

**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

**SECOND WITNESS STATEMENT OF
GORDON LLOYD ELLIS**

23 September 2022

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1 INTRODUCTION

- 1 I, Gordon Lloyd Ellis, provide a second witness statement in the arbitration between Lupaka Gold Corp. (“**Lupaka**”) against the Republic of Peru (“**Peru**”). My testimony is centred on specific parts of Peru’s Counter-Memorial.
- 2 Unless stated otherwise, I adopt for the purposes of this second witness statement the definitions set out in my first statement.

**2 THE EXPERIENCE OF LUPAKA’S MANAGEMENT
AND BOARD OF DIRECTORS IN DEVELOPING AND
OPERATING MINES IN PERU AND GLOBALLY**

- 3 My attention has been drawn to Peru’s allegation that Lupaka “lacked any experience in bringing any Peruvian mining project to the exploitation phase”¹ and that we were not able “to adequately manage [our] resources” and get mining projects “off the ground” to the exploitation phase.² This description is misleading and inaccurate.
- 4 As I described in my first witness statement, I have devoted much of my career to working in the mining industry and have been involved in a number of mining projects. Generally, over my 50-year career, I have worked for and held senior management positions in numerous mining and development companies, some of which I headed or co-founded. In particular, as mentioned in my first witness statement, I have had specific experience in the development of mines for advanced exploration projects reaching the mining phase.
- 5 For instance, early in my career, I was involved in the construction of the Endako and Granduc mines in British Columbia, Canada. Subsequent to that, I was a co-founder and directly involved in the development of the

¹ Counter-Memorial, 24/03/2022, p. 60 (para. 124).

² Counter-Memorial, 24/03/2022, p. 56 *et seq.* (paras. 118-119).

Sonora open-pit gold mine in California, United States.³ Outside of the mining industry, but with profits earned from the mining industry, I co-founded and led the expansion of two non-mining enterprises to become leaders in their respective sectors. Each was ultimately purchased by multibillion-dollar industry giants.

- 6 As Lupaka's co-founder and one of its largest shareholders, one of my primary responsibilities has been to recruit a management team and a board of directors with a vast array of experience across all stages of mining. As detailed below, Lupaka's executive officers and board directors all had a strong track record of bringing exploration projects into production and operating mines in Peru and in other mining jurisdictions. For example:
- a) Darryl Jones, Lupaka's other co-founder and CFO, played a key role in developing the Mirador exploration project in Ecuador as CFO of Corriente Resources. Corriente Resources sold that project for almost USD 700 million to the large Chinese mining conglomerate, China Railway Construction Corporation Ltd. This project was Ecuador's first open-pit mine and is currently Ecuador's largest operating mine.⁴
 - b) Will Ansley, Lupaka's former CEO, was Vice President at Lake Shore Gold Corp. during its successful transition into production of three gold mines and three nickel-copper-platinum mines in Timmins and Sudbury, Ontario, Canada, respectively.⁵
 - c) Dan Kivari, Lupaka's former director of operations, has extensive experience managing copper and gold mines across South America. Mr Kivari was COO of Carpathian Gold Inc. during its development of the Riacho dos Machados gold project in Brazil and Rovina porphyry copper-gold project in Romania. Mr Kivari

³ Witness Statement of Gordon Ellis, 01/10/2021, p. 4 *et seq.* (paras. 7, 10).

⁴ See Darryl Jones Net Worth, *Wallmine*, 01/07/2022, at **Exhibit C-256**; EcuaCorriente SA starts to ramp up Mirador copper mine in Ecuador as XCMG ships large scale mining equipment, *International Mining*, 03/11/2021, at **Exhibit C-257**; MDO website, "Mirador Mine: Overview" (accessed 16/09/2022), at **Exhibit C-258**; "Lupaka Gold: Invicta should provide the company with cash flow", *Caesars Report*, 24/07/2014, at **Exhibit C-259**, p. 8.

⁵ See "Lupaka Gold Appoints William Ansley as Chief Executive Officer", *Junior Mining Network*, 25/09/2017, at **Exhibit C-260**; Will Ansley CV, at **Exhibit C-261**.

had also previously supervised the successful transition to exploitation of the 350,000-ounces-per-year Meadowbank gold project and the Chapada gold-copper mine in Brazil (a 50,000-tonne-per-day operation) while working at Agnico Eagle Ltd. and Yamana Gold Inc., respectively. Mr Kivari also managed the underground mining operations of three producing mines in Brazil and Honduras.⁶

- d) Julio Castañeda, Lupaka's former country manager in Peru, worked as a Senior District Geologist for Barrick Gold Corporation at the Las Lagunas Norte gold mine. Over his career, Mr Castañeda coordinated exploration activities that discovered gold deposits with combined resources of several million ounces.⁷
- e) Luis Felipe Bravo, Lupaka's country manager in Peru as of 1 February 2019, acted previously as a General Manager of Century Mining Peru SAC, which brought into production and runs an underground gold mine in San Juan de Arequipa in Peru at 750 t/d, producing approximately 25,000 ounces of gold per year.⁸
- f) Norman Keevil Jr. (III), a member of Lupaka's Board of Directors since 2010,⁹ has been directly involved with the mining industry from a very early age. He is currently vice-chair of Teck Resources Limited ("**Teck**"), one of the world's larger mining conglomerates, and has been a member of its board since 1997.
- g) Luquman Shaheen, who has served on Lupaka's Board of Directors since 2013, is the CEO of Panoro Minerals Ltd., a

⁶ See "Lupaka Gold Appoints Dan Kivari as Director of Operations", *Bloomberg*, 20/02/2018, at **Exhibit C-262**; "Carpathian Gold Strengthens Management Team", *Bloomberg*, 28/01/2008, at **Exhibit C-263**.

⁷ See "Lupaka Gold: Invicta should provide the company with cash flow", *Caesars Report*, 24/07/2014, at **Exhibit C-259**, p. 8.

⁸ Lupaka News Release, "Lupaka Provides Update on Illegal Demonstration at Invicta, Announces Non-Brokered Private Placement, and Management Changes", 28/01/2019, at **Exhibit C-264**, p. 2; CAM, NI 43-101 Technical Report, San Juan Property Arequipa Department, Peru, 19/03/2007, at **Exhibit C-265**, p. 14 (Hard copy p. 17).

⁹ Lupaka News Release, "Lupaka Gold Reports Voting Results for Election of Directors", 16/05/2013, at **Exhibit C-266**, p. 1.

Canadian copper exploration company with a portfolio of exploration projects in Southern Peru.¹⁰

- h) Lucio Pareja, another of Lupaka's Directors, is the former CEO of Minsur S.A., which operates the San Rafael mine in the Puno region of Peru. Mr Pareja was directly involved as CEO and operations manager in the development and exploitation of numerous successful mines in Peru. As an example, the San Rafael mine is South America's largest tin-producing mine and the world's third largest.¹¹ There are not many people in Peru with a greater level of local mining experience than Mr Pareja. He currently acts as a consultant in the mining industry.
- i) Our director, Mario Stifano, is a former Vice President and CFO at Lake Shore Gold Corp Inc., where he successfully secured funding of over USD 500,000,000 and finalised the development of two gold mines in Canada, which are currently producing over 180,000 ounces of gold annually and have since been acquired by Tahoe Resources Inc.¹²

3 THE SALE OF CRUCERO AND THE PRIORITY ACCORDED TO INVICTA

- 7 Peru also alleges that Lupaka "failed to adequately manage its resources" in relation to the Crucero project.¹³ In particular, Peru criticises our decision to sell the Crucero project in the autumn of 2017.¹⁴ Such criticism demonstrates Peru's failure to understand the business of junior exploration companies and the context in which Lupaka decided to sell its interest in Crucero as I explain below. In essence, the sale of Crucero

¹⁰ See Panoro News Release, "Panoro Minerals Commences Pre-Feasibility Drilling Program at Cotabambas Project, Peru", 19/04/2022, at **Exhibit C-267**.

¹¹ See "Peru's Minsur looking for financing for Brazil buy", *Reuters*, 29/09/2008, at **Exhibit C-268**; Wikipedia, "San Rafael Mine" (accessed on 16/09/2022), at **Exhibit C-269**.

¹² See Lupaka News Release, "Lupaka Announces Changes to Board of Directors and Management Team", 23/05/2018, at **Exhibit C-270**; Crunchbase website, "Mario Stifano Profile Overview" (accessed on 16/09/2022), at **Exhibit C-271**.

¹³ Counter-Memorial, 24/03/2022, p. 56 *et seq.* (para. 118).

¹⁴ Counter-Memorial, 24/03/2022, p. 58 (para. 120).

resulted from the lesser prospects that it offered relative to the Invicta Project.

- 8 Most junior mining companies typically own a portfolio of exploration assets which they can progress and develop in parallel. Based on exploration results and prevailing economic conditions, junior companies can decide over time to focus their efforts on the more promising assets and divest from other projects with less potential to create shareholder value in the near term. As I explained to our shareholders at the time, this was precisely the rationale behind our decision to sell the Crucero project in the autumn of 2017.¹⁵
- 9 During Lupaka's ownership of Crucero, we expanded the indicated and inferred resource base from approximately 1,200,000 gold ounces in February 2011¹⁶ to 2,100,000 ounces of gold in a pit-constrained resource in November 2013.¹⁷ As we moved closer to the completion of the initial exploration phase, we undertook additional metallurgical studies. Although earlier studies had indicated that the mineralization was amenable to basic processing techniques, new metallurgical analyses carried out in 2013 revealed that a high percentage of the deposit consisted of "refractory" gold-bearing ores. This meant that the gold particles were encapsulated inside sulphide or arsenic minerals.¹⁸ In order to obtain a satisfactory recovery of these encapsulated gold particles, it was necessary to add an expensive step of very fine grinding before proceeding further with standard refining processes. In October 2013, we commissioned a conceptual study from SRK to determine the fundamental economics of what would now need to be a refractory project, including the feasibility

¹⁵ Lupaka News Release, "Lupaka Gold Agrees to Sell its Crucero Gold Project to Goldmining Inc.", 19/09/2017, at **Exhibit C-272**, p. 1.

¹⁶ Wardrop, NI 43-101 Technical report on the Crucero Project, 28/02/2011, at **Exhibit C-273**, p. 2.

¹⁷ SRK's Amended and Restated NI 43-101 Technical Report, Crucero Property, Peru, 22/10/2013, at **Exhibit C-274**, p. 53 (Table 14.4).

¹⁸ Lupaka News Release, "Metallurgical Results for Crucero Gold Project's A-1 Zone", 02/07/2013, at **Exhibit C-275**, p. 2.

of mining a portion of the defined Crucero mineralization.¹⁹ Unfortunately, the difficulties related to the low grade and high costs of processing the Crucero mineralization rendered it not economic to mine under the prevailing metal prices.

- 10 For the Invicta Project, we commissioned two conceptual studies from SRK to look into possible production scenarios in 2014.²⁰ These conceptual studies showed that the Invicta Project had much stronger prospects of economic extraction, could generate greater value for our shareholders in the near term and had exceptional growth potential as defined by the previous exploration. There had been a significant amount of exploration to date. Indeed, the Invicta property exploration by that time had uncovered at least three major mineralized zones of which Lupaka's initial development plan had only focused on one of these.²¹ It was clear therefore that the potential for further development was high. Andean American Gold's pre-feasibility study had defined a program mining over 4,000 tonnes per day on the basis of the mineralization from the three zones.²² All things considered, at the then current and forecast metal prices, the Invicta Project had greater growth potential, much stronger economic characteristics and a considerably higher likelihood of financial success.
- 11 As a result of SRK's technical and economic analysis of the two projects, we decided in 2014 to suspend active exploration at the Crucero project²³

¹⁹ Lupaka News Release, "Lupaka Announces Pit-Constrained Resource Estimate for the Crucero Gold Project", 28/10/2013, at **Exhibit C-276**; SRK's Amended and Restated NI 43-101 Technical Report, Crucero Property, Peru, 22/10/2013, at **Exhibit C-274**, p. 51 *et seq.* (Section 14.10); SRK, Lupaka Crucero Conceptual Pit Design for Resource Modelling, 23/10/2013, at **Exhibit C-277**.

²⁰ 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**.

²¹ 2012 SRK Report, at **Exhibit C-58**, p. iii.

²² Lokhorst Group, Invicta Mine Feasibility Study for AAG, June 2009, at **Exhibit C-57**, p. 15 (Section 1.8).

²³ Management's Discussion and Analysis, Lupaka Gold Corp., 20/04/2016, at **Exhibit R-0034**, p. 13 *et seq.*

and prioritise the development of the Invicta Project.²⁴ In the years that followed, we developed the Invicta Project through financing arrangements with Pandion. The proceeds from the sale of the Crucero Project in 2017 served to unlock further financing from Pandion, as I will explain.

- 12 By early 2015, PLH, Lupaka's mining contractor, had completed rehabilitation works to the existing underground infrastructure,²⁵ which had allowed Lupaka to carry out two run-of-mine bulk tests of 342 tonnes²⁶ and 532 tonnes,²⁷ respectively by early 2016. This was significant because most exploration projects cannot carry out such large sampling exercises directly from the orebody because they lack the underground infrastructure to access such large quantities of ore. For the first bulk test, we used the San Juan Evangelista plant with the supervision of our processing consultant, CERTIMIN,²⁸ while we relied on the plant owned by Minex in Nazca for the second bulk test.²⁹ The concentrates produced reported excellent recoveries.³⁰
- 13 On the back of the positive results, in June 2016, Lupaka secured a commitment from Pandion to contribute USD 7 million in three

²⁴ Lupaka News Release, "Lupaka Gold to Begin Permitting and Commence Small-Scale Production at the Invicta Gold Project by Q1-2015", 17/03/2014, at **Exhibit C-68**.

²⁵ Lupaka News Release, "Lupaka Gold begins underground mining at Invicta for initial toll mill test campaign", 19/05/2015, at **Exhibit C-77**, p. 1.

²⁶ Lupaka News Release, "Lupaka Gold Completes First Run-of-Mine Bulk Processing Test", 27/10/2015, at **Exhibit C-72**, p. 1.

²⁷ Lupaka News Release, "Lupaka Gold Completes Closing of Private Placement Financing and Reports Second Run-of-Mine Bulk Processing Test Results", 22/02/2016, at **Exhibit C-278**, p. 1.

²⁸ Lupaka News Release, "Lupaka Gold Completes First Run-of-Mine Bulk Processing Test", 27/10/2015, at **Exhibit C-72**, p. 2.

²⁹ Lupaka News Release, "Lupaka Gold Completes Closing of Private Placement Financing and Reports Second Run-of-Mine Bulk Processing Test Results", 22/02/2016, at **Exhibit C-278**, p. 1 *et seq.*

³⁰ Lupaka News Release, "Lupaka Gold Completes First Run-of-Mine Bulk Processing Test", 27/10/2015, at **Exhibit C-72**, p. 2; Lupaka News Release, "Lupaka Gold Completes Closing of Private Placement Financing and Reports Second Run-of-Mine Bulk Processing Test Results", 22/02/2016, at **Exhibit C-278**, p. 1.

instalments under the PPF Agreement to fund the development and initial production phases of the Invicta Project.³¹

- 14 By September 2017 (when we sold Crucero), Lupaka had already unlocked the first USD 2.5 million instalment of Pandion's financing³² and was a few weeks away from receiving the second USD 2 million instalment which would be received upon registration by the Peruvian authorities of the community agreement entered into with the Lacsanga Community and filed in July 2017.³³
- 15 At that stage, we had also already satisfied all but one of the conditions precedent to unlock the third and final instalment of USD 2.5 million. The only outstanding condition to receive this third instalment was that we contribute an additional USD 2 million of capital to the Invicta Project independently of Pandion.³⁴
- 16 It was clear that selling the Crucero project was the best way to meet this final condition and realise value for our shareholders in the short term.³⁵
- 17 The total consideration received for the sale of the Crucero project in September 2017 was USD 750,000 in cash and 3.5 million GoldMining shares.³⁶ After initial resale restrictions on the GoldMining shares had been lifted, we were then able to sell 3.1 million GoldMining shares in February 2018 for USD 3 million. These proceeds in turn allowed us to contribute to the Project the capital required to satisfy the outstanding

³¹ PPF Agreement, 30/06/2016, at **Exhibit C-44**.

³² Lupaka Gold Corp., "Lupaka Gold Receives First Tranche Under Amended Invicta Financing Agreement", 09/08/2017, at **Exhibit R-0050**.

³³ Lupaka News Release, "Lupaka Gold Receives US\$2 Million from Second Tranche of the Pre-Paid Forward Gold Purchase Agreement", 08/11/2017, at **Exhibit C-279**.

³⁴ Lupaka News Release, "Lupaka Gold Receives US\$2 Million from Second Tranche of the Pre-Paid Forward Gold Purchase Agreement", 08/11/2017, at **Exhibit C-279**, p. 1.

³⁵ Lupaka News Release, "Lupaka Gold Agrees to Sell its Crucero Gold Project to Goldmining Inc.", 19/09/2017, at **Exhibit C-272**, p. 1.

³⁶ Lupaka News Release, "Lupaka Gold Agrees to Sell its Crucero Gold Project to Goldmining Inc.", 19/09/2017, at **Exhibit C-272**; Lupaka News Release, "Lupaka Gold Receives \$5.7 Million in Cash and Securities from Sale of Non-Core Asset to GoldMining", 21/11/2017, at **Exhibit C-280**, p. 1.

condition precedent for the release of the third USD 2.5 million instalment by Pandion.³⁷

- 18 As a result, the Invicta Project was well funded to allow for the completion of its development and to bring it into production within a few months.³⁸ It also allowed us to potentially access a second round of funding estimated between USD 6 million and USD 12 million under substantially similar terms to acquire our own processing plant and further optimise our operating cashflows.³⁹
- 19 Contrary to Peru's allegations, the decision to sell the Crucero project cannot be viewed as a "fail[ure] to adequately manage its resources"⁴⁰ but rather a key strategic decision that allowed us to advance the Invicta Project.

4 PANDION'S PARTNERSHIP WITH LUPAKA

- 20 Peru makes several incorrect statements in its Counter-Memorial about the nature of the funding agreement between Pandion and Lupaka:
- a) The financing structure agreed with Pandion, including the pledge over IMC's shares, was "risky and potentially inadequate";⁴¹
 - b) The timeline set out under the PPF Agreement with Pandion forced Lupaka to rush its negotiations with the local communities;⁴²
 - c) In the absence of the Blockade, Lupaka would have failed to meet its delivery obligations and defaulted under the PPF Agreement;⁴³

³⁷ Lupaka News Release, "Lupaka Gold Completes Financing for Development of the Invicta Gold Project", 13/02/2018, at **Exhibit C-281**.

³⁸ Lupaka News Release, "Lupaka Gold Completes Financing for Development of the Invicta Gold Project", 13/02/2018, at **Exhibit C-281**, p. 1.

³⁹ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 16 *et seq.* (Section 1 "Second Tranche Prepayment").

⁴⁰ Counter-Memorial, 24/03/2022, p. 56 *et seq.* (para. 118).

⁴¹ Counter-Memorial, 24/03/2022, p. 171 *et seq.* (Section II. F. 3); p. 353 *et seq.* (Section V. B. 1. c.).

⁴² Counter-Memorial, 24/03/2022, p. 78 *et seq.* (Section II. C. 4).

⁴³ Counter-Memorial, 24/03/2022, p. 146 *et seq.* (para. 290).

- d) Apart from the failure to deliver gold, the other defaults relied on by PLI Huaura (after it was taken over by Lonely Mountain) in its Notice of Default were unconnected to the Blockade;⁴⁴
- e) “[Lupaka] retained an option to pay an Early Termination Amount, at any point up to and after default, to avoid PLI Huaura’s foreclosure on [its] shares in Invicta.”⁴⁵

- 21 I address each of these points below.
- 22 Peru also makes the general suggestion that, in the absence of the Blockade, Pandion would have seized on the first opportunity to call in the loan and possibly foreclose on IMC shares.⁴⁶
- 23 As I also explain further below, Pandion’s “philosophy” in the words of its founder, Joe Archibald, was to “take a solution-oriented and partnership approach to build long term relationships with mining companies.”⁴⁷ This meant in practice, that Pandion always demonstrated a willingness to adapt the PPF Agreement to the realities of the Project and actively collaborated with Lupaka to develop the Project towards production. Contrary to Peru’s suggestion, Pandion marketed itself as “provid[ing] flexible financing solutions to developing mining companies”⁴⁸ and had no interest in being perceived by the junior mining sector as hard to deal with.
- 24 In short, it was in Pandion’s interest to be flexible so as to maximise its return through gold purchases – not to sell its loan at a steep haircut to Lonely Mountain, which it was ultimately forced to do.

⁴⁴ Counter-Memorial, 24/03/2022, p. 174 *et seq.* (paras. 344-345).

⁴⁵ Counter-Memorial, 24/03/2022, p. 337 *et seq.* (para. 718).

⁴⁶ Counter-Memorial, 24/03/2022, p. 189 (para. 380) (“[PLI Huaura’s] foreclosure was not caused by any actions of Peru, but rather was a consequence of Claimant’s own conduct and its dispute with the Parán Community”); p. 357 *et seq.* (para. 762) (“PLI Huaura evidently had grounds *unrelated to the* [Blockade] to foreclose on the Invicta shares”) (emphasis in the original).

⁴⁷ Lupaka News Release, “Lupaka Gold Executes Definitive Agreement to Finance Invicta Mine Development and Mining Operations”, 30/06/2016, at **Exhibit C-282**, p. 1.

⁴⁸ Lupaka News Release, “Lupaka Gold Executes Definitive Agreement to Finance Invicta Mine Development and Mining Operations”, 30/06/2016, at **Exhibit C-282**, p. 3.

4.1 The financing structure agreed upon with Pandion was commensurate with the Project's capital requirements and in line with standard practice in the junior mining industry

- 25 I disagree with Peru's assertion that the financing structure agreed with Pandion was "risky and potentially inadequate".⁴⁹ Peru states that under the previous ownership, AAG "had underestimated the capital expenditures that would be required to bring the mine to its exploitation stage".⁵⁰ Peru further refers to the Joint Disclosure Booklet published by Lupaka and AAG, before the acquisition of the latter by the former, which states that "there [is] no assurance that the Combined Company will be able to obtain financing required to execute its business plan."⁵¹ On that basis, Peru concludes that the "Claimant [...] knew and accepted that the Invicta Project would pose a significant financial risk."⁵²
- 26 However, Peru's presentation is misleading because the Joint Disclosure Booklet refers to AAG's original "business plan" to build a processing plant on site and produce at a rate of 5,100 t/d.⁵³ After AAG's acquisition, Lupaka significantly downsized the project and developed a reduced mine plan at 355 t/d in September 2014 with much lower capital expenditure requirements.⁵⁴ Shortly after developing this mine plan, Lupaka secured a USD 7 million financing commitment from Pandion in June 2016.⁵⁵ As shown by the progress subsequently made to advance the Invicta Project towards production until October 2018, the capital provided by Pandion was adequate and in line with our revised capital expenditure requirements.
- 27 Peru also argues that Lupaka "plac[ed] its investment at risk" by pledging it as collateral to secure the performance of its obligations under the PPF

⁴⁹ Counter-Memorial, 24/03/2022, p. 171 *et seq.* (Section II. F. 3); p. 353 *et seq.* (Section V. B. 1. c.).

⁵⁰ Counter-Memorial, 24/03/2022, p. 78 (para. 158). See also, Counter-Memorial, 24/03/2022, p. 69 *et seq.* (para. 141).

⁵¹ Counter-Memorial, 24/03/2022, p. 171 (para. 336) (emphasis omitted).

⁵² Counter-Memorial, 24/03/2022, p. 171 (para. 337).

⁵³ 2012 SRK Report, at **Exhibit C-58**, p. ii.

⁵⁴ Asesores y Consultores Mineros S.A., Project Mining Plan for IMC, 2014 (SPA), at **Exhibit C-41**.

⁵⁵ PPF Agreement, 30/06/2016, at **Exhibit C-44**.

Agreement.⁵⁶ This statement shows a lack of understanding of project finance and junior mining. It is standard practice for junior mining companies to set up a special purpose vehicle, such as IMC, to hold a given mining project and use its assets to secure the necessary funding for the project's exploration and development activities.

4.2 Pandion amended the original PPF Agreement to give Lupaka more time to pursue its negotiations with the local communities

- 28 In its Counter-Memorial, Peru alleges that Lupaka “secured project financing that left virtually zero margin for any errors or setbacks (whether likely or unexpected)” and that it imposed a schedule that “force[d] [Lupaka] to rush various components of the mine development, and that threatened to compromise – and indeed, ultimately destroyed – Invicta’s still-tenuous relationships with the Parán Community.”⁵⁷ This is misleading for several reasons as explained below.
- 29 First, Lupaka did not rush its negotiations with the local communities as Peru implies. Ever since we took over the Invicta Project in October 2012 and thus, long before our partnership with Pandion, we actively engaged with the Parán Community. For instance, in 2013, we rolled out several development programmes to support the construction of a medical centre and school classrooms and provide food and medicine supplies to the Parán Community.⁵⁸
- 30 Contrary to Peru’s suggestion, our relationship with Pandion did not prevent us from further pursuing these outreach efforts. In fact, in September 2016, shortly after we entered into the PPF Agreement with Pandion, we intensified these efforts with the hiring of a specialist team from SSS, a community relations consultant – with Pandion’s full support.⁵⁹ In total, at the time of the Blockade, we had been engaging with the Parán Community for close to six years.

⁵⁶ Counter-Memorial, 24/03/2022, p. 353 *et seq.* (para. 755).

⁵⁷ Counter-Memorial, 24/03/2022, p. 78 (para. 158).

⁵⁸ Lupaka Gold Corp., 2013 Annual Report, at **Exhibit AC-49**, p. 38.

⁵⁹ Internal Lupaka email chain, 30/11/2016 to 01/12/2016, at **Exhibit C-283**, p. 2.

- 31 Second, as an experienced investment fund focussed on the mining sector, Pandion was conscious of the time needed to negotiate and conclude such community agreements. For example, while the PPF Agreement, as signed on 30 June 2016, originally granted Lupaka until 30 December 2016 to enter into an agreement with a neighbouring community to improve and use its community roads to transport ore from the Project to the State's highway,⁶⁰ Pandion subsequently extended the timeline to 31 December 2017.⁶¹ Lupaka eventually concluded such an agreement with the Lacsanga Community on 19 July 2017.⁶² Unfortunately, even though we continued to engage with the Parán Community after the conclusion of the agreement with the Lacsanga Community, we were not able to reach a similar agreement with the Parán Community. Peru's suggestion that this could be attributed to Pandion is just wrong.

4.3 Pandion and Lupaka agreed to defer Lupaka's gold repayment obligations until at least September 2019 under the Draft Amendment and Waiver No. 3 to the PPF Agreement

- 32 Peru argues that there was not enough ore processing capacity available to Lupaka near the Project to allow it to start making gold repayments in December 2018 in accordance with the PPF Agreement's unamended schedule.⁶³ For the reasons explained below, this issue would not have arisen in practice because, as part of a third full amendment and restatement of the PPF Agreement, Pandion and Lupaka had already agreed in early October 2018 to defer the gold repayments by 9 months to allow time to fully set up the Mallay plant.⁶⁴
- 33 However, for the sake of completeness, I also explain in Section 6 below that, even under the unamended schedule, there were many processing

⁶⁰ PPF Agreement, 30/06/2016, at **Exhibit C-44**, p. 22 *et seq.* (Section 3(1)(e)(xi) and Section 3(2) "Purchase Offer Termination Date").

⁶¹ First Amended and Restated PPF Agreement, 16/03/2017, at **Exhibit C-284**, p. 20 *et seq.* (Section 3(1)(e)(x) and Section 3(2) "Purchase Offer Termination Date").

⁶² Public Deed for the 2017 Lacsanga Agreement (SPA), 19/07/2017, at **Exhibit C-89**.

⁶³ Counter-Memorial, 24/03/2022, p. 81 *et seq.* (para. 165); p. 146 *et seq.* (paras. 290-291); p. 173 (para. 341).

⁶⁴ Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement (Final version), 05/10/2018, at **Exhibit C-285**.

options available to Lupaka and therefore, we would have been able to process enough ore to deliver the agreed quantities of gold in December 2018, if required to do so.

- 34 As I have already noted in Section 3 above, from the start of our partnership with Pandion we had anticipated that Lupaka may require a second round of financing, estimated between USD 6 million and USD 12 million for the acquisition of Lupaka's own processing plant.⁶⁵ Pandion was supportive of Lupaka buying our own processing plant because it would reduce the overall risk profile of the Project, reduce operating costs and thus increase cashflows.⁶⁶ We had been in contact for several years with Buenaventura, a Peruvian mining company, and we contemplated buying their processing plant at Mallay, provided they offered reasonable terms. Buenaventura approached us in early 2018 to re-open the negotiations on the acquisition of their processing plant, together with their adjoining mine at Mallay. When we informed Pandion of Buenaventura's intention to resume our negotiations to acquire their Mallay mining unit, Pandion continued to support such an acquisition. Indeed, it was willing to provide up to USD 13 million to finance this acquisition, which was beyond the upper limit of USD 12 million that had initially been envisaged.⁶⁷ To us, this was a sign of Pandion's strong confidence in our Project arising from the ongoing due diligence and scrutiny to which Pandion had subjected our Project.

⁶⁵ See the unchanged definition of "Second Tranche Prepayment" and Pandion's right of first refusal to provide the Second Tranche Prepayment under Section 7(1)(c) of the PPF Agreement, 30/06/2016, at **Exhibit C-44**, p. 18 *et seq.*, First Amended and Restated PPF Agreement, 16/03/2017, at **Exhibit C-284**, p. 16 *et seq.* and Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 16 *et seq.*

⁶⁶ Lupaka News Release, "Lupaka Gold Executes Definitive Agreement to Finance Invicta Mine Development and Mining Operations", 30/06/2016, at **Exhibit C-282**, p. 1 ("Joseph Archibald, Founding Partner of Pandion, commented, 'We are delighted to be working with the Lupaka team in providing the financing for their Invicta Gold Project and **look forward to providing the funding for their planned acquisition or construction of a processing plant** as well [...]'.") (emphasis added).

⁶⁷ See the unchanged definition of "Second Tranche Prepayment" and Pandion's right of first refusal to provide the Second Tranche Prepayment under Section 7(1)(c) of the PPF Agreement, 30/06/2016, at **Exhibit C-44**, p. 18 *et seq.*, First Amended and Restated PPF Agreement, 16/03/2017, at **Exhibit C-284**, p. 16 *et seq.*, and Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 16 *et seq.*

- 35 Together with Pandion, we spent the first half of 2018 conducting due diligence and negotiating the terms of the sale and purchase agreement with Buenaventura while preparing the necessary amendment to the PPF Agreement to provide for the required funding. By early October 2018, Buenaventura, Pandion and Lupaka had agreed to final versions of the sale and purchase agreement for the Mallay plant (“**Mallay Purchase Agreement**”) and the new amendment to the PPF Agreement (“**Draft Amendment and Waiver No. 3 to the PPF Agreement**”). Pandion, Buenaventura and Lupaka had further agreed that they would sign the two agreements on 15 October 2018 and that Lupaka would issue a press release the next day.⁶⁸
- 36 As set out in the Draft Amendment and Waiver No. 3 to the PPF Agreement, the parties anticipated that, after the signing of the Mallay Purchase Agreement, there would be a “closing” of the Mallay Purchase Agreement upon which Pandion would unlock the full USD 13 million tranche and grant Lupaka a further nine-month grace period on its delivery obligations as from such time.⁶⁹ One of the conditions precedent of the “closing” was that Buenaventura obtain the formal approval of the Mallay Community to transfer its surface rights agreement and related agreements to Lupaka (“**Mallay’s Consent**”).⁷⁰ Buenaventura had anticipated that Mallay’s Consent would be obtained shortly before the closing of the Mallay transaction in November 2018. One can see this from Schedule P-2 of the Draft Amendment and Waiver No. 3 to the PPF Agreement dated 5 October 2019 which reflects that the Mallay Consent would have been obtained (together with other conditions precedent) by November 2018 in order to allow for the drawdown of the USD 12.5 million instalment.⁷¹
- 37 However, on 5 October 2018, a few days before the agreed signing date, Buenaventura informed Mr Ansley that their community relations team

⁶⁸ Email chain between Buenaventura, Pandion and Lupaka, 24/09/2018-09/10/2018, 09/10/2018, at **Exhibit C-286**, p. 2.

⁶⁹ Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement (Final version), 05/10/2018, at **Exhibit C-285**, p. 45 (Schedule P-2).

⁷⁰ Draft Mallay Purchase Agreement between Buenaventura and IMC (Final version) (SPA), 05/10/2018, at **Exhibit C-287**, p. 20 *et seq.* (Section 11.1.1. b)).

⁷¹ Draft Amendment and Waiver No. 3 to the Second Amended and Restated PPF Agreement (Final version), 05/10/2018, at **Exhibit C-285**, p. 45 (Schedule P-2).

were worried that the issuance of a press release announcing the acquisition of Mallay could hamper their negotiations regarding Mallay's Consent.⁷² As a publicly listed company, we could not sign the transaction with Buenaventura without issuing a press release to inform our shareholders. As such, we were forced to postpone the signing of the Mallay Purchase Agreement until Buenaventura had signed and registered Mallay's Consent.

- 38 Buenaventura further informed us in early October 2018, that, due to the renewal of the Governing Committee of the Mallay Community, it would take Buenaventura an additional two to three months to finalise this agreement.⁷³ However, a few days later, on 14 October 2018, Parán invaded the Site for the second time and set up a permanent Blockade on the road we had just finished building to access our Project through Lacsanga's territory. Mallay's Consent was eventually signed and registered on 14 March 2019.⁷⁴ Had the Blockade not been in place at that time, we would have signed and closed the Mallay Purchase Agreement by the end of March 2019. Indeed, other than the Blockade, Mallay's Consent was the only item preventing us from acquiring the Mallay processing plant.
- 39 The closing of the Mallay Purchase Agreement at the end of March 2019 would have meant that our gold repayment obligation schedule would have been moved back to start in January 2020 (*i.e.*, nine months later).
- 40 It is true that the delay in obtaining Mallay's Consent pushed back the date of "closing" under the Mallay Purchase Agreement – which entitled Lupaka to the additional grace period – until after the first delivery dates under the unamended schedule (*i.e.*, after December 2018). However, in light of Pandion's pragmatic attitude throughout the Project, I do not believe that Pandion would have realistically insisted on a few monthly deliveries until Lupaka closed the Mallay transaction and the new schedule

⁷² Email chain between Buenaventura, Pandion and Lupaka, 24/09/2018-09/10/2018, 09/10/2018, at **Exhibit C-286**, p. 1.

⁷³ Email chain between Ausenco and Lupaka, 15/10/2018, at **Exhibit C-288**.

⁷⁴ Notarized Addendum to the Easement Contract between Buenaventura and the Mallay Community (SPA), 14/03/2019, at **Exhibit C-289**.

came into force. Pandion would have agreed to suspend our delivery obligations during these four months (December 2018-March 2019) until we closed the Mallay transaction.

- 41 As I alluded to above, Pandion had been willing to modify the terms and timeline for its financing to accommodate the reality of the Project's progress, even for much longer periods. Pandion additionally had a significant financial interest in seeing the Project come to fruition and no reason to create unnecessary difficulties as Lupaka progressed the Project to production.
- 42 As I mentioned above, for example, at the end of 2016, Lupaka was still negotiating an access agreement with local communities and Pandion agreed to grant Lupaka a one-year extension to satisfy this key condition under the PPF Agreement.⁷⁵ This gave us comfort that Pandion would be willing to work with us.
- 43 Similarly, Pandion was willing to adjust its expectations and timeline under the PPF Agreement to the actual progress of Lupaka's development works and regulatory processes gearing up to production. For instance, at the time of the signing of the Second Amended and Restated PPF Agreement on 2 August 2017, the parties expected that Lupaka would be able to start production in 2017 and forecast an initial production of 5,800 tonnes in 2017, going up to 119,867 tonnes in 2018.⁷⁶ While Pandion could have insisted on the terms of the PPF Agreement and required Lupaka not to deviate from the Initial Annual Production Forecast, Pandion instead agreed in early 2018 to amend the Initial Annual Production Forecast to reflect the additional time required to get the Invicta Project into production, without changing the terms of its financing.⁷⁷ At that time, it also appeared that some of the assumptions made under the PPF

⁷⁵ See PPF Agreement, 30/06/2016, at **Exhibit C-44**, p. 22 *et seq.* (Section 3(1)(e)(xi) and Section 3(2) setting the "Purchase Offer Termination Date" to 30 December 2016); First Amended and Restated PPF Agreement, 16/03/2017, at **Exhibit C-284**, p. 21 (Section 3(2) setting the "Purchase Offer Termination Date" to 31 December 2017).

⁷⁶ See Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 80 (Schedule B Initial Annual Production Forecast).

⁷⁷ Amendment No. 2 to the Second Amended and Restated PPF Agreement, 06/02/2018, at **Exhibit C-46**.

Agreement's Initial Expense Budget were no longer aligned with the reality of the Project. Again, while Pandion could have technically argued that Lupaka was not in strict compliance with its obligations under the PPF Agreement, Pandion instead agreed to increase Lupaka's overall expenditure allowance over the life of the mine while also deferring some of the expenditure projected for 2017-2018 to later production years.⁷⁸

- 44 Pandion had shown the same flexibility for the pay-out of the Barrick/Franco Nevada royalties and the release of the underlying liens which was also a key term of the PPF Agreement. By way of background to these royalties, IMC had originally acquired five of its mining concessions from Minera ABX Explorations S.A., a subsidiary of Barrick Gold Corporation, in December 2008 in exchange for a USD 800,000 NSR royalty,⁷⁹ the payment of which was secured against a mortgage on the same mining concessions.⁸⁰ In June 2014, Barrick then assigned this royalty to Franco Nevada.⁸¹ To obtain the full release of the funds under the PPF Agreement, Lupaka had to register a first priority lien over the mining concessions in favour of PLI Huaura, which meant removing Franco Nevada's existing lien.⁸² By the end of 2016, Lupaka was still negotiating an early release from its obligations with Franco Nevada. Pandion nevertheless agreed to grant Lupaka a one-year extension to finalise the necessary agreements and to amend the conditions precedent so that Lupaka could unlock part of the funds provided by Pandion even

⁷⁸ Amendment No. 2 to the Second Amended and Restated PPF Agreement, 06/02/2018, at **Exhibit C-46**, p. 15 *et seq.*

⁷⁹ Lupaka, Annual Information Form for the year ended 31 December 2014, 26/03/2015, at **Exhibit C-290**, p. 21.

⁸⁰ Lupaka Gold Corp., "Lupaka Gold Receives First Tranche Under Amended Invicta Financing Agreement", 09/08/2017, at **Exhibit R-0050**.

⁸¹ Lupaka, Annual Information Form for the year ended 31 December 2014, 26/03/2015, at **Exhibit C-290**, p. 21.

⁸² PPF Agreement, 30/06/2016, at **Exhibit C-44**, p. 20 (Section 3(1)(a) making the Barrick/Franco Nevada Consent and Release of Liens a condition precedent to the Initial Effective Date) and p. 22 *et seq.* (Section 3(1)(b) whereby the registration of a first priority lien is a condition precedent to the Supplemental Effective Date).

before obtaining a complete release from Barrick/Franco Nevada's royalties and liens over its mining concessions.⁸³

- 45 Pandion's practical attitude is further evidenced by the approach it took to the obligation to have and maintain mineral offtake agreements under the PPF Agreement.⁸⁴ During the development of the Project in 2016 and 2018, Lupaka had been producing concentrates from bulk testing and development ore⁸⁵ and then selling them to various offtakers. Since it agreed to finance the Project in 2016, Pandion had been actively reviewing the terms offered by various offtakers to Lupaka.⁸⁶ Even though the PPF Agreement technically required Lupaka to have and maintain a long-term mineral offtake agreement,⁸⁷ Pandion had instead chosen to continue its due diligence with Lupaka and we entered into two successive amendments to the PPF Agreement to defer the date on which this obligation would become effective.⁸⁸ The latest amendment required that such mineral offtake agreement be entered into on 30 April 2018. However, this date was later waived by Pandion as Pandion and Lupaka were continuing to cooperate in the negotiations with various offtake bidders.⁸⁹ Overall, as of 14 October 2018 when the Blockade came into effect, Pandion had deferred that obligation by more than a year (and almost two years when Pandion transferred its interest under the PPF Agreement to Lonely Mountain).

⁸³ PPF Agreement, 30/06/2016, at **Exhibit C-44**, p. 20 (Section 3(1)(a) making the Barrick/Franco Nevada Consent and Release of Liens a condition precedent to the Initial Effective Date); First Amended and Restated PPF Agreement, 16/03/2017, at **Exhibit C-284**, p. 20 (Section 3(1)(b) making the Franco Nevada Consent and Release Mortgage a condition precedent to the Supplemental Effective Date).

⁸⁴ PPF Agreement, 30/06/2016, at **Exhibit C-44**, p. 45 *et seq.* (Section 12(1)(r)).

⁸⁵ 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. 76 *et seq.* (Section 12).

⁸⁶ See *e.g.*, Email from Lupaka to Pandion, 09/05/2016, at **Exhibit C-291**.

⁸⁷ PPF Agreement, 30/06/2016, at **Exhibit C-44**, p. 45 *et seq.* (Section 12(1)(r)).

⁸⁸ Amendment No. 1 to the Second Amended and Restated PPF (Signed), 07/11/2017, at **Exhibit C-292**, p. 1 (Section 1.(b) amending Section 12(1)(r) of the Second Amended and Restated PPF Agreement); Amendment No. 2 to the Second Amended and Restated PPF Agreement, 06/02/2018, at **Exhibit C-46**, p. 1 *et seq.* (Section 1.(a) further amending Section 12(1)(r) of the Second Amended and Restated PPF Agreement).

⁸⁹ Lupaka, MD&A for the period ended 30 June 2018 and 30 June 2017, at **Exhibit C-293**, p. 29.

- 46 In each of the instances I have referred to, Pandion agreed to adapt to the reality of the Project and the time constraints inherent to commercial negotiations with royalty holders, local communities and offtakers alike – without changing the terms of financing. I have no reason to believe that it would have been any different for a delay of less than four months to conclude the Mallay Community Agreement and close the Mallay plant acquisition.
- 47 It should be noted that, as a result of Parán’s illegal Blockade, Lupaka was not able to make any gold repayments for seven months as required under the PPF Agreement’s unamended delivery schedule. Pandion only chose to sell its interest to Lonely Mountain in July 2019, by which point it no longer had any hope that the Peruvian authorities would resolve the situation.
- 48 I note that Pandion’s patience was consistent with the terms of the PPF Agreement according to which, in the event of force majeure preventing Lupaka from making its deliveries, the parties were first required to use their good faith efforts to reschedule the delivery obligations before taking any steps towards the early termination of the PPF Agreement.⁹⁰ As I explained above, Pandion also had a vested interest in seeing the Project through to production and to continue to cultivate its reputation amongst the junior mining sector as a pragmatic and conciliatory lender. In light of this, in the absence of the Blockade, Pandion would have suspended our gold repayment obligations until Mallay’s Consent was obtained in March 2019.

4.4 Peru’s references to other possible defaults under the financing agreements

- 49 Peru also argues that a failure to deliver gold was not the only possible default under the financing agreement and that PLI Huaura referred to other breaches in its Notice of Acceleration dated 2 July 2019, namely:

⁹⁰ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 56 (Section 12(1)(b)).

“Claimant’s failure to comply with the terms of its loan documents, its insolvency, the occurrence of an event that would cause a ‘Material Adverse Effect,’ its deviation from the ‘Initial Expense Budget,’ and its diversion from the ‘Initial Production Forecast’”.⁹¹

- 50 Peru alleges that “each relate to failures by Claimant that Claimant has not even alleged to have been proximately caused by the [Blockade], much less by Peru’s actions.”⁹² I have several comments on this Notice of Acceleration and Peru’s reliance on it.
- 51 First, the alleged events of default referred to by Peru as unrelated to the Blockade and set out in the Notice of Acceleration had never been raised while Pandion owned PLI Huaura. We had kept Pandion and PLI Huaura fully apprised of the situation which prevented us from complying with our obligations and shared all relevant information with Pandion.⁹³
- 52 Second, Lonely Mountain had bought out Pandion’s interest under the PPF Agreement to exploit Invicta themselves and were therefore shooting in all directions with the Notice of Acceleration, which they delivered the day after they acquired PLI Huaura, *i.e.*, on 2 July 2019. Yet, I disagree with Peru’s assertion that there were events of default alleged by Lonely Mountain in its Notice of Acceleration that were unrelated to the illegal Blockade maintained by the Parán Community. Based on my review, out of fourteen specified events of defaults listed in Schedule I of Lonely Mountain’s Notice of Acceleration, there are only six entries which are not directly related to the Blockade – five of which are reporting requirements with which Lupaka materially complied at all times (see Events No. 3, 4, 5, 6 and 7 in the table below). The final entry was expressly waived by Pandion (see Event No. 8).
- 53 I summarise my observations on each of these fourteen alleged “events of default” in the table below.

⁹¹ Counter-Memorial, 24/03/2022, p. 175 (para. 345).

⁹² Counter-Memorial, 24/03/2022, p. 175 (para. 345).

⁹³ Letter from Davis Wright Tremaine LLP to PLI Huaura, 19/08/2019, at **Exhibit C-294**, p. 2.

Table 1

No.	Lonely Mountain's Notice of Acceleration, Schedule I "Specified Defaults" ⁹⁴	My observations
1.	(a) pursuant to Section 13(1)(a) of the PPF Agreement, the Seller's failure to Deliver or cause to be Delivered any amount of Gold as and when required by the PPF Agreement and the Seller's admission of such default in its press release re: Lupaka Provides Update on Illegal Demonstration at Invicta, Announces Non-Brokered Private Placement, and Management Changes, dated as of January 28, 2019;	Directly related to Parán's illegal Blockade.
	(b) pursuant to Section 13(1)(f) of the PPF Agreement, the Obligors' failure to comply with terms, covenants or agreements in the PPF Agreement or any other Transaction Document to which it is a party, and such failure remaining unremedied for thirty (30) days, with respect to:	Directly related to Parán's illegal Blockade.
2.	(i) the Seller's failure to timely Deliver, or cause to be Delivered, the Scheduled Monthly Quantity of Gold for each Monthly Delivery Date, pursuant to Section 5 of the PPF Agreement;	
3.	(ii) the Seller's failure to timely deliver monthly management reports, pursuant to Section 12(1)(a)(vi) of the PPF Agreement;	Lupaka provided all the relevant information to Pandion and/or Pandion waived this reporting requirement. Indeed, PLI Huaura under Pandion's control never notified a breach in relation to this.
4.	(iii) the Seller's failure to timely deliver Capital Expenditure Reports, pursuant to Section 12(1)(a)(viii) of the PPF Agreement;	Lupaka provided all the relevant information to Pandion and/or Pandion waived this reporting requirement. Indeed, PLI Huaura under Pandion's control never notified a breach in relation to this.
5.	(iv) the Seller's failure to timely deliver Monthly Reports, pursuant to Section 12(1)(a)(ix) of the PPF Agreement;	Lupaka provided all the relevant information to Pandion and/or Pandion waived this reporting requirement. Indeed, PLI Huaura under Pandion's

⁹⁴ PLI, Notice of Acceleration under PPF Agreement, 02/07/2019, at **Exhibit C-54**, p. 4 *et seq.*

		control never notified a breach in relation to this.
6.	(v) the Seller's failure to timely deliver notice of any anticipated failure to Deliver as required on such Monthly Delivery Date, pursuant to Section 12(1)(c)(i) of the PPF Agreement;	This reporting requirement relates to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade. Lupaka provided all the relevant information to Pandion and/or Pandion waived this reporting requirement. Indeed, PLI Huaura under Pandion's control never notified a breach in relation to this.
7.	(vi) the Seller's failure to timely deliver statements of the chief financial officer of the Seller setting forth the details of Seller Default or Events of Default, pursuant to Section 12(1)(c)(ii) of the PPF Agreement;	This reporting requirement relates to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade. Lupaka provided all the relevant information to Pandion and/or Pandion waived this reporting requirement. Indeed, PLI Huaura under Pandion's control never notified a breach in relation to this.
8.	(vii) the Seller's failure to timely maintain a fully executed and enforceable Mineral Sales Contract/Refining Agreement containing terms substantially similar to those set forth in Schedule E of the PPF Agreement, pursuant to Section 12(1)(r) of the PPF Agreement;	Pandion had waived this requirement. ⁹⁵
9.	(viii) the Seller's failure to perform and cause all other Obligors to perform, all of its and their obligations under all Material Agreements in all material respects, pursuant to Section 12(1)(w) of the PPF Agreement; and	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.
10.	(ix) the Seller's failure to timely cure funding deficits, pursuant to Section 12(1)(aa) of the PPF Agreement;	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.
11.	(c) pursuant to Section 13(1)(m) of the PPF Agreement, the insolvency and general inability of the Seller to pay its debts as they become due;	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.

⁹⁵ Lupaka, MD&A for the period ended 30 June 2018 and 30 June 2017, at **Exhibit C-293**, p. 29.

12.	(d) pursuant to Section 13(1)(n) of the PPF Agreement, the occurrence, in the opinion of the Buyer, of an event or development that would reasonably be expected to have a Material Adverse Effect;	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.
13.	(e) pursuant to Section 13(1)(s)(i) of the PPF Agreement, the deviation by the Obligors from the Initial Expense Budget, where such deviation has had, in the sole and absolute discretion of the Buyer, a Material Adverse Effect; and	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.
14.	(f) pursuant to Section 13(1)(s)(ii) of the PPF Agreement, the changes by the Obligors from the Initial Production Forecast and updated Annual Production Forecasts, where such deviation has had, in the sole and absolute discretion of the Buyer, a Material Adverse Effect.	Directly related to Lupaka's inability to deliver gold as a result of Parán's illegal Blockade.

54 Lupaka would have obviously been in a different situation financially if its Invicta Project had not been held to ransom by Parán officials. There is no reason why it would not have been successful absent Parán's violence and Peru's inaction. If we had needed more cash, we could have raised it from the market given the prospects (absent the Blockade). Yet, as we were unable to produce, it was only natural that we were failing to cover our expenses, had effectively become insolvent, and were not meeting our production forecasts.

4.5 Discussions with Lonely Mountain in July/August 2019

55 Counsel for Lupaka has drawn my attention to the following statement by Peru in its Counter-Memorial:

“Claimant could have paid the Early Termination Amount rather than submit to a foreclosure proceeding. Claimant entered into discussions with Lonely Mountain, related to potential payment of the Early Termination Amount, but did not reach an agreement. **Because Claimant did not pay the Early Termination Amount,**

PLI Huaura was **contractually entitled to foreclose** on Claimant's shares in Invicta and did so."⁹⁶

- 56 This statement has matters the wrong way around. As I explain below, Lonely Mountain, through PLI Huaura, was contractually entitled to foreclose on Lupaka's shares in IMC, irrespective of whether Lupaka was willing or able to pay the Early Termination Amount.
- 57 Under the terms of the PPF Agreement, PLI Huaura was entitled to immediately terminate the agreement following the occurrence of an Event of Default.⁹⁷ Further to the termination, Section 14(4) of the PPF Agreement expressly gave discretion to Lonely Mountain to either demand that Lupaka make the payment of the Early Termination Amount or recover the amount by foreclosing on the shares pledged as collateral under the PPF Agreement.⁹⁸
- 58 As explained in my first witness statement⁹⁹ and as cited by Peru in its Counter-Memorial,¹⁰⁰ we did try to negotiate with Lonely Mountain and convince them to grant us time to pay the Early Termination Amount. However, as it transpired, they intended to exploit Invicta. For that purpose Lonely Mountain had hired Luis Goyzueta, an experienced Peruvian miner and Chairman of Vicuña Metals and Stellar Mining.¹⁰¹ Mr Goyzueta had been trying to acquire the Invicta Project for many years and, through several due diligence exercises, he had acquired extensive knowledge about the Invicta Project.¹⁰² On that basis, Mr Goyzueta believed that he was the best person to run the Invicta Project¹⁰³ and Lonely Mountain believed him.

⁹⁶ Counter-Memorial, 24/03/2022, p. 175 (para. 346) (emphasis added).

⁹⁷ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 56 (Section 14(1)).

⁹⁸ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 56 (Section 14(4)).

⁹⁹ Witness Statement of Gordon Ellis, 01/10/2021, p. 16 (para. 56).

¹⁰⁰ Counter-Memorial, 24/03/2022, p. 175 (para. 346); p. 333 *et seq.* (para. 710).

¹⁰¹ Email from Lupaka to Stellar Mining, 29/05/2020, at **Exhibit C-295**

¹⁰² Email from Panoro to Lupaka, 08/01/2019, at **Exhibit C-296**.

¹⁰³ Email from Panoro to Lupaka, 08/01/2019, at **Exhibit C-296**.

- 59 In sum, there was nothing we could do to prevent Lonely Mountain from exercising its right under the PPF Agreement to foreclose on IMC's shares because Luis Goyzueta had convinced Lonely Mountain that under his management IMC would be able to resolve the conflict with the Parán Community and go into production in a matter of months. History has now shown how wrong he was.

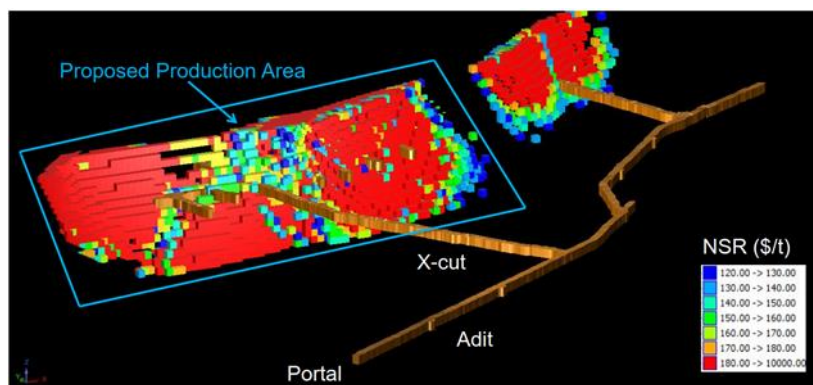
5 GRADES OF DEVELOPMENT ORE PROCESSED IN THE SUMMER OF 2018

- 60 In their report, AlixPartners, Peru's quantum experts, appear to question the gold grade of 4.85g/t set out in SRK's PEA dated March 2018 on which Accuracy relied in their first report dated 1 October 2021. Indeed, AlixPartners state that "the 4.85g/t gold grade assumed [in SRK's PEA cannot be reconciled] with the actual gold grade achieved as of October 2018 of 2.25g/t".¹⁰⁴ This criticism is misplaced because the gold grades set out in SRK's PEA are based on samples representative of the entire deposit to be mined which is not the case for the ore extracted as of October 2018 to which AlixPartners refers, as I will explain below.
- 61 SRK's PEA is based on extensive exploration work, including hundreds of drill hole samples, carried out across the entire Invicta mineralisation over the past thirty years.¹⁰⁵ All the geological data is compiled in a database commonly known as the "block model" which provides an accurate modelling of the underground resources. Moreover, since the Invicta Project already had a large underground infrastructure in place at the time of our acquisition of the Project, we could confirm the results obtained through drilling by collecting channel samples directly from underground – which enhances further the confidence of the block model and is not

¹⁰⁴ Expert Report of AlixPartners on Damages, 24/03/2022, p. 50 *et seq.* (para. 143 b) and Figure 19).

¹⁰⁵ 2012 SRK Report, at **Exhibit C-58**, p. iii.

available for most exploration projects.¹⁰⁶ I have included below a visual depiction of part of the block model for the Invicta Project:¹⁰⁷



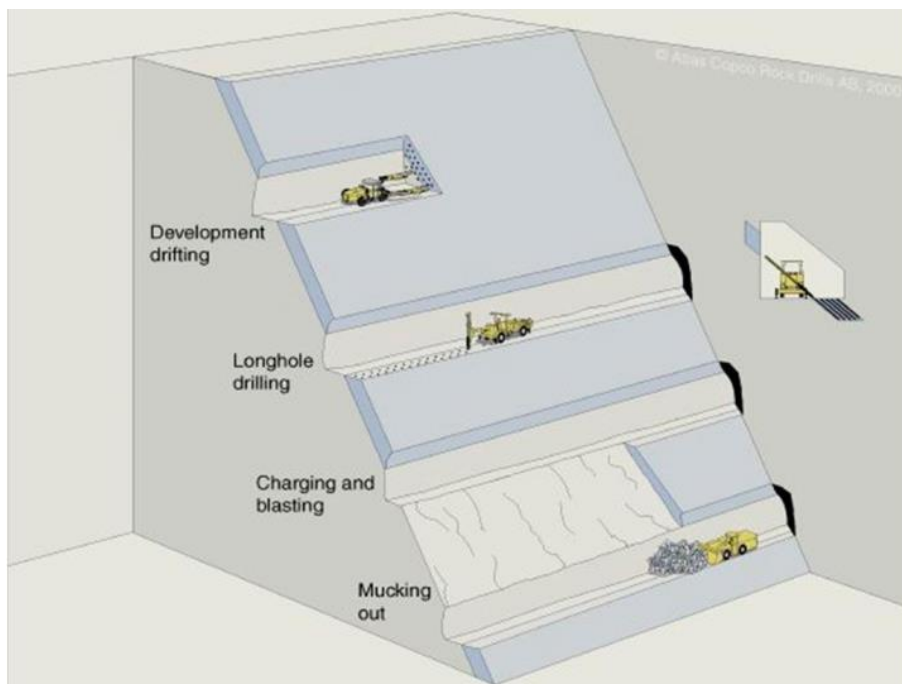
- 62 As can be gleaned from the figure above, the colours used for the ore blocks vary depending on the content of valuable minerals in each part of the deposit (*i.e.*, the grades for each metal).
- 63 After a mining company has developed a robust geological understanding of the deposit, the next step is to develop a mine plan (identifying which areas of the deposit should be mined) and a mining sequence (setting out the order in which these areas should be mined).
- 64 It is important to understand the mining method we adopted in order to appreciate why the October 2018 sampling was not representative of the mineralisation included in the mine plan in SRK's PEA of March 2018.
- 65 In the case of the Invicta Project, the studies carried out by SRK in 2014 had shown that the most economical mining method was the "sub-level open stoping" method ("**SLOS method**").¹⁰⁸ Under this method, the ore included in the mine plan (*i.e.*, the "production ore") is divided into "stopes", that is to say large blocks of ore that are extracted progressively through blasting. It is called sub-level stoping because the ore is blasted

¹⁰⁶ 2012 SRK Report, at **Exhibit C-58**, p. 83 (Table 12.1.1); 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. 46 (Figure 12).

¹⁰⁷ SRK, Conceptual Study Invicta Project: 300 tpd Option, 03/02/2014, at **Exhibit C-37**, p. 4.

¹⁰⁸ SRK, Conceptual Study Invicta Project: 300 tpd Option, 03/02/2014, at **Exhibit C-37**, p. 16. "Open" here simply means that there is no need for artificial support for the roof of the stope once excavated.

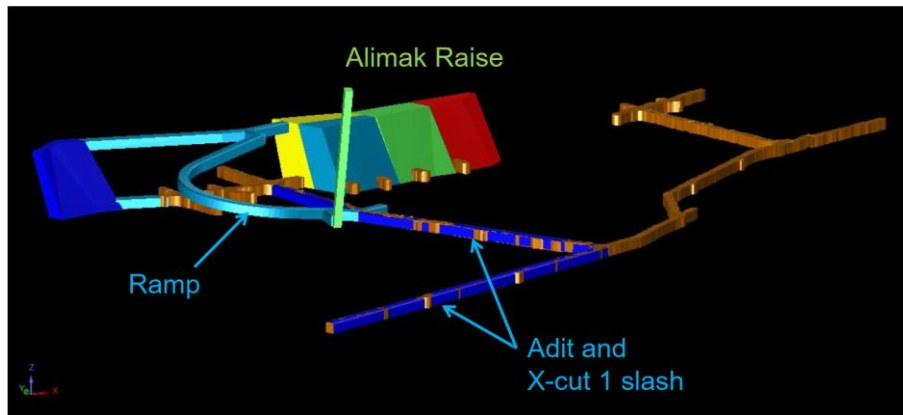
from a sub-level above the stope directly into another sub-level below. Once the ore from this stope is completely excavated, the stope is backfilled to access other stopes at higher sub-levels. The diagram below shows the four steps involved in the “sub-level open stoping” mining method: (i) excavate sub-levels above and below the stope (“development drifting”); (ii) drill through the stope to prepare extraction through blasting (“longhole drilling”); (iii) place the charges and blast the stope (“charging and blasting”) and finally (iv) muck out the blasted ore which has fallen to the lower sub-level (“mucking out”).¹⁰⁹



- 66 Some of SRK’s proposed stopes are shown as large colourful blocks on the figure below:¹¹⁰

¹⁰⁹ SRK, Conceptual Study Invicta Project: Preliminary Results (1,000 tpd), 22/01/2014, at **Exhibit C-67**, p. 10.

¹¹⁰ SRK, Conceptual Study Invicta Project: 300 tpd Option, 03/02/2014, at **Exhibit C-37**, p. 16.



- 67 To start commercial production and execute a mining sequence based on a SLOS method, it is therefore necessary to have built at least two sub-levels: a lower and an upper sub-level delimiting respectively the floor and the roof of the first stopes to be extracted through blasting. Before the Invicta Project could go into production, SRK had identified pre-production works that IMC had to complete at 3400m (the lower level) and 3430m (the upper level) to prepare for the extraction of the related stopes.¹¹¹
- 68 AlixPartners' observations on the gold grade relate in effect to these pre-production development works that IMC carried out in the summer of 2018 on the basis of the mining sequence laid out by SRK in their PEA.
- 69 The tonnage and grade of the development ore extracted during this pre-production will frequently be different from the tonnage and grades that will subsequently be achieved during commercial production. This is because the grade of the material extracted during the development phase is not necessarily representative of the grade of the ore that will be mined from the area specified by the mining plan. For example the mining software used to develop the mining sequence will typically recommend building the additional underground infrastructure (additional access tunnels, sub-levels etc.) through the lower grade areas shown in the block model. Moreover, during the excavation of the sub-levels and access tunnels development ore will often get mixed with waste rock – a

¹¹¹ 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. viii.

phenomenon that is referred to as “dilution” – which will further reduce the grades in development ore.

- 70 As such, and contrary to AlixPartners’s suggestions, there was nothing surprising about the fact that the anticipated gold grade of 4.83g/t for Year 1 under the PEA (which was based on commercial extraction of stopes) was higher than the gold grade of 2.25 g/t found in the ore extracted during the pre-production phase in the summer of 2018.¹¹² This lower grade simply reflects the fact that Lupaka was not yet extracting the production ore from the stopes delineated under SRK’s mine plan as it would have done when the Invicta Project would have gone into full commercial production.

6 THE INVICTA PROJECT WAS READY FOR PRODUCTION BEFORE DECEMBER 2018

- 71 Peru alleges in its Counter-Memorial that Lupaka has not shown that “it realistically would have been able to exploit the Invicta Project and meet it [*sic*] obligations, absent Peru’s alleged acts and omissions.”¹¹³ Peru further claims that it is “highly implausible”¹¹⁴ that, in the absence of the Parán Community’s violence and Peru’s passiveness, we “would have managed to (i) reach the exploitation stage, (ii) extract sufficient ore for processing, (iii) process that ore into gold, and (iv) deliver that gold to PLI Huaura in time to meet the contractual deadline.”¹¹⁵ These allegations are wrong as I explain below.
- 72 First, as I explained in the previous section, by early October 2018, IMC had completed all the necessary pre-production development work and was ready to start exploitation through the extraction of stopes. The figure below shows in yellow the tunnels that had been excavated at the 3400m

¹¹² Expert Report of AlixPartners on Damages, 24/03/2022, p. 29 (para. 80 and Figure 12); p. 50 *et seq.* (para. 143(b) and Figure 19).

¹¹³ Counter-Memorial, 24/03/2022, p. 146 *et seq.* (para. 290).

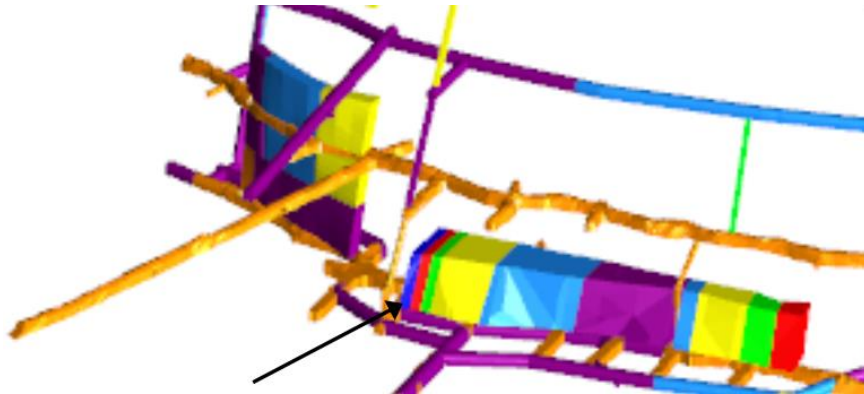
¹¹⁴ Counter-Memorial, 24/03/2022, p. 149 *et seq.* (para. 296).

¹¹⁵ Counter-Memorial, 24/03/2022, p. 146 *et seq.* (para. 290).

and 3430m levels and circled in red are the stopes IMC intended to blast first under its mining sequence:¹¹⁶



- 73 The following diagram further shows all the stopes that these two existing sub-levels would have allowed to extract in Year 1 of production:¹¹⁷



- 74 In light of this, it is clear that from an operational perspective, IMC was ready to start commercially extracting the ore in October 2018.
- 75 Moreover, as explained by Julio Castañeda in his second witness statement, all the outstanding permits would have been obtained as matter of course in the absence of the Blockade.¹¹⁸

¹¹⁶ IMC, Mining Sequence Year 2019 (SPA), at **Exhibit C-297**, p. 2. This mining sequence was developed in November 2018 and, as such, is based on the developed underground infrastructure as of the start of the Blockade. For ease of reference, I have drawn red circles on this diagram to identify the stopes included in the mine plan.

¹¹⁷ IMC, Mining Sequence Year 2019 (SPA), at **Exhibit C-297**, p. 13.

¹¹⁸ Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 37 *et seq.* (Section 7).

- 76 The Respondent refers to the fact that SRK's PEA states "the [Project] property is located within the boundaries of the Par[á]n, Lacsanga and Santo Domingo de Apache peasant communities"¹¹⁹ to argue that "that the Invicta Project was in fact within the Parán Community's territory".¹²⁰ However, the Respondent misunderstands the meaning of the term "property" in technical reports such as a PEA. The "property" refers to the entire area under concessions – which did include the Parán Community's land and was much broader than the area in which we were developing the Invicta Mine. Yet, Lupaka was not conducting, and did not intend to conduct, any mining activities on the Parán Community's land – at least until an agreement could be reached with this community.
- 77 Second, Peru states in its Counter-Memorial that "[Lupaka] has acknowledged that in the end it failed to secure adequate processing capacity to convert ore into marketable metals"¹²¹ and therefore, it was "unlikely [that Lupaka could] process ore at the rate necessary to satisfy the gold repayment obligations in the PPF Agreement."¹²² Again, these allegations are inaccurate and misrepresent the situation at the time.
- 78 Since the beginning of 2018, we had been carrying out due diligence on Buenaventura's Mallay plant together with Pandion with a view to acquiring it, as I noted in Section 4.2 above. By late May 2018, we were already fairly advanced in our negotiations with Buenaventura and anticipated that we would only need to rely on third-party toll mills until the summer of 2019 while we would complete the acquisition and upgrade of the Mallay plant.¹²³ The aim was to conclude a one-year agreement with a toll mill to process our ore until August 2019 when we anticipated that the Mallay plant would be up and running.¹²⁴
- 79 Before entering into such a contract with a toll mining, we needed to carry out pre-production testing – *i.e.*, try out various processing plants in the

¹¹⁹ 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. iv.

¹²⁰ Counter-Memorial, 24/03/2022, p. 82 (para. 166).

¹²¹ Counter-Memorial, 24/03/2022, p. 359 (para. 766).

¹²² Counter-Memorial, 24/03/2022, p. 155 *et seq.* (para. 307).

¹²³ Email chain between Lupaka and Pandion, 29/05/2019-30/05/2018, at **Exhibit C-298**.

¹²⁴ Email chain between Lupaka and Pandion, 29/05/2019-30/05/2018, at **Exhibit C-298**.

region by delivering small batches of ore to decide on the best processing option before starting full commercial production. This is what we did in the summer of 2018 until mid-October 2018 when the Parán Community set up the Blockade.

- 80 The issues that we faced in dealing with the toll mills during pre-production testing were easy to remedy and would not have continued with a longer-term contract in place for full production. I have read Mr Castañeda's statement and confirm that it is aligned with my recollection of the performance of Huancapeti, Coriland and San Juan Evangelista plants during pre-production testing.¹²⁵
- 81 Peru notes that Lupaka needed to "insulate itself against contractual breaches perpetrated by those mills with which it had pre-existing contracts" and it implies that Lupaka could only do so by having its own processing plant.¹²⁶ This is incorrect. While in an ideal world we would be acquiring our plant (in this case Mallay), a long-term contract with any of the processing plants where we took a large part of their capacity would have made the processing much more secure. Indeed, the lack of cooperation from the toll mills we faced was specific to pre-production testing and we would have been able to work much more collaboratively once we had committed to supplying larger quantities of our ore to one of these toll mills. Indeed, a toll mill can only process ore from one client at a time with downtimes for cleaning up and set-up in between, which makes it less profitable to process small shipments of ore. For this reason, toll mills tend to favour and prioritise larger shipments from regular suppliers with producing mines rather than small batches sent for pre-production testing. I will refer to a couple of examples to show this.
- 82 At the time SRK issued its PEA report in March 2018, we had anticipated that we would be using the DHP plant in Caraz (also referred to as "Virgen del Rosario").¹²⁷ We had been negotiating a contract with the owner of this plant to process 4,000 tonnes of ore to measure the performance of their

¹²⁵ Second Witness Statement of Julio F. Castañeda, 23/09/2022, p. 41 *et seq.* (paras. 100-111).

¹²⁶ Counter-Memorial, 24/03/2022, p. 155 *et seq.* (para. 308).

¹²⁷ 2018 PEA, 13/04/2018, at **Exhibit C-34**, p. 137.

plant.¹²⁸ However, by the time we were ready to start sending small batches of ore to DHP to test their plant in June 2018, the owner of the plant informed us that it had already given all its excess processing capacity to Stellar Mining to process their ore from the Toropunto mine.¹²⁹ DHP had in effect made a business decision to enter into a long-term exclusivity supply contract with Stellar Mining over testing our Invicta ore at their plant without any guarantee that they would be awarded a long-term contract.

- 83 In addition, Stellar Mining's founder and CEO, Luis Goyzueta (which I referred to above), told me in November 2018 about the results that Stellar Mining obtained from processing their production ore.¹³⁰ As Mr Goyzueta explained, Stellar Mining did face some teething issues when they started processing at DHP but after reviewing the plant's set-up, the performance they achieved was very good and the recoveries were even better than those they obtained during their pre-production metallurgical tests.¹³¹ What he said illustrates the benefits of having the processing plant process one's own ore for longer, uninterrupted periods where your metallurgists can work with the plant to make all the adjustments necessary to improve the plant's recoveries and maximise its yield. Indeed, this is entirely normal and would apply to other plants in my experience.
- 84 During the summer of 2018, we decided instead to test the performance of the Coriland plant in Caral since the DHP plant was fully occupied by Stellar Mining. Mr Javier Yep, the owner of this plant, expressed an interest in developing a long-term relationship with Lupaka by way of a joint venture or some other form of co-ownership agreement for his plant. He was also interested in buying our concentrates.¹³² As I explained above, at the time, we first wanted to ensure that the performance of the plant was adequate for our needs and therefore, we were only willing to start with a

¹²⁸ Internal Lupaka email chain, 29/04/2018-30/04/2018, at **Exhibit C-299**.

¹²⁹ Email exchange between Lupaka and Stellar Mining, 16/06/2019, at **Exhibit C-300**.

¹³⁰ Discussion with Stellar Mining, Comments on Denwood Holdings Perú Metals S.A.C, November 2018, at **Exhibit C-301**.

¹³¹ Discussion with Stellar Mining, Comments on Denwood Holdings Perú Metals S.A.C, November 2018, at **Exhibit C-301**.

¹³² Internal Lupaka email chain, 29/04/2018-30/04/2018, at **Exhibit C-299**.

small batch of approximately 1,500 tonnes in June 2018.¹³³ In total, we sent 4,987 tonnes in two shipments, with another shipment of 3056 tonnes in August 2018.¹³⁴ Unfortunately, although the recoveries improved along the way, we would have needed to make an additional investment to upgrade Coriland from 200 t/d to 350 t/d and, therefore, decided that it was less costly and more efficient to go with Huancapeti, another processing option that we had also been testing at the time, which already had a processing capacity of 350 t/d.¹³⁵

- 85 We had agreed to send larger shipments to Huancapeti to allow it to process between up to 7,000 tonnes in September and then 10,000 tonnes on an uninterrupted basis each month between October 2018 and May 2019.¹³⁶ In September 2018, we had already shipped a total of 2,140 tonnes of ore to Huancapeti¹³⁷ – which they were going to process at a rate of approximately 355 t/d over the course of 5-6 days.¹³⁸ Huancapeti were ready to start processing this ore a few weeks later but we needed to ship another batch to ensure that there was a continuous supply of ore for processing.¹³⁹ Accordingly, we had organised for the shipment of another batch of 6,500 tonnes for the week commencing 15 October 2018.¹⁴⁰ Unfortunately, as a result of the seizure of the Site and the Blockade that started on Sunday 14 October 2018, we were not able to ship any more ore

¹³³ Internal Lupaka email chain, 29/04/2018-30/04/2018, at **Exhibit C-299**.

¹³⁴ We sent a first batch of 1,931 tonnes in June 2018, see IMC, Monthly Report, June 2018, at **Exhibit C-234**, p. 7. In August 2018, we sent a second, larger batch of 3056 tonnes. We later decided to reship 923 tonnes from Coriland to Huancapeti in September 2018. see Lupaka, Project Monthly Report, September 2018, at **Exhibit C-86**, p. 7 *et seq.*

¹³⁵ Lupaka, Project Monthly Report, September 2018, at **Exhibit C-86**, p. 8.

¹³⁶ Service Contract for processing mineral at Huancapeti II (SPA), 01/08/2018, at **Exhibit C-146**, p. 1 (para. 2.1): “**INVICTA hires the services of VENARD in order to continuously process up to 7,000 WMT of polymetallic ore in September and 10,000 WMT monthly from October 2018 until May 2019** to obtain concentrates of: a) lead-silver-gold b) zinc and c) copper-silver-gold.”

¹³⁷ Lupaka, Project Monthly Report, September 2018, at **Exhibit C-86**, p. 8.

¹³⁸ IMC Management Call Notes, 09/10/2018, at **Exhibit C-302**, p. 2.

¹³⁹ IMC Management Call Notes, 09/10/2018, at **Exhibit C-302**, p. 2.

¹⁴⁰ IMC Management Call Notes, 09/10/2018, at **Exhibit C-302**, p. 2.

to Huancapeti.¹⁴¹ If we had been able to there is no reason why it would not have been processed at the rate of some 350 t/d.

- 86 Indeed, in the meantime, we had also agreed with Buenaventura that we would be able to start processing our Invicta ore at the Mallay plant in the interim period before we formally took over the plant. This can be seen from Section 10 of the Mallay Purchase Agreement dated 5 October 2018 which gave Lupaka the right, as of the signing of the Mallay Purchase Agreement, to process up to 8,000 tonnes per month at a rate of 600 t/d at the Mallay plant.¹⁴² This was in both parties' interest as, on the one hand, it allowed Buenaventura to generate additional revenues from its processing plant while, on the other hand, allowing us to start processing our ore earlier at the Mallay plant.
- 87 Pending the closing of the Mallay transaction, we would not have been able to proceed with the upgrade of the Mallay plant to build a third flotation circuit, but our plan was to use the two existing processing lines at Mallay in the meantime. Historically, the Mallay plant had been running two processing lines – one producing a lead concentrate and the other a zinc concentrate. Processing lines for most metals are similar so we would have simply converted the existing zinc line – the less valuable of the concentrates produced from the Invicta ore – into a copper line – the most valuable of our concentrates. This could be done in a few weeks and at minimal cost (some USD 20,000 at most). In 2016, we had used a single copper line for our 520-tonne bulk testing at the Minex plant in Nazca and our copper concentrates had sold for a very good price.
- 88 Had the Mallay Purchase Agreement been signed on 15 October 2018 as anticipated, we would have been able to rely on both Huancapeti with a processing capacity of 355 t/d and Mallay at 600 t/d – which was more than enough to cover our needs. It is true that due to Buenaventura's announcement on 5 October 2018 about the delays in obtaining Mallay's Consent we could not sign the Mallay Purchase Agreement on 15 October 2018. However, given that processing our ore at the Mallay plant did not

¹⁴¹ Lupaka, Project Monthly Report, October 2018, at **Exhibit C-87**, p. 7 (Section 4.3).

¹⁴² Draft Mallay Purchase Agreement between Buenaventura and IMC (Final version) (SPA), 05/10/2018, at **Exhibit C-287**, p. 20 (Article 10: Right to Process Minerals).

involve any transfer of agreements concluded with the Mallay Community, I am confident that, if the Blockade had not occurred 10 days later, we would have still reached an agreement with Buenaventura to start processing our ore at Mallay. In fact, even after Buenaventura's announcement on 5 October 2018, we continued to discuss sending our metallurgists to the Mallay plant¹⁴³ so that we could start the first shipments of ore when we could regain access to the Invicta Mine.

- 89 As explained above, in the absence of the Blockade, it is most likely that Lupaka would have started production in November 2018 and processed its ore both at Huancapeti and Mallay until the deal with Mallay was finalised and Lupaka could then upgrade the Mallay plant to have three circuits to produce three distinct concentrates. Lupaka would also have commissioned an update to SRK's PEA to prepare a revised mine plan taking into account the Mallay acquisition – similar to the report prepared by Micon in this arbitration. As a result of the Blockade, we never commissioned this update.

7 “GOLD DELIVERY OBLIGATIONS” TOWARDS PANDION UNDER THE PPF AGREEMENT

- 90 Finally, it appears that Peru and its quantum expert, AlixPartners, have misunderstood the provisions of the PPF Agreement regarding Lupaka's gold delivery obligations. For instance, Peru states in its Counter-Memorial that:

“[Lupaka needed] to (i) reach the exploitation stage, (ii) extract sufficient ore for processing, (iii) process **that ore** into gold, and (iv) deliver **that gold** to PLI Huaura [to satisfy its gold delivery obligations]”.¹⁴⁴

- 91 It is clear that Peru wrongly assumes that the PPF Agreement implied that we had to make physical deliveries of gold to Pandion, but that is not how the contract was structured. As defined in Section 1 of the PPF Agreement,

¹⁴³ Email from Buenaventura to Lupaka, 15/11/2018, at **Exhibit C-303**.

¹⁴⁴ Counter-Memorial, 24/03/2022, p. 146 *et seq.* (para. 290) (emphasis added).

“Delivery” means “delivery of gold by [Lupaka] to [Pandion] by means of **credit to [Pandion]’s Unallocated Gold Account**”.¹⁴⁵

92 To put it in simple terms, an unallocated gold account is simply a standard bank account with gold as its currency. The gold on the account is said to be “unallocated” because the bank does not physically store the gold on its client’s behalf in a separate vault (as opposed to “allocated gold accounts”). Therefore, making a “gold delivery” under the terms of the PPF Agreement simply meant making a bank order to credit Pandion’s Unallocated Gold Account; as with any other transfers between bank accounts, this could be done from any other currency into a gold-denominated account.

93 In practice, these “gold deliveries” would come out of the proceeds from our monthly concentrate sales to the offtakers – *i.e.*, the overall value of the concentrates sold, not just their payable gold content. To that effect, Section 12(1)(r) of the PPF Agreement provides that:

“[Lupaka] agrees to irrevocably direct and cause the Offtaker to **credit to [Pandion]’s Unallocated Gold Account**, in each month, **in priority to any other application**, the **Scheduled Monthly Quantity** for such month [...]”¹⁴⁶

94 In the same vein, Schedule E of the PPF Agreement requires Lupaka to include in any offtake contract for the purchase of concentrates the following term:

“The Offtaker hereby acknowledges and agrees that all amounts then due and owing to the Buyer in respect of any Contract Quantity of Gold to be delivered and any other amounts of Gold to be delivered by the Seller hereunder shall **first be credited** to the

¹⁴⁵ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 4 *et seq.* (Section 1) (emphasis added).

¹⁴⁶ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 44 *et seq.* (Section 12(1)(r)) (emphasis added).

Buyer's Unallocated Gold Account prior to any credit or remittance to the Seller or an account of the Seller.”¹⁴⁷

- 95 This meant that every month, after taking delivery of the concentrates, the offtaker would first credit the Scheduled Monthly Quantity to Pandion's Unallocated Gold Account before remitting the rest of the proceeds to Lupaka. The credit to Pandion's Unallocated Gold Account would be deducted from the entire value of the concentrates, not just their payable gold content. This is further confirmed by paragraph 6 of Schedule E which requires the offtake agreement to set out expressly Pandion's right to be paid based on the proceeds from all metals and not only gold:

“[t]he Buyer [*i.e.*, Pandion] shall have the **right** to be **credited** to its Buyer's Unallocated Gold Account **amounts deriving from minerals other than gold** that are processed by the Offtaker, in case that the Actual Monthly Quantity delivered is less than the amounts required to be delivered in such Scheduled Delivery Month.”¹⁴⁸

- 96 On that basis, it is clear that the following statement made by Peru in its Counter-Memorial – citing AlixPartners' report – is factually incorrect:

“[Lupaka]'s attempts to use third-party ore processing were so unsuccessful that, from June to October 2018, (*i.e.*, prior to the [Blockade]), [Lupaka] processed only ‘only 28.8% of the monthly Contract Quantity of gold required [under the PPF Agreement] to Sell starting December 2018, and 16.5% of the monthly Contract Quantity of gold required to Sell starting March 2019.’”¹⁴⁹

- 97 First, for the reasons outlined above, it is misleading to rely on sales figures obtained from pre-production testing from development ore as these

¹⁴⁷ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 84 (Schedule E, para. 2) (emphasis added).

¹⁴⁸ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 84 (Schedule E, para. 6) (emphasis added).

¹⁴⁹ Counter-Memorial, 24/03/2022, p. 366 *et seq.* (para. 787) (citing Expert Report of AlixPartners on Damages, 24/03/2022, p. 29 *et seq.* (paras. 80-81)).

figures are based on grades and volumes that are not representative of a mine in commercial production.

- 98 Second, even if one were to rely on pre-production sales to assess Lupaka's ability to make "gold deliveries" under the PPF Agreement, the overall value of the concentrates produced by Lupaka during this period should be taken into account, and not just simply consider its gold payable content. Over five months of pre-production, Lupaka generated net smelter returns worth USD 731,448.¹⁵⁰ This translates into monthly proceeds of USD 146,298.60¹⁵¹ which would allow crediting approximately 117oz of gold each month to Pandion's Unallocated Gold Account.¹⁵² This is equal to 63% and 36% of the monthly gold deliveries due from December 2018 and March 2019 respectively.¹⁵³ As noted by AlixPartners in their report, the tonnage of ore mined and processed by Lupaka during pre-production was only 11% of the tonnage for commercial production. Therefore, it is clear that with production tenfold that of pre-production, Lupaka would have been able to satisfy its gold deliveries by a comfortable margin.
- 99 In any case, I note that if Lupaka did not produce enough concentrates to meet its delivery obligations under the PPF Agreement, Section 5(5) allowed Lupaka to pay any shortfall directly in cash:

"Any obligation to Deliver Gold on a Monthly Delivery Date that is not performed in full on such Monthly Delivery Date shall be converted into, to the extent of the Gold Shortfall, an obligation of the Seller to pay to the Buyer in US Dollars [...]"¹⁵⁴

- 100 This meant that, if the value of the concentrates sold during the initial months fell short, Lupaka would have been able to raise funds to make up for the shortfall during the initial ramp-up to full production in the very

¹⁵⁰ Lupaka, Project Monthly Report, December 2018, at **Exhibit C-52**, p. 8.

¹⁵¹ $\text{USD } 146,289.60 = 731,448.00 / 5$.

¹⁵² Based on a gold price of USD 1,250 (as anticipated in the PEA), $\text{USD } 146,289.60 / 1,250 = 117.03$ oz of gold.

¹⁵³ $63\% = 117.03 / 187$. $36\% = 117.03 / (187+139)$.

¹⁵⁴ Second Amended and Restated PPF Agreement, 02/08/2017, at **Exhibit C-45**, p. 22 (Section 5(5)).

unlikely event that Pandion would have insisted on strict compliance with the schedule.

- 101 Indeed, as I set out in the Annex, up until the Blockade Lupaka had a very strong track record of raising funds in relation to the Invicta Project. As we would go into production, our ability to raise funds would only have improved.
- 102 This table further shows that the Blockade had a significant impact on our ability to raise funds and, as explained in Section 4.4 above, led to our default under the PPF Agreement.¹⁵⁵
- 103 Finally, it is important to stress that, prior to the Blockade, Pandion had every confidence that the Project would be a commercial success and was willing to invest further into the Project to have a greater share of the dividends the Project would bring. None of the parties considered that there was a risk of default on the part of Lupaka in the coming months.

* * *

This witness statement has been drafted with the assistance of LALIVE, counsel for Lupaka Gold Corp., on the basis of several discussions and exchanges of correspondence. I have carefully reviewed the statement and confirm that it correctly reflects my recollection of the facts described and my opinions. I am prepared to appear before the Arbitral Tribunal to confirm the content of this statement.



Gordon Lloyd Ellis

Signed on 23 September 2022 in Vancouver, Canada.

¹⁵⁵ See Annex and Table 1 (Item 11).

ANNEX – LUPAKA’S FUNDRAISING SINCE THE INVICTA PROJECT BECAME ITS PRIME FOCUS IN MARCH 2014

Date of press release	Debt / Equity	Type of fundraising	Amounts anticipated	Amounts effectively raised	Percentage raised
07 August 2014	Equity (Shares and Warrants)	Private Placement	USD 1’610’000.00	USD 1’610’000.00	100.00%
21 August 2015	Equity (Shares and Warrants)	Private Placement (announcement)	USD 600’000.00	N/A	N/A
24 August 2015	Equity (Shares and Warrants)	Private Placement (First Tranche)	USD 600’000.00	USD 452’260.00	75.38%
28 September 2015	Equity (Shares and Warrants)	Private Placement (Second Tranche)	USD 600’000.00	USD 150’250.15	25.04%
Total:	Equity (Shares and Warrants)	Private Placement	USD 600’000.00	USD 602’510.15	100.42%
29 December 2015	Equity (Shares and Warrants)	Private Placement (announcement)	USD 110’000.00	N/A	N/A

Date of press release	Debt / Equity	Type of fundraising	Amounts anticipated	Amounts effectively raised	Percentage raised
31 December 2015	Equity (Shares and Warrants)	Private Placement	USD 110'000.00	USD 110'000.00	100.00%
11 February 2016	Equity (Shares and Warrants)	Private Placement (announcement)	USD 300'000.00	N/A	N/A
22 February 2016	Equity (Shares and Warrants)	Private Placement	USD 300'000.00	USD 419'500.00	139.83%
15 June 2016	Debt	Bridge Loan (announcement)	USD 750'000.00	N/A	N/A
30 June 2016	Debt	Bridge Loan	USD 750'000.00	USD 750'000.00	100.00%
04 January 2017	Debt	Bridge Loan (announcement)	USD 300'000.00	N/A	N/A
12 January 2017	Debt	Bridge Loan	USD 300'000.00	USD 300'000.00	100.00%

Date of press release	Debt / Equity	Type of fundraising	Amounts anticipated	Amounts effectively raised	Percentage raised
19 May 2017	Equity (Shares and Warrants)	Private Placement (announcement)	USD 300'000.00	N/A	N/A
24 May 2017	Equity (Shares and Warrants)	Private Placement	USD 300'000.00	USD 300'000.00	100.00%
22 June 2017	Debt	Bridge Loan (announcement)	USD 600'000.00	N/A	N/A
30 June 2017	Debt	Bridge Loan	USD 600'000.00	USD 600'000.00	100.00%
04 May 2018	Debt	Extension of Bridge Loan	USD 600'000.00	USD 600'000.00	100.00%
Total before the Blockade:			USD 4'570'000.00	USD 4'692'010.15	102.67%
Date of Blockade: 14 October 2018					
28 January 2019	Equity (Shares and Warrants)	Private Placement (announcement)	USD 1'000'000.00	N/A	N/A
14 February 2019	Equity (Shares and Warrants)	Private Placement (announcement)	USD 1'000'000.00	N/A	N/A

Date of press release	Debt / Equity	Type of fundraising	Amounts anticipated	Amounts effectively raised	Percentage raised
07 March 2019	Equity (Shares and Warrants)	Private Placement	USD 1'000'000.00	USD 665'000.00	66.50%
14 March 2019	Equity (Shares and Warrants)	Private Placement	USD 1'000'000.00	USD 665'000.00	66.50%
Total after the Blockade:			USD 1'000'000.00	USD 665'000.00	66.50%
Total Overall:			USD 5'570'000.00	USD 5'357'010.15	96.18%