

International Centre for Settlement of Investment Disputes (ICSID)

Lupaka Gold Corp.,
Claimant,

v.

Republic of Peru,
Defendant.

ICSID Case No. ARB/20/46

Second Witness Statement of
Andrés Fernando Trigos

17 January 2023

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I. INTRODUCTION

1. I, **Andrés Fernando Trigoso**, within the scope of the arbitration proceedings brought by the company Lupaka Gold Corp. ("**Lupaka**" or "**Claimant**") against the Republic of Peru ("**Peru**"), ICSID Case No. ARB/20/46 ("**Arbitration Proceedings**"), with the credentials provided in my first witness statement of 11 March 2022 ("**First Statement**"), make this second witness statement ("**Second Statement**") at the request of the Special Commission representing the State in International Investment Disputes ("**Special Commission**"). This Second Statement, which I understand will be presented together with Peru's rejoinder ("**Rejoinder**"), is based on my personal knowledge of the facts, acquired in performing the duties which I identified in the First Statement, including the office of Regional Coordinator (from April 2014 to October 2018) and Coordinator for the Promotion of Dialogue and Citizen Participation, both at the General Office for Social Management ("**OGGS**") of the Ministry of Energy and Mines ("**MINEM**").
2. I have read the parts relevant to my testimony of 23 September 2022 in Claimant's Reply ("**Reply**"), as well as the second witness statements of Luis Felipe Bravo García [REDACTED] of 23 September 2022. I have also consulted several documents from the MINEM [Ministry of Energy and Mines] and other sources.
3. The lawyers for Peru's defense team have assisted me, at my request and under my supervision, in preparing this witness statement. I confirm that this witness statement reflects my personal knowledge and account of the relevant facts and events faithfully and correctly.
4. This Second Statement was prepared in Spanish. If I am called to testify at the Arbitration hearing, I reserve the right to testify in that language.

II. THE SOCIAL LICENSE AS A DUTY OF MINING COMPANIES TO REACH AGREEMENTS WITH THE COMMUNITIES SITUATED IN THE AREA OF INFLUENCE OF THE PROJECT

5. In my First Statement, I explained the existence and importance of the so-called “social license” in Peru¹. More specifically, I mentioned that, for a mining project to be successful, it is crucial for the company to have and maintain a good relationship with the communities within its area of influence and also obtain the corresponding social and environmental impact studies necessary.²
6. I have read that, in its Reply, Claimant rejects the existence of this concept under Peruvian law. More specifically, Claimant refers to my statement to affirm that I had allegedly recognized that Peruvian legislation does not contain a specific obligation held by mining companies to reach an agreement with communities that do not have rights to the area in which the project will be developed.³ Similarly, Claimant insists in affirming that the law only requires companies to arrange agreements with the owners of the superficial land. Claimant also argues that, although the law requires the Environmental Impact Assessment (“EIA”) to include certain social components to benefit all the communities in the area of influence of the project, those social components do not require the mining companies to reach agreements with the communities to develop the project.⁴ Claimant also affirms that it complied with its social obligations under the EIA with regard to the Parán Community.⁵ Claimant thus appears to suggest that it did not have to obtain a social license or reach an agreement with the Parán Community, because it complied with its legal obligations under the EIA.

¹ First Witness Statement of Andrés Trigos, ¶¶ 24–29.

² First Witness Statement of Andrés Trigos, ¶ 24.

³ Reply, ¶ 76.

⁴ Reply, ¶ 76.

⁵ Reply, ¶¶ 76–77.

7. Claimant's arguments reveal an ignorance of two important points: (i) the concept of social license, although not transcribed as such into Peruvian legislation, is a concept that is used to indicate that a project (mining, hydrocarbons or energy) has achieved the social standards and viability of most of the populations in the area of the aforesaid project as reflected in the obligations laid down by Supreme Decree No. 040-2014-EM ("**Regulations on Mining Activities**"). Its aim is for mining operators to work with the acceptance and collaboration of the communities that will be impacted by their operations, which is different in nature from the easement agreement with the owners of the land used for a project. Moreover, (ii) the administrative requirements under the EIA do not replace the need for the mining company to obtain the social license. I will explain these points in detail below.

A. The concept of a social license is contained in the legal obligations imposed by the Regulations on Mining Activity

8. Claimant's position expressed in the Reply demonstrates a limited and inexperienced understanding of its responsibilities to the local communities. In my First Statement, I explained, and now I repeat, that the concept of the social license in mining projects exists in Peru, which includes obligations to the local communities held by the companies wishing to develop a mining exploration and operation project.⁶ More specifically, as I pointed out in my First Statement, the Regulations on Mining Activity, impose obligations on companies to the communities in the area of direct influence of a project.⁷ Although the Supreme Decree does not use the term "social license," that does not deny the existence of that concept and the

⁶ First Witness Statement of Andrés Trigos, § III.

⁷ First Witness Statement of Andrés Trigos, ¶ 25.

obligation of the mining company to reach an agreement with the communities in those areas of influence.

9. Beyond the specific terms used by the Regulations on Mining Activities, the fundamental concept of the social license (or social management) cannot be ignored. As I explained in my First Statement, that concept consists of the need for companies to be accepted by the actors involved, for a project to be successful. To that effect, the Regulations on Mining Activities encourage companies to adopt social management policies that include the communities, which reduces the risk of social rejection of the projects by the communities. For that purpose, the Regulations on Mining Activity legally require the project managers to “implement the mechanisms and processes for citizen participation involving the people located in the area of influence of the project”.⁸
10. Owing to the very nature of these projects and communities, the provision does not specifically lay down or regulate the content of those agreements. The nature and objective of those agreements require them to adapt to the specific circumstances of the area, the needs of the communities and the characteristics of the project. This partly explains why the provisions do not establish a model agreement or specific obligations for all the projects.
11. Claimant argues that, contrary to what happens with a right of way over the land, Invicta did not have a duty to obtain a social license as the law does not impose it as a “pre-requisite” for the development of its project.⁹ Here, once again, Claimant ignores a duty of social management for the success of its project. This is a dangerous position for any mining operator. The minimum requirement of reaching an agreement with persons or communities who have surface rights over the land on which the mining project would be situated

⁸ Ex. R-0006, Supreme Decree No. 040-2014-EM, 5 November 2014, Arts. 57.9, 57.2, 57.7.

⁹ Reply, ¶¶ 76-77.

does not eliminate the need to obtain acceptance or social license from the communities in the area of direct and indirect environmental and social influence. Without an agreement with all the communities affected, there is a risk that the project will come up against serious obstacles, suffer delays or even fail, due to opposition from the local communities. Therefore, the legislation has imposed duties of relations with the local communities to which I have referred to with the objective of gaining project acceptance.

12. Claimant's incorrect approach of focusing solely on the communities with which it had to arrange easement agreements (rights over the specific land) explains why Invicta: (i) appeared not to be committed to talking with the Parán Community at the time; and in turn (ii) insisted on using the police against a community that had not accepted the Project, as it never understood the critical importance of ensuring that the project was approved by all the communities in the area of direct and indirect influence.

B. The social components of the EIA do not replace the communities' expectations that the company will obtain a social license

13. Claimant seems to affirm that it did everything it had to do under the EIA and that it was under no obligation to do anything else. However, the responsibilities of companies to the rural communities are not exhausted with the obligations contained in the EIA, as Claimant incorrectly suggests.¹⁰ Interpreting the legal framework of mining in this way completely ignores the purpose of the social management plans of the EIA: to strengthen social relations with the people in the area and to ensure that the project is socially sustainable.
14. Although the social obligations found in the EIA are intended to help the mining companies to achieve a harmonious relationship with the

¹⁰ Reply, ¶¶ 76-77.

communities in the area of influence, these are minimum requirements and do not guarantee that a social license will be obtained. The EIA is an administrative procedure, monitored and evaluated by the State, which takes place during the stage prior to commencement of the operating activities and which contains environmental and social activities offered or proposed by the company to the local community, largely for the company to obtain the local community's acceptance. The social license is an agreement between the company and the communities and *does not involve the State*. It is wrong to confuse these two concepts and reduce the social license to the environmental and social obligations established in the EIA.

15. Companies should not treat their social obligations under the EIA as mere formalities. For example, companies may sign an undertaking of continuous dialogue, submit plans for the organization of social wellbeing programs intended to benefit the community, and organize public meetings to promote citizen participation. However, if the company does not truly commit to the rapprochement process and comply with the spirit of social management, its project will not be accepted. Consequently, when companies treat these obligations as a simple check list of administrative tasks, without understanding the underlying objective of these obligations, or the local traditions and customs of the communities, they will not manage to obtain a social license to operate, even despite the fact that they have complied with the EIA in the strict sense.
16. Invicta's case confirms the above, but is not the only example. Currently in Peru there are projects that have all the authorizations required by the Peruvian environmental and social laws, but which have not been able to be concluded, to date, owing to the company's poor social management and lack of social acceptance by the local communities in the area of these projects. This was what happened in the Conga case, a project that obtained all the authorizations required by the Peruvian State, and was even the object of an international environmental audit, but

that was unable to work owing to poor relations with the communities. The foregoing demonstrates that the “social license” and the viability of a project not only derive from compliance with legal provisions and technical processes, but there must also be a process, well in advance, to promote and raise awareness among the communities of the benefits of the project, as well as the reputation of the operating company.

* * *

17. To conclude, Claimant’s stance in these arbitration proceedings on the concept of social license confirms the perception I had during my conversations with the representatives of Invicta. In my opinion and based on my professional experience, Claimant’s actions and its affirmations in these arbitration proceedings demonstrate: (i) Claimant’s lack of experience in the development of mining projects in Peru; (ii) Claimant and Invicta’s incorrect social strategy in their attempt to operate the Invicta mine, by believing that they did not need to obtain the acceptance of the Parán Community, one of the communities in the area of direct influence; and (iii) the lack of appreciation of the fundamental importance of the concept of social license, as a responsibility of the mining company that includes but is not limited to social obligations under the EIA.

III. THE ROLE OF THE OGGS IN THE DISPUTE BETWEEN INVICTA AND THE PARÁN COMMUNITY

18. In my First Witness Statement, I explained the functions of the OGGS in the settlement of disputes between mining companies and communities, and the role it played in the dispute between Invicta and the Parán Community.¹¹ More specifically, I explained that, in a social dispute with mining projects, the OGGS: (i) facilitates dialogue between the parties to look for an agreement to settle the dispute;¹² (ii) does not

¹¹ First Witness Statement of Andrés Trigos, ¶ 25.

¹² First Witness Statement of Andrés Trigos, ¶ 19.

have the legal authority to order police intervention as a method for the settlement of disputes;¹³ and (iii) does not have coercive mechanisms either to force the parties (companies and local communities) to comply with the voluntary agreements entered into outside those established in the EIA.¹⁴

19. Claimant (in its Reply) and Mr. Luis Bravo (in his second witness statement) responded to my affirmations arguing that: (i) the OGGS recognized that dialogue was not appropriate for settling the dispute with the Parán Community and recommended activating the intervention of the PNP [Peruvian National Police];¹⁵ and (ii) I had stated that the OGGS would guarantee compliance with the agreements entered into between Invicta and the Parán Community.¹⁶ As I will explain below, Claimant and Mr. Bravo have distorted the facts.

A. The OGGS does not have the power or the competence to order police intervention as a method for settling disputes

20. Contrary to what Claimant suggests,¹⁷ the OGGS does not have the power nor the competence to: (i) order police intervention; (ii) guarantee compliance with the agreements between the parties. On the contrary, the OGGS seeks to urge the compliance with the agreements signed, based on the principle of good faith, using dialogue mechanisms for that purpose.

¹³ First Witness Statement of Andrés Trigos, ¶ 21.

¹⁴ First Witness Statement of Andrés Trigos, ¶ 23.

¹⁵ Reply, ¶ 371 ("Tellingly, while Peru's witness Mr. Trigos, General Director of the MEM-OGGS from December 2018 to March 2019, states that he was not competent to order a police intervention to lift the Blockade, he does not state that such intervention would have been illegal in the circumstances. On the contrary, as Peru's internal documents show, Mr. Trigos and others at the MEM-OGGS recommended it, as did the Police."); ¶ 16 ("Peru's own documents show that it knew dialogue with Parán was of no use. The MEM-OGGS, the Peruvian entity which was closely involved in the dialogue between IMC and Parán for many months ('MEM-OGGS'), contemporaneously stated that '[d]ialogue mechanisms are not appropriate in this case' and that 'coordination at the highest inter-sectoral level between the MEM and the MININTER [is needed] in order to activate as soon as possible the mechanisms for the reestablishment of public order'. In other words, the Police needed to intervene to restore law and order, as it had done in multiple other projects in the face of unlawful behaviour by local communities.").

¹⁶ Second Witness Statement of Luis Bravo, ¶¶ 105–106.

¹⁷ Reply, ¶¶ 16, 371; Second Witness Statement of Luis Bravo, ¶¶ 105–106.

21. Without refuting my statements on the nature, functions and legislative framework of the OGGS,¹⁸ Claimant has presented internal OGGS documents in which officers had allegedly suggested recommending the intervention of the PNP.¹⁹ Although it is true that, at certain points during the dispute, the OGGS recommended the restoration of public order, this does not demonstrate in any way, as incorrectly suggested by Claimant and Mr. Bravo, that the OGGS could order police intervention, or that such a recommendation was a reflection of the OGGS' institutional position that the use of force against the Parán Community was the only or best way of resolving the dispute.
22. The arguments raised by Claimant based on those documents ignore the competence of the OGGS and of the MINEM. As I explained in my First Statement, the OGGS is the MINEM entity responsible for promoting, dealing with, participating in and implementing means of dialogue, negotiation and cooperation in social disputes that may arise in projects in the energy and mining sectors.²⁰ For the appropriate exercise of dialogue, the OGGS promotes coordination with various government entities,²¹ but the OGGS does not have the competence to instruct or order the PNP or the MININTER [Ministry of the Interior] to use public force through police intervention.²² Where, when and how to use public force is a decision to be taken by the PNP, not the MINEM. Therefore, any observation made by the OGGS on the restoration of public order

¹⁸ First Witness Statement of Andrés Trigos, § II.

¹⁹ See **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigos) to the Parán Community (A. Torres), 18 February 2019; **Ex. C-0572**, Internal MEM email with attachment, 28 February 2019; **Ex. C-0351**, Internal MEM email with attachment, 8 March 2019; **Ex. C-0353**, I Report No. 003-2019-MEM-OGGS/NCLH, 18 March 2019; **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019; **Ex. C-0576**, MEM, aide mémoire, 20 March 2019; **Ex. C-0570**, Email from MEM to Chief of Sayán Police with attachment, 18 February 2019.

²⁰ First Witness Statement of Andrés Trigos, ¶ 13.

²¹ First Witness Statement of Andrés Trigos, ¶ 14.

²² **Ex. R-0012**, Supreme Decree No. 021-2018-EM, 18 August 2018.

by police intervention is not binding. It may be considered by the PNP, but that is the entity that finally has to decide whether to proceed (if necessary, possible and advisable) with the use of public force.

23. Moreover, the internal documents presented by Claimant demonstrate that the OGGS did not adopt an institutional stance on the use of force. Those documents consist of internal memos from officer, proposing recommendations to their superiors within the OGGS. None of those documents contains or reflects a decision or institutional stance of the OGGS, and much less that the OGGS requested to the PNP or the MININTER for police intervention.
24. Despite the officers' opinions reflected in those documents, the OGGS, in performing its duties, continued to promote dialogue. Proof of this and of the fact that the OGGS was right to prioritize dialogue is the fact that the parties to the dispute made progress, even after the date of the documents referred to by Claimant. For example, a few days after the document dated 20 February 2019, on the restoration of public order,²³ the OGGS facilitated dialogue between the parties, which enabled them to reach the 26 February 2019 Agreement. That Agreement was considered to be a great milestone at the time, on the basis of which the parties would be in a position to move closer to a negotiated and lasting settlement of the dispute.
25. Before preparing this witness statement, I had not seen the documents dated 8 and 20 March 2019 referred to by Claimant.²⁴ In any event, despite what those documents say, at the time when I worked at the OGGS we were instructed to continue our efforts to restore dialogue with a view to a peaceful and lasting solution of the conflict.

²³ **Ex. C-0468**, Internal MEM email with attachment, 20 February 2019, p. 3.

²⁴ **Ex. C-0351**, Internal MEM email with attachment, 8 March 2019, p. 6; **Ex. C-0576**, MEM, aide mémoire, 20 March 2019, p. 2.

26. Finally, Mr. Bravo incorrectly affirms that I agreed to the intervention of the PNP. Mr. Bravo specifically refers (i) to a meeting with Mr. César Ulloa, on 13 February 2019, in which I allegedly agreed that the Police Operations Plan should be executed in parallel with the attempts to restore dialogue;²⁵ and (ii) a letter dated 18 February 2019, which I sent to the President of the Parán Community, in which I urged him to lift the blockade to resume the dialogue process in a climate of peace and peaceful coexistence with the company.²⁶
27. As I explained in my First Statement, the role of the OGGS specialists is to look for strategies for dialogue. Just as in any negotiating process, these strategies vary depending on the conduct of the parties at different times in the dispute. For example, if the parties adopt extreme, irreconcilable positions, the specialist will opt for tactics or actions to try and make those positions more flexible. It is evident that the OGGS prefers and promotes dialogue without any threats or forceful measures by any of the parties to the dispute. However, the OGGS cannot demand or impose conditions to reach an agreement.
28. Consistent with the foregoing, at the meeting on 13 February 2019, I encouraged Invicta to continue the dialogue, regardless of whether the company was still attempting (at the same time) to make the PNP lift the blockade with the use of public force. I also explained at that meeting that the OGGS would continue to seek dialogue, in parallel with any action that might be taken by the police.

²⁵ Second Witness Statement of Luis Bravo, ¶¶ 63–64; **Ex. C-0341**, Email from Lupaka to LAVETA with attachment, 13 February 2019.

²⁶ Second Witness Statement of Luis Bravo, ¶¶ 66–67; **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigos) to the Parán Community (A. Torres), 18 February 2019.

29. In view with the foregoing, on the letter dated 18 February 2019 which I sent to the President of the Parán Community, I explained that I considered it important to continue the dialogue within a framework of social peace and without the use of force, thus I requested that, before the following meeting with Invicta, no blockade or resistance against the company should exist.²⁷ Nonetheless, *it is not true*, as incorrectly alleged by Mr. Bravo,²⁸ that through that letter I was coordinating dialogue between the parties on the lifting of the protests, nor is it true that such letter reflects the fact that the OGGS was no longer prioritizing dialogue to resolve the dispute between the company and the Parán Community.
30. By means of the letter of 18 February 2019, I replied to the request made by members of the Parán Community to establish a dialogue. Nowhere in that letter did I say that I was in favor of the use of force against the Community, or that I considered the use of public force to be necessary or imminent, nor did I suggest that dialogue was impossible and should be abandoned. On the contrary, in my reply: (i) I insisted that it was advisable to continue the dialogue; and (ii) I urged the Community to lift the blockade to be able to hold a dialogue, within a framework of social peace with Invicta. More specifically, I pointed out the following:

It is important to mention that, after transferring the communication to the company and evaluating the current social scenario, the undersigned **considers it convenient to continue the dialogue**, but with the following considerations, first: the dialogue must be established on equal terms and on the basis of social peace, consist with public order. In this sense, such continuation will be exercised without any coercive measure. In this context, the next session will be convened immediately after verifying that there is no blockade in the area, or

²⁷ Ex. C-0191, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigoso) to the Parán Community (A. Torres), 18 February 2019, p. 1.

²⁸ Second Witness Statement of Luis Bravo, ¶ 67.

resistance from the population against the company.²⁹
(Emphasis added)

31. By then, Invicta's position was to reject dialogue while protests continued. For that reason, in order to bring both parties back to the dialogue process and to prevent the conflict from getting worse, I urged the Parán Community to lift the blockade.
32. In the letter, I also mentioned that, given the duration of the blockade, other State sectors might intervene. That does not mean that I warned them that, if the Community did not lift the blockade, the PNP would intervene immediately, as Mr. Bravo incorrectly affirmed.³⁰ In the letter, I mentioned that a prolonged blockade could cause other entities to intervene, according to their capacities to restore public order and social peace.³¹ That did not constitute a threat or a warning of immediate police intervention. I simply warned them of the logical effects: if the conflict were prolonged, the situation would get worse and the entities responsible for public order could take action. In any event, as I explained above, neither I nor anyone at the OGGS or the MINEM could decide or order the use of public force.
33. As I explain in that letter, our competence was limited to promoting and strengthening harmonious relationships, *using means of dialogue and cooperation*:

What is stated above in the preceding paragraph is closely related to our duties, as High Directorate . . . and the intervention protocol of this Office, under Article 50 of the Regulation . . . Which establishes: OGGS promotes and strengthens harmonious relations between all actors involved in the

²⁹ **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigos) to the Parán Community (A. Torres), 18 February 2019.

³⁰ Second Witness Statement of Luis Bravo, ¶ 67.

³¹ **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigos) to the Parán Community (A. Torres), 18 February 2019.

sustainable development of the activities of the Energy and Mines Sector, using mechanisms for dialogue and consultation.³²

34. As I explained in that letter dated 18 February 2019, it was the parties who had to “resolve their differences” finding “their own solutions without third party intervention.”³³ Our role was to act as proposers of those solutions, without imposing them in any way:

The State, through the OGGS/MEM, guarantees this forum of dialogue, so that the parties can resolve their differences by generating their own plans for solution without the intervention of third parties, that is to say, the parties will resolve their differences **with the presence of the State but without [the state] intervening directly in the solution.**³⁴

35. Contrary to what Mr. Bravo suggests, regardless of whether the Parán Community lifted its protest or not, at the OGGS we had the duty to promote dialogue between the parties. As I explained in my First Statement,³⁵ in an ideal world dialogue would take place in a context of social peace without blockades. In practice, however, what happens is that we are faced with conflicts in which the local communities often continue protests and blockades during negotiations. For the communities, a protest tends to be seen as a way of matching forces and of being heard. For that reason, there are cases in which the community temporarily suspends the protest, until the parties reach a final agreement. In view of this reality, at the OGGS we urged the Parán Community to lift its protest. However, we were aware of the possibility that the Community would not respect our request, but even in that case we would continue, as in fact

³² **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigos) to the Parán Community (A. Torres), 18 February 2019.

³³ **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigos) to the Parán Community (A. Torres), 18 February 2019.

³⁴ **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigos) to the Parán Community (A. Torres), 18 February 2019 (emphasis added).

³⁵ First Witness Statement of Andrés Trigos, ¶ 36.

we did, looking for ways of bringing the parties to a dialogue process. In fact, the parties managed to overcome some of their differences when they reached an agreement on 26 February 2019. It was in that agreement that Claimant agreed to start a dialogue, despite the protests.

B. The OGGS does not have the means to guarantee compliance with the agreements entered into between the parties

36. Contrary to what Claimant argues,³⁶ the OGGS does not have the means to coercively demand compliance with the agreements entered into, in good faith, by the parties. As I explained in my First Statement, when parties encounter differences over the interpretation of their agreements, the OGGS compiles information on the situation and tries to bring the parties together to solve their differences. However, the duties of the OGGS do *not* include: (i) deciding what the correct interpretation of an agreement is; (ii) taking coercive measures to force a party to comply with the agreement; or (iii) ordering the lifting of a blockade with the use of public force.³⁷
37. In this respect, Claimant refers to: (i) an exchange of messages which I had with Mr. Bravo via WhatsApp on 26 February 2019, in which I made reference to the compliance with the commitments which the parties had assumed during the dialogue process;³⁸ and (ii) a meeting with Mr. Arévalo, held on 8 March 2019, in which I had discussed the need to lift the blockade and had agreed to speak to the Parán Community.³⁹
38. Once again, Claimant's affirmations reveal its ignorance of Peruvian legislation and institutionality. Claimant does not present a single rule or regulation that demonstrates that OGGS had a duty of guarantor

³⁶ Second Witness Statement of Luis Bravo, ¶¶ 105–106.

³⁷ First Witness Statement of Andrés Trigos, ¶¶ 40–42.

³⁸ Second Witness Statement of Luis Bravo, ¶¶ 83, 105; Ex. C-0346, WhatsApp exchanges between Lupaka (Mr Bravo) and MEM (Mr Trigos), 6–26 February 2019.

³⁹ Second Witness Statement of Luis Bravo, ¶ 106.

regarding the compliance of agreements between mining companies and local communities. Pursuant to Article 51 of the Regulations on the Organization and Functions of the OGGS, the role of that entity is to promote and facilitate dialogue processes between parties, but not to decide on differences between them, nor to ensure the execution of commitments or penalize breaches thereon.⁴⁰ It is within that legislative framework that my WhatsApp message, sent during the negotiations that led to signature of the 26 February 2019 Agreement, must be read.

39. The OGGS can facilitate negotiations between the parties and find common areas. Therefore, it is normal that, at the meeting held on 8 March 2019, I said that the OGGS would discuss with the Parán Community the differences of interpretation regarding the 26 February 2019 Agreement, and the possibility of lifting the blockade.
40. Mr. Bravo insists that despite the fact that he notified us on 20 March 2019 that the protests were continuing, he failed to obtain a response from the OGGS.⁴¹ That is not a new claim. As I explained in my First Statement,⁴² it is not true that the OGGS failed to reply to Invicta's 20 March 2019 letter.⁴³ We acted within the scope of our duties, gathering information and meeting with the parties to try and initiate new dialogue. The OGGS received a request for dialogue from the Parán Community on 21 March 2019. To that effect, after Mr. León, officer of the OGGS, had met the Parán Community on 26 March 2019, we called Invicta to a meeting on 28 March, to explain the position of the Parán Community to them and to promote further dialogue. However, as recognized by Mr. Bravo, during 28 March the company

⁴⁰ **Ex. R-0012**, Supreme Decree No. 021-2018-EM, 18 August 2018, Art. 51.

⁴¹ Second Witness Statement of Luis Bravo, ¶ 107.

⁴² First Witness Statement of Andrés Trigos, ¶¶ 39–44.

⁴³ Second Witness Statement of Luis Bravo, ¶ 107; **Ex. C-0207**, Email from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigos), 21 March 2019.

declared that it was not willing to negotiate any further until the police intervened to lift the blockade.⁴⁴ As I have already explained, at the OGGS, we did not have the competence to arrange or order the use of public force and lift the blockade.

IV. INVICTA'S SHORTCOMINGS IN THE HANDLING OF THE DISPUTE AND ITS ATTITUDE TO THE COMMUNITIES

41. In my First Witness Statement, I explained the shortcomings of Invicta's community management and social relations team that participated in the negotiations. More specifically, I commented on: (i) the incapacity of Invicta's team to take immediate decisions; and (ii) the company's incapacity to make concessions to reach agreements with the Parán Community. On this latter point, I mentioned the behavior of Invicta's representative within the scope of the Agreement dated 26 February 2019, showing his unwillingness to adopt measures conducive to finding a solution to the dispute. This attitude confirmed the fact that Invicta wanted a quick and "easy" solution, consisting of the use of force, instead of the harder, but necessary, negotiating process to find a sustainable solution.⁴⁵ Moreover, (iii) I mentioned the breaches and differences of opinion occurring between the parties following signature of the Agreement dated February 26, 2019, and I pointed out the surprise of the OGGS by Invicta's unwillingness to cover the surveyor's fees.⁴⁶
42. Claimant and its two witnesses, Mr. Bravo [REDACTED] allege that Invicta's community relations team: (i) did have sufficient experience and autonomy to resolve the dispute;⁴⁷ and (ii) acted appropriately within the scope of

⁴⁴ Second Witness Statement of Luis Bravo, ¶ 137.

⁴⁵ First Witness Statement of Andrés Trigos, ¶ 48.

⁴⁶ First Witness Statement of Andrés Trigos, ¶¶ 39–43.

⁴⁷ [REDACTED]

the negotiations and implementation of the Agreement dated February 26, 2019. They also argue that it was the Parán Community that defaulted on the Agreement.⁴⁸ I will refer to those arguments below.

A. Invicta's community relations team did not have the required structure or experience to resolve the dispute

43. In my experience, the lack of continuity of the mining company's community relations team may harm the mutual trust between the parties and obstruct or frustrate agreements. This is what I observed with regard to Invicta, which failed to establish a continuous and effective dialogue with the Parán Community.
44. Contrary to what Claimant states, during the OGGS's participation in the dispute, Invicta did not have a community relations *team*. Negotiating and community relations teams must have an effective structure that may be adapted to the circumstances and dynamics of the negotiations. Normally, there is a contact with powers to take immediate decisions, a group of social analysts who have identified the players, their positions, interests and negotiating strategies, and a specialist in negotiating strategies; and this team is usually composed of representatives who have certain decision-making power. That did not happen in Invicta's case.
45. On the one hand, the external company hired by Claimant, *Social Sustainable Solutions* ("SSS"), withdrew in October 2018, during the critical period of the blockade.⁴⁹ Precisely, when a community relations team was most needed to handle the dispute, Claimant and Invicta ceased to have an external team of advisors. Since then, the team was reduced to a

⁴⁸ Second Witness Statement of Luis Bravo, §§ 5.3–5.4.

⁴⁹ Second Witness Statement of Luis Bravo, ¶¶ 157–160.

single community relations specialist.⁵⁰ In my opinion and based on my experience, I consider it was a mistake by Claimant not to have a well-structured community relations team, considering that the Parán Community manifested its own lack of trust towards Claimant's negotiating team.

46. On the other hand, Claimant itself recognizes the lack of discretion of its community relations team, which had to obtain authorization from higher levels for any matter of any importance "aside from simple decisions".⁵¹ All these measures weaken negotiations, because it sends the message to the community that the persons at the negotiating table do not have the power to make decisions, which is poorly perceived by the communities which feel that they are not negotiating with persons with authority and decision-making capacity.

B. Invicta's stance with regard to the 26 February 2019 Agreement

47. According to Mr. Bravo's second witness statement, by means of the 26 February 2019 Agreement, the parties agreed: (i) to allow access to the Invicta mine via the road through the Community of Lacsanga, and not just via the road through the Parán Community; and (ii) to conduct a limited survey of the land that had already been allegedly affected by Invicta's activities, and not the land owned by the Parán Community in which an access road to the mine could be located.⁵² According to Mr. Bravo, this understanding had been confirmed by me at a meeting held on 28 March 2019.⁵³ I do not agree with the account given by Mr. Bravo.
48. As I explained in my First Statement, I was present at the beginning of the dialogue process between the parties at the meeting on 26 February 2019, and I was informed by Mr. León

⁵⁰ [REDACTED]

⁵¹ Second Witness Statement of Luis Bravo, ¶¶ 157–160.

⁵² Second Witness Statement of Luis Bravo, §§ 5.3–5.4.

⁵³ Second Witness Statement of Luis Bravo, ¶ 139.

of the outcome of the negotiations. At that meeting, the parties discussed and agreed on: (i) access by Invicta employees to the Project via the *Parán* access road and the suspension of any forceful measures following the ratification of the agreements made at the community meeting on 2 March 2019; (ii) as well as the survey of the land that would be affected to plot the access road to the mine via the road through the Parán Community.⁵⁴

49. Shortly after the parties had signed the Agreement dated 26 February 2019, Invicta insisted on the lifting of the blockade installed on the access road through Lacsanga, which, to my knowledge, was not what the parties had agreed. My understanding of the Agreement is that the Parán Community agreed to allow Invicta to access the mining unit via the road through Parán, not through Lacsanga.
50. The issue of the topographical study gave rise to the other difference of opinions between the parties regarding the commitments made under the 26 February 2019 Agreement. As I explained in my First Statement, the understanding of the Parán Community (which coincides with the OGGS's understanding of the Agreement) is that Invicta undertook to hire a surveyor to carry out a survey of the land in the Parán Community on which a suitable access road for the Project could be built. Specifically, given that the access road to the Project through the territory of Parán was in a precarious state, the parties discussed the need to conduct a survey for its improvement. Hence the change between the drafts prior to the meeting of 26 February 2019, which mentioned that Invicta "will identify and locate any negative impacts to which the Community refers, these would have occurred on land that they describe as being part of their property (according to the Community, sector called Pishcopampa), by the mining facilities located within the territory of the Rural Community

⁵⁴ First Witness Statement of Andrés Trigos, ¶ 43.

. . . and a representative of the Environmental Assessment and Enforcement Agency (OEFA),”⁵⁵ and the final wording in which the parties agreed to conduct a survey:⁵⁶

4. The Invicta Mining Company, together with the Rural Parán Community, will identify and locate the affected land (Rural Parán Community) through a topographic survey; such survey will take place on 20 March 2019.

51. A survey is substantially different from an environmental study. The former is carried out to identify the surface or geography of the land, taking into account the physical and geographical characteristics of the land, and is generally used to plan constructions and adaptations. The latter, as its name indicates, aims to analyze the environmental damage caused in a specific ecosystem. Consequently, as I pointed out in my First Statement,⁵⁷ the aim of the surveyor’s visit, planned for 20 March 2019, according to the Agreement, consisted of the specific work involved in a topographical survey. This understanding was clear to me.
52. Despite the above, Invicta refused to pay for the survey, alleging that the scope of the survey fell outside the agreement. I was surprised by that approach taken by the company. Refusing to pay for the survey agreed confirmed Invicta’s unwillingness to reach an agreement with the Parán Community to resolve the dispute. Consequently, this attitude on the part of Invicta sent another signal to the Parán Community, jeopardizing the little trust that the Community had in the company. I thus believe that this event worsened the situation instead of helping to resolve the dispute. Finally, it is not true either that, on 28 March 2019, I confirmed that the survey was not related to

⁵⁵ **Ex. C-0199**, Email from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM, 25 February 2019.

⁵⁶ **Ex. C-0200**, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C. and MINEM, 26 February 2019.

⁵⁷ First Witness Statement of Andrés Trigos, ¶ 43.

the improvements to the road in the territory of Parán,⁵⁸ as I did not participate in that meeting. In any event, an OGGS officer would hardly make such affirmation. It is not up to the OGGS to decide on or assume positions of interpretation. The OGGS is there to facilitate dialogue between the parties and it is the parties themselves who reach such agreements.

53. I understand that Claimant finally, and belatedly, offered to pay for the survey to improve the access road through the territory of Parán. By then, however, the Parán Community had no trust in Invicta, partly owing to the violent confrontation between the private security firm hired by Invicta, War Dogs, and the Parán Community.

V. THE ALLEGED MOTIVES OF THE PARÁN COMMUNITY FOR OPPOSING THE PROJECT, ACCORDING TO THE CLAIMANT

54. Claimant affirms in its Reply that the Parán Community had no intention of negotiating with Invicta because its true intention was to keep the police away from the area to protect alleged marijuana trading by that Community.⁵⁹ Claimant refers to an internal memo from the OGGS, dated 20 February 2019, which mentions that “[t]he social process that the mining company maintains with the Parán Community, is affected by [the] presence of interests foreign to the State (producers of local marijuana plantations) the MININTER is aware of this problem and is activating the corresponding mechanisms”.⁶⁰ Claimant exaggerates this observation made in the OGGS report throughout this arbitration. In none of the meetings that I attended, or of which I have been informed by OGGS officers, did Invicta mention this matter of marijuana plantations as an alleged motive of the Parán Community for opposing the Project.

⁵⁸ First Witness Statement of Andrés Trigos, ¶ 43.

⁵⁹ Reply, § 2.1.

⁶⁰ Reply, ¶¶ 386, 674; Ex. C-0468, Internal MEM email with attachment, 20 February 2019.

Moreover, that OGGS report does not conclude or suggest, as Claimant does in its Reply, that the entire Parán Community dealt in marijuana and that that was why the Community was opposed to the Project. The OGGS never made an observation that would have allowed for such an accusation to be made against the entire Community.

* * *

I declare that, to my full knowledge and understanding, what I affirm in this witness statement is the truth and nothing but the truth and that it s in conformity with what I sincerely believe.

17 January 2023

[Signature]

Andrés Fernando Trigoso