

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
Nilton César León Huerta

20 January 2023

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I. INTRODUCTION

1. I, **Nilton César León Huerta**, 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 the rejoinder from Peru ("**Rejoinder**"), is based on my personal knowledge of the facts, acquired in performing the duties which I identified in the First Statement.
2. I have read the parts relevant to my testimony of Claimant's Reply made on 23 September 2022 ("**Reply**"), as well as the second witness statements of Luis Felipe Bravo García and [REDACTED] both on 23 September 2022. I have also consulted several documents of 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 LACK OF EXPERIENCE OF INVICTA'S COMMUNITY RELATIONS TEAM

5. As I explained in my First Statement, despite the fact that all mining companies in Peru know that they have to maintain harmonious and peaceful relations with the communities, the Invicta team: (i) was not diligent in seeking and much less in achieving an effective rapprochement with the Parán Community at the appropriate time; (ii) failed to form a team specializing in community relations; and (iii) did not involve persons in the region to facilitate an agreement either, but depended mainly on Mr. Luis Bravo and two other Invicta representatives.¹ In response to my First Statement, Claimant and its witnesses make a series of affirmations to which I believe my response is necessary.

A. The mistakes in the formation of Invicta's community relations team

6. I understand that Claimant has responded to my affirmations maintaining that Invicta did have a team specializing in community relations: the Social Sustainable Solutions company ("SSS").² Moreover, according to Claimant, it was not until 14 May 2019, during the confrontations between the private security company War Dogs and the Parán Community, that the State submitted complaints regarding the community relations team.³ These facts do not contradict what is explained in my First Statement.

7. In my experience, it is not enough to hire an external team to give advice on community relations. What is important is the strategy used by that team in the handling of the company's community relations. For that purpose,

¹ First Witness Statement of Nilton León, ¶¶ 73-76.

² Reply, ¶ 125.

³ Reply, ¶ 128 ("Peru's authorities never complained of IMC's CR Team. The only time Peru conveyed a request to IMC in relation to its CR Team was after the WDS team accessed the Site on 14 May 2019. At that time, the State conveyed the Parán Community's request that IMC restructure its CR Team as a condition to "re-establish" the dialogue process"). See Footnote 227 citing my First Witness Statement.

key factors apply, such as: (i) the time at which the team is formed; (ii) the quality and quantity of the persons forming it; (iii) its active participation in the company's relations and negotiations with the community; and (iv) the continuity of its work over time. At the OGGs [General Office of Social Management], we have not seen any of these characteristics in Claimant's team.

8. I have not had any contact with the company SSS. [REDACTED] states that SSS was hired in September 2016 and stopped work in October 2018, precisely when the blockade took place.⁴ [REDACTED] confirms my opinion on the company's deficient community relations strategy with the local community. In my experience, the task of the community relations team is to create trust between the company and the communities. For that reason, it is essential to have a strong community relations team from the outset and throughout the life of the project, including when social conflicts arise with the local community. Initial contact with the communities is crucial, as that is when the company has the opportunity to present its project and to create a relationship with the community so that they feel part of it and thus establish a relationship of mutual trust. This, in turn, facilitates the handling of disputes, when they arise. If there is trust between the parties, dialogue is easier.
9. When I became aware of the dispute between Invicta and the Parán Community, and I attended the initial meetings as a specialist from the OGGs, I pointed out that this trust between the parties did not exist. From my perspective, that is due to the fact that: (i) Claimant formed the community relations team very late, in 2016; and (ii) it did not involve the Parán Community with the frequency required to create such trust. This shows that Invicta did not have a preventive approach but a reactive one.

⁴ [REDACTED]

10. Moreover, Invicta reduced its community relations team just after the start of the access road protest in October 2018, that is, at the time when it most needed a community relations team. This affected the dialogue process and settlement of the dispute even more. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Mr. Bravo maintains that they

were also assisted by an external advisor, Mr. Arévalo.⁵ I cannot confirm this, as

I never met him. [REDACTED]

[REDACTED]

11. Claimant argues that it had a qualified community relations team as proved by the fact that the State did not make known any complaints against it until May 2019.⁶ It appears that, with this comment, Claimant is seeking to hold the State liable for its deficiencies in the social management of the company. Contrary to what Mr. Bravo appears to suggest, the role of the OGGS is not preventive. Moreover, it is not the duty of the State, the MINEM, or the OGGS, to manage companies and correct their community relations strategy. The party responsible for achieving and maintaining harmonious relations with the communities is the holder of the mining concession, not the OGGS. Once a dispute arises, the OGGS promotes strategies for dialogue, but it is not responsible for handling, supervising, correcting or ordering the restructuring of the mining company's community relations team.

12. In any event, as I explained in my First Statement, in May 2018 (that is, way before the date of May 2019 to which Claimant refers), the MINEM was notified of the deficiencies in Invicta's handling of the communities and assigned a specialist team from the OGGS to examine the

⁵ Second Witness Statement of Luis Bravo, ¶¶ 157-160.

⁶ Reply, ¶ 128. See Footnote 227 citing First Witness Statement of Nilton León.

situation.⁷ Back in May 2019, as a result of the impact caused by the confrontation between War Dogs and the Parán Community, and seeing the seriousness of the matter, both the OGGS and the PCM [Presidency of the Council of Ministers] suggested that Invicta take concrete measures to regain the Community's trust. By then, members of the Parán Community were rejecting the project and had requested the closure of the mine. However, the Parán Community appeared to be willing to reconsider its position if the mining company changed the negotiators in its community relations team. Therefore, we suggested that the company recognize "the mistakes made in the social management of the crisis"⁸, to demonstrate to the Parán Community that it intended to improve the social management and reach an agreement.

B. The mistakes made in the structure and appointment of mediators in Invicta's community relations team

13. As I explained in my First Statement, Invicta's community relations team mainly depended on Mr. Bravo.⁹ In this respect, I see that Mr. Bravo affirms that him being involved directly in relations with the Parán Community is proof of the seriousness with which the company took the matter, and does not show any lack of professionalism.¹⁰ I do not agree. On the contrary, based on my experience, this confirms a deficient strategy.

14. In general, teams are formed so that different mediators are sent if the relations or negotiations reach a deadlock and if the relations of certain mediators with representatives of the local community are bad. [REDACTED]

[REDACTED]

[REDACTED] That meant

⁷ First Witness Statement of Nilton León, ¶¶ 18-19; Ex. R-0156, Letter from Invicta Mining Corp. S.A.C. (D. Kivari) to Santo Domingode Apache Community (O. Claros), 6 July 2018.

⁸ Ex. C-0578, PCM, aide mémoire, 27 May 2019, pp. 3-4.

⁹ First Witness Statement of Nilton León, ¶¶ 73-76.

¹⁰ Second Witness Statement of Luis Bravo, ¶¶ 157-160.

¹¹ Second Witness Statement of Luis Bravo, ¶ 158.

that they were not effective negotiators or contacts. Therefore, the OGGS perceived that Mr. Bravo was the only negotiator acting for Invicta. However, the company failed to expand or change its team. That is not justifiable, as Mr. Bravo seeks to argue.¹² From my experience, a company that has to negotiate with three communities (with which there is a history of discontent between the company and the mining project, and even between the communities themselves) needs a robust and experienced community relations team, particularly on site, interacting constructively with the communities. If relations are characterized by mistrust, it is difficult to reach lasting agreements quickly.

15. Finally, as I mentioned in my First Statement, teams are generally formed by negotiators who are perceived to be allies and not adversaries.¹³ The company, however, failed to take any action for this to be the focus of its team. At the OGGS, we perceived that the company sought to access the site immediately to continue its operations, instead of reaching an amicable long-term agreement that would enable Invicta to operate the mine under conditions acceptable to all the communities in the area of influence. Consequently, Claimant incorrectly prioritized a short-term objective instead of a sustainable, lasting agreement.

C. Invicta's community relations team appeared to ignore the needs of the Parán Community

16. [REDACTED] that Invicta tried to include the Parán Community in various plans and projects, but argues that that Community refused to participate and work with the company until it reached an agreement with Invicta.¹⁴ If that were the case, it does not seem surprising to me. The plans and projects that

¹² Second Witness Statement of Luis Bravo, ¶ 158.

¹³ First Witness Statement of Nilton León, ¶ 76.

¹⁴ [REDACTED]

██████████ refers to are part of the various activities of the Environmental Impact Assessment (“EIA”).¹⁵ That is, they are activities that Invicta would have undertaken, in compliance with its legal obligation. That is different from the agreements that Invicta reached with the Communities of Lacsanga and Santo Domingo, to which the Parán Community aspired.

17. What the Community was claiming was that, once Invicta had signed the agreements with the other communities, the company did not have a true rapprochement with the Parán Community to arrange an agreement that answered the concerns of that community. As I explained in my First Statement, the Parán Community is dedicated to agriculture and was concerned about the effects that the Project might have on its crops. Representatives of the community explained to me that, when it rained, all the water from the mine flowed towards their territory. This is due to the geography of the region: the Parán Community is the one that is closest and feels the direct impact of the mining activities as it is downhill from the Project. Invicta’s mining project is situated at the top of a mountain. The crops grown by the Parán Community are on the left side of the mountain, and the people of that community live at the bottom. For that reason, the Parán Community was trying to reach a long-term collaboration agreement with the company that: (i) guaranteed that there would be no contamination that would harm their crops; and (ii) benefited the Community enabling it to sell its products on the market.¹⁶ Invicta’s alleged offer to the Parán Community, which consisted in offering them work in the mine, was not the solution and highlights somewhat the deficiencies in its relations with the members of the community, because it shows that, even to date, Claimant has not understood the interests of the Parán Community.

¹⁵ Ex. C-0397, SSS, Community Relations Annual Operating Plan, 2018.

¹⁶ First Witness Statement of Nilton León, ¶¶ 22, 32.

18. The foregoing shows that Invicta has never managed to draw up an effective strategy to deal with the legitimate concerns and interests of the Parán Community.

III. THE 26 FEBRUARY 2019 AGREEMENT AND IMPLEMENTATION OF THE COMMITMENTS MADE

19. In my First Statement, I explained: (i) the scope of the commitments made by the parties which are set out in the 26 February 2019 Agreement;(ii) the role of the OGGS with regard to that Agreement; and (iii) how the OGGS did not have the power to guarantee that the Parán Community (or any party involved in any dispute) would comply with its part of the Agreement.¹⁷

20. In his Second Statement, Mr. Bravo (i) distorts what happened within the context of this Agreement; and (ii) makes a series of incorrect affirmations on my role as specialist for the OGGS. I will refer to these two points below.

A. The different interpretations of the commitments set out in the 26 February 2019 Agreement

21. Mr. Bravo insists in arguing that, contrary to what I have stated in these arbitration proceedings,¹⁸ the parties agreed: (i) to unblock access to the Site through the *Lacsanga* Community and not the road through the Parán Community; and (ii) to conduct an environmental study of the land that would be affected by Invicta's mining project.¹⁹ According to Mr. Bravo, this could be confirmed with (i) the background to signature of the agreement; and (ii) subsequent documents prepared by the OGGS.²⁰ I have two comments to make in this respect.

22. *First*, as I stated in my First Statement, my understanding, after attending the meeting on the 26 February 2019, is that the parties obtained the following main commitments: (i) to lift the access road protest as from that date, with subsequent ratification at the community meeting on 2 March 2019,

¹⁷ First Witness Statement of Nilton León, § B.

¹⁸ Second Witness Statement of Luis Bravo, ¶¶ 92-93, 116.

¹⁹ Second Witness Statement of Luis Bravo, §§ 5.3-5.4.

²⁰ Second Witness Statement of Luis Bravo, ¶¶ 111-112.

allowing access by Invicta employees to the Project via the access road through *Parán territory*;²¹ and (ii) to perform a topographical survey on 20 March 2019, to determine the land affected and to analyse where the works could be carried out to allow the access route to the Project through the territory of Parán.²²

23. With regard to access road through Parán, Mr. Bravo affirms that, on 5 and 6 March 2019, at the meeting held by the Invicta representatives with me and Mr. César Ulloa, we recognized that the parties had not agreed on access via the road through Parán. That is not true.²³ In fact, the very documents quoted by Claimant, including one dated 28 March 2019, explain that for us it was clear that:

on February 26, 2019, the parties signed an agreement that releases the access road to the UM [Mining Unit] **through the Paran RC [Rural Community]** on March 2, 2019. However, **the release of the access road through the Paran RC is insufficient for the mining company**, who turns its attention to the sector with the purpose that the latter demands the aforementioned Community to the total release of the access roads (including access through the Lacsanga RC), **without contemplating that this request directly violates the commitments established between the parties, with the facilitation of the State.**²⁴ (Emphasis added)

24. Similarly, Claimant bases itself on a Report from 28 February 2019 in which I, allegedly, referred to the parties' commitment to unblock the "access roads" (emphasis added), to suggest that the Parán Community, pursuant to the 26 February 2019 Agreement, agreed to unblock access to the mine via the road situated in Lacsanga.²⁵ However, Claimant ignores the fact that, in the annex to that same document, I clarify that the

²¹ First Witness Statement of Nilton León, ¶ 58.

²² First Witness Statement of Nilton León, ¶ 64.

²³ Second Witness Statement of Luis Bravo, ¶ 103.

²⁴ Ex. C-0353, Report No. 003-2019-MEM-OGGS/NCLH, 18 March 2019, p. [2].

²⁵ Reply, ¶ 316; Ex. C-0572, Internal MEM email with attachment, 28 February 2019, pp. 2-3.

parties' commitment referred to: "guaranteeing the development of the activities of the mining company, **via the access road through the Rural Parán Community** as from signature of this record, guaranteeing social [relations] with the company"²⁶ (emphasis added). This report, as well as the final wording of the Agreement, expressly and solely refers to the access road via the Parán Community, not via Lacsanga. This is consistent with the expectations and the constant, repeated search by the Parán Community for an agreement to provide an access road to the Project through its territory.

25. I consider that the interpretation of the 26 February 2019 Agreement offered by Claimant in these arbitration proceedings does not make sense from the point of view of negotiations. Just as Invicta's main objective was to operate its project, from the perspective of the Parán Community the main objective was to ensure access to the mine through its territory. If Claimant had not agreed to use the road through the Parán Community, one would have to wonder what offer or concession the company had made to the Parán Community in the 26 February 2019 Agreement. Similarly, there is little sense in the Parán Community agreeing to cease any protest and allow access through the territory of Lacsanga, thereby waiving its claim for an access road to the mine to run through the territory of Parán.
26. Moreover, regarding the topographical survey, at the 26 February 2019 Agreement the parties agreed to "guarantee the development of the activities of the mining company **through the access road of the Parán Community,**"²⁷ as this access road was in a precarious state, thus, the parties discussed the need to conduct a study for its improvement.

²⁶ Ex. C-0572, Internal MEM email with attachment, 28 February 2019, p. 5.

²⁷ Ex. C-0200, Meeting Minutes, Meeting between the Parán Community, Invicta Mining Corp. S.A.C. and MINEM, 26 February 2019, p. 4.

27. In his Second Statement, Mr. Bravo refers to a WhatsApp message in which I allegedly affirmed that access through Parán was “not possible technically,”²⁸ which, according to Mr. Bravo, demonstrated that the parties had not agreed to either an access road through Parán territory or to conduct a study to build a road along that route.²⁹ I refute this affirmation by Mr. Bravo, which takes the conversation out of context and distorts it.
28. My WhatsApp message does not deny, as incorrectly suggested by Mr. Bravo, that the parties agreed to perform a topographical survey. I sent that message during the 26 February 2019 meeting precisely to explain that, as access to the mine via the access road through the Parán Community was barely passable, road engineering works were needed for that road to be fit for transit. The topographical survey had a second purpose. As recognized by Mr. Bravo, the Parán Community considered that Invicta had caused harm to its land. For that reason, the surveyor was to identify the areas affected in the territory of the Rural Parán Community.
29. In any event, there would be no sense either in agreeing to a topographical survey if the purpose was to conduct an environmental study. These are two different concepts; a topographical survey seeks to analyze the characteristics of the terrain to determine the changes required for construction works, while an environmental study evaluates environmental damage.
30. Second, regardless of the understanding of the commitments made in the 26 February 2019 Agreement, what is certain is that the parties made different interpretations of the agreements reached and accused each other of breaching the Agreement: Invicta alleged that the Parán Community had not

²⁸ Ex. C-0347, WhatsApp exchanges between Lupaka (Mr Bravo) and MEM (Mr León), 26 February–25 September 2019.

²⁹ Second Witness Statement of Luis Bravo, ¶ 92.

unblocked the access road to the Project, and the Parán Community maintained that Invicta had not honored the commitments made to check the harm caused to the territory of the Parán Community. My role, as a specialist for the OGGS, could not be to side with either interpretation. Therefore, the OGGS intervened to help the parties settle these differences of interpretation. The OGGS does not act as an interpreter or arbitrator, but as a mediator to bring the parties together to reach a common point of agreement. For that purpose, we compiled information on the differences and sought to resume the dialogue.³⁰ Unfortunately, that was not the opinion adopted by Claimant. Instead of committing to the dialogue process to overcome this new obstacle, Claimant showed no tolerance for any setback in the process and started to prioritize an alleged quick solution again, through the use of force, instead of the more arduous but more sustainable process of dialogue, conducive to a solution that was sustainable in the long term.

31. I noted that, after Invicta refused to pay for the topographical survey, the Parán Community resumed the protest. From my experience, Claimant's intransigent stance, refusing to bear the costs of the topographical survey, revealed an uncooperative attitude on the part of the company. After reaching such an important agreement as the 26 February 2019 Agreement, it was surprising that they once again broke the trust of the community for the sum of USD 9,000, which was the approximate cost of the topographical survey. As I will explain below, time would prove us right: several months later, in May 2019, the company offered to pay for the topographical survey to improve the access road through the territory of Parán.

³⁰ First Witness Statement of Nilton León, ¶¶ 43-44.

B. Monitoring of the commitments set out in the Agreement

32. I understand that, in his Second Witness Statement, Mr. Bravo states that OGGS officers have the duty to verify compliance with agreements and record any breach.³¹ Mr. Bravo incorrectly adds that I never checked that the Parán Community had unblocked the access, which led to the agreement being breached.³² That is not true.
33. As I mentioned in my First Statement,³³ the 2 March 2019 I attended the meeting of the Parán Community and I noted that the lifting of the access road protest had been confirmed. Moreover, at the OGGS we noted that, as from 4 March 2019, Invicta representatives were able to gain access to the mining unit, a fact that Claimant itself recognized in communications sent to the OGGS.³⁴ Later, when the parties accused each other of breaching the commitments set out in the 26 February 2019 Agreement the OGGS intervened to enable the parties to settle their differences of interpretation.
34. One of the key commitments in that Agreement was to formally establish a dialogue process, specifically to resolve the differences between the parties. However, from what I was able to see as a specialist for the OGGS, Claimant was not willing to commit to dialogue to resolve the differences of interpretation which, in my opinion, could have been overcome through dialogue. Up to that point, Claimant had participated in just four bilateral meetings, and the dispute had been going on for just under a year. For that reason, I was surprised at the desire of Claimant's representatives, who practically gave up on that promising process, thereby frustrating another joint meeting between the parties.

³¹ Second Witness Statement of Luis Bravo, ¶ 83.

³² Second Witness Statement of Luis Bravo, ¶¶ 83, 96, 99.

³³ First Witness Statement of Nilton León, ¶ 42.

³⁴ Ex. C-0207, Email from Invicta Mining Corp. S.A.C. (L. Bravo) to MINEM (F. Trigos), 21 March 2019, ¶ 2.

35. Consequently, the OGGS did comply with its duty to check compliance with or the progress of the Agreement, but it did not have any power to guarantee or oblige the parties to comply with their commitments.
36. Nor is it true, as Mr. Bravo suggests, that the OGGS had the power to determine that the dialogue had been exhausted and to order the intervention of the Peruvian National Police (“PNP”).³⁵ As I explained in my First Statement, the OGGS does not have the power or the competence to order police intervention as a means of resolving disputes.³⁶ Its function is limited to “monitoring social commitments” and, in the event of breach, to seek dialogue between the parties.³⁷

IV. CLAIMANT DISTORTS THE MINEM’S INTERNAL RECOMMENDATIONS

37. In my First Statement, I explained that the company’s position in requesting police intervention to evict the community members involved in the protest would not guarantee a long-term resolution of the dispute.³⁸ I also explained that neither the OGGS, nor the MINEM in general, considered this to be a viable option.³⁹
38. In its Reply, Claimant and Mr. Bravo replied to my affirmations to argue that the MINEM and the OGGS held a different position. More specifically, Mr. Bravo and Claimant cite several internal documents in which the OGGS and I allegedly confirmed that there was no value in dialogue and, therefore, recognized the need for police intervention.
39. More specifically, Mr. Bravo refers to: (i) an 8 March 2019 internal memo which I sent to Mr. Cesar Ulloa;⁴⁰ (ii) an internal memo from

³⁵ Second Witness Statement of Luis Bravo, ¶ 83, § 5.3.

³⁶ First Witness Statement of Nilton León, ¶ 34.

³⁷ Ex. R-0012, Supreme Decree No. 021-2018-EM, 18 August 2018, Art. 51.C.d.

³⁸ First Witness Statement of Nilton León, ¶¶ 34, 36, 80.

³⁹ First Witness Statement of Nilton León, ¶ 81.

⁴⁰ Second Witness Statement of Luis Bravo, ¶ 105; Ex. C-0351, Internal MEM email with attachment, 8 March 2019.

18 March 2019, signed by me and sent to Mr. Fernando Trigos, ⁴¹ in which I allegedly recognized that there was no room for dialogue and that the PNP's Operations Plan should be implemented⁴²; and (iii) a letter from Mr. Trigos sent to the President of the Parán Community on the 18 February 2018, in which he had warned that, if the Parán Community did not lift the access road protest, the Police would do so with force.⁴³ Claimant also refers to: (i) an 20 February 2019 internal memo which I sent to Mr. Cesar Ulloa;⁴⁴ and (ii) a MINEM aide-mémoire from the 20 March 2019, which allegedly reflects the MINEM's recommendation to order police intervention.⁴⁵ Claimant incorrectly categorizes the content of these memos. As I will explain below: (i) ordering PNP intervention and the use of force falls outside the competence of the OGGS; (ii) none of these documents affirms that the State ordered or would order the use of force; and (iii) in any event, these documents to which Mr. Bravo refers constitute internal assessments at a given time, not determinations or final decisions made by the MINEM and much less by the PNP.

40. *First*, as I explained in my First Statement, the decision to use force is a decision that only the PNP can take. The OGGS does not have the power to order a police operation.⁴⁶ Therefore, based on the memos, the OGGS officers could make an analysis or recommendation, based on the circumstances prevailing at the time of preparing those documents. However, in these internal recommendations, the OGGS is not issuing a police intervention order, something which the OGGS cannot do under any circumstances.

⁴¹ Second Witness Statement of Luis Bravo, ¶ 111.

⁴² Second Witness Statement of Luis Bravo, ¶ 112; Ex. C-0353, Report No. 003-2019-MEM-OGGS/NCLH, 18 March 2019, p. 2.

⁴³ Second Witness Statement of Luis Bravo, ¶¶ 66-67; Ex. C-0570, Email from MEM to Chief of Sayán Police with attachment, 18 February 2019.

⁴⁴ Ex. C-0468, Internal MEM email with attachment, 20 February 2019.

⁴⁵ Reply, ¶ 331; Ex. C-0576, MEM, aide mémoire, 20 March 2019.

⁴⁶ First Witness Statement of Nilton León, ¶¶ 81-83.

It is the PNP that decides whether the use of force is admissible, based on other considerations that fall outside the competence and even the knowledge of the OGGS.

41. *Second*, in none of these documents does the OGGS suggest activating the use of force. Contrary to what Mr. Bravo affirms,⁴⁷ in the internal memos sent in March 2019 I did not speak of the use of force when suggesting the restoration of public order on the part of the MININTER/DGOP, and PNP.⁴⁸ Restoring public order does not necessarily imply the use of force or the execution of a police operational plan. These entities have other means of dialogue, negotiation and persuasion. For example, the MININTER [Ministry of the Interior] promotes dialogue and prevention at the Directorate for the Prevention and Management of Social Conflicts and at the General Directorate for Public Order,⁴⁹ and the PNP has negotiating strategies for resolving moments of crisis in social conflicts.⁵⁰ Consequently, my recommendation aimed to look for a solution using the support of other State sectors, which have internal means and mechanisms, and which are not reduced or limited to the use of force.
42. Similarly, I would like to refer to the letter from the 18 February 2019 cited by Mr. Bravo, sent by Mr. Trigos to the President of the Parán Community.⁵¹ According to Mr. Bravo, this letter demonstrates that the OGGS and the MINEM were in favor of police intervention and that they informed the Community that police intervention was “imminent.”⁵² I do not agree with this interpretation; that is not what the letter says. In that letter, Mr. Trigos urges the Parán Community to

⁴⁷ Second Witness Statement of Luis Bravo, ¶ 67.

⁴⁸ **Ex. C-0353**, Report No. 003-2019-MEM-OGGS/NCLH, 18 March 2019, p. 2; **Ex. C-0351**, Internal MEM email with attachment, 8 March 2019.

⁴⁹ **Ex. R-0101**, Ministerial Resolution No. 1520-2019-IN, 4 October 2019, Arts. 110, 114.

⁵⁰ **Ex. R-0150**, *Cartilla para el personal policial que participa en operaciones de mantenimiento y restablecimiento del orden público*, PNP, 19 November 2013, pp. 14-18.

⁵¹ Second Witness Statement of Luis Bravo, ¶¶ 111-112.

⁵² Second Witness Statement of Luis Bravo, ¶ 67.

continue the dialogue without any blockade or other forceful measure.⁵³ The letter states at the end that the blockade has been maintained for 100 days and (once again) mentions that this situation could lead to other State sectors (other than the OGGs) intervening in the performance of their functions.⁵⁴

43. It is reasonable for the OGGs to ask the Parán Community to lift the blockade, because that would increase the possibility of Invicta being willing to resume the dialogue process and make concessions. The letter clearly indicates that, at the OGGs, we continued to prioritize dialogue and we wanted to achieve favorable conditions, to increase the possibilities for the parties to return to the table and find a peaceful solution to their dispute. However, that letter does not include any warning by the OGGs to the Community that the PNP's intervention was imminent, as incorrectly affirmed by Mr. Bravo, and much less that the OGGs had ceased to prioritize dialogue at that time.⁵⁵
44. Consequently, one cannot conclude, based on that letter dated 18 February 2019 and the other documents, that the OGGs and the MINEM had considered the dialogue stage to be closed and had ordered or threatened to activate the use of public force against the Parán Community if the latter did not lift the blockade.
45. The authorities –including the OGGs and the MINEM– know that it is normal for dialogue to take place while protests exist. Experience shows that, from the perspective of the rural communities that feel ignored, blockades are a form of bringing the mine operators to the negotiating table. In other words, the protests are actions taken in order to exert pressure on the other party to change their conduct. The role of the OGGs is to open up room for dialogue. Therefore, we try to persuade

⁵³ See **Ex. C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigos) to the Parán Community (A. Torres), 18 February 2019, p. 1.

⁵⁴ **Anexo C-0191**, Letter No. 0028-2019-MEM/OGGS/OGDPC from MINEM (F. Trigos) to the Parán Community (A. Torres), 18 February 2019, p. 1.

⁵⁵ Second Witness Statement of Luis Bravo, ¶¶ 66–67.

the concession holders to sit down and talk and we thus encourage the rural communities to stop their forceful measures, to be able to negotiate calmly. In this case, from the OGGs' perspective, we always had instructions (as we did) to look for a solution through dialogue.

46. *Third*, in any event, these internal recommendations cannot be read as final, isolated facts, but within the scope of a social conflict whose circumstances are complex and volatile. These documents mention critical points in the dialogue. However, just as in any conflict, these points may change or be overcome. In this case, between these critical points in the negotiations, and thanks to the efforts we made from the OGGs, we managed to open windows of opportunity for dialogue to resume.
47. Proof that the internal documents referred to by Mr. Bravo do not constitute a decision taken by the MINEM to recommend the use of force is the fact that the MINEM did not recommend such action to the MININTER or to the PNP. On the contrary, the OGGs continued its efforts for dialogue to resume, achieving significant milestones. For example, on 26 February 2019, a few days after the document from the 20 February 2019 referred to by Mr. Bravo,⁵⁶ the parties commenced a dialogue process. Similarly, after the internal recommendations at the beginning of March 2019,⁵⁷ the OGGs managed to call the parties to preparatory meetings for dialogue to resume. Unfortunately, on that occasion, it was Invicta that refused to continue the dialogue.⁵⁸
48. *Fourth*, Claimant seems to affirm that the OGGs' recommendations were based or reasoned solely on the conduct of the Parán Community. That is not the case. The OGGs' analysis was based not only on the Parán Community's insistence in

⁵⁶ Ex. C-0468, Internal MEM email with attachment, 20 February 2019.

⁵⁷ 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-0576, MEM, aide mémoire, 20 March 2019; First Witness Statement of Nilton León, ¶¶ 47-48.

⁵⁸ First Witness Statement of Nilton León, ¶ 49.

continuing to block Claimant's access via the Lacsanga road until a long-term agreement was reached, but also on Claimant's own inflexible position in failing to participate in the dialogue while the blockade remained in place. Therefore, it appeared at certain times that the dialogue would not work due to the actions of *both parties*.

49. To conclude, it is not true that the MINEM, the OGGS or I consider dialogue to be exhausted and that we are seeking to activate the use of public force. The OGGS has continued to promote dialogue and seek to open room for negotiation, a mechanism that has worked on many occasions.

V. INVICTA'S INSISTENCE ON THE USE OF FORCE AGAINST THE PARÁN COMMUNITY AFFECTED THE DIALOGUE PROCESS

50. As I stated in my First Statement, Claimant insisted on the use of force from the beginning, making its participation in a dialogue process conditional on the lifting of the blockade initiated by the Parán Community. Subsequently, it even hired an armed security unit, War Dogs, to try and regain control of Invicta mine by force.⁵⁹ Unfortunately, that decision and the armed raid by War Dogs, on 14 May 2019, had serious consequences and caused serious harm to our mediation efforts and the possibilities of achieving a negotiated solution to the social conflict.
51. Claimant is seeking to minimize the impact that the War Dogs' actions had, affirming that, at that time (May 2019), dialogue was no longer a viable alternative as the Parán Community had breached the 26 February 2019 Agreement.⁶⁰ Moreover, Mr. Bravo justified the War Dogs' action by pointing out that they did not commit any illegal act and that it was the demonstrators who attacked the War Dogs officers first.⁶¹ These

⁵⁹ First Witness Statement of Nilton León, ¶¶51, 84.

⁶⁰ Reply, ¶ 345.

⁶¹ Second Witness Statement of Luis Bravo, ¶¶ 148-152.

affirmations are not consistent with my understanding of the facts, and in any event they seek to ignore the fatal turn caused in the dialogue process by Claimant's decision to send the armed War Dogs unit to evict the demonstrators.

52. I will restate the facts related to the negotiations before Claimant decided to send the armed security unit: the War Dogs. In my First Statement, I explained that, after the parties had accused each other of defaulting on the 26 February 2019 Agreement, the OGGs undertook measures for dialogue to resume. More specifically, on the 26 March 2019, we agreed to hold a meeting with the Parán Community, which was attended by the MININTER, to convince them to resume the dialogue process.⁶² The 28 March 2019, we adopted the same procedure with Invicta, and we then called a meeting with both parties on April 2019. At that time, the trust between the parties was gone, that is why it was essential for both parties to make an effort to demonstrate good faith and thus forge mutual trust. The Parán Community responded to our call and attended that meeting. Invicta, however, did not. The Parán Community, seeing that Invicta was not even prepared to sit down with them for talks, informed us of their interest in seeking the closure of the mine. It was at that time, so critical to the future of their relations and our attempt to facilitate a negotiated solution to the dispute, that, on the 14 May the War Dogs entered the mining unit.
53. As I have explained above, the success of a mediation process depends on the will of the parties to resolve the dispute by dialogue. Rarely is it a process where disputes are resolved overnight. On the contrary, such a process takes time (generally many months). However, our impression at the OGGs was that Claimant did not seem to understand that

⁶² First Witness Statement of Nilton León, ¶¶ 47-48.

it had to invest time and resources into reaching an agreement, but insisted on the use of force to obtain what it believed to be a quick solution. If Claimant had understood the long-term objective of the dialogue process, it could have agreed to continue with the mediation, despite the disagreement arising over the interpretation of and compliance with the 26 February 2019 Agreement, to finally obtain a peaceful and lasting solution. As the more sophisticated party in this dispute, Claimant had responsibility for taking all possible measures to demonstrate good faith, establish trust with the Community, reach a lasting agreement and, in that way, achieve its own objectives. However, refusal to pay for the topographical survey and the decision to send the armed War Dogs, had precisely the opposite effect.

54. On 20 May 2019, I attended a meeting with the Parán Community to discuss these events. For the Community, sending tens of War Dogs officers was seen as a direct, armed confrontation. From what several members of the Community told us at that meeting, it was the War Dogs security officers who entered in a threatening manner and opened fire, causing the confrontation. Therefore, the leaders expressed their indignation due to the acts of violence which they considered to be instigated by Invicta, and they declared their mistrust. For the Parán Community, this confrontation showed that Invicta was not open to dialogue.
55. A few days later, on 27 May 2019, we held a very tense meeting with Invicta, the MININTER, the PCM, and the Ombudsman's Office.⁶³ We explained what had been discussed with the Parán Community and, after listening to the representatives of Invicta, we explained that it was advisable to recognize the mistakes made in the social management to be able to regain trust. For the State, the War Dogs' entry represented a critical point, as it was seen by the Parán Community

⁶³ Ex. C-0018, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019.

as disrespect for the negotiating processes and validation of the use of force. However, the company showed no interest and refused to talk while the protests continued, once again requesting the use of police force.⁶⁴

56. The 2 July 2019, we held another high-level meeting with Invicta, the MININTER, the Ombudsman's Office and the PCM.⁶⁵ At that meeting, Mr. Bravo once again tried to minimize the impact of these confrontations. However, Mr. César Ulloa and I explained again that, at the recent meetings with members of the Parán Community, the community members had maintained their position on the mistrust created by those confrontations. When the PCM mentioned the demands of the Parán Community and the benefits that a change by Invicta in its strategy and community relations policies would bring, Mr. Bravo had no hesitation in recognizing that this was unfeasible since at the time "Invicta no longer has personnel."⁶⁶

57. At that meeting, Invicta asked the OGGs to inform the members of the Parán Community that they were prepared to pay for the topographical survey. However, the Community rejected that offer since, by then, Invicta's conduct had made the dispute worse to the point that the topographical survey had ceased to be a sufficient concession, which it would have been in February 2019.⁶⁷

VI. CLAIMANT'S SPECULATION ON THE ALLEGED MOTIVATION OF THE PARÁN COMMUNITY

58. In my First Statement, I explained some of the reasons that contributed to the breakdown of negotiations between Invicta and the Parán Community. I explained my

⁶⁴ Ex. C-0018, Meeting Summary, Meeting between MINEM, PCM, MININTER, the Ombudsman's Office, and Invicta Mining Corp. S.A.C., 27 May 2019, p. 6, ¶¶ 20-21.

⁶⁵ Ex. C-0221, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019.

⁶⁶ Ex. C-0221, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman's Office and Invicta Mining Corp. S.A.C., 2 July 2019.

⁶⁷ Ex. C-0574, Internal PCM *aide mémoire*, 10 July 2019.

impression that the Parán Community would have liked to reach an agreement with Invicta. Of the three communities, the Parán Community was probably the one most interested in maintaining good relations with Invicta due to its geographical proximity to the Project. That not only has social repercussions, as it means living with a mining project for decades, but environmental repercussions as well. As I explained, the Parán Community will be most affected by possible environmental damage resulting from the project. However, that Community felt that, after signing agreements with the Communities of Lacsanga and Santo Domingo, the company had ignored the Parán Community.⁶⁸

59. In his Reply, Mr. Luis Bravo and Claimant rejected my affirmations and said that the Parán Community had an alleged plot against the Project. More specifically, according to Claimant, the Parán Community had no intention of negotiating with Invicta because, according to the company, the intention of that entire Community was: (i) to keep the police away from the region in order to protect its marijuana business;⁶⁹ (ii) to exploit the mine; and (iii) to generate opposition to the Project, supported by the Subprefect of Leoncio Prado, Mr. Soymán Román Retuerto⁷⁰, who, according to Claimant, had even allegedly participated and incited the Parán Community to carry out the protest of 19 June 2018.⁷¹ Based on those affirmations, Claimant insists that the State should have authorized the use of force.
60. I was surprised to hear these arguments used by Claimant, including regarding an alleged marijuana business by the Parán Community. To the best of my knowledge and understanding, the Parán Community did not have any marijuana dealings, as alleged by Claimant. In any event, at no time did Claimant or

⁶⁸ First Witness Statement of Nilton León, § II.C.ii.

⁶⁹ Reply, § 2.1.

⁷⁰

[REDACTED] Reply, ¶ 266.

⁷¹ [REDACTED] Reply, ¶ 269.

Invicta argue or express concern over alleged marijuana activity.

61. Although we had heard that there were marijuana crops in the region, during the time that I was appointed as specialist for OGGs in this dispute, no-one from the company raised the matter and much less suggested that those plantations belonged to the Parán Community, were supported by it or influenced or explained that Community's position regarding the Invicta mining project. On the contrary, as I have explained, our impression at the OGGs is that the Parán Community wanted to reach an agreement with Claimant.
62. With regard to the alleged illegal operation of the mine by the Parán Community, this was not something that Claimant mentioned at the negotiation meetings as an alleged motivation or objective behind the blockade installed in October 2018 either. Between 2018 and the first six months of 2019, I saw no evidence that the Parán Community was operating the mine or that that was the reason for the blockade. It was only in the third quarter of 2019, when Claimant was no longer driving the project forward, that I learned of the illegal operation of the mine.
63. Nor did I have any knowledge of Mr. Retuerto's alleged participation in the protests. In any event, Invicta never made such an accusation against Mr. Retuerto at any time during the lengthy discussions we held with representatives of Invicta. Nor is it true, as falsely suggested by Claimant,⁷² that at some point I confirmed that Mr. Retuerto's intention was to antagonize the company. This affirmation comes from one of Claimant's internal documents which discusses the Community of Santo Domingo's disagreements with the company. In fact, on learning of those

⁷² Reply, fn. 375.

disagreements, Mr. Retuerto sought to promote dialogue for Invicta and the Community of Santo Domingo to be able to discuss the company's breach of certain commitments which that Community had complained.⁷³ I repeat that I have never heard or been present at anything that demonstrates or even suggests any lack of impartiality or professionalism on the part of Mr. Retuerto.

* * *

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 agrees with what I truly believe.

20 January 2023

[Signature]

Nilton César León Huerta

⁷³ **Ex. C-0161**, Monthly Report on Invicta Mine, SOCIAL SUSTAINABLE SOLUTIONS, July 2018, p. 6 ("The new president of the Santo Domingo community, Adrián Román Mateo, has initiated efforts in the state institutions in company and advice from the sub-prefect of the Leoncio Prado district with the purpose of upsetting the company. This information was corroborated by Mr. Nilton León, representative of the Office of Social Management of the Ministry of Energy and Mines, who affirmed that this would not proceed.").