BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bear Creek Mining Corporation
Claimant,

v.

Republic of Perú.
Respondent.

Case No. ARB/14/21

Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction

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I. INTRODUCTION

1. Claimant describes this case as involving "world class mining projects" and identifies itself as "Bear Creek Mining Corporation." That is a mischaracterization from the outset. Bear Creek is not a "mining" company at all. A "mining" company is a company that builds and operates mines. Bear Creek has done neither. Bear Creek has never constructed or operated a mine in Peru or anywhere else in the world. As far as one can tell from Claimant's Memorial and the public information on its website, Santa Ana was Claimant's first-ever venture toward actual mining production.

2. Furthermore, the potential mine site at issue in this arbitration—the Santa Ana concessions—has never advanced beyond nascent stages of development. Even absent the government actions of which Claimant complains, no near-term prospects existed for mine construction at Santa Ana, let alone for the production of silver at the site. This is, if anything, a dispute about a mine exploration project.

3. Unabashedly, and despite its lack of experience and the preliminary nature of the projects, Claimant is before this Tribunal requesting over half a billion dollars. If Claimant receives even a small fraction of that sum, this arbitration will almost certainly represent the most successful business venture in Bear Creek's corporate history.

4. Claimant's initial foray into actual mining was a dubious one: Claimant acquired its concession rights at Santa Ana through an unlawful scheme to circumvent Peru's Constitutionally-mandated regulatory process for foreign investment in border areas. Specifically, Claimant used its Peruvian employee and legal representative as a front to acquire concession rights at Santa Ana on Bear Creek's behalf. This ruse violated Article 71 of Peru's Constitution, which forbids foreigners from owning rights to strategic resources near Peru's borders without an express waiver from the Government.

5. Article 71 is unambiguous, and Claimant admits that it knew full well of the border zone restriction. In fact, Claimant's CEO, Mr. Swarthout, was candid in his testimony, explaining that his plan to circumvent Article 71 was to "identify a trustworthy Peruvian citizen or company interested in applying for mineral concessions in Santa Ana and enter[] into an option agreement allowing Bear Creek to acquire these concessions." Mr. Swarthout's plan was soon realized, and this unlawful scheme spawned the investment at issue in this arbitration.

6. Once Claimant gained control of the Santa Ana concessions, its neophyte status was on full display during its interactions with local communities. Rather than engage with all of the communities near Santa Ana—26 separate communities by Claimant's own estimate—Bear Creek engaged with and tried to win support from just five local communities. This small minority of the affected communities received most if not all of the benefits Claimant provided, the most prized of which were jobs at the Santa Ana site. This left unaddressed the interests and concerns of other communities in the region.

7. As the community rift and opposition to the Project grew, a series of increasingly violent protests erupted and spread across the Puno region. These protests—which did relate specifically to Santa Ana as representative of the mining activity that the protesters opposed—shut down cities, blocked critical trade routes, and killed and injured scores of Peruvian citizens. This crisis demanded decisive Government action. In the midst of the turmoil, the Government was alerted to the suspect means by which Claimant first obtained the concession rights at Santa Ana. This circumvention of Peru's Constitutional restrictions also warranted a decisive Government response.

8. Respondent took action through a suite of interrelated measures, many of which applied generally to all mining properties in the region. Supreme Decree No. 032 was directed at

Santa Ana alone, because its purpose was to: (i) address Claimant's illegal acquisition of rights to those concessions; and (ii) respond to the social crisis triggered by the Santa Ana project. Not only was Supreme Decree No. 032 necessary, it was also effective. Shortly after its issuance (together with other government measures related to mining in the region), violence in the region subsided.

9. Despite the clear necessity and effectiveness of Supreme Decree No. 032, Claimant claims that this regulatory act, as well as the earlier suspension of the processing of Santa Ana's Environmental Impact Assessment ("EIA"), violated its rights under the Peru-Canada Free Trade Agreement (the "FTA" or "Treaty"). No such treaty breach occurred.

10. But at the threshold, the Tribunal need not address the merits of the claims to resolve this case. No jurisdiction exists here, because the investment arbitration system does not protect or countenance illegally acquired investments. Therefore, the moment Claimant enacted its unlawful scheme to obtain rights to Santa Ana without prior government permission, it surrendered its right to bring a claim under the Treaty. Investment arbitration tribunals have no jurisdiction over claims based on investments obtained in violation of either: (i) host State law; or (ii) the international law principle of good faith. Claimant's investment—which it obtained by circumventing Peru's constitutionally-mandated processes—fails on both accounts. This Tribunal has the authority and, indeed, the obligation to determine whether Claimant's investment was lawfully made. Because it was not, the Tribunal lacks jurisdiction.

11. Furthermore, Claimant bases its case on a supposed right to operate a "mining project" at Santa Ana, which is a right Claimant never held. This too is fatal to jurisdiction, because Article 25 of the ICSID Convention limits the Tribunal's purview to disputes "arising directly out of an investment." This dispute, as Claimant frames it, arises out of imagined rights

to a "mining project" that Claimant does not possess—Claimant held only the right to seek permission for a potential future project. Because Claimant does not own the rights upon which it bases its claim, the Tribunal lacks jurisdiction to decide this dispute.

12. Even if the Tribunal were to reach the merits despite Claimant's unlawful acquisition of its claimed investment, it will quickly discover that Claimant's claims are baseless. Claimant's expropriation claim fails because Supreme Decree No. 032 was an appropriate and necessary exercise of Peru's sovereign police powers. Supreme Decree No. 032 was a rational policy choice that helped end a wave of violence and protected the integrity of Peru's regulatory processes. International law affords States great deference in making these types of regulatory choices. The Decree, therefore, in no way amounted to an expropriatory act. Furthermore, Claimant cannot demonstrate that the issuance of Supreme Decree No. 032 was in any way an impermissible "rare circumstance," as the FTA demands for this type of expropriation claim. Indeed, there is nothing "rare" about a State taking action to protect its citizens – this is a core responsibility of a sovereign government.

13. Claimant's fair and equitable treatment ("FET") claim is equally baseless. Peru and Canada specifically and expressly agreed to limit the FTA's guarantee of FET to the customary law international law minimum standard of treatment. This standard creates a very high bar for Claimant – one that it cannot hope to clear. Claimant tries to revive its claim by importing a more favorable, autonomous FET standard from other Peruvian treaties, but this effort has no basis. Peru abandoned the autonomous standard in its treaty practice long ago, and the FTA specifically exempts previously enacted treaties from the scope of the its most favored nation ("MFN") clause. With no recourse to an autonomous standard, Claimant must argue its

FET case under customary international law, and this is an argument Claimant cannot hope to win.

14. At the end of its legal section, Claimant adds brief claims regarding full protection and security ("FPS") and unreasonable and discriminatory measures. The brevity of these claims suggests that they are not particularly serious. In any event, both claims lack merit. Claimant's full protection claim presumes that FPS includes legal security. However, Claimant has not demonstrated that customary international law guarantees legal security, as it must given that the Treaty's FPS provision is tied to the international minimum standard. Claimant's unreasonable and discriminatory measures claim is similarly baseless. In fact, the FTA does not provide for unreasonable and discriminatory measures protection at all. Instead, Claimant makes another ill-fated attempt to import a standard from treaties Peru signed before the FTA. Once again, for the reasons explained above, this effort fails.

15. Regarding damages, Claimant's case is not plausible on its face. Claimant's experts considered two unpermitted, never-constructed mining properties held by a small mineral exploration company with zero experience constructing or operating mines. Based on these underwhelming inputs, Claimant's experts drummed up more than $520 million in damages. That figure is disconnected from reality and simply not credible.

16. The methods Claimant's experts use to reach that implausible sum also, unsurprisingly, lacks credibility. FTI Consulting ("FTI") began its analysis with Santa Ana, opting for a discounted cash flow ("DCF") methodology for valuing that asset. Using a "cash flow" based approach to value an asset with no history of cash flow confounds logic and conflicts with longstanding international jurisprudence. FTI's DCF analysis is rendered even more inaccurate by its adoption of overstated and even flatly mistaken technical assumptions

from Claimant's mining experts. These inputs include unrealistically high silver prices, overly ambitious production timelines, and exaggerated estimates of the amount of economically mineable silver. Each of these flawed assumptions serves to inflate FTI's Santa Ana damages estimate.

17. Respondent's damages experts, Professor Graham Davis and the Brattle Group ("Brattle"), performed a "reality check" on Claimant's DCF calculation based on Bear Creek's actual market value (as measured by its stock price) before the issuance of Supreme Decree No. 032. This analysis revealed that the value Claimant's claims here for Santa Ana was more than double the market's perception of Santa Ana's value at that time. Thus, Brattle's exercise confirms what common sense tells us: FTI's valuation of Santa Ana is overstated and wholly unreliable.

18. While Claimant's Santa Ana damages claim is untenably inflated, its claim for damages to its separate Corani project is truly fanciful. Claimant's scant discussion of Corani—just two paragraphs in its facts section and three paragraphs in damages—suggests that Claimant tacked on its Corani claim as an afterthought for the sole purpose of inflating damages. The Tribunal should reject this thinly veiled "throwaway" claim without hesitation.

19. Claimant's Corani claim relies on the unproven and incorrect premise that Respondent's actions at Santa Ana lowered Corani's market value. Claimant's only evidence for this is the testimony of Mr. Swarthout. Today, Mr. Swarthout tells this Tribunal that Supreme Decree No. 032 "undoubtedly" will lead to delays and increased financing costs at Corani. But, in 2011, Mr. Swarthout told the public that Corani was "unaffected" by the Decree. This contradiction renders Mr. Swarthout's testimony unreliable, and without it, Claimant's entire Corani claim unravels.

20. For the reasons described more fully herein, the Tribunal must reject all of Claimant's claims in full. In the sections that follow, Respondent explains that: (i) Claimant's claims are undermined by the factual record (Section II below); (ii) the Tribunal has no jurisdiction to hear this case (Section III below); (iii) Claimant's legal claims have no merit (Section IV below); and (iv) Claimant's damages calculations are inappropriate, unreliable and grossly inflated (Section V below).

21. Respondent's Counter-Memorial is accompanied by 229 factual exhibits numbered R-010 to R-238, and 63 legal authorities numbered RL-013 to RL-076. Respondent also submits the following witness statements and expert reports:

- Witness Statement of Fernando Gala (RWS-001);
- Witness Statement of Felipe A. Ramírez Delpino (RWS-002);
- Witness Statement of César Zegarra (RWS-003);
- Expert Report of Francisco Eguiguren Praeli (REX-001);
- Expert Report of Antonio Alfonso Peña Jumpa (REX-002);
- Expert Report of Luis Rodríguez-Mariátegui Canny (REX-003);
- Expert Valuation Report of Prof. Graham Davis and The Brattle Group (REX-004); and
- Expert Technical Mining Report of SRK Consulting (REX-005).

II. FACTS OF THE CASE

A. BEAR CREEK'S LACK OF MINING EXPERIENCE

22. Claimant's Memorial describes Bear Creek's corporate history in just three short paragraphs.[1] Fundraising aside, the only experience listed in the Memorial is the acquisition of certain "newly-discovered gold prospects" in the early 2000s,[2] and work related to the Santa Ana and Corani concessions. Claimant makes no reference to having ever built or operated a mine, or to winning regulatory permission to do so.

23. Bear Creek's lack of mining experience (*i.e.*, experience actually building or operating a mine) is corroborated by its Canadian securities filings. Bear Creek characterizes itself as a "corporation engaged in the acquisition and exploration of mineral properties…," and notes that it "has received no revenue to date from the exploration activities on its properties."[3] Mr. Swarthout concurs in his witness testimony, describing Bear Creek as an "exploration" company.[4] Furthermore, the company's website lists Santa Ana and Corani—neither of which has moved past exploration to construction, much less, operation—as its only active projects.[5]

24. As will be seen in the sections that follow, Claimant's inexperience beyond exploration may well explain its failure to obtain what mining professionals refer to as the "social license to operate"—the agreement and support from local communities that is essential to being able to move a mining project forward—for the Santa Ana Project. By engaging only with the handful of communities most immediately affected by the Project, and focusing only on the formalities of community outreach, Bear Creek failed to engage many communities that were

[1] Claimant's Memorial, paras. 18-20.

[2] Claimant's Memorial, para. 18.

[3] Bear Creek Annual Information Form, April 3, 2014, at 6, 9 [Exhibit R-237].

[4] Swarthout Witness Statement at paras. 13.

[5] Bear Creek Mining Corporation website, "Projects Overview" available at: http://www.bearcreekmining.com/s/projects.asp (last accessed on October 6, 2015) [Exhibit R-238].

opposed to the Project and mining activity generally. This sowed the seeds for the violent social crisis that broke out in early 2011.

B. BEAR CREEK UNLAWFULLY ACQUIRED THE SANTA ANA PROJECT MINING CONCESSIONS

25. It is important to understand that, in Peru, the country's border zones are considered areas that have a special status. The Peruvian Constitution provides that aliens may acquire or possess rights in the border region only under exceptional circumstances.[6] While Claimant does not dispute that they had a legal obligation to obtain a declaration of public necessity to operate the Santa Ana Project, they fundamentally misrepresent the legal framework for the acquisition of mining rights in the border region by an alien. Specifically, Claimant alleges that they lawfully acquired the concessions to develop the Santa Ana Project ("Santa Ana concessions" or "Karina concessions") in the border zone.[7] This is incorrect. In this Section, Respondent explains the restrictions imposed by the Peruvian Constitution on aliens with respect to their activities in the border zone, and Bear Creek's unlawful scheme to circumvent these restrictions.

1. Article 71 of the Peruvian Constitution Limits Foreigners' Ability to Own or Possess, Directly or Indirectly, Any Mining Rights Within 50 km of the Border

26. Peruvian border areas are constitutionally protected. Due to political, security, cultural, and historical reasons, Peru has carefully regulated activities of foreigners in its border regions, including in particular with respect to the use and exploitation of natural resources.[8] Article 71 of the Peruvian Constitution provides

[6] *See* Constitution of Peru, December 29, 1993 ("Constitution of Peru"), at Art. 71 [Exhibit R-001].

[7] *See* Claimant's Memorial on the Merits, May 29, 2015 ("Claimant's Memorial"), at paras. 20-43.

[8] *See* Expert Report of Dr. Francisco Eguiguren Praeli, October 6, 2015 ("Eguiguren Report"), at paras. 12-18 [Exhibit REX-001]; *see also* Constitution of Peru, at Art. 71 [Exhibit R-001].

> [W]ithin a distance of fifty kilometers from the borders, aliens may not acquire or possess, directly or indirectly under any title, mines, land, woods, water, fuel or energy sources, whether it be individually or in partnership, under penalty of losing that so acquired right to the State. This restriction may be waived in case of public necessity expressly determined by an executive decree approved by the Council of Ministers in accordance with the law.[9]

27. Thus, aliens are prohibited from acquiring or possessing under any title, directly or indirectly, mines or land, among other resources in the border zone, unless they receive an express waiver by the Peruvian State. This express waiver can be granted only if the State determines that there is a public necessity that warrants permitting the foreigner's activity in the border zone, and issues a Supreme Decree signed by the Council of Ministers declaring that public necessity.

28. This prohibition has existed in Peru since the beginning of the 20th century. Dr. Francisco Eguiguren, Respondent's constitutional law expert, explains in his report that Peru has continuously regulated foreigners' activities in the border zones for national security purposes since the 1920 iteration of Peru's Constitution.[10] Under that and successive versions of the Constitution up to today, foreigners are allowed to possess rights over Peruvian territory and resources in the border regions if, and only if, the State determines that there is a public necessity that justifies the foreigners' presence in the region, and the State declares it as such.[11] That restriction reflects, *inter alia*, Peru's historical experiences with armed conflict in the border zones in which nationals of the bordering country who were resident on the Peruvian side of the

[9] Constitution of Peru at Art. 71 [Exhibit R-001].

[10] *See* Eguiguren Report at paras. 13, 19 [Exhibit REX-001]; *see also* Political Constitution of Peru, January 18, 2910 ("1920 Constitution of Peru"), at Art. 39 [Exhibit C-025]; Political Constitution of Peru, April 9, 1933 ("1933 Constitution of Peru"), at Art. 36 [Exhibit R-030]; Political Constitution of Peru, July 12, 1979 ("1979 Constitution of Peru"), at Art. 126 [Exhibit R-031].

[11] *See* Eguiguren Report at paras. 13,19 [Exhibit REX-001].

border aided the incursions of the bordering country (*e.g.*, Chile).[12] It is also consistent with the fact that some Peruvian nationals in the border zones—such as the indigenous Aymara people resident to the Puno region at issue here—have ethnic identities and affiliations that span Peru's formal borders.[13] And while that restriction is motivated by concerns of national security, Dr. Eguiguren explains that national security is understood broadly, encompassing not only external but also internal threats to the nation's peace and security.[14]

29. A declaration of public necessity is a wholly discretionary sovereign act that is not granted automatically.[15] A declaration of public necessity is only issued after careful consideration by the government authorities involved in the oversight of the economic activity that the foreigner intends to develop in the border area.[16]

30. The concept of public necessity is directly related to the welfare of Peru and its citizens. A declaration of public necessity will only be issued if the government weighs the potential benefits of the proposed investment for the neighboring communities and for Peru, in general, against competing concerns, such as concerns about maintaining internal and external security in the border region, and concludes, in its discretion, that the balance of interests is so strong that a situation of public necessity exists. As the government explained in the Statement of Reasons that accompanied the Supreme Decree finding such a situation of public necessity in connection with Bear Creek's proposal to develop the Santa Ana Project, "[t]he concept of

[12] *See* Eguiguren Report at paras. 15, 39 [Exhibit REX-001].

[13] Expert Report of Antonio Alfonso Peña Jumpa, October 6, 2015 ("Peña Report"), at para. 7 [Exhibit REX-002]; Witness Statement of Felipe A. Ramírez Delpino, October 6, 2015 ("Ramírez Witness Statement"), at para. 23 [Exhibit RWS-002].

[14] *See* Eguiguren Report at paras. 37-46 [Exhibit REX-001].

[15] *See* Eguiguren Report at paras. 25-36 [Exhibit REX-001].

[16] *See* Witness Statement of César Zegarra, October 6, 2015 ("Zegarra Witness Statement"), at paras. 6-7 [Exhibit RWS-003].

public necessity addresses the imperative character of society's needs."[17] In turn, a declaration of public necessity to activate the exception under Article 71 of the Constitution only "makes sense" if the project transcends the private benefits that may accrue to the applicant (here, Bear Creek); instead, it must "result[] in the welfare of the community."[18] As Dr. Eguiguren explains in his expert report, the concept of public necessity is strictly related to the possibility of benefitting or providing an advantage to the citizenry.[19]

31. A non-Peruvian national or company that intends to develop a mining project in the border zone must apply to the Ministry of Energy and Mines of Peru ("MINEM") to ask the government to consider whether a situation of public necessity exists for the proposed project.[20] Based on the applicant's description and supporting information about the proposed border zone activity, MINEM evaluates whether the project could potentially bring benefits to the region, such as development of infrastructure, job creation, and economic development, and the Ministry weighs those benefits against potential negative impacts. The request is also studied by the Ministry of Defense and the Ministry of Foreign Affairs to assess any national security and foreign affairs implications of the proposed project.[21] The views of the various Ministries are then weighed by the Council of Ministers on behalf of the Republic as a whole. Accordingly, for example, even if the MINEM were to issue a favorable opinion with respect to the project, a declaration of public necessity might be denied if other Ministries were to express concerns. In fact, in 2001 the government refused to issue a declaration of public necessity to another foreign

[17] *See* Statement of Reasons for Decree No. 083 of 2007, 2007 ("Statement of Reasons for Decree No. 083 of 2007"), at p. 2 ("El Concepto de necesidad pública responde al carácter indispensable de algunas necesidad de la sociedad.") [Exhibit R-032].

[18] *See* Statement of Reasons for Decree No. 083 of 2007 at p. 2 [Exhibit R-032].

[19] *See* Eguiguren Report at para. 28 [Exhibit REX-001].

[20] *See* Zegarra Witness Statement at para. 5 [Exhibit RWS-003].

[21] *See* Zegarra Witness Statement at para. 6 [Exhibit RWS-003]. With respect to the Ministry of Defense review, Respondent clarifies that the Joint Chiefs of Staff is the organ in charge of reviewing each public necessity case.

company for the very same area where the Santa Ana Project is currently located, due to security concerns.[22]

32. Contrary to the picture that Claimant paints of the public necessity declaration as a near-automatic and practically ministerial administrative formality,[23] such a declaration represents a sovereign, discretionary decision to grant an exception to Peru's Constitutional prohibition on direct or indirect foreign investment in, *inter alia*, mining in its border regions.[24] The border regions in Peru are sensitive for many reasons. A declaration of public necessity is granted by Peru's highest executive body, the Council of Ministers, if and only if the government determines in its discretion that, on balance, project will bring positive consequences to the communities and the economic development of the region that outweigh other public interests and sovereign concerns.[25]

33. Moreover, such an assessment of public necessity is particular to a moment in time and to the circumstances that prevail at the time of the declaration. At a different point in time, under different circumstances, it is legitimate and appropriate that the government could see a different balance between a project's benefits and costs and could reach a different conclusion as to the existence—or continued existence—of a public necessity. Such a determination could not be made lightly, because it too would require a Supreme Decree from the Republic's highest executive body.[26] But a declaration of public necessity cannot be treated

[22] *See* MINEM's Decision Rejecting the Declaration of Public Necessity to ASC PERU LDC (Apex Silver Mines Corp.), January 2001 [Exhibit R-189]; Patricia Quiñones, *Concessions, Participation, and Conflict in Puno. The Santa Ana Case* in THE LIMITS TO THE MINING EXPANSION IN PERU 43 (2013) [Exhibit R-117].

[23] Expert Report of Alfredo Bullard González, May 26, 2015 ("Bullard Report"), at paras. 18d, 108-110.

[24] *See* Eguiguren Report at paras. 25-36 [Exhibit REX-001].

[25] *See* Eguiguren Report at para. 25 [Exhibit REX-001].

[26] *See* Eguiguren Report at para. 25 [Exhibit REX-001].

as frozen and immutable, nor as a set of handcuffs on the State that forever prohibits it from revisiting that exercise of its discretion.

2. Bear Creek Violated Article 71 of the Peruvian Constitution

34. In 2004, Bear Creek identified potential silver deposits in the South of the Puno Department, within 50 km of the border with Bolivia, that it wished to explore and that it would eventually label the "Santa Ana Project."[27] Given the location of those possible deposits, Bear Creek—a Canadian company—was prohibited from acquiring (even indirectly) mining concessions for the deposits, unless it could first persuade the Peruvian government that its acquisition of such rights was a "public necessity." Nevertheless, Bear Creek proceeded to acquire such rights *before* obtaining a public necessity declaration from the Council of Ministers. Bear Creek alleges in its Memorial that it avoided violating the letter of Article 71 of the Constitution by resorting to permissible contractual devices.[28] This is incorrect; Bear Creek's claimed investment violated the Peruvian Constitution.

35. Evidence on the record shows that Bear Creek indirectly acquired rights on the Santa Ana Project's mining concessions years before it obtained, or even applied for, a declaration of public necessity. Bear Creek used a sham applicant—its own Peruvian employee and legal representative—to apply for and obtain mining concessions from MINEM for a series of plots of land in 2004. It was years later that Bear Creek bothered to apply for and ultimately obtain a declaration of public necessity to develop the Santa Ana Project on November 29, 2007 via Supreme Decree No. 083 of 2007 ("Supreme Decree No. 083"). Importantly, Bear Creek deliberately chose to circumvent the Peruvian Constitution in this manner. It could have obtained the concessions lawfully in the sequence required by Article 71 of the Constitution, but

[27] *See* Claimant's Memorial at para. 20.

[28] *See* Claimant's Memorial at paras. 28-32, 42-43.

it elected not to do so, presumably because it wished to move forward with the Project faster than the legally correct procedure would have allowed. This section details how Claimant made its unlawful investment.

a. Jenny Karina Villavicencio Was an Employee and Representative of Bear Creek between 2004 and 2007

36. According to Bear Creek, in 2004 it learned about the existence of potential silver deposits in the South of Puno.[29] After the company's geologist, Mr. César Rios, confirmed that there was a silver anomaly in the area, Bear Creek checked the public registry and determined that mining concessions were still available for the land parcels on which those potential deposits were located (*i.e.* they had not yet been claimed by any earlier applicant under Peru's first-to-apply system).[30] At the same time, however, Bear Creek was well aware that because the project would be located within the 50 km of the border with Bolivia, it would need to obtain an express authorization from the Peruvian Government before it could lawfully acquire the mining concessions in its own name.[31]

37. According to Mr. Andrew Swarthout, Bear Creek's CEO, the company was advised to commission a Peruvian national to acquire the mining concession rights for Bear Creek and to hold the concessions in his or her own name until the company could obtain the required declaration of public necessity.[32] Bear Creek identified such a willing Peruvian national to serve as its sham applicant: Ms. Jenny Karina Villavicencio. Bear Creek agreed with Ms. Villavicencio that she would apply for and acquire the concessions in her own name and hold

[29] *See* Claimant's Memorial at para. 20.

[30] *See* Claimant's Memorial at paras. 20-21.

[31] *See* Claimant's Memorial at paras. 20-21.

[32] *See* Witness Statement of Andrew T. Swarthout, May 28, 2015 ("Swarthout Witness Statement"), at paras. 16-17.

them while Bear Creek sought to obtain a public necessity declaration.[33] In the meantime, Ms. Villavicencio and Bear Creek would sign option contracts to implement that agreement.[34]

38. Bear Creek chose Ms. Villavicencio for two very specific reasons. First, Ms. Villavicencio is a Peruvian national, and thus did not require an express authorization to acquire the mining concessions in the border region. Second, and most importantly, she had a direct and close relationship with the company. Ms. Villavicencio was an employee of Bear Creek, as Claimant represented to the Tribunal at the First Session.[35] Ms. Villavicencio was also a legal representative of the company since at least May 2003, prior to her applications for the mining concessions. As published in the Commercial Companies Registry, Ms. Villavicencio was legally empowered to appear as Bear Creek's representative in certain banking matters as of May 2003, and in December 2006, she was legally empowered to represent Bear Creek more broadly in business matters.[36] Claimant's witnesses have not denied these facts.[37]

39. In sum, Bear Creek chose someone that they could trust and control to acquire the Santa Ana Project mining concessions to hold them on its behalf.

[33] *See* Swarthout Witness Statement at paras. 17-18.

[34] *See* Claimant's Memorial at paras. 25.

[35] At the First Session of these proceedings, counsel for Claimant described Ms. Villavicencio as an "employee" of Bear Creek. *Bear Creek v. Republic of Peru*, ICSID Case No. ARB/14/21, Audio Recording of the First Session, January 12, 2015 at 21:19-21:36 (counsel for Claimant) ("Bear Creek agreed with Ms. Karina Villavicencio, a Peruvian national and employee of Bear Creek of Peru that she would secure these mineral rights while the company requested and until it obtained, the authorization required under Article 71 of the Peruvian Constitution.").

[36] Commercial Companies Registry, Bear Creek Mining Company, Sucursal del Peru at pp. 5 (delegating to Jenny Karina Villavicencio Gardini certain "banking faculties") (May 19, 2003), 16 (delegating additional powers to Jenny Karina Villavicencio Gardini "to represent the interests of the company in its general duties") (December 15, 2006) [Exhibit R-003].

[37] *See* Swarthout Witness Statement at para. 18.

b. Bear Creek had an Indirect Interest in Border Zone Mining Concessions, Without a Declaration of Public Necessity

40. On May 26, 2004 Ms. Villavicencio submitted an application to acquire four of the Santa Ana concessions (Karina 9A, Karina 1, Karina 2 and Karina 3).[38] On November 29, 2004, Ms. Villavicencio applied for the other mining concessions (Karina 5, Karina 6, and Karina 7).[39] Ms. Villavicencio filed the requests to obtain the mining concessions nominally in her own name, but in reality on behalf of her employer, Bear Creek. Ms. Villavicencio did not disclose to MINEM in those applications her relationship with Bear Creek, or the fact that she was applying for the concessions at Bear Creek's request[40] and on its behalf.

41. Ms. Villavicencio's request was approved because she was a Peruvian national, and no one else had previously obtained any rights over those concessions. Once the concessions were issued in her name, Ms. Villavicencio was free to start applying—again at Bear Creek's request and on its behalf—for all the required permits and authorizations to start the exploration phase of the project. Bear Creek agreed that it would pay for all the costs involving these proceedings.[41]

42. As part of Bear Creek's scheme to secure ownership of the Santa Ana concessions even before it had obtained the public necessity declaration, on November 17 and December 5,

[38] *See* Application for the Attribution of Santa Ana Concessions, 9A, 1, 2, and 3 submitted by J.K. Villavicencio to INACC, May 26, 2004 [Exhibit C-029].

[39] *See* Application for the Attribution of Santa Ana Mining Concessions, 5, 6, and 7 submitted by J.K. Villavicencio Gardini to INACC, November 29, 2004 [Exhibit C-030].

[40] *See* Swarthout Witness Statement at para. 18.

[41] *See* Claimant's Memorial at paras. 15, 31; Option Contract for the Transfer of Mineral Rights No. 3,512, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, November 17, 2004, at Art. 3.5 [Exhibit R-006]; Option Contract for the Transfer of Mineral Rights No. 4,383, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, September 5, 2006, at Art. 3.5 [Exhibit R-007]; Swarthout Witness Statement at para. 22.

2004 Ms. Villavicencio signed two option contracts with Bear Creek.[42] These two contracts would allow Bear Creek to: (i) have priority over the concessions should Ms. Villavicencio attempt to sell them to a third party; and (ii) obtain the mining concessions after it obtained the public necessity declaration. The option contracts would give Bear Creek legally enforceable priority over the concessions that would prevent her from selling them to a third party in the interim. In other words, the option contracts were a tool to control Ms. Villavicencio's nominal ownership of the concession rights, by legally binding her to sell the concessions to Bear Creek, once they were able to obtain a declaration of public necessity, and not to any other party. The option contracts were even registered in the Public Registry to put third parties on notice of Bear Creek's priority over the concessions.

43. Claimant is quite candid in its written submissions that Ms. Villavicencio only acquired the Santa Ana concessions in order to hold them for Claimant. In its Request for Arbitration, Claimant described the company's plan that Ms. Villavicencio "would secure these mineral rights while the Company requested (and until it obtained) the authorization required" by the Peruvian Constitution.[43] Likewise, in its Memorial on the Merits, Claimant stated that:

> In early May 2004, Mr. Rios [Bear Creek's geologist] and Ms. Villavicencio – a Peruvian citizen – discussed the opportunity for Ms. Villavicencio to acquire mining claims over Santa Ana and enter into an option agreement with Bear Creek . . . . Bear Creek also considered this arrangement to be beneficial because, as advised by counsel, it would allow the Company to have a legally binding option agreement in place pending the Government's decision on its application for a supreme decree.[44]

[42] *See* Option Contract for the Transfer of Mineral Rights No. 3,512, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, November 17, 2004 [Exhibit R-006]; Option Contract for the Transfer of Mineral Rights No. 4,383, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, September 5, 2006 [Exhibit R-007].

[43] Claimant's Request for Arbitration, August 11, 2014 ("Request for Arbitration"), at para. 14.

[44] Claimant's Memorial at para. 25.

44. Claimant's CEO Mr. Andrew Swarthout also admits that Ms. Villavicencio was only holding the mining concessions for Bear Creek. He declares:

> A solution to our problem was to identify a trustworthy Peruvian citizen or company interested in applying for mineral concessions in Santa Ana and entering into an option agreement allowing Bear Creek to acquire these concessions once the Government issued the required supreme decree.[45]

45. Bear Creek alleges that this scheme with Ms. Villavicencio was not a violation of Article 71 of the Constitution because Bear Creek did not formally acquire title over the concessions until after it obtained the public necessity declaration, when it exercised the options in its contracts with Ms. Villavicencio and she formally transferred the concession rights to the company.[46] But there is only one way to interpret what Bear Creek and its officials are admitting in their own descriptions of the scheme: Bear Creek acquired the mining concessions *indirectly* (through Ms. Villavicencio) prior to obtaining a public necessity declaration. Ms. Villavicencio was nothing more than a sham applicant acting on Bear Creek's behalf. It is self-evident that Ms. Villavicencio had no independent interest in the concessions and never intended to utilize or exploit the concessions herself, and Claimant has not even attempted to claim that. Bear Creek paid her for that service, and bore all expenses and undertook all work that would be required to develop the concession rights. In effect, it was Bear Creek, not Ms. Villavicencio, that acquired the Santa Ana mining concession rights at the moment that they were issued by MINEM in 2004. That indirect interest was memorialized and implemented through the option contracts, but it was created by Ms. Villavicencio's proxy application; the whole scheme represented an indirect acquisition and possession of border zone mining rights by Bear Creek.

[45] Swarthout Witness Statement at para. 17.

[46] *See* Claimant's Memorial at paras. 29-30.

46. Bear Creek tries to focus attention solely on, and then to defend, the option contracts in particular. Bear Creek insists that option agreements are commonly used in the mining industry.[47] This is true, but not relevant. Option contracts do routinely serve as a mechanism to secure an interest in mining concessions, without yet purchasing them, while the buying company completes its research and makes a business decision.[48] However, these were not ordinary arms-length option contracts with a third party. They were part of a self-dealing scheme to create the appearance of compliance with, while at the same time circumventing, Article 71 of the Constitution. As explained, the option contracts in this case were the mechanism that Bear Creek used to ensure its control over Ms. Villavicencio and its ownership of the Santa Ana concessions against any possible change of heart on her part. But Bear Creek had indirectly acquired the concessions through Ms. Villavicencio's sham application for the concessions.

47. Bear Creek also claims that the option contracts with Ms. Villavicencio did not represent an impermissible indirect interest in the Santa Ana mining rights because they only provided for the future transfer of such rights (after a public necessity decree was obtained) and they did not convey an immediate property interest to the company. But, again, it is not the option contracts standing alone that constituted a violation of Article 71 here. Peru is not claiming that, *per se*, option contracts that anticipate a future transfer of border zone mining rights to a foreign company would violate the Constitution. Here, the option contracts are problematic and unconstitutional because they are part of a larger scheme—a deliberate attempt to avoid Article 71's restrictions—by simulating the appearance of concession rights being

[47] *See* Claimant's Memorial at para. 21 fn. 30, 29; *see also* Swarthout Witness Statement para. 19.

[48] Expert Report of Luis Rodríguez-Mariátegui Canny, October 6, 2015 ("Rodríguez-Mariátegui Report"), at para. 16 [Exhibit REX-003].

acquired by a Peruvian national, and the appearance of securing access to those concessions under option contracts, when in fact Bear Creek was the concessions' *de facto* owner from the outset.

48. Bear Creek also claims that its contractual scheme was validated by a decision of Peru's administrative tribunal overseeing the public Registry on which concessions and contracts affecting concessions are recorded (the "SUNARP tribunal"). That administrative tribunal decided that the option contracts between Bear Creek and Ms. Villavicencio could be recorded on the Registry, notwithstanding the fact that Bear Creek had not obtained a public necessity declaration, because the option contracts did not by themselves execute a transfer of ownership of the concessions to Bear Creek. In this arbitration, Claimant contends that this administrative decision to register the option contracts represents validation by the Republic of Peru of the constitutionality of Bear Creek's scheme with Ms. Villavicencio.[49] Claimant's characterization of the SUNARP tribunal decision is incorrect.[50]

49. First, the SUNARP tribunal does not have the jurisdiction or authority to render any such verdict on the scheme's legality. As Dr. Luis Rodríguez-Mariátegui explains, a decision by the SUNARP tribunal on whether to register a contract or not does not confirm a contract's validity.[51] The SUNARP tribunal merely decides whether a given legal document (*e.g.*, the issuance of concession rights, or a contract affecting concession rights) is subject to

[49] *See* Claimant's Memorial at paras. 33-38.

[50] *See* Claimant's Memorial at para. 33; *see also* Bullard Report at para. 19.

[51] *See* Rodríguez-Mariátegui Report at para. 27 ("Consequently, an act is valid or not as a function of the compliance of the requirements of validity that apply to each, and the registry neither concedes nor confirms its validity.") [Exhibit REX-003]. *See also* General Rules of the Public Registry, Art. 46 ("Registration does not validate whether the acts are null or annullable with regard to the existing legal provisions." [Exhibit R-146].

registration or not.[52] The SUNARP tribunal does not analyze whether a contract is valid, or whether it complies with Peruvian laws and regulations other than the Registry's requirements.[53] Likewise, the act of registration does not confirm or attest to the validity of the instrument that is registered.[54] In addition, a decision of the SUNARP tribunal only directs the Registry to register (or not register) a legal act. It does not create a legal precedent that is binding on any courts in Peru.[55] Indeed, the particular decision to which Bear Creek points was not even promulgated as a legal precedent for the SUNARP tribunal itself (the tribunal can give some of its decisions that effect, but it did not do so for the Bear Creek decision).[56] Thus, Bear Creek cannot maintain that the SUNARP tribunal decision affirmatively established that its scheme with Ms. Villavicencio was not a violation of Article 71 of Peru's Constitution.

50. Moreover, even if the SUNARP tribunal's decision had any significance beyond its instruction to record the option contracts on the public Registry, it could not validate Bear Creek's indirect acquisition of the Santa Ana concession rights. The tribunal looked only at the option contracts themselves, not at the entirety of Bear Creek's scheme with Ms. Villavicencio. There is no indication that the SUNARP tribunal had any knowledge of Ms. Villavicencio's role as Bear Creek's employee and legal representative, or the fact that she acquired the concessions at Bear Creek's request and (secretly) on its behalf, or the fact that, as discussed below, Bear Creek was already holding itself out to third parties as the owner of the concessions. The SUNARP tribunal had before it only the option contracts themselves. Thus, even if the

[52] *See* Rodríguez-Mariátegui Report at para. 23 [Exhibit REX-003]. *See also* General Rules of the Public Registry, Art. 31 ("The task of the registry is the integral evaluation of the titles presented to the registry that has the goal to determine the authenticity of its registration. . . ." [Exhibit R-146].

[53] *See* Rodríguez-Mariátegui Report at para. 24-25 [Exhibit REX-003].

[54] *See* Rodríguez-Mariátegui Report at para. 24 [Exhibit REX-003].

[55] *See* Rodríguez-Mariátegui Report at paras. 28-29 [Exhibit REX-003].

[56] *See* Rodríguez-Mariátegui Report at paras. 29-30 [Exhibit REX-003].

SUNARP tribunal were competent to opine on the constitutionality of anything (which it is not, as a matter of Peruvian law), at most it could have blessed the option contracts (alone) on their faces, and not the sham transaction that the option contracts were implementing.

51. It is notable—and confirmation of the reality of Bear Creek's arrangements with Ms. Villavicencio—that Bear Creek had no hesitation in describing itself as the "owner" of the mining concessions in dealings with third parties, well before it obtained a declaration of pubic necessity and formally transferred the concessions from Ms. Villavicencio into its own name. As noted above, once Ms. Villavicencio obtained the concession rights in 2004, Bear Creek pursued exploratory studies of the land to determine the existence and extent of the hoped-for silver deposits. To that end, Bear Creek not only dispatched Ms. Villavicencio to apply for MINEM approvals and permits, but it also had to obtain permission from the surface landowners of those parcels to carry out the exploratory drilling and other activities. Bear Creek signed such agreements with local communities in the area of the Santa Ana Project to allow Bear Creek to enter on and use their land for those exploratory activities.[57]

52. Critically, in those land use agreements, Bear Creek's CEO Mr. Andrew Swarthout—a witness in this case—represented to the local communities that Bear Creek was the owner of the mining concessions: "The Company declares it is the owner of Mining Concessions Karina, Karina 1 y Karina 2…."[58] The agreements were signed in May 2006, before Bear Creek had even applied for a public necessity declaration. At that time, Bear Creek was prohibited from owning the concessions under Article 71 of the Peruvian Constitution. But

[57] *See* MINEM's Report Approving Ms. Villavicencio's Sworn Declaration, Report No. 170-2006/MEM-AAM/EA, July 10, 2006, at p. 1 [Exhibit R-042]; Agreements Between Bear Creek and Local Communities, May 2006 [Exhibit R-043].

[58] Agreements Between Bear Creek and Local Communities, May 2006, Second Clause [Exhibit R-043].

Mr. Swarthout—who was aware of this prohibition[59]—candidly told the communities the real situation: his foreign company was the "owner" of the mining concessions. Bear Creek's statements holding itself out as the owner of the concessions in legally binding documents are confirmation of the reality of the situation: Ms. Villavicencio was only a front or a proxy for Bear Creek, used to circumvent Article 71 of the Constitution.

53. Bear Creek claims that it erected this façade because it was concerned about the risk that, while Bear Creek applied for a declaration of public necessity, other individuals or companies would learn of its interest in the properties and would apply for and obtain the mining concessions for those land parcels and then demand compensation to transfer the concession rights to Bear Creek.[60] First, even if this concern were valid, it would not provide an excuse for violating Peru's Constitution. Even if it were true that Bear Creek risked having to negotiate with a Peruvian third party and incur some economic costs in order to obtain the mining concession rights from that party, avoiding economic costs is not a license to evade or circumvent the Constitutional regime governing the border zones.

54. But second, and critically, the concern is false. Dr. Zegarra, the Legal Director of MINEM, explains that Bear Creek had no need to use a Peruvian national to circumvent Article 71 of the Constitution while it applied for the declaration of public necessity.[61] Bear Creek could have gone directly to MINEM and filed a request for the mining concessions in its own name. The Ministry would have taken note of the fact that the properties were in the border zone and that Bear Creek was a foreign company, of course. Accordingly, MINEM would have held the application—and critically, it would also have held Bear Creek's "place in line" as the first

[59] *See* Swarthout Witness Statement at para. 16.

[60] *See* Swarthout Witness Statement at para. 16.

[61] *See* Zegarra Witness Statement at paras. 9-10 [Exhibit RWS-003].

applicant for those concessions—while Bear Creek applied for a public necessity declaration from the Council of Ministers.[62] There would have been no risk of a third party jumping ahead of Bear Creek, and thus no risk of having to negotiate with and pay such a third party to transfer the mining concessions to Bear Creek. Thus, even if it could have excused violating the Constitution, Bear Creek's claimed explanation for why it 'needed' to circumvent the sequence required under Article 71 of the Constitution is incorrect.

55. The far more likely reason that Bear Creek used the artifice of Ms. Villavicencio's application comes back, once again, to the company's financial interests. Had Bear Creek followed the legally correct sequence (obtaining a public necessity declaration prior to obtaining the mining concessions), it would not have been able to start the exploration or exploitation phases of the Project until after it had obtained those concession rights.[63] Under Peruvian law, only the title-holder of the concessions may apply for the multiple permits and authorizations that are required for the exploration phase of the Project, such as securing approval of an Environmental Impact Study for exploration activities.[64] By obtaining the concession rights indirectly, in the name of Ms. Villavicencio, Bear Creek could proceed immediately with exploration by having Ms. Villavicencio apply for the necessary exploration permits in her name as well. From Bear Creek's perspective, it was surely more economically attractive to be able to move the project forward right away, in order to get it closer to the point where the Santa Ana Project could be attractively marketed to "senior" mining companies with actual experience in the operation of such mines. But once again, Bear Creek's business preferences and economic

[62] *See* Zegarra Witness Statement at paras. 6-7, 9-10 [Exhibit RWS-003].

[63] *See* Zegarra Witness Statement at para. 10 [Exhibit RWS-003].

[64] *See* Zegarra Witness Statement at para. 10 [Exhibit RWS-003].

incentives did not and cannot give it a license to take "shortcuts" in violation of the applicable Peruvian legal regime.

56. Bear Creek finally applied to MINEM to request a declaration of public necessity on December 5, 2006—more than two and a half years after Ms. Villavicencio applied for the concession rights on Bear Creek's behalf. Claimant has not explained why it took so long for Bear Creek to apply for the declaration of public necessity. It is safe to assume, however, that the company felt no pressing need to do so. Bear Creek already indirectly owned and controlled the concessions through Ms. Villavicencio, as secured by the option contracts, and it already could exercise and was exercising all the trappings of ownership, including proceeding with exploration activities and contracting with third parties as the owner of the concession rights. But evidently the development of the project eventually reached a point where Bear Creek — perhaps in the hopes of selling the project to a qualified senior mining company—wished to formalize the situation and become the direct, rather than indirect, title-holder of the concessions.

57. The Peruvian Government reviewed Bear Creek's application, and, in its discretion after review by multiple Ministries and the Council of Ministers, proceeded to issue a declaration of public necessity on November 29, 2007, based on its assessment that, on balance, the investment would improve the welfare of the neighboring communities.[65] The Council of Ministers did so, however, without knowledge of Bear Creek's scheme with Ms. Villavicencio, under which the company had *already* indirectly acquired and possessed the concession rights for the Santa Ana project in violation of the Peruvian Constitution.[66]

[65] *See* Statement of Reasons for Decree No. 083 of 2007 at p. 2 [Exhibit R-032].

[66] Claimant's allegations regarding the Government's knowledge at the time are discussed further in Section II.D.3 below.

C. BEAR CREEK WAS RESPONSIBLE FOR OBTAINING THE COMMUNITIES' SUPPORT FOR THE PROJECT AND FAILED TO DO SO

58. Bear Creek's Santa Ana project was ultimately stymied by widespread and violent protests in the Puno region and throughout Peru. As will be described in the sections to follow, the local populations protested against the perceived environmental and social harms that mining projects—specifically Bear Creek's Santa Ana Project—would bring to the areas.[67] It is evident that Bear Creek failed to secure the community support that is necessary to construct and operate a large scale mining operation. As the operator of the project and the newcomer to the remote southern Puno region of Peru, this responsibility falls on Bear Creek and Bear Creek alone. A foreign corporation that enters into an extremely rural area with the intention of constructing and operating a silver mine bears the responsibility to engage with and learn the concerns of the indigenous peoples affected by the project and to explain the costs and benefits associated with the project to the affected communities.[68] Peruvian law and international best practices—including those issued by Bear Creek's home government, the Government of Canada—place the burden on Bear Creek to build a consensus in favor of the Santa Ana Project. Given the scope and intensity of the anti-mining protests in the region related to Bear Creek's actions, it is clear that Bear Creek did not do so adequately.

1. Peruvian Law Informs Bear Creek that It Must Obtain Community Support Before It Can Develop Its Mine

59. Peruvian law should have signaled to Bear Creek the importance of building a positive consensus in the local communities in support of the Santa Ana Project. A central tenet

[67] *See* Section II.D.2 below.

[68] Bear Creek also should have been aware that a failure in this regard could lead to extreme conflict. International Council on Mining and Metals ("ICMM"), "Peru Country Case Study, The Challenge of Mineral Wealth: Using Resource Endowments to Foster Sustainable Development", July 2007, at Section 5.5 ("The growth of the mining sector since the early 1990s, has *undoubtedly generated social tensions and conflicts between mining companies and the communities where they operate*, not least because of their high expectations of the companies.") (emphasis added) [Exhibit R-141].

of Peruvian mining law is that a mining company must obtain the support of the affected communities in order to successfully construct and exploit its mine.[69] The laws of Peru reflect a delicate balance between the investment (foreign or domestic) that mining projects can bring to a community and the significant disruption they can cause to the indigenous populations that are often times rural and dependent on the land.[70] Community engagement is therefore crucial for the success of a mining project.

60. This is evident in the Peruvian mining law, which requires a mining company to engage formally with the directly and indirectly affected communities before it can receive the necessary approvals to construct and operate a mine.[71] The company must conduct workshops in the communities and provide the communities with explanatory materials about the project.[72] The company must also conduct at least one public hearing—after providing widespread public notice to potentially interested parties—where the company explains to the local population the possible costs and benefits of the project.[73]

61. According to the strict letter of the law, Bear Creek may have complied with these requirements in form. Still, complying with the minimum number of public hearings or making the EIA publicly available to affected communities is typically insufficient to build the kind of consensus necessary to successfully complete a project. Mining best practices suggest that

[69] *See* Rodríguez-Mariátegui Report at para. 52 ("Law provides a series of citizen participation mechanisms applicable during one or more of the phases for the approval of the environmental study, and to the project's execution ") (citing the Peruvian Regulation of Citizen Participation in the Mining Subsector) [Exhibit REX-003].

[70] *See, e.g.*, Ministry of Energy and Mines of Peru, General Direction of Environmental Affairs, Guide on Community Relations, January 2001("MINEM, Guide on Community Relations") , at p. 6 ("The force of the positive impacts and the management of the negative impacts of the energy and mining projects on the communities allows the development of harmonious relationships between businesses and populations.") [Exhibit R-172].

[71] Ramírez Witness Statement at para. 13 [RWS-002].

[72] Rodríguez-Mariátegui Report at paras. 56-57 [REX-003].

[73] Rodríguez-Mariátegui Report at para. 58 ("The public hearing—or public hearings, as determined by the authorities—is an obligatory citizen participation when the environmental study under evaluation is a study of environmental impact.") [REX-003].

additional measures may be necessary.[74] As Dr. Luis Rodríguez-Mariátegui—a Peruvian mining expert with a wealth of experience helping clients to navigate Peru's mining and environmental laws—explains:

> As a general comment with respect to the relationship with the community, my professional experience in mining in Peru has shown me that it is not sufficient to simply comply with the formalities and the basic obligations under the rules on public participation. It is imperative for the mining company to make every effort within its power to understand and consult with the impacted communities, so that they accept the project and its consequences. If the company is not in line with this approach, it is likely that the communities will not feel that the project will could benefit them and will oppose it. Avoiding an environment of conflict must be one of the premises of the enterprise, otherwise it will be very difficult to carry out the Project.[75]

62. Bear Creek should also have been aware that Peru was a party to Convention No. 169 of the International Labor Organization ("ILO").[76] ILO Convention No. 169 requires, in relevant part, that the state "shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands."[77] This is understood, in practical terms, as a requirement to obtain prior consent, not just provide prior notice or information.[78] As will be discussed in Section II.D.3 below, Peru adopted measures in

[74] *See* International Council of Mining and Metals ("ICMM"), "Position Statement, Mining and Indigenous Peoples", May 2008, para. 6 ("Equally, some national legal frameworks may be no more than a minimum requirement for companies seeking to build relationships of respect and trust with Indigenous Peoples.") [Exhibit R-178].

[75] Rodríguez-Mariátegui Report at para. 63 [Exhibit REX-003].

[76] *See* International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), entered into force September 5, 1991 ("ILO Convention") [Exhibit R-029]; *see also* Peña Report at para. 33[Exhibit REX-002].

[77] ILO Convention at Art. 15 [Exhibit R-029].

[78] Rodríguez-Mariátegui Report at para. 63 ("It is fundamental that the mining company make every effort within its power to understand and consult with the impacted communities so that the communities accept the project and its consequences.") [Exhibit REX-003]; Ramírez Witness Statement at para. 13 ("This requirement known as the

June 2011—measures that Claimant does not challenge as wrongful under the FTA—to implement its extant international law obligations under Convention No. 169. Knowing that Peru takes seriously its international law obligations, Bear Creek should have expected that Peru would live up to this ILO standard and apply it to mining projects in the country.

63. In 2001, MINEM published a Guide to Community Relations (the "MINEM Guide") that underscores the importance of building support in the local communities and provides suggestions for how to build that support.[79] It is not clear whether Bear Creek reviewed and implemented the many suggestions available in the MINEM Guide, but its actions would suggest that it did not.

64. For example, the Guide stresses the importance of carefully identifying and considering the "indirect impacts" of the mining project.[80] This is particularly salient in the case of Bear Creek because the indirectly affected communities were the ones who raised complaints about environmental contamination.[81] However, as MINEM pointed out to Bear Creek when reviewing its EIA,[82] Bear Creek failed to consider with any specificity which communities would be indirectly impacted by the project.[83]

'citizen participation component' is not an optional activity given that it is very important in order to achieve the support of the local communities for a large project that will interfere with daily life.") [Exhibit RWS-002].

[79] *See* MINEM, Guide on Community Relations [Exhibit R-172].

[80] MINEM, Guide on Community Relations at p. 23 [Exhibit R-172]. *See also* Ramírez Witness Statement at para. 12 ("In my experience, when companies have conflicts with the communities with respect to a proposed mining project, it is usually with the communities that are indirectly affected by the project, because it is less likely that they will receive the future benefits of the project (such as labor, promised works, or better access roads).") [Exhibit RWS-003].

[81] *See* Peña Report at paras. 56-63 [Exhibit REX-002]. *See also* Ramírez Witness Statement at para. 24 ("We thought that many local Aymara communities, particularly those indirectly affected by the project (which were rather remote), considered that they would not benefit if the project became operational. They felt excluded from the process and, therefore, opposed the project once its scope was reported at the hearing carried out as part of the [Citizen Participation Plan] established as a requirement of the EIA.") [Exhibit RWS-002].

[82] DGAAM's Observations to Bear Creek's EIA for Exploitation, April 19, 2011, p. 30 [Exhibit R-040].

[83] *See* Ramírez Witness Statement at para. 28 [Exhibit RWS-002].

65. Over-promising, for example with regard to job opportunities or financial windfalls for the community, can often lead to subsequent disillusion and distrust in the communities where the mining company fails to follow through on those promises. The MINEM Guide explains that inexperienced companies may zealously try to provide the communities with a list of benefits of the project that may never materialize.[84] Offers of employment can be particularly dubious, especially because the local populations will rarely have the skills and experience needed to operate mining equipment without extensive training that the company may not be willing to provide.[85] In one case study of the Antamina copper mine in northern Peru, it was shown that only about 16% of directly employed personnel were hired from the districts close to the mine, with the remainder coming from elsewhere in Peru.[86] The study concluded that the "high expectations by the surrounding population regarding local job creation have not been fully met."[87] Bear Creek's insistence that the local communities would benefit from the increased employment opportunities at the mine must therefore be viewed with skepticism.[88]

[84] *See* MINEM, Guide on Community Relations at p. 27 [Exhibit R-172].

[85] International Council on Mining and Metals ("ICMM"), Good Practice Guides, Indigenous Peoples and Mining, 2010, at p. 82 (noting several "barriers to the employment of Indigenous Peoples" such as lack of education and relevant training, geographical isolation, and cultural beliefs and practices) [Exhibit R-179]. *See also Id.*, at p. 57 ("[G]enerating economic development opportunities will be very important for some indigenous groups, whereas for others protection of traditional livelihoods and cultural heritage may be the highest priority.") [Exhibit R-179].

[86] ICMM, "Peru Country Case Study, The Challenge of Mineral Wealth: Using Resource Endowments to Foster Sustainable Development", July 2007, at Section 3.4.3 [Exhibit R-141]. The study attributes this number to the local population's lack of skills needed to support the mine. *See id.* [Exhibit R-141].

[87] ICMM, "Peru Country Case Study, The Challenge of Mineral Wealth: Using Resource Endowments to Foster Sustainable Development", July 2007, at p. 11 [Exhibit R-141].

[88] Claimant's Memorial at para. 59.

2. International Norms of Corporate Social Responsibility Stress the Importance of Consensus Building Within a Local Community

66. International best practices also suggest that the domestic laws provide a floor that a company *must* meet, rather than the ideal for which a company should aim. In other words, a company cannot expect that indigenous peoples will support a potentially intrusive mining project simply because federal law sanctions it or because the company has complied with notice and hearing regulations.[89] In Peru, and elsewhere, "[i]t is imperative for the mining company to make every effort within its power to understand and consult with the impacted communities, so that they accept the project and its consequences."[90] It is important for a mining company to act with the tenets of corporate social responsibility in mind. In fact, the Government of Canada, Bear Creek's home state, has issued a "Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad."[91] The Canadian Government expects its mining companies abroad to, among other things: "Respectfully engage relevant stakeholders, early on and regularly"; "Understand local customs, culture and expectations, and how they affect, and are affected by, the project"; and "Work with stakeholders to determine and communicate environmental, social and economic impact solutions."[92] Canada also expects that its companies

[89] *See* ICMM, "Position Statement, Mining and Indigenous Peoples", May 2008, para. 6 ("Equally, some national legal frameworks may be no more than a minimum requirement for companies seeking to build relationships of respect and trust with Indigenous Peoples.") [Exhibit R-178].

[90] Rodríguez-Mariátegui Report at para. 63. *See also* ICMM, "Position Statement, Indigenous Peoples and Mining", May 2013, para. 4 ("Successful mining and metals projects require the support of a range of interested and affected parties. This includes both the formal legal and regulatory approvals granted by governments and the broad support of a company's host communities.") [Exhibit R-83].

[91] Government of Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, November 14, 2014 [Exhibit R-180]. This enhanced strategy builds on the initial strategy that was announced in 2009, before Bear Creek filed its EIA with the Peruvian Government. *See* Government of Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*, March 2009 (available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng) [Exhibit R-181].

[92] Government of Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, November 14, 2014, at p. 3 [Exhibit R-180].

will rise to a "more rigorous standard" "[w]here host country requirements differ from the international standards . . . ."[93]

67. The International Council on Mining & Metals ("ICMM") is a consortium of 23 mining and metals companies and 35 national and regional mining associations and global commodity associations that seek to "address core sustainable development challenges."[94] The ICMM holds its members to high standards of sustainability performance, and provides the industry at-large with reports and guidance that can drive mining companies to higher standards of sustainable conduct.

68. Community engagement is a strong pillar of the standards recommended by the ICMM. In a 2008 position statement on Mining and Indigenous Peoples,[95] the ICMM advocated for "constructive relationships between the mining and metals industry and Indigenous Peoples which are based on respect, meaningful engagement and mutual benefit, and which have particular regard for the specific and historical situation of Indigenous Peoples."[96] The statement goes on to recognize that:

> [M]ining can have significant impacts on local communities. While these impacts can be both positive and negative, many Indigenous Peoples view their historical experiences of mining negatively. In some cases, mining operations—even though abiding by relevant national laws—have contributed to the erosion of Indigenous Peoples' culture, to restricted access to some parts of

[93] Government of Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, November 14, 2014, at p. 6 (listing a series of international standards that the Government of Canada incorporates into its own strategy) [Exhibit R-180].

[94] International Council of Mining and Metals ("ICMM") Website, "About Us", *available at* http://www.icmm.com/about-us/about-us (last accessed October 3, 2015) [Exhibit R-182].

[95] The 2008 position statement was issued shortly after Bear Creek acquired the title to the Santa Ana mining concessions, and more than two years before it submitted its EIA to the Peruvian government. It therefore had every opportunity to be aware of and implement the suggestions of the ICMM. In 2013, the ICMM issued another position statement that supersedes, but is substantially similar to, the one issued in 2008. *See* ICMM, "Position Statement, Indigenous Peoples and Mining", May 2013 [Exhibit R-183].

[96] ICMM, "Mining and Indigenous Peoples", May 2008, at p. 1 [Exhibit R-178].

> their territory, to environmental and health concerns, and to adverse impacts on traditional livelihoods.[97]

Abiding by the strict letter of the law may not be sufficient to build the necessary community support, particularly where the local communities have negative views of mining or outsiders.[98] A mining company must therefore take these historical and cultural factors into account when putting together a community outreach strategy. It is apparent from the resulting protests against the Santa Ana Project that Bear Creek failed to do so.

69. Given the clear potential for conflict between the Indigenous Peoples and the mining company, the ICMM "believe[s] that successful mining and metals projects require the broad support of the communities in which they operate, including the Indigenous Peoples, from exploration through to closure."[99] In this context, it is clearly insufficient for a mining company to disparage community concerns, for example over environmental contamination, simply because the rural community may be uninformed about the science.[100] It is the company's responsibility to communicate and explain why community concerns may be erroneous and get the community to buy in to that explanation.[101]

70. The ICMM has also published more substantial guidance. In its "Good Practice Guide" on Indigenous Peoples and Mining, the ICMM cautions that those mining companies that fail to respect the interests of the local communities are "more likely to become embroiled in

[97] ICMM, "Mining and Indigenous Peoples", May 2008, at p. 2 [Exhibit R-178].

[98] Peña Report at para. 96 [Exhibit REX-002].

[99] ICMM, "Position Statement, Mining and Indigenous Peoples", May 2008, at p. 2 [Exhibit R-178].

[100] *See, e.g.*, Claimant's Memorial at para. 75 (disparaging community concerns as a "strategy of deception" because any contaminated water from the Santa Ana project could not physically flow into Lake Titicaca, which was in a separate water basin).

[101] *See* ICMM, Good Practice Guides, Indigenous Peoples and Mining, 2010, at p. 16 (stating that "any concerns that communities have about potentially negative impacts should be understood and addressed by the company") [Exhibit R-179].

local and regional disputes and conflicts."[102] Even when the company believes that it has adequately consulted and addressed the community interests, communities may still react strongly and negatively if they feel that their concerns are not being met. In an example provided in the Good Practice Guide, communities protested and blockaded highways—delaying the transportation of equipment to the project—because the small rural community "felt that they had been inadequately consulted on the project."[103] In another example, a government imposed a three-year moratorium on mining in a remote region because of protests that arose when a mining company failed to address the potential environmental impacts of a gold mine.[104] It is crucial, therefore, that a mining company address all community concerns, even those it feels are invalid or overstated.[105] Anything less could lead to conflict and other potential risks to the mining operations.

71. At the end of the day, if a local community does not want a mining project its lands, it will be extremely difficult for the mining company to succeed. This is why Peruvian law, Peruvian mining practitioners, the MINEM Guide, and international norms all require or recommend that the mining company engage in comprehensive discussions with the local communities in order to alleviate any concerns—not just the ones that the mining company finds scientifically credible. As the next section will show, Bear Creek failed to garner the support that it tries here to claim that it had, with tragic results.

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[102] ICMM, "Good Practice Guides, Indigenous Peoples and Mining", 2010, at p. 2 [Exhibit R-179].

[103] ICMM, "Good Practice Guides, Indigenous Peoples and Mining", 2010, at p. 17 [Exhibit R-179].

[104] *See* ICMM, "Good Practice Guides, Indigenous Peoples and Mining", 2010, at p. 26 [Exhibit R-179].

[105] Assessment of impacts and consequences should focus on those issues that the local communities feel are important in their specific geographic and cultural context. ICMM, "Good Practice Guides, Indigenous Peoples and Mining", 2010, at p. 49 [Exhibit R-179]. The Good Practice Guide also notes that, to identify which issues are important, the company must take care "to identify all indigenous groups who may be indirectly affected by the project " which Bear Creek failed to do in its EIA. ICMM, "Good Practice Guides, Indigenous Peoples and Mining", 2010, at p. 49 [Exhibit R-179].

D. SOCIAL CRISIS IN PUNO IN 2011 NECESSITATED SUPREME DECREE NO. 032 OF 2011

72. In early and mid-2011, the circumstances under which the Peruvian Government had granted Bear Creek a declaration of public necessity dramatically changed. First, and most dramatically, the Santa Ana Project was one of the causes of one of the most critical situations experienced by the Puno Department in Peru. Thousands of people protested against mining concessions in Puno, and in particular against the Santa Ana Project. The protests paralyzed major cities in Puno for more than one month, and Puno's institutions, stability, and security were in jeopardy. In light of these events, Bear Creek's presence in the border region was no longer a public necessity. Bear Creek's presence in the region had caused violent social unrest, which affected Peru's national security, and was adversely affecting the region's welfare. Second, Government officials learned of Bear Creek's violation of Article 71 of the Constitution. This information, by itself, was reason enough to repeal Bear Creek's declaration of public necessity. In this Section Respondent describes the events that occurred in Puno in 2011, and explains the relationship between the Santa Ana Project and the 2011 social unrest.

73. In its Memorial on the Merits, Bear Creek tried to characterize the 2011 Puno protests as political theater, suggesting that they were a mere instrument of one opposition politician's political ambitions and entirely unrelated to the Santa Ana Project.[106] Bear Creek fundamentally mischaracterizes the situation. The 2011 Puno protests were the result of an underlying social problem: the population was concerned that mining activities, and the Santa Ana Project in particular, would adversely affect their lives and their lands.[107] Likely because of its lack of experience, Bear Creek had failed to work together with and get "buy in" from all of

[106] *See* Claimant's Memorial at paras. 65-72.

[107] *See* Peña Report at paras. 76-81 [REX-002].

the communities that would be affected by the Project to ensure that they would trust the company and the Project, and that they would ultimately accept Bear Creek's mining activities in their territory. While local politicians may well have opportunistically seized the limelight and cast themselves as "leaders" of the protests, no individual or political party could have brought about the level of social unrest that occurred, which was the result of deep-rooted indigenous community opposition to mining activities. Moreover, from the outset, the protests were directly related to the Santa Ana project, among other mining activities in the region.

74. Supreme Decree No 032, which repealed the 2007 declaration of public necessity for the Santa Ana Project, was adopted within a context of social unrest that resulted, at least in part, from Bear Creek's failure to meet and overcome indigenous community opposition to the Project. In this Section, Respondent discusses Bear Creek's relations with the local communities and the events that occurred between February and June 2011. It will be clear that, contrary to how Claimant tries to present them, the sweeping 2011 protests were directly related to the Santa Ana Project and mining more generally, and they were large-scale social conflicts, not puppet shows staged by politicians.

75. First, Respondent describes Bear Creek's failure to establish relations with all of the communities that the Project would potentially affect. Bear Creek failed to address all of the communities' needs and concerns with respect to the Project. This situation created a division among the communities and was a cause of the protests that erupted in March 2011. Second, Respondent describes the protesters' demands and the events that occurred in the Puno department, including in areas close to the Santa Ana Project site. By June 2011, the Puno department had been paralyzed by three fronts of protests, one of which was primarily directed to the Santa Ana Project in particular. Finally, Respondent describes all of the measures adopted by

the Government to reach a solution to this critical situation, including but certainly not limited to Supreme Decree No. 032.

1. Bear Creek Failed to Establish Relations With All of the Local Communities that the Santa Ana Project Would Affect

76. The Santa Ana Project is located in the South of the Department of Puno. As indicated on the map below, the Puno Department is located in the southeast of Peru along its border with Bolivia.

Figure 1 Map of Perú. [108]

77. The Santa Ana concessions cover part of the Huacullani and Kelluyo Districts located in the Chucuito Province of the Department of Puno. The Chucuito Province is in the south of the Department, as indicated in the following maps. These maps will be important to understand where the three fronts of protests (Chucuito Province, Melgar Province, and Azángaro Province) originated in 2011, as described in Section II.D.2 below.

[108] *See* Observatory for Governability – INFOGOB, Map of Peru *available at* http://www.infogob.com.pe/Localidad/localidad.aspx?IdLocalidad=80&IdUbigeo=000000&IdTab=0 (last visited on September 9, 2015) [Exhibit R-044].

Figure 2 Map of Puno Department. The Santa Ana Project is located in the Chucuito Province, which is in the South East of the Puno Department.[109]

Figure 3 Map of Chucuito Province. The Santa Ana Project is located between the Huacullani and Kelluyo Districts of the Chucuito Province.[110]

78. As indicated on Figure 3 above, the Santa Ana Project is located principally in the Huacullani District, but at the very edge between Huacullani and the Kelluyo District. This is a key point, because (as will be discussed), Bear Creek engaged with and provided economic benefits to a subset of Huacullani communities while alienating the Kelluyo communities (and other Huacullani communities) that were right next door. The Project is also located close to the "urban" areas of both the Huacullani and Kelluyo Districts. For example, according to Respondent's expert sociologist and anthropologist Prof. Antonio Peña, who recently visited the area, the mining project's site can be seen from the main square of the Huacullani urban area, as

[109] *See* Observatory for Governability – INFOGOB, Map of Peru *available at* http://www.infogob.com.pe/Localidad/ubigeo.aspx?IdUbigeo=200000&IdLocalidad=1626&IdTab=0 (last visited on September 9, 2015) [Exhibit R-045].

[110] *See* Observatory for Governability – INFOGOB, Map of Peru *available at* http://www.infogob.com.pe/Localidad/ubigeo.aspx?IdUbigeo=200400&IdLocalidad=1670&IdTab=0 (last visited on September 9, 2015) [Exhibit R-046].

it is located only 3 km away. The Project's proximity to the urban areas exposes the dramatic effect the Project could have had on the day-to-day life of the communities.

79. The pictures below illustrate just how close the Project was to the areas where the members of the communities live their daily lives. In the first picture, taken from the center square of the Huacullani urban area, the project site 3 km away is circled in red. In the second picture, taken from the center square of the Kelluyo urban area, the project site is just on the other side of the hill pictured behind the buildings. Bear Creek engaged with certain communities in the first area, but did not secure the cooperation or support of the second.

Picture taken from the urban area of Huacullani, July 20, 2015.[111] The Santa Ana project site is circled in red.

[111] *See* Peña Report at para. 48 [REX-002].

Picture taken from the urban area of Kelluyo. July 21, 2015.[112]

80. Critically, the Santa Ana Project site is located on the territory of multiple *Comunidades Campesinas.* In Peru, a *Comunidad Campesina* is a social organization of indigenous people, in this case the Aymara people.[113] Under Peruvian law, these communities have certain rights with respect to their land. In particular, communities' land is inalienable—while it may be subdivided among members of the community (typically family units), it cannot be sold to persons outside the *Comunidad*, unless two thirds of the *Comunidad* agrees.[114] This had a significant impact on the way Bear Creek had to relate to the local communities. Bear Creek could not simply purchase the land for the Project and then develop it at will. Instead, Bear Creek was going to need to persuade the local communities possessing the Project site lands, and the individual land-holders within the communities, to agree to give Bear Creek land use authorization for all of the activities necessary to develop the open-pit Santa Ana mine—and

[112] *See* Peña Report at para. 48 [REX-002].

[113] *See* Peña Report at para. 7 [REX-002].

[114] *See* Peña Report at para. 31 [REX-002].

that agreement, once obtained, could only be secured by contract rights. Contractual agreements, of course, are subject to breach, disputed obligations, conflicting interpretations, and pressures for renegotiation over time. This meant that Bear Creek would have to work very closely with the communities not only to obtain their initial acceptance of the project, but also to maintain that buy-in over the entire life of the mine—otherwise the mine's development and operation was vulnerable to disruption at any moment.

81. Claimant would have this Tribunal believe that Bear Creek's relations with the local communities surrounding the Santa Ana Project were consistently positive and peaceful.[115] Bear Creek alleges that the local "communities repeatedly expressed their support for the Santa Ana Project" and that they "overwhelmingly embraced the Company's Santa Ana Project."[116] Bear Creek fails, however, to explain that this allegedly "overwhelming" support came from only a handful of the communities in the area of influence of the Project. As discussed next, Bear Creek arbitrarily decided to establish relations with and secure its access to the site through contracts with some of the most directly affected communities (namely, the holders of the lands on which the Santa Ana mine would be sited), but it did not make comparable arrangements with other neighboring communities that would also be affected by the Project. That narrow focus by Bear Creek divided the affected communities, turning them against each other, and ultimately proved fatal to the Project.

82. First, Bear Creek only had relations with five communities in the Huacullani District and one community in the Kelluyo district, out of the twenty-six communities that Bear

[115] *See* Claimant's Memorial at paras. 59-61.

[116] Claimant's Memorial at paras. 61, 64.

Creek had identified as being affected by the Project.[117] These 26 communities are all very close to one another. Prof. Peña notes that the communities in the first group are located within 3 to 5 km of the project site, and the rest of the communities (those in the so-called area of indirect influence) are located within only 5 to 10 km of the site. [118] Still Bear Creek failed to work with all the communities that were within the area of influence of the Project, which later resulted in general discontent about the Project. Prof. Peña, who interviewed several members of the local communities, explains that this was one of the main sources of the conflict that later swept the area. The communities ignored by Bear Creek were opposed to the prospect of living in close proximity with a mining project that would bring no benefit to them, fearing that it could contaminate their lands and water supplies.[119]

83. Bear Creek contends that it had positive relationships with the communities within its area of direct influence. These relations were based on a promise to give job posts to members of these communities. Bear Creek boasts that it established a "large-scale rotational work program" with neighboring communities, because this was their main request to the Company.[120] Mr. Antunez de Mayolo, Chief Operating Officer of Bear Creek, explained in his witness statement that the program was to give 100 job posts to community members.[121] He did not explain, however, how the job posts would rotate and to which communities the posts would

[117] *See* Request from Bear Creek to MINEM Soliciting Authorization to Acquire Mining Rights Located in the Border Area, December 4, 2006, at pp. 18-19 [Exhibit C-017]; *see also* Claimant's Memorial at para. 61.

[118] *See* Peña Report at para. 96 [Exhibit REX-002].

[119] *See* Peña Report at para. 65 [Exhibit REX-002].

[120] Claimant's Memorial at para. 59; *see also* Witness Statement of Elisario Antunez de Mayolo, May 28, 2015 ("Antunez de Mayolo Witness Statement"), at para. 7.

[121] *See* Antunez de Mayolo Witness Statement at para. 7.

be assigned. In fact, this "large-scale rotational program" was only established for the five Huacullani communities on or closest to the proposed mine site.[122]

84. Prof. Peña explains the job program in his expert report. According to his investigations, Bear Creek had to renegotiate each year the number of job posts it would promise to each community.[123] In 2007, Bear Creek initially offered 25 job posts to the communities, but each year, the communities would request additional positions that Bear Creek agreed to provide in order to obtain the communities' support. According to Prof. Peña's research, Bear Creek granted the following job posts:[124]

Number of Job Posts Bear Creek Granted to Huacullani Communities 2007-2011						
Year	Jobs given to Condor Ancocahua	Jobs given to Challacollo	Jobs given to Ancomarca	Jobs given to Concepción Ingenio	Jobs given to Huacullani [urban area]	Total Jobs
2007	10	5	5	5	0	25
2008	15	10	10	10	3	48
2009	35	25	25	15	10	110
2010	35	25	25	15	10	110
2011 (Jan.)	35	25	25	15	10	110

85. This was apparently the focus of Bear Creek's engagement with the communities; the principal issue discussed was the number of jobs the company would create for the

[122] *See* Peña Report at paras. 57-58 [Exhibit REX-002].

[123] *See* Peña Report at paras. 57-58 [Exhibit REX-002].

[124] *See* Peña Report at para. 58 [Exhibit REX-002].

community, rather than focusing on the cultural and environmental concerns of the local communities. However, a strategy solely focused on buying support with jobs is not a comprehensive or sustainable approach to building community support. That strategy by Bear Creek could not address all of the communities' concerns with respect to the Project, even though Bear Creek knew that these communities were likely to be particularly concerned about a large-scale open-pit mining project like the one Bear Creek was proposing. As the Ministry of Foreign Affairs informed Bear Creek during the application process for the declaration of public necessity, the Huacullani and Kelluyo communities were traditionally agricultural—they were not familiar with mining activities or the effects of such activities.[125] Naturally, the idea of having a mining project next to their town raised alarm in communities concerned about the effects this Project might have on the environment and their agricultural activities. Those concerns were not answered by a promise of jobs for some individuals; the rest of the members of the communities were reasonably worried about the project's impact on them and would receive no benefits.

86. Moreover, Bear Creek's decision to make agreements with and award job posts to a handful of the affected communities, without making comparable or even other beneficial arrangements with closely neighboring communities like those of Kelluyo or in the rest of Huacullani, had the effect of dividing those communities. A small number of benefitting communities were pitted against a much larger number of affected communities that were not engaged by Bear Creek. While this might have been manageable in the early years of exploratory activities, as the project continued to develop and its size and scope became more clear, that division sharpened. As academics who have studied the Santa Ana situation have

[125] *See* Opinion by Ministry of Foreign Affairs to the Ministry of Energy and Mines Regarding Bear Creek's Declaration of Public Necessity, OF.RE(VSG) No. 2-13-17/43, September 26, 2007 [Exhibit R-047].

concluded, Bear Creek's favoring of only a subset of the affected communities created tensions in the region and generated opposition to the Project.[126]

87. Notably, Prof. Peña learned in his research that, by the time of the 2011 protests that will be discussed in detail in Section II.D.2 below, this tension between the communities reached a breaking point at which the communities in opposition to the Project prevailed and imposed their will on the less numerous communities that had stood to benefit from the Project.[127] Members of the Huacullani communities that had cooperated with Bear Creek were obliged by community social pressure to participate in the protests against the Project, as a form of making amends to the opposition communities they had offended.[128] Thus, the division that Bear Creek had created with its differential treatment ultimately backfired against the communities from which the company had sought support. The end result is that all of the communities now present (at least outwardly) a unified front in opposition to the Project.

88. Second, Bear Creek's relations with the communities were not even peaceful. In fact, in late 2008, members of the Kelluyo communities set Bear Creek's camp site on fire.[129] On October 14, 2008 a Bear Creek representative filed a criminal complaint against certain Aymara leaders because they had ransacked several of Bear Creek's offices at the camp site and then set fire to the offices.[130] According to the complaint, some 2,000 people gathered at the

[126] *See* Honorio Pinto Herrera, *Mining Conflict in Santa*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at p. 212 [Exhibit R-048]; *see also* Peña Report at para. 69 [REX-002].

[127] *See* Peña Report at para. 69 [Exhibit REX-002].

[128] *See* Peña Report at para. 90 [Exhibit REX-002].

[129] *See* Office of the Ombudsman of Perú, "Social Conflict Report No. 56", October 31, 2008, at p. 58 [Exhibit R-049]; *see also* Peña Report, para. 63 [Exhibit REX-002].

[130] *See* Resolution No. 468-2008-MP-2da-FPMCH-DESAGUADERO, October 17, 2008, Third *Considerando* [Exhibit R-051].

Santa Ana camp site to complain about Bear Creek's mining activities in the area.[131] These people were from the Kelluyo, Desaguadero, and Zepita districts, all within the Chucuito Province where the Santa Ana Project is located.[132] Eventually, the criminal complaint was dismissed due to lack of evidence against the perpetrators of the events.[133] Yet, the event itself makes clear that the Santa Ana Project faced opposition—indeed, large-scale and potentially violent opposition—dating back to some of the early stages of the exploratory work on the site. It also points to the divide that the Project created between affected communities: those sacking and burning the camp site were from communities that had not been engaged by Bear Creek, such as the Kelluyo communities. Had the company taken the 2008 event as a sign that it needed to work with and engage the Kelluyo communities, the situation in 2011 might well have been different.

89. Third, contrary to Claimant's claims, a public hearing that Bear Creek held on February 23, 2011 as part of their citizen participation plan ("PPC") is not evidence that the company had excellent relations with the local communities.[134] Claimant points to the large number of people who attended. But Felipe Ramirez, the General Director of Mining Affairs of MINEM at the time, explains that in his experience, attendance does not necessarily signal support. He explains that most attendees of a public hearing are not necessarily there to show

[131] *See* Resolution No. 468-2008-MP-2da-FPMCH-DESAGUADERO, October 17, 2008, Second *Considerando* [Exhibit R-051]; *see also* Omar Cavero, "Understanding Social Conflict: The Puno 2011 Mining Protests," December 2014, at p. 17 [Exhibit R-052].

[132] *See* Patricia Quiñones, *Concessions, Participation, and Conflict in Puno. The Santa Ana Case*, THE LIMITS TO THE MINING EXPANSION IN PERU 61 (2013) [Exhibit R-117]; *see also* Omar Cavero, "Understanding Social Conflict: The Puno 2011 Mining Protests," December 2014, at p. 17 [Exhibit R-052].

[133] *See* Peña Report, at para. 67 [Exhibit REX-002]; *see also* Omar Cavero, "Understanding Social Conflict: The Puno 2011 Mining Protests", December 2014, at p. 17 [Exhibit R-052].

[134] *See* Claimant's Memorial at para. 63; *see also* Antunez de Mayolo Witness Statement at para. 15.

support for the project, but rather to listen and find out whether their concerns will be addressed and whether they are likely to receive any benefits from the project.[135]

90. Furthermore, even if attendance were an indication of support, in this case it did not signal broad support from all affected communities. Prof. Peña notes that it was principally members the Huacullani communities who attended,[136] and these communities were in favor or at least were not opponents of the Project because Bear Creek had offered them job posts. What mattered more was whether Bear Creek had the support of the rest of the affected communities, and the events of the hearing indicated that it did not. More than 100 queries were raised at the hearing, primarily by members of the Kelluyo communities who, although smaller in number at the meeting than the Huacullani attendees, were evidently much more vocal.[137] Most of the queries focused on concerns about possible contamination and other risks of the Santa Ana Project.[138] The questioners were evidently concerned that the Project would affect the area's waterways, which would then affect their main economic activities (agriculture and grazing).[139]

91. Bear Creek's claims of community support are also undermined by the fact that the hearing concluded with protests led by the mayor of Desaguadero,[140] the closest sizeable town to the Project site (48 km away) and an area from which some of the 2008 camp site protesters had come as well. Subsequently, some members of the Kelluyo communities also claimed that they were not allowed into the hearing, and that Bear Creek never informed them of

[135] *See* Ramírez Witness Statement at para. 20 [Exhibit RWS-002].

[136] *See* Peña Report at para. 76 [Exhibit RWS-002]; *see also* Letter from Kelluyo Community Inquiring about the Project, March 2011 [Exhibit R-053]; List of Participants at the Public Hearing, February 23, 2011 [Exhibit R-055].

[137] *See* Claimant's Memorial at para. 63; *see also* Minutes of the Public Hearing, Mineral Subsector No. 007-2011/MEM-AAM – Public Hearing for the ESIA of the "Santa Ana" Project, February 23, 2011 [Exhibit C-076].

[138] *See* Questions Raised at the Santa Ana Public Hearing, February 23, 2011 [Exhibit R-054].

[139] *See* Questions Raised at the Santa Ana Public Hearing, February 23, 2011 [Exhibit R-054].

[140] *See* Ramírez Witness Statement at paras. 20-21 [Exhibit RWS-002].

the effects of the Project. They instead asked MINEM to provide them with the necessary information regarding the Project. [141]

92. Fourth, Bear Creek's public hearing clearly did not succeed in assuaging the population's concerns or in securing support from the affected communities. To the contrary, the same communities who raised queries about the project at the public hearing on February 23, 2011 then actively participated in the protests that began in early March 2011, as described in the next section. For example, on March 2, 2011, only days after the public hearing, members of the Kelluyo Communities were joined by members of the Desaguadero, Zepita, and Pisacoma communities in a meeting in Desaguadero to call for the cancellation of the Santa Ana Project. They drafted petitions to the Peruvian Congress, the President, and the Minister of Energy and Mines asking that they prohibit all mining activities in the south of Puno and cancel the Santa Ana project.[142] These documents were signed by 372 representatives of communities from Kelluyo, Desaguadero, Zepita, Pisacoma and Huacullani Districts. Most of the signatures are from representatives of the Kelluyo District, neighboring district to Santa Ana.[143] This event was the starting point of the anti-mining protests throughout the Puno Department that are described in the next Section.

93. In sum, Bear Creek failed to address the communities' concerns and to establish productive relations with all of the communities that would be affected by the Project, as international best practices dictate that it should have done. As a result, a number of

[141] *See* Letter from Kelluyo Community Inquiring about the Santa Ana Project, March 2011 [Exhibit R-053].

[142] *See* Memorial submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP, March 10 2011 ("Memorial from the Frente de Defensa No. 005"), at p. 1 [Exhibit R-015]; Memorial submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to the President of the Republic, Memorial No. 0001-2011-CO-FDRN-RSP, March 10 2011 ("Memorial from the Frente de Defensa No. 001"), at p. 1 [Exhibit R-016]; Memorial submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to the Minister of Energy and Mines, Memorial No. 0002-2011-CO-FDRN-RSP, March 10 2011 ("Memorial from the Frente de Defensa No. 002"), at p. 1 [Exhibit R-017].

[143] *See e.g.*, Memorial from the Frente de Defensa No. 005 at pp. 2-17 [Exhibit R-015].

communities objected to the Project, which in turn created tension in the region between the small number of communities that would benefit from job posts at the Project and the much larger group of communities that would not benefit even though they would be affected by the Project. This tension and opposition fueled the protests that ensued. In the next Section, Respondent describes the tumultuous events that took place between March and June 2011, which ultimately contributed to the Government's decision to repeal Bear Creek's declaration of public necessity.

2. The 2011 Protests in Puno Were Directly Related to the Santa Ana Project

94. Between March and June 2011, the Department of Puno was paralyzed and isolated from the rest of Peru due to severe social unrest. Major cities in the Puno Department, such as the cities of Puno and Desaguadero, were locked down for more than a month, and the situation was critical. Several people were killed or injured and commerce between Peru and Bolivia was blocked. The situation resulted in millions of dollars in losses. The central government had to take immediate actions to avoid any further escalation of the conflict.

95. In its Memorial on the Merits, Bear Creek paints a picture that the protests in Puno and the government's responses were merely spectacles of election-year maneuvering between political parties and that the protests were motivated by political interests that were completely unrelated to the Santa Ana Project.[144] That characterization is simply implausible. A straightforward review of the events that took place between March and June 2011 shows that Bear Creek's presence in the south of Puno was an essential factor that drove the conflict.

[144] *See* Claimant's Memorial at para. 80.

96. Three fronts of protests developed in Puno between March and June 2011: two in the north and one in the south of the Department. All of them were related to mining activities in the region.[145]

97. The front in the south was the first one to erupt. Protesters on this front explicitly sought from the outset, among other things, the cancellation of the Santa Ana Project.[146] As just discussed above, on February 23, 2011 Bear Creek held the public hearing required by the PPC. The PPC is one of the elements needed for the approval of the Environmental Impact Study (using its Spanish initials, "EIA") for exploitation activities. Respondent describes in detail the EIA's approval process, which Bear Creek has never completed, in Section II.G.1 below. At the EIA hearing, members of the Kelluyo communities among others raised queries about the impact of the Project in the region.[147] In particular, they were concerned about risks of contamination of their waterways, in part because other mining projects in the North of Puno had injured communities and polluted waterways, including the Rio Ramis.[148] The EIA hearing concluded with protests led by the mayor of Desaguadero.[149]

98. The population's concerns with respect to Santa Ana were legitimate. First, the Aymara people's main economic activity is agriculture and of cattle raising. Any effect on their waterways and water sources could deeply harm their livelihoods.[150] Second, the Aymara

[145] *See* Witness Statement of Fernando Gala, October 6, 2015 ("Gala Witness Statement"), at para. 7 [Exhibit RWS-001].

[146] *See* Gala Witness Statement at paras. 16-17 [Exhibit RWS-001].

[147] *See* Claimant's Memorial at para. 63; *see also* Minutes of the Public Hearing, Mineral Subsector No. 007-2011/MEM-AAM- Public Haring for the ESIA of the "Santa Ana" Project, February 23, 2011 [Exhibit C-076].

[148] *See* Questions Raised at the Santa Ana Public Hearing, February 23, 2011 [Exhibit R-054].

[149] *See* Ramírez Witness Statement at para. 20 [Exhibit RWS-002]; Gala Witness Statement at para. 19 [Exhibit RWS-001]; Peña Report at para. 77 [Exhibit REX-002].

[150] *See* Ramírez Witness Statement at para. 20 [Exhibit RWS-002]; *see also generally* Peña Report at paras. 9-13 [Exhibit REX-002].

people are not accustomed to mining activities.[151] In contrast, northern populations of Puno have lived in proximity to mining operations and have suffered due to contamination caused by both authorized and illegal mining projects. Thus, the Puno Department has not had positive experiences with mining, which explains why populations in the south—having heard principally of those negative experiences—would be reluctant to accept the project.

99. An analysis of the list of participants at the public hearing and of those that raised queries at the hearing shows that Bear Creek did not have the required support to carry on with the Santa Ana Project. As explained above, most of the participants were members of the five communities with which Bear Creek had been working—Huacullani, Ingenio, Challacollo, Condor de Ancocagua, and Ancomarca.[152] But, most of the queries were raised by members of the increasingly disaffected Kelluyo communities.[153] As discussed above, Bear Creek did not work closely with communities other than its chosen five Huacullani communities, even though the Kelluyo communities, for example, are in the neighboring district to the Project, and even though Bear Creek had recognized in 2006 that they were among 26 communities in the area that would be affected by the proposed project.[154]

100. On March 2, 2011 numerous representatives of from the Kelluyo, Desaguadero, Pisacoma, Zepita and Huacullani communities met in the city of Desaguadero to protest against

[151] *See* Peña Report at para. 49 [Exhibit REX-002]; *see also* ICMM, "Peru-Country Case Study-The Challenge of Mineral Wealth: Using Resource Endowments to Foster Sustainable Development," July 2007, at Section 3.2.2 [Exhibit R-141].

[152] *See* Claimant's Memorial at para. 61; *see also* List of Participants at the Public Hearing, February 23, 2011 [Exhibit R-055].

[153] *See* Questions Raised at the Santa Ana Public Hearing, February 23, 2011 [Exhibit R-054].

[154] *See* Claimant's Memorial at para. 61; *see also* Request from Bear Creek to MINEM Soliciting Authorization to Acquire Mining Rights Located in the Border Area, December 5, 2006, at pp. 18-19 [Exhibit C-017]

the mining activities in the south of Puno and the risk of contamination that they might pose.[155] They voiced concerns about the Santa Ana Project, in particular, and requested its cancellation. At this meeting, representatives of the communities prepared three documents addressed to the President, the Minister of Mines, and the Congress, respectively, requesting the prohibition of all mining activities in the south of Puno and the cancellation of the Santa Ana Project.[156] These documents were submitted with 372 signatures from representatives of different communities, most of them from the Kelluyo communities.[157] In addition, Kelluyo communities submitted another petition challenging Santa Ana's EIA and demanding that no mining should be allowed within their territories.[158] This document bears signatures of 61 representatives from the communities.[159]

101. On March 7, 2011, the communities' representatives led by a local activist, Mr. Walter Aduviri, submitted to the Regional Council of Puno a draft ordinance that purported to prohibit all mining activities in Puno.[160] The ordinance was approved by the Regional Council on March 20, 2011. The Regional President of Puno, Mr. Mauricio Rodríguez, disagreed with

[155] *See* Memorial submitted by Frente de Defensa No. 005, at pp. 2-17 [Exhibit R-0015]; Memorial submitted by the Frente de Defensa No. 002 at p. 2 [Exhibit R-017]; Memorials submitted by the Frente de Defensa No. 001, at p. 2 [Exhibit R-016].

[156] *See* Memorials submitted by the Frente de Defensa No. 005, at p. 2 [Exhibit R-0015]; Memorial submitted by the Frente de Defensa No. 002 at p. 2 [Exhibit R-017]; Memorials submitted by the Frente de Defensa No. 001, at p. 2 [Exhibit R-016].

[157] *See* Memorials submitted by the Frente de Defensa No. 005, at p. 2 [Exhibit R-0015]; Memorial submitted by the Frente de Defensa No. 002 at p. 2 [Exhibit R-017]; Memorials submitted by the Frente de Defensa No. 001, at p. 2 [Exhibit R-016].

[158] *See* Memorials submitted by the Frente de Defensa No. 005, at p. 19 [Exhibit R-0015]; Memorial submitted by the Frente de Defensa No. 002 at p. 18 [Exhibit R-017]; Memorials submitted by the Frente de Defensa No. 001, at p. 30 [Exhibit R-016].

[159] *See* Memorials submitted by the Frente de Defensa No. 005, at pp. 20-24 [Exhibit R-0015]; Memorial submitted by the Frente de Defensa No. 002 at p. 19-23 [Exhibit R-017]; Memorials submitted by the Frente de Defensa No. 001, at p. 31 [Exhibit R-016].

[160] *See* "Elimination of Mining Activities in Puno is Proposed," *La República Newspaper South Edition*, March 9, 2011 [Exhibit R-057].

and refused to sign the ordinance.[161] In response to the Regional President's position, 2,000 people gathered on March 30, 2011 at the main square in the city of Puno to demand the approval of the ordinance. [162]

102. The Regional President called for peace in the region and announced that he would meet with the protesters in the city of Juli, in Chucuito Province (the province in which the Santa Ana Project was sited), to discuss their complaints.[163] This meeting was scheduled to take place on April 6, 2011. However, after flyers threatening his life were circulated in the area, the Regional President had to cancel the meeting for security reasons.[164] Protesters were unhappy about the meeting's cancellation and announced that there would be a two day strike in the city of Desaguadero unless the Regional President agreed to sign the ordinance prohibiting all mining activities in the south of Puno.[165]

103. The threatened two day strike proceeded, starting on April 25, 2011. On that day, the protesters blocked the entrances to the city of Desaguadero, including the Desaguadero bridge to Bolivia. The city of Desaguadero is one of the main cities in the Puno Department, and more importantly, the Desaguadero Bridge is the main point of transit for persons and commercial trade between Peru and Bolivia.[166] If the bridge is blocked, commerce is deeply affected. During the strike, many institutions and business premises closed for fear of attacks by

[161] In the end, the ordinance was never published and never came into force; moreover, the regional government did not have the authority to enact such a ban in any event, because such mining projects are within the jurisdiction of the national government. *See* Human Rights and Environment Association, Chronology: Antimining Protests in the South Region-2011, 2011 ("DD.HH. Chronology") at p. 6 [Exhibit R-058]; Patricia Quiñones, *Concessions, Participation, and Conflict in Puno. The Santa Ana Case* in THE LIMITS TO THE MINING EXPANSION IN PERU 18 (2013) [Exhibit R-117].

[162] *See* Gala Witness Statement at para. 22 [Exhibit RWS- 001].

[163] *See* DD.HH. Chronology at p. 4 [Exhibit R-058].

[164] *See* DD.HH. Chronology at p. 4 [Exhibit R-058].

[165] *See* DD.HH. Chronology at p. 4 [Exhibit R-058].

[166] *See* Gala Witness Statement at para. 23 [Exhibit RWS- 001]; *see also* "Anti-mining Strike Generates Losses in the Tourism Sector in Puno," *La República Newspaper South Edition,* April 25, 2011 [Exhibit R-059].

the protesters. People were afraid to go to work and the city was paralyzed. The results were indeed chaotic and tragic. During the protest, several people were injured and one person died.[167]

104. As an aside, Bear Creek tries to suggest that none of the 2011 protests were related to the Santa Ana Project because they occurred in the cities and not at the Santa Ana project's camp site.[168] This is a misguided proposition. The 2011 strikes occurred in the major cities of Puno in order to maximize the impact that they would have on the government. As just noted, one the main sites of the protests was Desaguadero, which is one of the main cities in Puno and is also the closest city to the Santa Ana Project—a mere 45 kilometers away. In addition, according to the members of the communities interviewed by Prof. Peña, demonstrations did occur in Huacullani and Kelluyo as well during this period.[169] The protests were always related to the Santa Ana Project.

105. Returning to the chronology of events: On April 26, 2011 the Regional President of Puno asked the central government to intervene in the situation.[170] In a letter addressed to the Minister of Mines, the Regional President described the problematic situation that was developing in Puno due to the anti-mining protests. He explained that the two-day strike had seriously obstructed trade and transportation in the region.[171] The Regional President alerted the Minister that the protesters were planning a possible indefinite regional strike if the government

[167] *See* Gala Witness Statement at para. 23 [Exhibit RWS- 001]; *see also* "Anti-mining Strike Results in Violence," *La República Newspaper South Edition,* April 27, 2011 [Exhibit R-060].

[168] *See* Claimant's Memorial at para. 71.

[169] *See* Peña Report at para. 83 [Exhibit REX-002].

[170] *See* Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011 [Exhibit R-018]; *see also* "1700 Mining Concessions," *La República Newspaper South Edition*, April 28, 2011 [Exhibit R-061].

[171] *See* Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011 [Exhibit R-018].

did not respond to their complaints.[172] He explained that this constituted a "serious risk to governability of the Puno region."[173] In particular, the Regional President requested the suspension of the Santa Ana Project.[174] In a second letter, also addressed to the Minister of Mines and dated only two days later to the first one, the Regional President also requested the suspension of *all* mining activities in Puno.[175]

106. In support of its (incorrect) claim that the 2011 protests were not related to the Santa Ana project, Claimant maintains in its Memorial that the Regional President did not request specifically the cancellation of the Santa Ana Project. [176] Evidently, Claimant is either ignoring or forgetting the Regional President's first letter, which did specifically request the cancellation of the Santa Ana Project, and did connect the protests to Bear Creek's presence in the region. [177]

107. In response to the letters of April 26 and 28, the Vice-Minister of Mines, Mr. Fernando Gala, held a meeting with the Regional President on May 6, 2011.[178] At that meeting, Regional President Rodríguez explained that the population in the south of Puno (which to date had not had experience with significant mining activity) was deeply concerned about the risks of contamination associated with mining activities in the area. The Regional President informed Mr.

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[172] *See* Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011 [Exhibit R-018].

[173] Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011 [Exhibit R-018].

[174] *See* Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011 [Exhibit R-018].

[175] Letter No. 521-2011-GR-PUNO/PR from M. Rodriguez, Regional President of Puno, to P.E. Sánchez, Minister of Entergy and Mines, April 28, 2011 [Exhibit C-089].

[176] *See* Claimant's Memorial at para. 68.

[177] *See* Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011 [Exhibit R-018].

[178] *See* Gala Witness Statement at para. 24 [Exhibit RWS- 001].

Gala that, in general, the local communities lacked an understanding of the possible impacts (good or bad) that a mining project could cause. In particular, members of communities within the area of influence of the Santa Ana Project—Kelluyo communities—were not well-informed about the review process that Santa Ana's EIA would undergo at MINEM or about the impacts the Santa Ana project could have on their communities and their lands.[179] Vice-Minister Gala explained to the Regional President that Bear Creek had applied for approval of its EIA, but that the EIA had not been approved, and MINEM was still studying the potential impact of the project and Bear Creek's proposed means of addressing those impacts. Unless and until it obtained MINEM's approval of the EIA (and many other discretionary permits and authorizations from MINEM and other authorities), Bear Creek could not initiate any exploitation activities. In other words, Bear Creek had not yet acquired the right to exploit the mine, and might never do so.[180] Regional President Rodríguez asked that a commission of MINEM representatives be sent to Puno to explain this procedural posture to the population, in order to try to avoid the indefinite strike that had been threatened.[181]

108. As requested, on May 9, 2011 a delegation from MINEM was dispatched to Puno to try to explain the status of Bear Creek's EIA, and the general process for reviewing EIAs, to the local populations. The MINEM delegation met with 500 people. The main message that they intended to convey was that Bear Creek's EIA was still being assessed by the Ministry and that the Ministry would consider all of the communities' concerns with respect to potential adverse impacts of the project. The MINEM representatives also wanted to confirm that Bear Creek

[179] *See* MINEM, "Santa Ana Project May Not Do Any Mining Activities Because It Does Not Have the Environmental Permit," May 6, 2011 [Exhibit R-019]; *see also* Gala Witness Statement at para. 24 [Exhibit RWS-001].

[180] *See* Gala Witness Statement at para. 24 [Exhibit RWS-001].

[181] *See* Gala Witness Statement at para. 24 [Exhibit RWS-001].

could not start any exploitation activities until it had received all necessary approvals to initiate operations—and that any approval of a EIA would be only the first step to obtain that green light.[182] The meeting failed, however, when protesters did not allow the delegation to proceed with their presentation.

109. As threatened, an indefinite strike started in the city of Desaguadero on that same day (May 9, 2011).[183] Several roads were blocked, including the main road between Puno and Tacna (a border region with Chile), and the Desaguadero Bridge to Bolivia was again closed. The city was paralyzed, and the economic losses for the region were dramatic.[184]

110. In light of the increasingly critical situation, on May 15, 2011 the Prime Minister, Sra. Rosario Fernández, created a High Level Commission to travel to Puno to hold meetings with the protesters and seek a solution to the crisis.[185] This Commission was comprised of the Vice-Ministers of Mines, Interior, and Agriculture as well as a representative of the Presidency of the Council of Ministers ("PCM").[186]

111. The High Level Commission held three sessions with the protesters: one in the city of Puno and two in Juliaca, a city in the northern part of the Puno Department. The first session took place on May 16 and May 17, 2011 at the Offices of the Regional Government of

[182] *See* MINEM, "Dialogue Is Initiated to Discuss Mining Activities in the Puno Region", May 9, 2011 [Exhibit R-020]; *see also* Ramírez Witness Statement at para. 29 [Exhibit RWS-002].

[183] *See* Gala Witness Statement at para. 25 [Exhibit RWS-001]; *see also* "Tension Due to Aymara Protests is Back," *La República Newspaper South Edition,* June 9, 201 1[Exhibit R-062].

[184] *See* "Community Members Close Borders," La República Newspaper South Edition, May 11, 2011 [Exhibit R-063]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at p. 214 [Exhibit R-048]; *see also* "Protesters March towards Puno to Demand an Ordinance" *La República Newspaper South Edition*, May 12, 2011 [Exhibit R-064].

[185] *See* MINEM, "High Level Commission from the Executive Power Travels to Puno to Initiate Dialogue", May 15, 2011 [Exhibit R-021]; *see also* Gala Witness Statement at para. 26 [Exhibit RWS-001].

[186] *See* MINEM, "High Level Commission from the Executive Power Travels to Puno to Initiate Dialogue", May 15, 2011 [Exhibit R-021]; *see also* Gala Witness Statement at para. 26 [Exhibit RWS-001].

Puno.[187] Protesters initially demanded that the meeting take place in Desaguadero, but due to security reasons the meeting was held in Puno.[188] After the meeting, the protesters submitted four petitions seeking: (i) Cancellation of all mining and oil concessions in the south of Puno; (ii) cancellation of the Santa Ana Project; (iii) Repeal of Decree 083-2007 which had granted Bear Creek its declaration of public necessity; and (iv) Protection of the Khapia Hill, a sacred site for the Aymaras located partially in the Chucuito Province, some 53 km from the Santa Ana Project, that the Aymara feared could be harmed by mining activities in the area.[189] The strike continued.

112. The High Level Commission's second session with the protesters was held on May 19 and 20, 2011. Due to security concerns, the meetings had to be held in Juliaca, at the Army's headquarters. Six thousand people had congregated at the main square in Puno near the site of the first session, which made it impossible to ensure the security of the members of the High Level Commission.[190] Everything was paralyzed in Puno; schools and offices were closed because protesters had threatened to plunder every store in the city.[191]

113. At the second session, the Commission informed the protesters that the government had adopted measures to protect the Aymaras' sacred Khapia Hill. The Government issued a Resolution declaring the Khapia Hill to be part of the Nation's Cultural Heritage, which

[187] *See* MINEM, "High Level commission Continues Dialogue with Leaders and other Authorities Tomorrow in Puno" May 16, 2011 [Exhibit R-065]; MINEM, "Vice-Minister Gala Asks the Protesters to Lift the Strike to Reach Concrete Solutions," May 17, 2011 [Exhibit R-068]; *see also* Gala Witness Statement at para. 27 [Exhibit RWS-001]; Aide Memoire "Actions Done by the Executive Power Regarding Conflicts in the Puno Department", July 2011 ("Aide Memoire 2011"), at p. 5 [Exhibit R-010].

[188] *See* Aide Memoire 2011 at p. 5 [Exhibit R-010].

[189] *See* Gala Witness Statement at para. 27 [Exhibit RWS-001]; Aide Memoire 2011, at p. 5 [Exhibit R-010].

[190] *See* MINEM, "For Lack of Security Dialogue Between High Level Commission and Leaders Failed", May 19, 2011 [Exhibit R-022]; Aide Memoire 2011, at p. 5 [Exhibit R-010].

[191] *See* Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at p. 214 [Exhibit R-048].

meant that only limited economic activity could take place in the area.[192] The Commission also advised the protesters that it would create a multi-sector committee to study possible actions with respect to mining and oil concessions in the south of Puno. The protesters instantly reacted and rejected this proposal; they insisted on their initial four petitions. Nevertheless, the Government did proceed to create the promised multi-sector committee by Supreme Resolution No. 131 of 2011, issued the next day after the meetings.[193] This committee was comprised of government representatives and representatives of the Chucuito Province (where the Santa Ana project was sited).[194] The strike continued and the situation only continued to escalate. On May 23, 2011 the Ministry of Interior sent armed forces to help police forces maintain control in the area.[195]

114. The third session of the High Level Commission was on May 25 and 26, 2011. Again this meeting had to be held in Juliaca at the Army's headquarters due to security concerns. During these meetings, the High Level Commission proposed to pause the government's review of the EIA for the Santa Ana Project, in a bid to calm the protests and gain some breathing space in which the government could have a reasonable dialogue with the protesters. The protesters did not accept any of the proposals made by the government. The meetings failed, and the Commissioners had to abandon the meeting site in haste, believing there to be an imminent threat to their lives.[196] The strike continued.

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[192] *See* Aide Memoire 2011 at p. 5 [Exhibit R-010]; Resolution Declaring Cultural Heritage, Viceministerial Resolution No. 589-2011-VM-PC-IC-MC, May 13, 2011 [Exhibit R-023].

[193] *See* Aide Memoire 2011 at p. 6 [Exhibit R-010]; Resolution Creating Multi-Sectorial Committee, Supreme Resolution No. 131-2011-PCM, May 21, 2011 [Exhibit R-024]; MINEM: "A Multi-Sectorial Committee Is Created to Study and Propose Actions Regarding Mining Concessions in Puno," May 22, 2011 [Exhibit R-067].

[194] *See* Resolution Creating Multi-Sectorial Committee, Supreme Resolution No. 131-2011-PCM, May 21, 2011, at Arts. 1 and 2 [Exhibit R-024].

[195] *See* MINEM, "Vice-Minister of Mines Asks the Authorities of Puno to Promptly Name Representatives to the Multi-Sectorial Committee," May 23, 2011 [Exhibit R-069]; *see also* Resolution that Authorizes Intervention of Armed Forces in Puno, Supreme Resolution No. 161-2011-DE, May 22, 2011 [Exhibit R-070].

[196] *See* Gala Witness Statement at para. 29 [Exhibit RWS-001]; Aide Memoire 2011 at p. 6 [Exhibit R-010].

115. At the same time that the meetings in Puno between the central government and the protesters were falling apart, the security situation in the Puno Department reached critical levels. On May 25, some 13,000 protesters took over the city of Puno. As the strike had been going on for 16 days, there were shortages of food and services were lacking in Puno, protesters were living on the streets, and the hygiene situation was alarming. Numerous people were injured, and approximately US $20 million were lost in business activity and tourism was crippled.[197] On May 26, violent protesters looted and burned the offices of the Tax and Customs Authority ("SUNAT") and the Comptroller in Puno.[198] Protesters also threatened to sabotage the second round of the national presidential elections that were scheduled to occur on June 5, 2011.[199] The government needed to take immediate action to protect the lives and well-being of those in Puno, to protect trade and commerce, and to protect the electoral process so that people could freely exercise their democratic rights.[200]

116. Faced with such a chaotic situation, the Prime Minister summoned the Regional President of Puno and the mayors of the towns involved in the protests to a meeting in Lima on May 28, 2011. At this meeting, the government proposed three measures in an effort to calm the situation: [201]

[197] *See* "Strike Affects Bolivian Exports," *La República Newspaper South Edition*, May 26, 2011 [Exhibit R-071]; "Protesters are Open to Dialogue," *La República Newspaper South Edition*, May 26, 2011 [Exhibit R-072]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at pp. 214-215 [Exhibit R-048].

[198] *See* "Aymara Rage Is Out of Control in Puno," *La República Newspaper South Edition*, May 27, 2011[Exhibit R-073]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at pp. 214-215 [Exhibit R-048]; DD.HH. Chronology, p. 10 [Exhibit R-058].

[199] *See* DD.HH. Chronology, p. 15 [Exhibit R-058].

[200] *See* MINEM, Press Release, May 26, 2011 [Exhibit R-105].

[201] *See* Gala Witness Statement at para. 30 [Exhibit RWS- 001]; Aide Memoire 2011 at pp. 6-7 [Exhibit R-010].

(i) Supreme Decree No. 026 of 2011, which suspended the admission of any new requests for mining concessions in the south of Puno for 12 months.[202]

(ii) Supreme Resolution No. 142 of 2011, which extended the scope of Supreme Resolution No. 131 creating the multi-sector committee to study actions with respect to mining activities in the south of Puno. This amendment provided that decisions taken by the committee would be binding.[203]

(iii) Directorial Resolution No. 162 of 2011, which suspended MINEM's process for reviewing Santa Ana's EIA for exploitation activities in order to allow time for calm to be restored.[204]

117. On May 31, 2011, the protesters in the south announced that they would suspend the strike in order to allow the national elections to take place. [205] They cleared the Desaguadero Bridge and roads, which by that point had been blocked for 25 days.[206] Protests were suspended from May 31st to June 8th.

118. On May 30, 2011, however, a second front of protests erupted. Quechua communities from the north of Puno—which are distinct from the Aymara communities in the south of Puno—took over the *La Poderosa* Mine in the Melgar Province. The Quechua communities alleged that mining activities at *La Poderosa* had contaminated their water

[202] *See* Decree Suspending Admissions of New Mining Requests in the Provinces of Chucuito, El Collao, Puno and Yunguyo in the Puno Department, Supreme Decree No. 026-2011-EM, May 29, 2011 ("Supreme Decree No. 026") [Exhibit R-025].

[203] *See* Resolution that Extends the Scope of the Multi-Sectorial Committee, Resolution No. 142-2011-PCM, May 29, 2011, at Art. 1 [Exhibit R-026].

[204] *See* DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [Exhibit C-098]; see *also* Zegarra Witness Statement at para. 19 [Exhibit RWS-003]; Ramírez Witness Statement at paras. 30-34 [Exhibit RWS-002].

[205] *See* Gala Witness Statement at para. 32 [Exhibit RWS-001]; Aide Memoire 2011 at p. 11 [Exhibit R-010]; *see also* "Strike is Lifted for Elections," *La República Newspaper South Edition*, May 31, 2011 [Exhibit R-074].

[206] *See* "Strike is Lifted for Elections," *La República Newspaper South Edition*, May 31, 2011 [Exhibit R-074]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at p. 215 [Exhibit R-048]; DD.HH. Chronology, p. 15 [Exhibit R-058].

resources.[207] On June 1, 2011 officials from the Ministry of Mines went to the site to try to regain control over the situation; they suspended the activities of the mine in order to be able to initiate a dialogue with the protesters.[208]

119. On June 7, with the strike in the south due to resume in days, once again threatening commerce over the Desaguadero Bridge, the Government of Bolivia issued a note of protest to the Peruvian embassy in La Paz.[209] The Bolivian Government was "deeply concerned" about the situation in the Puno Department, because the "conflict was obstructing free transit between the two countries, causing significant and considerable economic damages to the exports and transportation sectors from Bolivia."[210] Thus it was clear that the social unrest had not only affected Puno and its stability and security, but also it had affected other regions of the country and as the Republic's bilateral relations with Bolivia.

120. On that same day the multi-sector committee created by Supreme Resolution No. 131 of 2011 had its first meeting in Puno to try to find solutions to the protesters' demands.[211]

121. On June 8, 2011 Vice-Minister Gala called on the population to refrain from any additional violence. He stated that the government had taken the protesters' concerns into account, and it had adopted appropriate measures to address their complaints. The measures adopted were those previously proposed on May 20 and 28: (i) the suspension of admitting new mining concession requests in Puno (Decree No. 026); (ii) the creation of multi-sector committee

[207] *See* Gala Witness Statement at paras. 8-10 [Exhibit RWS-001]; Aide Memoire 2011 at p. 11 [Exhibit R-010]; *see also* "Strike is Lifted for Elections," *La República Newspaper South Edition*, May 31, 2011 at p. 29 [Exhibit R-074].

[208] *See* Gala Witness Statement at para. 9 [Exhibit RWS-001]; Aide Memoire 2011, at p. 11 [Exhibit R-010].

[209] *See* Note of Protest from the Government of Bolivia, June 7, 2011 [Exhibit R-075].

[210] Note of Protest from the Government of Bolivia, June 7, 2011 [Exhibit R-075].

[211] *See* MINEM, "Multi-Sectorial Committee Initiates Sessions to Study and Propose Actions Regarding Mining Concessions in Puno" June 7, 2011 [Exhibit R-076].

to study the actions to be taken with respect to mining projects in the South (Resolutions 131 and 142 of 2011); and (iii) the temporary suspension of MINEM's review of Santa Ana's EIA.[212] However, the government's bid to restore calm was unsuccessful, and the strike in the south restarted on that day. Protesters blocked the border once more, and 500 police had to be sent to the area.[213]

122. On June 14, 2011, the second front of protests from the Melgar Province (north of Puno) commenced their own strike. Protesters blocked the road that connects Juliaca with the city of Cusco. These protesters claimed that mining activities had caused contamination and demanded the cancellation of all mining concessions in the Melgar Province.[214]

123. On June 15, 2011, a third front of protests erupted, also in the north of Puno in the Azángaro Province.[215] The area had long suffered from the effects of illegal mining operations. In 2007, the government had created a commission to deal with the issue, but despite the government's efforts, illegal mining activities in the area had increased between 2009 and 2011. This illegal activity contaminated the Ramis River basin. Communities that lived around the area and depended on that water source were deeply affected. Members of these communities demanded immediate action by the government to stop the illegal mining and contamination. On June 17, the government adopted Emergency Decree No. 028 of 2011 to declare the protection of

[212] *See* MINEM, "MEM: There Are No Mining Activities in the South of Puno, the Requests Have Been Answered," June 8, 2011 [Exhibit R-077]; Gala Witness Statement at paras. 8-10 [Exhibit RWS-001]; Aide Memoire 2011 at p. 11 [Exhibit R-010]; "Melgar Also Rejects Mining," *La República Newspaper South Edition*, June 15, 2011 [Exhibit R-079].

[213] *See* "Protesters Threat To Reinitiate Protests," *La República Newspaper South Edition*, June 8, 2011 [Exhibit R-078].

[214] *See* Gala Witness Statement at paras. 8-10 [Exhibit RWS-001]; Aide Memoire 2011 at p. 11 [Exhibit R-010]; *see also* "Melgar Also Rejects Mining," *La República Newspaper South Edition*, June 15, 2011 [Exhibit R-079].

[215] *See* "Antimining Strike is Will Be Against Informal Mining," *La República Newspaper South Edition*, June 20, 2011 [Exhibit R-080].

the Ramis River Basin to be a public necessity and a national interest. This Decree allowed the armed forces take action to stop the illegal mining activities in the area.[216]

124. On June 16, 2011, the Prime Minister invited the protesters from the south to a dialogue in Lima.[217] By that time, the crisis situation had reached a new high point. Since May 9, 2011 when the indefinite strike started, lives had been lost, hundreds of people had been injured, and millions of dollars of economic losses were being incurred. In addition, the situation was growing tense with Bolivia. The government had to take immediate action.

125. The Prime Minister and other government officials met in Lima with representatives of the protesters, including representatives from the *Comunidades Campesinas* of Kelluyo and Desaguadero, from June 17 to June 23, 2011. As Vice-Minister Gala explains, these meetings were long and tense.[218] The protesters demanded concrete actions from the Government, and insisted that all mining activities in the south of Puno–including the Santa Ana Project—should cease. Government officials explained that they had already adopted Decree No. 026, suspending admission of mining concessions requests in the south of Puno. In addition, the Government adopted Supreme Decree No. 034 of 2011, which provides that no mining activity (exploration or exploitation) in Puno will be authorized unless local communities have been consulted, consistent with Convention No. 169 of the ILO.[219]

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[216] Decree that Declares the Recovery of the Ramis River, a National Interest and an Environmental Priority, Emergency Decree No. 028-2011, June 17, 2011 ("Emergency Decree No. 028"), at Art. 1 [Exhibit R-013].

[217] *See* MINEM, "MEM Reiterates Its Will to Discuss With the Aymara People Within the Boundaries of the Constitution and Laws," June 16, 2011 [Exhibit R-081]; *see also* "Aymaras Accept Dialogue with the Executive Power," *La República Newspaper South Edition*, June 10, 2011 [Exhibit R-082].

[218] *See* Gala Witness Statement at para. 34 [Exhibit RWS-001].

[219] *See* Gala Witness Statement at para. 36 [Exhibit RWS-001]; *see also* Zegarra Witness Statement at para. 29 [Exhibit RWS-003]; Decree that Issues Provisions With Respect to Mining and Oil Activities in the Puno Department, Supreme Decree No. 034-2011-EM, June 25, 2011 ("Supreme Decree No. 34"), at Art. 1 [Exhibit R-027]. *See also* ILO Convention at Art. 15 [Exhibit R-029]. (ILO Convention No. 169 requires, in relevant part, that "governments shall consult these peoples, with a view to ascertaining whether and to what degree their interests

126. With respect to the Santa Ana Project, Vice-Minister Gala and Dr. César Zegarra explain in their witness statements that during the June meeting in Lima, representatives from the communities turned over to the government various documents that apparently indicated that Bear Creek had initially operated the Santa Ana Project through a Peruvian national,[220] which in turn indicated that Bear Creek had violated Article 71 of the Constitution by indirectly acquiring or holding mining rights prior to obtaining a declaration of public necessity.[221] On the basis of those credible indicia that Bear Creek had violated Peruvian law in acquiring the concession rights, coupled with the compelling need to quell the crisis situation in Puno, the Government reasonably began to reconsider whether its prior public necessity determination for the Santa Ana Project was appropriate or sustainable under the circumstances.

127. On June 17, 2011 Primer Minister Fernández also invited the protesters from the second front of protests (Melgar Province, North of Puno) to meetings in Lima which were held from June 21 to June 23, 2011, and were presided over by the Minister of Agriculture. Two measures resulted from these meetings as explained in Section II.D.3 below. First, the Government adopted Supreme Decree No. 033 of 2011 ("Decree No. 033"), which suspended the admission of new requests to acquire mining concessions in all of the Puno Department—extending the scope of Decree No. 026 that had suspended admission of mining concessions requests only in the south of Puno. Second, Decree No. 033 also provides that, with respect to mining concessions that had already been granted, MINEM or the Regional Government had to engage in consultations with the communities within the project's area of influence, again in

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would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands.")

[220] *See* Gala Witness Statement at para. 35 [Exhibit RWS-001]; *see also* Zegarra Witness Statement at para. 27 [Exhibit RWS-003].

[221] *See* Gala Witness Statement, at para. 35 [Exhibit RWS-001]; Zegarra Witness Statement at para. 26 [Exhibit RWS-003].

accordance with ILO Convention No. 169. Third, the Government created another multi-sector committee to study the possible actions vis-à-vis mining concessions in the Melgar Province in Puno (Supreme Resolution No. 162 of 2011).[222]

128. On June 19, 2011 protesters from the third front of protests launched a strike in Juliaca.[223] As previously mentioned, the third front of protests were concentrated in the Azángaro Province, in the north of Puno, and demanded Government actions to stop contamination of the Ramis River basin.[224] Prime Minister Fernández invited the mayor of the affected districts to hold meetings in Lima that spanned June 14-22, 2011. On June 24, the situation worsened, with protesters from the Azángaro Province violently taking over the Juliaca Airport, the main airport in the Puno Department, with a loss of six lives in the process.[225] A new government measure emerged from the meetings with the Azángaro protesters: the Government adopted Supreme Decree No. 035 of 2011, which provides the mechanisms to finance the programs adopted to remediate the Ramis River basin under Emergency Decree No. 028 of 2011.[226]

129. In sum, from March through June of 2011, the Peruvian government faced a serious and escalating crisis in the Puno region. The situation was chaotic. The whole region was paralyzed: roads and commercial activities were blocked, people were being injured and killed,

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[222] *See* Gala Witness Statement at para. 10 [Exhibit RWS-001]; Aide Memoire 2011 at p. 12 [Exhibit R-010]; Zegarra Witness Statement at para. 28 [Exhibit RWS- 003]; Supreme Decree on the Adjustments of Mining Petitions and Suspension of Admissions of Mining Petitions, Supreme Decree No. 033-2011-EM, June 25, 2011 ("Supreme Decree No. 033") [Exhibit R-011]; Resolution that Creates Multi-Sectorial Committee for the Melgar Province, Resolution No. 162-2011-PCM, June 24, 2011, at Art. 1 [Exhibit R-012].

[223] *See* Gala Witness Statement at para. 13 [Exhibit RWS-001]; Aide Memoire 2011 at p. 15 [Exhibit R-010].

[224] *See* Gala Witness Statement at paras. 11-13 [Exhibit RWS-001]; Aide Memoire 2011 at p. 15 [Exhibit R-010].

[225] *See* "The Strike Became Violent," *La República Newspaper South Edition*, June 24, 2011[Exhibit R-084]; "Strike Results With 6 People Dead," *La República Newspaper South Edition*, June 25, 2011[Exhibit R-085].

[226] *See* Decree that Complements Emergency Decree No. 028 of 2011, Supreme Decree No. 035-2011-EM, June 26, 2011 ("Supreme Decree No. 035") [Exhibit R-014]; *see also* Gala Witness Statement at para. 15 [Exhibit RWS-001]; Zegarra Witness Statement at para. 30 [Exhibit RWS-003]; Aide Memoire 2011 at p. 17 [Exhibit R-010].

and entire cities were locked down. This crisis was not caused by a single activist with political ambitions, or even a political party, as Bear Creek alleges. This crisis was caused because of legitimate and real popular concerns about the impact that mining activities—and in particular Bear Creek's mining activities at Santa Ana—could have on their land and their lives. It was a social conflict. In response, the Government had to take immediate action. Respondent describes in the next section the multiple measures adopted by Government to calm the crisis situation in Puno and to address the legitimate, serious complaints of the affected communities.[227] After these measures were adopted the protests subsided.[228]

3. The Government's Actions in June 2011 Were Appropriate to End the Violent Protests in the Puno Region, and, in the Case of Santa Ana, to Protect the Integrity of Peru's Legal Regime

130. In its Memorial on the Merits, Claimant alleges that the measures adopted against the Santa Ana Project (*i.e.,* the temporary suspension of the EIA review process, and then the repeal of the public necessity declaration) were arbitrary. Claimant also alleges that the sole purpose of these measures were to "placate a minority of political activists in the remote region of Puno."[229] Neither characterization is true. As already noted briefly above, the Government adopted multiple, interconnected measures intended to address the full range of the Puno people's very real and legitimate concerns about the consequences of mining activities in their region.

131. Bear Creek focuses all of its discussion of the events of 2011 on these two measures related to the Santa Ana Project (*i.e.,* the temporary suspension of the EIA review process, and then the repeal of the public necessity declaration), and they are the only measures

[227] *See* MINEM, "The Executive Power Issues Five Regulations to Solve the Protesters Claims in Puno," June 26, 2011 [Exhibit R-086].

[228] *See* DD.HH. Chronology at p. 26 [Exhibit R-058].

[229] Claimant's Memorial at para. 2.

that it claims breached the Peru-Canada FTA. However, those measures were not adopted in isolation. Just as the protests were surely related to Santa Ana but also reflected broader concerns about mining activity in the region and spanned issues in multiple districts, so to the Government's measures included ones addressed to Santa Ana as well as ones aimed at addressing other aspects of the serious social conflict. All of these measures are related and were intended to address the population's broader concerns about mining activities and their contaminating effects; Peru did not single out the Santa Ana Project. In addition, some of these measures, while not specific to the Santa Ana Project, had consequences for Bear Creek's prospects for proceeding with Santa Ana. Respondent recaps here the full set of measures adopted in tandem with Supreme Decree No. 032 to deal with the critical social situation that erupted in Puno in mid-2011, and, where applicable, notes their significance for Bear Creek.

a. Suspension of Applications for New Concession Rights

132. One of the key demands throughout the protests was a broad request to stop and prevent mining activity in the region. To meet that concern and gain breathing room for all stakeholders to consider the future of mining in the area, Supreme Decree No. 26 suspended, initially for 12 months, the admission of any new mining concessions requests for land in the Chucuito, Yunguyo, El Collao and Puno Provinces, all in the south of the Puno Department.[230] Supreme Decree No. 033 then extended that suspension of the admission of new mining concessions requests to cover the entirety of the Puno Department, and provided that the

[230] *See* Supreme Decree No. 026 at Art. 1 [Exhibit R-025]. This suspension was initially for 12 months, but Supreme Decree No. 033 later extended it to 36 months.

suspension would last for 36 months.[231] This suspension was later extended for three additional months in 2014, when the initial 36 month suspension expired.[232]

b. Addressing Contamination Concerns in the North

133. As noted in Section II.D.2 above, in addition to the complaints from the south of Puno with respect to mining activities, two fronts of protests erupted in the north of Puno, also demanding actions against mining activities and their contaminating effects. With respect to the second front of protests about contamination from mining projects in the Melgar Province in the Department of Puno, the Government adopted two measures: it suspended mining at the *La Poderosa* mine for not complying with environmental regulations, and it adopted Resolution No. 162-2011-PCM to study the possible actions to be taken regarding mining activities in the Melgar Province.[233]

134. With respect to the third front of protests about the contamination of the Ramis River basin, the Government adopted two decrees: Emergency Decree No. 028, and Supreme Decree No. 035. Emergency Decree No. 028 declared the recovery of the basin a national priority. Considering that most of the gold mining in the area was illegal, the Government also set out a program to formalize these activities and to educate the population on the negative effects of uncontrolled mining.[234] Supreme Decree No. 035 further regulated the actions adopted to stop illegal mining, and to recover the river basin.[235]

[231] *See* Supreme Decree No. 033 at Art. 3 [Exhibit R-011].

[232] *See* Decree that Extends the Suspension of Admissions of Mining Petitions, Supreme Decree No. 021-2014-EM, July 27, 2014 [Exhibit R-140].

[233] *See* Aide Memoire 2011 at p. 12 [Exhibit R-010].

[234] *See* Emergency Decree No. 028, June 17, 2011, at Arts. 1, 2 [Exhibit R-013].

[235] *See* Supreme Decree No. 035, June 26, 2011 at Arts. 1-3 [Exhibit R-014].

c. Prior Consultation with, and Express Consent from, Local Communities

135. Supreme Decree No. 033 discussed in sub-section (a) above also mandated previous consultations with local communities prior to pursuing any mining activities (exploration or exploitation), in accordance with Convention No. 169 of the International Labor Convention. According to Convention No. 169, indigenous people have the right to be consulted on the development of any economic activity intended to be implemented on their land.[236] Peru enacted Supreme Decree No. 023 of 2011 to implement the ILO Convention by regulating the prior consultation (*consulta previa*) process in Peru;[237] Supreme Decree No. 033 confirmed that that process would be mandatory for all new mining projects. As explained by Dr. Cesar Zegarra, this "previous consultation" obligation is not merely a formalistic requirement. In practice, the company must not only go through the motions of consulting with affected indigenous communities, but also must in fact obtain prior approval from the local communities to develop a mining project. Without that approval or consent, the project cannot succeed.[238] Supreme Decree No. 033 had retroactive effect as well: with respect to those concessions that had already been granted, consultations would have to take place within 30 days from the issuance of the Decree.[239] Finally, Supreme Decree No. 033 provided that no mining activity may start without an express authorization from the landowners to use the land for mining activities.[240]

[236] *See* ILO Convention at Art. 15 [Exhibit R-029].

[237] *See* Decree that Approves Regulation on the Proceeding to Apply the Right of Consultation of Indigenous People for Mining Activities, Supreme Decree No. 023-2011-EM, May 12, 2011 [Exhibit R-087].

[238] *See* Zegarra Witness Statement at para. 28 [Exhibit RWS-003]; Rodríguez-Mariátegui Report at para. 63 [Exhibit REX-003].

[239] *See* Supreme Decree No. 033 at Art. 2 [Exhibit R-011].

[240] *See* Supreme Decree No. 033 at Art. 2 [Exhibit R-011].

136. Supreme Decree No. 034 provided more generally that no mining activity may occur in Puno without express authorization from the local communities. In particular, the Decree confirmed that even if a person or company is granted a mining concession, this does not grant them the right to seek exploitation or exploration activities in the area. [241] Once again, unless a project has the approval of the affected local community (or communities), the project will never succeed.

137. Supreme Decrees Nos. 33 and 34 are significant for the Santa Ana Project and for Claimant's claims in this arbitration. Claimant does not contend that either of those measures breaches any of Claimant's treaty rights; it challenges only the EIA review suspension and Supreme Decree No. 32. But even if neither of the measures that Claimant does challenge had occurred—that is, in the situation Claimant would have been in "but for" the EIA suspension and public necessity revocation—Supreme Decrees Nos. 33 and 34 would have materially changed the legal landscape in ways that made it very unlikely that the Santa Ana Project could have proceeded (even assuming all other legal requirements could have been met). Because Supreme Decree No. 33 imposes an ILO "previous consultation" requirement that is, in practice, a "previous consent" requirement, and because both Decrees Nos. 33 and 34 require evidence of express community consent to proceed with mining activities, Bear Creek would have faced new and very difficult requirements to obtain the consent of local communities that, as of June 2011, were now united in their opposition to the Santa Ana Project. Even if it maintained the support of the five Huacullani communities immediately surrounding the Project, it is difficult to conceive how Bear Creek could have claimed local community consent to the Santa Ana Project after months of violent protests in opposition to it.

[241] *See* Supreme Decree No. 034 at Art. 1 [Exhibit R-027].

138. Moreover, it is extremely unlikely that, in mid-2011, Bear Creek could even have counted on the support of those five original Huacullani communities. As noted earlier, the communities in Chucuito Province that opposed the Project (*e.g.*, the Kelluyo and Desaguardero communities whom Bear Creek had not tried to win over) had prevailed in their dispute with the five Huacullani communities, to the point that the Huacullani supporters of the Project were socially compelled to participate in the protests against Santa Ana and to make amends to the other, opposition communities.[242] As a result, even if the five communities' support (alone) would have been sufficient to satisfy Supreme Decrees Nos. 33 and 34, by the time those Decrees were enacted in June 2011, *no one* in any community could have offered support to Bear Creek—not even the original five communities. Thus, it is very likely that, even if the public necessity declaration had never been revoked and Bear Creek's EIA review had never been suspended, Bear Creek would have been unable to meet the new requirements of Supreme Decrees Nos. 33 and 34, and the Santa Ana Project would never have proceeded in any event.

d. The Santa Ana Project

139. Finally, with respect to the Santa Ana project in particular, the Government issued a Resolution suspending the Project's EIA on May 30, 2011, and then adopted Supreme Decree No. 032 revoking the Project's public necessity declaration on June 25, 2011. Neither of these measures was arbitrary, contrary to Claimant's allegations.[243]

(i) Suspension of EIA Review

140. As Mr. Felipe Ramírez explains in his witness statement, the Government had to suspend MINEM's review of the Bear Creek EIA because of the critical social situation in the

[242] *See* Peña Report at para. 98 [Exhibit REX-002].

[243] *See* Claimant's Memorial at para. 2.

Puno Department.[244] It was an exceptional measure that had to be taken under exceptional circumstances.[245] MINEM described this situation in the legal report that was issued to support the suspension of the EIA:

> Recently there have been substantial mobilizations of people in the districts of Huacullani and Kelluyo, Chucuito Province, Puno department, who are blocking highways and particularly the road from Peru to the Republic of Bolivia, holding up the traffic flow of people and goods in the zone and affecting the economy of the referenced department and of the country, as an expression of opposition to the processing of the environmental impact study of the Santa Ana mining project.[246]

141. The report further states:

> Currently there is social unrest, violence and instability in the districts of Huacullani and Kelluyo, province of Chucuito, Puno department, which are areas of impact and influence of the Santa Ana project, consisting of an undefined strike as well as the threat of acts of violence to public and private property in opposition to the processing of the environmental impact study of the Santa Ana mining project. This is due to the fact that a large part of the population of the southern zone of Puno Department are uninformed about the scope of the mining project and are threatening the future efficacy of the administrative procedure to evaluate the environmental impact study of the aforesaid project.[247]

142. Bear Creek's plans and the prospect that its EIA would be approved to proceed with a large mining Project in the south of Puno were a substantial cause of massive protests that paralyzed part of the Puno Department for over a month. That state of crisis was not an appropriate environment in which MINEM could even analyze, much less approve, an EIA for a Project that was directly related to the protests. Thus, the Government decided to suspend the

[244] *See* Ramírez Witness Statement at paras. 30-34 [Exhibit RWS-002].

[245] *See* Ramírez Witness Statement at para. 32 [Exhibit RWS-002].

[246] DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011, at p. 2 [Exhibit C-098].

[247] DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011, at p. 3 [Exhibit C-098].

process to try to calm the situation, so that—in more reasonable circumstances later—it could resume its analysis of the EIA.

143. In that respect, the suspension was not an injury, but was even potentially a benefit to Bear Creek. If the Government had continued its review and ultimately approved the EIA at that time, against a backdrop of violence and social conflict, the social protests would been dangerously inflamed—and still would not have allowed the project to succeed.[248] The Government decision to suspend was, in effect, intended to safeguard the possibility for MINEM to approve the EIA (assuming of course that Bear Creek complied with all of the legal requirements), and for Bear Creek to be able to move forward with the Project, at a later time in a less fractious and less hostile public environment.[249] In the event, Supreme Decree No. 032 mooted the possibility of reaching that future, calmer time, but that does not undermine the helpful, not harmful, intent of the EIA suspension Resolution.

(ii) Revocation of the Public Necessity Declaration

144. Supreme Decree No. 032 was also a reasonable measure adopted by the Government. That Decree repealed Bear Creek's public necessity declaration to develop the Santa Ana Project.[250] Both Mr. Gala and Dr. Zegarra have explained that this Decree was adopted for two distinct, but coinciding, reasons.[251]

145. First, during the June 2011 meetings in Lima, protesters presented evidence to government officials that Bear Creek had indirectly acquired its mining concessions (through Ms. Villavicencio) prior to obtaining a public necessity declaration, in violation of Article 71 of

[248] *See* Ramírez Witness Statement at paras. 32-34 [Exhibit RWS-002].

[249] DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011, at p. 3 (3.4) [Exhibit C-098].

[250] *See* Supreme Decree No. 032, June 25, 2011, at Art. 1 [Exhibit C-004].

[251] *See* Gala Witness Statement at para. 42 [Exhibit RWS-001]; Zegarra Witness Statement at paras. 25-26 [Exhibit RWS- 003].

the Constitution. The government officials took those allegations very seriously, as they suggested that Bear Creek had circumvented important constitutional restrictions and carried out a sham to acquire mining rights in violation of the legal regime that governs the allocation of Peru's sovereign natural resources. Thus, as explained in Supreme Decree No. 032, the Government "became aware of new circumstances that extinguished a public necessity declaration." If Bear Creek had illegally acquired the mining rights, through Ms. Villavicencio, Decree No. 083, which granted the public necessity declaration, should have never been issued.[252]

146. Confronted with evidence of such serious offenses, the government officials had to act quickly, and they made reasonable decisions with the information that was available to them at that time. Based on that information, the Government issued Supreme Decree No. 032 on the basis that the circumstances no longer supported a public necessity determination—including, evidently, the circumstances of a suspected constitutional violation by Bear Creek.

147. In addition, the Minister of Mines ordered the Ministry's attorneys to initiate legal actions to seek to "nullify the legal instruments that affect the State's interests."[253] In other words, the Ministry would turn to the courts to determine if indeed a constitutional violation had taken place, and if so, to restore the State's rights over Bear Creek's wrongfully procured concession rights.

148. Bear Creek claims that the Government's 2011 discovery of its constitutionally suspect arrangements with Ms. Villavicencio could not be a basis for revisiting its public necessity determination, because Bear Creek claims that MINEM was already on notice of those

[252] *See* Eguiguren Report at para. 90 [Exhibit REX-001].

[253] *See* Resolution the Orders Initiation of Legal Actions to Annul Legal Acts, Ministerial Resolution No. 289-2011-MEM/DM, June 28, 2011, at Art. 1 [Exhibit R-028].

same facts. Bear Creek protests, for example, that it attached its option contracts with Ms. Villavicencio to its 2006 application for a public necessity declaration, such that MINEM was on notice of that arrangement and could not complain of it in 2011. But the question is not whether Peru had notice of the option contracts—the question is whether Peru was aware of the full parameters of the scheme, including the fact that the option contracts were entered into with Bear Creek's own employee and legal representative who had applied for and obtained the mining rights only nominally in her own name and in reality on Bear Creek's behalf. Likewise, it would not be enough for Bear Creek to point to scattered fragments in the voluminous record of Ms. Villavicencio's and Bear Creek's interactions with MINEM and claim that from those bits and pieces, the Ministry should have been able to "connect the dots" of the relationship and arrangements between Ms. Villavicencio and Bear Creek. It was not until 2011 that responsible officials of the Ministry and Peru's Government became aware of that information and of its significance, and they had every right to act on it promptly thereafter.

149. The second, and equally legitimate, reason for the Government's decision to revisit and revoke its earlier finding of public necessity was, of course, the critical social situation in Puno. Respondent has already explained that according to Peruvian Law, public necessity is only granted if the private investment will improve the welfare of the local communities and the Republic as a whole.[254] When a company's presence in the border zone contributes to such a chaotic situation as the one experienced in Puno in 2011—particularly when the company itself is materially to blame for that situation, having failed to win over indirectly affected local communities—it is reasonable and appropriate to conclude that the company's project is no longer a public necessity. Instead of creating welfare for the inhabitants

[254] *See* Statement of Reasons for Decree No. 083 of 2007 at p. 2 [Exhibit R-032]; Eguiguren Report at para. 28 [Exhibit REX-001].

of Puno, the Santa Ana Project created strife in the region. As explained by Dr. Eguiguren, a renowned constitutional expert, the State had a primordial duty to protect the safety and security of its territory. Government officials had to make an immediate, discretionary assessment of the State's public interests in the face of violence and even deaths. The Government's choice was not made lightly or arbitrarily.

150. In sum, the Government adopted appropriate, necessary measures to maintain peace and address legitimate citizen concerns in a sensitive region in Peru—including, among others, measures that adversely impacted Bear Creek. The Government was not out to "get" Bear Creek, and Bear Creek was not mere collateral damage of some political contest. The Government's measures responded appropriately to a real and serious crisis that was at least partly of Bear Creek's own making, because the communities had legitimate reasons to be concerned about the Santa Ana Project, and Bear Creek did not do enough to address the communities' concerns. The Government also responded appropriately to evidence that Bear Creek had tried to evade, and thus violated, important restrictions of Peruvian law and the Peruvian Constitution.

E. PERU DID NOT ACT CONTRARY TO PERUVIAN LAW WHEN IT ISSUED SUPREME DECREE NO. 032 OF 2011

151. In support of its claim that Supreme Decree No. 032 was a violation of its treaty rights, Claimant maintains that the issuance of the Decree was contrary to Peruvian law and violated Bear Creek's constitutional rights. For that purpose, Claimant relies heavily on a claim that Peru's courts have ruled that Supreme Decree No. 032 violated the Peruvian Constitution.[255] However, Claimant's contention is inappropriately based on a first instance decision of a

[255] *See* Claimant's Memorial at para. 1.

Peruvian constitutional court[256] that Claimant itself abandoned in favor of this international proceeding. Peru disputes the first instance constitutional court's ruling, and did not have the opportunity to test it on appeal. It would thus be inappropriate for this Tribunal to give weight to it here.

152. Bear Creek initiated the constitutional *amparo* action in question on July 12, 2011. Under Peruvian law, a constitutional *amparo* action is a legal recourse where the plaintiff seeks the protection of its constitutional rights. Bear Creek claimed that Supreme Decree No. 032 should be declared inapplicable to the company because it violated the company's constitutional rights to legal security, freedom of industry, and property. The court decided in favor of Bear Creek on May 12, 2014.[257] MINEM's attorney filed an appeal from the decision shortly thereafter.[258] However, while the appeal process was still pending, Claimant withdrew the *amparo* action—thereby terminating the appeal process—upon commencing this international arbitration. In consequence the appeal court never heard Peru's objections to the first instance ruling, and never itself ruled on the constitutionality of Supreme Decree No. 032.

153. Dr. Eguiguren, Respondent's constitutional law expert, explains that—contrary to the first instance constitutional court's determination—Supreme Decree No. 032 is in accordance with Peruvian constitutional law. First, the Supreme Decree was not arbitrary. The Decree explains the reasons that motivated it: (i) new circumstances resulted in the disappearance of the public necessity that had previously warranted Bear Creek's presence in the area; (ii) the State has a duty to ensure the reasonable and sustainable use of its natural resources; and (iii) the State

[256] *See* Claimant's Memorial at paras. 84-88.

[257] *See* Amparo Decision No. 28 Rendered by the Lima First Constitutional Court, May 12, 2014 [Exhibit C-006].

[258] *See* MINEM's Appeal to the First Instance Decision on Amparo Action, June 13, 2014 [Exhibit R-190].

must protect the social and environmental conditions in the area. As just explained in Sections II.D.2 and II.D.3(d) above, Government officials learned that Bear Creek had been operating in the area through a Peruvian national prior to obtaining a declaration of public necessity, and Bear Creek's presence in the area had been a trigger for social unrest and an internal security crisis. Thus, the government adopted a reasonable measure under the extreme circumstances experienced in Puno in the first half of 2011.[259]

154. Second, under the Peruvian Constitution, a foreigner is allowed to acquire or possess mining rights in the border regions if, and only if, the State determines there is a public necessity that justifies his presence in the area. If the circumstances that supported the public necessity cease to exist, the declaration of public necessity can be repealed. A public necessity may be found if an activity benefits and creates welfare for the population. Conversely, if a foreign company's presence in the border region, instead of creating welfare, contributes to crippling social unrest that causes the loss of life and extensive material harm to the economy, there will be no public necessity.[260] The first instance constitutional court did not give the proper deference to these arguments.

155. In any case, the Tribunal should disregard the first instance constitutional court decision because it is not a final judgment and it carries no weight in the Peruvian legal system. The decision on which Bear Creek relies was issued by a first instance constitutional court, not by an the Superior Court of Justice or by the Peruvian Constitutional Tribunal.[261] Second, the decision is not a final judgment and is not considered *res judicata* under Peruvian law. Because Claimant withdrew the *amparo* action prior to the completion of the proceeding, the

[259] *See* Eguiguren Report at paras. 76-83 [Exhibit REX-001].

[260] *See* Eguiguren Report at para. 85-87 [Exhibit REX-001].

[261] *See* Eguiguren Report at para. 82 [Exhibit REX-001].

constitutional court decision is not considered the final word on the matter—Supreme Decree No. 032 still stands and is still applicable to Bear Creek. In consequence, the first instance court's decision has no legal effect and it is not binding.[262]

156. Finally, it is because of Claimant's actions that this decision has no legal effect. As explained before, Claimant withdrew the *amparo* action for the purposes of initiating this arbitral proceeding under the FTA, which requires Claimant to "waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach."[263] Bear Creek had the option to rely on the favorable Peruvian court ruling—by continuing to pursue the *amparo* action to a final judgment of the Peruvian court system. Had Bear Creek not withdrawn from the *amparo,* the appellate court (or perhaps even the Peruvian Constitutional Tribunal) would have issued a final decision on the case. But despite the fact that Peru's reputable, independent judiciary was available to hear the case and had even demonstrated its impartiality by ruling in Bear Creek's favor, Bear Creek opted (as was its right) to abandon that avenue for relief.

157. Having elected to do so, however, Bear Creek cannot try to have its cake and eat it too—if it does not trust Peru's judiciary enough to complete the process and secure a final judgment, then it should not be heard to ask this Tribunal to trust or follow the decision of that same source. Put another way, if Claimant wishes to forsake the Peruvian courts in favor of these proceedings, then it likewise must forgo any reliance on an incomplete, non-final product of that court system that was halted mid-stream at Claimant's own election.

[262] *See* Eguiguren Report at para. 82 [Exhibit REX-001].

[263] Chapter Eight of the Free Trade Agreement Between Canada and the Republic of Perú signed May 29, 2008 ("Peru-Canada FTA"), Art. 823 (1e) [Exhibit C-0001].

F. PERU'S LEGAL PROCEEDINGS TO ENFORCE ARTICLE 71 OF THE CONSTITUTION ARE APPROPRIATE AND WELL-FOUNDED

158. As noted above, MINEM followed up on the issuance of Supreme Decree No. 032 by initiating a legal proceeding (the "inefficacy proceeding") to validate the Government's belief that Bear Creek violated the Constitution through its scheme to use Ms. Villavicencio as a front to acquire and hold the Santa Ana mining concessions without first obtaining a declaration of public necessity. As Article 71 itself specifies, if such rights are improperly acquired or held by a foreigner without the necessary declaration, they revert to the Peruvian state. MINEM launched a legal proceeding intended to bring about that outcome, assuming the court concurred that Bear Creek had violated Article 71.

159. Claimant alleges that the inefficacy civil proceeding MINEM initiated against Bear Creek and Ms. Villavicencio is unfounded or abusive.[264] Neither is true. MINEM filed suit based on serious indications that Bear Creek had breached Article 71 of the Peruvian Constitution.

160. As instructed by the Minister of Mines on June 28, 2011, the Ministry's Attorney initiated a civil proceeding to declare ineffective various "legal acts that affect the State's interests" [265] —that is, various of the legal acts in the scheme of Bear Creek's acquisition of the Santa Ana concession rights through Ms. Villavicencio. On July 14, 2011, MINEM filed a civil lawsuit against Bear Creek and Jenny Karina Villavicencio requesting the Court to declare ineffective: (i) the transfer of the Santa Ana mining concessions between Ms. Villavicencio and Bear Creek, (ii) the registration of the Santa Ana mining concessions, and (iii) the resolutions

[264] *See* Claimant's Memorial at para. 3.

[265] *See* Resolution the Orders Initiation of Legal Actions to Annul Legal Acts, Ministerial Resolution No. 289-2011-MEM/DM, June 28, 2011, at Art. 1 [Exhibit R-028].

granting the mining concessions to Ms. Villavicencio.[266] In essence, MINEM alleged that these acts were ineffective because they only resulted from a pretense by Ms. Villavicencio and Bear Creek that erroneously allowed Ms. Villavicencio to acquire the mining concessions rights.[267] Put another way, the Peruvian Government granted Ms. Villavicencio the mining concessions only because it was under the erroneous impression that she was a Peruvian national acquiring the concessions for herself, not someone acting at the request and on behalf of a foreign entity that was prohibited from indirectly acquiring the concessions without a public necessity declaration. On that basis, MINEM asked the court to revert the mining rights to the State.[268]

161. The lawsuit was filed on July 14, 2011. On September 12, 2011, Bear Creek moved to dismiss MINEM's claims on the ground that the court did not have the jurisdiction to declare the inefficacy of any of the acts, particularly the administrative acts that granted the mining concessions to Ms. Villavicencio.[269] The lower court found in favor of Bear Creek on the motion to dismiss on grounds of jurisdiction, in December 2012.[270] This decision on procedural grounds did not constitute any kind of substantive validation of the Bear Creek/Villavicencio scheme, and does not under any circumstance mean that Bear Creek was found to have lawfully acquired the mining rights.

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[266] *See* Inefficacy Law Suit, July 14, 2011 ("Inefficacy Law Suit"), at I [Exhibit C-112].

[267] According to Peruvian law, a legal act is effective if it has the capacity to produce the effects it is intended to produce. Thus, an act is ineffective if the act could not legally produce the effects it intended, due to an illegality in its formation. (*See* Inefficacy Law Suit at I [Exhibit C-112].) In this case, the illegality was that Bear Creek's indirect acquisition, through Ms. Villavicencio, of the mining concessions before it had obtain a declaration of public necessity. In consequence, all of the acts that the MINEM sought to declare ineffective were the result of a legal fiction concocted between Ms. Villavicencio and Bear Creek.

[268] *See* Inefficacy Law Suit at I [Exhibit C-112].

[269] *See* Motion to Dismiss on Grounds of Jurisdiction of Inefficacy Civil Lawsuit, December 20, 2011 [Exhibit R-089].

[270] *See* Lower Court Decision on Motion to Dismiss on Grounds of Jurisdiction of Inefficacy Lawsuit, December 27, 2012 [Exhibit C-113].

162. MINEM filed an appeal shortly after, which was decided in June 2013.[271] The appellate court held that the lower court did have jurisdiction to resolve the case on the inefficacy of the transfer between Ms. Villavicencio and Bear Creek, and ordered the court to start the proceeding on that issue.[272] The appellate court also held that the proceeding could not be used to rule directly on the inefficacy of the Resolutions granting the mining concessions to Ms. Villavicencio.[273] This case is currently being briefed, and the court has not issued a decision.

163. These ongoing proceedings are not unfounded or abusive. In 2011 MINEM received credible and serious indications that Bear Creek breached Article 71 of the Constitution, and thus that the transfer agreements between Ms. Villavicencio and Bear Creek and any underlying agreements between the parties with respect to the mining concessions were a simulation. There is nothing arbitrary or abusive in MINEM initiating the inefficacy action to protect State's property and interests. Moreover, the question that the Peruvian court will be called on to decide is of central importance in this arbitration—because a conclusion that the legal and economic arrangements between Bear Creek and Ms. Villavicencio violated Peruvian law would, in turn, mean that Claimant never lawfully acquired the concession rights that are the essence of its claimed investment under the Treaty and the ICSID Convention. This Tribunal is fully empowered to decide those questions of Peruvian law itself, as necessary, to establish or invalidate its jurisdiction over Claimant's claims. But there is nothing unfounded or abusive in Peru commencing an inefficacy proceeding to pose the question to its own courts, and to seek to

[271] *See* MINEM's Appeal to Lower Court Decision Motion to Dismiss on Grounds of Jurisdiction of Inefficacy Civil Lawsuit, January 23, 2013 [Exhibit R-091].

[272] *See* Decision on MINEM's Appeal to Motion to Dismiss on Grounds of Jurisdiction of Inefficacy Lawsuit, June 17, 2013 [Exhibit C-114].

[273] *See* Decision on MINEM's Appeal to Motion to Dismiss on Grounds of Jurisdiction of Inefficacy Lawsuit, June 17, 2013 [Exhibit C-114].

restore the State's sovereign rights over those concessions in the event that the court finds such a violation.

G. BEAR CREEK DOES NOT HAVE AND NEVER HAD THE RIGHT TO CARRY OUT THE SANTA ANA PROJECT

164. Throughout its factual recitations and as a predicate to its damages claims, Claimant maintains that the Santa Ana Project was "on the verge of commencing production" at the moment—June 25, 2011—when the Council of Ministers issued Supreme Decree No. 032.[274] Claimant also asserts that that construction of the mine was scheduled to start within the next six months (*i.e.*, in the second half of 2011), and that silver production would have started no later than in the second half of 2012.[275] In those (mis)characterizations, Claimant would like the Tribunal to assume that at that point Bear Creek already had the right to proceed with construction, operation, and silver production (*i.e.*, exploitation of) the Santa Ana Project.[276] Contrary to Claimant's misdirection, Bear Creek had yet to acquire any right to exploit the Project as of June 2011, and there is no guarantee that it would ever have obtained it, even if the Government had never taken the steps that Claimant labels as treaty breaches (namely, suspension of the EIA review followed by revocation of the public necessity declaration). As of June 2011, Bear Creek had not acquired any, much less all, of the authorizations and permits necessary to begin the construction and the operation of the Santa Ana Project. The few permits it had acquired for the earlier, limited exploration phase of the Project did not grant Bear Creek the right to proceed to exploit the Project.

[274] Claimant's Memorial at para. 11.

[275] *See* Claimant's Memorial at para. 54.

[276] It is equally deceptive that Claimant claims that it "developed world class mining projects at Santa Ana and Corani." Claimant's Memorial at *chapeau* to para. 44.

165. As a threshold matter, of course, if either this Tribunal or the Peruvian court hearing MINEM's inefficacy claims finds that Bear Creek acquired the mining concessions unlawfully through its scheme with Ms. Villavicencio, then Bear Creek could never obtain a right to exploit the Santa Ana Project.

166. But, even if the Tribunal were not to find Bear Creek's scheme unlawful and to deem it a proper title-holder of the Santa Ana concessions, those concessions only gave Bear Creek the exclusive right to *apply* for the necessary permits to develop the Santa Ana Project—Bear Creek never had an actual right to exploit the natural resources. As of June 2011, when Peru revoked Bear Creek's declaration of public necessity, Bear Creek had not secured even the very first, critical step in the process of obtaining permission to exploit the project—the Environmental Impact Study for the exploitation stage ("EIA").

167. Dr. Luis Rodríguez-Mariátegui, Respondent's expert in Peruvian mining law, details in his expert report the lengthy process that Bear Creek would need to follow to eventually obtain permission to commence construction and then operation of the Project. That process is bookended by the requirement to obtain approval of the EIA at the beginning, and a certification authorizing the commencement of mining operations at the end, and a myriad of permits and authorizations stand in between. [277]

168. Moreover, Dr. Rodríguez-Mariátegui explains that, among the myriad permits required to commence construction and operations of the mine, there are many key authorizations that represent complex, discretionary regulatory decision-making points[278]—

[277] *See* Rodríguez-Mariátegui Report, at paras. 107-08 (listing the 40 major permits or authorizations that Bear Creek never obtained for the Santa Ana Project) [Exhibit REX-003].

[278] *See* Rodríguez-Mariátegui Report at para. 47 ("[T]he EIA—and its approval in any event—could be considered as an initial point for the transmission of all of the other permits, licenses, authorizations, certificates, and registrations that will require distinct components and processes.") [Exhibit REX-003]; *see* Ramírez Witness Statement at para. 5 [Exhibit RWS-002].

which means that there was no certainty that Bear Creek would or even could ever secure them, even if the EIA review had not been suspended and Supreme Decree No. 032 had never been issued. Among the critical authorizations that Bear Creek could not be sure to obtain were, for example, the approval of the EIA for exploitation,[279] obtaining confirmation that there are no archaeological remains in the area,[280] and the approval of the Mining Plan.[281] And even apart from governmental authorizations, as of the December 2010 of the submission of its EIA, Bear Creek lacked perhaps the most fundamental prerequisite for the Project—the consent of the more than 94 separate owners of the land on which the mine and plant would be sited to use their property for that purpose. As of June 2011, in fact the *only* steps that Bear Creek is known to have taken toward that long list of regulatory approvals was the submission of its EIA for MINEM's review—in which MINEM found nearly 200 deficiencies—and the staging of the community meeting required under the citizen participation plan (PPC) that formed part of the EIA. Dr. Rodríguez-Mariátegui concludes that Claimant was very far away from obtaining permission to construct and then operate the Project, and that it is uncertain whether Bear Creek could have in fact secured this right even if Respondent had not adopted Supreme Decree No. 032.[282]

169. In the next sections Respondent describes all of the permits and licenses the Bear Creek lacked at the time Supreme Decree No. 032 was issued. First, Respondent explains that Bear Creek submitted an EIA for exploitation that was evidently incomplete and deficient in many respects, requiring the company to amend or rework several sections of its EIA before

[279] *See* Rodríguez-Mariátegui Report at paras. 41-46 [Exhibit REX-003].

[280] *See* Rodríguez-Mariátegui Report at paras. 70-73 [Exhibit REX-003].

[281] *See* Rodríguez-Mariátegui Report at paras. 74-75 [Exhibit REX-003].

[282] *See* Rodríguez-Mariátegui Report at paras. 46,108 [Exhibit REX-003].

MINEM could resume consideration of it. Second, Respondent explains the many other permits that Bear Creek would require, but had not yet obtained, in order to secure the right to exploit the Project.

1. Bear Creek Lacked and Might Never Have Obtained Final Approval of Its Environmental Impact Study

170. Development of a mining project is divided into two main phases: the exploration phase, and the exploitation phase.[283] In the exploration phase, the company determines, through testing, whether there are viable mining resources in a specific area.[284] In the exploitation phase, the company constructs the mining infrastructure and eventually proceeds to extract the mineral resources from the ground.[285] In Peru, MINEM must approve EIAs at both stages. Of course, each of these EIAs has a different scope. [286] Approval of an EIA for the exploration phase says nothing about whether an EIA for the exploitation phase will be approved.

171. Bear Creek concluded the exploration phase of its project in 2010, and in December 2010 it submitted its EIA for exploitation for MINEM's review. As explained in Section II.D.3(d)(i), the Government reasonably suspended MINEM's review of Bear Creek's EIA on May 30, 2011. Thus, Bear Creek's EIA for exploitation was never approved, and—critically—there is no certainty it would have ever been approved, even if the EIA review process had never been suspended.

a. <u>As of 2011 Bear Creek Had Completed Only the Exploration Stage of the Project</u>

172. As of June 2011, Bear Creek had completed only the exploration stage of the Santa Ana Project and had not yet even initiated the exploitation stage of the Santa Ana Project.

[283] *See* Ramírez Witness Statement at para. 4 [Exhibit RWS-002].

[284] *See* Ramírez Witness Statement at para. 4 [Exhibit RWS-002].

[285] *See* Ramírez Witness Statement at para. 5 [Exhibit RWS-002];

[286] *See* Ramírez Witness Statement at para. 5 [Exhibit RWS-002];

173. Bear Creek—through Ms. Villavicencio—initiated exploration activities in 2006. On June 9, 2006, Ms. Villavicencio submitted a Declaration of Environmental Impact to MINEM,[287] seeking approval to begin exploration activities for one of the concessions that she had acquired.[288] The General Directorate of Environmental Mining Affairs (*Dirección General de Asuntos Ambientales Mineros* – "DGAAM") approved Ms. Villavicencio's Declaration of Environmental Impact on July 11, 2006.[289] The approval of this Declaration granted Ms. Villavicencio (or in reality Bear Creek, the indirect owner of the concessions) the right to explore for mineral deposits through the use of six mining platforms.[290]

174. On January 30, 2007, Ms. Villavicencio, again in her own name, submitted an EIA for the exploration stage for an additional 20 drilling platforms.[291] DGAAM reviewed the EIA and issued several technical and social observations, all of which Bear Creek (nominally through Ms. Villavicencio) resolved.[292] Ms. Villavicencio, and then Bear Creek, filed a series of amendments and requests for extensions of the exploration deadline that ultimately brought them to the point where, as of Q3 2010 the Project had been granted authorization to use more than 350 platforms for exploration purposes. [293] Bear Creek concluded its exploration phase at the end of 2010.

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[287] *See* MINEM's Report Approving Ms. Villavicencio's Sworn Declaration, Report No. 170-2006/MEM-AAM/EA, July 10, 2006 [Exhibit R-042].

[288] *See* Rodríguez-Mariátegui Report at para. 35 [Exhibit REX-003].

[289] *See* Resolution Approving Ms. Villavicencio's Sworn Declaration, Directorial Resolution No. 256-2006-MEM/AAM, July 11, 2006 [Exhibit R-034]

[290] *See* Resolution Approving Ms. Villavicencio's Sworn Declaration, Directorial Resolution No. 256-2006-MEM/AAM, July 11, 2006, at p. 9 [Exhibit R-034]

[291] *See* Rodríguez-Mariátegui Report at para. 36 [Exhibit REX-003]; Agreements Between Bear Creek and Local Communities, May 2006, at Second Clause [Exhibit R-043].

[292] *See* Rodríguez-Mariátegui Report at para. 36 [Exhibit REX-003].

[293] *See* Rodríguez-Mariátegui Report at para. 36 [Exhibit REX-003].

175. Claimant refers to its activities in the exploration process, and to authorizations obtained for that exploration, as if to create the impression in the Tribunal's mind that Bear Creek was already authorized to or would surely be authorized to proceed with the further development of the Santa Ana Project. But even if the approval of a number of exploratory drilling platforms were to sound noteworthy, the approval of an EIA for an exploration stage is completely independent of the review and possible approval of an EIA for exploitation purposes. The fact that a mining company has concluded an exploration stage does not grant it any right to proceed into the exploitation stage.

b. Approval of the Environmental Impact Study for Exploitation Was Neither Predictable Nor Assured

176. Bear Creek submitted its EIA for exploitation to MINEM for its review on December 23, 2010. As of June 2011, when Supreme Decree No. 032 was issued, MINEM had not approved Bear Creek's EIA, and there is no certainty about whether it would ever have been approved or not.

177. An EIA for exploration includes several elements. For example, it describes the activities that the mining company intends to develop in the area, the environmental impact expected throughout the project, and the planned mitigation programs for that environmental impact.[294] The EIA also includes a social component: the company has to submit a Citizen Participation Plan ("PPC") with the EIA for MINEM's review.[295] More importantly, the EIA is the first step in the long process of obtaining all the necessary permits to be authorized to initiate

[294] *See* Ramírez Witness Statement at para. 16 [Exhibit RWS-002]; Rodríguez-Mariátegui Report at para. 44 [Exhibit REX-003].

[295] *See* Ramírez Witness Statement at para. 16 [Exhibit RWS-002];

construction and operation of the Project, because, depending on its content and description of the project, it determines which additional permits are required.[296]

178. Once DGAAM receives the EIA, DGAAM first reviews the PPC and the Executive Summary, and issues preliminary observations to the study.[297] If at that point DGAAM does not have many preliminary observations, it approves the Executive Summary and the PPC.[298] The DGAAM also sets a date for the company to have a public hearing with the local communities.[299] The DGAAM approved Bear Creek's Executive Summary and PPC on January 7, 2011.[300]

179. Contrary to the picture that Claimant tries to paint in its Memorial,[301] however, the fact that DGAAM approved the Executive Summary does not mean that DGAAM will not have further observations on the full EIA, and much less that it has approved or will approve the EIA.[302] Similarly, the approval of the PPC and the scheduling of the public hearing also does not mean that Bear Creek necessarily had an appropriate participation plan that would be adequate to secure the support of the local communities.[303] Mr. Ramírez explains that DGAAM does not have the means to ascertain whether the company has established relations and worked with all the communities that would be affected by the project or not.[304] It is the company's duty to adopt all the necessary measures to gain the support and approval of the local communities. If

[296] *See* Rodríguez-Mariátegui Report at para. 47 [Exhibit REX-003].

[297] *See* Ramírez Witness Statement at para. 18 [Exhibit RWS-002]; Rodríguez-Mariátegui Report at para. 55 [Exhibit REX-003].

[298] *See* Ramírez Witness Statement at para. 18 [Exhibit RWS-002].

[299] *See* Ramírez Witness Statement at para. 19 [Exhibit RWS-002].

[300] *See* MINEM Resolution No. 021-2011/MEM-AAM, January 7, 2011 [Exhibit C-073].

[301] *See* Claimant's Memorial at para. 62.

[302] *See* Ramírez Witness Statement at para. 18 [Exhibit RWS-002].

[303] *See* Ramírez Witness Statement at para. 18 [Exhibit RWS-002]; Claimant's Memorial at para. 62.

[304] *See* Ramírez Witness Statement at para. 13 [Exhibit RWS-002].

there is social conflict involving the mining project, it generally means that the company did not properly establish the necessary relationships with the communities surrounding the project, as occurred in this case.[305]

180. After DGAAM approves the Executive Summary, it starts to review the EIA, which is a lengthy and highly technical document. Bear Creek's EIA, for example, spanned 2,992 pages, including 4 Volumes of attachments. If the EIA has deficiencies or requires clarifications, DGAAM issues observations, which must be resolved within a fixed number of days (typically 30 days, unless extensions are obtained or MINEM grants a longer time period, as it did in this case granting 60 days) or the project is deemed abandoned.[306] The EIA is also reviewed by the Ministry of Agriculture ("MINAG"), and if it finds additional deficiencies, it will also issue observations to be resolved by the mining company.[307]

181. On April 19, 2011 the DGAAM and MINAG issued a total of 196 observations (157 from DGAAM and 39 from MINAG) identifying deficiencies in Bear Creek's EIA.[308] DGAAM's observations included Bear Creek's inadequate delimitation of the area of influence of the project (Observation 8), deficiencies in Bear Creek's Community Relations Plan (Observation 101), MINEM's concerns with respect to the allegations raised by the local communities and the *Frente de Defensa* regarding possible contamination that could result from the Santa Ana Project (Observations 155 and 156), and other technical aspects of the project.[309] Dr. Rodríguez-Mariátegui explains in his expert report that some of these technical observations

[305] *See* Ramírez Witness Statement at para. 12 [Exhibit RWS-002].

[306] *See* Rodríguez-Mariátegui Report at para. 44 [Exhibit REX-003].

[307] *See* Rodríguez-Mariátegui Report at para. 45 [Exhibit REX-003]; Ramírez Witness Statement at para. 25 [Exhibit RWS-002].

[308] *See* DGAAM's Observations to Bear Creek's EIA for Exploitation, April 19, 2011 [Exhibit R-040]; Ministry of Agriculture, Observations to the Environmental Impact Study, Technical Opinion No. 016-11-AG-DVM-DGAA-DGA, January 2011 [Exhibit R-041].

[309] *See* DGAAM's Observations to Bear Creek's EIA for Exploitation, April 19, 2011 [Exhibit R-040].

are critical and concerning.[310] For example, DGAAM issued observations related to water resources to be used by the Project (Observations 23, 24, 28, 53, 90, 99, 111, 141, and 153).[311] Respondent's technical mining and engineering experts likewise noted observations that could be causes for concern, including "eleven requests concerning the hydrology and hydrogeological modeling requiring substantive fieldwork and evaluation and much more detail on Soil and Rock Mechanics, Seismicity and Seismic Hazards, the Biological Assessment, Closure Plan and Cost/Benefit Analysis."[312] In sum, the DGAAM and MINAG found that the EIA had numerous deficiencies that Bear Creek would have to address in order for them to reconsider the study. Based on the number of observations and their content, Dr. Rodríguez-Mariátegui concludes that "under no circumstance, could it be considered that the EIA's approval was guaranteed."[313]

182. Bear Creek then had 60 days to resolve these observations. In the interim, on the 41st day of that period, a Resolution was issued suspending MINEM's review of the EIA due to the social crisis in Puno. Up to that date, Bear Creek had not submitted any response to MINEM's or MINAG's observations. Shortly after the suspension, Bear Creek did submit a response to the 39 MINAG observations; thereafter, Bear Creek submitted responses to the 157 DGAAM observations.[314] But because any responses would not have been reviewed due to the EIA suspension (and then became moot with the issuance of Supreme Decree No. 032), it is

[310] *See* Rodríguez-Mariátegui Report at para. 46 [Exhibit REX-003].

[311] *See* DGAAM's Observations to Bear Creek's EIA for Exploitation, April 19, 2011 [Exhibit R-040].

[312] Expert Technical Mining Report of SRK Consulting, October 6, 2015 ("SRK Report"), at para. 103 [Exhibit REX-005].

[313] Rodríguez-Mariátegui Report at para. 46 [Exhibit REX-003].

[314] *See* Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011 [Exhibit R-184]; Bear Creek's Responses to MINAG's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011[Exhibit R-185]; Bear Creek's Responses to Defense Committee's Observations to the Environmental Impact Study of the Santa Ana Project, July 2011[Exhibit R-177].

impossible to know whether Bear Creek's responses could have satisfied the regulators' concerns with respect to all of the observations.

183. In addition, as discussed in Section II.D.3(c) above, Supreme Decrees Nos. 33 and 34—which Claimant does not challenge as breaches of the FTA—materially revised the prior consultation and community consent requirements for all proposed mining projects in the region. Given the level of vehement community opposition to the Santa Ana Project that emerged in the first half of 2011, including the loss of support from even the Huacullani communities that were receiving jobs from the Project,[315] it seems extremely unlikely that Bear Creek could have satisfied the new requirements—which presumably would have been incorporated into the EIA process—even if its public necessity declaration had never been revoked.

184. Accordingly, even had the EIA suspension and the Supreme Decree never occurred, there is simply no assurance that Bear Creek could have completed even this first, essential step in the extended process to obtain, ultimately, permission to construct and operate the mine.

2. Bear Creek Lacked and Might Never Have Obtained Many Other Necessary Authorizations to Proceed to Construction and Operation of the Santa Ana Project

185. Obtaining approval for an EIA for exploration is only the first step in a long process to obtain the many necessary authorizations to construct and operate a mine.[316] As of June 2011, Bear Creek had not obtained the approval of the EIA, much less any of the other

[315] Peña Report at paras. 89-92 [Exhibit REX-002].

[316] *See* Ramírez Witness Statement at para. 29 [Exhibit RWS-002]; Rodríguez-Mariátegui Report at para. 47 [Exhibit REX-003].

permits and requirements.[317] Dr. Luis Rodríguez-Mariátegui, Respondent's expert on Peruvian mining law, has identified the permits and authorizations Bear Creek would have needed to obtain eventual permission to exploit the Santa Ana mining resources.[318] Dr. Rodríguez-Mariátegui also explains that the process of obtaining some of these permits is lengthy and that the process remains in the State's or landowner's discretion. He points in particular to land use permits, the approval of the Mining Plan, and the certification on existence of archaeological remains.[319] The following chart summarizes all of the major the permits Bear Creek would have required before it could operate the Santa Ana Project. To Respondent's knowledge, as of May/June 2011, Bear Creek had obtained exactly *none* of them.

Phase	Permit or Authorization	Completed by Bear Creek
Initial Stages	Land use Agreements with All Landowners and Landholders	No
	Environmental Impact Study for Exploitation	No
	Project for Evaluating Archaeological Remains	No
	Certificate of Non-Existence of Archaeological Remains Certificate (CIRA)	No
Construction of the Mine	Mining Plan	No
	Authorization for Use of Explosive	No
	Individual License for Use of Explosives	No
	License for the Powder Keg	No
	License for Powder Keg (for Ammonium Nitrate)	No

[317] *See* Ramírez Witness Statement at para. 29 [Exhibit RWS-002].

[318] *See* Rodríguez-Mariátegui Report at para. 107 [Exhibit REX-003].

[319] *See* Rodríguez-Mariátegui Report at paras. 65-69, 70-75 [Exhibit REX-003].

Phase	Permit or Authorization	Completed by Bear Creek
Operation of the Mine	Mining Plan	No
	Certificate for Mining Operation (COM)	No
	Authorization for the Use of Explosives and Relates Material	No
	License for Powder Keg	No
	Individual License for Use of Explosives	No
	License to Use Water Resources for Mining Purposes	No
	Authorization to Dispose Residual Treated Water (for Treatment Plant)	No
	Approval of the Plan to Close the Mine	No
	Authorization for Initiation/Re-initiation of Mining Activity	No
Construction of the Plant	Authorization to Construct	No
	Approval of Studies for the Use of Water Resources	No
Operation of the Plant	Compliance Inspection of the Construction Works	No
	Authorization to Dispose of Residual Treated Water	No
	Favorable Technical Opinion to Do Works related to Mining From the Ministry of Energy and Mines and the Water Authority (ANA)	No
	License for Use of Water for Mining Purposes	No
	Certificate for the Use of Chemical Products and Controlled Products	No
	Registration for the Use of Chemical Products and Controlled Products	No

Phase	Permit or Authorization	Completed by Bear Creek
	Sanitary Authorization to Permeate the Land	No
Construction of Complementary Infrastructure	Authorization of Studies for the Use of Water Resources	No
	Authorization to Do Works for the Use of Water Resources	No
	Favorable Technical Report for the Direct Consumption of Liquid Fuels	No
	Hydrocarbon Registry or Direct Consumers	No
	Sanitary Authorization for a Septic Tank	No
	Sanitary Authorization to Permeate the Land	No
Operation of Complementary Infrastructure	Favorable Technical Opinion to Conclude Works for the Use of Water Resources	No
	Certificate of the Design of the Works for the Technical Report for Direct Consumers of Liquid Fuels	No
	Favorable Technical Report for Direct Consumers for Liquid Fuels	No
	Hydrocarbon Registry for Direct Consumers	No
	Concession for Electric Transmissions	No
	Easement for the Electrical Purposes	No
	License to Use Water Resources for Domestic Purposes)	No
	Authorization for Water Treatment System and Sanitary Disposal	No
	Authorization for Disposal of Residual Waters	No
	Sanitary Authorization to Permeate the Land	No

186. A number of these missing items warrant further discussion. In particular, it is striking that Bear Creek was missing an indispensable—and difficult to obtain, especially under the circumstances—building block of the Project: permission from the owners of the land to build and then operate an open-pit mine on their properties.[320] The mining concessions grant Bear Creek rights only over the underground natural resources; Bear Creek had to separately acquire permission from the owners of the surface land parcels to use the land for exploitation purposes.[321] According to Dr. Rodríguez-Mariátegui, to comply with this requirement, mining companies may purchase the land or may sign land use agreements with the landowners. In this particular case, Bear Creek could not purchase the land, because in accordance with Peruvian law, the land of *Comunidades Campesinas* is inalienable, unless approval can be obtained from two-thirds of the Community.[322] In consequence, it is likely that Bear Creek's only option to be allowed to use the property for exploitation purposes was to enter into land use agreements with the local communities.

187. According to Bear Creek, the owners of the land where the mine would be constructed were the Huacullani communities with which they had been working closely. Bear Creek describes that the lands are owned by 3 different communities, and divided among 94 different landholders within those communities.[323] As a result, Bear Creek would have to complete negotiations with more than 94 counterparties.[324] Bear Creek had previously obtained authorizations from some of Huacullani's communities to carry out its exploratory activities.

[320] *See* Rodríguez-Mariátegui Report at paras. 65-69 [Exhibit REX-003].

[321] *See* Rodríguez-Mariátegui Report at para. 65-66 [Exhibit REX-003]. *See also* Law of the Private Investment in the Development of Economic Activities Within the National Territory and Lands of the Native Communities, Law No. 26505, July 14, 1995, Art 7 ("The use of lands for the exercise of mining or hydrocarbon activities requires the previous agreement with the landowner or the culmination of easement procedures . . . .".[Exhibit R-157].

[322] *See* Peña Report, para. 31 fn. 20 [Exhibit REX-002].

[323] *See* Rodríguez-Mariátegui Report at para. 67 [Exhibit REX-003].

[324] *See* Rodríguez-Mariátegui Report at para. 67 [Exhibit REX-003].

But of the date of its EIA submission (December 2010), Bear Creek did not claim to have acquired *any* permissions to use the land for exploitation activities. In the EIA, Bear Creek merely stated that it was in the process of negotiating agreements with the communities.[325]

188. On April 19, 2011, MINEM issued its observations with respect to the EIA. Two of these observations indicated that Bear Creek would need to submit documentary proof that it had the right to use the lands as a condition of EIA approval.[326] In July 2011, when the company submitted responses to MINEM's observations, the only documents that the company was able to produce to try to satisfy this requirement were letters that had been sent from Bear Creek to the communities indicating that they were open for dialogue on the land use agreements.[327] Without such land use agreements in place as of mid-2011, it is simply not credible for Claimant to believe that they all could have been smoothly obtained, much less that that could happen in time to commence construction of the mine by the end of 2011. Bear Creek simply did not have the authorizations required to use the land where the Santa Ana Project would be developed—and the hostile environment that had developed since early 2011 made it increasingly unlikely that those agreements could ever have been obtained, even if Bear Creek's public necessity declaration had never been repealed.

189. A second example of a requirement that could have proven difficult to satisfy relates to archaeological sites and artifacts. Obviously, construction of a mine requires extensive earth-moving and excavation. In Peru, however, no construction may start without a Certificate of Non-Existence of Archaeological Remains Certificate (CIRA) issued by the Ministry of

[325] *See* Rodríguez-Mariátegui Report at para. 67 [Exhibit REX-003]. *See also* EIA Executive Summary, Section 2.4.1 [Exhibit C-071].

[326] *See* DGAAM's Observations to Bear Creek's EIA for Exploitation, April 19, 2011, Observations Nos. 8 and 9 [Exhibit R-040].

[327] *See* Letters from Bear Creek to Communities on Land Use Agreements, December 2010 [Exhibit R-093].

Culture.[328] To obtain such certificate, the builder must commission and submit a preliminary study to certify that there are no archaeological remains in the area.[329] If the builder were to find any archaeological remains, additional proceedings are required to properly remove those artifacts and any ongoing operations would have to be suspended.[330] The process of obtaining the CIRA can prove quite contentions if there is any possibility of archaeological or historical material being found on the site.[331] Dr. Rodríguez-Mariátegui notes that Bear Creek had not even started the archaeological study to determine whether there were archaeological remains on the Project's site or not.[332]

190. A third example is the process of obtaining MINEM approval of the Project's Mining Plan,[333] which is important in its own right and is also a prerequisite for obtaining, *e.g.*, authorizations to use, transport and store explosives, among other hazardous materials.[334] A Mining Plan would need to include, at a minimum: (i) a general plan of the installations of the project site; (ii) a design of the mining pit; (iii) geo-mechanical studies explaining the angles of the slopes of the mining pit; (iv) the design of the mechanism of waste disposal; (v) a design of the powder keg and the storage facilities for explosives; and (vi) a schedule of implementation of

[328] *See* Rodríguez-Mariátegui Report at para. 70 [Exhibit REX-003]. *See also* Regulation on the Archaeological Investigations, Supreme Resolution N° 004-2000-ED, January 24, 2000, Art. 65 [Exhibit R-160].

[329] *See* Rodríguez-Mariátegui Report at para. 71 [Exhibit REX-003]. *See also* Regulation on the Archaeological Investigations, Supreme Resolution N° 004-2000-ED, January 24, 2000, Art. 65 [Exhibit R-160].

[330] *See* Rodríguez-Mariátegui Report at para. 72 [Exhibit REX-003]. *See also* Regulation on the Archaeological Investigations, Supreme Resolution N° 004-2000-ED, January 24, 2000, Art. 65 [Exhibit R-160].

[331] *See Renée Rose Levy and Gremcitel v. Republic of Perú,* ICSID Case No. ARB/11/17, Award, January 9, 2015, at paras. 6-37 [Exhibit RLA-072].

[332] *See* Rodríguez-Mariátegui Report at para. 73 [Exhibit REX-003].

[333] *See* Rodríguez-Mariátegui Report at para. 75 [Exhibit REX-003]. *See also* Regulation of Security and Occupational Health and Other Complementary Measures in Mining Activities, Supreme Decree No. 055-2010-EM, August 21, 2010, Art. 29 [Exhibit R-156].

[334] *See* Rodríguez-Mariátegui Report at para. 74 [Exhibit REX-003].

the Mining Plan.[335] Bear Creek had not submitted its proposed Mining Plan for review, much less obtained MINEM approval.

191. Some of the other required permits and authorizations might have been more routine, but nevertheless technically complex and vulnerable to delays and complications. For example, Bear Creek needed to supply the mine with basic public services, such as energy and water. For those purposes, Bear Creek needed to build an electric transmission line and its own electric station. To build those facilities, Bear Creek would need to obtain a transmission concession and an energy easement for the transmission line. In addition, the construction of the transmission line requires additional municipal permits. Bear Creek had not started the process of obtaining any of these because the EIA for exploitation had not been approved.[336]

192. As another example, Bear Creek needed to identify a water supply source and obtain the necessary permits for water supply. Bear Creek needed to obtain a License for the Use of Water Resources for Mining Purposes and a License for the Use of Water for Domestic Purposes.[337] Bear Creek had not applied for either license.[338] Finally, Bear Creek also needed to transport and store large amounts of fuel. As a result, Bear Creek needed to register with the Hydrocarbon Registry (Registry for Direct Consumers in Temporal Installations). Bear Creek also needed an authorization to store fuel from MINEM.[339] Bear Creek had not yet obtained these authorizations. [340]

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[335] *See* Rodríguez-Mariátegui Report at para. 75 [Exhibit REX-003]. *See also* Regulation of Security and Occupational Health and Other Complementary Measures in Mining Activities, Supreme Decree No. 055-2010-EM, August 21, 2010, Art. 29 [Exhibit R-156].

[336] *See* Rodríguez-Mariátegui Report at paras. 88-90 [Exhibit REX-003].

[337] *See* Rodríguez-Mariátegui Report at paras. 91-95 [Exhibit REX-003]. *See also* Regulation on Mining Proceedings, Chapter V, Supreme Decree No. 014-2011-EM, Art. 1 [Exhibit R-162].

[338] *See* Rodríguez-Mariátegui Report at para. 92 [Exhibit REX-003].

[339] *See* Rodríguez-Mariátegui Report at paras. 86-87 [Exhibit REX-003].

[340] *See* Rodríguez-Mariátegui Report at para. 86 [Exhibit REX-003].

193. In sum, Bear Creek had made little progress toward obtaining the necessary permits and authorizations to start construction and operation of the mine. As of June 2011, Bear Creek had failed to apply for, much less obtain, any of required permits other than having applied for approval of the EIA. Thus, Bear Creek cannot claim that it possessed any right to exploit the mine. It did not, and it is uncertain whether it would have ever obtained such right—even if it had never faced the EIA review suspension or Supreme Decree No. 032. It seems virtually certain that Bear Creek could not have done so within the timetable it contemplated for the Project, which claimed a start of construction as early as the end of 2011.

H. PERU'S NEGOTIATIONS IN GOOD FAITH WITH BEAR CREEK ARE NOT AN ADMISSION OF LIABILITY

194. Bear Creek alleges that the Government has repeatedly confirmed that the revocation of the public necessity declaration for Santa Ana was wrongful. That claim is unfounded.

195. One variation of this claim contends that Peru's courts have confirmed the illegality of Supreme Decree No. 032.[341] Respondent has already discussed in detail in Section II.E above the status of the first instance court's decision on the amparo proceeding and the perils of any reliance on it. The decision in question is not a final judgment, carries no weight because it was made by a lower court, it carries no precedent value, and it is not considered *res judicata* under Peruvian law.

196. The second variant of this claim focuses on alleged statements by individual government officials. Claimant alleges that government officials repeatedly assured Bear Creek that the government intended to resolve its dispute with Bear Creek.[342] Bear Creek also points

[341] *See* Claimant's Memorial at para. 1.

[342] *See* Claimant's Memorial at paras. 8, 9, 92-100; Swarthout Witness Statement at paras. 53-58.

out that former Minister of Energy and Mines, Mr. Jorge Merino, and Minister of Economy and Finance, Mr. Luis Castilla, publicly admitted that the government wanted to reach an amicable solution with Bear Creek to avoid arbitration.[343] However, neither of the statements cited by Bear Creek are admissions of any wrongdoing. They are not statements that the withdrawal of the public necessity declaration for Santa Ana had been unlawful. Instead, the officials were acting in good faith, trying to find a solution to Bear Creek's situation. Peru is a country that welcomes investment and treats investors well; it is a country that legitimately tries to seek solutions to the problems investors raise. Peru cannot be charged with admissions of misconduct for contemplating or trying to reach an amicable solution to Bear Creek's complaints.

[343] *See* Claimant's Memorial at paras. 8, 9, 92-100.

III. THE TRIBUNAL LACKS JURISDICTION OVER THIS DISPUTE

197. A claimant bears the burden of proving the factual prerequisites for jurisdiction.[344] If it cannot do so, the tribunal must dismiss the claim.[345] In this case, Claimant has failed to establish two premises upon which its jurisdictional case hinges: (1) that Claimant made a good-faith, legal investment in Peru; and (2) that Claimant's investment included the right to construct and operate a mine. As explained below, Claimant cannot meet its burden on these points, and thus, the Tribunal lacks jurisdiction over Claimant's claims.

A. THE TRIBUNAL LACKS JURISDICTION BECAUSE CLAIMANT INVESTED ILLEGALLY

198. The ICSID system was not designed—nor is it permitted—to extend international investment protections to unlawful investments. As explained in Section II.B.2 above, however, Claimant's scheme to acquire indirect rights at Santa Ana without the required prior authorization for foreign companies in the border zone violated Peruvian law. This unlawful scheme to acquire rights at Santa Ana also violated the bedrock international law principle of good faith. Claimant's unlawful acquisition of mining rights is the very foundation of its claims before this Tribunal. As such, the Tribunal lacks jurisdiction to hear this case.

[344] *See, e.g.*, *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Jurisdiction, July 7, 2004 ("*Soufraki*, Decision on Jurisdiction"), para. 58 [Exhibit RLA-013]; *Europe Cement Investment & Trade, S.A. v. Republic of Turkey*, ICSID Case No. ARB (AF)/07/2, Award, August 13, 2009 ("*Europe Cement*, Award"), para. 166 [Exhibit RLA-014]; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB (AF)/06/02, Award, September 17, 2009 ("*Cementownia*, Award"), paras. 113-114 [Exhibit RLA-015]; *Reza and Shahnaz Mohajer-Shojaee and The Government of the Islamic Republic of Iran*, Decision No. DEC 95-273-1, December 26, 1990, paras. 8-9 [Exhibit RLA-016]. *See also*, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge: Grotius Publications, 1987) at 327, 329-33 [Exhibit RLA-047].

[345] *See e.g.*, *Cementownia*, Award at para. 149 [Exhibit RLA-015]; *Soufraki*, Decision on Jurisdiction at para. 81 (RLA-013); *Europe Cement*, Award at para. 145 [Exhibit RLA-014].

1. Investment Treaty Arbitration and the ICSID Arbitral Process Do Not Protect Unlawful Investments

a. Investment treaty arbitration and the ICSID arbitral process do not protect investments that are illegal under the host State's law

199. Investment arbitration tribunals have recognized time and time again that ICSID jurisdiction cannot exist if a claimant obtains its investment by violating the host State's law.[346] The *Phoenix Action v. Czech Republic* tribunal held that:

> States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process.[347]

200. *Phoenix Action* clarified that this rule applies irrespective of whether the treaty at issue contains an explicit clause requiring investments to be made "in accordance with" domestic law. It stated that: "this condition – the conformity of the establishment of the investment with

[346] *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, March 30, 2015, paras. 372-373 [Exhibit RLA-017] (holding that: "[t]he Tribunal finds that an investment can be illegal and as a consequence not protected by investment conventions when it contravenes substantive law, in other words when it does not comply with material norms regulating investments. Norms may prohibit certain business activities, such as the production of drugs, or they may reserve certain sectors to national entities or protect certain sectorial or geographical areas, for example, by making an investment in a national park illegal.") (emphasis added); *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, November 18, 2014, para. 132 [Exhibit CL-0112]; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014 ("*Yukos Universal*, Final Award"), para. 1352 [Exhibit RLA-018] ("An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host state, has brought itself within the scope of application of the [Treaty] through wrongful acts. Such an investor should not be allowed to benefit from the Treaty."); *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, July 25, 2012 ("*Khan Resources*, Decision on Jurisdiction"), para. 383[Exhibit RLA-019]; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009 ("*Phoenix Action,* Award"), paras. 101-105 [Exhibit RLA-020]; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24 (Energy Charter Treaty), Award, August 27, 2008 ("*Plama* , Award"), paras. 138-146 [Exhibit CL-0104]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006 ("*Inceysa*, Award"), para. 239 [Exhibit RLA-021]; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010 ("*Hamester*, Award"), paras. 123-124 [Exhibit RLA-022]; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012, para. 308 [Exhibit RLA-023].

[347] *Phoenix Action,* Award at para. 101 [Exhibit RLA-020].

the national laws – is implicit even when not expressly stated in the relevant BIT."[348] The *Phoenix Action* tribunal found support in the *Plama v. Bulgaria* Award.[349] *Plama* involved a claim under the Energy Charter Treaty ("ECT"), which like the FTA at issue here, has no explicit "in accordance with" domestic law provision. The *Plama* tribunal held that this does not mean the ECT protects illegal investments:

> Unlike a number of Bilateral Investment Treaties, the [Energy Charter Treaty] does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law … The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law."[350]

201. The tribunal in the more recent *SAUR v. Argentina* arbitration held similarly, noting that:

> the purpose of the investment arbitration system is to protect only lawful and bona fide investments. Whether or not the BIT … mentions the requirement that the investor act in conformity with domestic legislation does not constitute a relevant factor. The condition of not committing a serious violation of the legal order is a tacit condition, inherent to any BIT as, in any event, it is incomprehensible that a State offer the benefit of protection through arbitration if the investor, in order to obtain such protection, has acted contrary to the law.[351]

[348] *Phoenix Action,* Award at paras. 101-105 [Exhibit RLA-020].

[349] *Phoenix Action,* Award at para. 101 [Exhibit RLA-020].

[350] *Plama,* Award at paras. (internal quotation omitted) 138-139 [Exhibit CL-0104].

[351] *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012, para. 308 [Exhibit RLA-023] (emphasis added) (the original Spanish reads: *"Sin embargo, el Tribunal también coincide en parte con la argumentación esgrimida por la República Argentina. El Tribunal entiende que la finalidad del sistema de arbitraje de inversión radica en proteger únicamente inversiones legales y bona fide. El hecho de que el APRI entre Francia y la Argentina mencione o deje de mencionar la exigencia de que el inversor haya actuado en conformidad con la legislación interna, no constituye un factor relevante. El requisito de no haber incurrido en una violación grave del ordenamiento jurídico es una condición tácita, ínsita en todo APRI, pues no se puede entender en ningún caso que un Estado esté ofreciendo el beneficio de la protección*

202. Several other tribunals have concurred with *Phoenix Action*, *Plama* and *SAUR* that the requirement of conformity with host State law is implicit in all international investment agreements.[352]

b. Investment treaty arbitration and the ICSID arbitral process do not protect investments that violate the international law principle of good faith

203. In addition to domestic law, would-be ICSID claimants must invest in accordance with general principles of international law, including good faith.[353] The *Plama* tribunal made this clear. The claimant in *Plama*, like Claimant here, procured its alleged investment by disguising to the government the true identity of the investor.[354] The tribunal declined jurisdiction because the claimant's "deceitful conduct" was:

> contrary to the principle of good faith which is part not only of Bulgarian law … but also of international law - as noted by the tribunal in the *Inceysa* case. The principle of good faith encompasses, *inter alia*, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly

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mediante arbitraje de inversión, cuando el inversor, para alcanzar esa protección, haya incurrido en una actuación antijurídica.").

[352] *See, e.g.*, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, November 18, 2014, para. 132 [Exhibit CL-0112] (English translation: "even if there is no explicit reference in the [BIT], the requirement of not having committed a serious violation of the law of the receiving State would be an implied condition, inserted in all [BITs], that it cannot be understood in any case that a State is offering the benefit of investment arbitration protection if the investor, to gain such protection, has committed a serious unlawful act."); *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, May 16, 2014, para. 131 [Exhibit RLA-024] ("The BIT in this case does not define an 'investment' in terms that explicitly require the investment to be made in accordance with the host State's law. Nonetheless, it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State's law.") (internal quotation omitted); *Hamester*, Award at paras. 123-124 [Exhibit RLA-022].

[353] *See, e.g.*, *Phoenix Action,* Award at para. 106 [Exhibit RLA-020] ("In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith. The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance."); *Plama*, Award at para. 145 [Exhibit CL-0104]; *Khan Resources*, Decision on Jurisdiction at para. 383 [Exhibit RLA-019]; *Inceysa* , Award at paras. 231, 239 [Exhibit RLA-021]; *Yukos Universal*, Final Award at para. 1352 [Exhibit RLA-018]; *Hamester*, Award at paras. 123-124 [Exhibit RLA-022].

[354] *Plama*, Award at para. 145 [Exhibit CL-0104].

> important when the information is necessary for obtaining the State's approval of the investment.[355]

204. *Plama* cited the *Inceysa v. El Salvador* case, which involved an investor that obtained a vehicle inspection contract by committing fraud during the public bidding process.[356] The *Inceysa* tribunal held that it lacked jurisdiction, because the investment violated the general international law principle of good faith, which it defined as the "absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment."[357] The *Inceysa* tribunal recognized that extending treaty protections to investments not made in good faith or in violation of domestic law would reward investors' misconduct, in violation of the principle of *nemo auditur propriam turpitudinem allegans* – that nobody can benefit from his own wrong.[358] Applying this maxim, the *Inceysa* tribunal affirmed that:

> the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud." […]
>
> Allowing Inceysa to benefit from an investment made clearly in violation of the rules of the bid in which it originated would be a serious failure of the justice that this Tribunal is obligated to render. No legal system based on rational grounds allows the party

[355] *Plama*, Award at para. 144 (emphasis added) [Exhibit CL-0104].

[356] *Inceysa*, Award at paras. 101-122 [Exhibit RLA-021].

[357] *Inceysa*, Award at paras. 231, 239 [Exhibit RLA-021].

[358] *Inceysa*, Award at paras. 240-242 [Exhibit RLA-021]; *See also Khan Resources*, Decision on Jurisdiction, July 25, 2012, para. 383 [Exhibit RLA-019]; *Plama*, Award, at para. 141 [Exhibit CL-0104]. The *Inceysa* tribunal noted that the principle of *nemo auditur propriam turpitudinem allegans* encapsulates a series of related legal maxims, each of which applies to this case: (i) "*Ex dolo malo non oritur actio*" (an action does not arise from fraud); (ii) "*Malitiis nos est indulgendum*" (there must be no indulgence for malicious conduct); (iii) "*Dolos suus neminem relevat*" (no one is exonerated from his own fraud); (iv) "*In universum autum haec in ea re regula sequenda est, ut dolos omnimodo puniatur*" (in general, the rule must be that fraud shall be always punished); (v) "*Unusquique doli sui poenam sufferat*" (each person must bear the penalty for his fraud). *Inceysa*, Award at para. 240 [Exhibit RLA-021].

> that committed a chain of clearly illegal acts to benefit from them.[359]

205. The *Khan v. Mongolia* tribunal echoed *Inceysa* on this point, stating that:

> An investor who has obtained its investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought him or herself within the scope of application of the [treaty] only as a result of his wrongful acts. Such an investor should not be allowed to benefit as a result, in accordance with the maxim *nemo auditur propriam turpitudinem allegans*.[360]

206. The jurisprudence discussed above is clear. Investment arbitration tribunals lack jurisdiction to adjudicate claims that: (1) are based on investments made in violation of domestic law; or (2) violate the international law principle of good faith. Claimant's claimed investment does both. Moreover, it would be inappropriate for the Tribunal to grant jurisdiction, because doing so would violate the international law principle that a claimant cannot benefit from its own wrong.

2. Claimant Did Not Obtain Its Rights Related to Santa Ana In Accordance with Peruvian or International Law

207. As explained in detail in Section II.B.2, above, through its indirect acquisition of concession rights near the Peruvian border, Claimant violated Peruvian law and failed to act in good faith. These illegal acts vitiated any right to protection Claimant might have enjoyed under the FTA.

208. The Peruvian Constitution—the supreme source of Peruvian domestic law—confers a unique, protected status upon Peru's border areas.[361] For a variety of important reasons, including national security and cultural considerations, Respondent allows only

[359] *Inceysa*, Award at paras. 242-244 [Exhibit RLA-021].

[360] *Khan Resources*, Decision on Jurisdiction at para. 383 [Exhibit RLA-019].

[361] *See* Constitution of Peru, December 29, 1993 ("Constitution of Peru"), at Art. 71 [Exhibit R-001].

Peruvian citizens to own or control natural resources near its borders. The Constitution permits limited exemptions from this rule, but only under exceptional circumstances and only upon receipt of an express waiver from the Peruvian Government.[362]

209. These restrictions are widely known and clearly drafted, and Claimant admits that it was well aware of the restrictions.[363] Nonetheless, rather than follow the proper procedure for obtaining a waiver, Claimant flouted Peruvian law and obtained an unlawful, indirect interest in the Santa Ana concessions without authorization. This unlawful interest is the root of the investment upon which Claimant bases its entire claim.

210. This was the same situation the *Phoenix Action* tribunal faced when it affirmed that:

> [i]f a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process.[364]

211. The Tribunal must reach the same conclusion here. Bear Creek, like the claimant in *Phoenix Action*, obtained its investment by "disregarding" Peru's ban on foreign mining companies owning, even indirectly, concessions in the border regions, without first obtaining a government-issued exception. Thus, Claimant's investment was illegal under Peruvian law, and like the investment in *Phoenix Action*, "cannot be protected through an ICSID arbitral process."[365]

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[362] *See* Constitution of Peru at Art. 71 [Exhibit R-001].

[363] *See* Claimant's Memorial at paras. 20-21.

[364] *Phoenix Action,* Award at para. 101 [Exhibit RLA-020].

[365] *Phoenix Action,* Award at para. 101 [Exhibit RLA-020].

212. In addition to being illegal under Peruvian law, Claimant's acquisition of the Santa Ana concessions violated the international law principle of good faith. As explained above,[366] Claimant did not act in good faith when it skirted Peru's Constitutional restrictions by using Ms. Villavicencio—a Peruvian Bear Creek employee and Bear Creek's legal representative—as a front to acquire the Santa Ana Concessions on Claimant's behalf.

213. Without disclosing to the Government her true intentions or her position as a proxy for Claimant, Ms. Villavicencio applied for and received mining concession rights for the Santa Ana parcels.[367] In short order, Ms. Villavicencio and Claimant (her employer) entered into option contracts that bound Ms. Villavicencio to transfer the concessions to Claimant.[368] Claimant denies none of this. As Mr. Swarthout candidly described, his plan to avoid the border zone restrictions was to "identify a trustworthy Peruvian citizen or company interested in applying for mineral concessions in Santa Ana and enter[] into an option agreement allowing Bear Creek to acquire these concessions."[369]

214. The purpose of Claimant's scheme is obvious: Claimant wanted to secure rights to Santa Ana without first obtaining the constitutionally mandated authorization. To accomplish this, Claimant failed to act in good faith and did not disclose its prior and existing relationship with Ms. Villavicencio. The *Inceysa* tribunal specifically held that because the claimant in that case had "hidden [an] existing relationship" from the government, it had violated domestic and

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[366] *See supra* at paras. 25-57.

[367] *See* Application for the Attribution of Santa Ana Concessions, 9A, 1, 2, and 3 submitted by J.K. Villavicencio to INACC, May 26, 2004, [Exhibit C-0029]; Application for the Attribution of Santa Ana Mining Concessions, 5, 6, and 7 submitted by J,K, Villavicencio Gardini to INACC, November 29, 2004 [Exhibit C-0030].

[368] *See* Claimant's Memorial at paras. 15, 31; Option Contract for the Transfer of Mineral Rights No. 3,512, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, November 17, 2004, at p. 1[Exhibit R-006]; Option Contract for the Transfer of Mineral Rights No. 4,383, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, September 5, 2006, at 3.5 [Exhibit R-007]; Witness Statement of Andrew T. Swarthout, May 28, 2015 ("Swarthout Witness Statement"), at para. 22.

[369] *See* Swarthout Witness Statement at paras. 16-17.

international law and prevented the tribunal from exercising jurisdiction.[370] The Tribunal must take the same approach here.

B. CLAIMANT'S VIOLATIONS OF PERUVIAN LAW INVALIDATE ITS SUPPOSED INVESTMENT AT SANTA ANA

215. Even if the Tribunal were to somehow determine that it can exercise jurisdiction over the unlawful investments that Claimant did not make in good faith, Peruvian law would nonetheless dictate that the Tribunal lacks jurisdiction. Under Peruvian law, the illegal manner in which Claimant obtained its supposed investment at Santa Ana will result in the reversion of the concession rights to the State and declarations of "inefficacy" for various of Claimant's legal acts to carry out the scheme.[371] This leaves the Tribunal with no investment upon which to base jurisdiction.

216. The Peruvian courts have been asked to confirm the illegality of Claimant's supposed investment, and to consequently nullify Claimant's interests at Santa Ana. The Tribunal need not wait for the Peruvian judiciary, however. The Tribunal may, and should, determine that Claimant's receipt of the Santa Ana Concession rights without a public necessity declaration violated Peruvian law, and that therefore no investment—and no jurisdiction—exists.

C. THE TRIBUNAL LACKS JURISDICTION BECAUSE CLAIMANT DOES NOT OWN THE INVESTMENTS UPON WHICH IT BASES ITS CLAIM

217. Furthermore, even if the Tribunal were to find that Claimant legally obtained some set of rights at Santa Ana, Claimant never obtained the right upon which it bases its claim, *i.e.*, the right to operate a "mining project" at Santa Ana. This is fatal to jurisdiction. Claimant cannot base its claim on mining rights that it never obtained.

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[370] *Inceysa*, Award at paras. 236, 239 [Exhibit RLA-021].

[371] *See supra* at para. 158.

218. That a claimant bears the burden of proving ownership of the investments on which it bases its case is uncontroversial and warrants little discussion. The *Gallo v. Canada* tribunal aptly summarized the state of the law, observing that: "[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted."[372] In this case, the Tribunal lacks jurisdiction because Claimant does not own the investments upon which it bases its claim.

219. Claimant repeatedly refers to its investment as the "Santa Ana Mining Project,"[373] but this is a misnomer: Claimant has never undertaken any "mining" at Santa Ana nor has it ever had the right to do so. In fact, calling Claimant a mining company at all is a misnomer: Claimant has never constructed or operated a mine in Peru or anywhere else in the world. Claimant, more accurately, is in the mineral exploration business. It has put forward no evidence that it has the technical wherewithal to build or operate any mine, let alone a large-scale project in the remote, high Andes. Furthermore, Claimant has never progressed beyond the earliest stages of the long, complex regulatory approval process for obtaining a mining permit.[374] In short, Claimant's investment in this case is, at most, a "mineral exploration" project—not a "mining" project as Claimant suggests.

[372] *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award, September 15, 2011, para. 328 [Exhibit RLA-025]; *see also Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, April 16, 2014, paras. 171-173 [Exhibit RLA-026].

[373] Claimant's Memorial at pp. iv, vi, 12, 15, 23 and para. 1 (emphasis added). Claimant also refers to the "Corani Mining Project," but this too is inaccurate, because Claimant has not advanced beyond the mineral exploration stage at Corani. Claimant's Memorial, p. 31.

[374] *See* Rodríguez-Mariátegui Report at paras. 107-08 (listing the 40 major permits or authorizations that Bear Creek never obtained for the Santa Ana Project) [Exhibit REX-003]. *See also supra* at paras. 170-75.

220. Claimant has also defined its investment as: "[t]he Santa Ana Project [which] comprises, *inter alia*, the Santa Ana Concessions and the legal rights associated therewith."[375] Claimant is careful, however, to avoid specifying what those "associated" rights might be. This omission is not surprising. Claimant understandably wants to gloss over the fact that it is seeking half a billion dollars for mining concessions that it has no right to mine. At most, Claimant has a right to seek the right to mine at Santa Ana and Corani.

221. Nonetheless, Claimant's damages analysis—which assumes lost profits from a fully permitted, constructed and operating mine—reveals that Claimant's case presupposes an investment that includes the right to mine at both Santa Ana and Corani. Claimant had no such right, nor was it remotely close to obtaining the many authorizations needed to obtain such a right.[376] Claimant, therefore, cannot prove ownership of the investment upon which it bases its claim, which is fatal to jurisdiction. Article 25 of the ICSID Convention limits ICSID's jurisdiction to disputes "arising directly out of an investment."[377] This dispute, as Claimant has framed it, arises directly out of an investment that Claimant does not have, *i.e.*, a "mining project" or a mining concession with the right to mine. The dispute does not arise directly out of, *e.g.*, ownership of Claimant's company branch in Peru.[378] Because Claimant does not own the rights upon which it bases its claim, the Tribunal lacks jurisdiction to decide this case.

[375] Claimant's Memorial at para. 105 (emphasis added).

[376] *See supra* at paras. 185-93.

[377] ICSID Convention, Article 25.

[378] Claimant has not closed its Peruvian branch or withdrawn any business licenses of that office.

IV. RESPONDENT DID NOT BREACH THE FTA

222. In its Memorial, Claimant tries to fabricate treaty breaches by misconstruing the facts, misapplying the law, and misreading the Treaty. In fact, Claimant bases much of its legal argument on standards of protection from other treaties that conflict with the plain text of the FTA. However, as explained below, the Contracting Parties to the FTA agreed only to limited investment protections that respect States' sovereign right to regulate for the common good. These protections in no way conflict with Peru's measured and necessary regulatory acts that Claimant is challenging in this arbitration.

223. Below, Respondent will demonstrate that it did not expropriate Claimant's investment (Section A below); it acted in accordance with the FTA's fair and equitable treatment provision (Section B below); and it did not violate the other standards of protections that Claimant has invoked (Section C below).

A. RESPONDENT DID NOT EXPROPRIATE CLAIMANT'S INVESTMENT IN THE SANTA ANA PROJECT

224. Supreme Decree No. 032 is not expropriatory because it is a legitimate exercise of Peru's sovereign police powers. The police powers doctrine is a well-known and widely accepted canon of international law, with a history that stretches back for more than a century.[379] Claimant's expropriation claim also fails because the FTA recognizes indirect expropriation claims only in "rare circumstances," and Claimant cannot meet this elevated standard. For these reasons, Claimant's expropriation claim must be rejected. Below, we explain that: (i) Claimant owns limited rights at Santa Ana, and Respondent cannot have expropriated rights that Claimant does not own (Section 1); (ii) Supreme Decree No. 032 was a legitimate exercise of Peru's

[379] *See, e.g.*, *Bischoff Case*, German-Venezuelan Commission, Decision (1903), 10 U.N.R.I.A.A. 420, at p. 420 [Exhibit RLA-027] (noting that "during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police power.").

sovereign police powers (Section 2); (iii) Claimant has no plausible direct expropriation claim because it still holds title to the Concessions (Section 3); and (iv) Claimant's indirect expropriation claim fails because it cannot demonstrate "rare circumstances" as the Treaty demands (Section 4).

1. Claimant's Rights Are Very Limited, and Respondent Cannot Have Expropriated Rights that Claimant Does Not Hold

225. Claimant claims expropriation of its "legal rights over the Santa Ana Concessions."[380] As Dr. Rodríguez-Mariátegui has explained, however, these rights were very limited. At the time of the alleged expropriation, Claimant was in the early stages of applying for the myriad regulatory approvals required to build and operate a mine, and it had not obtained any of the required approvals for the exploitation phase of a mining project.[381] This is a long, complex process that many would-be mining companies never complete.[382] Claimant has never navigated this regulatory process in Peru or in any other country (nor has it ever constructed or operated an industrial mine). Thus, whether Claimant ever would have acquired the right to mine at Santa Ana is very much uncertain.

226. In short, Claimant only held a right to apply for permission to develop and eventually operate a silver mine – not a right to mine at Santa Ana. Claimant can only claim expropriation of the rights it possessed. Thus, even if Claimant could somehow demonstrate that an expropriation occurred (which it cannot), and if Claimant could somehow demonstrate that it

[380] Claimant's Memorial at para. 121.

[381] *See* Rodríguez-Mariátegui Report at para. 47 ("[T]he EIA—and its approval in any event—could be considered as an initial point for the transmission of all of the other permits, licenses, authorizations, certificates, and registrations that will require distinct components and processes.") [Exhibit REX-003]; *see* Ramírez Witness Statement at para. 5 [Exhibit RWS-002].

[382] *See* SRK Report at para. 90 [Exhibit REX-005].

obtained title to the Santa Ana Concessions lawfully (which it cannot),[383] Claimant's expropriation claim would still be restricted to the very limited set of rights it held over the Santa Ana Concessions – that is, the right to try to obtain permissions for silver mining.

2. Claimant's Expropriation Claim Fails Because Supreme Decree No. 032 Was a Legitimate Exercise of Sovereign Police Powers

a. Respondent Has a Sovereign Right to Take Measures Necessary to Ensure Safety and Security

227. As noted above, the issuance of Supreme Decree No. 032 was a proper exercise of Respondent's sovereign police powers. Investment arbitration tribunals have repeatedly held that States are not liable for takings that may result from legitimate exercises of a State's inherent power to regulate for the protection of safety and public order.[384] The police powers doctrine

[383] *See supra* at paras. 34-57.

[384] *See, e.g.*, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001 at para. 198 [Exhibit RLA-028] (holding that a State is "not liable for economic injury that is the consequence of bona fide regulation within [its] accepted police powers…"); *Crompton (Chemtura) Corp. v. Canada*, Award, August 2, 2010, para. 266 [Exhibit CL-0066]; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group v. Argentine Republic*, UNCITRAL, Decision on Liability, July 30, 2010 at para. 128 [Exhibit CL-0102] ("As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation."); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010 at para. 197 [Exhibit CL-0096]; *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, July 17, 2006 at para. 176(j) [Exhibit RLA-029]; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, pt. IV, ch. D, para. 7 ("[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.") [Exhibit RLA-030]; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, para. 103 [Exhibit RLA-031] ("[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, September 13, 2001 ("*CME v. Czech Republic*"), at para. 603 [Exhibit CL-0103]. ("Of course, deprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law. Regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State.")

has a rich international law pedigree. In 1941, Professor Herz observed that the police powers exception was—even then—an established doctrine:

> [E]ven in the era of most radical non-intervention policy there were always certain cases in which state interference with private property was not considered expropriation entailing an obligation to pay compensation but a necessary act to safeguard public welfare: e.g., measures taken for reasons of police, that is, for the protection of public health or security against internal or external danger.
>
> The right of the state to interfere with private property in the exercise of its police power has been recognized by general international law as referring to foreign property also: interference with foreign property in the exercise of police power is not considered expropriation.[385]

228. Twenty years later, the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (the "Harvard Draft Convention") echoed Herz, declaring that a State may take property without compensation if necessary to maintain public order. The Draft Convention stated:

> An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results […] from the action of the competent authorities of the State in the maintenance of public order […] shall not be considered wrongful.[386]

229. Professor Christie concurred the following year, explaining that a State's reasons for a taking pursuant to the police powers doctrine need only be "valid and bear some plausible

[385] J. Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L L. 243 (1941), pp. 251-252 [Exhibit RLA-032] (emphasis added).

[386] L.B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AJIL 515 (1961), p. 554 [Exhibit RLA-033].

relationship to the action taken," and that "no attempt may be made to search deeper to see whether the State was activated by some illicit motive."[387]

230. Today, the police powers doctrine remains a fixture of international investment arbitration. The *Saluka v. Czech Republic* tribunal noted that: "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[388] The *Saluka* tribunal also observed that "[t]here is ample case law in support of th[e] proposition" that "[i]t is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required."[389]

231. *Tecmed v. Mexico* used similarly unqualified language when it held that: "[t]he principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable."[390] Many other tribunals have held similarly.[391]

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[387] G. C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 Brit. Y.B. Int'l L. 307 (1962), p. 338 [Exhibit RLA-034]. *See also* S. Friedman, EXPROPRIATION IN INTERNATIONAL LAW (London: Stevens, 1953) at 50-51 [Exhibit RLA-035]; Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6th ed. (New York: Oxford University Press, 2003) at 512 [Exhibit RLA-036] ("Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in *laissez-faire* economic systems, i.e. exercise of police power, health measures, and the like.").

[388] *Saluka Investments B.V. v. Czech Republic, UNCITRAL*, Partial Award, March 17, 2006 ("*Saluka*, Partial Award"), para. 255 [Exhibit CL-0091]. *See also* para. 254 of *Saluka*, invoking: "the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order."

[389] *Saluka*, Partial Award at para. 262 (quoting *Methanex v. USA, Final Award*, August 30, 2005, 44 ILM 1343, para. 410) [Exhibit CL-0091].

[390] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, para. 119 [Exhibit CL-0040].

[391] *See, e.g.*, the cases listed in footnote 384, above.

232. The academic literature also recognizes that the police powers doctrine allows States to regulate for the common good without compensating impacted property owners.[392] Professor Salacuse was clear that a State is: "not responsible for losses resulting from the bona fide exercise of regulatory … authority," which is "commonly accepted as part of a state's police powers."[393]

233. Investment tribunals have given effect to the police powers exception, including where, as here, a State regulates by revoking a permission granted to a single investor. The *Invesmart, B.V. v. Czech Republic* tribunal addressed this issue in the context of the Czech Republic's revocation of single, specific banking license. The tribunal took a deferential approach, holding that State action:

> is not reviewed at the international law level for its "correctness", but rather for whether it offends the more basic requirements of international law. Numerous tribunals have held that when testing regulatory decisions against international law standards, the regulators' right and duty to regulate must not be subjected to undue second-guessing by international tribunals. Tribunals need not be satisfied that they would have made precisely the same decision as the regulator in order for them to uphold such decisions.[394]

[392] G. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT'L L. 585 (1994), p. 609 [Exhibit RLA-037] (observing that international legal authorities have regularly concluded that "[l]iability does not arise from actions that are nondiscriminatory and are within the commonly accepted taxation and police powers of states"); A. Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. 1 (2005), 22 [Exhibit RLA-038] ("International law authorities have regularly concluded that no right to compensate arises for reasonably necessary regulations passed for the 'protection of public health, safety, morals or welfare.'").

[393] J. Salacuse, THE LAW OF INVESTMENT TREATIES (2010), p. 56 [Exhibit RLA-039].

[394] *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), June 26, 2009 ("*Invesmart*, Award (Redacted)"), para. 501 [Exhibit RLA-040] (emphasis added).

234. The *Invesmart* tribunal dismissed the expropriation claim, holding that the revocation of the bank's license was a non-arbitrary—and non-expropriatory—regulatory act.[395] The tribunal observed that:

> International investment treaties were never intended to do away with their signatories' right to regulate. As found in *Saluka*, where the instant Treaty was being applied, notwithstanding the breadth of its prohibition against expropriation and the absence of an express regulatory power exception, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order.[396]

235. As the *Invesmart* tribunal explained forcefully that:

> This is common sense. Otherwise, once having granted a license to operate a bank, the regulator could be constrained from revoking a license if such action were automatically to be labeled an expropriation at international law.[397]

236. The claimant in *Saluka*, like Claimant here, brought an expropriation claim based on a regulatory measure that was targeted at a single actor, rather than a generally applicable regulation. The *Saluka* tribunal found that the claimant had "been deprived of its investment" by the respondent's imposition of a forced administration of the claimant's interest in a bank,[398] but that nonetheless, no compensation was due. The tribunal reasoned that: "[i]n the absence of clear and compelling evidence that the [respondent State] erred or acted otherwise improperly in reaching its decision, […] the Tribunal must in the circumstances accept the justification given

[395] *Invesmart,* Award (Redacted) at para. 504 [Exhibit RLA-040].

[396] *Invesmart,* Award (Redacted) at para. 498 [Exhibit RLA-040].

[397] *Invesmart,* Award (Redacted) at para. 498 [Exhibit RLA-040].

[398] *Saluka*, Partial Award at para. 267 [Exhibit CL-0091].

by the Czech banking regulator for its decision."[399] The *Saluka* tribunal, therefore, found no treaty breach, stating that:

> based on the totality of the evidence which has been presented to it, that in imposing the forced administration of [the bank] the Czech Republic adopted a measure which was valid and permissible as within its regulatory powers, notwithstanding that the measure had the effect of eviscerating Saluka's investment […].[400]

237. The claimants in *Saluka* and *Invesmart*, like Claimant here, argued that targeted State regulations specific to their investments were expropriatory. In both cases, the tribunal dismissed the claims because the regulations were not "arbitrary"[401] or "improper."[402] As will be shown in Section c below, the issuance of Supreme Decree No. 032 likewise was a proper, non-arbitrary and therefore non-expropriatory act.

b. Respondent Enjoys Wide Discretion in Taking Regulatory Action

238. As an exercise of State regulatory authority, Respondent's enactment of Supreme Decree No. 032 is entitled to a "presumption of legitimacy,"[403] or, as the *Invesmart* tribunal put it, a "margin of appreciation."[404] That tribunal noted that "Ministers must make often difficult,

[399] *Saluka*, Partial Award at para. 273 [Exhibit CL-0091].

[400] *Saluka*, Partial Award at para. 276 [Exhibit CL-0091].

[401] *Invesmart,* Award (Redacted) at para. 504 [Exhibit RLA-040] (holding that the decision to revoke a license was not an expropriation because it was not "a case where the regulator arbitrarily decided to deprive a licensee of its license.").

[402] *Saluka*, Partial Award at para. 273 [Exhibit CL-0091].

[403] *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, July 7, 2011 ("*Tza Yap Shum*"), para. 95 [Exhibit RLA-041] (the original Spanish reads: "*el ejercicio del poder regulatorio y administrativo del Estado lleva aparejada una presunción de legitimidad. Esta es particularmente evidente cuando se advierte que el Estado actúa en aras de un interés público de gran importancia como preservar el orden, la salud o la moral pública (los conocidos como "poderes de policía" del Estado*." (emphasis added)).

[404] *Invesmart,* Award (Redacted) at para. 484 [Exhibit RLA-040].

multi-variable decisions that do not necessarily admit of clear right or wrong answers,"[405] and that:

> Numerous tribunals have held that when testing regulatory decisions against international law standards, the regulators' right and duty to regulate must not be subjected to undue second-guessing by international tribunals. Tribunals need not be satisfied that they would have made precisely the same decision as the regulator in order for them to uphold such decisions.[406]

239. The *Levy v. Peru* tribunal echoed this sentiment, stating that:

> it is unacceptable for an Arbitral Tribunal to 'step into the shoes' of any [State] organ and to 'second-guess' its actions. In other words, an Arbitral Tribunal cannot substitute itself for a State organ or convert itself into an appeals body to examine acts or decisions of the relevant authorities.[407]

240. The *S.D. Myers Inc. v. Canada* tribunal also noted the "high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[408]

241. In sum, the jurisprudence is clear: international law affords States substantial discretion in carrying out regulatory duties. The Tribunal must, therefore, approach its analysis of Supreme Decree No. 032 with deference to Peru's sovereign choices. This deferential approach informs the evidentiary standard applicable to Respondent's assertion of the police powers defense for actions taken in the name of public order. As the *Les Laboratoires v. Poland* tribunal observed, upon a State's *prima facie* showing that a regulation is justified, "the burden

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[405] *Invesmart,* Award (Redacted) at para. 484 [Exhibit RLA-040].

[406] *Invesmart,* Award (Redacted) at para. 501 [Exhibit RLA-040].

[407] *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, February 26, 2014, para .161 [Exhibit RLA-042].

[408] *S.D. Myers Inc. v. Canada*, UNCITRAL First Partial Award, November 13, 2000 ("*S.D. Myers*, First Partial Award"), para. 263 [Exhibit RLA-043].

then falls onto the Claimant[] to show that Respondent's regulatory actions were inconsistent with a legitimate exercise of [] police powers."[409] As explained in the following section, Claimant has not, and cannot, meet this evidentiary burden.

c. Respondent Issued Supreme Decree No. 032 to Protect Legitimate Sovereign Interests

242. Before Respondent submitted a single pleading on the merits in this arbitration, Claimant adopted the cavalier position that: "any argument that the expropriation of the Santa Ana Project could have served a public purpose and the interest of the local populations would be ludicrous."[410] Strongly worded but wholly unsupported declarations of this kind rarely tell the whole story. So too here.

243. In the factual section above, through extensive documentary and witness evidence, Respondent demonstrated that it adopted Supreme Decree No. 032 for several legitimate and important public purposes, including: (i) to quell violent protests that threatened the health and safety of Peru's citizens and destabilization of Peru's international border;[411] and (ii) to protect the integrity of its constitutional processes and its sovereignty over natural resources.[412] Far from "ludicrous," each of these motivations is a valid basis for exercising police power. Together, they give Supreme Decree No. 032 irrefutable legitimacy as a lawful exercise of sovereign police power.

[409] *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (Redacted), February 14, 2012, paras. 582-584 [Exhibit RLA-044].

[410] Claimant's Memorial at para. 138.

[411] *See supra* at paras. 116, 146; Note of Protest from the Government of Bolivia, June 7, 2011[Exhibit R-075].

[412] *See supra* at paras. 142-43.

(i) Respondent Issued Supreme Decree No. 032 to Quell Violent Protests that Arose, At Least In Part, Due To Claimant's Insufficient Community Outreach

244. As explained in Section II.C above, mining companies are responsible for establishing and maintaining positive relationships with the surrounding communities, and for building local support for their projects.[413] Claimant's efforts in this respect, owing perhaps to its lack of mining experience, were woefully inadequate. Rather than engage a large cross section of the local population, Claimant focused on just six out of the twenty-six communities it identified as potentially impacted by the Santa Ana project.[414] As Claimant handed out jobs and other social benefits to a select minority of communities, discontent grew in the areas Claimant ignored. This tension manifested itself in violent ways. For instance, in 2008, local community members ransacked Claimant's office and set its camp on fire.[415]

245. Public opposition to the Santa Ana Project, and to mining in the Puno region in general, came to a violent head between March and June 2011:

- On March 2, 2011, local community members met in Desaguadero to protest mining activities in southern Puno. The demonstrators protested the negative environmental impacts of mining, and specifically requested the cancellation of the Santa Ana project.[416]
- On April 25, 2011, protestors initiated a two-day strike in Desaguadero, which paralyzed the city and blocked the bridge that serves as the main point of transit

[413] *See supra* at paras. 56-58.

[414] *See* Request from Bear Creek to MINEM Soliciting Authorization to Acquire Mining Rights Located in the Border Area, December 4, 2006, pp. 18-19 [Exhibit C-0017]; *see also* Claimant's Memorial at para. 61.

[415] *See* Office of the Ombudsman of Perú, Social Conflict Report No. 56, October 31, 2008, p. 58 [Exhibit R-049]; Resolution No. 468-2008-MP-2da-FPMCH-DESAGUADERO, October 17, 2008, Third *Considerando* [Exhibit R-051].

[416] S*ee* Memorial from the Frente de Defensa No. 005 at pp. 2-17 [Exhibit R-015] Memorial from the Frente de Defensa No. 001 at p. 2 [Exhibit R-016]; Memorial from the Frente de Defensa No. 002 at p. 2 [Exhibit R-017]. *See also* "Elimination of Mining Activities in Puno is Proposed," *La República Newspaper South Edition*, March 9, 2011 [Exhibit R-057].

and trade between Peru and Bolivia. This protest resulted in several injuries and one death.[417]

- The following day, the Regional President of Puno asked the central government to intervene in the escalating demonstrations, specifically requesting the suspension of the Santa Ana Project as a way to quell the violence.[418]

- On May 9, 2011, another strike broke out in Desaguadero.[419] This blocked several roads, including, once again, the critical Desaguadero Bridge between Peru and Bolivia.[420]

- The protests continued on May 19, 2011, this time in the city of Puno, where protestors shut down schools and offices, and threatened to loot local businesses.[421]

- By May 25, 2011, the protest in Puno had grown to 13,000 individuals. The magnitude and length of this protest led to food shortages and poor sanitation throughout the city. Many injuries occurred.[422]

- On May 26, 2011, protesters violently looted Government offices in Puno,[423] and threatened to sabotage the upcoming presidential elections.[424]

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[417] *See* Gala Witness Statement at para. 23 [Exhibit RWS- 001]; *see also* "Anti-mining Strike Generates Losses in the Tourism Sector in Puno," *La República Newspaper South Edition,* April 25, 2011[Exhibit R-059].

[418] *See* Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011 [Exhibit R-018]; *see also* "1700 Mining Concessions," *La República Newspaper South Edition*, April 28, 2011[Exhibit R-061].

[419] *See* Gala Witness Statement at para. 25 [Exhibit RWS-001]; *see also* "Tension Due to Aymara Protests is Back," *La República Newspaper South Edition,* June 9, 2011[Exhibit R-062].

[420] *See* "Community Members Close Borders," La República Newspaper South Edition, May 11, 2011 [Exhibit R-063]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at p. 214 [Exhibit R-048]; *see also* "Protesters March towards Puno to Demand an Ordinance" *La República Newspaper South Edition*, May 12, 2011[Exhibit R-064].

[421] *See* Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at p. 214 [Exhibit R-048]. *See also* MINEM, "For Lack of Security Dialogue Between High Level Commission and Leaders Failed", May 19, 2011 [Exhibit R-022]; Aide Memoire 2011, at p. 5 [Exhibit R-010].

[422] *See* "Strike Affects Bolivian Exports," *La República Newspaper South Edition*, May 26, 2011 [Exhibit R-071]; "Protesters are Open to Dialogue," *La República Newspaper South Edition*, May 26, 2011 [Exhibit R-072]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at pp. 214-215 [Exhibit R-048].

[423] *See* "Aymara Rage Is Out of Control in Puno," *La República Newspaper South Edition*, May 27, 2011[Exhibit R-073]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at pp. 214-215 [Exhibit R-048]; DD.HH. Chronology, p. 10 [Exhibit R-058].

[424] *See* DD.HH. Chronology, p. 15 [Exhibit R-058].

- In June 2011, the protests spread, as demonstrations broke out in the Melgar and Azángaro provinces north of Puno.

246. Faced with escalating violence, increasingly widespread protests, and mounting threats to public safety, the Peruvian Government took appropriate action. In addition to issuing Supreme Decree No. 032, the Government adopted several other measures of general application. These included Supreme Decree No. 033, which suspended all new mining concession requests in Puno, and mandated consultations with the local communities, including communities impacted by mining concessions that the Government had already granted.[425] The goal of these measures was to address the legitimate concerns of the local populations, and to restore peace and order throughout the region. The Government's interventions were effective. Soon after their implementation, the protests, strikes and violence that had paralyzed the region subsided.[426]

(ii) Respondent Issued Supreme Decree No. 032 to Protect the Integrity of Its Constitutional Processes

247. In addition to quelling violence, Supreme Decree No. 032 was also a necessary and proper intervention to correct Claimant's violations of Peruvian law. As explained above,[427] Respondent first became aware of Claimant's scheme to acquire an indirect interest in Santa Ana without authorization in June 2011. This clear affront to the integrity of Respondent's constitutionally mandated process and regulatory authority over natural resources demanded a forceful response. Had Respondent not acted in the face of Claimant's evasion of Peruvian law, this would have emboldened others to act similarly. For this reason alone, Claimant's issuance of Supreme Decree No. 032 was an appropriate and valid exercise of its police power.

[425] Supreme Decree No. 033-2011-EM, June 25, 2011 [Exhibit R-011].

[426] *See supra* at para. 129.

[427] *See supra* at para. 126.

(iii) Respondent Issued Supreme Decree No. 032 to Preserve International Relations With Neighboring States

248. The issuance of Supreme Decree No. 032 was also a legitimate exercise of sovereign authority because it was necessary to maintain international comity with Bolivia. By June 2011, the Bolivian Government was growing increasingly frustrated with the protests in Southern Peru. In particular, Bolivia was concerned about the demonstrations that repeatedly closed the Desaguadero Bridge, which was main transit and trade route between Peru and Bolivia. On June 7, 2011, the Government of Bolivia delivered an official note of protest to the Peruvian embassy in La Paz.[428] Bolivia's protest note stated that it was "deeply concerned" about the situation in Puno, because the "conflict was obstructing free transit between the two countries, causing significant and considerable economic damages to the exports and transportation sectors from Bolivia."[429] This international tension was yet another legitimate reason Respondent needed to act to quell the protests. As noted above, Respondent's interventions proved effective: protests subsided throughout the region by June 27, 2011, just days after the enactment of the suite of measures discussed in Section II.D.2 above.

249. In sum, Respondent adopted Supreme Decree No. 032 to protect its citizens, defend the integrity of its constitutionally mandated processes, and preserve positive relations with its southern neighbor. In the words of *Invesmart*, this was not "a case where the regulator arbitrarily decided to deprive" an investor of property.[430] This was a case of a sovereign Government responding to a widespread crisis of public safety, and to willful circumvention of its regulatory processes, with rational government measures. As noted in *Saluka*, "[i]n the absence of clear and compelling evidence that the [regulator] erred or acted otherwise

[428] *See* Note of Protest from the Government of Bolivia, June 7, 2011 [Exhibit R-075].

[429] Note of Protest from the Government of Bolivia, June 7, 2011 [Exhibit R-075].

[430] *Invesmart*, Award (Redacted) at para. 504 [Exhibit RLA-040].

improperly in reaching its decision, […] the Tribunal must in the circumstances accept the justification given by [Respondent] for its decision."[431] Heeding the words of *Saluka*, the Tribunal should accept Respondent's good faith motivations and find that Supreme Decree No. 032 is a legitimate, non-arbitrary and non-expropriatory exercise of police powers.

3. Claimant Has No Plausible Direct Expropriation Claim Because Claimant Maintains Title to the Santa Ana Concessions

250. In the unlikely event that the Tribunal finds that Supreme Decree No. 032 is not a legitimate exercise of Respondent's police powers, Claimant nonetheless would be unable to support a direct expropriation claim. Claimant is careful never to specify whether it is alleging direct or indirect expropriation,[432] but Claimant's only plausible argument is that Supreme Decree No. 032 indirectly expropriated its investment. As the *El Paso v. Argentina* tribunal clarified, a direct expropriation requires transfer of title:

> Although the Claimant has complained about direct expropriation, it can be declared by the Tribunal from the outset, without extensive reasoning, that no such expropriation occurred. […] In direct expropriation, there is a formal transfer of the title of ownership from the foreign investor to the State […], and it has never been asserted that the shares […] have been transferred by the State to itself or to another public or private company. Thus the only question which remains is whether there has been an indirect expropriation […][433]

[431] *Saluka* at para. 273 [Exhibit CL-0091].

[432] For example, in paragraph 123 of its Memorial on the Merits, Claimant cites the definition of direct expropriation in *Tecmed*, and then, in paragraph 125, Claimant cites the *Tippets* case's discussion of indirect expropriation. In the very next paragraph, Claimant—without specifying whether it is alleging direct or indirect expropriation—simply declares that: "[i]t is uncontroversial on the facts of the case that Peru expropriated Bear Creek's rights over the Santa Ana Concessions." Claimant's Memorial at paras. 123-126.

[433] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011 ("*El Paso Energy*"), paras. 265-266 [Exhibit CL-0095] (emphasis added).

251. Supreme Decree No. 032 does not transfer ownership of the Santa Ana concessions to the State – it simply revokes Supreme Decree No. 083.[434] Supreme Decree No. 083 authorized Claimant to acquire mining concessions, but it did not grant Claimant any concessions.[435] Therefore, Supreme Decree No. 032 did not directly revoke any of Respondent's property rights. In fact, Claimant retains title to the Santa Ana Concessions today, albeit under the cloud of MINEM's lawsuit (discussed in Section II.F above), which if successful, would revert the Concessions to the State as Article 71 specifies.[436]

252. Thus far, Claimant has not argued that the MINEM inefficacy proceeding is an expropriatory act. If it did make this argument, however, the claim would be untenable. First, the MINEM case is years away from resolution. Any direct expropriation claim based on a possible future deprivation is not yet ripe for adjudication.[437] Second, in the civil action, MINEM is not seeking revocation of Respondent's concession rights. Instead, MINEM seeks annulment, *i.e.*, a ruling that Respondent did not lawfully receive the concession rights in the first place.[438] Should MINEM prevail, the ruling would not take anything from Claimant; it would simply declare that Claimant never lawfully received the Santa Ana Concessions in the

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[434] Supreme Decree No. 032-2011-EM, Jun. 25, 2011, Art. 1 [Exhibit C-0005] (Article 1 of the Decree reads: "Article 1 – Purpose of the norm: Supreme Decree No. 083-2007-EM is hereby derogated.")

[435] Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007, Art. 2 [Exhibit C-0004] (Article 2 of the Decree reads: "Article 2 – Authorization to acquire mining rights: Authorize BEAR CREEK MINING COMPANY SUCURSAL DEL PERU to acquire seven (7) mining rights, located in the Puno department, in the border zone with Bolivia, detailed as follows: […]).

[436] *See supra* at para. 155.

[437] *See, e.g.*, *Achmea B.V. v. Slovak Republic [II]*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, May 20, 2014, para. 236 [Exhibit RLA-045] (citing a line of cases that is "unanimous in holding that an expropriation claim is too hypothetical, and thus premature as long as no taking has occurred."); *Glamis Gold v. United States*, UNCITRAL, Award, June 8, 2009 ("*Glamis Gold*"), para. 328 [Exhibit RLA-046] ("for an [expropriation] claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor."); *Aminoil v. Kuwait*, 21 I.L.M. 976, Final Award, March 24, 1982, p. 1026 [Exhibit RLA-048] ("unless and until the Government took some concrete step - such as nationalization – […] there would have been no definite complaint with which to seize any arbitral tribunal.").

[438] Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, July 5, 2011 [Exhibit C-0112].

first place. Of course, Claimant cannot press a claim for expropriation of property that it never legally owned. It follows that neither the MINEM suit nor Supreme Decree No. 032 can amount to a direct expropriation. Thus, in the words of the *El Paso* tribunal, "the only question which remains is whether there has been an indirect expropriation."[439]

4. Claimant's Indirect Expropriation Claim Fails Because Claimant Cannot Demonstrate "Rare Circumstances" as the FTA Demands

253. Claimant's expropriation claim—which, as explained above, is an indirect expropriation claim—also fails because Claimant cannot identify any "rare circumstance" upon which to base its claim. Annex 812.1 of the FTA dictates that a claimant must demonstrate rare circumstances, such as a showing of bad faith, to support a claim of indirect expropriation:

> Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[440]

254. Based on this language, Claimant's indirect expropriation claim will fail unless Claimant can prove that the enactment of Supreme Decree No. 032: (i) represents a "rare circumstance;" (ii) is discriminatory; or (iii) was not designed to protect public safety. Claimant has not proven any of these elements.

a. Supreme Decree No. 032 Is a Good Faith Measure

255. The FTA does not define the term "rare circumstances," but it does provide an illuminating example of one such situation. Article 812.1 notes that a regulation passed in bad

[439] *El Paso Energy* at para. 266 [Exhibit CL-0095] (emphasis added).

[440] Peru-Canada FTA at Article 812.1 [Exhibit C-0001] (emphasis added).

faith would qualify as a rare circumstance.[441] By including the example of a bad faith regulation—which tribunals have noted would be a very exceptional finding[442]—the Contracting Parties indicated that a claimant pursuing an indirect expropriation claim would face a very high bar in proving that its circumstances are in fact "rare." Under any standard, Claimant here will struggle to show rare circumstances: there is nothing "rare" about a State adopting a measure to protect the safety of its citizens.

256. Claimant does allege bad faith in this case, but its allegations are baseless, particularly in light of the applicable legal standard. The *Tza Yap Shum v. Peru* tribunal observed that: "[u]nless there is clear evidence to the contrary [the regulatory authority] deserves to have its conduct examined presuming good faith."[443] The *ConocoPhillips v. Venezuela* tribunal noted "how rarely courts and tribunals have held that a good faith or other related standard is breached," concluding that "[t]he standard is a high one."[444]

257. Claimant's allegations of bad faith focus on Respondent's alleged awareness of the process through which Claimant acquired title to the Concessions.[445] As explained in Section II.B.2 above, however, this is not accurate.[446] Respondent was not aware of the scope or details of the illegal scheme through which Claimant acquired the Santa Ana Concessions until

[441] *See* Peru-Canada FTA at Article 812.1 [Exhibit C-0001].

[442] *See Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, September 3, 2013 ("*Conocophillips Petrozuata B.V.")*, para. 275 [Exhibit RLA-049]; *Tza Yap Shum*, Award at para. 125 [Exhibit RLA-041].

[443] *Tza Yap Shum*, Award at para. 125 [Exhibit RLA-041] (the original Spanish reads: *"A no ser que exista clara evidencia en contrario, ambas partes en este proceso merecen que su conducta se examine presumiendo su buena fe*.").

[444] *Conocophillips Petrozuata B.V.* at para. 275 [Exhibit RLA-049].

[445] Claimant's Memorial at para. 180.

[446] *See supra* at para. 163.

June 2011, when protestors raised the issue during negotiations with the Government.[447] Thus, Claimant's aspersions are baseless, and, in any event, fall well short of the high standard it must meet to prove bad faith.

258. Beyond this failed attempt to show bad faith, Claimant has not alleged—let alone proven—any other "rare circumstance" that might justify an indirect expropriation claim under Article 812.1.

b. Supreme Decree No. 032 Is a Non-Discriminatory Measure

259. Supreme Decree No. 032 is a non-discriminatory regulation. Claimant's argument otherwise comprises a single paragraph, which h is as unconvincing as it is brief.[448] Claimant protests that Respondent has not targeted any other foreign investor that acquired mining rights in border areas in a way comparable to Claimant.[449] Yet, Claimant has not identified any similarly situated foreign investor – that is, an investor that obtained mining rights in the border zones using the same illegal tactics Claimant employed. Furthermore, even if Claimant could identify such investors, as explained above, the protests in the southern Puno region focused directly on the Santa Ana Project.[450] Thus, taking action with respect to Santa Ana in particular was a rational regulatory choice. Finally, Respondent's actions in the mining sector were not limited to Claimant: Respondent suspended all new mining projects in Puno for 36 months and required prior consultation for all projects in the region (not just those owned by

[447] *See supra* at para. 123; Gala Witness Statement at para. 35 [Exhibit RWS-001]; Zegarra Witness Statement at para. 27 [Exhibit RWS-003].

[448] Claimant's Memorial at para. 192.

[449] Claimant's Memorial at para. 192.

[450] *See supra* at paras. 100, 104-14; *See also* Gala Witness Statement at para. 24 [Exhibit RWS- 001]; Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011 [Exhibit R-018].

foreigners).[451] Thus, there is no foundation to suggest that Respondent harbored any anti-foreign bias.

c. Respondent Adopted Supreme Decree No. 032 for Legitimate Reasons, Including the Protection of Public Safety and the Integrity of Its Constitutional Processes

260. As explained above, Respondent conceived of, and implemented, Supreme Decree No. 032 to protect public safety and the integrity of its regulatory system, and to preserve safety and security in the border region.[452] As the Government noted at the time, Peru was facing "a situation of social commotion, violence, and instability" near the Santa Ana project, including "an indefinite strike as well as the threat of acts of violence against public and private property showing opposition" to the Project.[453] Respondent's witnesses have explained that it was precisely these imminent threats to public safety that animated the proposal, adoption and enactment of Supreme Decree No. 032.[454] Respondent was also motivated to correct Claimant's circumvention of Article 71, and thereby protect the integrity of its constitutionally-mandated ban on foreign ownership of resources in the border zone.[455]

261. Based on the severe threats to public safety that it faced, and its desire to preserve the integrity of its sovereign regulatory regime for mining, Respondent took the responsible step of issuing Supreme Decree No. 032.

262. In sum, Supreme Decree No. 032 was a non-discriminatory measure adopted in good faith to further legitimate sovereign interests. The FTA does not provide for indirect

[451] *See supra* at paras. 132, 135-37.

[452] *See supra* at paras. 144-46, 149; *See* Gala Witness Statement at para. 42 [Exhibit RWS-001]; Zegarra Witness Statement at paras. 25-26 [Exhibit RWS- 003].

[453] *See* MINEM Resolution Suspending EIA, Report No. 522-2011-MEM-AAM/ACHM at p. 3 [Exhibit C-0098].

[454] *See* Gala Witness Statement at para. 42 [Exhibit RWS-001]; Zegarra Witness Statement at para. 25 [Exhibit RWS- 003].

[455] *See* Gala Witness Statement at para. 42 [Exhibit RWS-001]; Zegarra Witness Statement at para. 26 [Exhibit RWS- 003].

expropriation claims in these circumstances, which do not come close to meeting the "rare circumstances" test. For these reasons, Claimant's expropriation claim must be rejected.

B. RESPONDENT AFFORDED CLAIMANT FAIR AND EQUITABLE TREATMENT IN ACCORDANCE WITH THE FTA

263. The FTA guarantees investors fair and equitable treatment ("FET") in accordance with the minimum standard of treatment under customary international law.[456] Nothing more. To meet the exacting international minimum standard, Claimant must demonstrate that Respondent's actions reached the level of "shocking" or "egregious," or were indicative of "willful neglect" or "bad faith." As explained below, Claimant has not made, and cannot make, this factual showing.

1. The FTA Does Not Guarantee Fair and Equitable Treatment Beyond the International Minimum Standard of Treatment, Which Places a High Burden on Claimant

264. Article 805 does not guarantee FET beyond the minimum standard of treatment under customary international law.[457] The Treaty is unambiguous in this respect:

> **Article 805: Minimum Standard of Treatment**
>
> 1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.[458]

[456] Peru-Canada FTA at Article 805 [Exhibit C-0001].

[457] Claimant's Memorial at paras. 145-153.

[458] Peru-Canada FTA at Article 805 [Exhibit C-0001] (emphasis added).

265. Professor Borchard observed that the minimum standard sets an absolute floor of treatment, which ensures that States' treatment of aliens does not "fall[] below a civilized standard."[459] More recently, the *S.D. Myers* tribunal also noted that: "[t]he 'minimum standard' is a floor below which treatment of foreign investors must not fall."[460]

266. *S.D. Myers* also clarified that tribunals must afford deference to States when applying the international minimum standard:

> When interpreting and applying the "minimum standard," a […] tribunal does not have an open-ended mandate to second-guess government decision making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern government is through internal political and legal processes, including elections.[461]

267. Similarly, in *Thunderbird v. Mexico*, the tribunal applied the international law minimum standard in holding that:

> Mexico has in this context a wide regulatory 'space' for regulation; in the regulation of the gambling industry, governments have a particularly wide scope of regulation reflecting national views on public morals. Mexico can permit or prohibit any forms of gambling as far as the NAFTA is concerned. It can change its regulatory policy and it has wide discretion with respect to how it

[459] Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 58 (1939) [Exhibit RLA-050].

[460] *S.D. Myers*, First Partial Award *s* at para. 259 [Exhibit RLA-043]; *see also Glamis Gold* at para. 615 [Exhibit RLA-046] (recognizing that the customary international law minimum standard is "meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.").

[461] *S.D. Myers*, First Partial Award at para. 261 [Exhibit RLA-043].

> carries out such polices by regulation and administrative conduct.[462]

268. These precedents demonstrate that international tribunals afford respondent States great deference when examining the propriety of regulations under the international minimum standard.

269. With respect to the substantive content of the international minimum standard for FET, the *Neer v. Mexico* tribunal established a high bar for claimants. In its seminal decision, the *Neer* tribunal stated that a breach of the minimum standard of treatment requires action that amounts: "to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[463] *Neer*'s use of words like "outrage," "bad faith" and "willful neglect" created an extremely high burden for claimants pursuing FET claims.

270. Even if the Tribunal were to consider that the international minimum standard has evolved in some respects since *Neer*, claimants bringing FET claims under the international minimum standard still face a very high burden. The *Thunderbird* tribunal observed that:

> Notwithstanding the evolution of customary law since decisions such as *Neer* Claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of

[462] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL Award, January 26, 2006 ("*Thunderbird*, Award."), para. 127 [Exhibit CL-0073].

[463] *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), 4 RIAA 60, 61-62 [Exhibit RLA-051]. Several other historical cases applied the *Neer* standard or one very similar. *See* Jan Paulsson and Georgios Petrochilos, *—Neer-ly Misled?*, ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL, Fall 2007, 242, 242-257, citing the *Faulkner*, *Roberts* and *Chattin* cases, at 253-257 [Exhibit RLA-052].

> justice or manifest arbitrariness falling below acceptable international standards.[464]

271. The *Cargill* tribunal used comparably strong language to describe the fair and equitable treatment standard in the context of the international minimum standard:

> The requirement of fair and equitable treatment is one aspect of this [international] minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.[465]

272. The tribunal in *Glamis Gold* reached a similar conclusion, noting that customary international law was still rooted in the *Neer* standard, as was "evident in the abundant and continued use of adjective modifiers throughout arbitral awards, evidencing a strict standard."[466] *Glamis* itself invoked strong modifiers noting that:

> The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment […], an act must be sufficiently egregious and shocking — a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons — so as to fall below accepted international standards . . .[467]

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[464] *Thunderbird*, Award at para. 194 [Exhibit CL-0073] (emphasis added).

[465] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, para. 296 [Exhibit RLA-053] (emphasis added).

[466] *Glamis Gold* at para. 614 [Exhibit RLA-046] (emphasis added).

[467] *Glamis Gold* at para. 616 [Exhibit RLA-046] (emphasis added). *See also Loewen Group, Inc and Raymond L. Loewen. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award June 26, 2003, para. 132 [Exhibit CL-0118] (noting that a violation of the minimum standard requires "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety…").

273. Tribunals have invoked similarly strong language to describe the international minimum standard outside of the NAFTA context. For instance, the *Genin v. Estonia* tribunal held that: "[a]cts that would violate th[e] minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[468]

274. The strong language used in these awards proves two points: (1) the *Neer* standard remains the foundation of the modern international law minimum standard of treatment; and (2) this standard places an exceedingly high burden on claimants hoping to demonstrate a breach.

275. In its Memorial, Claimant selectively quotes three cases (*Waste Management II*, *Teco v. Guatemala*, and *Thunderbird v. Mexico*) in an attempt to lower its burden under the international minimum standard.[469] Claimant cherry picks words or phrases from each of these decisions—"arbitrary" from *Waste Management II*; "discriminatory" from *Teco*; "reasonable and justifiable expectations" from *Thunderbird*, etc.—and announces that this excised, selective combination of terms represents the international minimum standard.[470] Respondent cannot, however, establish a rule of customary international law by stringing together a few handpicked words from a few handpicked cases. As noted above, when considering the entirety of the jurisprudence on the customary international law minimum standard—including *Neer* and its modern progeny—it is clear that Claimant faces a very high bar in proving its FET claim. In fact, as shown below, even the cases that Claimant cites support Respondent's position.

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[468] *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001 ("*Genin*, Award"), para. 367 [Exhibit RLA-054] (emphasis added).

[469] Claimant's Memorial at paras. 147-153.

[470] *See* Claimant's Memorial at para. 153.

276. For instance, the very passage in *Waste Management II* that Claimant quotes at length demonstrates that the international minimum standard is permissive with respect to State action. Claimant cited the following:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[471]

277. Through the strong language underlined above, the *Waste Management II* tribunal was clear that the international minimum standard poses a high burden for claimants. Unsurprisingly, the FET claims in *Waste Management II* did not fare well, even though the tribunal accepted many of the claimant's factual arguments. For instance, the tribunal agreed with the claimant that the respondent: (i) "failed in a number of respects to fulfill its contractual obligations to Claimant;"[472] (ii) "inadequate[ly] enforce[d]" a city ordinance;[473] and (iii) attempted to enforce a performance bond in a "problematic" manner.[474] Nonetheless, the tribunal held that these negative facts did not amount to a breach of the international minimum standard. Instead, the tribunal dismissed the claimant's FET claims, holding that: "the evidence

[471] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 ("*Waste Management*, Award"), para. 98 [Exhibit CL-0069].

[472] *Waste Management,* Award at para. 109 [Exhibit CL-0069].

[473] *Waste Management,* Award at para. 109 [Exhibit CL-0069].

[474] *Waste Management*, Award at para. 135 [Exhibit CL-0069].

before it does not support the conclusion that the [respondent] acted in a wholly arbitrary way or in a way that was grossly unfair."[475]

278. The other awards that Claimant quotes in its Memorial (*Teco* and *Thunderbird*) invoke similarly strong language when describing what claimants must prove to establish FET violations under the minimum standard. Like *Waste Management II*, *Teco* also refers to measures that are "grossly unfair" or that amount to a "lack of due process leading to an outcome which offends judicial propriety."[476] *Thunderbird* held that a "gross denial of justice" or "manifest arbitrariness" was necessary for State action to fall below acceptable international standards.[477] As noted earlier, the *Thunderbird* tribunal also held that: "the threshold for finding a violation of the minimum standard of treatment still remains high" —and then proceeded to dismiss that claimant's FET claims.[478] In short, the cases Claimant cites do nothing to lower the elevated burden that Claimant faces. If anything, these cases reinforce the fact that Claimant must demonstrate egregious—or in the words of the *Cargill* tribunal, "shocking"—circumstances to succeed in its FET claim. As explained in section 3 below, Claimant has not met, and cannot meet, that burden.

2. Claimant's FET Claim Fails Because It Has Not Identified a Principle of Customary International Law Regarding Fair and Equitable Treatment That Respondent Violated

279. Claimant's FET claim also fails because it has not identified a specific rule of customary international law that Respondent allegedly breached. As noted above, the FTA guarantees fair and equitable treatment only "in accordance with the customary international law

[475] *Waste Management*, Award at para. 115 [Exhibit CL-0069] (emphasis added).

[476] *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013, para. 454 [Exhibit CL-0070] (emphasis added).

[477] *Thunderbird*, Award at para. 194 [Exhibit CL-0073] (emphasis added).

[478] *Thunderbird*, Award at paras. 194-195 [Exhibit CL-0073] (emphasis added).

minimum standard of treatment of aliens . . . ."[479] To demonstrate a breach of this standard, Claimant must identify a specific rule of customary international law that Claimant violated. It has not—and cannot—do so.

280. Establishment of a rule of customary international law requires two elements: "(1) a concordant practice of a number of States acquiesced in by others; (2) and a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)."[480] To date, broad State practice and *opinio juris* have converged to establish internationally recognized minimum standards only in limited areas. For instance, as will be discussed further in Section IV.C.1.b below, customary international law affords investors a minimum level of physical security and law and order under the rubric of full protection and security, but no more than that.[481]

281. Absent a specific rule of customary international law governing a specific type of conduct, however, States are free to regulate as they deem appropriate.[482] The burden is on Claimant to prove the existence of a rule of customary international law upon which it can

[479] Peru-Canada FTA at Article 805 [Exhibit C-0001] (emphasis added).

[480] *Glamis Gold* at para. 602 [Exhibit RLA-046] (internal quotations omitted); *see also Case of Nicaragua v. United States (Merits)*, I.C.J. REP. 14 (1986), para. 207 [Exhibit RLA-055] ("[F]or a new customary rule to be formed, not only must the acts concerned 'amount to settled practice,' but they must be accompanied by the *opinion juris sive necessitates*. Either the States taking such action or the other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'").

[481] *See, e.g.*, *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990, paras. 67-77 [Exhibit CL-0036]; *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, February 21, 1997, para. 6.06 [Exhibit RLA-056].

[482] *See S.S. Lotus (Fr. v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 18-19 [Exhibit RLA-057] (rejecting any implied "[r]estrictions upon the independence of States," and noting that States enjoy "a wide measure of discretion which is only limited in certain cases by prohibitive rules; . . .").

rely.[483] Claimant has not even tried to meet this burden. Unless and until it does so, Claimant's FET claim must fail.

3. Claimant's FET Claim Fails Because It Cannot Prove that Respondent's Actions Fell Below the International Minimum Standard for Fair and Equitable Treatment

282. Even if Claimant could point to a specific rule of customary international law, Claimant has not marshaled the evidence necessary to prove an FET violation under the customary international law minimum standard. Far from "outrageous," or "shocking," Respondent's actions with respect to Santa Ana were rational, non-discriminatory measures taken to protect public safety and the integrity of its regulatory regime for natural resources. Based on this alone, Claimant's FET claim must fail.

283. Claimant made only a token effort to meet its burden to prove that Respondent's actions fell short of the international minimum standard for FET. Claimant spent several pages applying its factual allegations to the autonomous FET standard,[484] but only one paragraph arguing that these allegations amount to a violation of the international minimum standard.[485] This discussion is woefully inadequate given the elevated burden Claimant faces. Even if Claimant expands the analysis in its Reply, Claimant will struggle to prove a breach for a simple reason: Respondent treated Claimant's investment fairly and equitably, and in accordance with Claimant's legitimate expectations, at all times.

[483] *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (August 27, 1952) (Judgment) (quoting *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (November 20, 1950) (Judgment)) [Exhibit RLA-058] ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.")

[484] Claimant's Memorial at paras. 176-180.

[485] Claimant's Memorial at para. 181.

284. Claimant correctly points out that the Tribunal's FET analysis will hinge largely on Claimant's legitimate expectations.[486] Given the unlawful way that Claimant obtained its rights at Santa Ana, however, Claimant could not have a legitimate expectation that Respondent would honor its investment. If anything, Claimant's expectation should have been that it would lose its concession rights as soon as Respondent uncovered Claimant's illegal acquisition scheme.

285. Even if Claimant had obtained its rights to Santa Ana legally, Claimant would have had no legitimate basis for assuming that its special permission to hold concession rights in the border area would remain in force indefinitely——Respondent gave no assurances to that effect. In fact, Respondent specifically premised Supreme Decree No. 083 on the fact that "the promotion of investments in the mining activity is of national interest."[487] Claimant should have expected that if Peru's national interest changed, the Government could revoke the Decree. Claimant assumed this risk when it invested at Santa Ana. As it turned out, in 2011 Peru's national interest vis-à-vis mining changed dramatically. As mining-related violence escalated, and the local communities' calls to suspend operations at Santa Ana became louder, the Government took the legitimate and expected step of revoking Supreme Decree No. 083.[488] This measure was in line with Claimant's legitimate expectations, and did not violate the international minimum standard for FET.

[486] Claimant's Memorial at paras. 177, 181.

[487] Supreme Decree 083-2007 at 1 [Exhibit C-0004].

[488] Claimant also protests that it received no "advanced warning" of the revocation, but Supreme Decree No. 032 could not have been a surprise to Claimant. Given that Santa Ana was one of just two assets Claimant held, Claimant would have been following the escalating protests—and the protestors' calls to end operations at Santa Ana—very closely.

286. Claimant also argues that Respondent's temporary suspension of the processing of its EIA in May 2011 was unfair and inequitable.[489] This suspension, however, could not have violated Claimant's legitimate expectations regarding Peru's approval process. Claimant was, or should have been, aware that the regulatory process for mining projects is long, complex, and prone to delay.[490] Claimant also should have been aware that mining is a controversial industry in Peru, which has long been the subject of popular protests.[491] Thus, neither the violent uprisings against the mining industry, nor the Government's consequent decision to suspend the processing of the EIA, could have conflicted with any legitimate expectations that Claimant held.

287. In sum, Claimant has not demonstrated that Supreme Decree No. 032 or the suspension of the EIA violated its legitimate expectations. Furthermore, Claimant cannot show that these actions even approach the type of "egregious" or "shocking" conduct required to breach the international minimum standard for FET.

288. The facts of this case are quite similar to those examined in *Genin v. Estonia*. In *Genin*, the respondent revoked the Estonian Innovation Bank's ("EIB") commercial bank license. EIB received no formal notice of the revocation, no invitation to attend the Government session discussing the revocation, and no chance to challenge the decision.[492] The claimant asserted that these actions breached the U.S.-Estonia bilateral investment treaty's FET standard, which is tied to the international minimum standard.[493]

[489] *See* Claimant's Memorial at para. 178.

[490] *See supra* at paras. 167-68; Rodríguez-Mariátegui Report, at paras. 107-08 (listing the 40 major permits or authorizations that Bear Creek never obtained for the Santa Ana Project) [Exhibit REX-003].

[491] *See supra* at paras. 59-71; Rodríguez-Mariátegui Report at para. 63 [Exhibit REX-003].

[492] *Genin*, Award at paras. 363-365 [Exhibit RLA-054].

[493] *Genin*, Award at paras. 1-3 [Exhibit RLA-054].

289. The *Genin* tribunal "censure[d]" the respondent for its poor treatment of EIB,[494] and expressed its "hope" that the respondent would "exercise its regulatory and supervisory functions with greater caution regarding procedure in the future."[495] However, the tribunal nonetheless rejected the claimant's claims because the respondent's actions, while not laudable, did not violate the minimum standard of treatment.[496] The tribunal stated that its task was to interpret the:

> 'international minimum standard' that is separate from domestic law, but that is, indeed, a *minimum* standard. Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.[497]

290. The tribunal held that despite the sympathetic facts for claimant—no notice, no invitation to Government sessions discussing the revocation, and no ability to challenge the measure—the respondent's treatment met the international minimum standard.[498]

291. Like the claimant in *Genin*, Claimant here cannot prove facts sufficient to meet the elevated burden for demonstrating unfair or inequitable treatment under the international law minimum standard. The Tribunal must, therefore, reject Claimant's FET claims. Even if the Tribunal were to apply an autonomous FET standard (which, for the reasons set out in the following section, it should not) the facts described above show that Claimant would still be unable to demonstrate an FET breach, even under that more restrictive standard.

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[494] *Genin*, Award at para. 381 [Exhibit RLA-054].

[495] *Genin*, Award at para. 372 [Exhibit RLA-054].

[496] *Genin*, Award at paras. 316-17, 365, 373 [Exhibit RLA-054].

[497] *Genin*, Award at para. 367 [Exhibit RLA-054].

[498] *Genin*, Award at paras. 363-367 [Exhibit RLA-054].

4. Claimant Cannot Import an Autonomous FET Standard Because the FTA Excludes Pre-existing Obligations from the Scope of Its Most-Favored Nation Clause

292. Unable to prove a breach under the international minimum standard, Claimant hopes to import a more favorable, autonomous FET standard by invoking the FTA's most favored nation ("MFN") clause.[499] This effort must fail. The autonomous FET standard appears only in treaties that Peru signed before the FTA entered into force, and Peru specifically exempted pre-existing treaty obligations from the FTA's MFN clause.[500] Claimant's effort also fails because the FTA's FET provision expressly excludes the importation of FET standards from other treaties.

293. The FTA's MFN clause provides that:

> Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of a non-Party . . . .[501]

294. However, Peru specifically excluded pre-existing international agreements from the scope of the FTA's MFN clause, through a reservation that reads:

> Peru reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.[502]

295. Through this language, Respondent reserved the right to accord investors from Canada "differential treatment" as compared to investors from other countries who are subject to pre-existing treaties such as BITs or free trade agreements. Claimant cannot, therefore, use the

[499] Claimant's Memorial at para. 154 *et seq*.

[500] Annex II to Peru-Canada FTA, Peru's First Reservation [Exhibit R-056].

[501] Peru-Canada FTA at Article 804 [Exhibit C-0001].

[502] Annex II to Peru-Canada FTA, Peru's First Reservation [Exhibit R-056].

FTA's MFN clause to import a treaty standard from an agreement signed before the FTA came into force on August 1, 2009. However, each of the treaties Claimant invokes in relation to an autonomous FET standard was signed and entered into force well before August 1, 2009, as shown in the table below:

Treaty Claimant cited[503]	Date signed[504]	Date entered into force[505]
Peru-Argentina	November 10, 1994	October 24, 1996
Peru-Australia	December 7, 1995	February 2, 1997
Peru-Bolivia	July 30, 1993	March 19, 1995
Peru-China	June 9, 1994	February 1, 1995
Peru-Cuba	October 10, 2000	November 25, 2001
Peru-Czech Republic	March 16, 1994	March 6, 1995
Peru-Denmark	November 23, 1994	February 17, 1995
Peru-Ecuador	April 7, 1999	December 9, 1999
Peru-El Salvador	June 13, 1996	December 15, 1996
Peru-Finland	May 2, 1995	June 14, 1996
Peru-Germany	January 30, 1995	May 1, 1997
Peru-Italy	May 5, 1994	October 18, 1995
Peru-Malaysia	October 13, 1995	December 25, 1995
Peru-Netherlands	December 27, 1994	February 1, 1996
Peru-Norway	March 10, 1995	May 9, 1995
Peru-Paraguay	February 1, 1994	December 18, 1994
Peru-Portugal	November 22, 1994	October 18, 1995
Peru-Romania	May 16, 1994	January 1, 1995
Peru-Spain	November 17, 1994	February 16, 1996
Peru-Sweden	May 3, 1994	August 1, 1994
Peru-Switzerland	November 22, 1991	November 23, 1993
Peru-Thailand	November 15, 1991	November 15, 1991
Peru-United Kingdom	October 4, 1993	April 21, 1994

[503] Claimant's Memorial at para. 156 and n. 404.

[504] UNCTAD List of Bilateral Investment Treaties to which Peru is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu (accessed on September 9, 2015) [Exhibit R-088].

[505] UNCTAD List of Bilateral Investment Treaties to which Peru is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu (accessed on September 9, 2015) [Exhibit R-088].

296. In total, Claimant cites 23 BITs, all of which were signed before the Peru-Canada FTA entered into force. In the FTA at Annex II, Peru reserved the right to treat investors from each of the countries listed above differently from Canadian investors. It follows that each of the BITs Claimant cites—along with the autonomous FET standards they contain—are irrelevant to this Tribunal's analysis.

297. Peru has not signed any BITs since the Peru-Canada FTA entered into force.[506] Peru has signed 10 non-BIT international investment agreements since that date, but none of these treaties helps Claimant. Each one of these agreements—like the FTA—limits FET protection to the minimum standard of treatment under customary international law.[507] In sum, Peru has not signed a single treaty that: (1) post-dates the entry into force of the Peru-Canada FTA; and (2) includes an autonomous FET standard. Therefore, Claimant cannot import an autonomous FET standard into the FTA and the international minimum standard applies. It follows that Claimant's 10-page discussion of the autonomous FET standard is inapposite.[508]

5. Claimant Cannot Import an Autonomous FET Standard Because Doing So Would Conflict with the Will of the Contracting Parties

298. Even if Peru had not specifically excluded pre-existing treaties from the FTA's MFN clause, Claimant's effort to import an autonomous FET standard would still fail based on

[506] UNCTAD List of Bilateral Investment Treaties to which Peru is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu (accessed on September 9, 2015) [Exhibit R-088].

[507] *See* Free Trade Agreement Between Peru and the European Free Trade Association States, signed on July 14, 2010 (includes no guarantee of fair and equitable treatment for foreign investors) [Exhibit R-090]; Free Trade Agreement Between Peru and Korea, signed on November 14, 2010, Article 9.5 [Exhibit R-092]; Free Trade Agreement Between Peru and Mexico, signed on April 6, 2011, Article 11(6) [Exhibit R-101]; Free Trade Agreement Between Peru and Costa Rica, signed on May 21, 2011, Article 12(4) [Exhibit R-125]; Free Trade Agreement Between Peru and Panama, signed on May 25, 2011, Article 12(4) [Exhibit R-126]; Free Trade Agreement Between Peru and Japan, signed on May 31, 2011 (includes no guarantee of fair and equitable treatment for foreign investors) [Exhibit R-127]; Free Trade Agreement Between Peru and Guatemala, signed on June 12, 2011, Article 12(4) [Exhibit R-128]; Free Trade Agreement Between Peru, Colombia and the EU, signed on June 26, 2012, (includes no guarantee of fair and equitable treatment for foreign investors) [Exhibit R-129]; Additional Protocol to the Pacific Alliance Framework Agreement, signed on February 10, 2014, Article 10(6) [Exhibit R-130].

[508] Claimant's Memorial at paras. 157-175.

the clear intent of the parties to the FTA. When Peru and Canada negotiated the FTA, they specifically and purposefully agreed to limit their FET obligations to the minimum standard of treatment. This choice—which the Parties memorialized through the FTA's unambiguous FET provision—is consistent with a broader change in Peru's treaty practice that began after 2000. As noted in the chart below (which lists all of the international investment agreements ("IIAs") that Peru signed between 1995 and 2009), Peru made a policy decision sometime after 2000 to no longer extend FET guarantees based on the autonomous standard:

Date treaty signed[509]	**Treaty**	**FET Standard**
January 30, 1995	Peru-Germany BIT	Autonomous (Art. 2(1))
March 10, 1995	Peru-Norway BIT	Autonomous (Art. 4(1))
May 2, 1995	Peru-Finland BIT	Autonomous (Art. 2(2))
October 13, 1995	Peru-Malaysia BIT	Autonomous (Art. 2(2))
December 7, 1995	Peru-Australia BIT	Autonomous (Art. 3(2))
June 13, 1996	Peru-El Salvador BIT	Autonomous (Art. 4(1))
April 7, 1999	Peru-Ecuador BIT	Autonomous (Art. 3(1))
October 10, 2000	Peru-Cuba BIT	Autonomous (Art. 3(1))
Change in Peru's treaty practice		
October 12, 2005	Peru-BLEU BIT	International minimum (Art. 3)
April 4, 2006	Peru-U.S. FTA	International minimum (Art. 10.5)
August 22, 2006	Peru-Chile FTA	International minimum (Art. 11.4)
November 14, 2006	Peru-Canada BIT	International minimum (Art. 5)
November 12, 2007	Peru-Colombia BIT	International minimum (Art. 4)
May 29, 2008	Peru-Singapore FTA	International minimum (Art. 10.5)
May 29, 2008	Peru-Canada FTA	International minimum (Art. 805)
November 22, 2008	Peru-Japan BIT	International minimum (Art. 5)
April 28, 2009	Peru-China FTA	International minimum (Art. 132)

299. As shown above, after 2000, Peru restricted the scope of the FET protection it granted in its IIAs to the minimum standard under customary international law. Peru negotiated

[509] UNCTAD List of Bilateral Investment Treaties to which Peru is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu (accessed on September 9, 2015) [Exhibit R-088].

the FTA with Canada well after this policy change, as reflected in the FTA's explicit reference to the international minimum standard.

300. Despite the FTA's clear language, Claimant hopes to use the MFN clause to transform the FTA's FET clause (which reflects Peru's current approach to FET protection) into a pre-2001 Peruvian FET clause (which reflects an approach to FET protection that Peru abandoned long ago). Claimant's approach, if successful, would render meaningless the clear and complete shift in Peru's treaty practice described above. This could not have been Peru's intention when it executed the FTA, and thus, the Tribunal must reject Claimant's argument.

301. Furthermore, Canada shares Peru's understanding that an MFN clause cannot alter a treaty's explicit FET standard. This is clear from Canada's interpretation of its FET obligations under NAFTA. NAFTA's FET provision guarantees investors: "treatment in accordance with international law, including fair and equitable treatment and full protection and security."[510] Canada (along with the U.S. and Mexico) issued a binding interpretation of the scope of this obligation (the "NAFTA Interpretive Note"), which referred to the customary international law minimum standard of treatment. The NAFTA Parties clarified that under NAFTA:

> the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international minimum standard of treatment of aliens.[511]

302. By invoking the international minimum standard, Canada and its co-signatories clarified that the FET standard in NAFTA is equivalent to the FET standard in the FTA.

[510] North American Free Trade Agreement at Art. 1105(1).

[511] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, Art. B(2), available at http://www.state.gov/documents/organization/38790.pdf [Exhibit R-131] (emphasis added).

303. In a subsequent submission to the *Pope & Talbot* tribunal, Meg Kinnear, then of the Canadian Government's Trade Law Division, confirmed that a claimant cannot invoke NAFTA's MFN clause to circumvent the Parties' express limitation of their FET obligations to the international minimum standard. Ms. Kinnear, writing on behalf of the Canadian Government and quoting Canada's previous submission, stated that: "Article 1103 [NAFTA's MFN provision] can no longer be relevant or constitute an issue with respect to the interpretation of Article 1105 [NAFTA's FET provision], as the interpretation of the latter is set out in the Note of Interpretation, which is binding on the Tribunal."[512]

304. Canada has, therefore, made its position clear: once the contracting parties explicitly define the scope of a treaty's FET protection, a claimant cannot expand those protections by invoking an MFN clause. In this case, the interpretation of the FTA's FET clause is not set out in a separate Note; the interpretation appears within the FET clause itself, which specifically refers to the international minimum standard. The Tribunal must give effect to this interpretation, and reject Claimant's attempt to import an autonomous FET standard.

C. RESPONDENT DID NOT VIOLATE OTHER PROVISIONS OF THE FTA

305. In addition to its expropriation and FET claims, Claimant—very briefly—asserts claims related to full protection and security ("FPS") and unreasonable and discriminatory measures.[513] We address Claimant's FPS claim in Section 1 below, and we address Claimant's unreasonable and discriminatory measures claim in Section 2 below.

[512] Letter from Meg Kinnear, General Counsel, Trade Law Division, Canada, to *Pope & Talbot* Tribunal, October 1, 2001, at 3 [Exhibit R-132].

[513] Claimant's Memorial at paras. 182-193.

1. Respondent Afforded Claimant Full Protection and Security in Accordance with the FTA

306. In contrast to Claimant's extensive submissions on expropriation and FET, Claimant's discussion of the FPS standard barely stretches to a second page.[514] And the scant discussion Claimant does provide is misguided. Claimant argues that it can import a more favorable FPS standard, but this effort must be rejected for the same reasons described above. Claimant also argues that the FTA's FPS provision guarantees "legal security,"[515] but as explained below, this too is incorrect.

a. Claimant Cannot Import an Autonomous FPS Standard Because the FTA Excludes Pre-existing Obligations from the Scope of Its Most-Favored Nation Clause

307. For the reasons explained in Section B.1 above, Claimant's attempt to use the MFN clause to import a more favorable, autonomous FPS standard must fail.[516] Respondent specifically excluded pre-existing agreements from the scope of the MFN clause.[517] Through this reservation, Respondent reserved the right to accord Canadian investors "differential treatment" from investors subject to pre-existing treaties, including prior Peruvian BITs.[518] Claimant cannot, therefore, use the MFN clause to import standards from treaties signed after the FTA came into force on August 1, 2009. Yet, every treaty that Claimant cites regarding an autonomous FPS standard was signed and entered into force before August 1, 2009, as shown in the table below:

[514] Claimant's Memorial at paras. 186-187.

[515] Claimant's Memorial at paras. 182-183.

[516] Claimant's Memorial at paras. 186-187.

[517] Annex II to Peru-Canada FTA, Peru's First Reservation [Exhibit R-056].

[518] Annex II to Peru-Canada FTA, Peru's First Reservation [Exhibit R-056].

Treaty Claimant cited[519]	Date signed[520]	Date entered into force[521]
Peru-Czech Republic	March 16, 1994	March 6, 1995
Peru-Denmark	November 23, 1994	February 17, 1995
Peru-France	October 6, 1993	May 30, 1996
Peru-Germany	January 30, 1995	May 1, 1997
Peru-Malaysia	October 13, 1995	December 25, 1995
Peru-Netherlands	December 27, 1994	February 1, 1996
Peru-United Kingdom	October 4, 1993	April 21, 1994

308. These pre-existing treaties are of no assistance to Claimant. Furthermore, the 10 international investment agreements that Peru signed after the Peru-Canada FTA entered into force all limit FPS protection to the minimum standard of treatment under customary international law, as does the FTA at issue here.[522] In sum, Claimant cannot use the MFN provision to import an autonomous FPS standard from any Peruvian treaty.

b. Claimant's FPS Claim Fails Because Customary International Law Does Not Guarantee "Legal Security"

309. The FTA's guarantee of full protection and security is limited to the minimum standard of treatment under customary international law. The Treaty is unambiguous in this respect:

[519] Claimant's Memorial at para. 183 and n. 454.

[520] UNCTAD List of Bilateral Investment Treaties to which Peru is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu (accessed on September 9, 2015) [Exhibit R-088].

[521] UNCTAD List of Bilateral Investment Treaties to which Peru is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu (accessed on September 9, 2015) [Exhibit R-088].

[522] *See* Free Trade Agreement Between Peru and the European Free Trade Association States, signed on July 14, 2010 [Exhibit R-090] (includes no guarantee of full protection and security for foreign investors); Free Trade Agreement Between Peru and Korea, signed on November 14, 2010, Article 9.5 [Exhibit R-092]; Free Trade Agreement Between Peru and Mexico, signed on April 6, 2011, Article 11(6) [Exhibit R-101]; Free Trade Agreement Between Peru and Costa Rica, signed on May 21, 2011, Article 12.4 [Exhibit R-125]; Free Trade Agreement Between Peru and Panama, signed on May 25, 2011, Article 12.4. [Exhibit R-126]; Free Trade Agreement Between Peru and Japan, signed on May 31, 2011 (includes no guarantee of full protection and security for foreign investors) [Exhibit R-127]; Free Trade Agreement Between Peru and Guatemala, signed on June 12, 2011, Article 12.4. [Exhibit R-128]; Free Trade Agreement Between Peru, Colombia and the EU, signed on June 26, 2012 [Exhibit R-129] (includes no guarantee of full protection and security for foreign investors); Additional Protocol to the Pacific Alliance Framework Agreement, signed on February 10, 2014, Article 10.6. [Exhibit R-130].

Article 805: Minimum Standard of Treatment

> 1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.[523]

310. To assert a breach of the international minimum standard for FPS, Claimant must identify a rule of customary international law that Respondent arguably violated.[524] Claimant has not done so. Claimant argues that Respondent failed to provide "legal security" to its investments,[525] but the customary international law standard guarantees only physical security.

311. As noted earlier, to prove that a rule of customary international law exists, Claimant must demonstrate: "(1)a concordant practice of a number of States acquiesced in by others; (2) and a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)."[526] With respect to FPS, an international consensus has coalesced around the State obligation to provide a minimum level of physical security,[527] but no such consensus exists with respect to legal security.

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[523] Peru-Canada FTA at Article 805(1) [Exhibit C-0001] (emphasis added).

[524] *See Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (August 27, 1952) (Judgment) (quoting *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (November 20, 1950) (Judgment)) [Exhibit RLA-058] ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.").

[525] Claimant's Memorial at paras. 186-87.

[526] *Glamis Gold* at para. 602 [Exhibit RLA-046] (internal quotations omitted); *see also Case of Nicaragua v. United States (Merits)*, I.C.J. REP. 14 (1986) [Exhibit RLA-055] ("[F]or a new customary rule to be formed, not only must the acts concerned 'amount to settled practice,' but they must be accompanied by the *opinion juris sive necessitates*. Either the States taking such action or the other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'").

[527] *See, e.g.*, *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990, at paras. 67-77 [Exhibit CL-0036]; *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, February 21, 1997, at para. 6.06 [Exhibit RLA-056].

312. Claimant has not shown otherwise. In fact, in its FPS discussion, Claimant does not cite a single case based on the international minimum standard,[528] let alone any case holding that the international minimum standard or any rule of customary international law guarantees legal security (or that any guarantee of legal security would require anything more than providing recourse to properly functioning courts).[529] Absent such a showing, Claimant can only argue FPS in the context of physical protection. However, Claimant has not alleged that Respondent in any way failed to protect the physical integrity of its Peruvian assets. For this reason alone, its FPS claim must fail.

313. Furthermore, even if the Tribunal were to take the novel step of finding a customary international law rule guaranteeing legal security, there would still be no FPS violation here. As explained in Section II.B.2, above, Claimant acquired its alleged rights to the Santa Ana concessions illegally. Respondent does not, of course, have any obligation to provide legal security to unlawful investments.

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[528] Paragraph 186 of Claimant's Memorial lists the following cases, each of which is based on a treaty that does not limit FPS to the international minimum standard: *Siemens v. Argentina* [Exhibit CL-0031] (*see* Agreement Between the Federal Republic of Germany and the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, signed April 9, 1991, November 8, 1993 at Art. 4(1) [Exhibit R-176]); *AAPL v. Sri Lanka* [Exhibit CL-0036] (*see* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka, signed February 13, 1980, February 13, 1980, at Art 2(2) [Exhibit R-133]); *Spyridon v. Romania* [Exhibit CL-0086] (*see* Agreement Between the Government of the Hellenic Republic and the Government of Romania for the Promotion and Reciprocal Protection of Investments, signed September 16, 1991, September 16, 1991, *at* Art. 2(2) [Exhibit R-134]); *Frontier v. Czech Republic* [Exhibit CL-0101] (*see* Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments, signed May 6, 2009, January 22, 2012, at Art. 3(1) [Exhibit R-135]); *Biwater v. U.K.* [Exhibit CL-0107] (*see* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania, signed January 7, 1994, August 2, 1996, *at* Art. 2(2) [Exhibit R-136]); *Azurix v. Argentina* [Exhibit CL-0082] (*see* Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed November 14, 1991, October 20, 1994, at Art. 2(2) [Exhibit R-137]); *CME v. Czech Republic* [Exhibit CL-0103] (*see* Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed April 29, 1991, October 1, 1992 at Art. 3(2) [Exhibit R-138]); and *Elettronica Sicula S.p.A. (ELSI)* [Exhibit CL-0122] (*see* Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Italian Republic, signed February 2, 1948, July 26, 1949, *at* Art. 5(1) [Exhibit R-139]).

[529] Claimant has never alleged that Respondent denied it access to Peruvian courts, or that the Peruvian judiciary acted improperly in any way. In fact, Claimant is actively defending its claim to the Santa Ana concession rights before the Peruvian courts today.

2. The FTA Contains No Unreasonable or Discriminatory Measures Clause, and Claimant Cannot Import Such a Clause from Another Treaty

314. The FTA contains no freestanding protection against unreasonable and discriminatory measures. Claimant tries to fabricate this requirement by once again invoking the MFN clause. For the reasons explained above, this attempt must fail. Again, the Peru-Canada FTA entered into force on August 1, 2009, and Claimant cannot use the MFN clause to import protections from treaties signed before that date. Once again, however, each of the treaties Claimant cites regarding unreasonable and discriminatory measures was signed and entered into force before August 1, 2009, as shown in the table below:

Treaty Claimant cited[530]	Date signed[531]	Date entered into force[532]
Peru-Argentina	November 10, 1994	October 24, 1996
Peru-Bolivia	July 30, 1993	March 19, 1995
Peru-Cuba	October 10, 2000	November 25, 2001
Peru-Denmark	November 23, 1994	February 17, 1995
Peru-Ecuador	April 7, 1999	December 9, 1999
Peru-Finland	May 2, 1995	June 14, 1996
Peru-Germany	January 30, 1995	May 1, 1997
Peru-Italy	May 5, 1994	October 18, 1995
Peru-Netherlands	December 27, 1994	February 1, 1996
Peru-Paraguay	February 1, 1994	December 18, 1994
Peru-Spain	November 17, 1994	February 16, 1996
Peru-Sweden	May 3, 1994	August 1, 1994
Peru-Switzerland	November 22, 1991	November 23, 1993
Peru-United Kingdom	October 4, 1993	April 21, 1994

[530] Claimant's Memorial at para. 184 and n. 455.

[531] UNCTAD List of Bilateral Investment Treaties to which Peru is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu (accessed on September 9, 2015) [Exhibit R-088].

[532] UNCTAD List of Bilateral Investment Treaties to which Peru is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu (accessed on September 9, 2015) [Exhibit R-088].

315. These pre-existing treaties do not help Claimant. What is more, none of the 10 international investment agreements Peru signed after the Peru-Canada FTA entered into force includes a standalone protection from unreasonable or discriminatory measures.[533] Thus, Claimant has no source from which to import an unreasonable or discriminatory measures clause, and the FTA does not provide this protection. Claimant's claim, therefore, must be rejected on its face.

[533] *See* Free Trade Agreement Between Peru and the European Free Trade Association States, signed on July 14, 2010 [Exhibit R-090]; Free Trade Agreement Between Peru and Korea, signed on November 14, 2010 [Exhibit R-092]; Free Trade Agreement Between Peru and Mexico, signed on April 6, 2011 [Exhibit R-101]; Free Trade Agreement Between Peru and Costa Rica, signed on May 21, 2011 [Exhibit R-125]; Free Trade Agreement Between Peru and Panama, signed on May 25, 2011 [Exhibit R-126]; Free Trade Agreement Between Peru and Japan, signed on May 31, 2011 [Exhibit R-127]; Free Trade Agreement Between Peru and Guatemala, signed on June 12, 2011 [Exhibit R-128]; Free Trade Agreement Between Peru, Colombia and the EU, signed on June 26, 2012 [Exhibit R-129]; Additional Protocol to the Pacific Alliance Framework Agreement, signed on February 10, 2014 [Exhibit R-130].

V. CLAIMANT'S DAMAGES CLAIMS ARE INFLATED, INACCURATE AND INAPPROPRIATE

316. As explained above, Respondent has not breached the FTA, and therefore Claimant is not entitled to damages. If, however, the Tribunal were to find liability and reach damages, it must reject Claimant's inflated and unreliable calculations. Claimant seeks more than half a billion dollars for damages to its planned Santa Ana and Corani projects, even though no one has ever produced an ounce of silver at either site, and no one has ever obtained the legal right to do so.

317. That Claimant would request damages of this magnitude is particularly absurd, given that:

- Claimant has never operated a mine in Peru or anywhere else in the world;
- Claimant has never constructed a mine in Peru or anywhere else in the world; and
- Claimant has never successfully navigated the regulatory approval process for building a mine in Peru or anywhere else in the world.

318. Despite its utter lack of experience, Claimant stands before this Tribunal requesting over $520 million for the alleged loss of a project that was, in fact, no more than a proposal (Santa Ana), and for imagined harms to another project that is equally aspirational and was not in any way impaired by the challenged measures (Corani). This figure is disconnected from reality and at odds with international arbitration precedent, which holds that damages for non-producing assets are limited, at most, to amounts invested. This jurisprudence is set out in Section A below.

319. With respect to Santa Ana, even if the Tribunal were inclined to award damages beyond Bear Creek's amounts invested (which it should not), it cannot rely on FTI's damages

calculations. As Professor Graham Davis and The Brattle Group ("Brattle") explain,[534] FTI's discounted cash flow ("DCF") analysis is rife with errors, almost all of which serve to inflate Claimant's damages claim. To demonstrate the unreliable, inflated nature of FTI's DCF calculation, Brattle checked Santa Ana's value against Bear Creek's market capitalization on the day before the enactment of Supreme Decree No. 032. That analysis—which is based on the market's actual valuation of the potential Santa Ana project at the time—would value Santa Ana at less than half of FTI's estimate. That market-based benchmark reveals the unreliability of FTI's work, and underscores the perils of attempting to value a non-producing asset using speculative inputs and a misguided DCF model. The quantum issues related to Santa Ana are addressed in more detail in Section B below and in Sections II and IV of Brattle's Report.

320. With respect to the proposed Corani project, Claimant's scant treatment of this project alone is enough to make clear that this claim is not a serious one. In any event, Claimant has failed to prove that Respondent's actions toward Santa Ana had any impact at all on the current market value of Corani. This claim must, therefore, be rejected in full. The quantum issues related to Corani are addressed in more detail in Section C below and in Section III of Brattle's Report.

A. CLAIMANT'S RECOVERY FOR SANTA ANA IS LIMITED TO AMOUNTS INVESTED BECAUSE CLAIMANT HAS NO HISTORY OF PROFITABLE OPERATION AT THAT SITE

321. Longstanding international law precedent dictates that calculating damages using an income-based approach, like FTI's DCF analysis, is inappropriate for an asset that is not a "going concern" or that lacks a history of profitability.[535] The future cash flows of an investment

[534] Expert Report of The Brattle Group, October 6, 2015 ("Brattle Report") at Section II [Exhibit REX-004].

[535] *Levitt v. Iran*, Award No. 297-209-1, April 22, 1987 14 Iran-U.S. C.T.R. 191, 209-10 [Exhibit RLA-059]; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case ARB/84/3, Award, May 20, 1992 ("*Southern Pacific,* Award"), paras. 188-189 [Exhibit RLA-060] ("In the Tribunal's view, the DCF method

without such an operational history are almost always too speculative to be projected accurately and with sufficient certainty. In these situations, the proper way to compensate the injured claimant is to award it the amount it invested in the asset, making it whole on its out-of-pocket losses.[536] According to Professor Pryles, awarding amounts invested:

> from an economics perspective, should produce a similar result to compensation calculated on this basis of future profits, unless the claimant argues that the project would have experienced exceptionally high or low profitability. And, if a claimant does claim it would have received unusually high profitability, its unproven track record gives incentive to avoid profits as the measure for assessing compensation.[537]

322. The *Metalclad v. Mexico* tribunal adopted the 'amounts invested' approach that Professor Pryles discussed, holding that:

> where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a

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is not appropriate for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation"); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, June 8, 2010 ("*Mohammad*, Award"), para. 71 [Exhibit RLA-061] ("As a general rule assets need to qualify as a going concern and have a proven track record of profitability in order to be valued in accordance with the DCF-method."); *Venezuela Holdings, B.V. Mobil Cerro Negro Holding, Ltd. Mobil Venezolana de Petroleos Holdings, Inc. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, October 9, 2014 ("*Venezuela Holdings*, Award"), paras. 382-385 [Exhibit RLA-062]; *Wena Hotels Limited v. Egypt*, Award, ICSID case ARB/98/4, December 8, 2000 ("*Wena Hotels*, Award") paras. 123-125 [Exhibit CL-0147]; *Siag and Veccchi v. Egypt*, Award, ICSID case No ARB/05/15, June 1, 2009 ("*Siag*, Award") paras. 566-570 [Exhibit RLA-063]; *Gemphus SA and others v. Mexico*, Award, ICSID Case No ARB(AF)/04/3, June 16, 2010 ("*Gemphus*, Award"), paras. 13-70 to 13-72 [Exhibit RLA-064]; *Sola Tiles, Inc. v. Iran*, Award No. 298-317-1, April 22, 1987, 14 Iran-U.S. C.T.R. 224, pp. 240-42 [Exhibit RLA-065]; *Phelps Dodge Corp. v. Iran*, Award No. 217-99-2, March 19, 1986, 10 Iran-U.S. C.T.R., para. 30; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000 ("*Metalclad*, Award"), paras. 120-122 [Exhibit CL-0105]; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, July 7, 2011 ("*Tza Yap Shum*, Award"), paras. 262-263 [Exhibit RLA-041]; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, June 21, 2011 ("*Impregilo*, Award"), paras. 380-381 [Exhibit RLA-066].

[536] *Phelps Dodge*, para. 31 [Exhibit CL-0051]; *Metalclad,* Award at paras. 120-122 [Exhibit CL-0105]; *Biloune v. Ghana Investments Centre*, Award on Damages and Costs, June 20, 1990, 95 I.L.R. 184 ("*Biloune*, Award") at pp. 228-9 [Exhibit RLA-070]; *Impregilo*, Award at paras. 380-381 [Exhibit RLA-066]; *Venezuela Holdings*, Award at para. 385 [Exhibit RLA-062]; *Tecmed*, Award at para. 195 [Exhibit CL-0040]; *Wena Hotels*, Award at paras. 123, 125 [Exhibit CL-0147].

[537] Michael Pryles, "Lost Profit and Capital Investment," World Arbitration and Mediation Review (WAMR) - 2007 Vol. 1 No. 1, pp. 9-10 *available at* http://www.arbitration-icca.org/media/0/12223892171920/damages_in_the_international_arbitration_paper.pdf (last visited September 21, 2015 (internal citation omitted) [Exhibit RLA-067].

> profit, future profits cannot be used to determine going concern or fair market value, […] a discounted cash flow analysis is inappropriate in the present case because the [investment] was never operative and any award based on future profits would be wholly speculative. Rather, the Tribunal agrees with the parties that fair market value is best arrived at in this case by reference to Metalclad's actual investment in the project."[538]

323. More recently, the *Mobil v. Venezuela* tribunal valued a petroleum project for which the claimant had secured certain regulatory approvals, but—like Claimant's projects here—was not yet under construction.[539] The *Mobil* tribunal held that the project was "in a phase of development, which excludes the application of the DCF method in order to evaluate the market value of the Claimants' interests."[540] Instead, the tribunal awarded Mobil its amounts invested, noting that: "the market value of the Claimants' interests in the [asset] must be established at the total of their investment in that Project."[541]

324. The tribunal in *PSEG v. Republic of Turkey* addressed this issue in the specific context of a planned, but unconstructed coal mine and power plant.[542] The *PSEG* tribunal noted that: "[i]t is an accepted fact of the case that, except for a groundbreaking ceremony, there was no mining undertaken or construction started, not even in terms of the necessary preparations to that effect."[543] In light of this, the tribunal concluded that "[r]elying on cash flow tables that were a part of proposals that did not materialize does not offer a solid basis for calculating future

[538] *Metalclad,* Award at paras. 120-122 (emphasis added) [Exhibit CL-0105].

[539] *Venezuela Holdings,* Award at para. 85 [Exhibit RLA-062].

[540] *Venezuela Holdings,* Award at para. 382 [Exhibit RLA-062].

[541] *Venezuela Holdings,* Award at para. 385 [Exhibit RLA-062].

[542] *PSEG Global, Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007 ("*PSEG*, Award") [Exhibit CL-0088].

[543] *PSEG*, Award at para. 304 [Exhibit CL-0088].

profits … . The future profits would then be wholly speculative and uncertain."[544] Even in that context, where the Claimant's future income was allegedly established in contracts—a feature not present in this case, where Bear Creek would have been entirely at the mercy of volatile commodities markets—the *PSEG* tribunal rejected income-based approaches and awarded damages based on the amount the claimant had invested.[545]

325. As this jurisprudence demonstrates, tribunals typically refuse to apply income-based valuation methods like the DCF approach to an asset that is not yet a going concern. Instead, tribunals look to the 'amounts invested' as a proxy for the market value of the asset.

326. To say that Santa Ana was not a 'going concern' would be an understatement. Not only has Claimant never produced an ounce of silver at Santa Ana (or any other site), it has not started construction or even come close to winning the myriad regulatory approvals or securing landowner consent to do so. In fact, the Santa Ana project was in a far more embryonic state than most of the projects addressed in the cases cited above, and even in those cases the tribunals rejected the DCF approach.

327. But the jurisprudence goes even further. Tribunals have also held that the DCF approach is inappropriate even in cases where an asset <u>is</u> operating and <u>is</u> producing revenue, but does not yet have a sufficient history of profitability.[546] Claimant, of course, falls woefully short of the "history of profitability" standard.

328. Consider, for example, the investment at issue in *Tecmed S.A. v. Mexico*, which had been operational for more than two years before the breach occurred. The tribunal considered that history too "brief" to support a DCF analysis, noting:

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[544] *PSEG,* Award at para. 313 [Exhibit CL-0088].

[545] *PSEG,* Award at paras. 316 *et seq.* [Exhibit CL-0088].

[546] *Southern Pacific*, Award at paras. 188-189 [Exhibit RLA-060]; *Tecmed*, Award at para. 186 [Exhibit CL-0040]; *Wena Hotels*, Award at paras. 123, 125 [Exhibit CL-0147].

> [t]he non-relevance of the brief history of operation [] – a little more than two years – and the difficulties in obtaining objective data allowing for application of the discounted cash flow method on the basis of estimates for a protracted future, not less than 15 years, together with the fact that such future cash flow also depends upon investments to be made [] in the long term, lead the Arbitral Tribunal to disregard such methodology to determine the relief to be awarded to the Claimant.[547]

329. Instead, the *Tecmed* tribunal calculated the market value of the investment, and awarded damages, based on the amount the claimant invested.[548]

330. The tribunal in *Wena v. Egypt* adopted a similar approach. Citing *Metalclad*, the *Wena* tribunal noted that the investment in that case—which included a hotel that had been in operation for a year-and-a-half—provided an "insufficiently solid base on which to found any profit … or for predicting growth or expansion of the investment made by Wena."[549] The tribunal held that: "the proper calculation of the market value of the investment expropriated immediately before the expropriation is best arrived at, in this case, by reference to Wena's actual investments."[550]

331. The arbitral decisions discussed above reveal the untenable nature of Claimant's damages claim. If multi-year, profitable business histories are insufficient to support a DCF analysis, then the unapproved, incomplete business plans upon which Claimant relies cannot support an income-based valuation. Instead, limiting Claimant's recovery to the amount it invested is the only appropriate approach. Based on Claimant's financial statements, Brattle

[547] *Tecmed*, Award at para. 186 [Exhibit CL-0040].

[548] *Tecmed*, Award at paras. 195, 201 [Exhibit CL-0040].

[549] *Wena Hotels*, Award at para. 124 (internal citations omitted) [Exhibit CL-0147].

[550] *Wena Hotels*, Award at para. 125 (internal citations omitted) [Exhibit CL-0147].

reports that Claimant claims to have invested $21,827,687 at Santa Ana.[551] This is the upper limit of Claimant's recovery in this case.

B. THE TRIBUNAL MUST REJECT CLAIMANT'S DCF ANALYSIS BECAUSE IT IS INACCURATE, INFLATED AND UNRELIABLE

332. As explained just above, the 'amounts invested' approach is the appropriate way for the Tribunal to value Santa Ana—a non-producing asset with no history of profitability. The Tribunal must reject FTI's attempt to stitch together a discounted cash flow model for an asset without any history of cash flow. The misguided nature of Claimant's approach is best illustrated by the unreliability of the valuation it produces. Below, we explain that FTI's DCF analysis is inaccurate and unreliable because: (i) FTI uses an imprecise DCF methodology (Section 1 below); (ii) FTI inflates damages by applying inaccurate and unrealistic technical inputs (Section 2 below); and (iii) FTI's damages estimate conflicts with the real-world market valuation of Santa Ana at the time (Section 3 below). As such, the Tribunal must reject FTI's approach as unreliable.

1. FTI Applies an Imprecise and Unreliable DCF Methodology

333. FTI's DCF analysis is methodologically flawed and imprecise.[552] Brattle describes FTI's approach as "simple" and "simplistic,"[553] because it cannot capture important differences in the risk of key cash flow components (such as prices and costs), and assumes that all cash flows—regardless of their nature—become exponentially riskier over time. As Brattle explains, this does not reflect reality because "it is unlikely that any project's cash flows will have exponentially increasing uncertainty."[554]

[551] Brattle Report at para. 39 [Exhibit REX-004].

[552] Brattle Report at Section II(D)(1) [Exhibit REX-004].

[553] Brattle Report at para. 88 [Exhibit REX-004].

[554] Brattle Report at para. 89 [Exhibit REX-004].

334. Furthermore, FTI's approach suffers from a lack of comparable properties from which to estimate the uncertainty that might be associated with the Santa Ana project. FTI itself notes that no analogous property exists.[555] Without an apt comparator, FTI is left to adopt a risk factor based on average uncertainties among U.S. precious metal mining companies.[556] Brattle notes that this "is a blunt measure, as it yields the same average value for precious metals project, anywhere in the world, no matter what the metal or the differences in their exposures to systematic risk factors."[557]

335. FTI's imprecise approach uses the discount rate to try to account for the uncertainty of the project. As such, FTI's calculations are very sensitive to discount rate changes. As Brattle explains:

> If the Santa Ana project is just slightly riskier in investors' eyes than the risk of the average precious metal mining company, then applying the market risk adjustments investors use for precious metal mining companies to Santa Ana's cash flows will result in a substantial overvaluation of Santa Ana. Likewise, if Santa Ana's cash flows are on the whole less risky, the application of the market risk adjustments investors use for precious metal mining companies will result in a substantial undervaluation.[558]

336. Brattle notes that use of a modern DCF approach would have removed much of the inherent volatility and imprecision in FTI's model.[559] Under such a modern approach, each cash flow item (*i.e.*, revenues from silver sales, mining costs, metallurgy costs, etc.) receives its own discount for risk, and then these individual cash flows are used to produce an overall project valuation. The modern approach is particularly well suited for mining projects, because clear

[555] Expert Report of FTI Consulting Canada ULC, May 29, 2015 ("FTI Report") at para. 7.67.

[556] FTI Report at para. A.5.21-22.

[557] Brattle Report at para. 111 [Exhibit REX-004].

[558] Brattle Report at para. 91 [Exhibit REX-004].

[559] Brattle Report at paras. 92 *et seq.* [Exhibit REX-004].

market indicators exist for many of the key individual cash flow streams (*e.g.*, silver futures prices).[560]

337. Without explanation, FTI eschews the more accurate modern approach and relies on an imprecise methodology. For this reason alone, FTI's calculation should be rejected. In addition, as explained below, FTI's use of inaccurate and inappropriate technical inputs exacerbates the flaws in its chosen valuation methodology, making it even more unreliable.

2. Claimant's Engineering Analysis for Santa Ana Is Inaccurate and Unreliable

338. In addition to its methodological weaknesses, Claimant's modeling of its hypothetical future cash flows is necessarily flawed because it depends heavily upon unrealistic and inaccurate inputs related to the mine's geological and economic features.[561] The most consequential of these erroneous inputs are: (i) overstated mineral reserve estimates and understated cost projections; (ii) overly ambitious production timelines; and (iii) incorrect silver price projections. As Brattle observes, and as explained below, even if it were methodologically acceptable to use FTI's DCF model despite the fundamental structural flaws discussed in Section 1 above, FTI's adoption of these inaccurate inputs renders FTI's entire DCF calculation unreliable.[562]

339. As outlined below, correcting the technical engineering and mining plan inputs to FTI's model demonstrates its inaccuracy and unreliability. This can be seen in either of two scenarios: (i) a "Base Case", which considers only mineral reserves (*i.e.*, the economically mineable portion of the ore body); and (ii) an "Extended Life Case", which considers mineral reserves as well as some of the mineral resources (*i.e.*, the portion of the ore body that is not

[560] Brattle Report at para. 93 [Exhibit REX-004].

[561] Expert Report of SRK Consulting, October 6, 2015 ("SRK Report") at para. 8 *et seq.* [Exhibit REX-005].

[562] Brattle Report at Section II(D)(2) [Exhibit REX-004].

currently economically mineable, but may become economical in the future). In both cases, correcting the engineering and economic inputs, even without correcting the methodological problems of FTI's model, shows FTI's valuations to be overstated by $137 million to $154 million dollars.[563]

a. Claimant Applies Reserve Estimates That Are Too High and Cost Projections That Are Too Low

340. FTI's DCF analysis relies on estimates of mineral resources and reserves from Roscoe Postle Associates ("RPA"), Claimant's mining consultants.[564] SRK, Respondent's technical mining experts, have identified critical errors in RPA's mineral reserve projections for Santa Ana.[565] Specifically, SRK determined that RPA applied a "cutoff grade" that was inappropriately low. The cutoff grade is the level of contained mineral in an ore below which it is not economically viable to mine and process. At a lower cutoff grade, more of a site's ore deposits will appear economic to mine, and the mine will be reported as having larger than appropriate reserves. As SRK explains:

> the determination of an economic cutoff grade … is essential to determining whether to proceed to the construction phase. The cutoff grade itself is a function of the operating costs and revenue associated with mining, processing and product sale. In order to build a mine, the mineral deposit must be valuable enough to pay for the costs of design and construction (i.e., capital costs), the costs of mine operation (i.e., operating costs), and for mine closure and reclamation costs while generating an acceptable return on the capital invested, by way of a profit stream.[566]

[563] Brattle Report at Tables 1 and 6 [Exhibit REX-004].

[564] FTI Report at paras. 4.28-4.32.

[565] SRK Report at Section 4 [Exhibit REX-005].

[566] SRK Report at para. 33 [Exhibit REX-005].

341. SRK determined that the cutoff grade that RPA applied, 15 grams of silver per ton, was far too low.[567] A more appropriate grade was 30 grams per ton, as reported in Claimant's own 2011 Feasibility Study for the Santa Ana project.[568] According to SRK, RPA's application of the wrong cutoff grade was: "a gross error by RPA, is most unfortunate and results in a gross overstatement of reserves…."[569] When FTI then applied RPA's overstated reserve figures in its DCF analysis, the result was an inflated, inaccurate damages estimate for Santa Ana.

342. In addition to overstating mineral reserves, RPA also understates the anticipated mining costs at Santa Ana. SRK notes that RPA's analysis of mining costs overlooks the fact that Claimant planned to use a contract miner at Santa Ana. SRK observes that:

> The contract miner will provide its own mining equipment with no capital cost to the project. Consequently the contract mining price charged by the mining contractor will have to cover the actual costs incurred, generate a return on the capital employed to purchase the equipment plus a fee or contractor profit. The figure of US$1.68 per tonne of material moved used in the feasibility study is therefore pitifully too low.[570]

343. SRK also notes that the Santa Ana project will face special challenges—and likely increased operating costs—due to altitude.[571] The Santa Ana deposit lies well over 4,000 meters above sea level in the remote, high Andes. This type of extreme environment can cause health problems for workers and mechanical problems for construction and mining equipment. According to SRK, "these challenges will likely result in lower labor and equipment productivity

[567] SRK Report at para. 67 [Exhibit REX-005].

[568] SRK Report at para. 70 [Exhibit REX-005]; *see also* Revised Feasibility Study, Santa Ana Project, April 1, 2011, Table-17.5 and pp. 61-62, 87 [Exhibit C-0061].

[569] SRK Report at para. 75 [Exhibit REX-005].

[570] SRK Report at paras. 79-80 [Exhibit REX-005].

[571] SRK Report at para. 80 [Exhibit REX-005].

which also supports the adoption of a higher operating cost."[572] For these reasons, SRK recommended an increase in projected mining costs from $1.68 per ton of ore to $2.50 per ton of ore.[573]

344. Brattle re-ran FTI's DCF model using SRK's revised cutoff grade, reserve and resource estimates, and mining costs, which resulted in a reduction of the value of the Extended Life Case from $224 million to $178 million, and a reduction in the value of the Base Case from $191 million to $166 million.[574]

345. Based on research regarding historical capital cost overruns, Brattle applied a 14% increase to capital costs to reflect the tendency within the industry to understate project costs in mining feasibility studies.[575] This adjustment further reduces the value of the Extended Case from $178 million to $170 million, and the Base Case value from $166 million to $158 million.[576]

b. Claimant Applies an Overly Ambitious Production Timeline

346. FTI's DCF analysis also assumes an overly aggressive timeline to production that Brattle, SRK, and Respondent's Peruvian mining law expert all find unrealistic.[577] Specifically, FTI assumes that construction at Santa Ana would have started by the end of 2011, and that Claimant would have been producing silver at the site just one year later.[578] Respondent's experts explain that the production schedule FTI applied fails to account for delays due to: (i)

[572] SRK Report at para. 80 [Exhibit REX-005].

[573] SRK Report at para. 80 [Exhibit REX-005].

[574] Brattle Report at paras. 100, 128 [Exhibit REX-004].

[575] Brattle Report at para. 101 [Exhibit REX-004].

[576] Brattle Report at Table 6 and para. 101 [Exhibit REX-004].

[577] SRK Report at Section 6.10 [Exhibit REX-005]; Brattle Report at Section II(D)(2)(b) [Exhibit REX-004]; Expert Report of Luis Rodríguez-Mariátegui Canny, October 6, 2015 ("Rodríguez-Mariátegui Report") at paras. 107-108 [Exhibit REX-003].

[578] Expert Report of Roscoe Postle Associates, May 29, 2015 ("RPA Report") at Section 13.

permitting; (ii) social unrest and protests; and (iii) operational issues, such as recruitment and staffing difficulties, and construction problems.

347. First, FTI's timeline does not account for the delays in obtaining permits that mining companies should expect to face in Peru (just as in countries elsewhere around the world). SRK noted that "[o]ver the past five years or so there has been a history of permitting delays for mining projects in Peru."[579] The concerns noted by SRK are echoed by Respondent's mining law expert Dr. Rodríguez-Mariátegui, who points to the fact that, as of June 2011, Bear Creek had obtained none of the necessary: (i) land use agreements with three communities and 94 land holders;[580] or (ii) approximately 40 permits and approvals.[581] He further opines that:

> [even] assuming that Bear Creek had obtained the land use agreements and the approval of the EIA, considering the numerous steps that were still pending . . . it would have been very difficult—if not impossible—for Bear Creek to start construction of the Santa Ana Project in the second half of 2011, as it alleges in its Memorial, or that it would have been able to start production in the fourth quarter of 2012.[582]

348. Second, FTI does not account for project delays due to social unrest and protests in the region. This error is particularly glaring given the history of widespread and often violent mining protests in Peru, which stretches back well before the valuation date. As SRK notes: "Peru has […] experienced considerable public opposition to mining projects sometimes for genuine concerns and sometimes as a result of the actions of political activists or NGOs."[583] Brattle reviewed the recent history of mining projects in Peru, and determined that other

[579] SRK Report at para. 90 [Exhibit REX-005]; *see also* Brattle Report at para. Section II(D)(2)(b) [Exhibit REX-004].

[580] Rodríguez-Mariátegui Report at para. 67 [Exhibit REX-003].

[581] Rodríguez-Mariátegui Report at para. 106[Exhibit REX-003].

[582] Rodríguez-Mariátegui Report at para. 107[Exhibit REX-003].

[583] SRK Report at para. 90 [Exhibit REX-005].

Peruvian mining projects that faced social unrest experienced typical delays of approximately four years.[584] Brattle notes that because Santa Ana was already the target of protests, it likely would have faced longer protest-related delays than the average Peruvian mine. Thus, the typical delay experienced by the mines that faced social opposition is a more reliable indicator of the delays that Santa Ana might have experienced.

349. Third, SRK explains that operational difficulties, *e.g.*, recruiting staff to work on-site in the remote high Andes, and complications related to construction at high altitudes would have further delayed the project.[585]

350. Taking all of this into account, Brattle extended FTI's pre-production timeline by four years to account for these sources of delay that FTI overlooked. Factoring this additional delay into FTI's DCF model further lowers the value of Santa Ana to $54 million in the Base Case and by $70 million in the Extended Life Case.[586]

c. Claimant Applies Incorrect Silver Price Projections

351. In addition to adopting overly ambitious production timelines, FTI also embraces silver pricing models that exaggerate forward-looking prices. FTI uses two pricing methods, neither of which is accurate or appropriate. First, FTI projects prices by combining commodity futures prices with projections of silver spot prices. As Brattle explains, "[t]he mix of futures and spot prices is inconsistent with finance principles."[587]

352. This flawed methodology leads to absurd results. For instance, FTI's projected silver price for 2015—the final year for which FTI calculates prices using silver futures—is $30.78 per ounce. For 2016, FTI abandons futures pricing almost completely, and adopts pricing

[584] Brattle Report at para. 105 [Exhibit REX-004].

[585] SRK Report at para. 92 [Exhibit REX-005].

[586] Brattle Report at para. 105 and Table 6 [Exhibit REX-004].

[587] Brattle Report at para. 116 [Exhibit REX-004].

projections based on forecasted spot prices. The result is a much lower price projection of $22.21 per ounce.[588] This dramatic one-year fall does not reflect any actual anticipated drop in prices: it results solely from the inconsistent methodology FTI adopts.

353. FTI's second silver pricing method is also deeply, but differently, flawed. For this method, FTI isolates the last available silver futures price as of the date of valuation, and holds that price constant into perpetuity.[589] The imprecision in this approach is self-evident. Brattle also identified a further, less obvious problems with FTI's second pricing method. FTI fails to adjust its discount rate when applying this scenario, even though the use of futures prices accounts for pricing risks that FTI purports to include in its discount rate.[590] These types of clear inconsistencies and methodological flaws further undermine FTI's estimate of Santa Ana damages.

354. Brattle did not perform an independent silver price projection, but the April 2011 Updated Feasibility Study for Santa Ana used a silver price of $13 per ounce – far lower than both of FTI's projections. SRK observes that the adoption of the $13 per ounce silver price in the Updated Feasibility Study "must have reflected Bear Creek's and its consultant's view of silver prices going forward."[591] Thus, not only are FTI's silver pricing models deeply flawed, its price projections far exceed Bear Creek's own estimates of forward-looking silver prices in 2011. Once again, FTI's assumptions are incorrect, and once again these errors serve to inflate damages.

[588] FTI Report at Figure 21.

[589] FTI Report at Figure 22 and Schedule 2.

[590] Brattle Report at para. 119 [Exhibit REX-004].

[591] SRK Report at para. 78 [Exhibit REX-005].

d. Conclusion on Claimant's DCF Analysis for Santa Ana

355. As is clear from the discussion above, Claimant's Santa Ana DCF analysis is deeply flawed. When Brattle re-ran Claimant's model using SRK's corrected inputs discussed above, the result was a $154 million decrease in FTI's Extended Life Case damages estimate. Importantly, this revised figure only accounts for FTI's erroneous inputs – it does not correct the broader methodological problems that underpin Claimant's approach. Thus, these adjusted figures are not themselves alternative damages calculations. They are presented here only to show that FTI's calculations based on RPA's inputs are unreliable.

3. A Market-based Analysis of the Value of Santa Ana Underscores the Unreliability of FTI's DCF Model

356. An explained above, Claimant's DCF analysis is rife with errors and conceptual shortcomings. Brattle examined options for a market-based valuation of Santa Ana. A market-based approach again confirms that Claimant's DCF modeling is off-target, and provides a more accurate assessment of Santa Ana's fair market value. Brattle cautions that although this market-based method is more reliable than FTI's significantly flawed DCF approach, that analysis too has limitations that make it an imperfect and imprecise method of valuing Santa Ana.

357. Brattle's market-based approach involves two main steps:

- **Step One**: Determine Bear Creek's enterprise value (*i.e.*, the value of Santa Ana and Corani) immediately before the alleged Treaty breach. Brattle calculated enterprise value by multiplying Bear Creek's stock price by the total number of outstanding shares on the day in question.

- **Step Two**: Multiply this enterprise value by the percentage of Bear Creek's total value attributable to Santa Ana alone. This produces an estimated market value of Santa Ana immediately before the alleged Treaty breach.

358. The core strength of such a market-based method is that it is grounded in a precise, concrete, real-world measure of value: Bear Creek's stock price. As Brattle explains:

> Bear Creek is publicly traded on the TSX Venture Exchange (TSXV) in Canada. Its share price therefore provides a direct measure of the total FMV of all the company's assets, including Santa Ana. …
>
> The FMV of Bear Creek's equity is straightforward to determine because it is reflected in the company's share price. The owner of a 1% share in the company receives 1% of the value that the company's assets generate, either over time as they generate cash flows from production or more immediately if the company sells its assets for cash. … If a 1% stake in the company is worth 1% of the assets' value, and the price of that 1% stake is known via market information, then the total asset value as judged by the market is simply 100 times that observed share price of the 1% share.[592]

359. In short, the market provides the most reliable measure of Bear Creek's value, and that metric lies at the heart of Brattle's approach (as noted in Step One, above).

360. To gauge the percentage of Bear Creek's total value attributable to Santa Ana (as required for Step Two, above), Brattle adopted the same analyst estimates that FTI used to value Corani.[593] These reports indicate that Santa Ana accounted for, on average, 19.2% of Bear Creek's total market value.[594] Brattle acknowledges that these reports are imperfect studies, noting that: "[t]heir methods are simplistic and have flaws."[595] However, the analyst reports—particularly in aggregate—provide a useful indication of the relative values of Santa Ana and Corani.[596]

361. Using these inputs, Brattle applied the market-based approach to two scenarios:[597]

[592] Brattle Report at paras. 51-52 [Exhibit REX-004].

[593] Brattle Report at para. 56 [Exhibit REX-004]; FTI Report at para. 8.8.

[594] Brattle Report at para. 56 [Exhibit REX-004].

[595] Brattle Report at para. 61 [Exhibit REX-004].

[596] Brattle Report at paras. 61-62 [Exhibit REX-004].

[597] Brattle Report at Tables 3 and 4 [Exhibit REX-004].

- **Scenario A**: This scenario would apply if the Tribunal determines that Supreme Decree No. 032 breached the FTA, but that the suspension of the processing of the EIA did not.

- **Scenario B**: This scenario would apply only if the Tribunal determines that both Supreme Decree No. 032 and the EIA suspension breached the Treaty.

362. For Scenario A, the starting point is Bear Creek's closing share price on June 23, 2011, the day before the public became aware of the impending issuance of Supreme Decree No. 032.[598] Based on that share price, Brattle reported Bear Creek's enterprise value as $464 million. Brattle then applied FTI's own 19.2% figure to allocate claimant's enterprise value across its two projects and thereby to ascertain the value of Santa Ana on the relevant date. These calculations are shown in the table below from Brattle's report:[599]

Bear Creek EV at June 23, 2011	[1]	464.0		
		Low	Average	High
FTI Estimate of Santa Ana Share of EV	[2]	9.1%	19.2%	32.2%
Implied Benchmark for Santa Ana FMV	[3]	42.2	89.1	149.4
FTI Estimate of Santa Ana FMV	[4]	224.2	224.2	224.2
Excess above Benchmark FMV ($ million)	[5]	182.0	135.1	74.8
Excess above Benchmark FMV (%)	[6]	431%	152%	50%

Sources and Notes:
[1]: FTI-03, Data Provided by Capital IQ.
[2]: FTI Report, Figure 26.
[3] = [1] x [2].
[4]: FTI Report, Figure 2.
[5]: [4] - [3].
[6]: [5] / [3].

363. As noted in the table above, this calculation produced a valuation for Santa Ana on June 23, 2011 of $89.1 million.

364. For Scenario B, Brattle begins the analysis with Bear Creek's closing share price on May 27, 2011, the business day before the suspension of MINEM's review of the Santa Ana

[598] Brattle Report at para. 58 [Exhibit REX-004].

[599] Brattle Report at Table 4 [Exhibit REX-004].

EIA.[600] Based on that share price, Brattle calculated Bear Creek's enterprise value as $543.5 million. Brattle again applied the 19.2% figure from FTI to estimate the value of Santa Ana, as shown in Brattle's table replicated below:[601]

Bear Creek EV at May 27, 2011	[1]	543.5		
		Low	Average	High
FTI Estimate of Santa Ana Share of EV	[2]	9.1%	19.2%	32.2%
Implied Santa Ana FMV at June 23, 2011	[3]	49.5	104.3	175.0
FTI Estimate of Santa Ana FMV	[4]	224.2	224.2	224.2
Excess above Benchmark FMV ($ million)	[5]	174.7	119.9	49.2
Excess above Benchmark FMV (%)	[6]	353%	115%	28%

Sources and Notes:
[1]: FTI-03, Data Provided by Capital IQ.
[2]: FTI Report, Figure 26.
[3] = [1] x [2].
[4]: FTI Report, Figure 2.
[5]: [4] - [3].
[6]: [5] / [3].

365. The Scenario B calculation produced a valuation for Santa Ana on May 27, 2011 of $104.3 million. Remarkably, even this higher estimate under Scenario B is still less than half of the valuation FTI reached using its flawed DCF methodology and unrealistic technical inputs.[602]

366. Although the market-based valuation methodology is itself imperfect, it is nonetheless much more reliable than FTI's defective calculation. Thus, if the Tribunal is compelled to award damages for Santa Ana beyond amounts invested (which it should not), Brattle's market-based valuation would be a viable option. Most importantly however, Brattle's calculation—which is based on concrete, real-world data rather than forward-looking projections—is further proof that FTI's DCF calculation for Santa Ana is wildly inflated.

[600] Brattle Report at para. 58 [Exhibit REX-004].

[601] Brattle Report at Table 3 [Exhibit REX-004].

[602] FTI Report at para. 10.1.

C. CLAIMANT'S DAMAGES CLAIM FOR CORANI IS FUNDAMENTALLY WITHOUT MERIT

367. It is textbook law that to obtain an award of damages based on alleged harm to its investment in the proposed Corani project, Claimant must prove: (1) "the fact of its loss or damage"; and (2) "the necessary causal link between the loss or damage and the treaty breach."[603] In its Memorial, Claimant did not make any serious attempt to do either. In fact, in its 50-page factual discussion, Claimant devotes just two paragraphs to Corani,[604] and its damages section contains only three paragraphs on the project.[605] On the basis of this fleeting and superficial treatment, Claimant nevertheless has the temerity to claim more than $200 million in Corani-related damages.[606]

368. The Tribunal must see the Corani claim for what it is: a throwaway claim asserted for strategic reasons. Presumably Claimant hopes the Tribunal will 'split the baby' on damages, and so it seeks to anchor the range of damages at a higher upper limit so that when the baby is split, the mid-point number is higher. Of course, Respondent is confident that the Tribunal will engage in a far more rigorous damages analysis than Claimant apparently

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[603] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013 ("*Rompetrol*, Award"), para. 190 [Exhibit RLA-068]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, November 21, 2007 ("*Archer Daniels*, Award"), para. 282 [Exhibit RLA-069] ("Any determination of damages under principles of international law require a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury."); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 ("*Biwater*, Award") at para. 779 [Exhibit RLA-075] ("compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is sufficient causal link between the actual breach of the BIT and the loss sustained."); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000 ("*S.D. Myers*, Partial Award"), para. 316 [Exhibit RLA-043]; *Gemphus, S.A., SLP, S.A. and Gemphus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, June 16, 2010 ("*Mexican States*, Award"), para. 11(8) [Exhibit RLA-064]; S. Ripinsky & K. Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 135 [Exhibit RLA-071]; Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge: Grotius Publications, 1987), pp. 169-170 [Exhibit RLA-047].

[604] Claimant's Memorial at paras. 55-56.

[605] Claimant's Memorial at paras. 242-244.

[606] Claimant's Memorial at p. 8.

envisions—and when the Tribunal does so it will reject all of Claimant's speculative claims. But whatever the reason Claimant decided to tack on the Corani claim—as an afterthought or an inflation factor—the Tribunal should not hesitate to reject it. The claim is wholly unsubstantiated and without merit.

369. Claimant bases its claim for Corani damages on the assumption that Respondent's actions toward Santa Ana reduced the market value of Corani.[607] According to Claimant, the Santa Ana measures reduced Corani's market value in three ways: (i) by increasing financing costs by requiring Claimant to obtain more outside investment for Corani, and to do so on less favorable terms; (ii) by delaying the development of Corani, because it became more difficult to attract the necessary financing; and (iii) by increasing the market's perception of the risk associated with the Corani project.[608] As explained below, however, Claimant has not met its burden to prove a "causal link" between Respondent's actions with respect to Santa Ana and the supposed decrease in Corani's market value. Specifically, Claimant has not shown any impact on Corani's market value that persisted beyond the short-lived, initial drop in stock price that followed the issuance of Supreme Decree No. 032. In any event, even if causation could be established (it cannot), Respondent's Corani damages estimate is inflated and internally inconsistent.

1. Claimant Has Failed to Demonstrate Any Lasting Damage to Corani's Market Value

370. The overarching flaw in FTI's Corani damages calculation is that it measures a brief, short-term drop in Bear Creek's stock price instead of any actual, lasting damages. As

[607] Claimant's Memorial at paras. 56, 232.

[608] Claimant's Memorial, at para. 56; Swarthout Statement at para. 46; FTI Report at para. 8.1.

explained below, the quantum of those damages—*i.e.*, any loss Claimant incurred for more than a fleeting period—is zero.

371. Claimant tasked FTI with quantifying "the reduction, to date, in the value of Corani as a result of the alleged breaches."[609] To do this, one would assume that FTI would have looked at the value of Corani immediately before the alleged breach, and compared that figure to Corani's value today. FTI did not. Instead, FTI compared Corani's value immediately before the alleged breach to Corani's value immediately after the alleged breach.[610] This misguided approach measured an initial—and quickly reversed—drop in stock price instead of the type of lasting damage for which Claimant might have a cognizable claim. As Brattle explains:

> [b]y focusing only on the immediate market reaction in June 2011 and ignoring subsequent developments, FTI's estimate of Corani damages is irrelevant to the standard of damages FTI purports to apply.[611]

372. Had FTI taken the long view—as it was instructed—and looked at damages "to date," it would have found none. Brattle notes that any initial loss in Corani-related value disappeared in short order, as Claimant's share price quickly rebounded in the wake of Supreme Decree No. 032.[612] This fact is reflected in the graph below, which shows the change in Bear Creek's share price over time, as compared to a set of market indices:[613]

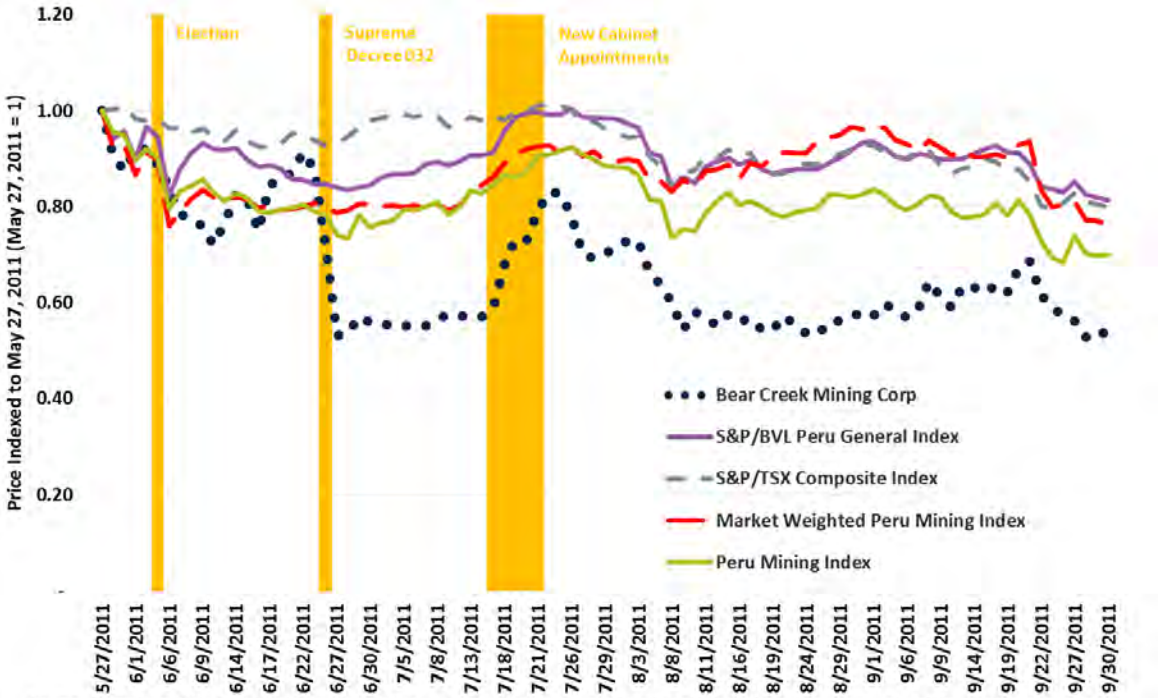
[609] FTI Report at para. 8.2 (emphasis added).

[610] FTI Report at para. 8.5.

[611] Brattle Report at para. 174 [Exhibit REX-004].

[612] Brattle Report at para. 170 [Exhibit REX-004].

[613] Brattle Report at Figure 6 [Exhibit REX-004].



Source: Bloomberg. The Peru Mining Index/Market Weighted Peru Mining Index are calculated based on the equal-weighted average return/ market capitalization-weighted average return of 16 publicly traded companies that own assets exclusively in Peru (excluding Bear Creek). For index calculation and selection of constituents, see Workpaper 6.

373. As shown above, Claimant's share price did, of course, drop following the issuance of Supreme Decree No. 032. Respondent's Corani damages claim depends upon the very arguable proposition that some of this initial drop reflected a reduction in the value of Corani, not only the loss of Santa Ana. However, within a month, Claimant's share price had almost completely recovered to pre-Decree levels, despite the fact that the Santa Ana Project could not proceed. Subsequent falls in the stock price would not be expected to be linked to the earlier Santa Ana measures. Thus, the graph above illustrates that Claimant incurred no lasting Corani-related losses. Claimant's damages at Corani "to date" are therefore non-existent.

374. The sections below address Claimant's specific allegations of Santa Ana-related impacts on Corani's financing costs, development timeline, and perceived market risk. As the discussion above portends, Claimant is unable to demonstrate that it suffered any damages to its Corani project in connection with these issues.

2. Claimant Has Failed to Prove That Respondent's Actions With Respect to Santa Ana Damaged Corani's Market Value Based on Project Delays or Increased Financing Costs

375. To prove that it suffered compensable damages at Corani due to increased financing costs or delays, Claimant must establish two facts: (1) that Respondent's actions regarding Santa Ana actually did increase financing costs or cause delays at Corani; and (2) that those alleged higher costs or delays lowered Corani's market value. As explained below, taking the second point first, Claimant cannot do so.

a. Issues that Relate Only to Claimant Cannot Lower the Market Value of Corani

376. In its Corani damages analysis, Claimant focuses only on its own circumstances, but an assessment of market value is not specific to Bear Creek. Brattle provides a helpful example:

> Suppose we owned a plot of land in downtown Manhattan, on which we grow tomatoes. The value of the land to us, if we plan to keep growing tomatoes, is much lower than if we sold it to a real estate developer. It would not make sense to claim that the land has little market value because growing tomatoes is not particularly profitable. The land's market value would be determined by its traded or tradeable value in its more profitable use as commercial or residential real estate. Moreover, if the prospect of a lengthy drought lowered the profit from growing tomatoes, it would not make sense to conclude that it caused a decrease in the land's market value.[614]

377. As this example illustrates, the market value of Corani is not the value of the concession to Bear Creek; the market values the concession at its most profitable use, and in the hands of its most efficient user. FTI recognized this concept by defining "fair market value" as "the price … at which property would change hands between a hypothetical willing and able

[614] Brattle Report at para. 154 [Exhibit REX-004].

buyer and a hypothetical willing and able seller…."[615] Thus, even if Claimant can show that Bear Creek faced financing difficulties (and therefore delays) at Corani, this would not affect Corani's market value if other more experienced and more financially secure mining companies could have bought and developed the site without these restrictions.

378. As Brattle explains, an active market exists for development-stage mining properties like Corani.[616] Major mining companies—with ample financial resources and no need to rely on outside funding—regularly buy properties from "junior" mining project developers like Claimant.[617] Put another way, even if Claimant faced financing challenges and delays at Corani, Claimant could have mitigated any loss by selling its rights in Corani—at fair market value—to a buyer able to self-finance the project. The project itself would not have lost any market value in connection with any liquidity issues at Bear Creek.

b. Claimant Has Not Proven That Respondent's Actions Caused Higher Financing Costs or Delays at Corani

379. In any event, neither Claimant nor FTI has shown that Claimant in fact faces higher financing costs or related delays at Corani due to Respondent's actions. Mr. Swarthout's witness statement is Claimant's only evidence that it faces financing challenges and delays at Corani. Mr. Swarthout testifies that Supreme Decree No. 032 "will undoubtedly make it extremely difficult for Bear Creek to obtain financing for Corani, which resulted in a significant delay in the Corani Project."[618] But that is not what Mr. Swarthout told the public in 2011. During a call with market analysts shortly after the issuance of Supreme Decree No. 032, Mr. Swarthout stated:

[615] FTI Report at para. 7.3.

[616] Brattle Report at para. 155 [Exhibit REX-004].

[617] Brattle Report at para. 155 [Exhibit REX-004].

[618] Swarthout Statement at para. 46.

> Corani is unaffected by the actions taken by the government or the protests and is on track for completion of the Feasibility Study …. So I think Corani can move forward, regardless of what we do, whether it's seek a political solution to Santa Ana or legal recourse. So Corani, we don't see the timeline as affected …[619]

380. Mr. Swarthout was, and remains, obligated under Canadian securities regulations to disclose any material information to investors—including any negative impact that Supreme Decree No. 032 might have had on the Corani project.[620] If Claimant truly lost $170 million at Corani—as it claims in this Arbitration—this would have been a material event requiring notice to investors. Yet, Bear Creek made no such disclosure. No mention of Santa Ana-related delays or financing difficulties at Corani appears in the Corani Feasibility Study issued in December 2011,[621] six months after Supreme Decree No. 032, nor in the company's 2011 Annual Report,[622] nor in company news releases or other public statements from that period.

381. In fact, as just noted, Mr. Swarthout was telling the investing public just the opposite. Mr. Swarthout's public statements at the time and his testimony today cannot both be true. Either Mr. Swarthout and Bear Creek violated Canadian securities regulations by hiding massive Corani-related losses in 2011, or they are asserting baseless claims before this Tribunal

[619] Transcript of Bear Creek Mining Corp. Special Call, Monday, June 27, 2011 2:0 pm GMT, pp. 3, 7 [Exhibit R-186] (emphasis added).

[620] To maintain its listing on the TSX Venture Exchange, Bear Creek must disclose all "material information," *i.e.*, "any information relating to the business and affairs of an Issuer that results in or would reasonably be expected to result in a significant change in the market price or value of any of the Issuer's Listed Shares, and includes Material Facts and Material Changes." TSX Venture Corporate Finance Policy 3.3 Timely Disclosure, Section 2.1 [Exhibit R-187]. Furthermore, "[a]n Issuer must disclose Material Information concerning its business and affairs immediately after management of the Issuer becomes aware of the existence of Material Information, or in the case of information previously known, upon it becoming apparent that the information is material." TSX Venture Corporate Finance Policy 3.3 Timely Disclosure, Section 3.1 [Exhibit R-187].

[621] M3 Engineering, Corani Project Form NI 43-101F1 Technical Report Feasibility Study, December 2011 [Exhibit C-0066].

[622] Bear Creek Mining 2011 Annual Report (March 27, 2012) [Exhibit R-188].

today. In either case, Mr. Swarthout's testimony—upon which Claimant's entire theory of Corani damages hinges—is not reliable.

382. Furthermore, even if Claimant could show that Respondent's actions toward Santa Ana somehow harmed its investment in Corani, any impact would have been minimal, for at least three reasons:

383. First, even if Claimant's assertion that it "would [have been] able to use the substantial cash flows generated by Santa Ana … to cover or finance part of the $574 million initial capital cost [for] Corani"[623] were true, the Santa Ana cash flows could have covered only a fraction of Corani's start-up costs. To illustrate this, if one assumes Claimant was able to generate all of the free cash flows it projected for Santa Ana,[624] and that Claimant devoted all of that free cash to Corani, it would take more than 8 years of operations at Santa Ana to finance Corani's initial capital needs. Thus, even if the Santa Ana project proceeded through permitting and construction precisely as planned—a dubious proposition given Claimant's inexperience and the many difficult hurdles still ahead of it—Claimant still would have needed to attract significant outside funding to develop Corani.

384. Second, although Claimant no longer had the prospect of potential cash flows from Santa Ana, Claimant also saved a projected $71 million in construction costs by not building a mine at Santa Ana.[625] This extra amount is larger than the projected free cash flow

[623] Claimant's Memorial at para. 56.

[624] The 2011 Revised Feasibility Study for Santa Ana estimated free cash flows of $68 million per year. Ausenco Vector, Revised Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report, Update to the Oct. 21, 2010 Technical Report, April 1, 2011, Section 1.1 [Exhibit C-0061].

[625] Ausenco Vector, Revised Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report, Update to the Oct. 21, 2010 Technical Report, April 1, 2011, Table 1.4 [Exhibit C-0061].

from the first year of production at Santa Ana,[626] and Claimant is now free to deploy these funds at Corani immediately.

385. Third, Bear Creek's assumption that it suffered a loss simply because it would need more outside financing instead of internal funds to build the Corani mine conflicts with basic economic principles. As Brattle explains:

> Basic financial economics principles imply that while borrowing (or issuing equity) has explicit costs (e.g., interest expense or dividends to the new shareholders), using internal funds is also costly because of their opportunity cost. It is an economic fallacy to argue, for example, that by using internal funds a company is "saving" the interest expense of borrowing the same amount, because the internal funds could have been invested and generated returns.[627]

386. For these reasons, even if Claimant could show that Respondent's actions damaged its investment at Corani (which it has not and cannot), the impact would have been much less than Claimant suggests. The quantum of these unproven damages is addressed in Section 4 below.

3. Claimant Has Failed to Prove That Respondent's Actions Increased the Market's Perception of Risk for Corani and That This Has Lowered Corani's Fair Market Value

387. Claimant also argues that Supreme Decree No. 032 increased the market's perception of risk with respect to Corani, and that this reduced Corani's market value.[628] Basic logic and analysis by Brattle demonstrate otherwise.[629]

388. Peru enacted Supreme Decree No. 032 for reasons that are entirely disconnected from Corani. Respondent has explained that it issued the Decree to: (i) quell violent protests

[626] Brattle Report at para. 159 [Exhibit REX-004].

[627] Brattle Report at para. 156 [Exhibit REX-004].

[628] Claimant's Memorial at para. 101; Swarthout Statement at para. 46.

[629] Brattle Report at Section III(B)(2) [Exhibit REX-004].

directed specifically at Santa Ana; and (ii) protect the integrity of its regulatory processes for obtaining mining rights in border zones.[630] Corani was not the subject of widespread protest, nor is there any indication that Claimant obtained its rights at Corani improperly. What is more, Corani is not located in a border zone, so it cannot be subject to an action equivalent to Supreme Decree No. 032. In short, no foundation exists for any increased concern that the Government would take action against Corani following the issuance of Supreme Decree No. 032.

389. This is consistent with Brattle's stock price analysis, which confirms that any impairment of Corani's market value following the Decree was fleeting and negligible.[631] For these reasons, the suggestion that Supreme Decree No. 032 increased the market's perception of risk at Corani simply does not hold water.[632]

4. Claimant's Calculation of Damages Related to Corani Is Internally Inconsistent and Erroneous

390. As shown above, Claimant has not demonstrated that it has suffered any compensable loss at Corani. Nonetheless, Claimant and its experts go to great lengths to create and then inflate a Corani damages estimate. Because the Tribunal need not consider the quantum of Claimant's Corani damages—there are none—we limit our discussion below to perhaps the most remarkable of the multiple critical flaws in Claimant's Corani damages calculation.

391. FTI's approach to Corani damages is, in broad strokes, as follows:[633]

- **Step One**: FTI starts with Bear Creek's enterprise value on May 27, 2011 (the business day preceding the suspension of the Santa Ana EIA review process), and then subtract from this figure the market value of Santa Ana (which FTI estimates three different ways), to arrive at the remainder as an estimated market value for Corani as of May 27, 2011.

[630] *See* Section II(D)(3) above.

[631] *See, e.g.*, Brattle Report at Figure 6 [Exhibit REX-004].

[632] Brattle Report at para. 160 *et seq.* [Exhibit REX-004].

[633] FTI Report at para. 8.5.

- **Step Two**: FTI projects this estimated value for Corani on May 27, 2011 forward to June 27, 2011 using a stock market index, to arrive at the estimated "but for" value of Corani on June 27, 2011.

- **Step Three**: FTI then subtracts from this "but for" value for Corani, the actual value of Bear Creek on June 27, 2011, which in theory no longer included any value for Santa Ana as of that date, to arrive at the loss of value for Corani.

392. The following chart summarizes FTI's approach and calculations, which produces damages estimates for Corani ranging from $59.6 million to $267.3 million:

Figure 27 Corani Reduction in Value Summary[126]

Description	Calculation	Santa Ana Allocation		
		FMV	19.2% of EV	0.0% of EV
May 27, 2011 BCM EV	[A]	$ 543.5	$ 543.5	$ 543.5
Less: Santa Ana value	[B]	$ (224.2)	$ (104.3)	$ -
May 27, 2011 Corani value	[C] = [A] - [B]	$ 319.3	$ 439.1	$ 543.5
Less: Index decline @ 7.3%	[D] = [C] * [1 - 7.3%]	$ (23.4)	$ (32.2)	$ (39.9)
June 27, 2011 Corani value	[E] = [C] -[D]	$ 295.9	$ 406.9	$ 503.6
Less: June 27, 2011 BCM EV	[F]	$ (236.2)	$ (236.2)	$ (236.2)
Reduction in Corani value	[E] - [F]	**$ 59.6**	**$ 170.6**	**$ 267.3**

393. FTI's methodology, which produces an absurdly broad range of damages estimates (from $59.6 million to $267.3 million), is not credible, much less precise. As Brattle notes, the key flaw and internal inconsistency in FTI's approach lies in the valuation for Santa Ana that FTI adopts in Step One, above.[634]

394. Step One is the pivotal piece of FTI's analysis. As noted above, this Step requires the subtraction of Santa Ana's value from Bear Creek's overall enterprise value to arrive at the value of Corani. The central question in Step One is how to value Santa Ana. Applying a higher value for Santa Ana yields a lower valuation and lower potential damages for Corani, whereas applying a lower value for Santa Ana yields a higher valuation higher potential damages for Corani.

[634] Brattle Report at paras. 176 *et seq.* [REX-004].

395. For Claimant, this question should be straightforward: Claimant and FTI argued at length for a $224.2 million DCF valuation of Santa Ana.[635] When Claimant applies its $224.2 million Santa Ana DCF valuation to its Corani damages calculation, it reaches an estimated reduction in value for Corani of $59.6 million. This calculation, which we refer to as "Approach A", is shown below:[636]

Approach A

Figure 27 Corani Reduction in Value Summary[126]

Description	Calculation	Santa Ana Allocation		
		FMV	19.2% of EV	0.0% of EV
May 27, 2011 BCM EV	[A]	$ 543.5	$ 543.5	$ 543.5
Less: Santa Ana value	[B]	$ (224.2)	$ (104.3)	$ -
May 27, 2011 Corani value	[C] = [A] - [B]	$ 319.3	$ 439.1	$ 543.5
Less: Index decline @ 7.3%	[D] = [C] * [1 - 7.3%]	$ (23.4)	$ (32.2)	$ (39.9)
June 27, 2011 Corani value	[E] = [C] -[D]	$ 295.9	$ 406.9	$ 503.6
Less: June 27, 2011 BCM EV	[F]	$ (236.2)	$ (236.2)	$ (236.2)
Reduction in Corani value	[E] - [F]	**$ 59.6**	**$ 170.6**	**$ 267.3**

396. One would think the analysis would end there.

397. But Claimant had a problem: under its methodology, when the Santa Ana valuation it uses goes up, Corani damages go down. Thus, when Claimant applies its own misguided and inflated Santa Ana valuation, it produced what was evidently a lower-than-desired damages estimate for Corani. Undeterred, and unencumbered by any respect for internal consistency, Claimant jettisoned its own analysis, and looked elsewhere for more helpful inputs.

398. Claimant turned to a series of analyst reports that, on average, suggest that the value of Santa Ana accounted for 19.2% of Bear Creek's total enterprise value.[637] This translates into a market value for Santa Ana of just $104.3 million (whereas FTI says Santa Ana

[635] Claimant's Memorial at paras. 236-241.

[636] FTI Report at Figure 27.

[637] FTI Report at paras. 8.7-8.8.

is worth more than double that on the basis of its DCF calculations[638]). Although using the analyst reports in this manner conflicts with FTI's own estimate of Santa Ana's value, doing so provides Claimant with the low value for Santa Ana that it needs to increase its Corani damages estimate. When FTI re-ran its calculations using this approach, its Corani damages estimate nearly tripled, jumping from $59.6 million to $170.6 million. This calculation, which we refer to as "Approach B", is shown below:[639]

Approach B

Figure 27 Corani Reduction in Value Summary[126]

Description	Calculation	Santa Ana Allocation		
		FMV	19.2% of EV	0.0% of EV
May 27, 2011 BCM EV	[A]	$ 543.5	$ 543.5	$ 543.5
Less: Santa Ana value	[B]	$ (224.2)	$ (104.3)	$ -
May 27, 2011 Corani value	[C] = [A] - [B]	$ 319.3	$ 439.1	$ 543.5
Less: Index decline @ 7.3%	[D] = [C] * [1 - 7.3%]	$ (23.4)	$ (32.2)	$ (39.9)
June 27, 2011 Corani value	[E] = [C] -[D]	$ 295.9	$ 406.9	$ 503.6
Less: June 27, 2011 BCM EV	[F]	$ (236.2)	$ (236.2)	$ (236.2)
Reduction in Corani value	[E] - [F]	**$ 59.6**	**$ 170.6**	**$ 267.3**

399. FTI then went a step further in its quest to lower Santa Ana's value for the sake of inflating Corani damages: it suggested that the market may have considered that Santa Ana had no value at all before the alleged breaches occurred.[640] Unfazed by the suggestion that the market placed no value on Santa Ana—the very asset for which Claimant now seeks $224 million in damages—Claimant applies this scenario to its Corani damages calculation. This approach produces a damages estimate for Corani of $267.3 million,[641] which is close to five

[638] FTI Report at Figure 30.

[639] FTI Report at Figure 27.

[640] FTI Report at para. 8.9.

[641] FTI Report at para. 8.9.

times higher than FTI's estimate for Corani when applying its own Santa Ana valuation. This calculation, which we refer to as "Approach C", is shown below:[642]

Approach C

Figure 27 Corani Reduction in Value Summary[126]

Description	Calculation	Santa Ana Allocation		
		FMV	19.2% of EV	0.0% of EV
May 27, 2011 BCM EV	[A]	$ 543.5	$ 543.5	$ 543.5
Less: Santa Ana value	[B]	$ (224.2)	$ (104.3)	$ -
May 27, 2011 Corani value	[C] = [A] - [B]	$ 319.3	$ 439.1	$ 543.5
Less: Index decline @ 7.3%	[D] = [C] * [1 - 7.3%]	$ (23.4)	$ (32.2)	$ (39.9)
June 27, 2011 Corani value	[E] = [C] -[D]	$ 295.9	$ 406.9	$ 503.6
Less: June 27, 2011 BCM EV	[F]	$ (236.2)	$ (236.2)	$ (236.2)
Reduction in Corani value	[E] - [F]	**$ 59.6**	**$ 170.6**	**$ 267.3**

400. FTI makes no attempt to explain how an efficient market could have placed no value on Santa Ana, an asset that FTI simultaneously says was worth more than $224 million. The Tribunal must see through Claimant's effort to have it both ways, *i.e.*, to artificially inflate Santa Ana's value for its Santa Ana damages calculation, and then to artificially deflate Santa Ana's value for its Corani damages calculation.

401. FTI's willingness to adopt a Santa Ana valuation that so clearly conflicts with its own DCF analysis reflects its determination to inflate damages at every turn. The issue explained above is one particularly blatant flaw in FTI's approach, but it is by no means the only one. However, no further criticism of Claimant's methodology is warranted, because the Tribunal should not even reach the quantum of damages for Corani. Claimant has failed to prove that it suffered any compensable Corani-related loss. This is a 'throw-away' claim and the Tribunal should not hesitate to do just that.

[642] FTI Report at Figure 27.

D. CLAIMANT'S INTEREST CALCULATION IS ERRONEOUS

402. With respect to interest, Claimant argues that:

> In essence, Peru's failure to pay compensation to Claimant is effectively a loan to Peru. Hence, Bear Creek should be compensated like any other lender to Peru during this period and thus, should receive interest at a rate equivalent to Peru's external cost of debt financing from private lenders.[643]

403. Respondent is prepared to accept, *arguendo*, this approach to the determination of an interest rate. Respondent does not, however, agree with the rate that Claimant suggests is "equivalent to Peru's external cost of debt financing."[644]

404. Claimant applies a rate of 5.0%, which it borrows from the "legal interest rate for judgments in Peru [which] is determined based on a reference rate published by the Central Reserve Bank of Peru."[645] This interest rate for domestic court judgments is not equivalent to, nor indicative of, Peru's external cost of debt (nor is it a relevant benchmark in this international proceeding). It has no connection to Peru's external cost of debt financing from private lenders.

405. By contrast, Brattle has identified an appropriate, logically related proxy for Peru's cost of debt – the average spread for Peru's sovereign credit default swaps.[646] Brattle added a proper risk-free rate to this figure (to account for the time value of money), and arrived at an average annual interest rate of 0.65%, far lower than Respondent's inappropriate statutory rate of 5% per annum.[647]

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[643] Claimant's Memorial at para. 247.

[644] Claimant's Memorial at para. 247.

[645] FTI Report at para. 9.3.

[646] Brattle Report at para. 40 [Exhbit REX-004].

[647] Brattle Report at para. 196 [Exhbit REX-004].

E. CLAIMANT'S CLAIM FOR COSTS AND EXPENSES IS INAPPROPRIATE

406. Claimant bases its request for an award of costs and expenses on the existence of compensable Treaty breaches. As explained above, however, Respondent's actions in no way violated the FTA. In fact, Claimant's case fails on both jurisdiction and on the merits. Investment tribunals have awarded costs and expenses to respondent States that faced unmeritorious claims.[648] Respondent therefore requests that the Tribunal order Claimant to pay the fees and expenses, including attorneys' fees, that Respondent incurs defending against Claimant's meritless claims. Respondent will stand ready to set forth a complete accounting of these sums in a costs submission at the end of these proceedings.

[648] *See, e.g.*, *Iberdrola Energia S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, August 17, 2012, paras. 515-516 [Exhibit CL-0117]; *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, May 29, 2013, paras. 162-164 [Exhibit RLA-073]; *RSM Production Corporation and others v. Grenada [II]*, ICSID Case No. ARB/10/6, Award, December 10, 2010, para. 8.3.4 [Exhibit RLA-074].

VI. PRAYER FOR RELIEF

407. For the foregoing reasons, Respondent respectfully requests that the Tribunal dismiss all of Claimant's claims for want of jurisdiction, or, in the alternative, on their merits, and award Respondent the costs and fees, including attorneys' fees, it has incurred in this Arbitration.

Respectfully submitted,

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