fact, in its Counter-Memorial, the Respondent does not deny that IMC had satisfactorily completed these works, but simply argues that:

> "[the] Claimant provides no evidence for its suggestion that [in the But-for scenario] it would have […] completed each of the pending regulatory steps […] to bring the mine into production **in a period of less than two months**."[1523]

992 In other words, the Respondent is not claiming that the Claimant did not satisfy the substantive conditions for issuance of a mining certificate to start exploitation, but simply that its own authorities, namely the MEM and the DEAR, would not have issued the final two regulatory approvals **within two months** from the start of the Blockade (*i.e.*, before December 2018). In essence, the Respondent is claiming that its own authorities would have unnecessarily delayed granting the final two approvals IMC needed to start production.

993 In the absence of any evidence suggesting that there was any defect with IMC's works, the Respondent still seeks to justify these delays on the basis

[1522] See *supra* Section 3.3.3.

[1523] Counter-Memorial, 24/03/2022, p. 358 *et seq.* (para. 765) (emphasis added).

of procedural requirements. Both excuses used by the Respondent to justify these anticipated delays are equally unavailing.

994 On the one hand, the Respondent argues that the MEM's site inspection would have been delayed because IMC had filed the certificate of quality assurance – while in fact, as explained in Section 3.3.1, IMC swiftly provided a copy of the certificate in response to the MEM's request and this certificate was based on inspections that had already carried out before the Blockade. On the other hand, the Respondent wrongly alleges that the DEAR could not certify the new water management system until IMC's Third ITS had been approved whereas, as demonstrated in Section 3.3.2, the two procedures were completely independent from one another.

995 This analysis shows that the Respondent's first assumption is both speculative and self-serving. It follows that it should be assumed for the purposes of the But-for Scenario that the Respondent's authorities would have acted reasonably and diligently and issued the two final approvals without delay. The Respondent has not adduced any valid reason to assume otherwise.

996 The Respondent's second assumption is equally unlikely. Mr Ellis explains in his second witness statement that the more likely assumption is that Lupaka would only have been required to start making gold repayment in **January 2020**.

997 Indeed, in early October 2018, Pandion (who owned PLI Huaura at the time) had already approved and agreed to finance the Claimant's acquisition of the Mallay. As reflected in their contemporaneous correspondence and cashflow models, Pandion and the Claimant anticipated that, during the first year of production, Lupaka would produce at a lower rate relying on third-party toll mills for processing before processing all its ore at a fully upgraded Mallay plant from August 2019 onwards.[1524] On that basis, Pandion and Lupaka had agreed to defer

[1524] Email chain between Lupaka and Pandion, 29/05/2019-30/05/2018, at **Exhibit C-298**.

Lupaka's gold repayment obligations until September 2019 once the acquisition and upgrade of the Mallay plant had been completed.[1525]

998 Mr Ellis explains in his second witness statement that, a few days before the Parán Community set up its illegal Blockade – which started on the day before Buenaventura, Pandion and Lupaka were due to sign the purchase and financing agreements for Mallay, Buenaventura asked to postpone the signing of the Mallay Purchase Agreement until it obtained the Mallay Community's consent to transfer its related community agreements to Lupaka[1526] – which it received in March 2019.[1527] As explained by Mr Ellis, in the absence of the Blockade, Buenaventura and Lupaka would have therefore been able to conclude the Mallay transaction in March 2019.

999 As Pandion had always been supportive of the Mallay acquisition and was aware of the time needed to set up the Mallay plant, Mr Ellis explains that it is most likely, in his view, that Pandion would have agreed to defer Lupaka's gold repayment obligations until January 2020 on account of the delay caused by Buenaventura to the original timeline.[1528] In this regard, Mr Ellis provides several in his second statement, showing that Pandion had always been willing to accommodate the production and repayment schedules to the realities of the Project and suspend or defer Lupaka's obligations for more longer periods of time on previous occasions.[1529] In light of this, contrary to the Respondent's second assumption, it is more likely than not that Pandion would not have required Lupaka to start making gold repayments until January 2020.

1000 As noted above, the Respondent's contention – according to which the Claimant would have equally lost its investment in the But-for Scenario – relies on two further assumptions, namely that, in the (unlikely) event that Pandion would have required Lupaka start making gold repayments in

[1525] Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement (Final version), 05/10/2018, at **Exhibit C-285**, p. 45.

[1526] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 17 *et seq*. (paras. 36-38).

[1527] Notarized Addendum to the Easement Contract between Buenaventura and the Mallay Community (SPA), 14/03/2019, at **Exhibit C-289**.

[1528] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 18 *et seq.* (para. 40).

[1529] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 19 *et seq*. (paras. 41-46).

December 2018, Lupaka would not have been able to comply with this obligation (the Respondent's third assumption) and that, instead of seeking to reschedule Lupaka's delivery obligations as contemplated under the PPF Agreement, [1530] Pandion would have elected to terminate the PPF Agreement and enforce against the Claimant's shares (the Respondent's fourth assumption).

1001 The Respondent's third assumption is closely related to the fifth "causal circumstance" addressed in the following Section, namely that, according to the Respondent, Lupaka would not have been able to process its ore at sufficient rate after starting commercial production. For this reason, the Claimant addresses the Respondent's further two assumptions together in Section 10.1.3.5 below.

1002 For the sake of completeness, it should be noted that the Respondent does not explain, let alone demonstrate, how this "circumstance" could be amount to contributory fault on the part of the Claimant. The Respondent does not even attempt to prove the three elements of contributory fault, namely causation, wilful or negligent actions or omissions showing a lack of due care for one's property or rights, and a material and significant contribution to one's injury.

10.1.3.5 The performance of the processing plants during pre-production testing in the summer of 2018 did not cause the Claimant's loss of its investment in August 2019

1003 The Respondent further argues that the performance of the toll mills tested by the Claimant during the summer of 2018 would constitute a fifth "causal circumstance" which "resulted in the failure of [the] Claimant's investment, and thus in the alleged damages".[1531]

1004 As noted above in relation to the Respondent's fourth "causal circumstance" in Section 10.1.3.4, this "circumstance" is also wholly unrelated to the Claimant's **actual** damage. Indeed, the Claimant's loss of

[1530] Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 56 (Section 14(1)(b)).

[1531] Counter-Memorial, 24/03/2022, p. 351 (para. 748).

its investment in August 2019 was not caused in any way by the performance of the processing plants used by IMC during pre-production testing in the summer of 2018. Contrary to the Respondent's assertions, this circumstance is not a concurrent cause of the Claimant's loss, let alone a supervening cause (*i.e.*, a "concurrent cause" that would make the damage too remote from the State's breach and thus break the chain of causation).

1005 As with the Respondent's fourth "causal circumstance", this circumstance is merely a hypothetical alternative "cause" that, the Respondent alleges, would have resulted in the complete loss of the Claimant's investment in the But-for Scenario. Again, this argument, properly construed, only relates to the **quantum** of the Claimant's damages, **not causation**.

1006 In particular, the Respondent contends that the Claimant has failed to prove that, in the But-for Scenario , the "Claimant would have (i) finished negotiating an agreement to acquire a separate processing plant (viz., the Mallay processing plant); (ii) secured the financing needed to execute that purchase; and (iii) put that plant into operation with sufficient celerity to deliver gold to its creditor on time with the deadline established under the PPF Agreement."[1532] This assertion is in turn the only support that the Respondent offers for its third assumption above that Lupaka, assuming it was required to do so by Pandion, would have been unable to fulfil its gold repayment obligations. As demonstrated below, it is no more credible than the previous two assumptions made by the Respondent.

1007 First, there is no good faith basis for the Respondent to argue that the Claimant has not shown that it "would have finished negotiating an agreement to acquire a separate processing plant".[1533] As explained by Mr Ellis in his two witness statements, in early October 2018 Buenaventura and Lupaka had already agreed the terms of the Mallay Purchase

[1532] Counter-Memorial, 24/03/2022, p. 359 *et seq.* (para. 767).

[1533] Counter-Memorial, 24/03/2022, p. 359 *et seq*. (para. 767).

Agreement that were due to be sign on 15 October 2018, the day immediately after the Blockade began.[1534]

1008 Second, it is equally inaccurate for the Respondent to argue that the Claimant has failed to show that "[it] had secured the financing needed to execute [the Mallay] purchase".[1535] In early October 2018, Lupaka had also agreed with Pandion the final terms of the Amendment and Waiver No. 3 to the PPF Agreement which they had agreed to sign on the same day as the Mallay Purchase Agreement on 15 October 2018.

1009 Third, contrary to the Respondent's assertion, the Claimant would have had enough processing capacity once it would have started commercial production at the end of 2018. The Respondent's argument is based purely on the quantities of ore processed by the Claimant while it was still in the pre-production phase, testing the available processing options in the region. As explained by Mr Ellis in his second witness statement, a mining company would typically not wish to commit large quantities of ore to a single processing plant at this stage and will instead send small shipments to various plants to compare the results before selecting its preferred option and entering into a long-term ore supply agreement.[1536] For this reason, the volumes of ore processed during pre-production testing are not comparable to those processed later during full commercial production with a long-term contract in place with a toll mill.

1010 Mr Ellis further explains that, after trying out several processing options Lupaka had entered into a one-year contract with Huancapeti to which it had started to send larger shipments of ore in mid-October 2018, which abruptly stopped as a result of the Blockade.[1537] Mr Ellis also explains that, as part of the Mallay Purchase Agreement, Buenaventura had also agreed to allow Lupaka to process its Invicta ore at the Mallay plant until Lupaka formally took over ownership of the plant upon completion on the

[1534] Witness Statement of Gordon Ellis, 01/10/2021, p. 15 (para. 52); Second Witness Statement of Gordon Ellis, 23/09/2022, p. 17 (para. 35); Draft Mallay Purchase Agreement between Buenaventura and IMC (Final version) (SPA), 05/10/2018, at **Exhibit C-287**.

[1535] Counter-Memorial, 24/03/2022, p. 359 *et seq*. (para. 767).

[1536] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 34 *et seq.* (para. 79).

[1537] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 36 *et seq*. (paras. 84-85).

transaction.[1538] During the first year of commercial production, the Claimant could have relied on Huancapeti (which could ensure uninterrupted processing of the Claimant's ore at 355 t/d) and Mallay (which would offer a processing capacity of 590 t/d, save for the three-month interruption required after March 2019 to instal the new copper circuit after the completion of the Mallay transaction).[1539] On that basis, Mr Ellis explains that IMC would have had more than enough processing capacity to process its ore until the Mallay plant was fully upgraded.[1540]

1011 In any event, even assuming for the sake of argument that Lupaka would not have had enough processing capacity to start production at 355 t/d in November 2018 and that Pandion would have required Lupaka to make the first gold repayments in December 2018, Micon shows in its report that Lupaka would have been able to satisfy its obligations under the PPF Agreement. Indeed, Micon demonstrates that it would have been sufficient for Lupaka to process only 30 t/d between November 2018 and February 2019 to make the initial gold repayments.[1541]

1012 In this regard, as pointed out by Mr Ellis in his second witness statement, the Respondent and its quantum expert, AlixPartners, appear to misconstrue the nature of Lupaka's obligations under the PPF Agreement. Mr Ellis clarifies that the PPF Agreement did not require Lupaka to deliver actual gold bullions to Pandion. Instead, the agreement was structured in such a way that Lupaka would use the proceeds of its sales of concentrates to offtakers to credit Pandion's unallocated gold account (*i.e.*, an account simply denominated in gold, and not an account on which actual gold is deposited).[1542] Moreover, Mr Ellis explains that under the terms of the PPF Agreement, Lupaka could have used cash to pay for any shortfall in the value of the concentrates. In this respect, Mr Ellis emphasises the strong

[1538] Draft Mallay Purchase Agreement between Buenaventura and IMC (Final version) (SPA), 05/10/2018, at **Exhibit C-287**, p. 20 (Art. 10).

[1539] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 38 *et seq.* (para. 88).]

[1540] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 39 (para. 89).

[1541] Expert Report of Christopher Jacobs, 21/09/2022, p. 39 *et seq.* (Section 6.1).

[1542] LBMA website, "A Guide to the Loco London Precious Metals Market: 8. Precious Metal Accounts" (accessed on 22/09/2022), at **Exhibit C-635**.

track-record that Lupaka had raising funds in relation to the Invicta mine until the Blockade occurred.[1543]

1013 For all these reasons, Mr Ellis considers that it is extremely unlikely that, if required to do so, Lupaka would not have been able to make the initial gold repayments to Pandion in December 2018 onwards.[1544]

1014 Finally, even in the unlikely event that Lupaka would have failed to meet certain instalments under the PPF Agreement, Mr Ellis points out that the PPF Agreement required Pandion to use its best efforts to agree to reschedule the gold repayments[1545] and that it would not have been in Pandion's interest to cause Lupaka to default on the PPF Agreement and foreclose on the Claimant's shares in IMC. Indeed, it seems highly unlikely that Pandion would have foreclosed on the Claimant's shares in such a situation given that Pandion, as a financial institution, had no interest in taking over IMC and operate itself the Invicta mine. Rather than foreclosing on the Claimant's shares, it is much more likely that Pandion would have rescheduled Lupaka's obligations as it had previously done on several occasions to adjust to the advancement of the Project.

1015 In summary, the evidence shows that the Respondent's assertion according to which its fourth and fifth alleged "circumstances" would have caused the complete loss of the Claimant's investment in the But-for scenario is completely meritless.

1016 In fact, as discussed below, Accuracy already accounts for the possible risks associated with the outstanding regulatory approvals or the ramp-up to full commercial production as part of the discount rate in the calculations of the fair market value of the Project in the But-for scenario.

1017 For the sake of completeness, it should be noted that the Respondent does not explain, let alone demonstrate, how this "circumstance" could be amount to contributory fault on the part of the Claimant. The Respondent does not even attempt to prove the three elements of contributory fault, namely causation, wilful or negligent actions or omissions showing a lack

[1543] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 43 (para. 101).

[1544] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 42 *et seq.* (para. 100).

[1545] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 22 (para. 48).

of due care for one's property or rights, and a material and significant contribution to one's injury.

10.2 The Claimant is not claiming compensation for prospective investments

1018 The Respondent alleges that compensation for damages should not be based on a counterfactual scenario where the Claimant would have produced ore at a rate of 590 t/d because the production at this rate is premised on the Claimant's prospective acquisition of the Mallay Plant and prospective investments are not protected investments under Article 847 of the FTA.[1546] This argument is a red herring.

1019 The Claimant is obviously not asking to be compensated for the expropriation of the Mallay Plant. The reference to *Gold Reserve v. Venezuela*[1547] is therefore not helpful to the Respondent's case. In *Gold Reserve v. Venezuela*, the tribunal refused to "compensate Claimant for the deprivation of a right that it never possessed",[1548] but which the claimant was likely to acquire. The claimant in *Gold Reserve* requested compensation for the expropriation of a parcel of land that should have been included in the mining concession that was subsequently expropriated. According to the claimant, the parcel was not included in the concession due to a surveying error.[1549] However, the tribunal agreed with the respondent that the parcel in question was not part of the investment and should therefore be disregarded for all relevant purposes.[1550]

1020 The factual background in *Gold Reserve* differs significantly from the case at hand. As indicated above, the Claimant is not requesting compensation for an expropriation of the Mallay Plant. As described above in Section

[1546] Counter-Memorial, 24/03/2022, p. 363 (paras. 777).

[1547] Counter-Memorial, 24/03/2022, p. 363 *et seq.* (paras. 779).

[1548] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 212 (para. 829).

[1549] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 116 (para. 483).

[1550] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 118 (para. 492).

10.1.3.5, the Claimant was about to acquire the Mallay Plant immediately before the Blockade in order to process ore at a rate of 590 t/d instead of 355 t/d. Contrary to the claimant's case in *Gold Reserve*, Lupaka does not claim that the Mallay Plant was part of the Claimant's investment. Rather, the imminent acquisition of the Mallay Plant supports the Claimant's contemporaneous business plan according to which it would have processed ore at a rate of 590 t/d.

1021 In *Lemire v. Ukraine*, the investor based its claim on the fact that in the But-For Scenario absent the State's breaches, the investor would have been able to acquire certain radio frequencies to follow through with its business plan for the development of a national broadcasting company in Ukraine. In assessing the claimant's claims, the *Lemire* tribunal considered that it was sufficient for the investor to prove on the balance of probabilities that:

> "if the tenders had hypothetically been decided in a fair and equitable manner, and Claimant had participated in them, he (and not some of the other participants) would have won the disputed frequencies."[1551]

1022 In other words, the *Lemire* tribunal relied on a **but-for test**, and ultimately found that the claimant in that case had demonstrated that, if Ukraine had not violated its treaty obligations, the claimant would have acquired the assets in question (here radio licences).[1552]

1023 The *Lemire* tribunal is not alone in applying a but-for test when selecting the appropriate business plan for assessing damages. In *Tethyan v. Pakistan*, the claimant's case on quantum required the claimant to conclude a Mineral Agreement with the Governments of Balochistan and Pakistan to start production as envisaged in the business plan. The Parties were in dispute as to whether a Mineral Agreement would have been concluded at all but for the respondent's breach.

[1551] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28/03/2011, at **Exhibit CLA-95**, p. 53 (para. 171).

[1552] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28/03/2011, at **Exhibit CLA-95**, p. 56 (para. 191).

1024 The tribunal in that case also engaged in a but-for analysis to determine whether it was likely that such an agreement would have been concluded in order to determine quantum:

> "At the outset of its analysis of whether Claimant has established that the Parties would have concluded a Mineral Agreement at all, the Tribunal notes that it is undisputed that a Mineral Agreement was not a strictly necessary requirement for constructing and operating the mine. However, as demonstrated, *inter alia*, by Claimant's contemporaneous evaluation in the Feasibility Study of the risk that no mineral agreement would be concluded, […] it was considered highly desirable and relevant to reach an agreement on the commercial terms and in particular the fiscal regime that would apply to the project. Consequently, the Tribunal also considers it common ground that the question whether a Mineral Agreement would have been concluded or, from the perspective of a willing buyer in November 2011, whether it was likely that a Mineral Agreement would be concluded following the approval of TCCP's Mining Lease Application is relevant to determining the value of the project as of the valuation date."[1553]

1025 In the subsequent but-for analysis the Tethyan tribunal found that "an agreement would likely have been reached between the negotiating parties"[1554] and therefore assumed for determining the quantum of the claimant's claim that a Mineral Agreement would have been concluded.[1555]

1026 In the present case, the facts show that it is **highly probable**, **if not certain**, that the Mallay transaction would have taken place in the absence of the Blockade and the Respondent's breaches:

a) In early October 2018, after five months of negotiations, Lupaka, Buenaventura and Pandion had finalised both the Mallay Purchase

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[1553] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12/07/2019, at **Exhibit CLA-94**, p. 126 *et seq.* (para. 402).

[1554] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12/07/2019, at **Exhibit CLA-94**, p. 130 (para. 415).

[1555] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12/07/2019, at **Exhibit CLA-94**, p. 131 (para. 417).

Agreement and the corresponding financing agreement (the Draft Amendment and Waiver No. 3 to the PPF Agreement).[1556]

b) The date for signatures of these two agreements had already been set.[1557]

c) A press release announcing the transaction was ready to be issued on the day following the signing of the deal.[1558]

d) Even after the Parán Community set up its illegal Blockade preventing the Claimant to access the Invicta mine, Buenaventura and Lupaka continued to work towards the completion of the acquisition. Lupaka's and Buenaventura's community relations brokered an agreement with the Mallay Community in March 2019 and everything was ready for the deal to be concluded. The only reason the deal was not signed at that time is that Pandion insisted – understandably – that the Claimant regained access to the Invicta mine as a condition precedent to its financial support to the transaction.[1559]

1027 Consequently, on the balance of probabilities, the Claimant would have processed ore at a rate of 590 t/d, but for the Respondent's breaches. The Claimant's losses therefore have to be assessed on that basis.

10.3 The fair market value of Lupaka's investment but for Peru's breaches

1028 Before dealing with the Respondent's defences on the valuation of Lupaka's investment but for Peru's breaches, it is important to note that both the Claimant's and the Respondent's experts agree on one important aspect: the valuation method. Both experts agree that the appropriate

[1556] Draft Mallay Purchase Agreement between Buenaventura and IMC (Final version) (SPA), 05/10/2018, at **Exhibit C-287**; Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement (Final version), 05/10/2018, at **Exhibit C-285**.

[1557] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 17 (para. 35).

[1558] *Id.*

[1559] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 18 (para. 38).

method to determine the fair market value of Lupaka's investment is the income approach, or discounted cash flow method.[1560]

1029 While both experts agree on the valuation method to be used, the Respondent claims that "IMC's shares in the Invicta Project [were] worthless" on the basis of four factual allegations which it polemically describes as four "fundamental flaws" in the Claimant's quantum case and, alternatively, that the fair market value of Lupaka's investment was lower than estimated by the Claimant's quantum experts on the basis of incorrect assumptions. Both contentions are wrong.

1030 As shown below, the Respondent's factual allegations on quantum are not borne out by evidence (**Section 10.3.1**) and its criticism of the assumptions made by Accuracy in their first report are also unfounded (**Section 10.3.2**). Accordingly, the Tribunal should award compensation on the basis of the updated valuation of the Claimant's damages presented in Accuracy's second report (**Section 10.3.3**).

10.3.1 The Respondent's factual allegations on quantum are unsupported

1031 The Respondent alleges that the fair market value of Lupaka's investment was nil, irrespective of the Respondent's breaches. The Respondent and its trusted expert Isabel Santos Kunsman from AlixPartners make this remarkable allegation on the basis of four factual allegation, which, however, do not withstand scrutiny:

1032 First, the **Respondent claims that intervention by the police would not have resolved the conflict** with the Parán Community or the Blockade.[1561] As explained above Section 9.3.5.1, this allegation perverts Peru's obligations to accord the Claimant and its investment full protection and security under the FTA. It is for the Respondent, not for the Claimant to properly deal with the Parán Community and its Blockade in a manner that allows the Claimant to enjoy its investment in Peru. An alleged "pervasive

[1560] Expert Report of AlixPartners on Damages, 24/03/2022, p. 37 *et seq.* (para. 103); Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 7 (para. 1.18).
[1561] Counter-Memorial, 24/03/2022, p. 365 (para. 782).

history of social conflict in Peru's extractive industries" and its own long-standing failure to command control over remote areas of the Andes are no excuse for Peru's failure to apply the law in respect of the Parán Community members' criminal actions against the Claimant's protected investment and meet its obligations under the FTA.[1562]

1033 Second, the **Respondent claims that there was some "social license risk"** in the sense that Lupaka's investment was subject to the risk of not reaching certain agreements with local communities.[1563] As explained above in Section 3.2.2 there is simply no requirement for Lupaka to obtain a "social license". In any event, as at the Valuation Date, the Claimant already had in place land surface agreements with the communities of Santo Domingo and Lacsanga.[1564] In addition it has, through Buenaventura, received the relevant approvals from the Mallay Community regarding the purchase of the Mallay Plant, which would have allowed the Claimant to process ore at a rate of 590 t/d.[1565]

1034 Third, the Respondent claims that – irrespective of Peru's breaches – the Claimant was likely to default on the PPF Agreement because of the alleged unavailability of a processing plant with adequate capacity.[1566] This allegation is not supported by the evidence for the reasons given below.

1035 Mr Ellis explains that, given Lupaka's previous experience, Pandion would have shown flexibility regarding its financing of the Invicta Project. It is highly unlikely that it would have demanded payment of the Early Termination Amount and/or foreclosed upon Lupaka's shares in IMC at the earliest possible opportunity, as the Respondent insinuates.[1567]

[1562] See *supra* Section 9.3.5.1.

[1563] Counter-Memorial, 24/03/2022, p. 365 (para. 782) (emphasis added). See also Expert Report of AlixPartners on Damages, 24/03/2022, p. 40 *et seq.* (paras. 116-123).

[1564] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 9 (para. 23).

[1565] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 38 (para. 86); Expert Report of Christopher Jacobs, 21/09/2022, p. 32 (para. 103.R).

[1566] Counter-Memorial, 24/03/2022, p. 365 (para. 782).

[1567] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 18 *et seq*. (paras. 40-48).

1036 Moreover, Micon performed an analysis of the Claimant's ability to meet its gold repayment obligations both with and without the acquisition of the Mallay Plant. Micon conclude that "Lupaka's gold repayment obligations were achievable, both under the 355 t/d plan and the 590 t/d plan."[1568] Most importantly, Micon concluded on the basis of the contemporaneous that, even without the purchase of the Mallay Plant:

> "[…] but for the blockade that prevented access to and operation of the Invicta mine, Lupaka would otherwise have been able to produce the ore tonnages and grade required to service the PLI facility, to deliver and arrange treatment of this material at the Huancapeti and other third-party toll-treatment plants (e.g., Coriland, Huari), and to ship the resulting concentrates to market in time to meet its obligations as set out above."[1569]

1037 Further, as Mr Ellis explains, IMC had agreed with Buenaventura that it would be able to start processing ore at the Mallay Plant in the interim period, before formally taking over the plant.[1570] Indeed, the (final) draft Mallay Purchase Agreement gave Claimant the right, upon signing of the agreement, to process up to 8,000 t/month at a rate of 600 t/d at the Mallay Plant.[1571]

1038 Fourth, the Respondent and its quantum expert allege that the Claimant's experts ignored the **financing risks** associated with Claimant's existing debt and its planned acquisition of the Mallay Plant under the PPF Agreement.[1572] This allegation is equally baseless. As Accuracy have already explained in their first report and as further detailed in their second report, Accuracy did not assume that the Claimant would have obtained financing for the acquisition of the Mallay Plant under "friendlier" terms

[1568] Expert Report of Christopher Jacobs, 21/09/2022, p. 42 (para. 133).

[1569] Expert Report of Christopher Jacobs, 21/09/2022, p. 40 (para. 125).

[1570] Second Witness Statement of Gordon Ellis, 23/09/2022, p. 38 (para. 86).

[1571] Draft Mallay Purchase Agreement between Buenaventura and IMC (Final version) (SPA), 05/10/2018, at **Exhibit C-287**, p. 20 (Art. 10).

[1572] Counter-Memorial, 24/03/2022, p. 365 (para. 782).

than under the PPF Agreement.[1573] To the contrary, as the concept of fair market value reflects a notional transaction between a hypothetical buyer and seller, Claimant-specific factors or financing should generally be disregarded when performing a valuation under the fair market value standard. Therefore, Accuracy correctly assumed that a hypothetical buyer would have funded the Mallay Acquisition at its own cost of capital.

10.3.2 None of AlixPartners' criticisms of Accuracy valuation have merit

1039 The Respondent and its quantum experts claim that the Claimant's valuation of the investment but for Peru's breaches are based on unrealistic assumptions. It is, of course, not surprising to hear such criticism from a respondent State and its experts. AlixPartners' criticism can be divided into three categories, all of which are without merits: (i) comments on operational and technical assumptions (**Section 10.3.2.1**), (ii) comments on valuation assumptions (**Section 10.3.2.2**), and (iii) comments on the residual value of IMC's shares in the actual scenario (**Section 10.3.2.3**).

10.3.2.1 Accuracy's operational and technical assumptions based on the Red Cloud Model as updated by Micon are reasonable

1040 The valuation in the First Accuracy Report made certain **operational and technical assumptions** that AlixPartners acknowledged "may not be unreasonable".[1574] These assumptions concerned mainly adjustments to the Red Cloud Model, which was the basis for the 590 t/d ore production scenario. As the Tribunal will recall, Red Cloud is a market dealer focused on the junior resource sector, who updated the SRK Model which was based on an ore production of 355 t/d to reflect the prospective purchase of the Mallay Plant. AlixPartners claim that the adjustments "do not appear

[1573] Expert Report of Edmond Richards and Erik van Duijvenvoorde, 01/10/2021, p. 28 (para. 4.6); Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 40 *et seq.* (Section 5(C)).

[1574] Expert Report of Edmond Richards and Erik van Duijvenvoorde, 01/10/2021, p. 12 (paras. 2.8-2.9); Expert Report of AlixPartners on Damages, 24/03/2022, p. 50 (para. 143).

to have documentary support" and "typically have the effect of increasing" the fair market value of the Invicta Project.[1575]

1041 In response, the Claimant has appointed Micon as its independent mining expert to review the operational and technical assumptions made by Accuracy, both for the 590 t/d and 355 t/d ore production scenario. Accuracy in its second report has updated its valuation on the basis of the Micon report and taking into account AlixPartners' comments on operational and technical assumptions.[1576]

1042 Most importantly, however, Micon has performed a detailed review of the Red Cloud Model, and developed an updated mine layout, development schedule and production plan identifying specific materials to be mined in each year under the 590 t/d Scenario. Micon considers that confidence in the 590 t/d ore production scenario has been raised to a level comparable to the 2018 PEA prepared by SRK.[1577] The Claimant in this Reply therefore continues to rely on the 590 t/d ore production scenario as this scenario is supported by the updated business plan that was in place immediately before the Blockade.[1578]

10.3.2.2 Accuracy's valuation assumptions with respect to the discount rate and pre-award interest

1043 As to the **valuation assumptions**, AlixPartners criticises Accuracy for (i) the discount rate (weighted average cost of capital, WACC) used and the (ii) the rate of pre-award interest applied. Both criticisms are without basis.

1044 While AlixPartners take issue with the discount rates Accuracy used, they do not engage in detail with Accuracy's underlying assumptions nor do they provide an alternative calculation. Accuracy, in its Second Report has reiterated the basis for the discount rate (including the pre-production premiums) used and its source, a publicly available data set that was

[1575] Expert Report of AlixPartners on Damages, 24/03/2022, p. 50 (para. 143).

[1576] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 25 *et seq.* (Section 4(B)).

[1577] Expert Report of Christopher Jacobs, 21/09/2022, p. 33 (para. 103.U).

[1578] Memorial, 01/10/2021, p. 118 (para. 360).

compiled by an expert in the field of mineral project evaluation, risk assessment and due diligence.[1579]

1045 In addition, AlixPartners suggest that Accuracy has failed to account for the fact that Latin America faces specific risks, such as the risk of suspension of mining projects due to community opposition.[1580] It is essentially another iteration of what AlixPartners call one of the four "fundamental flaws" that allegedly render the Claimant's investment "worthless".[1581] This argument has no merits for a number of reasons:

1046 First, the widely used data set used to calculate the beta[1582] for precious metals industry is based on a sample where about 40% of the of entities that contributed to the data set have operations in Latin America. If there is any specific and systematic regional risk in Latin America, this risk is reflected in the discount rate used by Accuracy.[1583]

1047 Second, Accuracy has applied a further Peru-specific country risk premium to the discount rate used to reflect the additional risk associated with doing business in Peru over a "risk-free" jurisdiction.[1584]

1048 Third, adding an additional premium for the risk that mining projects are more likely to get paralysed in Peru than in other countries due to repeated failures by Peru's law enforcement to address adequately violent community opposition would reward Peru for not enforcing its own laws and not according full protection and security to its foreign investors. The tribunal in *Gold Reserve v. Venezuela* (on which the Respondent also relies) expressly rejected a similar argument made by the respondent State, holding that:

[1579] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 33 (para. 4.43).

[1580] Expert Report of AlixPartners on Damages, 24/03/2022, p. 69 *et seq.* (para. 198).

[1581] Expert Report of AlixPartners on Damages, 24/03/2022, p. 3 *et seq*. (para. 16).

[1582] The beta (β) of an investment asset is a measurement of its volatility of returns relative to the entire market. It is used as a measure of systematic risk.

[1583] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 33 *et seq.* (para. 4.47(b)).

[1584] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 33 *et seq.* (para. 4.47(c)).

> "[…] it is not appropriate to increase the country risk premium to reflect the market's perception that a State might have a propensity to [act] in breach of BIT obligations."[1585]

1049 As recognised by the *Gold Reserve* tribunal, increasing the discount on account of an alleged risk of non-compliance by the Respondent of its BIT obligations would simply create a perverse incentive for respondent States not to abide by their international commitments.

1050 As to the **pre-award interest rate**, AlixPartners notes in their report that the publication of US LIBOR settings will cease after 30 June 2023.[1586] On that basis, AlixPartners present two alternative pre-award interest calculations based on the One-Year U.S. Treasury Bill ("**UST**") and a 180-day moving average based on the secured overnight financing rate ("**SOFR**"), with a 2% premium.[1587] However, the rates put forward by AlixPartners do not amount "a commercial reasonable rate" as required under Article 812.1 of the FTA for the two following reasons.

1051 First, as explained by Accuracy in their report, UST and SOFR are not comparable to LIBOR.[1588] Indeed, these two interest rates correspond to risk-free rates that would not be available to commercial counterparties.[1589] On the contrary, LIBOR, as it is based on short-term borrowing on the

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[1585] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 217 (para. 841). See also *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, the National Iranian Oil Company*, IUSCT Case No. 39, Award No. 425-39-2, 29/06/1989, at **Exhibit CLA-67**, p. 30 (para. 111) ("any such analysis [*i.e.*, determination of the fair market value of the asset using DCF] must also involve an evaluation of the effect on the price of **any other risks** likely to be perceived by a reasonable buyer at the date in question, **excluding** only reductions in the price that could be expected to result from **threats of expropriation or from other actions by the Respondents** related thereto.") (emphasis added) (cited approvingly in *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara*, Final Award, 04/05/1999, at **Exhibit CLA-157**, p. 41 (para. 357)).

[1586] Expert Report of AlixPartners on Damages, 24/03/2022, p. 60 (para. 170).

[1587] Expert Report of AlixPartners on Damages, 24/03/2022, p. 59 *et seq.* (Section VIII).

[1588] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 34 *et seq.* (paras. 4.50-4.58).

[1589] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 35 *et seq.* (paras. 4.53 and 4.55).

interbank market, includes a typical credit risk premium for banks.[1590] For this reason, neither of the two rates proposed by the Respondent's expert, AlixPartners, can be substituted for LIBOR without adding a markup to reflect the credit risk already included in LIBOR.[1591] Based on the recent trends noted by Accuracy in their report, the Claimant considers that UST+1% would represent an appropriate proxy for LIBOR after its discontinuance in June 2023.[1592]

1052 Second, while the Claimant instructed Accuracy to calculate pre-award interest based on LIBOR+2% in their first report, the current inflationary market environment no longer supports this assumption. While in the past two decades rates offered in the interbank market, such as LIBOR, would closely track then-prevailing low inflation rates, the figure below[1593] shows that LIBOR has become strongly decoupled from inflation since mid-2020.

1053 As a result, during the last twelve months, with the inflation rate in the US averaging approx. 8%,[1594] LIBOR+2% would have been constantly below inflation rate. The same is all the more true for the two interest rates presented by AlixPartners. In practice, if the Tribunal were to adopt LIBOR+2% (or worse, UST+2% or SOFR+2% as suggested by

[1590] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 35 (paras. 4.52-4.53).

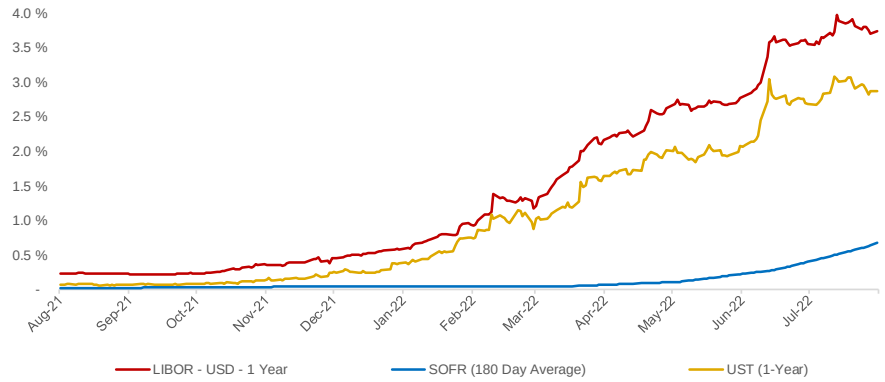
[1591] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 36 (paras. 4.56).

[1592] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 36 (para. 4.58).

[1593] Graph and data from https://fred.stlouisfed.org/.

[1594] US Bureau of Labor Statistics News Release, *"Consumer Price Index - August 2022"*, 13/09/2022, at **Exhibit C-636**, p. 1.

AlixPartners), the Claimant would effectively receive an award of compensation with a "real interest rate" (nominal interest rate minus inflation rate) that would be negative.[1595] This can be seen clearly from the figure below appended to Accuracy's report:[1596]



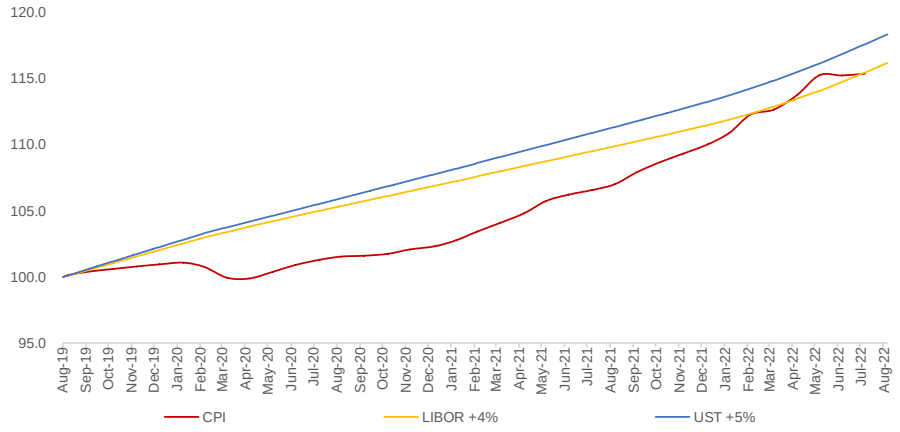
1054 Awarding negative real interest in an arbitral award can have grave consequences for a prevailing claimant. Indeed, in the current inflationary context, a respondent State would then have every incentive to delay payment of an award because an interest rate of UST+2% or SOFR+2% (or even LIBOR+2%) would mean that, contrary to the principles justifying awarding interest, the value of the amount owed to the Claimant would decrease over time in real terms. In other words, delaying payment or enforcement of an award would make the respondent State better off economically since the award would be worth less with the passage of time and the interest awarded for late payment would not be sufficient to offset the decrease in value of the principal.

1055 In light of these considerations, the Claimant instructed Accuracy to calculate pre-award interest in their second report based on LIBOR+4% (and, alternatively, UST+5% in light of LIBOR's upcoming discontinuance). As shown on the graph below prepared by Accuracy in

[1595] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 36 (para. 4.58).

[1596] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 35 *et seq.* (para. 4.54 and Figure 4.1).

their second report, using these two interest rates would ensure an effective pre-award interest rate slightly above zero in real terms.[1597]



1056 Moreover, these rates are also consistent with past arbitral practice. Indeed, even before the current inflationary spike, various investment tribunals considered that LIBOR+4%, compounded annually, was a reasonably commercial rate, and awarded pre-award interest on that basis.[1598]

1057 The Claimant respectfully request the Tribunal to award interest on the basis of LIBOR+4%, compounded annually, to ensure that the interest rate awarded remains higher than the prevailing interest rate. In the event that LIBOR is discontinued while compensation owed to the Claimant remain outstanding, the Claimant respectfully request that interest due, from that date onwards, be calculated on the basis of UST+5%.

[1597] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 88 (para. A6.4 and Table A6.1).

[1598] *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (SPA)her, 18/11/2014, at **Exhibit CLA-158**, p. 197 (para. 965); *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)*, PCA Case No. 2012-16, 06/05/2016, at **Exhibit CLA-159**, p. 162 (para. 517); *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, UNCITRAL, PCA Case No. 2012-07, Final Award, 23/12/2019, at **Exhibit CLA-61**, p. 175 (para. 617); *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, Award, 15/04/2021, at **Exhibit CLA-160**, p. 74 (para. 185).

1058 The Claimant reserves the right further to amend its position in the course of the arbitration in light of the evolving economic circumstances, in accordance with the ICSID Convention and the ICSID Arbitration Rules.

10.3.2.3 The value of the Claimant's investment at the Valuation Date in the Actual Scenario is nil

1059 AlixPartners repeatedly assert in their report that the Claimant's damages should be reduced by USD 13 million to account for the "residual value" of the Claimant's shares in IMC.[1599] As explained in Sections 9.5 and 10.1.2, AlixPartners relies in this respect on an independent valuation of IMC's shareholding performed by PwC Peru, shortly before the Claimant's shares in IMC were transferred to PLI Huaura. The purpose of this valuation was to determine the value of the pledged shares compared to the USD 15.9 million Early Termination Amount due and payable to PLI Huaura under the PPF Agreement. PwC Peru concluded that the value of the pledged shares was USD 13 million. Contrary to the conclusion drawn by the Respondent and AlixPartners, Accuracy explains that this valuation in fact shows that the value of the Claimant's investment (which includes its liability towards PLI Huaura under the PPF Agreement) was in fact nil or even negative.

1060 Accordingly, it is wrong for AlixPartners to suggest a deduction of USD 13 million from the Claimant's damages because, as stated in Accuracy's second report, the Claimant's financial position in the Actual Scenario was nil or even negative (and not USD 13 million as suggested by the Respondent and AlixPartners).

10.3.3 Accuracy's updated calculation of the Claimant's damages

1061 In their second report, Accuracy update their calculations of the fair market value of the Project under the 590 t/d scenario in light of the findings set out in Micon's expert report. In view of AlixPartners' observations on the modelling of the gold repayments under the PPF Agreement, Accuracy in

[1599] Expert Report of AlixPartners on Damages, 24/03/2022, p. 36 *et seq.* (paras. 97, 150, 166 and 173).

their second report model explicitly the payments that would have been made to PLI Huaura in the cashflows in its DCF calculations.[1600]

On that basis, Accuracy concludes that the Claimant's damages at the Valuation Date amount to **USD 41.0 million**, excluding interest. As of the date of their second report, Accuracy calculates pre-award interest to amount to USD 6.7 million relying on LIBOR+4%, compounded annually.

[1600] Second Expert Report of Edmond Richards and Erik van Duijvenvoorde, 21/09/2022, p. 51 (para. 6.29).

11 REQUEST FOR RELIEF

1062 The Claimant respectfully asks the Arbitral Tribunal:

a) to declare that the Republic of Peru has breached its obligation not to expropriate the Claimant's investment under Article 812 of the Free Trade Agreement between Canada and Peru;

b) to declare that the Republic of Peru has breached its obligations to accord full protection and security and fair and equitable treatment to the Claimant's investment under Article 805 of the Free Trade Agreement between Canada and Peru;

c) to declare that the Republic of Peru has breached its obligations to accord most-favoured-nation treatment to the Claimant under Article 804 of the Free Trade Agreement between Canada and Peru;

d) to order the Republic of Peru to pay compensation for the loss and damage sustained by the Claimant as a result of the breaches by the Republic of Peru of its obligations under the Free Trade Agreement between Canada and Peru in an amount of at least USD 41,000,000 plus interest at a rate of LIBOR plus 4% (and, in the event LIBOR is discontinued before full payment is made, at a rate of UST plus 5% thereafter), compounded annually, from 27 August 2019 until payment; and

e) to order the Republic of Peru to bear the costs of the arbitration and compensate the Claimant for all its costs and expenses incurred in relation to the present arbitration, including the fees and expenses of their counsel, witnesses and experts.

The Claimant reserves its right to further amend, develop and quantify its claims and to present further argument and evidence in the course of the arbitration, in accordance with the ICSID Convention and the ICSID Arbitration Rules.

Respectfully submitted,

23 September 2022

For and on behalf of the Claimant,

Lupaka Gold Corp.

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Guillermina Huber

LIST OF EXHIBITS