INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

LUPAKA GOLD CORP.

The Claimant

and

REPUBLIC OF PERU

The Respondent

ICSID Case No. ARB/20/46

AWARD

Members of the Tribunal

Prof. John R. Crook, President Mr. Oscar M. Garibaldi, Arbitrator Dr. Gavan Griffith KC, Arbitrator

Secretary of the Tribunal

Ms. Luisa Fernanda Torres

Date of dispatch to the Parties: 30 June 2025

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President of the Special Commission

Representing the State in International Investment

Disputes

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Mr. Mijail Feliciano Cienfuegos Falcón

Mr. Jhans Armando Panihuara Aragón

Technical Secretariat of Special Commission

Representing the State in International Investment

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Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
AAG	Andean American Gold Corp.
Canada Submission	Non-Disputing Party Submission of the Government of Canada dated 26 May 2022
C-[#]	The Claimant's Exhibit
CD-[#]	The Claimant's Demonstrative Exhibit
CLA-[#]	The Claimant's Legal Authority
CER-[Name]- [1 st] [2 nd]	The Claimant's Expert Report
CWS-[Name]- [1 st] [2 nd]	The Claimant's Witness Statement
CIL	Customary International Law
Cl. Costs Submission	The Claimant's Submission on Costs dated 17 October 2023
Cl. Mem.	The Claimant's Memorial dated 1 October 2021
Cl. Reply	The Claimant's Reply dated 23 September 2022
Cl. Skeleton	The Claimant's Pre-Hearing Skeleton dated 13 March 2023
Cl. PH Mem.	The Claimant's Post-Hearing Submission dated 30 June 2023
DCF	Discounted Cash Flow
EIA	Environmental Impact Assessment
FET	Fair and Equitable Treatment
FMV	Fair Market Value
FPS	Full Protection and Security

FTA	Free Trade Agreement between Canada and the Republic of Peru signed on 29 May 2008, in force on 1 August 2009
FTA Parties	The States signatories of the FTA (Canada and Peru)
Hearing	Hearing held from 27 March 2023 to 3 April 2023
ICJ	International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC Articles	International Law Commission's Articles on State Responsibility
ILO	International Labour Organization
IMC or Invicta	Invicta Mining Corporation
Lacsanga Community	Rural Community of Lacsanga
Lupaka	Lupaka Gold Corp.
MEM	Ministry of Energy and Mines of Peru
MFN	Most Favoured Nation
Micon	Micon International Ltd.
Micon Report	Expert Report of Christopher Jacobs, CEng MIMMM of Micon International Ltd. on the Invicta Project-Peru dated 21 September 2022
MININTER	Ministry of the Interior
OGGS	General Office of Social Management ("Oficina General de Gestión Social")
Parán or Parán Community	The Rural Community of Parán
Peru	The Republic of Peru

PEA	Preliminary Economic Assessment
PLI Huaura	PLI Huaura Holdings LP
PNP	Peruvian National Police
PPF Agreement	Pre-Paid Forward Gold Purchase Agreement entered into between Lupaka and PLI Huaura on 30 June 2016 and subsequently amended on 2 August 2017
R-[#]	The Respondent's Exhibit
RD-[#]	The Respondent's Demonstrative Exhibit
RLA-[#]	The Respondent's Legal Authority
RER-[Name]-[1 st] [2 nd]	The Respondent's Expert Report
RWS-[Name]-[1 st] [2 nd]	The Respondent's Witness Statement
Red Cloud	Red Cloud Klondike Strike Inc.
Resp. C-Mem.	The Respondent's Memorial on Jurisdiction and Counter-Memorial on Merits dated 24 March 2022
Resp. Costs Submission	The Respondent's Submission on Costs dated 17 October 2023
Resp. Rej.	The Respondent's Reply on Jurisdiction and Rejoinder on Merits dated 25 January 2023
Resp. Skeleton	The Respondent's Pre-Hearing Skeleton dated 13 March 2023
Resp. PH Mem.	The Respondent's Post-Hearing Submission dated 30 June 2023
Request for Arbitration	Request for Arbitration dated 21 October 2020
Santo Domingo Community	Rural Community of Santo Domingo de Apache
SRK	SRK Consulting (Canada) Inc.

Tr. Day [#], [page:line]-[page:line]	Transcript of the Hearing (English version) (final versions, as revised and finalized on 8 September 2023)
Tribunal	Arbitral Tribunal (constituted on 19 February 2021 and reconstituted on 20 April 2022)
UN	United Nations
Valuation Date	26 August 2019
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

- 1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Free Trade Agreement between Canada and the Republic of Peru signed on 29 May 2008 and entered into force on 1 August 2009 (the "FTA" or the "Canada-Peru FTA"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "ICSID Convention"). The proceeding is conducted in accordance with the ICSID Rules of Procedure for Arbitration Proceedings in force as of 10 April 2006 (the "ICSID Arbitration Rules").
- 2. The Claimant is Lupaka Gold Corp. ("Lupaka" or the "Claimant"), a Canadian corporation.
- 3. The Respondent is the Republic of Peru ("**Peru**" or the "**Respondent**").
- 4. The Claimant and the Respondent are collectively referred to as the "Parties," and the term "Party" is used to refer either to the Claimant or the Respondent.¹
- 5. The Parties' representatives and their addresses are listed above on page (i).
- 6. The Parties have presented extensive arguments in this case and filed a large volume of written materials. The Tribunal has carefully reviewed and considered all the Parties' arguments, but only discusses in this Award those that are relevant to its decision.

¹ In this Award the term "Parties" is used to refer to the Claimant and the Respondent in this proceeding, and the term "Party" is used to refer to either the Claimant or the Respondent. (The Tribunal is mindful that Chapter 8, Sections B and C of the Canada-Peru FTA refer to the Claimant and the Respondent together as the "disputing parties" and to either of them as a "disputing party.") In turn, in this Award, the State signatories of the FTA (Canada and Peru) will be referred to as "FTA Party" or the "FTA Parties," for clarity. (The Tribunal is mindful that the Canada-Peru FTA refers to the States signatories to the FTA as "Party.")

II. PROCEDURAL HISTORY

A. REGISTRATION AND CONSTITUTION OF THE TRIBUNAL

- 7. On 21 October 2020, ICSID received a Request for Arbitration dated 21 October 2020, from the Claimant against the Respondent, accompanied by exhibits C-0001 to C-0027, and legal authorities CLA-0001 to CLA-0003 (the "Request for Arbitration").
- 8. On 28 October 2020, the Respondent confirmed receipt of a copy of the Request for Arbitration, and designated counsel for this proceeding.
- 9. On 30 October 2020, in accordance with Article 36(3) of the ICSID Convention, the Secretary-General of ICSID registered the Request for Arbitration and notified the Parties of the registration. In the Notice of Registration, in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "ICSID Institution Rules"), the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible.
- 10. In accordance with Article 37(2)(a) of the ICSID Convention and Article 826 of the FTA, the Parties agreed to constitute the Tribunal as follows: three arbitrators, one to be appointed by each Party, and the presiding arbitrator to be appointed by the Secretary-General in accordance with a strike and rank method agreed upon by the Parties.
- 11. The Tribunal was composed of Prof. John R. Crook, a national of the United States of America, President, appointed by the Secretary-General of ICSID pursuant to the Parties' agreed method; Mr. Jonathan D. Schiller, a national of the United States of America, appointed by the Claimant; and Dr. Gavan Griffith KC, a national of Australia, appointed by the Respondent.
- 12. On 19 February 2021, in accordance with ICSID Arbitration Rule 6, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments, and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Luisa Fernanda Torres, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

B. THE FIRST SESSION

- 13. On 13 April 2021, a date agreed by the Parties, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties by videoconference (the "First Session").
- 14. On 16 April 2021, following the First Session, the Tribunal issued Procedural Order No. 1 ("PO1"). PO1 embodies the Parties' agreements on procedural matters and the Tribunal's confirmation of such agreements and decisions on the disputed issues. PO1 establishes, *inter alia*, that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006 "except to the extent provided otherwise by Section B of Chapter 8 of the [FTA]," that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, DC, and it also set out the Procedural Calendar for this arbitration. Neither Party sought redaction of confidential information from PO1, as confirmed at the First Session and recorded in PO1.
- 15. On 23 April 2021, pursuant to paragraph 9.4 of PO1, the Claimant informed the Tribunal that "the global litigation funder Bench Walk Advisors, through its subsidiary Bench Walk 20A, LP, is funding the Claimant in the present arbitration proceedings."
- 16. On 24 June 2021, following an initial proposal from the Parties and further communications between the Tribunal and the Parties, the Tribunal amended the Procedural Calendar ("Procedural Calendar Revision No. 1").
- 17. On 20 July 2021, following an initial proposal from the Parties and further communications between the Tribunal and the Parties, the Tribunal issued Procedural Order No. 2 ("PO2") governing the transparency regime applicable to the arbitration, as well as the designation and use of confidential information. Neither Party sought redaction of confidential information from PO2, as confirmed in the Tribunal's communication of 6 August 2021.
- 18. On 23 September 2021, following a joint request by the Parties, the Tribunal amended the Procedural Calendar ("**Procedural Calendar Revision No. 2**").

C. THE PARTIES' WRITTEN SUBMISSIONS AND PROCEDURAL APPLICATIONS

- 19. On 1 October 2021, the Claimant filed its Memorial ("Memorial"), accompanied by exhibits C-0028 to C-0254; legal authorities CLA-0004 to CLA-0105; five witness statements by: (i) Mr. Eric Harrison Edwards, (ii) Mr. Gordon Ellis, (iii) Mr. Julio Félix Castañeda, (iv) Mr. Luis Felipe Bravo and (v) and one expert report by Messrs. Edmond Richards and Erik van Duijvenvoorde of Accuracy, with appendices 001 to 009, and exhibits AC-0001 to AC-0056.²
- 20. On 13 October 2021, in accordance with paragraph 11 of PO2, the Claimant filed an application seeking protection and reduction of confidential information from the Memorial and some of its accompanying Witness Statements, related to protection of the identity of a witness. The Parties submitted further communications on this matter on 22 and 27 October 2021, and 3 November 2021.
- 21. On 9 November 2021, the Tribunal issued Procedural Order No. 3 ("PO3"), concerning the Claimant's application for protection of confidential information. The Tribunal found that the Claimant's request was warranted. It ordered that the identity of the witness and the contents of the Witness Statement in question be designated as confidential information, and authorized redactions from the Memorial and another Witness Statement. Neither Party sought redaction of confidential information from PO3, as confirmed in the Tribunal's communication of 17 March 2022.
- 22. On 22 October 2021, pursuant to the Procedural Calendar, the Respondent informed the Tribunal that it would not seek bifurcation of the preliminary objections it intended to raise in this proceeding.
- 23. On 16 March 2022, following a joint request by the Parties, the Tribunal amended the Procedural Calendar ("Procedural Calendar Revision No. 3").

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² Pursuant to paragraph 13.1.2 of PO1, exhibits and legal authorities were submitted two business days following the email filing, namely, on 5 October 2021. On 22 October 2021, the Claimant submitted *corrected* versions of (i) the Memorial; (ii) and (iii) exhibit C-0041.

- 24. On 16 March 2022, the Government of Canada ("Canada") requested an extension of the deadline to provide its Notice of Intent to File a Submission under Article 832 of the FTA. The Parties consented to the requested extension that same day. Accordingly, on 17 March 2022, the Tribunal approved Canada's request and amended the Procedural Calendar ("Procedural Calendar Revision No. 4").
- On 24 March 2022, the Respondent submitted its Memorial on Jurisdiction and Counter-Memorial on the Merits ("Counter-Memorial"), accompanied by exhibits R-0001 to R-0171; legal authorities RLA-0001 to RLA-0132; four witness statements by: (i) Mr. Andrés Fernando Trigoso, (ii) Mr. Luis Miguel Incháustegui, (iii) Mr. Nilton César León, and (iv) Mr. Esteban Saavedra; and three expert reports by: (i) Dr. Iván Fabio Meini, with exhibits IMM-0001 to IMM-0055, (ii) Mr. Daniel Vela, with exhibits DV-0001 to DV-0014, and (iii) Ms. Isabel Santos and Mr. Alexander Lee of AlixPartners LLP, with appendices 1-6 and exhibits AP-0001 to AP-0064.³
- 26. On 8 April 2022, in accordance with paragraph 11 of PO2, the Parties informed the Tribunal that they had agreed on the redaction of certain confidential information from the Counter-Memorial. On 22 April 2022, the Tribunal approved the Parties' agreement.
- 27. On 11 April 2022, in accordance with ICSID Arbitration Rule 10(1), the Secretary-General of ICSID informed the Parties that, on 7 April 2022, Mr. Jonathan D. Schiller had notified his co-arbitrators and the Secretary-General of ICSID that he resigned as arbitrator in this proceeding pursuant to ICSID Arbitration Rule 8(2); that Professor John R. Crook and Dr. Gavan Griffith KC had consented to the resignation; and that pursuant to ICSID Arbitration Rule 10(2) the proceeding was therefore suspended until the vacancy had been filled.

³ Pursuant to paragraph 13.1.2 of PO1, exhibits and legal authorities were submitted two business days following the email filing, namely, on 28 March 2022. On 5 May 2022, the Respondent submitted *corrected* versions of (i) Mr. Andrés Fernando Trigoso's Witness Statement, (ii) Mr. Luis Miguel Incháustegui's Witness Statement; (iii) Dr. Iván Fabio Meini's Expert Report; and (iv) exhibit R-0151. On 10 May 2022, the Claimant wrote to the Tribunal observing that, while it considered that the late submission of these corrections caused it prejudice, it did not object to their admission to the record. On 11 May 2022, the Tribunal confirmed that the corrected documents were admitted to the record.

- 28. On 14 April 2022, the Claimant appointed Mr. Oscar M. Garibaldi, a national of Argentina and the United States of America, to fill the vacancy in the Tribunal.
- 29. On 19 April 2022, the Claimant's counsel informed that Mr. Timothy Foden had left LALIVE on 15 April 2022, that he had joined Boies Schiller Flexner as a partner as of 18 April 2022, and that he would continue acting as co-counsel for the Claimant in this matter in conjunction with LALIVE. The Claimant's counsel added that a "Chinese wall ha[d] been installed between [Mr. Foden] and Mr. Schiller."
- 30. On 20 April 2022, the Secretary-General of ICSID notified the Parties that Mr. Oscar M. Garibaldi had accepted his appointment as an arbitrator, and that pursuant to ICSID Arbitration Rule 12, the proceeding was therefore resumed that day from the point it had reached at the time the vacancy occurred.
- 31. On 21 April 2022, the reconstituted Tribunal wrote to the Parties concerning proposed modifications to the Procedural Calendar, to account for the 10-day suspension of the proceeding resulting from the vacancy in the Tribunal arising from Mr. Schiller's resignation. On 25 April 2022, the Claimant submitted observations to the proposed modifications; and on 29 April 2022, the Respondent submitted a response thereto. On 2 May 2022, having heard the Parties' submissions on the matter, the Tribunal confirmed the amendment to the Procedural Calendar as proposed on 21 April 2022 ("Procedural Calendar Revision No. 5").
- 32. On 28 April 2022, Canada submitted its Notice of Intent to File a Submission under Article 832 of the FTA.
- 33. On 23 May 2022, following exchanges between the Parties, the Parties submitted for decision by the Tribunal their respective Redfern Schedules including their Requests, Objections and Replies on Document Production. The Respondent's Redfern Schedule was accompanied by exhibit R-0172, and legal authorities RLA-0133 to RLA-0139.
- 34. On 26 May 2022, Canada filed its written submission pursuant to Article 832(1) of the FTA ("Canada's Submission"). On 18 and 20 June 2022, the Claimant and the

Respondent, respectively, confirmed that neither Party was seeking redactions of confidential information from Canada's Submission.

- 35. On 2 June 2022, the Tribunal issued Procedural Order No. 4 ("**PO4**") on Production of Documents. Neither Party sought redaction of confidential information from PO4, as confirmed in the Tribunal's communication of 21 June 2022.
- 36. On 14 June 2022, pursuant to PO4, the Respondent submitted a Privilege Log, identifying documents that it had withheld from production on the basis of (i) confidentiality in relation to law enforcement, and (ii) legal privilege. The Respondent's Privilege Log was accompanied by legal authorities RLA-0140 to RLA-0141, and a revised translation of a previously submitted exhibit (R-0135). On 28 June 2022, the Claimant submitted an application requesting that the Tribunal compel the production of certain documents withheld by the Respondent. On 5 July 2022, the Respondent submitted its response, accompanied by legal authorities RLA-0142 to RLA-0151, and a corrected version of a previously submitted legal authority (RLA-0136). On 12 July 2022, the Claimant submitted comments in reply, accompanied by exhibit C-0255. On 15 July 2022, the Respondent submitted comments in rejoinder, accompanied by legal authorities RLA-0152 to RLA-0154, and exhibit R-0173, as well as a revised translation of a previously submitted exhibit (R-0172).
- On 29 July 2022, the Tribunal issued Procedural Order No. 5 ("**PO5**"), on the Production of Disputed Documents. The Tribunal ordered the Respondent to produce the documents withheld on the basis of confidentiality in relation to law enforcement, directing that "production be limited to named counsel of the Claimant only, upon counsel's undertaking to make no wider disclosure without leave of the Tribunal." Neither Party sought redaction of confidential information from PO5, as confirmed in the Tribunal's communication of 16 August 2022.
- 38. On 23 September 2022, the Claimant submitted its Reply ("Reply"), accompanied by exhibits C-0256 to C-0636; legal authorities CLA-0106 to CLA-0160; four witness

⁴ PO5, para. 36.

statements by: (i) Mr. Gordon Lloyd Ellis, (ii) Mr. Luis Felipe Bravo, (iii) Mr. Julio Félix Castañeda, and (iv) and two expert reports by (i) Messrs. Erik van Duijvenvoorde and Edmond Richards of Accuracy, with exhibits AC-0057 to AC-0072, and (ii) Mr. Christopher Jacobs of Micon International Ltd., with exhibits MI-0001 to MI-0009.

- 39. On 26 September 2022, the Claimant informed the Tribunal that, in accordance with PO5, by communications dated 3 and 9 August 2022 and 12 September 2022, counsel for the Claimant had entered into a Confidentiality Undertaking in connection with the documents produced by the Respondent pursuant to PO5 (the "FAEO documents"). The Claimant further observed that some of those documents had been referenced as exhibits in the Reply, and requested that certain administrative arrangements be put in place for purposes of introducing those exhibits into the record of this proceeding. The Tribunal and the Parties exchanged further communications in this regard on 27 September 2022, pursuant to which both Parties confirmed that the administrative arrangements in place were satisfactory.
- 40. On 8 October 2022, in accordance with paragraph 11 of PO2, the Claimant filed an application seeking protection and redaction of confidential information from the Reply and some of its accompanying Witness Statements, related to (i) protection of the identity of a witness and (ii) confidentiality of the documents produced by the Respondent pursuant to PO5. On 19 October 2022, the Parties informed the Tribunal that they had reached an agreement concerning the Claimant's application. On 20 October 2022, the Tribunal approved the Parties' agreement.

⁵ Pursuant to paragraph 13.1.2 of PO1, exhibits and legal authorities were submitted two business days following the email filing, namely, on 27 September 2022. On 24 October 2022, the Claimant submitted (i) a *corrected* version of its Reply; and (ii) exhibits C-0637 to C-0639, said to correct clerical errors in the original submission. On 3 November 2022, the Respondent confirmed that it did not object to the admission to these materials to the record. On 6 March 2023, the Claimant submitted a *corrected* version of Mr. Luis Felipe Bravo's Second Witness Statement (as part of the Electronic Hearing Bundle). The Parties informed the Tribunal that the Respondent did not agree that all of the proposed corrections were non-substantive and considered that a number of them should not be allowed by the Tribunal at that stage. Having considered the matter, the Tribunal decided to admit the corrected version. *See* PO6, fn. 4.

- 41. On 18 January 2023, the Parties informed the Tribunal that they had agreed (i) to extend the deadline for filing of the Respondent's Rejoinder and (ii) to dispense with the Pre-Hearing Skeleton Arguments contemplated in the Procedural Calendar, and sought the Tribunal's approval of their agreement. On 19 January 2023, the Tribunal approved the Parties' agreed extension for the filing of the Rejoinder, and 20 January 2023, it denied the Parties' request to dispense with the Pre-Hearing Skeleton Arguments.
- 42. On 25 January 2023, the Respondent submitted its Reply on Jurisdiction and Rejoinder on Merits ("**Rejoinder**"), accompanied by exhibits R-0174 to R-0273; legal authorities RLA-0024 (bis) and RLA-0155 to RLA-0193; four witness statements, by: (i) Mr. Luis Miguel Incháustegui, (ii) Mr. Andrés Fernando Trigoso, (iii) Mr. Nilton César León, and (iv) Mr. Soymán Román Retuerto; and two expert reports, by: (i) Ms. Miyanou Dufour von Gordon, with exhibits MD-0001 to MD-0139, and (ii) Ms. Isabel Santos and Mr. Alexander Lee of AlixPartners, with exhibits AP-0065 to AP-0081.6
- 43. On 7 February 2023, each Party notified the Tribunal of the witnesses and experts called for cross-examination at the Hearing.
- 44. On 9 and 11 February 2023, in accordance with paragraph 11 of PO2, the Parties informed the Tribunal that they had agreed on the redaction of certain confidential information from the Rejoinder and three of its accompanying Witness Statements. On 14 February 2023, the Tribunal approved the Parties' agreed redactions.
- 45. On 19 February 2023, the Tribunal circulated a draft procedural order concerning the organization of the Hearing, in preparation for the Pre-Hearing Organizational Meeting ("Pre-Hearing Conference"). On 20 February 2023, pursuant to paragraph 20.2 of PO1, the Parties submitted their respective positions regarding the schedule for the Hearing. Thereafter, on 24 February 2023, the Parties submitted their comments on the draft procedural order previously circulated by the Tribunal.

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⁶ Pursuant to paragraph 13.1.2 of PO1, exhibits and legal authorities were submitted two business days following the email filing, namely, on 27 January 2023.

- 46. On 27 February 2023, the Tribunal held a Pre-Hearing Conference with the Parties, by videoconference. That same day, the Respondent confirmed the names of its witnesses and experts that would require interpretation during the Hearing.
- 47. On 3 March 2023, following the Pre-Hearing Conference, the Parties informed the Tribunal of their agreement to reduce the witnesses and experts to be called for examination at the Hearing. Thereafter, on 6 March 2023, the Parties submitted for consideration by the Tribunal a joint proposal on the schedule for the Hearing, with one area of disagreement for decision by the Tribunal.
- 48. On 6 March 2023, the Parties jointly submitted the electronic bundle for use at the Hearing ("Electronic Hearing Bundle").
- 49. On 7 March 2023, the Respondent informed the Tribunal that one of its witnesses (Mr. Soymán Román Retuerto) would be unable to travel to attend the Hearing in person, and that, in consequence, the Parties had agreed to conduct his examination via videoconference. The Claimant confirmed the agreement on that same day.
- 50. On 8 March 2023, following an inquiry from the Tribunal, Canada informed the Tribunal and the Parties that it would not be making an oral submission at the Hearing pursuant to Article 832 of the FTA, but confirmed that its representatives did plan to attend the Hearing remotely.
- On 9 March 2023, the Claimant informed the Tribunal that the Parties had agreed to add certain additional translations to the record, and jointly submitted an updated version of the electronic bundle for use at the Hearing ("Electronic Hearing Bundle Update No. 1").
- 52. On 13 March 2023, the Parties submitted their respective Pre-Hearing Skeletons.
- 53. On 16 March 2023, the Tribunal issued Procedural Order No. 6 ("**PO6**") on the Organization of the Hearing. On 18 December 2024, the Parties informed the Tribunal that

⁷ Translations of exhibits MD-0009, MD-0016, MD-0027, MD-0031, MD-0081, and MD-0094 to MD-0138.

they had agreed on the redaction of certain confidential information from PO6. On 17 June 2025, the Tribunal approved the Parties' agreed redactions.

- 54. On 20 March 2023, the Parties informed the Tribunal of their agreed protocol for the conduct of the remote examination of Mr. Soymán Román Retuerto.
- On 26 March 2023, the Parties informed the Tribunal that they had agreed to add to the record a number of revised translations or revised versions of documents already on the record. On the same day, the Tribunal approved the Parties' agreement, requested that the Parties jointly update the Electronic Hearing Bundle before the Hearing accordingly, and gave further directions concerning the Parties' proposed procedure for the introduction of additional revised translations during the Hearing.
- 56. On 26 March 2023, the Parties jointly produced an updated version of the electronic bundle for use at the Hearing ("Electronic Hearing Bundle Update No. 2").
- 57. On 28 March 2023, in accordance with paragraph 11 of PO2, the Parties informed the Tribunal that they had agreed on the redaction of certain confidential information from the Parties' respective Skeleton Arguments. On 12 December 2024, the Tribunal approved the Parties' agreed redactions.

D. THE ORAL PROCEDURE

58. The Hearing was held from 27 March to 3 April 2023 in Washington, D.C. (the "Hearing"). The following persons were present:

Tribunal:

Prof. John R. Crook
Mr. Oscar M. Garibaldi
Dr. Gavan Griffith KC
Arbitrator

ICSID Secretariat:

.

⁸ Revised translations of exhibits C-0023, C-0429, C-0609, C-0640 (revised translation of R-0113); C-0641 (revised translation of R-0121), C-0642 (revised translation of R-0127), and C-0643 (revised translation of R-0225), R-0047, R-0076, R-0081, R-0113, R-0165, R-0274 (revised translation of C-0392), and MD-0010; and revised legal authority RLA-0001.

Ms. Luisa Fernanda Torres

Secretary of the Tribunal

For the Claimant:

Mr. Marc Veit
Mr. Jaime Gallego
LALIVE
Mr. Luis Miguel Velarde
Ms. Guillermina Huber
LALIVE
Ms. Stela Negran
LALIVE

Mr. Timothy Foden Boies Schiller Flexner LLP

Party Representatives

Mr. Gordon Ellis Lupaka Gold Corp.

Witnesses (*)

Mr. Luis Felipe Bravo
Mr. Julio Castañeda
Lupaka Gold Corp.
Lupaka Gold Corp.
Lupaka Gold Corp.

<u>Experts</u>

Mr. Erik van Duijvenvoorde Accuracy
Mr. Edmond Richards Accuracy
Mr. Louis Osman Accuracy
Mr. Pranshu Agarwal [R] Accuracy

For the Respondent:

Counsel

Mr. Paolo Di Rosa Arnold & Porter Kaye Scholer LLP Arnold & Porter Kaye Scholer LLP Mr. Patricio Grané Labat Arnold & Porter Kaye Scholer LLP Mr. Timothy Smyth Mr. Brian Bombassaro Arnold & Porter Kaye Scholer LLP Ms. Ana Pirnia Arnold & Porter Kaye Scholer LLP Ms. Bailey Roe Arnold & Porter Kaye Scholer LLP Arnold & Porter Kaye Scholer LLP Mr. Andrés Álvarez Calderón Ms. Laura Arboleda Arnold & Porter Kaye Scholer LLP Ms. Gabriela Guillén Arnold & Porter Kaye Scholer LLP Arnold & Porter Kaye Scholer LLP Ms. Emily Betancourt Ms. Alexia Morán Arnold & Porter Kaye Scholer LLP Mr. Hugo Forno J&A GARRIGUES, S.L.P

Mr. Javier Bueno [R] J&A GARRIGUES, S.L.P

Party Representatives

Ms. Vanessa Rivas Plata Saldarriaga Ministerio de Economía y Finanzas

Mr. Jhans Panihuara Ministerio de Economía y Finanzas Mr. Erick Vargas Guevara [R] Presidencia del Consejo de Ministros

Ms. Esperanza Molla León [R] Ministerio de Energía y Minas

Witnesses (*)

Mr. Andrés Fernando Trigoso Witness Mr. Nilton César León Witness Mr. Esteban Saavedra Witness Mr. Soymán Román Retuerto [R] Witness

Experts

Ms. Isabel Santos Kunsman

Mr. Alexander Lee

Alix Partners / Expert

Alix Partners / Expert

Mr. Sheng Bi Alix Partners / Assistant to Ms. Santos

Kunsman and Mr. Lee

Ms. Miyanou Dufour von Gordon Expert

Mr. Sebastián Saavedra Assistant to Ms. Dufour Ms. Joceline Pérez Assistant to Ms. Dufour

Non-Disputing Treaty Party:

Mr. Scott Little [R]

Mr. Scott Little [R]

Trade Law Bureau, Government of Canada

Mr. Chris Koziol [R]

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Ms. Marjorie Peters
Mr. David Kasdan [R]
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Mr. Dante Rinaldi [R]
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DR-ESTENO

Interpreters:

Ms. Silvia Colla Interpreter (ENG-SPA)
Mr. Charlie Roberts Interpreter (ENG-SPA)
Mr. Daniel Giglio Interpreter (ENG-SPA)

Technical Support:

Mr. Quinn Derek Lloyd World Bank, IT
Mr. Petar Tsenkov [R] World Bank, IT
Ms. Andrea Clavijo ICSID, Paralegal

(*) not present before testimony

[R] Remote participant

59. The following persons were examined during the Hearing:

On behalf of the Claimant:

Witnesses

Mr. Luis Felipe Bravo Mr. Julio Castañeda

Experts

Mr. Erik van Duijvenvoorde

Mr. Edmond Richards

On behalf of the Respondent:

Witnesses

Mr. Andrés Fernando Trigoso

Mr. Nilton César León

Mr. Esteban Saavedra Mendoza

Mr. Soymán Román Retuerto

Experts

Ms. Miyanou Dufour von Gordon

Ms. Isabel Santos Kunsman

Mr. Alexander Lee

60. During the Hearing, the Parties introduced the following materials into the record:

- The Claimant: Demonstrative Exhibits CD-0001 to CD-0003; updated translations of exhibits C-0392 (revised translation of R-0274), C-0483, C-0549, C-0572, C-0618 and C-0640 (revised translation of R-0113); and additional translations under new exhibit numbers C-0643 (revised translation of R-0061), C-0644 (revised translation of R-0179), C-0645 (revised translation of R-0012), C-0646 (revised translation of R-0059) and C-0647 (revised translation of R-0146).
- **The Respondent**: Demonstrative Exhibits RD-0001 to RD-0004; updated translations of exhibits R-0074, R-0127, R-0219; an additional translation under new exhibit number R-0275 (revised translation of C-0453); and legal authority RLA-0010 (FRE-SPA-ENG).

During the Hearing, following an application by the Claimant and submissions in response by the Respondent, the Tribunal rendered the following procedural ruling concerning the Expert Report of Ms. Miyanou Dufour von Gordon ("**Dufour Report**") previously filed with the Rejoinder:

"[...] The Tribunal has given a great deal of thought to Claimant's application, and has determined as follows:

The Tribunal finds that the Claimant's application for an order striking the Dufour report from the record is sufficiently timely to preserve the Claimant's objection for the purposes of the ICSID Rules, but is not in time with respect to the remedy the Claimant now seeks.

[...] 2[.] [I]n particular, the Tribunal finds that the Claimant's identification of its concerns in its letter of February 20, 2023, was in time to preserve its objection to the expert opinion of Ms. Dufour.

The Tribunal observes that her report was reviewed by the Tribunal and distributed to the Claimants less than a month earlier, on or around January 26, 2023.

3[.] [I]n the Claimant's letter of February 20th, however, the only relief sought was that the Tribunal authorize three hour opening statements. The Tribunal authorized such three hour openings.

4[.] [O]n the first day of the hearing, Claimant's counsel proposed that Ms. Dufour's statement also be stricken from the record. In response to the Tribunal's direction on the second day of the hearing, the Claimant identified, with greater precision, the elements of the specific remedy it sought.

5[.] [T]he Tribunal has a duty to conduct the proceedings in a manner conforming to due process, as reflected in the legal systems of many nations; this includes the principle that a party may not be required to respond to new allegations against its interests without prior notice or an opportunity to respond.

The Tribunal considers, therefore, that it has a duty in carrying out its responsibility for the proper conduct of this arbitration to address this situation in a way that gives proper weight to the rights of each party.

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⁹ Tr. Day 1, 119:6-22 (Mr. Foden); Tr. Day 1, 140:1-141:16 (President Crook, Mr. Foden, Mr. Grané); Tr. Day 2, 367:13-370:9 (President Crook; Mr. Grané); Tr. Day 2, 500:5-18 (Mr. Gallego); Tr. Day 3, 670:12-678:7 and 694:1-695:11 (Mr. Foden: argument and answer to Tribunal's questions); Tr. Day 3, 678:17-693:21 (Mr. Grané: argument and answer to Tribunal's questions).

6[.] [T]he Tribunal considers that the portions of Ms. Dufour's report describing additional regulatory requirements, not previously identified, affecting the Claimant's ability to begin commercial production should have been introduced at an earlier stage in the proceedings so that the Claimant would have appropriate opportunity to respond to them in the established procedural framework. This finding is without prejudice to any further findings that the Tribunal may make with respect to any other issues identified pursuant to Paragraph 8.

7[.] [T]herefore, the Tribunal rules as follows:

A[.] Ms. Dufour's report shall remain a part of the record in this case, subject to the following:

B[.] [T]he Tribunal shall not take account of: 1, the portions of Ms. Dufour's report setting out regulatory requirements affecting the Claimant's ability to begin commercial production that were not referred to in Respondent's Counter Memorial, defined as the Additional Requirements, as well as, 2, any associated documents and evidence not previously on record related to the Additional Requirements.

8[.] [T]he Claimant may, on application, have no more than 10 additional pages in a post hearing submission to address any other portions of Ms. Dufour's report that it shows to be not in compliance with the Tribunal's Procedural Order Number 1. In such additional pages, the Claimant may refer to and introduce statutes and regulations and other similar legal materials constituting elements of the law of Perú that are not previously on record, but not including commentaries or other similar analytical materials. No other new evidence is authorized.

That is the unanimous ruling of the Tribunal on this question." ¹⁰

E. THE POST-HEARING PROCEDURE

On 10 April 2023, the Tribunal gave certain post-Hearing directions to the Parties, concerning specifications for the Post-Hearing Submissions and updating of the Electronic Hearing Bundle in order to incorporate the materials added to the record during the Hearing pursuant to the Tribunal's authorizations.

63. On 11 April 2023, following the Tribunal's request during the Hearing, the Claimant submitted a new legal authority to the record designated as CLA-0161.

¹⁰ Tr. Day 4, 961:5-964:14 (President Crook). *See also*, Tr. Day 5, 1440:3-8 (President Crook); Tr. Day 5, 1446:19-1447:12 (President Crook).

- 64. On the same day, following the Tribunal's directions during Day 4 and Day 6 of the Hearing and the Parties' conferrals, the Parties jointly submitted new exhibits to the record designated as C-0648, and R-0276 to R-0278, as well as an explanatory note concerning the resolution of boundary disputes between Rural Communities.
- 65. On 12 April 2023, the Parties requested an extension for the submission of the updated Electronic Hearing Bundle. On 13 April 2023, the Tribunal granted the extension.
- 66. On 13 April 2023, the Parties submitted an agreed upon updated translation of R-0127. Thereafter, on 17 April 2023, the Parties submitted agreed upon translations of R-0276 to R-0278.
- 67. On 17 April 2023, the Parties jointly submitted an updated version of the electronic hearing bundle ("Electronic Hearing Bundle Update No. 3"), together with a joint explanatory list of the documents and translations added to the record with Electronic Hearing Bundle Update No. 2 and Electronic Hearing Bundle Update No. 3.¹¹
- 68. On 10 May 2023, the Parties submitted for the Tribunal's approval their agreements (i) to extend the due date for the joint correction of the Hearing Transcripts; and (ii) to submit the Post-Hearing Submissions on the due date on the basis of the original Hearing Transcripts, and to file at a later date corrected versions of the Post-Hearing Submissions, limited to updating the transcript citations to reflect the revised final Hearing Transcripts. The Tribunal confirmed the Parties' agreements on the same day.
- 69. On 19 May 2023, the Claimant asked the Tribunal to confirm its understanding that, in view of one of the Tribunal's questions in the post-Hearing directions of 10 April 2023, the Parties were authorized to add additional legal authorities to the record in response to that question. On 22 May 2023, the Tribunal confirmed the Claimant's understanding.
- 70. On 30 June 2023, the Parties filed their Post-Hearing Submissions. The Claimant's Post-Hearing Submission was accompanied by legal authorities CLA-0162 and CLA-0163. The

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¹¹ *See supra*, paragraphs 55, 60, 63-64, 66. The Claimant also submitted an additional exhibit numbered C-0649 (revised translation of R-0225), to renumber a translation priorly submitted under a repeated C-0643 designation.

Respondent's Post-Hearing Submission was accompanied by legal authorities RLA-0194 to RLA-0196. 12

- On 3 July 2023, the Parties submitted for the Tribunal's approval an agreed upon calendar for the submission of requests for redaction of confidential information from the corrected Post-Hearing Submissions and the revised final Hearing Transcripts. The Tribunal approved the Parties' agreement on 5 July 2023.
- On 10 July 2023, the Parties submitted for the Tribunal's approval their agreement with respect to the due date and the specifications for the Parties' Submissions on Costs. The Tribunal approved the Parties' agreement on 11 July 2023.
- 73. On 14 July 2023, the Parties submitted their agreed corrections to the Hearing Transcripts and identified a number of areas of disagreement for decision by the Tribunal.
- 74. On 17 July 2023, the Tribunal gave further directions concerning the Parties' dispute regarding corrections to the Hearing Transcripts. The Tribunal further indicated that, in light of the Parties' disagreement and the need of a ruling from the Tribunal on corrections to the Hearing Transcripts, the previously agreed calendar for submission of the corrected Post-Hearing Submissions, redactions to the revised final Hearing Transcript and to the corrected Post-Hearing Submissions, and the filing of the Submissions on Costs was vacated and would be amended.
- 75. On 21 July 2023, pursuant to the Tribunal's directions, the Parties submitted to the Tribunal a table summarizing their disagreements on corrections to the Hearing Transcripts. On 27 July 2023, the Tribunal ruled upon the Parties' disagreements. Thereafter, the revised final Hearing Transcripts were made available to the Parties on 8 September 2023.
- 76. On 7 August 2023 and 19 June 2025, pursuant to PO6, the Parties informed the Tribunal that they had agreed on the redaction of certain confidential information from the recordings of the Hearing.

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¹² Pursuant to paragraph 13.1.2 of PO1, exhibits and legal authorities were submitted two business days following the email filing, namely, on 3 July 2023 (for the Claimant) and on 5 July 2023 (for the Respondent).

- 77. On 14 September 2023, the Parties submitted for the Tribunal's approval their agreed calendar for submission of the corrected Post-Hearing Submissions, redactions to the revised final Hearing Transcripts and to the corrected Post-Hearing Submissions, and the filing of the Submissions on Costs. The Tribunal approved the Parties' agreement on 15 September 2023.
- 78. On 20 September 2023, the Parties filed their corrected Post-Hearing Submissions.
- 79. On 22 September 2023, the Claimant filed an application seeking redaction of confidential information from the revised final Hearing Transcripts. On the same day, the Respondent confirmed that it had no objections to the Claimant's application. On 27 September 2023, the Tribunal approved the Parties' agreed redactions.
- 80. On 29 September 2023, in accordance with paragraph 11 of PO2, the Parties informed the Tribunal that they had agreed on the redaction of certain confidential information from their corrected Post-Hearing Submissions. On 3 October 2023, the Tribunal approved the Parties' agreed redactions.
- 81. On 17 October 2023, the Parties filed their Submissions on Costs.
- 82. On 4 November 2023, the Parties submitted for the Tribunal's approval their agreement to extend the due date for requests for the protection and redaction of confidential information from the Submissions on Costs. The Tribunal approved the Parties' agreement on 5 November 2023.
- 83. On 9 November 2023, in accordance with paragraph 11 of PO2, the Parties informed the Tribunal that they had agreed on the redaction of certain confidential information from their Submissions on Costs. On 13 November 2023, the Tribunal approved the Parties' agreed redactions.
- 84. The proceeding was closed on 23 June 2025.

III. FACTUAL BACKGROUND

- 85. This introductory statement is intended to provide an overview of the factual situation giving rise to this dispute and to the key events. As indicated below, there are numerous disputed factual issues. This statement is without prejudice to further discussion of these issues elsewhere in this Award and is not intended to reflect the Tribunal's decision on any of these disputed issues.
- 86. Mining plays a key role in Peru's economy, and a significant proportion of Peru's mineral resources are located in the country's highland regions. These areas are largely populated by Rural Communities, self-contained and self-governing groups with deep pre-colonial roots and associations with the areas in which they live. According to the Respondent's expert, Dr. Daniel Vela, there were 6,220 Rural Communities in Peru in 2017, 90% of which are established in the mountains. According to his Report, such communities occupy 27% of the national territory and 55% of the Andean region. 13 Rural Communities vary in size and level of economic development.
- 87. The Peruvian national government has a limited presence in many highland areas. Given the limited reach of its authority, Peru's national government encouraged Rural Communities to create Rural Patrols (Rondas Campesinas) for self-defence against Shining Path guerrillas which were active in the 1980s and 1990s. The State provided the *Rondas* Campesinas with arms and training. Many Rural Patrols remain in existence.
- 88. There is illegal commercial marijuana cultivation in some highland areas, including in the general area of the Claimant's operations. 14

¹³ RER-Vela, paras. 53-55.

¹⁴ See Cl. Reply, para. 35, fn. 37 citing C-0104, "More than 3,000 marijuana plants incinerated in the highlands of Lima," Andina, 13 August 2014; C-0105, "Nearly 10,000 marijuana plants seized in Huamboy - Leoncio Prado," Diario Ecos Huacho, 9 May 2017; C-0106, "Nearly 10,000 Marijuana Plants Found in Huaura," Peru 21, 9 May 2017; C-0107, "Hard Blow to Drug Trafficking: Sierra of Huaura Province is the Drug Haven of the Norte Chico," Agencia Digital de Noticias - Huacho, 11 April 2018; C-0108, "5,000 Marijuana Plants Valued at 1.5 Million Soles Incinerated," Litoral Noticias, 12 April 2018; C-0109, "More Drugs Seized in Huamboy," Litoral Noticias, Vol. 194, 19 April 2018; C-0476, "Peruvian National Police seizes 789 marijuana plants in the Sayán District," Andina, 19 September 2017; C-0475, "Sayán is no longer the country of the sun, it is the country of marijuana," Prensa al Día, 12 January 2016.

89. There is a long history of social conflicts between Rural Communities and mineral interests in Peru, continuing to the present day. Peru's former Deputy Minister of Mines told the Tribunal that:

"During the period in which I held office as Deputy Minister of Mines, I recall that there were more than 200 social conflicts reported throughout Peru, 66% of which were related to the mining sector. [...] Social conflicts involving the rural communities and the private sector are not a new phenomenon in Peru; on the contrary, they have a long and tumultuous history." ¹⁵

- 90. Rural Communities own land collectively, make collective decisions on matters involving community interests, exercise significant forms of governmental authority, and often maintain armed *Rondas Campesinas*. The status and roles of Rural Communities are addressed in Peru's Constitution, legislation, and regulations; relevant provisions are discussed elsewhere in this Award. The Respondent also refers to the International Labour Organization ("ILO") Convention No. 169 ("ILO Convention 169"), to which Peru is a Party, and the United Nations ("UN") Declaration on the Rights of Indigenous Peoples as relevant to the status of Rural Communities.
- 91. The Respondent and its experts explained that Peru has sought to protect Rural Communities and to manage the social and environmental impacts of extractive industries upon them, and that it has developed a substantial legal framework to this end. 19 Government policies are aimed at avoiding or managing conflict between mining companies and Rural Communities through emphasis on dialogue and obtaining and maintaining "social license." The Respondent's expert, Dr. Miyanou Dufour von Gordon, explained this concept:

"The social license constitutes an intangible, unwritten and dynamic agreement. It should be clear that the use of the word 'license' in this concept corresponds to a metaphorical sense, and does not involve the formal obtaining of a Permit in the

¹⁵ RWS-Incháustegui 1st, para. 34.

¹⁶ *Infra*, paras. 213 et seq.

¹⁷ Resp. C-Mem., paras. 88-94, citing **RLA-0028**, International Labour Organization, Convention No. 169 (Indigenous and Tribal Peoples Convention), 1989.

¹⁸ Resp. C-Mem., paras. 95-99, citing **RLA-0030**, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007.

¹⁹ Resp. C-Mem., paras. 42 et seq.; RER-Vela, para. 32.

strict sense or from the point of view of administrative law [...] The social license also does not necessarily involve the subscription of a formal agreement with the parties involved, although this may serve as a tool to materialize (and measure) the license in question. This metaphorical license [...] is in principle the consent that the company tacitly receives when there is trust and when the expectations of the community are properly managed, so that the latter accepts or approves the execution of the project."²⁰

- 92. Peruvian government officials testified that obtaining and maintaining social peace with local communities and securing social license is the mining companies' responsibility.²¹
- 93. This claim grows out of actions taken by the Rural Community of Parán ("Parán" or "Parán Community") or certain of its members. ²² The Parán Community is a registered rural community located in a mountainous region about 120 kilometres northeast of Lima. ²³ According to a 2018 government report, the Parán Community has a total population of 600 persons with an average of 200 active Community members. Ninety percent of homes have electricity, and sixty percent have access to water through a Community well. Twenty-six percent of the population did not complete primary school. ²⁴ The Community's economy is based on agriculture, primarily production of peaches and, to a lesser extent, avocados. ²⁵ The population is largely located in two villages (Parán and Huamboy). ²⁶
- 94. Lupaka Gold Corp., the Claimant, is a mineral exploration and mining company incorporated in British Columbia, Canada.²⁷ In 2012, Lupaka acquired over 99% of the shares of Invicta Mining Corporation ("IMC" or "Invicta"), a holder of gold mining

²⁰ RER-Dufour, para. 273.

²¹ RWS-Incháustegui 1st, para. 32 ("[i]t is up to the company to ensure a harmonious and peaceful coexistence with the inhabitants within [its] zone of influence."); RWS-Trigoso 1st, para. 28 ("the mining company is responsible for obtaining what is known in the industry as a 'social licence' […].")

²² See, e.g., Cl. Mem., Section 2.3.

²³ RER-Meini, para. 22.

²⁴ Detailed demographic data is contained in the detailed report on Invicta's revised Environmental Impact Assessment ("EIA") permit application. C-0226, MINAM, Report on ITS No. 3, 12 November 2018, pp. 14-16.

²⁵ **C-0226**, MINAM, Report on ITS No. 3, 12 November 2018, p. 15.

²⁶ **C-0226**, MINAM, Report on ITS No. 3, 12 November 2018, p. 14.

²⁷ Cl. Request for Arbitration, para. 4, citing **C-0001**, Kcrok Enterprises Ltd., Certificate of Incorporation, 3 November 2000; and **C-0002**, Kcrok Enterprises Ltd., Certificate of Change of Name to Lupaka, 4 May 2010.

concessions in Peru, as further described below. Lupaka appears to have been a thinly capitalized junior mining company, reliant on investors and loans for operating capital, primarily loans from a single lender.²⁸ The Claimant appears to have been in difficult financial condition, laying off staff, and deferring IMC's executives' salaries even before an October 2018 blockade halted development work at the mine. The blockade greatly aggravated the Claimant's financial difficulties by preventing economic development of the mine.

- 95. The mining concession areas involved in this dispute covered portions of the communal lands of three rural communities: the Parán Community, the Rural Community of Santo Domingo de Apache ("Santo Domingo Community") and the Rural Community of Lacsanga ("Lacsanga Community").²⁹ While the Santo Domingo and Lacsanga Communities have agreed on the boundaries between their respective territories, the Parán Community has not agreed on boundaries with its neighbouring communities.
- 96. Mining activities in the area began in the 1960's, in the form of exploration activities intermittently conducted by various companies. Initial investigations resulted in positive assessments of the resource potential of the area. IMC held mining concessions in the area at issue. Under its prior owners, IMC applied for and received permits from Peru's Ministry of Energy and Mines ("MEM") authorizing a large surface mining project with production of 5,100 tons/day.³⁰
- 97. The multiple permits IMC was required to obtain included an environmental permit, which was approved following extensive studies of the projected environmental and social impacts of the project. The permits included requirements for the permittee to develop and

²⁸ The Claimant apparently had difficulty coming up with US\$80,000 to meet Parán's claim regarding two classrooms that were not built. Resp. C-Mem., paras. 186 *et seq*.

²⁹ C-0058, Technical Report on Resources, Invicta Gold Project, SRK Consulting, 16 April 2012, p. ii ("There are three neighboring communities within 12 km of the Invicta Project area: Parán, Lacsanga and San Domingo de Apache [...] These three communities are in the area of direct influence of the Invicta Project and are titleholders of the surface lands where Invicta Project development would occur.")

³⁰ Cl. Mem., para. 79.

carry out detailed plans to support and enhance the economic and social development of the affected Rural Communities.

- 98. In 2012 the Claimant acquired over 99% of the shares in IMC³¹ for CAN\$10.3 million.³² IMC's new management subsequently decided to proceed with a much smaller underground mining operation. IMC accordingly applied for and was granted amended permits authorizing an underground mining operation with a projected production of 400 tons/day.
- 99. IMC's prior owners had reached an agreement with the Lacsanga Community to carry out mining activities on land claimed by Lacsanga and shown on official maps to lie within the Lacsanga Community's territory. The Parán Community, however, has not accepted that the mine is located within the territory of the Lacsanga Community. At various points in the course of the dispute, the Parán Community has asserted that the mine is in its territory and belongs to it.
- 100. Development and exploitation of the mine required access rights to a road suitable for heavy truck traffic. The Claimant concluded an access agreement with the Lacsanga Community in 2017, providing access to the mine site on a road across Lacsanga's territory.³³
- 101. The Claimant contends that the mine was nearing commercial production in the fall of 2018 and that the few remaining required permits and approvals would not have been an obstacle to a rapid move to production.³⁴ The Respondent disputes this claim, contending that the Claimant could not have begun production before July 2020, a delay that in its view would likely have resulted in foreclosure by the Claimant's lender and the loss of its investment.³⁵

³¹ CWS-Edwards 1st, para. 37.

³² **CD-0003**, Accuracy Hearing Presentation, slide 4.

³³ **C-0043**, 2017 Lacsanga Agreement, 18 July 2017; **C-0089**, Public Deed for the 2017 Lacsanga Agreement, 19 July 2017.

³⁴ CWS-Castañeda 2nd, paras. 87 et seq.

³⁵ See Resp. Rej., paras. 395-396.

- 102. While the circumstances and reasons are disputed, the evidence shows that relations between IMC and the Parán Community deteriorated over time. The Parán Community complained, *inter alia*, that IMC began production at the mine without official authorization, a claim that IMC denied. Events came to a head in 2018. On 19 June 2018, a large group of Community members occupied the mine site for a day (an event described by the Respondent as the "19 June 2018 Protest" and by the Claimant as the "June 2018 Invasion". The characteristics and events of the day are disputed. The Respondent maintains that the visit was a non-violent inspection of the mine and mining camp by Parán Community members and that they did little or no damage and left peacefully. The Claimant contends that the event was accompanied by threats and violence against IMC's personnel and contractors and the theft and destruction of property, in response to which IMC personnel filed criminal charges against several Parán Community leaders who led the Parán contingent to the mine. 39
- 103. The Parán Community authorized a second occupation of the mine to occur in September 2018. However, following consultations between Parán Community leaders and police authorities and the mobilization of a contingent of police at the site, that planned occupation did not occur.
- 104. The dispute intensified in October 2018. On 14 October 2018, members of the Parán Community initiated a blockade of the access road to the mining camp (event described by the Respondent as the "Access Road Protest" and by the Claimant as the "Blockade" thereby preventing the continuation of preparatory work by IMC or its contractors at the mine. This blockade remained in place through the end of the Claimant's investment in

³⁶ See, e.g., Resp. C-Mem., Glossary and para. 16.

³⁷ See, e.g., Cl. Mem., Table of Defined Terms, and para. 97.

³⁸ Resp. Rej., paras. 292-297, citing **R-0261**, Prosecutorial Filing No. 03, Huaura Prosecutor's Office, 5 June 2022, pp. 5-11.

³⁹ Cl. Mem., paras. 105-108.

⁴⁰ See, e.g., Resp. C-Mem., Glossary and para. 16.

⁴¹ See, e.g., Cl. Mem., Table of Defined Terms, and para. 8.

August 2019, when the Claimant lost its IMC's shares through foreclosure of its loans. The evidence indicates that the blockade remained in effect after August 2019.

- 105. Following initiation of the blockade, the Claimant's management made frequent appeals to MEM and police officials for assistance in regaining access to the mine. For their part, MEM officials made unsuccessful efforts to bring about some form of dialogue and negotiated settlement. Preparations were also made for a large-scale police operation to clear access to the mine. However, shortly before this operation was to be launched in February 2019, Parán Community leaders expressed willingness to seek a negotiated resolution, and the operation was immediately postponed. There followed an intense one-day negotiation between Parán Community leaders and IMC's General Manager in Peru. The negotiation culminated in a short-lived agreement, the interpretation of which is disputed by the Parties.⁴² The 26 February 2019 agreement ("26 February 2019 Agreement") soon collapsed amid reciprocal claims of non-compliance.⁴³
- 106. Matters rapidly escalated following the collapse of the 26 February 2019 Agreement. In March 2019 members of the Parán Community took physical control of the mine site and expelled the handful of IMC employees the Community had allowed to return following the February Agreement. The occupiers subsequently retained control of and began to exploit the mine. The evidence includes photographs, apparently taken after March 2019 near the mining camp, displaying a green and white flag with the Parán Community's symbol and the words "República de Parán." The Claimant never regained possession of the site.
- 107. The conflict between IMC and the Parán Community intensified following incidents on 14-15 May 2019. On 14 May, security guards from War Dogs Security, a security firm

⁴² **C-0200**, Minutes of the Meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement.

⁴³ The reasons for the failure of the 26 February 2019 Agreement are disputed. The Respondent's witnesses blame Invicta. *See* RWS-Léon 1st, paras. 44-45; RWS-Trigoso 1st, paras. 43, 48. The Claimant's witness, Mr. Bravo, says that the agreement failed because of the Parán Community's non-compliance. *See* CWS-Bravo 1st, para. 46; CWS-Bravo 2nd, para. 75.

⁴⁴ C-0469, Email from Lupaka to Canadian Embassy, 11 July 2019.

retained by IMC, gained access to the mining camp. 45 The circumstances of their access are disputed. The Claimant contends that the security guards found the road blockade unmanned and proceeded unimpeded to the mining camp. 46 The Respondent contends that they forced aside a small group of Parán Community members. 47 It is undisputed that while the security guards were at the mining camp, a large number of Parán Community members, some of them armed, also came to the camp. There was shooting; two security guards suffered gunshot wounds and a member of the Lacsanga Community was also shot. The circumstances of the shooting at the camp are disputed. The Respondent cites a police report quoting Parán members saying that security personnel started the shooting. 48 Other police and government documents contradict this version of events.⁴⁹ After the shooting began, the security guards fled the camp, and several were subsequently arrested by police. On 15 May, a small group of guards was accosted on the road, and one guard was shot and later died.⁵⁰ The Respondent's expert, Mr. Vela, describes this event in clinical terms: "a purported security guard died from an acute haemorrhage caused by chest trauma inflicted by a firearm."51 The Tribunal has not been informed of any action taken to identify and arrest the perpetrators.

108. Throughout these events, Invicta personnel made frequent unsuccessful oral and written requests to various government agencies for assistance in securing access to its property and protection of its operations.⁵² Peru's officials consistently insisted that IMC needed to

⁴⁵ See, e.g., C-0640 (corrected translation, of Spanish original at R-0113-SPA), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 23.

⁴⁶ Cl. Reply, paras. 343-344.

⁴⁷ See Resp. C-Mem., paras. 333-334.

⁴⁸ **R-0262**, Intervention Act No. 5, 14 May 2019 (a May 2019 Police report recording Parán Community members' claims that War Dogs personnel started the firing; the report also refers to a man with a gunshot wound at Lacsanga medical center).

⁴⁹ **C-0578**, PCM, *aide mémoire*, 27 May 2019. The memorandum describes the appearance of 100 armed Parán Community members and ensuing violence: "two guards were wounded, one […] by a gunshot wound to the mouth cavity."

⁵⁰ *Id.* The Council of Ministers staff memo describes these events. The victim was Jimmy Ronald Vergara Jáuregui.

⁵¹ RER-Vela, para. 142.

⁵² C-0014, Letter from IMC to the MEM, enclosing Letter to Parán, 14 November 2018; C-0015, Letter from Lupaka Gold to the MEM regarding the illegal blockade, 6 February 2019; C-0016, Letter from IMC to MININTER regarding Parán's illegal blockade, 19 February 2019; C-0017, Letter from Lupaka Gold to

pursue dialogue with the Parán Community as the only effective means to manage the situation, and sought to arrange meetings and otherwise to facilitate such dialogue.

- 109. In July 2019, IMC learned that unauthorized persons, believed to be members of the Parán Community, were stealing ore belonging to IMC stockpiled at the mine and trucking it to purchasers down the mountain.⁵³ Informed of this situation by IMC, a senior government official undertook to have inquiries made and appropriate action taken. There is no evidence that any action was taken.⁵⁴
- 110. After initiation of the blockade in October 2018, Invicta personnel had only limited and intermittent access to the site. In the circumstances, the company was unable to mine ore to generate revenue or to secure additional loans. Absent cash flow, it fell increasingly into default on payment and other obligations under its financing agreements with its principal lender. The lender sold its interests under the financing agreements to another party, which called default and foreclosed on the Claimant's shares, which had been pledged as security for the loans. 55
- 111. In December 2021, a large force of police was assembled to close the mine, which remained under the Parán Community's control. The police were driven off by rock-throwing members of the Parán Community. Several policemen and the Deputy Prefect were injured, and police and private vehicles were damaged.⁵⁶

MININTER regarding breach of agreement to stop blockade, 28 February 2019; **C-0018**, Minutes of Meeting between Central Government Officials and IMC, 27 May 2019; **C-0013**, Letter from IMC to the Director of the Office of Dialogue and Citizen Participation at the MEM, 8 July 2019; **C-0019**, Letter from LALIVE to Peru on behalf of Lupaka, 6 August 2019.

[;] RWS-León 2nd, para. 62 (Mr. León became aware of illegal mining in "the third quarter of 2019"); **C-0013**, Letter from IMC to the Director of MEM's Office of Dialogue and Citizen Participation, 8 July 2019.

⁵⁴ CWS-Bravo 1st, paras. 96-97.

⁵⁵ CWS-Ellis 1st, paras. 55-57.

112. The Respondent indicated that a further police operation might occur,⁵⁷ but the Tribunal received no further information regarding this matter.

IV. THE PARTIES' REQUESTS FOR RELIEF

- 113. In paragraph 1062 of its Reply, the Claimant requests that the Tribunal take the following actions:
 - "(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 the amount of at least USD 41,000,000 plus interest at the 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." 58

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⁵⁷ Resp. Rej., para. 444. ("Peru has not executed any operational plans at the Invicta Mine since 14 December 2021. However, future circumstances and intelligence might warrant execution of an operational plan to close the Invicta Mine.")

⁵⁸ Cl. Reply, para. 1062.

- 114. In its Post-Hearing Submission, the Claimant reaffirmed this request for relief, subject to a revision of the amount claimed to US\$40,400,000.⁵⁹ The Claimant's Post-Hearing Submission also requested that the Tribunal make multiple findings with respect to specific aspects of jurisdiction, merits and quantum.⁶⁰ The Tribunal has taken these requests into account as appropriate in formulating this Award.
- 115. In its Post-Hearing Submission, the Respondent requested that the Tribunal:

"a. dismiss all of Claimant's claims for lack of jurisdiction;

b. dismiss for lack of merit any and all claims in respect of which the Tribunal may find that it has jurisdiction;

c. reject Claimant's request for compensation, should the Tribunal find that it has jurisdiction and that there is merit to one of more of Claimant's claims; and

d. order Claimant to pay all costs of the arbitration as well as the totality of the legal fees and expenses incurred by Peru in the present proceeding, up to the date of the final award, plus compounded annual interest on such amounts until the date of effective payment, calculated on the basis of a reasonable interest rate to be determined by the Tribunal."⁶¹

116. The Tribunal has summarized the Parties' respective positions in the various sections that follow. The Tribunal emphasizes that it has considered and taken into account the Parties' arguments in their written and oral submissions in their entirety, irrespective of whether an argument is referred to expressly in the summary of the Parties' positions in this Award and its reasons.

⁵⁹ Cl. PH Mem., paras. 10, 182 ("the Tribunal should award the Claimant damages amounting to USD 40,400,000 plus interest at the rate of LIBOR +4% from 26 August 2019 until 30 June 2023 and UST +5% from 1 July 2023 to the date of payment.")

⁶⁰ Cl. PH Mem., paras. 11 et seq.

⁶¹ Resp. PH Mem., para. 199.

V. JURISDICTION

A. FIRST OBJECTION: LACK OF JURISDICTION RATIONE PERSONAE BECAUSE THE CLAIMANT DISPOSED OF ITS INVESTMENT BEFORE COMMENCING THE ARBITRATION

(1) The Parties' Positions

a. The Respondent's Position

- 117. The Respondent contends that the Claimant is not an investor protected by the FTA because it does not satisfy the FTA definition of "investor of a Party." The Respondent refers to Article 847 of the FTA, which defines "investor of a Party" to mean: "(a) in the case of Canada: [...] a national or and enterprise of Canada, that seeks to make, is making or has made an investment [...]."62
- 118. According to the Respondent, the FTA Parties' use of the present perfect tense ("has made") necessarily means that the definition of investor relates to an activity or event that began in the past and continues to the present. 63 Hence, in the Respondent's understanding, the FTA's definition of "investor of a Party" requires that a claimant continue to own its investment when it brings its claim. 64 In this case, the Claimant lost its investment in the IMC shares to foreclosure prior to bringing this claim in October 2020, and is therefore not an investor protected by the FTA. 65
- 119. At the Hearing, counsel for the Respondent directly addressed the two key words in Article 847, contending that "has made" necessarily means that the Claimant had to retain the investment when it filed its claim:

"[T]he text uses the present perfect 'has made.' It thus refers to an investment that was made in the past, but has continued through to the present time. And this is confirmed by Sidney Greenbaum's seminal work on English grammar, which notes that 'the state present perfect refers to a state that began before the present time

⁶² Resp. C-Mem., paras. 351, 373; CLA-0001/RLA-0010, FTA, Art. 847 (emphasis added).

⁶³ Tr. Day 1, 274:15-275:3 (Mr. Smyth).

⁶⁴ Resp. C-Mem., paras. 352 et seq.

⁶⁵ See Resp. C-Mem., paras. 27, 349, 360 (arguing that the "Claimant transferred to its creditor" the shares in IMC).

of speaking or writing and continues until that time, perhaps including it.' And that's RLA-170, page 270."66

- 120. The Respondent argues that when the Claimant lost all its shares to foreclosure in August 2019, it did not reserve any right to bring claims in respect of those shares. According to the Respondent, there is "no evidence in the record that, at the time [the] Claimant transferred its interest in Invicta, it retained either expressly or even impliedly its right to bring a claim against Peru under the Peru-Canada FTA."⁶⁷ Hence, the Claimant had no surviving investment qualifying it as an investor when it lodged its Request for Arbitration in October 2020, or any retained right to claim in respect of that investment.⁶⁸
- 121. The Respondent finds support for its position in the decisions of other arbitral tribunals in cases such as *Aven v. Costa Rica*⁶⁹ and *Daimler v. Argentina*. In its view, these decisions show 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 [...] namely, where special circumstances exist, and where an investor has retained the right to assert a claim)."⁷¹
- 122. The Respondent contends that the special-circumstances exception to the claimed general rule does not apply here. It does not apply because, *inter alia*, any damage suffered by the Claimant resulted from its own actions in failing to develop a positive relationship with the Parán Community and by entering into financial arrangements that left it vulnerable to failure absent such a relationship.⁷²

⁶⁶ Tr. Day 1, 274:16-275:3 (Mr. Smyth).

⁶⁷ Resp. C-Mem., paras. 365-366.

⁶⁸ Resp. C-Mem., para. 27. *See also*, Resp. C-Mem., paras. 365-373.

⁶⁹ **RLA-0017**, *David R. Aven, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018, para. 301.

⁷⁰ **RLA-0019**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 145.

⁷¹ Resp. C-Mem., para. 353 (emphasis in original).

⁷² Resp. C-Mem., paras. 362-364.

123. At the Hearing, the Tribunal noted that the FTA was concluded in three official languages, each equally authentic. Article 33 of the Vienna Convention on the Law of Treaties ("VCLT") provides in this regard:

"Article 33 -- Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

[...]

3. The terms of the treaty are presumed to have the same meaning in each authentic text. $[...]^{973}$

124. Accordingly, the Tribunal requested that the Parties' Post-Hearing Submissions consider:

"Are the definitions of 'investor of a Party' in Article 847 in the three official languages of the FTA consistent? If not, what principles or rules should the Tribunal apply to address any discrepancy? What should be the result?" ⁷⁴

125. The Respondent's Post-Hearing Submission contends that all three authentic languages are consistent with its understanding that a claimant must continue to hold its investment when it brings its claim:

"The Spanish and French versions of the definition of an investor under Treaty Article 847 are consistent with the English version. The Spanish version uses the pretérito perfecto compuesto, 'ha realizado,' which is equivalent to the present perfect in English and describes an action that started in the past and is still happening or holds a connection with the present. By contrast, the pretérito perfecto simple, 'realizó'—which is equivalent to the simple past in English ('made')—commonly describes an action completed in the past. The French version of Article 847 uses the passé composé, which is equivalent to the present perfect in English and the pretérito perfecto compuesto in Spanish. Hence, there is no discrepancy between the three versions of the Treaty— all three languages require that an investor still have an investment at the time the arbitration is commenced." 75

⁷³ **RLA-0128**, Vienna Convention on the Law of Treaties, United Nations, 1969 ("VCLT"), Art. 33.

⁷⁴ Tribunal Email to Parties, 10 April 2023.

⁷⁵ Resp. PH Mem., para. 31.

b. The Claimant's Position

126. The Claimant contends that the FTA does not require that a claimant continue to own the investment when it brings a claim.⁷⁶ For the Claimant, the key phrase "has made" in the English text relates to an action that occurred in the past but does not require that the action continue to the present. Hence, a claimant need not continue to own the investment when it brings its claim. The Claimant finds support for this view in Canada's Non-Disputing Party Submission.⁷⁷ In Canada's view:

"Article 847 defines an 'investor of a Party' as, in the case of Canada, 'a national or an enterprise of Canada that seeks to make, is making or has made an investment'. A person's ability to bring a claim as an investor is therefore tied to the investment that it is seeking to make, is making, or has made in the past. Canada notes that the definition contemplates circumstances where an investor may have started and completed the relevant investment entirely in the past. Read together, Article 819 and the definition of 'investor of a Party' in Article 847 do not expressly require that a person own or control an investment at the time it submits a claim to arbitration." ⁷⁸

- 127. In its Post-Hearing Submission, the Claimant refers to other cases in which tribunals have found that language analogous to that of the FTA does not require that an investor retain ownership of its investment when a claim is lodged, pointing to *Mondev v. USA*⁷⁹ and *EnCana v. Ecuador*.⁸⁰
- 128. As to the Tribunal's questions regarding the three authentic languages of the FTA, the Claimant maintains that all three are consistent with its position.⁸¹ Applying the interpretive principles of the VCLT, the Claimant submits that this conclusion is compelled by ordinary meaning ("[t]he sentence 'that seeks to make, is making or has made an investment' covers three simple scenarios with regard to the investment: future, present

⁷⁶ Cl. Reply, para. 396; Cl. PH Mem., para. 21.

⁷⁷ Cl. Reply, paras. 396-399; Cl. PH Mem., paras. 22-31.

⁷⁸ Canada Submission, para. 5 (emphasis added).

⁷⁹ Cl. PH Mem., para. 23, citing **CLA-0161**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paras. 77, 80.

⁸⁰ Cl. PH Mem., para. 24, citing **RLA-0016**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Final Award, 3 February 2006, paras. 125, 129, 131-132.

⁸¹ Cl. PH Mem., paras. 19-20.

and past, respectively"); 82 context (citing provisions such as Articles 810 and 820 of the FTA, which do not require an investor to continue to hold the investment); 83 and object and purpose (citing *Mondev v. USA*, 84 which concluded that similar treaty language did not require ownership when a claim is filed). According to the Claimant:

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

'[t]o require the Claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its 'sale or other disposition' (Article 1102(2))."85

(2) The Tribunal's Analysis and Decision

- 129. The Respondent's first jurisdictional objection poses a narrow issue involving the meaning of two words in the definition of "investor of a Party" in Article 847 of the FTA. In considering this question, the Tribunal is mindful that its jurisdiction depends on the specific wording adopted by Canada and Peru in the FTA, not on the decisions of other tribunals considering jurisdiction under other treaties. The words used by the FTA Parties in this agreement control.
- 130. Article 837 of the FTA on "Governing Law" provides that the Tribunal is to decide "the issues in dispute in accordance with this Agreement and applicable rules of international law." In this regard, the VCLT, which sets out generally accepted international law rules

⁸² Cl. PH Mem., para. 27.

⁸³ Cl. PH Mem., para. 28.

⁸⁴ **CLA-0161**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002.

⁸⁵ Cl. PH Mem., para. 29, quoting **CLA-0161**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 91 (emphasis by the Claimant).

⁸⁶ CLA-0001/RLA-0010, FTA, Art. 837.

of treaty interpretation, is in force between Canada and Peru. Article 31 of the VCLT provides in relevant part:

- "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
- 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. [...]."87
- 131. The Tribunal therefore turns to the ordinary meaning of the disputed phrase. In their written submissions, the Parties did not explicitly address application of the rules of the VCLT to the disputed phrase. However, as noted above, in the Respondent's opening at the Hearing, counsel addressed the meaning of the phrase in light of what were said to be the relevant rules of English grammar. Citing a treatise on English grammar, so counsel maintained that the key phrase "has made" is in the present perfect tense. In counsel's contention, this conveyed that an action accomplished in the past must continue into the present. Hence, the investment must remain the property of the investor when the claim is filed.
- 132. A Tribunal member asked about this contention, observing that "I learned from good teachers [...] that the present perfect can refer also to actions that happened in the past, but that have an importance in the present. So is that something that Greenbaum refers to [...]?" Counsel replied that "I'd have to look in detail at the page [...] but as I recall, the examples that are used by Greenbaum focus on an action that is started in the past and continues through to the present."89

⁸⁷ **RLA-0128**, VCLT, Art. 31.

⁸⁸ RLA-0170, S. Greenbaum, The Oxford English Grammar, 1996.

⁸⁹ Tr. Day 1, 275:13-276:1 (Arbitrator Garibaldi, Mr. Smyth).

- 133. The Tribunal notes that the treatise cited by the Respondent describes, on the page following that cited at the Hearing, the "event present perfect" tense. According to the author, this "refers to one or more events that have taken place in a period that precedes the present time of speaking or writing. The period within which the event or events took place is viewed as relevant to the present."90
- 134. The Tribunal understands this to be the situation here. The Claimant's past ownership of the investment occurred in a period that has central relevance to the present situation, as it gave rise to the events leading to the present claim.
- 135. The Tribunal considers that this understanding of the phrase is consistent with the "ordinary meaning to be given" to the language of the provision, as required by the VCLT. Further, the Tribunal does not see that the interpretation advocated by the Respondent would advance the object and purpose of the FTA. As the *EnCana v. Ecuador* tribunal observed in rejecting a claim similar to the Respondent's, "[p]rovided loss or damage is caused to an investor by a breach of the Treaty, the cause of action is complete at that point; retention of the subsidiary (assuming it is within the investor's power to retain it) serves no purpose as a jurisdictional requirement."⁹¹
- 136. The meaning of the disputed phrase in French and Spanish is consistent with the Tribunal's understanding of the present perfect tense in the English-language text. The Tribunal notes in this regard that the Respondent's Post-Hearing Submission agrees that both the Spanish and French texts are equivalent to the present perfect in English.

"The Spanish version uses the pretérito perfecto compuesto, 'ha realizado,' which is equivalent to the present perfect in English and describes an action that started in the past and is still happening or holds a connection with the present. [...] The French version of Article 847 uses the passé composé, which is equivalent to the present perfect in English and the pretérito perfecto compuesto in Spanish." ⁹²

⁹⁰ **RLA-0170**, S. Greenbaum, The Oxford English Grammar, 1996, p. 271.

⁹¹ **RLA-0016**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Final Award, 3 February 2006, para. 131.

⁹² Resp. PH Mem., para. 31.

- 137. The Spanish text of the definition of "inversionista de una Parte" in Article 847 reads "una empresa [...] que intenta realizar, está realizando o ha realizado una inversión," utilizing the compound past perfect tense. 93 In this regard, the Tribunal is aware that there is considerable regional and other variation in usage of the compound past perfect tense in different regions of the Spanish-speaking world, and that usage has evolved over time. Hence, the key phrase ("ha realizado una inversión") may be subject to different interpretation depending on the location or the origin or background of the interpreter. However, in the Tribunal's view, the use of the Compound Past Perfect Tense as used in the FTA is best understood to relate to an event in the past or to an event in the past with continuing relevance in the present, as with the English phrase, a view confirmed by the Respondent in its Post-Hearing Submission.
- 138. The French text is again comparable to the English. It refers to "une enterprise [...] qui cherche à effectuer, effectue ou a effectué un investissement," utilizing the passé composé. 94 In the Tribunal's understanding, while the passé composé as used here in the French text is often used to convey the simple past tense that an action was completed in the past it can also be used for a past action with present consequences.
- 139. The Tribunal therefore understands the meaning of the disputed phrase in French and Spanish to be consistent with this understanding of the English.
- 140. All three authentic languages point in the same direction. They do not require that a claimant continue to own its investment at the time it brings the claim.
- 141. The Tribunal accordingly finds that the disputed phrase "has made" does not require the Claimant's continued ownership of the investment at the time it filed its claim. The Claimant is a protected investor within the scope of Article 847 of the FTA. The Respondent's first jurisdictional objection is denied.
- 142. The Claimant advances a further argument that, even if the FTA is interpreted as urged by the Respondent, it need not show that it owned the investment when it brought the claim.

⁹³ RLA-0010-SPA, FTA, Art. 847.

⁹⁴ **RLA-0010-FRE**, FTA, Art. 847 (hard copy).

The Claimant contends that the Respondent itself recognises that there is an exception to the ownership requirement where the loss of the investment stems from special circumstances, as articulated in cases such as *Aven v. Costa Rica.*⁹⁵ The Claimant notes that, in the Respondent's own submission, the exception holds that the investor need not own the investment "where there has been 'direct causation' between actions attributable to the State and the transfer of the claimant's investment."⁹⁶

143. In light of the Tribunal's decision regarding interpretation of "has made" in the definition of "investor of a Party" in Article 847 of the FTA, it is not necessary to address this alternative argument at length. However, the Tribunal finds *infra* that the Claimant's investment was expropriated.⁹⁷ Accordingly, even if Article 847 were construed to require continued ownership, the cited exception would apply. The Claimant lost its investment on account of acts and omissions attributable to the Respondent.

B. SECOND OBJECTION: LACK OF JURISDICTION RATIONE MATERIAE BECAUSE THE CLAIMANT FAILED TO COMPLY WITH THE WAIVER REQUIREMENT UNDER ARTICLE 823.1 OF THE TREATY

(1) The Parties' Positions

a. The Respondent's Position

144. The Respondent's second objection to jurisdiction is that the Tribunal lacks jurisdiction because the Claimant did not provide the waiver required by Article 823(1)(e) of the FTA in respect of the injuries claimed by Invicta.⁹⁸

145. Article 823(1)(e) of the FTA provides:

"(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

⁹⁵ Cl. Reply, paras. 406 *et seq.*, citing **RLA-0017**, *David R. Aven et al v. Republic of Costa Rica*, ICSID Case No. UNCT/5/3, Award, 18 September 2018. *See also*, Cl. PH Mem., para. 12.

⁹⁶ Cl. Reply, para. 409, citing Resp. C-Mem., para. 354.

⁹⁷ *Infra*, Section VI.E(2) (Expropriation).

⁹⁸ Resp. C-Mem., paras. 374-381.

measure of the disputing Party that is alleged to be a breach referred to in Article 819 [...]."99

146. The Respondent argues that it is undisputed that the Claimant did not provide such a waiver in respect of Invicta, the enterprise claimed to have suffered loss or damage. ¹⁰⁰ It also contends that the exception to the waiver requirement in Article 823(5) of the FTA does not apply in this case, because "Peru did not deprive Claimant of its control in Invicta," and instead "Claimant lost control of Invicta" as a result of a "foreclosure [which] was not caused by any actions of Peru." ¹⁰¹

b. The Claimant's Position

- 147. The Claimant contends that Lupaka has provided its waiver "as the disputing investor," and that Article 823(5) of the FTA relieves it of the obligation to submit a waiver on behalf of Invicta. 102 Article 823(5) provides: "[a] waiver from the enterprise under subparagraphs 1(e) or 2(e) shall not be required only where a disputing Party has deprived a disputing investor of control of an enterprise." 103
- 148. The Claimant insists that this exception applies because the Respondent deprived it of control of its investment in Invicta. 104

(2) The Tribunal's Analysis and Decision

149. The terms of Article 823(5) of the FTA dictate that a tribunal weighing whether it has jurisdiction may – indeed, likely will – need to make a jurisdictional finding concerning matters that are also involved in the merits of the claim. Thus, as there is no waiver from Invicta, this Tribunal must assess at the jurisdictional threshold whether the Respondent deprived the Claimant of control of its enterprise. This involves competing claims

⁹⁹ CLA-0001/RLA-0010, FTA, Art. 823(1)(e).

¹⁰⁰ Resp. C-Mem., para. 379. Lupaka's own waiver is at **C-0021**, Lupaka, Consent and Waiver in accordance with Article 823 FTA, 27 September 2020.

¹⁰¹ Resp. C-Mem., para. 380. This argument is further detailed elsewhere in this Award, *infra*, Section VII.A(1)b (Causation).

¹⁰² Cl. Reply, paras. 412 et seq.

¹⁰³ CLA-0001/RLA-0010, FTA, Art. 823(5).

¹⁰⁴ Cl. Reply, para. 416.

regarding the reasons for the Claimant's loss of control that are also involved in the merits of the claim.

- 150. For purposes of determining its jurisdiction, the Tribunal finds here that the Claimant was deprived of control of its investment by the Respondent. This occurred *inter alia*, by the physical seizure of the Claimant's mine by the Parán Community in March 2019 and by the Respondent's national authorities' failure to respond appropriately to the seizure of the mine and other acts and omissions that caused the Claimant to lose control of its investment. The events, actions, and failures to act that caused the Claimant's loss of control are fully set out *infra* in this Award. For clarity and economy, these events, actions and failures are not set out here a second time for the narrower purpose of applying Article 823(5)'s exception to the waiver requirement.
- 151. The Tribunal finds that Article 823(5)'s exception to the waiver requirement applies. The Respondent's Second Objection to jurisdiction is denied.

VI. LIABILITY

A. APPLICABLE LAW

152. There is no disagreement regarding the applicable law. Pursuant to Article 837 of the FTA, "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." 106

B. ATTRIBUTION

(1) The Parties' Positions

153. The Claimant contends that the actions of the Parán Community and its members, which it views as central to the loss of its investment, are attributable to the Respondent under the customary international law ("CIL") rules of attribution as set out in the International Law

¹⁰⁵ Infra, Sections VI.B (Attribution) and VI.E (Expropriation).

¹⁰⁶ CLA-0001/RLA-0010, FTA, Art. 837.

Commission's Articles on State Responsibility ("ILC Articles"). 107 The Respondent denies that the actions of the Parán Community and its members are attributable to it. 108

154. The Parties agree that the ILC Articles reflect the applicable rules of international law. 109

They emphasize the following ILC Articles:

"Article 4. Conduct of organs of a State

- 1. 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.
- 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."
- "Article 5. Conduct of persons or entities exercising elements of governmental authority

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 the person or entity is acting in that capacity in the particular instance."

"Article 7. Excess of authority or contravention of instructions

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 the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions." ¹¹⁰

¹⁰⁷ See, e.g., Cl. Mem., Section 4.1; Cl. Reply, Section 9.2; Cl. Skeleton, Section 3.2.2; **CLA-0003**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001); **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001).

¹⁰⁸ See, e.g., Resp. C-Mem., Section IV.A; Resp. Rej., Section IV.A; Resp. Skeleton, Section V.A.

¹⁰⁹ Cl. Mem., paras. 237 et seq.; Resp. C-Mem., para. 385.

Ci. Wieni., paras. 257 ct seq., resp. C Wieni., para. 505.

¹¹⁰ CLA-0003, ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Arts. 4, 5, 7.

a. The Claimant's Position

155. The Claimant claims attribution alternatively under ILC Article 4 (dealing with State organs) or Article 5 (non-organs exercising governmental authority). The Parties also referred to ILC Article 7 (excess of authority or contravention of instructions), which has a less significant role in the context of this claim. 112

(i) The Claimant's Position Regarding ILC Article 4

- 156. The Claimant contends that its injury is attributable to the Respondent under ILC Article 4, involving the acts of State organs.¹¹³
- 157. In the Claimant's view, a Rural Community constitutes a "territorial unit of the State," and qualifies as a State organ within the scope of ILC Article 4.¹¹⁴ The Claimant describes 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." According to the Claimant, each of the Parán Community's component organs (its President and other officers, Governing Committee, and *Rondas Campesinas*) played a central role in the "June 2018 Invasion," the "Blockade" and other relevant events, making these events attributable to Peru. ¹¹⁶
- 158. The Claimant discounts the Respondent's emphasis on the lack of precedent for such attribution, the claimed special status of indigenous communities as non-State actors, and their autonomous status under Peru's domestic law. The Claimant characterizes these arguments as predicated upon the Parán Community's presumed autonomy and the State's lack of control over it. 117 For the Claimant, international law does not require State control or direction of an entity for the entity to be a State organ. The Claimant points to the actions of autonomous territorial units such as States of the United States like Arizona. Their

¹¹¹ Cl. Mem., Section 4.1; Cl. Reply, Sections 9.1 and 9.2; Cl. Skeleton, Section 3.2.

¹¹² See infra, paras. 242-243.

¹¹³ Cl. Reply, Sections 9.1. and 9.2.1; Cl. Skeleton, paras. 72, 74.

¹¹⁴ See, e.g., Cl. Reply, paras. 425, 427, 442.

¹¹⁵ Cl. Reply, para. 421.

¹¹⁶ *Id*.

¹¹⁷ Cl. Reply, paras. 422-423.

actions are not subject to control by the national government but can give rise to attribution, as shown in the *LaGrand* case in the International Court of Justice ("ICJ"). 118 According to the Claimant:

"[T]he 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. [...] [T]hese 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." 119

- 159. The Claimant also stresses the Parán Community's position as a distinct territorial entity with broad powers of self-government over its territory, characteristics which show it to be a territorial unit of Peru covered by ILC Article 4. 120 The Claimant dismisses the Respondent's invocation of the claimed special status of indigenous peoples in international law, on the ground that it finds no rule of international law precluding attribution to the State of actions of such communities. 121 The Claimant also observes that Peru's MEM, applying the principles of the ILO Convention 169, determined the Parán Community did not qualify as an indigenous community either under Peruvian law or under international law. 122
- 160. According to the Claimant, the Respondent's emphasis upon rural communities' prerogatives of self-governance and autonomy proves too much: "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 Claimant disputes the significance of Parán's "distinct but subordinate personality" under Peru's internal law, arguing that the controlling principle under

¹¹⁸ Cl. Reply, paras. 431, 439.

¹¹⁹ Cl. Reply, para. 423.

¹²⁰ Cl. Reply, para. 425.

¹²¹ Cl. Reply, paras. 433 et seq.

¹²² Cl. Reply, para. 435.

¹²³ Cl. Reply, para. 442.

international law is that a State is responsible for the acts of and omissions of organs, regardless of whether they act independently of the central government of the State. 124

161. The Claimant also denies that improper conduct by Parán Community members involved individual misconduct, and not actions by the Community attributable to the State. According to the Claimant:

"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 and other officials from Parán's Governing Committee and Parán's Rondas Campesinas." 125

In claiming attribution under ILC Article 4, the Claimant also cites the words and actions of the local Subprefect, Mr. Soymán Román Retuerto, clearly an official of the Ministry of the Interior ("MININTER") whose conduct was attributable to the State. ¹²⁶ The Claimant portrayed Mr. Retuerto as an implacable opponent of the Invicta project who made false public statements, gave misleading interviews, ¹²⁷ and played "a leadership role in the various invasions of the Invicta Mine and the Blockade." His opposition to the project is suggested in an October 2018 letter to the Minister of Energy and Mines from Parán's President Isidro Román Palomares, citing an (incorrect) report by Mr. Retuerto claiming that Invicta was active, operating and "transporting material on a daily basis." The Respondent accepts that Mr. Retuerto was a State official, but denies that he took any improper actions. ¹³⁰

¹²⁴ Cl. Reply, paras. 444-446.

¹²⁵ Cl. Reply, para. 450.

¹²⁶ Cl. Reply, para. 418 et seq.

¹²⁷ See Cl. Reply, para. 208, citing inter alia, C-0526, Interview with Leoncio Prado Subprefect (MININTER) (Video), 21 December 2018; C-0527, Interview with Leoncio Prado Subprefect (MININTER) (Video Transcript), 21 December 2018; C-0528, Interview with Leoncio Prado Subprefect (MININTER) (Video), 8 July 2019; C-0529, Interview with Leoncio Prado Subprefect (MININTER) (Video Transcript), 8 July 2019.

¹²⁸ Cl. Reply, para. 419.

¹²⁹ See Cl. Reply, para. 207, fn. 382, citing C-0163, Letter from the Parán Community to MEM, 10 October 2018.

¹³⁰ See Resp. Rej., paras. 213 et seq.; Resp. PH Mem., paras. 114 et seq. (referring to Mr. Retuerto as a "regional government official").

(ii) The Claimant's Position Regarding ILC Article 5

163. The Claimant contends in the alternative that there is attribution on the basis of ILC Article 5, involving conduct by entities that are not organs of the State but exercise elements of governmental authority. The Claimant notes that the ILC's Commentary to Article 5 "specifies that an 'entity' under Article 5 embraces a 'wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental Authority' and may include semi-public entities and private companies." Citing the powers and characteristics of rural communities under Peru's Constitution, the General Law of Rural Communities and Article 2 of Peru's Decree No. 8 of 1991, 133 the Claimant contends that the Parán Community exercised governmental authority within the scope of ILC Article 5. The Claimant thus contends, *inter alia*, that:

"Rural communities like Parán receive public funds, have their own governmental and administrative apparatus, and manage and administer land collectively owned by the community. Furthermore, rural communities exercise jurisdictional powers within their territorial scope in accordance with customary law." ¹³⁴

- 164. The Claimant's Article 5 analysis emphasizes the role of the Parán Community's armed rural patrols (*Rondas Campesinas*) which are said to exercise "significant police powers." The Claimant points out that the ILC Commentary "confirms that police powers are a function of a public character normally exercised by State organs. Thus, where the State delegates that power to an entity, the conduct of the entity (while exercising the police powers) will be attributable to the State." 136
- 165. The Claimant contends that the Respondent delegated significant powers to the Parán Community, particularly to its *Ronderos*. ¹³⁷ The Claimant refers to multiple provisions of Peru's domestic law said to show "the extent to which the State has delegated sweeping

¹³¹ Cl. Mem., Section 4.1; Cl. Reply, Section 9.2.2.

¹³² Cl. Mem., para. 239.

¹³³ Cl. Mem., paras. 240-242.

¹³⁴ Cl. Mem., para. 243 (footnote omitted).

¹³⁵ Cl. Mem., para. 246.

¹³⁶ Cl. Mem., para. 247.

¹³⁷ Cl. Reply, paras. 476 et seq.

powers to the *Rondas Campesinas* to fill the institutional vacuum created by its near-total absence in the rural areas of the Andes region."¹³⁸ Cited provisions include, *inter alia*, provisions of Peru's Constitution allocating a "special jurisdiction" to Rural and Native Communities and their *Rondas Campesinas*; the General Law on Rural Communities; General Law No. 27908 on *Rondas Campesinas*; and Peru's Regulations on *Rondas Campesinas*. The Claimant also cites jurisprudence of Peru's Supreme Court recognizing and addressing the scope of the special powers and responsibilities of *Rondas Campesinas*, including powers of arrest and detention of third parties who are not members of the rural community. ¹⁴⁰

- 166. According to the Claimant, these provisions, particularly the Regulations on *Rondas Campesinas*, "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." The Claimant also points to MININTER regulations promoting dialogue and engagements between the Ministry and the *Rondas Campesinas* and to Parán's *Ronderos*' receipt of arms and training from Peru's Army, 143 as showing the *Rondas Campesinas*' position as part of Peru's law enforcement and security structure.
- 167. The Claimant maintains that the powers conferred upon the Parán Community and its *Rondas Campesinas* involve the exercise of governmental authority. The Claimant applies in this connection a four-part analysis articulated by Professor Crawford to show the exercise of governmental authority, an analysis also cited by the Respondent. This analysis calls for consideration of (i) the content of the powers; (ii) how they were conferred; (iii) the purpose for which they were conferred; and (iv) the degree of accountability to, and supervision by, the State. 145

¹³⁸ Cl. Reply, para. 476.

¹³⁹ Cl. Reply, paras. 479-489.

¹⁴⁰ Cl. Reply, paras. 500-511.

¹⁴¹ Cl. Reply, para. 490.

¹⁴² Cl. Reply, paras. 493-494.

¹⁴³ Cl. Reply, paras. 497-499.

¹⁴⁴ Cl. Reply, paras. 512 et seq.

¹⁴⁵ Cl. Reply, paras. 512-513. *See also*, Resp. C-Mem., para. 391.

- 168. In the Claimant's view, the key elements of this analysis are satisfied. As to (i), the Claimant emphasizes that the police powers allocated to the Parán Community and its *Rondas Campesinas* are archetypical governmental powers of the sort that a State normally reserves to itself. The Claimant disputes the Respondent's claim that these powers were limited and non-judicial. 147
- 169. Element (ii) addresses how the powers were conferred. According to the Claimant, this element is satisfied, because the powers involved were derived from provisions of Peru's Constitution, statutes, and regulations. Element (iii), involving the purpose of the powers, is met, because of the unusual circumstances that led to formal delegations of powers to rural communities and their *Rondas Campesinas*. The *Ronderos* were granted their powers, according to the Claimant, "to fill the institutional vacuum left by the neartotal 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." The Claimant judges that element (iv) of the analysis is not dispositive: while oversight and accountability might be relevant, "the State cannot escape international responsibility for delegating away its powers and failing to supervise the entity thereby entrusted with governmental authority." ¹⁵⁰
- 170. The final stage of the Claimant's argument for application of ILC Article 5 involves a factual inquiry addressing the final clause of the ILC's formulation: did the Parán Community and its *Rondas Campesinas* act with apparent authority during the course of the events involved in this claim?¹⁵¹
- 171. The Claimant insists that they did, disputing the Respondent's contention that claims that the *Rondas Campesinas* played a role in these events were "unsubstantiated." For the

¹⁴⁶ Cl. Reply, paras. 514-517.

¹⁴⁷ Cl. Reply, paras. 518-521.

¹⁴⁸ Cl. Reply, para. 523.

¹⁴⁹ Cl. Reply, para. 524.

¹⁵⁰ Cl. Reply, para. 528.

¹⁵¹ Cl. Reply, paras. 531 et seq.

¹⁵² Cl. Reply, paras. 532(a) and 534.

Claimant, the evidence shows that "Parán's *Ronda Campesina* played [a] central role in the key events that led to the demise of the Claimant's investment." The evidence is said to show, *inter alia*, that the Community's *Ronderos* were present during the "June 2018 Invasion," illegally used their firearms, took part in ransacking the mine site, and participated in the illegal detention of Invicta staff members. As to the October 2018 blockade, the evidence is said to show that the *Ronderos* played a central role in creating and operating the blockade, including using their weapons, wounding a Lacsanga Community member, and being involved in the killing of one of IMC's security personnel. 155

172. The Claimant rejects the Respondent's contention that the *Rondas Campesinas* did not act in a governmental capacity because their alleged acts were illegal under Peruvian law and exceeded the *Ronderos*' legal authority. ¹⁵⁶ The Claimant cites ILC Article 7, confirming a State's responsibility for conduct by a person or entity exercising governmental authority even if the conduct exceeds the actor's authority or contravenes instructions. ¹⁵⁷ According to the Claimant, "the State cannot [...] 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 [...]." The Claimant acknowledges that international law does not impose responsibility for purely private acts but finds this irrelevant here. In the Claimant's view, the Respondent would have to prove that the violent actions involved were those of unconnected individuals, and not of the Parán Community or its *Ronderos*, ¹⁵⁹ but it could not do so:

"[I]n 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

¹⁵³ Cl. Reply, para. 534.

¹⁵⁴ *Id*.

¹⁵⁵ Cl. Reply, para. 535.

¹⁵⁶ Cl. Reply, para. 532.

¹⁵⁷ Cl. Reply, para. 539.

¹⁵⁸ Cl. Reply, para. 540.

¹⁵⁹ Cl. Reply, para. 544.

coincidence that all the individuals involved were all members of the same organ or entity." ¹⁶⁰

- 173. The Claimant dismisses four other arguments by the Respondent disputing application of ILC Article 5. First, as to the argument that the blockade and mine invasions occurred outside of Parán's territorial limits, the Claimant maintains that the legal test is not whether the actions fell within the scope of Parán's territorial jurisdiction under Peruvian law, but whether they "were so far removed from the scope 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." Here, the Claimant examined a table offered by the Respondent intended to show that the actions complained of exceeded the powers of the Parán Community and its *Ronda Campesina* under Peru's laws. According to the Claimant, this table in fact shows these actions were closely related to powers conferred by Peru's legislation. 162
- 174. Second, the Claimant disputes the claimed lack of evidence showing that members of the Parán Community and its *Ronderos* acted in an official capacity. ¹⁶³ For the Claimant, the evidence "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." ¹⁶⁴
- 175. Third, the Claimant disagrees that the evidence did not show the *Ronderos* use of firearms, citing contrary statements in a Police Operational Plan. For the Claimant, "the limited evidence that the Respondent did agree to produce [...] confirmed that the Police were aware of Parán's *Ronda Campesina*'s use of these military weapons" supplied by the Army. ¹⁶⁵
- 176. Finally, the Claimant denies that the actions of Parán and its Ronderos were taken for private gain, not for governmental purposes. The Claimant points out, *inter alia*, that under

¹⁶⁰ Cl. Reply, para. 548.

¹⁶¹ Cl. Reply, para. 559.

¹⁶² Cl. Reply, paras. 561 et seq.

¹⁶³ Cl. Reply, para. 592.

¹⁶⁴ *Id*.

¹⁶⁵ Cl. Reply, para. 595.

ILC Article 7, the existence of improper motives does not preclude attribution. With respect to ILC Article 5, the Claimant concludes that:

"[T]he 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." ¹⁶⁷

b. The Respondent's Position

177. The Respondent denies that the actions of the Parán Community and its *Rondas Campesinas* are attributable to it under either ILC Article 4 or 5, characterizing the Claimant's position as "outlandish." ¹⁶⁸

(i) The Respondent's Position Regarding ILC Article 4

- 178. The Respondent disputes the Claimant's arguments for attribution under ILC Article 4. It emphasizes the absence of legal authority for finding the actions of an indigenous or rural community attributable to the State, and urges that such a finding would "set a dangerous precedent" and conflict with a half century of efforts by States "to ensure that the rights of such communities are properly respected." ¹⁶⁹
- 179. The Respondent contends: (i) that ILC Article 4 requires a showing that the Parán Community is structurally a part of the State or is in complete dependence upon the State; (ii) that the Parán Community is not an organ or "territorial unit" of the State; (iii) that the *Rondas Campesinas* are not empowered to exercise governmental authority; and (iv) that any actions allegedly carried out by the *Rondas Campesinas* were not carried out in the exercise of such authority.¹⁷⁰
- 180. According to the Respondent, in assessing whether an entity is an organ of the State, "the starting point is the classification of the entity as a matter of domestic law."¹⁷¹ If an entity

¹⁶⁶ Cl. Reply, para. 597.

¹⁶⁷ Cl. Reply, para. 599.

¹⁶⁸ Resp. Rej., para. 476.

¹⁶⁹ Resp. Rej., para. 478.

¹⁷⁰ Resp. Rej., para. 485.

¹⁷¹ Resp. Rej., para. 488.

is not so classified, it may qualify as a "de facto organ" but only if there is "complete dependence" between the entity and the State, 172 as shown by the ICJ's decision in the Bosnian Genocide case. 173 Further, the Respondent argues, there is "a strong presumption" that an entity with separate legal personality is not an organ, citing Unión Fenosa v. Egypt. 174

- 181. Several provisions in Peru's legal order are said to show that Rural Communities are not part of the legal structure of the State. These include, *inter alia*, Title IV of the Constitution (entitled "the structure of the State") which lists various State organs but does not include Rural (or native) Communities; and Chapter XIV of the Constitution, providing for the creation of decentralized geographic entities as vehicles for decentralization, which again does not include Rural Communities.¹⁷⁵
- 182. The Respondent dismisses the significance of a MEM report cited by the Claimant which, emphasizing that Spanish was the dominant language in the area, found that there were no indigenous communities in the area of the Invicta Mine. As to this, the Respondent stresses Article 89 of Peru's Constitution recognizing the existence and autonomous character of Native Communities. The Respondent disputes the weight and authority of a scholarly article in which the author concluded that the United States would be internationally responsible for human rights violations by American Indian Tribes, alleging numerous flaws in the author's analysis. The Respondent also discounts the

¹⁷² Resp. Rej., paras. 489-490.

¹⁷³ Resp. Rej., para. 489, quoting **RLA-0162**, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ, Judgment, 26 February 2007, para. 392.

¹⁷⁴ Resp. Rej., para. 491, citing **RLA-0163**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.98.

¹⁷⁵ Resp. Rej., paras. 505-506.

¹⁷⁶ C-0009, Report No. 127-2014-MEM-DGM-DTM/PM and Resolution No 0566-2014-MEM-DGM/V, Resolution Approving Mining Plan, MEM, 10 and 11 December 2014, para. 4.6.

¹⁷⁷ Resp. Rej., paras. 509, 511.

¹⁷⁸ **CLA-0111**, K. Cowan, "International Responsibility for Human Rights Violations by American Indian Tribes," Yale Human Rights & Developments L.J., Vol. 9, p. 34.

¹⁷⁹ Resp. Rej., paras. 512-515.

opinion of Professor Momtaz¹⁸⁰ that "State organ" encompasses "territorial communities," observing that Professor Momtaz does not explain the meaning of the term he employs. ¹⁸¹

- 183. The Respondent's second argument opposing attribution under ILC Article 4 holds that the Parán Community is not a "territorial unit" of the State. According to the Respondent, this concept is limited to political subdivisions of the State, as shown by the fact that all of the cases cited in the ILC Articles and Commentary involve entities that are territorial units within a federated state. The Respondent emphasizes that indigenous and rural communities have a separate and independent existence from the "social and political framework of the State." The Respondent frequently cites in this regard authorities dealing with indigenous communities, but contends that rural communities were "analogous, for legal purposes to indigenous communities." 184
- 184. The Respondent also disputes the Claimant's contention that the acts at issue were carried out by the Parán Community as a whole. According to the Respondent, the cited evidence falls short of showing that acts reflected community rather than individual actions, or that any individual actors acted in the exercise of community authority.¹⁸⁵

(ii) The Respondent's Position Regarding ILC Article 5

185. As to attribution on the basis of ILC Article 5, the Respondent maintains that the Claimant has not met its burden of proof and that the facts do not meet the requirements of that Article. The Respondent maintains that ILC Article 5 involves two core requirements: that an entity must be empowered to exercise governmental authority, and that the

¹⁸⁰ **CLA-0109**, 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), p. 239.

¹⁸¹ Resp. Rej., para. 516.

¹⁸² Resp. Rej., para. 495.

¹⁸³ Resp. Rej., para. 497.

¹⁸⁴ Resp. Rej., para. 499.

¹⁸⁵ Resp. Rej., paras. 520-521.

¹⁸⁶ Resp. C-Mem., para. 388.

impugned conduct involves such an exercise of authority. ¹⁸⁷ In the Respondent's view, neither requirement is met. ¹⁸⁸

- 186. As to the first requirement whether the Parán Community exercises governmental authority the Respondent cites the four-factor test developed by the ILC and Professor Crawford, also cited by the Claimant, while noting that the four factors are not prescriptive or exhaustive and that their application depends on context. ¹⁸⁹ The four factors involve (i) the content of an entity's powers; (ii) the manner in which they were conferred; (iii) the purpose for which they were conferred; and (iv) the entity's level of accountability to the State. ¹⁹⁰ In applying these factors, the Respondent urges, citing *Jan de Nul v. Egypt*, ¹⁹¹ that the Tribunal must assess "whether the person or entity merely behaved in a way that any private person could have in the relevant circumstances. If that is the case, then the relevant acts will not be attributable to the State." ¹⁹²
- 187. The Respondent argues that none of the four factors is satisfied. As to (i), the Respondent contends that the cited powers are "expressly extrajudicial as a matter of Peruvian law, and therefore do not connote the exercise of any governmental power." The Respondent adds that the powers are to be exercised "in accordance with customary law," which shows that the *Ronderos* have no mandate to apply Peruvian law and that their rights are communal and involve only the collective rights of the community. 194
- 188. As to (ii), the Respondent maintains that the State conferred no powers on the *Ronderos*. They instead exercise "inherent rights and prerogatives" of Rural Communities, as recognized in international instruments such as ILO Convention 169 and the UN

¹⁸⁷ Resp. C-Mem., paras. 389-390, 393.

¹⁸⁸ Resp. C-Mem., paras. 397 et seq.

¹⁸⁹ Resp. C-Mem., paras. 391-392.

¹⁹⁰ Resp. C-Mem., para. 391.

¹⁹¹ **RLA-0025**, *Jan de Nul N.V.*, *et al.*, *v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 169.

¹⁹² Resp. C-Mem., para. 395.

¹⁹³ Resp. Rej., para. 528.

¹⁹⁴ Resp. Rej., paras. 529-530.

Declaration on the Rights of Indigenous Peoples.¹⁹⁵ As to (iii), the Respondent contends that legal provisions recognizing the powers of institutions such as the *Rondas Campesinas* do not confer additional powers. Instead, they "diminish [...] the reach of the State in the affairs of such communities."¹⁹⁶ Finally, the Respondent urges that (iv) weighs heavily against attribution, stressing the Rural Communities' autonomy and insulation from interference by the State.¹⁹⁷

- 189. The Respondent thus dismisses the Claimant's contention that the four factors support attribution under ILC Article 5.¹⁹⁸ *Inter alia*, the Respondent contends that the *Rondas Campesinas*' role as conciliators does not make them part of the judicial system, citing Article 143 of the Constitution, which does not list the *Rondas Campesinas* as part of the judicial branch. ¹⁹⁹ Similarly, in the Respondent's view, the *Ronderos*' powers of detention involve the exercise of customary communal powers, not any government or public function. ²⁰⁰
- 190. Thus, according to the Respondent, the Claimant fails to show that the Parán Community exercises governmental powers. The Claimant's invocations of Peru's legislation and administrative practices do not alter this conclusion. For example, in the view of Peru's expert, Mr. Vela, the Rural Communities' powers to settle disputes do not involve judicial functions. The *Rondas Campesinas* are analogous to private security guards and do not perform governmental duties. ²⁰²
- 191. The Respondent urges that Peru's domestic law shows that a Rural Community and its members are not empowered to exercise governmental authority. Instead, Peru's legal order recognizes Rural Communities as having separate legal personality and recognized

¹⁹⁵ Resp. Rej., paras. 531-533.

¹⁹⁶ Resp. Rej., para. 534.

¹⁹⁷ Resp. Rej., paras. 535-536.

¹⁹⁸ Resp. Rej., paras. 537 et seq.

¹⁹⁹ Resp. Rej., paras. 539-541.

²⁰⁰ Resp. Rej., para. 543.

²⁰¹ Resp. C-Mem., paras. 438-446.

²⁰² Resp. C-Mem., para. 447.

status and rights.²⁰³ While Peru's laws authorize Rural Communities to establish *Rondas Campesinas* for self-defense of their property and limited non-judicial dispute settlement, this does not constitute the exercise of governmental authority.²⁰⁴

- 192. The Respondent dismisses the relevance of the circumstances that led to the *Rondas Campesinas*' recognition in Peru's legislation (said by the Claimant to be an effort "to fill the institutional vacuum left by the near-total absence of State institutions") and the MININTER's regulations providing for cooperation between *Rondas Campesinas* and certain law enforcement agencies, noting that government agencies regularly coordinate with private actors. ²⁰⁵ The Respondent also disputes the significance of the 1991 Regulations authorizing self-defence committees to use weapons provided by the State, as they authorize actions in self-defence only in specifically defined circumstances, now long past, "rather than any State purpose." ²⁰⁶
- 193. The Respondent views the second key question arising under ILC Article 5 to be whether members of the Parán Community carried out the impugned acts in the exercise of governmental authority. The Respondent contends that the Claimant has not shown this, and has instead rested its case on conclusory assertions. ²⁰⁷ In any case, the actions complained of (described by the Respondent as the "19 June 2018 Protest" and the "Access Road Protest") all involved conduct exceeding the powers of the Parán Community, its members, or the *Rondas Campesinas*. ²⁰⁸ The Respondent adds that these actions "took place in their entirety not on the Parán Community's lands, but on the lands of two other rural communities: the Lacsanga Community and the Santo Domingo de Apache Community." ²⁰⁹ They were thus outside the limited territorial scope of the Community's

²⁰³ Resp. C-Mem., paras. 418-424.

²⁰⁴ Resp. C-Mem., paras. 425-426.

²⁰⁵ Resp. Rej., paras. 544-546, referring to Cl. Reply, para. 524.

²⁰⁶ Resp. Rej., paras. 547-548.

²⁰⁷ Resp. C-Mem., paras. 449-455.

²⁰⁸ Resp. C-Mem., paras. 456-459.

²⁰⁹ Resp. C-Mem., para. 459. The Tribunal notes that this argument by the Respondent conflicts with the Parán Community's claim that the mine is located on its land.

powers. Further, any use of weapons had no relation to the purposes for which the weapons were supplied.²¹⁰

- 194. According to the Respondent, ILC Article 7 (providing for attribution if an organ, person or entity "exceeds its authority or contravenes instructions") does not rescue the Claimant's case, because Article 7 applies only where the actor was acting under "the cloak of State authority" and not for private purposes. The Respondent cites in this regard the jurisprudence of venerable Mixed Claims Commissions, including the French-Mexico Commission's *Caire* case and *Mallén v. USA* before the United States-Mexico Claims Commission. The Respondent argues that the impugned actions of Parán Community members were private acts, not acts by persons holding themselves out as agents of the State; any private persons could have carried out these acts. The June 2018 "protest" and the blockade could have been carried out by private persons and did not require the exercise of any governmental authority (citing *Jan de Nul v. Egypt*). 215
- 195. The Respondent points to the Claimant's contemporaneous correspondence with its lender and other documents invoking *force majeure*, rather than characterizing the events as the result of acts by the State. Had the Claimant regarded the State as implicated, it could have filed criminal actions addressing misconduct by the State or its officials, but it did not do so.²¹⁶
- 196. The Respondent stresses the lack of precedent for the claim that an indigenous or rural community exercises governmental authority.²¹⁷ In many jurisdictions, indigenous

²¹⁰ Resp. Rej., paras. 555-557.

²¹¹ Resp. C-Mem., paras. 460-462, referring to **CLA-0003**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 7.

²¹² Resp. C-Mem., paras. 463-464, citing **RLA-0031**, *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, Reports of International Arbitral Awards, Decision No. 33, 7 June 1929, pp. 529-530.

²¹³ Resp. C-Mem., para. 465, citing **RLA-0032**, Francisco Mallén (United Mexican States) v. United States of America, Reports of International Arbitral Awards, Decision, 27 April 1927, paras. 4, 7.

²¹⁴ Resp. C-Mem., paras. 468-475.

²¹⁵ Resp. Rej., para. 571, citing **RLA-0025**, *Jan de Nul N.V., et al., v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170.

²¹⁶ Resp. Rej., paras. 572-574.

²¹⁷ Resp. C-Mem., para. 403.

communities are said to have a special status separate from the State; Peruvian law confers such status on autonomous rural communities, but this status does not include the exercise of governmental functions.²¹⁸ The Respondent cites *Bear Creek v. Peru*²¹⁹ and *Von Pezold v. Zimbabwe*²²⁰ as showing that investment tribunals have recognized the status of indigenous communities as separate from the State.²²¹

- 197. Further, the Respondent contends that public international law related to indigenous peoples, while still developing, does not support the Claimant's case. For the Respondent, "emergent principles demonstrate" that indigenous communities are non-State actors whose powers of self-governance are not derived from the State. The Respondent cites ILO Convention 169, a report of the UN Special Rapporteur on Discrimination against Indigenous Populations, and the UN Declaration on the Rights of Indigenous Peoples in support of the proposition that indigenous communities are distinct from other sectors of society, with inherent powers of self-governance. The Respondent also cites the writings of commentators characterizing indigenous communities as non-State actors capable of entering into international treaties; as such, they cannot be regarded as exercising the governmental authority of the surrounding State. 223
- 198. The Respondent cites the UN Declaration on the Rights of Indigenous Peoples as calling for partnership or cooperation between indigenous communities and the State, suggesting their separate character and "a level of structural equality" in their relationship with the State is inconsistent with the idea that such communities exercise the governmental authority of the State.²²⁴

²¹⁸ Resp. C-Mem., paras. 400-402.

²¹⁹ Resp. C-Mem., para. 404, citing **CLA-0086**, *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 666.

²²⁰ Resp. C-Mem., para. 405, citing **RLA-0026**, *Bernhard von Pezold, et al., v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012, paras. 29, 51-52.

²²¹ Resp. C-Mem., paras. 404-405.

²²² Resp. C-Mem., para. 406.

²²³ Resp. C-Mem., paras. 407-414.

²²⁴ Resp. C-Mem., paras. 415-416.

- 199. The Respondent refers to a table the Claimant prepared setting out actions by the Parán Community's *Rondas Campesinas* and the legal provisions the Claimant cited as authority for them. In the Respondent's view, its own supplemented version of that table shows that the alleged actions in fact exceeded the *Rondas Campesinas*' powers. For example, the Claimant contends that the *Rondas Campesinas* had authority to search or inspect mining projects but cites no legal provision giving them that authority. Other claims to authority cited in the Claimant's table were likewise deficient.²²⁵
- 200. The Respondent also urges that the Claimant has not shown that the actions complained of were in fact actually taken by members of the *Rondas Campesinas*. There is no proof, for example, that persons who allegedly used weapons were *Ronderos*; moreover, if weapons were used, they were used for an unauthorized purpose, and so could not have been used in the exercise of State authority.²²⁶

(2) The Tribunal's Analysis and Decision

- 201. The Tribunal recalls the context in which the issue of attribution arises. The Respondent has an international legal obligation under the FTA to provide full protection and security ("FPS") to the Claimant's investment along with other significant obligations. The Respondent does not dispute the existence of these obligations, and confirms in its Post-Hearing Submission that the FTA is part of Peru's internal law. However, it insists that it has done all the FTA requires to meet its obligations.
- 202. The Claimant contends that the loss of its investment resulted, in the first instance, from actions of the Parán Community and of its members, and that under international law those actions are attributable to the Peruvian State.²³⁰ The Respondent retorts that the actions at issue were taken by private persons and not by the State. In the Respondent's view, the Parán Community does not engage in governmental activity; its governance involves

²²⁵ Resp. Rej., paras. 575-577, referring to Cl. Reply, para. 561.

²²⁶ Resp. Rej., paras. 578-580.

²²⁷ CLA-0001/RLA-0010, FTA, Art. 805.

²²⁸ Resp. PH Mem., para. 44.

²²⁹ See, e.g., Resp. PH Mem., para. 7.

²³⁰ See, e.g., Cl. Mem., Section 4.1; Cl. Reply, Section 9.2.

decisions and actions of private persons, akin to those of a private association or of private security guards.²³¹ The Parán Community is an autonomous entity separate from the State and independent of its control.²³² Hence, the Respondent contends, any injury to the Claimant caused by the actions of the Parán Community or its members is not attributable to the State.²³³

203. Indeed, the Respondent insists that the State and its officials cannot direct or require the Parán Community to do anything, and attempting to do so would place them in legal peril under Peru's internal law.²³⁴

"[R]ural communities in Peru are not politically or organizationally accountable to the central government for their actions. They enjoy extensive autonomy and in fact the Peruvian central government would attract liability if it were to interfere with the affairs of rural communities." ²³⁵

204. The Respondent also maintains that it is an investor's sole responsibility to attain and maintain conditions of social peace with neighbouring Rural Communities.²³⁶ Failing to do so exposes their investments to the risk of failure in the face of a neighbouring Rural Community's potentially violent opposition.²³⁷ However, the Respondent's counsel confirmed at the Hearing that Rural Communities had no reciprocal responsibility to pursue social peace:

"ARBITRATOR GARIBALDI: [...] This [the obligation to obtain and maintain a social license] is an obligation of the mining company; is that right?

MR. GRANÉ: It is an obligation of the mining company, yes.

ARBITRATOR GARIBALDI: There [...] isn't a reciprocal obligation of the local communities; is that right?

²³¹ See, e.g., Resp. C-Mem., paras. 29, 447; RER-Vela, paras. 23, 59.

²³² See Resp. Rej., para. 477.

²³³ See Resp. Rej., paras. 479, 485 et seq.

²³⁴ RER-Meini, para. 50.

²³⁵ Resp. Rej., para. 535.

²³⁶ See Resp. C-Mem., paras. 55-59.

²³⁷ See Resp. C-Mem., paras. 111-112.

MR. GRANÉ: There is no – no, there is no reciprocal obligation by the local communities." 238

- 205. The Respondent contends that it is not responsible for any actions by Rural Communities that injure investors, ²³⁹ and that under Peru's internal law, it cannot affect their behaviour other than to encourage them to engage in dialogue, ²⁴⁰ but with no assurance that dialogue will succeed.
- 206. In the Tribunal's view, this position of the Respondent raises serious questions in light of the fundamental international legal principle that a State cannot invoke its national law to avoid its international legal obligations. As Article 27 of the VCLT affirms, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." In the FTA, Peru undertook significant international legal obligations, including the duty to assure Canadian investors FPS of their investments and other protections. The Claimant alleges the greatest threats to its investment were actions of the Parán Community, but Peru asserts that it is barred by its internal law from interfering with the Parán Community's policies and actions and can only encourage dialogue and consultation. If this is so, it is not apparent that Peru can assure compliance with its obligations under the FTA, or that it has done so in this case.

a. Attribution under ILC Article 4

- 207. The Claimant contends that the actions of the Parán Community are attributable to Peru under the rules of attribution articulated in either ILC Article 4 or ILC Article 5.²⁴²
- 208. To find attribution under ILC Article 4, the key question is whether the entity at issue is an "organ" of the State. In the ILC's formulation:

"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

²³⁸ Tr. Day 1, 198:2-10 (Arbitrator Garibaldi; Mr. Grané).

²³⁹ See, e.g., Resp. Rej., para. 475.

²⁴⁰ See infra, paras. 284-288, 295. See also, infra, paras. 329-336. On the limited role of ILC Article 7, see infra, paras. 242-243.

²⁴¹ **RLA-0128**, VCLT, Art. 27.

²⁴² Cl. Mem., Section 4.1; Cl. Reply, Section 9.2; Cl. Skeleton, Section 3.2.2.

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."²⁴³

- 209. The ILC's Articles do not define "organ." Instead, the Commentary states that "the reference to a State organ in Article 4 is intended in the most general sense," and "extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level."²⁴⁴ Professor Crawford, a central actor in bringing the ILC Articles to completion and the author of much of the Commentary, observes that: "[t]he degree of actual integration into the legal structure of the State is what is crucial for the determination of a State organ."²⁴⁵
- 210. ILC Article 4 provides that "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State." Accordingly, in the view of the *Ulysseas v. Ecuador* tribunal, "decisions in investment treaty cases have confirmed that to determine whether an entity is a State organ one must look to the State's domestic law." However, while a State's internal law is an important factor in assessing attribution, it is only the starting point:

"[...] 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; however, domestic law is not the end of the matter. As the [ILC] Commentary makes clear, in some legal systems the status and function of particular bodies may be determined not only by law but also by practice; further, the internal law of a State may not classify, whether exhaustively or at all, which bodies are to be regarded as organs as a matter of internal law. As a consequence,

²⁴³ CLA-0003, ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 4(1).

²⁴⁴ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 4, Commentary, para. 6.

²⁴⁵ **RLA-0168**, J. Crawford & P. Mertenskötter, "Chapter 3: The Use of the ILC's Attribution Rules in Investment Arbitration," in Building International Investment Law: The First Fifty Years of ICSID (2015), p. 1.

²⁴⁶ CLA-0003, ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 4(2).

²⁴⁷ **RLA-0164**, *Ulysseas*, *Inc. v. Republic of* Ecuador, UNCITRAL, Final Award, 12 June 2012, para. 126, citing **RLA-0025**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 160.

a State cannot avoid responsibility of a body which in fact constitutes an organ 'merely by denying it that status under its own law." ²⁴⁸

211. The Respondent appears to suggest that there can be attribution under ILC Article 4 only for entities that are somehow explicitly classified as organs. The Respondent thus urges that "[i]n the event that an entity is *not* classified as an organ under domestic law" there can be attribution only if the entity is a "de facto organ" subject to the total control and direction of the State, requirements not met here. In the Tribunal's view, this position involves a degree of formalism that does not reflect how States actually organize and conduct their affairs. As the ILC's Commentary to Article 4 observes, "the reference to a State organ in Article 4 is intended in the most general sense," and "extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy [...]." As Professor Crawford's Commentary makes clear, what matters are the facts of the situation: "[t]he degree of actual integration into the legal structure of the State is what is crucial for the determination of a State organ." 251

b. The Position of Rural Communities in Peru's Legal Order

212. In assessing whether there is attribution under ILC Article 4, the Tribunal must consider the position of Rural Communities such as the Parán Community in what Professor Crawford calls "the legal structure of the State." As noted, the Respondent and its experts contend that Rural Communities are autonomous and not part of the structure of the State or subject to its direction or control. In support of its view, the Respondent points to what it sees as the special status of Indigenous (and by analogy, Rural)

²⁴⁸ **CLA-0109**, 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), p. 243.

²⁴⁹ Resp. Rej., paras. 489-490 (emphasis in original).

²⁵⁰ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 4, Commentary, para. 6.

²⁵¹ **RLA-0168**, J. Crawford & P. Mertenskötter, "Chapter 3: The Use of the ILC's Attribution Rules in Investment Arbitration," in Building International Investment Law: The First Fifty Years of ICSID (2015), p. 1.

²⁵³ See, e.g., Resp. Rej., paras. 477, 497.

Communities and their right to control their lands and affairs under "developing" principles of international law.²⁵⁴

- 213. The Tribunal does not agree that Rural Communities exist outside of the legal structure of the State and so cannot be a State organ. To the contrary, the provisions of Peru's Constitution, ²⁵⁵ laws and regulations cited by the Parties show significant integration of Rural Communities into Peru's legal structure and assign important State functions to such communities.
- 214. Several provisions of Peru's Constitution having general application by their terms apply equally to Rural Communities and their members. Article 38 of the Constitution captioned "Duties to the State," requires that "[a]ll Peruvians have the duty to honour Peru and to protect national interests, as well as to respect, obey, and defend the Constitution and the code of laws of the Nation." There has been no claim that members of the Parán Community are not citizens of Peru. The Constitution thus establishes that they, like all other Peruvians, have a duty to comply with Peru's domestic law.
- 215. Article 54 of the Constitution captioned "Territory, sovereignty and jurisdiction," states that "[t]he territory of the State is inalienable and inviolable. It includes the soil, the subsoil, the maritime domain, and the airspace that covers them." It follows that all of Peru's land territory, including areas lying within the geographic limits of Rural Communities, remain part of the State subject to its jurisdiction and legal order.
- 216. Article 55 of the Constitution, captioned "Treaties," provides that the "[t]reaties concluded by the State and in force are part of national law." The Respondent confirmed that

²⁵⁴ See Resp. C-Mem., paras. 406, 401.

²⁵⁵ C-0023 (corrected), Political Constitution of Peru, 1993.

²⁵⁶ C-**0023** (updated corrected), Political Constitution of Peru, 1993, Art. 38 ("Todos los peruanos tienen el deber de honrar al Perú y de proteger los intereses nacionales, así como de respetar, cumplir y defender la Constitución y el ordenamiento jurídico de la Nación.")

²⁵⁷ C-0023 (corrected), Political Constitution of Peru, 1993, Art. 54 ("Territorio, soberanía y jurisdicción").

²⁵⁸ **C-0023** (corrected), Political Constitution of Peru, 1993, Art. 54 ("El territorio del Estado es inalienable e inviolable. Comprende el suelo, el subsuelo, el dominio marítimo, y el espacio aéreo que los cubre.")

²⁵⁹ C**-0023** (corrected), Political Constitution of Peru, 1993, Art. 55 ("*Tratados. Los tratados celebrados por el Estado y en vigor forman parte del derecho nacional.*")

"treaties concluded by Peru and in force—such as the [FTA]—are part of its internal law."²⁶⁰ It follows that treaties such as the FTA apply to entities whose conduct is attributable to Peru as a matter of Peru's domestic law.

217. These general provisions are supplemented by Title III, Chapter VI of the Constitution, "Of the Agrarian Regime and [the] Rural and Native Communities," which contains two articles. Article 88 provides that the State preferentially supports agrarian development and guarantees the right to own land, privately or communally. Article 89 is of greater relevance; it directly addresses the status of Rural and Native Communities in Peru's legal order:

"The Rural and Native Communities have legal existence and they are legal entities.

They are autonomous in their organisation, in the communal work and in the use and free disposition of their lands, as well as in economic and administrative [matters], within the framework established by the law. Ownership of their lands is not subject to any [acquisitive prescription], except in the case of abandonment as provided for in the previous article.

The State respects the cultural identity of Rural and Native Communities." ²⁶³

218. The Constitution thus establishes that the Parán Community is a legal entity with legal capacity to carry out economic and administrative functions. The Parán Community is assured autonomy in the conduct of its affairs, but this autonomy must be exercised "within the framework established by the law."²⁶⁴

²⁶⁰ Resp. PH Mem., para. 46.

²⁶¹ C-0023 (corrected), Political Constitution of Peru, 1993, Chap. 6 ("DEL REGIMEN AGRARIO Y DE LAS COMUNIDADES CAMPESINAS Y NATIVAS.")

²⁶² **C-0023** (corrected), Political Constitution of Peru, 1993, Art. 88 ("El Estado apoya preferentemente el desarrollo agrario. Garantiza el derecho de propiedad sobre la tierra, en forma privada o comunal o en cualquiera otra forma asociativa.")

²⁶³ **C-0023** (updated corrected), Political Constitution of Peru, 1993, Art. 89 ("Las Comunidades Campesinas y las Nativas tienen existencia legal y son personas jurídicas. Son autónomas en su organización, en el trabajo comunal y en el uso y la libre disposición de sus tierras, así como en lo económico y administrativo, dentro del marco que la ley establece. La propiedad de sus tierras es imprescriptible, salvo en el caso de abandono [...]. El Estado respeta la identidad cultural de las Comunidades Campesinas y Nativas.")
²⁶⁴ Id.

219. A second constitutional provision expands upon Rural Communities' position in Peru's legal order. Title IV of the Constitution, captioned "THE STRUCTURE OF THE STATE," identifies and lists the powers of the major branches of government (legislative, the presidency, the Council of Ministers, etc.). The Respondent contends that Indigenous and Rural Communities are not specifically listed in Title IV, and that this confirms that they are not State organs. However, as the Claimant notes, important functions of Rural Communities are included in the mapping of Peru's Judicial Power set forth in Title IV. Article 149 is located in Chapter VIII of Title IV, the portion addressing the Judicial Power. It provides:

"Article 149 – Exercise of the jurisdictional function by the rural and native communities.

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."

220. Article 149 thus confirms the Rural Communities' authority to perform certain judicial functions as an element of the Judicial Power of the State. The connection is reinforced by the concluding language of that provision: "[t]he law establishes the means of coordination of this special jurisdiction with the Peace Courts and with other bodies of the Judicial Power." Rural Communities are thus positioned in the legal structure created by Peru's Constitution.

²⁶⁵ C-0023 (corrected), Political Constitution of Peru, 1993, Title IV ("DE LA ESTRUCTURA DEL ESTADO").

²⁶⁶ Resp. Rej., para. 504.

²⁶⁷ Cl. Reply, para. 478.

²⁶⁸ **C-0023** (updated corrected), Political Constitution of Peru, 1993, Title IV, Chap. VIII ("Poder Judicial"), Art. 149 ("Ejercicio de la función jurisdiccional por las comunidades campesinas y nativas[.] Las autoridades de las Comunidades Campesinas y Nativas, con el apoyo de las Rondas Campesinas, pueden ejercer las funciones jurisdiccionales dentro de su ámbito territorial de conformidad con el derecho consuetudinario, siempre que no violen los derechos fundamentales de la persona. La ley establece las formas de coordinación de dicha jurisdicción especial con los Juzgados de Paz y con las demás instancias del Poder Judicial.")

²⁶⁹ Id.

- 221. The Parties identified a substantial body of additional statutes and regulations that elaborate upon the roles and powers of Rural Communities and their *Rondas Campesinas* in Peru's legal order. The General Law of Rural Communities details the powers, functions, and governance of Rural Communities.²⁷⁰ It regulates such matters as communities' powers and functions (Article 4), community membership (Article 5), use of community lands (multiple articles), and community governance (multiple articles, particularly Article 18 defining the powers of the General Assembly). Article 2 of the General Law of Rural Communities declares that "[t]he Rural Communities are organizations of public interest."²⁷¹
- 222. Other legal provisions elaborate upon the organization and activities of Rural Communities and their connections with the State. Supreme Decree 008-91 approves regulations implementing the General Law of Rural Communities.²⁷² These regulations address such matters as registration of Rural Communities (Articles 2-9), membership in a Community (Articles 21-23), rights and obligations of Community members and residents (Articles 25-30), the role, procedure, and powers of the General Assembly (Articles 38-47), the duties and functions of the Governing Committee (the body "responsible for the government and administration of the Community") (Articles 48-61),²⁷³ the duties and powers of the Community's President and other officers (Articles 62-68), and the frequency and conduct of elections (Articles 78-91).
- 223. In addition, the Parán Community and other Rural Communities have armed Rural Patrols Rondas Campesinas authorized, trained and armed by the national authorities to maintain the peace and provide internal security. As described by the Claimant, and not disputed by the Respondent, the Rondas Campesinas were authorized and armed in order to address a pressing security situation in the Andean region.

²⁷⁰ **R-0052**, Law No. 24656, General Law of Rural Communities, 13 April 1987. This is a fuller and better translation than the Claimant's **C-0024**; Cl. Mem, para. 241.

²⁷¹ **R-0052**, Law No. 24656, General Law of Rural Communities, 13 April 1987, Art. 2.

²⁷² **C-0025**, Supreme Decree No. 008-91-TR, Regulation of the General Law of Rural Communities Approved, 12 February 1991.

²⁷³ C-**0025**, Supreme Decree No. 008-91-TR, Regulation of the General Law of Rural Communities Approved, 12 February 1991, Art. 48.

"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). 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. 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. [...]"²⁷⁴

224. The *Rondas Campesinas*' functions and powers are addressed in, *inter alia*, Law No. 27908 on Rural Patrols, defining their powers and their role in Peru's security and jurisdictional structure. ²⁷⁵ It provides:

"Article 1. Legal Status

The Rural Patrols to be recognized as an autonomous and democratic form of communal organization, 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 peace within their territorial area. The recognized rights of indigenous peoples and rural and native communities apply to the Rural Patrol in whatever corresponds to them and favors those peoples and communities.

[...]

Article 6. Right of Participation, Control, and Inspection

The Rural Patrols have the right of participation, control, and inspection of the development programs and projects that are implemented in their communal jurisdiction, according to law.

Article 7. Activities in Benefit of Communal Peace

The Rural Patrols, in the use of their customs, may intervene in the peaceful resolution of conflicts arising between the members of the community or organizations within their jurisdiction and other external ones, as long as the

²⁷⁴ Cl. Reply, para. 477.

Ci. Reply, para. 477.

²⁷⁵ **R-0116**, Law No. 27908, 6 January 2003.

dispute has its origin inside of communal jurisdiction and the events occurred there. [276]

Article 8. Coordination with the Authorities and Social Organizations

In the exercise of their duties, the Rural Patrols coordinate with the political, police, and municipal authorities, the Ombudsman's Office, and others, within the framework of national legislation. [...]

Article 9. Coordination and Support with Jurisdictional Authorities

The ordinary jurisdictional authorities will establish relations with the leaders of the Rural Patrols, respecting their selfsame institutional autonomy. The leaders of Rural Patrols may request the support of the law enforcement and other authorities of the State."

- 225. Law No. 27908 thus recognizes that the *Rondas Campesinas* carry out functions related, *inter alia*, to communal security and peace. The Law also makes clear that the *Rondas Campesinas* do not exist or operate in a vacuum; rather, they are to coordinate with other law enforcement and administrative entities of the State.
- 226. The role and powers of the *Rondas Campesinas*, and their place in Peru's legal order, are further detailed in Supreme Decree No. 025-2003-JUS, "Regulations of the Law of *Rondas Campesinas*." It provides:

"Article 12. Functions

The following are the functions of the Rural Patrol and Communal Patrol:

a) Contribute to the defense of the physical, moral, and cultural integrity of the members of the rural community [...] in order to maintain the peace and security of the population, as well as to contribute to the progress of its people.

[...]

²⁷⁶ Cl. Reply, para. 482 contains a more precise translation of Article 7 ("[t]he *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.") (Emphasis omitted)

²⁷⁷ **R-0103**, Supreme Decree No. 025-2003-JUS, 29 December 2003.

- d) Intervene in the peaceful resolution of conflicts arising between members of the community and other outside parties, whenever the dispute originates from acts occurring within their communal area.
- e) Act as a spokesperson in interactions with the State.
- f) Participate in, monitor, and supervise development programs and projects that are implemented in the territory, as well as denounce any functional misconduct of any authority, in accordance to law.

[...]

h) Coordinate, within the framework of national legislation, with the political, police, municipal, and regional authorities, the representatives of the Ombudsman's Office, and other agencies of public administration.

[...]

(k) Provide patrol services. The organization of groups, the election of leaders, as well as the assignment of responsibilities and frequency of attention to patrol services is regulated by the bylaws of each rural or communal patrol.

Article 13. Dispute Resolution

The Rural Patrol and Communal Patrol, based on the customs of the rural community [...] may intervene in the resolution of conflicts that arise between members of the community or other outside parties within their territorial area, by means of actions that will be recorded in the book of incidents that is maintained for that purpose. [...] The issues that can be reconciled are only those related to the possession, usufruct of communal property, property, and the use of the different communal resources."

227. In the Tribunal's view, this network of Constitutional, statutory, and regulatory provisions and related provisions shows both that Rural Communities are substantially integrated into the legal structure of the State, and that they perform important functions that are distinctly governmental in character. While some of these provisions refer to the autonomy of Rural Communities, they also show that this autonomy is exercised within a defined territory and a detailed legal framework established by the State. Within that framework, Rural Communities are empowered by law to perform important functions classically recognized as those of States and their organs, including legislative policy and rule-making, dispute resolution, law enforcement, and security.

- 228. The Respondent maintains that the actions and activities of Rural Communities and the *Rondas Campesinas* are not governmental in character, and instead are akin to the governance of a private association and the role of private security guards.²⁷⁸ The Tribunal is not persuaded. The powers and responsibilities allocated to Rural Communities and the *Rondas Campesinas* in Peru's legal structure, and the manner in which those authorities are exercised, can only be described as governmental. Rural Communities and their institutions are engaged in governance, not running a private association.
- 229. The nature of the roles and activities of Rural Communities and of their *Rondas Campesinas* differ fundamentally from those of the entities involved in several cases denying attribution cited by the Respondent. *Ulysseas v. Ecuador* involved several entities involved in Ecuador's electrical generation sector, including the national electricity regulator CONELEC and other State-owned bodies.²⁷⁹ The tribunal found that key conduct at issue (CONELEC's performance and termination of a license contract) did not involve the exercise of *puissance publique*, governmental authority. The disputed activities instead involved commercial behaviour and was therefore not attributable to the State.²⁸⁰
- 230. *Jan de Nul v. Egypt*²⁸¹ is similar; that case (involving an arbitrator who also sat on the *Ulysseas* tribunal) again found no exercise of *puissance publique* in the respondent's decisions involving a dredging contract.²⁸² By contrast here, the Parán Community and its institutions engage in activities of governance and armed security, all involving distinctly governmental characteristics.
- 231. The Parties also dispute whether the Parán Community constitutes a "territorial unit" of the State for purposes of Article 4. The Respondent denies it is a territorial unit, contending that this concept is limited to political subdivisions of the State, as shown by the fact that

²⁷⁸ Resp. C-Mem., para. 447.

²⁷⁹ **RLA-0164**, *Ulysseas*, *Inc. v. Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012, paras. 129-133.

²⁸⁰ See **RLA-0164**, *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012, paras. 136-139, 141-143.

²⁸¹ **RLA-0025**, *Jan de Nul N.V.*, *et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008.

²⁸² **RLA-0025**, *Jan de Nul N.V.*, *et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 169-171.

the situations cited in the ILC Articles and Commentary involve entities that are territorial units within a federated state or the "acts of [...] the regional government of a country."²⁸³ The Claimant counters that Peru's Constitution, legislation and regulations affirm Rural Communities' role as a primary organ of governmental authority in their respective territories, so that the area of the Parán Community's authority is a "territorial unit" for purposes of Article 4.²⁸⁴

- 232. The very existence of a Rural Community is linked to a particular territory; Peru's recognition of Rural Communities reflects the historical and psychological connection of a community to a particular area. The Tribunal sees no compelling difference between a regional or local government with specified powers governing and providing security within a defined area and the similar situation of the Parán Community. These entities' roles and their connections to a specific territory are, in substance, the same. Accordingly, the Tribunal concludes that the Parán Community constitutes a "territorial unit" of Peru for purposes of ILC Article 4.
- 233. The Respondent further contends that Rural Communities' separate legal personality demonstrates that the Parán Community is not a State organ. "Where an entity has separate legal personality from the State, there is a strong presumption that it is *not* a State organ either *de jure* or *de facto*." To illustrate the claimed presumption the Respondent cites *Unión Fenosa v. Egypt* and *Bayindir v. Pakistan*. The Claimant counters that the Parán Community's separate legal personality "does not negate the 'principle according to which

²⁸³ Resp. Rej., para. 495.

²⁸⁴ See Cl. Reply, para. 438 ("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") and para. 439 ("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").

²⁸⁵ Resp. Rej., para. 491. See also Resp. Rej., para. 502.

²⁸⁶ Resp. Rej., fn. 1049, citing **RLA-0163**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.98; and **CLA-0048**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 119.

the State is answerable for acts and omissions of organs of public territorial communities."287

- The Tribunal is not persuaded that the cases cited by the Respondent show the existence of the claimed presumption. The separate legal personality of EGPC, the entity at issue in *Unión Fenosa*, was one element of a multi-part analysis leading to the tribunal's conclusion that EGPC was not an organ of the State.²⁸⁸ *Bayindir*'s one-paragraph conclusion that Pakistan's National Highway Authority was not an organ of the State indeed points to the Authority's distinct legal personality but offers little further analysis.²⁸⁹ The Tribunal also notes that entities with separate legal personality have been held to engage the responsibility of the State under ILC Article 4.²⁹⁰ The actions of constituent States of the United States of America, for example, which also have separate personality, budgets, and the ability to contract, have been assessed by the ICJ to be attributable to the national State.²⁹¹
- 235. The Respondent cites Peru's lack of control over the Parán Community's activities to show that it is not an organ.²⁹² However, this argument conflicts with the ILC's Commentary to Article 4, which points out that for purposes of attribution "it is [...] 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."²⁹³ The Commentary points to the ICJ's decision in the *LaGrand* case, where the United States was held internationally responsible for the execution of Walter LaGrand by the State of Arizona,²⁹⁴

²⁸⁷ Cl. Reply, para. 444.

²⁸⁸ **RLA-0163**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, paras. 9.90-9.112.

²⁸⁹ **CLA-0048**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 119.

²⁹⁰ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 4, Commentary, para. 9.

²⁹¹ Cl. Reply, para. 431.

²⁹² See Resp. Rej., paras. 489-490, 517-518 (referring to lack of "complete dependence").

²⁹³ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 4, Commentary, para. 9.
²⁹⁴ *Id*.

an execution that the US national government was unable to prevent. The Tribunal does not accept this argument by Respondent.

- 236. Finally, the Respondent invokes Rural Communities' status under "developing" international law principles bearing on the rights of Indigenous Peoples as demonstrating that such communities cannot be State organs. The Claimant counters that Peru's MEM, applying ILO Convention 169, determined the Parán Community did not qualify as an indigenous community under Peruvian law.²⁹⁵ The Respondent's argument is advanced at a general level, without clear analysis of specific normative texts. The Respondent thus points to ILO Convention 169 in general terms, but the Tribunal finds nothing in that Convention insulating a State from being held internationally responsible for actions of a Rural Community. Other texts cited by the Respondent are political or aspirational in character; the UN Declaration on the Rights of Indigenous Peoples was adopted by a General Assembly Resolution and is not a treaty. The Respondent has not shown that this Declaration is legally binding as a matter of customary international law or otherwise, or identified specific provisions claimed to preclude a finding of attribution.
- 237. The Respondent emphasizes what is said to be Rural Communities' inherent status wholly apart from the State.²⁹⁶ However, the Respondent does not address how this claimed status can be reconciled with the detailed provisions of Peru's law discussed above that define the status and powers of such communities. The Tribunal believes that no such reconciliation is possible.
- 238. The Respondent urges that any finding of attribution would "set a dangerous precedent" and conflict with long-running efforts by States "to ensure that the rights of such communities are properly respected." This argument is not developed or explained. Its necessary consequence seems to be that a State, and the State's treaty partners, are bound to accept that there are areas within a State's territory where its treaty obligations do not operate. The Tribunal does not agree. Whatever status the Parán Community may have

²⁹⁵ Cl. Reply, para. 435.

²⁹⁶ See Resp. Skeleton, para. 55 ("[c]onsistent with international law principles and jurisprudence in relation to indigenous communities, rural communities are non-State actors and do not form part of the State.")

²⁹⁷ Resp. Rej., para. 478.

does not shield the Respondent from being internationally responsible for violations of its treaty obligations stemming from the Parán Community's actions.

- 239. For the foregoing reasons, the Tribunal concludes that the Parán Community constitutes an organ of the State of Peru within the scope of ILC Article 4, so that the Respondent can, in appropriate circumstances, bear international responsibility for actions of the Parán Community or its members.
- 240. In its second principal line of argument opposing attribution under ILC Article 4, the Respondent contends that, even if the Parán Community is an organ of the State, the various actions said by the Claimant to cause the loss of its investment were not taken in an official capacity.²⁹⁸ They were instead the actions of private parties for which the State is not internationally responsible.
- 241. The Tribunal does not agree. As discussed *infra*, the evidence shows that the actions of the Parán Community and its members leading to the loss of the Claimant's investment were taken pursuant to the decisions or directions of the Parán Community and its leaders. In blockading the road, occupying the mine camp, and ultimately seizing sole possession of and exploiting the mine, Parán Community members acted as agents of the Community, not as private persons acting for private benefit. Relevant evidence in this regard is reviewed in the next section, dealing with attribution under ILC Article 5 should the Parán Community not be regarded as an organ of the State.²⁹⁹
- 242. The Respondent maintained further that certain of the Parán Community's actions, particularly those of the Parán Community's *Rondas Campesinas*, exceeded the scope of their authority under the relevant legislation, so that their conduct is not attributable to the State.³⁰⁰ In response, the Claimant invoked the principle reflected in Article 7 of the ILC Articles that the conduct of an organ or entity empowered to exercise elements of governmental authority "shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or

²⁹⁸ Resp. Skeleton, paras. 53, 57.

²⁹⁹ *Infra*, para. 255.

³⁰⁰ Resp. C-Mem., paras. 456-459.

contravenes instructions."³⁰¹ The Respondent countered that Article 7 applies only to actions taken under State authority, and that the actions involved were taken for private purposes.³⁰² The Claimant in turn denied that the concerted conduct of numerous members of the Parán Community merely reflected the actions of numerous private citizens coincidentally acting in concert.³⁰³

- 243. The Tribunal does not accept the Respondent's denial of attribution. As discussed in the previous paragraph and elsewhere in this Award, the actions at issue were not those of rogue individuals but of the Parán Community and its members acting pursuant to decisions and guidance of the Community and its leaders.³⁰⁴ Accordingly, the principle of ILC Article 7 applies, even if as the Respondent contends the actions of the Parán Community and its *Rondas Campesinas* exceeded their statutory authority.
- 244. For the foregoing reasons, the Tribunal finds that the Parán Community is an organ of the State for which Peru is internationally responsible under the principles on State Responsibility in ILC Article 4.

c. Attribution under ILC Article 5

- 245. The Claimant contends in the alternative that, if the Parán Community is not an organ of the State, its conduct is in any case attributable to the Respondent under ILC Article 5, dealing with attribution of conduct of persons or entities exercising elements of governmental authority.³⁰⁵ The Tribunal agrees.
- 246. ILC Article 5 involves three core elements: (i) the entity or person involved must be "empowered by the law of that State;" (ii) "to exercise elements of the governmental authority;" and (iii) the person or entity must be "acting in that capacity in the particular instance." As to (i) and (ii), the Claimant contends that the Parán Community exercised

³⁰¹ CLA-0003, ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 7.

³⁰² Resp. C-Mem., para. 467.

³⁰³ See Cl. Reply, paras. 548, 593-594.

³⁰⁴ See infra, para. 255 and evidence cited there.

³⁰⁵ Cl. Reply, para. 458.

³⁰⁶ CLA-0003, ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 5.

governmental authority pursuant to multiple provisions of Peru's domestic law, citing *inter alia*, Rural Communities' powers and characteristics under Peru's Constitution, the General Law of Rural Communities, and Article 2 of Peru's Decree No. 8 of 1991.³⁰⁷

- 247. In the previous section of this Award finding the Parán Community to be an organ of the State under ILC Article 4, the Tribunal reviewed the Community's roles and authorities as set out in Peru's national legal system. The Tribunal found that these roles and authorities were defined in Peru's national legal framework and were governmental in character.³⁰⁸ The same conclusions apply to attribution under ILC Article 5.
- 248. The Tribunal's conclusion regarding the governmental character of the authority conferred upon the Parán Community is in harmony with a list of four factors articulated in Professor Crawford's Commentary and cited by both the Claimant³⁰⁹ and the Respondent.³¹⁰ The Commentary to Article 5 states:

"Article 5 does not attempt to identify precisely the scope of 'governmental authority' for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just [1] the content of the powers, but [2] the way they are conferred on an entity, [3] the purposes for which they are to be exercised and [4] the extent to which the entity is accountable to government for their exercise. [...]"³¹¹

249. As to factors [1], [2] and [3], the Parán Community and its *Rondas Campesinas* perform their functions in a multi-part statutory and regulatory framework established by Peru's national legislative and regulatory authorities. This framework defines in substantial detail, *inter alia*, the functions and powers of the Parán Community's several organs and the scope of their authority. These provisions collectively establish the structure for governance of the Parán Community and its members in broad areas of civic activity and cooperation,

³⁰⁷ Cl. Mem., paras. 240-242.

³⁰⁸ *Supra*, para. 227.

³⁰⁹ *Supra*, para. 167.

³¹⁰ Supra, para. 186.

³¹¹ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 5, Commentary, para. 6 (emphasis and internal numbering added).

including providing for the Community's security through the establishment and operations of the Community's *Ronderos*.

- As to this, the Respondent contends throughout that Rural Communities are autonomous and not subject to direction by or accountability to the State.³¹² However, the Tribunal does not regard this as determinative in assessing whether actions involved the exercise of governmental authority. As the ILC's Commentary to Article 5 observes, "[f]or the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act [...]."³¹³
- 251. The third core element for assessing attribution under Article 5 is whether a person or entity is acting in the exercise of governmental authority in the conduct at issue, or is instead acting for private benefit.³¹⁴ The Tribunal finds that in the key events at issue in this case, the officers and members of the Parán Community acted in the exercise of the Community's governmental authority. There is no evidence suggesting that large groups of Parán Community members blockaded the access road or took over the mine and its production for their private individual gain.
- 252. The Parán Community's exercise of its governmental authority is dramatically illustrated by a 4 May 2018 official letter from the Community's President to the Claimant. This demanded on behalf of the Parán Community that Invicta remove its personnel and equipment from the mine site "within FIFTEEN (15) calendar days; otherwise, in accordance with the prerogatives of the Political Constitution of the State and the General Law on Rural Communities, which recognises us as autonomous democratic institutions, WE WILL PROCEED TO EVICT YOU."315

³¹² Resp. C-Mem., para. 434.

³¹³ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 5, Commentary, para. 7.

³¹⁴ *Supra*, para. 246.

³¹⁵ C-0121, Notarised Letter from the Parán Community to IMC, 4 May 2018 (capitalization in original).

- 253. Throughout the interactions between the Claimant and the Parán Community, the Parán Community's officials frequently claimed that Invicta's mine lay entirely on the Parán Community's territory and belonged to it, not to the Lacsanga Community. The claim, which culminated in the Parán Community's final seizure and exploitation of the mine in and after March 2019, was asserted on behalf of the Parán Community and not on behalf of the individuals making it.
- 254. The Parán Community advanced no evidence supporting its ownership claim, and did not follow procedures available under Peru's law to adjust territorial disputes between Rural Communities. Moreover, the record is not consistent regarding the Parán Community's claimed ownership of the mine. In its Counter-Memorial, the Respondent disputes attribution because "all of the actions of which Claimant complains took place in their entirety not on the Parán Community's lands, but on the lands of two other rural communities: the Lacsanga Community and the Santo Domingo de Apache Community." According to a document prepared in the Presidency of the Council of Ministers, "
- 255. Multiple illustrations show the dominant role of the Parán Community's officers and *Ronderos* acting on behalf of or pursuant to the Parán Community's directions in key events:
 - A police report referring to the June 2018 mine occupation emphasizes the role of the Parán Community's leaders and *Ronderos*:

"On 19JUN2018, at approximately 08:00 hours, a group of 250 to 300 community members of the rural community of Parán, led by its president Isidro ROMAN PALOMARES, treasurer David PALOMARES NARVASTA, Silas NARVASTA PANTOJA, Israel NARVASTA CLAROS, Saul TORRES NARVASTA, Israel

³¹⁶ *Id*.

³¹⁷ Resp. C-Mem., para. 459.

³¹⁷

PALOMARES ALVAREZ (president of the peasant rounds), **Huber MEJIA NARVASTA**, **Adela NARVASTA PANTOJA**, being the men who entered carrying short and long-range firearms (pistols, revolvers, breech-loading shotguns and carbines); the same ones who without any authorization entered the camp of the mining company, demanding an inspection of the facilities [...]."319

• A police report discussing the initiation of the blockade in October 2018 highlights the role of the Parán Community's Vice-President:

"On 14OCT2018 an approx. of ninety (90) people from the rural community of Parán-district of Leoncio Prado [...] arrived at the camp of the mining company INVICTA MINING CORP. SAC, the same ones that were stationed at the gate of distant entrance about 300 meters from the mining camp, headed by the vice president of the CC of Parán, Wilber NARVASTA CRUZ (66), DNI N° 15727925, indicating that 'they were initiating protest measures in a peaceful manner with the inhabitants of the aforementioned community against the mining company INVICTA MINING CORP. SAC." 320

 The Parán Community's President led the March 2019 occupation and seizure of the mine:

"On 20MAR2019 at 11.00 hours an approx. of one hundred and fifty (150) community members of the C.C. of Parán, headed by the president of the [...] community [Azarias] Gilberto TORRES PALOMARES arrived at the camp of the Invicta mining company MINING CORP. SAC., located in the district of Paccho and have entered the camp where eight workers of the company were, those who were forced to withdraw [...]."321

• A Council of Ministers Report illustrates the Parán Community's subsequent role in blocking official inspections:

³¹⁹ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 1 (emphasis in original).

³²⁰ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 2 (emphasis in original).

³²¹ C-0640 (corrected translation, of Spanish original at R-0113-SPA), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 20 (emphasis in original) (correction in brackets by the Tribunal, to reflect Spanish original: "[...] comuneros de la C.C. de Paran, encabezados por el presidente de la comunidad Azarias Gilberto TORRES PALOMARES llegaron hasta el campamento [...].")

 A 2020 police report describes the Parán Community's complete possession of the mine:

"Currently the camp and the explosive magazine have been completely dismantled by the community members of Parán, who have taken possession of the place despite being territories belonging to the CC of Lacsanga and Santo Domingo de Apache and remain in place [...]."³²³

256. The record thus shows that, even if one were to assume, for the sake of argument, that the Parán Community was not an organ for which the Respondent is internationally responsible under the principles of ILC Article 4, the Parán Community's actions would nonetheless be attributable to the Respondent under the principles of ILC Article 5. In other words, if the Parán Community were not an organ of the Peruvian State, the requirements for attribution under ILC Article 5 would be satisfied. The Parán Community is empowered by the law of Peru "to exercise elements of the governmental authority" and was "acting in that capacity" in the crucial instances leading to the loss of the Claimant's investment.³²⁴

C. FIRST CLAIM: FULL PROTECTION AND SECURITY

(1) The Parties' Positions

a. The Claimant's Position

257. Article 805(1) of the FTA requires each Party to "accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of

³²³ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, Part B, para. 4.

³²⁴ Should the Parán Community's actions not be attributable to Peru under either ILC Article 4 or 5, Peru would nevertheless be internationally responsible where the treaty obliged Peru to act in response to those actions, but it failed to do so. As the ILC's Commentary points out, "a State may be responsible for the effects of the conduct of private parties if it failed to take necessary measures to prevent those effects." **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Chapter II, Commentary, Introduction, para. 4.

aliens, including [...] full protection and security."³²⁵ Article 805(2) adds that the concept FPS does "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." ³²⁶

- 258. The Claimant contends that the Respondent "failed entirely to provide Lupaka's investment with protection and security, as required [...]."³²⁷ It denies that a claimant must prove the existence of a customary international law rule requiring FPS, urging that Peru clearly had this obligation under the FTA, pointing, *inter alia*, to the explicit reference to FPS in Article 805(1) of the FTA.³²⁸
- 259. As to the content of the FPS standard, "[t]he Claimant does not dispute the Respondent's description of the FPS standard as abstract statements of law."³²⁹ The Claimant broadly accepts that the obligation is of due diligence and "agrees that the FPS obligation does not impose strict liability on the host State to prevent physical or legal infringement of the investment." Thus, "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."³³⁰
- 260. The Claimant also agrees that circumstances should be taken into account in assessing compliance with the FPS obligation, but views the circumstances cited by the Respondent as aggravating factors, not as limit on the Respondent's obligation.³³¹ The Claimant denies that application of the FPS standard varies in light of a country's means and resources. According to the Claimant, the cases to this effect cited by the Respondent involve application of autonomous treaty standards, not the customary international law objective minimum standard.³³² The Claimant points to the Respondent's reliance on *Glamis Gold*

³²⁵ CLA-0001/RLA-0010, FTA, Art. 805(1).

³²⁶ CLA-0001/RLA-0010, FTA, Art. 805(2).

³²⁷ Cl. Mem., para. 250.

³²⁸ Cl. Reply, paras. 606, 611-624.

³²⁹ Cl. Reply, para. 607.

³³⁰ Cl. Reply, para. 626.

³³¹ Cl. Reply, para. 609.

³³² Cl. Reply, paras. 627-628.

v. USA,³³³ which finds the customary international law minimum standard of treatment to be a floor which "is not meant to vary from state to state or investor to investor."³³⁴ The Claimant rejects the views of writers who see the FPS obligation as a "modified objective standard," arguing that this makes the FPS minimum standard no longer a floor, but instead the equivalent of a weak national treatment standard.³³⁵ The surrounding circumstances are relevant to determining what protection the State must provide, not to assessing the State's means and resources.³³⁶

- 261. According to the Claimant, the Respondent has not engaged with core elements of the FPS standard as developed in numerous tribunal decisions, noting that the Respondent also cites such decisions. Referring to several tribunals' decisions, the Claimant urges that the FPS obligation is broad. In AMT v. Zaire it was applied to require the host State to "take all measures necessary to ensure the full enjoyment of protection and security of [a covered] investment [...]. In Parkerings v. Lithuania, the tribunal saw the "failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury" to violate the standard.
- 262. Citing *Cengiz v. Libya*, the Claimant contends that the FPS obligation involves two elements: a negative obligation obliging the State and those whose conduct is attributable to it "to refrain from directly harming the investment by acts of violence," and a second,

³³³ Cl. Reply, para. 628, citing **CLA-0078**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, para. 615.

³³⁴ Id

³³⁵ Cl. Reply, paras. 630-631.

³³⁶ Cl. Reply, para. 632.

³³⁷ Cl. Reply, para. 633-635.

³³⁸ Cl. Mem., paras. 252-253.

³³⁹ Cl. Mem., para. 252, citing **CLA-0022**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, para. 6.05 (emphasis added).

³⁴⁰ Cl. Mem., para. 253, citing **CLA-0023**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 355.

positive obligation to prevent third parties from causing physical damage to an investment.³⁴¹

- As to the first obligation, the Claimant maintains that "[a]t 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 [sic]."³⁴² The Claimant points to tribunals finding a breach of the FPS obligation involving actions by representatives of the State.³⁴³ Cited cases include *Tatneft v. Ukraine* (host State's security forces and others forcibly entered the investor's oil refinery),³⁴⁴ and *Biwater v. Tanzania* (failure to accord FPS where State representatives removed the claimant's representatives from their offices).³⁴⁵
- 264. The Claimant submits that Parán Community officials here, acting in their capacity as officers of an entity for which Peru is internationally responsible, led Community members in a violent raid of the Claimant's mining site in June 2018 and instituted a blockade of the site in October 2018. As in *Tatneft v. Ukraine*, the Claimant's investment was directly harmed by illegal acts by Parán's officials, contrary to Peru's FPS obligation.³⁴⁶
- 265. The Claimant also cites multiple cases implicating the second element, involving injury stemming from actions by third parties. The *AMT v. Zaire* tribunal found that the State's failure to protect and ensure the security of the investor's property from persons who twice "destroyed, damaged, and stole property" breached the applicable treaty, which imposed "an obligation of vigilance and precaution to protect the claimant's investment [...]."³⁴⁷

³⁴¹ Cl. Mem., para. 254, citing **CLA-0025**, *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018, paras. 403-404 (Libyan armed forces, or militia controlled by the Libyan government, pillaged the Claimant's camps); Cl. Reply, para. 634.

³⁴² Cl. Reply, para. 638.

³⁴³ Cl. Mem., paras. 256-257.

³⁴⁴ Cl. Mem., para. 256, citing **CLA-0026**, *OAO Tatneft v. Ukraine*, UNCITRAL, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, para. 428.

³⁴⁵ Cl. Mem., para. 257, citing **CLA-0020**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 731.

³⁴⁶ Cl. Mem., para. 258.

³⁴⁷ Cl. Mem., para. 260, citing **CLA-0022**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, paras. 6.04-6.11.

The Claimant also cites *Wena Hotels v. Egypt*,³⁴⁸ *von Pezold* v. *Zimbabwe*,³⁴⁹ *MNSS v. Montenegro*³⁵⁰ and *Ampal-American v. Egypt*.³⁵¹ The Claimant notes the similarity of its claim to that of the claimant in *Copper Mesa v. Ecuador*, where opponents of a mining project blocked access to the site, but the State did not take steps to restore access, the tribunal finding the State's presence in the area to be "invariably weak, intermittent and ineffective."³⁵²

- 266. On the hypothesis that the conduct of the Parán Community is not attributable to Peru, the Claimant contends that the Respondent similarly failed to meet its positive obligation to prevent third parties, specifically Parán Community residents and officials, from harming Lupaka's investment and personnel. The Claimant lists alleged conduct of the Respondent's police and other authorities falling short of the Respondent's obligations:
 - Failure to prevent the armed invasion of the Claimant's mine on 19 June 2018.
 - Failure to remove the invaders and to stop Parán's representatives from damaging Lupaka's property and abusing its personnel.
 - Failure to sanction the invaders, notwithstanding Lupaka's complaints, for the acts of 19 June 2018.
 - Failure to prevent the armed invasion of the Site and the "Blockade" of the Lacsanga road on 14 October 2018.

³⁴⁸ Cl. Mem., para. 261, citing **CLA-0028**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08 December 2000, paras. 84-95. *See also*, Cl. Reply, para. 655.

³⁴⁹ Cl. Mem., para. 262, citing **CLA-0027**, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, paras. 596-597.

³⁵⁰ Cl. Mem., para. 263, citing **CLA-0029**, *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 04 May 2016, paras. 351-353, 356. *See also*, Cl. Reply, para. 650.

³⁵¹ Cl. Mem., para. 264, citing **CLA-0030**, *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 February 2017, paras. 286-289.

³⁵² Cl. Mem., para. 265, quoting **CLA-0031**, Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-2, Award, 15 March 2016, paras. 6.82-6.84.

- Failure to remove the invaders and to restore Lupaka's access to the Site through the Lacsanga road.
- Failure to sanction the invaders for abuse of the Claimant's representatives on 14
 October 2018, 20 March 2019 and 14 May 2019, and for damaging the Claimant's property and facilities; and
- Providing tacit support of the invaders' actions during the negotiations with Parán's officials following the invasion and "Blockade." 353
- 267. The Claimant's Reply sets out four obligations that the Claimant contends are subsumed within the FPS customary international law minimum standard:³⁵⁴
 - A State's negative obligation not to cause harm to investors and their investments, ³⁵⁵ as affirmed in the *Caire* case, ³⁵⁶ *Amco v. Indonesia* ³⁵⁷ and other cases cited.
 - An obligation to take all reasonable measures to prevent third parties from causing damage, 358 citing the United States-Mexico General Claims Commission's 1926 *Home Insurance Co.* case and its 1930 *Chapman* case, as well as *AMT v. Zaire.* 359 The Claimant urges that the Respondent appears to acknowledge this obligation, as it cites *Tulip Real Estate v. Turkey*, which finds an obligation to take every reasonable effort to ensure investment's physical security and protection. 360

³⁵³ Cl. Mem., para. 266.

³⁵⁴ Cl. Reply, paras. 636 et seq.

³⁵⁵ Cl. Reply, paras. 638-641.

³⁵⁶ Cl. Reply, para. 638, citing **RLA-0031**, *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, RIAA No. 33, 7 June 1929, p. 531.

³⁵⁷ Cl. Reply, para. 639, citing **CLA-0066**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, para. 172.

³⁵⁸ Cl. Reply, para. 642.

³⁵⁹ Cl. Reply, paras. 643-646, citing **CLA-0127**, *The Home Insurance Co. (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 31 March 1926, paras. 16-17; **CLA-0128**, *William E. Chapman (U.S.A.) v. United Mexican States*, UN, Reports of International Arbitral Awards (Vol. IV), 24 October 1930, pp. 634-635; **CLA-0022**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, paras. 6.05-6.06.

³⁶⁰ Cl. Reply, para. 647.

- An obligation to take necessary steps to end third parties' interference with, and to restore the investor to full enjoyment of, the investment, citing MNSS v. Montenegro, where the State took no action to dislodge persons occupying a steel plant. The Claimant contends that the Respondent acknowledges this obligation in its Counter-Memorial. 462
- An obligation to investigate, prosecute and punish "offenders for committing criminal acts against investors and their property," citing several early twentieth century and other cases recognizing this duty.³⁶³
- 268. The Claimant disputes the Respondent's characterization of the road blockade and Parán's occupations of the mine site as "protests." They were instead "armed invasions, accompanied by the threat and use of violence [...]."³⁶⁴ The Claimant points out in this regard that a core theme in the Respondent's defence is that police intervention would have led to violence.³⁶⁵
- 269. As the Parán Community's actions are attributable to Peru, it is clear to the Claimant that the Respondent failed to accord FPS. ³⁶⁶ In addition, Peru's officials directly participated in actions harming the Claimant, citing the alleged participation and leadership of the local Subprefect, Mr. Retuerto, in the 19 June 2018 occupation of the mine camp. ³⁶⁷
- 270. According to the Claimant, the Respondent also failed to exercise necessary due diligence.³⁶⁸ Peru's police and intelligence services knew of the risk of an invasion of the mine site since at least October 2017. They also knew of the danger posed by Parán Community members already subject to arrest warrants. Knowing this, the State could and

³⁶¹ Cl. Reply, paras. 649-650, citing **CLA-0029**, MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016.

³⁶² Cl. Reply, para. 651, citing Resp. C-Mem., para. 545.

³⁶³ Cl. Reply, paras. 652-655.

³⁶⁴ Cl. Reply, para. 660.

³⁶⁵ Cl. Reply, para. 661.

³⁶⁶ Cl. Reply, paras. 657-663.

³⁶⁷ Cl. Reply, para. 664.

³⁶⁸ Cl. Reply, para. 665.

should have taken preventive measures. It did not.³⁶⁹ The Claimant also disputes the Respondent's claim that the nearest police station is two hours away from the mine; driving time is actually one hour. Whatever the driving time, "it was incumbent on Peru to explore other means to prevent invasions of the Site by Parán."³⁷⁰

- 271. By early 2019, following the two previous invasions of the site and a months-long blockade barring access "it ought to have been clear [...] that IMC was at the mercy of the Parán Community." Nevertheless, the Respondent took no action after 150 hostile community members again invaded and took control of the site in March 2019, an event not mentioned in the Respondent's Counter-Memorial. The Claimant adds that the Counter-Memorial does not address other incidents of illegal behaviour by the Community and its members. The Respondent knew of Parán's possession and use of weapons, but did not confiscate them, culminating in shootings on 14-15 May 2019 that "left several injured and one dead." It knew of the risk of theft of explosives from IMC's magazine but did nothing to prevent it. Peru likewise did nothing after being informed that Parán was appropriating and selling IMC's ore stockpiled at the mine site. 374
- 272. In addition to failing to prevent the blockade and other criminal actions by Parán's members, Peru did not take necessary steps to restore the Claimant's access and ability to operate the mine.³⁷⁵ The Claimant rejects the Respondent's insistence that police intervention was unreasonable and that dialogue was the only option for the Claimant to recover its property. However, even if intervention was unreasonable, Peru could have taken other actions that would have increased security of the investment: removing the Parán Community's weapons, arresting individuals against whom IMC had filed criminal complaints, and acting to stop the illegal marijuana business allegedly operated by the

³⁶⁹ Cl. Reply, para. 666.

³⁷⁰ Cl. Reply, para. 667.

³⁷¹ Cl. Reply, para. 668.

³⁷² Cl. Reply, paras. 668-669.

³⁷³ Cl. Reply, para. 670.

³⁷⁴ Cl. Reply, para. 670.

³⁷⁵ Cl. Reply, para. 672.

Parán Community.³⁷⁶ Failing such action, the Respondent's insistence on dialogue as the only option "forces mining investors to negotiate with a counterparty that faces no consequences if it violates its part of the bargain."³⁷⁷

- 273. The Claimant points to the criminal complaints lodged by IMC or its personnel against Parán Community members. The preliminary investigations in these cases remained open over three years after the deadline for the prosecutor to decide whether to launch a preparatory investigation. Meanwhile, none of the alleged offenders were arrested or prosecuted.³⁷⁸
- 274. The Claimant contrasts this lenient treatment with the police response the day after the 14 May 2019 events involving the Claimant's security guards. The police arrested several of the security guards the next day, 379 but took no action against Parán Community members who stole property and shot and killed a member of the security team. 380 The Claimant objects to the Respondent's invocation of this killing to support its position, given that the Respondent has failed to investigate and prosecute those responsible. 381
- 275. The Claimant denies the relevance of the special circumstances invoked by the Respondent to justify its policy, maintaining that they do not justify lowering the minimum standard of treatment. The cited circumstances "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."³⁸²
- 276. As to the history of frequent social conflict cited by the Respondent to justify its policy of relying on dialogue, the Claimant accepts that the State must determine the balance between the interests of local communities and investors. However, having written the balance into law, the State must ensure that investors and local communities abide by the

³⁷⁶ Cl. Reply, paras. 673-675.

³⁷⁷ Cl. Reply, para. 676.

³⁷⁸ Cl. Reply, paras. 677-678.

³⁷⁹ Cl. Reply, para. 346.

³⁸⁰ Cl. Reply, para. 679.

³⁸¹ *Id*.

³⁸² Cl. Reply, para. 685.

law. The Claimant insists that it was not legally obliged to conclude agreements with communities where mining does not occur, including those like Parán in the area of direct influence of the project. The Claimant concluded agreements with the Lacsanga and Santo Domingo Communities, whose lands it utilized and where its mining activities took place. However, citing *Bear Creek v. Peru*,³⁸³ the Claimant maintains that other nearby communities do not have veto power over a project.³⁸⁴ Communities in the area of direct influence of a project have specified statutory rights of consultation, but the Claimant maintains that it met all of its corresponding obligations.³⁸⁵

- 277. The Claimant acknowledges that Peru's law recognizes the right to public protest, but that right must be exercised so as not to violate other fundamental rights, including the rights of ownership. In the Claimant's view, while it complied with its legal obligations, the Parán Community did not. Its blockade was clearly an unlawful measure, but the State refused to lift it and restore law and order. The State cannot rely on soft law instruments to impose new legal obligations on the Claimant or expand the Parán Community's legal rights. The State cannot rely on soft law instruments to impose new legal obligations on the Claimant or expand the Parán Community's legal rights.
- 278. In any event, the Claimant insists that it did more than was legally required in seeking an accommodation with the Parán Community. Agreement was not possible because "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." 388
- 279. As a further circumstance justifying its policy, the Respondent cites the limited law enforcement resources available in the affected area. In response, the Claimant submits that 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

³⁸³ CLA-0086, Bear Creek Mining v. Republic of Peru, ICSID Case No. ARB/14/21, Award, 30 November 2017.

³⁸⁴ Cl. Reply, paras. 686-690.

³⁸⁵ Cl. Reply, paras. 691-698.

³⁸⁶ Cl. Reply, paras. 699-702.

³⁸⁷ Cl. Reply, paras. 703-705.

³⁸⁸ Cl. Reply, para. 706.

fail."³⁸⁹ In the Claimant's view the Respondent's FPS obligation extends over its entire territory. "The State, whether by delegation or omission, cannot abnegate responsibility over part of its territory."³⁹⁰ While *force majeure* conditions may temporarily excuse a State's compliance, such conditions are not present here. Instead, the State has made a conscious decision to delegate policing powers to the *Rondas Campesinas*.³⁹¹

280. The Claimant identified other instances where Peru has undertaken police interventions to evict invaders from mining sites, clear roadblocks and take other similar actions. It chose not to do so in the Claimant's case.³⁹²

b. The Respondent's Position

- 281. The Respondent initially contends that the Claimant has not met its burden of proving the existence and content of a rule of customary international law requiring States to provide FPS. According to the Respondent, the Claimant has not proved either consistent State practice demonstrating that States provide FPS, or that such practice reflects a sense of legal obligation.³⁹³ Further, the arbitration tribunal awards cited by the Claimant "cannot establish the existence or content of customary international law."³⁹⁴ Hence, "[t]he Claimant has failed to prove the existence and content of 'full protection and security' under the customary law minimum standard," so its FPS claims must be dismissed.³⁹⁵
- 282. Notwithstanding this call to dismiss the claim for failure to prove the existence of a customary rule requiring FPS, the Respondent "recognizes" that the standard exists, although it does so "without prejudice to its rights" including "its due process right to be heard in respect of any alleged evidence the Claimant may hereafter invoke [...]." The Respondent thus conditionally acknowledges that the FPS obligation "requires States to

³⁸⁹ Cl. Reply, para. 715.

³⁹⁰ Cl. Reply, para. 710.

³⁹¹ Cl. Reply, paras. 711-713.

³⁹² Cl. Reply, para. 714.

³⁹³ Resp. Rej., para. 593.

³⁹⁴ Resp. C-Mem., paras. 479 et seq.

³⁹⁵ Resp. C-Mem., para. 487; Resp. Rej., paras. 588-595.

³⁹⁶ Resp. Rej., para. 596.

act with *due diligence* with respect to the physical security of a covered investment, but only *as is reasonable in the circumstances*."³⁹⁷ This obligation is not of strict liability to prevent violations, but is instead to exercise due diligence and to take such measures to protect the investment as are reasonable in the circumstances.³⁹⁸ The Respondent refers to numerous cases including *AAPL v. Sri Lanka*, ³⁹⁹ *Rumeli v. Kazakhstan*, ⁴⁰⁰ *Tulip Real Estate v. Turkey*, ⁴⁰¹ *Lauder v. Czech Republic*, ⁴⁰² *Strabag SE v. Libya* ⁴⁰³ and *Cengiz v. Libya*, ⁴⁰⁴ showing that the obligation is one of due diligence to take measures reasonable in the circumstances.

283. The Respondent characterizes the Parán Community's actions as "protests," and invokes the ICJ's decision in *ELSI (United States v. Italy)*. 405 The ICJ there assessed that "the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed." 406 Citing *Noble Ventures v. Romania*, 407 the Respondent adds that a claimant must prove both that the respondent state failed to take required measures and "that such measures would in fact have prevented the claimant's alleged losses." 408

³⁹⁷ Resp. C-Mem., para. 488 (emphasis in original).

³⁹⁸ Resp. C-Mem., para. 489.

³⁹⁹ Resp. C-Mem., para. 490, citing **CLA-0100**, Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, paras. 45-46, 49, 53.

⁴⁰⁰ Resp. C-Mem., para. 490, citing **CLA-0033**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 575, 668.

⁴⁰¹ Resp. C-Mem., para. 491, citing **RLA-0004**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, paras. 419, 430.

⁴⁰² Resp. C-Mem., para. 492, citing **RLA-0083**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 308.

 $^{^{403}}$ Resp. C-Mem., para. 492, citing **RLA-0084**, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, paras. 234-235.

⁴⁰⁴ Resp. C-Mem., para. 492, citing **CLA-0025**, *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018, paras. 401, 406.

⁴⁰⁵ Resp. C-Mem., para. 493.

⁴⁰⁶ **RLA-0006**, Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, 20 July 1989, para. 108.

⁴⁰⁷ Resp. C-Mem., para. 494, citing **RLA-0007**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, paras. 165-166.

⁴⁰⁸ Resp. C-Mem., para. 494.

- 284. The Respondent insists that it did act with due diligence to protect the physical security of the Claimant's investment "as reasonable in the circumstances." It cites Peru's long history of sometimes violent social conflict between mining companies and local communities as a "fundamental circumstance" showing the reasonableness of Peru's approach to dealing with social conflicts, involving rural and indigenous communities, which enjoy a special status in Peru. 10
- 285. The Respondent observes that past uses of force to address conflicts between mining companies and rural communities have led to violent encounters. These "steered Peruvian State policy away from the use of force as a way of resolving civilian protests in mining conflicts," in the belief that using force exacerbated conflict and distrust. Instead, Peru implemented a framework "that emphasized dialogue as the means to prevent social conflicts from escalating into violence and instead to propitiate durable, peaceful solutions." This legal and policy framework is said to reflect international norms, particularly "the concept of the social license to operate." Securing social license is essential because social conflict in the mining sector "is a risk that all mining companies face, and that they must therefore prevent and adequately manage." 13
- 286. The Respondent characterizes the Claimant's claims as "premised on the contention that Peru was required to use force against the members of the Parán Community." To uphold this position "the Tribunal must determine that Peru was required, as a matter of domestic and international law, to use force against the members of the Parán Community." Such a ruling would have "extraordinary consequences," as a State "should not be held liable for concluding, in conformity with its domestic legislation, that the use of force against a rural community [...] was neither required nor appropriate in the circumstances." The Respondent adds that the "Claimant has not even shown that the competent Peruvian

⁴⁰⁹ Resp. C-Mem., para. 497 (emphasis in original).

⁴¹⁰ Resp. C-Mem., paras. 498-500.

⁴¹¹ Resp. C-Mem., para. 502.

⁴¹² Resp. C-Mem., para. 503.

⁴¹³ Resp. C-Mem., paras. 504-505.

⁴¹⁴ Resp. Rej., para. 585.

⁴¹⁵ Resp. Rej., para. 586.

authorities were authorized – let alone required – under Peruvian law to use force; nor that if the PNP had been so authorized (*quod non*), the decision not to use force in *the specific circumstances then present* was contrary to Peruvian laws and regulations."⁴¹⁶

- 287. The Respondent contends that "[t]he Claimant's main allegation is that Peru should have responded with immediate and aggressive force to prevent the Parán Community from setting up their Access Road Protest [...]." This would ignore the remoteness of the mine location, the distance to the nearest police precincts, and "Peru's limited institutional capacity to intervene, given the overwhelming police deployment required to prevent protests or civilian blockades of the magnitude of the Access Road Protest." The Respondent indicates that the nearest police station had only 15 officers responsible for an area of 1,630 square kilometres. Hence, the Respondent had insufficient resources to prevent the Access Road Protest and was not "under any legal obligation to provide [the] Claimant with its own dedicated PNP security force."
- According to the Respondent, "given the limited institutional means and resources" of the local police and the impossibility of intervention to prevent the blockade, "Peru took reasonable actions to manage the conflict and to steer both the Claimant and the Parán Community towards dialogue to resolve their differences." These measures met and indeed exceeded its due diligence obligation. They began in June 2018, when the Claimant's employees lodged a complaint at the police station regarding the 19 June 2018 events at the mine. In response, Peru took the statements of the complaining employees and promptly began an investigation. Thereafter, the General Office of Social Management ("Oficina General de Gestión Social") ("OGGS") (the MEM element charged with promoting dialogue for conflict management and resolution) "diligently and persistently assessed, monitored, and facilitated dialogue between [the] Claimant and the

⁴¹⁶ Resp. Rej., para. 586 (emphasis in original).

⁴¹⁷ Resp. C-Mem., paras. 508-509.

⁴¹⁸ Resp. C-Mem., para. 510.

⁴¹⁹ Resp. C-Mem., para. 511.

⁴²⁰ Resp. C-Mem., para. 512.

⁴²¹ Resp. C-Mem., paras. 513-515.

Parán Community" by convening meetings with the Parán Community and contacting the Claimant's representatives. 422

- 289. In September 2018, the Parán Community planned a second occupation of the mine. In response, the police, the prosecutor, and the sub-prefect met with the Parán Community to encourage dialogue. Further, a contingent of the police deployed to the mine for three days to prevent another confrontation. The Parán Community abandoned the planned occupation. However, the Claimant ignored the warning signs of deepening social conflict and did not act to de-escalate the situation. Instead, "[t]he Claimant's insistence on conducting business as usual only increased the risk of escalation of the conflict into more violent expressions of opposition."424
- 290. According to the Respondent, after the Claimant failed to make progress in reconciling with the Parán Community, the Community on 14 October 2018 initiated the "Access Road Protest." The police promptly dispatched a patrol which interviewed Parán Community members regarding the reasons for the protest. Then, "having contained the situation and observing that the circumstances did not require nor justify the use of force, the PNP left the site."
- 291. Thereafter, Peru acted "to help position Invicta and the Parán Community to reach an agreement," including multiple meetings with the protagonists, travel by government officials to meet with Parán Community leaders, and involvement of additional agencies to enlist their expertise.⁴²⁷ Throughout, Peru's officials "emphasized the importance of dialogue" and of resolution through agreement.⁴²⁸ The Respondent contends that in this process, "Peruvian officials never acquiesced in, accepted, or expressed agreement with

⁴²² Resp. C-Mem., para. 518.

⁴²³ Resp. C-Mem., para. 519.

⁴²⁴ Resp. C-Mem., para. 520.

⁴²⁵ Resp. C-Mem., para. 521.

⁴²⁶ Resp. C-Mem., para. 522.

⁴²⁷ Resp. C-Mem., para. 523.

⁴²⁸ Resp. C-Mem., para. 523.

the Parán Community's chosen tactics." Instead, they "firmly urged the Parán Community to cease its protest so that negotiations could progress constructively."⁴²⁹

- 292. The Respondent contends that its efforts resulted in the 26 February 2019 meeting which produced an agreement initially applauded by the Claimant's senior executives. However, the agreement quickly broke down over disputes regarding which road the Parán Community would allow the Claimant to use to reach its mine. In the Respondent's view, the Claimant gave "apparent consent" to use an undeveloped road through Parán Community territory instead of its existing developed road on Lacsanga territory, but it then insisted on using the Lacsanga road. The Respondent also attributes collapse of the 26 February 2019 agreement to the Claimant's "rejection of a meager investment to survey improvements to the Parán's access road."
- 293. According to the Respondent, the situation further deteriorated when the Claimant did not attend a meeting with the Parán Community on 1 April 2019. This was seen by the Parán Community "as yet another expression of disdain by Invicta." Then, on 14 May 2019:

"[T]he conflict took a violent turn when [the] Claimant hired a private, independent security contractor — ominously called 'War Dogs' — that later attempted to remove the protestors and end the Access Road Protest. Unfortunately, this use of force resulted in physical violence, one death, and moreover was predictably unsuccessful in resolving the conflict. Peru promptly investigated the violent War Dogs intervention, and undertook efforts to reinstate communication channels [...]."433

294. In subsequent meetings with high-level government officials on 20 May and 2 July 2019, the Claimant "flatly rejected" government proposals that it take good-faith measures to lessen the conflict, instead insisting that the Parán Community withdraw the blockade as a precondition for dialogue.⁴³⁴

⁴²⁹ Resp. C-Mem., para. 525.

⁴³⁰ Resp. C-Mem., paras. 526-527.

⁴³¹ Resp. PH Mem., para. 94.

⁴³² Resp. C-Mem., para. 529.

⁴³³ Resp. C-Mem., para. 530.

⁴³⁴ Resp. C-Mem., paras. 531-532.

- 295. According to the Respondent, the Claimant's demands for the forceful removal of the protesters were impracticable and legally infeasible. Peruvian and international law render the use of force absolutely exceptional and possible only after all possible alternatives have been exhausted. According to the Respondent's legal expert, Dr. Meini, none of the limited circumstances permitting the use of force under Peruvian law existed. In his opinion, the Claimant could have sought a judicial order to remove the blockade rather than appealing to the criminal justice system, but it did not do so. Instead, the Claimant sought intervention through an Operational Plan previously developed by the police. However, implementation of the plan would have been illegal and would have triggered criminal liability for those involved. 436
- 296. The Respondent argues that forcibly removing the Parán Community's blockade would have produced only a fleeting respite; the underlying social conflict would have remained and would have recurred. Here, as in *Noble Ventures v. Romania*, 437 the Claimant did not prove that the remedy it sought would have brought about peace with the Parán Community. 438
- 297. The Respondent disputes the relevance of the *Tatneft v. Ukraine* and *Biwater v. Tanzania* cases cited by the Claimant, contending that these involved fundamentally different facts involving action by State forces. Here, the relevant conduct involved the Parán Community's Members, conduct not attributable to Peru. Six other cases cited by the Claimant each involved unique circumstances materially different from those involved here. Each involved instances where the State failed to act, in contrast with Peru's vigorous action here to seek a solution. 440

⁴³⁵ Resp. C-Mem., paras. 533-535.

⁴³⁶ Resp. C-Mem., paras. 536-538.

⁴³⁷ Resp. C-Mem., para. 541, citing **RLA-0007**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 166.

⁴³⁸ Resp. C-Mem., paras. 539-541.

⁴³⁹ Resp. C-Mem., para. 543.

⁴⁴⁰ Resp. C-Mem., paras. 544-545.

(2) The Tribunal's Analysis and Decision

- 298. The Claimant contends that Peru failed to meet its obligations under Article 805 of the FTA to provide FPS to the Claimant's investment.⁴⁴¹ The Respondent insists that it has met its obligation.⁴⁴² Article 805 of the FTA provides:
 - "1. 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.
 - 2. The concepts of 'fair and equitable treatment' and 'full protection and security' in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. [...]."⁴⁴³
- 299. The application of Article 805 of the FTA raises two interconnected legal issues. First, the Tribunal must assess the content of the customary international law minimum standard of treatment of aliens in general terms, both as it applies to this claim for denial of FPS and to the Claimant's separate claim of denial of fair and equitable treatment ("FET") (addressed in the next section of this Award). Second, as to this FPS claim, the Tribunal must assess the content of the customary obligation to accord FPS, both as it applies to the Parán Community (as its conduct is attributable to the State), and to the conduct of Peru's national authorities in the hypothetical alternative that the Parán Community's conduct should not be attributable to the State.
- 300. As to the content of the customary international law minimum standard of treatment overall, the Tribunal is mindful that cases applying autonomous conceptions of FET untethered from the customary international law minimum standard do not assist in this analysis. As the *Glamis Gold v. USA* tribunal observed, "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom." 444

⁴⁴¹ Cl. Mem., Section 4.2; Cl. Reply, Section 9.3; Cl. Skeleton, Section 3.3.3.

⁴⁴² Resp. C-Mem., Section IV.B; Resp. Rej., Section IV.B; Resp. Skeleton, Section V.B.

⁴⁴³ CLA-0001/RLA-0010, FTA, Art. 805.

⁴⁴⁴ CLA-0078, Glamis Gold, Ltd. v. United States of America, UNCITRAL, Award, 8 June 2009, para. 608.

301. The decision of the U.S.-Mexico Claims Commission in *Neer*⁴⁴⁵ is a familiar early reference point in assessing the customary international law minimum standard. Although *Neer* involved claims of denial of justice through an allegedly insufficient investigation of Mr. Neer's murder, the Commission's formula defining a State's minimum obligations in its dealings with foreign nationals has had lasting resonance:

"[T]he 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."

302. For *Neer* and like cases, a significant factor in assessing potential international liability under customary international law is the gravity or seriousness of the alleged actions or failures to act. As *Neer* had it, a State's conduct must amount to "an outrage," to "wilful neglect of duty," or to conduct that every reasonable and impartial observer would find insufficient. Other cases applying the customary international law minimum standard also emphasized the serious nature of the required deficiency. The U.S.-Mexico Claims Commission in *Mecham v. Mexico* 447 saw shortcomings in Mexican authorities' failure to apprehend and punish those who fatally wounded Mr. Mecham, but found no international responsibility:

"[E]ven though more efficacious measures might perhaps have been employed to apprehend the murderers of Mecham, that is not the question, but rather whether what was done shows such a degree of negligence, defective administration of justice, or bad faith, that the procedure falls below the standards of international law. The Commission is not prepared to say such a thing in this case." 448

303. Other mixed claims commission decisions stress the degree of seriousness required to establish international responsibility under customary international law. The commission in *Noyes v. Panama* thus observes that for there to be international responsibility:

⁴⁴⁵ **CLA-0138**, *Neer and Neer (U.S.A.) v. United Mexican States*, General Claims US-Mexico, Decision, 15 October 1926.

⁴⁴⁶ *Id.*, para. 4.

⁴⁴⁷ CLA-0129, Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.) v. United Mexican States, UN, Reports of International Arbitral Awards (Vol. IV), 2 April 1929.

⁴⁴⁸ *Id.*, p. 443.

"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." ⁴⁴⁹

304. Multiple cases under the North American Free Trade Agreement ("NAFTA") examined the content of the customary international law minimum standard, and in particular whether it had evolved in some way over time. 450 "Probably the most comprehensive review [of this question] was done by the tribunal in *Waste Management*, in which it attempted a survey of the holdings to date in NAFTA jurisprudence."451 Although the decision in *Waste Management v. Mexico II* involved FET and not FPS, both the Claimant and the Respondent invoked its summary of the contemporary meaning of the customary international law minimum standard, which the Respondent's Counter-Memorial characterized as reflecting "contemporary State practice and *opinio juris*": 452

"[T]he 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 candour in an administrative process." 453

305. For its part, the *Glamis Gold v. USA* tribunal held similarly that a violation of the customary international law minimum standard "requires an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete

⁴⁴⁹ **CLA-0139**, *Walter A. Noyes (United States) v. Panama*, UN, Reports of International Arbitral Awards (Vol. VI), 22 May 1933, p. 311.

⁴⁵⁰ Glamis Gold v. USA assessed that Neer's description of the customary requirements has retained its authority, but also recognized that assessments may have evolved. CLA-0078, Glamis Gold, Ltd. v. United States of America, UNCITRAL, Award, 8 June 2009, para. 613 ("this Tribunal holds that the Neer standard, when applied with current sentiments and to modern situations, may find shocking and egregious events not considered to reach this level in the past."), para. 616 ("[t]he standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under Neer; it is entirely possible, however that, as an international community, we may be shocked by State actions now that did not offend us previously.")

⁴⁵¹ CLA-0078, Glamis Gold, Ltd. v. United States of America, UNCITRAL, Award, 8 June 2009, para. 559.

⁴⁵² Cl. Mem., para. 269; Resp. C-Mem., para. 561.

⁴⁵³ **CLA-0037**, Waste Management v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98.

lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards."454

- 306. While these articulations of the customary international law minimum standard use different words, they require a reviewing court or tribunal to assess the overall gravity or seriousness of the conduct at issue. Minor technical breaches of an international agreement or conduct that causes little harm are not apt to violate the customary international law minimum standard of treatment.
- 307. The Tribunal now turns to the content of the customary obligation to accord FPS.
- 308. The Respondent initially asks that the Tribunal reject the Claimant's FPS claim because the Claimant did not prove the existence and content of a rule of customary international law requiring that investments be accorded FPS. In the Respondent's view, decisions of arbitral tribunals defining and applying the FPS standard are not State practice and do not prove the existence or contents of a customary international law obligation to accord FPS. Instead, the Respondent argues, the Claimant was obliged to provide sufficient evidence of consistent State practice taken from a sense of legal obligation to prove the existence and content of a customary FPS standard and it failed to do so. 457
- 309. In response, the Claimant points out that the FTA itself refers to FPS as an element of the customary international law minimum standard.⁴⁵⁸ It also notes that the Respondent itself frequently cites investment treaty awards as indications of the content of the standard.⁴⁵⁹
- 310. The Tribunal does not agree that the Claimant must prove the existence and content of a customary obligation to accord FPS from the ground up. Peru and Canada, the Parties to the FTA, twice referred in Article 805 to the obligation to accord FPS to investments as part of the customary international law minimum standard of treatment. Although the

⁴⁵⁴ CLA-0078, Glamis Gold, Ltd. v. United States of America, UNCITRAL, Award, 8 June 2009, para. 627.

⁴⁵⁵ Resp. C-Mem., para. 487; Resp. Rej., paras. 588-595.

⁴⁵⁶ Resp. C-Mem., paras. 479 et seq.

⁴⁵⁷ See Resp. C-Mem., paras. 486-487; Resp. Rej., para. 593.

⁴⁵⁸ Cl. Reply, paras. 606, 611-614.

⁴⁵⁹ Cl. Reply, para. 622.

Respondent seeks dismissal of the claim on the ground that the Claimant failed to prove the existence of the FPS standard, the Respondent itself ends up recognizing that the FPS standard exists, although it does so cautiously "without prejudice to its rights" including its "due process right [...]."⁴⁶⁰

- 311. As to the contents of this standard, the Respondent cites multiple arbitral awards said to show that the FPS obligation "requires States to act with due diligence with respect to the physical security of a covered investment, but only as is reasonable in the circumstances."⁴⁶¹
- 312. The Claimant does not dispute the due diligence obligation in cases of injury caused by third parties, but finds a more demanding obligation applies in the case of the State's own acts: "[t]he obligation to provide full protection and security thus first and foremost attaches to actions by representatives of the host State." Hence, for the Claimant:

"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 [sic]. It has been a well-established part of that standard since the emergence of the minimum standard of treatment of aliens under international law." 463

- 313. The Claimant cites *Cengiz v. Libya*, where the tribunal described the obligation to provide full protection and security as "an obligation of result and an obligation of means," which comprised two parts:
 - "- A negative obligation to refrain from directly harming the investment by acts of violence attributable to the State, plus
 - A positive obligation to prevent that third parties cause physical damage to such investment." ⁴⁶⁴

⁴⁶⁰ Resp. Rej., para. 596.

⁴⁶¹ Resp. C-Mem., para. 488 (emphasis omitted).

⁴⁶² Cl. Mem., para. 255.

⁴⁶³ Cl. Reply, para. 638, citing **RLA-0031**, *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, Reports of International Arbitral Awards, Decision No. 33, 7 June 1929.

⁴⁶⁴ Cl. Mem., para. 254, citing **CLA-0025**, *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018, paras. 403-404.

- 314. The Claimant points to tribunals' findings involving the application of this negative standard in FPS cases involving conduct of State actors, citing *inter alia Tatneft v. Ukraine* (host state's security forces joined in forcible entry into a refinery), 465 *Parkerings v. Lithuania* ("[a] violation of the standard of full protection and security could arise in case of failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury" and "[t]he injury could be committed either by the host State, or by its agencies or by an individual"), 466 and *Biwater v. Tanzania*, ("[t]he Arbitral Tribunal also does not consider that the 'full security' standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself."). 467
- 315. The Claimant concludes that "[t]hrough 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."⁴⁶⁸ According to the Claimant:

"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 it 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." 469

316. The Respondent does not directly address the Claimant's claim that there is a negative obligation entailing international liability where the State or its agents have caused injury. Instead, for the Respondent, the injuries complained of were caused by the Parán Community or its members. This conduct was not attributable to the State; "the relevant

⁴⁶⁵ Cl. Mem., para. 256, citing **CLA-0026**, *OAO Tatneft v. Ukraine*, UNCITRAL, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, para. 428.

⁴⁶⁶ Cl. Mem., para. 253, citing **CLA-0023**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 355.

⁴⁶⁷ Cl. Mem., para. 257, citing **CLA-0020**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 730.

⁴⁶⁸ Cl. Reply, para. 657.

⁴⁶⁹ Cl. Reply, para. 662, citing Resp. C-Mem., para. 543.

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."⁴⁷⁰

- 317. In the Tribunal's view, there is indeed a negative obligation on the State to refrain from directly harming an investment, as the Claimant contends. The State's obligation to afford protection and security to the investment implies (at least) the obligation to refrain from causing harm to a protected investment where the State's actions or failures to act involve serious or grave misconduct of the nature required by the customary international law minimum standard. This negative obligation is not confined to due diligence; it is an obligation for the State to refrain from certain conduct causing harm.⁴⁷¹
- 318. Beyond this, the Parties do not agree whether the FPS obligation entails certain specific obligations identified by the Claimant. The Tribunal will address these disagreements to the extent required in this Award.
- 319. The Tribunal has found that the actions of the Parán Community and its officers and members carrying out Parán Community business impacting the Claimant's investment are attributable to the Respondent under the principles articulated by the ILC. The Tribunal accordingly weighs the conduct and actions of the Parán Community affecting the investment against the customary obligations of a State with respect to harm it causes to a protected investment.
- 320. In making this assessment, the Tribunal has given particular consideration to four aspects of the Parán Community's conduct identified by the Claimant:⁴⁷²

⁴⁷⁰ Resp. C-Mem., para. 543.

⁴⁷¹ **CLA-0025**, *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018, para. 403 (FPS entails "[a] negative obligation to refrain from directly harming the investment by acts of violence attributable to the State"); **CLA-0023**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 355; **CLA-0024**, C. McLachlan *et al.*, International Investment Arbitration: Substantive Principles (OUP, 2017), p. 34, para. 7.242 (the full protection standard "is concerned with failures by the State to protect the investor's property from actual damage caused by either miscreant State officials, or by the actions of others, where the State has failed to exercise due diligence").

⁴⁷² Cl. Reply, para. 660.

- The Parán Community's forcible occupation of the mining camp in June 2018. 473
- The Parán Community's imposition and continuation of the access road blockade beginning in October 2018, totally denying the Claimant access to, and any economic benefit from, its property for the life of its investment.⁴⁷⁴
- The Community's definitive seizure and subsequent exploitation of the Claimant's mine, ore stocks and other property in and after March 2019;⁴⁷⁵ and
- The Community's armed expulsion of the Claimant's security guards from the site in May 2019, together with the wounding of guards and other persons by gunfire, and the killing of a guard the next day.⁴⁷⁶
- 321. The evidence shows that these were actions of the Community and its members acting in response to Parán Community decisions and leadership. 477 As already explained, they all are attributable to the Respondent. They all involved unilateral decisions and acts of the Parán Community and its members unconstrained by law and taken without due process or effective means for the Claimant to seek redress. They subjected the Claimant's personnel to threats and armed violence, including ultimately the killing of an unarmed security guard and the wounding of other persons. They resulted in theft and other loss of the Claimant's property. Culminating in the physical seizure of the Claimant's mine, ore and other property, they deprived the Claimant of its investment in a manner that was grossly unfair, unjust, and unconstrained by law.
- 322. The Tribunal finds that these actions caused significant injury to the Claimant and its investment in a manner that violated the Respondent's obligation to accord FPS satisfying the customary international law minimum standard of treatment, as required by Article 805 of the FTA. (Questions related to causation are addressed *infra*.)

⁴⁷³ Cl. Mem., paras. 105-107;

⁴⁷⁴ Cl. Mem., para. 119; CWS-Ellis 1st, para. 54.

⁴⁷⁵ Cl. Mem., para. 167;

⁴⁷⁶ Cl. Mem., para. 177; CWS-Bravo 1st, paras. 82-83; CWS-Bravo 2nd, para. 154.

⁴⁷⁷ Cl. Reply, paras. 450-457 (reviewing evidence of Community direction and leadership).

- 323. The Tribunal thus finds that the Respondent, through the actions of the Parán Community, violated its obligation to accord FPS to the Claimant's investment.
- 324. The Tribunal's finding of a breach of the Respondent's FPS obligation resolves this element of the Claimant's case. Nevertheless, the Tribunal also considers whether Peru's national authorities would have failed to accord FPS to the Claimant's investment, if hypothetically, conduct of the Parán Community had not been attributed to the State. On this hypothesis, the Tribunal finds that the Respondent failed to exercise due diligence as required by its obligation to accord FPS under the customary international law minimum standard.
- 325. Relevant actions by the Parán Community and its members again include the first occupation of the Mining Camp in June 2018, the continuous blockade of the Lacsanga access road denying the Claimant access to its investment after October 2018, the physical seizure of the mine and expulsion of IMC's handful of personnel in March 2019, the violent expulsion of IMC's security guards in May 2019 and the subsequent killing of a guard and the wounding of other persons, the continued occupation and exploitation of the mine after March 2019, and the theft of IMC's ore and other property.⁴⁷⁸
- 326. The Tribunal finds that Peru's national authorities failed to meet the State's due diligence obligation under the customary international law minimum standard in responding to these events. The State's response essentially consisted of urging the parties to engage in dialogue. To this end, it arranged a meeting that produced an ambiguous agreement that soon collapsed a collapse that the Respondent's officials appear to view as the Claimant's fault. (As discussed in Section VII.A on Causation, *infra*, the Tribunal does not agree with this view. Given the character, duration, gravity, and dire economic consequences of these events for the investment, the Respondent's calls for dialogue did not meet its obligation under the FTA to accord FPS in accordance with the customary international law minimum standard of treatment.

⁴⁷⁸ Cl. Reply, paras. 665-671.

⁴⁷⁹ *Infra*, paras. 523 et seq.

- 327. As articulated in *Waste Management v. Mexico II*, which the Respondent accepts as reflecting "contemporary State practice and *opinio juris*," the international minimum standard "is infringed by conduct attributable to the State and harmful to the claimant" that is "grossly unfair, unjust or idiosyncratic" and "exposes the claimant to sectional or racial prejudice [...]." In the Tribunal's view, the Respondent's national authorities' conduct here meets this standard. The Respondent's policy was essentially to leave it to the investor to secure its own protection by reaching agreement with a difficult interlocutor that was making mounting demands for the fruits, and ultimately for possession, of the Claimant's mine. The Respondent steadfastly pursued this policy even though, as it acknowledged in these proceedings, the mine lies on the territory of another rural community. 482
- 328. The Respondent's witnesses affirmed that social conflicts involving Rural Communities and the private sector "have had a long and tumultuous history." The evidence also indicates that in large areas in Peru, including the area of the Claimant's investment, the Respondent's police and other officials have limited presence. Investors are essentially left to fend for themselves in securing their investments' physical security, albeit with intermittent support from government officials coming from Lima to conduct meetings and otherwise seek to promote dialogue. The Claimant was thus repeatedly instructed to gain its security through negotiations with an interlocutor that the Claimant believed was not negotiating in good faith. As discussed elsewhere, the Tribunal shares the Claimant's reservations in this regard.
- 329. In denying a significant role for the State in relation to Rural Communities' conduct affecting mining investments, the Respondent's witnesses insisted that investments' security is only possible through "social license," essentially the ongoing consent of

⁴⁸⁰ Resp. C-Mem., para. 561; Resp. Rej., para. 668. See also, Cl. Mem., para. 269.

⁴⁸¹ CLA-0037, Waste Management v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98.

⁴⁸² Resp. C-Mem., para. 459.

⁴⁸³ RWS-Incháustegui 1st, para. 34.

⁴⁸⁴ The Respondent's expert Dr. Vela states that Rural and Native Communities occupy 27% of the national territory, and 55% of the Andean region. RER-Vela, paras. 54-55.

⁴⁸⁵ Resp. C-Mem., para. 510.

⁴⁸⁶ *Infra*, paras. 504-505.

neighbouring communities to the initiation and continuation of a mining project, consent that can be withdrawn at any time.⁴⁸⁷ The witnesses also insisted that securing and maintaining social license is the investor's sole responsibility and goes beyond compliance with formal legal requirements. It is not the State's affair, although State agencies may encourage and attempt to facilitate dialogue.

330. The Respondent's expert, Ms. Dufour, highlighted both the central role of social license and the State's limited role in protecting investments:

"[I]n current practice, restricting the planning of a mining project only to compliance with legal requirements and Permits is not enough. In addition, it is necessary to obtain consent from the surrounding population." 488

"Unlike other more objective technical or regulatory requirements, by its very nature, the State cannot certify that a company has obtained or is in a social license scenario." 489

"Failure to obtain (or maintain) the social license to operate can have detrimental consequences for the project. These consequences can range from delays in its execution to even, in more extreme cases, its cancellation." ⁴⁹⁰

331. Mr. Luis Miguel Incháustegui, Deputy Minister of Mines at the MEM at the time of some key events affecting the Claimant and later Minister of Energy and Mines, likewise made clear the that the State's role is limited:

"Social management and relations with the communities are a responsibility held by the companies, not by the State. The MINEM assists but is not obliged to guarantee an agreement or the observance thereof. A mining concession is simply a right to begin a project [...]."491

⁴⁸⁷ Ms. Dufour defines social license as "the intangible, unwritten and tacit agreement between a mining company and society (or social group) that allows the initiation and/or continuation of legally authorized activities." RER-Dufour, para. 264.

⁴⁸⁸ RER-Dufour, para. 258.

⁴⁸⁹ RER-Dufour, para. 273.

⁴⁹⁰ RER-Dufour, para. 271.

⁴⁹¹ RWS-Incháustegui 2nd, para. 11.

"It is up to the company to ensure a harmonious and peaceful coexistence with the inhabitants within [its] zone of influence." 492

332. Mr. Nilton César León, an official in OGGS, the MEM entity charged with promoting and facilitating dialogue between mining companies and their neighbours, had the greatest personal involvement in the current dispute. He too emphasized the State's very limited role:

"[The] Claimant is seeking to hold the State liable for its deficiencies in the social management of the company [...] the role of the OGGS is not preventive. Moreover, it is not the duty of the State, the MINEM, or the OGGS, to manage companies and correct their community relations strategy. The party responsible for achieving and maintaining harmonious relations with the communities is the holder of the mining concession, not the OGGS."⁴⁹³

"[...] the executive's facilitation only guarantees the space for dialogue, leaving it up to the parties to find a solution to their differences[.] [I]n this context, the executive could not constrain any of the parties to do what the other demands [...]." 494

333. Mr. Andrés Fernando Trigoso, a senior OGGS official and Mr. León's superior, also referred to the State's limited role, and summed up the consequences of failure to attain and maintain social license:

"Although the State entities seek to act as facilitators in bringing the rural Communities and the companies together, the company has the duty of including the local Communities in the development of the mining project and thus obtain social licence and peace." 495

"Currently in Peru there are projects that have all the authorizations required by the Peruvian environmental and social laws, but which have not been able to be concluded, to date, owing to the company's poor social management and lack of social acceptance by the local communities in the area of these projects." 496

⁴⁹² RWS-Incháustegui 1st, para. 32.

⁴⁹³ RWS-León 2nd, para. 11.

⁴⁹⁴ **C-0576**, MEM, aide mémoire, 20 March 2019.

⁴⁹⁵ RWS-Trigoso 1st, para. 29.

⁴⁹⁶ RWS-Trigoso 2nd, para. 16.

334. The Respondent thus made clear that the burden of gaining protection and security by securing social license reflecting the neighbours' consent to the project fell entirely upon the Claimant; and affected Rural Communities had no reciprocal responsibility:

"ARBITRATOR GARIBALDI: [...] This [the obligation to obtain and maintain a social license] is an obligation of the mining company; is that right?

MR. GRANÉ: It is an obligation of the mining company, yes.

ARBITRATOR GARIBALDI: There [...] isn't a reciprocal obligation of the local communities; is that right?

MR. $GRAN\acute{E}$: There is no – no, there is no reciprocal obligation by the local communities."⁴⁹⁷

335. Counsel also confirmed that nothing limits the factors that may guide a Rural Community's decisions:

"PRESIDENT CROOK: [...] Let's suppose that the objection of a community was that, we don't like Canadians and we, therefore, do not think your project should go forward.

What consequence in the real world then happens, if any?

MR. GRANÉ: Well, I think that in that case, the mining company would understand that the rejection of the mining project has, at its core, something that cannot be addressed; and therefore, the engagement with the community has to be such that the local community understands that it's not in the interest of that community to simply resort to nationality, for instance, as a reason to reject the project. [...]

PRESIDENT CROOK: So it's incumbent upon--it's incumbent upon them to somehow go in and persuade the community that Canadians are very nice people and they should not persist in this objection?

MR. GRANÉ: To engage the community to persuade them that Canadians are very nice people, which indeed they are, but all-but more importantly, Mr. Chairman, that the mining project does not pose a threat to their well-being. [...]

PRESIDENT CROOK: All right. And at the end of the day, the engagement and communication does not succeed; what then?

⁴⁹⁷ Tr. Day 1, 198:2-10 (Arbitrator Garibaldi; Mr. Grané).

MR. GRANÉ: Well, what then, you find the consequences that you see in this case. Now, how you deal with that $\,-\,$

PRESIDENT CROOK: All right. At that point, then the investor--the investment fails because they're Canadians, to use my hypothesis.

MR. GRANÉ: It's a hypothesis, Mr. President, that, you know, unfortunately, is one that is not quite so simple in the real world. [...]"⁴⁹⁸

- 336. Thus, the Respondent contends (i) that it is not responsible for actions by Rural Communities that injure investors; and (ii) that it cannot affect their behaviour other than by promoting dialogue. The FPS provided by the State consists of encouraging dialogue between an investor and a Rural Community blocking exploitation of the investment, with no assurance of success. In the Tribunal's view, this raises serious questions regarding the Respondent's capacity or willingness to meet its obligations under the FTA.
- 337. The Respondent's experts' evidence indicates that the Claimant had few if any options to recover its property. Self-help was not available; the Respondent's expert, Dr. Meini, states that Invicta's officers or workers would have been likely to be guilty of the criminal offence of usurpation if they had sought to recover Invicta's property using force. Peru's legal system and to the police were not effective avenues for the Claimant to seek protection of its investment. Dr. Meini's expert opinion details the limited utility of investors in the Claimant's position resorting to legal processes or appealing to the police. He explains that Peru's police had little or no authority under local law to assist the Claimant with its difficulties. In his opinion, the police cannot use force except in a very limited and exceptional situations, not including recovering property. Indeed, Dr. Meini argues that implementing a police Operations Order to assist the Claimant in regaining access to its property would have been illegal because of the threat to life it posed. In his view, such action would expose any police carrying it out to criminal liability. 101

⁴⁹⁸ Tr. Day 1, 200:17-202:12 (President Crook; Mr. Grané).

⁴⁹⁹ RER-Meini, para. 71.

⁵⁰⁰ RER-Meini, para. 72.

⁵⁰¹ RER-Meini, paras. 71, 131.

- 338. Nevertheless, the Claimant did attempt to seek the protection of Peru's legal institutions, but without success. Beginning with the Parán Community's occupation of the mine camp in June 2018 and continuing until the Claimant's loss of its investment through foreclosure in August 2019, the Claimant unsuccessfully sought the support of Peru's legal institutions to help secure its personnel and property. ⁵⁰²
- 339. Thus, in June 2018, following Parán's initial large-scale occupation of the Claimant's mine site, two Invicta employees who complained of being threatened and detained went to the local police station and filed complaints. ⁵⁰³ No arrests ensued. Their complaints were not dismissed until 2022, four years later, long after this arbitration was filed and after the Claimant's investment was lost. ⁵⁰⁴ The Respondent indicates that the complaints were investigated, ⁵⁰⁵ but two persons present at the June events who testified at the Hearing were apparently not approached in connection with any investigation; one of them told the Tribunal that he did not know his complaint had been dismissed until he learned of it at the Hearing. ⁵⁰⁶
- 340. Similarly, a Request for Civil Guarantees (a civil protection order) was lodged by Mr. Castañeda on 26 June 2018.⁵⁰⁷ This produced no results and was also dismissed four years later in 2022, while this arbitration was underway and long after the Claimant lost its investment. When the Claimant's General Manager reported the theft of stockpiled ore to MEM's Deputy Minister in the summer of 2019, the official promised to investigate and respond, but there is no evidence that anything was done.⁵⁰⁸ Thus, appeals to the legal system and to senior Ministry officials provided no protection or security.

⁵⁰² **C-0208** is a compendium of some of the criminal complaints filed by Invicta personnel, including a 21 March 2019 complaint for the theft of a large quantity of explosive detonators, fuses and other company property. **IMM-0047** is a summary of seven criminal complaints lodged by Invicta personnel, none of which resulted in arrests or other action against the alleged perpetrators.

⁵⁰³ C-0125, Criminal Complaint filed with the Sayán Police by IMC Representatives, 20 June 2018.

⁵⁰⁴ Cl. Reply, para. 279.

⁵⁰⁵ See Resp. Rej., paras. 291-296; Tr. Day 2, 658:18-22 (Mr. Di Rosa).

⁵⁰⁶ Tr. Day 2, 658:22-659:12 (Mr. Di Rosa;

⁵⁰⁷ CWS-Castañeda 1st, para. 68.

⁵⁰⁸ CWS-Bravo 1st, paras. 96-97.

- 341. The evidence also suggests that Peru's law enforcement authorities were not even-handed in dealing with the Claimant.⁵⁰⁹ The Respondent's Rejoinder lists as a circumstance limiting the Respondent's duty to accord FPS that "law enforcement agencies are not designed or equipped to serve as private security forces for companies and their investments."⁵¹⁰ However, when in May 2019 the Claimant retained the services of a security contractor, an action it explained to the Tribunal as intended to assist a planned police operation to secure the property, several of the guards were later detained by the police, and Claimant's action was viewed by the Respondent's officials as cause for condemnation.⁵¹¹
- 342. On 14 May 2019, a group of private security guards engaged by the Claimant arrived at the mine site. The circumstances of their passage through the Lacsanga access road blockade are disputed. A video said to have been shot at the time of the security guards' entry shows the tents of the Parán Community members manning the blockade to be vacant, ⁵¹² but Parán Community members told police later that day that the guards had removed five Community members manning the blockade. ⁵¹³ In any case, according to a police report, following the guards' arrival, a hundred Parán Community members described in the police report as "carrying firearms and carrying out shots" arrived. The security guards fled and the watchman was wounded. ⁵¹⁴ Two security guards suffered gunshot wounds; another person, evidently a member of the neighbouring Lacsanga Community, was also shot. The guards fled on foot and their vehicles were detained at the scene. ⁵¹⁵

⁵⁰⁹ Cl. Reply, para. 346.

⁵¹⁰ Resp. Rej., para. 609(g).

⁵¹¹ CWS-Bravo 1st, para. 96.

⁵¹² CWS-Bravo 2nd, para. 149; the video is **C-0362**.

⁵¹³ **R-0113**, Official Letter No. 52-2020-REGIÓN POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO from PNP Colonel (L. Pérez) to PNP General (H. Ramos), 22 February 2020, para. 23.

⁵¹⁴ C-0640 (corrected translation, of Spanish original at R-0113-SPA), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 23.

⁵¹⁵ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 23.

- 343. The next day, the police stopped eleven security guards on the road, and disarmed and arrested them. That same day, Parán Community members intercepted a second group of five guards who were on foot and robbed them of personal property, including a pistol. One of the guards (Mr. Vergara Jáuregui) was shot and later died. Str. So far as the Tribunal was informed, those responsible for wounding the two guards or the Lacsanga Community member on 14 May or killing Mr. Jáuregui the next day were not identified or charged by the authorities.
- 344. The Respondent regularly portrays the Claimant as demanding one thing only, the violent use of significant force by police agencies to clear the blockade. However, the testimony of Mr. Bravo, Invicta's General Manager in Peru at relevant times, was more nuanced. For Mr. Bravo, a past intervention that led to violence and deaths cited by the Respondent to justify its dialogue policy "was an example of bad planning and execution by the Police and the armed forces." In his view, "where communities seek to enforce their interests using violence, the State should react by using the minimum force necessary in such circumstances in a well-planned manner, instead of refusing to use force altogether [...]." Mr. Bravo cited several instances in his personal experience where police had intervened to halt lawless behaviour.
- 345. An event in late August and early September 2018 cited by both Parties indeed shows that involvement of the police need not equate with violence. 521 It instead suggests that timely, judicious, and non-violent deployment of police agencies with the support of government officials could protect and secure the Claimant's investment without violence.

⁵¹⁶ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 24; Resp. PH Mem., para. 97(d).

⁵¹⁷ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 24; **C-0578**, PCM, *aide mémoire*, 27 May 2019, p. 2.

⁵¹⁸ CWS-Bravo 2nd, para. 6.

⁵¹⁹ CWS-Bravo 2nd, para. 6.

⁵²⁰ CWS-Bravo 2nd, para. 9.

⁵²¹ See Cl. Mem., paras. 111-113; Resp. C-Mem., paras. 224-225.

- 346. In June 2018, prior to the first occupation of the mine site, the Parán Community's President told the local sub-prefect of the Parán Community's intent to descend upon the mine site *en masse*. The sub-prefect "informed the Regional Directorate for Energy and Mines of the intentions of members of the Parán Community to stage a protest." However, the record shows no action by the authorities to discourage the occupation. In contrast, in late August and early September 2018, the Claimant and the police learned that Parán's Assembly had approved a second occupation of the mine site. The local chief of police then met with Parán's leaders and discouraged them from proceeding. A substantial body of police was visibly deployed to the site prior to the planned occupation. The Parán Community changed its mind. The occupation did not occur. 523
- 347. The Tribunal finds this event instructive. The Respondent's witnesses regularly insisted that involving police in protecting or securing the return of the Claimant's property would be counterproductive and indeed dangerous. However, in August 2018, a careful, considered, and peaceful deployment of police personnel helped deter a second occupation of the Claimant's mine site, without exploding into violence or increased social conflict. In a similar vein, when asked about his personal involvement in past road closure disputes at the Hearing, Mr. Léon testified that police participation had been valuable in some cases in which he was personally involved:

"PRESIDENT CROOK: [...] in your experience, there have been situations where police participation in the resolution of a situation made a contribution; is that right?

THE WITNESS: Yes. Again, Mr. President, the police provided support to us in those critical events, specifically, when there are situations that are quite important, such as the blockade of a roadway."524

348. However, following the October 2018 blockade of the access road and the March 2019 seizure of the mine, the Respondent's officials consistently maintained that protection and

⁵²² RWS-Retuerto, para. 19.

⁵²³ **R-0208**, Email from Lupaka (G. Ellis) to Lupaka (R. Webster), 11 September 2018 (internal Invicta Blackberry message, recording presence of 45 police officers in the Camp, stating that Parán "has taken note of presence of police" and has "cancelled the mobilization.")

⁵²⁴ Tr. Day 5, 1404:22-1405:8 (Mr. Léon).

security of the Claimant's investment depended upon its willingness or ability to satisfy the Parán Community's demands. The burden was on the Claimant. And, as was made clear at the Hearing, there was no corresponding burden on the Parán Community to enter into dialogue, or to participate in it in good faith.⁵²⁵

- 349. The Tribunal accordingly must consider whether the measures taken by the Respondent to promote and encourage dialogue between the Claimant and its increasingly difficult neighbour satisfy the Respondent's due diligence obligations under the customary international law minimum standard. A key issue is Peru's response to the Parán Community's blockade of access to the mine via the Lacsanga road. The blockade began in October 2018 and remained in place until the Claimant lost its investment in August 2019 and for an unknown time thereafter. The blockade prevented the Claimant's workforce, materials, and supplies from reaching the mine, halted development work, and halted efforts to move the mine to commercial production. The blockade was a key event leading to loss of the investment.
- 350. As described by Mr. León, the OGGS official most familiar with the dispute and closest to events, the Respondent's response took the form of several meetings aimed at promoting dialogue by OGGS specialists with the Claimant and/or the Parán Community. These occurred on 24 October 2018, 7 November 2018, 15 and 16 January 2019, and 29 January 2019. They did not succeed.
- 351. At that point, Mr. León apparently concluded that dialogue was not the solution and that more robust action was required. An undated OGGS internal document apparently drafted by Mr. León in February 2019, recommends:

"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 reestablishment of public order in the area by MININTER. Dialogue mechanisms are not appropriate in this case because **community leadership manages a double**

⁵²⁵ *Supra*, para. 204.

⁵²⁶ Although the record is not clear, it appears that the Lacsanga road remained closed as of December 2021, when police staged an operation to clear the mine by way of a road through Parán's territory.

⁵²⁷ CWS-Ellis 1st, paras. 50-54.

⁵²⁸ **C-0468**, Internal MEM email with attachment, 20 February 2019.

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."529

- 352. The document adds that "[t]he social process that the mining company maintains with the Parán Community, is affected by [the] presence of interests outside [of] the State (producers of local marijuana plantations) the MININTER is aware of this problem and is activating the corresponding mechanisms."530
- 353. A similar document prepared by Mr. León a month later in March 2019 urges "the reestablishment of public order through the corresponding channels, MININTER, PNP, DGOP, should proceed."⁵³¹
- 354. Others shared Mr. León's scepticism about the prospects for constructive dialogue. Peru's law enforcement authorities prepared an extensive and detailed Operations Plan for a police operation to restore order. The plan was widely coordinated and cleared with security authorities, including at high levels. It was scheduled to be launched on 19 February 2019. However, on 12 February, a few days before, the Parán Community sent a fortuitously timed letter expressing its wish to enter into dialogue with Invicta. A MININTER official quickly called the police directing that the operation not proceed. At the Ministry's direction it was cancelled.
- 355. Following the last-minute cancellation of the planned police operation, a further meeting ensued on 26 February 2019 between multiple members of the Parán Community and Mr.

⁵²⁹ C-0468, Internal MEM email with attachment, 20 February 2019 (emphasis added).

⁵³⁰ **C-0468**, Internal MEM email with attachment, 20 February 2019.

⁵³¹ C-0353, MEM, Report No. 003-2019-MEM-OGGS/NCLH, 18 March 2019.

⁵³² The 110-page Operations Order is **C-0193**, Operations Order No. 002 -2019-Police Region Lima / DIVPOL-H-CS. SEC "Maintenance and Restoration of Public Order, Clearing of the Access Road to the Camp of the Mining Company Invicta Mining Corp. S.A.C. - Located in the Paccho and Leoncio Prado Districts," 9 February 2019.

⁵³³ **C-0468**, Internal MEM email with attachment, 20 February 2019.

⁵³⁴ CWS-Bravo 1st, para. 32.

⁵³⁵ Mr. Bravo's understanding of these events is set out in a 19 February 2019 letter to the Deputy Minister Saavedra. **C-0016**, Letter from IMC to MININTER, 19 February 2019. *See also*, CWS-Bravo, 1st, paras. 32-34.

Bravo, Invicta's Manager.⁵³⁶ This resulted in an agreement that the Respondent hails as a success for dialogue but that was understood in fundamentally different ways by the Claimant and Parán.⁵³⁷ The 26 February 2019 Agreement quickly collapsed, for reasons that are disputed. (The agreement and its demise are discussed *infra*.⁵³⁸) The Respondent's response was to blame the Claimant for the collapse of the 26 February 2019 Agreement,⁵³⁹ and to insist that the Claimant attempt to repair the damage caused by that collapse and renew efforts to seek dialogue with Parán.⁵⁴⁰

- 356. The failure of the February Agreement was followed by another major event that capped the Claimant's loss of its investment. On 20 March 2019, members of the Parán Community again occupied the mine site and expelled the small group of Invicta employees who had been allowed to return to the site following the 26 February 2019 Agreement. Except for the short time Invicta's security guards were at the mine on 14 May 2019, this was the last date on which Invicta had any presence at or influence over its mine. The mine remained under the continuing physical control of members of the Parán Community. 542
- 357. In the weeks following the March seizure of the mine, the Claimant learned that stockpiled ore was being stolen from its mine, trucked down from the mine site on a road through the Parán Community, and sold. Mr. Bravo reported this in a meeting with MEM's Deputy Minister who promised that the matter would be investigated, and appropriate action taken. ⁵⁴³ There is no indication that the Respondent took any such action.

⁵³⁶ See, e.g., CWS-Bravo 1st, para. 41.

⁵³⁷ **C-0200**, Minutes of the Meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement.

⁵³⁸ *Infra*, paras. 523 *et seq*.

⁵³⁹ See RWS-Léon 1st, paras. 44-45; RWS-Trigoso 1st, paras. 43, 48.

⁵⁴⁰ RWS-Léon 2nd, para. 52.

⁵⁴¹ CWS-Bravo 1st, para. 69.

⁵⁴² CWS-Bravo 2nd, para. 150, CWS-Castañeda 1st, para. 102.

⁵⁴³ CWS-Bravo 1st, para. 97.

- 358. These events left Invicta in dire financial straits, unable to move to production to generate revenue to meet its obligations to its lender.⁵⁴⁴ In August 2019, the Claimant lost its investment in Invicta due to foreclosure.
- 359. The Respondent's aversion to using police personnel to assist investors was apparently overcome in December 2021, more than two years after the Claimant lost its investment. From at least the summer of 2019, persons believed to be members of the Parán Community or working for it carried out illegal operations at the mine, extracting ore that was trucked to purchasers. Given this protracted situation, Invicta's new owners asked Peru's authorities to close the mine. 545 The result was the large and unsuccessful December 2021 police operation. Several hundred members of the Parán Community, throwing rocks and wielding sticks, caused 150 police to withdraw, injuring police officers and damaging their vehicles. The Tribunal received little information regarding subsequent events or the state of the mine today. 546
- 360. The events described in this Award led to the Claimant's loss of its investment. The Respondent's reaction to these events was typically weak, ineffectual, or non-existent. The Respondent essentially abdicated its responsibility under the FTA to accord FPS to the investment, instead insisting that the State had a very limited role, and that the investment's security required the Claimant to find some accommodation with the escalating demands of the Parán Community and its leaders. The Claimant's security problems, said the Respondent, were the Claimant's, not the State's. The Respondent's ineffectual attitude persisted even after the actions of the Parán Community resulted in death and injuries among the Claimant's security guards. In the Tribunal's view, this course of conduct by Peru's central authorities amounts to a failure to exercise due diligence to protect and secure the Claimant's investment from the actions of the Parán Community and its leaders assumed here by hypothesis to be third parties. In particular, the Tribunal points out that the Respondent's failure to take effectual measures to investigate and punish those

⁵⁴⁴ CWS-Ellis 1st, paras. 54-58.

⁵¹⁶

responsible for the killing and injuries inflicted on Claimant's security guards is by itself a breach of its obligation of due diligence under the FPS standard. For these reasons and even in the hypothetical case that the actions of the Parán Community were not imputable to the State, the Tribunal finds that the central authorities of Peru failed to meet Peru's FPS obligations under the international minimum standard of treatment of aliens.

361. In conclusion, the Tribunal finds that the actions of the Parán Community, as an entity for which the Respondent bears international legal responsibility, violated Respondent's obligation under the FTA to accord FPS to Claimant's investment. Further, even if the evidence did not show that the Parán Community's actions disrupting and ultimately seizing Claimant's investment were attributable to the Respondent, the Respondent's ineffectual response violated its obligation to accord the Claimant's investment FPS.

D. SECOND CLAIM: FAIR AND EQUITABLE TREATMENT

362. Article 805 of the FTA ("Minimum Standard of Treatment") requires that:

"1. 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.

2. The concepts of 'fair and equitable treatment' and 'full protection and security' in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. [...]"547

(1) The Parties' Positions

a. The Claimant's Position

363. The Claimant contends that Peru failed to accord its investment FET as required by the customary international law minimum standard of treatment under the FTA. The Respondent "patently failed to provide the customary international law minimum standard of treatment," in that the State's representatives either participated in or failed to address or sanction multiple events involving injury to the Claimant's property and personnel. 548

⁵⁴⁷ **CLA-0001/RLA-0010**, FTA, Art. 805.

⁵⁴⁸ Cl. Mem., paras. 273-274.

The Claimant urges that this conduct was "arbitrary as well as grossly unreasonable, unfair, and unjust," and was "not in any way consistent, even-handed, unambiguous, transparent, or candid."⁵⁴⁹

- 364. The Claimant rejects the Respondent's contention that it has not met the burden of proving the existence of a customary international law obligation to accord FET,⁵⁵⁰ noting that the FTA itself incorporates the concept.⁵⁵¹ It dismisses the Respondent's contention that international law establishes a legal standard defining "composite acts," a standard the Respondent claims is not met here. For the Claimant there is no such legal standard,⁵⁵² and the Respondent's contention is "completely unfounded."⁵⁵³ The Claimant contends that the FET obligation imposes an obligation for a State to enforce is own laws,⁵⁵⁴ and that arbitrary State conduct not bound by applicable rules and standards breaches the minimum standard of treatment, including FET,⁵⁵⁵ as does subjecting an investor to coercion or harassment.⁵⁵⁶
- 365. For the Claimant, the actions of Parán Community Members "undoubtedly" breach the minimum standard of treatment if attributable to Peru, a contention the Respondent is said not to dispute. 557
- 366. The Claimant submits that "[t]he customary international law minimum standard of treatment and the FET standard are not materially different." To define the content of FET under the customary international law minimum standard, the Claimant again refers, inter alia, to the oft-cited description in Waste Management v. Mexico II, cited supra in

⁵⁴⁹ Cl. Mem., para. 274.

⁵⁵⁰ Cl. Reply, paras. 723-725.

⁵⁵¹ Cl. Reply, para. 613.

⁵⁵² Cl. Reply, para. 729.

⁵⁵³ Cl. Reply, para. 732.

⁵⁵⁴ Cl. Reply, para. 742.

⁵⁵⁵ Cl. Reply, para. 756.

⁵⁵⁶ Cl. Reply, para. 760.

⁵⁵⁷ Cl. Reply, Section 9.4.3.2. and para. 767.

⁵⁵⁸ Cl. Mem., Section 4.3.1.

connection with the Claimant's FPS claim. In the words of the *Waste Management v. Mexico II* tribunal:

"[T]he 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 candour in an administrative process." 559

- 367. The Claimant also cites other NAFTA tribunals applying the FET standard including *Merrill & Ring v. Canada* (FET "protects against *all* such acts or behavior that might infringe a sense of fairness, equity and reasonableness") and *Pope & Talbott v. Canada*, (which reasoned that NAFTA claimants "receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be 'egregious', 'outrageous' or 'shocking,' or otherwise extraordinary.")⁵⁶⁰
- 368. In the alternative, and "[t]o the extent that that the minimum standard under customary international law is considered to provide a lower level of obligations towards the investor than that set out in *Waste Management*," the Claimant also invokes the Most-Favoured-Nation ("MFN") treatment clause of the FTA, to claim the protection of what it views as the more favourable FET standard contained in the bilateral investment treaty between Peru and the United Kingdom ("Peru-UK BIT"). ⁵⁶¹ Article 804(2) of the FTA requires each FTA Party to "accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory." ⁵⁶² Article 2(2) of the Peru-UK BIT

⁵⁵⁹ CLA-0037, Waste Management v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98.

⁵⁶⁰ Cl. Mem., paras. 271-272, citing **CLA-0035**, *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, para. 210 (emphasis by the Claimant); and **CLA-0045**, *Pope & Talbot Inc v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 118.

⁵⁶¹ Cl. Mem., para. 275.

⁵⁶² CLA-0001/RLA-0010, FTA, Art. 804(2).

accords FET and adds an obligation that the State not impair the investment through unreasonable or discriminatory measures, providing in relevant part:

- "2. Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment [...]. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. [...]"563
- 369. The Claimant points to multiple decisions of other investment tribunals importing more favourable FET regimes through MFN provisions said to be similar to that in the FTA. ⁵⁶⁴
- 370. The Claimant cites Annex 804.1 of the FTA addressing the interpretation of Article 804 of the FTA. This states "[f]or greater clarity" that "treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments' referred to in paragraphs 1 and 2 of Article 804 does not encompass dispute resolution mechanisms [...]."565 In the Claimant's view, the necessary implication of this exclusion is that substantive provisions, such as Article 2(2) of the Peru-UK BIT, can be imported into the FTA.
- 371. The Claimant cites multiple events involving either the Parán Community and its officials and members, or Ministry and police personnel and other national authorities said to be "arbitrary as well as grossly unreasonable, unfair, and unjust," arguing also that "[t]hey were not in any way consistent, even-handed, unambiguous, transparent, or candid."⁵⁶⁷ The Claimant urges that national government authorities "participated in and/or failed to address or sanction: i) the repeated invasions of the Site; ii) the Blockade of the Lacsanga road; iii) the repeated threats and instances of coercion and harassment, as well as physical harm to the Claimant's personnel; and iv) the damage to the Claimant's facilities."⁵⁶⁸

⁵⁶³ **CLA-0046**, Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Peru, 4 October 1993, Art. 2(2).

⁵⁶⁴ Cl. Mem., para. 276.

⁵⁶⁵ Cl. Mem., para. 277, quoting **CLA-0001**, FTA, Annex 804.1.

⁵⁶⁶ Cl. Mem., para. 277.

⁵⁶⁷ Cl. Mem., para. 274.

⁵⁶⁸ Cl. Mem., para. 273.

- 372. In the Claimant's view, "[t]he same acts and omissions by State authorities that amount to a failure to provide full protection and security (as well as other acts and omissions) amount to a failure by Peru to provide fair and equitable treatment to Lupaka's investment, in breach of the FTA."⁵⁶⁹ The Claimant points to *Wena Hotels v. Egypt*, ⁵⁷⁰ Suez v. *Argentina*, ⁵⁷¹ and *Copper Mesa v. Ecuador*, ⁵⁷² as showing how conduct or events that constitute a denial of FPS also give rise to violations of FET. ⁵⁷³
- 373. In the Claimant's view, the FET standard of Article 805 of the FTA "protected Lupaka's legitimate expectations and guaranteed its investment transparency, due process and freedom from arbitrary or discriminatory conduct." The Claimant notes in this regard that "Peru's administrative procedure stresses that administrative authorities must act in accordance with the legitimate expectations of administered persons [...]." Peru's acts and omissions are said to have frustrated Lupaka's legitimate expectations to be able to access and safely work its mine free of interference and harm or damage to its personnel, facilities and equipment:

"[...] 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.

The Respondent, however, violated Lupaka's legitimate expectations, mainly by participating in and/or failing to address or sanction the repeated invasions of the

⁵⁶⁹ Cl. Mem., para. 286.

⁵⁷⁰ Cl. Mem., para. 287, citing **CLA-0028**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 95.

⁵⁷¹ Cl. Mem., para. 288, citing **CLA-0054**, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic,* ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 171.

⁵⁷² Cl. Mem., para. 289, citing **CLA-0031**, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, paras. 6.82, 6.84.

⁵⁷³ Cl. Mem., paras. 287-289.

⁵⁷⁴ Cl. Mem., para. 278.

⁵⁷⁵ Cl. Mem., para. 279.

Site and the Blockade, as well as well as the physical harm to the Claimant's personnel and damage to its facilities." ⁵⁷⁶

Pointing to Article 15(1) of the ILC Articles,⁵⁷⁷ the Claimant contends that the obligations to accord FET and FPS may both be breached by a composite act, that is, a series of actions that may not individually violate a treaty, but that in the aggregate may do so. Citing *Rompetrol v. Romania*⁵⁷⁸ and other awards finding an accumulation of acts to result in a breach,⁵⁷⁹ the Claimant contends that "when considering whether Peru accorded the Claimant's investment the customary minimum standard of treatment including FET and FPS, the Tribunal should not limit itself to examining whether Peru's individual acts and omissions constitute a breach of the standard but should examine Peru's conduct as a whole."⁵⁸⁰

b. The Respondent's Position

- 375. The Respondent maintains that it has fulfilled its obligation to accord FET to the investment in accordance with the customary international law minimum standard of treatment of aliens.⁵⁸¹
- 376. The Respondent objects to the Claimant's contention "that FET under MST is 'not materially different' from other, treaty-specific ('autonomous') interpretations of FET." The Respondent renews the argument it made in response to the Claimant's FPS claim, to the effect that the Claimant failed to prove the contents of the customary international law minimum standard of FET by providing evidence of consistent State practice and *opinio juris*. The Respondent denies the authority of arbitration tribunal decisions addressing the

⁵⁷⁶ Cl. Mem., paras. 291-292.

⁵⁷⁷ Cl Mem., para. 281, quoting **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 15(1) ("[t]he breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions of omissions is sufficient to constitute the wrongful act.")

⁵⁷⁸ Cl. Mem., para. 283, citing **CLA-0051**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 271.

⁵⁷⁹ Cl. Mem., para. 284.

⁵⁸⁰ Cl. Mem., para. 285.

⁵⁸¹ Resp. C-Mem., Section IV.C.; Resp. Rej., Section IV.C.

⁵⁸² Resp. C-Mem., para. 552.

contents of the FET standard, urging that they are not evidence of either State practice or *opinio juris*. It thus denies the relevance of NAFTA and other cases cited by the Claimant addressing the contents of the standard. ⁵⁸³

- 377. Nevertheless, the Respondent addresses the content of the standard "as articulated and confirmed in the jurisprudence of the ICJ and of investor-State arbitration tribunals" although it does so "without prejudice to its rights, and without relieving Claimant of its burden of proof."584
- 378. The Respondent cites the oft-quoted assessment of the NAFTA tribunal in *Waste Management v. Mexico II* as correctly reflecting the customary international law minimum standard of treatment.⁵⁸⁵ As the Claimant had done the same, there is mutual agreement on this point.
- 379. The Respondent disputes the Claimant's contention that the FTA's customary international law minimum standard encompasses a range of specific protections, such as obligations to respect an investor's legitimate expectations, guarantee transparency, and observe due process. The Respondent denies that the FTA protects investors' legitimate expectations, citing, *inter alia*, NAFTA cases finding that the minimum standard of treatment does not encompass protection of investors' expectations. Similarly, the Respondent argues that the standard does not impose an obligation of transparency; it observes that the award in *Metalclad v. Mexico* was annulled because of the tribunal's mistaken reliance upon supposed transparency obligations. The Respondent accepts that due process is part of the standard, but only in cases of extreme violations. Similarly,

⁵⁸³ Resp. C-Mem., paras. 551 et seq.

⁵⁸⁴ Resp. C-Mem., para. 553.

⁵⁸⁵ Resp. C-Mem., para. 561, quoting **CLA-0037**, *Waste Management v. United Mexican States* (II), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98.

⁵⁸⁶ Resp. C-Mem., para. 565.

⁵⁸⁷ Resp. C-Mem., paras. 566-571.

⁵⁸⁸ Resp. C-Mem., para. 573, citing **RLA-0052**, *United Mexican States v. Metalclad Corp.*, Supreme Court of British Columbia, Reasons for Judgment of the Honorable Mr. Judge Tysoe, 2 May 2001, para. 70.

⁵⁸⁹ Resp. C-Mem., para. 574.

the FET standard extends to only extreme cases of arbitrariness.⁵⁹⁰ Further, proof of discrimination requires much more than a showing of differential treatment.⁵⁹¹

- 380. The Respondent disputes the Claimant's contention that the impugned actions should be viewed as a composite event that cumulatively denies FET. For the Respondent, a composite act could give rise to a violation of FET only if the separate elements involved are numerous, inter-connected, have some common denominator, and each has an adverse effect on the investment, conditions not met here.⁵⁹²
- 381. The Respondent also rejects the Claimant's invocation of the MFN provision of the FTA to gain the benefit of what is said to be a more favourable standard of FET under the 1993 Peru-UK BIT.⁵⁹³ Noting the specific language of the MFN clause of the FTA, the Respondent maintains that differences in applicable legal standards are not "treatment" for purposes of the treaty,⁵⁹⁴ adding that the Claimant's position conflicts with the rules of treaty interpretation under the VCLT⁵⁹⁵ and with Annex 804.1 of the FTA.⁵⁹⁶ The Respondent also disputes the relevance of other investor-State cases cited by the Claimant, finding that these involved different treaty language and different reasoning.⁵⁹⁷
- 382. The Respondent maintains that Article 808 of the FTA and Annex II operate as a treaty reservation authorizing Peru to maintain any measure according differential treatment to countries under an agreement such as the Peru-UK BIT that was in force when the FTA entered into force.⁵⁹⁸ The Respondent contends further that, even if the autonomous FET standard of the Peru-UK BIT were to apply, that standard sets a high threshold that is not met here.⁵⁹⁹

⁵⁹⁰ Resp. C-Mem., paras. 576-579.

⁵⁹¹ Resp. C-Mem., paras. 580-582.

⁵⁹² Resp. C-Mem., paras. 584-588.

⁵⁹³ Resp. C-Mem., paras. 589-590.

⁵⁹⁴ Resp. C-Mem., paras. 592-595.

⁵⁹⁵ Resp. C-Mem., para. 596.

⁵⁹⁶ Resp. C-Mem., paras. 597-598.

⁵⁹⁷ Resp. C-Mem., paras. 599-607.

⁵⁹⁸ Resp. C-Mem., paras. 609-611.

⁵⁹⁹ Resp. C-Mem., paras. 612-618.

- 383. The Respondent addresses the Claimant's allegation that the Peruvian national authorities failed to act at several points in the course of the dispute. The Respondent contends that such alleged failures to act did not constitute a composite act and did not violate the standard under the FTA ("whether under the CIL MST standard (which is the one that the [FTA] expressly mandates), or even under an autonomous FET standard (via the MFN Clause)"). These alleged failures to act did not frustrate Claimant's legitimate expectations, were not arbitrary or unreasonable, and were transparent and consistent. 600
- 384. The Respondent maintains that its actions were not part of any "pattern or system" to harm the Claimant, but were instead "designed to *assist* rather than harm Claimant." Further, the Claimant did not show how any of the actions or failures to act complained of actually harmed the Claimant's investment; whatever harm the investment suffered was due to the Claimant's own missteps or actions by the Parán Community for which Peru is not responsible. 602
- 385. The Respondent urges that legitimate expectations are not part of the customary international law minimum standard of treatment, but that in any event, whatever expectations the Claimant had were neither legitimate nor frustrated by the challenged measures. 603 The Claimant identified no representations made to it by Peru giving rise to expectations; did not show that it relied on any such expectations; and its alleged expectations were unreasonable or disingenuous. 604 Further, the Claimant has not shown that Peru breached any legitimate expectation. Instead, "when the evidence is properly and objectively examined, it is evident that each of Peru's actions between early June 2018 and August 2019 was well within its sovereign right to regulate and in accordance with Peruvian and international law, and thus cannot constitute a breach of Claimant's legitimate expectations." 605 Rather than breaching legitimate expectations, the Respondent's actions sought "to foster an environment that gave Claimant the best possible chances of reaching

⁶⁰⁰ Resp. C-Mem., para. 622.

⁶⁰¹ Resp. C-Mem., paras. 626-627 (emphasis in original).

⁶⁰² Resp. C-Mem., para. 628.

⁶⁰³ Resp. C-Mem., paras. 629-631.

⁶⁰⁴ Resp. C-Mem., paras. 634-646.

⁶⁰⁵ Resp. C-Mem., para. 648.

agreement with that Community so that the Invicta Project could move forward."⁶⁰⁶ Throughout the many meetings and consultations involved in these efforts, Peru acted transparently and consistently.⁶⁰⁷

386. In summary, the Respondent insists that its impugned conduct was well above the *Waste Management v. Mexico II* standard. To the contrary, Peru acted in an appropriate and responsible way in the circumstances, expending substantial effort aimed at assisting the investor in securing peace with the Parán Community. Invicta's various legal complaints were properly addressed. In the end, the Claimant's loss was due to its own missteps or actions by the Parán Community, not to any failure to accord FET by Peru.

(2) The Tribunal's Analysis and Decision

387. In the previous section of this Award addressing the Claimant's FPS claim the Tribunal discussed the content of the minimum standard of treatment under customary international law. 612 That analysis applies equally to the Claimant's FET claim and need not be repeated here. Further, as to the content of the FET obligation, both Parties endorsed the distillation of the customary international law FET obligation as set out in *Waste Management v. Mexico II*:

"[T]he 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 candour in an administrative process." 613

⁶⁰⁶ Resp. C-Mem., para. 651.

⁶⁰⁷ Resp. C-Mem., paras. 664-666.

⁶⁰⁸ See Resp. C-Mem., para. 655.

⁶⁰⁹ See Resp. C-Mem., paras. 656, 663. See also Resp. C-Mem., paras. 626-627, 651-652.

⁶¹⁰ See Resp. C-Mem., para. 656. See also Resp. C-Mem., para. 651.

⁶¹¹ See Resp. C-Mem., para. 628.

⁶¹² Supra, paras. 300-306.

⁶¹³ CLA-0037, Waste Management v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98. See, e.g., Cl. Mem., para. 269; Cl. Reply, paras. 724, 738; Resp. C-Mem., paras. 560-561; Resp. Rej., para. 668.

- 388. In assessing this claim, as with the case of the Claimant's FPS claim, the conduct and actions of the Parán Community, which the Tribunal has found to be attributable to the Respondent, 614 must be measured against the FET requirement as distilled in *Waste Management v. Mexico II*. In making this assessment, the Tribunal again refers in particular to several examples of the Parán Community's conduct affecting the Claimant's investment: 615
 - The initial occupation of the mining camp in June 2018.
 - The Parán Community's imposition and continuation of the access road blockade beginning in October 2018, totally denying the Claimant access to, and any economic benefit from, its property for the remaining life of its investment.
 - The Parán Community's definitive seizure and subsequent exploitation of the Claimant's mine, ore stocks, and other property in and after March 2019; and
 - The Community's armed expulsion of the Claimant's security guards from the site in May 2019, together with the wounding of guards and other persons by gunfire, and the killing of a security guard the next day.
- As in the case of the Claimant's FPS claim, such conduct of the Parán Community and its leaders contravenes the customary international law obligation to accord FET as set out in Waste Management v. Mexico II. These actions involved unilateral decisions and acts of the Parán Community, taken with no due process or reasonable avenue for the Claimant to seek redress. They were arbitrary and grossly unfair. They directly subjected the Claimant's personnel to threats and armed violence, including ultimately the killing of a security guard and the wounding by gunfire of other guards and others. They resulted in theft and other loss of the Claimant's property. They culminated in the physical seizure of the Claimant's mine, ore and other property, depriving the Claimant of its investment in a manner that was grossly unfair, unjust, and unconstrained by law.

⁶¹⁴ Supra, Section VI.B(2).

⁶¹⁵ See, e.g., Cl. Mem., paras. 266, 273, 292; Cl. Reply, paras. 660, 768.

- 390. The Tribunal finds that these actions of the Parán Community, both individually and collectively, caused substantial injury to the Claimant and its investment. (Questions related to causation are addressed in Section VII.A, *infra*).
- 391. The Tribunal therefore finds that the Respondent, through the actions of the Parán Community, violated its obligation to accord FET to the Claimant's investment, contrary to the customary international law minimum standard of treatment as required by Article 805 of the FTA and customary international law. Even if the actions of the Parán Community were not attributable to the Peruvian State, the Tribunal would reach the same conclusion in respect of the conduct of the central authorities of Peru. Through a combination of inaction and patently insufficient measures in response to the actions of the Parán Community, the central authorities stood aside while the Parán Community prevented the Claimant from exercising its rights in the investment, exerted deadly violence on its security personnel, and ultimately seized the investment for its own benefit. This conduct of the central authorities was grossly unfair and unjust and hence inconsistent with the FET standard under customary international law.
- 392. As previously noted, the Claimant contended in connection with this claim that, "[t]o the extent that that the minimum standard under customary international law is considered to provide a lower level of obligations towards the investor than that set out in *Waste Management*," 616 Article 804(2) of the FTA, the MFN clause, entitled it to import what it viewed as the more favourable FET provision contained in Article 2(2) of the Peru-UK BIT. 617
- 393. In light of the Tribunal's finding that the Respondent failed to accord FET complying with the customary international law minimum standard of treatment and Article 805 of the FTA, the Tribunal need not consider the Parties' arguments relating to the possible importation of a different standard of treatment under the Peru-UK BIT.⁶¹⁸

⁶¹⁶ Cl. Mem., para. 275.

⁶¹⁷ *Supra*, para. 368.

⁶¹⁸ *Infra*, paras. 452-465.

E. THIRD CLAIM: EXPROPRIATION

(1) The Parties' Positions

a. The Claimant's Position

394. The Claimant contends that the Respondent expropriated its investment in violation of Article 812(1) of the FTA,⁶¹⁹ which provides:

"Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation'), except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation." 620

- 395. The Claimant advances alternative claims for the expropriation of its investment. It first contends that the investment was directly expropriated through the acts and takeover and exploitation of the mine by the Parán Community. Alternatively, the Claimant contends that the investment was indirectly expropriated through the acts and omissions of Respondent's "regional and central" authorities. Alternatively.
- 396. *Direct Expropriation*. The Claimant contends, as the Tribunal has held, that the Respondent is internationally responsible for the actions of the Parán Community, as an organ of the State under Article 4 of the ILC Articles, or alternatively under Article 5 of the ILC Articles as an entity authorized to exercise governmental authority and exercising such authority. The Claimant's direct expropriation claim is based on actions by the Parán Community and its leaders. The Claimant submits that "Parán's elected officials and community representatives committed the acts at the heart of Lupaka's claims in these proceedings. Their conduct is attributable to Peru under international law [...]."624

⁶¹⁹ Cl. Mem., Section 4.4; Cl. Reply, Section 9.5.

⁶²⁰ CLA-0001/RLA-0010, FTA, Art. 812.

⁶²¹ Cl. Mem., para. 312.

⁶²² Cl. Mem., para. 313.

⁶²³ Cl. Mem., para 312 ("[t]he acts of Parán's officials and representatives amount to a direct expropriation of Lupaka's investment, in breach of the FTA.")

⁶²⁴ Cl. Mem., para. 237.

397. The Claimant's direct expropriation claim highlights Parán's take-over and continued physical control of the mine site:

"The acts of Parán's officials and representatives amount to a direct expropriation of Lupaka's investment, in breach of the FTA [...] [T]he acts and omissions of Parán officials, including their illegal take-over of the Site as of October 2018, must be deemed acts of the State and thus attributed to the Respondent. They have since that point in time prevented Lupaka's representatives from fully accessing the Site and from exercising Lupaka's rights under the Concessions." 625

398. The Claimant observes in this regard:

"Parán's officials and representatives illegally raided the Site in June 2018 and took possession of it in October 2018. These officials and other Parán representatives continued to occupy the Site through 2019 – only allowing some of the Claimant's representatives limited access for brief periods of time – and it was recently reported that Parán's representatives were still occupying the Site. Because the acts of Parán's officials are attributable to Peru, it must be concluded that the Respondent de facto possessed the Site from October 2018 through much of 2019 and at least until the Claimant's permanent loss of the investment in August 2019."

- 399. Citing *Phillips v. Iran*⁶²⁷ and other cases from the Iran-US Claims Tribunal, the Claimant finds it "well established that rights and interests under licenses or contracts may be expropriated." ⁶²⁸
- 400. The Claimant contends that the expropriation of its property by the Parán Community did not satisfy the requirements for a legal expropriation under Article 812 of the FTA.⁶²⁹ The property was not taken for a public purpose; "[t]he taking has benefitted, if anyone, only a handful of Parán representatives, to the detriment of the State as a whole, by preventing the development of a project that was in the State's favour."⁶³⁰ Further, the taking was not accomplished through due process of law; "[h]ere, there has been no due process: Lupaka was not lawfully warned of or provided an opportunity to prevent the events that

⁶²⁵ Cl. Mem., para. 312.

⁶²⁶ Cl. Mem., para. 302.

⁶²⁷ **CLA-0067**, 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 June 1989.

⁶²⁸ Cl. Mem., para. 306.

⁶²⁹ Cl. Mem., para. 314.

⁶³⁰ Cl. Mem., para. 315.

subsequently followed, nor has it been able to secure legal redress since."⁶³¹ The taking was discriminatory, as "Lupaka alone was the target and victim thereof."⁶³² Finally, "the Respondent did not offer the Claimant any compensation, let alone in a prompt, adequate and effective manner, as required by Article 812 of the FTA."⁶³³

- 401. The Claimant also rejects the Respondent's contention that there was no direct expropriation because there was no transfer of title or outright seizure. It argues that if the acts of the Parán Community are attributed to the Respondent, they would undeniably constitute a seizure. Moreover, relying on *Wena Hotels v. Egypt* and *Amco v. Indonesia*, the Claimant adds that, in any event, "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," because "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." 637
- 402. *Indirect Expropriation*. Assuming, *quod non*, that the actions of the Parán Community are not attributable to the State or do not constitute a direct taking, the Claimant contends that its investment was indirectly expropriated as the result of the Respondent's "regional and central" authorities' actions or failures to act.⁶³⁸ The Claimant cites Annex 812.1 of the FTA which reflects the FTA Parties' shared understanding of the concept of indirect expropriation:

"(a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;

⁶³¹ Cl. Mem., para. 316.

⁶³² Cl. Mem., para. 317.

⁶³³ Cl. Mem., para. 318.

⁶³⁴ Cl. Reply, paras. 816-820.

⁶³⁵ Cl. Reply, paras. 818-819.

⁶³⁶ Cl. Reply, paras. 821-822.

⁶³⁷ Cl. Reply, para. 822 (emphasis added).

⁶³⁸ Cl. Mem., para. 313.

- (b) The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the **economic impact of the measure** or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
 - (ii) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations, and
 - (iii) the character of the measure or series of measures;
- (c) 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." ⁶³⁹
- 403. The Claimant contends that an indirect expropriation may result from both acts and omissions, 640 without a formal transfer of title. 641 The Claimant sees an overarching consideration under both Article 812 and Annex 812.1 of the FTA to be 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." 642 It cites Iran-US Claim Tribunal jurisprudence finding expropriation where "the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral." 643
- 404. The Claimant maintains that an indirect expropriation can result from omissions, not just affirmative acts. 644 It finds that in this case crucial omissions led to indirect expropriation.

"[W]hen 'the state withdraw[s] the protection of its courts form [sic] the owner expropriated, and tacitly allow[s] a de facto possessor to remain in possession of the thing seized [...]' Thus, even if Parán's representatives are deemed third-party

⁶³⁹ CLA-0001/RLA-0010, FTA, Annex 812.1 (emphasis added); Cl. Mem., para. 297.

⁶⁴⁰ Cl. Mem., para. 298.

⁶⁴¹ Cl. Mem., para. 299.

⁶⁴² Cl. Reply, para. 830.

⁶⁴³ Cl. Mem., para. 299, citing **CLA-0055**, *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award No. 141-7-2, 29 June 1984, paras. 21-22.

⁶⁴⁴ Cl. Mem., para. 298.

adverse possessors of the Site and their acts are not attributable to Peru (quod non), the Respondent is still liable for expropriation."⁶⁴⁵

405. On omissions as an element of indirect expropriation, the Claimant cites, *inter alia*, *Amco v. Indonesia*, 646 and *Eureko v. Poland*, which found it "obvious that the rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions." 647 The Claimant also points to *Wena Hotels v. Egypt*, where the State was held liable for its failure to respond to the taking of two hotels, finding that:

"Whether or not it authorized or participated in the actual seizures of the hotels, Egypt deprived Wena of its 'fundamental rights of ownership' by allowing EHC forcibly to seize the hotels, to possess them illegally for nearly a year, and to return the hotels stripped of much of their furniture and fixtures."

- 406. The Claimant contends that its investment was subject to an indirect "creeping" expropriation, described as being carried out "through a series of measures over time, with the aggregate effect of destroying the value of an investment." The Claimant cites *Biwater v. Tanzania* for the proposition that the test of creeping expropriation is whether the cumulative effect of a series of acts and omissions "deprive the investor in whole or in material part of the use or economic benefit of its assets." For the Claimant, this is what happened to its investment.
- 407. Reviewing the facts against the factors identified in Annex 812.1 of the FTA, the Claimant maintains that the impugned conduct clearly had an economic impact, depriving it of the fundamental rights of ownership. 651 "[I]t is undisputed that the Claimant has been deprived

⁶⁴⁵ Cl. Mem., para. 303 (emphasis in original).

⁶⁴⁶ Cl. Reply, paras. 822-823, citing **CLA-0066**, *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, para. 158. *See also*, Cl. Mem., para. 303, fn. 480.

⁶⁴⁷ Cl. Mem., fn. 487, citing **CLA-0070**, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, paras. 186-187.

⁶⁴⁸ Cl. Mem., para. 304, citing **CLA-0028**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 99 (emphasis omitted).

⁶⁴⁹ Cl. Mem., para. 307.

⁶⁵⁰ Cl. Mem., para. 308, fn. 487, citing **CLA-0020**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 455.

⁶⁵¹ Cl. Reply, paras. 833-838.

of the rights it lawfully had under Peruvian law to carry out mining activities at the Invicta mine."652

408. As to the second factor referred to in Annex 812.1 of the FTA, the Claimant maintains that the Respondent's conduct clearly interfered with its reasonable investment-backed expectations:

"[...] 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." 653

409. These expectations were frustrated by the Respondent's failures to act:

"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 [sic] that the State would allow it to develop its investment." 654

410. According to the Claimant, the third factor mentioned in Annex 812.1 of the FTA – the nature of the measures – does not weigh against indirect expropriation. Here, the Parán Community had no intention of reaching an agreement and had expressed its intention to take over the mine, all while the Parán Community's armed *Ronda Campesina* posed a threat to residents and workers. In these circumstances, the character of the Respondent's failure to act was "unreasonable, unjustified and constituted wilful neglect." 656

⁶⁵² Cl. Reply, para. 840.

⁶⁵³ Cl. Reply, para. 851.

⁶⁵⁴ Cl. Reply, para. 854.

⁶⁵⁵ Cl. Reply, para. 859.

⁶⁵⁶ Cl. Reply, para. 860.

411. Finally, as to the fourth element in Annex 812.1 of the FTA, the Claimant rejects that the Respondent's measures pursued "legitimate public welfare objectives" in a non-discriminatory and proportional manner. 657 It argues that:

"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. They were not afraid to use violence and shoot to kill, as they did to several Lacsanga community members and to a WDS employee. 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." 658

412. The Claimant concludes that the Respondent's acts and – more significantly, its omissions – indirectly expropriated its investment:

"The failure to act – on the part of other regional and central State authorities (other than Parán's officials) – either before or after the illegal Blockade amounts to a 'measure having an effect equivalent to nationalization or expropriation.' Indeed, even if the acts of Parán officials are not attributed to the Respondent (quod non), the Respondent has tacitly allowed, through its acts and omissions, a de facto possessor (Parán representatives) to occupy and use the Site unlawfully. Specifically, the acts and omissions amount to a creeping, indirect expropriation of Lupaka's investment [...]." 659

b. The Respondent's Position

413. *Direct Expropriation*. As to the Claimant's claim of a direct expropriation involving conduct by the Parán Community, the Respondent reiterates its denial of attribution and international responsibility:

"[C]onduct by the Parán Community cannot be attributed to Peru because the Parán Community is not empowered with the exercise of governmental functions, and thus was not acting in a governmental capacity when carrying out the relevant

⁶⁵⁷ Cl. Reply, Section 9.5.2.4.

⁶⁵⁸ Cl. Reply, para. 871.

⁶⁵⁹ Cl. Mem., para. 313.

acts. Actions by the Parán Community therefore could not have resulted in a direct expropriation by Peru."⁶⁶⁰

414. The Respondent further contends that the Claimant failed to show a seizure of its property:

"[A] direct expropriation occurs only when there is a 'formal transfer of title or outright seizure.' As the sole basis for its direct expropriation claim, the Claimant invokes a so-called 'take-over of the Site as of October 2018.' However, the Claimant has not explained on what basis the Access Road Protest (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."

415. The Respondent characterizes the sole basis of the Claimant's direct expropriation claim to be "the Access Road Protest." In its view, this protest did not amount to a formal transfer of title or outright seizure of the Claimant's investment. It could not and did not constitute a direct expropriation.⁶⁶² Referring to the Claimant's contention that the Access Road Protest "effectively led" to the forfeiture of the investment, the Respondent submits that: (i) even if this were true (quod non), it would be insufficient because a direct transfer of title or seizure is necessary for a finding of direct expropriation; 663 (ii) the alleged seizure was not conducted by Peru or attributable to it, and instead, the "Claimant's decision to pledge its shares, and PLI Huaura's subsequent exercise of its contractual right under the Pledge Agreement to foreclose on Claimant's investment, are attributable solely to Claimant itself and its creditor;"664 and (iii) while the Claimant's contention that omissions can constitute direct expropriation and its interpretation of Wena Hotels v. Egypt and Amco v. Indonesia are incorrect, in any event, the Claimant's own test would fail because "Peru never 'knowingly allow[ed]' any transfer of shares (formal or otherwise) or any seizure [...],"665 and the challenged conduct in those two cases was "radically different from that at issue in the present case."666

⁶⁶⁰ Resp. C-Mem., para. 670. See also Resp. Rej., para. 738.

⁶⁶¹ Resp. C-Mem., para. 671.

⁶⁶² Resp. Rej., para. 738.

⁶⁶³ Resp. Rej., para. 740.

⁶⁶⁴ Resp. Rej., para. 741.

⁶⁶⁵ Resp. Rej., para. 742.

⁶⁶⁶ Resp. Rej., paras. 743-744.

- 416. *Indirect Expropriation*. The Respondent denies that it indirectly expropriated the investment. It argues that (i) the Claimant has failed to identify the applicable legal standard for indirect expropriation, and to apply the factors required in Annex 812.1 of the FTA; 668 and (ii) the Claimant has not "demonstrate[d] that the alleged omissions" meet the applicable legal standard, and instead, "the evidence demonstrates that Peru did not commit—either by affirmative acts or omission—an indirect expropriation of Claimant's investment."669
- 417. The Respondent also rejects the Claimant's arguments said to posit a composite act leading to a creeping expropriation, denying, *inter alia*, that there was a coordinated plan or scheme of conduct by the State. ⁶⁷⁰ In the Respondent's view, the "Claimant has utterly failed to substantiate its allegation of a common pattern or scheme." ⁶⁷¹ Further, "the alleged composite act that Claimant created consists merely of the repetition of the same grievance," with nothing giving the supposed composite act a legal character different from its elements. ⁶⁷² Rather than adopting a policy of non-intervention, the State here "took an active role and made affirmative efforts to resolve the social conflict." ⁶⁷³
- 418. The Respondent denies that the Claimant's claim meets the requirements of Annex 812.1 of the FTA, which sets out the FTA Parties' shared understanding of factors involved in indirect expropriation, contending that the Claimant does not address these sufficiently, or at all.⁶⁷⁴ It first denies that Peru's alleged conduct had "adverse economic impact" on the investment.⁶⁷⁵ The Respondent contends that "this factor requires an investor to prove that the complained-of conduct caused a complete or near-complete destruction in value," and "the mere fact that a State's measures have had *some* adverse impact (which in any event

⁶⁶⁷ Resp. C-Mem., paras. 673 et seq.

⁶⁶⁸ Resp. C-Mem., paras. 673-674. *See also* Resp. C-Mem., paras. 676-701.

⁶⁶⁹ Resp. C-Mem., paras. 673, 675. *See also* Resp. C-Mem., paras. 702-736.

⁶⁷⁰ Resp. Rej., paras. 746 et seq.

⁶⁷¹ Resp. Rej., para. 751.

⁶⁷² Resp. Rej., para. 752.

⁶⁷³ Resp. Rej., para. 753.

⁶⁷⁴ Resp. Rej., paras. 756-757.

⁶⁷⁵ Resp. Rej., Section IV.D.2.b.(i), paras. 758 et seq.

was not the case here) is insufficient."⁶⁷⁶ The Claimant's contention that it only needs to show "substantial deprivation" is incorrect.⁶⁷⁷ The Respondent argues that "[s]ince Claimant's claim of indirect expropriation is based on its alleged loss of access, possession, and title, it fails to meet the Treaty's requirement that the alleged State conduct must have had an economic impact on the investment."⁶⁷⁸ In the Respondent's view, "[a]ll of this amounts to a claim of interference with [the Claimant's] legal rights, but does not serve to demonstrate the requisite *economic* impact."⁶⁷⁹

- 419. In this connection, the Respondent cites the appraisal of the value of Invicta's shares at US\$13.4 million at the time of the 2019 foreclosure, as showing that the investment did not experience the severe economic impact required for indirect expropriation. The Respondent submits that the Claimant's contrary argument that the net value of the investment was negative is (i) unsupported by the expert evidence (which only addresses "the value of 'Claimant's economic wealth'" as distinguished from the "investment's value") or by any legal authority; and (ii) disproved by the fact that "shortly after Lonely Mountain acquired PLI Huaura, those two companies foreclosed on Claimant's investment, thereby demonstrating [...] that they perceived the investment to have significant value." 682
- 420. The Respondent further contends that the Claimant did not show a causal link between Peru's "alleged conduct" and the loss of the investment. The Respondent denies that it failed to act in response to the "social conflict," contending that it acted "with the objective of restoring Claimant's access to the Invicta Mine." The investment was lost due to shortcomings in the Claimant's financial arrangements and its failure to obtain social

⁶⁷⁶ Resp. Rej., para. 758 (emphasis in original).

⁶⁷⁷ Resp. Rej., para. 762.

⁶⁷⁸ Resp. Rej., para. 761.

⁶⁷⁹ Resp. Rej., para. 761 (emphasis in original).

⁶⁸⁰ Resp. Rej., paras. 764.

⁶⁸¹ Resp. Rej., para. 765. *See also* Resp. Rej., paras. 766-769.

⁶⁸² Resp. Rej., para. 765. See also Resp. Rej., paras. 770-771.

⁶⁸³ Resp. Rej., para. 773.

⁶⁸⁴ Resp. Rej., para. 774.

license.⁶⁸⁵ "It was a variety of actions, omissions, and deficiencies of Claimant itself that were the direct cause" of the forfeiture of the Claimant's shares.⁶⁸⁶

- 421. The Respondent denies that the Claimant had any legally cognizable expectations regarding its investment.⁶⁸⁷ Peru contends that "Annex 812.1(b)(ii) requires an assessment of whether the alleged State conduct 'interfere[d] with distinct, reasonable, investment-backed expectations." In its view, the Claimant's "generalized reference to a State's alleged law does not qualify as a specific obligation or assurance" by the State. Further, "there is no obligation under Peruvian law for the police to use force;" and the Claimant's expectation that the police would use force against the Parán Community was "objectively unreasonable."
- 422. The Respondent urges that the character of its alleged conduct namely in not using force against the Paran Community is not expropriatory.⁶⁹¹ Peru's intent was not to expropriate, but instead was "to achieve a long-term, sustainable resolution to the social conflict between Claimant and the Parán Community."⁶⁹² Further, the "overall context" and the "public policy objectives" that motivated Peru's conduct also confirm that the character of the alleged conduct was not expropriatory.⁶⁹³
- 423. Finally, the Respondent maintains that its decision not to use force against the local community was non-discriminatory and was taken in pursuit of legitimate public welfare activities.⁶⁹⁴ It dismisses the Claimant's counter-arguments as attempts to alter the

⁶⁸⁵ Resp. Rej., paras. 775-784.

⁶⁸⁶ Resp. Rej., para. 785.

⁶⁸⁷ Resp. Rej., Section IV.D.2.b.(ii).

⁶⁸⁸ Resp. Rej., para. 786.

⁶⁸⁹ Resp. Rej., para. 788(a).

⁶⁹⁰ Resp. Rej., para. 788(b)-(c) (emphasis in original).

⁶⁹¹ Resp. Rej., Section IV.D.2.b.(iii), paras. 790 et seq.

⁶⁹² Resp. Rej., para. 791(a).

⁶⁹³ Resp. Rej., para. 791(b)-(c).

⁶⁹⁴ Resp. Rej., Section IV.D.2.b.(iv), paras. 794 et seq.

meaning and scope of Annex 812.1 of the FTA, *inter alia*, by seeking to import a requirement of proportionality.⁶⁹⁵

(2) The Tribunal's Analysis and Decision

a. Direct Expropriation

- 424. The Tribunal first considers the Claimant's direct expropriation claim.
- 425. The Tribunal has found that the Respondent is internationally responsible for the acts of the Parán Community under the attribution principles set out in the ILC Articles. ⁶⁹⁶ The conduct of the Parán Community and its members is therefore central in assessing whether there has been direct expropriation in this case. As discussed below, the Tribunal finds that the Claimant's rights have been directly expropriated by the actions of the Parán Community and its members. Accordingly, the Respondent is responsible for the unlawful expropriation of the Claimant's investment.
- 426. The Parties agree that a direct expropriation occurs when the State (i) formally deprives the investor of its title to the investment or (ii) seizes the investment outright.⁶⁹⁷ The evidence demonstrates that the Claimant's property has been taken by outright seizure, occupation and exploitation of the mine and the mine camp by the Parán Community.⁶⁹⁸
- 427. The expropriated property includes the Claimant's rights under its mining concessions as well as other rights and physical property. In 2012, the Claimant acquired 100% of Andean American Gold Corp ("AAG"), the holder of six mining concessions and of a 1.2-kilometre-long mining tunnel in Huaura Province. As noted elsewhere in this Award, the Claimant made substantial progress in developing both this property and beneficial relationships with two Rural Communities in the impact area of the mine, including the Lacsanga Community where the mine and access road are located. The Claimant did not

⁶⁹⁵ Resp. Rej., para. 798.

⁶⁹⁶ Supra, Section VI.B(2).

⁶⁹⁷ Cl. Reply, para. 813; Resp. C-Mem., para. 671.

⁶⁹⁸ See, e.g., Tr. Day 5, 1409:5-20 (Mr. León).

⁶⁹⁹ CWS-Ellis 1st, paras. 14, 18.

arrive at such a relationship with the Parán Community, the third Rural Community in the Project's impact area.

- 428. *Inter alia*, beginning in October 2018, the Parán Community initiated its blockade barring the Claimant's access to its mine site. Thereafter, the Claimant never resumed development work or was able to begin commercial mining. Except for a small group of Invicta employees whom the Parán Community briefly allowed at the site in March 2019, the Claimant never regained access to its mine. Instead, in March 2019, the Parán Community definitively seized and occupied the site, expelling the handful of Invicta employees mentioned above.
- 429. In May 2019, armed Parán Community members confirmed the Parán Community's control. They violently expelled security guards hired by the Claimant who had briefly gained access to the site. Several persons were wounded by gunfire, followed by the killing of a security guard by Parán Community members on the road the next day.⁷⁰⁰
- 430. After seizing physical control of the mine, the Parán Community began selling ore previously mined and stockpiled by Invicta, and to conduct mining operations for its own benefit, apparently utilizing a contractor. According to a witness's statement:



431. The Tribunal received uncontested testimony at the Hearing that the Parán Community remained in possession of the mine and continued to carry on illegal mining there until at

⁷⁰⁰ See infra, paras. 342-343.

⁷⁰¹

least four months before the Hearing in 2023, the most recent information available to the Respondent's witness. 702 Thus, the evidence clearly shows that the Parán Community deprived the Claimant of control and use of its enterprise.

- 432. For avoidance of doubt, the Tribunal also notes here an argument raised by the Respondent in its response to the Claimant's indirect expropriation claim. The Respondent argues that at the time of the foreclosure on the Claimant's shares in August 2019, the shares were appraised to have a value of US\$13.4 million. Hence, the Respondent contends, the Claimant in fact retained substantial value after the alleged expropriation.⁷⁰³
- 433. At a practical level, the Tribunal finds this argument unpersuasive. By August 2019, when PLI Huaura enforced its rights and foreclosed on the Claimant's shares in Invicta Mining, the Claimant had already lost physical control of the mine and mining camp to the Parán Community, which had seized the mine and begun to exploit its resources. As a result of these actions by the Parán Community, the Claimant was unable to meet its loan obligations and lost its shares to foreclosure.
- 434. The Claimant also responded to this argument in terms that the Tribunal finds convincing:

"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.

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 [the] Claimant's investment was already negative as a result of the Respondent's failure to restore the Claimant to possession of the Invicta mine."⁷⁰⁴

435. The Tribunal finds that the Claimant was deprived of its investment by the actions of the Parán Community, actions for which the Respondent is internationally responsible. The

⁷⁰² Tr. Day 5, 1409:5-20 (Mr. León).

⁷⁰³ *Supra*, para. 419.

⁷⁰⁴ Cl. Reply, paras. 843-844 (emphasis in original).

Claimant's mine was seized for the narrow economic benefit of the Parán Community and its members, not for any broader public purpose; the Claimant was not accorded due process of law; and was singled out for action by the Parán Community. It did not receive prompt, adequate, and effective compensation.

436. The Tribunal accordingly finds that the Respondent directly expropriated the Claimant's investment in violation of Article 812 of the FTA.

b. Indirect Expropriation

- 437. The Claimant also contends that if the actions of the Parán Community are not attributable to the State, its investment was in any case indirectly expropriated by Peru's regional and central authorities' actions and failures to act.⁷⁰⁵ These primarily involved what the Claimant views as the Respondent's recurring failure to take effectual measures in response to actions injuring its investment by the Parán Community and its members.
- 438. In support of its contention that failures to act can give rise to indirect expropriation, the Claimant refers, *inter alia*, to *Amco v. Indonesia*, ⁷⁰⁶ *Eureko v. Poland*, ⁷⁰⁷ and *Wena Hotels v. Egypt*, ⁷⁰⁸ each finding an international delict in a respondent State's failure to act where it was bound to do so. The Tribunal agrees. In a case where a State has an international legal duty to act, for example to provide FPS, and fails to do so, it commits an international

⁷⁰⁵ Cl. Mem., para. 313.

⁷⁰⁶ **CLA-0066**, *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, para. 158 ("[e]xpropriation in international law 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, as did the Roman praetor in allowing *longi temporis praescripto* [sic], (cf. B. A. Wortley, *Expropriation in Public International Law*, 1959)"); para. 171 ("[...] where the Claimants through their ownership of the shares in PT Amco were foreign investors the army/police personnel had a special duty to assist the Claimants in at least preserving the status quo until the dispute between the parties was settled by means of law. By not doing this, an act was committed by the army/police against the Claimants whereby the latter - at least for a time - lost their right to management and control.")

⁷⁰⁷ **CLA-0070**, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, paras. 186-187 ("[i]t is obvious that the rights of an investor can be violated as much by the failure of the Contracting State to act as by its actions. Many international tribunals have so held") citing *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, pp. 154-164.

⁷⁰⁸ **CLA-0028**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 99 ("[w]hether or not it authorized or participated in the actual seizures of the hotels, Egypt deprived Wena of its 'fundamental rights of ownership' by allowing EHC forcibly to seize the hotels, [and] to possess them illegally for nearly a year [...].")

delict just as if it had directly injured property that it was legally required to protect or secure. The Commentary to the ILC Articles underscores this point:

"[A]n international wrongful act of a State may consist in one or more actions or omissions or a combination of both." 709

"[...] the term 'act' is intended to encompass omissions [...]."710

"Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts and no difference in principle exists between the two." 711

- 439. The actions of the Parán Community and its members are at the core of the Tribunal's decisions finding that the Respondent violated its obligations to accord both FPS and FET. However, the Respondent insists that as matters of national law and policy, it could only respond to these actions by urging and trying to facilitate dialogue. Any more robust response, the Respondent insists, would be ineffectual and expose its police and other officials involved to the risk of criminal liability under national law.⁷¹²
- 440. As the Claimant's situation turned for the worse, culminating in the Parán Community's physical seizure of the mine in March 2019, its subsequent exploitation of the mine, and the violence and killing in May 2019, the Respondent continued to insist on dialogue as the remedy. Only in December 2021, long after the Claimant's departure from the scene, did Peru's authorities overcome their reservations and mount a significant, albeit unsuccessful, police operation to close the mine. The Respondent contended that the various alleged acts and omissions by the State and its entities could result in an indirect

⁷⁰⁹ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 1, Commentary, para. 1.

⁷¹⁰ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 1, Commentary, para. 8. The Commentary refers to the *Corfu Channel* case, in which the ICJ found Albania internationally responsible where it knew or should have known of the presence of mines in its waters but did nothing to warn other States of their presence.

⁷¹¹ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 2, Commentary, para. 4.

⁷¹² Supra, paras. 285-286, 295. See also, Resp. C-Mem., paras. 533-534, 539.

⁷¹³ See, e.g., RWS-León 2nd, para. 55.

⁷¹⁴ *Supra*, para. 359.

expropriation only if they constituted a composite act, involving a coordinated pattern of scheme of conduct. The Claimant countered that an indirect expropriation may result from an accumulation of acts not themselves illegal, and disputes the existence of a rule of international law requiring that these actions be linked together. There is no 'legal standard' to determine what counts as a composite act by a State or another actor on the international plane. The Tribunal agrees. The Respondent has not established the existence of a customary international law rule of the nature it asserts.

- 441. It is thus clear to the Tribunal that the Respondent's policies and failures to act were the key factors in the loss of the Claimant's investment. The Respondent declared itself powerless to do more than encourage dialogue in response, leaving the way clear for the Parán Community to seize and exploit the Claimant's investment.
- 442. These facts must be measured against the elements of Annex 812.1 of the FTA, which sets out Peru's and Canada's understanding of the elements of indirect expropriation. Annex 812.1(b) provides that "[t]he determination of whether a measure or series of measures of a [FTA] Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers" three listed factors "among others." The first factor is "the economic impact of the measure." As to this, the Respondent contends that:

"Claimant asserts that it 'lost possession and all access' to the Invicta Mine during the Access Road Protest, and that 'it lost title' as a result of Peru's conduct. All of this amounts to a claim of interference with its legal rights, but does not serve to demonstrate the requisite economic impact. Since Claimant's claim of indirect expropriation is based on its alleged loss of access, possession, and title, it fails to meet the Treaty's requirement that the alleged State conduct must have had an economic impact on the investment."⁷¹⁹

443. The Tribunal finds wholly unconvincing the argument that, *inter alia*, physical seizure of the mine had no economic impact. By the time of foreclosure on its shares in August 2019, the Claimant had lost access to, physical control of, and all ability to develop and exploit

⁷¹⁵ See, e.g., Resp. C-Mem., paras. 704 et seq.; Resp. Rej., paras. 746 et seq.

⁷¹⁶ Cl. Reply, para. 729.

⁷¹⁷ **CLA-0001/RLA-0010**, FTA, Annex 812.1.

⁷¹⁸ **CLA-0001/RLA-0010**, FTA, Annex 812.1(b)(i).

⁷¹⁹ Resp. Rej., para. 761.

its mine. The Respondent, the territorial sovereign, bound by significant treaty obligations, took no effectual action in response. These circumstances had devastating impact on the economic value of the investment.

- 444. The Respondent contends further that an appraisal at the time of the foreclosure on Invicta's shares shows that the investment retained significant value. The Tribunal has addressed, and rejected, this argument above.⁷²⁰
- 445. Next, Annex 812.1(b)(ii) of the FTA calls for consideration of "the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations [...]."⁷²¹ The Claimant contends that Peru's acts and omissions frustrated Lupaka's legitimate expectations to be able to access and safely work on its mine free of interference and harm or damage to its personnel, facilities and equipment:

"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." ⁷²²

"The Respondent, however, violated Lupaka's legitimate expectations, mainly by participating in and/or failing to address or sanction the repeated invasions of the Site and the Blockade, as well as well as the physical harm to the Claimant's personnel and damage to its facilities." ⁷²³

446. The Respondent denies that the Claimant had any legally cognizable expectations; arguing that the Claimant's "generalized reference to a State's alleged law does not qualify as a specific obligation or assurance on the part of the State," while the Claimant's expectation that the police would use force against the Parán Community is "objectively unreasonable."⁷²⁴

⁷²⁰ *Supra*, paras. 433-434.

⁷²¹ CLA-0001/RLA-0010, FTA, Annex 812.1(b)(ii).

⁷²² Cl. Reply, para. 851.

⁷²³ Cl. Mem., para. 292.

⁷²⁴ Resp. Rej., para. 788.

- 447. The Tribunal finds that in the circumstances of this case, the Claimant could legitimately expect that the Respondent would not leave the security and ultimately, the possession of its investment to the ambitions of the Parán Community and its leaders. This factor does not weigh against a finding of indirect expropriation.
- 448. Annex 812.1(b)(iii) of the FTA then calls for consideration of "the character of the measure or series of measures." ⁷²⁵ As to this element, the Tribunal assesses that the measures taken by the Respondent primarily to attempt to facilitate meetings and consultations and to exhort the parties to come to some agreement were not a sufficient response to the Claimant's situation.
- 449. Finally, Annex 812.1(c) of the FTA provides that "[e]xcept in rare circumstances" non-discriminatory measures "designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment do not constitute indirect expropriation." The Respondent maintains that its policies of promoting dialogue and mutual agreement are just such measures, as they seek to avoid violence and promote harmonious social relations. 727
- 450. While a policy of non-interference and promotion of dialogue may sometimes be appropriate, the Tribunal has found that it does not satisfy the Respondent's obligations under the FTA in the circumstances of this case. The Respondent's insistence upon dialogue to the exclusion of other more active measures left the Claimant exposed to the demands and threats of the Parán Community, culminating in the Community's lawless seizure and exploitation of the investment. Given these circumstances, the Tribunal need not and does not reach the question whether the acts and omissions of the Respondent's central authorities were non-discriminatorily designed and applied to protect legitimate public welfare objectives. Whatever the answer to this question, Annex 812.1(c) of the FTA contemplates that there may be exceptions to its general principles in "rare circumstances." This case involves such circumstances.

⁷²⁵ CLA-0001/RLA-0010, FTA, Annex 812.1(b)(iii).

⁷²⁶ CLA-0001/RLA-0010, FTA, Annex 812.1(c).

⁷²⁷ See Resp. Rej., paras. 794-801; Resp. Skeleton, para. 91.

451. The Tribunal accordingly finds that, should the actions of the Parán Community and its members not be attributable to the Respondent, the Respondent has in any case indirectly expropriated the Claimant's investment.

F. FOURTH CLAIM: MOST FAVORED NATION TREATMENT

- (1) The Parties' Positions
 - a. The Claimant's Position
- 452. Article 804 (1) and (2) of the FTA provides:
 - "1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
 - 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory."⁷²⁸
- 453. Annex 804.1 of the FTA then provides:

"For greater clarity, treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments' referred to in paragraphs 1 and 2 of Article 804 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international treaties or trade agreements." ⁷²⁹

454. The Claimant's Memorial, which contains only four short references to Article 804 of the FTA, invoked the article on a contingent basis:

"To the extent that that the minimum standard under customary international law is considered to provide a lower level of obligations towards the investor than that set out in Waste Management (quod non), the Claimant relies on the most-favoured nation ('MFN') clause in Article 804 of the FTA to import the FET standard in the Peru-United Kingdom BIT."

⁷²⁸ **CLA-0001/RLA-0010**, Art. 804(1)-(2).

⁷²⁹ CLA-0001/RLA-0010, Annex 804.1.

⁷³⁰ Cl. Mem., para. 275.

- 455. The Claimant contends that the FET standard in the Peru-UK BIT constitutes a form of "treatment" which Article 804 allows to be imported into the FTA.⁷³¹ On this basis, the Memorial asks the Tribunal "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."⁷³²
- 456. The Claimant's Reply renews the Claimant's initial argument. It again invokes Article 804 of the FTA but this time only for a limited and contingent purpose, to apply in case the Tribunal should decide that the Respondent's alleged misconduct does not meet the customary international law minimum standard for denial of FET under Article 805 of the FTA:

"[S]hould the Tribunal consider that the minimum standard of treatment sets a lower standard of treatment [than the minimum standard of treatment as stated in Waste Management II] (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 [sic] Article 804 of the FTA [...]."⁷³³

457. The Claimant opposes the Respondent' contention that "Article 804 [...] only covers preferential treatment accorded to other foreign investors in 'like circumstances,' and therefore alternative standards cannot be imported from other BITs." It submits that, there is nothing in the words of Article 804 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." That said, the Claimant argues that "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." The Claimant's Reply contains a number of concrete examples said to show different treatment by the

⁷³¹ See Cl. Mem., para. 277.

⁷³² Cl. Mem., para. 374(c). A similar *petitum* is included in the Claimant's Reply and reaffirmed in the Claimant's Post-Hearing Submission. *See* Cl. Reply, para. 1062(c); and Cl. PH Mem., paras. 10, 15(c).

⁷³³ Cl. Reply, para. 717. See also, Cl. Reply, para. 779.

⁷³⁴ Cl. Reply, para. 797.

⁷³⁵ Cl. Reply, para. 799.

⁷³⁶ Cl. Reply, para. 802.

Respondent to investors in similar circumstances. It cites instances of disruption of investors' mining operations by Indigenous or Rural Communities where the Respondent utilized police forces to remove protesters and clear blockades,⁷³⁷ as well as other situations involving similar police operations in other economic sectors.⁷³⁸ According to the Claimant:

"[T]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. 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. It is not in dispute that Lupaka received no such protection in this case."⁷³⁹

458. Finally, the Claimant argues that, contrary to the Respondent's contention, Article 808 of the FTA does not prevent the Claimant from relying on a preferential standard of FET. 740

b. The Respondent's Position

459. The Respondent maintains that Article 804 of the FTA does not allow the Claimant to import a different autonomous FET standard from a different treaty. According to the Respondent, the text of Article 804, interpreted in accordance with the VCLT's rules of interpretation, requires that the Claimant identify a specific investor or investment, in like circumstances that has actually been accorded the treatment at issue. The Claimant has not done so.

⁷³⁷ Cl. Reply, paras. 374-379.

⁷³⁸ Cl. Reply, para. 383.

⁷³⁹ Cl. Reply, para. 802.

⁷⁴⁰ Cl. Reply, paras. 803 et seq.

⁷⁴¹ Resp. C-Mem., paras. 589 et seq.

⁷⁴² Resp. C-Mem., paras. 592, 595.

- 460. Further, in the Respondent's view, differences in legal standards are not "treatment" in this context. 743 The Respondent distinguishes two cases cited by the Claimant, 744 contending that the treaty language involved in each was materially different, and that in neither case had the opposing party objected to the incorporation of FET provisions from another treaty. 745
- 461. The Respondent adds that even if Article 804 of the FTA is interpreted to permit importation of an autonomous standard from a different treaty, Article 808 of the FTA, precludes this result. Article 808 provides that Article 804 does not apply to measures adopted or maintained prior to conclusion of the FTA. The 1993 Peru-UK BIT antedates the FTA.⁷⁴⁶
- 462. The Respondent adds that even if it were applicable, the autonomous standard "grants a high level of deference to States."⁷⁴⁷
- 463. As to the additional examples in the Claimant's Reply of Peru's use of police and forcible intervention in other situations, the Respondent contends that these situations do not assist the Claimant. The Respondent argues that the Claimant "never identifies with any precision the circumstances of any comparator mining investors, nor does it attempt to analyze the alleged likeness between their respective circumstances" and "never alleges that any of those alleged 'mining investors' was a *foreign* investor, which is a pre-requisite to any invocation of the MFN Clause."⁷⁴⁸ It further contends that the Las Bambas intervention cited by the Claimant was unsuccessful, aggravated the situation, and resulted

⁷⁴³ Resp. C-Mem., paras. 593-595.

⁷⁴⁴ Resp. C-Mem., paras. 599-605, citing **CLA-0047**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004; **CLA-0033**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008.

⁷⁴⁵ Resp. C-Mem., paras. 600-605.

⁷⁴⁶ Resp. C-Mem., paras. 608-611. *See also*, Resp. Rej., paras. 734-735.

⁷⁴⁷ Resp. C-Mem., paras. 612-618.

⁷⁴⁸ Resp. Rej., para. 733 (emphasis in original).

in loss of life and multiple injuries, ⁷⁴⁹ while other cited cases were said to involve different circumstances not analogous to Invicta's. ⁷⁵⁰

(2) The Tribunal's Analysis and Decision

464. The Claimant invoked Article 804 of the FTA and its MFN provision for a limited and contingent purpose:

"To the extent that that the minimum standard under customary international law is considered to provide a lower level of obligations towards the investor than that set out in Waste Management (quod non), the Claimant relies on the most-favoured nation ('MFN') clause in Article 804 of the FTA [...]."

465. Earlier in this Award, the Tribunal agreed with the Parties' common position that the *Waste Management v. Mexico II* formula correctly reflects the customary international law minimum standard of treatment. Applying that standard, the Tribunal has found that the Respondent did not accord the Claimant's investment FET. As previously noted by the Tribunal, as the hypothetical contingency cited by the Claimant did not occur, there is no need for the Tribunal to make any decision regarding Article 804 of the FTA.

VII. DAMAGES

A. CAUSATION

(1) The Parties' Positions

a. The Claimant's Position

466. As described above, the Claimant contends that the Respondent's acts and omissions – notably the actions of the Parán Community and its members – caused its loss. In particular, the Parán Community's seizure and occupation of the mine led to Claimant's

⁷⁴⁹ Resp. Rej., paras. 163, 300-301.

⁷⁵⁰ Resp. Rej., paras. 302-304.

⁷⁵¹ Cl. Mem., para. 275. *See also*, Cl. Reply, paras. 717, 779.

⁷⁵² *Supra*, para. 387.

⁷⁵³ *Supra*, paras. 389-391.

⁷⁵⁴ *Supra*, paras. 392-393.

loss of access to and use of its investment, to foreclosure on the Claimant' loans and to the total loss of its investment.⁷⁵⁵

- 467. The Claimant contended that proof of causation requires a causal link between a State's wrongful act and the investor's loss, involving proof that the loss would not have occurred but-for the State's wrongful conduct (factual causation), and that the loss was a normal, foreseeable or intended consequence of the illegal conduct (legal causation). Once these elements are satisfied, the burden shifts to the other party to prove that some intervening event breaks the chain of causation.⁷⁵⁶
- 468. The Claimant maintained that the record in the case satisfied both elements, arguing that the chain of causation involved two central factors: "[t]he Parán Community's illegal Blockade and seizure of the Claimant's Project" and the failure by the Respondent's other state organs "to ensure compliance with the law in the vicinity of the Project and restore the Claimant to its rights over the Invicta Project." For the Claimant the subsequent foreclosure on its shares did not break the chain of causation as "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." ⁷⁵⁸

469. In sum, for the Claimant:

"[T]he 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

⁷⁵⁵ Cl. PH Mem., para. 165 ("Parán's illegal Blockade and seizure of the Project followed by Peru's failure to ensure compliance with the law and to ensure that Lupaka could pursue its legitimate right to exploit the Project, led to Pandion's foreclosing under the PPF Agreement, thereby entailing the loss of the entire investment.").

⁷⁵⁶ Cl. Reply, paras. 888 et seq.; Cl. Skeleton, para. 101.

⁷⁵⁷ Cl. Reply, para. 917.

⁷⁵⁸ Cl. Reply, para. 918.

- 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."⁷⁵⁹
- 470. The Claimant denied the Respondent's invocation of contributory fault, contending that a finding of contributory fault requires proof of two further elements:
 - "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'; and
 - b) The contribution [of the victim's conduct to the injury sustained] must be material and significant."⁷⁶⁰
- 471. For the Claimant, these "conditions cumulatively impose a high threshold before contributory fault can be established,"⁷⁶¹ and are conditions not satisfied here:

"[T]he 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." ⁷⁶²

- 472. Much of the Claimant's argumentation on causation addressed a set of circumstances that the Respondent contended showed there was no causation attributable to any breach of the FTA. For the Respondent, five circumstances not attributable to Peru caused the failure of the Claimant's investment:
 - "(i) Claimant's failure to resolve its conflict with the Parán Community; (ii) Claimant's pledge of its investment as loan collateral; (iii) Claimant's breach of the PPF Agreement; (iv) Claimant's failure to resolve pending regulatory requirements to operate the mine; and (v) Claimant's failure to secure sufficient ore processing capacity."⁷⁶³

⁷⁵⁹ Cl. Reply, para. 926 (emphasis omitted).

⁷⁶⁰ Cl. Reply, para. 912 (emphasis omitted).

⁷⁶¹ Cl. Reply, para. 913.

⁷⁶² Cl. Reply, para. 945.

⁷⁶³ Resp. C-Mem., para. 748. These five circumstances are developed in Resp. C-Mem., Section V.B., paras. 743-772.

- 473. In answer to the Respondent's first contention, that it failed to resolve the conflict with the Parán Community, the Claimant denies that it was cavalier in its dealings with the Parán Community or that it ignored the Community's legitimate interests and concerns. The Claimant maintains that Peru's laws and regulations did not require it to secure an agreement with the Community. Nevertheless, it devoted substantial efforts and resources to developing relations with the Parán Community, until Parán's continuing blockade of the mine created a situation standing in the way of productive dialogue. The Claimant says that it engaged in numerous meetings and outreach efforts, and made a payment of 300,000 soles to the Parán Community even after it agreed with the Lacsanga Community on an access road though Lacsanga's territory.
- 474. The Claimant contends that it was on the verge of securing a reasonable and mutually beneficial agreement that had the approval of 90% of the Parán Community at the end of 2016. However, Community elections in January 2017 brought new leaders to power, including a consistent critic of the project, Mr. Isidro Román Palomares, as President, as well as other opponents of the project. Thereafter, the Claimant contends, it was subject to a series of shifting and unreasonable demands.
- 475. According to the Claimant, the Parán Community did not deal in good faith. At least some key Community members harboured ulterior motives, including protection of illicit marijuana production.⁷⁷¹ A witness stated in this regard:



⁷⁶⁴ See, e.g., Cl. Reply, Section 10.1.3.1.

⁷⁶⁵ Cl. Reply, paras. 74 et seq.

⁷⁶⁶ CWS-Ellis ^{2nd}, paras. 20 et seq.

⁷⁶⁷ Tr. Day 1, 59:2-20 (Mr. Velarde).

⁷⁶⁸ C-0097, Letter from IMC to the Parán Community, 6 October 2016; CWS-Castañeda 1st, para 60; Tr. Day 1, 56:2-7 (Mr. Velarde).

⁷⁶⁹ C-0523, Letter from the Parán Community to MEM, 23 July 2018, p. 4.

⁷⁷⁰ See Tr. Day 1, 61:6-64:13 (Mr. Velarde).

⁷⁷¹ Cl. Reply, para. 771(c) and fn. 1302 and exhibits cited there.

476. As to the Respondent's second contention, that Claimant entered into risky financial arrangements involving the pledge of its shares as collateral, the Claimant maintains that its contractual gold delivery obligations were not the straitjacket that the Respondent made them out to be, and that it could have met its payment obligations to its lender had there been no blockade. However, according to the Claimant's witness Mr. Ellis:

"As a result of Parán officials' Blockade of the Mine, we were forced to suspend operations entirely. This was highly problematic as it meant we could not service the PPF Agreement because we could not mine, process or sell any gold or other minerals." 773

- 477. The Claimant adds that, even if it had encountered delays in moving to production, it could have expected its lender to be flexible as it had in the past, as the lender had a significant financial incentive to allow more time.⁷⁷⁴
- 478. The Claimant also disputes the Respondent's third set of arguments relating to non-compliance with the loan agreement. It contends, *inter alia*, that but for the blockade, it would have moved to production in time to meet its contractual gold delivery obligations, ⁷⁷⁵ and that the breaches of the loan agreement cited by the Respondent involved matters that were either the consequence of the illegal blockade of its property or involved reporting requirements that had been waived. ⁷⁷⁶
- 479. As to the Respondent's fourth set of arguments alleging failure to comply with regulatory requirements, the Claimant maintains that in October 2018, when the blockade was first imposed, the project was on the verge of completion. The mine had key regulatory permits

⁷⁷³ CWS-Ellis 1st, para. 44.

⁷⁷⁴ CWS-Ellis ^{2nd}, paras. 23-24.

⁷⁷⁵ Cl. Reply, paras. 105 et seq.

⁷⁷⁶ Cl. Reply, para. 976.

and approvals,⁷⁷⁷ and only two regulatory requirements remained to be satisfied.⁷⁷⁸ As to these, in September 2018, the Claimant requested the MEM to do the final pre-production inspection⁷⁷⁹ (which was ultimately prevented because the Parán Community blocked access to the mine),⁷⁸⁰ and was ready for inspection and certification of its water system.⁷⁸¹

- 480. The Claimant denies that it caused significant environmental damage, pointing to the June 2018 report by the Huaura Water Authority finding no "evidence of off-mine wastewater discharge" and "[n]o direct impact on the water resources of the Community of Parán and surrounding areas [...]."⁷⁸² The Claimant disputes the sincerity of the environmental concerns cited by the Parán Community, ⁷⁸³ noting that after the Parán Community seized the mine in March 2019, it exploited it without any oversight by environmental or other authorities.⁷⁸⁴
- 481. As to the Respondent's fifth set of arguments asserting the Claimant's failure to arrange sufficient ore processing capacity, the Claimant observes that as of October 2018, it had reached agreement to purchase a processing plant next to the village of Mallay (the "Mallay Processing Plant"), subject to approval of the Mallay Community, which was given in March 2019.⁷⁸⁵ Revised financing terms were agreed with its lender in October 2018, shortly before the blockade, but were not signed pending approval by the Mallay Community.⁷⁸⁶ The revised terms provided that the Claimant's gold repayment obligations came into operation only after the completed purchase of the Mallay Processing Plant.⁷⁸⁷

⁷⁷⁷ Cl. Reply, paras. 56 et seq.

⁷⁷⁸ Cl. Mem., para. 343.

⁷⁷⁹ Cl. Reply, para. 58.

⁷⁸⁰ Cl. Reply, para. 85.

⁷⁸¹ Cl. Reply, paras. 87 et seq.

⁷⁸² Tr. Day 1, 40:18-41:6 (Mr. Velarde).

⁷⁸³ Cl. PH Mem., paras. 8, 139.

⁷⁸⁴ See, e.g., Cl. PH Mem., para. 139; Cl. Reply, para. 943 ("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.")

⁷⁸⁵ Cl. Reply, paras. 108 et seq.; CWS-Ellis 1st, para. 40. See also, Cl. Mem., paras. 88-94.

⁷⁸⁶ Cl. Reply, paras. 110-111. The revised terms are at C-0285, Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement (Final version), 5 October 2018.

⁷⁸⁷ Cl. Reply, para. 114.

Even assuming that gold repayments had to begin earlier, technical issues with other ore processors could have been readily overcome, allowing for sufficient gold production.⁷⁸⁸

482. The Claimant maintains that the Parán Community's misconduct, and the State's failure to respond appropriately, caused the Claimant's injury, not the Claimant's own actions or errors.⁷⁸⁹

b. The Respondent's Position

- 483. The Respondent's position regarding causation is spelled out in detail over the course of many pages in its written materials. The position is trenchantly summarized in the opening paragraphs of its Pre-Hearing Skeleton:
 - "2. [...] Claimant itself is to blame for the social conflict that led to the loss of its investment. The evidence shows that the breakdown of Claimant's relationship with the Parán Community was entirely of Claimant's own making (Rej., § II.B). Claimant disregarded the critical importance of obtaining and maintaining the support of all local communities in the area of influence of its mine (i.e., social license). Claimant first delayed engaging with the Parán Community, then marginalized such community before ultimately abandoning any attempt to reach an agreement, and instead resorted to the use of force.
 - 3. Having failed to secure the community's support, and facing local opposition to the mining project, Claimant ill-advisedly decided to take matters into its own hands. It unleashed War Dogs, a private security firm, to expel the opposition by brute force (Rej., § II.B.10). Such action triggered a violent confrontation, and ended any prospect of reaching an amicable resolution in time for Claimant to comply with its financial obligations to its creditor, PLI Huaura, and to avoid forfeiting its shares in the local mining company, Invicta, pursuant to the Pledge Agreement (Rej., § II.D)." ⁷⁹⁰
- 484. The Respondent thus maintains that it did not cause the Claimant's injuries.⁷⁹¹ They were instead caused by the Claimant's own actions or omissions,⁷⁹² notably: "(i) Claimant's failure to resolve its conflict with the Parán Community; (ii) Claimant pledge of its investment as loan collateral; (iii) Claimant's breach of the PPF Agreement; (iv)

⁷⁸⁸ Cl. Reply, paras. 114-117.

⁷⁸⁹ See, e.g., Cl. Reply, paras. 917-918.

⁷⁹⁰ Resp. Skeleton, paras. 2-3.

⁷⁹¹ Resp. C-Mem., paras. 749-750; Resp. Rej., paras. 813-819.

⁷⁹² See Resp. C-Mem., para. 748; Resp. Rej., para. 820; Resp. PH Mem., para. 121.

Claimant's failure to resolve pending regulatory requirements to operate the mine; and (v) Claimant's failure to secure sufficient ore processing capacity."⁷⁹³

- 485. As to item (i), the Respondent maintains that a range of cavalier conduct by the Claimant led to feelings of deep mistrust and animosity between the Claimant and the Parán Community. These led the Parán Community or its members to take actions in protest, including the occupation of the mine in June 2018, the blockade of the access road in October 2018, and the takeover of the mine and mining camp in March 2019.⁷⁹⁴
- 486. According to the Respondent, the Claimant held the Parán Community in "disrespect and contempt."⁷⁹⁵ It ignored legitimate Community interests, unreasonably favoured the two other Rural Communities in the affected area by concluding agreements with them but not with the Parán Community, and devoted insufficient resources, effort, and attention to building relations with the Parán Community. ⁷⁹⁶ As an example of the Claimant's allegedly contemptuous conduct, the Respondent's witnesses placed sole blame for the collapse of the 26 February 2019 Agreement on the Claimant's unwillingness to pay nine thousand dollars for a road survey to which it had agreed. ⁷⁹⁷
- 487. The Respondent denies that the Parán Community or some of its members opposed an agreement with the Claimant in order to protect the illicit large-scale cultivation of marijuana, 798 contending that Invicta did not raise concerns regarding marijuana production in connection with its efforts to seek lifting of the blockade. 799

⁷⁹³ Resp. C-Mem., para. 748. The Respondent's Post-Hearing Submission refers to these factors in a different order and in slightly different terms. *See* Resp. PH Mem., para 121 ("Claimant's investment failed as a result of its own actions, namely its (i) commitment to an ambitious and unrealistic repayment schedule, (ii) failure to obtain a social license to operate, (iii) failure to secure the necessary permits for exploitation, and (iv) failure to contract with reliable ore processors.")

⁷⁹⁴ See, e.g., Resp. C-Mem., paras. 751-754; Resp. Rej., paras. 821-822, 828; Resp. PH Mem., paras. 127-132.

⁷⁹⁵ Resp. Rej., para. 413.

⁷⁹⁶ See, e.g., Resp. C-Mem., para. 752; Resp. Rej., para. 822.

⁷⁹⁷ RWS-Trigoso 2nd, paras. 50-53. *See also* Resp. Rej., para. 822(i).

⁷⁹⁸ See Resp. Rej., Section II.E.1., paras. 406 et seq.

⁷⁹⁹ RWS-León 2nd, para. 60.

488. The Respondent's second argument maintains that the loss of the investment was caused by the Claimant's pledge of its shares as security for its loan financing on risky terms that gave it too little time to meet its contractual obligations.⁸⁰⁰ For the Respondent:

"Claimant chose to grant PLI Huaura the right to seize the Invicta shares if certain conditions were met (as in the event, they were). Claimant's decision to sign over its investment as collateral to PLI Huaura was an action attributable solely to Claimant. Peru therefore cannot be held responsible for any alleged damages resulting from the foreclosure [...]."801

- 489. Similarly, the Respondent contends in its third argument that multiple defaults on the Claimant's obligations under the loan agreement were not attributable to Peru. Save one default the Claimant attributed to Peru, the Respondent contends that the Claimant "has not alleged that any of the other five events of default [...] were proximately caused by the Access Road Protest, much less by Peruvian authorities." 802
- 490. As to the Respondent's fourth objection alleging failure to meet regulatory requirements, the Respondent disputes the Claimant's contention that when the blockade began in October 2018, only two final regulatory approvals remained and that they could be obtained without difficulty. 803 In this regard, the Respondent submitted with its Rejoinder the 126-page Expert Report of Ms. Miyanou Dufour von Gordon, an attorney specializing in mining law ("Dufour Report"). Her report included conclusions regarding the Claimant's alleged shortcomings in dealing with the Parán Community based upon materials previously of record in the case and not personal knowledge. The report also set out Ms. Dufour's analysis and opinions regarding Peru's permitting requirements and procedures in the mining sector, largely drawn from her own experience as an attorney practicing in this field.
- 491. The Dufour Report addressed several permitting and regulatory factors that the Claimant contended had not been raised previously in the proceedings, leaving the Claimant no

⁸⁰⁰ Resp. C-Mem., para. 757.

⁸⁰¹ Resp. C-Mem., para. 755.

⁸⁰² Resp. C-Mem., paras. 759-763.

⁸⁰³ See, e.g., Resp. C-Mem., paras. 764-765; Resp. PH Mem., para. 133.

opportunity for written response.⁸⁰⁴ Based upon the expert's analysis of various regulatory and permitting processes and requirements, she concluded that the Claimant could not begin commercial production before July 2020, well after it was contractually bound to begin gold deliveries to its lender in November 2018.

- 492. At the Hearing, upon an oral application by the Claimant and the Respondent's oral response, 805 the Tribunal ruled that it would not take into account any new elements introduced in the Dufour Report that were not responsive to arguments or evidence previously adduced by the Claimant. 806 The Tribunal deferred to later consideration which materials, if any, should be excluded from consideration in light of this ruling. In its Post-Hearing Submission, the Respondent protested this decision, insisting that all of the allegedly new material in the Dufour Report was in fact a proper rebuttal of the Claimant's earlier arguments and evidence. The Respondent maintained that it "reserve[d] all its rights in that respect." 807
- 493. The Tribunal returns to this issue *infra* para. 556, concluding that in the circumstances of the case it need not determine whether the disputed new material in Ms. Dufour's Report is proper rebuttal material.

(2) The Tribunal's Analysis and Decision

a. Analysis and Decision on the Respondent's First Causation Argument

494. While the Parties disputed aspects of the legal standards applicable to determining causation and contributory fault, the Tribunal believes that the most significant disputed issues bearing on causation involve assessments of facts. In this regard, the Tribunal sees

⁸⁰⁴ Tr. Day 1, 119:6-22 (Mr. Foden); Tr. Day 3, 670:18-672:8 (Mr. Foden).

⁸⁰⁵ Tr. Day 1, 140:1-141:11 (President Crook, Mr. Foden, Mr. Grané); Tr. Day 2, 367:13-370:9 (President Crook; Mr. Grané); Tr. Day 2, 500:5-18 (Mr. Gallego); Tr. Day 3, 670:12-678:7 and 694:1-695:11 (Mr. Foden: argument and answer to Tribunal's questions); Tr. Day 3, 678:17-693:21 (Mr. Grané: argument and answer to Tribunal's questions).

⁸⁰⁶ Tr. Day 4, 961:5-964:14 (President Crook) ("[...] A[.] Ms. Dufour's report shall remain a part of the record in this case, subject to the following: B[.] the Tribunal shall not take account of: 1, the portions of Ms. Dufour's report setting out regulatory requirements affecting the Claimant's ability to begin commercial production that were not referred to in Respondent's Counter-Memorial defined as the Additional Requirements, as well as, 2, any associated documents and evidence not previously on record related to the Additional Requirements [...]").

⁸⁰⁷ Resp. PH Mem., para. 148.

the most significant disputed issues to be raised by the first consideration identified by the Respondent, its claim that the Claimant brought failure on itself by failing to secure social license from the Parán Community.

- 495. The Tribunal appreciates that dialogue between a mining company and a Rural Community may not proceed smoothy and that reconciling colliding interests can be challenging. However, in the Tribunal's view, the weight of the evidence shows that the increasingly acrimonious and ultimately deadly relationship between the Parán Community and the Claimant was not the result of the Claimant's failings, as the Respondent contends. The Claimant's loss was the result of actions by the Parán Community, and in particular, the increasingly combative policies and actions of certain of the Parán Community's members and leaders, actions to which the Respondent's central government did not respond, *inter alia*, by providing FPS as required by the FTA.
- 496. In assessing causation, the Tribunal notes that the Respondent's case regarding the attitudes and concerns of the Parán Community is largely based upon the witness statements and Hearing testimony of past and present government officials. No members of the Parán Community (who the evidence shows speak Spanish) were offered as witnesses. Of the several past and present government officials who testified, only one, Mr. Nilton César León Huerta, indicated that he had regular direct communications with Parán Community members. Mr. León, a social specialist in MEM's Office for Dialogue and Citizen Participation, described his duties as "the management of social conflicts and citizen participation processes arising in the projects in the Energy and Mining Sector." He is based in Lima, but testified that he made multiple trips to the area to attend meetings and "acquire first-hand knowledge of the situation and to talk to the Community members."
- 497. Mr. León reported to his superiors in Lima, including Mr. Fernando Trigoso, the head of OGGS, who also testified. Mr. Trigoso's evidence indicates that he derived his understanding of events from Mr. León. For example, as to the disputed reference to a survey in the 26 February 2019 Agreement, Mr. Trigoso testified that he "was informed by

⁸⁰⁸ RWS-León 1st, para. 2.

⁸⁰⁹ RWS-León 1st, para. 14.

Mr. León of the outcome of the negotiations,"⁸¹⁰ stating that the agreement provided for a survey "to plot the access road to the mine via the road through the Parán Community" and for "access by Invicta employees to the Project via the Parán access road."⁸¹¹ (As discussed below, the Tribunal does not agree with Mr. León's and Mr. Trigoso's interpretation of these provisions.)

- 498. Mr. León's reporting on relations between the Claimant and the Parán Community seems to have been based upon what he was told by Parán Community members; on cross-examination, he confirmed that he remained in communication with the Parán Community. He did not have a corresponding level of communication with the Claimant. When asked if he had ever spoken directly with Mr. Bravo to learn his understanding of the 26 February 2019 Agreement, Mr. León testified that he had not. 813
- 499. Although Mr. León's witness statements and testimony in this arbitration extolled the principle of dialogue, as the blockade dragged on in February and March 2019, he apparently came to doubt the continued utility of that principle. He wrote at least two official documents questioning the value of continuing dialogue and recommending that the security forces should act to restore public order. The first document is an *aide mémoire* that Mr. León attached to a 20 February 2019 e-mail. *Inter alia*, the *aide mémoire* calls for:

"Coordination at the highest inter-sectoral level, between the MEM and the MININTER[814] in order to activate as soon as possible the mechanisms for the reestablishment 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." 815

⁸¹⁰ RWS-Trigoso 2nd, para. 48.

⁸¹¹ *Id*.

⁸¹² Tr. Day 5, 1409:21-1410:8 (Mr. León).

⁸¹³ Tr. Day 5, 1408:8-11 (Mr. León).

⁸¹⁴ Ministry of the Interior.

⁸¹⁵ C-0468, Internal MEM email with attachment, 20 February 2019 (emphasis added).

500. The document cites the negative impact of local marijuana-producing interests on the negotiations between the Claimant and the Parán Community:

"The social process that the mining company maintains with the Parán Community, is affected by [the] presence of interests outside [of] the State (producers of local marijuana plantations) the MININTER is aware of this problem and is activating the corresponding mechanisms." 816

- 501. In March 2019, after the collapse of the 26 February 2019 Agreement, Mr. León wrote in a similar vein: "the reestablishment of public order through the corresponding channels, MININTER, PNP, DGOP, should proceed."817
- 502. In cross examination at the Hearing, Mr. León attempted, with little success, to deny the clear import of what he wrote and to take back his comments about the impact of marijuana interests on the negotiating process between the Claimant and the Parán Community.
 - "Q: Mr. León, I was referring you to this paragraph, and I was asking you to confirm my understanding that the social process was affected by the marijuana business. I understand that you said yes; right?
 - A. No. It was not being affected by the situation you have just referred.
 - Q. Excuse me. But here it says that the social process of the mining company maintains with Parán is affected by the presence of interests outside the State, producers of local marijuana plantations.
 - A. This has to do with the State, and not with the mining process."818

[...]

- "Q. There is an illegal business. This entails certain interests. These are illegal, and this is preventing a good faith negotiation between the company and Parán; correct?
- A. That's not true. At no time did the company, during the dialogues of the meetings, say that these kinds of illegal activities were adversely affecting the

⁸¹⁶ **C-0468**, Internal MEM email with attachment, 20 February 2019.

⁸¹⁷ C-0353, MEM, Report No. 003-2019-MEM-OGGS/NCLH, 18 March 2019.

⁸¹⁸ Tr. Day 5, 1363:3-15 (Mr. León).

dialogue. At no time was that an obstacle for us as the government, and for the community, and the company to have a rapprochement."819

- 503. The Tribunal finds Mr. León's written words more convincing than his attempt to reinterpret them at the Hearing. It is significant that in February and March 2019, the government official closest to the situation felt that dialogue could not succeed "because community leadership manages a double discourse [...]."820
- 504. Other evidence suggests that extraneous interests indeed weighed against a mutually beneficial agreement allowing the Claimant's investment to move ahead. The Claimant contended that the Parán Community resisted coming to agreement, *inter alia*, to protect interests in large-scale marijuana cultivation from increased traffic and police scrutiny associated with an active mine. While the Respondent dismissed the argument, contemporaneous newspaper and broadcast reports indeed showed that there was a significant amount of illicit marijuana cultivation in the area of the mine and of the Parán Community. 821
- 505. The Tribunal does not suggest that all members of the Parán Community who opposed an agreement did so for inappropriate reasons or were engaged in illicit activities. However, it appears that "

"822 Individuals alleged to be involved in marijuana cultivation served on the Dialogue Committee and were in a position to impede an agreement between the Parán Community and Invicta. 823 A memorandum prepared in the Presidency of Peru's Council of Ministers following the failed December 2021 police intervention observes:

⁸¹⁹ Tr. Day 5, 1363:19-1364:6 (Mr. León).

⁸²⁰ **C-0468**, Internal MEM email with attachment, 20 February 2019.

⁸²¹ **C-0475**, "Sayán is no longer the country of the sun, it is the country of marijuana," Prensa al Día, 12 January 2016; **C-0476**, "Peruvian National Police seizes 789 marijuana plants in the Sayán District," Andina, 19 September 2017; **C-0477**, "Marijuana production follows cocaine route," Perú 21, 1 October 2017; **C-0529**, Interview with Leoncio Prado Subprefect (MININTER) (Video Transcript), 8 July 2019.

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⁸²³ *Id*.

- 506. The Tribunal does not find in Mr. León's evidence, or in the evidence of more senior officials who relied upon his reports, proof of the type of the cavalier, contemptuous behaviour by the Claimant alleged by the Respondent.
- 507. The Tribunal also questions the weight of other evidence adduced in support of the Respondent's claim. Before the Claimant acquired the Invicta project in 2012, the previous owners planned a large open-pit mine. See The Respondent's expert Dr. Vela points to a 2011 letter from an environmental group to the Minister of the Environment to show "legitimate environmental concern" and a "warning of conflict and social confrontation" at that time. However, Dr. Vela does not note that after the Claimant acquired the project, it abandoned plans for a large open-pit mine, significantly reducing the size and impact of the project to that of a much smaller underground mining operation. The MEM approved this significantly reduced project.
- 508. Contrary to the Respondent's claim that the Claimant ignored the Parán Community, the evidence shows that Invicta maintained contacts and communication with the Parán Community, 828 including developing a project aimed at greater access to water and to improving agricultural development techniques. 829 Correspondence between Invicta and the Parán Community and reports of Invicta's Community relations team show positive interactions with the Parán Community on matters ranging from donations to Christmas and Mothers' Day events, to requests to brief the Community on the scope and potential

⁸²⁵ CWS-Edwards 1st, para. 37.

⁸²⁶ RER-Vela, para. 40.

⁸²⁷ See CWS- Castañeda 1st, paras. 15-17.

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benefits of the project.830 Thus, according to the

509. The evidence indicates that by the end of 2016, Invicta and the Parán Community seemed near to an agreement which would have included multiple benefits for the Community.⁸³² However, the Community's elections in January 2017 empowered new leaders apparently less supportive of the project and more prone to confrontation. Under this new leadership, the Parán Community demanded as a precondition for any negotiations a payment of 300,000 soles for two new classrooms said to be required under an agreement concluded by Invicta's previous owners.⁸³³ While Invicta denied that this money was owed, the amount was ultimately paid. Resolution of the issue was made more difficult by a unilateral Community demand for a large additional penalty for delayed payment of the 300,000

⁸³⁰ C-0381, Letter from IMC to the Parán Community and Parán Educational Institution (Jorge Basadre School), 1 December 2014; C-0382, Letter from IMC to the Parán Community and Educational Institution of Parán (Colegio Jorge Basadre), 1 December 2014 (donations to 2014 Christmas celebration); C-0383, Letter from IMC to the Parán Community, 17 November 2014 (2014 donation of pediatric medicines); C-0390, IMC, CR Team, Report No. 10-2015/RRCC, January 2015 ("[i]n conversations with some community members from Parán, they expressed their wish to resume talks with the company and be able to reach a good agreement for our mutual benefit"); C-0384, Letter from IMC to the Parán Community, 7 May 2015 and C-0386, IMC, CR Team, Report No. 05-2015/RRCC, May 2015 (2015 food donation to Mother' Day event); C-0388, Letter from IMC to the Parán Community, 5 November 2015 (2015 request to meet with Parán leadership on matters relating to project scope); C-0387, Letter from IMC to the Parán Community, 12 March 2016 (2016 request to Brief Parán Extraordinary Community Assembly on "some matters related to mining exploitation" of the project); C-0389, Letter from IMC to the Parán Community, 30 June 2016 (2016 request to attend July 2016 Parán General Assembly to "to expose and clarify to the assembly on the conditions and benefits offered by Invicta Mining Corp SAC for the exploitation stage"); C-0422, Letter from the Parán Community to IMC, 7 October 2016 (2016 invitation from Parán Community attend event commemorating creation of the Community); C-0150, Letter from IMC to the Parán Community, 10 November 2016 (accepting invitation to attend 2016 anniversary event and offering cash donation).

⁸³² C-0111, SSS, Report on Social Intervention for Signing of an Agreement with the Parán Community, 2018 (Community Relations Contractor's report of activities reporting on progress made in moving to agreement).

soles, a demand later dropped. IMC made the initial payment of 100,000 soles in December 2017 with the remainder in January 2018. However:



- In its Post-Hearing Submission, the Respondent contends that "[i]n 2017, the Claimant ceased having direct communication with the Parán Community [...]."835 This statement is difficult to reconcile with the evidence. Indeed, the Respondent cites in support of the statement a detailed report by the Claimant's community outreach contractor listing multiple positive interactions involving Invicta and the Parán Community and its members during 2017. 836 There are multiple such reports recounting contacts and conversations with Parán Community members and leaders during 2017. describes a 2017 training program involving Parán Community members 837 and the December 2017 meeting with the Parán Governing Committee at which Invicta agreed to pay the 300,000 soles and Parán agreed to waive the claimed penalty. There was as well a formal meeting involving Parán, IMC, and OGGS officials in November 2017.
- 511. By 2018, IMC had made substantial progress in readying the mine for commercial production. As summarized by the Respondent's expert Dr. Meini:

"By 2018, Invicta had made progress in the works involved in the infrastructure and development of the Project: (i) it had completed almost the entire route for the daily transit of lorries along the road from Lacsanga, which included the installation of drainage systems that enabled the water to flow under the road; (ii) the construction of an additional entrance to the mine at sublevel 3.430, which

⁸³⁵ Resp. PH Mem., para. 88, citing Resp. Rej., para. 100; **C-0111**, SSS, Report on Social Intervention for Signing of an Agreement with the Parán Community, 2018.

⁸³⁶ **C-0111**, SSS, Report on Social Intervention for Signing of an Agreement with the Parán Community, 2018 ("Systematized Report on Social Intervention of the Signing of an Agreement with the Rural Community of Parán").

⁸³⁷ 838

⁸³⁹ **C-0183**, Summary of the meeting between IMC and the Parán Community, 7 November 2018.

provided Invicta with easier access to the mine; and (iii) the infrastructure works at all sublevels of the mine and a ventilation system at all levels of the mine.

"In 2018 Invicta had also obtained finance to commence the operation of the Project and had ensured the purchase of a suitable processing plant less than 100 kilometers away."840

512. At this point, according to the



- 513. At the Hearing, Counsel for the Respondent cross-examined this witness at length over two days and the Respondent's Post-Hearing Submission attacked his credibility. 842 However, the Tribunal found the witness and his oral and written testimony to be credible and persuasive. The Tribunal notes that key portions of his testimony which the Respondent seeks to impugn are corroborated by other evidence, including police reports. 843
- 514. The record shows that over the course of 2018 and 2019, the Parán Community and its key leaders presented escalating demands for payments and other benefits to the Community, 844 for a share in the mine's revenues, and ultimately for the mine itself. These mounting demands led Mr. Bravo, the Claimant's General Manager in Peru, to opine in 2019 that "it was impossible to negotiate with the Parán Community." 845

⁸⁴⁰ RER-Meini, paras. 26-27.

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⁸⁴² Resp. PH Mem., paras. 168-170.

⁸⁴³ For example, **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, 22 February 2020 (Police Report 07-2020, 22 February 2020, para. 1, confirms the witness's account of the 19 June 2018 occupation of the mine camp, describing how a group of 250-300 Community members led by named Parán Community leaders entered the camp without authorization and "violently entered the facilities of the camp attacking the workers [...]"); **C-0160**, Sayán Police Inspection Report, Project Site, 20 June 2018 (police report describing theft and damage of property observed by a police Major and others at the mine camp the day after the June 2018 invasion).

⁸⁴⁴ C-0120, Letter from the Parán Community to IMC, 3 January 2018.

⁸⁴⁵ CWS-Bravo 1st, para. 22.

515. *Inter alia*, the Parán Community's leaders contended that the mine was on the Parán Community's land, a claim for which they offered no documentary support. The Parán Community demanded that IMC terminate its agreements with the Lacsanga and Santo Domingo Communities, and:



516. The Parán Community apparently pursued inconsistent tracks with respect to its neighbouring Rural Communities. While it demanded that other communities not receive any benefits from the project, in May 2018, Parán's lawyers reportedly sought to convince the Santo Domingo Community to demand 4 million soles more from IMC, roughly US\$1.3 million, for the use of the Santo Domingo land, and to divide that money equally.



- 517. Ultimately, the Parán Community demanded that IMC abandon the project entirely. A 4 May 2018 official notarial letter from Parán's President demanded that Invicta remove its personnel and equipment from the mine site "within FIFTEEN (15) calendar days; otherwise, in accordance with the prerogatives of the Political Constitution of the State and the General Law on Rural Communities, which recognizes us as autonomous democratic institutions, WE WILL PROCEED TO EVICT YOU."848
- 518. The threat conveyed in the Parán Community's 4 May 2018 letter was soon followed by action. On 19 June 2018, the Community's President, Mr. Palomares, and other Parán Community officers led a large contingent of Community members, some armed, to

⁸⁴⁶ 847

⁸⁴⁸ C-0121, Notarised Letter from the Parán Community to IMC, 4 May 2018 (capitalization in original).

occupy the mine camp. The Respondent minimizes this event, deeming it a "protest," but the evidence shows that Parán Community members damaged property and detained and assaulted Invicta's personnel.⁸⁴⁹ A police report describes the event:

"On 19JUN2018, at approximately 08:00 hours, a group of 250 to 300 community members of the rural community of Parán, led by its president Isidro ROMAN PALOMARES [listing other named Community officials] being the men who entered carrying short and long-range firearms (pistols, revolvers, breech-loading shotguns and carbines); the same ones who without any authorization entered the camp of the mining company, demanding an inspection of the facilities that the company has been carrying out to see environmental issues and the mine's adit [850] of the Invicta mining project, all this happened in the presence of the workers of the company, [naming IMC personnel] during the development of the inspection carried out by the community members, they violently entered all the facilities of the camp attacking the workers, later began to elaborate their minutes proposing a series of things and in addition, they forced them to sign an agreement with them, also the community members of Parán entered the various areas that are restricted and the installations of the mine's adit, they even tried to enter the powder magazine where explosive material was stored for mining work, But they did not achieve their goal by failing to break the Security locks."851

- 519. During their June 2018 occupation, Parán Community officials reportedly told IMC staff that "they would only resume talks if IMC stopped its mining activities. They further demanded 10% of IMC's profits from the Project" as part of any agreement. 852
- 520. The aggressive tactics of the Parán Community and its leaders escalated over the course of 2018 and 2019. The October 2018 blockade ended the Claimant's ability to develop and eventually to profit from its investment. Then, in December 2018, Parán Community members prevented a criminal prosecutor and an accompanying police contingent from inspecting the camp and its explosives magazine. According to a police report:

"[A] group of fifty (50) people approx. apparently community members of the rural community of Parán met in an aggressive attitude; some cover[ing] their faces

⁸⁴⁹ C-0158, Minutes Detailing the June 2018 Invasion, 19 June 2018; C-0129, SSS, Special Report, Seizure of the Invicta Mine Camp and Facilities, 19 June 2018; C-0458, Sayán Police, Report No. 002-2019-REGPOL.LIMA/DIVPOL-H-CS.SEC, 4 January 2019, p. 1.

⁸⁵⁰ The Tribunal understands that, according to Wikipedia, an adit is "a horizontal or nearly horizontal passage to an underground mine."

⁸⁵¹ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 1.

[;] CWS-Castañeda 1st, para. 70.

with their own clothes, which prevented traffic to the mine, blocking the road with stones [...]."853

- 521. In February 2019, police and officials were finally allowed access to the explosives magazine, which they found had been broken into. They found boxes of explosives, detonators and fuses that had been opened and some that had been emptied.⁸⁵⁴
- 522. As these events unfolded, the Parán Community's leaders escalated their demands. In a January 2019 meeting among Parán Community officials, officials of MEM's social relations department, and Invicta's General Manager in Peru, Mr. Bravo, the Parán Community officials "demanded that IMC make payments to the community before any negotiations could take place. They also threatened to exploit the mine themselves." 855
- 523. After the Parán Community instituted its blockade in October 2018, government officials sought to encourage the Community and IMC to begin dialogue to seek a solution. Following multiple meetings and consultations, Parán Community members and officials eventually met with Mr. Bravo of IMC on 26 February 2019. At that meeting, the Parties ultimately reached an agreement intended to end the stalemated situation. The Respondent's witnesses celebrated this agreement as a vindication of Peru's dialogue policy, but the agreement quickly collapsed due to differences over two provisions.
- 524. The first disputed provision stated:

⁸⁵³ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 10.

⁸⁵⁴ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 14.

⁸⁵⁵ CWS-Bravo 1st, para. 28.

⁸⁵⁶ C**-0200**, Minutes of the Meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement.

⁸⁵⁷ At the Hearing, Mr. León was asked by the Tribunal if he regarded the 26 February 2019 Agreement as "a significant accomplishment." He replied "That's correct. Yes sir." Tr. Day 5, 1410:9-14 (Mr. León).

"The 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; such survey will take place on 20 March 2019."858

525. Mr. Bravo testified that the purpose of this provision was to identify the specific areas which the Parán Community claimed had been harmed by Invicta's activities. He recounted that in the 26 February 2019 negotiations:

"Parán's representatives were adamant that there was environmental damage to their land, but never produced any evidence of such damage. The vast majority of the discussions were devoted to this. In the end, we agreed to their suggestion that a topographic survey be carried out to verify the location of any environmental or other damage." 859

- 526. Things quickly fell apart following a 15 March 2019 meeting convened to discuss arrangements for the 20 March 2019 survey. The Parán Community's President reportedly told Invicta's representative that "Parán's Governing Committee had already hired a topographer and instructed him to conduct a road construction study to upgrade Parán's road. In addition, all related costs had to be borne by IMC."860 In this meeting, a subsequent telephone conversation between Mr. Bravo and the Parán Community's President and a further letter, IMC objected to the Parán Community's effort to change unilaterally the purpose and scope of the agreed survey.861
- 527. The Tribunal does not agree that the 26 February 2019 Agreement language provided for a road survey, an interpretation claimed by the Parán Community, endorsed and disseminated by Mr. León, and embraced and contended by the Respondent.⁸⁶² In the Tribunal's view, the language of the 26 February 2019 Agreement providing for a one-day survey for a modest charge of about US\$9000 cannot plausibly be interpreted as requiring a survey to identify needed improvements to the Parán Community's multi-kilometre-long

⁸⁵⁸ C-0200, Minutes of the Meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement, Agreements, para. 4.

⁸⁵⁹ CWS-Bravo 2nd, para. 85.

 $^{^{860}}$ CWS-Bravo 1^{st} , paras. 58-59.

⁸⁶¹ CWS-Bravo 1st, paras. 60-61; **C-0205**, Letter from IMC to the Parán Community, 18 March 2019.

⁸⁶² See Resp. PH Mem., paras. 94, 178 ("[T]he topographic survey was intended to evaluate the Parán access road for potential improvements, not to judge whether there was environmental damage to Parán territory.").

mountain road, as the Respondent would have it. In this regard, Mr. Bravo confirmed that the main issue between the parties was the purpose or subject of the survey. He testified: "[w]e never talked about the road. A survey for a road probably costs \$200- or \$500,000. It's not what we are talking about. We're talking about the scope of the agreement."863 The Tribunal's reading of the document is apparently shared by Peru's own expert, Ms. Dufour, whose report characterized the agreed survey as intended to "identify and locate the surface lands affected by IMC's activities."864

- 528. The Respondent's Post-Hearing Submission attacks Mr. Bravo's credibility and indeed suggests that he testified falsely because he understood that "the topographic survey was intended to evaluate the Parán access road for potential improvements, not to judge whether there was environmental damage." The footnote supporting this attack on the witness cites Exhibits C-199, C-200 and C-354. The Tribunal finds that these exhibits support the Claimant's position; they do not support the Respondent's attack impugning a witness who in the Tribunal's assessment was credible and well informed. 866
- 529. There were no government officials present at the 15 March 2019 meeting, and Mr. León acknowledged at the Hearing that he had not spoken with Mr. Bravo concerning his understanding of what the language of the agreement was intended to mean. However, the version of events conveyed to Lima by Mr. León, which apparently defined senior officials' understanding of events, was not that Invicta objected to the Parán Community's unilateral redefinition of the purpose of the survey. IMC was instead denounced for unreasonably refusing to pay the topographer's modest fee of 35,000 soles, about

⁸⁶³ Tr. Day 4, 1049:7-13 (Mr. Bravo).

⁸⁶⁴ RER-Dufour, para. 413.

⁸⁶⁵ Resp. PH Mem., para. 178.

⁸⁶⁶ In the Tribunal's view, the draft agreement at C-0199 strongly supports Mr. Bravo's description of the limited scope of the survey. Paragraph 4 of that draft describes a proposed one-day inspection to "identify and locate any negative impacts to which the Community refers," not to design an improved mountain road. C-0199, Email from IMC to MEM with attachments, 25 February 2019. The supposed relevance of C-0200 is not clear. C-0354, a draft of a message from the Claimant's CEO, Mr. Ansley, which harshly criticizes the Parán Community's conduct, refers to an agreement that "an inspection of our damages onto Paran [sic] Lands would be performed on March 25." C-0354, Email from Lupaka to Lupaka and Laveta, 27 March 2019. This again supports Mr. Bravo's testimony.

⁸⁶⁷ Tr. Day 5, 1408:8-11 (Mr. León).

⁸⁶⁸ See RWS-Trigoso 1st, para. 43.

US\$9000. This is reflected in the witness statements of Mr. León⁸⁶⁹ and his superior Mr. Trigoso.⁸⁷⁰ According to Mr. León:

"Claimant's intransigent stance, refusing to bear the costs of the topographical survey, revealed an uncooperative attitude on the part of the company. After reaching such an important agreement as the 26 February 2019 Agreement, it was surprising that they once again broke the trust of the community for the sum of USD 9,000 [...]."871

- 530. Mr. León's claim that the dispute was about IMC's refusal to pay was reflected in Peru's Post-Hearing Submission, which characterized IMC's refusal to pay as "obstinate and petty." Of greater consequence, the Respondent also accepted the Parán Community's dubious re-characterization of the survey, criticizing the "Claimant's rejection of a meager investment to survey improvements to the [sic] Parán's access road [...]."873
- 531. A second provision in the 26 February 2019 Agreement also led to controversy and conflict. This stated:

"The parties agree that the Rural Community of Parán will suspend all coercive measures as of this date, which will be ratified by the Community Assembly on 2 March 2019. The RURAL COMMUNITY OF PARÁN guarantees the development of the activities of the mining company through the access road of the Parán Community as of the signing of this minutes, guaranteeing social peace with the company." 874

532. The Claimant understood this text to require the Parán Community to lift its blockade of the Lacsanga road and to allow use of the Parán road as an additional access route. ⁸⁷⁵ The Parán Community, however, did not lift its blockade. It instead insisted that the agreement

⁸⁶⁹ RWS-León 1st, para. 65.

⁸⁷⁰ RWS-Trigoso 1st, para. 43.

⁸⁷¹ RWS-León 2nd, para. 31.

⁸⁷² Resp. PH Mem., para. 91.

⁸⁷³ Resp. PH Mem., para. 94.

⁸⁷⁴ **C-0200**, Minutes of the Meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement, Agreements, para. 5.

⁸⁷⁵ The Police also apparently understood that the Parán Community had agreed to lift the blockade. **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 17 (the Parán Assembly accepted the agreement "in the sense of lifting the blockade they maintained […].")

obligated IMC to repudiate its agreement with the Lacsanga Community for use of the existing road on Lacsanga territory, and instead use an undeveloped road through Parán Community territory as its sole access to the mine.

- 533. The disputed provision is not a model of clarity. However, the Tribunal believes that the obligation to "suspend all coercive measures" necessarily means that the blockade would be suspended. There were no other coercive measures in effect at the time. There is no dispute that the blockade was not suspended.
- 534. At another meeting four days later, on 19 March 2019, the Parán Community's President "demanded that IMC cancel the agreements with Lacsanga and Santo Domingo [...], use the Parán road exclusively and build a processing plant in Parán."⁸⁷⁶ The Claimant's CEO, Mr. Ansley, was present and reported that the Parán Community's President:

"[...] stated that Parán[']s land ownership extends beyond where our mine is situated and into Lacsanga territory. He has no proof whatsoever of this claim, and does not care that he lacks formal proof of the claim. He firmly stated that no vehicular traffic or workers can use the existing road through Lacsanga, and insisted that all efforts going forward must be through Parán using Parán[']s people and territory. Or if not he promised we would never ever have a mine. I mentioned that these requests would no doubt violate our existing community agreements with both Lacsanga and Santa Domingo and we that we are unwilling and unable to provide this to Parán. The President said he didn't care about those communities and that he would insist on maintaining his own security along the boundary of the project, to protect it from Lacsanga."

- 535. According to another account of the 19 March 2019 meeting, the Parán contingent also sought "the payment of one hundred and seventy-five thousand soles for arrangements on the road of Parán and thirty-five thousand soles for the payment of a topographer [...]."878
- 536. The next day, Mr. Torres Palomares and a contingent of about 150 Parán Community members again occupied the mine, this time permanently seizing control. They expelled eight IMC workers who had recently been allowed to return and established a picket around

⁸⁷⁶ CWS-Bravo 2nd, para. 119.

⁸⁷⁷ C-0354, Email from Lupaka to Lupaka and Laveta, 27 March 2019, p. 2.

⁸⁷⁸ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 19; **C-0578**, PCM, *aide mémoire*, 27 May 2019.

the mine site "who settled in tents on the outskirts of the camp, which are relieved by turns." The Parán Community remained in possession of the mine throughout the Claimant's remaining period of ownership of its IMC shares and subsequently.

- An abortive attempt by security guards hired by Invicta to access the mine camp in May 2019 was met with armed force and gunfire by Parán Community members and quickly collapsed. 880 Drawing on the security company's name, the Respondent accuses the Claimant of "unleashing the War Dogs." The Respondent's recurring characterization is not convincingly borne out by the evidence, which indicates that it was the Parán Community, and not the security guards, who were "unleashed." This event resulted in gunshot wounds to two security guards and a Lacsanga Community member, and the fatal shooting of another security guard on the road the next day. 882
- 538. In cross-examination at the Hearing, the Respondent's counsel cited a short initial police report summarizing what Parán Community leaders told police, who were being barred from going to the site to make their own assessment. This short report recounts a police encounter with the Parán Community's Vice-President and the head of its Rural Patrol at a roadblock on the day of the event. The Parán officials told police that "about fifty strangers" entered the mining camp "firing shots" and "causing a confrontation." The report adds that police were not allowed to go to the scene to prepare a report, and that a man had been admitted to the Lacsanga medical post "due to an injury caused by a firearm."884

⁸⁷⁹ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 20.

⁸⁸⁰ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, paras. 23-25.

⁸⁸¹ Resp. Rej., para. 7 and Section II.B.10 (heading) at para. 162.

⁸⁸² C-0640 (corrected translation, of Spanish original at R-0113-SPA), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, paras. 23-25.

⁸⁸³ Tr. Day 4, 1065:15-1066:7 (Mr. Di Rosa).

⁸⁸⁴ **R-0262**, Intervention Act No. 5, 14 May 2019.

- 539. A second police report, dated 22 February 2020, is a much fuller account sent by the local police chief to the police general commanding the Lima Region. This second report observes, *inter alia*, that "approx. than [sic] a hundred community members of Par[á]n have gone up to the area of the mining camp carrying firearms and carrying out shots and have forced the private security guards who were in the camp, being wounded by PAF the watchman [...] also detained three minivan vehicles that had transported the guards and drivers."885
- 540. The police evidently concluded that Invicta's security personnel were the villains, not the victims, in this event. The next day, several of the guards were detained by police. Ref Parán Community members also intercepted a small group of guards fleeing on foot and robbed them of personal property, including a pistol. One guard (Mr. Vergara Jáuregui) was shot and later died. The Tribunal was not informed whether those responsible for his killing were ever identified or charged. At the Hearing, Mr. León indicated that his agency's response to the killing was apparently subdued: "we held a meeting with the representatives of the company. We wanted them to see that these kinds of attitudes didn't really help dialogue."
- 541. A classified intelligence assessment accompanying a January 2019 Police Report on the Parán Community blockade listed alternative possible future events. As the first alternative, the report accurately predicted "[t]hat villagers from the Rural Community of Parán intend to take over the installations of the Mina Invicta Mining Corp. SAC by not reaching an agreement with the mining company Invicta Mining Corp. [...]."889 This is

⁸⁸⁵ **C-0640** (corrected translation, of Spanish original at **R-0113-SPA**), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 23. The Tribunal understands "PAF" to mean "*Proyectil de arma de fuego*" (firearms projectile).

⁸⁸⁶ C-0640 (corrected translation, of Spanish original at R-0113-SPA), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 24; Resp. PH Mem., para. 97(d).

⁸⁸⁷ C-0578, PCM, *aide mémoire*, 27 May 2019, p. 2; C-0640 (corrected translation, of Spanish original at R-0113-SPA), Official Letter No. 52-2020-REGION POLICIAL LIMA/DIVPOL-HUACHO-OFIPLO, Report No. 07-2020-Lima Police Region, 22 February 2020, para. 25.

⁸⁸⁸ Tr. Day 5, 1402:19-22 (Mr. León).

⁸⁸⁹ **C-0458**, Sayán Police, Report No. 002-2019-REGPOL.LIMA/DIVPOL-H-CS.SEC, 4 January 2019, Attachment: Intelligence Appreciation No. 264-2018-9C1U-U17, Section V: Projections, para. 1.

what occurred. Since the Parán Community seized physical control of the mine in March 2019, it has itself occupied and exploited the mine, without reference to Peru's regulatory and environmental requirements or the rights of the legal owners of the concessions.⁸⁹⁰ "[I]n November 2019, the police confirmed during a site inspection that Parán was exploiting the mine. The police intercepted various trucks loaded with ore that month near the project site."⁸⁹¹ An internal MEM report from September 2021 adds 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."⁸⁹²

542. In December 2021, several hundred Parán Community members attacked and repelled a large contingent of police who had been ordered to close the mine:



543. The Respondent's witness, Mr. León, confirmed at the 2023 Hearing that illegal activity was continuing at the mine as of four months before the Hearing, the most recent information available to him.⁸⁹⁴

⁸⁹⁰ Cl. Reply, paras. 33 *et seq*; CWS-Ellis 1st, para. 49 ("[t]o this day, I understand that the Parán officials retain control of the Project. Further, I understand from my connections in the Peruvian mining sector that the Parán officials and representatives are operating the Mine and selling the minerals"); RWS-León 2nd, para. 62 (stating that Mr. León became aware of "illegal operation of the mine" in "the third quarter of 2019").

⁸⁹¹ Tr. Day 1, 101:3-7 (Mr. Gallego).

⁸⁹² C-0624, MEM, Report No. 103-2021-MINEM/OGDPC/NCLH, September 2021, p. 3.

⁸⁹⁴ Tr. Day 5, 1409:8-20 (Mr. León).

544. For the foregoing reasons, the Tribunal rejects the Respondent's first argument, that the Claimant's own conduct and failings in its dealings with the Parán Community resulted in failure to end the conflict with the Parán Community and led to loss of its investment. The actions of the Parán Community and its leaders resulting in the Parán Community's seizure and continuing occupation and exploitation of the mine, and the failure of the Respondent State to act as required by the FTA, caused the Claimant's loss of its investment, not missteps or "contemptuous" behaviour by the Claimant.

b. Analysis and Decision on the Respondent's Second, Third, Fourth and Fifth Causation Arguments

- 545. The second and third factors invoked by the Respondent in denying causation are that the Claimant's pledge of its shares unwisely left it vulnerable to foreclosure, ⁸⁹⁵ and that its failures to meet its obligations under the loan agreement led to foreclosure. ⁸⁹⁶ Thus, for the Respondent, the Claimant's distress resulted from its own decisions and actions, not any acts or omissions by the Respondent.
- As to the second alleged causal factor, the pledge of the shares, Claimant denied that its pledge of its shares left the investment on course to fail. Mr. Ellis, Lupaka's former CEO and President, urged that their financial arrangements were not a straitjacket imposing requirements that could not be met. He maintained that Pandion, their lender, had been and would remain flexible, had a financial interest in keeping the investment going and would not pull the plug. PMr. Ellis observed in this regard that "Pandion had been willing to modify the terms and timeline for its financing to accommodate the reality of the Project's progress, event for much longer periods [...]. PMR. Ellis was present in the Hearing room throughout the Hearing, but the Respondent did not call him for cross-examination on his views regarding the lender's likely behaviour. Neither did the Respondent's written materials address Mr. Ellis's view of the Claimant's relationship with its lender.

⁸⁹⁵ See Resp. C-Mem., paras. 755 et seq.; Resp. Rej., paras. 844 et seq.; Resp. PH Mem., para. 122.

⁸⁹⁶ See Resp. C-Mem., paras. 759 et seg.; Resp. Rej., paras. 848 et seg.

⁸⁹⁷ CWS-Ellis 2nd, paras. 20 et seq.; paras. 32 et seq.; para. 45.

⁸⁹⁸ CWS-Ellis 2nd, para. 41.

547. The Tribunal further finds that, as the Claimant contended, the actions by the Parán Community and Peru's failure to respond as required by the FTA, "had already annihilated the entire value of the Claimant's investment by August 2019, even before PLI Huaura's foreclosure."⁸⁹⁹ As the Claimant correctly notes:

"[R]egardless 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." ⁹⁰⁰

- 548. Therefore, the Tribunal finds that the Respondent's second ground for denying causation must fail. In the Tribunal's view, the interference with, and eventual physical seizure of, the mining operation by the Parán Community, accompanied by the Respondent's failure to take appropriate action in response, caused the loss of the investment. The Claimant's decision to pledge its shares as part of the financial underpinnings of its investment did not cause the loss of the investment. The eventual loss of the shares to foreclosure was consequential damage, not a cause.
- 549. The Respondent's third objection maintained that there were multiple events of noncompliance with the terms of the PPF Agreement that would have been sufficient ground to foreclose on the shares and caused the loss of the investment. Mr. Ellis convincingly countered this contention, observing that when Lonely Mountain lodged its Notice of Acceleration (on the day after it acquired PLI Huaura), all but six of the events of default alleged by Lonely Mountain were directly related to the blockade; the other six were reporting requirements "with which Lupaka materially complied at all times" while the final item was waived by Pandion. ⁹⁰¹
- 550. The Tribunal also recalls in this connection Mr. Ellis's testimony regarding its lender's financial incentives to remain with a promising investment. As he observed, "Pandion had

⁸⁹⁹ Cl. Reply, para. 958.

⁹⁰⁰ Id.

⁹⁰¹ CWS-Ellis 2nd, para. 52.

been willing to modify the terms and timeline for its financing to accommodate the reality of the Project's progress, even for much longer periods [...]."902

- 551. Against this background, the Tribunal does not accept that the accumulation of events cited in Lonely Mountain's Notice of Acceleration constituted an independent cause of the Claimant's loss. These events had consequences only because the Parán Community and the Respondent had already deprived the Claimant of the value of its investment. They were not of themselves a cause of the Claimant's loss.
- 552. The Respondent's fourth and fifth objections to causation rested in the Respondent's contention that, even absent the blockade barring the Claimant from developing and exploiting its mine, it could not have met its gold delivery obligations to its lender on time. Hence, in this hypothetical scenario, the Claimant would have defaulted on its loans and its lender would have foreclosed.⁹⁰³
- 553. The Parties debated at length the Claimant's contention, that the Invicta Mine faced only modest remaining regulatory requirements and absent the blockade would soon be able to begin commercial production. These were met by the Respondent's claims, buttressed by Ms. Dufour's 126-page expert report and its extensive exhibits filed with the Rejoinder. Her report identified additional regulatory and scheduling challenges, said by the Claimant not to have been previously identified. In Ms. Dufour's view, these would have delayed commercial production until at least December 2019 or even July 2020,904 rendering the Claimant unable to meet its contractual obligation to begin gold deliveries in time to comply with the loan agreement.

⁹⁰² CWS-Ellis 2nd, para. 41.

⁹⁰³ See Resp. C-Mem., paras. 290 et seq. ("1. Claimant has failed to establish that the Invicta Mine would have been ready for exploitation before December 2018 in the absence of the Access Road Protest"), paras. 336 et seq. ("3. Claimant executed the PPF Agreement with PLI Huaura at its own risk, knowing that the financing structure for the Invicta Project was risky and potentially inadequate"), paras. 342 et seq. ("4. Claimant is responsible for failing to satisfy the terms of the PPF Agreement, leading to a foreclosure on its shares in Invicta").

⁹⁰⁴ RER-Dufour, para. 7.

- 554. At the Hearing, upon an oral application by the Claimant and the Respondent's oral response, 905 the Tribunal ruled that it would not take into account any new elements introduced in the Dufour Report that were not responsive to arguments or evidence previously adduced by the Claimant. 906 The Tribunal deferred to later consideration which materials, if any, would be excluded from consideration in light of this ruling. In its Post-Hearing Submission, the Respondent protested this decision, insisting that all of the allegedly new material in the Dufour Report was in fact a proper rebuttal of the Claimant's earlier arguments and evidence. The Respondent "reserve[d] all its rights in that respect."907
- 555. Aside from the questions concerning what was proper rebuttal material in Ms. Dufour's lengthy report and what was not, the Parties addressed at length issues going to such matters as the permits and operating capacities of regional ore processing plants, Peru's apparent requirement to remove existing environmental control measures so that they could receive environmental permits and then be rebuilt in identical form, the relevant time periods under complex financial documents, and other matters.
- 556. The Tribunal believes that a more compelling way to understand this situation is along the lines indicated in Mr. Ellis's two witness statements. In essence, Mr. Ellis maintained that the Claimant's lender was an experienced and sophisticated funder of junior mining companies. Except for the Parán Community's opposition, this looked like a sound project. The lender stood to benefit financially from staying on with the financing package. It had been flexible in the past. In the Tribunal's view, it could reasonably be expected to be so again in the hypothetical world where there had been no blockade, even in the face of a

⁹⁰⁵ Tr. Day 1, 140:1-141:11 (President Crook, Mr. Foden, Mr. Grané); Tr. Day 2, 367:13-370:9 (President Crook; Mr. Grané); Tr. Day 2, 500:5-18 (Mr. Gallego); Tr. Day 3, 670:12-678:7 and 694:1-695:11 (Mr. Foden: argument and answer to Tribunal's questions); Tr. Day 3, 678:17-693:21 (Mr. Grané: argument and answer to Tribunal's questions).

⁹⁰⁶ Tr. Day 4, 961:5-964:14 (President Crook) ("[...] A[.] Ms. Dufour's report shall remain a part of the record in this case, subject to the following: B[.] the Tribunal shall not take account of: 1, the portions of Ms. Dufour's report setting out regulatory requirements affecting the Claimant's ability to begin commercial production that were not referred to in Respondent's Counter-Memorial defined as the Additional Requirements, as well as, 2, any associated documents and evidence not previously on record related to the Additional Requirements [...]").

⁹⁰⁷ Resp. PH Mem., para. 148.

few months of unanticipated delays due to unexpected regulatory hurdles such as the additional requirements cited in Ms. Dufour's report. 908

557. In his witness statements, Mr. Ellis observed:

"Pandion had been willing to modify the terms and timeline for its financing to accommodate the reality of the Project's progress, even for much longer periods [...]."909

"[...] Pandion's 'philosophy' in the words of its founder, Joe Archibald, was to 'take a solution-oriented and partnership approach to build long term relationships with mining companies.' This meant in practice, that Pandion always demonstrated a willingness to adapt the PPF Agreement to the realities of the Project and actively collaborated with Lupaka to develop the Project towards production. Contrary to Peru's suggestion, Pandion marketed itself as 'provid[ing] flexible financing solutions to developing mining companies' and had no interest in being perceived by the junior mining sector as hard to deal with. In short, it was in Pandion's interest to be flexible so as to maximise its return through gold purchases – not to sell its loan at a steep haircut to Lonely Mountain, which it was ultimately forced to do."

"When we informed Pandion of Buenaventura's intention to resume our negotiations to acquire their Mallay mining unit, Pandion continued to support such an acquisition. Indeed, it was willing to provide up to USD 13 million to finance this acquisition, which was beyond the upper limit of USD 12 million that had initially been envisaged. To us, this was a sign of Pandion's strong confidence in our Project arising from the ongoing due diligence and scrutiny to which Pandion had subjected our Project." ⁹¹¹

558. The Tribunal finds Mr. Ellis' analysis persuasive. Invicta's funding arrangements had already been amended several times to reflect the evolution of the project. The arrangements gave Pandion a share in the mine's production in a period of rising gold prices. 912 Holding on to this for the few additional months required for production to get underway would seem to involve minor costs in relation to the potential long-term benefit

⁹⁰⁸ CWS-Ellis 2nd, paras. 20 et seq.; paras. 32 et seq.; para. 45.

⁹⁰⁹ CWS-Ellis 2nd, para. 41.

⁹¹⁰ CWS-Ellis 2nd, paras. 23-24.

⁹¹¹ CWS-Ellis 2nd, para. 34.

⁹¹² CER-Accuracy 1st, para. 3.22; Tr. Day 6, 1587:3-11 (Mr. Richards).

to Pandion. It would also be less harmful to Pandion's interests than foreclosure and a firesale of the asset.

- 559. Hence, the Tribunal rejects the Respondent's fourth line of argument, that the Claimant would not have been able to satisfy all remaining regulatory requirements in time to meet its contractual gold delivery obligations.
- 560. The Respondent cited as a fifth factor causing the Claimant's loss the Claimant's failure to secure sufficient ore processing capacity. The Tribunal also finds this argument unconvincing. The evidence shows that before the blockade was imposed in October 2018, the Claimant and its lender had agreed on the financing to purchase the large Mallay Processing Plant. According to the uncontested evidence of Mr. Ellis:

"Peru argues that there was not enough ore processing capacity available to Lupaka near the Project to allow it to start making gold repayments in December 2018 in accordance with the PPF Agreement's unamended schedule. [...] [T]his issue would not have arisen in practice because, as part of a third full amendment and restatement of the PPF Agreement, Pandion and Lupaka had already agreed in early October 2018 to defer the gold repayments by 9 months to allow time to fully set up the Mallay plant." 913

Plant when the blockade was imposed and that the Mallay Community approved the purchase transaction in March 2019. The evidence of Mr. Castañeda addresses the anticipated purchase of the plant, and cites modifications that would have significantly increased its capacity. The lender's readiness to finance purchase of the Mallay Processing Plant after substantial due diligence reinforces the Claimant's contention that the plant would have provided sufficient processing capacity. The Tribunal rejects the Respondent's fifth factor as a separate element that would have caused loss of the investment.

⁹¹³ CWS-Ellis 2nd, para. 32. The Claimant was purchasing the Mallay Processing Plant to process ore from the Invicta mine.

⁹¹⁴ CWS-Ellis 2nd, para. 38.

⁹¹⁵ CWS-Castañeda 1st, paras. 83-84, 91, 99-101.

⁹¹⁶ CWS-Ellis 2nd, para. 34.

562. The Tribunal finds that the Respondent, through its failure to provide the investment FPS and FET, and ultimately by expropriating the investment, caused the Claimant's loss. The Claimant's decisions and actions did not cause the loss of its investment.

c. Analysis on Contributory Fault

- 563. The Respondent also contended that even if the factors listed above did not break the chain of causation, the Claimant's actions and failures to act contributed to its injury, so that any recovery should therefore be reduced on account of the Claimant's contributory fault. 917
- 564. Article 39 of the ILC Articles directs that in determining reparation, "account shall be taken" of a claimant's contribution to the injury where the action or omission involved is "wilful or negligent." A rigorous standard applies in determining whether conduct is willful or negligent. The ILC Commentary explains that in making this assessment, Article 39 allows "to be taken into account only those actions or omissions [...] which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights." Further, the contribution of the victim's conduct to the injury must be material.
- 565. The Claimant contends that the only cases cited by the Respondent in support of its argument involved conduct by claimants "contrary to the laws and regulations of the host State." Thus, in *Occidental Petroleum v. Ecuador*, 922 the tribunal is said to have "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

⁹¹⁷ Resp. C-Mem., paras. 738, 743, and paras. 768-772; Resp. Rej., paras. 853-873.

⁹¹⁸ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 39.

⁹¹⁹ **CLA-0018**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 39, Commentary, para. 5.

⁹²⁰ CLA-0018, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 39, Commentary, para. 1.

⁹²¹ Cl. Reply, para. 913.

⁹²² Cl. Reply, para. 914, citing **RLA-0090**, *Occidental Petroleum Corporation and Occidental Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paras. 662-663 (breach of contract and hydrocarbons law).

hydrocarbon laws." In *MTD v. Chile*, ⁹²³ the "claimant's planned investment was contrary to the respondent State's existing zoning regulations." According to the Claimant, both of these reflect failure to abide by relevant provisions of national law. No such conduct is involved here.

566. The Tribunal does not agree that the Claimant's conduct here was willful or negligent in a sense envisioned by ILC Article 39. The decisions and actions impugned by the Respondent did not "manifest a lack of due care" by the Claimant for its property and rights. Instead, in the Tribunal's view, they reflect reasonable and lawful decisions and actions by the Claimant in connection with its investment. The claim of contributory fault is denied.

B. DAMAGES

(1) The Parties' Positions

a. The Claimant's Position

567. The Claimant contends that it is entitled to compensation for the full amount of its losses under the full reparation principle of *Chorzów Factory* and Article 812 of the FTA, which requires in cases of expropriation compensation "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place [...]."925 It further argues that "[t]he 'date of expropriation' in accordance with the FTA is [...] 26 August 2019," ("Valuation Date") which the Claimant submits is the date in which the "expropriation of the Claimant's investment was completed [...] when Lonely Mountain seized the Claimant's shares in IMC."926 According to the Claimant, the discounted cash

⁹²³ Cl. Reply, para. 914, citing **RLA-0132**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 95.

⁹²⁴ Cl. Reply, para. 914.

⁹²⁵ See Cl. Mem., paras. 321-325, citing inter alia CLA-0088, Case Concerning The Factory at Chorzów (Germany v. Poland), PCIJ Series A, No. 17, Judgement No. 13 (Merits), 13 September 1928; CLA-0001/RLA-0010, FTA, Art. 812.

⁹²⁶ Cl. Mem., para. 325.

flow ("DCF") method is "most appropriate for calculating the fair market value [("FMV")] of the Project" in this case. 927

- 568. To determine the amount of compensation due, the Claimant's valuation experts from Accuracy engaged in a "but-for" analysis, comparing the estimated value of the investment in a "but-for" world where violations of the FTA are assumed not to have occurred with the value in the actual world. The experts assessed the actual value of the investment as of the Valuation Date of 26 August 2019 to be nil. They compared this value with two assessments of the "but-for" value of the investment, each assessing the investment's FMV utilizing a DCF analysis. The two assessments are based on alternative scenarios, one in which the mine is projected to produce 355-tons-per-day and a second with projected production of 590-tons-per-day.
- 569. In their assessments, the Claimant's experts "relied upon the analyses and opinions of SRK Consulting (Canada) Inc. ('SRK'), a leading international mining consulting firm," and in particular a Preliminary Economic Assessment ("PEA") and a financial model ("SRK Model"). 931 They also utilized a model prepared by Red Cloud Klondike Strike Inc. ("Red Cloud") in connection with the Claimant's projected purchase of the Mallay Processing Plant, 932 and an additional expert report submitted by Micon International Ltd. ("Micon"), a firm of mineral industry consultants ("Micon Report"). 933 The experts adjusted the analyses in the SRK and Red Cloud reports (i) to reflect metal price projections as of the Valuation Date, (ii) to adjust working capital and discount rate assumptions used in the SRK Model and, (iii) *inter alia*, to reduce estimated metal grades and increase the discount rate in the Red Cloud valuation. 934

⁹²⁷ Cl. Mem., paras. 329-349.

⁹²⁸ Cl. Mem., paras. 326-327.

⁹²⁹ Cl. Mem., para. 327.

⁹³⁰ Cl. Mem., para. 351.

⁹³¹ CER-Accuracy 1st, paras. 1.21., 3.23-3.29.

⁹³² CER-Accuracy 1st, para. 3.42.

⁹³³ CER-Accuracy 2nd, para. 1.10(b).

⁹³⁴ CER-Accuracy 1st, paras. 2.8-2.9, 4.44-4.45.

- 570. SRK's PEA quantified the Invicta Project's resource base to be "c. 3 million tonnes of ore at an average grade of 5.78g/t, applying a 3.0g/t cut-off grade. The PEA also defined an initial mine plan, based upon six years of operations at a daily ore mining capacity of c.355 t/day," resulting in an estimated value of US\$43.4 million. The Red Cloud model projected that the acquisition of the Mallay Processing Plant would enable increased output to 590 t/day, with an estimated value for the mine plan of US\$86.3 million. 936
- 571. Beginning with the SRK and Red Cloud analyses, the Claimant's experts constructed DCF valuations for the two production scenarios. 937 They derived updated metal price projections as of the Valuation Date utilizing data from Capital IQ, "a leading global financial intelligence platform."938 While the experts could not use hindsight in calculating FMV, they note that the projected mineral prices at the Valuation Date in their assessments are in fact lower than actual prices, showing that their valuations reflect conservative estimates of revenues. 939 For the 355 t/day scenario, the experts adjusted other variables in SRK's valuation, inter alia, to increase projected costs to reflect mine closure contributions, 940 and to add an additional risk premium of 3.3% "to reflect a level of uncertainty attached to future cash flows, given that production based on the PEA Mine Plan had not yet commenced."941 In the 590 t/day scenario, the experts adjusted the Red Cloud model to reflect the lower grade ore of the project as a whole in lieu of the higher grade assumed by Red Cloud, thereby reducing projected gold production. 942 They also introduced a higher risk premium of 6.9.% to reflect uncertainty regarding the 590 t/day production schedule.⁹⁴³

⁹³⁵ CER-Accuracy 1st, para. 2.5.

⁹³⁶ CER-Accuracy 1st, para. 2.6.

⁹³⁷ CER-Accuracy 1st, paras. 4.38 et seq., 5.9 et seq.

⁹³⁸ CER-Accuracy 1st, para. 5.22 et seq.

⁹³⁹ CER-Accuracy 1st, para. 5.25.

⁹⁴⁰ CER-Accuracy 1st, paras. 5.32 to 5.34.

⁹⁴¹ CER-Accuracy 1st, para. 5.49.

⁹⁴² CER-Accuracy 1st, paras. 6.14, 6.17.

⁹⁴³ CER-Accuracy 1st, para. 6.19.

- 572. On the Claimant's instructions, the experts offset both of their estimates of damages by US\$15.9 million, the value of debts that would have been settled with PLI Huaura in the but-for situation. In their First Report, the experts therefore assess the Claimant's damages at the Valuation Date as US\$28.3 million in the 355 t/day scenario and US\$47.7 million in the 590 t/day scenario. 944
- 573. The experts test their projected valuations against other indicators, including the Claimant's market capitalization, its sunk costs and transactions relating to other gold mining projects. They conclude that their assessments are "broadly consistent" with these other benchmarks. 945
- 574. In response to AlixPartners' criticisms, the Accuracy experts observe that AlixPartners' four "fundamental flaws" essentially involve factual and merits issues that are outside their remit and expertise. 946 Accuracy maintains that AlixPartners' contention that the Claimant would likely default conflicts with the evidence and analysis of the Micon Report, and that AlixPartners' fourth flaw reflects a misunderstanding of the approach of Accuracy's First Report. 947
- 575. Accuracy' experts further note, *inter alia*, that AlixPartners do not consider the possibility that the Tribunal might find the conduct of the Parán Community to be attributable to the Respondent. As to the contention that Accuracy did not sufficiently reflect the challenges and potential costs involved in addressing the Parán Community's concerns, Accuracy notes that the PEA Mine Plan included US\$1.2 million of capital expenditure related to community infrastructure, as well as US\$3 million of community-relations costs. Accuracy also questions AlixPartners' projections of higher costs for obtaining

⁹⁴⁴ CER-Accuracy 1st, para. 2.10.

⁹⁴⁵ CER-Accuracy 1st, paras. 2.11, 8.1 et seq.; CER-Accuracy 2nd, paras. 2.13 et seq.

⁹⁴⁶ CER-Accuracy 2nd, para. 2.2.

⁹⁴⁷ CER-Accuracy 2nd, paras. 2.3-2.4.

⁹⁴⁸ Tr. Day 6, 1582:22-1583:2 (Mr. Richards).

⁹⁴⁹ Tr. Day 6, 1583:6-10 (Mr. Richards).

and maintaining an agreement with the Parán Community, 950 and denies that Accuracy failed to explain how third-party processing issues would be resolved. 951

- 576. As previously noted, Accuracy's Second Report is accompanied by the Micon Report. 952 Micon was instructed, *inter alia*, to review SRK's PEA and Red Cloud's work, to adjust the PEA production and costs schedules to reflect the actual situation as of October 2018, and to ascertain the validity of Red Cloud's assumptions in its evaluation of the 590 t/day scenario. 953
- 577. In their Second Report, Accuracy reduces parts of its damages assessment to reflect the Micon Report, arriving at revised estimates of damages before interest of US\$32.1 million for the 355 t/day scenario and US\$41.0 million for the 590 t/day scenario. 954
- 578. At the Hearing, Accuracy stated that they had made a further adjustment which reduced their assessment of damages to a range of US\$31.5 million (for the 355 t/day scenario) to US\$40.4 million (for the 590 t/day scenario). 955
- 579. In response to the Respondent's contention that any calculation of damages could not take account of production attributable to the Mallay Processing Plant as the Claimant never acquired the plant and it was not an investment covered by the FTA, the Claimant finds the argument "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." ⁹⁵⁶
- 580. In this regard, the Claimant dismisses arbitral awards cited by the Respondent. The Claimant contends that, unlike the situation here, *Gold Reserve v. Venezuela*⁹⁵⁷ involved

⁹⁵⁰ Tr. Day 6, 1583:11-15 (Mr. Richards).

⁹⁵¹ Tr. Day 6, 1585:12-19 (Mr. Richards).

⁹⁵² CER-Accuracy 2nd, para. 1.10(b).

⁹⁵³ CER-Micon, para. 2.

⁹⁵⁴ CER-Accuracy 2nd, para. 2.12, Table 2.2.

⁹⁵⁵ Tr. Day 6, 1580:8-14 (Mr. van Duijvenvoorde). See also, CD-0003, Accuracy Hearing Presentation, slide 9.

⁹⁵⁶ Cl. Reply, para. 883 (emphasis omitted).

⁹⁵⁷ CLA-0043, Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.

an expropriation claim for the value of land that the claimant never acquired. The tribunal in *Lemire v. Ukraine* 959 and other cases cited by the Respondent applied a balance of probabilities test to assess the likelihood of planned future acquisitions. Here, the Claimant contends, such a test would show that it was "highly probable, if not certain, that the Mallay transaction would have taken place in the absence of the Blockade and the Respondent's breaches."

b. The Respondent's Position

- The Respondent's experts from AlixPartners dispute Accuracy's projected valuations, contending that the investment would have no value in the but-for world. AlixPartners opine that Accuracy's work suffers from four "fundamental flaws" which closely mirror several of the Respondent's merits arguments. The alleged four "fundamental flaws" are that (i) police intervention would be unlikely to permanently resolve the conflict with the Parán Community; (ii) Accuracy failed to incorporate social license risk reflecting the continuing social conflict; (iii) the Claimant and Accuracy did not demonstrate that Lupaka could have met the terms of its loan agreement, particularly given the unavailability of a processing plant and shortcomings in Invicta's production to the Valuation Date; and (iv) Accuracy failed to address the financing risk associated with the Claimant's financial arrangements with its lender. 962
- AlixPartners contend further that Accuracy's valuations are overstated. For the 590 t/day valuation, they contend that the Claimant has not shown that a potential purchaser would provide more generous financing terms. Further, they contend that damages in the 590 t/day case are overstated by (i) removing cash flows and expenses from the Mallay Processing Plant; (ii) excluding US\$13 million in debt incurred to acquire the Mallay Processing Plant; and (iii) by failing to reflect the flaws identified by AlixPartners in the

⁹⁵⁸ Cl. Reply, paras. 1019-1020.

⁹⁵⁹ CLA-0095, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, 28 March 2011.

⁹⁶⁰ Cl. Reply, paras. 1021-1025.

⁹⁶¹ Cl. Reply, para. 1026 (emphasis omitted).

⁹⁶² RER-AlixPartners 1st, para. 16 and Section V.

risk premium. AlixPartners contend that correcting these defects would reduce the Claimant's damages claim for the 590 t/day valuation to US\$21.3 million.⁹⁶³

- The Respondent further observes that the 590 t/day valuation "is premised on Claimant's prospective acquisition of the Mallay Plant to increase its production capacity," which was never acquired; and on "future modifications to the Mallay Plant that Claimant would not be entitled to implement unless it were the owner." It submits that there is "no legal justification for claiming damages based on an investment in the Mallay Plant that Claimant never actually made," emphasising that the Mallay Processing Plant was not a "covered investment." In response to the Claimant's contention that the Mallay Processing Plant was part of its business plan, the Respondent further adds that the FTA "does not apply to Claimant's prospective acquisition of the Mallay Plant, even if it was part of Claimant's 'business plan,' and therefore all of Claimant's damages claims based on, or relating to, the Mallay Plant must be dismissed."
- 584. For the 355 t/day scenario, AlixPartners contend that the Tribunal should reject the claim altogether, as the Claimant and Accuracy have not shown that Invicta's difficulties finding a suitable processing plant could be overcome in a scenario in which it did not purchase the Mallay Processing Plant. Moreover, AlixPartners contend that Accuracy's valuation is overstated by Accuracy's treatment of cash flows related to closure costs and by its failure to consider the fundamental flaws in its risk premium. Correcting these flaws would reduce the valuation in the 355 t/day scenario to US\$23.2 million. 968
- 585. AlixPartners dismisses as irrelevant the other indicators of value cited by Accuracy as checks on its valuations, in some cases because they do not take account of the four "fundamental flaws" alleged by AlixPartners. 969

⁹⁶³ RER-AlixPartners 1st, paras. 17-19.

⁹⁶⁴ Resp. C-Mem., paras. 774-775.

⁹⁶⁵ Resp. C-Mem., para. 775. See also, Resp. C-Mem., paras. 776-780; and Resp. Rej., paras. 874-877.

⁹⁶⁶ Resp. Rej., para. 877.

⁹⁶⁷ RER-AlixPartners 1st, para. 20.

⁹⁶⁸ RER-AlixPartners 1st, paras. 21-22.

⁹⁶⁹ RER-AlixPartners 1st, para. 25.

(2) The Tribunal's Analysis and Decision

- 586. At the Hearing, the Tribunal asked the Parties' experts whether there could be a difference between any compensation due under the *Chorzów Factory* principle of full reparation and compensation under Article 812 of the FTA which requires compensation "equivalent to the fair market value of the expropriated investment" in cases of expropriation. The experts agreed in broad terms that the results might differ under the two standards, in that determining FMV under the FTA involves a hypothetical transaction between hypothetical market participants, while determining full reparation involves consideration of factors specific to the injured party. The experts had not previously addressed the implications of this difference and indicated that they could not be assessed without further calculations.
- 587. The Tribunal has determined that the Claimant's investment was directly expropriated without meeting the conditions imposed by Article 812 of the FTA, which would have required that the expropriation be carried out "for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation." It follows that the expropriation of the Claimant's investment was unlawful under the FTA.
- 588. While in principle the compensation for breach of a treaty is governed by the full reparation principle set forth in the *Chorzów Factory* case, ⁹⁷³ in the circumstances of this case, the Tribunal perceives no difference between the results of applying that principle and those of applying the formula contained in Article 812 of the FTA for the quantum of compensation in cases of lawful expropriation. Neither Party here has advanced evidence or arguments to show that compensation on the basis of full reparation would be any different from compensation on the basis of the FTA formula. The Tribunal will apply that formula, which the Tribunal understands to refer to the FMV of the investment at a time

⁹⁷⁰ Tr. Day 6, 1778:3-1779:9 (Mr. Garibaldi).

⁹⁷¹ Tr. Day 6, 1779:11-1780:17 (Mr. Richards).

⁹⁷² CLA-0001/RLA-0010, FTA, Art. 812(1).

⁹⁷³ CLA-0088, Case Concerning The Factory at Chorzów (Germany v. Poland), PCIJ Series A, No. 17, Judgment No. 13 (Merits), 13 September 1928.

prior to the expropriation, which coincides with the Valuation Date of 26 August 2019 used by both Parties' experts.

- 589. The Tribunal has also determined that the Respondent breached its obligations under the FTA to afford the Claimant's investment FPS and FET. While the measure of compensation for these breaches may conceivably be different from that for expropriation, in the present case, the Claimant does not allege or prove damages caused by those breaches in excess of those resulting from the expropriation.⁹⁷⁴ Therefore, the Tribunal considers that the compensation owed by the Respondent on the expropriation claim includes also the compensation owed for the other breaches of the FTA for which the Respondent is liable.
- 590. The Tribunal turns to AlixPartners' claimed "Four Fatal Flaws" in Accuracy's work. These alleged flaws largely involve merits issues that are resolved in this Award in ways that either eliminate the claimed flaws altogether or minimize their significance.
- The first alleged flaw is that police intervention would not have permanently resolved the Access Road Protest. 975 To the extent that this argument is meant to apply to the actual world, the Tribunal recalls that Article 53(1) of the ICSID Convention directs that "[e]ach Party shall abide by and comply with the terms of the award [...]."976 The Tribunal finds in this Award that the State of Peru is internationally responsible for actions of the Parán Community and of its members acting on behalf of the Community. Hence, if in the actual world the Claimant had remained in control of its investment notwithstanding the breaches found in this Award, the Award itself would have imposed a continuing legal obligation on the Parán Community to refrain from inflicting injury on the Claimant, including by renewing the road blockade, continuing its forced occupation of the mine, or otherwise disrupting or impeding the Claimant's operations. In the but-for world, the Respondent cannot in good faith invoke the possibility or risk of future breaches of the FTA, either by

⁹⁷⁴ See, e.g., Cl. Mem., para. 323.

⁹⁷⁵ RER-AlixPartners 1st, para. 16(a); Resp. C-Mem., para. 782.

⁹⁷⁶ ICSID Convention, Art. 53(1).

the Parán Community or the Respondent's central government as a reason for diminishing the compensation owed to the Claimant for the actual breaches committed in this case.

- 592. The second alleged fatal flaw is that Accuracy does not take into account social license risk. 977 In response, Accuracy points out that the PEA Mine Plan included US\$1.2 million of capital expenditure related to community infrastructure, as well as US\$3 million of community relations costs. 978 Further, Accuracy increased the discount rate to take account of possible uncertainty with respect to continuing social peace. 979 Particularly in a situation where the Parán Community has a continuing legal obligation to comply with the FTA and the Tribunal's Award, these amounts appear reasonable.
- 593. As to the third claimed fatal flaw that the Claimant would have defaulted on the PLI Huaura loan even absent the breaches of the FTA ⁹⁸⁰ the Tribunal recalls its earlier decision in this Award rejecting the Respondent's corresponding arguments. ⁹⁸¹ Taking account of the past relationship between Invicta and its lender, and the significant upside potential to the lender of continuing its relationship with the Claimant, ⁹⁸² the Tribunal does not agree that default was inevitable or likely in a but-for world free of the Respondent's breaches of the FTA.
- 594. The same considerations overcome AlixPartners' fourth alleged flaw, that Accuracy did not take into account the difficulties of refinancing. In the Tribunal's assessment, given the potential benefits to both sides of the relationship, the most likely future course would have involved the Claimant and PLI Huaura maintaining their financial connection.

⁹⁷⁷ RER-AlixPartners 1st, para. 16(b); Resp. C-Mem., para. 782.

⁹⁷⁸ Tr. Day 6, 1583:6-10 (Mr. Richards).

⁹⁷⁹ Cl. PH Mem., paras. 169-170.

⁹⁸⁰ RER-AlixPartners 1st, para. 16(c); Resp. C-Mem., para. 782.

⁹⁸¹ Supra, Section VII.A(2)b.

⁹⁸² The benefit formula required Lupaka to pay PLI Huaura an additional amount calculated as the product of "[...] (a) 30% of the Monthly Payable Production of such Covered Metal and (b) an amount equal to the price as determined pursuant to the Mineral Offtake Agreement for such Covered Metal for the corresponding Monthly Payable Production minus the Base Spot Price for such Covered Metal [...]." Lupaka estimated that this clause would be triggered if gold rose about US\$ 1200/oz, and at September 2019 prices, was worth approximately US\$4.6 million. RER-AlixPartners 1st, paras. 67-68.

⁹⁸³ RER-AlixPartners 1st, para. 16(d); Resp. C-Mem., para. 782.

- 595. AlixPartners also raised criticisms relating to several Accuracy's parameters involving the mining operation, including metal grades, operating costs, and capital expenses, matters on which Accuracy largely relied on the Micon Report. However, at the Hearing, AlixPartners' witness acknowledged that she was not a mining expert and could not address such matters. For example, the witness could not address the implications of AlixPartners three-year reduction of Micon's projected production under the 590 t/day scenario.
 - "Q. [...] can we agree that just cutting off the last three years is [an] inappropriate way to calculate NPV of a shorter project?
 - A. I don't -I don't know. I don't have the technical expertise to answer that question." 985
- 596. The Respondent did not offer the report of a mining expert responding to the analysis and conclusions of the Micon Report, nor did the Respondent elect to cross-examine Micon. In these circumstances, the Tribunal does not view such criticisms as convincing rebuttals to Accuracy's work.
- 597. The Tribunal questions some of AlixPartners' other proposed adjustments to Accuracy's valuations. For example, AlixPartners maintain that Accuracy's discount rate should be significantly increased to reflect increased risk because Invicta did not carry out additional studies addressing the feasibility of developing the mine. The Tribunal finds this argument unconvincing. The mine project here was well advanced. The ore body had been assessed, mine shafts had been dug, and tons of sample ore had been extracted and processed. The Tribunal does not see a convincing argument for the need for additional studies to show that these things could be done.
- 598. Similarly, AlixPartners contended that Accuracy's projections of future costs did not sufficiently reflect the costs of securing and maintaining social license from the Parán

⁹⁸⁴ Tr. Day 6, 1678:13-20; 1750:7-12 (Dr. Veit; Ms. Kunsman).

⁹⁸⁵ Tr. Day 6, 1750:7-12 (Dr. Veit, Ms. Kunsman).

⁹⁸⁶ See, e.g., **RD-0004**, AlixPartners Hearing Presentation, Slide 17.

Community. AlixPartners explained at the Hearing that they "were asked by counsel to estimate this based on the requests made by Parán, Lacsanga and Santo Domingo [...]."988 The Tribunal finds the methodology used, which lumps together all of the past requests of three dissimilar communities (one of which hosted the mine site and the access road to the mine) to predict the future costs of social license, unpersuasive. A member of the Tribunal observed in this regard "isn't it unquantifiable?" The AlixPartners expert responded: "[i]t is – based on the data that we have, yes, it's very hard. [...]"989

- 599. The remaining question concerns Accuracy's two alternative valuations the smaller valuation based on projected production of 355 t/day or the larger valuation based on projected production of 590 t/day. As to the validity of the PEA's and Red Cloud's projected production levels, the Tribunal notes that the Micon Report specifically reviewed both, concluding that "the production rates of 355 t/d and 590 t/d applied in the 2018 PEA and Red Cloud models, respectively, are therefore conservative and readily achievable." ⁹⁹⁰
- 600. The Tribunal assesses that in the but-for world, the Claimant would have been able to complete its purchase of the Mallay Processing Plant. The lender had agreed to finance the purchase. The terms for the additional financing had been negotiated and drafted, and were due to be signed when the blockade was imposed in October 2018. 991 Under the agreed new terms, the Claimant's gold deliveries were to begin nine months after completion of acquisition of the Mallay Processing Plant, which could not have occurred before the sale was approved by the Mallay Community in March 2019. This would have made the first gold delivery under the revised schedule due in January 2020. 992 The Tribunal assesses that, but for the breaches of the FTA by the Parán Community and Peru's national government's failure to respond appropriately to those breaches, the Claimant would have

⁹⁸⁷ See, e.g., **RD-0004**, AlixPartners Hearing Presentation, Slide 13; RER-AlixPartners 2nd, para. 112.

⁹⁸⁸ Tr. Day 6, 1728:8-10 (Mr. Lee). *See also*, RER-AlixPartners 2nd, para. 115 ("Counsel also asked us to use the average of the following three amounts as a baseline for an estimate of the cost to obtain and maintain the SLO: i) costs Claimant agreed to pay to the Lacsanga Community; ii) costs Claimant agreed to pay to the Santo Domingo De Apache Community; and iii) the amounts that the Parán Community requested. [...]").

⁹⁸⁹ Tr. Day 6, 1734:22-1735:3 (Mr. Garibaldi, Ms. Kunsman).

⁹⁹⁰ CER-Micon, para. 81.

⁹⁹¹ CWS-Ellis 1st, paras. 51-52.

⁹⁹² Tr. Day 6, 1586:9-17 (Mr. Richards).

completed its acquisition of the Mallay Processing Plant that would have made the 590 t/d production level realistically attainable within this time-frame.

- 601. The Tribunal does not accept the Respondent's contention that future revenues attributable to production from the Mallay Processing Plant cannot be considered in determining the Claimant's damages because the plant is not a protected investment. The Claimant makes clear that it is not claiming for the value of the ore processing plant as a separate component of the value of its lost investment. Rather, the Claimant seeks compensation for the present value of the revenues that would have been generated had it been possible to complete and operate the investment. In this connection, the Tribunal finds it highly probable that, but for the Respondent's breaches of the FTA, the Claimant would have completed its purchase of the Mallay Processing Plant. The contract terms and financing were agreed, and the Mallay Community had approved the transaction. Given this record, the Tribunal finds it correct to take into account anticipated future production involving the Mallay Processing Plant in calculating the Claimant's damages. The Respondent's claim in this regard is denied.
- 602. The Tribunal accordingly decides that the Claimant is entitled to compensation in the amount of US\$40.4 million, plus interest to the date of payment.
- 603. In its final submission, its Post-Hearing Submission, the Claimant requested an award of interest at the rate of LIBOR +4% from 26 August 2019 until 30 June 2023 and UST +5% from 1 July 2023 to the date of payment.⁹⁹⁵
- 604. According to AlixPartners, the alleged fundamental flaws in Accuracy's valuations "mean [that] the FMV of the Project could reasonably be nil as of the Valuation date. Therefore, it may be appropriate to award no pre-judgment interest." AlixPartners Second Report was non-committal as to the applicable rate should the Tribunal award interest:

⁹⁹³ Cl. Reply, para. 883.

⁹⁹⁴ CWS- Ellis 2nd, paras. 35, 38.

⁹⁹⁵ Cl. PH Mem., para. 182.

⁹⁹⁶ RER-AlixPartners 1st, para. 24.

"We recognize there is no consensus regarding the exact appropriate interest rate to calculate pre-award interest. Historically, the most commonly used variable interest rates were based on LIBOR and UST, with a premium of 2%. As LIBOR is being retired, we provide our calculation of the pre-award interest using SOFR +2% and UST+2%." 997

- 605. At the Hearing, Accuracy testified that "in our view, the rates proposed by AlixPartners are inappropriate as they result in cumulative rates below inflation."⁹⁹⁸ The Respondent's expert from AlixPartners agreed that in current conditions, their proposed rates would in fact be negative:
 - "Q. Now, you would agree with me that awarding an interest rate of LIBOR or SOFR plus 2 percent would mean that the real interest rate is negative?
 - A. Yes. We've had negative interest rates for a long time now."999
- 606. The Tribunal decides that the principal amount **US\$40.4 million** due the Claimant shall bear interest at the rate of LIBOR +4% from 26 August 2019 until 30 June 2023 and at the rate of UST+5% from 1 July 2023 to the date of payment, compounded annually. 1000

VIII. COSTS

(1) The Parties' Positions

a. The Claimant's Position

607. The Claimant urges that the Tribunal has broad discretion to decide on the allocation of costs incurred in the proceeding. Further, in making that allocation, "the most-commonly applied rule in international arbitration (including in ICSID arbitration) is that the prevailing party should be reimbursed its reasonable costs, *i.e.*, the principle that costs follow the event." 1002

⁹⁹⁷ RER-AlixPartners 2nd, para. 22.

⁹⁹⁸ Tr. Day 6, 1601:18-20 (Mr. van Duijvenvoorde).

⁹⁹⁹ Tr. Day 6, 1757:5-9 (Dr. Veit, Ms. Kunsman).

¹⁰⁰⁰ Compound interest is the customary form of interest in current investment arbitration practice.

¹⁰⁰¹ Cl. Costs Submission, para. 4.

¹⁰⁰² Cl. Costs Submission, para. 5.

608. The Claimant submitted the following Schedule of Costs (the "Claimant's Costs"):1003

Head of cost	Amount (USD)
Legal representation and	,
assistance	
LALIVE	
Legal fees (based on hourly rates)	2,402,374.12
Translation expenses	81,135.15
Accommodation	33,221.27
Photocopying, printing, scanning	15,863.92
Travel	15,724.14
IT (Luminance and USB keys)	12,874.15
Postage/courier	1,111.26
Other expenses	780.93
Boies Schiller Flexner	
Legal fees (based on hourly rates)	155,266.40
Travel expenses	8,905.06
Other expenses	28.49

Local legal counsel ²		
Miranda & Amado	43,164.30	
Lupaka Gold Corp.		
Darryl Jones ³	30,000	
Subtotal		2,800,449.19
Witnesses		
Time costs (Gordon Ellis) ⁴	50,000	
Time costs (Luis Felipe Bravo) ⁵	37,995	
Time costs (Eric Edwards - payable		
from the proceeds of the Award) ⁶	26,675	
Time costs (Julio Castañeda) ⁷	20,425.50	
Time costs	2,800	

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¹⁰⁰³ Cl. Costs Submission, para. 3. Therefore, the Claimant's Costs excluding the lodging fee and advances on costs to ICSID amount to **US\$ 3,579,278.05** (which is the result of adding the subtotals for Legal Representation (US\$ 2,800,449.19), Witnesses (US\$ 153,783.40) and Experts (US\$ 625,045.46). The Tribunal further notes that, after the Claimant's Schedule of Costs dated 17 October 2023, the Claimant paid an additional (third) advance on costs for US\$ 250,000.00 to cover the costs of the proceeding (*see* ICSID Letter, 6 November 2023 and ICSID Email, 4 December 2023), for a total of US\$ 700,000.00 in advances on costs.

Travel, accommodation and meals of		
Messrs Ellis, Bravo, Castañeda and		
	15,887.90	
Subtotal		153,783.40
Subtotal		100,700.40
_		
Experts		
Christophor Insula (Missa)	65 DAE 16	
Christopher Jacobs (Micon)	65,045.46	
Erik van Duijvenvoorde and		
Edmond Richards (Accuracy)	560,000	
Subtotal		625,045.46
Tribunal and ICSID		
Tribunar and Testib		
Filing fee (October 2020)	25,000	
First advance payment (March		
2021)	200,000	
	200,000	
Second advance payment (February		
2023)	250,000	
Subtotal		475,000
Total		4,054,278.05
10411		1,007,270,00

609. The Claimant submitted that its total claim of **US\$4,054,278.05** for costs and expenses was reasonable in relation to the nature of the case and larger amounts frequently awarded in other cases. 1004

610. Accordingly, the Claimant requests:

"[...] that the Tribunal apply the costs follow the event approach, which would entitle the Claimant to reimbursement of all its costs incurred during these proceedings, as above. Doing so would be consistent with the full reparation principle, which requires awarding the Claimant a sum which would 'wipe out all the consequences of the [Respondent's] illegal act and re-establish the situation which would, in all probability, have existed if that act [by the Respondent] had not been committed." 1005

b. The Respondent's Position

611. The Respondent advocates a multi-factor assessment in allocating costs, involving "a fact-specific analysis that takes into account the individual circumstances of the case at hand, in addition to the ultimate relative success of the parties." ¹⁰⁰⁶ The Respondent contends in

¹⁰⁰⁴ Cl. Costs Submission, para. 6.

¹⁰⁰⁵ Cl. Costs Submission, para. 7.

¹⁰⁰⁶ Resp. Costs Submission, para. 7.

this regard that previous ICSID tribunals have adopted a multi-factor approach that takes into account:

"[...] (i) the parties' respective requests for relief concerning the allocation of costs; (ii) the outcome of the parties' respective claims, defenses and applications; (iii) the complexity or novelty of the issues raised in the arbitration proceeding; (iv) the submission of frivolous claims; (v) conduct that unnecessarily increased the expense of the proceedings; and (vi) the reasonableness of the parties' legal costs." 1007

- 612. The Respondent adds that some tribunals also have taken into account "the good faith motives of the State in adopting measures that are alleged to constitute a breach of its treaty obligations," thereby alleviating the burden on a State that acts in good faith to promote the public interest. 1008
- 613. Combining these principles, the Respondent contends that if it prevails, the "Claimant should be ordered to pay the entirety of Peru's costs and expenses." ¹⁰⁰⁹ If Peru does not prevail, the Tribunal should take account in allocating costs that "the relevant measures [...] were taken in good faith" in order to secure "a sustainable resolution" of the dispute between the Claimant and the Parán Community, and to discharge "Peru's legal obligations under international and domestic law." ¹⁰¹⁰
- 614. The Respondent concludes with a substantial list of the Claimant's conduct it contends unnecessarily increased the length and cost of the proceeding. Impugned conduct includes making excessively broad document production requests, objecting to Peru's privilege log, making late and frivolous arguments, withholding its objection to the Dufour Report until the Hearing, and an unwarranted request for confidentiality protection of a witness. Peru submits that these factors should be considered in any allocation of costs. 1011

¹⁰⁰⁷ Resp. Costs Submission, para. 8.

¹⁰⁰⁸ Resp. Costs Submission, para. 9.

¹⁰⁰⁹ Resp. Costs Submission, para. 10.

¹⁰¹⁰ Resp. Costs Submission, para. 11.

¹⁰¹¹ Resp. Costs Submission, paras. 12-13.

615. The Respondent submits the following Schedule of Costs (the "Respondent's Costs"): 1012

Table A: Summary of Peru's Costs and Expenses

Summary of Fees and Expenses	Amount (USD)
ICSID fees and expenses	450,000.00
Legal fees and expenses (Arnold & Porter, Garrigues)	2,986,502.67
Fees and expenses for damages expert (AlixPartners)	482,000.00
Fees and expenses for legal experts (Mr. Daniel Vela, Mr. Ivan F. Meini, Ms. Miyanou Dufour)	86,500.00
TOTAL COSTS	4,005,002.67

616. Accordingly, the Respondent requests that the Claimant bear all of Peru's costs and expenses in the arbitration in the amount of **US\$4,005,002.67** as of 17 October 2023, plus any additional costs and expenses that Peru may reasonably incur before the Award is rendered, all to accrue compound interest until the date of payment at a "reasonable commercial rate determined by the Tribunal."¹⁰¹³

(2) The Tribunal's Analysis and Decision

617. At the Tribunal's request, the Parties reached an agreement with regard to their submissions on costs. They agreed to file simultaneous submissions including "(i) a schedule of costs and (ii) comments on the costs incurred and the principles to be applied on this matter. The

¹⁰¹² Resp. Costs Submission, para. 4. Therefore, the Respondent's Costs excluding the advances on costs to ICSID amount to **US\$ 3,555.002.67** (which is the result of adding the subtotals for Legal Fees and Expenses (US\$ 2,986,502.67), Fees and Expenses for Damages Expert (US\$ 482,000.00) and Fees and Expenses for Legal Experts (US\$ 86,500.00). The Tribunal further notes that, after the Respondent's Schedule of Costs dated 17 October 2023, the Respondent paid an additional (third) advance on costs for US\$ 250,000.00 to cover the costs of the proceeding (*see* ICSID Letter, 6 November 2023 and ICSID Email, 20 December 2023), for a total of US\$ 700,000.00 in advances on costs.

¹⁰¹³ Resp. Costs Submission, para. 14.

comments in (ii) will not exceed 1,000 words (inclusive of footnotes)."¹⁰¹⁴ The Parties filed their respective statements as agreed.

618. Article 61(2) of the ICSID Convention provides:

"(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award." ¹⁰¹⁵

- 619. Paragraph 1.1 of the Tribunal PO1 provides that "[t]hese proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006, except to the extent provided otherwise by Section B of Chapter 8 of the [FTA] [...]." Article 841(1) of the FTA confirms that "[t]he Tribunal may also award costs in accordance with the applicable arbitration rules." 1017
- 620. ICSID Arbitration Rule 28 provides that, unless otherwise agreed by the Parties, a tribunal may decide:
 - "(a) [...] the portion which each party shall pay [...] of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
 - (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
 - (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. [...]."1018

¹⁰¹⁴ Cl. E-mail of 10 July 2023 (Ms. Negran) and Resp. Email of 10 July 2023 (Mr. Smyth). The Parties further agreed that "the Parties will retain the right to seek leave from the Tribunal to file a supplemental submission on costs, if deemed necessary. Any such further submission will be subject to the Tribunal's decision." *Id*.

¹⁰¹⁵ ICSID Convention, Art. 61(2).

¹⁰¹⁶ PO1, para. 1.1.

¹⁰¹⁷ CLA-0001/RLA-0010, FTA, Art. 841(1).

¹⁰¹⁸ 2006 ICSID Arbitration Rules, Rule 28.

- 621. ICSID Arbitration Rule 47(1)(j) then provides that the award shall contain "any decision of the Tribunal regarding the cost of the proceeding." ¹⁰¹⁹
- 622. The ICSID Convention, the FTA, and the applicable rules thus give the Tribunal broad discretion to determine whether and how the Parties' expenses and the costs of the proceeding should be allocated between them.
- 623. The Tribunal decides that in the circumstances of this case, the principle that costs follow the event should be applied. The Claimant has prevailed in the case on its claims of breach of the FTA and has proved that it is entitled to a substantial financial recovery on account of the Respondent's failure to meet its obligations under the FTA. The Tribunal assesses that the principle that costs should follow the event would most closely accomplish the objective of returning the Claimant to the position it would have occupied had Peru acted as the FTA required.
- 624. The Tribunal finds that, subject to the observation below related to the amount actually consumed of the Claimant's advances on costs to ICSID (*see infra*, paragraph 629), the amount of costs claimed by the Claimant is reasonable in the context of this vigorously contested case. ¹⁰²⁰ It closely corresponds to the costs claimed by the Respondent. It also falls below the range of costs awards made in successful claimants' favour in many other investment arbitration cases.
- 625. The Tribunal does not accept the Respondent's contention that the allocation of costs should be modified or reduced because the Respondent acted in good faith with the goal of pursuing social peace. Without entering into characterizations of the Respondent's conduct, the FTA (in accord with the generality of treaties) does not contain some sort of sliding scale of responsibility, reducing the obligation to provide restitution if a State conceives that it was doing the right thing. The obligation to provide restitution for

¹⁰¹⁹ 2006 ICSID Arbitration Rules, Rule 47(1)(j).

¹⁰²⁰ The Claimant's Costs include advance payments to ICSID which have not been consumed in their entirety, as specified below.

violation of an international legal obligation does not require bad faith or a culpable state of mind. The same applies to the allocation of costs.

- 626. The Respondent contended further that the Tribunal's allocation of costs should be reduced to take account of the Respondent's charge that various actions by the Claimant unreasonably complicated and increased the costs of the proceeding. In this respect, the Tribunal assesses that all of the matters complained of fall well within the bounds of proper professional advocacy. The Tribunal denies the Respondent's request to alter the allocation of costs. Accordingly, the Tribunal decides that the Respondent shall reimburse the Claimant for the total costs it incurred in this arbitration, which the Tribunal assesses in the manner indicated below.
- 627. The Claimant's Costs excluding the lodging fee and advances on costs to ICSID amount to US\$ 3,579,278.05. 1021
- 628. The Costs of the Proceeding, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in US\$):

	Amounts in US\$
Arbitrators' Fees and Expenses	
Prof. John R. Crook	
Fees	US\$ 403,187.50
Mr. Oscar M. Garibaldi	
Fees	US\$ 184,250.00
Expenses	US\$ 7,721.07
Dr. Gavan Griffith KC	
Fees	US\$ 205,125.00
Expenses	US\$ 36,123.15
Mr. Jonathan D. Schiller	
Fees	US\$ 9,675.00
ICSID's Administrative Fees	US\$ 230,000.00
Direct Expenses	US\$ 197,275.02
<u>Total</u>	US\$ <u>1,273,356.74</u>

. .

¹⁰²¹ Supra, para. 608 and fn. 1003.

- 629. The above Costs of the Proceeding have been paid out of the advances made by the Parties in equal parts. Accordingly, the expended portion of each Party's advances to cover the above Costs of the Proceeding amounts to US\$ 636,678.37 (for the Claimant) and US\$ 636,678.37 (for the Respondent). 1022
- 630. Accordingly, the Tribunal decides that the Respondent shall reimburse the Claimant US\$ US\$ 4,215,956.42, which is the total of adding: (i) US\$ 636,678.37 (on account of the expended portion of the Claimant's advance payments to ICSID to cover the Costs of the Proceeding) (*supra*, paragraph 629); and (ii) US\$ 3,579,278.05 (on account of the Claimant's legal fees and other expenses) (*supra*, paragraph 627).

IX. AWARD

- 631. For the reasons set forth above, the Tribunal decides as follows:
 - (i) The Centre has jurisdiction and the Tribunal competence over the Claimant's claims.
 - (ii) The conduct of Parán Community and of its members when acting on behalf of the Community is attributable to the Respondent.
 - (iii) The Respondent failed to accord the Claimant's investment full protection and security in breach of Article 805 of the FTA.

¹⁰²² The ICSID Secretariat will provide the Parties with a Final Financial Statement of the case fund. The remaining balance will be reimbursed to the Parties based on the payments that each advanced to ICSID, subject to the provisions in PO2. PO2 concerning the procedure for redactions of the Award provides that:

[&]quot;[A]s the proceeding will conclude upon dispatch of the Tribunal's Award, any costs incurred after the dispatch of the Award (e.g., arbitrator fees for time spent addressing disputed confidentiality designations) will **not** be considered part of the costs of the proceeding. To ensure the payment of any fees incurred by the members of the former Tribunal in connection with disputes over redactions of the Award, the Parties agree that ICSID will maintain the case trust fund open after the proceeding is concluded. The [...] arbitrators [...] claims will be paid from the advance payments made by the Parties. ICSID will close the case trust fund once the arbitrators have submitted their claims for fees relating to the resolution of disputes over redactions of the Award, if any." (See PO2, fn. 3) (emphasis added).

Accordingly, costs related to disputes over redactions of the Award (if any) shall be paid from the funds in the case fund held by ICSID, and as such they will be shared by the Parties in equal parts.

- (iv) The Respondent failed to accord the Claimant's investment fair and equable treatment in breach of Article 805 of the FTA.
- (v) The Respondent expropriated the Claimant's investment in violation of Article 812 of the FTA.
- (vi) The Claimant's claim for failure to accord most-favored-nation treatment is dismissed as moot.
- (vii) The Respondent shall compensate the Claimant in the amount of US\$40.4 million plus interest thereon compounded annually at the rate of LIBOR +4% from 26 August 2019 until 30 June 2023 and at the rate of UST +5% from 1 July 2023 to the date of payment.
- (viii) The Respondent shall fully compensate the Claimant for its costs and expenses in the amount of US \$4,215,956.42, with compound interest at UST + 5% from the date of this Award to the date of final payment.

	Oscar M. Garibald Arbitrator	di		Gavan Griffith KC Arbitrator
Date:			Date:	
		[SIGNED]		
	_	John R. Croo President of the T		

[27 June 2025]

Date:

	[SIGNED]			
	Oscar M. Garibal Arbitrator	di		Gavan Griffith KC Arbitrator
Date:	[27 June 2025]		Date:	
	_	John R. Cr President of the		
		Date:		

				[SIGNED]	
	Oscar M. Gariba Arbitrator	aldi		Gavan Griffith KC Arbitrator	
Date:			Date:	[30 June 2025]	
	-	John R. Cr President of the			
		Date:			