

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

ICSID CASE NO. ARB/20/46

LUPAKA GOLD CORP.

Claimant

VS.

REPUBLIC OF PERU

Respondent

CLAIMANT'S MEMORIAL

1 October 2021

LALIVE

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TABLE OF DEFINED TERMS

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

Blockade	Blockade of the road through Lacsanga leading to the Site
Buenaventura	Compañía de Minas Buenaventura S.A.A.
But-For Scenario	Lupaka's financial position but for the Respondent's breaches of the FTA
CIMVAL	Canadian Institute of Mining, Metallurgy, and Petroleum on Valuation of Mineral Properties
Concessions	The following six concessions held by the Claimant at all relevant times: Victoria Uno, Victoria Dos, Victoria Tres, Victoria Cuatro, Victoria Siete and Invicta II
CPO	Chief Police Officer
CR Team	Community relations team of IMC
DCF	Discounted Cash Flow
26 February 2019 Agreement	Agreement between IMC and Parán's representatives that Parán would lift the Blockade signed on 26 February 2019
FET standard	Fair and equitable treatment standard
FPS standard	Full protection and security standard
Framework Agreement	Agreement with Santo Domingo to promote the implementation of sustainable development projects within their community concluded on 22 October 2010
FTA	Free Trade Agreement between Canada and Peru (signed on 29 May 2008 and entered into force on 1 August 2009)

ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed on 18 March 1965
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
IMC	Invicta Mining Corporation, a Peruvian subsidiary of Lupaka
Lacsanga Community	Rural Community of Lacsanga
Lonely Mountain	Lonely Mountain Resources S.A.C.
Lupaka	Lupaka Gold Corp.
Mallay	Mallay processing plant
MEM	Ministry of Energy and Mines
MFN	Most Favoured Nation
MININTER	Ministry of Internal Affairs
NAFTA	North American Free Trade Agreement
Operational Plan	The police's plan for the eviction of Parán invaders and the securing of the Site
Pandion	Pandion Mine Finance LLC
Pangea	Pangea Peru S.A.

Parán Community	Rural Community of Parán
PCM	Presidency of the Council of Ministers (Spanish acronym for <i>Presidencia del Consejo de Ministros</i>)
PEA Mine Plan	Six-year mine plan which is contemplated in the 2018 PEA and which uses a 4.0g/t AuEq cut-off grade
Peru	The Republic of Peru
PLI	PLI Huaura Holdings LP
PPF Agreement	Pre-Paid Forward Gold Purchase Agreement entered into between Lupaka and PLI on 16 March 2017 and subsequently amended on 2 August 2017
Project	The investments made by Lupaka for the purposes of mining gold and other minerals at the Victoria Uno concession
Respondent	The Republic of Peru
Rural Communities	Rural communities of Santo Domingo, Lacsanga and Parán
Santo Domingo Community	Rural Community of Santo Domingo de Apache
September 2018 Commitment	The commitment by Parán's President on 18 September 2018 to refrain from all acts of violence, threats or harassment towards IMC personnel
Site	Base of activities and infrastructure developed by Lupaka on the Victoria Uno concession area

SRK	SRK Consulting (Canada) Inc.
t/d	tonnes per day
Valuation Date	The date of expropriation per the FTA – 26 August 2019
WDS	War Dogs Securities S.A.C.

1 INTRODUCTION

- 1 In accordance with Rule 31(a) of the ICSID Rules for Arbitration Proceedings (“**ICSID Arbitration Rules**”) and the procedural calendar appended to Procedural Order No. 1 dated 16 April 2021 (as amended), Lupaka Gold Corp. (“**Lupaka**” or the “**Claimant**”) submits this Memorial in support of its claims against the Republic of Peru (“**Peru**” or the “**Respondent**”) pursuant to the Free Trade Agreement between Canada and Peru (the “**FTA**”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”).¹
- 2 This dispute arises out of Lupaka’s project to mine gold, silver and copper in a rural area of the “pre-Cordillera” of the Andes Mountains in Peru. In October 2012, Lupaka acquired Invicta Mining Corp (“**IMC**”), which held several adjacent mining concessions spanning an area of roughly 47 square kilometres. In the ensuing years, Lupaka invested extensively in one of those concessions to develop its mining project (the “**Project**”).
- 3 Lupaka carried out testing and procured technical studies from leading industry experts. It also secured permits, approvals and the necessary surface rights in accordance with Peruvian law. The surface rights agreements were with two communities called Lacsanga and Santo Domingo de Apache (the “**Lacsanga Community**” and “**Santo Domingo Community**”, respectively).² A third community, Parán (the “**Parán Community**”), was located downhill from the Project site. All three are “rural communities”, which, under Peruvian law, means that they have a degree of autonomy compared to Peruvian municipalities and are empowered by the State to carry out certain governmental functions.³ Lupaka engaged extensively with these three communities (together, the “**Rural Communities**”). It did so to secure surface rights (in the case of

¹ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**. See also, Canada-Peru Free Trade Agreement, additional background information in Government of Canada’s official website, at **Exhibit CLA-2**.

² Witness Statement of Julio F. Castañeda, 01/10/2021, p. 9 (para. 23).

³ Rural communities are also different from indigenous communities which have a separate status under Peruvian law.

Lacsanga and Santo Domingo) and to ensure local engagement with the Project.

- 4 Lupaka managed the Project through a team of experienced professionals based in Vancouver and Peru (both in Lima and on-site), several of whom have provided detailed witness statements.⁴
- 5 By late 2018, after years of effort and USD 24.8 million of investment, Lupaka was on the cusp of the exploitation phase of the Project. In addition to securing all of the key permits, approvals and the necessary surface rights, it had obtained funding to begin exploitation. It had also built the mine infrastructure and had secured the purchase of a suitable processing plant less than 100 kilometres away. However, just as the Project was coming to fruition, the Parán Community took the Project by force, sealed off all routes of ingress and eventually began to exploit the Project for itself. When Lupaka beseeched the central Government for assistance and to restore law and order, Peru effectively shrugged.
- 6 Specifically, on 19 June 2018, Parán officials and representatives raided the Project site (the “**Site**”) in a shockingly violent fashion. IMC’s personnel endured death threats, beatings and harassment at the hands of armed Parán officials. This was not the workings of a small group of bad apples. Approximately 350-400 of Parán’s members participated in the invasion, *i.e.*, the vast majority of its population.
- 7 A few days earlier, Parán officials had wrongfully claimed that IMC was operating on Parán land and demanded that IMC personnel leave immediately. However, as IMC had already advised Parán officials on multiple occasions, the Project was not on Parán land; it was only to be on Lacsanga and Santo Domingo land. The Police confirmed this,⁵ and it can also be seen from a satellite image on a Peruvian Government website that, even today, shows clearly that the Project only existed over Lacsanga and Santo Domino territory.⁶

⁴ See *infra* para. 24.

⁵ Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 31, 37 and 47.

⁶ See *infra* para. 101.

- 8 Later that year, in October 2018, the Parán Community again invaded the Site. This time Parán representatives also set up a blockade on the only workable road to the Site, which went through Lacsanga territory and which Lupaka had upgraded at considerable cost (the “**Blockade**”). Some 100, typically armed, Parán representatives manned the Blockade.
- 9 Lupaka took all possible steps to recover access to the Site and to save its investment, to no avail. First, Lupaka’s representatives doggedly insisted that the central authorities do everything in their power to lift the Blockade. The response was, for nine months, the same. Lupaka was told that it should engage in “dialogue” with the Parán Community.
- 10 Second, Lupaka abided by the central authorities’ requests that it engage in such dialogue with the Parán Community. Lupaka’s representatives attended an endless series of meetings with Parán’s officials, even after it became clear that those officials had no desire to negotiate in good faith. The central authorities mediated many meetings between Lupaka and Parán representatives and noted early on that the Parán Community’s position was untenable, its actions illegal, and its demands unreasonable. It was abundantly clear after the meetings that followed the start of the Blockade that the Parán Community had no intention of abandoning its illegal occupation of the Project.
- 11 Third, Lupaka’s representatives continuously coordinated with the Police. They coordinated on all levels: with the Police in Sayán (some 20 kilometres away from Parán), with the hierarchically superior officers in Huacho (some 75 kilometres away), and then with the head police authorities in Lima. Lupaka’s representatives obtained a consistent message at all levels: the Police were ready to intervene as soon as the Ministry of Internal Affairs (or “**MININTER**”, the Spanish acronym for “*Ministerio del Interior*”) authorised them to do so. The Police had even prepared a 55-page operational plan to take back control of the Project, which they provided to Lupaka and which they were ready to implement in mid-February 2019. Yet the Police never received the green light from the MININTER.
- 12 Lupaka’s representatives remained optimistic that the ministerial authorities would enforce the law and bring the Parán Community to order

by expelling its members from Lacsanga's territory and removing the Blockade. Not only was the Parán Community trampling on Lupaka's rights and those of the Lacsanga Community, but it also posed a violent threat to public order. Indeed, the Parán members had stolen materials from the explosive magazine at the Project site. Parán representatives also shot a Lacsanga member that was cooperating with IMC and mounted a full-scale armed offensive when Lupaka's security contractors entered the Site in May 2019 during a brief period when the Blockade was left unmanned. The security contractors did not retaliate and ran for their lives, with two of them later having to be hospitalised.

- 13 Yet the central authorities took no action to remedy this dangerous situation and protect a foreign investor's protected investment. Lupaka's representatives wrote letter after letter demanding that its rights to access the Site be reinstated. These efforts were to no avail, and nearly three years later, the Parán Community not only continues to occupy the mine but is profiting from the exploitation of its ore by its contractors.
- 14 Ultimately, the actions of the Parán Community and the omissions of the Peruvian central authorities destroyed Lupaka's investment in Peru. After Lupaka was barred from exploiting its mine for months, it was unable to produce the ore necessary to service a debt facility agreement. In default, Lupaka's creditors foreclosed on its shares, resulting in the definitive destruction of its investment in August 2019.
- 15 As a consequence of the actions and omissions summarised above and set out in further detail below, Lupaka is bringing claims against Peru for breaches of its obligations under the FTA i) to refrain from the unlawful expropriation of Lupaka's investment; ii) to provide full protection and security to Lupaka's investment; and iii) to treat Lupaka's investment fairly and equitably.
- 16 Peru's breaches of its FTA obligations entitle Lupaka to full compensation for the loss of its investment. In accordance with the FTA and customary international law, Lupaka's loss must be determined by reference to the difference between the Project's fair market value (adjusted for liability to creditors) at the time of Peru's breaches of the FTA, but for those breaches, and the Project's actual value, which is nil. Therefore, as at the date of this

Memorial, Lupaka is entitled to the payment of **USD 47.7 million**, plus interest.

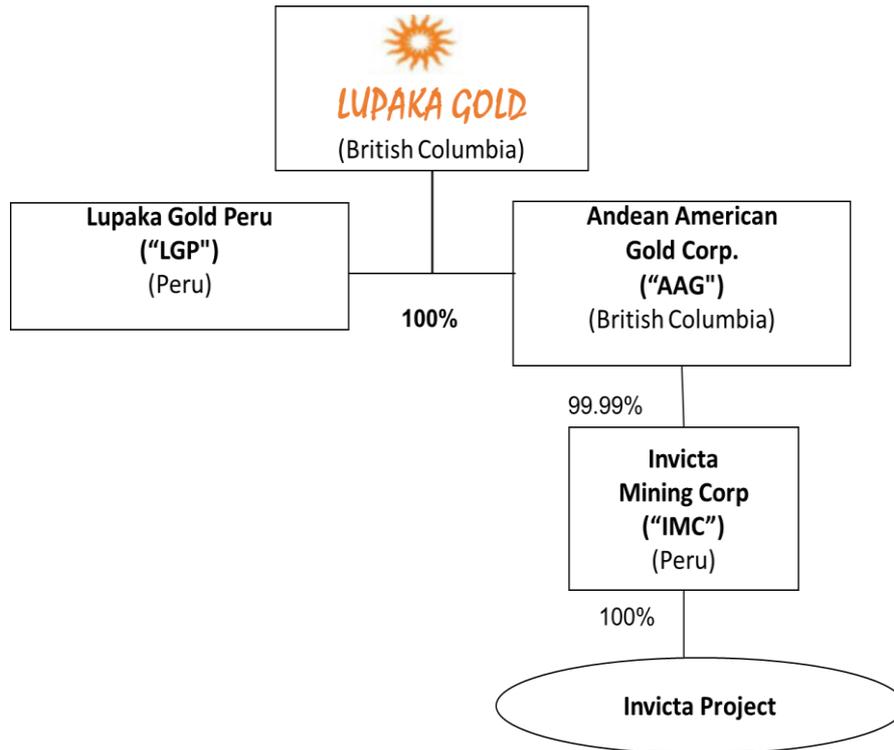
- 17 After this introduction, **Section 2** sets out the facts relevant to this dispute. As demonstrated in **Section 3**, Lupaka’s claims meet the relevant jurisdictional requirements under the FTA and the ICSID Convention. The Claimant’s claims and the compensation to which it is entitled are set out in **Sections 4 and 5**, respectively. **Section 6** contains Lupaka’s request for relief.
- 18 This Memorial is accompanied by:
- i) the witness statement of **Mr Gordon Ellis**, co-founder of Lupaka and a director since its incorporation, having held various senior roles, including as Chairman of Lupaka’s Board of Directors as well as its current Chief Executive Officer (“**CEO**”);
 - ii) the witness statement of **Mr Eric Edwards**, former CEO and President of Lupaka from 1 January 2011 to 14 October 2015, who participated in its acquisition of the Project and its initial development activities;
 - iii) the witness statement of **Mr Julio Félix Castañeda Mondragón**, former General Manager of IMC from mid-2013 until October 2018, who supervised the development of the Project, interacted with Peruvian authorities to obtain the necessary permits and was involved in the conclusion of the surface rights agreements;
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- v) the witness statement of **Mr Luis Felipe Bravo García**, former General Manager of IMC between January and August 2019, who held extensive discussions with the Peruvian authorities and Parán officials;
 - The expert report of Messrs Edmond Richards and Erik van Duijvenvoord of the consultancy Accuracy;
 - Exhibits C-28 to C-254; and
 - Legal Authorities CLA-4 to CLA-105.

2 FACTUAL BACKGROUND

- 19 As explained below, Lupaka acquired IMC and, through it, a series of mining concessions in Peru in October 2012. Prior to Lupaka's investment, various companies had explored and developed those concession areas (**Section 2.1**).
- 20 Lupaka invested extensively in those concessions and developed the Project. It conducted exploratory works and testing and obtained technical and feasibility studies, permits and approvals, and funding (**Section 2.2**).
- 21 In 2018, however, officials and representatives of the nearby Parán Community illegally invaded the Site and, later in the year, blocked the access to the Site and occupied it, entirely preventing IMC's operations. Despite IMC's many requests for assistance, the Police and other State officials failed to restore law and order at the Site as well as IMC's access (**Section 2.3**). As a result, Lupaka lost its investment in Peru (**Section 2.4**).

2.1 Background to Lupaka’s investment

- 22 On 1 October 2012, Lupaka acquired 100% of Andean American Gold Corp (“AAG”) for CAD 26.7 million. AAG owned 99.99% of the shares in IMC.⁷ Mr Gordon Ellis, Lupaka’s Chairman and current CEO, acquired 0.01% of IMC. The ownership structure was therefore as follows:



- 23 Lupaka acquired, through IMC, six mining concessions: Victoria Uno; Victoria Dos; Victoria Tres; Victoria Cuatro; Victoria Siete; and Invicta II⁸ (the “**Concessions**”).⁹
- 24 When Lupaka acquired IMC and the Concessions in 2012, many foreign mining companies were operating successfully in Peru. Lupaka’s board and management team had years of experience in the mining industry and,

⁷ Any reference in this submission to Lupaka’s acts from October 2012 therefore includes the acts of IMC.

⁸ IMC had also acquired a nearby concession known as “Invicta I” but it was not directly adjacent to the Victoria Uno concession.

⁹ See registry documents and records for the concessions at **Exhibits C-28, C-29, C-30, C-31, C-32 and C-33**.

specifically, with Peru.¹⁰ As Mr Ellis explains in his witness statement, the Peruvian government had historically treated investment in the mining sector favourably and Peru had a long-standing body of law to support mineral rights.¹¹

- 25 Lupaka focused on developing the Victoria Uno concession, which is surrounded by the five other concessions. Even though Lupaka aimed to develop and exploit the Victoria Uno concession, the Project was commonly referred to as “the Invicta Project”, as shown in the diagram above.¹²
- 26 The Concessions span approximately 4,700 hectares and are located 120 kilometres to the northeast of Lima, in a rural area in the western Pre-Cordillera of the Andes in the Huaura Province, Department of Lima, Central Coast of Peru. They are located 3,500 metres above sea level.¹³
- 27 Between 1996 and 2001, Pangea Peru S.A. (“**Pangea**”) held all but one of the Concessions (namely the five Victoria concessions but not Invicta II). Pangea had conducted exploration work at its Concessions that demonstrated a good recovery of gold and other minerals.¹⁴ In December 2001, Minera ABX Exploraciones SA acquired Pangea and, with it, the Victoria concessions.¹⁵ On 3 December 2008, IMC acquired the Victoria

¹⁰ See Witness Statement of Gordon Ellis, 01/10/2021, p. 4 *et seq.* (paras. 7-10); Witness Statement of Eric Edwards, 01/10/2021, p. 4 (para. 8); Witness Statement of Julio F. Castañeda, 01/10/2021, p. 4 (paras. 4-5); Witness Statement of Luis F. Bravo, 01/10/2021, p. 4 (para. 7-8);

¹¹ Witness Statement of Gordon Ellis, 01/10/2021, p. 6 *et seq.* (para. 17).

¹² See *supra* para. 22.

¹³ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 7 (para. 15)

¹⁴ 2012 SRK Report, at **Exhibit C-58**, p. 17.

¹⁵ Consolidated record of Victoria Uno concession (SPA), at **Exhibit C-28**, p. 5; Consolidated record of Victoria Dos concession (SPA), at **Exhibit C-29**, p. 6; Consolidated record of Victoria Tres concession (SPA), at **Exhibit C-30**, p. 7; Consolidated record of Victoria Cuatro concession (SPA), at **Exhibit C-31**, p. 5; Consolidated record of Victoria Siete concession (SPA), at **Exhibit C-32**, p. 5.

concessions from Minera ABX Exploraciones SA.¹⁶ That same day, IMC also acquired the Invicta II concession from El Misti Gold SAC.¹⁷

- 28 Before its takeover by Lupaka in 2012, IMC had achieved several legal, logistical, and technical milestones in developing the Victoria Uno concession.¹⁸ For instance, IMC had constructed a 1.2-kilometre exploration tunnel, a camp with a capacity for 90 people, and facilities with water and electricity.¹⁹
- 29 IMC had also secured regulatory approvals. For example, the Ministry of Energy and Mines (the “MEM”) had approved an Environmental Impact Assessment for the Project on 28 December 2009 (the “2009 EIA”).²⁰ That assessment envisaged a project with a potential to extract 5,100 tonnes of ore per day (“t/d”), which would be processed on-site.²¹ Lupaka’s Project was ultimately much more straightforward, with a much-reduced environmental footprint compared to the mining plan set out in the 2009 EIA.
- 30 Another significant milestone was IMC’s conclusion of agreements with the Rural Communities.
- 31 Thus, IMC entered into an agreement (the “**2010 SD Land Use Agreement**”) to use over 200.93 hectares of land on Santo Domingo’s property.²² However, although the Santo Domingo Community had claimed to be the exclusive owner of this land, it had not formally registered its ownership title at the land registry. The agreement thus

¹⁶ Consolidated record of Victoria Uno concession (SPA), at **Exhibit C-28**, p. 6; Consolidated record of Victoria Dos concession (SPA), at **Exhibit C-29**, p. 7; Consolidated record of Victoria Tres concession (SPA), at **Exhibit C-30**, p. 8; Consolidated record of Victoria Cuatro concession (SPA), at **Exhibit C-31**, p. 6; Consolidated record of Victoria Siete concession (SPA), at **Exhibit C-32**, p. 6.

¹⁷ Consolidated record of Invicta II concession (SPA), at **Exhibit C-33**, p. 1-2.

¹⁸ 2012 SRK Report, at **Exhibit C-58**, p. 19 *et seq.* (Table 4.2.1.1).

¹⁹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 6 *et seq.* (para. 14).

²⁰ MEM Resolution approving the EIA (SPA), 28/12/2009, at **Exhibit C-7 (corrected translation)**.

²¹ See *e.g.*, 2012 SRK Report, at **Exhibit C-58**, p. ii.

²² Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**, p. 7.

specified that the Santo Domingo Community would proceed with the formal registration of the land under its name.²³ However, it did not do so. Lupaka later discovered that a part of the land belonged to the Lacsanga Community.²⁴ IMC also concluded various agreements with the Parán Community in 2008 relating to the use of a road, prevention of pollution, provision of jobs for local residents and opening a well.²⁵

- 32 Before Lupaka’s takeover, IMC had also commissioned several technical reports, the findings of which encouraged Lupaka and contributed to its decision to acquire IMC.²⁶ These reports included a feasibility study dated June 2009 and an optimised feasibility study dated 26 July 2010 (the “**2010 Optimised Feasibility Study**”), both by The Lokhorst Group.²⁷ The 2010 Optimised Feasibility Study concluded that “the recoveries of gold and silver from the copper concentrates are very high, with gold reaching 96.95% and silver 89.96%.”²⁸ It also noted that several other mineralised structures had not been tested by drilling yet and could potentially extend the Project’s life by several years if they were also found to contain precious metals.²⁹
- 33 On 6 April 2012, IMC had also obtained a Technical Report on Resources from SRK Consulting (Canada) Inc. (“**SRK**”), one of the industry’s leading independent international mining consultancy firms (the “**2012 SRK Report**”).³⁰ The 2012 SRK Report confirmed that mineral resource estimates for the Project were accurate and advised that IMC could expect

²³ *Id.*, p. 8 (Art. 5.5); Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64**, p. 4 (Art. 5.5).

²⁴ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 14 (paras. 36-37).

²⁵ Agreement between the Parán Community and IMC (SPA), 29/04/2008, at **Exhibit C-60**; Agreement between the Parán Community and IMC (SPA), 07/05/2008, at **Exhibit C-61**; Addendum to Agreement between the Parán Community and IMC signed on 29 April 2008 (SPA), 13/12/2011, at **Exhibit C-62**.

²⁶ Witness Statement of Eric Edwards, 01/10/2021, p. 5 *et seq.* (Sections 4.1.1-4.1.2).

²⁷ Lokhorst Group, Invicta Mine Feasibility Study for AAG, June 2009, at **Exhibit C-57**; 2010 Optimised Feasibility Study, at **Exhibit C-35**.

²⁸ 2010 Optimised Feasibility Study, at **Exhibit C-35**, p. 15.

²⁹ *Id.*, p. 8 *et seq.* See also, IMC, Metallurgical Assessment, UNSA Laboratory, Invicta Project dated 2011 (SPA), at **Exhibit C-223**.

³⁰ 2012 SRK Report, at **Exhibit C-58**.

overall gold and silver recoveries of 84.8% and 79.8%, respectively.³¹ These estimated recovery rates were just 6.2% and 2.2% lower, respectively, than the overall gold and silver recoveries estimated in the 2010 Optimised Feasibility Study.

2.2 Lupaka's development of the Project

- 34 Between 2012 and 2018, Lupaka invested over USD 24.8 million in the Project.³² As explained below, Lupaka's investment went towards, amongst other things, conducting geological and metallurgical studies (**Section 2.2.1**); securing funding (**Section 2.2.2**); developing relations with the Rural Communities (**Section 2.2.3**); securing permits and approvals (**Section 2.2.4**); investigating potential third-party processing plants (**Section 2.2.5**); and developing the Project's infrastructure (**Section 2.2.6**).

2.2.1 Lupaka invested in testing and independent studies of the Project

- 35 Under the 2009 EIA, IMC had a three-year window to initiate development activities at the Project (*i.e.*, until December 2012).³³ This window had almost expired when Lupaka acquired the Project on 1 October 2012. Therefore, on 17 October 2012, IMC submitted a request to the MEM for a two-year extension to initiate development activities (*i.e.*, until December 2014). The MEM granted IMC's request on 14 November 2012.³⁴
- 36 In 2014, Lupaka commissioned SRK to conduct two conceptual studies and advise Lupaka on a revised mining plan for the Project.³⁵ These

³¹ *Id.*, p. v.

³² Expert Report of Edmond Richards and Erik van Duijvenvoorde, p. 63 (para. 8.29 and Table 8.1).

³³ See MEM Report and Resolution approving an extension to initiate development activities (SPA), 14/11/2012, at **Exhibit C-8 (corrected translation)**, p. 1 (Section 2.1).

³⁴ *Id.*

³⁵ SRK, Conceptual Study Invicta Project: Preliminary Results (1,000 tpd), 22/01/2014, at **Exhibit C-67**; SRK, Conceptual Study Invicta Project: 300 tpd Option, 03/02/2014, at **Exhibit C-37**; Witness Statement of Eric Edwards, 01/10/2021, p. 13 (paras. 44-45).

studies compared two different production scenarios: one at 1,000 t/d and one at 300 t/d. Lupaka eventually decided to go with the less capital-intensive option proposed and prepared a streamlined mining plan for up to 400 t/d. IMC filed it with the MEM in December 2014, as explained below.³⁶ The two conceptual studies also confirmed that a processing plant at Site, as contemplated by IMC's previous owners, would be economically challenging.³⁷ SRK thus recommended that Lupaka identify an existing processing plant off-site.

- 37 In 2014, Lupaka also commissioned a report from Aminpro Mineral Processing Ltd. (“**Aminpro**”).³⁸ Aminpro carried out metallurgical studies on the Project's ore and confirmed global recovery rates of 94.6% for gold and 97.8% for copper.³⁹ SRK's and Aminpro's findings supported Lupaka's view that a revised strategy and mining plan could render the Project highly profitable.⁴⁰
- 38 In November 2017, Lupaka commissioned SRK to provide a Preliminary Economic Assessment (the “**PEA**”) to secure additional funding.⁴¹ The PEA would provide an economic analysis of the Project, confirm mineral resources and recommend a suitable mining plan. When it issued the PEA in 2018, SRK concluded that the geological data was sufficient to “interpret with confidence the boundaries for gold mineralisation ... and support [IMC's] mineral resource estimation.”⁴² The PEA noted likely recoveries for gold and other minerals that were generally in line with the results IMC had obtained from its sampling activities in 2011, 2013, 2014

³⁶ See *infra* para. 80.

³⁷ SRK, Conceptual Study Invicta Project: Preliminary Results (1,000 tpd), 22/01/2014, at **Exhibit C-67**, p. 42.

³⁸ Aminpro, Lupaka Gold: Invicta Project, Test on Polymetallic (Pb/Zn/Cu) Sulphide Ore Phase II, 23/10/2014, at **Exhibit C-73**.

³⁹ *Id.*, p. 5; Lupaka News Release, “Global Recoveries of 94.6% Gold and 97.8% Copper Realized in Updated Metallurgical Testing for the Invicta Gold Project”, 28/10/2014, at **Exhibit C-71**.

⁴⁰ Witness Statement of Eric Edwards, 01/10/2021, p. 16 (paras. 49-50); Witness Statement of Julio F. Castañeda, 01/10/2021, p. 6 (para. 13).

⁴¹ Between 2014 and 2017, IMC continued to carry out metallurgical test work. However, during this period, IMC was primarily focused on the negotiations with the Rural Communities and securing permits and financing.

⁴² 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. 99.

and 2015.⁴³ The PEA also confirmed that the Project complied with the MEM’s environmental management requirements and the main regulatory requirements needed for IMC to initiate production at 400 t/d.⁴⁴

- 39 Therefore, SRK concluded that the Project “demonstrated positive PEA results”⁴⁵ and that the data “strongly suggest[s] the potential for mineral resource expansion along existing mineralised structures.”⁴⁶ SRK therefore confirmed what IMC and Lupaka already knew – the Project had “considerable merit”.⁴⁷

2.2.2 Lupaka secured funding for the Project

- 40 Throughout 2015 and 2016, Lupaka searched for appropriate third-party finance options to help fund the Project’s transition from exploration to exploitation. As set out below, Lupaka obtained financing from PLI Huaura Holdings LP (“**PLI**”), a subsidiary of Pandion Mine Finance LLC (“**Pandion**”).
- 41 Pandion, to which Lupaka was introduced in 2016, specialises in providing “financing solutions to near or currently producing mining companies.”⁴⁸ Pandion was interested in investing in Lupaka and thus carried out an extensive due diligence exercise on the Project.⁴⁹
- 42 Towards the beginning of 2016, Lupaka and Pandion commenced negotiations on a finance agreement and, by mid-2016, had reached an agreement. Pandion formed PLI, a Canadian investment vehicle, for its investment into the Project. Accordingly, on 30 June 2016, Lupaka and

⁴³ 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. v *et seq.*

⁴⁴ *Id.*, p. 144 *et seq.* (Table 94).

⁴⁵ *Id.*, p. 169.

⁴⁶ *Id.*, p. 168.

⁴⁷ *Id.*, p. 169.

⁴⁸ Pandion website, “About Us” (last accessed on 23 September 2021), at **Exhibit C-224**.

⁴⁹ Witness Statement of Gordon Ellis, 01/10/2021, p. 11 (para. 32).

PLI executed a Pre-Paid Forward Gold Purchase Agreement, which was subsequently amended in 2017 and 2018 (the “**PPF Agreement**”).⁵⁰

- 43 The PPF Agreement provided Lupaka with gross proceeds of USD 7,000,000 in exchange for deliveries of gold. Lupaka received this funding in three tranches of USD 2,500,000, USD 2,000,000 and USD 2,500,000,⁵¹ on 9 August 2017, 8 November 2017 and 13 February 2018, respectively.⁵² Lupaka used these funds to progress the Project.
- 44 The terms of the PPF Agreement were reasonable and allowed Lupaka sufficient time to start producing gold before the agreement’s repayment obligations commenced. However, as a consequence of the Blockade, Lupaka and IMC were denied access to the Site. Naturally, therefore, IMC could not produce any gold, and as a result, Lupaka missed its repayment obligations under the PPF Agreement.

2.2.3 Lupaka, through IMC, sought to develop relations with the local communities

- 45 Shortly after Lupaka acquired the Project, it sought to develop positive relations with the Rural Communities and to inform them about the Project. The first step Lupaka took was to open a local office. Members of the Rural Communities could thus drop into the IMC office at their convenience to enquire about the Project.⁵³
- 46 IMC also organised and held regular meetings with the Rural Communities and issued an open invitation to all those who wished to attend. It advertised these meetings in advance at its local office and made sure that

⁵⁰ PPF Agreement, 30/06/2016, at **Exhibit C-44**; Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**; Amendment No. 2 to the Second Amended and Restated PPF Agreement, 06/02/2018, at **Exhibit C-46**.

⁵¹ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 24 *et seq.* (Section 7).

⁵² Lupaka consolidated Financial Statements for 2018 and 2017, 17/04/2019, at **Exhibit C-225**, p. 20 (11. Deferred revenue).

⁵³ Witness Statement of Eric Edwards, 01/10/2021, p. 18 (para. 64).

as many people as possible were informed that these meetings were taking place.⁵⁴

- 47 Lupaka, though IMC, invested in a qualified and experienced community relations team (“**CR Team**”), which was on-site and always present at IMC’s local office. Its mandate included:
- i) engaging with the Rural Communities regularly to explain Lupaka’s strategy for the Project;
 - ii) providing the Rural Communities with updates as the Project developed;
 - iii) gathering and relaying to Lupaka any concerns the Rural Communities had about the Project; and
 - iv) identifying any issues which could disrupt the Project.⁵⁵
- 48 Lupaka also invested significant time and effort in negotiating agreements with each of the Rural Communities, as explained below.

2.2.3.1 The Santo Domingo Community

- 49 Santo Domingo is located in the District of Leoncio Prado, part of the Huaura Province and, more broadly, the Lima Region. It has roughly 600 inhabitants, and the village is located approximately six kilometres to the east of the Site.⁵⁶
- 50 On 22 October 2010 (prior to Lupaka’s acquisition), IMC had executed three agreements with the Santo Domingo Community: i) the 2010 SD Land Use Agreement;⁵⁷ ii) an agreement not to use Santo Domingo’s

⁵⁴ *Id.*

⁵⁵ *Id.*, p. 21 (para. 66).

⁵⁶ MEM Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 14 *et seq.*

⁵⁷ See *supra* para. 31; Witness Statement of Julio F. Castañeda, 01/10/2021, p. 12 *et seq.* (para. 32); Contract for the Constitution of Mining Easement between IMC and the Santo Domingo Community (SPA), 22/10/2010, at **Exhibit C-65**; Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**.

road;⁵⁸ and iii) an agreement for IMC to promote and support sustainable development projects (the “**Framework Agreement**”).⁵⁹

- 51 The 2010 SD Land Use Agreement allowed IMC access to Santo Domingo to conduct mining operations in exchange for a payment of PEN 341,000 (approximately USD 87,000) made in two instalments.⁶⁰ IMC had paid the first tranche on the date of execution (*i.e.*, on 22 October 2010) and, from that point forward, had the right to access and develop the Project in Santo Domingo.⁶¹ Payment of the second tranche was contingent upon the Santo Domingo Community formally registering its land.⁶²
- 52 The second agreement stipulated that IMC would not use the Santo Domingo road, except in cases of force majeure.⁶³ IMC had agreed to these terms because the Santo Domingo road was much longer than the Lacsanga and Parán roads. In addition, it traversed rugged terrain and would have required significant investment to be fit for purpose.⁶⁴
- 53 The third agreement, the Framework Agreement, stated that IMC would promote and support sustainable development projects in Santo Domingo during and after mining activities.⁶⁵ IMC committed, among other things,

⁵⁸ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 13 (para. 33); Agreement between IMC and the Santo Domingo Community (SPA), 22/10/2010, at **Exhibit C-79**.

⁵⁹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 13 *et seq.* (paras. 34-35); Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64**.

⁶⁰ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 12 *et seq.* (para. 32); Contract for the Constitution of Mining Easement between IMC and the Santo Domingo Community (SPA), 22/10/2010, at **Exhibit C-65**, p. 3 (Art. 4); Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**, p. 7 (Art. 4).

⁶¹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 12 *et seq.* (para. 32); Contract for the Constitution of Mining Easement between IMC and the Santo Domingo Community (SPA), 22/10/2010, at **Exhibit C-65**, p. 4 (Art. 5.1); Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**, p. 7 (Art. 5.1).

⁶² Witness Statement of Julio F. Castañeda, 01/10/2021, p. 12 *et seq.* (para. 32); Contract for the Constitution of Mining Easement between IMC and the Santo Domingo Community (SPA), 22/10/2010, at **Exhibit C-65**, p. 3 (Arts. 4.1 and 4.2); Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**, p. 7 (Arts. 4.1 and 4.2).

⁶³ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 13 (para. 33); Agreement between IMC and the Santo Domingo Community (SPA), 22/10/2010, at **Exhibit C-79**.

⁶⁴ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 13 (para. 33).

⁶⁵ *Id.*, p. 12 *et seq.* (para. 34); Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64**, p. 1 (Art. 1.2).

to invest an annual sum of PEN 300,000 (approximately USD 73,000) into sustainable development projects, to employ 36 Santo Domingo residents⁶⁶ and to compensate the Santo Domingo Community for mining activities carried out on its land prior to 2008 (well before Lupaka acquired the Project).⁶⁷

- 54 In 2017, IMC started negotiations with the Santo Domingo Community to update the Framework Agreement by way of an addendum.⁶⁸ It proposed to pay Santo Domingo i) PEN 600,000 (approximately USD 146,000) in quarterly instalments during 2018; and ii) PEN 900,000 (approximately USD 219,000) in 2019, when the exploitation phase of the Project was estimated to begin.⁶⁹
- 55 IMC's negotiations with Santo Domingo officials on the addendum continued into 2018.⁷⁰ In the second half of 2018 though, IMC was required to shift its attention to the Parán Community. Parán's officials and representatives violently invaded the Site in June 2018, and then again later in the year, as described in detail in Section 2.3.3 below.
- 56 In early 2019, Santo Domingo officials expressed their desire to continue negotiating the addendum.⁷¹ However, ultimately, the Blockade rendered those negotiations futile.

2.2.3.2 The Lacsanga Community

- 57 Like Santo Domingo, Lacsanga is located in the Huaura Province of the Lima Region. However, Lacsanga is in the District of Paccho, which borders the District of Leoncio Prado to the south. Lacsanga has

⁶⁶ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 13 *et seq.* (para. 35); Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64**, p. 4 (Art. 5.3).

⁶⁷ Framework Agreement (SPA), 22/10/2010, at **Exhibit C-64**, p. 4 *et seq.* (Art. 7.1-7.3).

⁶⁸ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 17 *et seq.* (paras. 48-50); Draft Addendum to Framework Agreement between the Santo Domingo Community and IMC (SPA), 15/09/2017, at **Exhibit C-94**.

⁶⁹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 18 (para. 50); Letter from IMC to the Santo Domingo Community (SPA), 04/05/2018, at **Exhibit C-93**.

⁷⁰ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 17 (para. 48). See also *e.g.*, Letter from the Santo Domingo Community to IMC (SPA), 07/05/2018, at **Exhibit C-92**.

⁷¹ See *e.g.*, Internal IMC email (SPA), 25/02/2019, at **Exhibit C-227**, p. 2.

approximately 350 inhabitants, and its village is about three kilometres to the north of the Site.⁷²

- 58 After Lupaka acquired IMC, it discovered that the Lacsanga Community owned most of the land on which the Project was to be carried out and that Santo Domingo could only claim the remaining minority.⁷³ Also, IMC determined that the best way to access the Site was via Lacsanga, as the road crossed more even terrain than the road through Parán (as discussed below).⁷⁴ Therefore, in late 2014, IMC began negotiating with Lacsanga officials for the right to develop and use Lacsanga’s land and road.⁷⁵
- 59 The Lacsanga Community was broadly supportive of the Project.⁷⁶ However, IMC’s previous owners had made promises to the Lacsanga Community which they had not kept, so Lacsanga officials demanded that Lupaka pay PEN 500,000 (approximately USD 120,000) before negotiations could commence. They stated that this sum was to compensate the community for the mining activities that IMC had carried out before Lupaka’s acquisition.⁷⁷ Lupaka acceded to this request.
- 60 Therefore, on 31 March 2015, IMC entered into a “settlement agreement” with the Lacsanga Community.⁷⁸ Lupaka committed to paying PEN 500,000 plus an additional PEN 37,000 (approximately USD 9,000) in exchange for the right to develop and use Lacsanga’s road and install a water pipe across Lacsanga’s land.⁷⁹

⁷² MEM Report on ITS No. 3 (SPA), 12/11/2018, at **Exhibit C-226**, p. 14.

⁷³ Lupaka learnt that Santo Domingo could not claim title to some of the land it had represented was its own in the 2010 SD Land Use Agreement. It was the Lacsanga Community that owned most of the land identified in that agreement. Furthermore, the Lacsanga Community was the only community to have registered its land in the official land register. Witness Statement of Julio F. Castañeda, 01/10/2021, p. 14 (paras. 36-37).

⁷⁴ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 15 (para. 38); see *infra* para. 74.

⁷⁵ *Id.*, p. 14 *et seq.* (Section 5.2).

⁷⁶ *Id.*, p. 15 (para. 39).

⁷⁷ *Id.*, p. 15 (para. 41); Agreement between IMC and the Lacsanga Community (SPA), 31/03/2015, at **Exhibit C-42**, p. 1 *et seq.* (First Clause).

⁷⁸ Agreement between IMC and the Lacsanga Community (SPA), 31/03/2015, at **Exhibit C-42**.

⁷⁹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 15 (para. 42); Agreement between IMC and the Lacsanga Community (SPA), 31/03/2015, at **Exhibit C-42**, p. 2 (Second Clause).

- 61 By October 2015, IMC was ready to plan the next stage of the Project’s development.⁸⁰ It therefore approached Lacsanga officials with a proposal for a comprehensive surface rights agreement covering 710 hectares for mining and the construction of the main access road.⁸¹
- 62 Following several months of negotiations in 2016 and 2017, on 18 July 2017, IMC and Lacsanga officials concluded a new surface rights agreement (the “**2017 Lacsanga Agreement**”).⁸² This agreement granted IMC the usufruct and surface and easement rights over 292 hectares of land. It also allowed IMC to conduct mining activities, build mine infrastructure, and develop and use Lacsanga’s road for the Project.⁸³ The surface covered by the 2017 Lacsanga Agreement is shown in the following map from 2018, which also includes the mining components, as

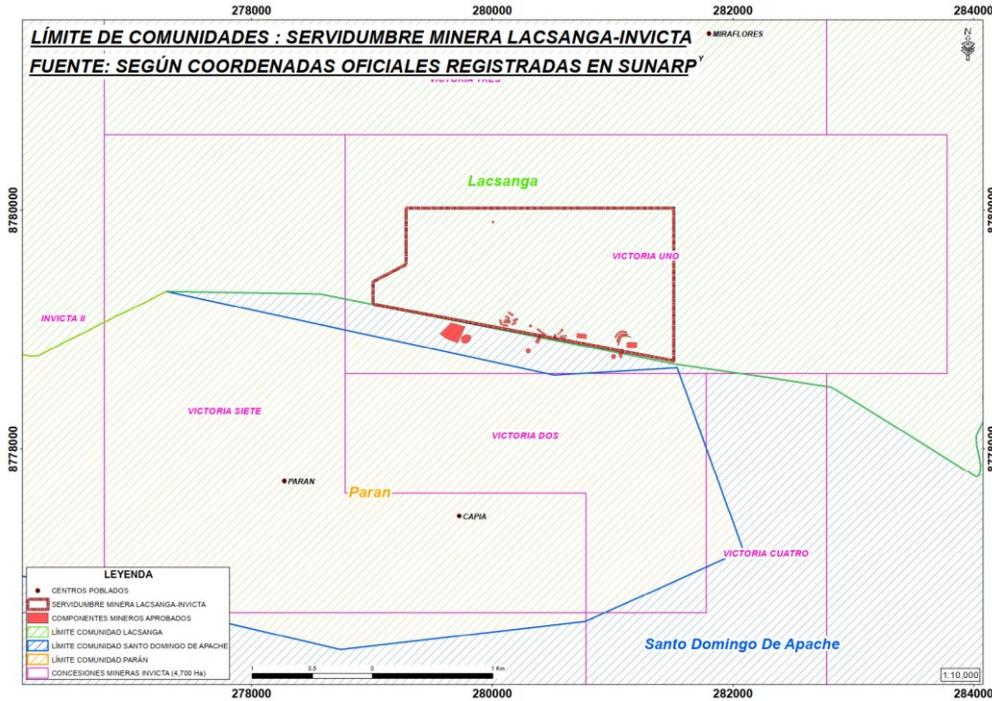
⁸⁰ IMC, Proposal to the Lacsanga Community (SPA), 19/10/2015, at **Exhibit C-88**, p. 2 (para. 3).

⁸¹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 15 *et seq.* (para. 43); IMC, Proposal to the Lacsanga Community (SPA), 19/10/2015, at **Exhibit C-88**.

⁸² Witness Statement of Julio F. Castañeda, 01/10/2021, p. 16 *et seq.* (para. 46); 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**; Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**.

⁸³ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 16 *et seq.* (para. 46); 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 2 (Clause 1.2); Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**, p. 2 *et seq.* (Clause 1.2 and Annex).

well as the boundaries of the Rural Communities taken from official sources:⁸⁴



63 In exchange, IMC agreed to the following:

- i) to avoid any harm to the agricultural area, air quality and water sources, and to indemnify the Lacsanga Community in case such damage occurred;⁸⁵
- ii) to record and monitor all water sources and prepare a mitigation plan in case of any accident;⁸⁶

⁸⁴ Community boundaries according to Peruvian public registry (“SUNARP” which is the Spanish acronym for “Superintendencia Nacional de los Registros Públicos”) including the area in 2017 Lacsanga Agreement dated 19 June 2018. Legend in descending order: red dots represent villages; the red dotted line represents the 2017 Lacsanga Agreement area; the red colour represents the approved mining components; the green striped background represents Lacsanga; the blue striped background represents Santo Domingo; the orange striped background represents Parán; the pink lines represents IMC’s Concessions.

⁸⁵ 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 7 (Clause 6.4); Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**, p. 7 (Clause 6.4).

⁸⁶ 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 6 (Clause 6.1); Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**, p. 6 (Clause 6.1).

- iii) to implement a flora and fauna protection plan which would enable Lacsanga officials to impose a fine in the event of a breach of the protection plan;⁸⁷
- iv) to grant Lacsanga members the exclusive right to provide fuel for the Project;⁸⁸
- v) to prioritise the provision of accommodation, food, laundry and transportation services for the Project by Lacsanga residents;⁸⁹
- vi) to hire no fewer Lacsanga members to work at the Project than IMC hired from the other Rural Communities;⁹⁰ and
- vii) to make various payments to and for the benefit of the Lacsanga Community, including contributions for a water pump and reservoir projects.⁹¹

64 Thus, by the end of 2017, Lupaka had secured surface rights agreements with both Santo Domingo and Lacsanga Communities, enabling it to undertake mining operations at the Project.

2.2.3.3 The Parán Community

65 The Parán Community has roughly 600 members who reside in two areas: one called “Huambo” and the other called “Parán” – which, like Santo Domingo, are both located in the District of Leoncio Prado. The first hamlet is eight kilometres to the west of the Site, while the second hamlet lies in a valley, three kilometres downhill to the south of the Site.

⁸⁷ 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 7 (Clause 6.5); Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**, p. 7 (para. 6.5).

⁸⁸ 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 9 (Clause 8.8); Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**, p. 8 (Clause 8.8).

⁸⁹ 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 9 (Clauses 8.9-8.10); Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**, p. 8 *et seq.* (Clauses 8.9-8.10).

⁹⁰ 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 9 (Clause 8.7); Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**, p. 8 (Clause 8.7).

⁹¹ 2017 Lacsanga Agreement (SPA), 18/07/2017, at **Exhibit C-43**, p. 8 (Clause 8.1); Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**, p. 7 *et seq.* (Clauses 8.1-8.6).

- 66 IMC's previous owners had entered into several agreements with the Parán Community relating to the use of its road and investments for community development.⁹² These agreements had not been performed to the Parán Community's satisfaction, which meant that the relationship with IMC was strained when Lupaka took over the Project.⁹³
- 67 Lupaka's reduced Project did not touch upon Parán territory. Accordingly, IMC was not obliged to conclude any agreements with the Parán Community as a matter of Peruvian law.⁹⁴ Nevertheless, IMC recognised the importance of good relations with all of the Rural Communities.⁹⁵ IMC was also interested in exploring whether an alternative access route to the Site through Parán territory could be secured.⁹⁶ However, negotiations with Parán officials proved difficult despite Lupaka's best efforts.⁹⁷
- 68 Between 2016 and 2018, IMC submitted proposals to Parán officials,⁹⁸ attended meetings with the Parán Governing Committee (the body responsible for the government and administration of the community),⁹⁹ participated in Parán Assemblies¹⁰⁰ and organised workshops for community members.¹⁰¹ During these various meetings, Parán officials made many demands, including the following:

⁹² Witness Statement of Julio F. Castañeda, 01/10/2021, p. 11 *et seq.* (para. 31); Agreement between the Parán Community and IMC (SPA), 29/04/2008, at **Exhibit C-60**; Agreement between the Parán Community and IMC (SPA), 07/05/2008, at **Exhibit C-61**; Addendum to Agreement between the Parán Community and IMC signed on 29 April 2008 (SPA), 13/12/2011, at **Exhibit C-62**.

⁹³ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 18 (para. 62).

⁹⁴ See *infra* para. 122.

⁹⁵ Witness Statement of Eric Edwards, 01/10/2021, p. 18 (para. 62).

⁹⁶ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 19 (para. 54).

⁹⁷ *Id.*, p. 10 (para. 30).

⁹⁸ See *e.g.*, Letter from IMC to the Parán Community (SPA), 06/10/2016, at **Exhibit C-97**.

⁹⁹ See *e.g.*, [REDACTED]

[REDACTED] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 22 (para. 61).

¹⁰⁰ See *e.g.*, [REDACTED]

[REDACTED] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 21 *et seq.* (paras. 60-61).

¹⁰¹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 19 *et seq.* (para. 56). See *e.g.*, Special Report, Field Trip in Lima with the Parán Community and IMC (SPA), 21/10/2016, at **Exhibit C-100**.

- i) that IMC pay approximately PEN 500,000 (USD 120,000) for AAG's construction of a storage facility for explosives and make various other payments resulting from AAG's activities;¹⁰²
 - ii) that IMC pay other debts allegedly contracted by its previous owners;¹⁰³
 - iii) that access to the Project be exclusively through Parán;¹⁰⁴
 - iv) that any future mining camp or extension of the current camp be located within Parán territory;¹⁰⁵ and,
 - v) that IMC hire the majority of its workforce from the Parán Community.¹⁰⁶
- 69 IMC could agree to some of these demands. However, IMC's pre-existing commitments towards the Lacsanga Community did not make it possible to agree to several of the others.¹⁰⁷ IMC eventually succeeded in coming to an agreement in principle with the Parán Community at the end of 2016. This agreement envisaged a 15% increase in IMC's annual investments (to PEN 700,000 or approximately USD 170,000). It also included constructing and managing a water reservoir and settling the alleged outstanding debt (of IMC's previous owners).¹⁰⁸

¹⁰² Witness Statement of Julio F. Castañeda, 01/10/2021, p. 20 *et seq.* (para. 58); IMC's comments to the Parán Community's counterproposal, November 2016 (SPA), at **Exhibit C-102**, p. 2 *et seq.* (Section 4).

¹⁰³ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 20 (para. 57); IMC's comments to the Parán Community's counterproposal, November 2016 (SPA), at **Exhibit C-102**, p. 2 *et seq.* (Section 4).

¹⁰⁴ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 20 *et seq.* (paras. 57-58); IMC's comments to the Parán Community's counterproposal, November 2016 (SPA), at **Exhibit C-102**, p. 2 and 4 *et seq.* (Sections 3 and 6).

¹⁰⁵ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 20 *et seq.* (paras. 57-58); IMC's comments to the Parán Community's counterproposal, November 2016 (SPA), at **Exhibit C-102**, p. 5 (Section 8).

¹⁰⁶ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 20 *et seq.* (paras. 57-58); IMC's comments to the Parán Community's counterproposal, November 2016 (SPA), at **Exhibit C-102**, p. 6 (Section 13).

¹⁰⁷ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 20 *et seq.* (para. 58).

¹⁰⁸ IMC Presentation to the Parán Community, Invicta Project (SPA), 10/12/2016, at **Exhibit C-110**, p. 6 *et seq.*

- 70 However, at a Community Assembly meeting in early 2017, Parán’s newly elected leaders¹⁰⁹ refused to execute this agreement.¹¹⁰ They insisted that Lupaka pay the PEN 300,000 (approximately USD 73,000) purportedly owed by IMC’s previous owners and that it do so within 45 days (or else pay a “fine”).¹¹¹ Lupaka paid the PEN 300,000 to move matters forward.¹¹²
- 71 Around that time, Lupaka became aware of local news reports that the Police had made marijuana seizures in the area,¹¹³ and that some of Parán’s leaders – notably, those who seemed opposed to the Project – were engaged in the illegal cultivation and trade of marijuana.¹¹⁴ IMC staff suspected that the Parán leaders’ reluctance to come to an agreement with IMC was linked to a concern that the Project might hinder its marijuana cultivation activities.¹¹⁵
- 72 This conclusion appeared consistent with the fact that Parán leaders continued to make unreasonable and baseless demands for more payments.¹¹⁶ IMC resisted these demands while at the same time trying to pursue the negotiations in good faith.

¹⁰⁹ Internal Lupaka email, 14/12/2016, at **Exhibit C-112**.

¹¹⁰ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 22 (para. 61).

¹¹¹ *Id.*, p. 21 (para. 61).

¹¹² [REDACTED] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 23 (para. 63); Confirmation of payment from IMC to the Parán Community (SPA), 18/12/2017, at **Exhibit C-116**; Confirmation of payment from IMC to the Parán Community (SPA), 31/01/2018, at **Exhibit C-117**.

¹¹³ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 21 (para. 59). See e.g., “More than 3,000 marijuana plants incinerated in the highlands of Lima”, *Andina - Agencia Peruana de Noticias* (SPA), 13/08/2014, at **Exhibit C-104**; “Nearly 10,000 marijuana plants seized in Huambo - Leoncio Prado”, *Diario Ecos Huacho* (SPA), 09/05/2017, at **Exhibit C-105**; “Nearly 10,000 marijuana plants found in Huaura”, *Peru21* (SPA), 09/05/2017, at **Exhibit C-106**; “Hard blow to drug trafficking: Sierra of Huaura Province is the drug haven of the Norte Chico”, *Agencia Digital de Noticias Huacho* (SPA), 11/04/2018, at **Exhibit C-107**; “5,000 marijuana plants valued at 1.5 million soles incinerated”, *Litoral Noticias* (Vol. 193) (SPA), 12/04/2018, at **Exhibit C-108**; “More drugs seized in Huambo”, *Litoral Noticias* (Vol. 194) (SPA), 19/04/2018, at **Exhibit C-109**.

¹¹⁴ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 21 (para. 59)

¹¹⁵ *Id.*

¹¹⁶ *Id.*, p. 21 *et seq.* (para. 63).

- 73 Tensions escalated on 4 May 2018 when Parán officials sent IMC a notarised letter wrongly claiming that IMC was conducting operations on Parán land and polluting the water supply.¹¹⁷ They also threatened to evict IMC from the Site,¹¹⁸ even though the land belonged to the Lacsanga Community, not the Parán Community.
- 74 Significantly, IMC did not need the Parán Community's agreement for the Project, not only because, as noted above,¹¹⁹ the Project was not going to be on Parán land but also *a fortiori* because, by this point in time, Lupaka had an agreement with the Lacsanga Community to use its road.¹²⁰
- 75 In the months that followed, the Parán Community became violent.¹²¹ First, the Parán Community invaded the Site on 19 June 2018 and then, on 14 October 2018, barricaded the Lacsanga road and occupied the Site (discussed in more detail at Section 2.3.3 below).

2.2.4 IMC secured key permits and approvals

- 76 According to Peruvian law and regulations, mining concession holders such as IMC must obtain the following key permits and approvals to secure an exploitation licence from the MEM:¹²²
- i) the MEM's approval of the mining plan;
 - ii) the MEM's approval of the EIA;

¹¹⁷ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 23 (para. 64); Notarised letter from the Parán Community to IMC (SPA), 04/05/2018, at **Exhibit C-121**. See also, Letter from IMC to the Parán Community (SPA), 30/05/2018, at **Exhibit C-122**.

¹¹⁸ Notarised letter from the Parán Community to IMC (SPA), 04/05/2018, at **Exhibit C-121**. See also, Letter from the Parán Community to IMC (SPA), 03/01/2018, at **Exhibit C-120**; SSS, Report on Social Intervention for signing of an agreement with the Parán Community, 2018 (SPA), at **Exhibit C-111**, p. 4.

¹¹⁹ See *supra* para. 58.

¹²⁰ Contract for the Constitution of Mining Easement between IMC and the Santo Domingo Community (SPA), 22/10/2010, at **Exhibit C-65**; Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**.

¹²¹ [REDACTED]
Witness Statement of Julio F. Castañeda, 01/10/2021, p. 23 *et seq.* (para. 65).

¹²² Supreme Decree 018-92-EM, Approval of the Regulation of Mining Procedures (SPA), at **Exhibit C-228**, p. 22 *et seq.* (Art. 23). See also, Witness Statement of Julio F. Castañeda, 01/10/2021, p. 8 (para. 19).

- iii) the issuance by the Ministry of Internal Affairs of a licence to acquire and store explosives;
 - iv) the MEM's issuance of a mining operation certificate, which allows for the use of explosives in the development of a mine;
 - v) the Ministry of Culture's issuance of a certificate of absence of archaeological ruins;
 - vi) the MEM's approval of the mine closure plan (also known as the mine reclamation plan), which must describe the rehabilitation and projected use of the land after a mining project; and,
 - vii) the MEM's confirmation, after an on-site inspection, that the mine has been constructed in accordance with the approved mining plan.
- 77 Separately, the concession holder must secure a surface rights agreement with the landholder(s) on whose land the mining activities are to take place.
- 78 As explained in the following paragraphs, IMC had secured these permits and approvals and concluded the necessary surface rights agreements.
- 79 First, IMC had successfully submitted its mining plan, a technical document detailing the annual work programme for the lifetime of a mine. The prior management of IMC had prepared a mining plan in 2009, which envisaged a project that would process up to 5,100 t/d at a plant located on-site.¹²³ However, this plan would require a high initial capital investment (approximately USD 200 million), and it was not technically or economically desirable to construct a processing plant of that capacity and size on-site.¹²⁴
- 80 Lupaka, through IMC, therefore revised the mining plan and envisaged a reduced production of 400 t/d.¹²⁵ The MEM approved the revised mining

¹²³ Witness Statement of Eric Edwards, 01/10/2021, p. 10 (para. 31); Witness Statement of Julio F. Castañeda, 01/10/2021, p. 6 (para. 12); 2012 SRK Report, at **Exhibit C-58**, p. 129.

¹²⁴ Witness Statement of Eric Edwards, 01/10/2021, p. 16 (para. 53); Witness Statement of Julio F. Castañeda, 01/10/2021, p. 7 (para. 15).

¹²⁵ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 7 *et seq.* (paras. 16-17); Asesores y Consultores Mineros S.A., Project Mining Plan for IMC, 2014 (SPA), at **Exhibit C-41**, p. 41 and 43.

plan on 11 December 2014 (the “**2014 Mining Plan**”).¹²⁶ Because of this reduction in production and the absence of a large processing plant, the Project’s possible environmental impact was also lessened.¹²⁷

- 81 Second, Lupaka revised the 2009 EIA, which the MEM approved on 9 April 2015.¹²⁸
- 82 Third, IMC had secured the necessary surface rights agreements through the 2010 SD Land Use Agreement and the 2017 Lacsanga Agreement.¹²⁹
- 83 Fourth, in May 2016, the MININTER granted IMC a licence to purchase and store explosives,¹³⁰ and on 30 November 2017, the MEM granted it a certificate of mining operations, thereby allowing it to use explosives for the Project.¹³¹
- 84 Fifth, IMC had obtained the certificate of absence of archaeological ruins on 25 May 2010.¹³²

¹²⁶ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 7 *et seq.* (para. 17); MEM Report and Resolution approving the Mining Plan (SPA), 11/12/2014, at **Exhibit C-9 (corrected translation)**.

¹²⁷ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 7 *et seq.* (para. 17).

¹²⁸ *Id.*, p. 6 (para. 12); MEM Resolution approving the EIA (SPA), 28/12/2009, at **Exhibit C-7 (corrected translation)**; MEM Report and Resolution approving ITS No. 1 (SPA), 09/04/2015, at **Exhibit C-40**, p. 2 (Section 3.4).

¹²⁹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 12 *et seq.* (paras. 32, 46); Public Deed for the 2010 SD Land Use Agreement (SPA), 22/10/2010, at **Exhibit C-63**; Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**; Supreme Decree 018-92-EM, Approval of the Regulation of Mining Procedures (SPA), at **Exhibit C-228**, p. 23 (Art. 23(c)).

¹³⁰ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 8 (para. 19); See *e.g.*, SUCAMEC, Licence to operate explosive magazines (SPA), 06/05/2016, at **Exhibit C-80**.

¹³¹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 8 (para. 19); MEM, IMC mining operations certificate (SPA), 30/11/2017, at **Exhibit C-10**.

¹³² Witness Statement of Julio F. Castañeda, 01/10/2021, p. 8 (para. 19); Ministry of Culture, Certificates of Non-Existence of Archaeological Remains for IMC, 2009-2010 (SPA), at **Exhibit C-59**.

- 85 Sixth, the MEM had approved IMC’s reclamation plan in 2012.¹³³ Prior to the Blockade, IMC was in the process of submitting to the MEM an amendment to said reclamation plan and the related guarantee.¹³⁴
- 86 Finally, as a result of the Blockade, the MEM was prevented from carrying out the final inspection of the Site to certify that it complied with the 2014 Mining Plan. On 7 September 2018, IMC had notified the MEM that it had finalised development works at the Site and requested that the MEM perform the final pre-exploitation inspection.¹³⁵ The inspection was rescheduled several times and ultimately never took place because of the Blockade.¹³⁶

2.2.5 Lupaka identified third-party processing plants

- 87 As noted above, Lupaka concluded that it would be more efficient to outsource the processing of the Project’s ore to an off-site third-party processing plant.¹³⁷ During the mine development phase, IMC sent ore to three nearby processing plants (*i.e.*, Coriland, Huancapeti II and San Juan Evangelista). However, the experience with those plants was not optimal.¹³⁸
- 88 An opportunity arose in 2014 for IMC to purchase a processing plant next to the village of Mallay, in Oyón, in the department of Lima, approximately 100 kilometres from the Site (“**Mallay**”).¹³⁹ Mallay was a relatively new

¹³³ See MEM Report and Resolution approving ITS No. 1 (SPA), 09/04/2015, at **Exhibit C-40**, p. 2 (Section 3.6).

¹³⁴ IMC, Presentation on ITS No. 3, August 2018 (SPA), at **Exhibit C-229**.

¹³⁵ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 9 (para. 22); Letter from IMC to MEM (SPA), 06/09/2018, at **Exhibit C-81**.

¹³⁶ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 9 (para. 22); Letter from IMC to MEM (SPA), 17/10/2018, at **Exhibit C-11**; MEM Resolution (SPA), 23/10/2018, at **Exhibit C-82**; Letter from IMC to MEM (SPA), 14/12/2018, at **Exhibit C-230**; MEM Report fixing a date and inspector to carry out the final audit to enter the exploitation phase (SPA), 17/01/2019, at **Exhibit C-231**; and Letter from IMC to MEM (SPA), 22/01/2019, at **Exhibit C-232**.

¹³⁷ See *supra* para. 36.

¹³⁸ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 31 (paras. 88-89).

¹³⁹ *Id.*, p. 27 (para. 82).

and modern plant and was operating at 400 t/d, with the potential to process 600 t/d.¹⁴⁰

- 89 Towards the end of 2014, IMC commenced formal due diligence for the acquisition of Mally and engaged Aminpro to this effect. Aminpro concluded that Mally was “a state of the art operation”, had “good key performance indicators”, and its processing facilities were in good working order.¹⁴¹ Aminpro also found Mally’s operating costs reasonable and noted that its current running costs were less than Mally’s owner, Compañía de Minas Buenaventura S.A.A. (“**Buenaventura**”), had budgeted.¹⁴² By running its own processing plant, IMC would have lower processing costs per unit of ore.¹⁴³ Further, by acquiring Mally, IMC could increase its production rate from 400 t/d to up to 600 t/d, therefore generating a quicker return on investment.¹⁴⁴
- 90 Based also on the Aminpro reports, IMC resolved to acquire Mally.¹⁴⁵ However, its initial purchase plans were stymied when Buenaventura insisted on selling Mally as a whole mining unit, including the mine adjacent to the processing plant, the related mining concession and assets for USD 30 million.¹⁴⁶ Buenaventura’s price was not acceptable to Lupaka, particularly since Lupaka was only interested in acquiring the processing plant. Consequently, negotiations halted in early 2015.¹⁴⁷
- 91 In early 2018, Lupaka and Buenaventura resumed negotiations. In mid-2018, Buenaventura agreed to sell the processing plant and related mining facilities and assets.¹⁴⁸ Lupaka prepared a formal letter of intent to

¹⁴⁰ *Id.*, p. 27 (para. 82); Aminpro, Due Diligence Report for Lupaka, Project, 25/11/2014, at **Exhibit C-38**, p. 6 (para. 2.1).

¹⁴¹ Aminpro, Due Diligence Report for Lupaka, Project, 25/11/2014, at **Exhibit C-38**, p. 2 *et seq.*

¹⁴² *Id.*, p. 21.

¹⁴³ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 32 (para. 92).

¹⁴⁴ *Id.*, p. 29 (para. 91).

¹⁴⁵ *Id.*, p. 30 (para. 94).

¹⁴⁶ *Id.*, p. 27 (para. 84).

¹⁴⁷ *Id.*, p. 27 (para. 84).

¹⁴⁸ *Id.*, p. 31 (para. 97).

framework the negotiations, in which it proposed, amongst other things, a purchase price of USD 10 million.¹⁴⁹

- 92 By September 2018, Lupaka and Buenaventura had agreed on the terms of a purchase and sale agreement.¹⁵⁰ This agreement in principle reflected the agreed purchase price of USD 10.4 million, plus VAT (approximately USD 12.2 million in total).¹⁵¹ Lupaka was planning to finance the purchase of Mally through a loan from PLI, further to an amendment to the PPF Agreement.¹⁵²
- 93 Lupaka's purchase of Mally was contingent upon the transfer to IMC of an easement agreement between Buenaventura and the Mally Community.¹⁵³ Buenaventura therefore sought this approval, and the parties agreed to wait for this approval before executing the documents,¹⁵⁴ expecting that it would follow soon thereafter. Lupaka planned to make a market announcement of the Mally transaction on 16 October 2018.¹⁵⁵
- 94 The Mally Community eventually provided its approval in March 2019.¹⁵⁶ However, by then, the Blockade had been in place for about four months. PLI declined to fund the Mally purchase as long as the Blockade was ongoing.¹⁵⁷

¹⁴⁹ Lupaka, Draft Letter of Intent to purchase Mally, 04/06/2018, at **Exhibit C-147**, p. 2.

¹⁵⁰ Draft Mally Purchase Agreement between Buenaventura and IMC, 21/09/2018, at **Exhibit C-48**.

¹⁵¹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 33 (para. 98); Draft Mally Purchase Agreement between Buenaventura and IMC, 21/09/2018, at **Exhibit C-48**, p. 7 (Clause Fourth).

¹⁵² Witness Statement of Julio F. Castañeda, 01/10/2021, p. 33 *et seq.* (para. 99); Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement, 26/09/2018, at **Exhibit C-50**. See also, Lupaka, Board Meeting Minutes, 27/09/2018, at **Exhibit C-51**, p. 3 *et seq.*

¹⁵³ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 34 (para. 100); Draft Mally Purchase Agreement between Buenaventura and IMC, 21/09/2018, at **Exhibit C-48**.

¹⁵⁴ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 34 (para. 101).

¹⁵⁵ Lupaka, Board Meeting Minutes, 27/09/2018, at **Exhibit C-51**, p. 2 *et seq.*

¹⁵⁶ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 34 (para. 101); Email from Buenaventura to Lupaka, 11/03/2019, at **Exhibit C-233**. See also, Witness Statement of Julio F. Castañeda, 01/10/2021, p. 32 (para. 100).

¹⁵⁷ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 34 (para. 102).

2.2.6 Lupaka, through IMC, invested in significant infrastructure and development works

- 95 In 2018, IMC made significant progress with infrastructure and development works. As noted above,¹⁵⁸ by September 2018, IMC requested that the MEM carry out the final inspection of the Site to certify that it complied with the 2014 Mining Plan.¹⁵⁹ As also noted above, that inspection never took place due to the Blockade.
- 96 IMC, for instance, had i) virtually completed the road works for the daily transit of 30-tonne haul trucks on the Lacsanga road, including the completion of the top surfacing of large sections of the Lacsanga road,¹⁶⁰ as well as the installation of drains¹⁶¹ and culverts (structures that allowed water to flow under the road);¹⁶² ii) completed the construction of an additional mine entry at 3,430 sublevel, which would allow IMC easier access to the mine; and iii) completed infrastructure works within all mine sublevels, including the construction of a relief slot connecting 3,400 and 3,430 sublevels (intended to provide void space for blasting), a stationary grizzly (a large grate installed to slow the flow of mined ore)¹⁶³ and a ventilation system throughout the mine levels.¹⁶⁴
- 97 As set out below, IMC’s significant progress in the development works was interrupted by the Parán Community’s 19 June 2018 Invasion (“**June 2018 Invasion**”) (Section 2.3.1) and brought to a complete stop by Parán’s Blockade as from 14 October 2018 (Section 2.3.3).

2.3 Peru’s acts and omissions destroyed the Project

- 98 The Parán Community acted with violence and impunity from June 2018 until Lupaka lost its investment in August 2019. In June 2018, it carried

¹⁵⁸ See *supra* para. 86.

¹⁵⁹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 8 (para. 22); Letter from IMC to MEM (SPA), 06/09/2018, at **Exhibit C-81**.

¹⁶⁰ IMC, Monthly Report, June 2018, at **Exhibit C-234**, p. 16 *et seq.* (para. 1.8).

¹⁶¹ IMC, Monthly Report, April 2018, at **Exhibit C-235**, p. 46 *et seq.* (para. 7.1).

¹⁶² IMC, Monthly Report, May 2018, at **Exhibit C-236**, p. 11 (para. 1.8).

¹⁶³ IMC, Monthly Report, June 2018, at **Exhibit C-234**, p. 6 *et seq.*

¹⁶⁴ IMC, Monthly Report, May 2018, at **Exhibit C-236**, p. 3 *et seq.* (paras. 1.2 and 1.4).

out an armed invasion of the Site and attacked IMC's personnel (**Section 2.3.1**). The Parán Community left the Site but sent threats of a further invasion in September 2018 (**Section 2.3.2**), which then materialised in October 2018, this time by setting up the Blockade, which was never lifted (**Sections 2.3.3**).

99 From October 2018, Lupaka continuously sought Police assistance to regain access to the Site (**Section 2.3.4**), and in early 2019 liaised with senior officials of the Peruvian Government to protect its rights and assets (**Section 2.3.5**). However, despite the Blockade dragging on for months, the authorities refused to enforce law and order (**Section 2.3.6**). They limited themselves to requesting that Lupaka continue dialogue with the Parán Community (**Section 2.3.7**), despite Parán officials' unreasonable demands and their breach of a commitment to lift the Blockade in February 2019 (**Section 2.3.8**).

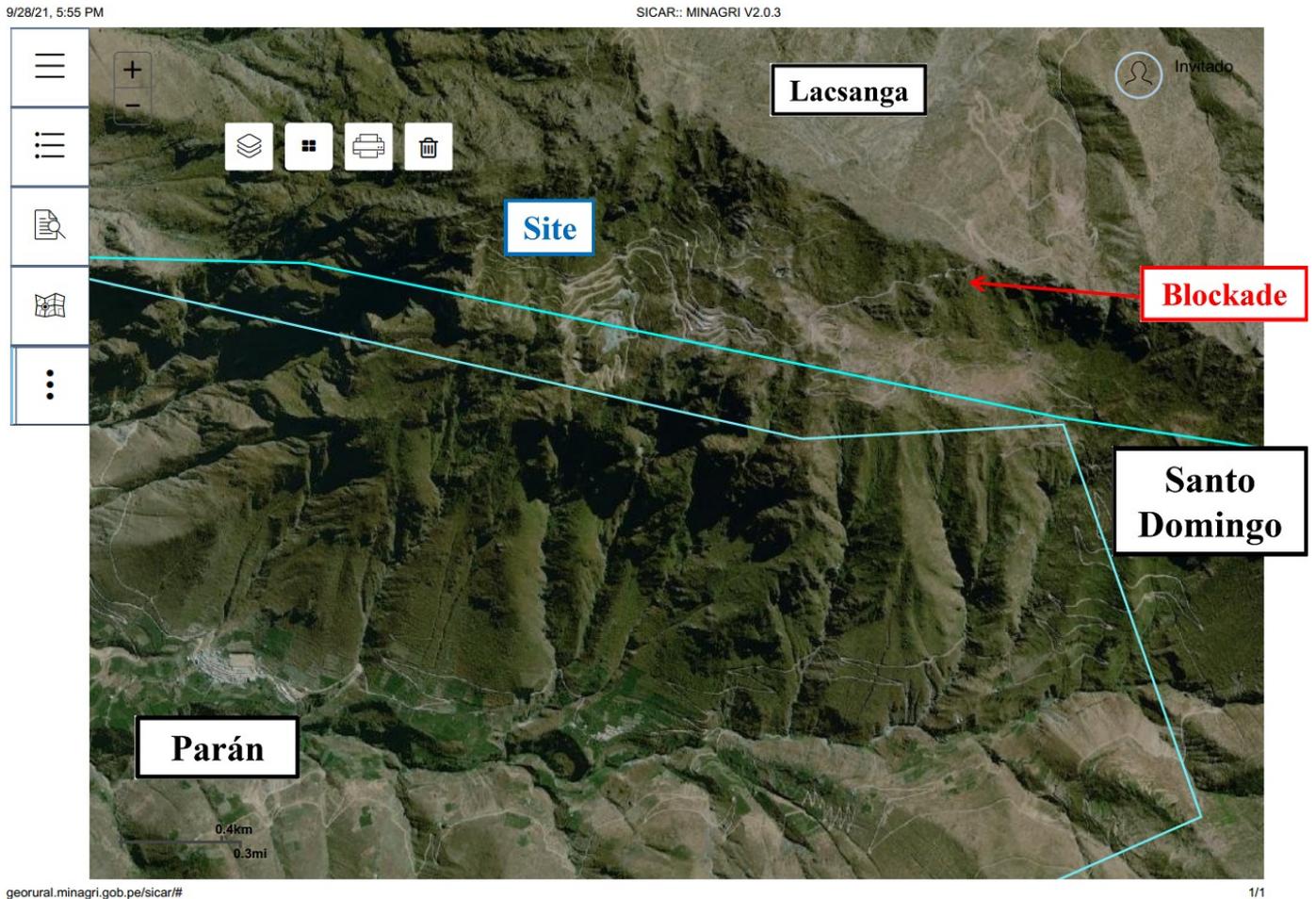
100 Lupaka's personnel could access the Site on foot for a brief period in March 2019, but this access was discontinued following a violent intervention by the Parán Community that same month (**Section 2.3.9**). The Government continued to fail to use any effective means to remove the Blockade in the months that followed (**Section 2.3.10**). This led to the destruction of Lupaka's investment in August 2019 (**Section 2.3.11**) and the Parán Community's unlawful appropriation and exploitation of the mine (**Section 2.3.12**).

2.3.1 The Parán Community invaded the Site on 19 June 2018

101 As described above in Section 2.2.3.3, the Parán Community was a difficult counterparty during negotiations. For example, in January 2018, Parán officials insisted that the Project was located on their land.¹⁶⁵ This was demonstrably untrue, as can be seen from an official map published

¹⁶⁵ See *e.g.*, Letter from the Parán Community to IMC (SPA), 03/01/2018, at **Exhibit C-120**.

on the website of the Ministry of Agriculture (where the place of the Blockade which started on 14 October 2018 has been marked):¹⁶⁶



102 An internal report by the Police would also confirm this in February 2019 by stating that the Project was located 70% on Lacsanga land and 30% on Santo Domingo land.¹⁶⁷

¹⁶⁶ This map can be found at a website of the Ministry Agricultural Development and Watering (*Ministerio de Desarrollo Agrario y Riego*) at <http://georural.minagri.gob.pe/sicar/> (labels added). [REDACTED]

¹⁶⁷ Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 31, 37 and 47.

them, including into the mine’s main adit, against the threat of violence.¹⁷⁵ When the invaders spotted unknown people in the nearby hills, they drew their guns and started shooting into the air. The violence escalated further, and some IMC personnel were knocked to the ground and beaten. [REDACTED]

[REDACTED]

[REDACTED] The Parán invaders then drew up fabricated minutes of the events, stating that Parán representatives’ actions had been “peaceful”. [REDACTED]

[REDACTED]

108 [REDACTED] the invaders had demanded that IMC cede 10% of the Project’s revenues to the Parán Community.¹⁸¹ As explained by Mr Castañeda, IMC’s General Manager at the time, this was an untenable proposition.¹⁸²

109 Even with the Parán invaders gone, no one from the central Government guaranteed that Lupaka’s rights would be preserved and that further

175 [REDACTED] Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 30 (paras. H, I).

176 [REDACTED]

177 [REDACTED]

178 [REDACTED] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 25 (para. 69).

179 [REDACTED] Minutes detailing the June 2018 Invasion (SPA), 19/06/2018, at **Exhibit C-158**.

180 Witness Statement of Julio F. Castañeda, 01/10/2021, p. 24 *et seq.* (para. 68) [REDACTED]. See also, SSS, Special Report, seizure of the Invicta Mine Camp and Facilities (SPA), 19/06/2018, at **Exhibit C-129**.

181 [REDACTED] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 25 (para. 70). See also, SSS, Special Report, seizure of the Invicta Mine Camp and Facilities (SPA), 19/06/2018, at **Exhibit C-129**; Photographic material of the June 2018 Invasion (SPA), 19/06/2018, at **Exhibit C-124**.

182 Witness Statement of Julio F. Castañeda, 01/10/2021, p. 25 (para. 70).

invasions would be prevented. The Police, which IMC had alerted before the invasion, only reached the Site the next day, on 20 June 2018.¹⁸³ The few local Police officers who were present inspected the Site and noted the damage but took no further action.¹⁸⁴ IMC's communications to other governmental authorities, including the Minister of the MEM (Mr Francisco Ismodes), had no immediate effect.¹⁸⁵ As a result, Lupaka was forced to suspend development works for ten days to ensure that it was safe to proceed.¹⁸⁶

- 110 Despite the brutality displayed by the Parán Community, Lupaka remained open to a negotiated solution.¹⁸⁷ However, in late June and early July 2018, the Parán officials rejected invitations to meet until Lupaka withdrew the Police complaints filed in the aftermath of the June 2018 Invasion.¹⁸⁸

2.3.2 In September 2018, the Parán Community again planned to invade the Site

- 111 Lupaka received various reports in late August 2018 and early September 2018 that the Parán Community planned to invade the Site again on 11 September 2018.¹⁸⁹ Given what happened during the June 2018 Invasion,

¹⁸³ [REDACTED]

¹⁸⁴ [REDACTED] Sayán Police inspection report, Project Site (SPA), 20/06/2018, at **Exhibit C-160**. See also, SSS, Special Report, seizure of the Invicta Mine Camp and Facilities (SPA), 19/06/2018, at **Exhibit C-129**.

¹⁸⁵ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 24 *et seq.* (para. 68); Letter from IMC to MEM (SPA), 20/06/2018, at **Exhibit C-126**, p. 2; Letter from IMC to Energy and Mining Investment Supervisory Body (SPA), 20/06/2018, at **Exhibit C-127**, p. 1; Request by J. Castañeda to the Huaura Sub-Prefecture for protection (SPA), 26/06/2018, at **Exhibit C-128**.

¹⁸⁶ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 26 (para. 71).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*, p. 24 (para. 71); [REDACTED] Letter from IMC to the Parán Community (SPA), 25/06/2018, at **Exhibit C-131**; Internal Lupaka email (SPA), 02/07/2018, at **Exhibit C-132**. See also, SSS, Monthly Report, Project, June 2018 (SPA), at **Exhibit C-157**, p. 4.

¹⁸⁹ [REDACTED] Witness Statement of Julio F. Castañeda, 01/10/2021, p. 26 (para. 72); Letter from IMC to Sayán Police (SPA), 02/09/2018, at **Exhibit C-134**.

by letter dated 2 September 2018, Mr Castañeda urged the Chief Police Officer (“CPO”) of Sayán to intervene.¹⁹⁰

112 On 7 September 2018, the CPO of Sayán, the Huaura Prosecutor and the Huaura Sub-Prefect met with Parán leaders.¹⁹¹ At that meeting, the CPO urged the Parán Community not to invade the Site again.¹⁹² As a result, the Parán Community decided at its Assembly on 8 September 2018 that they would cancel the invasion scheduled for 11 September 2018.¹⁹³

113 Nevertheless, the Police acted pre-emptively to avoid another invasion.¹⁹⁴ The CPO of Sayán was authorised to lead a 40-strong Police contingent to the Site on 10 September 2018 to secure the Site perimeter. The Police contingent remained stationed in the area until the morning of 12 September 2018.¹⁹⁵ Another invasion by the Parán Community was thus averted.¹⁹⁶ This brief yet effective display of force contrasted with subsequent events, where the Police were not allowed to intervene by the ministerial authorities, as explained below.

114 Lupaka was open to negotiating a solution with the Parán Community despite their hostility.¹⁹⁷ To that end, Mr Castañeda attended a first meeting with Parán representatives brokered by the MEM later in September 2018. However, at that meeting, no progress was made as Parán representatives demanded that IMC stop the Project.¹⁹⁸

¹⁹⁰ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 26 *et seq.* (para. 73); Letter from IMC to Sayán Police (SPA), 02/09/2018, at **Exhibit C-134**.

¹⁹¹ [REDACTED]

¹⁹² [REDACTED]

¹⁹³ [REDACTED]

¹⁹⁴ Police approval of plan to avoid the Parán Community’s invasion (SPA), 08/09/2018, at **Exhibit C-136**.

¹⁹⁵ [REDACTED] CR Team Report on the Police intervention 10-12 September 2019 at the Project Site (SPA), 13/09/2018, at **Exhibit C-137**, p. 2.

¹⁹⁶ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 26 *et seq.* (para. 73).

¹⁹⁷ *Id.*, p. 27 (para. 74).

¹⁹⁸ *Id.*, p. 27 (para. 75).

- 115 After the June 2018 Invasion, Mr Castañeda had requested the Huacho Sub-Prefect that IMC personnel be provided with protection.¹⁹⁹ This request prompted a meeting on 18 September 2018 between Mr Castañeda, the Parán President and the Huacho Sub-Prefect.²⁰⁰ At the meeting, the Parán President committed to refrain from all acts of violence, threats or harassment towards IMC (the “**September 2018 Commitment**”).²⁰¹ The September 2018 Commitment stated that any breach would constitute contempt of authority.²⁰²
- 116 However, the events of only a few weeks later showed that the September 2018 Commitment was not worth the paper it was written on. The central authorities were unwilling to enforce the law against the Parán Community.²⁰³

2.3.3 On 14 October 2018, the Parán Community invaded the Site and established the Blockade

- 117 On 13 October 2018 [REDACTED] the Parán Community had plans to invade the Site again. [REDACTED] [REDACTED] namely the MEM, the Huaura Sub-Prefect, the Huacho Police Division, the Huaura Prosecutor and the Paccho Mayor. Only the Huacho Sub-Prefect responded, [REDACTED]
[REDACTED]

¹⁹⁹ *Id.*, p. 24 *et seq.* (para. 68); [REDACTED] [REDACTED] Request by J. Castañeda to the Huaura Sub-Prefecture for protection (SPA), 26/06/2018, at **Exhibit C-128**.

²⁰⁰ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 27 (para. 76) [REDACTED]
[REDACTED].

²⁰¹ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 27 *et seq.* (para. 77); [REDACTED] [REDACTED] Minutes of the Sub-Prefecture meeting between IMC and the Parán Community including September 2018 Commitment (SPA), 18/09/2018, at **Exhibit C-139**, p. 2.

²⁰² Minutes of the Sub-Prefecture meeting between IMC and the Parán Community including September 2018 Commitment (SPA), 18/09/2018, at **Exhibit C-139**, p. 2.

²⁰³ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 28 (para. 78).

²⁰⁴ [REDACTED]

[REDACTED]

[REDACTED] she informed [REDACTED] that she could not help.²⁰⁶

118

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

119 On 14 October 2018, approximately 100 Parán Community members, led by Parán officials, converged on the Site. As had occurred in June 2018, they cut off all routes of access to the Site, expelled IMC's personnel and took control. Moreover, the Parán mob set up the Blockade on the Lacsanga road close to the entry to the Site.²⁰⁹

120 The small Police contingent that arrived did not confront the 100 Parán members that had installed the Blockade, nor did they request reinforcements. They merely took some photographs and warned the Parán mob not to cause any damage or disturbance.²¹⁰ A member of the CR Team [REDACTED] [REDACTED] managed to obtain an agreement for the Parán members to leave the Site if IMC personnel would also leave.²¹¹ As part of the agreement, IMC was to keep one security guard on the Site, and the Parán Community was to post one representative 300 meters away from the camp. [REDACTED]
[REDACTED]

205 [REDACTED]

206 [REDACTED]

207 [REDACTED]

208 [REDACTED]

209 [REDACTED]

210 [REDACTED]

211 [REDACTED]

212 Minutes of the meeting between the Parán Community, IMC and Chief of Sayán Police (SPA), 14/10/2018, at **Exhibit C-166** [REDACTED]
[REDACTED]

- 121 Yet, this agreement was also a dead letter. The Parán Community allowed nobody to enter the Site as it manned the Blockade with more than 100 people.²¹³
- 122 The Parán Community explained the reason for the invasion in the same document, namely that “exploitation” had commenced without the Parán Community’s consent.²¹⁴ Yet this was not necessary as a matter of Peruvian law. Further, the Parán Community set an eight-day deadline for Lupaka to revert with a proposal to meet for the resumption of dialogue.²¹⁵ On 14 October 2018, IMC delivered a letter to the Parán leadership proposing a meeting date.²¹⁶ Parán leaders responded that they would only meet under the auspices of the MEM and the Presidency of the Council of Ministers (“PCM” which is the Spanish acronym for “*Presidencia del Consejo de Ministros*”).²¹⁷
- 123 The central authorities attended several meetings after 14 October 2018.²¹⁸ During those meetings, they acknowledged that the Parán representatives were acting illegally and had been unreasonable in their demands.²¹⁹

2.3.4 From as early as October 2018, it was apparent to the authorities that Police intervention was necessary

- 124 In the days following the start of the Blockade, IMC contacted all competent authorities to obtain assistance. [REDACTED] this included sending a letter to the highest levels of the Police, requesting their

213 [REDACTED]

214 Minutes of the meeting between the Parán Community, IMC and Chief of Sayán Police (SPA), 14/10/2018, at **Exhibit C-166**. See also, SSS, Monthly Report, Project, October 2018 (SPA), at **Exhibit C-165**, p. 4 [REDACTED]

215 Minutes of the meeting between the Parán Community, IMC and Chief of Sayán Police (SPA), 14/10/2018, at **Exhibit C-166**.

216 [REDACTED] Letter from IMC to the Parán Community (SPA), 14/10/2018, at **Exhibit C-168**.

217 [REDACTED]

218 [REDACTED] Witness Statement of Luis F. Bravo, 01/10/2021, p. 8. *et seq.* (paras. 17, 20-29, 39-44, 57, 71-73, 86-90, 93-94, 96-97).

219 [REDACTED]

220 [REDACTED]

help in restoring order and lifting the Blockade at the Site,²²¹ as well as communicating with the MEM, the PCM, the Huacho Prosecutor and the Huaura Sub-Prefect to request their assistance by mediating between IMC and the Parán Community.²²²

- 125 [REDACTED] the Police [REDACTED] [REDACTED] were awaiting approval by their superiors to proceed with the removal of the Parán representatives from the Site and the Lacsanga road.²²³ In addition, the MEM, the PCM, the Huaura Sub-Prefecture and the Huaura Prosecutor confirmed that they would attend a meeting with Parán officials scheduled for 24 October 2018 in Melcopallán, *i.e.*, the area within Lacsanga where the Parán Community had set up the Blockade (see map at paragraph 101 above).²²⁴
- 126 Prior to this meeting, Lupaka's representatives and some 100 members of the Parán Community met on 18 October 2018 in the presence of the CPO of Sayán.²²⁵ [REDACTED] the Parán members present showed no willingness to compromise on their unreasonable demands. They displayed aggressive behaviour and demanded that Lupaka withdraw the criminal complaints filed in the aftermath of the June 2018 Invasion. There was no room to discuss the lifting of the Blockade.²²⁶
- 127 The 24 October 2018 meeting was attended by representatives of the MEM, the CPO of Sayán and the Huacho Prosecutor.²²⁷ Around fifteen Parán officials attended, as did several IMC representatives [REDACTED] [REDACTED] IMC's representatives explained that they were open to

²²¹ Letter from IMC to MEM (SPA), 15/10/2018, at **Exhibit C-171**; Letter from IMC to Police Headquarters in Lima (SPA), 17/10/2018, at **Exhibit C-170**, p. 2.

²²² [REDACTED] Letter from IMC to MEM (SPA), 15/10/2018, at **Exhibit C-171**. See also, Report on Progress in Social Management before State Institutions (SPA), 22/10/2018, at **Exhibit C-172**, p. 1.

²²³ [REDACTED] See also, Report on Progress in Social Management before State Institutions (SPA), 22/10/2018, at **Exhibit C-172**.

²²⁴ [REDACTED]

²²⁵ [REDACTED]

²²⁶ [REDACTED]

²²⁷ [REDACTED] Report on meeting between IMC, the Parán Community, the MEM and the Mayor of the District of Leoncio Prado (SPA), 24/10/2018, at **Exhibit C-173**, p. 2 *et seq.*

²²⁸ [REDACTED]

discuss and negotiate an agreement with the Parán Community, but this willingness was subject to lifting the Blockade.²²⁹ The Parán leaders responded that they would not lift the Blockade and that no discussions could take place unless IMC withdrew the criminal complaints lodged further to the June 2018 Invasion. They added, for good measure, that there would only ever be any agreement in any event if IMC agreed to pay “whatever the community asked for”.²³⁰

128 The Prosecutor explained that a complainant cannot withdraw a criminal complaint as a matter of Peruvian law.²³¹ He also explained that Parán officials were wrong in maintaining the Blockade and in demanding that IMC accept whatever they asked.²³² [REDACTED] despite already being clear that the Parán Community had been conducting itself unreasonably and would not budge, both the MEM representative and the Huaura Sub-Prefect recommended to IMC that the Parán Community be given one last opportunity.²³³ Accordingly, a new meeting was scheduled.²³⁴

129 The next meeting between Parán leaders, IMC and governmental authorities took place on 7 November 2018.²³⁵ Parán leaders first met with the various governmental authorities who were present (an official from the MEM, the Huaura Sub-Prefect and the CPO of Sayán), then separately with IMC’s representatives, and finally all participants met *in plenum*.²³⁶ During the meeting between IMC and Parán’s leaders, the latter made similar demands to those in previous meetings and added some more. In particular, they demanded that IMC: i) withdraw the criminal complaints; ii) ensure that all transit to and from the Site take place only via Parán’s

229 [REDACTED]

230 [REDACTED]

231 [REDACTED]

232 [REDACTED]

233 [REDACTED]

234 [REDACTED]

235 [REDACTED] Summary Report of meeting between IMC, the Parán Community and other authorities (SPA), 07/11/2018, at **Exhibit C-182**.

236 [REDACTED] Summary of the meeting between IMC and the Parán Community (SPA), 07/11/2018, at **Exhibit C-183**.

road; iii) agree to all of the Parán Community's environmental demands; and iv) agree to pay compensation for alleged damage in Parán.²³⁷ IMC's requests that the Parán Community end the Blockade and allow the resumption of the operations before dialogue could continue fell on deaf ears once again.²³⁸ It was evident that an agreement would not be reached.²³⁹

130 When all participants met *in plenum* on 7 November 2018, the MEM representative and the Huaura Sub-Prefect told the Parán representatives that they were behaving unreasonably and that the Blockade needed to be lifted.²⁴⁰ Nevertheless, the Parán leaders confirmed that they would maintain the Blockade and left the meeting without discussing the next steps.²⁴¹

131 Given the failure to achieve any resolution of the situation in the presence of the authorities, IMC followed up with several communications to the authorities. On 9 November 2018, IMC requested formally that the Huaura Sub-Prefect denounce Parán's President for contempt of authority further to the breach of the September 2018 Commitment to cease all acts of violence.²⁴² The Huaura Sub-Prefect took no action.

132 On 14 November 2018, IMC wrote to the MEM and other central authorities, forwarding a letter written to the Parán Community stating that it would be liable for potential claims against IMC for environmental damage caused by the lack of access to the Site.²⁴³ Indeed, IMC could not

237 [REDACTED]

238 [REDACTED]

239 [REDACTED] Summary Report of meeting between IMC, the Parán Community and other authorities (SPA), 07/11/2018, at **Exhibit C-182**, p. 1.

240 [REDACTED] Summary of the meeting between IMC and the Parán Community (SPA), 07/11/2018, at **Exhibit C-183**, p. 2.

241 [REDACTED] Summary of the meeting between IMC and the Parán Community (SPA), 07/11/2018, at **Exhibit C-183**, p. 2.

242 Letter from IMC to Huaura Sub-Prefect (SPA), 09/11/2018, at **Exhibit C-237**. See also, Minutes of the Sub-Prefecture meeting between IMC and the Parán Community including September 2018 Commitment (SPA), 18/09/2018, at **Exhibit C-139**.

243 Letter from IMC to MEM (SPA), 14/11/2018, at **Exhibit C-14**.

service the equipment and secure material at the mine and could therefore not assume responsibility for the Parán Community's use or misuse thereof.²⁴⁴ The MEM took no action.

- 133 On 18 November 2018, Mr Estrada filed a complaint at the Sayán Police station stating that the Parán Community was maintaining the illegal Blockade.²⁴⁵ Further to this, the Huaura Prosecutor later confirmed that he believed that those from the Parán representatives responsible for the Blockade were committing a criminal offence and referred the matter to the competent prosecutorial authority for the next stage of investigations.²⁴⁶ Furthermore, police intelligence also attested to the presence of Parán's rural patrols mounting guard on Lacsanga's land at the Blockade at night, firing gunshots at whoever approached the Site.²⁴⁷ Yet, nearly three years later, the matter never progressed beyond the preliminary investigation phase.²⁴⁸
- 134 On 19 November 2018, IMC sent a letter to the MEM stating that although it was willing to continue the dialogue, the Blockade needed to be lifted before any dialogue with the Parán Community could proceed.²⁴⁹ In response to this, IMC received an invitation from the MEM to meet with Parán representatives in Sayán on 21 November 2018, without addressing IMC's request that the Blockade be lifted beforehand.²⁵⁰
- 135 Lupaka had nothing to lose and therefore, IMC's representatives attended a meeting on 21 November 2018 with Parán's President, a representative of the MEM and the Ombudsman's Office.²⁵¹ Again, despite the presence

²⁴⁴ *Id.*, p. 2 *et seq.*

²⁴⁵ Criminal complaint filed with the Sayán Police by IMC representatives (SPA), 18/11/2018, at **Exhibit C-167**.

²⁴⁶ Notification of decision of the Prosecutor's Office for Crime Prevention in Huaura to IMC (SPA), 05/12/2018, at **Exhibit C-238**.

²⁴⁷ Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 46 *et seq.* (para. J).

²⁴⁸ State of criminal proceedings against Parán (SPA), 02/09/2021, at **Exhibit C-239**.

²⁴⁹ See Letter from MEM to IMC (SPA), 22/11/2018, at **Exhibit C-240**, p. 2.

²⁵⁰ Letter from MEM to IMC (SPA), 22/11/2018, at **Exhibit C-240**. See also Letter from MEM to IMC (SPA), 15/11/2018, at **Exhibit C-241**.

²⁵¹ Minutes of the meeting between IMC, the Parán Community and MEM (SPA), 21/11/2018, at **Exhibit C-242**.

of these authorities, the Parán representatives remained defiant. Parán's President only committed to discussing the lifting of the Blockade and the possible continuation of the dialogue at the Parán Community's Assembly to be held on 1 December 2018. The Parán representatives stated that they would inform the MEM and the Ombudsman's office of the result.

- 136 On 4 December 2018, the Police went to the Blockade site and confirmed that it was still in place.²⁵² IMC personnel, therefore, filed yet another formal complaint that same day and informed the MEM of the *status quo* immediately.²⁵³ There was no reaction.
- 137 By letters dated 7 December 2018, IMC requested the Minister of the MININTER,²⁵⁴ the CPO of Sayán²⁵⁵ and the Chief of Police in Lima²⁵⁶ to order urgent Police intervention to lift the Blockade and alerted them to the danger posed by the Parán Community having access to the explosives on-site. The Parán Community had been given every opportunity to raise its grievances. The authorities present had seen that Parán's representatives were acting not only in breach of the law but also making unreasonable demands. It was clear that an agreement would not be reached and that the Parán Community would not lift the Blockade. However, the Police refused to intervene.
- 138 The situation with the Blockade grew even more dire on 21 December 2018. On that day, the Huaura Prosecutor travelled to the Blockade site accompanied by fifteen police officers and Mr Estrada to inspect the explosive magazine. At the Blockade, they were met by 50 Parán

²⁵² Sayán Police inspection report further to IMC request (SPA), 05/12/2018, at **Exhibit C-243**.

²⁵³ Internal Lupaka email referring to communication with MEM and MININTER (SPA), 05/12/2018, at **Exhibit C-244**.

²⁵⁴ Letter from IMC to MININTER (SPA), 07/12/2018, at **Exhibit C-184**. See also, Letter from IMC to MININTER (SPA), 12/12/2018, at **Exhibit C-245**.

²⁵⁵ Letter from IMC to Sayán Police (SPA), 07/12/2018, at **Exhibit C-186**. The Police in Sayán was well informed of the Blockade, given that the CPO of Sayán had been present on 14 October 2018, had received a request from IMC for Police assistance to lift the Blockade by letter dated 17 October 2018 (Letter from IMC to Police Headquarters in Lima (SPA), 17/10/2018, at **Exhibit C-170**), had received a complaint from the Lacsanga President on 26 October 2018 (Criminal complaint filed with the Sayán Police by Lacsanga's representatives (SPA), 26/10/2018, at **Exhibit C-176**) and had attended the two meetings referred to above.

²⁵⁶ Letter from IMC to Police Headquarters (SPA), 07/12/2018, at **Exhibit C-185**.

representatives. When the Prosecutor requested that they be allowed to inspect the explosive magazine, the Parán representatives denied access to the Site and threatened them. The minutes taken by the Prosecutor state only that they would reschedule the inspection.²⁵⁷

- 139 Yet again, the authorities were unwilling to take the steps necessary to ensure that the Blockade would be removed and Lupaka allowed to continue with the Project.

2.3.5 In late January 2019, Lupaka liaised with Peru’s highest-ranking law enforcement officials who refused to reinstate law and order

- 140 Mr Luis Felipe Bravo García took over the role of General Manager of IMC and of Country Manager for Lupaka in late January 2019.²⁵⁸ He remained in that position until August 2019, when Lupaka lost its investment. In his witness statement, Mr Bravo provides an account of IMC’s extensive efforts to convince Peruvian officials to lift the Blockade. To this end, Lupaka representatives held meetings with the top echelons of law enforcement in Peru as late as July 2019, shortly after which the investment was lost.

- 141 For instance, on 22 January 2019, Mr Bravo met with the Deputy Minister of the MININTER. At that point, Lupaka knew that the Police had designed a plan to deploy a 200-strong Police force at the Site (the “**Operational Plan**”), but that it required the MININTER’s approval. At the meeting, Mr Bravo explained the situation, highlighting the violence inflicted upon IMC staff during the June and October 2018 invasions and their inability to proceed with the Project because of the Blockade. He also highlighted the danger posed by the Parán Community’s access to the Site’s explosive magazine. Mr Bravo insisted that the Police implement the Operational Plan to remove the Blockade and to secure the Site. The

²⁵⁷ Provincial Prosecutor’s Inspection Report (SPA), 21/12/2018, at **Exhibit C-246**.

²⁵⁸ Witness Statement of Luis F. Bravo, 01/10/2021, p. 4 (para. 2).

Deputy Minister simply took note and did not take any action further to Mr Bravo's request.²⁵⁹

- 142 On 24 January 2019, Lupaka's then-CEO, Mr Ansley, met with the Lima CPO to discuss the Operational Plan. The Lima CPO confirmed that the Police would proceed with the Operational Plan imminently.²⁶⁰ A further meeting at the end of January 2019 with the highest regional Police authority, the CPO in Huacho, also confirmed that the Police were ready to proceed. However, the execution of the Operational Plan was awaiting final approval from the central Government in Lima.²⁶¹ Ultimately, no such approval was forthcoming, as discussed below.

2.3.6 A meeting on 29 January 2019 with Parán officials again demonstrated that Police intervention was necessary

- 143 On 23 January 2019, Lupaka met with the Deputy Minister for the MEM. Mr Bravo explained that IMC's mining licence was worthless whilst the Blockade was in place and that it was having dire economic consequences for the company. Mr Bravo also stressed that a genuine dialogue could only occur if the Parán officials lifted the Blockade; otherwise, they were holding Lupaka to ransom. Disappointingly, the MEM's only proposal was for Lupaka to continue discussions with the Parán Community.²⁶²
- 144 Even though it had become evident that further discussions were futile, Lupaka continued to cooperate. In this regard, Mr Bravo attended a preparation meeting with MEM representatives on 25 January 2019 as a prelude to a meeting with Parán's leaders arranged for 29 January 2019.²⁶³ As Mr Bravo noted at the meeting on 25 January, Lupaka's priority was that the Operational Plan go ahead rather than holding further unhelpful discussions.²⁶⁴

²⁵⁹ *Id.*, p. 8 *et seq.* (para. 17). See also Letter from IMC to MININTER (SPA), 19/02/2019, at **Exhibit C-16 (corrected translation)**.

²⁶⁰ Witness Statement of Luis F. Bravo, 01/10/2021, p. 9 (para. 18).

²⁶¹ *Id.*, p. 9 (para. 19).

²⁶² *Id.*, p. 9 *et seq.* (para. 21-22).

²⁶³ Witness Statement of Luis F. Bravo, 01/10/2021, p. 10 (para. 23).

²⁶⁴ *Id.*

- 145 At the meeting on 29 January 2019 with Parán’s leaders, MEM representatives, and IMC’s representatives, the Parán delegates bluntly refused to lift the Blockade. They demanded, once again, that IMC acknowledge the “damage” that the mining operation had caused their Community and that the company address the risks of water contamination.²⁶⁵ Mr Bravo explained that there could not have been any damage given that the Project had only been in the development stage. He also explained that the risk of pollution to the water was minimal given the nature of the Project. In addition, Lupaka had in any event controlled any risk through a treatment system.²⁶⁶
- 146 The Parán delegates demonstrated that they had no intention to engage in good faith negotiations. They refused to lift the Blockade, demanded payments before continuing any further negotiations and threatened to exploit the mine themselves.²⁶⁷ Further, Peruvian officials offered no solutions to reinstate Lupaka at the Site.

2.3.7 In February 2019, Peru stalled Police intervention in favour of further discussions

- 147 In the weeks that followed the 29 January 2019 meeting, Lupaka continued to push for Police intervention. In early February 2019, the CR Team obtained a document from the Police detailing the Operational Plan.²⁶⁸ This document confirmed that the Police had conducted a thorough investigation and developed a detailed strategy to lift the Blockade and to secure the Site.²⁶⁹ The Operational Plan would need to be approved by the Police hierarchy as well as the central ministerial authorities in Lima. Lupaka once again reached out to high-ranking officials in the central Government to ensure that the Operational Plan would go forward.²⁷⁰

²⁶⁵ *Id.*, p. 10 (para. 25).

²⁶⁶ *Id.*, p. 11 (paras. 26-27).

²⁶⁷ *Id.*, p. 11 (para. 28).

²⁶⁸ *Id.*, p. 11 (para. 30). See also Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**.

²⁶⁹ Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-193**, p. 32, 45-48.

²⁷⁰ Witness Statement of Luis F. Bravo, 01/10/2021, p. 12 (para. 31).

- 148 On 6 February 2019, Lupaka wrote to the MEM Minister, Mr Ismodes, highlighting the violent stance taken by Parán’s leaders and representatives and reiterating that Lupaka’s explosives at the Site were unguarded.²⁷¹ The letter also noted that Parán representatives had expressed the intention to exploit the mine. Lupaka requested urgent intervention to resolve the Blockade, failing which it would lose its investment.²⁷²
- 149 On 11 February 2019, Mr Bravo received news that the CPO of Sayán had approved a document containing the Operational Plan and had sent it to his superior in Huacho for approval.²⁷³ Accordingly, Mr Bravo arranged to meet the Chief of Police in Huacho on 12 February 2019. At the meeting, Mr Bravo insisted that the Police should implement the Operational Plan without delay.²⁷⁴ The Chief of Police in Huacho informed Mr Bravo that the Police were ready to proceed but that Ms Evelyn Tello, of the conflicts prevention office at the MININTER, had instructed him to wait and to allow the MEM to continue to mediate discussions between the Parán Community and Lupaka.²⁷⁵
- 150 The next day, Mr Bravo liaised through instant messaging with the Deputy Minister of the MININTER, Mr Esteban Saavedra, asking him to approve the Operational Plan and expressing concern at Ms Tello’s order to suspend the Police’s intervention.²⁷⁶ Mr Saavedra responded that the Parán Community was willing to engage in discussions and that the Central Government had concerns about bad press following a potential Police intervention.²⁷⁷ Mr Bravo pleaded that the Operational Plan take place on 19 February 2019, as he understood had been planned. Mr Bravo stated that it was clear that the Parán Community was pretending to be open to a

²⁷¹ Letter from Lupaka to MEM, 06/02/2019, at **Exhibit C-15**, p. 2.

²⁷² *Id.*

²⁷³ Witness Statement of Luis F. Bravo, 01/10/2021, p. 12 *et seq.* (para. 32); Approval by Mayor Soria of the Police Operational Plan to lift the Blockade (SPA), 09/02/2019, at **Exhibit C-195**.

²⁷⁴ Witness Statement of Luis F. Bravo, 01/10/2021, p. 12 *et seq.* (para. 32).

²⁷⁵ *Id.*, p. 12 *et seq.* (para. 32).

²⁷⁶ *Id.*, p. 13 (para. 33); WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192**, p. 2.

²⁷⁷ Witness Statement of Luis F. Bravo, 01/10/2021, p. 13 (para. 33); WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192**, p. 3.

mediated solution to avoid Police intervention.²⁷⁸ There was no response despite Mr Bravo's persistent messaging over the following days.²⁷⁹

- 151 As a result, Mr Bravo wrote a formal letter to Mr Saavedra on 19 February 2019 requesting that the MININTER authorise the intervention of the Police to restore order and to protect Lupaka's investments.²⁸⁰ This letter also notified Mr Saavedra that Lupaka had received intelligence reports that the Parán Community had been using firearms obtained from the military and explosives taken from the Site.²⁸¹ The letter also noted the danger of an escalated conflict between the Santo Domingo and Lacsanga Communities on the one hand and the Parán Community on the other.²⁸² Neither Mr Saavedra nor anyone else from the MININTER responded to Mr Bravo's letter.
- 152 On 22 February 2019, Lupaka then requested that the Canadian Embassy in Peru intervene to obtain a response from the MININTER.²⁸³ Lupaka's contacts in the Canadian Embassy reported that same day that the MININTER had halted Police intervention since the Parán Community had announced that it was willing to resume discussions.²⁸⁴
- 153 The MEM brokered a meeting between the Parán leaders and Lupaka on 26 February 2019 in Lima.²⁸⁵ Before the meeting, the MEM representatives advised Mr Bravo that they would meet with the Parán

²⁷⁸ Witness Statement of Luis F. Bravo, 01/10/2021, p. 13 (para. 34); WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192**, p. 3.

²⁷⁹ Witness Statement of Luis F. Bravo, 01/10/2021, p. 13 *et seq.* (para. 35); WhatsApp exchanges between Lupaka (Mr Bravo) and MININTER (Mr Saavedra), 5/02/2019-20/02/2019 (SPA), at **Exhibit C-192**, p. 3 *et seq.*

²⁸⁰ Witness Statement of Luis F. Bravo, 01/10/2021, p. 13 *et seq.* (para. 35); Letter from IMC to MININTER (SPA), 19/02/2019, at **Exhibit C-16 (corrected translation)**, p. 4.

²⁸¹ Letter from IMC to MININTER (SPA), 19/02/2019, at **Exhibit C-16**, p. 4.

²⁸² *Id.*, p. 4. See also, Letter from Mayor of Paccho District to the Parán Community (SPA), 15/02/2019, at **Exhibit C-196**.

²⁸³ See Email chain between Canadian Embassy officials and Lupaka - 27/02/2019 to 20/02/2019, at **Exhibit C-197**, p. 4.

²⁸⁴ *Id.*, p. 3.

²⁸⁵ Witness Statement of Luis F. Bravo, 01/10/2021, p. 15 (paras. 39-41).

leaders without Lupaka.²⁸⁶ The MEM representatives stated that they would insist that the only way to reinstate the dialogue would be for Parán leaders to lift the Blockade.²⁸⁷ During the meeting on 26 February 2019, the MEM representatives convinced the Parán authorities to lift the Blockade immediately and to start a formal dialogue process. Mr Bravo and his colleagues were invited to join the meeting. A discussion ensued as to further terms to be set out in a written agreement.²⁸⁸

154 The meeting led to Parán officials agreeing to: i) lift the Blockade immediately; ii) guarantee “social peace”; and iii) proceed to a formal discussion process. Additionally, the Parán community guaranteed that iv) the Parán road could be used to access the Project; and v) a joint topographic survey would take place on 20 March 2019 that would identify any surface area within Parán which Parán officials alleged had been affected by the Project.²⁸⁹ The points were memorialised in a document signed on behalf of IMC, the Parán Community and the MEM (the “**26 February 2019 Agreement**”).²⁹⁰

155 The expectation was that, further to the 26 February 2019 Agreement, the Parán officials would lift the Blockade, especially given that the MEM officials present at the meeting represented to IMC that the central Government would ensure compliance with the agreement, including by committing Police personnel to prevent any violence.²⁹¹ Those expectations were later dashed.

2.3.8 The Parán Community breached the 26 February 2019 Agreement and maintained the Blockade

156 In the days that followed the conclusion of the 26 February 2019 Agreement, IMC’s personnel attempted to access the Site through the

²⁸⁶ *Id.*, p. 15 (para. 40).

²⁸⁷ Email chain between Canadian Embassy officials and Lupaka - 27/02/2019 to 20/02/2019, at **Exhibit C-197**, p. 2.

²⁸⁸ Witness Statement of Luis F. Bravo, 01/10/2021, p. 16 (para. 42).

²⁸⁹ *Id.*, p. 16 (para. 43).

²⁹⁰ Minutes of the meeting between the Parán Community, IMC and MEM including 26 February 2019 Agreement (SPA), 26/02/2019, at **Exhibit C-200**.

²⁹¹ Witness Statement of Luis F. Bravo, 01/10/2021, p. 16 (para. 44).

- Lacsanga road.²⁹² Notwithstanding its commitments under the 26 February 2019 Agreement, the Parán Community maintained the Blockade, allowing access to the Site only through Parán's barely traversable road.²⁹³ Again, despite committing to enforcing the 26 February 2019 Agreement, the Government was passive in the face of the Parán Community's unwillingness to abide by its commitments.
- 157 IMC representatives first attempted to enter the Site on 27 February 2019. This was unsuccessful as the Blockade continued.²⁹⁴ The continuing Blockade led to Mr Bravo issuing letters to the MININTER and the MEM dated 28 February 2019. In those letters, IMC requested that the Government ensure that the Blockade was lifted, including by using force if necessary.²⁹⁵ The Government did not take such action.
- 158 IMC obtained confirmation from Parán's President on 3 March 2019 that they would allow access to the Site the following day.²⁹⁶ On 4 March 2019, Parán officials allowed the IMC staff to access the Site, although central Government officials did not accompany IMC personnel.²⁹⁷ This was contrary to the agreement with Government officials present when the 26 February 2019 Agreement was executed.
- 159 However, the Parán Community forced IMC's staff to use the Parán road to access the Site while maintaining the Blockade on the Lacsanga road.²⁹⁸ This breached the promises in the 26 February 2019 Agreement and was problematic because the Parán road was nearly impassable. All vehicles thus had to park two and half hours away, and IMC's staff continued on foot.²⁹⁹

²⁹² *Id.*, p. 17 (para. 47-48).

²⁹³ *Id.*, p. 18 (para. 53).

²⁹⁴ *Id.*, p. 17 (paras. 47-48).

²⁹⁵ Letter from Lupaka to MININTER (SPA), 28/02/2019, at **Exhibit C-17**; Letter from IMC to MEM (SPA), 28/02/2019, at **Exhibit C-201**.

²⁹⁶ Witness Statement of Luis F. Bravo, 01/10/2021, p. 17 (para. 50).

²⁹⁷ *Id.*, p. 18 (para. 54).

²⁹⁸ *Id.*, p. 18 (para. 53); Letter from IMC to MININTER (SPA), 05/03/2019, at **Exhibit C-202**, p. 2 *et seq.*

²⁹⁹ Witness Statement of Luis F. Bravo, 01/10/2021, p. 18 (para. 53).

- 160 When IMC’s team eventually reached the Site, they found that the Parán Community had damaged and destroyed valuable equipment. In addition, tools were missing, as well as pieces of heavy equipment.³⁰⁰ Moreover, the explosive magazine had been forced open, and, on inspection, it was clear that items were missing.³⁰¹
- 161 In a letter dated 5 March 2019, Mr Bravo again explained the situation to the MININTER and requested Police intervention to lift the Blockade and restore order.³⁰² Mr Bravo visited key Governmental officers during the following weeks, pointing out the Parán Community’s breach of the 26 February 2019 Agreement and insisting there should be urgent Police intervention.³⁰³ Still, Peru took no action.
- 162 During further communications with IMC, Parán’s representatives continued to act unpredictably. On 15 March 2019, the Lupaka team met Parán’s President to coordinate the topographical survey of the surface area on Parán territory that had been agreed as part of the 26 February 2019 Agreement. The topographical survey had been scheduled to take place on 20 March 2019. Parán’s President announced that a road construction study on the Parán road should be conducted instead and that the Parán Community had already engaged a topographer for this purpose. He added that IMC had to cover the cost immediately, failing which, the Parán Community would stop allowing even the currently limited Site access and expel IMC personnel from the Site.³⁰⁴
- 163 IMC rejected the Parán President’s position in a letter dated 18 March 2019, although IMC extended an invitation to meet within the next two days to discuss moving matters forward.³⁰⁵ On 19 March 2019, Mr Bravo and Lupaka’s CEO, Mr Ansley, met with Parán’s President in the hope of

³⁰⁰ *Id.*, p. 18 *et seq.* (para. 54).

³⁰¹ *Id.*, p. 19 (para. 55); IMC, Internal Report on missing items from the explosive magazine (SPA), 08/03/2019, at **Exhibit C-247**.

³⁰² Letter from IMC to MININTER (SPA), 05/03/2019, at **Exhibit C-202**.

³⁰³ Witness Statement of Luis F. Bravo, 01/10/2021, p. 19 (para. 57). See also, Internal Lupaka email chain, 6/3/2021 to 7/3/2021, at **Exhibit C-204**.

³⁰⁴ Witness Statement of Luis F. Bravo, 01/10/2021, p. 20 (paras. 58-60).

³⁰⁵ Letter from IMC to the Parán Community (SPA), 18/03/2019, at **Exhibit C-205**.

reverting to the actual terms of the 26 February 2019 Agreement.³⁰⁶ Given that the central government authorities were not present at this meeting, Mr Bravo expected the Parán Community to express its motivations as candidly as possible.³⁰⁷ Mr Bravo recounts that Lupaka offered to reconsider the Parán village road's topographic survey and to provide jobs to Parán members at the mine in due course.³⁰⁸

164 However, Parán's President raised demands different from those discussed on 26 February 2019. He stated that the Project was located on Parán's land and that IMC should cancel its agreements with the Lacsanga and Santo Domingo Communities. He suggested that Lupaka should build a processing plant on Parán's territory.³⁰⁹ There was no mention of the previously demanded withdrawal of the criminal complaints filed against Parán representatives or any discussion of alleged environmental damage.³¹⁰

165 As Mr Bravo notes, IMC explained its position on these issues to Parán's President. Mr Bravo explained that the mine was not on Parán land and that there was no immediate need for a processing plant. Also, IMC could not cancel the agreements with the Lacsanga and Santo Domingo Communities.³¹¹ Alternative proposals, including the fostering of social and economic development of the area to the direct benefit of the Parán Community, were of no interest to Parán's President. He abruptly ended the meeting when it was clear that Lupaka would not accept his demands.³¹²

166 An IMC representative nevertheless went to the main square in Parán's village on 20 March 2019, prepared to carry out the topographical survey to which the parties had agreed in the 26 February 2019 Agreement.

³⁰⁶ Witness Statement of Luis F. Bravo, 01/10/2021, p. 21 (para. 62).

³⁰⁷ *Id.*, p. 21 (para. 62).

³⁰⁸ *Id.*, p. 21 (para. 63).

³⁰⁹ *Id.*, p. 22 (para. 66).

³¹⁰ *Id.*, p. 21 *et seq.* (para. 65).

³¹¹ *Id.*, p. 21 *et seq.* (para. 65).

³¹² *Id.*, p. 21 (para. 67).

However, on the morning of the survey, no Parán officials were present to take part.³¹³

2.3.9 The Parán Community invaded the Site again on 20 March 2019

- 167 On 20 March 2019, approximately 150 hostile Parán representatives invaded the Site, led by Parán’s President, whilst simultaneously maintaining the Blockade. Some of the Parán invaders were armed, and on entry, demanded that IMC’s staff leave immediately.³¹⁴
- 168 IMC wrote to the MEM on 21 March 2019 complaining about the situation and requesting urgent intervention.³¹⁵ Additionally, IMC wrote to the MEM requesting that it do everything in its power to allow the development of the Project.³¹⁶ Mr Bravo also personally called high-level officials at the MININTER, the MEM, and the Chief of Police in Huacho to report on the Parán Community’s breach of the 26 February 2019 Agreement and the new invasion. IMC personnel also filed a complaint with the Sayán Police, denouncing both the attack and again noting the danger of the missing material from the explosive magazine at the Site.³¹⁷
- 169 There was no immediate reaction from the authorities. As Mr Bravo notes, it was only on 28 March 2019 that he met with representatives of the MEM and the MININTER, following pressure exerted by Canadian Embassy officials and after many calls.³¹⁸ Despite the Parán Community’s repeated criminal conduct and continuing bad faith, the MEM representatives yet again requested that Lupaka continue with the “dialogue”. Moreover, the MEM informed Lupaka that the Parán Community claimed that Lupaka

³¹³ *Id.*, p. 22 (para. 68).

³¹⁴ *Id.*, p. 22 *et seq.* (Section 4.8). See also, Criminal complaints filed with the Sáyan Police by IMC representative (SPA), 21/03/2019, at **Exhibit C-208**.

³¹⁵ Letter from IMC to MININTER (SPA), 20/03/2019, at **Exhibit C-206**.

³¹⁶ Email from IMC to MEM with attachment (SPA), 20/03/2019, at **Exhibit C-207**.

³¹⁷ Criminal complaints filed with the Sáyan Police by IMC representative (SPA), 21/03/2019, at **Exhibit C-208**.

³¹⁸ Witness Statement of Luis F. Bravo, 01/10/2021, p. 23 (para. 71).

had breached the 26 February 2019 Agreement by refusing to conduct the topographical survey.³¹⁹ As explained above, this was, of course, false.

170 The Government was effectively ignoring Lupaka's letters and complaints. Accordingly, at the 28 March 2019 meeting, Mr Bravo conveyed Lupaka's disappointment with the Government's passiveness in the face of the seriousness of the situation.³²⁰

171 Following the meeting, IMC sent a letter to the MEM (with the MININTER and the Canadian embassy in copy), dated 29 March 2019, in which it once again requested that its rights be restored and that the Police intervene to remove the Parán invaders.³²¹ As on prior occasions, nothing came of this.

172 In the weeks that followed, the Parán representatives also began to try to extort money from IMC's contractors who wanted to recover their equipment from the Site. Parán representatives successfully extracted payments from contractors and ensured that the last machine to leave the camp blocked the access by moving earth and rocks directly onto the Lacsanga road.³²²

2.3.10 The Government continued to avoid implementing the Operational Plan while the Parán Community again resorted to violence

173 In April 2019, IMC continued to push the Huacho Police to implement the Operational Plan and received confirmation from the CPO in charge of intelligence services that he was ready to approve the Operational Plan.³²³ However, the Chief of Police stated that the Operational Plan would also need to be approved by the central authorities in Lima. Hence, he

³¹⁹ *Id.*, p. 22 (para. 72).

³²⁰ *Id.*, p. 23 (paras. 73-74).

³²¹ Letter from IMC to MEM (SPA), 29/03/2019, at **Exhibit C-209**.

³²² Witness Statement of Luis F. Bravo, 01/10/2021, p. 24 (para. 75).

³²³ *Id.*, p. 24 *et seq.* (para. 76); Internal IMC email (SPA), 24/04/2019, at **Exhibit C-214**.

suggested that IMC should lobby various government officials in Lima to obtain their approval.³²⁴

- 174 On 25 April 2019, Mr Estrada reported to Mr Bravo on his conversation with the Sayán Police from the previous day relating to the Operational Plan. He had been informed that the Operational Plan had stalled because the Parán Community had better contacts with the central Government in Lima than IMC, and that those central authorities apparently did not see the crisis as sufficiently grave as to warrant central Government intervention.³²⁵
- 175 Despite this, Lupaka continued its efforts to garner support for the execution of the Operational Plan. Specifically, IMC sought assistance from a Peruvian security consultant named War Dogs Security S.A.C. (“WDS”). WDS had originally been contacted in January 2019 to secure the Site when the Police intervened to lift the Blockade.³²⁶ In early April 2019, WDS collaborated with the Huacho Police’s intelligence services to gather intelligence on the Parán Community’s activities at the Blockade. IMC hoped that the Police would take this intelligence into account in devising and executing the Operational Plan.³²⁷
- 176 On 1 May 2019, local Police, accompanied by members of WDS, learnt that there were only a handful of Parán representatives manning the Blockade.³²⁸ Then, a few days later, WDS personnel confirmed that the tents set up by Parán representatives on the Lacsanga access road were empty.³²⁹ A trip to secure the Site appeared feasible, although MC had not authorised WDS personnel to proceed without Police accompaniment.³³⁰

³²⁴ Witness Statement of Luis F. Bravo, 01/10/2021, p. 24 *et seq.* (para. 76); Internal IMC email (SPA), 10/04/2019, at **Exhibit C-213**; Internal IMC email (SPA), 24/04/2019, at **Exhibit C-214**.

³²⁵ Internal IMC email (SPA), 25/04/2019, at **Exhibit C-215**.

³²⁶ Witness Statement of Luis F. Bravo, 01/10/2021, p. 25 *et seq.* (paras. 78-79).

³²⁷ *Id.*, p. 25 *et seq.* (para. 79).

³²⁸ Internal IMC email (SPA), 04/05/2019, at **Exhibit C-216**, p. 2.

³²⁹ Witness Statement of Luis F. Bravo, 01/10/2021, p. 26 (para. 80).

³³⁰ *Id.*

- 177 WDS personnel were able to reach the Site on 14 May 2019 and advised Mr Bravo that they were awaiting the Police.³³¹ However, when the Parán Community received news of this “unauthorised” access by IMC’s contractors to its own Site, Parán representatives violently swarmed the Site by the hundreds. WDS reported to Mr Bravo that Parán representatives were setting upon the Site.³³² Before WDS’ personnel could leave, Parán representatives began shooting in their direction. The WDS personnel did not return fire and fled the area through the hills, as did Mr Estrada, who had arrived shortly before the shooting began.³³³ While there were no casualties within the Parán Community, two members of the WDS team were hospitalised.³³⁴ The following day, the Sayán Police detained some members of the WDS team.³³⁵ They did not, however, detain the Parán members that had carried out the assault.
- 178 After the events of 14 May 2019, the Parán Community began to man the Blockade again with gunmen.³³⁶ The Lacsanga Community continued to reject the Blockade on its land by Parán representatives. In the days following these events, it issued a public statement to this effect and filed a criminal complaint against Parán members.³³⁷

2.3.11 Lupaka continued to plead for the Government’s assistance until its investment was completely destroyed

- 179 On 27 May 2019, Lupaka representatives met with Government representatives from MININTER, the PCM as well as the Ombudsman’s office. These same Government officials had met separately with Parán officials a week before. They informed Lupaka that the Parán Community was relying on the events of 14 May 2019 to argue that it was IMC that

³³¹ *Id.*, p. 26 (para. 81).

³³² *Id.*, p. 26 (para. 82).

³³³ *Id.*

³³⁴ *Id.*, p. 26 (para. 83).

³³⁵ *Id.*, p. 26 (para. 83).

³³⁶ Police Information Note on Parán Conflict (SPA), 25/05/2019, at **Exhibit C-217**.

³³⁷ Lacsanga Press Release, 17/05/2019, at **Exhibit C-249**.

had breached the 26 February 2019 Agreement. The Parán officials had requested that the Site be closed.³³⁸

180 Mr Bravo explained the difficulties Lupaka had had with the Parán Community and the failed attempts to reach an agreement.³³⁹ However, Government officials did not appear to understand – or to want to understand – the situation. As Mr Bravo recounts, Ms Tello, of the MININTER’s Deputy Minister’s office, stated that all possibilities of dialogue had to be exhausted before the Police could intervene.³⁴⁰

181 Ms Tello added that, in any event, she had not received the Operational Plan.³⁴¹ However, as noted above, Lupaka had received a copy of the same back in February 2019.³⁴² The Police authorities had confirmed many times that they were ready to proceed with it if only the MININTER would allow them to do so.³⁴³ Ms Tello, in particular, had been named by the Chief of Police in Huacho as having instructed that the Operational Plan should not proceed in February 2019 and that dialogue should continue.³⁴⁴ Therefore, Mr Bravo was shocked to hear from Ms Tello that she had allegedly not received the Operational Plan.³⁴⁵

182 At the 27 May 2019 meeting, the Government representatives listed the Parán Community’s demands for the Blockade to be lifted, namely: i) that IMC agree to terms equivalent to those reached with the Lacsanga and Santo Domingo Communities; ii) that IMC replace its CR Team; and iii) that IMC withdraw the criminal charges against Parán’s officials.³⁴⁶

³³⁸ Summary of the meeting between MEM, PCM, MININTER, Ombudsman’s Office and IMC, 27/05/2019, at **Exhibit C-18**, p. 6 (para. 23). See also, Witness Statement of Luis F. Bravo, 01/10/2021, p. 25 (para. 86).

³³⁹ Witness Statement of Luis F. Bravo, 01/10/2021, p. 27 *et seq.* (para. 86).

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² See *supra* paras. 141-142.

³⁴³ See *supra* paras. 141 and 149.

³⁴⁴ See *supra* para. 149.

³⁴⁵ Witness Statement of Luis F. Bravo, 01/10/2021, p. 27 (para. 86).

³⁴⁶ Summary of the meeting between MEM, PCM, MININTER, Ombudsman’s Office and IMC, 27/05/2019, at **Exhibit C-18**, p. 6 (para. 18).

- 183 The Parán Community was again changing its demands. Specifically, it now wanted Lupaka to change its CR Team and had re-introduced the criminal charges issue. The processing plant now appeared to be off the table. In addition, the Parán Community was stating clearly that the Blockade would not be lifted before Lupaka agreed to these conditions. Despite the Parán Community's intransigence, the Government insisted that discussions should continue.³⁴⁷
- 184 In his witness statement, Mr Bravo recounts the tense exchange that followed. He confronted the Ministerial officials and stated that the central Government's insistence on the continuation of dialogue exposed its unwillingness to address the situation.³⁴⁸ Mr Bravo referred to the appetite for violence displayed by Parán's representatives, including the shooting of a member of Lacsanga in January 2019,³⁴⁹ the armed attack on WDS on 14 May 2019 and an incident with Santo Domingo farmers the week before.³⁵⁰
- 185 However, the Government officials did not alter their line that discussions should continue. The meeting ended with the PCM representative stating that all parties should wait for fifteen days before taking any further action.³⁵¹
- 186 Lupaka used its contacts at the Canadian Embassy to press Government authorities to take decisive action in restoring Lupaka's investment rights.³⁵² However, this only resulted in a 19 June 2019 invitation from the MEM to Lupaka to attend yet another meeting with Parán's President.³⁵³

³⁴⁷ *Id.*, p. 6 (para. 19).

³⁴⁸ Witness Statement of Luis F. Bravo, 01/10/2021, p. 28 (para. 90).

³⁴⁹ See also, Criminal complaint by Lacsanga Community (SPA), 25/03/2019, at **Exhibit C-248**, p. 3.

³⁵⁰ Summary of the meeting between MEM, PCM, MININTER, Ombudsman's Office and IMC, 27/05/2019, at **Exhibit C-18**, p. 5 (para. 11).

³⁵¹ *Id.*

³⁵² Email chain between Canadian Embassy officials and Lupaka, 19/06/2019 to 6/6/2019, at **Exhibit C-219**, p. 1.

³⁵³ Letter from MEM to the Parán Community (SPA), 19/06/2019, at **Exhibit C-220**.

- 187 The meeting took place on 2 July 2019, but the Parán Community ultimately refused to participate.³⁵⁴ Representatives from the MEM, the PCM, the MININTER and the Ombudsman’s office were present. The Government officials’ main concern was unrelated to restoring Lupaka’s rights. Instead, they demanded an explanation regarding the events of 14 May 2019 and ignored the long history of violent conduct by the Parán Community.³⁵⁵ As Mr Bravo explained at the meeting, the Parán officials were using the 14 May 2019 incident as an excuse to justify the continued Blockade – even though the Parán Community had acted violently before establishing the Blockade.³⁵⁶ The only response from the Government was, again, that the dialogue should continue.³⁵⁷
- 188 In a letter dated 8 July 2019, IMC alerted the MEM that there was more evidence that the Parán Community intended to appropriate Lupaka’s stockpiled ore and exploit the mine. There had also been reported instances of pillaging at the Site.³⁵⁸ Indeed, as noted above, Parán leaders had threatened to exploit the mine already in January 2019.³⁵⁹ The Government did not respond to the 8 July 2019 letter.
- 189 On 15 July 2019, Lupaka’s management, together with Canadian Embassy officials, attended a meeting with the Deputy Minister of the MEM, Mr Augusto Cauti. He was not aware of the impossible situation Lupaka now faced, nor its history. However, once apprised, he expressed his concern. He asked for evidence of the illegal actions reported by Lupaka and mentioned that if the Parán Community was indeed exploiting the mine, the MININTER could be required to order Police intervention.³⁶⁰

³⁵⁴ Witness Statement of Luis F. Bravo, 01/10/2021, p. 29 (para. 93).

³⁵⁵ *Id.*, p. 29 *et seq.* (para. 94).

³⁵⁶ *Id.*, p. 29 (para. 94); Minutes of the meeting between MEM, PCM, MININTER, Ombudsman’s office and IMC, 02/07/2019, at **Exhibit C-221**.

³⁵⁷ Minutes of the meeting between MEM, PCM, MININTER, Ombudsman’s office and IMC, 02/07/2019, at **Exhibit C-221**.

³⁵⁸ Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**.

³⁵⁹ See *supra* para. 146.

³⁶⁰ Witness Statement of Luis F. Bravo, 01/10/2021, p. 30 (para. 97); Summary of the meeting between Deputy Minister of Mines and IMC with support of Canadian Embassy officials, 15/07/2019, at **Exhibit C-222**, p. 3 (para. 22).

190 However, despite the Parán Community having prevented Lupaka from developing the Project for over eight months at that point, the Government still took no action.

2.3.12 The Parán Community is actively exploiting the mine

191 The Parán Community made no attempts to hide its intention to exploit the mine. As explained by Mr Bravo, Parán representatives warned Lupaka as early as January 2019 that the Parán Community intended to engage in mining activities at the Site.³⁶¹ As noted, Lupaka alerted the central Government authorities of the Parán Community's plan to exploit the mine.³⁶² Still, Peru took no action.

192 The Claimant understands that the Parán Community is now executing its plan: it has contracted with a company that extracts the ore and pays Parán a fee. The same company also employs some Parán members.³⁶³

2.4 The resulting loss of Lupaka's investment

193 As noted above, at the time of the Parán Community's illegal invasion in October 2018, Lupaka had completed the development of the mine and was on the verge of exploitation.³⁶⁴ However, because of Peru's illegal acts and omissions as set out above, Lupaka could not bring the mine into production. Accordingly, Lupaka was unable to service its obligations under the PPF Agreement.³⁶⁵

194 In July 2019, Pandion transferred its interest in the PPF Agreement to Lonely Mountain Resources S.A.C. ("**Lonely Mountain**"), a Peruvian mining consortium.³⁶⁶ Lonely Mountain then enforced its contractual

³⁶¹ Witness Statement of Luis F. Bravo, 01/10/2021, p. 11 (para. 28).

³⁶² *Id.*, p. 12 *et seq.* (para. 31); Letter from Lupaka to MEM, 06/02/2019, at **Exhibit C-15**; Letter from IMC to MEM (SPA), 08/07/2019, at **Exhibit C-13**.

³⁶³ [REDACTED]

³⁶⁴ See *supra* Section 2.2.6.

³⁶⁵ Witness Statement of Gordon Ellis, 01/10/2021, p. 16 (para. 54).

³⁶⁶ *Id.*, p. 17 *et seq.* (para. 55).

rights under the PPF Agreement by seizing IMC's shares on 26 August 2019, thus taking control of the Project.³⁶⁷

- 195 Lonely Mountain's enforcement against IMC's shares was the direct consequence of Peru's acts and omissions. It was publicly known that Lupaka would likely lose its investment if it could not resume mining activities.³⁶⁸ In addition, Lupaka had communicated this likely outcome to Peruvian authorities at the time.³⁶⁹

³⁶⁷ *Id.*, p. 17 *et seq.* (paras. 56-57).

³⁶⁸ See *e.g.*, "Construction of Invicta has been paralysed for nine months", *Minera Andina* (SPA), 05/07/2019, at **Exhibit C-20**.

³⁶⁹ See *e.g.*, Letter from Lupaka to MEM, 06/02/2019, at **Exhibit C-15**, p. 2.

3 THE TRIBUNAL HAS JURISDICTION

196 In the Request for Arbitration, the Claimant demonstrated that this dispute falls within the jurisdiction of ICSID. The bases for the Tribunal’s jurisdiction are reaffirmed in this Memorial.

197 All requirements under the FTA and the ICSID Convention to commence this arbitration are met. Lupaka is both an investor within the meaning of the FTA and a national of an ICSID Contracting State other than Peru, in accordance with the ICSID Convention (**Section 3.1**). Lupaka made an investment that is protected under the FTA and in the ICSID Convention (**Section 3.2**). Finally, the Claimant has complied with the conditions precedent for the submission of a claim to arbitration under Articles 822 and 823 of the FTA (**Section 3.3**).

3.1 The Tribunal has Jurisdiction *Ratione Personae*

198 Lupaka qualifies as an investor within the meaning of the FTA (**Section 3.1.1**) and the ICSID Convention (**Section 3.1.2**) concurrently.

3.1.1 Lupaka qualifies as an investor within the meaning of the FTA

199 Article 847 of the FTA defines an “investor of a Party” as follows:

“(a) in the case of Canada:

[...]

(ii) a national or an enterprise of Canada,

that seeks to make, is making or has made an investment;

[...]”³⁷⁰

200 The same provision defines “enterprise of a Party” as follows:

³⁷⁰ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 165 *et seq.* (Art. 847).

“enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.”³⁷¹

201 The term “enterprise” has the meaning given in Article 105 of the FTA (and applies equally to a branch of any such entity), as follows:

“any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association”.³⁷²

202 Lupaka is a corporation duly incorporated under the laws of British Columbia, Canada in November 2000, which made an investment in Peru. Lupaka therefore qualifies as an “investor of a Party” under the FTA.

3.1.2 Lupaka is a national of another Contracting State (Canada) in accordance with Article 25(2)(b) of the ICSID Convention; Peru is a Contracting State

203 Lupaka qualifies as a national of another ICSID Contracting State other than Peru for the purpose of ICSID jurisdiction. The Claimant is a “juridical person which ha[s] the nationality of [Canada]”,³⁷³ as required by Article 25(2)(b) of the ICSID Convention.

204 The ICSID Convention requires that the Claimant have the requisite nationality “on the date on which the [P]arties consented to submit [this] dispute to [...] arbitration”.³⁷⁴ Such consent crystallised when the Claimant accepted the Respondent’s offer to arbitrate this dispute in its Request for Arbitration dated 21 October 2020. Lupaka has been a Canadian national in an uninterrupted manner since its incorporation in November 2000. The Claimant therefore conforms with the definition of “National of another Contracting State” set out in Article 25(2)(b) of the ICSID Convention.

³⁷¹ *Id.*

³⁷² *Id.*, p. 6 (Art. 105).

³⁷³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 14/10/1966, at **Exhibit CLA-4**, p. 18 (Art. 25(2)(b)).

³⁷⁴ *Id.* Lupaka submitted its Request for Arbitration against Peru on 21 October 2020.

205 The Respondent is a Contracting State to ICSID for the purposes of Article 25(1). It signed the ICSID Convention on 4 September 1991 and the ICSID Convention entered into force for the Respondent on 8 September 1993. Canada signed the ICSID Convention on 15 December 2006 and the ICSID Convention entered into force for Canada on 1 December 2013.³⁷⁵

3.2 The Tribunal has Jurisdiction *Ratione Materiae* as Lupaka made a protected investment under the FTA and the ICSID Convention

206 The second jurisdictional requisite is *ratione materiae*. Lupaka made an investment within the definition of the FTA (**Section 4.2.1**) and in conformity with the ICSID Convention (**Section 4.2.2**).

3.2.1 Lupaka made a protected investment within the meaning of the FTA

207 Article 847 of the FTA defines “investment” as follows:

“(a)# an enterprise;

(b)# an equity security of an enterprise;

[...]

(e)# an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

[...]

(g)# real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h)# interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under:

³⁷⁵ Database of ICSID Member States, at **Exhibit CLA-5**.

- (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
- (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.”³⁷⁶

208 By contrast, the term “investment” within Article 25 of the ICSID Convention was left undefined intentionally, leaving States with the discretion to agree on a definition. Therefore, the definition is as provided in Article 847 of the FTA, as discussed below.

209 Lupaka invested significant financial resources in Peru for the evaluation, acquisition, exploration and development of the Project. Specifically, the Claimant's investment in the Project included the following elements, all of which fall within the definition of “investment” in Article 847 of the FTA:

- i) a 99.999% interest in IMC through AAG (acquired in October 2012), an enterprise incorporated under the laws of Peru;
- ii) six mining Concessions in Peru held by IMC which under Peruvian law, do not have an expiry date;
- iii) surface rights in the Project area held by IMC allowing for mining activities to be undertaken;
- iv) Lupaka's attendant equipment and infrastructure including, among other things, moveable and immovable as well as tangible and intangible property; and
- v) the expenses incurred by Lupaka for exploration drilling, assaying and metallurgical tests among others.

3.2.2 Lupaka satisfies any additional *ratione personae* requirements which (*quod non*) are deemed to exist under Article 25(1) of the ICSID Convention

210 Article 25(1) of the ICSID Convention provides that:

³⁷⁶ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 166 *et seq.* (Art. 847).

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment [...]”³⁷⁷

- 211 The term “investment” is not defined in the ICSID Convention. This omission has given rise to extensive discussion by arbitral tribunals and commentators.³⁷⁸ Overall, ICSID tribunals have adopted one of two contrasting approaches to interpreting the term “investment” under Article 25(1).
- 212 The first approach is to interpret the term “investment” in the ICSID Convention by reference to the definition of “investment” contained in the applicable investment agreement (or other expression of consent to ICSID arbitration).³⁷⁹ Pursuant to this approach, where (as here) an investor’s investment falls within the definition of “investment” in the FTA, then there is a strong presumption that the investor will have an “investment” for the purposes of the Convention.³⁸⁰

³⁷⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 14/10/1966, at **Exhibit CLA-4**, p. 18 (Art. 25(1)).

³⁷⁸ See, for example, C. H. Schreuer *et al.*, *The ICSID Convention: A Commentary*, 2nd ed. (CUP, 2009), p. 112-134, at **Exhibit CLA-6**, p. 114 *et seq.* and p. 128 *et seq.*; and R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd ed. (OUP, 2012), Chapter III: Investors and Investments, at **Exhibit CLA-7**, p. 15 *et seq.*

³⁷⁹ See, for example, *Abaclat and others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 04/08/2011, at **Exhibit CLA-8**, p. 141 *et seq.* (paras. 364-365); *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16/04/2009, at **Exhibit CLA-9**, p. 30 *et seq.* (paras. 72-73); *Generation Ukraine, Inc v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16/09/2003, at **Exhibit CLA-10**, p. 33 (para. 8.2); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16/08/2007, at **Exhibit CLA-11**, p. 140 *et seq.* (para. 305); *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Jurisdiction of the Arbitral Tribunal, 08/12/1998, at **Exhibit CLA-12**, p. 473 (para. 48); and *M.C.I Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31/07/2007, at **Exhibit CLA-13**, p. 36 *et seq.* (paras. 157-160).

³⁸⁰ See, for example, *Československá Obchodní Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24/05/1999, at **Exhibit CLA-14**, p. 273 *et seq.* (paras. 63, 66); *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 08/03/2010, at **Exhibit CLA-15**, p. 59 *et seq.* (para. 130); *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, 37 I.L.M. 1378 (1998), Decision of the Tribunal on Objections to Jurisdiction, 11/07/1997, at **Exhibit CLA-16**, p. 1384 (para. 31).

- 213 The second approach is to apply a self-standing, so-called “objective” meaning to the term “investment” for the purposes of Article 25(1), regardless of the definition of “investment” in the applicable investment agreement. Investment tribunals adopting this approach have inquired whether the investment bears the basic features of an investment, which include: i) a substantial commitment of capital; ii) a certain duration; iii) regularity of profits and returns; iv) an assumption of risk; and, for some tribunals, v) significance for the host State’s development.³⁸¹
- 214 As set out above, in cases such as the present where the FTA includes a clear definition of “investment”, it is reasonable to proceed on the basis of the first approach to *ratione materiae* jurisdiction. However, to the extent that the term “investment” has any separate meaning of its own under the ICSID Convention, the Claimant’s investment bears all of the five above-mentioned criteria of an investment under the ICSID Convention.
- 215 First, Lupaka made substantial investment of capital in Peru, amounting to more than USD 24.8 million.³⁸² Second, Lupaka, through IMC and its other subsidiaries, secured the Concessions, permits and financial agreements for a significant period of time, thereby satisfying the “certain duration” characteristic. Third, Lupaka expected to make a substantial profit through its investment. Fourth, Lupaka assumed an element of risk when making its investment in Peru’s mining sector. Fifth, Lupaka’s investment provided significant benefits to the host State’s economy not only through tax payments but also to the Rural Communities surrounding the Project.
- 216 Lupaka has met all the elements of Article 25(1) of the ICSID Convention. Therefore, the Centre and the Tribunal have jurisdiction in this case. Lupaka has also met all of the conditions precedent to submit a claim to arbitration under the FTA, as set out below.

³⁸¹ See, for example, *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, 37 I.L.M. 1378 (1998), Decision of the Tribunal on Objections to Jurisdiction, 11/07/1997, at **Exhibit CLA-16**, p. 1382 *et seq.* (para. 21-33); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23/07/2001, at **Exhibit CLA-17**, p. 622 (para. 53).

³⁸² Expert Report of Edmond Richards and Erik van Duijvenvoorde, p. 63 (para. 8.29 and Table 8.1).

3.3 Lupaka has met the conditions precedent to submit a claim to arbitration under Articles 822 and 823 of the FTA

217 Article 824 of the FTA provides, in the relevant part:

“1. [...] a disputing investor who meets the conditions precedent in Article 823 may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing Party and the Party of the disputing investor are parties to the Convention.”³⁸³

218 As set out in the sub-sections that follow, Lupaka has complied with all of the conditions precedent in Article 823 of the FTA. The Claimant has also complied with the obligation to carry out consultations per Article 822 of the FTA.

3.3.1 Both Parties consented to arbitration as required by Article 823.1(a) and Lupaka has provided the requisite waiver pursuant to Article 823.1(e) of the FTA

219 Lupaka provided a consent and waiver document in accordance with the form provided at Annex 823.1 with its Request for Arbitration.³⁸⁴ Such document complies with Article 823.1(a) of the FTA which provides as follows:

“1. A disputing investor may submit a claim to arbitration under Article 819 [Claim by an Investor of a Party on Its Own Behalf] only if:

“(a) the disputing investor consents to arbitration in accordance with the procedures set out in this Section.”³⁸⁵

220 It also exhausts the requirement at Article 823.1(e) and Article 823.5 of the FTA:

³⁸³ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 146 *et seq.* (Art. 824).

³⁸⁴ Lupaka, Consent and Waiver in accordance with Article 823 FTA, 27/09/2020, at **Exhibit C-21**.

³⁸⁵ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 143 (Art. 823).

“(e) the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

[...]

5. 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.”³⁸⁶

221 Article 823.3 of the FTA in turn requires that:

“3. A consent and waiver required by this Article shall be in the form provided for in Annex 823.1, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.”³⁸⁷

3.3.2 Lupaka has complied with the timing requirements in Article 823.1(b) and (c) of the FTA

222 Article 823.1(b) and (c) of the FTA requires the following:

“(b) at least six months have elapsed since the events giving rise to the claim;

(c) not more than 39 months have elapsed from the date on which the disputing investor first acquired, or should have first acquired,

³⁸⁶ *Id.*, p. 144 *et seq.* (Arts. 823.1(e) and 823.5).

³⁸⁷ *Id.*, p. 145 (Art. 823.3).

knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby.”³⁸⁸

223 As set out at Section 2.3 above, the events giving rise to the claim span from June 2018 to August 2019. Accordingly, more than six months elapsed since the events giving rise to the claims and the Claimant submitting those claims to arbitration, in accordance with Article 823.1(b) of the FTA.

224 Consistent with Article 823.1(c) of the FTA, not more than 39 months have elapsed from the time Lupaka acquired knowledge of Peru’s breaches of the FTA (namely arising from the events from June 2018 to August 2019) and that it incurred loss or damage as a result and when it brought its claims to arbitration.

3.3.3 Lupaka has delivered a Notice of Intent in accordance with Article 823 (d) of the FTA

225 Article 823.1 (d) refers to the requirement to file a Notice of Intent in the following terms:

“(d) the disputing investor has delivered the Notice of Intent required under Article 821, in accordance with the requirements of that Article, at least six months prior to submitting the claim.”³⁸⁹

226 Article 821 of the FTA provides that:

“1. The disputing investor shall deliver to the disputing Party a written notice of its intent to submit a claim to arbitration at least six months before the claim is submitted. The notice shall specify:

(a) the name and address of the disputing investor and, where a claim is made under Article 820, the name and address of the enterprise;

³⁸⁸ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 143 (Art. 823.1 (b) and (c)).

³⁸⁹ *Id.*, p. 144 (Art. 823.1 (d)).

- (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;
- (c) the issues and the factual basis for the claim, including the measures at issue; and
- (d) the relief sought and the approximate amount of damages claimed.

2. The disputing investor shall also deliver, with its Notice of Intent to Submit a Claim to Arbitration, evidence establishing that it is an investor of the other Party.”³⁹⁰

227 Lupaka delivered a Notice of Intent to Peru by letter dated 12 December 2019,³⁹¹ which complied with the requirements set out in Articles 821 of the FTA. Peru acknowledged receipt of the Notice of Intent on 27 December 2019.³⁹²

3.3.4 The Parties held consultations pursuant to Article 822 of the FTA

228 Article 822 of the FTA provides as follows:

“1. Before a disputing investor may submit a claim to arbitration, the disputing parties shall first hold consultations in an attempt to settle a claim amicably.

2. Consultations shall be held within six months of the submission of the Notice of Intent to Submit a Claim to Arbitration, unless the disputing parties otherwise agree.

3. The place of consultation shall be the capital of the disputing Party, unless the disputing parties otherwise agree.”³⁹³

³⁹⁰ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 142 (Art. 821).

³⁹¹ Notice of Intent to Submit Claims to Arbitration, 12/12/2019, at **Exhibit C-22**.

³⁹² Communication from Peru’s Special Commission to LALIVE regarding Lupaka’s Notice of Intent (SPA), 08/01/2020, at **Exhibit C-250**.

³⁹³ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 143 (Art. 822).

- 229 In its Notice of Intent, Lupaka requested consultations with Peru in accordance with Article 822 of the FTA.³⁹⁴
- 230 Due to COVID-19 related restrictions imposed by Peru, the Parties were unable to convene in Lima as per Article 822.3 of the FTA. Accordingly, on 22 April 2020, the Parties held a videoconference in order to discuss a mutually acceptable solution to Lupaka's claims. However, despite the Parties' consultations at such time, and the further consultations through subsequent correspondence, the Parties were not able to reach an agreement to settle the dispute amicably.
- 231 More than six months have elapsed since the Claimant's Notice of Intent. In light of the above, the requirements under Article 822 of the FTA have been satisfied.
- 232 It is clear from the above that the Tribunal has jurisdiction over Lupaka's claims against Peru.

³⁹⁴ Notice of Intent to Submit Claims to Arbitration, 12/12/2019, at **Exhibit C-22**, p. 5.

4 PERU’S ACTS AND OMISSIONS BREACHED THE FTA

- 233 Peru’s acts and omissions vis-à-vis the Project breached the FTA and destroyed the Claimants’ investment.
- 234 Many of the acts and omissions that harmed the Claimant’s investment were committed by and/or at the hands of Parán’s President and officials. They are thus attributable to Peru (**Section 4.1**).
- 235 The other acts and omissions that amount to breaches of the FTA were by Ministry officials (from, for instance, the MEM), the Police (local and national), prosecutorial authorities, and other local officials and are, also, therefore attributable to Peru.
- 236 These acts and omissions amount to a failure by Peru to provide full protection and security as well as fair and equitable treatment to the Claimant’s investment under the FTA (**Sections 4.2 and 4.3**). Even if the actions of Parán’s President and officials were not attributable to Peru (*quod non*), they would qualify as acts of third parties from which Peru had an obligation under the FTA to protect the Claimant’s investment. Further, these acts and omissions resulted in an expropriation of Lupaka’s investment (**Section 4.4**), also in breach of the FTA.

4.1 The acts and omissions of Parán’s officials are attributable to Peru

- 237 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, as explained below.
- 238 Article 5 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”) provides:

“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.”³⁹⁵

- 239 The Commentary to the ILC Articles specifies that an “entity” under Article 5 reflects 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.³⁹⁶
- 240 Parán is classified as a rural community in Peru and is, together with its elected officials, empowered by law with governmental authority. The Constitution of Peru describes rural communities as legal persons which are autonomous in their organisation, in their communal work and in the use and disposition of their lands, as well as in economic and administrative matters within an established legal framework.³⁹⁷
- 241 The General Law of Rural Communities further defines these communities as organisations of public interest, with legal personality, comprised of families that inhabit and control certain territories linked by ancestral, social, economic and cultural ties which are expressed through communal ownership of the land, communal work, mutual assistance, a democratic government and the development of multi-sectorial activities.³⁹⁸
- 242 Article 2 of Peru’s Decree No. 8 of 1991 provides that a rural community’s legal personality is recognised through registration with the regional government.³⁹⁹ Parán registered itself as a rural community as a matter of Peruvian law (with the Leoncio Prado province of Peru) on 9 May 2001.⁴⁰⁰

³⁹⁵ ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), at **Exhibit CLA-3**, p. 3.

³⁹⁶ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 43.

³⁹⁷ Political Constitution of Peru, 1993 (SPA), at **Exhibit C-23 (corrected translation)**, p. 27 (Art. 89).

³⁹⁸ Law No. 24656, General Law of Rural Communities (SPA), 13/04/1987, at **Exhibit C-24 (corrected translation)**, p. 1 (Art. 2).

³⁹⁹ Supreme Decree No. 008-91-TR, Regulation of the General Law of Rural Communities Approved (SPA), 05/02/1991, at **Exhibit C-25 (corrected translation)**, p. 1 (Art. 2).

⁴⁰⁰ See, SICCAM, Directory of Rural Communities in Peru, Information System on Rural Communities in Peru, 2016 (SPA), at **Exhibit C-26**, p. 1; Supreme Decree No. 008-91-TR,

- 243 Rural communities like Parán receive public funds,⁴⁰¹ have their own governmental and administrative apparatus, and manage and administer land collectively owned by the community.⁴⁰² Furthermore, rural communities exercise jurisdictional powers within their territorial scope in accordance with customary law.⁴⁰³
- 244 The president of a rural community is the legal representative of the community and is empowered by law to execute all administrative, economic and judicial acts that involve the community.⁴⁰⁴ He or she also presides the Governing Committee⁴⁰⁵ and must regularly liaise with the regional government.⁴⁰⁶
- 245 Members of rural communities also play an important role in the Peruvian administration. They participate in State regional councils and municipal councils and must thus be represented in the elections for those posts. At least 15% of each list of candidates in certain areas must comprise representatives from rural (and/or indigenous) communities.⁴⁰⁷

Regulation of the General Law of Rural Communities Approved (SPA), 05/02/1991, at **Exhibit C-25 (corrected translation)**, p. 3 *et seq.* (Art. 2 and Art. 9).

⁴⁰¹ Law No. 24656, General Law of Rural Communities (SPA), 13/04/1987, at **Exhibit C-24 (corrected translation)**, p. 7 (Art. 24).

⁴⁰² See generally Law No. 24656, General Law of Rural Communities (SPA), 13/04/1987, at **Exhibit C-24 (corrected translation)** and Supreme Decree No. 008-91-TR, Regulation of the General Law of Rural Communities Approved (SPA), 05/02/1991, at **Exhibit C-25 (corrected translation)**.

⁴⁰³ Political Constitution of Peru, 1993 (SPA), at **Exhibit C-23 (corrected translation)**, p. 47 (Art. 149).

⁴⁰⁴ Supreme Decree No. 008-91-TR, Regulation of the General Law of Rural Communities Approved (SPA), 05/02/1991, at **Exhibit C-25 (corrected translation)**, p. 17 (Art. 62).

⁴⁰⁵ The Governing Committee is the body responsible for the government and administration of the community. See *supra* para. 68.

⁴⁰⁶ See *e.g.*, Supreme Decree No. 008-91-TR, Regulation of the General Law of Rural Communities Approved (SPA), 05/02/1991, at **Exhibit C-25 (corrected translation)**, p. 5 (Art. 12.4) (requiring, where two communities merge, that the president of the new community present the community's inventory and balance sheet to the regional government).

⁴⁰⁷ Resolution No. 0083-2018-JNE, Regulations for the Registration of Candidate Lists for Regional Elections (SPA), at **Exhibit C-251**, p. 1 (Art. 8.1); Resolution No. 0082-2018-JNE, Regulations for the Registration of Candidate Lists for Municipal Elections (SPA), at **Exhibit C-252**, p. 1 (Art. 8.1).

- 246 In addition, as noted above, rural communities exercise significant police powers through the so-called rural patrols (“*rondas campesinas*”), which the Peruvian Army trains and equips with military weapons.⁴⁰⁸ The State has entrusted those patrols with the task of ensuring the security of the communities.
- 247 Significantly, the Commentary to the ILC Articles 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. The Commentary gives the following two examples:
- “For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations.
- [...]
- [...] for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers...”⁴⁰⁹
- 248 In this case, Parán has two rural patrols which serve a policing role for the community. They abused that authority and played an important role in the June 2018 Invasion and the Blockade.⁴¹⁰
- 249 Accordingly, the illegal acts and omissions of Parán’s officials are attributable to Peru under international law.

⁴⁰⁸ See *supra* para. 106.

⁴⁰⁹ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 43 (paras. 2 and 5).

⁴¹⁰ See *supra* para. 106.

4.2 Peru breached its obligation to provide full protection and security to Lupaka’s investment

250 As demonstrated below, Peru failed entirely to provide Lupaka’s investment with protection and security, as required under the FTA.

251 Under Article 805.1 of the FTA, Peru is required to accord investments with the customary international minimum standard of treatment, which includes full protection and security (and fair and equitable treatment, as discussed below in Section 4.3).⁴¹¹ This obligation requires Peru to accord both physical and legal protection and security to covered investments.⁴¹²

252 Investment tribunals have described a State’s obligation to provide full protection and security as broad. For instance, the tribunal in *AMT v. Zaire* noted that the obligation to provide full protection and security required the host State to “take **all** measures necessary to ensure the full enjoyment of protection and security of [a covered] investment [...]”.⁴¹³

253 The tribunal in *Parkerings v. Lithuania* also broadly described the obligation to provide full protection and security in the following terms:

“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. The

⁴¹¹ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 126 (Art. 805.1).

⁴¹² See *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14/07/2006, at **Exhibit CLA-19**, p. 146 *et seq.* (para. 408); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24/07/2008, at **Exhibit CLA-20**, p. 216 (para. 729) (“when the terms ‘protection’ and ‘security’ are qualified by ‘full’, the content of the standard may extend to matters other than physical security. It implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal’s view be unduly artificial to confine the notion of ‘full security’ only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.”); *National Grid plc v. The Republic of Argentina*, UNCITRAL, Award, 03/11/2008, at **Exhibit CLA-21**, p. 75 *et seq.* (paras. 187-189).

⁴¹³ *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21/02/1997, at **Exhibit CLA-22**, p. 18 (para. 6.05) (emphasis added).

injury could be committed either by the host State, or by its agencies or by an individual.”⁴¹⁴

254 In *Cengiz v. Libya*, 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.”⁴¹⁵

255 The obligation to provide full protection and security thus first and foremost attaches to actions by representatives of the host State.⁴¹⁶

256 Several tribunals have found host States in breach of the standard where the security of an investment was threatened by host State representatives. For example, in *Tatneft v. Ukraine*, the host State’s security forces had participated in the forcible entry (with third parties) into the investor’s oil refinery. In finding that the respondent had breached its obligation to provide full protection and security, the tribunal noted that the Respondent had failed to provide adequate police protection and the following:

⁴¹⁴ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11/09/2007, at **Exhibit CLA-23**, p. 75 (para. 355). See also C. McLachlan *et al.*, *International Investment Arbitration: Substantive Principles* (OUP, 2017), at **Exhibit CLA-24**, p. 34 (para. 7.242) (stating that 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”).

⁴¹⁵ *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 07/11/2018, at **Exhibit CLA-25**, p. 81 (paras. 403-404) (finding a breach of FPS standard because the Libyan armed forces, or militia controlled by the Libyan government, pillaged the claimant’s camps).

⁴¹⁶ See *e.g.*, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24/07/2008, at **Exhibit CLA-20**, p. 216 (para. 730) (the tribunal “[did] 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.”); see also *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 07/11/2018, at **Exhibit CLA-25**, p. 81 (para. 403); *OAO Tatneft v. Ukraine*, UNCITRAL, PCA Case No. 2008-8, Award on the Merits, 29/07/2014, at **Exhibit CLA-26**, p. 126 *et seq.* (para. 428).

“Particularly telling are the subsequent **participation of the Ministry of the Interior’s troops in such events** and the scant credibility of the argument that they intervened in the capacity of private security at the service of the company. The **forceful entry** into the premises of the refinery and the **retention of certain officials** in their offices, just like the **carrying of weapons**, are all pointing in the direction of a breach of full protection and security in the realm of police protection and physical security.”⁴¹⁷

- 257 In *Biwater v. Tanzania*, State representatives had, among other things, removed from their offices certain representatives of the claimant. The tribunal found that “even if no force was used in removing the management from the offices or in the seizure of City Water’s premises,” these acts by State representatives amounted to a failure to provide full protection and security.⁴¹⁸
- 258 In this case, Parán’s officials led the violent raids of the Site in June and October 2018. As explained above, the acts and omissions of Parán’s officials are attributable to Peru because they are empowered with governmental authority.⁴¹⁹ Accordingly, as in with *Tatneft v. Ukraine*, the claimant’s investment was directly harmed by illegal acts on the part of Parán’s officials in breach of Peru’s obligation to provide full protection and security to Lupaka’s investment. In the words of the *Cengiz v. Libya* tribunal, Peru violated its “negative obligation to refrain from directly harming the investment by acts of violence attributable to the State.”⁴²⁰
- 259 In any event, the Tribunal need not find that the acts and omissions of Parán’s officials are attributable to Peru to find a breach of the full protection and security standard (the “**FPS standard**”). Indeed, the

⁴¹⁷ *OAQ Tatneft v. Ukraine*, UNCITRAL, PCA Case No. 2008-8, Award on the Merits, 29/07/2014, at **Exhibit CLA-26**, p. 126 *et seq.* (para. 428) (emphasis added).

⁴¹⁸ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24/07/2008, at **Exhibit CLA-20**, p. 216 *et seq.* (para. 731).

⁴¹⁹ See *supra* section 4.1.

⁴²⁰ See *supra* para. 254. *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 07/11/2018, at **Exhibit CLA-25**, p. 81 (para. 403).

perpetrator of the interference is not determinative for purposes of the FPS standard.⁴²¹

- 260 Several investment tribunals have found that host States breached their positive obligation to provide full protection to investments by failing to prevent or address physical harm by third parties. For instance, in *AMT v. Zaire*, the tribunal concluded that the State's omission to take every measure necessary to protect and ensure the security of the claimant's investment from third parties who destroyed, damaged, and stole property located in the claimant's premises on two different occasions (first in 1991 and subsequently in 1993) breached the standard of protection and security under the applicable treaty. In the tribunal's view, this standard imposed an obligation of vigilance and precaution to protect the claimant's investment on Zaire's territory, which must not be inferior to the minimum standard of vigilance and of care required by international law.⁴²²
- 261 Similarly, in *Wena Hotels v. Egypt*, the tribunal found the State in breach of its obligation to accord Wena's investment full protection and security. It based its decision on the following factual findings: i) the government was aware of the Egyptian Hotel Company's intention to seize the claimant's hotels and took no action to prevent this seizure; ii) once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to restore the hotels promptly to Wena's control; and iii) neither the Egyptian Hotel Company nor its senior officials were

⁴²¹ See also *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28/07/2015, at **Exhibit CLA-27**, p. 150 (para. 445) ("indirect liability for the acts of others can also occur under Article 4 – for example, the failure to stop someone doing something that violated an obligation. It does not matter that a third party actually undertook the action, if a State organ (such as the police) was aware of it and did nothing to prevent it."); *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21/02/1997, at **Exhibit CLA-22**, p. 19 *et seq.* (paras. 6.13) ("it suffices to confirm once more the engagement of the responsibility of the State of Zaire for all the losses resulting 'from riot or act of violence in the territory of such other Party' [...] It is of little or no consequence whether it be a member of the Zairian armed forces or any burglar whatsoever.").

⁴²² *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21/02/1997, at **Exhibit CLA-22**, p. 18 *et seq.* (paras. 6.04-6.11).

seriously sanctioned for their actions in forcibly expelling Wena and illegally possessing the hotels for approximately a year.⁴²³

- 262 In *Pezold v. Zimbabwe*, the claimant’s farmland had been invaded and occupied by settlers, who had also threatened the claimant’s representatives when doing so. In its 2015 award, the tribunal observed that the FPS standard related to not only physical security, but also threats of violence.⁴²⁴ It further concluded that the respondent had breached the FPS standard through i) the police’s failure to protect the claimants’ properties from occupation or to remove the settlers; and ii) the non-responsiveness of the police to various violent incidents that occurred.⁴²⁵
- 263 Similarly, in *MNSS v. Montenegro*, the claimant’s steelworks had on two occasions been invaded and occupied by workers protesting over unpaid wages and social benefits.⁴²⁶ With regard to the first occupation, the tribunal noted that “[i]rrespective of when the police was advised of the demonstration, the police took no action to dislodge the occupiers during the seven days that the occupation lasted.”⁴²⁷ With regard to the second occupation, State authorities (including the then Minister of Economy) had been advised of a forthcoming strike and of the workers’ intent to occupy the claimant’s site the next day. The tribunal noted that the police had not intervened. Not only had the building been occupied as announced, but also the CEO had been physically assaulted. The tribunal concluded that the respondent had failed to provide the “most constant protection and security” to the claimant’s investments.⁴²⁸
- 264 More recently, in *Ampal-American v. Egypt*, the claimant’s personnel had contacted an Egyptian army patrol and asked them to stop saboteurs from

⁴²³ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 911 *et seq.* (paras. 84-95).

⁴²⁴ *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28/07/2015, at **Exhibit CLA-27**, p. 195 (para. 596).

⁴²⁵ *Id.*, p. 196 (para. 597).

⁴²⁶ *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 04/05/2016, at **Exhibit CLA-29**, p. 121 *et seq.* (paras. 352-353).

⁴²⁷ *Id.*, p. 121 (para. 352).

⁴²⁸ *Id.*, p. 121 *et seq.* (paras. 351 and 356) (The tribunal noted that “the expression ‘most constant’ does not increase the level of protection and security as understood under international law.”).

laying explosives on the claimant’s pipeline at a nearby facility. The police refused to act and subsequently the explosives detonated, cutting off the gas supply for almost three months.⁴²⁹ In its 2017 award, the tribunal held that the State had breached the FPS standard by failing to take material steps – whether “preventive or reactive” – to protect the claimant’s pipeline from continuous attacks by third parties.⁴³⁰

265 Finally, the case of *Copper Mesa v. Ecuador* bears certain similarities with this case. There, opponents to the mining project at issue had blocked the claimant’s access to its mining site, preventing it from, among other things, completing its environmental impact study. Despite the claimant’s requests for assistance, State authorities failed to take steps to restore the claimant’s access to the mining site. The tribunal concluded that “the Respondent should have attempted something to assist the Claimant in completing its consultations and other requirements for the EIS” and that its inaction amounted to a failure to provide full protection and security (and fair and equitable treatment).⁴³¹ It noted that “the risk from anti-miners in the Junín area was both real, long standing and well-known” and that “the State’s presence in the Junín area, including its police, was invariably weak, intermittent and ineffective.”⁴³²

266 Here, Peru breached its positive obligation to prevent third parties (Parán residents, led by its officials) from causing physical and non-physical harm to Lupaka’s representatives and investment. Specifically, the following acts and omissions constitute breaches of this positive obligation:

- i) the failure by the Police and other State authorities to prevent the armed invasion of the Site byarán’s officials and representatives in June 2018;⁴³³

⁴²⁹ *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21/02/2017, at **Exhibit CLA-30**, p. 72 (paras. 286-289).

⁴³⁰ *Id.*, p. 72 (para. 288-289).

⁴³¹ *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15/03/2016, at **Exhibit CLA-31**, p. 221 *et seq.* (paras. 6.82-6.84).

⁴³² *Id.*, p. 221 *et seq.* (para. 6.83).

⁴³³ See *supra* paras. 104 and 109.

- ii) the failure that day by the Police and other State authorities to remove the invaders and to stop Parán's representatives from damaging Lupaka's property and abusing Lupaka's personnel;⁴³⁴
- iii) the failure by the Police, prosecutorial and other State authorities to sanction the invaders in the weeks that followed, notwithstanding Lupaka's complaints, for the acts of 19 June 2018;⁴³⁵
- iv) the failure by the Police and Ministry officials to prevent the armed invasion of the Site and the Blockade of the Lacsanga road by Parán's officials and representatives on 14 October 2018;⁴³⁶
- v) the ongoing failure (since 14 October 2018) by the Police and other State authorities to remove the invaders and to restore Lupaka's access to the Site through the Lacsanga road, notwithstanding its numerous complaints and pleas for assistance;⁴³⁷
- vi) the failure by the Police, prosecutorial, and other State authorities to sanction the invaders for their abuse of the Claimant's representatives, including on 14 October 2018, 20 March 2019 and 14 May 2019 as well as their damage to the Claimant's property and facilities;⁴³⁸ and,
- vii) the State authorities' tacit support of the invaders' actions during the negotiations with Parán's officials following the 14 October 2018 invasion and Blockade.⁴³⁹

4.3 Peru breached its obligation to provide fair and equitable treatment to Lupaka's investment

267 As demonstrated below, Peru failed to accord fair and equitable treatment to Lupaka's investment, in breach of the FTA.

⁴³⁴ See *supra* paras. 105-107.

⁴³⁵ See *supra* para. 108.

⁴³⁶ See *supra* paras. 117-120.

⁴³⁷ See *supra* paras. 124-139.

⁴³⁸ See *supra* paras. 133, 136, 168, and 178.

⁴³⁹ See *supra* paras. 131, 134, 143, 169, 180, 181, 184, and 187.

4.3.1 The customary international law minimum standard of treatment and the FET standard are not materially different

- 268 Like many investment treaties, the FTA does not define “fair and equitable treatment” but provides that the obligation “do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens”.⁴⁴⁰ As the tribunal in *Rusoro v. Venezuela* observed, “there is no substantive difference in the level of protection afforded by [those] standards.”⁴⁴¹
- 269 Article 1105 of the North American Free Trade Agreement (“NAFTA”), like the FTA, sets out the obligation to accord fair and equitable treatment with reference to the customary international law minimum standard of treatment.⁴⁴² In its 2004 award, the *Waste Management (II)* tribunal described the standard in the following terms:

⁴⁴⁰ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 126 (Art. 805.2).

⁴⁴¹ *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22/08/2016, at **Exhibit CLA-32**, p. 117 (paras. 520-521); see also *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29/07/2008, at **Exhibit CLA-33**, p. 162 (para. 611) (The tribunal “shares the view of several ICSID tribunals that the treaty standard of [FET] is not materially different from the minimum standard of treatment in customary international law.”); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14/07/2006, at **Exhibit CLA-19**, p. 130 *et seq.* (para. 361) (“[T]he minimum requirement to satisfy [the FET standard] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24/07/2008, at **Exhibit CLA-20**, p. 175 (para. 592) (“the actual content of the [FET standard] is not materially different from the content of the minimum standard of treatment in customary international law.”); *Saluka Investments BV v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17/03/2006, at **Exhibit CLA-34**, p. 62 (para. 291); *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31/03/2010, at **Exhibit CLA-35**, p. 81 *et seq.* (para. 210-211).

⁴⁴² The NAFTA Free Trade Commission stated: “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party;” and “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.” NAFTA Free Trade Commission, “North American Free Trade Agreement: Notes of Interpretation of Certain Chapter 11 Provisions”, 31/07/2001, at **Exhibit CLA-36**.

“[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.”⁴⁴³

- 270 Investment tribunals have endorsed extensively this definition in the NAFTA context and otherwise.⁴⁴⁴
- 271 Other NAFTA tribunals have interpreted the standard more onerously for States. For instances, the tribunal in *Merrill & Ring v. Canada* stated that the fair and equitable treatment standard (the “**FET standard**”) as reflected in customary international law:

⁴⁴³ *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30/04/2004, at **Exhibit CLA-37**, p. 35 *et seq.* (para. 98) (emphasis added).

⁴⁴⁴ See *e.g.*, *Bilcon of Delaware et al v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17/03/2015, at **Exhibit CLA-38**, p. 129 (paras. 442-443) (“[...] the Tribunal finds this quote from *Waste Management* to be a particularly apt one.”); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19/12/2013, at **Exhibit CLA-39**, p. 95 (para. 455) (“The Arbitral Tribunal agrees with the many arbitral tribunals [including *Waste Management*] and authorities that have confirmed that such is the content of the minimum standard of treatment in customary international law.”); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29/06/2012, at **Exhibit CLA-40**, p. 83 (para. 219) (“[...] *Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment.”); *Chemtura Corporation v. Government of Canada*, UNCITRAL, PCA Case No. 2008-01, Award, 02/08/2010, at **Exhibit CLA-41**, p. 32 *et seq.* (paras. 122 and 215) (agreeing with the *Waste Management II*, *Mondev*, and *ADF* tribunals that a violation need not be outrageous to breach Art. 1105); *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 06/07/2020, at **Exhibit CLA-42**, p. 86 *et seq.* (paras. 283-284); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 140 *et seq.* (paras. 568-573); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24/07/2008, at **Exhibit CLA-20**, p. 177 *et seq.* (paras. 597-600); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 08/10/2009, at **Exhibit CLA-44**, p. 61 *et seq.* (para. 216).

“[...] protects against **all** such acts and behavior that might infringe a sense of fairness, equity or reasonableness. Of course, the concepts of fairness, equitableness and reasonableness cannot be defined precisely: they require to be applied to the facts of each case. In fact, the concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behavior of a sort, which while difficult to define, may still be regarded as unfair, inequitable or unreasonable.”⁴⁴⁵

272 Also, the tribunal in *Pope & Talbot v. Canada* stated:

“[...] the Tribunal interprets Article 1105 to require that covered investors and investments 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.”⁴⁴⁶

273 In this case, the Respondent patently failed to provide the customary international law minimum standard of treatment to Lupaka’s investment and thus breached the FTA. In particular, State representatives 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.⁴⁴⁷

274 These acts and omissions, which were committed at the hands of Parán’s officials, Ministry representatives, the police, prosecutorial authorities, and other central and local authorities, were arbitrary as well as grossly unreasonable, unfair, and unjust. They were not in any way consistent, even-handed, unambiguous, transparent, or candid. And, although the Claimant need not make the showing, they were, in the words of the *Pope*

⁴⁴⁵ *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31/03/2010, at **Exhibit CLA-35**, p. 81 *et seq.* (para. 210) (emphasis added).

⁴⁴⁶ *Pope & Talbot Inc v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10/04/2001, at **Exhibit CLA-45**, p. 55 *et seq.* (para. 118).

⁴⁴⁷ See *supra* paras. 107, 138, and 266.

& *Talbot* tribunal, without a doubt egregious, outrageous, shocking, and extraordinary.

4.3.2 In the alternative, the Tribunal should rely on the MFN provision to import the FET standard at Article 2 of the Peru-UK BIT

275 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. Article 2(2) of the Peru-United Kingdom BIT provides:

“2. Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. 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. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.”⁴⁴⁸

276 Other tribunals have imported through an MFN provision either more favourable FET regimes⁴⁴⁹ or, where an FET provision was missing under the applicable treaty, an FET provision in its entirety.⁴⁵⁰

⁴⁴⁸ Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Peru, 04/10/1993, at **Exhibit CLA-46**, p. 4 (Art. 2(2)).

⁴⁴⁹ See e.g., *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 28/05/2004, at **Exhibit CLA-47**, p. 28 (para. 104); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29/07/2008, at **Exhibit CLA-33**, p. 152 *et seq.* (para. 575).

⁴⁵⁰ See e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27/08/2009, at **Exhibit CLA-48**, p. 41 *et seq.* (paras. 148, 150, 153-160); *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18/05/2010, at **Exhibit CLA-49**, p. 35 (paras. 73,

277 Here, the FTA implicitly approves the importation of substantive obligations since it excludes only the importation from other treaties of dispute resolution provisions, not substantive protections.⁴⁵¹

278 In any event, the FET standard in the FTA protected Lupaka’s legitimate expectations and guaranteed its investment transparency, due process and freedom from arbitrary or discriminatory conduct. In *Pezold v. Zimbabwe*, the tribunal summarised the FET standard in the following terms:

“[...] a breach of FET can be based on State actions that are ‘arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, expose the investor to sectional or racial prejudice, coerce or harass the investor, or lack due process’ and/or a breach of specific representations made to the investor (legitimate expectations). A State is thus expected to behave ... in a ‘consistent, even handed, unambiguous, transparent, candid’ manner.”⁴⁵²

279 Additionally, the restatement of Peru’s administrative procedure stresses that administrative authorities must act in accordance with the legitimate expectations of administered persons:

“1.15. Principle of predictability and legitimate expectations

Administrative authorities shall provide accurate, complete and reliable information to administered persons and entities and their representatives concerning any procedure within their remit in order to ensure that administered persons and entities at all times

125 fn. 16) (where Turkey-Jordan BIT did not contain an obligation to accord FET, interpreting a similarly worded MFN provision to permit claimant to invoke such provision from another BIT); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29/07/2008, at **Exhibit CLA-33**, p. 152 *et seq.* (para. 575); *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15/12/2014, at **Exhibit CLA-50**, p. 173 (para. 555).

⁴⁵¹ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 171 (Annex Art. 804) (“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.”).

⁴⁵² *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28/07/2015, at **Exhibit CLA-27**, p. 184 (para. 546).

have a clear understanding of the requirements, procedures, their estimated length and possible outcomes that may be obtained.

Administrative authorities must act in accordance with the legitimate expectations that administered persons and entities may have as reasonably created by administrative practices and precedents unless the authority concerned decides to depart from said practices and precedents by setting out its reasons for doing so in writing.

Administrative authorities must comply with the existing legal framework and shall not act arbitrarily. In this respect, administrative authorities shall not modify the interpretation of any applicable rules unreasonably and without justification.”⁴⁵³

280 Peruvian law also confirms that State may not act in a manner that is arbitrary or unreasonable and that it must not resort to harassment, coercion, abuse of power, or otherwise act in bad faith.⁴⁵⁴

4.3.3 A breach of the FET standard may result from a composite act

281 A breach of the FET standard (and of the FPS standard) may result from a composite act – that is, a series of acts and omissions which, on their own, may not constitute a breach of the applicable treaty. The concept of composite act is defined in Article 15(1) of the ILC Articles, which provide:

“The 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

⁴⁵³ Restatement of Law No. 27444, Law on General Administrative Procedure (SPA), 25/01/2019, at **Exhibit C-253**, p. 3 (Art. 1.15) (emphasis added). This “Texto Único Ordenado” was approved by Decreto Supremo 004-2019-JUS” published in the official gazette “El Peruano” on 25 January 2019; this text is a restatement of the various laws and decrees already existing at the time as stated in its preamble.

⁴⁵⁴ See *e.g.*, Restatement of Law No. 27444, Law on General Administrative Procedure (SPA), 25/01/2019, at **Exhibit C-253**, p. 3 *et seq.* (Arts. 1.4, 1.8, 1.17, and 1.18).

other actions or omissions, is sufficient to constitute the wrongful act.”⁴⁵⁵

282 Multiple international arbitral tribunals have found a breach of the FET standard based on a composite act and have confirmed that, in such a case, the determination of whether a breach has occurred is based on the cumulative effect of the respondent State’s acts and omissions.

283 As the *Rompetrol v. Romania* tribunal noted:

“[T]he cumulative effect of a succession of impugned actions by the State of the investment can together amount to a failure to accord [FET] even where the individual actions, taken on their own, would not surmount the threshold for a Treaty breach.”⁴⁵⁶

284 Similarly, in *El Paso v. Argentina*, the tribunal, relying on the decision in *Société Générale v. Dominican Republic*, held that “acts that are not illegal can become such by accumulation”.⁴⁵⁷ The tribunal considered that, “in the same way as one can speak of creeping expropriation, there can also be creeping violations of the FET standard”.⁴⁵⁸ The tribunal explained:

⁴⁵⁵ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 62 (Art. 15(1)). See also, p. 63 (Commentary on Art. 15, Item (7)) (“A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.”).

⁴⁵⁶ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 06/05/2013, at **Exhibit CLA-51**, p. 146 (para. 271). See also *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 139 (para. 566); *AO Tameft v. Ukraine*, UNCITRAL, PCA Case No. 2008-8, Award on the Merits, 29/07/2014, at **Exhibit CLA-26**, p. 136 *et seq.* (paras. 462-466).

⁴⁵⁷ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31/10/2011, at **Exhibit CLA-52**, p. 188 *et seq.* (para. 516). See also *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19/09/2008, at **Exhibit CLA-53**, p. 42 (para. 91).

⁴⁵⁸ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31/10/2011, at **Exhibit CLA-52**, p. 189 (para. 518).

“A creeping violation of the FET standard could [...] be described as a process of extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.”⁴⁵⁹

285 Accordingly, 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.

4.3.4 Peru’s acts and omissions, taken individually or cumulatively, breach its obligation to provide Lupaka’s investment FET

286 The 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.

287 A State’s obligations to provide fair and equitable treatment and full protection and security are often provided together in the relevant treaty, as is the case with the FTA in this case.⁴⁶⁰ Accordingly, investment tribunals often examine these standards together and, although they represent different obligations, a breach of one often entails a breach of the other. For instance, in *Wena Hotels v. Egypt*, the tribunal concluded that the same acts and omissions by State authorities amounted to both a failure to provide full protection and security and fair and equitable treatment to Wena’s investments.⁴⁶¹

288 In *Suez v. Argentina*, the tribunal noted that the obligations to provide full protection and security and fair and equitable treatment were contained in

⁴⁵⁹ *Id.*

⁴⁶⁰ See Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 126 (Art. 805).

⁴⁶¹ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 914 (para. 95).

the same provision of the Argentina-France BIT and concluded that a breach of the former entailed a breach of the latter:

“[...] the concept of full protection and security is included within the concept of fair and equitable treatment, but that the scope of full protection and security is narrower than the fair and equitable treatment. **Thus, State action that violates the full protection and security clause would of necessity constitute a violation of fair and equitable treatment** under the French BIT.”⁴⁶²

289 Similarly, in *Copper Mesa v. Ecuador*, the tribunal examined whether the State had breached the FPS and FET standards together, noting that “[f]or present purposes, although the FET and FPS standards impose legally distinct obligations under the Treaty, it is not necessary to distinguish between them.”⁴⁶³ As noted above, it found a breach of both standards and observed the following:

“[...] the Respondent’s conduct was arbitrary, in the sense that it was unreasonable and disproportionate at that time to side so completely with the anti-miners as to make it impossible, both legally and physically, for the Claimant to complete its EIS [environmental impact study], with inevitable consequences.”⁴⁶⁴

290 In this case, it is also not necessary to distinguish between Peru’s obligations to provide full protection and security and fair and equitable treatment to Lupaka’s investment: the same acts and omissions by State authorities that amount to a breach of full protection and security also

⁴⁶² *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, 30/07/2010, at **Exhibit CLA-54**, p. 65 (para. 171) (emphasis added).

⁴⁶³ *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15/03/2016, at **Exhibit CLA-31**, p. 221 (para. 6.82) (adding that “The issue is much the same: should the Respondent have imposed its will on the anti-miners, acting with all the powers and forces available to a sovereign State, so as to ensure that the Claimant, as the concessionaire under concessions granted by the Respondent, could gain access to the Junín concessions in order to carry out the required consultations and other activities required for its EIS?”).

⁴⁶⁴ *Id.*, p. 222 (para. 6.84); see *supra* para. 265.

amount to a failure to provide fair and equitable treatment to Lupaka's investment, in breach of the FTA.⁴⁶⁵

291 Furthermore, through their acts and omissions, State authorities frustrated Lupaka's legitimate expectations regarding the Project. Indeed, 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.⁴⁶⁶

292 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.⁴⁶⁷

293 These acts and omissions on the part of Parán's officials, Ministry representatives, the Police, prosecutorial authorities, and other central and local authorities were arbitrary as well as grossly unreasonable, unfair, and unjust. They were not in any way consistent, even-handed, unambiguous, transparent, or candid. They therefore clearly amount to a failure to provide FET to Lupaka's investment, in breach of the FTA.

4.4 Peru unlawfully expropriated Lupaka's investment

294 As explained below, Peru unlawfully expropriated Lupaka's investment in breach of Article 812 of the FTA.

4.4.1 The principles regarding expropriation and measures having an equivalent effect

295 Article 812 of the FTA provides:

⁴⁶⁵ See *supra* paras. 258 and 266.

⁴⁶⁶ Witness Statement of Gordon Ellis, 01/10/2021, p. 6 *et seq.* (para. 17).

⁴⁶⁷ See *supra* paras. 266 and 273.

“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.”⁴⁶⁸

296 Failure to comply with any of these criteria renders the measure, the effect of which is tantamount to expropriation, unlawful under the FTA.

297 Annex 812.1 of the FTA clarifies the meaning of an indirect expropriation as follows:

“The Parties confirm their shared understanding that:

(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;**

(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

⁴⁶⁸ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 132 *et seq.* (Art. 812).

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.”⁴⁶⁹

4.4.1.1 Measures may effect an expropriation indirectly

298 As noted above, Annex 812.1(a) of the FTA refers to “**measures** [...] that have an effect equivalent to [...] expropriation”.⁴⁷⁰ Such measures may include both acts and omissions. This follows from a good faith reading of the ordinary meaning of the term “measure”, particularly given that conduct that may give rise to State responsibility includes both acts and omissions.⁴⁷¹

299 Annex 812.1(a) also confirms that an expropriation may occur even without formal transfer of title. This provision is in line with prior international judgments and awards. For instance, Chamber Two of the Iran-U.S. Claims Tribunal found in the *Tippetts* case that “[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, **even where legal title to the property is not affected.**”⁴⁷² The chamber further stated:

“[w]hile assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was

⁴⁶⁹ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 172 *et seq.* (Annex 812.1) (emphasis added).

⁴⁷⁰ *Id.* (emphasis added).

⁴⁷¹ See *supra* para. 238.

⁴⁷² *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award (Award No. 141-7-2), 29/06/1984, at **Exhibit CLA-55**, p. 5 (para. 21) (emphasis added).

deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”⁴⁷³

300 Annex 812.1(b) requires the Tribunal to consider the “the economic impact of the measure or series of measures”. It is well established that, under international law, for there to be an expropriation, there must be a substantial deprivation or the complete or near complete deprivation of an investment. For instance, the tribunal in *CMS v. Argentina* held that the question is whether the enjoyment of the investment “has been effectively neutralized”.⁴⁷⁴ Similarly, the tribunal in *PL Holdings v. Poland* stated:

“In indirect expropriation cases, the investor almost invariably retains ownership; expropriation will have occurred because, notwithstanding that fact, the investment has been deprived of virtually all value.”⁴⁷⁵

⁴⁷³ *Id.*, p. 5 (para. 22).

⁴⁷⁴ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12/05/2005, at **Exhibit CLA-56**, p. 76 *et seq.* (para. 262).

⁴⁷⁵ *PL Holdings Sarl v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award, 28/06/2017, at **Exhibit CLA-57**, p. 128 *et seq.* (para. 320); see also *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 07/10/2003, at **Exhibit CLA-58**, p. 52 (para. 10.3.1); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30/08/2000, at **Exhibit CLA-59**, p. 28 (para. 103); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13/09/2001, at **Exhibit CLA-60**, p. 170 *et seq.* (paras. 604-606); *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, UNCITRAL, PCA Case No. 2012-07, Final Award, 23/12/2019, at **Exhibit CLA-61**, p. 62 (para. 221). See also *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30/11/2012, at **Exhibit CLA-62**, p. 169 (para. 6.62) (where the tribunal referred to a “substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment”); *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17/02/2000, at **Exhibit CLA-63**, p. 193 *et seq.* (para. 76); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12/04/2002, at **Exhibit CLA-64**, p. 26 (para. 107).

- 301 In the same vein, the tribunal in *Santa Elena v. Costa Rica* noted that control of a property included the ability for “the owner reasonably to exploit the economic potential of the property”.⁴⁷⁶
- 302 As explained above, Parán’s officials and representatives illegally raided the Site in June 2018 and took possession of it in October 2018.⁴⁷⁷ 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.⁴⁷⁸ 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 2019.⁴⁷⁹
- 303 Nevertheless, the Tribunal need not find that the State currently owns or *de facto* possesses Lupaka’s land or the rights to that land. An expropriation “exists not only when a state takes over private property, but also when the expropriating state transfers ownership to another legal or natural person” as well as when “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 [...]**”⁴⁸⁰ Thus, even if Parán’s representatives are deemed third-party adverse possessors of the Site and their acts are not attributable to Peru (*quod non*), the Respondent is still liable for expropriation.
- 304 The Tribunal also need not find that Peru made or participated in the taking as the *Wena Hotels v. Egypt* tribunal made clear. In that case (described

⁴⁷⁶ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17/02/2000, at **Exhibit CLA-63**, p. 193 *et seq.* (para. 76), cited with approval in *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 09/10/2018, at **Exhibit CLA-65**, p. 82 (para. 311).

⁴⁷⁷ See *supra* sections 2.3.1 and 2.3.3.

⁴⁷⁸ See *supra* paras. 158 and 192.

⁴⁷⁹ See *supra* para. 194.

⁴⁸⁰ See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 914 (para. 97) (citing *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20/11/1984, at **Exhibit CLA-66**, p. 44 (para. 158) (emphasis added)).

above), the tribunal concluded that Egypt had breached the relevant treaty by failing to provide Wena with “prompt, adequate and effective compensation” for the losses it suffered as a result of the seizures of the Luxor and Nile Hotel.⁴⁸¹ In making this finding, the tribunal noted that it was irrelevant whether the State had directly participated in the taking:

“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.”⁴⁸²

305 The tribunal furthermore rejected Egypt’s argument that the deprivation was merely “ephemeral”, stating that “allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference ‘in the use of that property or with the enjoyment of its benefits.’”⁴⁸³

306 Finally, it is also well established that rights and interests under licenses or contracts may be expropriated. For instance, in the *Phillips v. Iran* case, the Iran-US Claims Tribunal dealt with rights arising from a concession agreement, which it held were subject to expropriation:

“As the Tribunal has held in a number of cases, expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or *de facto* and whether the property is tangible, such as real estate or a factory, or **intangible, such as the contract rights** involved in the present Case.”⁴⁸⁴

⁴⁸¹ See *supra* para. 261.

⁴⁸² *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 915 (para. 99) (emphasis added).

⁴⁸³ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 915 (para. 99).

⁴⁸⁴ *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, the National Iranian Oil Company*, IUSCT Case No. 39, Award No. 425-39-2, 29/06/1989, at **Exhibit CLA-67**, p. 19 (para. 76) (emphasis added) (citing *e.g.*, *Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and others*,

4.4.1.2 An expropriation effected incrementally is a composite act

- 307 An indirect expropriation, which takes place through a series of measures over time, with the aggregate effect of destroying the value of an investment, is commonly referred to as a “creeping expropriation”.⁴⁸⁵
- 308 For instance, in *Vivendi v. Argentina*, the arbitral tribunal explained that “even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached”.⁴⁸⁶ The test is whether the cumulative effect of the series of acts and omissions was to “deprive the investor in whole or in material part of the use or economic benefit of its assets”.⁴⁸⁷
- 309 The tribunal in *Siemens v. Argentina* described creeping expropriation as follows:

“By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The

IUSCT Case No. 24, Interlocutory Award (Award No. ITL 32-24-1), 19/12/1983, at **Exhibit CLA-68** and *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award (Award No. 141-7-2), 29/06/1984, at **Exhibit CLA-55**.

⁴⁸⁵ See, e.g., *Generation Ukraine, Inc v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16/09/2003, at **Exhibit CLA-10**, p. 87 (para. 20.22) (describing a creeping expropriation as “a form of indirect expropriation with a distinctive temporal quality [where] a series of acts attributable to the State over a period of time culminate in [an] expropriatory taking”).

⁴⁸⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20/08/2007, at **Exhibit CLA-69**, p. 235 *et seq.* (para. 7.5.31).

⁴⁸⁷ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24/07/2008, at **Exhibit CLA-20**, p. 132 *et seq.* (para. 455), p. 143 (para. 489), p. 153 (para. 516) and p. 154 (para. 519). See also *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13/09/2001, at **Exhibit CLA-60**, p. 166 (para. 591); *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19/08/2005, at **Exhibit CLA-70**, p. 60 *et seq.* (paras. 186-187) (“It is 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. Many international arbitral tribunals have so held.”).

last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.”⁴⁸⁸

310 In *Khan v. Mongolia*, the tribunal held that the host State's invalidation of and refusal to reinstate a mining and exploration license “made the execution of those contractual obligations [under the licence] impossible”, such that the investor's rights “were essentially worthless”.⁴⁸⁹ The tribunal concluded:

“Therefore, it does not matter that the Agreements were not formally terminated. Without the Mining License, the Agreements could not proceed. Thus, not only were the three Claimants deprived of their rights under the Mining and Exploration Licenses, but CAUC Holding (and through it, Khan Canada) was deprived of the benefit of its contractual rights under the Agreements.”⁴⁹⁰

⁴⁸⁸ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 06/02/2007, at **Exhibit CLA-71**, p. 81 (para. 263).

⁴⁸⁹ *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Award on the Merits, 02/03/2015, at **Exhibit CLA-72**, p. 80 *et seq.* (para. 311); see also *Stans Energy Corp. and Kutsay Mining LLC v. Kyrgyz Republic (I)*, MCCI Case No. A-2013/29, Award, 30/06/2014, at **Exhibit CLA-73**, p. 90 (“the mentioned actions mean an actual deprivation of the Claimants of the right to carry out subsoil use activity, the Investor's loss of control over its investments and the loss of future revenues from its investments”).

⁴⁹⁰ *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Award on the Merits, 02/03/2015, at **Exhibit CLA-72**, p. 81 (para. 312); see also *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29/05/2003, at **Exhibit CLA-74**, p. 43 *et seq.* (paras. 115 and 117) (“When the Resolution put an end to such operations and activities at the Las Víboras site, the economic or commercial value directly or indirectly associated with those operations and activities and with the assets earmarked for such operations and activities was irremediably destroyed.”); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10/11/2017, at **Exhibit CLA-75**, p. 340 (paras. 1326-1328) (“By denying [the] Mining Lease Application [...] the Licensing Authority rendered it impossible for Claimant to make use of the information and data it had collected and thereby also rendered Claimant's interest in both [companies] useless. Without a mining lease, neither of them could any longer fulfil their exclusive purpose, after the exploration had been completed; thus, following the denial of [the Mining Lease] Application, the value of [...] the [investment] was effectively neutralized.”).

311 Similarly, in *Biloune v. Ghana*, the host State first issued a stop work order against the investor in a construction-related dispute, then required the investor to obtain a building permit that the competent authority never issued.⁴⁹¹ The tribunal considered that these measures, together with a series of other measures aimed at undermining the investor’s long-term project, amounted to a creeping expropriation.⁴⁹²

4.4.2 Peru unlawfully expropriated Lupaka’s investment

312 The acts of Parán’s officials and representatives amount to a direct expropriation of Lupaka’s investment, in breach of the FTA.⁴⁹³ As explained at length above, the 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.⁴⁹⁴ 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.

313 In the alternative, Peru’s acts and omissions have had an “effect equivalent to nationalization or expropriation” and thus amount to an indirect

⁴⁹¹ *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27/10/1989, at **Exhibit CLA-76**, p. 19 (para. 84).

⁴⁹² *Id.*, p. 18 *et seq.* (paras. 80-81); see also *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30/08/2000, at **Exhibit CLA-59**, p. 28 *et seq.* (para. 106) (where the tribunal considered that unlawful denial of a local construction permit by a municipality was tantamount to expropriation, as it “effectively and unlawfully prevented the Claimant’s operation of the landfill”).

⁴⁹³ Direct expropriation is a State measure that removes the investor’s legal title to the investment and/or results in a permanent physical seizure of an investment. See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14/12/2012, at **Exhibit CLA-77**, p. 169 (para. 506); *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, 30/07/2010, at **Exhibit CLA-54**, p. 48 (para. 132); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 08/06/2009, at **Exhibit CLA-78**, p. 155 (para. 355); *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29/05/2003, at **Exhibit CLA-74**, p. 42 *et seq.* (para. 113).

⁴⁹⁴ See *supra* para. 249.

expropriation.⁴⁹⁵ 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 have been set out above.⁴⁹⁶

314 As explained below, the expropriation met none of the requirements of Article 812 of the FTA and was thus entirely unlawful.

315 First, the taking of the Claimant’s investment was not justified by a public purpose.⁴⁹⁷ The taking occurred through the unlawful road blockade and Site invasion by Parán officials and representatives. The 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.

316 Second, the taking was not conducted in accordance with due process of law. Due process requires, at a minimum, that the expropriation accord with a “lawful procedure”,⁴⁹⁸ including “basic legal mechanisms” which enable an investor to have its claims heard, including notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in

⁴⁹⁵ See *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29/05/2003, at **Exhibit CLA-74**, p. 43 (para. 114); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12/04/2002, at **Exhibit CLA-64**, p. 26 (para. 107).

⁴⁹⁶ See *supra* para. 266.

⁴⁹⁷ See e.g., *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 02/10/2006, at **Exhibit CLA-79**, p. 79 (paras. 432-433) (“[A] treaty requirement for ‘public interest’ requires some genuine interest of the public. If mere reference to ‘public interest’ can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless.”).

⁴⁹⁸ See e.g., *Antoine Goetz et consorts v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10/02/1999, at **Exhibit CLA-80**, p. 1 (para. 127).

dispute.⁴⁹⁹ Absent such legal procedure, “the argument that ‘the actions are taken under due process of law’ rings hollow”.⁵⁰⁰ Due process also requires that the host State act transparently and does not take decisions with the intent of causing damage to an investment.⁵⁰¹ Here, there has been no due process: Lupaka was not lawfully warned of or provided an opportunity to prevent the events that subsequently followed, nor has it been able to secure legal redress since.

- 317 Third, the Respondent targeted the Claimant’s investment in a discriminatory manner. It is established that State conduct is discriminatory if it treats similar cases differently without reasonable justification.⁵⁰² The measures were discriminatory in that Lupaka alone was the target and victim thereof.
- 318 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.

⁴⁹⁹ See e.g., *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 02/10/2006, at **Exhibit CLA-79**, p. 79 (para. 435).

⁵⁰⁰ *Id.*

⁵⁰¹ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24/07/2008, at **Exhibit CLA-20**, p. 40 *et seq.* (paras. 149-175), p. 142 *et seq.* (para. 486) and p. 234 (para. 789); *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 03/03/2010, at **Exhibit CLA-81**, p. 128 (paras. 396-397) and p. 131 (para. 402).

⁵⁰² See e.g., *Saluka Investments BV v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17/03/2006, at **Exhibit CLA-34**, p. 67 (para. 313); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 04/04/2016, at **Exhibit CLA-82**, p. 164 (para. 616); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27/08/2008, at **Exhibit CLA-83**, p. 57 (para. 184).

5 LUPAKA IS ENTITLED TO FULL COMPENSATION

319 The Respondent’s breaches of the FTA deprived the Claimant of the value of its investment in the Project. The Claimant is entitled to full reparation for the losses suffered.

320 As explained below, the appropriate measure of damages is the “fair market value” of the Claimant’s investment, which in the present circumstances is best calculated using the income/discounted cash flow (“DCF”) method (**Section 5.1**). Accordingly, the Claimant has retained independent valuation experts, Mr Edmond Richards and Mr Erik van Duijvenvoorde, from Accuracy to calculate the fair market value of the Claimant’s investment in Peru but for the Respondent’s treaty breaches (**Section 5.2**). On that basis, the Claimant sets out below its entitlement to damages in respect of the Project (**Section 5.3**). Furthermore, the Claimant is entitled to interest at a commercial rate (**Section 5.4**) and its full costs related to these proceedings (**Section 5.5**).

5.1 The appropriate standard of compensation: fair market value

5.1.1 Lupaka is entitled to full reparation for the losses it has suffered as a result of Peru’s wrongful conduct

321 To determine the compensation due to the Claimant, the Tribunal should in the first instance look to any *lex specialis* in the FTA and, in the absence of any *lex specialis*, to the rules of customary international law.⁵⁰³ The only *lex specialis* standard of compensation found in the FTA is Article 812, which provides the standard of compensation for lawful expropriations (fair market value immediately before the expropriation).⁵⁰⁴ For an unlawful expropriation or any other breach, the FTA is silent and customary international law therefore fills the lacuna.⁵⁰⁵

⁵⁰³ *Amoco International Finance Corporation v. Government of Islamic Republic of Iran*, IUSCT Case No. 56, Partial Award (Award No. 310-56-3), 14/07/1987, at **Exhibit CLA-84**, p. 24 (para. 112), p. 41 *et seq.* (paras. 189-199).

⁵⁰⁴ Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 132 (Art. 812).

⁵⁰⁵ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 02/10/2006, at **Exhibit CLA-79**, p. 90 (para. 483); *Waguuh*

- 322 The applicable standard under customary international law is well established: the State must provide full reparation for the injury caused by the breach of its international obligations. As set out in Article 31(1) of the ILC Articles, “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”⁵⁰⁶ Under Article 36, reparation, in the form of compensation, must include “any financially assessable damage including loss of profits insofar as it is established.”⁵⁰⁷ The ILC Articles reflect the principle in the *Chorzów Factory* case that full reparation requires awarding a sum which would “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁵⁰⁸
- 323 Since the Respondent has expropriated the Claimant’s investment, full reparation requires a sum equal to the market value that the Claimant would have enjoyed but for the Respondent’s breaches. Indeed, damages for unlawful expropriation must be no less than the compensation prescribed for lawful expropriation.⁵⁰⁹ Moreover, all breaches of the FTA

Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, 01/06/2009, at **Exhibit CLA-85**, p. 146 *et seq.* (paras. 535 and 540); *Bear Creek Mining v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30/11/2017, at **Exhibit CLA-86**, p. 225 *et seq.* (para. 595); *ESPF Beteiligungs GmbH et al. v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14/09/2020, at **Exhibit CLA-87**, p. 317 (para. 836).

⁵⁰⁶ ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), at **Exhibit CLA-3**, p. 8 (Art. 31(1)).

⁵⁰⁷ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 98 *et seq.* (Art. 36)

⁵⁰⁸ *Case Concerning The Factory at Chorzów (Germany v. Poland)*, PCIJ Series A, No. 17, Judgement No. 13 (Merits), 13/09/1928, at **Exhibit CLA-88**, p. 47. See *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29/07/2008, at **Exhibit CLA-33**, p. 215 *et seq.* (paras. 792-793).

⁵⁰⁹ See *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, the National Iranian Oil Company*, IUSCT Case No. 39, Award No. 425-39-2, 29/06/1989, at **Exhibit CLA-67**, p. 29 *et seq.* (para. 110); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22/04/2009, at **Exhibit CLA-89**, p. 34 (paras. 111–112); *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan*, SCC Case No. V 116/2010, Award, 19/12/2013, at **Exhibit CLA-90**, p. 314 (para. 1461); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20/08/2007, at **Exhibit CLA-69**, p. 244 (para. 8.2.5); S. Ripinsky, *Damages in International Investment Law*, BIICL (2008), Chapters 6.3, 9.2, at **Exhibit CLA-91**, p. 8 (Hard copy p. 245) (“[...] logically, compensation for unlawful expropriation cannot be lower than that for a lawful one.”).

– unlawful expropriation, breach of the FET standard and breach of the FPS standard – have led to the destruction of the Claimant’s investment and the loss of their market value. Since there is no need to differentiate between treaty breaches when all breaches have caused the same loss,⁵¹⁰ the lost fair market value serves as the standard of compensation for all claims under the FTA.

324 The concept of ‘fair market value’ is not singular to the FTA but is a widely accepted basis of value used in valuation and international investment law. ‘Fair Market value’ is understood in arbitral practice to mean the price at which an asset would change hands between a willing buyer and seller.⁵¹¹ As explained by Messrs Richards and van Duijvenvoorde,⁵¹² the International Glossary of Business Valuation Terms published by the American Society of Appraisers defines “fair market value” as:

“the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.”⁵¹³

325 Accordingly, the Claimant’s loss should be assessed on the basis of the fair market value of its investment at the relevant valuation dates. According to Article 812(2) of the BIT, the proper date for the assessment of the fair market value of the Claimant’s investment for lawful expropriation is “immediately before the expropriation took place (‘date of expropriation’),

⁵¹⁰ See e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20/08/2007, at **Exhibit CLA-69**, p. 245 (para. 8.2.8); *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, SCC Case No. V 116/2010, Award, 19/12/2013, at **Exhibit CLA-90**, p. 258 *et seq.* (paras. 1205–1207); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30/08/2000, at **Exhibit CLA-59**, p. 30 (para. 113).

⁵¹¹ See e.g., *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30/10/2017, at **Exhibit CLA-92**, p. 246 *et seq.* (paras. 9.192–9.196).

⁵¹² Expert Report of Edmond Richards and Erik van Duijvenvoorde, p. 28 (para. 4.6).

⁵¹³ AICPA, “Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset”, (2007), at **Exhibit CLA-93**, p. 44.

and shall not reflect any change in value occurring because the intended expropriation had become known earlier”. In the present case, the expropriation of the Claimant’s investment was completed on 26 August 2019 when Lonely Mountain seized the Claimant’s shares in IMC. This is therefore the effective date upon which Claimant permanently lost its investment in the Project.⁵¹⁴ The “date of expropriation” in accordance with the FTA is therefore 26 August 2019 (the “**Valuation Date**”).

326 Compensation for the losses incurred should seek to put the Claimant in the position it would have been in but for the actions and omissions of the Respondent. Applying the principle of full reparation, damages should correspond to the difference between the Claimant’s economic wealth resulting from the counterfactual situation but for the Alleged Breaches (the “**But-For Scenario**”), less the Claimant’s economic wealth resulting from the actual situation (the “**Actual Scenario**”).

327 Accuracy has therefore compared the value of the investment in the “Actual Scenario” with its value in the “But-For Scenario”.⁵¹⁵ In the Actual Scenario, the Respondent’s breaches resulted in the loss of Claimant’s entire interest in the Project. Therefore, the value of the Actual Scenario is nil. In the But-For Scenario, the Claimant would have enjoyed the fair market value of the Project (less any liability to creditors such as PLI) – at the Valuation Date.

328 Since the fair market value of the Actual Scenario is nil, the losses caused by Peru’s wrongful conduct amounts to the fair market value of the Project (less liabilities to creditors) at the Valuation Date.

5.1.2 The discounted cash flow method is the most appropriate indicator of the Project’s fair market value

329 It is well established in the practice of investment treaty tribunals that, in assessing the market value of an investment, the appropriate valuation methodology will depend on the facts of the specific case. As put by the *Crystallex* tribunal:

⁵¹⁴ See *supra* Section 2.4.

⁵¹⁵ Expert Report of Edmond Richards and Erik van Duijvenvoorde, p. 27 (para. 4.3).

“[T]here is no one methodology best suited for determining the fair market value of the investment lost in every situation. Tribunals may consider any techniques or methods of valuation that are generally acceptable in the financial community, and whether a particular method is appropriate to utilize is based on the circumstances of each individual case. A tribunal will thus select the appropriate method basing its decision on the circumstances of each individual case, mainly because a value is less an actual fact than the expression of an opinion based on the set of facts before the expert, the appraiser or the tribunal.”⁵¹⁶

- 330 In determining the market value, tribunals have regard to generally practised valuation methodologies such as the income-based approach, principally the DCF analysis, or the market approach, which uses multiples derived from comparable transactions or traded companies. Occasionally, tribunals have taken a “backward-looking” or cost-based approach, considering the sunk costs expended by the investor to date. The investor’s sunk costs have also been used as a lower boundary for compensation or as a fallback approach where no other methodology is appropriate.⁵¹⁷
- 331 Tribunals have held that income-based approaches, such as DCF, are preferable, provided that i) the investment has a track record of profitability, or ii) in the absence of a history of profitability, there is an evidentiary basis on which the tribunal can estimate future profits with a sufficient degree of certainty.⁵¹⁸

⁵¹⁶ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 04/04/2016, at **Exhibit CLA-82**, p. 243 (para. 886).

⁵¹⁷ *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Award on the Merits, 02/03/2015, at **Exhibit CLA-72**, p. 106 (para. 409) (“[...] such an approach can serve as a ‘bottom line’ below which compensation should not fall [...]”); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 04/04/2016, at **Exhibit CLA-82**, p. 242 (para. 882) (noting the cost approach may be used in certain instances where “other methodologies would lead to excessively speculative and uncertain results”).

⁵¹⁸ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 04/04/2016, at **Exhibit CLA-82**, p. 241, (para. 877); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 213 (para. 830).

- 332 In this case, Peru’s actions and omissions prevented the Project from becoming fully operational. Pertinently, a body of case law has emerged on the applicable methodology for valuing mining projects which are not yet operational.
- 333 Recently, the tribunal in *Tethyan v. Pakistan* summarised the relevant case law and elaborated two criteria as to when a DCF method was appropriate for a pre-operational mining project:
- i) first, the tribunal should determine whether, in the absence of the respondent’s breaches, the expropriated project would have become operational and would also have become profitable; and,
 - ii) second, the tribunal should consider whether it can determine, with reasonable confidence, the amount of profits the claimant would have made based on the evidence before it.⁵¹⁹
- 334 The first part relates to the existence of lost profits, to be factored into a DCF analysis: in other words, whether, on the balance of probabilities, the project would have become profitable but for the respondent’s breaches. That does not mean that any risk or uncertainty negates the use of the DCF methodology, since the uncertainty attached to future cash flows is reflected in the discount rate. Rather, an income-based methodology is inappropriate only if the tribunal reaches the conclusion that “there are ‘*fundamental uncertainties*’ due to which it is not convinced that the project would have reached the operational stage and would have been able to generate profits”.⁵²⁰
- 335 In determining whether a project would have reached production, it is necessary to exclude the effect of any wrongful conduct by the State. In *Tethyan*, for example, the local government had stalled negotiations on a mineral agreement with the investor because it had decided to take over and exploit the mine site for itself. The tribunal held that the “but for” scenario should disregard the local government’s recalcitrance and that,

⁵¹⁹ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12/07/2019, at **Exhibit CLA-94**, p. 101 (para. 330).

⁵²⁰ *Id.*, p. 101 (para. 330).

under normal circumstances, the investor would have been able to conclude a mineral agreement.⁵²¹

- 336 The second part relates to the amount of lost profits. Multiple tribunals have noted that the standard of proof under this second limb (*i.e.*, the precise quantification of the loss) is lower than under the first limb (*i.e.*, the existence of the loss). As the tribunal in *Lemire v. Ukraine* stated:

“[I]t is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide **a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.**”⁵²²

- 337 The *Crystallex* tribunal agreed with this approach, noting that many tribunals have awarded damages “on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself.”⁵²³ The tribunal’s task is “to make the best estimate that it can of the amount of the loss, on the basis of the available evidence.”⁵²⁴
- 338 In practice, tribunals often refer to contemporaneous business plans or studies forecasting cash flows as a basis for estimating the investor’s

⁵²¹ *Id.*, p. 129 *et seq.* (paras. 412–414).

⁵²² *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28/03/2011, at **Exhibit CLA-95**, p. 70 (para. 246) (emphasis added).

⁵²³ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 04/04/2016, at **Exhibit CLA-82**, p. 239 *et seq.* (paras. 869–871) (emphasis added).

⁵²⁴ *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 03/03/2010, at **Exhibit CLA-81**, p. 191 (para. 594); see also *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12/07/2019, at **Exhibit CLA-94**, p. 107 (para. 348).

losses.⁵²⁵ Mining projects lend themselves more readily to DCF analysis than many other businesses in different sectors, because their future cash flows are a function of finite deposits and commodity prices (long-term forecasts which are readily available), and “predicting future income from ascertained reserves [...] can be done with a significant degree of certainty, even without a record of past production.”⁵²⁶ Moreover, a tribunal may adjust the inputs and assumptions in the DCF model to the extent it considers necessary, without leading to the conclusion that the DCF method “cannot produce a sufficiently reliable result.”⁵²⁷

339 Application of a DCF analysis is appropriate in this matter as the Project was on the verge of production and, indeed, had even produced small quantities of gold. Even before acquiring the Project, Lupaka considered it to be almost production-ready from a technical perspective and of a “reasonably low risk profile”.⁵²⁸ Several technical and economic reports, which the previous owners had commissioned, highlighted the significant potential of the Project and made it a very attractive target for the Claimant.⁵²⁹

340 After the acquisition in 2012, Lupaka carried out extensive mapping and sampling exercises and commissioned several technical and economic reports. After first carrying out laboratory studies, Lupaka moved on to metallurgical testing on bulk quantities (production-type testing).⁵³⁰ By 2017, the Claimant had nearly completed the development of the Project, and the next step would have been to commence commercial production. In that context, Lupaka was looking for investment partners to help fund

⁵²⁵ See *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 02/10/2006, at **Exhibit CLA-79**, p. 96 (para. 507), noting that a contemporaneous business plan “constitutes the best evidence before the Tribunal of the expectations of the parties at the time of expropriation for the expected stream of cash flows.”

⁵²⁶ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 04/04/2016, at **Exhibit CLA-82**, p. 242 (para. 879).

⁵²⁷ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12/07/2019, at **Exhibit CLA-94**, p. 102 *et seq.* (paras. 334–335).

⁵²⁸ Witness Statement of Eric Edwards, 01/10/2021, p. 5 (para. 17).

⁵²⁹ *Id.*, p. 6 *et seq.* (Sections 4.1.1-4.1.2). See *supra* paras. 32 and 33.

⁵³⁰ Witness Statement of Eric Edwards, 01/10/2021, p. 14 (para. 47).

the next stage of the Project and hence entered into the PPF Agreement⁵³¹ with Pandion through a Canadian investment vehicle called PLI.⁵³² The PPF Agreement would have allowed Lupaka to fund the continued development, and commence production, of the Project.⁵³³

- 341 Once Lupaka had secured funding in 2017, it pushed forward with the development of the Project, aiming to start production shortly. Before going into production, junior miners often commission an updated feasibility study with a view of attracting further funding. However, as Mr Castañeda explains, Lupaka did not commission a new feasibility study for a number of reasons, including because it already had funding in place, and because it had materially completed all of the required development works by the summer of 2018.⁵³⁴
- 342 In April 2018, Lupaka obtained a technical report on the preliminary economic assessment of the Project (the “**2018 PEA**”) from SRK⁵³⁵ which confirmed the findings of the 2012 SRK Report and concluded that the Project was of “considerable merit”.⁵³⁶ Further, in September 2018, Lupaka reached an agreement with Buenaventura on the terms of IMC’s acquisition of the entire Mally mining production unit, which would have allowed IMC to increase its daily production from 355 t/d to 590 t/d.⁵³⁷
- 343 By that time, the commencement of production was mainly contingent on two outstanding items: the MEM’s approval of an amendment to the mine closure plan and an associated guarantee; and the MEM’s final inspection of the completed development works.⁵³⁸ IMC had requested the final

⁵³¹ PPF Agreement, 30/06/2016, at **Exhibit C-44**; Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**; see *supra* para. 42.

⁵³² Witness Statement of Gordon Ellis, 01/10/2021, p. 11 (para. 32).

⁵³³ *Id.*, p. 12 (paras. 33).

⁵³⁴ Witness Statement of Julio F. Castañeda, 01/10/2021, p. 10 (para. 26); Witness Statement of Gordon Ellis, 01/10/2021, p. 12 (para. 39).

⁵³⁵ 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. x *et seq.*

⁵³⁶ *Id.*, p. xi.

⁵³⁷ Draft Mally Purchase Agreement between Buenaventura and IMC, 21/09/2018, at **Exhibit C-48**, p. 7 (Clause Fourth).

⁵³⁸ Witness Statement of Gordon Ellis, 01/10/2021, p. 12 (para. 39); see *supra* para. 86.

inspection in September 2018, but it never took place because of the Blockade.⁵³⁹

344 It is highly likely that – in the absence of Peru’s breaches – the Project would have become not just operational but also profitable in the very near future. There are no “fundamental uncertainties” which would have prevented the Project from reaching the operational stage in the very near future. The first *Tethyan* criterion is therefore fulfilled.

345 Also, the amount of profits lost as a result of Peru’s breaches can be estimated with sufficient certainty: Lupaka’s contemporaneous business plan, which was prepared during the negotiations for the acquisition of the Mallay processing plant, allows Lupaka’s quantum experts to calculate the profits lost. Accuracy has in its report addressed the uncertainties in the 590 t/d business plan,⁵⁴⁰ which simply resulted from the fact that at the time this business plan had not yet been supported by an independent study. In any event, Accuracy has also determined the lost profits in the baseline scenario of a processing capacity of 355 t/d, which is supported by the 2018 PEA.⁵⁴¹

346 Therefore, the second *Tethyan* criterion, that is whether the tribunal can determine, with reasonable confidence, the amount of profits the claimant would have made based on the evidence before it, is met. It is hence appropriate for the Tribunal to determine the fair market value of the Project on the basis of a DCF analysis.

347 Lastly, tribunals have relied on mining-specific valuation codes when deciding on the appropriate valuation method.⁵⁴² Valuation codes provide

⁵³⁹ Letter from IMC to MEM (SPA), 06/09/2018, at **Exhibit C-81**; see *supra* para. 95.

⁵⁴⁰ Expert Report of Edmond Richards and Erik van Duijvenvoorde, p. 35 (para. 4.44).

⁵⁴¹ *Id.*, p. 34 (paras. 4.39-4.40).

⁵⁴² *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16/09/2015, at **Exhibit CLA-96**, p. 133 *et seq.* (paras. 393-394); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 04/04/2016, at **Exhibit CLA-82**, p. 243 (paras. 883-885); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 213 *et seq.* (para. 831); *South American Silver Limited v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Award, 22/11/2018, at **Exhibit CLA-97**, p. 230 *et seq.* (paras. 805-809); *Tethyan Copper Company Pty Limited v.*

good evidence of the valuation methodology likely to be used in practice by market participants.⁵⁴³ As such, the relevant mining valuation framework is illustrative of the valuation methodology that a hypothetical buyer would have used, and the amount it would have been willing to pay, had the expropriated investment been offered for sale in the open market.

348 In Canada, the relevant framework is the Canadian Standards and Guidelines for Valuation of Mineral Properties as published by the Special Committee of the Canadian Institute of Mining, Metallurgy, and Petroleum on Valuation of Mineral Properties (“CIMVAL”). As explained by Accuracy, CIMVAL also recommends the income approach as the primary method for valuing the Project,⁵⁴⁴ especially when the property is close to production (and, only to a lesser extent, the market approach).

349 Hence, the DCF method is most appropriate for calculating the fair market value of the Project.

5.2 The fair market value of Lupaka’s investment but for Peru’s breaches

350 As noted, the Claimant has retained an independent quantum expert, Accuracy, to assess the market value of the Project under the DCF approach. Accuracy has been able to rely on an abundance of contemporaneous evidence and other sources of information to build its DCF model.

351 Accuracy has quantified the fair market value of the Claimant’s investment under two scenarios: i) the baseline business plan⁵⁴⁵ with a processing capacity of 355 t/d, supported by the 2018 PEA and ii) the updated business plan that Lupaka adopted in the context of the acquisition of the Mallay processing plant immediately before Peru’s breaches.⁵⁴⁶ As explained

Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Award, 12/07/2019, at **Exhibit CLA-94**, p. 107 (para. 348).

⁵⁴³ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12/07/2019, at **Exhibit CLA-94**, p. 107 (para. 348).

⁵⁴⁴ Expert Report of Edmond Richards and Erik van Duijvenvoorde, p. 32 *et seq.* (paras. 4.32-4.33).

⁵⁴⁵ Expert Report of Edmond Richards and Erik van Duijvenvoorde, p. 37 *et seq.* (section 5).

⁵⁴⁶ *Id.*, p. 47 *et seq.* (section 6).

above,⁵⁴⁷ the acquisition of the Mallay processing plant would have allowed IMC to process ore at an increased capacity of 590 t/d.

- 352 The starting point under the 355 t/d scenario is a total production of 670 kilotons of mineralised material over the six-year mine plan, which is contemplated in the 2018 PEA and which uses a 4.0g/t AuEq cut-off grade (the “**PEA Mine Plan**”).⁵⁴⁸
- 353 While relying on the technical assumptions which underpin the 2018 PEA, Accuracy has challenged and updated SRK’s assumptions to reflect prevailing prices and market conditions as at the Valuation Date.⁵⁴⁹ In addition, Messrs Richards and van Duijvenvoorde have in their report assessed the potential risks associated with carrying out the PEA Mine Plan.
- 354 Messrs Richards and van Duijvenvoorde assume that by the Valuation Date, 26 August 2019, IMC would have obtained all outstanding authorisations and that the Claimant – or a prospective purchaser – would have been able to implement the PEA Mine Plan and start production.⁵⁵⁰
- 355 Accuracy then uses a discount rate of 11.1% to account for the risk of unknown future business conditions and the time value of money. This is significantly higher than the discount rate used by SRK (5%) and reflects Accuracy’s prudent approach.⁵⁵¹
- 356 Using a DCF methodology, Accuracy assesses the fair market value of the Claimant’s Investment under 355 t/d scenario to be USD 44.2 million.⁵⁵²
- 357 Under the 590 t/d scenario which is based on the Mallay acquisition Lupaka was about to sign immediately before Peru’s breaches, the Claimant would have been able to achieve production of 590 t/d over a

⁵⁴⁷ See *supra* para. 88.

⁵⁴⁸ 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. vi- vii; Expert Report of Edmond Richards and Erik van Duijvenvoorde, p. 38, (para. 5.6).

⁵⁴⁹ *Id.*, p. 39 (para. 5.12).

⁵⁵⁰ *Id.*, p. 39 (para. 5.16).

⁵⁵¹ *Id.*, p. 92 (paras. A4.27).

⁵⁵² *Id.*, p. 47 (para. 5.52).

seven-year period with a total production of 1,367 kilotons.⁵⁵³ The starting point for the 590 t/d scenario is the contemporaneous business plan set out in the Red Cloud Model.⁵⁵⁴

358 Accuracy has again challenged, updated and adjusted a number of assumptions in the Red Cloud Model. In addition to updating metal prices, working capital and taxation assumptions in line with the 590 t/d scenario, Accuracy has adjusted downwards the metal grades.⁵⁵⁵ Compared to the 355 t/d scenario, Accuracy has increased the discount rate to 14.7% to accommodate for any potential higher level of uncertainty attached to the 590 t/d production model. Accuracy considered the increase in discount rate appropriate for the time being because the 590 t/d production schedule had not been subject to the same level of detailed scrutiny as the PEA Mine Plan, while noting that they might revisit their assumptions if and when further information becomes available.⁵⁵⁶

359 On that basis, Accuracy assesses the fair market value of the Claimant's Investment under the 590 t/d scenario to be USD 63.6 million.⁵⁵⁷

360 Lupaka relies on the fair market value in the amount of USD 63.6 million on the basis that the 590 t/d scenario is the one supported by the updated business plan – including financing – that was in place immediately before the Blockade, hence, the most likely scenario but for Peru's breaches.

5.3 Adjustment for liabilities to be settled in the But-For Scenario

361 Under the PPF Agreement, Lupaka had the possibility to terminate the PPF Agreement upon payment of the so-called Early Termination Amount.⁵⁵⁸ Thus, Lupaka had the option either to service the outstanding debt under the PPF Agreement during the term of the agreement or pay the Early Termination Amount. Hence, the maximum amount Lupaka would have

⁵⁵³ *Id.*, p. 49 (para. 6.5).

⁵⁵⁴ *Id.*, p. 49 (para. 6.4).

⁵⁵⁵ *Id.*, p. 50 (paras. 6.13-6.14).

⁵⁵⁶ *Id.*, p. 52 (para. 6.19).

⁵⁵⁷ *Id.*, p. 53 (para. 6.20).

⁵⁵⁸ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 23 *et seq.* (Section 5(8)).

paid to Pandion to buy out the loan is the Early Termination Amount. Any damages due to Lupaka will therefore have to be reduced by the Early Termination Amount.

362 On 2 July 2019, PLI notified Lupaka of the early termination of the PPF Agreement on the basis that the Claimant was in default of the agreement and requested immediate payment of the Early Termination Amount of USD 15.6 million.⁵⁵⁹ Later, on 24 July 2019, PLI increased the amount claimed to USD 15.9 million.⁵⁶⁰ The fact that PLI claimed this amount provides strong contemporaneous evidence of the Early Termination Amount that Lupaka would have had to pay to Pandion/PLI to voluntarily terminate the PPF Agreement on the Valuation Date.

363 Therefore, Lupaka is claiming compensation stemming from Peru's breaches of USD 63.6 million minus USD 15.9 million, *i.e.*, USD 47.7 million.⁵⁶¹

5.4 The Claimant is entitled to compound interest

364 The Claimant is entitled to pre-award interest on its losses from the Valuation Date to the date of the award and post-award interest from the date of the award until payment.

365 In claims brought under Article 812 of the FTA, Article 812(3) provides that compensation for expropriation "shall be payable in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until date of payment."⁵⁶² Interest on damages for unlawful expropriation or other treaty breaches should certainly be no lower than in cases of lawful expropriation.⁵⁶³

⁵⁵⁹ PLI, Notice of Acceleration under PPF Agreement, 02/07/2019, at **Exhibit C-54**

⁵⁶⁰ PLI, Notices of enforcement of the Pledge over IMC's shares (SPA), 24/07/2019, at **Exhibit C-55**.

⁵⁶¹ Expert Report of Edmond Richards and Erik van Duijvenvoorde, p. 56 (para. 7.8).

⁵⁶² Canada-Peru Free Trade Agreement, 2009, at **Exhibit CLA-1**, p. 133 (Art. 812(3)).

⁵⁶³ *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 06/09/2019, at **Exhibit CLA-98**, p. 261 (para. 720) ("[Article 13

366 The obligation to pay interest under customary international law is reflected in Article 38 of the ILC Draft Articles:

“1. Interest on any principal sum [...] shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”⁵⁶⁴

367 Interest is meant to compensate the Claimant for the lost time value of money, having been deprived of the use of the sum that the Claimant was entitled to receive.⁵⁶⁵ Hence, pre- and post-award interest is necessary in order to ensure full reparation,⁵⁶⁶ which is the approach typically taken by investment tribunals.⁵⁶⁷

368 As noted by the tribunal in *Wena Hotels v. Egypt*, “compound interest may be and, in absence of special circumstances, should be awarded to the

of the ECT] is applicable to compensation in case of a lawful expropriation and thus not directly in case of an unlawful breach of the ECT. But it can be concluded that the interest due for an unlawful breach shall not be lower than that for a lawful measure under the ECT. Therefore, the Tribunal takes guidance from this provision to the effect that ‘interest at a commercial rate established on a market basis’ is at least due for the amount of damages found in the present case.”). See also *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Award, 11/12/2019, at **Exhibit CLA-99**, p. 20 (para. 68).

⁵⁶⁴ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at **Exhibit CLA-18**, p. 107.

⁵⁶⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20/08/2007, at **Exhibit CLA-69**, p. 257 (para. 9.2.3).

⁵⁶⁶ See e.g., *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 04/04/2016, at **Exhibit CLA-82**, p. 255 *et seq.* (para. 930). See also *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27/06/1990, at **Exhibit CLA-100**, p. 23 (Hard copy p. 571) (para. 114) (“interest becomes an integral part of the compensation itself, and should run consequently from the date when the State’s international responsibility became engaged”).

⁵⁶⁷ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 06/02/2007, at **Exhibit CLA-71**, p. 126 *et seq.* (paras. 397 and 398); *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 03/03/2010, at **Exhibit CLA-81**, p. 210 *et seq.* (paras. 668 and 678); *Venezuela Holdings v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 09/10/2014, at **Exhibit CLA-101**, p. 130 (para. 397); *Watkins Holdings S.À.R.L. and others. v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21/01/2020, at **Exhibit CLA-102**, p. 217 *et seq.* (paras. 746 *et seq.*).

claimant as damages by international tribunals.”⁵⁶⁸ Likewise, it has been held that “[c]ompound interest better reflects current business and economic realities and therefore the actual damage suffered by a party.”⁵⁶⁹ For this reason, there is an “unquestionable trend in the investment case law” towards compound interest, as noted by the ICSID Annulment Committee in *UAB E Energija v. Latvia*.⁵⁷⁰ Indeed, compound interest is the norm in commercial practice and has become the norm in investment arbitration awards rendered at least over the last fifteen years.⁵⁷¹

369 Article 812(3) of the FTA provides that interest has to be awarded at a “commercially reasonable rate”. As noted by the tribunal in *Rusoro v. Venezuela*, “the best approach for establishing ‘a normal commercial rate’ is to select LIBOR plus an appropriate margin” because:⁵⁷²

“LIBOR is an international commercial benchmark: the interest rate at which banks can borrow funds from other banks in the London interbank market. LIBOR is published daily for different maturities and currencies and is universally accepted as a valid reference for the calculation of variable interest rates. Since the compensation is expressed in USD, the appropriate rate of reference for the calculation of interest should be the LIBOR rates for one-year deposits denominated in USD, calculated as of the date of expropriation.”⁵⁷³

⁵⁶⁸ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08/12/2000, at **Exhibit CLA-28**, p. 919 (para. 129).

⁵⁶⁹ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 222 (para. 854).

⁵⁷⁰ *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Decision on Annulment, 08/04/2020, at **Exhibit CLA-103**, p. 60 (para. 237).

⁵⁷¹ See I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, (Oxford, 2017), 2nd Edition (extracts), at **Exhibit CLA-104**, p. 389 *et seq.* (paras. 6.246-6.247), which lists 40 awards rendered between 2007 and 2016 that have applied compound interest.

⁵⁷² *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22/08/2016, at **Exhibit CLA-32**, p. 181 (para. 836).

⁵⁷³ *Id.*, p. 181 (para. 837).

- 370 While the *Rusoro* tribunal considered that LIBOR plus 4% was an appropriate rate,⁵⁷⁴ other investment tribunals have typically awarded interest at a rate of LIBOR plus 2 to 4%.⁵⁷⁵
- 371 The commercial reasonable of relying on LIBOR plus a margin is further evidenced by the fact that Lupaka and Pandion contemporaneously agreed on a default interest rate of LIBOR plus 2% in the PPF Agreement.⁵⁷⁶
- 372 Accordingly, the Claimant claims pre- and post-award interest at the rate of LIBOR plus 2% compounded annually.

5.5 The Claimant is entitled to recovery of its costs

- 373 Peru's conduct has caused the Claimant significant losses, as a result of which the Claimant has had to bring this arbitration to seek reparation. For this reason, the Claimant should be entitled to recover the costs of this arbitration in full, including its reasonable funding costs, to be detailed at the appropriate juncture in cost submissions.

⁵⁷⁴ *Id.*, p. 181 (para. 838).

⁵⁷⁵ See e.g., *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22/09/2014, at **Exhibit CLA-43**, p. 225 (para. 863(iii)); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31/10/2011, at **Exhibit CLA-52**, p. 273 (para. 752); *Enron Corporation Ponderosa Assets, L.P v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22/05/2007, at **Exhibit CLA-105**, p. 138 (para. 3); *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 03/03/2010, at **Exhibit CLA-81**, p. 217 (para. 693(h)); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28/03/2011, at **Exhibit CLA-95**, p. 106 (para. V.3); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28/07/2015, at **Exhibit CLA-27**, p. 305 (para. 1022.2); *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Award on the Merits, 02/03/2015, at **Exhibit CLA-72**, p. 117 (para. 451(iv)). See also S. Ripinsky, *Damages in International Investment Law*, BIICL (2008), Chapters 6.3, 9.2, at **Exhibit CLA-91**, p. 18 (Hard copy p. 370).

⁵⁷⁶ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 4.

6 REQUEST FOR RELIEF

374 The Claimant respectfully asks the Arbitral Tribunal:

- a) to declare that the Republic of Peru has breached its obligation not to expropriate the Claimant's investment under Article 812 of the Free Trade Agreement between Canada and Peru;
- b) to declare that the Republic of Peru has breached its obligations to accord full protection and security and fair and equitable treatment to the Claimant's investment under Article 805 of the Free Trade Agreement between Canada and Peru;
- c) to declare that the Republic of Peru has breached its obligations to accord most-favoured-nation treatment to the Claimant under Article 804 of the Free Trade Agreement between Canada and Peru;
- d) to order the Republic of Peru to pay compensation for the loss and damage sustained by the Claimant as a result of the breaches by the Republic of Peru of its obligations under the Free Trade Agreement between Canada and Peru in an amount of at least USD 47,700,000 plus interest at a rate of LIBOR plus 2%, compounded annually, from 27 August 2019 until payment;
- 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, in-house counsel, witnesses and experts.

The Claimant reserves its right to further amend, develop and quantify its claims and to present further argument and evidence in the course of the arbitration, in accordance with the ICSID Convention and the ICSID Arbitration Rules.

Respectfully submitted,

1 October 2021

For and on behalf of the Claimant,

Lupaka Gold Corp.

Counsel for the Claimant

A handwritten signature in blue ink, appearing to be 'P. Veit', written in a cursive style.

LALIVE

Dr Marc Veit
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