**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**ICSID Case No. ARB/14/21**

**In the Matter of**

**BEAR CREEK MINING CORPORATION**

**Claimant,**

**v.**

**THE REPUBLIC OF PERU**

**Respondent.**

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# CLAIMANT'S REPLY ON THE MERITS AND COUNTER-MEMORIAL ON JURISDICTION

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Claimant, Bear Creek Mining Company ("Bear Creek") hereby submits its Reply Memorial in this arbitration proceeding against the Republic of Peru ("Respondent," "Peru," the "Government" or the "State") pursuant to the Free Trade Agreement between Canada and the Republic of Peru (the "FTA" or "Canada-Peru FTA").

## I. INTRODUCTION

1. Throughout its Counter-Memorial, Peru makes and repeats factual assertions that range from mistaken to misleading to demonstrably false. Putting aside the intent that may be ascribed to Peru when making these erroneous allegations, **Section II** of Bear Creek's Reply Memorial rebuts Peru's position and exposes these falsehoods for what they are. Among them is Peru's attempt from the outset (*i.e.*, in the introduction to its Counter-Memorial) to denigrate Bear Creek and to attempt to depict it as an inexperienced company that brought upon itself the events that led to the expropriation of Santa Ana. Peru argues that Bear Creek chose to acquire the Santa Ana mining concessions unlawfully, poorly managed the Santa Ana Project, and alienated the communities' support for the project such that it single-handedly awakened and fueled the anti-mining protests in the Puno region.

2. Notwithstanding Peru's best—and disingenuous—efforts, however, this narrative simply does not reflect what truly transpired in connection with the Santa Ana Project. Far from being a novice in the mining industry, Bear Creek and its founders, management and directors have extensive mining experience, much of it in Peru **(A.)**. Bear Creek thoughtfully and—upon the advice of experienced mining counsel—lawfully acquired the Santa Ana concessions by exercising its option under valid and duly registered option agreements only *after* receiving the necessary declaration of public necessity from the Government **(B.)**. Bear Creek then developed the Santa Ana Project with the support of the neighboring communities: Bear Creek pursued a

successful community relations program while preparing its ESIA, the Government approved both the ESIA's Executive Summary and Bear Creek's PPC, and Bear Creek held a successful public hearing, with the Government's direct participation, after such approval such that community support for the Santa Ana Project continued **(C.)**.

3. Contrary to Peru's *ex post facto* justifications for issuing Supreme Decree 032, revoking Bear Creek's authorization to own and operate mining concessions within 50 km of the border was not necessary to quell social protests (as Peru claims) since these protests were unrelated to the Santa Ana Project and Bear Creek did not cause the protests in Puno in any way; nor was it justified by supposed "new information" concerning Bear Creek's acquisition of the concessions that, Peru says, surfaced days before it issued Supreme Decree 032 **(D.)**. Additionally, if Peru had truly had any concerns over social issues or the means by which Bear Creek had acquired Santa Ana it had several well established administrative actions available to it to address any concerns, all far short of expropriating Santa Ana. Bear Creek's meetings with high-level Peruvian officials after the issuance of Supreme Decree 032, as well as public statements from Government officials, underscore the fabricated nature of these *ex post facto* justifications and constitute admissions of liability **(E.)**. As Peru must know, but for Peru's unlawful acts, Santa Ana would have gone into production in the fourth quarter of 2012, as planned **(F.)**.

4. Peru seeks to avoid international liability for its wrongful conduct by challenging the Tribunal's jurisdiction. As **Section III** demonstrates, Peru's unfounded and reckless claims of "illegality" relating to Bear Creek's acquisition of the Santa Ana concessions fail, and the Tribunal should assert jurisdiction over Bear Creek's claims. Turning to the merits of these claims, **Section IV** demonstrates that Peru violated the Canada-Peru FTA by unlawfully

expropriating, either directly or indirectly, Bear Creek's mining concessions and property rights, for which Peru must compensate Bear Creek on the basis of fair market value. Peru's misconduct does not only constitute an expropriation of Bear Creek's investment, but also rises to the level of a breach of Peru's obligation to accord Bear Creek and its investments fair and equitable treatment. As **Section V** explains, Peru has violated this international obligation, irrespective of whether it is cast in terms of the minimum standard of treatment or in terms of an autonomous standard. **Section VI** highlights Peru's failure in affording Bear Creek and its investments full protection and security and in protecting them against unreasonable and discriminatory measures.

5. Finally, **Section VII** sets forth the quantum of damage to which Bear Creek is entitled as a result of the foregoing. *First*, Bear Creek explains why compensation for the unlawful measures and ultimate expropriation of the Santa Ana Project is not, and should not be, limited to the amounts invested and that the valuation must exclude the effects of any pre-expropriation announcements of impending expropriation. *Second*, Bear Creek rebuts Peru's criticism of FTI's and RPA's DCF valuation of Santa Ana in the amount of **US$ 224.2** million in damages plus **US$ 72.4** million in pre-award intest. *Third*, Bear Creek illustrates why Peru must compensate it for damages to the Corani Project in an amount of **US$ 170.6** million plus **US$ 55.0** million in pre-award interest resulting from Peru's unlawful actions, which clearly caused those losses. This Section also debunks Peru's criticisms of FTI's quantum analysis and RPA's technical analysis of Bear Creek's feasibility-level work at Corani. *Finally*, Bear Creek explains why the Tribunal should adopt FTI's 5% interest rate and emphasizes that Peru does not dispute that interest should be compounded.

## II. FACTUAL BACKGROUND

### A. BEAR CREEK HAS EXTENSIVE MINING EXPERIENCE

6. Throughout its Counter-Memorial, Peru displays a surprising lack of understanding of the mining industry. Peru blithely professes that since "[a] 'mining' company is a company that builds and operates mines,"[1] Bear Creek "is not a 'mining' company at all."[2] As Peru knows well, but purposefully ignores, mining companies do much more than build and operate mines. They also explore to identify mineral deposits and undertake many other activities that are necessary prior to constructing and putting into production a viable mining project.[3] In the past 50 years, however, large mining companies (often referred to as *majors*) have focused their efforts on building and operating mines, while specialized mining companies (the so-called *juniors*) have become primarily responsible for exploring for new ore bodies and developing projects.[4] But that does not mean that juniors are not mining companies. Successful junior mining companies have an extremely sophisticated understanding of the geological, technical, and economic challenges associated with discovering economic ore bodies and bringing them into production. It should come as no surprise then that *juniors* are responsible for the discovery and development of some of the largest and most profitable mines in Peru and around the world – they are simply more sophisticated and efficient than *majors* in this respect.[5] Thus, there is no basis for Peru to belittle Bear Creek for being a junior mining company.

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1 Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, Oct. 6, 2015 ¶ 1 (*hereinafter*, "Respondent's Counter-Memorial").

2 Respondent's Counter-Memorial ¶ 1.

3 Witness Statement of Peter M. Brown, O.B.C., LL.D, Dec. 14, 2015 ¶ 11 (*hereinafter*, "Brown Witness Statement").

4 Brown Witness Statement ¶ 12.

5 Brown Witness Statement ¶ 13.

7. Peru's allegation that Bear Creek does not have any experience building or operating mines is equally baseless.[6] Bear Creek was formed and is run by accomplished miners who have significant experience in all aspects of the construction and operation of mining projects, in Peru and elsewhere. Peter M. Brown, one of the most respected names in mining finance worldwide, makes clear that "[i]t is simply preposterous for Peru to suggest that Bear Creek has no experience developing and operating mines when its principals, directors and key executives all spent decades doing precisely that in Peru and elsewhere."[7]

8. Andrew Swarthout founded Bear Creek in June 2000 and is the company's current President, CEO, and Director. He has over 40 years of mining experience, including building and operating mines, and has spent many years of his career in Peru.[8] He oversaw the successful development of the US$ 30 million expansion of the Bolaños silver mine in Jalisco, Mexico, and put the Rawhide silver and gold heap leach project in Nevada into production (a project that was similar in design to the Santa Ana Project).[9] He later managed the design, construction, and operation of three silver and gold heap leach mines in Mexico and the U.S., all of which were also similar in design to the Santa Ana Project and produced significant amounts of silver and gold over the following years.[10] As Director General of Exploration at Southern Peru Copper Corporation ("SPCC"), the largest and most respected copper mining company in Peru, Mr. Swarthout prepared and certified the mineral reserves statements issued in conjunction

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6 Respondent's Counter-Memorial ¶ 23.

7 Brown Witness Statement ¶ 15.

8 Rebuttal Witness Statement of Andrew T. Swarthout, Jan. 6, 2016 ¶ 4 (*hereinafter*, "Swarthout Rebuttal Witness Statement").

9 Swarthout Rebuttal Witness Statement ¶ 4.

10 Swarthout Rebuttal Witness Statement ¶ 4.

with SPCC's listing on the New York Stock Exchange, which allowed SPCC to raise over US$ 700 million used to expand existing mining operations.[11]

9. The other partners who founded Bear Creek with Mr. Swarthout also had a wealth of mining experience. **J. David Lowell**, a prominent geologist, is credited with over fifteen major mine discoveries worldwide and referred to in mining circles as "mining's greatest explorer."[12] Together with **Catherine McLeod-Seltzer**, Mr. Lowell formed Arequipa Resources, a company that discovered the Pierina gold mine in Peru in 1995 and was bought by Barrick Gold Corporation ("Barrick") for over C$ 1.1 billion in 1996.[13] **Kevin Morano** is the former CFO and COO of ASARCO, one of the largest mining companies in North America and the parent of SPCC. Earlier in his career, Mr. Morano served as General Manager of the ASARCO Ray Complex in Arizona, one of the largest copper mines in the southwestern United States. Mr. Morano was also a director of Apex Silver during the construction and start-up of the San Cristobal mining project in Bolivia (one of the largest silver producing mines in the world), where he oversaw the financing, engineering, procurement and construction management ("EPCM") aspects of the San Cristobal mine.[14] **Charles Smith**, a former CEO of SPCC, served as Vice-President for Operations of the Cuajone and Toquepala copper mines in Peru, as well as of the Pinto Valley open pit copper mine located in Pinal County, Arizona.[15] **Richard deJ. Osborne** was a former CEO of ASARCO.[16]

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[11] Swarthout Rebuttal Witness Statement ¶ 4.

[12] Witness Statement of Andrew T. Swarthout, May 28, 2015 ¶ 11 (*hereinafter*, "Swarthout Witness Statement").

[13] Witness Statement of Catherine McLeod-Seltzer, Dec. 14, 2015 ¶ 5 (*hereinafter*, "McLeod-Seltzer Witness Statement").

[14] Swarthout Rebuttal Witness Statement ¶ 5.

[15] Swarthout Rebuttal Witness Statement ¶ 6.

[16] Swarthout Rebuttal Witness Statement ¶ 6.

10. Ms. McLeod-Seltzer joined Bear Creek's Board of Directors in April 2003, when Bear Creek became a public company and listed on Canada's TSX Venture Exchange ("TSXV").[17] She is one of the world's most successful and recognized mining entrepreneurs.[18] In addition to Arequipa Resources, Ms. McLeod-Seltzer helped create and finance Francisco Gold Corporation – which discovered the El Sauzal gold deposit in Mexico and was acquired by Glamis Gold Ltd. for approximately C$ 400 million in 2002,[19] and Peru Copper – which discovered massive copper mineralization in Toromocho, Peru, and was acquired by Chinalco for C$ 840 million in 2007.[20]

11. Bear Creek raised US$ 6 million with its IPO, twice as much than most other mining companies at the time.[21] As Ms. McLeod-Seltzer explains, Bear Creek was able to do so because of "the quality, track record and reputation of the founders and management team."[22] Some of the largest and most sophisticated mining investors purchased large stakes in Bear Creek, based on "the individual and collective strength of its founders and management team, and on their exceptional track record discovering, financing and developing mines in Latin America."[23]

12. Bear Creek continued to hire highly experienced mining executives. In 2006, Bear Creek hired **Marc Leduc** as Vice-President of Technical Services, responsible for the engineering development of the Santa Ana and Corani Projects.[24] Mr. Leduc had been in charge

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17 McLeod-Seltzer Witness Statement ¶ 11.

18 McLeod-Seltzer Witness Statement ¶ 10.

19 McLeod-Seltzer Witness Statement ¶ 6.

20 McLeod-Seltzer Witness Statement ¶ 7.

21 Swarthout Rebuttal Witness Statement ¶ 7.

22 McLeod-Seltzer Witness Statement ¶ 13.

23 Brown Witness Statement ¶ 7.

24 Swarthout Rebuttal Witness Statement ¶ 9.

of various engineering and operational aspects of Barrick's Goldstrike mine in Nevada between 1992 and 1996. He also led the technical group for the design, construction, and commissioning of the Pierina gold mine in Peru, which was built on time and on budget in 1998, and entered into production later that year.

13. In April 2010, Bear Creek hired **Elsiario Antunez de Mayolo** as General Manager of Bear Creek's Peruvian branch, Bear Creek *sucursal del Perú* ("Bear Creek Peru") and Vice-President of Operations. Mr. Antunez de Mayolo had close to 30 years of mining experience, and over 10 years of specific technical experience supervising the operations of some of the largest mines in Peru for SPCC.[25] As Director of Operations for the Cuajone mine, Mr. Antunez de Mayolo oversaw every aspect of the mine, supervising over 1,100 employees and managing an annual operating budget exceeding US$ 170 million per year.[26] While at SPCC, Mr. Antunez de Mayolo also successfully developed relations with the neighboring communities by, for example, achieving complete acceptance of the goals of the Cuajone project among all stakeholders after accurately identifying and responding positively to the communities' concerns.[27] He also gained extensive experience working with local, regional, and national public authorities regarding regulatory and permitting issues, including the preparation and submission of an Environmental and Social Impact Assessment ("ESIA").[28]

14. Upon joining Bear Creek, Mr. Antunez de Mayolo assembled a team of highly-experienced managers to assist him. **Alvaro Diaz Castro**, a Peruvian attorney, had more than 15 years of industry experience overseeing environmental impact reports, applications for water

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[25] Rebuttal Witness Statement of Elsiario Antunez de Mayolo, Jan. 7, 2016 ¶ 4 (*hereinafter*, "Antunez de Mayolo Rebuttal Witness Statement"); *See also* Witness Statement of Elisario Antunez de Mayolo, May 28, 2015 (*hereinafter, "*Antunez de Mayolo Witness Statement") ¶ 2-5.

[26] Antunez de Mayolo Rebuttal Witness Statement ¶ 7; Antunez de Mayolo Witness Statement ¶ 3.

[27] Antunez de Mayolo Rebuttal Witness Statement ¶¶ 5, 8; Antunez de Mayolo Witness Statement ¶ 4.

[28] Antunez de Mayolo Rebuttal Witness Statement ¶¶ 5, 9; Antunez de Mayolo Witness Statement ¶ 5.

permits, and community relations programs; he also had supervised and submitted to the Peruvian authorities the biggest compliance and environmental management program (*Programa de Adecuación y Manejo Ambiental*) to date, worth US$ 1 billion in investments.[29] Other individuals recruited by Mr. Antunez de Mayolo included **Martin Olano**, who had 10 years of experience working as a mine engineering manager in Peru; **Andres Franco**, who had experience working as a project manager and mining contractor; and **Jorge Lobato**, who had close to 10 years of experience working on environmental issues on big Peruvian mining projects.[30]

15. Shortly after Mr. Antunez de Mayolo joined the company, in October 2010, Bear Creek completed a bankable Feasibility Study for the Santa Ana Project.[31] On the basis of the Feasibility Study's excellent results, Bear Creek successfully raised US$ 130 million in equity financing on November 5, 2010,[32] which would be applied primarily towards the construction of the Santa Ana Project.[33] The equity offering was twice over-subscribed, reflecting the market's strong endorsement of Bear Creek and its development of Santa Ana.

16. Based on the foregoing, it is obvious that Peru's misplaced attempt to undermine Bear Creek's experience in the mining sector does not withstand even the slightest scrutiny. Bear Creek is managed by highly-regarded mining executives with a wealth of experience discovering, building, and operating mines in Peru and around the world. Randy Smallwood, the President and CEO of Silver Wheaton Corporation, the world's largest pure precious metals

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29 Antunez de Mayolo Rebuttal Witness Statement ¶ 10.

30 Antunez de Mayolo Rebuttal Witness Statement ¶ 10.

31 **Exhibit C-0003**, Ausenco Vector, Feasibility Study – Santa Ana Project – Puno, Peru – NI 43-101 Technical Report, Oct. 21, 2010.

32 McLeod-Seltzer Witness Statement ¶ 16.

33 Brown Witness Statement ¶ 10.

streaming company, confirms that Bear Creek would never have obtained US$ 130 million from sophisticated investors if they had viewed the company as lacking the experience to bring Santa Ana successfully into production.[34]

### B. BEAR CREEK LAWFULLY ACQUIRED THE SANTA ANA MINING CONCESSIONS

17. Article 71 of the Peruvian Constitution prevents a foreigner from acquiring or possessing, directly or indirectly, under any title, mines or land located within 50 km of the Peruvian border, unless a situation of public necessity presents itself that is expressly recognized in a supreme decree approved by the Council of Ministers.[35] Because the Santa Ana mining concessions are located within 50 km of the Peruvian border, Bear Creek had to apply for a declaration of public necessity from the Peruvian government to obtain permission to acquire the concessions.[36]

18. On December 5, 2006, Bear Creek submitted a comprehensive application to MINEM requesting a declaration of public necessity.[37] That application, prepared by a preeminent Peruvian mining law firm, Estudio Grau, contained all of the required details in respect of the Santa Ana mining concessions, including documents confirming the facts that Karina Villavicencio, a Bear Creek representative (*apoderada*), already owned these concessions, and that Bear Creek had entered into option agreements[38] with her in order for the company to acquire them if it obtained the declaration of public necessity from the Peruvian

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[34] Witness Statement of Randy V. J. Smallwood, Dec. 21, 2015 ¶ 17; Swarthout Rebuttal Witness Statement ¶ 8.

[35] Respondent's Counter-Memorial ¶¶ 26-27; Claimant's Memorial on the Merits, May 29, 2015 ¶ 22 (*hereinafter*, "Claimant's Memorial").

[36] Respondent's Counter-Memorial ¶ 34; Claimant's Memorial ¶¶ 20-21.

[37] **Exhibit C-0017**, Bear Creek's application soliciting from the Peruvian government the authorization to acquire mining rights located within 50 km of the Peruvian border, Dec. 4, 2006.

[38] Bear Creek and Ms. Villavicencio entered into option agreements on November 17, 2004, and December 5, 2004 (*hereinafter*, "Option Agreements").

government. Bear Creek's application also included a detailed description of Bear Creek's planned investments in the area, a socio-economic impact assessment of the proposed exploration program, a complete set of corporate documentation, certificates of good standing for Bear Creek Peru and its corporate representatives, copies of the duly registered Option Agreements themselves, a cadastral map for the Santa Ana concessions, and two years of consolidated financial statements.[39]

19. On November 29, 2007, after – in Peru's own words – "careful consideration by the government authorities involved in the oversight of the economic activity that the foreigner intends to develop in the border area,"[40] the Council of Ministers issued Supreme Decree 083, declaring that Bear Creek's ownership of the Santa Ana mining concessions was a case of public necessity.[41] Thereafter, in accordance with the Option Agreements, Ms. Villavencio transferred the concessions to Bear Creek.[42]

20. Three and a half years later, Peru unlawfully revoked Supreme Decree 083 by issuing Supreme Decree 032 on the basis of unspecified "new circumstances."[43] Peru now claims that these "new circumstances" referred to its belief that Bear Creek had acquired the Santa Ana mining concessions in breach of Article 71 of the Constitution.[44] As Vice-Minister

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[39] **Exhibit C-0017**, Bear Creek's application soliciting from the Peruvian government the authorization to acquire mining rights located within 50 km of the Peruvian border, Dec. 4, 2006; Claimant's Memorial ¶ 39; and Swarthout Rebuttal Witness Statement ¶ 26.

[40] Respondent's Counter-Memorial ¶ 29.

[41] **Exhibit C-0004**, Supreme Decree No. 083-2007-EM, Nov. 29, 2007.

[42] **Exhibit C-0015**, Contracts for the Transfer of Mineral Rights between J. Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 3, 2007 (*hereinafter*, "Transfer Agreements"); **Exhibit C-0019**, Notarized Contracts for the Transfer of Mineral Rights between J. Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 6. 2007; *See also* **Exhibit C-0020,** SUNARP Registration Notice of the Transfer Agreement for Santa Ana Concessions 9A, 1, 2 and 3, Feb. 1, 2008; **Exhibit C-0021,** SUNARP Registration Notice of the Transfer Agreement for Santa Ana Concessions 5, 6 and 7, Feb. 28, 2008.

[43] **Exhibit C-0005**, Supreme Decree 032-2011-EM, Jun. 25, 2011.

[44] Respondent's Counter-Memorial ¶ 145.

Gala himself acknowledged, however, that reason was used to cover up the real basis for the enactment of Supreme Decree 032, namely the appeasement of the political protests in the south of the Department of Puno led by Walter Aduviri and the *Frente de Defensa de Recursos Naturales de la Región de Puno* ("FDRN").[45]

### 1. Bear Creek Did Not Engage in an UnlawFul Scheme to Acquire the Santa Ana Mining Concessions

21. Peru erroneously contends that prior to requesting – and obtaining – a declaration of public necessity from the Peruvian government (Supreme Decree 083), Bear Creek had indirectly acquired the Santa Ana mining concessions, in violation of Article 71 of the Constitution.[46] This is simply not true. Ms. Villavicencio – and Ms. Villavicencio alone – owned the mining concessions until she transferred them to Bear Creek, on December 3, 2007, after the enactment of Supreme Decree 083.[47]

22. Bear Creek and Ms. Villavicencio entered into option agreements on November 17, 2004, and December 5, 2004. These agreements provided that Bear Creek had 60 months from the date of signature to exercise its option (the "Option Period"), *i.e.*, to request that Ms. Villavicencio transfer the mining concessions to Bear Creek.[48] Bear Creek could do so only if it obtained a declaration of public necessity from the Peruvian government.[49] Until then, Ms.

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[45] **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013.

[46] Respondent's Counter-Memorial ¶ 45.

[47] **Exhibit C-0034**, Notice of Registration of the Karina 2 and Karina 3 Concessions, Jul. 5, 2006; **Exhibit C-0035**, Notice of Registration of the Karina 1 Concession, Aug. 8, 2006; **Exhibit C-0036**, Notice of Registration of the Karina 5, Karina 6, and Karina 7 Concessions, Feb. 28, 2008; **Exhibit C-0015**, Transfer Agreements; **Exhibit C-0019**, Notarized Contracts for the Transfer of Mineral Rights between J. Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 6, 2007.

[48] **Exhibit C-0016**, Contracts for the Option to Transfer Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Nov. 17, 2004, and Dec. 5, 2004, Arts. 2.1, 2.3.1.

[49] *Id.* at Art. 2.4.1.

Villavicencio owned the mining concessions,[50] and was under no contractual obligation to follow any instruction from Bear Creek.[51] Crucially, Ms. Villavicencio would remain the owner of the Santa Ana mining concessions if Peru refused to issue the declaration of public necessity in favor of Bear Creek, if Bear Creek failed to obtain it within the Option Period, or if Bear Creek decided not to exercise its option.[52]

23. The SUNARP Registry Tribunal reviewed the Option Agreements and confirmed that their execution did not transfer the ownership of the mining concessions from Ms. Villavicencio to Bear Creek.[53] The transfer of ownership would occur later in time and only if – and when – Bear Creek decided to exercise its option under the terms of the agreements, provided that it met the conditions to be able to do so.[54] Contrary to Peru's assertion, the Tribunal's decision was not devoid of any legal authority.[55] SUNARP took the rare step of publishing it in the Peruvian official gazette, *El Peruano*,[56] putting all actors of the Peruvian mining sector on notice of the important issues addressed therein. Following the decision, SUNARP registered the Option Agreements on August 9, 2006.[57]

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50 **Exhibit C-0016**, Contracts for the Option to Transfer Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Nov. 17, 2004, and Dec. 5, 2004, Art. 1.1.

51 *Id*. at Art. 2.1.

52 **Exhibit C-0016**, Contracts for the Option to Transfer Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Nov. 17, 2004, and Dec. 5, 2004, Art. 2.5.

53 **Exhibit C-0038**, Resolution No. 193-2005-SUNARP-TR-A issued by the SUNARP Registry Tribunal, Nov. 7, 2005.

54 *Id*.

55 Respondent's Counter-Memorial ¶¶ 49-50.

56 **Exhibit C-0038**, Resolution No. 193-2005-SUNARP-TR-A issued by the SUNARP Registry Tribunal, Nov. 7, 2005.

57 **Exhibit C-0041**, SUNARP Notice of Registration of Mineral Rights, Aug. 9, 2006. Article 2012 of the Peruvian Civil Code provides, as a non-rebuttable legal presumption, that every person is aware of the content of the public registry (*see* **Exhibit C-0198**).

24. Peru takes issue with the fact that, instead of directly applying for the mining concessions and declaration of public necessity, Bear Creek entered into option agreements with Ms. Villavicencio, after she had requested and obtained the Santa Ana mining concessions.[58] Bear Creek decided to follow this course of action because, as Mr. Swarthout explains, "without an option agreement in place, there was a potential risk that others interested in acquiring the concessions would interfere with our application process."[59]

25. Although Peru and Dr. Zegarra, MINEM's Legal Director, dismiss these concerns,[60] Hans Flury, Peru's former Minister of Energy and Mines, confirms that such risks do exist in the event of a direct application for a mining concession.[61] While Peru could have held Bear Creek's "place in line" as the first applicant for the Santa Ana mining concessions during the application process,[62] this was not mandatory and MINEM's Geological, Mining, and Metallurgical Institute (*Instituto Geológico, Minero y Metalúrgico* or "INGEMMET") could have changed this practice at any time.[63] Moreover, Peru neglects to mention that Bear Creek's place would not be held indefinitely, but only for 7 months,[64] despite the fact that it takes much longer for the Council of Ministers to issue a declaration of public necessity (it took a year for Bear Creek).[65] In these circumstances, a third party could request that the application be declared inadmissible if a declaration of public necessity is not issued within the 7-month

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58 Respondent's Counter-Memorial ¶¶ 50, 54.

59 Swarthout Rebuttal Witness Statement ¶ 14.

60 Respondent's Counter-Memorial ¶ 54; **RWS-003**, Witness Statement of César Zegarra ¶¶ 9-10 (*hereinafter*, "Zegarra Witness Statement").

61 Expert Report of Hans A. Flury, Jan. 5, 2016 ¶¶ 42, 46-47 (*hereinafter*, "Flury Expert Report").

62 Respondent's Counter-Memorial ¶ 54.

63 Flury Expert Report ¶ 42.

64 Flury Expert Report ¶ 43.

65 Flury Expert Report ¶¶ 43-45.

period.[66] Equally worrisome for Bear Creek, a third party also could request that the application be considered "abandoned" if the applicant were to fail to comply with a particular step resulting in the suspension of the application procedure for 30 or more days.[67] Thus, Peruvian mining concerns could have interfered with Bear Creek's efforts and secured the Santa Ana concessions for themselves before Bear Creek could have obtained the required declaration of public necessity. Like other similar arrangements that foreign mining companies have used before and after Bear Creek, the Option Agreements concluded with Ms. Villavicencio mitigated that risk.

26. Moreover, Peru itself expressly acknowledged that Bear Creek's decision to enter into option agreements with Ms. Villavicencio complied with Peruvian law in all respects. On May 19, 2011, Mr. Swarthout, Mr. Antunez de Mayolo and another Bear Creek executive met with Clara García Hidalgo, the Legal Advisor to the Minister of Energy and Mines.[68] At this meeting, Bear Creek discussed its acquisition of the Santa Ana mining concessions in detail, including the fact that it had signed option agreements with Ms. Villavicencio, who was an employee and company representative.[69] Ms. García confirmed to Bear Creek that this was all proper and legal as far as she was concerned.[70] On that same day, Ms. García publicly stated that the Santa Ana Project complied with the law.[71]

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66 Flury Expert Report ¶ 47.

67 Flury Expert Report ¶ 42.

68 **Exhibit C-0173**, Email from T. Balestrini to E. Antunez de Mayolo, A. Swarthout, and M. Leduc, May 18, 2015.

69 Antunez de Mayolo Rebuttal Witness Statement ¶ 56.

70 Antunez de Mayolo Rebuttal Witness Statement ¶ 56.

71 **Exhibit C-0093**, *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011.

27. Estudio Grau, one of the most prominent mining law firms in Peru,[72] advised Bear Creek that entering into option agreements with Ms. Villavicencio would comply with Peruvian law.[73] The firm then drafted all of the relevant documentation. Estudio Grau's advice was confirmed subsequently by another renowned mining law firm in Peru, Rodrigo, Elias & Medrano Abogados:[74]

> [W]e consider that the fact that BCMC resorted to a contractual framework by virtue of which, after having learned of the existence of potential mineral deposits in a border zone, it proceeded with its request through a natural, trustworthy person (Ms. Villavicencio) and entered into option contracts with her for the future acquisition of the corresponding mining rights in case it obtained the Authorization, constitutes a valid contractual framework that does not infringe the prohibition to which Article 71 of the Constitution refers or any other law of the Peruvian legal order, and, rather, complies with the principles of reasonableness, celerity, and effectiveness that underpin it [the Peruvian legal order].[75]

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[72] **Exhibit C-0199**, Latin Lawyer 250: Latin America's leading business law firms (2007) at p. 121. According to Latin Lawyer, Estudio Grau is "[o]ne of the oldest firms in the country [Peru], with a prestigious name and a solid portfolio of established international clients." Latin Lawyer also notes that "[m]ining remains the backbone of the firm [and the firm's client] lists contain both some very important and faithful clients in its traditional area of expertise in mining and natural resources as well as newer clients looking for advice in project finance, environmental law and other areas, while the firm has also done work for multilateral agencies." Estudio Grau has remained among Latin Lawyer's top ranked firms to this day. *See also* **Exhibit C-0200**, Chambers Latin America: Latin America's Leading Lawyers for Business (2010), pp. 556-57. Since Chambers & Partners began surveying Latin American lawyers and firms in 2010, Estudio Grau has consistently been ranked among the leading firms in the "Energy and Natural Resources: Mining" sector. In Chambers Latin America's first survey, Estudio Grau was ranked among the top 3 firms with mining expertise in Peru and Chambers Latin America described Estudio Grau as "[o]ne of the most established names on the Lima legal scene, this full-service firm is also one of the most traditional names in mining, active in the sector since the 1970s." Chambers Latin America says of Cecilia González of Estudio Grau, who assisted in the drafting of the Option Agreements, that she is "commonly considered one of the top names in the market and a practitioner with great international recognition."

[73] Swarthout Rebuttal Witness Statement ¶¶ 12, 14.

[74] **Exhibit C-0200**, Chambers Latin America: Latin America's Leading Lawyers for Business (2010), p. 556. Chambers Latin America ranks Estudio Rodrigo, Elías & Medrano Abogados as the only Band 1 firm in the "Energy & Natural Resources: Mining" division in Peru and notes that "[t]his Lima powerhouse has had a mining division since the firm's foundation in 1965. The firm has thus been involved in many of the major mining projects to have shaped the Peruvian industry."

[75] **Exhibit C-0142**, Memorandum from Rodrigo, Elias & Medrano Abogados to Mr. Alvaro Diaz Castro, Bear Creek Peru, Sept. 26, 2011, p. 3, ¶ 2.

28. Professor Bullard agrees that the Option Agreements did not breach Article 71 of the Constitution.[76] These agreements served a legitimate purpose, namely to ensure that Bear Creek would be in a position to acquire the Santa Ana mining concessions, provided that the Peruvian government issued a declaration of public necessity in its favor.[77] Mr. Flury concurs, concluding that the Option Agreements that Bear Creek signed with Ms. Villavicencio complied with Article 71, and constituted a valid method for the company to acquire the concessions.[78]

29. Peru speculates, without providing any evidence whatsoever, that Bear Creek signed the Option Agreements with Ms. Villavicencio to proceed immediately with exploration activities "in order to get it closer to the point where the Santa Ana Project could be attractively marketed to 'senior' mining companies…"[79] This is not correct. Bear Creek worked hard to develop the Santa Ana Project, not to sell it, as evidenced by the fact that Bear Creek specifically raised US$ 130 million in November 2010 for that purpose.[80] Moreover, specific exploration activities did not begin "immediately," but only in late 2006, more than a year and a half after the Option Agreements were signed.[81] MINEM was fully aware of these activities,[82] which Bear Creek carried out on behalf and for the benefit of Ms. Villavicencio.[83]

30. Peru accuses Bear Creek of having held itself out to third parties as the owner of the Santa Ana mining concessions, prior to obtaining the declaration of public necessity from the

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76 Second Expert Report of Alfredo Bullard González, Jan. 6, 2016 ¶ 62 (*hereinafter*, "Second Bullard Expert Report").

77 *See* Expert Report of Professor Alfredo Bullard, May 26, 2015, ¶ 19 (*hereinafter*, "First Bullard Expert Report"); Second Bullard Expert Report ¶¶ 52-56, 70.

78 Flury Expert Report ¶ 59.

79 Respondent's Counter-Memorial, ¶ 55.

80 Swarthout Rebuttal Witness Statement ¶ 23; Swarthout Witness Statement ¶ 34.

81 Swarthout Rebuttal Witness Statement ¶ 22.

82 *See infra* ¶ 31.

83 Swarthout Rebuttal Witness Statement ¶ 22.

Peruvian government.[84] This is grossly misleading. Peru relies on a land use agreement that Bear Creek signed, *on behalf and for the benefit of Ms. Villavicencio*, with the Fundo Ancocahua community so that it could conduct exploration activities.[85] At no point during these negotiations did Bear Creek or any of its employees represent that it owned the mining concessions.[86] Mr. Swarthout further confirms that "on any other occasions that I met with different community leaders, I made very clear that Bear Creek simply held an option to acquire the mining concessions that Ms. Villavicencio owned."[87]

31. Importantly, MINEM's General Directorate for Environmental Mining Affairs (*Dirección General de Asuntos Ambientales Mineros* or "DGAAM") reviewed the agreement with the Fundo Ancocahua community and asked Ms. Villavicencio to resubmit the document, making clear that the agreement was between the community and her, as the owner of the mining concessions, and not Bear Creek, which was a third party that did not own the concessions:

**OBSERVACIONES**

Luego de evaluar el documento de la referencia, el suscrito encuentra lo siguiente:

1.- La administrada no ha cumplido con probar la titularidad de la concesión minera Karina 9A en la cual desarrollará los trabajos de exploración.
Se requiere la presentación de copia de documento expedido por Registros Públicos por el cual se acredite la titularidad de Jenny Karina Villavicencio Gardini respecto de la concesión minera Karina 9A.

2.- De la revisión del expediente se desprende que el permiso de uso de tierras está celebrado entre la Asociación de Productores Agropecuarios El Cóndor de Aconcahua, como titular del terreno superficial y la Empresa Bear Creek Mining Company, quien es un tercero distinto a la titular minero, Jenny Karina Villavicencio Gardini.
En este sentido, la titular deberá comprometerse a obtener o regularizar la obtención de la autorización de uso del terreno superficial, antes del inicio de actividades. Para ello, deberá tener presente lo dispuesto en la Ley Nº 26505, Ley de la Inversión Privada en el Desarrollo de las Actividades Económicas en las Tierras del Territorio Nacional y de las Comunidades Campesinas y Nativas, y su reglamentación

84 Respondent's Counter-Memorial ¶¶ 51-52.

85 **Exhibit R-043**, Agreements between Bear Creek and Local Communities, May 2006.

86 Swarthout Rebuttal Witness Statement ¶ 18.

87 Swarthout Rebuttal Witness Statement ¶ 18.

**(Observations from MINEM's DGAAM to Ms. Villavicencio's Sworn Declaration in Respect of the Santa Ana Mining Exploration Project)**[88]

32. The fact that Bear Creek was mentioned in the agreement with the Fundo Ancocahua community was obviously not of great import to the government since neither MINEM nor any other governmental agency questioned Bear Creek in relation to this matter. Nor did Peru ever question the fact that Bear Creek itself was paying, *on Ms. Villavicencio's behalf,* the sub-surface mining fees (*derechos de vigencia*) corresponding to the mining concessions that she had acquired, as provided in the Option Agreements.[89] Peru was well aware of that situation, given that Bear Creek was paying these fees directly to INGEMMET.[90]

33. Peru also takes exception with the fact that Ms. Villavicencio was a Bear Creek employee and representative when she applied for the Santa Ana mining concessions and entered into the Option Agreements.[91] But Bear Creek never hid that fact from anyone, especially from Peru, given that it submitted documentation, in its application for a declaration of public necessity in December 2006, making clear that Ms. Villavicencio was a company representative.[92] Besides, there is nothing unlawful about what Bear Creek did.[93] Thus, Peru's

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88 **Exhibit C-0139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006 at 5 ("2.- Upon review of the file, it appears that the authorization for the use of the land has been signed by the Association of Agricultural Producers of El Condór de Aconcahua, as owners of the land, and by Bear Creek Mining Company, which is a third party that is distinct from the owner of the mining rights, Jenny Karina Villavicencio Gardini. Therefore, the owner of the mining rights must agree to obtain or correct the authorization for the use of the land, prior to the initiation of the activities. To do so, she must bear in mind that which is provided in Law No. 26505, Law regarding Private Investment in the Development of Economic Activities on the Lands of the National Territory and of the Rural and Indigenous Communities, and its corresponding regulation").

89 **Exhibit C-0016**, Contracts for the Option to Transfer Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Nov. 17, 2004, and Dec. 5, 2004, Art. 2.3.3.

90 **Exhibit C-0201**, Letter from A. Swarthout and K. Villavicencio to Banco de Credito, Jun. 27, 2006; **Exhibit C-0202**, Letter from D. Volkert and K. Villavicencio to Banco de Credito, Jun. 20, 2007.

91 Respondent's Counter-Memorial ¶¶ 38, 50.

92 Swarthout Rebuttal Witness Statement ¶ 26.

93 *See supra* ¶¶ 27-28.

exaggerated rhetoric cannot alter the unassaible truth: Ms. Villavicencio owned the mining concessions, and Bear Creek's acquisition of these concessions depended solely on Peru issuing a declaration of public necessity authorizing Bear Creek to exercise its option to acquire them. Without such declaration, Bear Creek would have had absolutely no claim to the concessions.[94]

34. Bear Creek applied to MINEM for a declaration of public necessity and corresponding supreme decree on December 5, 2006.[95] Peru claims that the company should have applied earlier.[96] Before applying, however, Bear Creek validly registered the Option Agreements with SUNARP,[97] and conducted some exploration activities on behalf and for the benefit of Ms. Villavicencio – and with MINEM's knowledge and approval –[98] to determine whether it was worth applying to the Peruvian government for a supreme decree. Preparing the application also took time. Bear Creek received the first draft of the application from Estudio Grau in July 2006 and Estudio Grau finalized it in November 2006.[99]

35. Bear Creek's application to MINEM for a declaration of public necessity included, among other things, a complete set of corporate documentation for Bear Creek Peru and its corporate representatives, evidence that Ms. Villavicencio was the owner of the mining concessions, copies of the Option Agreements themselves, and a description of Bear Creek's

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94 First Bullard Expert Report ¶ 18 (b), 18(i); Second Bullard Expert Report ¶¶ 69, 131; Swarthout Rebuttal Witness Statement ¶ 15.

95 **Exhibit C-0017**, Request from Bear Creek to MINEM soliciting the authorization to acquire the mining rights located in the border area, Dec. 4, 2006.

96 Respondent's Counter-Memorial ¶ 56.

97 Claimant's Memorial ¶¶ 35-38.

98 **Exhibit C-0139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006; **Exhibit C-0140**, Informe No. 170-2006/MEM-AAM/EA, Jul. 10, 2006; and **Exhibit C-0141**, Informe No. 265-2006/MEM-AAM/EA/RC, Oct. 12, 2006.

99 Swarthout Rebuttal Witness Statement ¶ 25.

plans with respect to the Santa Ana Project.[100] Specifically, Annex VI of the application provided that, as from May 19, 2003, Ms. Villavicencio had been a representative of the Company (*apoderada*), empowered to deal with limited banking issues on behalf of Bear Creek Peru.[101]

36. An application for a declaration of public necessity entails careful and thorough review by the governmental authorities, a fact that Peru itself recognizes: "Such executive decrees do not come lightly from Peru's Council of Ministers; they are issued only after extensive study and careful consideration."[102] MINEM carefully reviewed Bear Creek's application and supporting documentation, as evidenced by the fact that, on February 8, 2007, it requested additional information regarding the location and access roads to the Santa Ana Project, as well as Bear Creek's incorporation and nationality.[103] Yet, Dr. Zegarra suggests that he was not made aware of the existence of the Option Agreements or the document listing Ms. Villavicencio as one of Bear Creek Peru's representatives,[104] even though such documents were included in the application. This is highly unlikely in light of the thoroughness that Peru claims to have demonstrated when reviewing the other aspects of Bear Creek's application, or even other documents.[105] At a minimum, MINEM would have requested clarifications if it had had

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[100] **Exhibit C-0017**, Bear Creek's application soliciting from the Peruvian government the authorization to acquire mining rights located within 50 km of the Peruvian border, Dec. 4, 2006.

[101] **Exhibit C-0017**, Bear Creek's application soliciting from the Peruvian government the authorization to acquire mining rights located within 50 km of the Peruvian border, Dec. 4, 2006, Annex VI at 80.

[102] Respondent's Response to Claimant's Request for Provisional Measures, Feb. 6, 2015 ¶ 6. *See also* Respondent's Counter-Memorial ¶ 29.

[103] **Exhibit C-0042**, Letter from MINEM, to Bear Creek, Feb. 8, 2007. Bear Creek addressed MINEM's queries on February 26, 2007. *See* **Exhibit C-0043**, Letter from M. Grau to MINEM, Feb. 26, 2007.

[104] **RWS-003**, Zegarra Witness Statement ¶ 27.

[105] *See supra* ¶ 31.

any doubts as to the legality or propriety of Bear Creek's Option Agreements with Ms. Villavicencio.

37. On November 29, 2007, Peru issued Supreme Decree 083 declaring that Bear Creek's ownership of the Santa Ana mining concessions was of public necessity.[106] The decree was signed by the President, the Prime Minister, MINEM, and the Ministry of Defense. Also, the seal of MINEM's Legal Department, which Dr. Zegarra heads, along with his own initials, are visible on each page of the document that describes the reasons for the enactment of Supreme Decree 083.[107] One can thus reasonably conclude that Peru had properly reviewed, vetted, and approved the contents of Bear Creek's application, including the existence and propriety of the option agreements with Ms. Villavicencio.[108]

38. Peru's enactment of Supreme Decree 083 constitutes an endorsement of the way in which Bear Creek chose to acquire the Santa Ana mining concessions, *i.e.*, through valid option agreements with a company representative.[109] Moreover, by approving Bear Creek's acquisition of the concessions, Peru has foregone its right to challenge it subsequently.[110]

### 2. The Declaration of Public Necessity Issued by the Council of Ministers Is Not a Discretionary Decision

39. Peru disingenuously attempts to suggest that a declaration of public necessity is "a wholly discretionary sovereign act,"[111] which can be revoked at any time. To the contrary, a declaration of public necessity constitutes an administrative act regulated by a proceeding made

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106 Claimant's Memorial ¶ 42.

107 **Exhibit R-032**, Statement of Reasons for Supreme Decree No. 083, 2007.

108 Swarthout Rebuttal Witness Statement ¶¶ 26-27.

109 Second Bullard Expert Report ¶¶ 85-99.

110 Second Bullard Expert Report ¶¶ 85-104.

111 Respondent's Counter-Memorial ¶¶ 29, 32.

up of specific requirements, which the applicant must satisfy, and that the Council of Ministers must review prior to issuing the declaration.[112]

40. Under Peruvian administrative law, all proceedings that may be initiated before a particular administrative body, as well as the corresponding requirements that must be fulfilled, must be described in a Unified Text of Administrative Proceedings (*Texto Único de Procedimientos Administrativos* or "TUPA").[113] Each administrative body has its own TUPA.[114] The TUPA for MINEM includes the declaration of public necessity pursuant to Article 71 of the Constitution – it is designated as Proceeding No. 53.[115] The declaration also is regulated by Legislative Decree No. 757 and Supreme Decree 162-92-EF.[116] Article 33 of Supreme Decree 162-92-EF provides that applicants must include in their request specific information, which is set out in Annex III of the supreme decree.[117]

41. Furthermore, the Council of Ministers is not free to decide whether or not to rule on an application for a declaration of public necessity.[118] Likewise, it may not request from the applicant any information that it wishes, but is limited by the provisions of the TUPA and the legislation mentioned above.[119] Finally, the Council of Ministers may not reject an application

[112] Second Bullard Expert Report ¶ 11.

[113] Second Bullard Expert Report ¶ 13.

[114] Second Bullard Expert Report ¶ 13.

[115] Second Bullard Expert Report ¶ 18; Flury Expert Report ¶ 32.

[116] Flury Expert Report ¶ 32.

[117] Second Bullard Expert Report ¶ 20.

[118] Second Bullard Expert Report ¶ 39.

[119] Second Bullard Expert Report ¶ 40.

for any reason.[120] In fact, the only valid reason for which the Council of Ministers may deny an application for a declaration of public necessity is for national security concerns.[121]

42. The issue of national security is addressed at Article 32 of Supreme Decree 162-92-EF. It states that the declaration of public necessity must be approved by the Joint Chiefs of Staff of the Armed Forces (*el Comando Conjunto de las Fuerzas Armadas*), taking into consideration issues of national security.[122] The fact that the approval of the Joint Chiefs of Staff of the Armed Forces is required confirms that the notion of national security in Article 32 should be understood to refer to external threats,[123] contrary to Peru's allegations.[124]

43. Peru also suggests that if circumstances change, the State has the discretion to "revisit" its earlier declarations of public necessity.[125] That is not the case because – as seen above – a declaration of public necessity is an administrative act, which granted specific rights to Bear Creek, and not a discretionary decision.[126] Accordingly, the Council of Ministers does not have the authority to modify or repeal such declaration by issuing a new supreme decree.[127] It follows that Peru's repeal of Supreme Decree 083 through the enactment of Supreme Decree 032 constituted an unlawful abuse of power,[128] in breach of Peruvian law and the FTA. Even Dr.

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120 Second Bullard Expert Report ¶ 41.

121 Second Bullard Expert Report ¶ 41.

122 Second Bullard Expert Report ¶ 22.

123 Claimant's Memorial ¶ 23. *See also* Second Bullard Expert Report ¶ 24.

124 Respondent's Counter-Memorial ¶ 28; **REX-001**, Expert Report of Francisco José Eguiguren Praeli, Oct. 6, 2015 ¶ 37 (*hereinafter*, "Eguiguren Report").

125 Respondent's Counter-Memorial ¶ 33.

126 Second Bullard Expert Report ¶¶ 10, 21; Flury Expert Report ¶ 35.

127 Flury Expert Report ¶ 35.

128 Second Bullard Expert Report ¶¶ 113, 121; Flury Expert Report ¶¶ 66, 68.

Zegarra acknowledges that a declaration of public necessity should remain in place for 20 or 30 years so as to provide investors with a reasonably consistent legal framework.[129]

### 3. Numerous Foreign Investors Acquired Mining Concessions Within 50 Km of the Peruvian Border by Using Structures that Were Similar to Bear Creek's

44. Peru repeatedly, and falsely, claims that Bear Creek unlawfully acquired the Santa Ana mining concessions because it (i) acquired such rights *before* obtaining a public necessity declaration from the Council of Ministers;[130] and (ii) relied on Ms. Villavicencio to apply for and obtain mining concessions from MINEM while entering into option agreements with her.[131]

45. There is, however, nothing irregular – let alone unlawful – about Bear Creek's acquisition of the Santa Ana mining concessions. After analyzing the legality of every step of the process, Mr. Flury concluded that "the way in which Bear Creek proceeded in the acquisition of the concessions was legal and consistent with the usual practices of the mining industry in Peru."[132]

46. In fact, foreign investors have used many similar transaction structures to acquire mining concessions located within 50 kilometers of the Peruvian border. As was the case with Bear Creek, they did so based on the advice and counsel of first-tier Peruvian mining and corporate law firms. Peru never questioned or challenged the way in which these other investors acquired their mining concessions in the border areas. Peru went so far as to issue authoritative supreme decrees under Article 71 of the Constitution *retroactively* approving acquisitions of mining concessions located in border areas by foreign investors, where Peru clearly knew and

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[129] **Exhibit C-0203**, Entrevista al Abog. César Zegarra, Director General de la Oficina General del Asesoría Jurídica, Pontifica Universidad Católica del Perú, Jan. 22, 2014.

[130] Respondent's Counter-Memorial ¶ 35.

[131] Respondent's Counter-Memorial ¶¶ 35, 42.

[132] Flury Expert Report ¶ 59.

understood that the foreign investor had acquired the concessions *before* it requested the issuance of the authoritative supreme decree.

*a. Authoritative Supreme Decrees Issued After the Foreign Investor Had Already Acquired Mining Rights*

**(i) Supreme Decree 024-2008-DE**

47. Supreme Decree 024-2008-DE,[133] issued on December 27, 2008, authorized a Chinese Consortium, **Xiamen Zijin Tongguan Investment and Development Co., Ltd.** ("Zijin"), to acquire mining rights corresponding to the "Rio Blanco" copper mining project located in Piura, within 50 kilometers of the northern border of Peru. However, Zijin had already acquired the mining rights corresponding to this project many months earlier, as was common knowledge in the Peruvian mining sector. Furthermore, the Peruvian Government was specifically advised of this fact by Zijin before the issuance of Supreme Decree 024-2008-DE. Thus, Peru issued an authoritative supreme decree, granting a *retroactive* declaration of public necessity in favor of Zijin, blessed by Dr. Zegarra.

48. Supreme Decree 024-2008-DE confirms that Zijin had acquired 35 mining concessions located within 50 kilometers of the border by acquiring a controlling interest in Monterrico Metals Plc (a Cayman Islands company), which owned Compañía Minera Mayari S.A. (a Peruvian company and holder of 27 mining concessions), and Minera Majaz S.A. (now Rio Blanco Copper S.A., a Peruvian company and holder of 8 mining concessions).

49. Even though Supreme Decree 024-2008-DE issued in December 2008 ostensibly employs prospective language when describing the acquisition, Zijin had actually acquired

[133] **Exhibit C-0204**, Supreme Decree 024-2008-DE, Dec. 27, 2008.

89.9% of the shares issued by Monterrico Metals Plc on April 25, 2007,[134] and on June 1, 2007,[135] the Chinese consortium formally took over Monterrico Metals Plc's management: Mr. Huan Xiadong was appointed Chief Executive Officer. Thus, the foreign company acquired the corresponding concessions well over one year *prior* to the issuance of Supreme Decree 024-2008-DE, a fact that would have been obvious to the four separate state organs that reviewed Zijin's application for the supreme decree.

50. Nor was this transaction hidden or secretive. To the contrary, it was widely publicized. Shortly after the acquisition, on June 6, 2007, the new members of the board of Minera Majaz S.A. (indirectly owned by Monterrico Metals Plc) were registered in the company's public registry file.[136] In addition, on June 8, 2007, Mr. Huan Xiadong (*"the newly appointed CEO of the British Monterrico and Chairman and General Manager of the Peruvian Majaz Mining Company"*) had a meeting in Lima with the Minister of Energy and Mines and informed him about Zijin's acquisition and of the "changing of the management of Majaz, Monterrico's wholly owned subsidiary in Peru."[137] The Minister "expressed his welcome to Mr. Huang Xiaodong, and reiterated again his and the Ministry of Energy and Mine's attention to and support for the White River Project (…). At the same time he pointed out that Peru's President Mr. García also attached great importance to the project, and he especially emphasized in his

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134 **"***Zijin Consortium successfully takeover of Monterrico in April 2007", "The Consortium acquires 89.9% shareholding for 350p per share and maintains AIM listing"* **Exhibit C-0205**, Monterrico Metals Plc's Annual Report 2007 at 54 (http://www.monterrico.com/i/pdf/2007AnnualReport.pdf.)

135 **Exhibit C-0205, "***Since the Zijin Consortium formally took over the management of Monterrico on 1 June 2007, Monterrico has been reorganized and restructured. In Peru we have established a new Board of Directors for our wholly owned subsidiary Rio Blanco Copper S.A. (formerly Minera Majaz SA), which operates the Rio Blanco Project".* Monterrico Metals Plc's Annual Report 2007 at 6.

136 **Exhibit C-0206**, Archived Title of Entry N° C00011 of File N° 11352728 of the Corporate Registry of the Public Rigistry Office of Lima at 7-8 - Xiadong Huang (Chairman of the Board), Guobin Hu, Shan Shan Li, Andrew Peter John Bristow Bevege, Luis Chang Reyes and Jian Wu Yu.

137 **Exhibit C-0207**, *The new CEO of Monterrico had an audience with Peru's minister of Energy & Mines,* The Zijin Consortium Press Release, Jun. 11, 2007.

recent remarks the support of the government for the mining exploitation."[138] The next day, the Chinese ambassador to Peru visited Minera Majaz S.A. and was briefed on the details regarding Zijin's acquisition of Monterrico Metals Plc.[139]

51. Although the acquisition had already occurred, and was fully effective, it was not until July 2, 2007, that Zijin filed the formal request before MINEM in order to obtain the authorization under Article 71 of the Peruvian Constitution to acquire the mining rights corresponding to the "Rio Blanco" mining copper project located in Piura, within 50 kilometers of the northern border of Peru.[140] On December 19, 2007, the Ministry of Defense issued a favorable opinion regarding the Article 71 authorization.[141]

52. On March 25, 2008, several months after the acquisition was publicly known (and notified by Zijin to the Peruvian Government), Dr. Zegarra confirmed that the *ex post* authorization requested by Zijin (to ratify its acquisition of the mining rights corresponding to the Rio Blanco mining project) was legal.[142] Around that same time, during an official trip to Beijing, President Alan García held a meeting with directors of 10 large-scale Chinese business

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138 **Exhibit C-0207,** *The new CEO of Monterrico had an audience with Peru's minister of Energy & Mines,* The Zijin Consortium Press Release, Jun. 11, 2007.

139 **Exhibit C-0208**, "On the morning of June 9 Chinese ambassador in Peru Gao Zhengyue and his wife visited Majaz company and listened to the information about the acquisition of the British Monterrico by Xiamen Zijin Tongguan Investment and Development Co., Ltd., changing of the board members and the changing of the management of Majaz, Monterrico's subsidiary in Peru presented by Huang Xiadong, Chairman and General Manager of Majaz". - *China's ambassador in Peru Gao Zhengyue investigated Majaz company,* The Zijin Consortium Press Release, Jun. 11, 2007.

140 **Exhibit C-0209**, Copy of the file with the administrative procedure which led to Supreme Decree 024-2008-DE, at 3 to 8.

141 **Exhibit C-0209**, Copy of the file with the administrative procedure which led to Supreme Decree 024-2008-DE, at 75 and 76.

142 **Exhibit C-0209**, Copy of the file with the administrative procedure which led to Supreme Decree 024-2008-DE, at 98.

concerns, including Zijin, whose Chairman thanked him for his support for the Rio Blanco project.[143]

53. On December 27, 2008, Supreme Decree 024-2008-DE was issued, granting Zijin a retroactive authorization to acquire the mining rights corresponding to the "Rio Blanco" mining project located in Piura, within 50 kilometers of the northern border of Peru. The Peruvian Government has never challenged the acquisition of the Rio Blanco concessions by Zijin, much less has it expropriated its investments in any way, including by revocation of its authoritative supreme decree.

**(ii) Supreme Decree 021-2003-EM**

54. Supreme Decree 021-2003-EM[144] issued on June 26, 2003, authorized Minera IMP-Perú S.A.C. ("Minera IMP"), a Peruvian entity "*incorporated by foreign individuals*," as stated in the supreme decree itself, to acquire mining rights within 50 kilometers of the northern border of Peru. The mining concessions referenced in Supreme Decree 021-2003-EM are part of the "Rio Tabaconas" mining project. This transaction is another example in which a foreign investor acquired mining rights prior to the issuance of the authoritative supreme decree.

55. On July 31, 2000, Catalina Tomatis Chiappe, a Peruvian lawyer, applied to INGEMMET for ownership of the main mining concession of the "Rio Tabaconas" project, named "Don José."[145] On October 9, 2000, her petition was granted.[146] On November 30, 2002,

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[143] **Exhibit C-0210**, *"After the breakfast conference, President Garcia and his accompanying crew meet with Chairman Chen Jinghe. Chen thanks Mr. President's support and help to the project of Rio Blanco copper mine. He briefs the situation of the mine and extends his determination and confidence to develop the project in accord with world-class standards, and contribute his share to the economic development of the area where the mine locates and whole Peru. President of Peru Alan Garcia: No reason not to succeed in project Rio Blanco,* The Zijin Consortium Press Release, March 21, 2008.

[144] **Exhibit C-0211**, Supreme Decree 021-2003-EM, Jun. 26, 2003.

[145] **Exhibit C-0212**, INGEMMET Unique File for mining concession "Don José" N° 01-01751-00 at 2 to 5.

[146] **Exhibit C-0212**, INGEMMET Unique File for mining concession "Don José" N° 01-01751-00 at 31 to 33.

*prior to the issuance of Supreme Decree 021-2003-EM on June 26, 2003*, Ms. Tomatis transferred the mining concession to foreign-owned Minera IMP.[147]

56. Public registry records show that at least since March 24, 1998, and at least until March 24, 2003, IMPSA Resources BVI Inc, a company incorporated in the British Virgin Islands whose parent was a Canadian company, had been a majority shareholder in Minera IMP with a 98% ownership stake in the company (two foreign individuals owned the remaining 2% stake).[148] Considering that the "Don Jose" mining concession is explicitly referenced within the authorization granted by Supreme Decree 021-2003-EM and that Minera IMP acquired the mining concession on November 30, 2002, it appears clearly that Minera IMP acquired the "Don Jose" mining concession at a time when the company was 100% foreign-owned, nearly seven months prior to the issuance of Supreme Decree 021-2003 EM on June 26, 2003.[149] It is evident that Ms. Tomatis was either acting on behalf of or pursuant to an agreement with Minera IMP and its shareholders when she filed the claim for the "Don José" mining concession and subsequently transferred it to the foreign investor shortly thereafter.[150]

57. The ownership of the other mining concessions that are part of the "Rio Tabaconas" mining project, namely "Don Miguel Alberto," "Don Juan Carlos," "Don José 1," "Don José 2," "Don José 3," and "Don José 4" followed a similar course. Initially, Minera IMP requested the mining concessions in February 2001. As indicated above, at that time Minera IMP was 100% owned by a BVI company, in turn owned by a Canadian company, and two

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147 **Exhibit C-0212**, INGEMMET Unique File for mining concession "Don José" N° 01-01751-00 at 39 to 40.

148 **Exhibit C-0213**, Archived File of Entry N° 8 of File N° 11564463 of the Corporate Registry of the Public Registry Office of Lima at 4 to 5.

149 **Exhibit C-0212**, INGEMMET Unique File for mining concession "Don José" N° 01-01751-00 at 31 to 33.

150 **Exhibit C-0213**, Archived File of Entry 8 of File 11564463 of the Corporate Registry of the Public Registry Office in Lima at 6; **Exhibit C-0214**, Archived File of Entry C00001 of File 11564463 of the Corporate Registry of the Public Registry Office in Lima at 12; and, **Exhibit C-0215**, Entry C00005 of File 11564463 of the Corporate Registry of the Public Registry Office in Lima at 3.

foreign individuals. The pending requests were then assigned to Ms. Tomatis, to whom the mining concessions were granted in May, 2002. Subsequently, on July 17, 2003, a few weeks after the authoritative supreme decree was issued, Ms. Tomatis transferred the mining concessions to Minera IMP.[151]

58. To sum up, a Peruvian citizen and mining lawyer acquired the primary concession, "Don José," and transferred it to the foreign-owned company *prior* to the issuance of Supreme Decree 021-2003 EM. The foreign company itself requested the six other mining concessions. The requests were then transferred to the same Peruvian mining lawyer, who was granted ownership of the concessions. That Peruvian mining lawyer then promptly transferred the concessions to the foreign company after Peru had issued Supreme Decree 021-2003-EM.

59. The Peruvian Government has never challenged the acquisition by Minera IMP, much less has it expropriated its investments in any way, including by revocation of the company's authoritative supreme decree. This is significant, given that Peru must have been made aware that these concessions had been owned or claimed by a foreign mining company prior to the enactment of the required supreme decree. Here, by contrast, Bear Creek did not acquire the concessions until after the issuance of Supreme Decree 083, after exercising its duly registered Option Agreements with Ms. Villavicencio.

[151] **Exhibit C-0216**, INGEMMET Unique Files for mining concessions "Don Miguel Alberto" N° 01-00059-01, at 2 to 10, 55 to 60 and 65 to 66; "Don JuanCarlos" N° 01-00060-01 at 2 to 10, 99 to 105 and 121 to 127; "Don José 1" N° 01-00809-02 at 1 to 7, 8 to 10, 11 to 12; "Don José 2" N° 01-00810-02 at 2 to 8, 32 to 35 and 38 to 39; "Don José 3" N° 01-00811-02 at 2 to 8, 34 to 37 and 42 to 43; and, "Don Jose 4" N° 01-01504-02 at 3 to 12, 35 to 38 and 43 to 44.

*b. Authoritative Supreme Decrees Issued in Cases with Structures Similar to that Executed by Bear Creek in the Acquisition of the Santa Ana Mining Concessions*

**(i) Supreme Decree 041-94-EM**

60. Supreme Decree 041-94-EM,[152] issued on October 6, 1994, authorized Compañía Minera Ubinas S.A. ("CMU"), (a Peruvian entity that had COLOROBBIA Holding S.P.A., an Italian company, as its shareholder), to acquire mining rights within 50 kilometers of the southeastern border of Peru. This transaction followed a structure somewhat similar to that used by Bear Creek to acquire the Santa Ana mining concessions. Hugo Forno Florez, a well-known corporate lawyer, obtained the mining concessions named "La Solución," "La Solución No. 1," and "La Solución No. 2" from its previous owner on December 27, 1990. Mr. Forno was a nominee shareholder and the general manager of CMU and a legal representative of its shareholders when he obtained the concessions.[153] Thus, he was acting most likely either on behalf of or pursuant to an agreement with CMU and/or its shareholders when he acquired the mining concessions and then transferred them after issuance of Supreme Decree 041-94-EM.[154]

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[152] **Exhibit C-0217**, Supreme Decree 041-94-EM, Oct. 6, 1994.

[153] It is clear from publicly available information that Mr. Forno had a close relationship, or relationship of trust, with the foreign shareholders of Compañía Minera Ubinas S.A. A search of the public registry shows that, a few months after December 27, 1990, Mr. Forno appeared in the corporate file of the public registry of Compañía Minera Ubinas S.A as holder of 0.0021% of its shares. At that time (April 1, 1991), the other shareholders of Compañía Minera Ubinas S.A were Ricardo Luque Gamero with a stake of 0.0021% and Bitossi Peru S.A. with 99.9958% of the shares of Compañía Minera Ubinas S.A. **Exhibit C-0218**, Archived File of Entry N° 10 of File N° 01186245 of the Corporate Registry of the Public Registry Office of Arequipa, page 6. In turn, Bitossi Peru S.A.'s initial shareholders were Mr. Forno, Bitossi USA Corporation and Ricardo Luque Gamero. Also, within the period from August 8, 1989 until February 18, 1991, Mr. Forno acted as general manager of Bitossi Perú S.A. **Exhibit C-0219**, File 02002531 of the Corporate Registry of the Public Registry Office in Lima, pages 1 and 2. Subsequently, and as reflected in the corporate file of the public registry of Compañía Minera Ubinas S.A., between late 1991 and late 1993, the shares held by Mr. Forno and Mr. Luque appear to have been acquired by Fincolor S.P.A and B.M.S.R.L. In a shareholders meeting of such company dated November 2, 1993, Mr. Forno also actied as legal representative of Fincolor S.P.A and B.M.S.R.L.

[154] As also reflected in the corporate file of the public registry of Compañía Minera Ubinas S.A., on June 21, 1994, a few months prior to the issuance of Supreme Decree 041-94-EM, the shareholders of Compañía Minera Ubinas S.A. were Industrie Bitossi S.P.A., COLOROBBIA Holding S.P. A. and B.M.S.R.L. In a shareholder meeting dated June 21, 1994, they appointed Mr. Forno to sign a public deed on behalf of Compañía Minera Ubinas S.A. Finally, from January 9, 1989 until January 4, 1991, Mr. Forno appeared as a matter of public

61. It is hard to imagine that Peru was unaware of these facts, as there was publicly available evidence of the relationship between CMU and Mr. Forno (namely the nominee shareholding and general management position of Mr. Forno in CMU). Yet, Peru never challenged CMU's acquisition of the concessions, despite the clear and close relationship between CMU and Mr. Forno, the fact that he held the concessions pending the decision on CMU's application for the autoritative supreme decree, and Mr. Forno's subsequent transfer of the concessions to the company.

### (ii) Supreme Decree 013-97-EM

62. Supreme Decree No. 013-97-EM issued on July 16, 1997, authorized Rio Blanco Exploration LLC (US Company) ("Rio Blanco US") to acquire 100% of the shares of Empresa Minera Coripacha S.A. ("EMC"), which held 18 mining concessions in Piura, within 50 kilometers of the northern border of Peru.

63. EMC was incorporated on August 24, 1993,[155] and was owned by three partners at the well-known Peruvian mining law firm of Rubio, Leguía & Normand.[156] It requested 18 mining concessions between 1993 and 1995, which were granted to the company between January and May 1997.[157] In the meantime, EMC listed foreign individuals (such as Messrs.

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record as the general manager of Compañía Minera Ubinas S.A. **Exhibit C-0220**, Entry N° 4 of File N° 01186245 of the Corporate Registry of the Public Registry Office of Arequipa at 3. A couple of months after the issuance of Supreme Decree 041-94-EM, on Dec.23, 1994, Mr. Forno transferred the relevant mining rights to Compañía Minera Ubinas S.A. **Exhibit C-0221**, INGEMMET Unique Files for mining concessions "La Solución" N° 14003327x01 at 66 to 72; "La Solución 1" 14003594x01 at 144; and, "La Solución 2" N°14003595x01 at 126.

[155] **Exhibit C-0222**, Archived File of Entry N° 001 of File N° 02021527 of the Corporate Registry of the Public Registry Office of Lima at 6 and 7.

[156] Enrique Normand Sparks, Alfonso Rubio Arena and Alfonso Rubio Feijoo. **Exhibit C-0223**, Profile Rubio, Leguía & Normand: http://rubio.pe/Nosotros , http://rubio.pe/Abogados/Details/7.

[157] **Exhibit C-0224**, INGEMMET Unique Files for mining concessions "Mojica 1" N° 01-02296-93 at 2 to 11 and 35 to 36; "Mojica 2" N° 01-02297-93 at 2 to 11 and 36 to 37; "Mojica 3" N° 01-02298-93 at 2 to 11 and 34 to 35 ; "Mojica 4" N° 01-02299-93 at 2 to 11 and 35 to 36; "Mojica 9" N°01-02304-93 at 2 to 10 and 34 to 35; "Mojica 10" N° 01-00793-95 at 2 to 11 and 32 to 34; "Mojica 11" N° 01-00792-95 at 2 to 12 and 53 to 55; "Mojica 12" N° 01-07757-95 at 2 to 10 and 26 to 28; "Mojica 13" N° 01-08578-95 at 2 to 13 and 31 to 33;

William Marion Danley, *American*; Johan Albert Smit, *Australian*; Simon John Meldrum, *British*; Gale Curtis Knutsen,[158] *American*)[159] among its representatives since September 1994. Some of these individuals were related to the foreign interests behind the project at the time.[160] Rio Blanco US acquired 99% of the shares of EMC after the issuance of Supreme Decree No. 013-97-EM granting Rio Blanco US authorization to acquire 100% of the shares in EMC.[161]

64. Mr. Normand and Messrs. Rubio were evidently either acting on behalf of or pursuant to an agreement with Rio Blanco US when EMC made the requests for the mining concessions.[162] Again, it is hard to imagine that Peru was unaware of these facts as there was evidence of the relationship between Mr. Normand and Messrs. Rubio, EMC, the foreign individuals listed as EMC's representatives, and Rio Blanco US that was a matter of public record. Nevertheless, Peru never challenged this arrangement.

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"Mojihua 1" N° 01-02424-93 at 2 to 12 and 35 to 36; "Mojihua 2" N° 01-02425-93 at 2 to 8 and 35 to 36; "Mojihua 3" N° 01-02426-93 at 2 to 8 and 34 to 35; "Mojihua 4" N° 01-02427-93 at 2 to 8 and 35 to 36; "Mojihua 5" N° 01-02428-93 at 2 to 8 and 35 to 36; and, "Mojihua 6" N° 01-02429-93 at 2 to 8 and 35 to 36.

158 **Exhibit C-0225**, Memorial to Gale Curtis Knutsen, Geological Society of America *Memorials*, December 1996.

159 **Exhibit C-0226**, File N° 02021527 of the Corporate Registry of the Public Registry Office of Lima at 1, 3, 5, 8 and 12.

160 **Exhibit C-0227**, The Rio Blanco Project was first discovered (1994) by the Peruvian subsidiary of Newcrest Mining of Australia, in 1996 Newcrest signed an agreement with Cyprus Amax by means of which Cyprus Amax earned equity by advancing exploration. In 1999 Cyprus Amax was acquired by Phelps Dodge Corporation. In 2000 Gitennes acquired Newcrest's assets in Peru including the Rio Blanco Project and Phelps Dodge relinquished their rights to Rio Blanco. In 2001 Monterrico acquired an option to acquire up to 75% of Rio Blanco. - Monterrico Metals Plc's Annucal Report 2002 at 6.

161 **Exhibit C-0228**, Archived File of Entry N° 0010 of File N° 02021527 of the Corporate Registry of the Public Registry Office of Lima at 4.

162 Messrs. Normand and Rubio are well-respected Peruvian corporate and mining lawyers, who certainly acted as lawyers for Empresa Minera Coripacha S.A. and Rio Blanco US since they were nominee shareholders of Empresa Minera Coripacha and legal representatives of both Empresa Minera Coripacha and the foreign interests behind the project at the time. **Exhibit C-0229**, Entry N° 1 of the File N° 03026941 of the Registry of Powers of Attorney granted by foreign companies of the Public Registry at 1 and 2; Entry N° 1 of the File N° 01632426 of the Registry of Powers of Attorney granted by foreign companies of the Public Registry at 1; and, Entry N° 1 of the File N° 01632434 of the Registry of Powers of Attorney granted by foreign companies of the Public Registry at 1.

65. These examples of other acquisitions of mining rights that were made by other foreign mining companies in Peru, before and after Bear Creek acquired the Santa Ana mining concessions, demonstrate that: (i) foreign companies have acquired mining concessions within 50 km from the Peruvian border *prior* to the issuance of the relevant supreme decree; and (ii) foreign investors have used the same (or a similar) structure as the one that Bear Creek utilized to acquire the Santa Ana mining concessions, namely, having a trusted Peruvian individual(s) secure and hold target mining concessions within 50 kilometers of the border pending the outcome of the foreign investor's application for the required supreme decree. Peru determined these transactions to be in compliance with Article 71 of the Constitution and, accordingly, issued the requested supreme decree. In the present case, however, Peru vilified Bear Creek for employing a similar framework for acquiring the Santa Ana Concessions. It is clear that Peru's feigned indignation constitutes nothing more than an after-the-fact justification for the arbitrary and discriminatory issuance of Supreme Decree 032.

### C. BEAR CREEK DEVELOPED THE SANTA ANA PROJECT WITH THE SUPPORT OF THE NEIGHBORING COMMUNITIES AND THE APPROVAL OF PERU

66. Harmonious community relations are a priority for Bear Creek.[163] Its commitment to developing peaceful and respectful relationships with local communities is even recognized in the industry: Bear Creek was ranked fourth in MacCormick's 2013 Social Responsibility Index, which reviewed the top 100 junior mining companies by market capitalization listed on the TSXV.[164] At Corani, the surrounding communities are very supportive of the company's work, so much so that during the unrest that took place in 2011

[163] Antunez de Mayolo Rebuttal Witness Statement ¶ 65.

[164] **Exhibit C-0230**, 2013 MacCormick Social Responsibility Index at 13.

targeting the nearby Macusani Yellowcake project, the communities spontaneously created a barrier to protect Corani from any possible damage.[165]

67. Peru itself acknowledged Bear Creek's successes regarding Santa Ana: in December 2010, the Ministry of Environment's Environmental Assessment and Monitoring Agency (*Organismo de Evaluación y Fiscalización Ambiental* or "OEFA") visited the project site and reported that the relationship between Bear Creek and the local communities was "harmonious."[166] The OEFA returned to the project site in November 2011, *i.e.*, after Peru unlawfully issued Supreme Decree 032 and expropriated Santa Ana, and found that the communities close to Santa Ana continued to support both Bear Creek and the Project.[167]

68. However, in this arbitration, Peru has chosen to present a counterfactual narrative according to which Bear Creek failed to obtain the communities' support for the Project,[168] which in turn caused the Puno protests of 2011.[169] Peru also criticizes Bear Creek's community relations program.[170] These efforts fall short, though, and Peru is left arguing that compliance with its own legal framework was not enough and that Bear Creek should have gone above and beyond what the law requires in terms of community outreach efforts.[171] This absurd take on

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165 Swarthout Rebuttal Witness Statement ¶ 38.

166 **Exhibit C-0143**, OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 at 4, 31. The OEFA Report describes Bear Creek's community relations as "good." The other categories are "bad" and "regular."

167 **Exhibit C-0179**, *Acta de Supervisión Ambiental*, Nov. 25, 2011; and **Exhibit C-180**, OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011 at 15.

168 Respondent's Counter-Memorial ¶¶ 58 *et seq.*; **RWS-001**, Witness Statement of Luis Fernando Gala Soldevilla, Oct. 6, 2015 ¶¶ 24, 40 (*hereinafter*, "Gala Witness Statement"); **RWS-002**, Witness Statement of Felipe A. Ramírez Delpino, Oct. 6, 2015 ¶ 13 (*hereinafter*, "Ramírez Witness Statement").

169 Respondent's Counter-Memorial ¶ 93.

170 Respondent's Counter-Memorial ¶¶ 81 *et seq.*

171 Respondent's Counter-Memorial ¶ 61.

community relations serves at least one purpose – to confirm that Bear Creek complied with its community relations obligations under Peruvian law.

69. To buttress its allegations regarding the communities' supposed lack of support for Bear Creek and the Santa Ana Project, Peru has submitted a report by Professor Antonio Alfonso Peña Jumpa.[172] Professor Peña, an academic whose publications denote a marked bias against foreign mining companies,[173] visited the districts of Desaguadero, Huacullani, and Kelluyo twice in July and August 2015 to interview community members about Bear Creek and the Santa Ana Project.[174] However, he does not identify the individuals that he interviewed. On this basis, Professor Peña criticizes Bear Creek's community relations program and concludes that the communities massively rejected the Project,[175] even though the interviews were not conducted four years earlier, at the time of the actual events. It is also impossible to check his sources or the veracity of his statements since the "statements" on which he relies are anonymous. The Tribunal therefore should disregard Professor Peña's report. His obvious partiality aside, it is difficult to ascribe any credibility or reliability to a report that consists of little else than unverifiable information and conclusory assertions.

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172 **REX-002**, Expert Report of Antonio Alfonso Peña Jumpa, Oct. 6, 2015 (*hereinafter*, "Peña Expert Report").

173 *See, e.g.*, **Exhibit C-0231**, "*Pueblos Originarios, Estado y Sociedad: Retos Actuales del Multiculturalismo en el Perú*," 35 Derecho & Sociedad 152 at 153 ("One of the big issues concerns natural resources. What can we do with natural resources, if these are located on the territory of indigenous populations and the State grants concessions to private entities to exploit those resources, and these are private entities that do not belong to the communities, they are completely foreign to the communities, **then, it is logical that conflicts result**. Because we do not understand how to handle or address these conflicts") and 156 ("Private companies also operate in this context, which seek to obtain the concessions, they seek their own benefit and particular interest, they seek profit. These mega-projects like those in Cusco generate lots of income for the private companies and **they do not take into consideration issues such as the country's diversity, or the conflict that will arise or the damages that will be caused**. This omission or commission confers on them their share of responsibility") (emphasis added). *See also* **Exhibit C-0232**, Blog Posts of Antonio Alfonso Peña Jumpa; **Exhibit C-0233**, "*El caso Ilave: Barbarie o justicia?*" LA REPÚBLICA, May 18, 2004; and **Exhibit C-0234**, Antonio Peña Jumpa, "*Las Comunidades Campesinas y Nativas en la Constitución Política del Perú: Un Análisis Exegético del Artículo 89º de la Constitución*," 40 Derecho & Sociedad at 195.

174 **REX-002**, Peña Expert Report ¶¶ 4-5.

175 **REX-002**, Peña Expert Report ¶¶ 93 *et seq.*

70. In contrast to Peru's strategy of relying on dubious statements and anonymous "interviews" about events that took place more than four years ago, Bear Creek provides substantive and contemporaneous evidence documenting its relationship with the local communities and describing every step of its community relations efforts. If Peru had had any legitimate concerns regarding Bear Creek's community relations program at Santa Ana, it could and would have raised them at the time, through the proper channels and in accordance with the applicable procedure. Yet Peru never voiced any concerns in that regard. To the contrary, it approved Bear Creek's Citizen Participation Plan (*Plan de Participación Ciudadana* or "PPC") in early 2011.[176] The PPC described in exhaustive detail the citizen participation mechanisms that Bear Creek had already implemented during the preparation of the ESIA and would continue to implement during the evaluation phase of the ESIA and throughout the construction and operation of the Santa Ana Project.[177]

71. Therefore, the Tribunal should reject Peru's unacceptable recourse to *ex post facto* arguments regarding Bear Creek's relationship with the Santa Ana communities. The truth is – and the contemporaneous evidence on the record makes clear – that the local communities supported Bear Creek and the Project, and that Peru unequivocally endorsed the company's community relations program.

### 1. Bear Creek Developed Close Relationships with the Santa Ana Communities Prior to the Preparation of Its ESIA

72. After Bear Creek acquired the Santa Ana mining concessions in December 2007 from Ms. Villavicencio, the company devoted considerable efforts and resources to develop and

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[176] **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.

[177] **Exhibit C-0155**, Ausenco Vector, *Plan de Participación Ciudadana* ("PPC") de Bear Creek, The ESIA is the foundational document upon which every aspect of the mining project is built. *See* Antunez de Mayolo Rebuttal Witness Statement ¶ 13; Antunez de Mayolo Witness Statement ¶ 12.

implement citizen participation mechanisms through which it would discuss the scope and impact of the Santa Ana Project with the local communities. Supreme Decree No. 028-2008-EM ("Supreme Decree No. 28") and Ministerial Resolution No. 304-2008-MEM/DM ("Resolution No. 304") regulated that process.[178] Notably, Article 4 of Supreme Decree No. 28 already incorporated Peru's relevant obligations under ILO Convention No. 169,[179] contrary to Peru's surprising suggestion that it had not yet implemented such obligations.[180]

73. Bear Creek organized workshops with the communities to introduce them to the Santa Ana Project.[181] With the communities' approval, Bear Creek also implemented a large-scale rotational work program, which allowed the company to employ, at the program's peak, over 100 community members to assist with exploration activities.[182] Now, for the first time, Peru criticizes Bear Creek for having provided jobs to members of the communities where the Santa Ana Project was located "without making comparable or even other beneficial arrangements with closely neighboring communities" because, by so doing, the company allegedly alienated some communities from others.[183]

74. Peru's remark illustrates, once again, a surprising disregard for established mining industry practices.[184] Given the Santa Ana Project's relatively small size during the exploration phase, the few positions that Bear Creek could provide to the local communities, while the drilling was taking place, had to be given to members of the communities on whose land the

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178 Flury Expert Report ¶ 70.

179 Flury Expert Report ¶¶ 71-72.

180 Respondent's Counter-Memorial ¶ 62.

181 Bear Creek conducted five such workshops, even though Article 12 of Resolution No. 304 only required one (*see* **Exhibit R-153**, MINEM Resolution No. 304-2008-MEM/DM, Jun. 24, 2008; and **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011).

182 Swarthout Witness Statement ¶ 40; Antunez de Mayolo Witness Statement ¶ 7.

183 Respondent's Counter-Memorial ¶¶ 78, 86.

184 *See supra* ¶ 6.

company was drilling.[185] This is because the communities would grant access to their lands only if Bear Creek employed their members.[186] This is a normal arrangement for mining projects, especially during the early stages when few personnel are required.[187]

75. Peru also seeks to exacerbate an isolated incident that occurred at Bear Creek's camp site on October 14, 2008.[188] On that day, members of the Kelluyo community invaded the campsite after participating in a local fair where alcohol had been served.[189] They caused only minimal damage and left many valuables untouched, such as Bear Creek's US$ 5 million drill core.[190] Bear Creek filed a criminal complaint nonetheless because a pickup truck and several laptops had been stolen.[191] The matter was settled amicably, and participants returned to the camp to repair it and to repaint the buildings.[192] Bear Creek even hired one of the leaders to assist with exploration activities.[193] There was no lasting animosity between Bear Creek and the communities and not a single disturbance occurred on the Santa Ana Project site after October 14, 2008.[194] It is revealing of Peru's desperation that it would rely on this isolated incident to suggest that there were poor relations between Bear Creek and the local communities.

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185 Antunez de Mayolo Rebuttal Witness Statement ¶ 77.

186 Antunez de Mayolo Rebuttal Witness Statement ¶ 77.

187 Antunez de Mayolo Rebuttal Witness Statement ¶ 77.

188 Respondent's Counter-Memorial, ¶ 88; **REX-002**, Peña Expert Report ¶¶ 64-71.

189 Swarthout Rebuttal Witness Statement ¶ 35.

190 Swarthout Rebuttal Witness Statement ¶ 35.

191 Swarthout Rebuttal Witness Statement ¶ 35.

192 Swarthout Rebuttal Witness Statement ¶ 36.

193 Swarthout Rebuttal Witness Statement ¶ 36.

194 Swarthout Rebuttal Witness Statement ¶¶ 36-37.

### 2. Bear Creek Pursued Its Successful Community Relations Program During the Preparation of the ESIA

76. In early 2009, Bear Creek hired Ausenco Vector, one of the leading mining consultancies in Peru and the world, to assist with the preparation of the ESIA.[195] Article 13 of Resolution No. 304 required that at least one workshop be organized during the preparation of the ESIA.[196] Bear Creek conducted five such workshops.[197] Bear Creek held *120 additional workshops* in a total of 18 communities,[198] from the exploration phase of the Santa Ana Project to the submission of the ESIA, as well as numerous guided visits and participatory monitoring events.[199] In doing so, Bear Creek actually went above and beyond what was legally required of it. This does not prevent Felipe A. Ramírez Delpino, the Director General of the DGAAM, from arguing that Bear Creek should have organized even more workshops due to the expansion of its drilling campaign during the exploration phase.[200]

77. Mr. Ramírez also questions the communities' actual support for Bear Creek and the Santa Ana Project by professing the DGAAM's inability to actually monitor the local communities' level of acceptance for the project.[201] However, not only did Bear Creek regularly and thoroughly inform the DGAAM of its activities,[202] DGAAM staff also visited the project

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195 Antunez de Mayolo Rebuttal Witness Statement ¶ 14; Antunez de Mayolo Witness Statement ¶ 7; Claimant's Memorial ¶ 61.

196 **Exhibit R-153**, MINEM Resolution No. 304-2008-MEM/DM, Jun. 24, 2008, Art. 13.

197 **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.

198 **Exhibit C-0155**, Ausenco Vector, *Plan de Participación Ciudadana* ("PPC") de Bear Creek, Annex 2.

199 Antunez de Mayolo Rebuttal Witness Statement ¶ 82.

200 **RWS-002**, Ramírez Witness Statement ¶ 15.

201 **RWS-002**, Ramírez Witness Statement ¶ 13.

202 **Exhibit C-0157**, Letter from C. Rios Vargas, Bear Creek, to F. Ramírez, MINEM, Jul. 6, 2009; **Exhibit C-0158**, Letter from E. Antunez de Mayolo, Bear Creek, to F. Ramírez, MINEM, Oct. 19, 2010; **Exhibit C-0159**, Letter from F. Ramírez, MINEM, to V. Paredes Argandoña, Regional Directorate of Energy and Mines (*Dirección Regional de Energía y Minas* or "DREM"), Oct. 28, 2010; **Exhibit C-0160**, Letter from E. Antunez de Mayolo, Bear Creek, to F. Ramírez, MINEM, Nov. 18, 2010.

area on repeated occasions for the purpose of monitoring Bear Creek's relationship with the communities. DGAAM representatives, together with representatives of the Regional Directorate of Energy and Mines (*Dirección Regional de Energía y Minas* or "DREM"), also participated in the workshops that Bear Creek organized for the communities.[203] Not once did MINEM, the DGAAM, the DREM, or any Peruvian governmental agency, inform Bear Creek that its community relations program was somehow not satisfactory, or that the local communities did not support the Santa Ana Project.

78. The truth is that the communities neighboring Santa Ana repeatedly expressed their support for Bear Creek and the Project. Bear Creek signed agreements with them, formalizing their support for the Project as well as Bear Creek's commitment to provide them with jobs, assist them in the development of sustainable projects, and respect their way of life.[204] When Mr. Antunez de Mayolo joined the company in April 2010, he traveled to the project site and spoke with community members about their expectations and concerns.[205] They expressed their desire for an environmentally responsible mining project that would stimulate the local economy and provide much-needed jobs.[206]

79. When the OEFA visited the Santa Ana project site in December 2010, it reported that the relationship between Bear Creek and the surrounding communities was "harmonious."[207] When the OEFA returned to the project site in November 2011 (after Peru had enacted Supreme

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203 **Exhibit C-0155**, Ausenco Vector, *Plan de Participación Ciudadana* ("PPC") de Bear Creek, Annexes 3 and 4.

204 *See*, *e.g.*, **Exhibit C-0177**, Agreement between Condor Ancocahua and Bear Creek, May 23, 2009; and **Exhibit C-0178**, Agreement between Ancomarca and Bear Creek, Jul. 2, 2009.

205 Antunez de Mayolo Rebuttal Witness Statement ¶ 65.

206 Antunez de Mayolo Rebuttal Witness Statement ¶ 65.

207 **Exhibit C-0143**, OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 at 4, 31. The OEFA Report describes Bear Creek's community relations as "good." The other categories are "bad" and "regular."

Decree 032), it concluded that Bear Creek still enjoyed a good relationship with the local communities.[208] The OEFA specifically noted that certain inhabitants of the Concepción de Ingenio community seemed to ignore that Peru had put an end to the Santa Ana Project, and had asked OEFA inspectors when Bear Creek would be returning to Santa Ana, expressing their hope that the company would soon return to continue developing the Project.[209]

80. Peru acknowledges that the communities never filed a formal complaint against Bear Creek before the OEFA.[210] Mr. Ramírez, however, attributes this fact to the alleged difficulties for the communities to do so because of their remoteness, their ignorance of the law, and their illiteracy.[211] This is not the case. The whole point of an OEFA site visit is to interview community members who live close to the mining project and get their impressions of the project and the company running it.[212] As Mr. Antunez de Mayolo explains, "if community members had had any complaint relating to the Project, … they would have said something to OEFA."[213]

### 3. The DGAAM Approved the Executive Summary of Bear Creek's ESIA as well as Its PPC

81. On December 23, 2010, Bear Creek submitted its ESIA to MINEM.[214] Mr. Antunez de Mayolo wrote to Mr. Ramírez requesting that the DGAAM approve the Executive Summary of its ESIA and the PPC,[215] in accordance with the applicable procedure.[216] The

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[208] **Exhibit C-0179**, *Acta de Supervisión Ambiental*, Nov. 25, 2011; and **Exhibit C-0180**, OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011 at 15.

[209] **Exhibit C-0180**, OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011 at 15.

[210] **RWS-002**, Ramírez Witness Statement ¶ 22.

[211] **RWS-002**, Ramírez Witness Statement ¶ 22.

[212] Antunez de Mayolo Rebuttal Witness Statement ¶ 67.

[213] Antunez de Mayolo Rebuttal Witness Statement ¶ 67.

[214] Antunez de Mayolo Rebuttal Witness Statement ¶ 15.

[215] **Exhibit C-0072**, Request from Bear Creek Mining Corporation to DGAAM for Approval of the ESIA, Dec. 23, 2010.

Executive Summary of Bear Creek's ESIA was a comprehensive account of the Santa Ana Project, from baseline through to construction and operation, until closure.[217] As noted above, the PPC described in detail the citizen participation mechanisms that Bear Creek had already implemented during the preparation of the ESIA and would continue to implement during the evaluation phase of the ESIA and throughout the construction and operation of the Santa Ana Project.[218] The PPC was based on all legally relevant norms, including Resolution No. 304 and MINEM's Guide to Community Relations.[219]

82. On January 7, 2011, the DGAAM approved the Executive Summary of Bear Creek's ESIA as well as its PPC.[220] That approval meant that the DGAAM endorsed Bear Creek's citizen participation mechanisms, and that Bear Creek was acting properly, in compliance with Peruvian laws, in connection with the development of the Santa Ana Project.[221] In other words, by approving the Executive Summary of the ESIA and the PPC, DGAAM provided Bear Creek with a roadmap to follow in order to maintain good community relations while continuing to develop the Santa Ana Project.[222]

83. Peru denigrates the importance of that approval, characterizing it as "not significant" and a mere procedural step.[223] This is incorrect and misleading. The DGAAM

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[216] **Exhibit C-0156**, MINEM, *Dirección General de Asuntos Ambientales Mineros, Certificación Ambiental para Actividades de Explotación Mediana y Gran Minería*.

[217] **Exhibit C-0071**, Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, Dec. 2010 at 3. *See also* Antunez de Mayolo Rebuttal Witness Statement ¶ 16.

[218] *See supra* ¶ 70. *See also* Antunez de Mayolo Rebuttal Witness Statement ¶ 17.

[219] Antunez de Mayolo Rebuttal Witness Statement ¶ 81.

[220] **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.

[221] Flury Expert Report ¶ 82.

[222] Antunez de Mayolo Rebuttal Witness Statement ¶ 81.

[223] **RWS-002**, Ramírez Witness Statement ¶ 18; Respondent's Counter-Memorial ¶ 179.

carefully reviewed the contents of the ESIA, the ESIA's Executive Summary, and the PPC, and approved the last two documents:

> Based on Report No. 013-2011-MEM-AAM/WAL/AD/ KVS above, and being in agreement with that which is written, **IT IS RESOLVED: TO APPROVE** the PPC and the Executive Summary of the ESIA of the Santa Ana mining project, presented by Bear Creek Mining Company Sucursal del Perú, in accordance with Article 18 of Ministerial Resolution No. 304-2008-MEM/DM – the rules that regulate the process of citizen participation in the mining subsector. – **Inform the applicant**.

**AUTO DIRECTORAL N° 005 -2011-MEM-AAM**

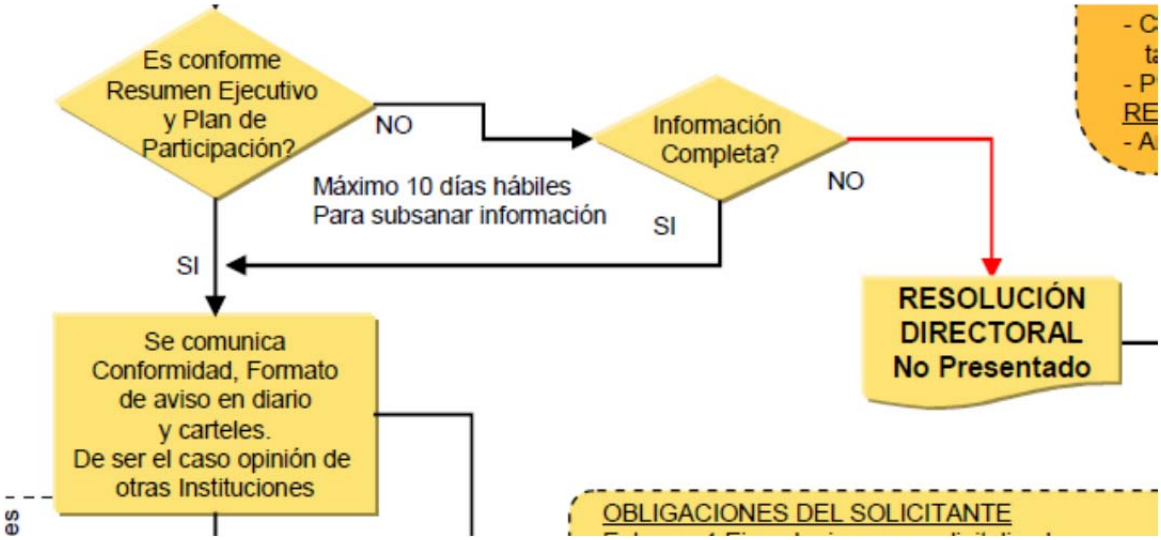
Lima, 07 ENE. 2011

Visto, el Informe N° 013 -2011-MEM-AAM/WAL/AD/KVS, que antecede y estando de acuerdo con lo expresado, **SE RESUELVE: DAR CONFORMIDAD** al Plan de Participación Ciudadana y al Resumen Ejecutivo del EIA del proyecto minero Santa Ana, presentado por **BEAR CREEK MINING COMPANY SUCURSAL DEL PERÚ**, de conformidad con el artículo 18° de la R.M. No. 304-2008-MEM/DM – Normas que regulan el proceso de Participación Ciudadana en el Subsector Minero.- **Notifíquese a la administrada**.

**(The DGAAM's Approval of Bear Creek's ESIA Executive Summary and PPC)**[224]

84. Conversely, the DGAAM could have decided that the information provided by Bear Creek in the Executive Summary of its ESIA or in its PPC was insufficient and requested it to provide additional material, or it could have rejected these documents altogether:

[224] **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.




**(The Different Steps that Are Required for the Approval of the ESIA, Excerpt)**[225]

85. The DGAAM did not request further information from Bear Creek. Instead, it approved the Executive Summary of the ESIA and the PPC. This approval "constituted a critical step" for Bear Creek at Santa Ana.[226] The DGAAM's approval confirmed that Bear Creek had implemented adequate community relationship programs, in accordance with the applicable law, had maintained good relationships with the communities, and that no social conflicts or issues existed in connection with the further development of the Santa Ana Project.[227] Mr. Flury concurs, noting that the approval "it represents an initial Green light from the authority and is a very important milestone in the process of approval of the ESIA."[228]

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[225] **Exhibit C-0156**, MINEM, *Dirección General de Asuntos Ambientales Mineros*, *Certificación Ambiental para Actividades de Explotación Mediana y Gran Minería*. The chart above shows that if the DGAAM believes that the Executive Summary of the ESIA and PPC are satisfactory, it shall approve both documents (as was the case with Bear Creek). However, if it is not satisfied with the documents, it is entitled to request that the applicant provide further information within a maximum time period of 10 business days. If the new information that is provided is deemed complete, then the DGAAM shall approve the Executive Summary of the ESIA and PPC. However, if it finds that the information provided is incomplete, the DGAAM shall issue a Resolution declaring that the documents have not been presented.

[226] Antunez de Mayolo Rebuttal Witness Statement ¶ 21; Antunez de Mayolo Witness Statement ¶ 12.

[227] Antunez de Mayolo Rebuttal Witness Statement ¶ 21; Antunez de Mayolo Witness Statement ¶ 12.

[228] Flury Expert Report ¶ 82.

86. In addition to approving the Executive Summary of the ESIA and the PPC, the DGAAM outlined the next steps that Bear Creek was required to take for the public hearing to occur,[229] in accordance with the applicable procedure.[230] These actions included distributing copies of Bear Creek's ESIA and of the Executive Summary to the communities, local authorities, and the Regional government; advertising, through different means, the ESIA and the public participation mechanisms that Bear Creek would be implementing; and informing the communities that a public hearing would be taking place regarding the Santa Ana Project.[231]

87. On January 21, 2011, Mr. Antunez de Mayolo wrote to the DGAAM informing it that Bear Creek had complied with all of these requirements.[232] Bear Creek then proceeded to hold the public hearing, with the DGAAM's support and authorization.

88. The public hearing took place on February 23, 2011, and lasted 5 hours.[233] Mr. Antunez de Mayolo attended, together with two DGAAM representatives, Kristian Véliz Soto, an attorney, and Walter Alfaro Lopez, an engineer, as well as another attorney representing the DREM, Jesus Obet Alvarez Quispe.[234] Mr. Ramírez, Vice-Minister Gala, Professor Peña, and Dr. Rodríguez-Mariátegui all comment on the public hearing, although none of them was

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229 **Exhibit C-0073**, MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011.

230 **Exhibit C-0156**, MINEM, *Dirección General de Asuntos Ambientales Mineros*, *Certificación Ambiental para Actividades de Explotación Mediana y Gran Minería*.

231 **Exhibit C-0073**, MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011. *See also* Antunez de Mayolo Rebuttal Witness Statement ¶ 22; Antunez de Mayolo Witness Statement ¶ 12; **Exhbit C-0074** Services Agreement entered into by Radio Wayra – Huacullani and Bear Creek Mining Company, Jan. 13, 2011; **Exhibit C-0075** Notices by Bear Creek published in various newspapers inviting communities to participate in the public hearing on Feb. 23, 2011.

232 **Exhibit C-0162**, Letter from Bear Creek to DGAAM, Jan. 21, 2011.

233 Antunez de Mayolo Witness Statement ¶ 13.

234 Antunez de Mayolo Rebuttal Witness Statement ¶ 24.

present.[235] Dr. Rodríguez-Mariátegui questions whether the proper materials were handed out to the participants, whether Bear Creek checked that the audiovisual equipment was working before the public hearing began, and whether the company had an Aymara translator.[236] As Mr. Antunez de Mayolo can confirm, this was all done.[237]

89. Peru suggests that the large number of attendees at the public hearing did not mean that there was broad support within the communities for the Santa Ana Project,[238] and that a peaceful public hearing does not mean that the people in attendance agree with the project.[239] These statements are incorrect insofar as they concern the public hearing for the Santa Ana Project. Mr. Antunez de Mayolo sat among the community members at the public hearing and observed first-hand that the immense majority of the individuals present strongly supported the project because they wanted Bear Creek to invest and bring economic activity and development to the local communities.[240]

90. Peru contends that the number of questions asked at the public hearing – 103 – "indicates that the communities had significant concerns about the effects the project would have on their sources of livelihood and everyday lives."[241] However, it is important to understand that the public hearing was Bear Creek's opportunity to present the Project in as much detail as possible. As Mr. Antunez de Mayolo recalls, the community members, far from being worried,

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235 **RWS-001**, Gala Witness Statement ¶ 19; **RWS-002**, Ramírez Witness Statement ¶ 20; **REX-002**, Peña Expert Report ¶¶ 76 *et al.*; and **REX-003**, Expert Report of Luis Rodríguez-Mariátegui Canny, Oct. 6, 2015, ¶ 59 (*hereinafter*, "Rodríguez-Mariátegui Expert Report").

236 **REX-003**, Rodríguez-Mariátegui Expert Report ¶ 59.

237 Antunez de Mayolo Rebuttal Witness Statement ¶ 24.

238 **RWS-002**, Ramírez Witness Statement ¶ 20; Respondent's Counter-Memorial ¶ 89.

239 **RWS-001**, Gala Witness Statement ¶ 19.

240 Antunez de Mayolo Rebuttal Witness Statement ¶ 25; Antunez de Mayolo Witness Statement ¶ 15.

241 **RWS-002**, Ramírez Witness Statement ¶ 20; Respondent's Counter-Memorial ¶ 90.

were curious and engaged in the process, and asked a normal amount of questions for a project of this size.[242]

91. During the public hearing, the DGAAM attorneys announced that if community members believed that Bear Creek had not fully answered their questions, they could submit their questions, as well as any observations that they could have regarding the ESIA, including their opposition to the Project, in writing at the end of the hearing.[243] These questions and/or observations would then be identified in the public hearing minutes and would be included subsequently in the general observations to the ESIA that MINEM would send to Bear Creek for comment.[244] The community members did not submit a single question or observation at the end of the public hearing:

> Next, the Presiding Officers [*Mesa Directiva*] received from the participants the documents that they presented in the amount of – [nil], which form part of the evaluation file.
>
> A continuación, la Mesa Directiva recibió de los participantes los documentos que éstos presentaron en cantidad de ....., formando estos parte del expediente en evaluación.

**(Minutes of the Public Hearing)**[245]

92. The lack of questions and observations at the end of the public hearing demonstrates that the communities were supportive of the Project and that they did not have any significant concerns.[246]

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[242] Antunez de Mayolo Rebuttal Witness Statement ¶ 27.

[243] Antunez de Mayolo Rebuttal Witness Statement ¶ 28.

[244] Antunez de Mayolo Rebuttal Witness Statement ¶ 28.

[245] **Exhibit C-0076**, Minutes of the Public hearing – Mineral Subsector No. 007-2011/MEM-AAM – Public Hearing for the ESIA of the Santa Ana Project, Feb. 23, 2011.

[246] Antunez de Mayolo Rebuttal Witness Statement ¶ 28.

93. Only a few local Huacullani police were present at the public hearing.[247] The Peruvian government, on its own initiative or at the request of the mining company, normally enlists the assistance of large contingents of policemen to maintain public order and guarantee the safety of all public hearing participants, as was the case for example at the public hearings for the Las Bambas, Toromocho, and Tia Maria projects.[248] That neither Bear Creek nor the Peruvian government requested the presence of any significant number of police at the public hearing for the Santa Ana Project is further evidence that Bear Creek's relationship with the neighbouring communities was far from acrimonious.

94. Peru disingenuously focuses on the opposition voiced at the end of the public hearing by less than 50 people out of more than 700 attendees.[249] Those 50 people were brought to the public hearing in a truck by Juan Carlos Aquino Condori, the then recently elected mayor of Desaguadero, who was intent on boosting his popularity.[250] They expressed their anti-mining stance, were ignored by the other attendees, and left.[251] As anyone present at the public hearing can attest, their position was absolutely not representative of the widespread support for the Project expressed by the communities at the public hearing.[252] Walter Aduviri was also present at the public hearing and asked about environmental contamination, claiming that Bear Creek

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247 Antunez de Mayolo Rebuttal Witness Statement ¶ 29.

248 Antunez de Mayolo Rebuttal Witness Statement ¶ 29.

249 **RWS-001**, Gala Witness Statement ¶ 19; **RWS-002**, Ramírez Witness Statement ¶ 20; and Respondent's Counter-Memorial ¶ 91.

250 Antunez de Mayolo Rebuttal Witness Statement ¶ 30.

251 Antunez de Mayolo Rebuttal Witness Statement ¶ 30.

252 Antunez de Mayolo Rebuttal Witness Statement ¶ 30.

would use mercury to extract gold from the project area.[253] Company representatives responded that Santa Ana was not a gold project and would not, in any event, be using mercury.[254]

95. Everyone applauded when the public hearing concluded.[255] After the public hearing, Mr. Antunez de Mayolo and the DGAAM and DREM attorneys visited the Challacoyo community, where Bear Creek intended to build wells for the Project, close to the Callacame river.[256] Bear Creek discussed this with the community members, who were satisfied with the company's clarifications.[257] Mr. Antunez de Mayolo and the DGAAM and DREM attorneys then returned to the city of Puno, and toasted at dinner to the success of the Santa Ana Project.[258]

96. Thus, Bear Creek's public hearing was clearly successful. It is also obvious that the Peruvian government officials who were present agreed. If the DGAAM and DREM attorneys had not been satisfied with the public hearing's conduct or outcome, the DGAAM could have either suspended or cancelled it, and scheduled a new hearing:

[253] Antunez de Mayolo Rebuttal Witness Statement ¶ 31; Antunez de Mayolo Witness Statement ¶ 16.

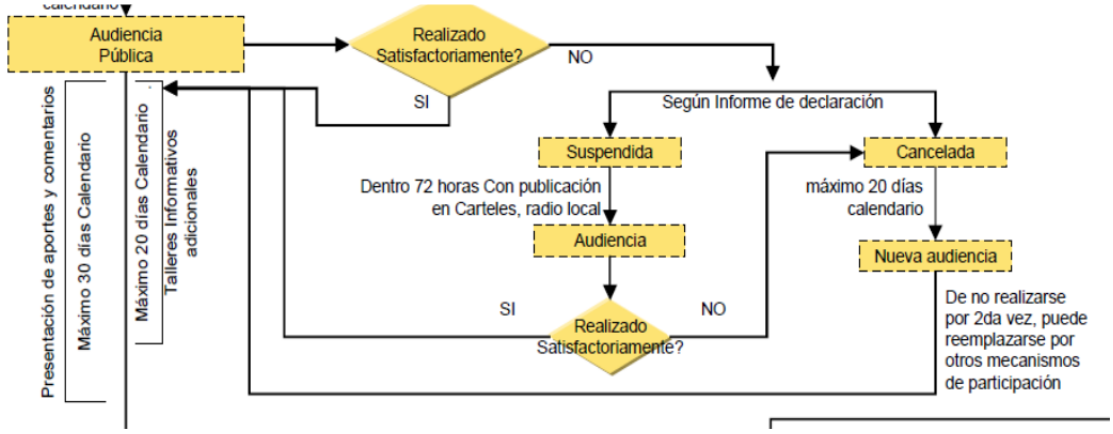
[254] Antunez de Mayolo Rebuttal Witness Statement ¶ 31; Antunez de Mayolo Witness Statement ¶ 16.

[255] Antunez de Mayolo Rebuttal Witness Statement ¶ 26.

[256] Antunez de Mayolo Rebuttal Witness Statement ¶ 26.

[257] Antunez de Mayolo Rebuttal Witness Statement ¶ 26.

[258] Antunez de Mayolo Rebuttal Witness Statement ¶ 26.




**(The Different Steps that Are Required for the Approval of the ESIA, Excerpt)**[259]

97. The DGAAM neither suspended nor cancelled the Santa Ana public hearing. Instead, the DGAAM chose to continue with the process, confirming that it was satisfied with the public hearing and would proceed with its evaluation of the ESIA that Bear Creek had submitted back in December 2010.

### 4. Community Support for Bear Creek and the Santa Ana Project Continued After the Public Hearing

98. The communities close to Santa Ana continued to support the Project and Bear Creek after the public hearing took place, contrary to Peru's allegations.[260] For example, in March 2011, Huacullani District representatives publicly denounced the protests related to natural resource projects that were being led by Walter Aduviri and the FDRN, as well as the March 20, 2011 ordinance approved by the Puno Regional Council that purported to prohibit all

[259] **Exhibit C-0156**, MINEM, *Dirección General de Asuntos Ambientales Mineros*, *Certificación Ambiental para Actividades de Explotación Mediana y Gran Minería*. The chart above shows that if the DGAAM believes that the public hearing was successful, it shall proceed with the evaluation of the ESIA. If, however, the DGAAM believes that the public hearing was not satisfactory, it may choose to either suspend or cancel it. If the DGAAM chooses to suspend the public hearing, then another hearing is held within 72 hours. If that second public hearing is successful, then the DGAAM will proceed with the evaluation of the ESIA. If it is not, then the DGAAM must cancel it. If the DGAAM chooses (or is compelled) to cancel the public hearing, a new public hearing must be held within a maximum time period of 20 business days. If it is successful, then the DGAAM will proceed with the evaluation of the ESIA. If it is not, then the chart indicates that the public hearing may be replaced by other participation mechanisms.

[260] Respondent's Counter-Memorial ¶¶ 137-138, 183.

mining activities in the Department of Puno.[261] Braulio Morales Choquecahua, the Huacullani District mayor, stated that the ordinance would affect the development of the Santa Ana Project, which was the only source of jobs for the local communities in the area.[262] He added that the communities were in constant contact with Bear Creek regarding the Project,[263] flatly contradicting the statements of Vice-Minister Gala and Mr. Ramírez.[264] In early April 2011, the *Primer Teniente Gobernador* of the Huacullani District reiterated his district's opposition to the protests and violence, which, he wrote, went against the development and progress of the community.[265]

99. Between March and May 2011, Bear Creek began to finalize agreements with landowners and possessors.[266] Bear Creek had initiated negotiations in 2010, and they had proceeded harmoniously throughout this time.[267] On April 2, 2011, the Concepción de Ingenio community organized an extraordinary general assembly to discuss the transfer of land to Bear Creek.[268] The general assembly reviewed a draft contract for that purpose, which more than two

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261 **Exhibit C-0184**, *Comunidades de Huacullani Apoyan a Minera Santa Ana*, Correo Puno Prensa Peru, Mar. 23, 2011; **Exhibit C-0083**, *Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, Mar. 29, 2011; and **Exhibit C-0185**, *Huacullani en contra de marcha antiminera,* LA REPÚBLICA, Mar. 29, 2011.

262 **Exhibit C-0185**, *Huacullani en contra de marcha antiminera,* LA REPÚBLICA, Mar. 29, 2011.

263 **Exhibit C-0083**, *Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, Mar. 29, 2011.

264 **RWS-001**, Gala Witness Statement ¶¶ 24, 40; **RWS-002**, Ramírez Witness Statement ¶ 13.

265 **Exhibit C-0181**, Letter from the *Primer Teniente Gobernador* of the Huacullani District to Juan José Alvares Delgado, Puno Regional Council, Apr. 4, 2011; and **Exhibit C-0182**, Letter from the *Primer Teniente Gobernador* of the Huacullani District to Mauricio Rodriguez Rodriguez, President of the Puno Regional Government, Apr. 4, 2011.

266 Antunez de Mayolo Rebuttal Witness Statement ¶ 75.

267 Antunez de Mayolo Rebuttal Witness Statement ¶ 75.

268 **Exhibit C-0186**, *Acta de Asamblea General Extraordinaria de la Comunidad Campesina de Concepción de Ingenio*, Apr. 2, 2011.

thirds of the voting members approved.[269] Bear Creek also was negotiating similar agreements with the communities of Aconcagua, Challacollo, and Ancomarca.[270]

100. Despite clear evidence of the communities' continued support for Bear Creek and the Santa Ana Project after the public hearing of February 23, 2011, Peru claims that the public hearing "did not succeed in assuaging the population's concerns,"[271] referring to two sets of letters submitted to the President, the Minister of Energy and Mines, and Congress on March 9 and 10, 2011.[272]

101. The first set of letters was drafted by the FDRN, the organization led by Walter Aduviri, which he apparently created shortly after the Santa Ana public hearing of February 23, 2011.[273] Prime Minister Rosario Fernández described the FDRN as an extremist organization with political motivations.[274] Although Peru refers to Mr. Aduviri in this arbitration as merely "a local activist,"[275] Ms. Fernández characterized him as "a nefarious leader" who "has very bad intentions, deceives peoples," and "takes advantage of the situation."[276] Moreover, neither the FDRN nor Mr. Aduviri should be considered as representatives of the Kelluyo, Desaguadero,

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269 **Exhibit C-0186**, *Acta de Asamblea General Extraordinaria de la Comunidad Campesina de Concepción de Ingenio*, Apr. 2, 2011, p. 14.

270 Antunez de Mayolo Rebuttal Witness Statement ¶ 75.

271 Respondent's Counter-Memorial ¶ 92.

272 **Exhibit R-15**, Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP, Mar. 10, 2011; **Exhibit R-16**, Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to the President of Peru, Memorial No. 0001-2011-CO-FDRN-RSP, Mar. 9, 2011; and **Exhibit R-17**, Memorials 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, Mar. 10, 2011.

273 **Exhibit R-057**, "Elimination of Mining Activities in Puno is Proposed," *La República* Newspaper South Edition, Mar. 9, 2011.

274 **Exhibit C-0092**, Press Release, Presidencia del Consejo de Ministros, *Premier califica de inadmissible bloque de carreteras en Puno y pide deponer acciones violentas*, May 18, 2011.

275 Respondent's Counter-Memorial ¶ 101.

276 **Exhibit C-0097**, *Interview of Prime Minister Rosario Fernández*, Mira Quién Habla, Willax TV, May 31, 2011, [03:48] – [05:00] and [05:34] – [07:38].

Zepita, and Pisacoma communities, which are fully capable of making their voice heard on their own.[277]

102. In its letters, the FDRN contended that the Santa Ana Project would contaminate the local rivers and, therefore, Lake Titicaca.[278] This is demonstrably false. The Santa Ana Project was designed as a zero-discharge project in which all of the water used throughout the mining and metallurgical processes would be recycled and reused.[279] None of the neighboring rivers could be contaminated. There could be no contamination to Lake Titicaca either, since the water running through Santa Ana does not drain to the Lake Titicaca water basin.[280]

103. The second set of letters was drafted by the *Comunidad Campesina* of Alto Aracachi, located in the Kelluyo District. The root cause of that community's petition was a dispute with the Huacullani District over a piece of land called "Ingenio," which the Alto Aracachi community claimed as theirs.[281] However, the Huacullani District has stated repeatedly that the Santa Ana Project is located entirely on lands that belong to the district.[282] This 20-year

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277 Antunez de Mayolo Rebuttal Witness Statement ¶ 72.

278 **Exhibit R-15**, Memorial submitted by the Frente de Defensa, Mar. 10, 2011, Whereas; **Exhibit R-16**, Memorial submitted by the Frente de Defensa, Mar. 9, 2011, Whereas; and **Exhibit R-17**, Memorial submitted by the Frente de Defensa, Mar. 10, 2011, Whereas.

279 Antunez de Mayolo Rebuttal Witness Statement ¶ 50; Swarthout Witness Statement ¶¶ 36-37 (confirming that Bear Creek's design for the mining and recovery of precious metals was based on "practices utilized safely for approximately 40 years" and that "the system is designed as a closed-circuit, zero-discharge, facility, meaning that no solution would be released into the environment") and ¶ 38 (Mr. Swarthout testifies that he "can think of at least six very similar mines that are built and safely operating in Peru including the Barrick's Pierina mine and the Tucari mine, which is located 30 kilometers west of Santa Ana in the Department of Puno and has been operating for over ten years using the exact same processes described above").

280 Antunez de Mayolo Rebuttal Witness Statement ¶ 50.

281 **Exhibit R-15**, Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP, Mar. 10, 2011, p. 19/24, *Segundo*; **Exhibit R-16**, Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to the President of Peru, Memorial No. 0001-2011-CO-FDRN-RSP, Mar. 9, 2011, p. 23/28, *Segundo*; and **Exhibit R-17**, Memorials 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, Mar. 10, 2011, p. 19/24, *Segundo*.

282 **Exhibit C-0181**, Letter from the *Primer Teniente Gobernador* of the Huacullani District to Juan José Alvares Delgado, Puno Regional Council, Apr. 4, 2011; and **Exhibit C-0182**, Letter from the *Primer Teniente*

old land dispute obviously predated Bear Creek's involvement in the area and had nothing to do with the Santa Ana Project.[283]

104. Peru also suggests that some of the local communities, especially those that would be affected only indirectly by Santa Ana, considered that they would not benefit from the Project, and felt excluded from the community approval process.[284] This is surprising. After the DGAAM approved the Executive Summary of Bear Creek's ESIA and the PPC, Mr. Antunez de Mayolo wrote to Mr. Ramírez himself on a monthly basis informing him of the community relations activities that Bear Creek had carried out in compliance with the schedule set out in the PPC.[285] Yet, the DGAAM never informed Bear Creek of any "concerns" that it may have had related to Bear Creek's community relations program.[286]

105. In sum, the contemporaneous evidence on the record shows that the communities surrounding the Santa Ana Project supported Bear Creek and the Project, and that the company complied with – even went above and beyond – all applicable legal requirements in respect of community outreach efforts, while carrying out these activities under the close supervision, and with the approval, of Peru's national and regional authorities.

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*Gobernador* of the Huacullani District to Mauricio Rodriguez Rodriguez, President of the Puno Regional Government, Apr. 4, 2011.

283 Antunez de Mayolo Rebuttal Witness Statement ¶ 73; **Exhibit C-0235**, "*Distritos de Huacullani y Kelluyo necesitan urgente demarcación territorial*," Radio Onda Azul, Nov. 16, 2011.

284 **RWS-002**, Ramírez Witness Statement ¶ 24.

285 **Exhibit C-0187**, Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, Feb. 1, 2011; **Exhibit C-0188**, Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, Mar. 1, 2011; **Exhibit C-0189**, Letter from E. Antunez, Bear Creek, to C. García, DGAAM, Apr. 1, 2011; and **Exhibit C-0190**, Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, May 3, 2011.

286 Antunez de Mayolo Rebuttal Witness Statement ¶¶ 78-79.

### D. THE EVENTS IN PUNO DID NOT JUSTIFY THE SUSPENSION OF THE ESIA EVALUATION PROCESS OR THE ENACTMENT OF SUPREME DECREE 032

106. Resolution No. 162-2011-MEM-AAM suspended the evaluation process of Bear Creek's ESIA for a 12-month period. Supreme Decree 032 then revoked the declaration of public necessity embodied in Supreme Decree 083, which Peru had granted to Bear Creek in connection with its proposed acquisition of the Santa Ana mining concessions. Given that these concessions were located within 50 km of the Peruvian border, Supreme Decree 032 effectively cancelled Bear Creek's right to own the concessions and, accordingly, expropriated Bear Creek's Santa Ana Project.

107. Peru alleges that the suspension of Bear Creek's ESIA evaluation process was necessary because of the social unrest that occurred in the Department of Puno in the first months of 2011, which it claims Bear Creek caused.[287] Peru further alleges that the enactment of Supreme Decree 032 was justified in light of "the circumstances under which the Peruvian Government had granted Bear Creek a declaration of public necessity dramatically changed."[288] The "circumstances" that Peru appears to be referring to are: (i) the social unrest in Puno, again; and (ii) Peru's sudden "discovery" that Bear Creek allegedly could have violated Article 71 of the Constitution when it acquired the mining concessions.[289] These are absurd excuses.

#### 1. Bear Creek Did Not Cause the Protests in the Department of Puno

108. Peru repeatedly alleges that Bear Creek caused the social unrest that occurred in the Department of Puno in the first months of 2011.[290] Peru's sensationalist contention, clearly manufactured for purposes of this arbitration, is wrong.

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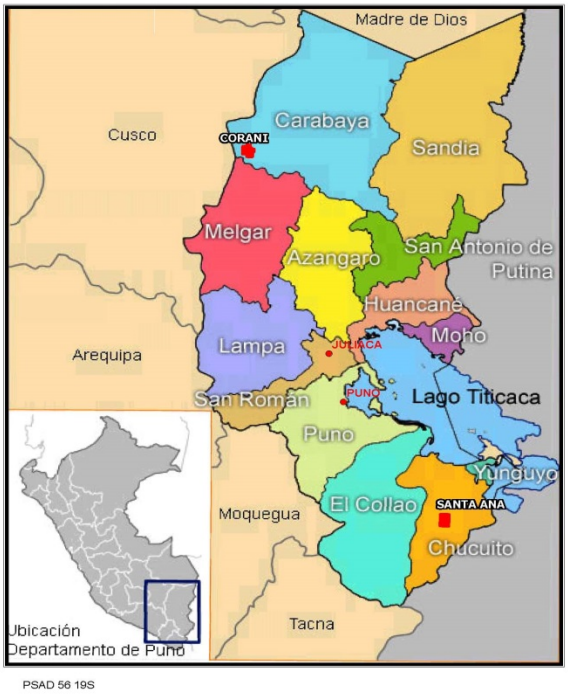
[287] Respondent's Counter-Memorial ¶¶ 140-143.

[288] Respondent's Counter-Memorial ¶ 72.

[289] Respondent's Counter-Memorial ¶ 72.

[290] Respondent's Counter-Memorial ¶¶ 72, 93, 95.

109. As Peru itself admits, at least three "fronts" of protests developed in the Department of Puno between March and June 2011.[291] Although one of the fronts was based in Chucuito, where the Santa Ana Project is located, the other two fronts erupted in provinces that are several hundred kilometers away from Chucuito. In the Melgar province, Quecha communities took over the *La Poderosa* mine, claiming that it was contaminating their water resources.[292] In the Azangaro province, communities protested against illegal mining activities that had contaminated the Ramis River basin.[293] It is the protests in Azangaro that culminated with the violent and tragic takeover of the Juliaca airport,[294] which is located 185 kilometers from the Santa Ana Project.




**(The Puno Region of Peru)**

[291] Respondent's Counter-Memorial ¶ 96.

[292] Respondent's Counter-Memorial ¶ 118.

[293] Respondent's Counter-Memorial ¶ 123.

[294] Respondent's Counter-Memorial ¶ 128.

110. The Peruvian government considered these three fronts of protests to be entirely separate, as evidenced by the fact that they organized three separate roundtables (*mesas de diálogo*), in different parts of Lima, with the representatives of the three fronts.[295] Peru also enacted different measures in response to their demands.[296] Supreme Decree 033 was enacted in response to the demands of the Melgar province protesters, and Supreme Decree 035 in response to the demands of the protesters from Azangaro.[297]

111. It is obvious that Bear Creek's efforts to develop the Santa Ana Project did not cause – and could not have caused – the protests that erupted in Melgar and Azangaro. Peru's attempt to conflate the three fronts of protests – in order to blame Bear Creek for the social unrest that occurred in the Department of Puno from March through June 2011 – is an ill-conceived tactic designed to mislead this Tribunal.

112. As for the protests that took place in the Chucuito Province, which Peru refers to as the "southern front" protests,[298] they were orchestrated for political reasons by Walter Aduviri and the FDRN. The protests' political nature is evidenced by the looting and burning, on May 26, 2011, of various public institutions in the city of Puno, including the SUNAT (the Peruvian tax authority), the *Controlaría* (the State's office of internal control), the *Gobernación* (the seat of the regional government), and *Aduana* (the Customs office) buildings.[299] Prime Minister Rosario Fernández confirmed in an interview that the burning of these state-owned buildings was

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295 **RWS-003**, Gala Witness Statement ¶ 33.

296 Respondent's Counter-Memorial ¶¶ 133-134.

297 **RWS-003**, Zegarra Witness Statement ¶¶ 28, 30.

298 Respondent's Counter-Memorial ¶ 97.

299 **RWS-001,** Gala Witness Statement ¶ 25; **Exhibit R-63**, "*Community Members Close Borders*," LA REPÚBLICA, May 11, 2011; **Exhibit R-64**, "*Protesters March towards Puno to Demand on Ordinance*," LA REPÚBLICA, May 12, 2011; **Exhibit R-71**, "*Strike Affects Bolivian Exports*," LA REPÚBLICA, May 20, 2011; **Exhibit R-73**, "*Aymara Rage Is Out of Control in Puno*," LA REPÚBLICA, May 27, 2011; **Exhibit R-78**, "*Protesters Threat To Reinstate Protests*," LA REPÚBLICA, Jun. 8, 2011.

perpetrated by those being investigated and/or prosecuted for smuggling and tax evasion, who were also followers of Walter Aduviri.[300]

113. Likewise, Ricardo Uceda, a highly-respected Peruvian journalist, reported that Mr. Aduviri attended a secret meeting with representatives of Ollanta Humala, one of the candidates during the 2011 presidential election – and the current President of Peru – at which it was decided that the protests would cease during the week of the second round of the election.[301] As Peru acknowledges, the "southern front" protests were suspended from May 31 to June 8, 2011,[302] and Mr. Humala won the presidential election.[303]

114. At the time, many Peruvian public officials recognized the political nature of the "southern front" protests and the unlawfulness of the protesters' demands. Thus, for example, on May 26, 2011, President Alan García made clear that "electoral" interests were behind these protests and that the protesters' demands were "irrational":

> The request to prevent mining activity in the Puno region is "constitutional nonsense" and fractures the country's unity, claimed President Alan García yesterday, who indicated that the Government cannot adopt the "easy way out policy" and give in to "irrational requests." In statements to

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300 **Exhibit C-0097**, Interview of Prime Minister Rosario Fernandez, Mira Quien Habla, Willax TV, May 31, 2011 at Minutes 03:48, 05:00 and 05:34 (stating that the destruction of public buildings resulted from "a mix between the agenda of a leader [Walter Aduviri] who, it seems to me, has very bad intentions, deceives people, and on the other hand the people who have their own economic interests in the matter, and finally some political passion that also transcends this situation, right?" When asked if the SUNAT building in Puno was where the cases and records regarding cases for smuggling and tax evasion were located Prime Minister Fernandez stated, "[T]hat's correct, cases linked to smuggling and tax evation. So, who, who is interested in [vandalizing] those [institutions]? Basically, those persons who were processed and investigated and questioned for those acts, right?").

301 **Exhibit C-0078**, *Puno: prueba de fuego*, Revista Poder 360º, Jun. 2011, p. 29. *See also*, Claimant's Memorial ¶ 76.

302 Respondent's Counter-Memorial ¶ 117.

303 **RWS-001,** Gala Witness Statement ¶ 32 ("This [the suspension of the protests] made it possible to hold the second round of presidential elections").

> the press, the President denounced the "electoral interests" that are behind the forceful measures taken in Puno against the mining concessions…[304]

115. Prime Minister Rosario Fernández explained that the "southern front" protests were political in nature and that extremist organizations were behind them: "I believe, unfortunately, that this is not a trade union strike or an economic strike but basically a strike that is linked to political purposes, I am sorry to have say it because it is being confirmed that there would be people linked to extreme organizations that in reality are encouraging this situation."[305] In a TV interview on May 31, 2011, *i.e.*, after the three meetings of the High Level Commission,[306] and after the May 28, 2011 meeting with local and regional leaders,[307] she characterized Mr. Aduviri, the leader of the protests, as someone who "has very bad intentions, deceives people."[308] In that same interview, she rejected the protesters' demand to cancel the oil and mining concessions, noting that "legal security comes first, and without that, there is nothing."[309]

116. Minister of Energy and Mines Pedro Sánchez also rejected the protesters' demand to cancel the oil and mining concessions, indicating that the demand was unconstitutional, excessive, and impossible to implement:

> Similarly, Sánchez said that the request of the protest leaders, who demand that the Executive issue decrees annulling the mining concessions in the area, is unconstitutional, and that therefore it is not possible to address it.

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304 **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011.

305 **Exhibit C-0092**, Prime Minister's Office, Press Release No. 5765, May 18, 2011.

306 Respondent's Counter-Memorial ¶¶ 110-114.

307 Respondent's Counter-Memorial ¶ 116.

308 **Exhibit C-0097**, Interview of Prime Minister Rosario Fernández, Mira Quien Habla, Willax TV, May 31, 2011.

309 **Exhibit C-0097**, Interview of Prime Minister Rosario Fernández, Mira Quien Habla, Willax TV, May 31, 2011.

> "This would be the same as cancelling a media license by means of a supreme decree," he said after indicating that accepting this demand would create liabilities and economic contingencies for the Executive, in addition to affecting legal certainty. "As a result, the request is excessive and cannot be implemented," he emphasized.[310]

117. Vice-Minister of Energy and Mines Fernando Gala explained that the cancellation of concessions and the revocation of Supreme Decree 083 were "completely illegal demands."[311] He also declared that it would not be feasible to cancel the oil and mining concessions because this would affect legal security in the country.[312]

118. Clara García Hidalgo, the Legal Advisor to Minister Sánchez, with whom Bear Creek had personally met and who had assured Bear Creek that its acquisition of the Santa Ana mining concessions was legal,[313] explained that Peru could not cancel concessions that it had legally granted.[314] She added that the Santa Ana Project complied with the law, was not contaminating the environment, and had acquired the "social license to operate,"[315] an important fact that Peru now denies:[316]

> Clara García Hidalgo, the principal advisor at the Ministry of Energy and Mines, argued that there is no legislation to cancel concessions that were granted legally. She explained that the State guarantees the rights of the mining companies, as long as they comply with what the law provides in order for them to be considered legal.

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310 **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011.

311 **Exhibit C-0095**, *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTRO DE ENERGÍA Y MINAS, May 26, 2011.

312 **Exhibit C-0237**, *El aimarazo, a cuatro años de la huelga antiminera*, DIARIO CORREO, May 26, 2014. *See also* **Exhibit C-0094**, *Huelga antiminera en Puno sigue sin solución*, LA REPÚBLICA, May 21, 2011.

313 *See supra* ¶ 26.

314 **Exhibit C-0093**, *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011.

315 **Exhibit C-0093**, *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011. *See also* **Exhibit C-0094**, *Huelga antiminera en Puno sigue sin solución*, LA REPÚBLICA, May 21, 2011.

316 Respondent's Counter-Memorial ¶ 24.

> She assured that the Santa Ana project was lawful, and that it could not be accused of contaminating because it still had not obtained the permit to operate and produce silver. The mining company has a social license and the permits that it has are subject to environmental laws.[317]

119. It is clear from the above that as late as May 31, 2011, the Peruvian Government unequivocally acknowledged the political nature of the "southern front" protests and refused to give in to the protesters' demands. It is also clear that no one in the government was blaming Bear Creek for the protests – and rightfully so. Moreover, even if Bear Creek was somehow responsible for the "southern front" protests, which it most certainly was not, Peru's unlawful enactment of Supreme Decree 032, in violation of basic and universal norms of due process and transparency, as well as Peruvian law,[318] was not the appropriate manner to address the issue. Peru had at its disposal numerous legal mechanisms that it could have employed without having to resort to the expropriation without compensation of Bear Creek's Santa Ana Project.

### 2. Even Though Bear Creek was not Responsible for the Protests in Puno, Peru Summarily Suspended Bear Creek's ESIA Evaluation Process

120. Peru argues that Bear Creek never proposed any solution to the Peruvian government, or took any kind of action, to put an end to the "southern front" protests that took place between March and June 2011.[319] These accusations are meritless. As explained above, Bear Creek did not cause the "southern front" protests. Moreover, the Peruvian government never once invited Bear Creek to discuss the situation or to meet with the protesters during the numerous consultations that it organized.[320] The company was never informed officially about

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317 **Exhibit C-0093**, *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011.

318 *See infra* ¶¶ 132 *et seq.*

319 **RWS-001**, Gala Witness Statement ¶ 41; **RWS-002**, Ramírez Witness Statement ¶ 33.

320 Antunez de Mayolo Rebuttal Witness Statement ¶ 47.

any of the meetings that Vice-Minister describes in his Witness Statement.[321] This is inconsistent with Peru's allegation in the arbitration that Bear Creek was directly responsible for these protests. To the contrary, Bear Creek sought meetings with Peruvian government officials to discuss the "southern front" protests and offer its assistance.[322]

121. For example Bear Creek requested a meeting with Prime Minister Rosario Fernández on April 8, 2011.[323] The meeting took place on April 19, 2011.[324] According to Mr. Antunez de Mayolo, who attended the meeting, the company expressed its concern with the "southern front" protests and the political motivations behind them. Bear Creek also informed the Prime Minister that the Santa Ana public hearing of February 23, 2011 had gone extremely well, and that the local communities supported Bear Creek and the Project. Bear Creek even offered to assist the government in any way that it could. Prime Minister Fernández assured Bear Creek that its rights would be respected and that the rule of law would be maintained.[325]

122. Bear Creek also held various meetings with Vice-Minister Gala between March and June 2011. Like Prime Minister Fernández, Vice-Minister Gala assured the company that its rights would be protected and that Peru would uphold the principle of legal security.[326]

123. Yet, despite these assurances, on May 30, 2011, the DGAAM summarily and improperly suspended the evaluation process of Bear Creek's ESIA for a 12-month period, without providing any advance notice to Bear Creek or due process whatsoever.[327] Hans Flury

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321 **RWS-001**, Gala Witness Statement ¶¶ 27-30, 33-35.

322 Antunez de Mayolo Rebuttal Witness Statement ¶ 47.

323 **Exhibit C-0170**, Letter from M. A. Balestrini, Bear Creek, to Prime Minister Rosario Fernández, Apr. 8, 2011.

324 Antunez de Mayolo Rebuttal Witness Statement ¶ 48.

325 Antunez de Mayolo Rebuttal Witness Statement ¶ 48.

326 Antunez de Mayolo Rebuttal Witness Statement ¶ 48.

327 **Exhibit C-0098**, DGAAM Resolution No. 162-2011-MEM-AAM, May 30, 2011.

confirms that the DGAAM's suspension was contrary to Peruvian law.[328] Bear Creek promptly appealed the suspension. On June 17, 2011, Mr. Antunez de Mayolo wrote a letter to the DGAAM requesting that the resolution be reexamined by the Mining Council (*Consejo de Minería*), MINEM's second and highest administrative instance.[329] However, the Mining Council could not rule on the company's appeal because one outstanding member remained to be appointed by the Peruvian government, and the government had failed to do so.[330] The vacancy persisted for 3 years.

124. The Mining Council was finally constituted in 2014, and convened a hearing on Bear Creek's appeal on February 26, 2014.[331] At the hearing, Bear Creek argued that Resolution No. 162-2011-MEM-AAM was unlawful.[332] The DGAAM did not defend its position. On May 13, 2014, the Mining Council held that a ruling on a 12-month suspension ordered back in 2011 was no longer required because the 12-month suspension period had expired, and, accordingly returned the file to the DGAAM.[333] No further action has been taken. Peru's failure to constitute the Mining Council in a timely manner deprived Bear Creek of a ruling on the merits in respect of the legality of Resolution No. 162-2011-MEM-AAM.

### 3. Peru's Claim that it Received New Information in June 2011 Allegedy Demonstrating that Bear Creek Had Breached Article 71 of the Peruvian Constitution Is Implausible

125. Peru and its witness Vice-Minister Gala allege that, during meetings between June 17 and 23, 2011, which Vice-Minister Gala attended, Aymaran leaders representing the

328 Flury Expert Report ¶ 81.

329 **Exhibit C-0166**, Letter from Bear Creek to the DGAAM, Jun. 17, 2011.

330 Antunez de Mayolo Rebuttal Witness Statement ¶ 43.

331 **Exhibit C-0167**, Letter from the Mining Council to Bear Creek, Jan. 21, 2014.

332 Antunez de Mayolo Rebuttal Witness Statement ¶ 43.

333 **Exhibit C-0168**, Mining Council Resolution No. 13-2014-MEM-CM, May 13, 2014.

"Southern front" protesters provided documents to the government, which allegedly would indicate that Bear Creek had acquired the Santa Ana mining concessions improperly, in breach of Article 71 of the Constitution.[334] Neither Peru nor Vice-Minister Gala provides details or documentary evidence concerning the nature and content of these documents.

126. When Messrs. Swarthout and Antunez de Mayolo met with Vice-Minister Gala on June 22, 2011,[335] the latter did not refer to these documents or to their content,[336] even though he confirmed that Peru would protect Bear Creek's legally acquired rights over Santa Ana.[337] Had Vice-Minister Gala received documents containing "new facts" suggesting that Bear Creek had acquired the Santa Ana mining concessions improperly, in breach of Article 71 of the Constitution, he certainly would have (and should have) discussed them with Messrs. Swarthout and Antunez de Mayolo during their meeting. Had Vice-Minister Gala received these documents after the June 22, 2011 meeting with Bear Creek, one could reasonably expect that he would have contacted Bear Creek to demand an explanation.

127. Equally perplexing is the fact that, contrary to his testimony, Vice-Minister Gala explained on November 18, 2013, that a *congressman* (not Aymara leaders) had provided documents to the Peruvian government suggesting that Bear Creek allegedly had breached Article 71 of the Constitution when it acquired the Santa Ana mining concessions.[338]

128. Whatever the information provided to the Peruvian government could have been, it was certainly not "new." Bear Creek had included, in its 2006 application to MINEM for a

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334 Respondent's Counter-Memorial ¶¶ 125-126; **RWS-001**, Gala Witness Statement ¶¶ 33, 35-36.

335 Swarthout Rebuttal Statement ¶ 29; Antunez de Mayolo Rebuttal Witness Statement ¶ 52.

336 Swarthout Rebuttal Statement ¶ 31; Antunez de Mayolo Rebuttal Witness Statement ¶¶ 52, 54.

337 Swarthout Rebuttal Statement ¶ 30; **RWS-001,** Gala Witness Statement ¶¶ 44-45.

338 **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013.

declaration of public necessity, copies of the Option Agreements with Ms. Villavicencio, which were filed with the public registry, together with evidence that Ms. Villaviencio was a company representative.[339]

129. Oddly, on May 30, 2011, MINEM sent Bear Creek Resolution No. 165-2011-MEM-DGM/V, directing Bear Creek to provide MINEM with a copy of its 2006 application, which it apparently had misplaced.[340] Although Mr. Antunez de Mayolo thought this was a strange request,[341] Bear Creek complied and sent a copy of its application on June 3, 2011.[342]

130. Mr. Antunez de Mayolo also discussed the details of Bear Creek's acquisition of the Santa Ana mining concessions with Vice-Minister Gala during their meetings of March to June 2011.[343] He also talked about this with Ms. García Hidalgo, the Legal Advisor to the Minister of Energy and Mines, who confirmed that Bear Creek's signature of option agreements with Ms. Villavicencio, a company employee and representative, was proper and complied with Peruvian law.[344]

131. Based on the foregoing, it is highly unlikely that in late June 2011, unidentified Aymara leaders could have provided the Peruvian government with documents containing "new" information that it did not already know at the time.

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339 *See supra* ¶¶ 35-37.

340 **Exhibit C-0174**, MINEM Report No. 442-2011-MEM-DGM-DNM and Resolution No. 165-2011-MEM-DGM/V, May 30, 2011.

341 Antunez de Mayolo Rebuttal Witness Statement ¶ 57.

342 **Exhibit C-0175**, Letter from E. Antunez de Mayolo, Bear Creek, to the General Directorate of Mining, Jun. 3, 2011.

343 *See supra* ¶ 122; Antunez de Mayolo Rebuttal Witness Statement ¶ 54.

344 *See supra* ¶ 26; Antunez de Mayolo Rebuttal Witness Statement ¶ 56.

### E. PERU'S ENACTMENT OF SUPREME DECREE 032 WAS UNLAWFUL

#### 1. Peru Violated Basic and Universal Norms of Due Process and Transparency when it Enacted Supreme Decree 032

132. After improperly suspending the evaluation process of Bear Creek's ESIA, Peru issued Supreme Decree 032 on June 25, 2011.[345] It provides, in relevant part, that:

> Circumstances have been made known that would imply the disappearance of the legally required conditions for the issuance of the mentioned act [Supreme Decree 083];
>
> […]
>
> As such, given the existence of these new circumstances, it is necessary to issue the corresponding act [Supreme Decree 032];[346]

133. Supreme Decree 032, however, does not provide any explanation as to what these "new circumstances" could be. In this arbitration, Peru alleges that Supreme Decree 032 was adopted for two, "equally legitimate," reasons:[347] "new circumstances" suggesting that Bear Creek had acquired the Santa Ana mining concessions in breach of Article 71 of the Constitution;[348] and the "critical social situation" in the Department of Puno.[349]

134. Neither of these two reasons can possibly justify Peru's enactment of Supreme Decree 032 and its failure to compensate Bear Creek as a result. As noted above, the "new" information allegedly contained in the documents provided to the Peruvian government could not have been new.[350]

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345 Congressman Lescano announced the measure to the press in the early hours of June 24, 2011 (*see* **Exhibit C-0176**, "*Yonhy Lescano: Concesión a la minera Santa Ana quedó sin efecto*," RPP, Jun. 24, 2011).

346 **Exhibit C-0005**, Supreme Decree 032-2011-EM, Jun. 25, 2011.

347 Respondent's Counter-Memorial ¶¶ 144, 149; **RWS-001**, Gala Witness Statement ¶ 42.

348 Respondent's Counter-Memorial ¶ 145.

349 Respondent's Counter-Memorial ¶ 149.

350 *See supra* ¶¶ 128-130.

135. Nor could the "critical social situation" in the Department of Puno have been considered to be a "new circumstance." As late as May 31, 2011, Prime Minister Rosario Fernández had rejected the demands of the "southern front" protesters to cancel oil and mining concessions,[351] despite the fact that the Desaguadero Bridge and roads had already been blocked for 25 days,[352] and despite the fact that protesters had looted and burned various public institutions in the city of Puno, including the SUNAT, the *Controlaría*, the *Gobernación*, and *Aduana* buildings.[353] In late May, President Alan García had also stated that "electoral" interests were behind these protests and that the protesters' demands were "irrational,"[354] and Minister Sánchez had rejected the protesters' demands as being unconstitutional.[355]

136. The protests then stopped for one week, in furtherance to Mr. Aduviri's secret agreement with President Humala,[356] so that the residents of Puno could vote in the second round of the presidential election, and started again on June 9, 2011.[357] In between that date and the enactment of Supreme Decree 032 on June 25, 2011, no "new" social situation erupted other than the continuation of the protests and the tragic incident at the Juliaca airport, which, as Peru itself recognizes, had absolutely nothing to do with Bear Creek's activities at Santa Ana or even the "southern front" protests.[358] Therefore, the "new circumstances" mentioned in Supreme Decree 032 could not have referred to the ongoing social situation in the Department of Puno.

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[351] *See supra* ¶ 115.

[352] Respondent's Counter-Memorial ¶ 117.

[353] *See supra* ¶ 112.

[354] *See supra* ¶ 114.

[355] *See supra* ¶ 116.

[356] *See supra* ¶ 112.

[357] Respondent's Counter-Memorial ¶ 117.

[358] Respondent's Counter-Memorial ¶ 128.

137. The truth is that Peru enacted Supreme Decree 032, revoking Supreme Decree 083 and expropriating Bear Creek's Santa Ana Project, in order to appease the political "southern front" protests led by Walter Aduviri and the FDRN. Vice-Minister Gala expressly confirms this in an interview on November 18, 2013.[359] He explains, however, that Peru could not admit publicly that it was caving to Mr. Aduviri's demands, especially after so many Peruvian government officials, including the President, Prime Minister, and Minister of Energy and Mines, had denounced publicly Mr. Aduviri and his tactics and rejected his demands as unlawful and unconstitutional.[360] That is why Peru relied on a more "formal" reason – namely, the information that Bear Creek allegedly had violated Article 71 of the Constitution when it acquired the Santa Ana mining concessions – to enact Supreme Decree 032.[361]

138. The pretextual nature of this "formal" reason is confirmed by the Aide Memoire that accompanies Peru's Counter-Memorial, and on which Vice-Minister Gala and Dr. Zegarra heavily rely in their testimonies.[362] Their frequent reliance on the Aide Memoire is striking, given that it is unclear who authored the document, and the document itself has no exact date nor does it contain an official document number, as is customary in Peru for internal memoranda.

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359 **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013: "I would say there are two reasons from the State's perspective, one of formal nature and an internal one that cannot be said openly… From the internal point of view, the reason was a social issue; the State was on the verge of a crisis over the issue of the Aymaras and Mr. Walter Aduviri, who did not stop the protests and there was no way to make them understand."

360 *See supra* ¶¶ 114-118.

361 **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013: "The State had no reason to remove the concessions from the company until a Congressman presented documents disclosing the above. The State then found a reason to revoke the Supreme Decree. The social pressure was so strong that there was no way to resolve it… To support the revocation on the latter [the pressure by the Aymaras] demonstrated an entirely weak State. The State wanted to finish with the social issue and it found the possibility to do so. It was not easy to explain the situation."

362 **Exhibit R-010**, Aide Memoire "Actions Done by the Executive Power Regarding Conflicts in the Puno Department," July 2011, at p. 7 ("Some of the participants at these meetings presented new facts regarding Supreme Decree No. 2007-0283-EM, **which made it possible to find a solution to this petition**") (emphasis added).

139. Vice-Minister Gala admits that when Peru enacted Supreme Decree 032 on the basis of the "formal" reason described above, it had not been established that Bear Creek had violated Article 71 of the Constitution.[363] This explains why the conditional tense was used in the language of the decree: "Circumstances have been made known that **would imply** the disappearance of the legally required conditions for the issuance of the mentioned act."[364] Vice-Minister Gala confirms that the judiciary ultimately had to decide whether Bear Creek had done anything wrong. That view is shared by Dr. Zegarra, who notes that "we had to withdraw the public necessity declaration *until the issue was clarified*."[365]

140. Vice-Minister Gala makes clear that if it had not been for Mr. Aduviri's politically-motivated protests, the alleged issue regarding Bear Creek's acquisition of the concessions would have been resolved between the State and the company in order for the Santa Ana Project to continue: "If we were sure that social issues would not be presented, the problem between the State and the company could be solved, so that the project could continue."[366]

141. It is apparent, in light of the above, that the enactment of Supreme Decree 032 violated basic and universal norms of due process and transparency. Peru issued the decree on the basis of supposedly "new" – but unverified – information allegedly received from unidentified Aymara leaders, and did not even put Bear Creek on notice or afford it an

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363 **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013: "In the supreme decree the conditional "would imply" was included because it had to be proved, the State was certain, but it had to conduct further investigations regarding the check and the company's employee, they were only indicia. The State believed that it implied a wrongful acquisition. But it would be the judges who would at the end determine it."

364 **Exhibit C-0005**, Supreme Decree No. 032-2011-EM, Jun. 25, 2011: "*Que, se ha hecho de conocimiento circunstancias que* ***implicarían*** *la desaparación de las condiciones exigidas legalmente para la emisión del mencionado acto*." (emphasis added)

365 **RWS-003**, Zegarra Witness Statement ¶ 26 (emphasis added).

366 **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013.

opportunity to be heard. By issuing Supreme Decree 032, Peru effectively took away all of Bear Creek's rights to the Santa Ana Project, without any advance warning and with no legal process at all!

142. Peru also failed to act transparently. As noted above, Supreme Decree 032 does not explain what were the "new circumstances" that prompted its enactment.[367] Moreover, when Mr. Antunez de Mayolo filed a request with MINEM in August 2011 to obtain a copy of all documents related to the enactment of Supreme Decree 032, particularly regarding the "new circumstances,"[368] MINEM responded that no such documents existed.[369] In fact, Dr. Zegarra specifically noted that "there is no report that served as a basis for the issuance of Supreme Decree No. 032-2011-EM."[370] Yet, in this arbitration, Dr. Zegarra has testified that "documents came to light that indicated … that Bear Creek had violated Article 71 of the Constitution."[371] Peru did not provide these documents – assuming they actually existed – to Bear Creek when it made its request in August 2011.

### 2. Peru Enacted Supreme Decree 032 in Violation of Peruvian Law

143. In addition to violating basic universal norms of due process and transparency, Peru's enactment of Supreme Decree 032 was contrary to Peruvian law. The Lima First Constitutional Court held on May 12, 2014, that Peru had violated Bear Creek's constitutional

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367 *See supra* ¶¶ 132-133.

368 **Exhibit C-0110**, Letter from E. Antunez, Bear Creek, to R. Wong, Secretary General of the Ministry of Energy and Mines, Aug. 10, 2011. *See also,* Antunez de Mayolo Witness Statement ¶ 23; Claimant's Memorial ¶ 83.

369 **Exhibit C-0111**, Letter from R. Wong, Secretary General of the Ministry of Energy and Mines to E. Antunez, Bear Creek, Aug. 19, 2011. The only document related to Supreme Decree 032 provided by MINEM was a one-page long *exposición de motivos* (or explanatory statement) paraphrasing the language of the decree without adding any meaningful precision or justification.

370 **Exhibit C-0111**, Letter from R. Wong, Secretary General of the Ministry of Energy and Mines to E. Antunez, Bear Creek, Aug. 19, 2011 at 7.

371 **RWS-003**, Zegarra Witness Statement ¶ 26.

rights by enacting Supreme Decree 032.[372] Peru goes to great lengths to minimize the import of this decision, arguing that it is not a final judgment and that it "did not have the opportunity to test it on appeal."[373] Bear Creek cannot be faulted for Peru's inability to test that decision on appeal, however. The only reason Bear Creek desisted from this *amparo* proceeding after Peru's appeal was because the FTA that Peru negotiated with Canada required Bear Creek to terminate any domestic court proceedings prior to commencing this arbitration. In all events, the decision of the Lima First Constitutional Court constitutes persuasive evidence of Peru's wrongdoing, under Peruvian law, in the eyes of a Peruvian court. The Lima First Constitutional Court held that Supreme Decree 032 lacked proper legal motives and that the issuance of that decree had been "an action by the State that is not found within the margins of reasonability and proportionality required not to violate the principle of legal security."[374]

144. Professor Bullard concurs that Supreme Decree 032 was enacted in breach of Peruvian law. In his first Expert Report, Professor Bullard had already concluded that the supreme decree had been issued improperly because it did not fit into any of the grounds for revocation provided by Article 203.2 of Law No. 27444 on general administrative proceedings, and because the proper procedure for revocation, which includes providing an opportunity for defense and payment of compensation, had not been followed.[375] Peru does not appear to respond to Professor Bullard's conclusions in its Counter-Memorial.

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372 Claimant's Memorial ¶ 85.

373 Respondent's Counter-Memorial ¶ 151. It is ironic that Peru is complaining in this arbitration of having been deprived of an opportunity to test a decision on appeal, when that is exactly what happened to Bear Creek in respect of DGAAM Resolution No. 162-2011-MEM-AAM of May 30, 2011, which suspended the evaluation process of Bear Creek's ESIA for a 12-month period. As noted above, Bear Creek was deprived of its right to a ruling on the merits in respect of the legality of the resolution because of Peru's failure to timely appoint one outstanding member on the Mining Council (*see supra* ¶¶ 123-124).

374 Claimant's Memorial ¶ 86; **Exhibit C-0006**, Amparo Decision No. 28, rendered by the Lima First Constitutional Court, May 12, 2014.

375 First Bullard Expert Report ¶ 18(q).

145. Professor Bullard adds that Supreme Decree 032, which expropriated Bear Creek's Santa Ana Project, did not comply with Law No. 27117 on expropriation because: (i) Bear Creek's rights were not expropriated by way of a specific law approved by the Peruvian Congress; (ii) Bear Creek was not granted compensation commensurate to the loss that it incurred; and (iii) neither a public necessity nor a national security reason was invoked to justify the expropriatory measure – Supreme Decree 032 – that deprived Bear Creek of its rights.[376] Finally, Supreme Decree 032 was arbitrary, and thus contrary to Peruvian law, because Peru enacted it without guaranteeing Bear Creek's right to a defense and without providing adequate reasons for its decision.[377]

146. Hans Flury, Peru's former Minister of Energy and Mines, agrees with Professor Bullard's analysis that Peru enacted Supreme Decree 032 in violation of Peruvian law. He notes that Supreme Decree 032 was enacted in breach of Article 203 of Law No. 27444 on general administrative proceedings because Bear Creek was deprived of its right to a defense and was not granted compensation.[378] He adds that Supreme Decree 032 was issued in violation of the constitutionally-protected principle of legal security.[379] Dr. Zegarra even suggests that it is on the basis of that principle that declarations of public necessity should remain in effect for 20 or 30 years.[380] Mr. Flury also notes that he has been unable to find any precedent whereby MINEM revoked an authoritative supreme decree granted in favor of a foreign investor on the basis of a

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376 Second Bullard Expert Report ¶ 3.

377 Second Bullard Expert Report ¶ 154; President Humala has conceded that such arbitrary decisions are a violation of Peruvian and international law, as evidenced by his recent refusal to suspend the Tia Maria Project. *See* **Exhibit C-0127***, "Ollanta Humala reitera que Tía María cumple con todos los requisitos exigidos por la ley,"* LA REPÚBLICA, May 15, 2015 ("… the State cannot adopt a unilateral decision that is not governed by the legal framework, because an arbitrary decision would expose it to international litigation for failure to comply, leading to important economic losses for the entire society…")."

378 Flury Expert Report ¶ 66.

379 Flury Expert Report ¶ 66.

380 *See supra* ¶ 43.

change of circumstances or the supposed "disappearance of the legally required conditions to issue said act."[381]

### F. PERU'S NUMEROUS MEETINGS WITH BEAR CREEK SHORTLY AFTER ENACTING SUPREME DECREE 032 ARE AN ADMISSION OF LIABILITY

147. Bear Creek met 46 times with the Peruvian government between June 25, 2011, when it enacted Supreme Decree 032, and February 2014, including with President Humala (three meetings), Prime Minister Fernández, Prime Minister Jimenez (three meetings), Minister of Economy and Finance Luis Miguel Castilla, four Ministers of Energy and Mines, Pedro Sánchez, Jorge Merino, Eleodoro Mayorga, and Carlos Herrera Descalzi (12 meetings), four Vice-Ministers of Energy and Mines, Fernando Gala, Guillermo Shinno, Luis Talledo, and Susana Vilca (15 meetings), MINEM Legal Director Zegarra, and others.[382] It is inconceivable that the highest-ranking Peruvian officials – including the President himself – would have done so if Peru actually considered Bear Creek guilty – or even suspect – of any wrongdoing. In fact, not once during those meetings did any of these high-ranking officials ever mention that Bear Creek had acquired the Santa Ana mining concessions improperly or committed some other irregularity.[383] To the contrary, the Peruvian government officials repeatedly apologized for what had happened to Bear Creek.[384]

148. Peru has not denied the existence or content of any of the discussions that took place between Bear Creek and Peruvian officials after Peru enacted Supreme Decree 032, as described by Bear Creek. Peru has not denied that Minister Herrera Descalzi stated in a

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381 Flury Expert Report ¶ 64.

382 Antunez de Mayolo Rebuttal Witness Statement ¶¶ 61-63; Antunez de Mayolo Witness Statement ¶¶ 21, 25; Swarthout Witness Statement ¶ 58.

383 Antunez de Mayolo Rebuttal Witness Statement ¶ 63; Antunez de Mayolo Witness Statement ¶ 25; Swarthout Witness Statement ¶ 58.

384 Antunez de Mayolo Rebuttal Witness Statement ¶ 63.

television interview that Supreme Decree 032 was a grave and bad development for the Peruvian mining sector because it undermined Peru's credibility and deterred new investments.[385] Peru has not denied that Prime Minister Fernández informed Bear Creek that she was surprised by the manner in which Supreme Decree 032 had been enacted, without justification and without providing an opportunity for Bear Creek to present its case against the revocation of Supreme Decree 083.[386] Nor has Peru denied that Minister Sánchez advised the company, in the presence of Vice-Minister Gala, that MINEM had no information or reason to believe that Bear Creek had acquired its mining concessions improperly.[387]

149. Instead, Peru insists that conversations between Ministers Merino and Castilla and Bear Creek do not constitute admissions of wrongdoing.[388] Peru does not address the fact that, during a meeting on December 13, 2013, Minister Merino provided Bear Creek with specific instructions to follow in order for the State to enact a supreme decree reinstating Bear Creek's rights over Santa Ana.[389] Minister Merino even handed to Bear Creek a draft letter to his attention that he requested Bear Creek send back to him, outlining the government's proposed steps to resolve Bear Creek's situation at Santa Ana.[390] Peru does not contest that either because it simply cannot.

150. Mr. Antunez de Mayolo describes in further detail another meeting that he attended with Vice-Minister Shinno and Dr. Zegarra:

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385 Swarthout Witness Statement ¶ 55.

386 Antunez de Mayolo Witness Statement ¶ 21.

387 Antunez de Mayolo Witness Statement ¶ 21; Antunez de Mayolo Rebuttal Witness Statement ¶ 61.

388 Respondent's Counter-Memorial ¶ 196.

389 Antunez de Mayolo Witness Statement ¶ 32.

390 **Exhibit C-0121**, Draft letter remitted by Minister J. Merino to E. Antunez de Mayolo, outlining the Government's proposed steps to resolve Bear Creek's situation at Santa Ana, Dec. 11, 2013.

> At this meeting, Messrs. Shinno and Zegarra admitted that the manner in which Bear Creek had acquired its mining concessions, through option agreements with Ms. Villavicencio, complied with applicable legal requirements. They candidly volunteered that Supreme Decree 032 had no valid legal basis and that Peru would lose if Bear Creek went to arbitration.[391]

151. In these circumstances, the meetings between Bear Creek and Peruvian government officials, both in terms of their frequency – during close to three years as Bear Creek sought to resolve the dispute in good faith – and content, constitute an admission by Peru or, at a minimum, a strong indication of its liability in connection with the enactment of Supreme Decree 032.

### G. BUT FOR PERU'S UNLAWFUL ACTS, PRODUCTION AT SANTA ANA WOULD HAVE COMMENCED IN THE FOURTH QUARTER OF 2012

152. On May 30, 2011, Peru issued Resolution No. 162-2011-MEM-AAM, which suspended the evaluation process of Bear Creek's ESIA for a 12-month period.[392] Then, on June 25, 2011, Peru enacted Supreme Decree 032, revoking Supreme Decree 083.[393] Peru's enactment of Supreme Decree 032 expropriated all of Bear Creek's rights to the Santa Ana Project and brought the Project itself to a sudden and permanent halt. But if Peru had not taken these two measures, then Bear Creek would have been on track to begin construction of the Santa Ana Project at the end of 2011, and enter into production in the last quarter of 2012.

153. Peru disagrees with that assessment. It alleges that the approval of Bear Creek's ESIA was not guaranteed,[394] and that even if its ESIA had been approved, there were many other authorizations necessary to commence the operation and construction of Santa Ana that Bear

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391 Antunez de Mayolo Rebuttal Witness Statement ¶ 62.

392 *See supra* ¶ 123.

393 *See supra* ¶ 132.

394 Respondent's Counter-Memorial ¶ 176 *et seq.*

Creek may never have obtained.[395] Peru also describes Bear Creek's construction and operation schedule as "overly ambitious."[396] These allegations are wrong. Bear Creek's ESIA complied with all applicable legal requirements, as numerous Peruvian government officials admitted, and would have in all likelihood been approved by MINEM. Moreover, the remaining permits that Bear Creek needed to construct and operate the Santa Ana Project were based largely on information already contained in the ESIA, which would simply have to be extracted and submitted in connection with the permits, and were therefore not difficult to obtain. As for the construction and operation timeline, it was reasonable and, in fact, quite conservative.[397]

### 1. Bear Creek's ESIA Complied with All Applicable Legal Requirements and MINEM Likely Would Have Approved It

154. Bear Creek submitted its ESIA to MINEM on December 23, 2010,[398] and on January 7, 2011, the DGAAM approved the Executive Summary of Bear Creek's ESIA as well as its PPC.[399] That approval meant that Bear Creek was acting properly, in compliance with Peruvian laws, in connection with the development of the Santa Ana Project.[400] By approving the Executive Summary of the ESIA and the PPC, DGAAM also blessed Bear Creek's proposed roadmap to maintain good community relations while continuing to develop the Santa Ana Project.[401]

155. Mr. Ramírez, the then Director General of the DGAAM, now claims in this arbitration that the Government's approval of Bear Creek's Executive Summary and PPC "is not

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395 Respondent's Counter-Memorial ¶¶ 185 *et seq.*

396 Respondent's Counter-Memorial ¶¶ 346 *et seq.*

397 Antunez de Mayolo Rebuttal Witness Statement ¶ 94.

398 *See supra* ¶ 81.

399 **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.

400 Flury Expert Report ¶ 82.

401 Antunez de Mayolo Rebuttal Witness Statement ¶ 81.

a significant or substantive step in the approval process,"[402] and suggests that Bear Creek's ESIA was flawed and incomplete.[403] This is incorrect. As Mr. Ramírez surely knows, approval of the ESIA's Executive Summary and PPC are, in fact, significant milestones.[404] As Mr. Ramírez also knows (or certainly should know), Bear Creek's ESIA was based on field studies and lab analyses that were conducted over a two-year period by Ausenco Vector, a world-renowned mining consultancy, and complied with all of the requisite technical criteria for a study of this nature.[405] If Bear Creek's ESIA truly had been flawed or incomplete, which was not the case, then the DGAAM never would have approved the Executive Summary of the ESIA or the PPC.[406]

156. Also, as previously discussed, Peruvian government officials acknowledged that there were no problems with Bear Creek's ESIA. Both Vice-Minister Gala and Clara García Hidalgo, the Legal Advisor to the Minister of Energy and Mines, publicly stated that the Santa Ana Project and Bear Creek's submission of its ESIA complied with all applicable legal requirements.[407] Mr. Flury, who has reviewed many environmental and social impact assessments over his career, reviewed Bear Creek's ESIA and concluded that it complied with Peruvian law and that it was reasonable to expect that MINEM would have approved it.[408]

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402 **RWS-002**, Ramírez Witness Statement ¶ 27.

403 **RWS-002**, Ramírez Witness Statement ¶ 27.

404 *See supra* ¶¶ 81-87.

405 Antunez de Mayolo Rebuttal Witness Statement ¶ 33.

406 Antunez de Mayolo Rebuttal Witness Statement ¶ 34.

407 **Exhibit C-0094**, *Huelga antiminera en Puno sigue sin solución*, LA REPÚBLICA, May 21, 2011; **Exhibit C-0093**, *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011.

408 Flury Expert Report ¶ 80.

157. On April 19, 2011, the DGAAM sent to Bear Creek its 157 observations to the ESIA, together with 39 observations from the Ministry of Agriculture ("MINAG").[409] Peru alleges, on the basis of the number of observations to the ESIA, that its approval was not guaranteed.[410] But the number of observations has nothing to do with the quality of the ESIA or the probability that a project will become a producing mine.[411] A large number of observations is simply part of the process to arrive at a document that resolves the concerns of the population and the authorities:

> However, the quantity of "observations" does not constitute a challenge or put into question the quality of the ESIA . For example, one same group can put forth one or more 'observations,' and the 'observations' may be repeated- with nuances- by different persons or groups. . A high number of observations is part of the process of generating a document that resolves all the concerns of residents and authorities. In other words, there is no relationship between the number of observations and the socio-environmental sensitivity of a mining Project; nor with the likelihood that the project will become a mine.[412]

158. Peru and Mr. Ramírez claim that Bear Creek had not submitted its responses to the observations by the time the DGAAM issued Resolution No. 162-2011-MEM-AAM on May 30, 2011, suspending the ESIA evaluation process, and further insinuate that it is Bear Creek's fault if the DGAAM has not reviewed the responses.[413] However, per the applicable procedure,[414] Bear Creek had 60 *business* days – not calendar days, as Peru indicates[415] – from

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409 **Exhibit R-040**, DGAAM's Observations to Bear Creek's EIA, April 19, 2011; and **Exhibit R-041**, MINAG's Observations to Bear Creek's EIA, January 2011.

410 Respondent's Counter-Memorial ¶ 181; **RWS-002**, Ramírez Witness Statement ¶ 27.

411 Flury Expert Report ¶ 84.

412 Flury Expert Report ¶ 84.

413 **RWS-002**, Ramírez Witness Statement ¶ 26; Respondent's Counter-Memorial ¶ 182.

414 **Exhibit C-0156**, MINEM, *Dirección General de Asuntos Ambientales Mineros*, *Certificación Ambiental para Actividades de Explotación Mediana y Gran Minería*. The 90 working days indicated in the chart is the maximum amount of time that MINEM can grant a mining company to respond to its observations.

the date of receipt of the observations to respond to them,[416] and it had every right to make use of the full 60 business days, *i.e.*, until July 22, 2011, to do so.[417] Moreover, the DGAAM suspended the ESIA evaluation process on the 22nd day of the 60 business day period, as MINEM itself confirmed,[418] and not on the 41st day, as Peru now wrongly claims in this arbitration.[419] Thus, Peru cannot cast blame upon Bear Creek for not having provided responses to the observations prior to the DGAAM's suspension of the ESIA evaluation process, when it had 40 more calendar days to do so.

159. Peru alleges that it would have been difficult for Bear Creek to respond properly to the 196 observations in the allotted time-period.[420] This was certainly not the case. On July 22, 2011, Bear Creek submitted detailed responses to every single observation,[421] together with all required technical documentation,[422] and entrusted it all to a notary, given that the DGAAM had suspended the ESIA evaluation process.[423] Mr. Antunez de Mayolo explains that, after receiving the observations, Bear Creek met with different representatives of the DGAAM and of MINAG to discuss their comments and better understand their concerns, such that he has no doubt that the Peruvian authorities would have been satisfied with the responses that Bear Creek

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415 Respondent's Counter-Memorial ¶ 182.

416 **Exhibit R-040**, DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD, Apr. 19, 2011, at 50, Recommendations.

417 Antunez de Mayolo Rebuttal Witness Statement ¶ 35.

418 **Exhibit C-0238**, Letter from Dr. Manuel Castro Baca, DGAAM, to Elsiario Antunez de Mayolo, Bear Creek, Jul. 20, 2012.

419 Respondent's Counter-Memorial ¶ 182.

420 **RWS-002**, Ramírez Witness Statement ¶ 27; **REX-003**, Expert Report of Luis Rodríguez-Mariátegui Canny, October 6, 2015 ¶ 46 (*hereinafter*, "Rodríguez-Mariátegui Expert Report").

421 **Exhibit R-184**, Bear Creek's Responses to the DGAAM's Observations to the Santa Ana Project EIA, July 2011.

422 Antunez de Mayolo Rebuttal Witness Statement ¶ 38.

423 **Exhibit C-0164**, Letter from Bear Creek to Ms. Rosalía Mejía and *Acta de Custodia*, Jul. 22, 2011.

submitted.[424] Mr. Flury reviewed the 196 observations and Bear Creek's responses. He concludes that no observation represented a significant hurdle for the Project, that Bear Creek's responses to the observations were adequate, and that it was reasonable to expect that MINEM and MINAG would have accepted them:

> I have reviewed the observations made on the ESIA of the Santa Ana Project and Bear Creek's responses to those observations. In my opinion, all of the observations could be remedied through the usual procedure, there was no observation on the merits that could entail a significant obstacle for the development of the project. In addition, in my opinion, Bear Creek's responses to the observations are appropriate, and, due to this, it was reasonable to expect that the Ministry of Energy and Mines would accept them, declaring the observations remedied, and that it would have approved the ESIA[425]

160. Peru also focuses on specific observations, claiming that these would have been particularly hard for Bear Creek to address.[426] For example, Mr. Ramírez claims that Observation No. 155 required Bear Creek to organize guided visits of the project site with community members, and that this would have been challenging to do within 60 business days, given that, at the time, the communities were allegedly protesting against the Project.[427] That is not correct. Observation No. 155 required Bear Creek to *prove* that it had carried out the guided visits as part of the citizen participation mechanisms that had been implemented, not to *organize* guided visits as Mr. Ramírez incorrectly asserts.[428] Accordingly, Bear Creek responded to

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[424] Antunez de Mayolo Rebuttal Witness Statement ¶ 36.

[425] Flury Expert Report ¶ 87.

[426] Respondent's Counter-Memorial ¶ 181.

[427] **RWS-002**, Ramírez Witness Statement ¶ 27; **Exhibit R-040**, DGAAM's Observations to Bear Creek's EIA, April 19, 2011.

[428] **Exhibit R-040**, DGAAM's Observations to Bear Creek's EIA, Apr. 19, 2011 at 30.

Observation No. 155 by indicating that it would be providing the required information in a separate document.[429]

161. Similarly, Dr. Rodríguez-Mariátegui states that many of MINEM's observations "concern issues that could be considered critical."[430] Dr. Rodríguez-Mariátegui mischaracterizes many observations.[431] For example, he refers to Observation No. 114, which, according to him, involves redesigning the pit.[432] Again, this is inaccurate.[433] Observation No. 114 is simply a request for additional information to help those reviewing the ESIA understand and visualize the criteria used to design the pit.[434] In its response, Bear Creek provided the clarifications sought by MINEM, together with technical documentation and the numerical model that Bear Creek had relied upon, so that MINEM could check the method and details of the calculations.[435]

162. Dr. Rodríguez-Mariátegui describes Observation No. 34 as requiring the submission of additional feasibility studies.[436] This is also incorrect.[437] Observation No. 34 requested specific clarifications regarding the practical and feasible measures that could be

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[429] **Exhibit R-184**, Bear Creek's Responses to the DGAAM's Observations to the Santa Ana Project EIA, July 2011 at 233.

[430] **REX-003**, Rodríguez-Mariátegui Expert Report ¶ 46; Respondent's Counter-Memorial ¶ 181.

[431] Antunez de Mayolo Rebuttal Witness Statement ¶¶ 38-40.

[432] **REX-003**, Rodríguez-Mariátegui Expert Report ¶ 46.

[433] Antunez de Mayolo Rebuttal Witness Statement ¶ 39.

[434] **Exhibit R-040**, DGAAM's Observations to Bear Creek's EIA, Apr. 19, 2011 at 45.

[435] **Exhibit R-184**, Bear Creek's Responses to the DGAAM's Observations to the Santa Ana Project EIA, July 2011 at 187.

[436] **REX-003**, Rodríguez-Mariátegui Expert Report ¶ 46.

[437] Antunez de Mayolo Rebuttal Witness Statement ¶ 39.

adopted in respect of the external geomechanics actually present in the Project area.[438] Bear Creek provided those clarifications in its response.[439]

163. Dr. Rodríguez-Mariátegui also refers to Observations No. 23, 24, 90, 99, 111, and 141, which are all related to water resources.[440] However, he fails to mention that the Peruvian National Water Authority (*Autoridad Nacional del Agua* or "ANA") did not submit comments to Bear Creek's ESIA, even though it was entitled to do so.[441] ANA actually issued a favorable opinion regarding the water resources at the Santa Ana Project.[442]

164. Thus, contrary to Peru's rhetoric,[443] Peru provides no credible argument that MINEM would not have approved Bear Creek's ESIA. To the contrary, the evaluation process of Bear Creek's ESIA was proceeding normally and the ESIA would have been approved but for Peru's interference.

### 2. The Remaining Permits that Bear Creek Needed for the Construction and Operation of the Santa Ana Project Were Routine and Not Difficult to Obtain

165. After MINEM approved its ESIA, Bear Creek still needed to obtain additional permits for the construction and operation of the Santa Ana Project. Peru alleges that among these permits, "there are many key authorizations that represent complex, discretionary regulatory decision-making points."[444] This is false. Mr. Flury explains that the outstanding permits do not depend on the discretion of the administration, but are granted following formal

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438 **Exhibit R-040**, DGAAM's Observations to Bear Creek's EIA, Apr. 19, 2011 at 35.

439 **Exhibit R-184**, Bear Creek's Responses to the DGAAM's Observations to the Santa Ana Project EIA, July 2011at 84-85.

440 **REX-003**, Rodríguez-Mariátegui Expert Report ¶ 46; Respondent's Counter-Memorial ¶ 181.

441 **Exhibit C-0156**, MINEM, *Dirección General de Asuntos Ambientales Mineros*, *Certificación Ambiental para Actividades de Explotación Mediana y Gran Minería*.

442 **Exhibit C-0165**, Technical Report No. 0169-2011-ANA-DGCRH/MASS, Feb. 21, 2011 at 5.

443 Respondent's Counter-Memorial ¶ 184.

444 Respondent's Counter-Memorial ¶ 168.

procedures in accordance with specific requirements.[445] If the owner of the mining concession satisfies the relevant requirements, then the administration must deliver the corresponding permit.[446] Mr. Antunez de Mayolo is not aware of a single mining company in Peru that had its ESIA approved but was later forced to cancel its project because it was unable to obtain one of the outstanding permits that Peru refers to in this arbitration.[447] It is highly improbable that this would have occurred in Bear Creek's case. Peru's attempt to lead the Tribunal astray into believing that the permitting process would have been difficult for Bear Creek to complete by including charts and lists of outstanding permits must be rejected.

166. Peru also claims that "Bear Creek had made little progress toward obtaining the necessary permits and authorizations to start construction and operation of the mine."[448] That is not true either. In March 2011, Bear Creek had entered into an EPCM agreement with a leading Peruvian engineering firm, Graña and Montero, for the engineering, logistics, and construction management of the Santa Ana Project.[449] Bear Creek and Graña and Montero had started working together and completed approximately 26% of the engineering work.[450] Bear Creek had already paid over half a million U.S. dollars to Graña and Montero for this work.[451] In other words, the Santa Ana Project was in the EPCM/Construction/Commissioning phase, per Table 4-2 of SRK Consulting's Expert Report,[452] *i.e.*, the Project's last phase prior to operation. As

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445 Flury Expert Report ¶ 92.

446 Flury Expert Report ¶ 92.

447 Antunez de Mayolo Rebuttal Witness Statement ¶ 85.

448 Respondent's Counter-Memorial ¶ 193. *See also* Respondent's Counter-Memorial ¶¶ 164, 185.

449 **Exhibit C-0144**, Letter of Intent between Bear Creek and Graña and Montero, Mar. 3, 2011.

450 **Exhibit C-0191**, Graña and Montero, Valuation of Works, Jun. 17, 2011.

451 Antunez de Mayolo Rebuttal Witness Statement ¶ 84.

452 **REX-005**, Expert Report of Neal Rigby, Prepared by SRK Consulting (U.S.), Inc., October 6, 2015 ¶ 58, Table 4-2 at 12 (*hereinafter*, "SRK Report").

confirmed by Mr. Swarthout, Bear Creek had the financial capacity to build and operate the Santa Ana Project and was on its way to building it.[453]

167. Moreover, Bear Creek could not begin the process of obtaining the majority of the remaining permits until its ESIA was approved, a point with which Dr. Rodríguez-Mariátegui appears to agree.[454] Regardless, Bear Creek did all it could in advance of the approval of the ESIA, and was well-prepared to file permit and license applications upon receiving such approval.[455] Mr. Swarthout confirms that permitting risk would be greatly reduced once the ESIA was approved, and the remaining permits would be easily and routinely obtained within a reasonable time period.[456]

168. Peru focuses in its Counter-Memorial on several permits and authorizations that Bear Creek needed prior to the construction and operation of the Santa Ana Project in an attempt to demonstrate that Bear Creek would not have been able to stick to the "overly ambitious" timeline of beginning construction at the end of 2011 and operation during the last quarter of 2012.[457] Peru's misguided efforts fall flat.

169. Peru alleges that Bear Creek did not have permission from landowners to build and operate the mine.[458] That is not true. In April 2011, the Concepción de Ingenio community approved entering into a land transfer agreement with Bear Creek, and Bear Creek also was negotiating agreements with the communities of Aconcagua, Challacollo, and Ancomarca.[459] As

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453 Swarthout Rebuttal Witness Statement ¶¶ 41-42.

454 **REX-003**, Rodríguez-Mariátegui Expert Report ¶¶ 47-48, 108.

455 Antunez de Mayolo Rebuttal Witness Statement ¶ 86.

456 Swarthout Rebuttal Witness Statement ¶ 41.

457 Respondent's Counter-Memorial ¶¶ 346 *et seq.*

458 Respondent's Counter-Memorial ¶¶ 186 *et seq.*

459 *See supra* ¶ 99.

Mr. Antunez de Mayolo explains, Bear Creek would have ultimately obtained the necessary permissions:

> We were negotiating with community members that had a good relationship with us. They were willing to do business with Bear Creek and supportive of the Santa Ana Project in general. Moreover, in my experience, if a mining company is able to successfully negotiate agreements with some of the owners or possessors, as we had done with the Concepción de Ingenio community, it incentivizes the rest into quickly entering into deals with the company. For example, for our Corani mining project, we bought the land where the ore-body was located in July 2011. In October of that year, we had purchased the remaining land that we needed to develop the project. We were using the same action plan at Santa Ana, and I am confident that it would have worked, but for the DGAAM's suspension of the ESIA evaluation process and Peru's subsequent enactment of Supreme Decree 032.[460]

170. Peru argues that Bear Creek had not yet obtained a Certificate of Non-Existence of Archaeological Remains ("CIRA") from the Ministry of Culture.[461] In that connection, Dr. Rodríguez-Mariátegui alleges that when MINEM suspended the ESIA evaluation process, "it was unknown whether there existed any archaeological remains in the area."[462] Dr. Rodríguez-Mariátegui is again mistaken. In Peru, an environmental and social impact assessment must include a report regarding the existence of archaeological remains in the project area.[463] Bear Creek's report identified nine archaeological sites, none of which was located in the areas of the principal components of the Santa Ana Project, *i.e.*, the pit, the plant, the rock waste deposits, and the leaching pad.[464] Moreover, if the archeological nature of any of the nine identified sites later had been confirmed, this would not have affected the operation of the Project because in

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460 Antunez de Mayolo Rebuttal Witness Statement ¶ 87.

461 Respondent's Counter-Memorial ¶ 189.

462 **REX-003**, Rodríguez-Mariátegui Expert Report ¶ 73.

463 Antunez de Mayolo Rebuttal Witness Statement ¶ 88.

464 **Exhibit C-0192**, Ausenco Vector, Plano de los Sitios Arqueológicos del Projecto Santa Ana 2.31.

accordance with Peruvian regulations, works could have been undertaken to ensure their isolation.[465] Given that there were no archaeological sites within the Project's principle components, obtaining the CIRA would not have been complicated.[466]

171. Peru points to the fact that Bear Creek would have had to develop a Mining Plan that MINEM would have had to subsequently review and approve.[467] This is a non-issue, however, because Bear Creek was ready to submit its Mining Plan to MINEM upon approval of the ESIA, given that the documents that make it up were already included in the ESIA and in the Feasibility Study, both of which had been completed.[468]

172. Peru refers to the fact that Bear Creek needed to build an electric transmission line and its own electric station, and adds that the company had not done anything in that regard.[469] This is not the case. The construction of these two items required a separate ESIA, and Bear Creek had initiated the process of obtaining the requisite approval for it.[470] For example, Bear Creek had conducted community workshops in Huacullani and Pomata in relation to the electric transmission line.[471] The Company was also in discussions with ElectroPuno regarding sub-contracting the entire process to them.[472]

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[465] Flury Expert Report ¶ 95 ("It should be noted that even if there are archeoloical remains, the rules allow their preservation and care, so their presence—unless it is a major installation—generally does not prevent the carrying out of projects.").

[466] Antunez de Mayolo Rebuttal Witness Statement ¶ 88.

[467] Respondent's Counter-Memorial ¶ 190.

[468] Antunez de Mayolo Rebuttal Witness Statement ¶ 89.

[469] Respondent's Counter-Memorial ¶ 191.

[470] Antunez de Mayolo Rebuttal Witness Statement ¶ 90.

[471] **Exhibit C-0193**, *Acta de Primer Taller Participativo, Línea de Transmisión*, Huacullani, Sept. 2, 2010; and **Exhibit C-0194**, *Acta de Primer Taller Participativo, Línea de Transmisión*, Pomata, Sept. 2, 2010.

[472] *See, e.g.*, **Exhibit C-0195**, Letter from E. Antunez, Bear Creek, to C. Falconi Salazar, ElectroPuno, Mar. 28, 2011.

173. Peru notes that Bear Creek still needed to identify a water supply source and apply for the corresponding licenses.[473] But Bear Creek had already identified an adequate water supply source with no adverse impacts on the environment.[474] Moreover, as indicated above, Bear Creek could not apply for the corresponding licenses until its ESIA was approved.

174. Finally, Peru alleges that Bear Creek would have experienced permitting delays because over the past five years, there has been a history of permitting delays for projects in Peru and that "permitting timelines have increased from 6 months or 12 months or even longer" and that 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 non-governmental organizations (NGOs)."[475] Bear Creek's technical mining expert, RPA, disagrees and observes:

175. The Project Execution schedule included in the Santa Ana [Updated Feasibility Study] (Table 5-3) includes nine months for the Peruvian government to review the ESIA and an additional six months to procure construction and operating permits, which actually exceeds the 6 months to 12 months that SRK mentions. While it is true that Peru has experienced opposition to a number of mining projects, it is also true that a number of mining projects have been allowed to proceed without delays, such as Rio Alto's La Arena Project and Hudbay's Constancia Project (the latter located 330 km NW from Santa Ana).[476] Thus, Bear Creek had progressed the preparation and collection of the information that was required to obtain the remaining permits as far as possible, and there is no doubt that once its ESIA was approved, Bear

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473 Respondent's Counter-Memorial ¶ 192.

474 Antunez de Mayolo Rebuttal Witness Statement ¶ 91.

475 **REX-005**, SRK Report ¶ 90.

476 Second RPA Expert Report on the Santa Ana Project and Corani Project, Puno, Peru, Jan. 6, 2016 ¶ 114 (*hereinafter*, "Second RPA Expert Report").

Creek would have been granted the outstanding permits within a reasonable time period, enabling it to commence construction of the Project by the end of 2011, and production in the fourth quarter of 2012. Another significant project in Peru, Rio Alto, submitted its ESIA for its La Arena Gold project in September 2009 and received approval ten months later in July 2009, with production commencing only ten months after Peru approved its ESIA.[477]

### 3. Bear Creek's Construction and Production Schedule Was Reasonable, Even Conservative

176. Peru disputes the reasonableness of Bear Creek's schedule for the Santa Ana Project, which estimated construction at the end of 2011 and production for the last quarter of 2012.[478] However, that timeline corresponds to the concrete work schedule that Graña and Montero had included in its Technical and Commercial Proposal.[479] Bear Creek also raised US$ 130 million in equity financing by explaining in its prospectus that "[i]n late 2011, once the proper permits are obtained, the principal off-site project infrastructure are expected to be developed. … the onsite construction is expected to start in the 2nd quarter of 2012 or earlier… Commercial production is expected to start in early part of the fourth quarter of 2012…"[480]

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[477] Second RPA Expert Report ¶ 118.

[478] Respondent's Counter-Memorial ¶¶ 346 *et seq.*; **REX-003**, Rodríguez-Mariátegui Expert Report ¶ 108 ("given the numerous pending steps to be able to begin construction of the Santa Ana project, together with the fact that, in many cases, they are drawn out processes, it would have been very difficult, if not impossible, for Bear Creek to have been able to begin construction of the Santa Ana project facilities during the second semester of 2011 … or to have been able to begin production in the fourth quarter of 2012…").

[479] **Exhibit C-0196**, Graña and Montero Technical and Commercial Proposal for Bear Creek Mining Corporation's Santa Ana Project, Apr. 5, 2011, Master Schedule; **Exhibit C-0239**, Graña and Montero April 2011 Monthly Report for the Santa Ana Project, Apr. 29, 2011, Master Schedule.

[480] **Exhibit C-0240**, Bear Creek Short Form Prospectus, Oct. 29, 2010 at 12-13.

| Item / Period | Q4 2010 | Q1 2011 | Q2 2011 | Q3 2011 | Q4 2011 | Q1 2012 | Q2 2012 | Q3 2012 | Q4 2012 |
|---|---|---|---|---|---|---|---|---|---|
| ESIA Review | | | | | | | | | |
| Detailed Engineering | | | | | | | | | |
| Permitting | | | | | | | | | |
| Off-site Infrastructure Construction | | | | | | | | | |
| Site Development | | | | | | | | | |
| Production | | | | | | | | | |

**(Project Execution, Bear Creek's Short Form Prospectus)**[481]

177. Bear Creek would never have obtained US$ 130 million from sophisticated investors if the market had believed that the company's construction and operation schedule was unrealistic. Mining financier Peter M. Brown testifies in this respect that market underwriters had performed rigorous due diligence concerning all aspects of the US$ 130 million financing, including the construction/operation timeline:

> The underwriting syndicate (comprised of Canaccord, BMO, Scotia Bank, Paradigm, and Cormark Securities) performed rigorous due diligence in respect of this bought-deal financing, satisfying itself that the 2010 Santa Ana Feasibility Study, completed by Vector Engineering, amply demonstrated the project's viability **and that the permitting and construction completion expectations were reasonable as represented by Bear Creek**. Canaccord was further satisfied that management team, led by Mr. Swarthout, was adequately equipped to bring the Santa Ana project to production within two years and continue advancing the Corani project in the meantime.[482]

178. Bear Creek's construction and production schedule was also in line with the development of other mining projects in Peru. For example, it took 20 months from the submission of its ESIA for the La Arena Project, which is a very similar project to Santa Ana in

[481] **Exhibit C-0240**, Bear Creek Short Form Prospectus, Oct. 29, 2010 at 13.

[482] Brown Witness Statement ¶ 10 (emphasis added).

terms of capacity and process, to start the production phase (the pour of first gold).[483] Likewise, as from the submission of the ESIA for the Corani project, it took nine months, from December 2012 to September 2013, for MINEM to approve it.[484] The Corani project is a much bigger and more complex project than Santa Ana in terms of location, construction, metallurgy, environmental footprint, and a host of other factors.[485] RPA further observes that the Constancia Project met a similar schedule to that presented for Santa Ana, despite the fact that it was a US$ 1.3 billion project.[486] Hudbay was able to permit and complete the substantially larger Constancia Project in six quarters, only one quarter longer than the time allotted in the Santa Ana schedule.[487]

179. Mr. Flury agrees that Bear Creek's timeline was sensible: "if the State acted in good faith in the processing of permits, as was its obligation and its practice, it was reasonable to expect that Bear Creek would have had the neccesary permits to commence construction of the Santa Ana Project in the second half of 2011 and production in the last quarter of 2012 as scheduled."[488]

180. Peru's technical expert, SRK, opines that Bear Creek's construction and ramp up schedule for Santa Ana was too simplistic in comparison to the project and construction start-up presented in the Gantt Chart in the 2015 Corani Feasibility Study and that permitting delays, difficulty in logistics due to Santa Ana's location in the high Andes, and an increase in leach

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483 Antunez de Mayolo Rebuttal Witness Statement ¶ 93; Swarthout Rebuttal Witness Statement ¶ 42; Second RPA Expert Report at ¶¶ 41, 118.

484 Antunez de Mayolo Rebuttal Witness Statement ¶ 93.

485 Antunez de Mayolo Rebuttal Witness Statement ¶ 93.

486 Second RPA Expert Report ¶ 116.

487 Second RPA Expert Report ¶ 117, Figure 5-6.

488 Flury Expert Report ¶ 113.

cycle time could lengthen first silver production "by at least one year from that presented in the FSU."[489]

181. Bear Creek's expert RPA concludes, among other things, that, to the contrary, Bear Creek's construction and ramp-up schedule was actually conservative and that "it is totally incorrect to compare the detailed Gantt chart for Corani, which is a milling operation, with the production schedule for Santa Ana, which is a simple heap leaching operation"[490] because "[m]illing operations are much more complicated processing circuits that contain a number of larger, more expensive, and more intricate unit operations such as crushing, grinding, flotation, leaching, thickening, filtration, and tailings storage requirements."[491] Moreover, RPA noted that:

> [T]he production ramp-up schedule for Santa Ana can be considered conservative. It assumes that 65.8% of the silver will be extracted in the first year after the ore is placed on the leach pad and the remaining 9.9% of the silver will be recovered the following year. This is a conservative estimate based on the 180 day leach cycle. In order to complete a more detailed ramp up schedule for a heap-leaching operation, it is necessary to complete a detailed short-term mine plan on a weekly or monthly basis and a detailed leach pad stacking plan. This level of detail is not commonly completed for a Feasibility Study but is completed as the mine goes into operation. It is during permanent heap-leaching of material where it is often demonstrated that higher-than-expected recoveries actually occur as opposed to those predicted by column leach testing.[492]

182. In conclusion, given that Bear Creek had submitted its ESIA to MINEM in December 2010, the company's estimate that it would begin construction of the Santa Ana

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489 **REX-005**, SRK Report ¶¶ 91-92.

490 Second RPA Expert Report ¶ 122.

491 Second RPA Expert Report ¶ 122.

492 Second RPA Expert Report ¶ 121.

Project at the end of 2011 and production during the last quarter of 2012 was reasonable, and in fact quite conservative.[493]

#### 4. The Santa Ana Communities Would Not Have Impeded the Further Development of the Santa Ana Project

183. Peru alleges that Supreme Decrees No. 33 and 34, which it enacted in June 2011, would have required evidence of express community consent for Bear Creek to proceed with its mining activities, and that "it is difficult to conceive how Bear Creek could have claimed local community consent to the Santa Ana Project."[494] This is not true. As Mr. Flury explains, these supreme decrees do not grant a veto right to the communities.[495] Peru's speculative claims are undermined also by the local communities' continued support for Bear Creek and the Santa Ana Project, even after Peru's expropriation. As noted above, when the OEFA visited the project site in November 2011, after Peru had enacted Supreme Decree 032, it noted that Bear Creek and the communities still had a good relationship.[496]

184. Furthermore, consistent with that support, on May 15, 2013, local authorities, community leaders, and community members from the Huacullani District sent a memorandum to the Prime Minister, MINEM and Bear Creek, expressing their support for the Santa Ana

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493 Antunez de Mayolo Rebuttal Witness Statement ¶ 94.

494 Respondent's Counter-Memorial ¶¶ 137, 183.

495 Flury Expert Report ¶ 112. Nor does Article 89 of the Peruvian Constitution grant to communities a veto right over projects to be developed within their territory, contrary to Professor Peña's allegations (**REX-002**, Peña Expert Report ¶¶ 37-38). As Mr. Flury indicates, "Dr. Peña misinterprets Article 89 of the Constitution when suggesting that a veto right in favor of such communities over projects conducted in the areas in which they inhabit arises from such provision. The autonomy this article grants to native and farmer communities relates to 'their organization, in the communal work and the use and free disposal of their lands, as well as in economic and administrative matters, within the framework established by the law.' This provision must be read in harmony with all other Constitutional provisions, which clearly establish that the Peruvian State is a unitary State, and that the use of natural resources shall be governed by the State." Flury Expert Report ¶ 75. Peruvian public officials have also made clear that local communities do not have a veto right over projects (**Exhibit C-0242**, "*Ningún proyecto se ha paralizado por procesos de consulta previa*," EL PERUANO, Jun. 10, 2014).

496 *See supra* ¶ 79.

Project and requesting that the Project be resumed.[497] In particular, they insisted on the fact that Bear Creek's investments at Santa Ana were the driving force behind the communities' own economic development plans, which had been frustrated by the suspension of the Project:

> Our plans and desires were directed to develop the livestock, agriculture, craftwork and commercial potential for which we counted with the engine that meant the Santa Ana mining project which deposit is located in Huacullani and that would also help for the development of our neighboring brothers, such as the province of Chucuito and the region of Puno, both for the sharing of the mining tax and the royalties and for the developments plans that would for now be already under development with the Santa Ana mine.[498]

185. In the same memorandum, the communities and authorities of Huacullani explained that they could not understand the Government's reason for suspending the Santa Ana Project, since the Company had provided the community with social programs, activities, workshops and had conducted a public hearing with a majority of the community expressing its support for the Project:

> We know that the development of a project such as Santa Ana signifies resources for the State, which at the same time justifies that the State may come closer and be present with training programs and social, development and infrastructure projects in the Aymaran province of Chucuito and its districts and therefore we do not understand why the development of the Santa Ana mining project was suspended that had been doing social programs and planning activities for the communities, and likewise it had developed workshop and the public hearing with an attendance of the majority of the community.[499]

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[497] **Exhibit C-0118**, Memorandum from Members of the Huacullani District to the Prime Minister of Perú, MINEM and Bear Creek Mining, *Memorial Por El Desarollo y La Inclución*, May 15, 2013.

[498] *Id*.

[499] *Id*.

186. On October 27, 2013, Huacullani district authorities and community leaders sent another request to MINEM to allow the Santa Ana Project to resume.[500] In that memorandum, the communities confirmed that they rejected Mr. Aduviri's politically-motivated opposition to mining projects in the area:

> The lack of knowledge from the population with respect to the economic investments were led by anti-mining messages taking to an extreme the mining operations as a fatal pollution making it confusing with the INFORMAL mines without being clear that the Santa Ana mining project is formal and counts with environmental impact studies EIA.
>
> Two years have passed until today and the alleged environmentalist [Mr. Aduviri] has not solved the poverty problem in conclusion it led to worse cases and still the agricultural activity is a failure; in that sense, we, the inhabitants have come to realize that the leader [Mr. Aduviri] was only after political and personal interests.[501]

187. On January 24, 2014, the local authorities, community leaders, and community members from the Huacullani District reiterated their request for MINEM to allow Bear Creek to return to Santa Ana.[502] These repeated pleas to the Peruvian government by the local communities and authorities demonstrate their strong support for Bear Creek and the Santa Ana Project. But for Peru's suspension of the ESIA evaluation process and enactment of Supreme Decree 032, they certainly would not have prevented the Project from going forward and Bear Creek from beginning construction at the end of 2011 and operation during the last quarter of 2012.

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[500] **Exhibit C-0119**, Memorandum from Members of the Huacuallni District to MINEM, *Reactivación del Proyecto Santa Ana,* Oct. 27, 2013.

[501] *Id*.

[502] **Exhibit C-0120**, Memorandum from Members of the Huacuallni District to Prime Minister of Perú, MINEM and Bear Creek Mining, *Reiterativo Por El Desarollo y La Inclusión*, Jan. 24, 2014.

## III. PERU'S ATTEMPT TO DEPRIVE THE TRIBUNAL OF JURISDICTION OVER BEAR CREEK'S CLAIMS ON THE GROUND OF SUPPOSED "ILLEGALITY" FAILS

188. Bear Creek has been a protected investor and the rightful owner of a protected investment under the Canada-Peru FTA since 2007. But in an attempt to avoid judgment of its indefensible expropriatory acts, Peru now alleges that Bear Creek should not receive any of the protections of the FTA because its investment supposedly was acquired through an illegal "scheme" designed to sidestep the Peruvian Constitution. This allegation is false and highly cynical. Consistent with its obligation to act in accordance with Peruvian law, Bear Creek took particular care to ensure that its actions in the period leading to the issuance of Supreme Decree 083 and the actual making of the investment were legal, fully disclosing to Peru its Option Agreements with Ms. Villavicencio, a company representative and employee. Peru specifically approved Bear Creek's investment and cannot be permitted today to declare the modality of the investment illegal and in bad faith.

189. Peru's arguments have no basis in fact or in law: Bear Creek acquired its investment legally and in good faith, and regardless, legality and good faith are not prerequisites for access to international arbitration dispute resolution (**III.A**). Further, Claimant owned an investment upon which the Tribunal can base its jurisdiction (**III.B**) and Claimant held the rights upon which it bases its claim (**III.C**).

### A. BEAR CREEK IS THE RIGHTFUL OWNER OF A PROTECTED INVESTMENT

190. Bear Creek acquired its investment on December 3, 2007 when it exercised its option to purchase the Karina Mining Concessions pursuant to the Option Agreements with Ms. Villavicencio.[503] Prior to December 3, 2007, Bear Creek held neither direct nor indirect

[503] **Exhibit C-0015**, Transfer Agreements.

ownership rights in any of the Karina Mining Concessions, as the Lima First Constitutional Court confirmed in its decision of May 12, 2014.[504] Bear Creek acquired these rights only after it had obtained the Government's approval to do so through Supreme Decree 083, issued on November 29, 2007, which declared the Santa Ana Mining Project a public necessity following almost a year of thorough vetting and analysis.[505] At the time it issued Supreme Decree 083, the Government was well aware that the Option Agreements were the instruments through which Bear Creek intended to exercise its right under Supreme Decree 083 to acquire a controlling interest over the Santa Ana Project; Bear Creek had openly and transparently informed the Government of this intention.[506]

191. Over three years later, on June 25, 2011, the Government unlawfully expropriated Bear Creek's investment, without justification, through Supreme Decree 032.[507] It was only after this unlawful expropriation that the Government formally challenged Bear Creek's acquisition arguing that Bear Creek had acquired its investment unlawfully and in bad faith, when MINEM filed a lawsuit on July 5, 2011, seeking to annul Bear Creek's rights over the Karina Mining Concessions.[508] Peru's *ex post facto* attempt to justify its unlawful conduct fails because Bear Creek acquired its investment in good faith, in accordance with Peruvian and international law (III.A.1). Peru also is estopped by its own conduct from claiming that Bear Creek acquired its investment illegally (III.A.2). In any event, neither legality of the investment nor good faith is a

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504 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

505 **Exhibit C-0004**, Supreme Decree No. 083-2007-EM, Nov. 29, 2007.

506 **Exhibit C-0017**, Request from Bear Creek to MINEM for authorization to acquire mining rights in border area, Dec. 4, 2006 (*hereinafter*, "Supreme Decree Application").

507 **Exhibit C-0005**, Supreme Decree 032-2011-EM, Jun. 25, 2011. *See disc. infra* at 241 *et seq.*

508 **Exhibit C-0112**, Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, July 5, 2011.

prerequisite for access to international arbitration dispute resolution under the Canada-Peru FTA, the ICSID system, or international law (III.A.3).

### 1. Bear Creek Acquired Its Investment Legally and in Good Faith

192. Peru does not contest that (i) option agreements "that anticipate a future transfer of border zone mining rights to a foreign company"[509] are legal; (ii) Bear Creek's Option Agreements with Ms. Villavicencio conditioned Bear Creek's exercise of the option in compliance with Peruvian law; (iii) Bear Creek lawfully exercised its option under the Option Agreements; and (iv) there was no illegality surrounding the payment of the purchase price.

193. Peru's sole line of attack is to point to Ms. Villavicencio's status as an employee and legal representative of Bear Creek so as to accuse Claimant of engaging in a "scheme" to acquire the Karina Concessions illegally.[510] The crux of Peru's argument is that the Option Agreements 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 acquired by a Peruvian national [Bear Creek's employee and legal representative for certain banking matters, Ms. Villavicencio], 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."[511] Peru's position is untenable as a factual and legal matter because Bear Creek acted lawfully, transparently and in good faith at all times.

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509 Respondent's Counter-Memorial ¶ 47.

510 *Id.* ¶¶ 207-214.

511 *Id*. ¶ 47.

194. First, Bear Creek did not engage in a deliberate attempt to avoid Article 71's restrictions. Bear Creek consulted preeminent Peruvian counsel[512] regarding how to acquire the mining rights over the Santa Ana area in compliance with Article 71 and followed counsel's advice at all times.[513] Acting on counsel's advice, Claimant ensured that the Option Agreements would provide for the *future acquisition* of the mining rights over Santa Ana *should Bear Creek succeed in satisfying the requirements of Article 71*.[514] Under the Option Agreements, Bear Creek held no ownership rights over the Karina Concessions prior to obtaining a supreme decree authorizing it to acquire those rights.[515] Claimant took great care to ensure that the Option Agreements were publicly available, valid and in compliance with Peruvian law by registering the Option Agreements with the Peruvian Public Registry, even though it was not legally required to do so. The decision of the SUNARP Registry Tribunal confirming that the Option

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512 Swarthout Witness Statement ¶ 16. Bear Creek consulted leading attorneys at Estudio Grau, who prepared the Option Agreements and confirmed that Bear Creek's plan for acquiring the mining rights over the Santa Ana area was in compliance with Peruvian law. According to Latin Lawyer, Estudio Grau is "[o]ne of the oldest firms in the country [Peru], with a prestigious name and a solid portfolio of established international clients." Latin Lawyer also notes that "[m]ining remains the backbone of the firm [and the firm's client] lists contain both some very important and faithful clients in its traditional area of expertise in mining and natural resources as well as newer clients looking for advice in project finance, environmental law and other areas, while the firm has also done work for multilateral agencies." **Exhibit C-0199**, Latin Lawyer 250: Latin America's leading business law firms (2007) at p. 121. Estudio Grau has remained among Latin Lawyer's top ranked firms to this day. Moreover, since Chambers & Partners began surveying Latin American lawyers and firms in 2010, Estudio Grau has been ranked consistently among the leading firms in the "Energy and Natural Resources: Mining" sector. In Chambers Latin America's first survey, Estudio Grau was ranked among the top 3 firms with mining expertise in Peru and Chambers Latin America described Estudio Grau as "[o]ne of the most established names on the Lima legal scene, this full-service firm is also one of the most traditional names in mining, active in the sector since the 1970s." Chambers Latin America says of Cecilia González of Estudio Grau, who assisted in the drafting of the Option Agreements, that she is "commonly considered one of the top names in the market and a practitioner with great international recognition." **Exhibit C-0200**, Chambers Latin America: Latin America's Leading Lawyers for Business (2010), pp. 556-57.

513 Swarthout Rebuttal Witness Statement ¶¶ 12, 14.

514 *Id.* .

515 **Exhibit C-0038**, Resolution No. 193-2005-SUNARP-TR-A issued by the SUNARP Tribunal Registral, Nov. 7, 2005 at §§ VI.5-7 (*hereinafter*, "SUNARP Decision").

Agreements did not transfer ownership of the Santa Ana Concessions was even published in the Official Gazette (*El Peruano*).[516]

195. Claimant fully and transparently disclosed the Option Agreements to the Peruvian Government, including Ms. Villavicencio's role as a legal representative for banking matters, in its application for a supreme decree under Article 71, and exercised its option only after Peru issued Supreme Decree 083.[517] When Peru first argued that Bear Creek had acquired its investment unlawfully, Bear Creek sought a legal opinion from a second renowned Peruvian law firm, which also confirmed that Bear Creek had complied with all legal requirements.[518] Also, Mr. Flury, an expert on Peruvian mining law with more than 40 years of experience and a former Minister of Energy and Mines, has explained that the structure Bear Creek used to acquire its investment is commonly used by foreigners in the border areas.[519] Further, as described in Section II.B.3, other top tier Peruvian law firms and specialized mining lawyers have put similar structures in place for their foreign clients seeking to acquire mining concessions in border areas confirming that the structure Bear Creek used is a lawful one. In all of these cases, the Government granted authoritative supreme decrees as in the case of Bear Creek. Finally, Professor Bullard also concludes that Bear Creek's use of Option Agreements with Ms. Villavicencio was not in breach of Article 71.[520]

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516 **Exhibit C-0038**, SUNARP Decision.

517 **Exhibit C-0015**, Transfer Agreements.

518 **Exhibit C-0142**, Memorandum from Rodrigo, Elias & Medrano Abogados to Mr. Alvaro Diaz Castro, Bear Creek Peru, Sept. 26, 2011, p. 3, ¶ 2. Chambers Latin America ranks Estudio Rodrigo, Elías & Medrano Abogados as the only Band 1 firm in the "Energy & Natural Resources: Mining" division in Peru and notes that "[t]his Lima powerhouse has had a mining division since the firm's foundation in 1965. The firm has thus been involved in many of the major mining projects to have shaped the Peruvian industry." **Exhibit C-200**, Chambers Latin America: Latin America's Leading Lawyers for Business (2010) at 556.

519 Flury Expert Report ¶ 59.

520 Second Bullard Expert Report ¶ 62.

196. If, as Peru alleges, Claimant had deliberately attempted to avoid Article 71's restrictions, it would not have sought and followed legal advice from preeminent counsel in Peru regarding how to acquire the mineral rights lawfully; it would not have conditioned its right to exercise the Option Agreements on its fulfillment of the requirements set forth in Article 71; it would not have registered the Option Agreements with the Peruvian Public Registry thereby putting the world on notice of its option; and it would not have disclosed the Option Agreements and its relationship with Ms. Villavicencio and Ms. Villavicencio's role in its application for a supreme decree. This is the antithesis of a deliberate attempt to circumvent Article 71's restrictions. Bear Creek undertook all of these actions in good faith, precisely because it wanted to ensure that it was in compliance with Peruvian law.

197. Second, there is no prohibition under Peruvian law against a company entering into an option agreement with an employee or legal representative for the future acquisition of rights under Article 71,[521] and Peru does not claim otherwise. Indeed, Peru admits that it does not contend that "option contracts that anticipate a future transfer of border zone mining rights to a foreign company would violate the [Peruvian] Constitution."[522] At least three organs of the Peruvian State have confirmed that the Option Agreements are in compliance with Peruvian law:

198. (1) On November 7, 2005, the SUNARP Registry Tribunal determined that the transfer of mining rights does not take place with the execution of the option agreement, but rather when the optionee exercises the option.[523] SUNARP published the Registry Tribunal's

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521 Second Bullard Expert Report ¶¶ 50, 61-84.

522 Respondent's Counter-Memorial ¶ 47.

523 **Exhibit C-0038**, SUNARP Decision §§ VI.5-7. Respondent contends that the SUNARP Tribunal's decision is inapposite because the SUNARP Tribunal "does not have the jurisdiction or authority to render any such verdict on the scheme's legality… 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." Respondent's Counter-Memorial ¶ 49. But the SUNARP Tribunal did precisely this. It analyzed the Option Agreements to determine whether to permit registration thereof, and determined that they were in accordance with Peruvian law, which

decision in the Peruvian Official Gazette, *El Peruano*, on December 22, 2005, thereby putting the world on notice of its decision.[524] (2) On November 29, 2007, the Government enacted Supreme Decree 083, declaring Bear Creek's investment a public necessity and approving Bear Creek's acquisition of the Karina Mining Concessions, knowing at the time (as further discussed *infra* at ¶ 208) that Bear Creek intended to acquire mineral rights over the Santa Ana area through the Option Agreements with Ms. Villavicencio.[525] (3) On May 12, 2014, having analyzed the facts and circumstances surrounding Bear Creek's acquisition of the Santa Ana Project, the Lima First Constitutional Court found, *inter alia*, that Bear Creek was the rightful title holder of the Karina Mining Concessions.[526] Thus, on multiple occasions, Peru recognized the validity of Bear Creek's approach to the acquisition of the mining rights in Santa Ana.

199. Third, Bear Creek was not the legal or *de facto* owner of the concessions prior to December 3, 2007, when it exercised its option. Option agreements do not confer any ownership rights, directly or indirectly, on the optionee before the exercise of the option; they merely grant the right to acquire the property at issue at a future date, at a determined price, and in this case, provided certain conditions precedent are met. Under the Option Agreements, if Bear Creek did not obtain the necessary supreme decree within 60 months of executing the Option Agreements, then the option would lapse and Ms. Villavicencio would be free to sell the Concessions or develop them, at her discretion.[527] Bear Creek's and Ms. Villavicencio's agreement did not

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permitted the tribunal to allow registration. A determination of the legality of the Option Agreements was expressly within the purview of the SUNARP Tribunal; in fact, it was required.

[524] **Exhibit C-0038**, SUNARP Decision § VII.

[525] **Exhibit C-0017**, Supreme Decree Application.

[526] **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

[527] **Exhibit C-0016**, Option Agreements Arts. 2.3.1 and 2.5.

confer direct or indirect ownership rights on Bear Creek, and violated neither the text nor the spirit of Article 71, which, as explained above, is to protect Peru from foreign territorial attacks.

200. Bear Creek acted in good faith and in compliance with the law in acquiring its investment, as demonstrated in this section, and Peru's allegations of illegality and bad faith therefore fail.

### 2. Respondent Is Estopped from Asserting Illegality or Bad Faith

201. Irrespective of whether Bear Creek lawfully acquired the Karina Mining Concessions (which it did), the Government is estopped under international and Peruvian law from arguing otherwise and asserting the alleged illegality of Claimant's investment. Bear Creek fully disclosed the manner in which it intended to acquire its investment as early as 2005 with the public registration of the Option Agreements, and Peru has been on notice since then. With that knowledge, Peru supported Bear Creek's acquisition of mineral rights over the Santa Ana area and only challenged the legality of the acquisition after it had unlawfully expropriated the Santa Ana Project years after it issued Supreme Decree 083. Peru should not be permitted to assert the alleged illegality of the acquisition of an investment in circumstances where no new facts actually have come to light, Peru supported that investment by issuing a supreme decree with knowledge of the facts surrounding the acquisition of that project, and Claimant relied on Peru's support in acquiring its investment.

202. International law recognizes the principle according to which "a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation."[528] As the ICJ stated in the *Argentine-Chile Frontier Case*:

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[528] **CL-0158**, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award on the Merits, Jun. 15, 1962, I.C.J. Reports 1962 at 39, Separate Opinion of Vice-President Alfaro, quoted in **CL-0159**, *Argentine-Chile Frontier Case (Arg. V. Chile)*, Award, Dec. 9, 1966, 16 R.I.A.A. at 109, 164 (1969).

> This principle is designated by a number of different terms, of which 'estoppel' and 'preclusion' are the most common. … Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (allegans contraria non audiendus est).[529]

203. The existence of a doctrine of estoppel or preclusion that prohibits inconsistency between a party's claims or defenses and its previous conduct is well established in international law.[530] ICSID tribunals have applied the principle of estoppel to prevent State parties from evading the effects of their past representations.[531] For example, the tribunal in *ADF* rejected the respondent State's arguments that the relevant agreements were illegal or unenforceable because the respondent had performed these agreements for several years and thereby led the claimant to believe that they were effective.[532]

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[529] **CL-0159**, *Argentine-Chile Frontier Case (Arg. V. Chile)*, Award, Dec. 9, 1966, 16 R.I.A.A. at 109, 164 (1969) (citing **CL-0158**, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award on the Merits, Jun. 15, 1962, I.C.J. Reports 1962, at 39, Separate Opinion of Vice-President Alfaro. *See also* **CL-0160**, *Legal Status of Eastern Greenland (Den. V. Nor.)*, Judgment, 1933 P.C.I.J., Ser. A/B, No. 53 at 68-69. **RLA-017**, *Mamidoil Jetoil Greek Pertroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, Mar. 30, 2015 ¶¶ 315-316 (*hereinafter* "*Mamidoil* Award") (citing *Kardassopolos v. Georgia* in which the tribunal rejected the respondent State's illegality claim because the State, acting under the cloak of State authority, had repeatedly confirmed the validity of the agreements the State claimed were illegal in the arbitration).

[530] *See* **CL-0161**, Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 Cal. L. Rev. 1777, 1779 (1986); **CL-0160**, *Legal Status of Eastern Greenland (Den. V. Nor.)*, Judgment, 1933 P.C.I.J., Ser. A/B, No. 53 at 73; **CL-0162**, *Case Concerning the Arbitral Award Made by the King of Spain (Honduras v. Nicaragua)* (1960) ICJ Reports 1960 at 213; **CL-0163**, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award on the Merits, Jun. 15, 1962, I.C.J. Reports 1962 at 62 (Separate Opinion of Sir Gerald Fitzmaurice).

[531] *See, e.g.*, **CL-060**, *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 ¶ 475; **CL-0164**, *Canfor Corp. v. United States*, NAFTA, Order of the Consolidated Tribunal, Sept. 7, 2005 ¶ 168; **CL-0165**, *Pan American Energy LLC, et al., v. The Argentine Republic,* ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006 ¶¶ 159-60; **CL-0166**, *Chevron Corp. and Texaco Petroleum Co., v. The Republic of Ecuador,* PCA Case No. AA277, Partial Award on the Merits, Mar. 30, 2010 ¶¶ 351-52.

[532] **CL-060**, *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 ¶ 475.

204. International public policy embraces a principle that is closely related to the doctrine of estoppel, namely *allegans contraria non audiendus est*. This principle expresses the international public policy that inconsistency between a party's claims or defenses and its previous conduct in connection therewith precludes that party from relying on such inconsistent position in a later proceeding. As an expression of international public policy, the principle of *allegans contraria non audiendus est* is among the "fundamental principles of law that are considered to be common among developed legal systems, and to have mandatory application, regardless of what the parties have agreed[.]"[533]

205. Peruvian law also recognizes the principle of estoppel. Under Peruvian law, a party is not allowed to act against the reliance created in a counterparty by its own prior conduct.[534] As Professor Bullard explains, the "*Doctrina de los Actos Propios,*" derived from the principle of good faith, establishes that when a party's conduct generates reliance in another party, such party has in practice (by its own conduct) waived such claims that would contradict its conduct, even if ordinarily this party would be entitled to assert those claims.[535]

206. Peru's position in this case that Bear Creek acquired its investment illegally contradicts years of its previous conduct vis-à-vis Bear Creek and the Santa Ana Project, and Peru is therefore estopped under international and Peruvian law from claiming illegality today.

207. There can be no doubt that the Government knew of Ms. Villavicencio's role in Bear Creek's acquisition of the mining rights over the Santa Ana area at the time it approved Bear Creek's application for a supreme decree and any argument Peru advances to the contrary is in bad faith. The Option Agreements into which Bear Creek had entered with Ms. Villavicencio

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533 **CL-0167**, G. Born, INTERNATIONAL COMMERCIAL ARBITRATION 2193-94 (2009).

534 Second Bullard Expert Report ¶ 94.

535 Second Bullard Expert Report ¶ 94.

had been publicly available and registered on a Peruvian Government database since 2005 and an organ of the Peruvian State – the SUNARP Registry Tribunal – determined and publicized its decision that the Option Agreements were valid and in compliance with Peruvian law on December 22, 2005.[536] Moreover, in mid-2006, the Government requested that Ms. Villavicencio amend the format of the land use agreement to reflect clearly that she was the counter-party.[537] Finally, on December 5, 2006, Bear Creek initiated the procedure to obtain the necessary authorizations to acquire the Karina Mining Concessions and to exercise its option under the Option Agreements. As noted above, as part of the application process, Bear Creek submitted these Option Agreements and disclosed that Ms. Villavicencio was Bear Creek's *apoderada* and that Bear Creek would pay all Concession fees and any taxes.[538]

208. MINEM,[539] the Ministry of Defense,[540] and the Vice-minister Secretary General of External Relations[541] all reviewed Bear Creek's application for a supreme decree, which included the Option Agreements and disclosed Bear Creek's relationship with Ms. Villavicencio's role, and granted the application. After almost a year of review and analysis of Bear Creek's application, on November 29, 2007, Peru enacted supreme Decree 083 declaring Bear Creek's investment a public necessity and approving Bear Creek's acquisition of the Karina Mining Concessions.[542] Supreme Decree 083 is signed by the President of Peru, Alan Garcia,

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536 **Exhibit C-0038**, SUNARP Decision § VII.

537 **Exhibit C-0139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006, p. 5. *See disc. supra* ¶ 31.

538 **Exhibit C-0017**, Supreme Decree Application.

539 **Exhibit C-0044**, Resolution issued by MINEM to the Ministry of Defense for the Authorization to Acquire Mineral Rights filed by Bear Creek Mining Company, Mar. 12, 2007.

540 **Exhibit C-0045**, Letter from the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces to the Secretary General of the Ministry of Defense, Jul. 26, 2007.

541 **Exhibit C-0046**, Letter from the Vice-minister Secretary General of External Relations to the Ministry of Mines, Sept. 26, 2007.

542 **Exhibit C-0004**, Supreme Decree No. 083-2007-EM, Nov. 29, 2007.

the President of the Council of Ministers, the Minister of Energy & Mines, and the Minister of Defense.[543] In reliance on Supreme Decree 083, Bear Creek exercised its option to acquire the Karina Mining Concessions on December 3, 2007.[544] Without express governmental authorization in the form of Supreme Decree 083, Bear Creek could not and would not have exercised its option, and Bear Creek would not have invested many millions of dollars in developing the Santa Ana Project subsequently between 2007 and 2011.

209. Over the course of more than three years following its enactment of Supreme Decree 083, the Government supported the Santa Ana Project, approved Bear Creek's PPC, and publicly acknowledged that revoking Supreme Decree 083 would be "completely illegal."[545] In fact, as Vice-Minister Gala, Peru's own witness, recently conceded in an interview, had it not been for the social conflict in Puno, the Government would have allowed Bear Creek to continue operating the Santa Ana Project: "If we [the Government] were sure that social issues would not be presented, the problem between the State and the company could be solved, so that the project could continue."[546] At the same time, Mr. Gala acknowledged that the social conflict in the Puno region was not a sufficient reason to revoke Supreme Decree 083.[547]

210. Moreover, as discussed above, at least three organs of the Peruvian State, acting under State authority, confirmed the legality of Bear Creek's acquisition of the mineral rights over Santa Ana through the Option Agreements.[548] Under similar circumstances, the tribunal in

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543 *Id.*

544 **Exhibit C-0015**, Transfer Agreements.

545 *See, e.g.*, **Exhibit C-0095**, *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTRO DE ENERGÍA Y MINAS, May 26, 2011 (Gala saying in May 2011 that derogating from SD 083 would be completely illegal).

546 **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013 at 114.

547 *Id.*

548 *See supra* at ¶ 197.

*Kardassopolos v. Georgia* rejected the respondent State's allegations that the tribunal lacked jurisdiction because the investor acquired its investment illegally:

> In the Tribunal's view, Respondent cannot simply avoid the legal effect of the representations and warranties set forth in the JVA [Joint Venture Agreement] and the Concession by arguing that they are contained in agreements which are void ab initio under Georgian law. **The assurances given to Claimant regarding the validity of the JVA and the Concession were endorsed by the Government itself, and some of the most senior Government officials of Georgia** (including, inter alia, President Gamsakhurdia, President Shevardnadze, Prime Minister Sigua and Prime Minister Gugushvili) **were closely involved in the negotiation of the JVA and the Concession.** The Tribunal also notes that the Concession was signed and "ratified" by the Ministry of Fuel and Energy, an organ of the Republic of Georgia.
>
> The Tribunal further observes that **in the years following the execution of the JVA and the Concession** by SakNavtobi and Transneft, respectively, **Georgia never protested nor claimed that these agreements were illegal under Georgian law.** In light of all of the above circumstances, the Tribunal is of the view that **Respondent created a legitimate expectation for Claimant that his investment was, indeed, made in accordance with Georgian law and, in the event of breach, would be entitled to treaty protection.**[549]

211. Similarly here, the Government knew of Bear Creek's acquisition plan for many years and supported the Santa Ana Project during that time. And Bear Creek relied on the Government's public support for its Santa Ana Project. Peru thus created a legitimate expectation for Bear Creek that its investment was made in accordance with Peruvian law, such that it would be entitled to treaty protection. Peru is estopped under international and Peruvian law from avoiding liability for its treaty breaches by alleging that Bear Creek acquired its investment illegally or in bad faith when there are no new circumstances of which Peru may have been unaware that have come to light.

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[549] **CL-0032**, *Ioannis Kardassopolos and Ron Fuchs v. Georgia*, ICSID Case No. ARB/05/18 and ARB/07/15, Award, Mar. 3, 2010 ¶ 192 (*hereinafter* "*Kardassopolos* Award") (emphasis added).

### 3. Neither Legality of the Investment nor Good Faith Is a Prerequisite for Access to International Arbitration Dispute Resolution Under the Canada-Peru FTA, the ICSID System, or International Law

212. Peru asserts that investment treaty arbitration and the ICSID arbitral system "do not protect investments that are illegal under the host State's law"[550] or that "violate the international law principle of good faith[.]"[551] Peru's arguments fail, however, for the following reasons.

213. First, contrary to many investment treaties, including treaties to which Peru is a contracting party,[552] the Canada-Peru FTA does not limit its scope of application to investments made in accordance with the laws of the host State. This so-called "legality requirement," which implies that investments made in violation of national laws are not protected,[553] is absent from the FTA. Article 847 of the Canada-Peru FTA defines the term "investment" without any reference to a legality requirement. Peru does not, nor can it, deny this. In fact, Article 816 of the Canada-Peru FTA, on special formalities and information requirements, suggests that the Contracting Parties agreed that the legality requirement would be explicitly excluded from the scope of the FTA:

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550 Respondent's Counter-Memorial ¶¶ 199-202.

551 *Id.* ¶¶ 203-206.

552 *See, e.g.*, **CL-0079**, Bilateral Investement Treaties to which Peru is a party and that grant fair and equitable treatment: Peru-Austrailia BIT § 1 ("For the purpose of this Agreement: (a) "investment" means every kind of asset, owned or controlled by investors of one Party **and admitted by the other Party subject to its law and investment policies** applicable form time [sic] and includes…"); Peru-China BIT § 1 ("The term "investment" means every kind of asset invested by investors of one Contracting Party **in accordance with the laws and regulations of the other Contracting Party** in the territory of the Latter [sic] [.]"); Peru-Switzerland BIT § 2(e) ("The term "investments" shall include every kind of assets and particularly: … (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as other rights given by law, by contract or by decision of the authority **in accordance with the law**.").

553 *See* **CL-0168**, Rudolf Dolzer and Christopher Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 93 (Oxford University Press, 2nd ed. 2012).

> Nothing in Article 803 [on national treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of covered investments, such as a requirement that investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.

Article 816 identifies the legality requirement as a special formality that the host State is entitled to adopt if it so wishes. This confirms that the legality requirement is neither an express nor an implied requirement under the FTA itself.

214. Investment tribunals have rejected respondent States' attempts (like Peru's here) to inject a legality requirement into the jurisdictional inquiry, where none exists. For example, the *Stati v. Kazakhstan* tribunal dismissed Kazakhstan's argument that the tribunal lacked jurisdiction because the claimant's investments were illegal on the basis that the Energy Charter Treaty ("ECT") under which the arbitration was brought did not contain a legality requirement.[554] The tribunal in *Liman Caspian Oil v. Kazakhstan* reached a similar conclusion.[555]

215. Second, contrary to Peru's assertions, legality and good faith are not independent bars to the Tribunal's *jurisdiction*. Although legality of the investment and good faith are principles of international law that the Tribunal may take into account in adjudicating the merits of Claimant's case, they are not independent jurisdictional hurdles.

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[554] **CL-0080**, *Anatolie Stati et al. v. The Republic of Kazakhstan*, SCC Arbitration V No. 116/2010, Award, Dec. 19, 2013, ¶ 812 ("Respondent has also argued that Claimants' investments were either illegal from the beginning or became so at a later stage. First, the Tribunal notes that the ECT contains no requirement in this regard. Indeed, if the contracting states had intended there to be such a requirement, they could have written it into the text of the Treaty … This consideration is even more valid in view of the extremely detailed definition of investment and other details regulated in the ECT. At least with regard to jurisdiction, the Tribunal does not see where such a requirement could come from.").

[555] **CL-0169**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts), Jun. 22, 2010, ¶ 187 (holding under the ECT that legality of the investment was not a jurisdictional hurdle).

216. In asserting that legality and good faith are requirements for ICSID jurisdiction, Peru relies on a laundry list of cases, including two that were subject to the UNCITRAL Rules: *Mamidoil*, *Yukos Universal* (UNCITRAL), *Khan Resources* (UNCITRAL), *Plama*, *Inceysa*, *Hamester*, *Flughafen Zurich*, *Phoenix Action*, and *Saur International*.[556] However, none of these cases provides the reasoned, unequivocal support for Respondent's position that Peru's selective quotations suggest. Moreover, not one of the awards on which Respondent relies held that a tribunal lacked jurisdiction solely on the basis of a supposed implicit requirement that the investor's investment be made in good faith and in compliance with the host State's law.[557]

217. In *Mamidoil*, a Greek investor asserted claims against Albania under the Greece-Albania BIT and the ECT. The former treaty contains an express legality requirement in Article 2, unlike the Canada-Peru FTA, and the tribunal's application and analysis thereof is consequently inapposite.[558] With respect to the ECT, the tribunal noted, without any analysis whatsoever, that investments must be made legally.[559] However, the tribunal ultimately held that

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[556] Respondent's Counter-Memorial n.346

[557] **RLA-017**, *Mamidoil* Award (upholding jurisdiction); **RLA-018**, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014 (declining to decide whether illegality is a jurisdictional or merits issue); **RLA-019**, *Khan Resources* Decision on Jurisdiction (deferring question of legality of the investment to merits); **CL-0104**, *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 (*hereinafter* "*Plama* Award") (holding that illegality of the investment impacts merits not jurisdiction); **RLA-021**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006 (*hereinafter* "*Inceysa Vallisoletana* Award") (rejecting jurisdiction at least in part because the applicable BIT, its *traveaux preparatoires*, and contemporaneous correspondence between the contracting parties evidenced the contracting parties' unambiguous intent to limit consent to arbitration to investments made in compliance with local law); **CL-0112**, *Flughafen Zürich A.G. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, Nov. 18, 2014 (*hereinafter* "*Flughafen* Award") (applying BIT with express legality requirement); **RLA-022**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, Jun. 18, 2010 (*hereinafter* "*Hamester* Award") (applying BIT with express legality requirement); **RLA-020**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009 (*hereinafter* "*Phoenix Action* Award") (upholding jurisdiction and applying BIT with express legality requirement); **RLA-023**, *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, Jun. 6, 2012 (*hereinafter* "*SAUR* Decision on Jurisdiction and Liability") (finding no proof of illegal conduct on the part of the investor).

[558] **RLA-017**, *Mamidoil* Award ¶ 292 (citing Greece-Albania BIT Article 2).

[559] *Id.* ¶¶ 293-94.

it had jurisdiction over the claimant's claim even though it found that the claimant's investment was tainted by procedural illegality.[560] The illegality of the claimant's investment thus did not defeat the ICSID tribunal's jurisdiction.

218. *Yukos Universal* and *Khan Resources*, two UNCITRAL cases, do not support Respondent's position that "ICSID jurisdiction cannot exist if a claimant obtains its investment by violating the host State's law."[561] In *Yukos*, the tribunal expressly declined to decide whether alleged illegality operates as a bar to jurisdiction or as a bar to substantive protections.[562] And in *Khan Resources*, the tribunal decided to "defer[] the question of whether Khan Netherlands [the claimant] ha[d] breached Mongolian law to the merits."[563]

219. *Plama*, as discussed in greater detail below, supports Claimant's position that any alleged illegality or bad faith on the part of Claimant might impact the Tribunal's adjudication of Claimant's case on the merits, but it does not defeat the Tribunal's jurisdiction.[564]

220. Respondent next cites *Inceysa*.[565] But in *Inceysa*, the *travaux préparatoires* and written communications between the contracting parties to the applicable BIT, El Salvador and Spain, as well as the BIT itself unequivocally demonstrated the contracting parties' intent to limit their consent to arbitration only to investments made "in accordance with the laws in force in

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560 *Id.* ¶¶ 491, 495.

561 Respondent's Counter-Memorial ¶ 199

562 **RLA-018**, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014 ¶ 1353 ("For reasons that will become apparent further in this chapter, the Tribunal does not need to decide here whether the legality requirement it reads into the ECT operates as a bar to jurisdiction or, as suggested in *Plama*, to deprive claimants of the substantive protections of the ECT.").

563 **RLA-019**, *Khan Resources Inc., et al. v. Government of Mongolia,* UNCITRAL, Decision on Jurisdiction, July 25, 2012 ¶ 385.

564 **CL-0104**, *Plama* Award ¶ 130; *see disc. infra* ¶¶ 223-224.

565 Respondent's Counter-Memorial n. 346, ¶¶ 203-204.

each of the Contracting Parties[.]"[566] The tribunal took note of this in its holding: "[T]his Tribunal can only declare its incompetence to hear Inceysa's complaint, since its investment cannot benefit from the protection of the BIT, *as established by the parties during the negotiations and the execution of the agreement [the BIT]*."[567] There is no such evidence in the present case.

221. In *Flughafen Zurich*, *Hamester*, and *Phoenix Action*, the respectively applicable BITs – the *lex specialis* – expressly and unambiguously required compliance with the host State's law and the tribunals' musings on general requirements of international law are therefore dicta.[568] *Hamester* and *Phoenix Action* also have been heavily criticized for their reasoning (or rather lack thereof) on the question of illegality as a jurisdictional hurdle.[569] Finally, although the tribunal in *SAUR* opined on the existence of an implicit requirement of legality and good faith, it undertook no analysis to substantiate this opinion and, in any event, declined to find illegality.[570]

222. Contrary to Respondent's assertions, "[m]ost tribunals [] have rejected any reading of the ICSID Convention, at least, that would import a sweeping jurisdictional requirement of lawfulness by implication[.]"[571] Professor Zachary Douglas articulated Claimant's position succinctly: "[A] plea by the respondent host State to the effect that the

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566 **RLA-021**, *Inceysa Vallisoletana* Award ¶¶ 192-96.

567 *Id.* ¶ 239.

568 **CL-0112**, *Flughafen* Award ¶ 131; **RLA-022**, *Hamester* Award ¶ 126; **RLA-020**, *Phoenix Action* Award ¶ 134. *See* **CL-0170**, Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, ICSID Review (2014) at 1-32, 17, 22-23 (*hereinafter* "Douglas").

569 **CL-0170**, Douglas at 1-32, 17, 22-23.

570 **RLA-023**, *SAUR* Decision on Jurisdiction and Liability ¶¶ 308, 311.

571 **CL-0171**, Aloysius Llamzon and Anthony C. Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct* in Albert Jan van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18 (© Kluwer Law International; Kluwer Law International 2015) at 498 (*hereinafter* "Llamzon & Sinclair").

claimant has violated its laws does not provide the basis for an objection to the tribunal's jurisdiction in any circumstances."[572] This position is the logical consequence of the near-universally recognized doctrines of separability and competence-competence.[573] In investment arbitration, absent an express clause in the applicable treaty conditioning jurisdiction on the legality of the investment, legality cannot defeat a tribunal's jurisdiction because the host State's consent to arbitration is contained in the applicable treaty rather than in the legal acts or agreements underlying the investment, and an investor's allegedly unlawful conduct cannot amend or nullify a treaty between the host State and the investor's home country.

223. In *Plama Consortium v. Republic of Bulgaria*, the respondent alleged that the claimant obtained the host State's approval to acquire the relevant investment (shares in an oil refinery company, Nova Plama) through fraudulent misrepresentation. The tribunal held that the respondent's allegations of fraudulent misrepresentation were not directed specifically at the parties' agreement to arbitrate, which was to be found in Article 26 of the ECT, even though the tribunal acknowledged and ultimately held that the investor obtained the investment illegally.[574] Rather, the tribunal found that:

> It is not in these documents [the State's approval of the claimant's privatization agreement permitting the share purchase] that the agreement to arbitrate is found. Bulgaria's agreement to arbitrate is found in the ECT, a multilateral treaty, a completely separate document. The Respondent has not alleged that the Claimant's purported misrepresentation nullified the ECT or its consent to arbitrate contained in the ECT. **Thus not only are the dispute settlement provisions of the ECT, including Article 26, autonomous and separable from Part III of that Treaty but they are independent of the entire Nova Plama**

[572] **CL-0170**, Douglas at 1-32, 17.

[573] *Id.* at 4-9.

[574] **CL-0172**, *Plama Consortium v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8 2005; **CL-0104**, *Plama* Award ¶ 143.

> **transaction; so even if the parties' agreement regarding the purchase of the Nova Plama is arguably invalid because of misrepresentation by the Claimant, the agreement to arbitrate remains effective.**[575]

224. The tribunal in *Plama* determined that the respondent State's allegations of illegality raised questions on the merits of the claimant's case, but did not affect the respondent State's consent to arbitration under the ECT and thus did not deprive the tribunal of jurisdiction. The tribunal ultimately held, following a full hearing on the merits, that the respondent proved its claim of fraudulent misrepresentation.[576] But the consequence of this finding was not the retroactive vitiation of the tribunal's jurisdiction; it was the dismissal of Plama's claims on the merits because its unlawful investment was not entitled to the *substantive* protections of the ECT.[577]

225. The *Malicorp v. Egypt* tribunal reached a similar conclusion, holding that under the doctrine of separability, "defects undermining the validity of the substantive legal relationship, which is the subject of the dispute on the merits, do not automatically undermine the validity of the arbitration agreement."[578] In *Malicorp*, the respondent State argued that the claimant obtained a concession by illegal means. Such illegality, the tribunal held, would not defeat the tribunal's jurisdiction because it did not vitiate the respondent's consent to arbitration contained in the applicable treaty. According to the tribunal, "[t]he offer to arbitrate [contained in the BIT] covers all disputes that might arise in relation to that investment, including its validity."[579]

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[575] **CL-0104**, *Plama* Award ¶ 130 (emphasis added).

[576] *Id.*

[577] *Id*. ¶ 143.

[578] **CL-0173**, *Malicorp v. Egypt*, ICSID Case No. ARB/08/18, Award, Feb. 7, 2011 ¶ 119.

[579] *Id.*

226. *Liman Caspian Oil v. Kazakhstan* reached the same result: "[T]he Tribunal considers that the scope of Respondent's consent to jurisdiction must be understood to extend also to those investments in respect of which the underlying transaction was made in breach of Kazakh law[.]"[580] The tribunal proceeded to state that even if the investment is ultimately found to violate the host State's law "from the very beginning[,] it could be argued that the investment had still been made" and that consequently the investment would still fall within the jurisdiction of the tribunal.[581] Similarly, the tribunal in *Arif v. Moldova* noted that the 'normative power of facticity' "requires illegality in a case like the present one to be treated as an issue of liability and not jurisdiction."[582] The doctrines of separability and competence-competence mandate that pleas of illegality be regarded as questions on the merits of an investor's claim rather than jurisdictional hurdles, which is sound policy and practice.[583] Respondent, as the party advocating that illegality is a jurisdictional impediment implied by international law and the ICSID system, bears the burden of persuasion to demonstrate otherwise.[584]

227. Third, and finally, Respondent's argument that good faith is an independent pre-requisite to jurisdiction under ICSID and international law is similarly misguided. Respondent relies primarily on *Phoenix Action*, *SAUR*, and *Inceysa* for the proposition that investments not made in good faith are not entitled to protection in investment arbitration.[585] However, while

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580 **CL-0169**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts), Jun. 22, 2010 ¶ 187.

581 *Id.*

582 **CL-0113**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013, ¶ 376 (*hereinafter* "*Franck Charles* Award").

583 *See generally* **CL-0170**, Douglas.

584 *Id.* at 17.

585 Respondent's Counter-Memorial ¶¶ 199-206.

international law recognizes the principle of good faith, that principle does not itself constitute a prerequisite to the jurisdiction of an investment arbitration tribunal.

228. According to Llamzon and Sinclair, "[t]he difficulty in identifying with precision what a lack of good faith might be, independent of fraud (including deceit and misrepresentation) or other specific violations of host State law, places this putative form of investor wrongdoing at an unhelpful degree of abstraction… good faith cannot, by itself, identify how, by what rules, and under what conditions a purported lack of good faith actually occurs."[586] In each of the decisions on which Respondent relies, the tribunal found a basis independent of bad faith to support a finding that it lacked jurisdiction due to investor wrongdoing.[587] Good faith cannot, by itself, vitiate a tribunal's jurisdiction over an investor's claim and thus, if the Tribunal finds that Claimant acted in accordance with Peruvian law, Peru's allegations of bad faith cannot defeat the Tribunal's jurisdiction.

229. The holding of the tribunal in *Saba Fakes* is particularly instructive:

> The principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be 'legal' or 'illegal,' made in "good faith" or not, it nonetheless remains an investment. **The expressions 'legal investment' or 'investment made in good faith' are not pleonasms, and the expressions 'illegal investment' or 'investment made in bad faith' are not oxymorons. … While a treaty should be interpreted and applied in good faith, this is a general requirement under treaty law, from which an additional criterion of 'good faith' for the definition of investments, which was not contemplated by the text of the ICSID Convention, cannot be derived**.[588]

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[586] **CL-0171**, Llamzon & Sinclair.

[587] *See disc*. ¶¶ 216 *et. seq*. *supra*.

[588] **CL-0174**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010 ¶¶ 112-113 (emphasis added).

230. In conclusion, even if Claimant had made its investment in violation of Peruvian law and in bad faith, which it did not, and even if Respondent were not estopped from claiming illegality, legality and good faith would not vitiate the Tribunal's jurisdiction.

### B. THERE IS AN INVESTMENT UPON WHICH THE TRIBUNAL CAN BASE ITS JURISDICTION

231. Peru argues that, under Peruvian law, Bear Creek's concession rights would revert to the State such that no investment exists upon which the Tribunal can base its jurisdiction.[589] This assertion rests on two assumptions, both of which are equally without merit.

232. First, Peru presumes that "Peruvian law would nonetheless dictate that the Tribunal lacks jurisdiction."[590] But Peruvian law is not relevant to the Tribunal's jurisdictional inquiry given the precise text of the Canada-Peru FTA. The terms of the Canada-Peru FTA and the ICSID Convention are the relevant instruments that govern this Tribunal's jurisdiction, including the definition of investment.[591] The Canada-Peru FTA is *lex specialis* and as such, prevails over any other source of law applicable to the dispute.[592] Thus, the definition of investment contained in the Canada-Peru FTA is the definition this Tribunal must apply to determine whether Bear Creek's investment is a protected investment for jurisdictional purposes. Investment tribunals have maintained this position repeatedly, even when the applicable investment treaty contained a definition of investment that referenced the host state's law (which, as discussed above, the Canada-Peru FTA lacks): "a host state's domestic law concerns not the

589 Respondent's Counter-Memorial ¶¶ 215-216.

590 Respondent's Counter Memorial ¶ 215.

591 **Exhibit C-0001**, Canada-Peru FTA §§ 824-825, 847; **CL-0175**, ICSID Convention, Regulations and Rules, April 2006, Article 25.

592 *See, e.g.*, **CL-0036**, *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, Jun. 27, 1990, 30 I.L.M. 580, (1991) ¶ 54.

definition of the term 'investment' but solely the legality of the investment."[593] As Bear Creek explained in Section III.A.3., the Canada-Peru FTA defines the term "investment" without reference to a legality requirement, which in any event would be a merits issue, not a jurisdictional issue. Moreover, Claimant has shown that its investment was legal (Section III.A.1 above), such that Peru's contentions have no legal or factual merit.

233. Second, Peru posits that Bear Creek allegedly violated Peruvian law by obtaining "the Santa Ana Concession rights without a public necessity declaration," such that the Tribunal should conclude that "no investment—and no jurisdiction—exists."[594] But Peru's argument is based on a false factual premise. There can be no question that Bear Creek exercised its option under the Option Agreements only after it lawfully obtained a public necessity declaration from Peru. As Peru explained, "[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."[595] Here, "[t]he 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."[596] Bear Creek acquired the Santa Ana Concessions from Ms. Villavicencio on December 3, 2007.[597] Bear Creek's conduct prior to its acquisition of the Santa Ana Concessions is

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[593] *See* **CL-0168,** Rudolf Dolzer and Christopher Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 64 (Oxford University Press, 2nd ed. 2012) (citing *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction, Apr. 29, 2004 ¶¶ 83 *et seq*; *Yaung Chi Oo v. Myanmar*, March 31, 2003, ¶¶ 53-62; *LESI—Dispenta v. Algeria*, Award, Jan. 10, 2005, ¶ 24(iii); *Plama v. Bulgaria*, Decision on Jurisdiction, Feb. 8, 2005, ¶¶ 126-31; *Gas Natural v. Argentina*, Decision on Jurisdiction, June 17, 2005, ¶¶ 33-34; *Aguas del Tunaria v. Bolivia*, Decision on Jurisdiction, Oct. 21, 2005, ¶¶ 139-55, *Bayindir v. Pakistan*, Decision on Jurisdiction, Nov. 14, 2005, ¶¶ 105-10; *Saluka v. Czech Republic*, Partial Award, March 17, 2006 ¶¶ 183, 202-21; *Inceysa v. El Salvador*, Award, Aug. 2, 2006 ¶¶ 190-207).

[594] Respondent's Counter-Memorial ¶ 216.

[595] *Id.* ¶ 29.

[596] *Id.* ¶ 57.

[597] **Exhibit C-0015**, Transfer Agreements.

irrelevant for purposes of jurisdiction but, in any event, its acquisition complied with Peruvian law and practices of the industry and was executed in good faith.

234. In sum, Peru's argument that there is no investment upon which the Tribunal's jurisdiction rests is premised on two faulty assumptions, namely that (i) Peruvian law applies to the definition of "investment" under the Canada-Peru FTA (it does not), and (ii) Bear Creek acquired the Santa Ana Concessions without a public necessity declaration in hand (it did not). As Claimant previously explained, Bear Creek has a protected investment under the Canada-Peru FTA, which defines "investment" as including: (1) an enterprise, meaning, "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;"[598] (2) any "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes;"[599] and (3) "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under: (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, … ."[600] Bear Creek, a Canadian privately-owned enterprise, lawfully obtained the approval from the Peruvian State to acquire and operate the mining concessions comprising the Santa Ana Project. With that approval in hand, Bear Creek acquired the Santa Ana Concessions to engage in mining activity for an economic benefit.[601] For years, Bear Creek engaged in extensive and costly exploration and development

[598] **Exhibit C-0001**, Canada-Peru FTA, Article 847.

[599] *Id.*

[600] *Id.*

[601] *See also* Claimant's Memorial ¶¶ 105-111.

efforts, which resulted in the discovery of significant economic silver mineralization in the area.[602] Thus, Bear Creek's investment in Peru is exactly the type of protected investment under the terms of the Canada-Peru FTA. Peru's *ex post facto* branding of the Santa Ana Concessions as "illegal" is nothing more than an attempt to avoid the consequences of its wrongful conduct.[603]

### C. CLAIMANT HELD THE RIGHTS UPON WHICH IT BASES ITS CLAIM

235. Peru argues that this Tribunal lacks jurisdiction because Bear Creek purportedly never obtained "the right upon which it bases its claim, *i.e.*, the right to operate a 'mining project' at Santa Ana."[604] The Tribunal should reject Peru's contention for the following four main reasons.

236. First, Peru improperly seeks to limit and minimize the scope and nature of Bear Creek's protected investment in Peru. According to Peru, Bear Creek's investment consists only of "a right to seek the right to mine at Santa Ana and Corani."[605] Peru purposely misconstrues and ignores: (i) The approval that Bear Creek sought and obtained from Peru, which "included: (1) the finding of 'public necessity,' that is required for foreign ownership of mineral concessions in the border region and (2) the express authorization for Claimant to acquire mining rights in the border region;"[606] (ii) Bear Creek's actual acquisition of the seven mining concessions comprising the Santa Ana Project as well as Bear Creek's acquisition of the Corani Project;[607] (iii) the many years Bear Creek engaged in extensive and costly exploration and

602 *See id.* ¶¶ 44 *et seq.*

603 **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Univesidad Católica del Perú, Nov. 18, 2013.

604 Respondent's Counter-Memorial ¶¶ 217-221.

605 *Id.* ¶ 220.

606 Respondent's Rejoinder on Claimant's Request for Provisional Measures, Mar. 16, 2015 ¶ 28 (emphasis added) (*hereinafter* "Respondent's Rejoinder on Provisional Measures").

607 *See* Claimant's Memorial ¶¶ 105-111.

development efforts in Peru;[608] which (iv) resulted in the discovery of significant economic silver mineralization in the area.[609] It is now uncontroversial in investment arbitration law that "an investment typically consists of several interrelated economic activities each of which should not be viewed in isolation."[610] Thus, Peru's attempt to focus on a single aspect of Bear Creek's investment, to the exclusion of the entirety of its investment, should be rejected.

237. Second, at all relevant times, Bear Creek held the rights on which it bases its claim. As Professor Bullard explains, Bear Creek "validly acquired a property right over mining concessions within 50 kilometers of the Bolivian border, because: (i) it obtained the declaration of public necessity from the Council of Ministers, authorizing it to own property, in compliance with all the requirements prescribed by Peruvian law; and (ii) it obtained property of the mining concessions through acquisition contracts which were based on valid option contracts."[611] These mining concessions entailed many rights, including the right to exploit mineral resources. As explained by Peruvian mining law expert and former Minister of Energy and Mines, Hans Flury, a mining concession carries with it the rights to:

- "[E]xplore and exploit mineral resources granted."[612]
- "[U]se and enjoyment of the natural resource granted and, consequently, the property of the fruits and products that are extracted."[613]
- "[A] right in rem … consist[ing] of the sum of the attributes that this law recognizes in favor of the concessionaire.[614]

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608 *See id.* ¶¶ 44 e*t seq.*

609 *See id.* ¶¶ 44 *et seq.,* 105-110.

610 *See* **CL-0168,** Rudolf Dolzer and Christopher Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 61 (Oxford University Press, 2nd ed. 2012).

611 Second Bullard Expert Report ¶ 3(a).

612 **Bullard Exhibit 031**, Decreto Supremo No. 014-92-EM, Ley General de Minería, Art. 9, **Flury Exhibit 002**, Ley de Promoción de Inversiones en el Sector Minero, Decreto Legislativo No. 708, Nov. 13, 1991, Art. 20.

613 **Exhibit R-142**, Organic Law for the Sustainable Use of Natural Resources, Law No. 26821 ("Law Bi, 26821"), Article 23, Jun. 25, 1997.

614 **Bullard Exhibit 031**, Decreto Supremo No. 014-92-EM, Ley General de Minería, Art. 10.

- These rights "are irrevocable provided the holder meets the obligations that this law or special legislation requires to maintain its validity.[615]

In short, Bear Creek held an ascertainable set of rights, including the right to own and exploit the mineral concessions it lawfully acquired, which form the basis of its claim in these proceedings.

238. Notably, Peru conflates the existence of these rights (*i.e.*, the existence of a right to exploit the mineral rights) with the need to obtain the requested permits and licenses to build and operate a mine (*i.e.*, the necessary approvals to exercise the right to exploit the mineral rights). But Peru's conflated theory ignores both the facts of this case as well as Peru's own prior admissions regarding Bear Creek's ownership of these concessions and the mineral rights attached to them. Specifically, Peru admitted that Bear Creek owned mining concessions and mining rights in Peru, while asserting that Peru is entitled to investigate the manner "in which Claimant acquired the mineral concessions that are essential to the Santa Ana Project."[616] Peru also explained that "one possible outcome of the MINEM lawsuit [was] reversion of the mineral rights to Peru."[617] Similarly, in resolving Bear Creek's *amparo* request against Supreme Decree 032, the Lima First Constitutional Court repeatedly referred to Bear Creek's "rights" as having been created by Supreme Decree 083 and explained that "there is no justified purpose for bringing an action by the State to reverse the rights granted to [Bear Creek]."[618] In short, Peru's claim that Bear Creek "does not own the investments upon which it bases it claims" should be rejected.[619]

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615 *Id*.

616 Respondent's Rejoinder on Provisional Measures ¶ 6 (emphasis added).

617 Respondent's Response to Claimant's Request for Provisional Measures, Feb. 6, 2015 ¶ 30 (emphasis added).

618 **Exhibit C-0006**, Amparo Decision No. 28, rendered by the Lima First Constitutional Court, May 12, 2014, Ninth Whereas (emphasis added).

619 Respondent's Counter-Memorial § III.C.

239. Third, even if Bear Creek only had "a mining exploration project," as asserted by Peru, this would still be a protected investment. The relevant inquiry is whether Bear Creek's investments and business activities in Peru fall within the Canada-Peru FTA definition of investment—which they do—regardless of their characterization as a mining project or, as Peru would have it, "a mining exploration project." Indeed, international tribunals analyzing BIT-related claims have afforded protection to diverse types of investments, including tangible and intangible property as well as contractual rights and returns on investments.[620] As Claimant explained in Section III.C, Bear Creek's investment falls within the Canada-Peru FTA's definition of investment.

240. Lastly, in any case, Peru cannot argue that Bear Creek had no right to mine when Peru's own actions thwarted the development of the project and prevented Bear Creek from obtaining all requisite permits and authorizations. Under international law, a state cannot benefit from its own wrongdoing. As explained by Professor Cheng, "[a] State may not invoke its own illegal act to diminish its own liability."[621] The 1927 *Chorzow Factory Case* succinctly stated:

> It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that **one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from**

[620] **CL-0049**, *Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Iran-U.S. Claims Trib., Case No. 39, Chamber 2, Award No. 425-39-2, Jun. 29, 1989 ¶ 105 (analyzing rights arising from a concession agreement, which it held were illegally expropriated); **CL-0040**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 116 (*hereinafter* "*Tecmed* Award") (holding that "under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary").

[621] **CL-0176**, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS at 149 (Cambridge University Press 2006) (discussing the principle of *Nullus Commodum Capere De Sua Injuria Propria*).

> **fulfilling the obligation in question,** or from having recourse to the tribunal which would have been open, to him.[622]

In other words, Peru cannot argue that Bear Creek would not have obtained the requisite permits, when Bear Creek cannot prove Peru wrong precisely because Peru revoked Bear Creek's right to mine and thus prohibited Bear Creek from engaging in the permitting process.[623] Finding otherwise would allow Peru to benefit from its wrongdoing, in contravention of international law.

## IV. PERU UNLAWFULLY EXPROPRIATED BEAR CREEK'S MINING RIGHTS

241. Peru unlawfully expropriated Bear Creek's investment in Santa Ana by issuing Supreme Decree 032. In doing this, Peru violated the Canada-Peru FTA which prohibits Peru from expropriating protected investments "except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation."[624] As Claimant explained in its Memorial on the Merits, Peru's issuance of Supreme Decree 032 does not comply with any of the FTA requirements for a lawful expropriation.[625] Thus, Bear Creek suffered the most severe form of interference with property: expropriation without compensation.[626]

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622 **CL-0177**, *Case Concerning The Factory at Chorzów (Germ. v. Pol.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 9 (July 26, 1927) ¶ 87 (emphasis added).

623 In any event, as Mr. Flury opines, "if the State acted in good faith in the processing of permits, as was its obligation and its practice, it was reasonable to expect that Bear Creek would have had the necessary permits to commence the construction of the Santa Ana Project in the second half of 2011 and production in the last quarter of 2012 as scheduled." Flury Expert Report ¶ 113.

624 **Exhibit C-0001**, Canada-Peru FTA, Article 812.1.

625 Claimant's Memorial ¶¶ 67-78.

626 *See* **CL-0168,** Rudolf Dolzer and Christopher Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 98 (Oxford University Press, 2nd ed. 2012) (explaining that "[e]xpropriation is the most severe form of interference with property. All expectations of the investor are destroyed if the investment is taken without adequate compensation").

242. Peru attacks Claimant for not specifying "whether it is alleging direct or indirect expropriation."[627] Peru misses the point. Supreme Decree 032 constitutes an illegal taking of property regardless of its classification as direct or indirect expropriation. Any objective observer reviewing the facts of this case would conclude that Supreme Decree 032 was a specific taking of property, without compensation, targeting one particular investor, in a discriminatory manner and without due process of law, all of which engages Peru's international responsibility.

243. Peru insists that "Claimant's only plausible argument is that Supreme Decree No. 032 indirectly expropriated its investment"[628] because "Supreme Decree No. 032 does not transfer ownership of the Santa Ana concessions to the State,"[629] and that such claim fails because "Claimant cannot identify any 'rare circumstance' upon which to base its claim," as the FTA purportedly demands.[630] As further discussed below, however, even on Peru's own case that this is an indirect expropriation claim, there can be no doubt that Supreme Decree 032 constitutes an indirect expropriation of Bear Creek's mining rights (**Section IV.A**). This expropriatory measure was not taken against prompt, adequate, and effective compensation (**Section IV.B**), was not for a public purpose (**Section IV.C**), and was not conducted in accordance with due process of law and was arbitrary and discriminatory (**Section IV.D**).

244. Peru's defense that Supreme Decree 032 "is not expropriatory because it is a legitimate exercise of Peru's sovereign police powers"[631] fails (**Section IV.E**.) Simply stated, the exercise of sovereign police powers—which Peru's own witnesses admit was exercised

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627 Respondent's Counter-Memorial ¶ 250.

628 *Id.* ¶ 250 (emphasis in original).

629 *Id.* ¶ 251.

630 *Id.* ¶ 253.

631 *Id.* ¶ 250.

*wrongfully*[632]—is not a complete defense to expropriation under the terms of the Canada-Peru FTA. A lawful expropriation under the FTA—whether it is direct or indirect—requires compliance with the stringent conditions and requirements set forth in Article 812(1) of the FTA, which Peru has wholly disregarded. In any event, a State's sovereign police powers are not without limit. Peru cannot abuse its so-called sovereign powers without incurring international liability.

245. In the alternative, the blatant, arbitrary, and destructive nature of Peru's measures against Bear Creek constitutes a direct expropriation of Bear Creek's investment **(Section IV.F).** Contrary to Peru's blanket assertion that Supreme Decree 032 "did not directly revoke any of [Claimant's] property rights,"[633] Supreme Decree 032 did just that: it revoked Bear Creek's right to acquire and own the Santa Ana Concessions that Supreme Decree 083 embodied. Without that express right, Bear Creek could not have acquired the Santa Ana Concessions, and today, Bear Creek is not permitted to conduct any activity in connection with these Concessions. Supreme Decree 083 was the *sine qua non* of the entire Santa Ana Project; it was an intrinsic and essential component of Bear Creek's property right in the Santa Ana Project. Peru's revocation of Supreme Decree 083 constitutes a forcible—and unlawful—taking of Bear Creek's property, for which Peru must compensate Bear Creek.

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[632] **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013; First Bullard Expert Report ¶ 18(n) (explaining that "[t]he derogation does not constitute a proper procedure to withdraw an authorization granted under Article 71 of the Constitution, as is the case of SD. 083-2007-EM. The derogation is a legal concept solely applied to leaving without effect regulations possessing a regulatory nature); Second Bullard Expert Report ¶ 3(c) (concluding that "[t]he Peruvian State unlawfully impaired BEAR CREEK's property right by not complying with the revocation process or the expropriation process, wherefore it carried out an unlawful expropriation, which is nothing but a confiscation of property.").

[633] Respondent's Counter-Memorial ¶ 251.

### A. PERU INDIRECTLY EXPROPRIATED BEAR CREEK'S MINING CONCESSIONS IN VIOLATION OF THE CANADA-PERU FTA

246. Supreme Decree 032 indirectly expropriated Bear Creek's investment in Santa Ana in violation of the Canada-Peru FTA. Article 812(1) of the Canada-Peru FTA sets forth the general prohibition against direct and indirect expropriation unless specific criteria are met. The FTA further specifies that Article 812(1) "shall be interpreted in accordance with Annex 812.1."[634] In turn, Annex 812.1 provides a specific definition of what constitutes "indirect expropriation," namely:[635]

> (a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
>
> (b) The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact- based inquiry that considers, among other factors:
>
> i. the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
>
> ii. the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations, and
>
> iii. the character of the measure or series of measures;
>
> (c) Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be 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.

247. Thus, to determine whether Supreme Decree 032 constitutes an indirect expropriation of Bear Creek's investment, the Tribunal first must conduct a "case-by-case, fact-

634 **Exhibit C-0001**, Canada-Peru FTA, Article 812(1), n.3.

635 *Id.* Annex 812.1.

based inquiry" that considers a number of factors, including the three factors listed at Annex 812.1(b).[636] As Claimant will demonstrate below (and as Peru did not dispute in its Counter-Memorial), this fact-based inquiry should lead the Tribunal to conclude that Supreme Decree 032 indirectly expropriated Bear Creek's investment (**Section IV.A.1**). The Tribunal then should consider whether the language in Annex 812.1(c) impacts its conclusion in any way, *i.e.*, whether Supreme Decree 032 is a non-discriminatory measure that was designed and applied to protect legitimate public welfare objectives. As Bear Creek will demonstrate in **Section IV.A.2** below, this is simply not the case. But even if the Tribunal were to find that Supreme Decree 032 conforms to the aforementioned characteristics, it still may—and indeed should—conclude that the circumstances in this case warrant a finding of indirect expropriation, at the very least because Supreme Decree 032 was "so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith."

### 1. Supreme Decree 032 Constitutes an Indirect Expropriation

248. Starting with the "case-by-case, fact-based inquiry" mandated by Annex 812.1(b), Peru does not dispute that such inquiry—which in fact Peru does not address at all—exposes Supreme Decree 032 as an expropriatory measure.

249. *Supreme Decree 032 had a substantial, adverse economic impact on the value of Bear Creek's investment*. The first factor listed in Annex 812.1(b) is the economic impact of the

[636] The indirect expropriation standard set forth in Annex 812.1 of the Canada-Peru FTA has its roots in the United States' 2004 Model Bilateral Investment Treaty (the "U.S. Model BIT"), which in turn borrows from U.S. jurisprudence interpreting regulatory takings and the Fifth Amendment of the U.S. Constitution. *See* **CL-0178**, Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test*?, 30 NW. J. INT' L. & BUS. 339, 344 (2010). As one commentator noted, this language "incorporates the *Penn Central* test" under U.S. law, which is foreign to both the Canadian and Peruvian legal systems. "[A]lthough the test is drawn from *Penn Central*, it is not beholden to *Penn Central* itself. It is not a part of a larger case and its specific facts, but a provision of a treaty with no specific facts. Also, the interpretation of an international treaty is not beholden to the case law of one (and only one) of the treaty's signatories." *Id.* at 364. As further noted by this commentator, the "test is increasingly popular, perhaps precisely because no one knows what it actually means." *Id.* at 344.

measure or series of measures. This factor inquires whether Claimant "was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto—such as the income or benefits related to … exploitation—had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss."[637] As the *Tecmed* tribunal explained, "[t]his determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure … and a *de facto* expropriation that deprives those assets and rights of any real substance."[638]

250. *Here*, it is undeniable that Supreme Decree 032 rendered Bear Creek's investment worthless and incapable of sale since it has been reduced to mining concessions to which Bear Creek "does not possess 'clean title'"[639] (the Santa Ana Project), with a resulting reduction in value reaching US$ 170.6 million for the Corani Project.[640] Supreme Decree 032 stripped away Bear Creek's "constitutionally required authorizations that are needed 'to acquire or possess' the border-zone mining concessions that are the subject of this arbitration."[641] Thus, Bear Creek can "not [] lawfully [] do anything with" its mining concessions located in Santa Ana, and the development of the Corani Project has been compromised substantially.[642] The Corani Project always has been closely intertwined with the Santa Ana Project.[643] In fact, as Bear Creek

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637 **CL-0040**, *Tecmed* Award ¶ 115.

638 *Id.*

639 Respondent's Rejoinder on Provisional Measures ¶ 30. In other words, "there is not even the possibility that BEAR CREEK could sell its property right to third parties, since its property is unauthorized and has been declared illegal by the State." Second Bullard Expert Report ¶ 131.

640 Claimant's Memorial ¶ 244.

641 Respondent's Rejoinder on Provisional Measures ¶ 28.

642 *Id.*

643 Swarthout Witness Statement ¶ 46.

explained, the development of the Corani Project depended on Santa Ana's success.[644] Thus, if Bear Creek can "not [] lawfully [] do anything with" the Santa Ana Project, the value and success of the Corani Project is undeniably impacted. In short, Supreme Decree 032 radically deprived Bear Creek of the economical use and enjoyment of its investment.

251. *Supreme Decree 032 interfered with Bear Creek's reasonable, investment-backed expectations*. The second factor listed in Annex 812.1(b) is the extent to which the measure interferes with distinct, reasonable investment-backed expectations, *i.e.*, whether "the Claimant's expectation was that of a long-term investment relying on the recovery of its investment and the estimated return through the operation of the [investment] during its entire useful life," and whether that expectation was reasonable.[645]

252. In the instant case, Bear Creek purchased seven mining concessions on the basis of Peru's grant to Bear Creek of the right to own and operate mining concessions in a border zone (*i.e.*, Supreme Decree 083).[646] After an extensive and lengthy vetting process, Peru's Supreme Decree 083 declared that the Santa Ana Project was a public necessity, *i.e.*, an "investment … in productive activities conducted or to be conducted in the border areas of the country."[647] On that basis, Bear Creek exercised its options under the Option Agreements and

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644 Claimant's Memorial ¶ 56.

645 **CL-0040**, *Tecmed* Award ¶ 149.

646 Swarthout Witness Statement ¶¶ 15, 26-29.

647 **Bullard Exhbit 004**, Article 13, Law 27444, Law on General Administrative Procedure ("Article 13. Pursuant to that set forth in the final paragraph of Article 126 of the Political Constitution the private investment, **national and foreign, in productive activities conducted or to be conducted in the border areas of the country is hereby declared as a national necessity**. Consequently, individuals and legal entities may acquire concessions and rights over mines, lands, woods, water, fuel or energy sources and other resources, **necessary for the development of their productive activities within the fifty kilometers from the border of the country border**, with prior authorization granted by way of a Supreme Resolution endorsed by the Minister that holds the office of President of the Council of Ministers and the Minister of the Corresponding Sector. Such Supreme Resolution may establish the conditions to which the acquisition or exploitation is subject. The competent sectorial authorities shall grant the concession and other forms of authorization for the exploitation of natural resources located within the fifty kilometers from the country's border in favor of individuals or legal

acquired seven mining concessions and invested tens of millions of dollars in developing the Santa Ana Project, with the expectation that it would engage in mining activity for an economic benefit, and that Peru would not interfere with those rights arbitrarily, discriminatorily, and without due process of law. Bear Creek reasonably expected that the authorization granted in Supreme Decree 083 would last as long as Bear Creek, as a foreign national, did not pose an external threat to Peru's national security.[648] Supreme Decree 032 shattered every single one of those expectations.

253. *Supreme Decree 032 individually targets Bear Creek for political reasons*. The third factor listed in Annex 812.1(b) "takes account of the nature and character of the measure, including … 'whether the interference with property can be characterized as a physical invasion by government or whether it is regulatory in nature, *i.e.,* it arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'"[649] Supreme Decree 032 does not "arise from a public program" nor can it be deemed an abstract measure of general regulatory character. To the contrary, Supreme Decree 032 individually targets Bear Creek and specifically terminates its previously-granted rights. "The fact that [] [S]upreme [D]ecree [032] also contains, in its article 2, a general provision in no way changes the nature of the administrative act contained in article 1,"[650] which is definite and motivated by political pressure. As detailed herein, Peru caved to—in the words of former President Alan Garcia — "electoral interests" and opted for the "easy way out policy,"[651] issuing Supreme Decree 032

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entities that request it, subject to compliance with the applicable legal provisions and prior verification that the supreme resolution referred to in the preceding paragraph has been issued.") (emphasis added).

[648] *See, e.g.,* Second Bullard Expert Report, ¶ 28, 125, 140.

[649] **CL-0179**, Chester Brown, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791 (Oxford 2013) (discussing the U.S. BIT model where these elements were first listed).

[650] Second Bullard Expert Report ¶ 130.

[651] **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011.

outside of the legal process established for administrative acts and in violation of Bear Creek's due process rights. Thus, the character of Supreme Decree 032 favors a finding of indirect expropriation.

### 2. Annex 812(c) of the Canada-Peru FTA Does Not Exonerate Peru from Liability for Indirect Expropriation

254. Rather than disputing that Bear Creek has established the aforementioned elements, Peru focuses on the language in Annex 812.1(c) seeking to abscond from liability for indirect expropriation. Peru argues that there cannot be an indirect expropriation unless "Claimant can prove that the enactment of Supreme Decree 032: (i) represents a 'rare circumstance,' (ii) is discriminatory, or (iii) was not designed to protect public safety."[652] Peru contends that Bear Creek has not proven any of these elements.[653]

255. Peru's argument fails for three reasons. *First,* contrary to Peru's assertion, Annex 812.1(c) of the FTA does not impose "a very high bar [on Claimant] in proving that its circumstances are in fact 'rare'" (**Section IV.A.2(a)**).[654] *Second*, Annex 812.1(c) requires proportionality between the impact of the measure and its purpose, something that is wholly lacking in Supreme Decree 032 (**Section IV.A.2(b)**). *Third*, Supreme Decree 032 is a discriminatory measure that was not designed and applied to protect legitimate public welfare objectives (**Section IV.A.2(c)**). *Lastly*, even if Supreme Decree 032 were a non-discriminatory measure that was designed and applied to protect legitimate public welfare objectives (which it is not), the circumstances in which Supreme Decree was issued would still warrant a finding that Peru indirectly expropriated Bear Creek's investment (**Section IV.A.2(d)**).

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652 Respondent's Counter-Memorial ¶ 254.

653 *Id.*

654 *Id.* ¶ 255.

*a. Annex 812.1(c) of the FTA Does Not Impose a New "Very High Bar" on Indirect Expropriation Claims*

256. Although Peru acknowledges that the FTA does not define the term "rare circumstances,"[655] Peru points to the example of a bad faith regulation contained in Annex 812.1(c) to posit that 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'."[656] For Peru, the reference to "rare circumstances" in Annex 812.1(c) of the FTA imposes an "elevated standard" that "Claimant cannot meet."[657] However, the plain text of the FTA says neither of these things, and Peru points to no authority or evidence to support its assertion. If the Contracting Parties had wanted to create "a very high bar" or a new "elevated standard," then they would have said so expressly in the text of the FTA.

257. As noted by scholars, the language in Annex 812.(c) "does not state what level of scrutiny to apply to a law in determining whether it has 'legitimate public welfare objectives.'"[658] In practice, this means that "the extreme deference under U.S. law afforded legislatures in presuming that a law almost always *does* have a legitimate public welfare objective need not be present in an arbitral panel interpreting a BIT under [the] Annex."[659] In other words, "the absence of clearly defined rules governing when [the rare circumstances] exception will apply" necessarily means that "disputing parties and tribunals may address that

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655 *Id.* ¶ 255.

656 *Id.* The example provided in Annex 812.1(c), however, is just that: an example. Nothing in the text of Annex 812.1(c) precludes the Tribunal from concluding that the present circumstances under which Supreme Decree 032 was issued warrant a finding of indirect expropriation.

657 Respondent's Counter-Memorial ¶ 224.

658 **CL-0178**, Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test*?, 30 NW. J. INT' L. & BUS. 339, 365 (2010).

659 *Id.*

issue in arbitration."[660] Indeed, the language in Annex 812.1(c) is purposely broad, vague, and subject to the interpretation of international tribunals under a case-by-case factual inquiry.[661]

258. The provision in Annex 812.1(c) was intended to reflect that *ordinary regulatory* measures by States will not lead to international liability except in rare circumstances.[662] But, as explained, Article 1 of Supreme Decree 032 contains no general regulatory measure; instead, it is a targeted administrative decision.[663] In any event, the "phrase 'except in rare circumstances' makes clear that [it] is not meant to create a blanket exception for regulatory measures, which could 'create a gaping loophole in international protection against expropriation.'"[664] In fact, this language in Annex 812.1(c) "might actually help in making a regulatory takings claims. It does not say 'extremely uncommon' or 'very unlikely,' but simply 'rare.'"[665] In turn, "rare" is commonly defined as something "not occurring very often."[666] Whether or not a situation occurs very often is inevitably "in the eye of the interpreter."[667] But in this case, this type of decree (*i.e.* Supreme Decree 032) is not a regular occurrence under Peruvian law. Peruvian mining expert

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660 **CL-0179**, Chester Brown, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791 (Oxford 2013).

661 *See* **CL-0178,** Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test?,* 30 NW. J. INT' L. & BUS. 339, 363-65 (2010).

662 *See* **CL-0179,** Chester Brown, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791 (Oxford 2013) (discussing similar language included in the U.S. Model BIT).

663 *See, e..g.,* Second Bullard Expert Report ¶¶ 10, 115; 130 (explaining that a government decision that "does not have general effects" cannot be considered a general regulatory measure. Article 1 of Supreme Decree 032 does not and cannot have "general effects" because it solely targets Bear Creek. In other words, the "fact that this [S]upreme [D]ecree [32] also contains, in its article 2 a general provision, in no way changes the nature of the administrative act contained in article 1," because it contains "particular and specifically defined effects").

664 **CL-0179**, Chester Brown, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791 (Oxford 2013) (discussing similar language included in the U.S. Model BIT).

665 **CL-0178**, Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test?,* 30 NW. J. INT' L. & BUS. 339, 363-364 (2010).

666 **C-0180**, Oxford dictionary.

667 **CL-0178**, Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test?,* 30 NW. J. INT' L. & BUS. 339, 363-364 (2010).

Hans Flury stated that he is not aware of the Ministry of Energy and Mines ever issuing a similar decree, and Peru has not shown otherwise.[668]

259. Peru's limited reading of the language in Annex 812.1(c) contradicts not only the text of that provision but also the very purpose of the protections included in the FTA. The Contracting Parties to the Canada-Peru FTA expressly recognized that "the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity."[669] To find that Annex 812.1(c) creates a new, higher standard would contravene the text of that provision as well as the Contracting Parties' intent to afford protections against expropriation so as to stimulate investments.

*b. The Language in Annex 812.1(c) of the Canada-Peru FTA Requires Proportionality Between the Severity of the State Measure and Its Purpose*

260. Peru also contends that "the applicable legal standard" requires that, "[u]nless there is clear evidence to the contrary, [the regulatory authority] deserves to have its conduct examined presuming good faith."[670]

261. Peru misconstrues "the applicable legal standard," however. The "applicable legal standard" is defined by Annex 812.1(c) which does not carry with it a presumption of good

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668 Flury Expert Report ¶ 64 (explaining that he has "not found any precedent in which the Ministry of Energy and Mines has repealed the authoritative supreme decree of a foreign investor using the argument of a change in circumstances or the 'dissapearance of the legally required conditions to issue said act'").

669 **Exhibit C-0001**, Preamble to the Canada-Peru FTA.

670 Respondent's Counter-Memorial ¶ 256 (quoting the *Tza Yap Shum* tribunal). But the *Tza Yap Shum* tribunal found that both parties "deserve[d] their conduct to be examined assuming their good faith." **RLA-041**, *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, July 7, 2011 at ¶¶ 125-126 (*hereinafter*, "*Tza Yap Shum* Award") (rejecting Peru's legal and factual justifications for the disputed measures as "insufficient"). Thus, contrary to Peru's assertion, the presumption of good faith does not benefit only the regulatory authority or tip the balance in its favor.

faith in favor of the State nor does it create a very high standard.[671] What the "applicable legal standard" defined by Annex 812.1(c) *does* carry with it, however—and what Peru completely glosses over—is a requirement of proportionality. When a non-discriminatory measure that is designed and applied to protect legitimate public welfare objectives is "so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith"—as expressed by Annex 812.1(c)—then it constitutes an indirect expropriation.

262. There is a reason why Peru ignores the proportionality requirement in Annex 812.1(c): Supreme Decree 032 is disproportionate in the extreme and thus cannot be said to have been adopted and applied in good faith. State measures with a general welfare purpose do not impose international liability on States "except in cases where the State's action is obviously disproportionate to the need being addressed."[672] The severe nature of Supreme Decree 032 is unquestionable: it permanently deprives Bear Creek of its ability to own and operate its lawfully-acquired mining concessions. The purpose of Supreme Decree 032 was to quell political pressure and social protests unrelated to Bear Creek's operations at Santa Ana.[673] The disproportionality between the nature and purpose of Supreme Decree 032 is evident in that Peru could have achieved the same result—of calming political pressure—by implementing other

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671 *See* **CL-0178,** Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test?,* 30 NW. J. INT' L. & BUS. 339, 365 (2010); **CL-0179**, Chester Brown, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791 (Oxford 2013).

672 **CL-0089**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006 ¶ 195 (stating that "[w]ith respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed"); **CL-0040**, *Tecmed* Award ¶ 122 (holding that "the Arbitral Tribunal will consider, in order to determine if [regulatory actions and measures] are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby, and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality").

673 Claimant's Memorial ¶¶ 130-138; *See* supra ¶¶137-140.

measures at its disposal, such as enacting a temporary measure[674] instead of a permanent and admittedly "unconstitutional" one.[675] Yet it chose the most severe form of interference with Bear Creek's rights: it simply stripped them away without a thought to due process or basic notions of property rights.

263. As Claimant already explained, there is a complete disconnect between Supreme Decree 032 targeting Bear Creek and the reality of the facts on the ground.[676] The reality is that Supreme Decree 032 was issued in response to "obscure political interests;"[677] and is completely "irrational" and "constitutional nonsense."[678]

*c. Supreme Decree 032 Is A Discriminatory Measure That Was Not Designed and Applied to Protect Legitimate Public Welfare Objectives*

264. Per the terms of Annex 812.1(c) of the Canada-Peru FTA, "**non-discriminatory measures** of a Party that are **designed and applied** to protect legitimate public welfare objectives" do not constitute an indirect expropriation except in rare circumstances.[679] Here, Supreme Decree 032 is discriminatory: it specifically and vindictively targeted Bear Creek and Bear Creek only. No other mining company lost its right to own and operate its mining concessions purportedly to quell the social protests. Nor did any other foreign mining company see its supreme decree revoked for using a transaction structure that was similar to Bear Creek's.

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674 *See* **RWS-003**, Zegarra Witness Statement ¶ 26 (implying that a temporary measure was possible "until the issue was clarified").

675 **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 (quoting to the Minister of Energy and Mines Pedro Sanchez explaining that "the request of the protest leaders, who demand that the Executive issue decrees annulling the mining concessions in the area, is unconstitutional, therefore is it not possible to address it.").

676 Claimant's Memorial ¶¶ 135-138. *See also* Section II.D above.

677 **Exhibit C-0242**, *Alan García: Hay oscuros intereses políticos en protestas en Puno*, LA REPUBLICA.PE, Jun. 25, 2011.

678 **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011.

679 **Exhibit C-001**, Canada-Peru FTA, Annex 812.1(c) (emphasis added).

As detailed above (**Section II.B.3**), although foreign investors have used similar structures to acquire mining concessions located within 50 kilometers of the Peruvian border, Peru never challenged the way in which these investors acquired their mining concessions in the border areas. In fact, Peruvian mining expert Hans Flury testifies that he is not aware of the Ministry of Energy and Mines ever issuing a similar decree, and Peru has not shown otherwise.[680]

265. Further, Supreme Decree 032 was not designed and applied to protect legitimate public welfare objectives as further detailed in **Section IV.C** below. Supreme Decree 032 was initially championed, by politician Mr. Walter Aduviri of the *Frente de Defensa de Recursos Naturales* as part of his political platform.[681] Peru was fully aware that "issu[ing] a decree … derogating Supreme Decree 083-2007 with the purpose of preventing the mining activity of the Santa Ana mining project" was a "completely illegal demand" that "would bring serious contingencies to the country," as explained by then Vice-Minister of Mines—and current witness in this arbitration—Luis Fernando Gala Soldevilla.[682] Notwithstanding the foregoing, Peru implemented Supreme Decree 032 in an effort to placate political pressure, which cannot be conceived as a legitimate public welfare objective.[683]

266. Peru's assertions that it "adopted multiple interconnected measures intended to address" the full range of protests taking place in the Puno region[684] is nothing more than a veiled attempt to legitimize Supreme Decree 032. A State cannot bootstrap regulation that is

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680 Flury Expert Report ¶ 64 (explaining that he has "not found any precedent in which the Ministry of Energy and Mines has repealed the authoritative supreme decree of a foreign investor using the argument of a change in circumstances or the 'dissapearance of the legally required conditions to issue said act.'").

681 *See* **Exhibit C-0099**, *Huelga de aymaras termina en "cuarto intermedio*", LOS ANDES, June 1, 2011.

682 **Exhibit C-0095**, *Diálogo no prosperó en Puno debido a instansigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011.

683 Claimant's Memorial ¶¶ 130-138; *See* supra ¶¶137-140.

684 Respondent's Counter Memorial ¶ 130.

internationally wrongful with other regulation that may not qualify as such to purposefully evade international liability.[685] Peru's full knowledge that a derogation of Supreme Decree 083 would be "unconstitutional" and that "accepting this demand would create liabilities,"[686] makes it all the more inevitable to conclude that Peru seeks to hide Supreme Decree 032's illegality behind other "interconnected measures." Supreme Decree 032, thus, does not qualify as a "non-discriminatory measure[] . . . designed and applied to protect legitimate public welfare objectives."[687]

*d. The Circumstances Under Which Supreme Decree 032 Was Issued Warrant a Finding of Indirect Expropriation*

267. The circumstances surrounding the issuance of Supreme Decree 032 warrant, at a minimum, a finding of indirect expropriation. As already explained, the "phrase 'except in rare circumstances' makes clear that [it] is not meant to create a blanket exception for regulatory measures, which could 'create a gaping loophole in international protection against expropriation.'"[688] Here, Peru merely argues that "there is nothing 'rare' about a State taking action to protect its citizens."[689] But Peru misses the point. Peru owed a duty to protect both its citizens and foreign investors in its territory. Yet, it issued Supreme Decree 032:

- To accommodate Mr. Walter Aduviri's political agenda;[690]
- Fully knowing it was yielding to a "completely illegal" request;[691]

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685 "A State may not invoke its own illegal act to diminish its own liability." **CL-0176**, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS at 149 (Cambridge University Press 2006) (discussing the principle of Nullus Commodum Capere De Sua Injuria Propria)

686 **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011.

687 **Exhibit C-0001**, Canada-Peru FTA, Annex 812.1(c).

688 **CL-0179**, Chester Brown, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791 (Oxford 2013) (discussing similar language included in the U.S. Model BIT).

689 Respondent's Counter-Memorial ¶ 255.

690 *See* **Exhibit C-0099**, *Huelga de aymaras termina en "cuarto intermedio"*, LOS ANDES, Jun. 1, 2011.

- In a way that left no doubt that Peru was individually targeting Bear Creek;[692]
- After discussing the measure in a series of meetings to which Bear Creek had no access;
- Without giving Bear Creek notice or an opportunity to be heard;[693]
- Without observing the established legal procedures to do so;[694]
- In an arbitrary manner.[695]

268. For a measure to be issued in this manner and in the context of all of these circumstances is indeed "rare"—it is not often that a State so blatantly, and knowingly, disregards its own legal framework, its international law obligations, and all semblance of due process. These circumstances compel a finding that Supreme Decree 032 constitutes an indirect expropriation of Bear Creek's investment per the terms of Annex 812.1. As further discussed below, this indirect expropriation was not taken against prompt, adequate and effective compensation; not for a public purpose; not conducted in accordance with due process of law; and it was arbitrary and discriminatory.

### B. PERU'S EXPROPRIATORY MEASURES WERE NOT TAKEN AGAINST PROMPT, ADEQUATE AND EFFECTIVE COMPENSATION

269. The payment of "prompt, adequate and effective compensation" is a necessary condition for an expropriatory act to be considered lawful.[696] Failure to pay compensation as

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691 **Exhibit C-0095**, *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTRO DE ENERGÍA Y MINAS, May 26, 2011.

692 **Exhibit C-0005**, Supreme Decree 032 (stating: "WHEREAS: … BEAR CREEK MINING COMPANY SUCURSAL DEL PERU, requested authorization to acquire seven (7) mining rights located in the border zone with Bolivia of the Puno department; In view of the documents submitted, Supreme Decree No. 083-2007-EM was issued … Article 1 – Purpose of the norm. Supreme Decree No. 083-2007-EM is hereby derogated.").

693 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

694 *See, e.g.,* Bullard Expert Report ¶¶ 121, 122, 126, 165.

695 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

696 **Exhibit C-0001**, Canada-Peru FTA, Article 812.1.

mandated by the FTA and international law will render any expropriation illegal and give rise to international liability.[697] As explained by Professor Arnaud de Nanteuil: "the State has the right to carry out an expropriation as long as it provides compensation to the expropriated person; if it does not, that expropriation becomes automatically unlawful, the State is held liable and is obligated to remedy the loss incurred by the expropriated person."[698] Investment treaty tribunals have adopted that position as well.[699] Here, it is undisputed that Peru has not paid any form of compensation to Bear Creek. Thus, Peru's expropriation of the Santa Ana Project is an unlawful act under the FTA and international law.

### C. PERU'S EXPROPRIATORY MEASURES WERE NOT FOR A PUBLIC PURPOSE

270. Pursuant to the Canada-Peru FTA, an expropriation cannot be lawful unless it is taken for a "public purpose."[700] In turn, "[t]he term 'public purpose' shall be interpreted in accordance with international law. It is not meant to create any inconsistency with the same or similar concepts in the domestic law of either Party."[701]

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[697] *Id.*; **CL-0181**, Arnaud de Nanteuil, *Droit international de l'investissement* (Pedone, 2014) p. 346, ¶ 741: "*Indiscutablement, une expropriation ne peut avoir lieu dans le respect de la licéité internationale sans qu'une compensation financière soit versée à l'investisseur qui en est l'objet*" ("Unquestionably, an internationally lawful expropriation may not take place without financial compensation being provided to the expropriated investor"). *See also* Claimant's Memorial ¶¶ 127-129.

[698] **CL-0181**, Arnaud de Nanteuil, *Droit international de l'investissement* (Pedone, 2014) p. 347, ¶ 743 ("*l'Etat a le droit de procéder à une expropriation sous réserve de verser une compensation à la personne expropriée ; s'il ne le fait pas, son expropriation devient automatiquement illicite, ce qui engage sa responsabilité et l'oblige à indemniser la perte ainsi subie*.").

[699] *See, e.g.*, **CL-0031**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007, ¶ 273.

[700] **Exhibit C-0001**, Canada-Peru FTA, Article 821.1; **CL-0055**, A. Reinisch, STANDARDS OF INVESTMENT PROTECTION 178 (Oxford University Press, 2008) (explaining that "today the requirement of a 'public purpose' or 'public interest' for an expropriation to be considered lawful can be found in almost all IIAs.").

[701] **Exhibit C-0001**, Canada-Peru FTA, Article 812, fn. 4.

271. International tribunals and scholars have held consistently that the public purpose requirement must be genuine[702] and that "the mere post facto explanation by the host state of its intention will in itself carry no decisive weight."[703] The *ADC v. Hungary* tribunal warned against considering a "mere reference to 'public interest'" as sufficient evidence that a public interest was "genuine" because if the words "public interest" "can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."[704]

272. The same can be said of the Canada-Peru FTA's public purpose requirement. Peru's Counter-Memorial on the Merits cobbles together a series of events that appear to have the veneer of legitimate public purpose so as to purportedly justify the issuance of Supreme Decree 032.[705] But, as explained below, all of these "public purposes" are nothing more than *ex post facto* justifications that can carry no weight in this arbitration. The truth is that Peru's expropriatory measures were taken to placate political opposition, not for a public purpose.[706]

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[702] *See, e.g.*, **CL-0057**, F.V. Garcia-Amador, *State Responsibility: Fourth Report by the Special Rapporteur on International Responsibility*, UN Doc. A/CN.4/119, (1959) II Y.B. Int'l. L. Comm'n. 1 ¶ 59 (1960) (explaining that a public purpose must be genuine and if "this raison d'être is plainly absent, the measure of expropriation is 'arbitrary' and therefore involves the international responsibility of the State"); **CL-0058**, *BP Exploration Company (Libya) Ltd., v. Government of The Libyan Arab Republic*, Award, Aug. 1, 1974, 53 ILR 297, 329 (holding that expropriation was unlawful because it had been "for purely extraneous political reasons"); **CL-0060**, *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006 (*hereinafter* "*ADC* Award") ¶ 432.

[703] *See* **CL-0168,** Rudolf Dolzer and Christopher Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 115 (Oxford University Press, 2nd ed. 2012).

[704] **CL-0060**, *ADC* Award ¶ 432.

[705] For example, Peru tries to justify Supreme Decree 032 by pointing to the provisions therein that also address illegal mining. Although violent protests occurred on June 24, 2011 against illegal mining, those illegal activities had nothing to do with Bear Creek's legal mining activities. *See* Swarthout Witness Statement ¶ 50; Respondent's Counter-Memorial ¶ 134 (discussing "the third front of protests about the contamination of the Ramis River basin" and how Peru issued two emergency decrees "[c]onsidering that most of the gold mining in the area was illegal").

[706] *See* Claimant's Memorial ¶¶ 130-138.

273. As Bear Creek has shown, Supreme Decree 032 was a direct response to extraneous political pressure: it was issued to placate a minority of political activists in the region of Puno (where the Santa Ana Project is located).[707] As the then President of Peru, Alan García, expressly acknowledged on the very day that he issued Supreme Decree 032, the protests taking place in Puno were "taken by force with obscure interests," "obscure political interests."[708] In President García's view, there were "higher interests" of "democracy transition and change of administration that require us to make decisions, to avoid that the ruler is subject to pressure, as it is the intention."[709] These "obscure political interests" referenced by President García were led by Mr. Walter Aduviri, a politician who campaigned against natural resource projects in the region, for the sole purpose of achieving political notoriety in a bid to unseat the incumbent leadership of the regional government. Mr. Aduviri exerted political pressure to declare Puno a mining free area. This pressure included, *inter alia*:

- forming a political front to run against the incumbent Regional President;[710]
- preparing and circulating a draft ordinance declaring Puno a mining free area;[711]
- threatening authorities with massive protests should the Regional President not adopt the mining ban ordinance;[712]

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[707] *Id.* at 2, 65-67; *See supra* ¶¶ 137-140; *see also* Swarthout Rebuttal Witness Statement ¶ 33; Antunez Rebuttal Witness Statement ¶ 31.

[708] **Exhibit C-0242**, *Alan García: Hay oscuros intereses políticos en protestas en Puno*, LA REPUBLICA.PE, Jun. 25, 2011.

[709] *Id.*

[710] Swarthout Witness Statement ¶ 47; Antunez Witness Statement ¶ 16. *See also* **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360º, Jun. 2011.

[711] Swarthout Witness Statement ¶ 47; Antunez Witness Statement ¶ 16. *See also* **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360º, Jun. 2011.

[712] **Exhibit C-0079**, *Comuneros dan plazo a presidente regional - firma ordenanza o lo revocan*, LA REPÚBLICA, Mar. 23, 2011.

- actually carrying out protests in which members from various communities further away from Santa Ana participated;[713]

- demanding that the Peruvian Ministry of Mines suspend new and pending petitions for mining concessions in the Puno region;[714]

- declaring an indefinite strike and calling supporters to block major roads in the Puno region;[715] and

- staging violent protests in Puno on May 26, 2011 which resulted in acts of looting and violence.[716]

274. As Bear Creek pointed out,[717] several regional and national authorities condemned Mr. Aduviri's actions and noted that they were nothing more than political ploys. For example, Mr. Juan Luna Vilca, the Governor of Huacullani (one of the districts of the Puno region), issued a statement "repudiat[ing] the attitude of leaders from other districts" causing unrest in the Huacullani jurisdiction where the Santa Ana project is located.[718] Peru's Prime Minister, Rosario Fernandez, stated that the blockade of roads in the Puno region were "unacceptable" and "linked to political purposes of extreme organizations."[719] In fact, the violent protests staged on May 26, 2011, targeted governmental offices that were investigating some of the leaders of the movement for acts unrelated to the Santa Ana Project (tax evasion and smuggling). As Prime Minister Fernandez pointedly asked, "who, who is interested in

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713 **Exhibit C-0082**, *Alcalde del distrito de Huacullani ratificó que no participarán en la movilización de mañana*, ONDA AZUL, Mar. 29, 2011; **Exhibit C-0083**, *Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, Mar. 29, 2011.

714 **Exhibit C-0089**, Letter No. 521-2011-GR-PUNO/PR from M. Rodriguez, Regional President of Puno to P.E. Sánchez, Minister of Energy and Mines, Apr. 28, 2011

715 *Id.*; **Exhibit C-0090**, *"Esperan que haya alguna víctima,"* EL COMERCIO, May 25, 2011.

716 **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360º, Jun. 2011.

717 Claimant's Memorial ¶¶ 67 *et seq.*

718 **Exhibit C-0081**, Press Release, LOS ANDES, *La Opinion Pública*, Mar. 23, 2011 [freehand translation].

719 **Exhibit C-0092**, Press Release, Presidencia del Consejo de Ministros, *Premier califica de inadmisible bloqueo de carreteras en Puno y pide deponer acciones violentas*, May 18, 2011.

[vandalizing] those [institutions]? Basically, those persons who were processed and investigated and questioned for those acts, right?"[720]

275. Yet, notwithstanding the clear political nature of the protests, Peru responded to the above-referenced actions on May 30, 2011 by issuing a 12-month suspension of Bear Creek's ESIA evaluation process.[721] For his part, Mr. Aduviri announced a suspension of the indefinite strike until June 7, 2011,[722] while urging the Peruvian government to issue a supreme decree revoking Supreme Decree 083.[723] Mr. Aduviri's announcement was designed to prevent interference with voting in the run-off presidential election opposing Ollanta Humala to Keiko Fujimori.[724] Mr. Aduviri's strikes and protests resumed two days after the run-off elections, on June 7, 2011, and directly led to the issuance of Supreme Decree 032 on June 25, 2011.[725]

276. While Peru argues that the issuance of Supreme Decree 032 was necessary to "restore peace and order throughout the region,"[726] this is simply not true given the text of Supreme Decree 032 and the political background against which it was issued.[727] Specifically, Supreme Decree 032 says nothing about why mining in the border area no longer constitutes a public necessity.[728] This is probably not an oversight since according to Peruvian law, the property or possession rights granted to foreigners in border areas "***may be restricted only for***

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720 **Exhibit C-0097**, *Interview of Prime Minister Rosario Fernandez*, MIRA QUIÉN HABLA, WILLAX TV, May 31, 2011.

721 **Exhibit C-0098**, DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011.

722 **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360º, Jun. 2011.

723 **Exhibit C-0099**, *Huelga de aymaras termina en "cuarto intermedio"*, LOS ANDES, Jun. 1, 2011.

724 **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360º, Jun. 2011; **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011.

725 *Id*.; **Exhibit C-0100**, *Volvió tensión con huela aimara*, LA REPÚBLICA, Jun. 9, 2011.

726 Respondent's Counter-Memorial ¶ 246.

727 *See, e.g.,* Claimant's Memorial ¶¶ 130-138; *see supra* ¶¶ 137-140.

728 *See generally* **Exhibit C-0005**, Supreme Decree 032-2011-EM, Jun. 25, 2011.

***reasons of national security***," which was not the case here.[729] What really occurred, in the words of Peruvian authorities, was that "intransigent leaders, who continue[d] to demand that the Executive Power issue a decree … derogating Supreme Decree 083,"[730] succeeded on implementing "pressure measures" to make the Peruvian Government "grant irrational petitions."[731] But even if true that the public necessity had really disappeared, then according to Peruvian law, Peru should have included a provision for payment since Supreme Decree 032 "implied depriving the owner of its property."[732] Moreover, Supreme Decree 032 does not state anything precise about Peru's need to restore order throughout the region, or how the issuance of Supreme 032 against Bear Creek was a necessary and proportionate measure to achieve Peru's purported needs.[733]

277. Indeed, Supreme Decree 032's lack of a legitimate public purpose is apparent from the decree's own vagueness. Supreme Decree 032 is a two-page document with seven short whereas clauses, three operative articles and one complementary provision. The operative article directly applicable to Bear Creek simply states: "Supreme Decree No. 083-2007-EM is hereby derogated."[734] The only purported justification for this derogation states that "[c]ircumstances have been made known that would imply the disappearance of the legally

729 Second Bullard Expert Report ¶ 41 (emphasis in the original).

730 **Exhibit C-0095**, *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTRO DE ENERGÍA Y MINAS, May 26, 2011 (quoting Vice-Minister of Mines, Fernando Gala Soldevilla).

731 **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 (quoting President Allan Garcia).

732 Second Bullard Expert Report ¶ 3(g).

733 **Exhibit C-0005**, Supreme Decree 032-2011-EM, Jun. 25, 2011, Fourth Whereas.

734 *Id.* Article 1. Article 2 prohibits illegal mining activities; Article 3 calls for the endorsement of the decree by the President of the Council of Ministers, the Minister of Defense and the Minister of Energy and Mines. Finally, the complementary provision orders the eventual issuance of provisions prohibiting mining activities in the Puno Department.

required conditions for the issuance of [Supreme Decree 083]."[735] There is no explanation as to what this means. Further, Peru admittedly acknowledged that there are no contemporaneous public documents that could explain what could possibly constitute "new circumstances" justifying the issuance of Supreme Decree 032.[736] This Tribunal—just like Bear Creek and the Lima First Constitutional Court—is being asked to "deduce[]," "based on the [media] publications" and Peru's *ex post facto* justifications, that the circumstances to which Supreme Decree 032 is referring "would be the violent demonstrations and illicit attacks on public and private property in the Puno department."[737] However, even Peru itself does not actually believe this based on statements by its own officials, including witnesses in this arbitration, who admit that Peru "had no reason to remove the concessions from the company."[738]

278. These circumstances that Peru now advances (in this arbitration) as purported justifications for the issuance of Supreme Decree 032 are extraneous to Bear Creek's activities and to the original bases for the issuance of Supreme Decree 083. Simply stated, these circumstances "are not attributable to [Bear Creek]"[739] and they cannot serve as a basis for derogating "the rights granted to Bear Creek."[740] Indeed, "[w]hat the State should have done to solve the social conflicts is to fulfill its role and impose order through the intercession of the National Police. However, the State decided to impair a fundamental right without

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735 *Id.*, Fourth Whereas.

736 **Exhibit C-0111,** Letter from R. Wong, Secretary General of MEM, to E. Antunez, Bear Creek Mining Company, Aug. 19, 2011. The only document MINEM could provide was a one-page *exposición de motivos*, which simply paraphrased the language of Supreme Decree 032 without any meaningful discussion or justification.

737 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014 at 20.

738 **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013.

739 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014 at 20.

740 *Id.*

compensating its holder. There is not a single provision in the entire legal framework that authorizes an expropriation to avoid social conflicts."[741] Accordingly, Peru's derogation of Supreme Decree 083 "lacks proper reasoning" and "is an action by the State that is not found within the margins of reasonability and proportionality required not to violate the principle of legal security."[742]

279. Bear Creek's situation is similar to the claimant's in *Tecmed v. Mexico*. In that case, the claimant argued, *inter alia*, that the respondent State expropriated its investment by refusing to renew the claimant's authorization to operate a landfill.[743] According to the claimant, this decision was not issued for a legitimate public purpose but instead to quell political pressure by the local government and community who opposed the landfill.[744] The *Tecmed* tribunal thus examined the question of whether the State's measures were "reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation," stating that "[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[745] Quoting the European Court of Human Rights, the *Tecmed* tribunal noted that "[t]he requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden'."[746]

280. The *Tecmed* tribunal first reviewed the language of the State's decision not to renew the claimant's authorization to operate the landfill and noted that it did not state any public

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741 Second Bullard Expert Report ¶ 126(c).

742 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014 at 20.

743 **CL-0040**, *Tecmed* Award ¶ 41.

744 *Id.* ¶¶ 42-43, 108-109.

745 *Id.* ¶ 122.

746 *Id.* ¶ 122 (*quoting* European Court of Human Rights, *In the case of James and Others*, judgment of February 21, 1986, 50, pp.19-20, http://hudoc.echr.coe.int) (emphasis added).

interest, public use, or public emergency reasons justifying such decision.[747] The tribunal then analyzed the precise nature of opposition to ascertain whether the measure was proportional, and concluded that "the reasons that prevailed in INE's decision to deny the renewal of the Permit were reasons related to the social or political circumstances and the pressure exerted on municipal and state authorities and even on INE itself created by such circumstances."[748] This political pressure and community opposition focused on "the site of the Landfill and not the manner in which the Landfill was operated"[749] and "had been sustained by its advocates through an insistent, active and continuous public campaign in the mass media."[750] The tribunal found "particularly" relevant the fact that the investor itself had not "originat[ed] a serious emergency due to [its own] behavior,"[751] and that the "political and social circumstances referred to … which conclusively conditioned the issuance of the Resolution, were shown with all their magnitude after a substantial part of the investment had been made and could not have reasonably been foreseen by the Claimant with the scope, effects and consequences that those circumstances had."[752]

281. On the basis of these findings, in particular that there had been no "serious urgent situation, crisis, need or social emergency,"[753] the *Tecmed* tribunal found that the opposition to the landfill and pressure on the authorities were not sufficient justifications for the State to deprive the claimant of its investment without compensation.[754] Similarly, the tribunal

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747 **CL-0040**, *Tecmed* Award ¶ 125.

748 *Id.* ¶ 132 (emphasis added).

749 *Id.* ¶ 145.

750 *Id.* ¶ 144.

751 *Id.* ¶¶ 145, 147.

752 *Id.* ¶ 149.

753 *Id.* ¶ 139.

754 *Id.* ¶ 147.

determined that the investor's operations "never compromised the ecological balance, the protection of the environment or the health of the people."[755] Thus, "it would be excessively formalistic, in light of … the Agreement and international law, to understand that the Resolution is proportional" when the investor's operations "do not pose a present or imminent risk to the ecological balance or to people's health."[756] The tribunal concluded that the State's decision not to renew the claimant's authorization to operate the landfill was not proportional to the State's objectives,[757] and thus was an expropriation in violation of international law.[758]

282. Like in *Tecmed*, in the present case, the language of Supreme Decree 032 does not state the existence of a public or social emergency taking place in the area where the Santa Ana Project is located. While Supreme Decree 032 contains general language stating that "it was deemed pertinent to provide that the Executive Power … dictates provisions for the purpose of prohibiting mining activities" to safeguard "the environment and social conditions in the areas of the… Puno department,"[759] this general language does not—and cannot—justify the measures taken against Bear Creek. This language is nothing more than a "mere reference to 'public interest'" that cannot "magically put such interest into existence."[760]

283. Again like in *Tecmed*, Supreme Decree 032 was motivated by political opposition to the project.[761] This political opposition was due to the location of Bear Creek's Santa Ana Project as well as past mining activities of mining companies in the Puno region and illegal gold

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[755] *Id.* ¶ 148.

[756] *Id.* ¶ 149.

[757] *Id.*

[758] *Id.* ¶ 151.

[759] **Exhibit C-0005**, Supreme Decree 032-2011-EM, Jun. 25, 2011.

[760] **CL-0060**, *ADC* Award ¶ 432.

[761] Claimant's Memorial ¶¶ 2, 65-67; *see supra* ¶¶ 137-140; *see also* Swarthout Rebuttal Witness Statement ¶ 33; Antunez Rebuttal Witness Statement ¶ 31.

mining north of the Santa Ana Project rather than the manner in which Bear Creek conducted its operations at Santa Ana.[762] Peru has not shown that this political opposition, "however intense, aggressive and sustained,"[763] generated a true social emergency. This is evident from statements from the "Huacullani district authorities … [who] declared to be living in a state of peace and tranquility, and inform that, upon hearing different comments and communications from various means of communication, they hold the leaders of the agitators responsible for what may happen to them."[764]

284. Bear Creek's operations did not "pose a present or imminent risk to the ecological balance or to people's health."[765] As Claimant has shown, Bear Creek's operations did not cause environmental damage.[766] Indeed, Bear Creek was successfully working with the communities that could be impacted by the Santa Ana Project to identify any potential environmental and social risks[767] and to implement processes to prevent, mitigate and remediate potential impacts.[768] Moreover, there is no record that environmental mining authorities were even involved in the issuance of Supreme Decree 032 to evaluate any environmental concerns, issue an environmental report or provide any recommendations. The reason is that there were no

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[762] Swarthout Witness Statement ¶ 50 (recounting that protests held on June 24, 2011, "we are actually to demonstrate opposition to the illegal gold mining activity that was taking place at La Rinconada, where illegal gold miners used mercury to extract gold and poisoned the water flowing further north from Juliaca. Fighting with police forces ensued, resulting in loss of several lives. This tragic incident had nothing to do with Bear Creek or Santa Ana, and involved instead a completely different issue that arose at a location several hundred kilometers and a five-hour drive from Santa Ana."); Respondent's Counter Memorial ¶ 134 (discussing "the third front of protests about the contamination of the Ramis River basin" and how Peru issued two emergency decrees "[c]onsidering that most of the gold mining in the area was illegal").

[763] **CL-0040**, *Tecmed* Award ¶ 144.

[764] **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014 at 22.

[765] **CL-0040**, *Tecmed* Award ¶ 149.

[766] *See, e.g.,* Claimant's Memorial ¶ 74.

[767] *See, e.g.,* Claimant's Memorial ¶¶ 62-64.

[768] **Exhibit C-0069**, Bear Creek Mining Corporation, *Environmental Stewardship*; **Exhibit C-0071**, Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, Dec. 2010.

environmental concerns whatsoever. Indeed, the Environmental Affairs Office of the Ministry of Energy and Mines expressly acknowledged it "had no involvement in the issuance of Supreme Decree 032-2011-EM."[769]

285. Moreover, Peru's measures were not "proportional to the public interest presumably protected."[770] Targeting Bear Creek in Supreme Decree 032 was not the way to address localized protests when (i) the protests were not actually taking place in the Santa Ana Project area,[771] (ii) the protests had nothing to do with Bear Creek's actual operations,[772] and (iii) Bear Creek had the support of the communities surrounding the Santa Ana Project.[773] The "several other measures of general application" that Peru asserts it adopted at the same time as it issued Supreme Decree 032[774] only highlight Peru's political motivations in targeting Bear Creek. Peru did not allow these "other measures of general application" to play out before Peru chose to use Bear Creek's Santa Ana Project as a pawn in a political game; the only reason that Peru issued Supreme Decree 032 with these "other measures of general application" was because it caved in to Mr. Aduviri's political demands, namely to make the Puno region "mining-free," which Peru itself has acknowledged was "constitutional nonsense."[775] Supreme Decree 032 can be seen only for what it truly is: a political, public and unequivocal response to "obscure

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769 *See* **Exhibit C-0111**, Letter from R. Wong, Secretary General of MEM, to E. Antunez, Bear Creek Mining Company, Aug. 19, 2011 at 5.

770 **CL-0040**, *Tecmed* Award ¶ 122.

771 *See* **Exhibit C-0103**, *Peruvian Unrest at Juliaca Airport Occurring 160KM from Project Site*, PR NEWSWIRE, Jun. 25, 2015.

772 *See, e.g.*, Swarthout Witness Statement ¶ 50; Antunez Witness Statement ¶ 19.

773 *See, e.g.,* **Exhibit C-0077**, *Comunidades de Huacullani dan luz verde a Proyecto minero Santa Ana*, EL GRAN SUR, LA REPÚBLICA, Mar. 18, 2011.

774 Respondent's Counter-Memorial ¶ 246.

775 **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 (quoting then Peruvian President Alan Garcia). *See also* **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 (quoting the Minister of Energy and Mines Pedro Sanchez who explained that "annulling the mining concessions in the area is unconstitutional").

political interests"[776] that specifically clamored for Peru to issue a supreme decree "derogating Supreme Decree 083,"[777] without any regard for Bear Creek's rights.

286. Peru's recourse to *ex post facto* justifications for the issuance of Supreme Decree 032 only serves to highlight the absence of a legitimate public purpose for the issuance of Supreme Decree 032. Specifically, Peru argues that it issued Supreme Decree 032 "for several legitimate and important public purposes,"[778] ranging from protecting the health and safety of Peru's citizens,[779] to "preserv[ing] relations with neighboring States"[780] and "protect[ing] the integrity" of Peru's constitutional processes.[781] But not a single one of these issues was actually considered when Supreme Decree 032 was issued. The text of Supreme Decree 032 speaks for itself. None of these alleged purposes is stated in said decree, nor does the text bear any relation to why Supreme Decree 032 was really issued. As explained by Vice Minister of Mines Luis Fernando Gala, Peru "had no reason to remove the concessions from the company," even "on the

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776 **Exhibit C-0242**, *Alan García: Hay oscuros intereses políticos en protestas en Puno*, LA REPUBLICA.PE, Jun. 25, 2011.

777 **Exhibit C-0099**, *Huelga de aymaras termina en "cuarto intermedio"*, LOS ANDES, Jun. 1, 2011 (freehand translation).

778 Respondent's Counter-Memorial ¶ 243.

779 *Id.* ¶ 243.

780 *Id.* ¶ 248.

781 *Id.* ¶ 247. Peru argues that Supreme Decree No. 032 was "a necessary and proper intervention to correct Claimant's violations of Peruvian law." *Id.* However, as detailed in Claimant's Memorial and in this Reply Memorial, Bear Creek acquired the Santa Ana Concessions in compliance with Peruvian law (including its Constitution), did so pursuant to legal advice from experienced mining counsel, and openly shared the Option Agreements with Respondent. There was no violation of Peruvian law "to correct." *See generally* First Bullard Expert Report; Second Bullard Expert Report; Flury Expert Report. This is also evident from the fact that many other foreign mining companies have used a transaction structure similar to Bear Creek's, without any "corrective" intervention from Peru. Respondent goes so far as to say that had it "not acted in the face of Claimant's evasion of Peruvian law, this would have emboldened others to act similarly." *Id.* But when the Chinese company Zijin Consortium acquired mining rights in a border area prior to obtaining the necessary supreme decree, with Peru's full knowledge and support, Peru did not "correct" the Zijin Consortium. Rather, it blessed the Zijin Consortium's acquisition of mining rights in breach of Article 71 of the Constitution by issuing a supreme decree with retroactive application. In light of the foregoing, Peru's attempt to concoct a public purpose for Supreme Decree 032 by referring to the integrity of its constitutional processes is as audacious as it is without merit.

verge of a crisis over the issue of the Aymaras and Mr. Walter Aduviri."[782] It was not "until a Congressman presented documents disclosing" a purported non-compliance with Article 71 of the Constitution, that Peru found a "reason" to issue Supreme Decree 032.[783] In short, all of the "important purposes" referenced by Peru are nothing more than *ex post facto* justifications that the Tribunal should disregard.

### D. THE EXPROPRIATION WAS NOT CONDUCTED IN ACCORDANCE WITH DUE PROCESS OF LAW AND WAS ARBITRARY AND DISCRIMINATORY

287. As Bear Creek explained in its Memorial on the Merits, Article 812(1) of the FTA expressly requires that a lawful expropriation or nationalization of a protected investment must take place "in accordance with due process of law." In its Counter-Memorial, Peru does not attempt to demonstrate how Supreme Decree 032 comports with due process of law; rather, Peru altogether ignores this necessary component of a lawful expropriation. Peru's silence on this point speaks for itself: Bear Creek simply was not afforded any due process of law in connection with the issuance of Supreme Decree 032.

288. As Claimant explained in its Memorial and Peru does not dispute in its Counter-Memorial, due process of law requires "[s]ome basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, [which] are expected to be readily available and accessible to the investor to make such legal procedure meaningful."[784] Here, the Peruvian Government failed to observe due process of law when enacting Supreme Decree 032 because: (i) Supreme Decree 032 was not the proper way to repeal Supreme Decree 083—an administrative act that could not be derogated—and

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[782] **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013.

[783] *Id.*

[784] Claimant's Memorial ¶ 139 (citing *ADC* Award).

rescind Bear Creek's right to own mines and mining rights in Santa Ana; (ii) Supreme Decree 032 was not issued in the context of any defined legal procedure within MINEM; (iii) Bear Creek never received advance notice of Supreme Decree 032 or an opportunity to be heard; (iv) the Government did not provide any credible justification for Supreme Decree 032; and (v) Supreme Decree 032 violated the legal principles of legal security and prohibition of arbitrariness, as recognized by the Lima First Constitutional Court.[785] Peru offers no response in this regard.

289. Similarly, Bear Creek already explained how Supreme Decree 032 was an arbitrary measure that violated the legal principle of juridical certainty and proportionality. The Lima First Constitutional Court condemned Supreme Decree 032 precisely on this basis, finding, *inter alia*, that Supreme Decree 032:

- "does not impute any responsibility whatsoever" on Bear Creek;
- "lacks proper reasoning";
- "does not set out the circumstances" justifying the Government's decision;
- "is drafted using an uncertain conditional [tense];" and
- "is not found within the margins of reasonability and proportionality, required to not violate the principle of legal security."[786]

In other words, Supreme Decree 032 was issued based on "circumstances" that were unproven; Peru "had to do more research" because it only had "clues."[787] Yet, Peru did not hesitate to arbitrarily terminate Bear Creek's rights without due process. And it did so in a discriminatory manner in breach of the FTA. No other foreign mining company lost its right to own and operate

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785 *Id.* ¶¶ 139 *et seq.*

786 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

787 **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013.

its mining concessions supposedly to quell social protests or to redress an alleged "illegality" in its original acquisition of mining concessions. Therefore, it is clear that the expropriatory measure at issue in the instant case does not comply with the FTA's requirements for a lawful expropriation. Supreme Decree 032 therefore constitutes an internationally wrongful act under the FTA and international law.

### E. THE DOCTRINE OF SOVEREIGN POLICE POWERS IS NOT A DEFENSE AGAINST AN UNLAWFUL EXPROPRIATION UNDER THE TERMS OF THE FTA

290. In its Counter-Memorial, Peru invokes the doctrine of sovereign police powers in an attempt to avoid responsibility for its unlawful expropriation (whether direct or indirect) of Bear Creek's investment. As detailed below, however, this doctrine does not absolve Peru from liability. *First*, the sovereign powers doctrine is not a default rule on which Peru can rely. To determine whether the sovereign powers doctrine has any role to play in the present analysis, the Tribunal must interpret and apply the Canada-Peru FTA, which does not excuse expropriations resulting from the exercise of police powers (**Section E.1**). *Second*, the majority of the cases that Peru cites are inapposite to this case because they concern regulatory actions of general application, whereas the conduct at issue here is a targeted decree directed at a single company (**Section E.2**). *Finally*, the sovereign powers doctrine is not without limit. While it is true that States enjoy a certain margin of discretion in regulatory matters, it is no less true that this discretion cannot be exercised in an arbitrary manner and that international arbitral tribunals have the jurisdiction—and the duty—to determine whether measures issued within traditional notions of police power violate international obligations that a State has assumed. In this case, even if Supreme Decree 032 were to fall within the scope of Peru's police powers (it does not), there can be no doubt that the decree was issued in an arbitrary manner (**Section E.3**).

### 1. The Police Powers Doctrine Is Not Applicable to Article 812 of the Canada-Peru FTA

291. In its Counter-Memorial on the Merits, Peru argues that the police powers doctrine is an "established doctrine"[788] and "a fixture of international investment arbitration"[789] that "allows States to regulate for the common good without compensating impacted property owners."[790] Peru asserts that States have an "inherent power to regulate for the protection of safety and public order,"[791] such that the police powers doctrine is always applicable, irrespective of the text of the applicable international instrument. In support of its position, Peru purports to rely on the *Tecmed* tribunal's "unqualified language" referring to the "indisputable" principle that the exercise of a State's sovereign powers that may cause economic damage does not give rise to an obligation to compensate.[792] Peru is wrong, however.[793]

292. Contrary to Peru's truncated quotation,[794] the *Tecmed* tribunal did not recognize the existence and general applicability of the police powers doctrine in international investment law using "unqualified language." Rather, the *Tecmed* tribunal acknowledged the existence of the police powers doctrine on the domestic plane, while simultaneously asserting its duty "to examine whether the [measure] violates the [Investment Protection] Agreement in light of its

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788 Respondent's Counter-Memorial ¶ 227.

789 *Id.* ¶ 230.

790 *Id.* ¶ 232.

791 *Id.* ¶ 227.

792 *Id.* ¶ 231.

793 For example, Peru cites to paragraph 198 of the award in *Lauder v. Czech Republic*, and asserts that the tribunal held that a State is "not liable for economic injury that is the consequence of bona fide regulation within [its] accepted police power." Respondent's Counter-Memorial ¶ 227, n.384. However, in that paragraph, the *Lauder* tribunal is merely summarizing Respondent's arguments. What that tribunal actually held is that there was no expropriation because "there was no direct or indirect interference by the Czech Republic in the use of Mr. Lauder's property or with the enjoyment of its benefits." **RLA-028**, *Ronald S. Lauder v. Czech Republic,* UNCITRAL, Final Award, 201-202, Sept. 3, 2001.

794 Respondent's Counter-Memorial ¶ 231.

provisions and of international law," since legality of the respondent's actions under domestic law "does not mean that they conform to the [Investment Protection] Agreement or to international law."[795] The *Tecmed* tribunal thus examined the intersection of the police powers doctrine and the tribunal's own mandate to determine whether the State's exercise of these so-called police powers breached the applicable Spain-Mexico BIT.

293. The tribunal's starting point in its analysis was the text of the BIT. "[I]nterpret[ing] its terms according to the ordinary meaning to be given to them (Article 31(1) of the Vienna Convention)," the tribunal found "no principle stating that regulatory administrative actions are *per se* excluded from the scope of the Agreement, even if they are beneficial to society as a whole—such as environmental protection—particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever."[796] The tribunal thus concluded that "regulatory actions and measures will not be initially excluded from the definition of expropriatory acts."[797]

294. Here too, the Tribunal must start its analysis by reference to the text of the Canada-Peru FTA, which it must interpret in accordance with the Vienna Convention on the Law of Treaties, namely "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[798] The text of

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[795] **CL-0040**, *Tecmed* Award ¶¶ 119-120.

[796] **CL-0040**, *Tecmed* Award ¶ 121 (emphasis added). *See also id.* (*quoting Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica,* ICSID case No. ARB/96/1, 15 ICSID Review-FILJ 72, p. 192 (2000) ("Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.")).

[797] **CL-0040**, *Tecmed* Award ¶ 122.

[798] **CL-0039**, Vienna Convention on the Law of Treaties, May 23, 1969 ("Vienna Convention"), Article 31(1).

Article 812 of the Canada-Peru FTA establishes the specific circumstances under which an expropriation may be deemed lawful: the expropriation must be effected (i) for a public purpose, (ii) in accordance with due process of law, (iii) in a non-discriminatory manner and (iv) on prompt, adequate and effective compensation.[799] Nowhere does Article 812 exclude regulatory actions from the definition of expropriatory acts.[800] Accordingly, since there is no express carve-out to expropriation for a State's regulatory actions or exercise of police powers, the legality of Peru's expropriation of Bear Creek's investment must be assessed against the four aforementioned elements only. As detailed above (*see supra* Sections IV.B - IV.D), Peru failed to comply with each of those requirements and is thus liable for carrying out an unlawful expropriation.

### 2. Supreme Decree 032 Is A Specifically-Targeted Measure Designed to Divest Bear Creek of its Investment that Falls Outside the Scope of the Police Powers Doctrine

295. Peru dedicates several pages of its Counter-Memorial to citing investment cases for the general proposition that a State is not liable for damages resulting from *bona fide* regulation.[801] Most of the cases cited by Peru have a common trait, however: they concern regulatory measures of general application, often considered "ordinary measures" of the State.[802]

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[799] **Exhibit C-0001**, Canada-Peru FTA, Article 812.

[800] To the extent that Peru argues that Annex 812.1 carves out regulatory conduct from the definition of indirect expropriation, this was addressed in Section IV.A.2 above.

[801] *See* Respondent's Counter-Memorial ¶¶ 117 *et seq*.

[802] *See, e.g.*, **RLA-030**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002, pt. IV, ch. D, ¶ 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 alia*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government) (emphasis added) (concerning an executive order issued in 1999 providing for the removal of MTBE from gasoline before Dec. 31, 2002); **RLA-031**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB (AF)/99/1, Award, Dec. 16, 2002, ¶ 103 ("[r]easonable **government regulation** of this type cannot be achieved if any business that is adversely affected may seek compensation") (emphasis added) (involving a tax statute that granted rebates to producers/exporters of cigarettes but rendered resellers/exporter of cigarettes ineligible for the same rebates); **CL-0091**, *Saluka*

Naturally, all of these cases are easily distinguishable from the instant arbitration. Supreme Decree 032 cannot be considered a regulatory measure of general application nor an ordinary measure:

- Supreme Decree 032 specifically targets Bear Creek and its investment in the Santa Ana Project;[803]
- Supreme Decree 032 contains a measure with particular effects—affecting Bear Creek and Bear Creek only—that cannot be considered of general application. The "fact that this [S]upreme [D]ecree [32] also contains, in its article 2 a general provision, in no way changes the nature of the administrative act contained in article 1," because it contains "particular and specifically defined effects";[804]
- Supreme Decree 032 was not issued for a legitimate public purpose;[805]
- Supreme Decree 032 was not issued in compliance with Peruvian law;[806] and
- Supreme Decree 032 was issued in response to political pressure.[807]

296. Peru further asserts that the police powers exception has been applied in cases concerning the revocation of a "permission granted to a single investor."[808] Peru relies on two

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*Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, 255 ("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") (emphasis added) (analyzing regulatory action taken pursuant to the Czech Banking Act). See also other cases cited in Respondent's Counter-Memorial on the Merits, n.384, which concern: (i) a statute regulating media broadcasting licenses; (ii) environmental related regulation; (iii) a decree declaring a nation-wide economic emergency; (iv) a tax statute; or (v) a banking statute).

803 **Exhibit C-0005**, Supreme Decree 032-2011-EM, Jun. 25, 2011 (stating: "WHEREAS: … BEAR CREEK MINING COMPANY SUCURSAL DEL PERU, requested authorization to acquire seven (7) mining rights located in the border zone with Bolivia of the Puno department; In view of the documents submitted, Supreme Decree No. 083-2007-EM was issued … Article 1 – Purpose of the norm. Supreme Decree No. 083-2007-EM is hereby derogated.").

804 *See* Second Bullard Expert Report ¶¶ 10, 130.

805 *See, e.g.,* Claimant's Memorial ¶¶ 130-138; *see supra* ¶¶ 137-140.

806 *See, e.g.*, First Bullard Expert Report ¶¶ 175 *et seq.*; Second Bullard Expert Report ¶¶ 122, 127, 135, 145; **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014 at 8.

807 *See, e.g.,* Claimant's Memorial ¶¶ 130-138; *see supra* ¶¶ 137-140.

cases to make this argument: *Invesmart, B.V. v. Czech Republic* and *Saluka* v. *Czech Republic*. Peru posits that these cases illustrate that "a revocation of a single, specific []license" can be considered a regulatory taking that does not give rise to international liability.[809] But neither of these two cases supports Peru's position in this arbitration.

297. Unlike this case, the tribunal's analysis in *Invesmart* centered on a statute of "general applicability" that gave rise to a specific administrative act carried out within "a detailed national legal framework that includes administrative and judicial remedies."[810] The statute at issue (which existed prior to the claimant's investment) authorized the Czech National Bank to revoke a bank's license if the Czech National Bank were to identify shortcomings in the operations of that bank.[811] It was undisputed that the local bank Invesmart owned (Union Banka) was facing a "catastrophic" financial situation.[812] In fact, Union Banka itself had informed the Czech National Bank that it was unable to continue operating due to Union Banka's illiquidity.[813] The Czech National Bank then revoked Union Bank's license as authorized by the statute.[814] Invesmart argued that this revocation constituted an expropriation of its investment.[815]

298. The *Invesmart* tribunal rejected Invesmart's expropriation claim. The tribunal considered that it was "confronted with a measure taken under a banking statute of general

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808 Respondent's Counter-Memorial ¶ 233.

809 *Id.* ¶¶ 233, 236.

810 **RLA-040**, *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, June 26, 2009, ¶ 501 (*hereinafter, "Invesmart* Award").

811 *Id.* ¶ 496.

812 *Id.* ¶¶ 142-143.

813 *Id.* ¶ 148.

814 *Id.* ¶¶ 149, 496.

815 *Id.* ¶ 467.

application,"[816] and thus it first analyzed the underlying statute that gave rise to the revocation of the banking license. As the *Invesmart* tribunal explained, the banking statute was "a *bona fide* non-discriminatory regulation aimed at the general welfare."[817] It is in that context that the tribunal made the statement quoted by Peru, namely that "[i]nternational investment treaties were never intended to do away with their signatories' right to regulate."[818]

299. The *Invesmart* tribunal then analyzed whether the administrative order that actually revoked the license was issued improperly since that "plainly could constitute an expropriation."[819] To do so, it considered the "context within which an impugned measure is adopted and applied," which it deemed "critical to the determination of its validity."[820] The tribunal found that the Czech National Bank's "decision to revoke the licence cannot be viewed as an expropriation" because this was not a case in which "the regulator arbitrarily decided to deprive a licensee of its licence."[821] In the tribunal's view, the statute specifically authorized the Czech National Bank's revocation of the license in circumstances such as the ones facing Union Banka, namely its illiquidity and its inability to continue operating, which Union Banka itself had communicated directly to the Czech National Bank.[822]

300. In contrast, in the present case, Supreme Decree 032 is not a non-discriminatory regulation aimed at the general welfare. Supreme Decree 032 specifically targeted Bear Creek.

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816 *Id.* ¶ 496 (emphasis added).

817 *Id.* ¶ 497.

818 Respondent's Counter-Memorial ¶¶ 234, 235 (citing *Invesmart* ¶ 498).

819 **RLA-040**, *Invesmart* Award¶ 500.

820 **CL-0091**, *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006, ¶ 264 (emphasis in original); **RLA-040**, *Invesmart* Award ¶ 500.

821 **RLA-040**, *Invesmart* Award ¶ 504.

822 *Id.* ¶¶ 496, 504 (finding that "Section 26(b) of the Czech Banking Act, the statutory power pursuant to which the [State] acted" allowed the State "to change the banking licence by excluding or restricting certain activities stipulated in the licence"; thus, the State's actions taken "pursuant to the statutory provision" and in response to receiving notice of the bank's illiquidity, could not be characterized to be in breach of the applicable BIT).

"The fact that [] [S]upreme [D]ecree [032] also contains, in its article 2, a general provision in no way changes the nature of the administrative act contained in article 1."[823] Article 1 revoked Supreme Decree 083, a decree concerning Bear Creek and granting Bear Creek (and no one else) the right to own mining rights in seven specific mining concessions comprising the Santa Ana Project.

301. In further contrast to the statute at issue in *Invesmart*, here, neither Article 71 of the Constitution nor Supreme Decree 083 lays out the specific circumstances under which the revocation of Supreme Decree 083 would be permitted. In fact, neither makes any mention whatsoever of the possibility of changing or revoking an authorization granted under Article 71 of the Constitution, much less of the specific criteria that would justify such revocation.[824] This is apparent from the very language of Supreme Decree 032, which does not reference *any* criteria or factors that would warrant revoking Supreme Decree 083.[825] Rather, Supreme Decree 032 vaguely asserts that "[c]ircumstances have been made known that would imply the disappearance of the legally required conditions for the issuance of [Supreme Decree 083]."[826] Unlike the Czech National Bank's decision to revoke Union Banka's license in application of the general banking statute, here Supreme Decree 032 was not enacted to implement a legal framework that was set forth in Article 71 of the Constitution or even in Supreme Decree 083. Moreoever, Peru intentionally circumvented Peruvian law establishing procedural and substantive requirements to revoke the authorization granted by Supreme Decree 083, an administrative act, by labeling its

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823 Second Bullard Expert Report ¶ 130.

824 *See generally* **Exhibit C-0004**, Supreme Decree 083-2007-EM, Nov. 29, 2007; **Exhibit C-0024**, Political Constitution of Peru Enacted on Dec. 29, 1993, Official Edition and English Translation, Art. 71.

825 Second Bullard Expert Report ¶ 142 (explaining that Supreme Decree 032 "has in no way identified the 'circumstances' which produced the disappearance of the public necessity" requirement).

826 **Exhibit C-0005**, Supreme Decree 032-2011-EM Jun. 25, 2011, Fourth Whereas (emphasis added).

decision a "derogation."[827] Thus, Bear Creek's case is more akin to a case where "the regulator arbitrarily decided to deprive a licensee of its licence."[828]

302. In accordance with the *Invesmart* tribunal's reasoning, the "context within which [Supreme Decree 032] is adopted and applied" becomes all the more critical for the Tribunal's analysis of Bear Creek's expropriation claim.[829] Here, the context of the issuance of Supreme Decree 032 makes clear that Peru "arbitrarily decided to deprive" Bear Creek of its investment. As Bear Creek has explained previously, Supreme Decree 032 specifically targeted Bear Creek's investment[830] for political reasons.[831] In fact, high ranking officials in Peru's government at the time, including the President, unequivocally memorialized the context in which Supreme Decree 032 was issued:

> - Alan Garcia, f**ormer President of Peru**: "The petition so that there is no mining activity in the Puno region is 'constitutional nonsense' and breaks the country's unity," warning that "the Government cannot fall on the 'easy way out policy' and grant irrational petitions."[832]
>
> - Pedro Sanchez, **Minister of Energy and Mines**: "[T]the request of the protest leaders, who demand that the Executive power issue decrees annulling the mining concessions in the area, is unconstitutional, therefore is it not possible to address it." Mr. Sanchez further explained that "accepting this demand would generate liabilities and economic contingents to the

827 As Professor Bullard explains, the purposes Peru now claims were the basis for Supreme Decree 032 would not allow for a revocation of the previously granted authorization under Peruvian law and, in any event, such revocation would be subject to payment of compensation to Bear Creek. *See generally*, Second Bullard Expert Report.

828 **RLA-040**, *Invesmart* Award ¶ 504.

829 *Id.* ¶ 500; **CL-0091**, *Saluka* ¶ 264.

830 **Exhibit C-0005**, Supreme Decree 032-2011-EM, Jun. 25, 2011 (stating: "WHEREAS: … BEAR CREEK MINING COMPANY SUCURSAL DEL PERU, requested authorization to acquire seven (7) mining rights located in the border zone with Bolivia of the Puno department; In view of the documents submitted, Supreme Decree No. 083-2007-EM was issued … Article 1 – Purpose of the norm. Supreme Decree No. 083-2007-EM is hereby derogated.").

831 Claimant's Memorial ¶¶ 130-138; *see supra* ¶¶ 137-140.

832 **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011.

> Executive Power, in addition to affecting the legal certainty."[833]
>
> - Clara García Hidalgo**, senior adviser to the Minister of Energy and Mines**: "[T]he Santa Ana project was lawful" and there was "no legislation to cancel concessions that were granted legally" and that the Santa Ana Project "could not be accused of contaminating because it still had not obtained the permit to operate and produce silver."[834]
>
> - Rosario Fernandez, **Prime Minister:** "[U]nfortunately, [ ] this is not a trade union strike or an economic strike but basically a strike that is linked to political purposes; I am sorry to have to say it because it is being confirmed that there are would be people linked to extreme organizations that in reality are encouraging the situation."[835]

303. In short, Supreme Decree 032 was issued in violation of the Peruvian legal framework, outside of the defined legal procedure, without proper notice or legal reasoning.[836] Thus, Supreme Decree 032 cannot be considered "a *bona fide* non-discriminatory regulation aimed at the general welfare."[837]

304. Peru's reliance on *Saluka v. Czech Republic* is equally misplaced. In *Saluka*, the claimant asserted that it had been deprived of the value of its shares in a local bank, IPB, as a result of the Czech Republic's intervention, which culminated in the forced administration of the bank. The Czech Republic responded that the decision of the Czech National Bank to put IPB into forced administration was a permissible regulatory action taken pursuant to the Czech Banking Act and could not constitute expropriation. The tribunal noted the lack of a "bright and easily distinguishable line between non-compensable regulations on the one hand and, on the

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833 **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011.

834 **Exhibit C-0093**, *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011.

835 *Id.*

836 Claimant's Memorial ¶¶ 140-144.

837 **RLA-040**, *Invesmart* Award ¶ 497.

other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law."[838] The tribunal thus examined the "context" and the "circumstances" of the measure at issue to determine whether such measure "'crosses the line' that separates valid regulatory activity from expropriation."[839] The tribunal focused on the Czech National Bank's reasoned decision to subject IPB to forced administration and appoint an administrator. In fact, the tribunal reproduced that decision *in extenso* in the text of the award: it spanned more than four, single-spaced pages, and painstakingly detailed the basis for the ultimate conclusion.[840] The tribunal commented that this decision was "fully motivated"[841] and that it was confirmed by an administrative appellate board as well as by the City Court in Prague on two occasions.[842]

305. In contrast, in the instant case, Supreme Decree 032 is not reasoned or "well motivated." It only sets forth a few lines in the Whereas Clause, in which it refers vaguely to "new circumstances" that "would imply the disappearance of the legally required conditions for the issuance of the mentioned act."[843] There is absolutely no explanation as to what these circumstances are, much less how they justify the revocation of Supreme Decree 083.[844] There is no factual or legal analysis whatsoever, likely because Peruvian authorities were fully aware that "there is no legislation to cancel concessions that have been legally granted,"[845] and that a measure derogating Supreme Decree 083 would be "inadmissible," unconstitutional" and that it

838 **CL-0091**, *Saluka* ¶ 263.

839 *Id.* ¶ 264.

840 *Id.* ¶ 270.

841 *Id.* ¶ 271.

842 *Id.* ¶ 274.

843 **Exhibit C-0005**, Supreme Decree 032-2011-EM, Jun. 25, 2011.

844 Second Bullard Expert Report ¶ 142.

845 **Exhibit C-0093**, *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011.

would "generate liabilities and economic contingencies for the Executive Power, in addition to affecting legal certainty."[846] And Supreme Decree 032 was condemned—not confirmed—by the Lima First Constitutional Court. In light of all of this, the *Saluka* decision is of no assistance to Peru; to the contrary, it highlights the grave shortcomings of Supreme Decree 032.

306. Peru also asserts that Supreme Decree 032 is entitled to a presumption of legitimacy or "as the *Invesmart* tribunal put it, a 'margin of appreciation.'"[847] But whatever deference Peru's action may receive, it cannot be confused with a prohibition against review. Simply stated, a State's regulatory actions are not "beyond review."[848] Even when "regulatory authority of the State deserves deferential treatment, it is essential to do so without losing sight of the reasons why such deference is accorded."[849] The *Tecmed* tribunal similarly found that it had jurisdiction to question that deference, under the applicable BIT, "to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation."[850] A State, even in the exercise of its sovereign powers, must act in accordance with the rule of law which in this case requires—at the

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846 **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011; **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011.

847 Respondent's Counter-Memorial ¶ 238 (citing **RLA-041**, *Tza Yap Shum* Award ¶ 95 and **RLA-040**, *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, June 26, 2009 ¶ 484). While Peru cites *Tza Yap Shum v. Peru* for the proposition that there is a presumption of legitimacy for regulatory actions, it nonetheless sought to annul that same award because "the Tribunal applied no such presumption in favor of Peru's legitimate exercise of its taxation powers." **CL-0182**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, Feb. 12, 2015 ¶ 195 (*hereinafter*, "*Tza Yap* Annulment Decision"). The arbitral tribunal, "even recognizing the importance of the functions that … tax administration and collection" performs, found that Peru's "failure to observe its own procedures, must be considered arbitrary." **RLA-041**, *Tza Yap Shum* Award ¶ 218. The annulment committee rejected Peru's annulment request finding, *inter alia*, that Peru was complaining simply "because the Arbitral Tribunal did not agree with the Republic of Peru's arguments." **CL-0182**, *Tza Yap* Annulment Decision ¶ 197.

848 **RLA-040**, *Invesmart* Award¶ 487.

849 **RLA-041**, *Tza Yap Shum* Award ¶ 180 ("Aun cuando el Tribunal reconoce que la potestad regulatoria del Estado merece un trato deferente, es esencial hacerlo sin perder de vista las razones que lo ameritan") (emphasis added).

850 **CL-0040**, *Tecmed* Award ¶ 139.

very least—the observance of due process and the adoption of non-discriminatory measures.[851] And such exercise of police powers is subject to an international investment tribunal's scrutiny.

### 3. Supreme Decree 032 Was Arbitrary, Not Proportional, and Issued Without Regard for Due Process

307. In all events, even if Supreme Decree 032 somehow could fall within the scope of the police powers doctrine (it does not), that doctrine is not without limit. While true that States enjoy wide discretion to regulate their affairs, it is no less true that this discretion cannot be arbitrary. The *Saluka* tribunal (cited by Peru) observed that "the so-called 'police power exception' is not absolute."[852] Similarly, the *ADC v. Hungary* tribunal noted that the exercise of a State's right to regulate its domestic affairs "is not unlimited and must have its boundaries," which include a State's treaty obligations. Thus, "when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate."[853]

308. Here, Article 812 of the Canada-Peru FTA expressly circumscribes any exercise of Peru's police powers to so-called regulatory conduct that is for a public purpose, in

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851 *See, e.g.*, **Exhibit C-0001**, Canada-Peru FTA, Article 812; **RLA-030**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002, pt. IV, ch. D, ¶ 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") (emphasis added).

852 **CL-0091**, *Saluka* Award ¶ 258.

853 **CL-0060**, *ADC* Award ¶ 423 (holding that Hungary's measures depriving the claimant of its rights to operate two airport terminals and of the benefits from future business opportunities constituted an indirect expropriation). The tribunal also rejected Hungary's argument that the claimant had assumed the "risk" associated with the State's regulatory regime: "It is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do with it." *Id.* ¶ 424. The tribunal considered that, "had the Claimants ever envisaged the risk of any possible depriving measures . . . they took that risk with the legitimate and reasonable expectation that they would receive fair treatment and just compensation and not otherwise." *Id.*

accordance with due process of law, non-discriminatory, and for prompt, adequate and effective compensation. As already detailed above (Section IV), Supreme Decree 032 does not satisfy any of these elements.

309. Peru accepts that the police powers doctrine has limits and does not afford States *carte blanche* to regulate—and expropriate—with impunity. In *Tza Yap Shum v. Peru,* Peru accepted that a State may exercise its regulatory activity only under certain conditions, which included ensuring that a measure is proportional to its objective and observes due process.[854] The cases cited by Peru concerning the police powers doctrine support this position.[855]

310. On Peru's own case regarding the limits of the police powers doctrine, Supreme Decree 032 was an arbitrary measure, not proportional to its objective and issued without due process of law. As explained by the Lima First Constitutional Court, Supreme Decree 032 "must be reasonable and bearing a proportional sense to the intended prohibition."[856] Yet, Supreme Decree 032 lacked "reasonable motive" and was:

> clearly [an] arbitrary act; all the more so, because upon its issuance, the claimant was not provided with the opportunity to accredit that the circumstances relating to its assumed obligations had not been neglected.

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[854] **RLA-041**, *Tza Yap Shum* Award ¶ 174: "Dicho lo anterior, también está establecido en el derecho internacional que el ejercicio de la actividad regulatoria del Estado (incluyendo la potestad tributaria) debe ejercerse bajo ciertas condiciones. Así lo reconoce la parte Demandada que expresa que, entre otros factores, el Tribunal debe entrar a evaluar la proporcionalidad del accionar de la SUNAT y la observancia del debido proceso."

[855] *See, e.g.,* **RLA-040**, *Invesmart* Award ¶¶ 497-499 (discussing concepts of bona fide regulation, non-discriminatory and aimed at general welfare); **RLA-030**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002, pt. IV, ch. D, ¶ 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) (emphasis added); **CL-0091**, *Saluka* Award, ¶ 255 (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") (emphasis added). *See also* other cases cited in Respondent's Counter Memorial on the Merits, n. 384.

[856] **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014, at 21.

> As such, it can be verified that the cited supreme decree violates the principle of the prohibition of arbitrariness, given that, as observed therein, there is no imputation whatsoever attributable to the claimant that allows the derogation of the supreme decree under which the mining rights … were granted.[857]

The Lima First Constitutional Court is only one of the many Peruvian authorities that have acknowledged the arbitrariness of Supreme Decree 032. High ranking officials forecasted that a supreme decree derogating Supreme Decree 083 would be "unacceptable,"[858] "unconstitutional,"[859] "irrational,"[860] "unattainable,"[861] and "constitutional nonsense."[862]

311. Thus, even if this Tribunal were to analyze this case under the police powers doctrine, it should conclude that Supreme Decree 032 was not a legitimate exercise of Peru's police powers as it was arbitrary, not proportional, and issued without affording Bear Creek due process of law, *i.e.*, Supreme Decree 032 constitutes a breach of Peru's international obligations.

### F. PERU DIRECTLY EXPROPRIATED BEAR CREEK'S MINING RIGHTS

312. In its Counter-Memorial, Peru cast its expropriation of Bear Creek's investment in the terms of an indirect expropriation so as to attempt to hide behind the language of Annex

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857 *Id.*

858 **Exhibit C-0092**, Press Release, Presidencia del Consejo de Ministros, *Premier califica de inadmisible bloqueo de carreteras en Puno y pide deponer acciones violentas*, May 18, 2011; **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011; **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011.

859 **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 (quoting to the Minister of Energy and Mines Pedro Sanchez explaining that "the request of the protest leaders, who demand that the Executive power issue decrees annulling the mining concessions in the area, is unconstitutional, therefore is it not possible to address it.").

860 **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011.

861 **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 (quoting to the Minister of Energy and Mines Pedro Sanchez explaining that "the request of the protest leaders, who demand that the Executive power issue decrees annulling the mining concessions in the area, is unconstitutional, therefore is it not possible to address it.").

862 **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 (quoting then Peruvian President Alan Garcia). *See also* **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011(quoting the Minister of Energy and Mines Pedro Sanchez who explained that "annulling the mining concessions in the area is unconstitutional").

812(c) and avoid international liability. This strategy, however, should not obscure the fact that Supreme Decree 032 actually constitutes Peru's deliberate and forcible taking of Bear Creek's property rights. As Claimant previously explained, direct expropriation is defined as "a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect."[863] Claimant also explained the widely-accepted concept that expropriation may affect "a broad range of rights that are economically significant to the investor."[864] Peru does not dispute any of this. Instead, Peru incorrectly argues that Claimant's direct expropriation claim fails because "direct expropriation requires transfer of title" and, here, "Claimant retains title to the Santa Ana Concession today."[865] Central to Peru's argument is its mischaracterization that Supreme Decree 083 (which Supreme Decree 032 purported to abrogate) granted Bear Creek merely a "right to apply for permission to develop and eventually operate a silver mine – not a right to mine at Santa Ana."[866]

313. But as further detailed below (**Sections IV.F.1** and **2**), Supreme Decree 083 granted Bear Creek a right to acquire, own, and possess the Santa Ana Concessions after making a finding that the Santa Ana Project constituted a public necessity. Bear Creek then acquired those specific mining concessions. Supreme Decree 083 is thus a fundamental component of Bear Creek's property right—it goes to the core of Bear Creek's ability to acquire, own, and possess the Santa Ana Concessions. As the tribunal in *Enron v. Argentina* explained, direct expropriation requires the transfer of "at least some essential component of property rights . . . to

863 Claimant's Memorial ¶ 123 (citing *Tecmed v. Mexico*).

864 *Id.*

865 Respondent's Counter-Memorial ¶¶ 250, 251.

866 *Id.*¶ 226 (emphasis in original).

a different beneficiary, in particular the State."[867] That is precisely what Supreme Decree 032 did. It deprived Bear Creek of its right to own those concessions: "In the absence of that authorization, which is a material requirement needed to create property, BEAR CREEK has completely lost its right"[868] *i.e.*, its property right since Bear Creek "can no longer be the owner thereof."[869] Peru's Supreme Decree 032 thus breaches the Canada-Peru FTA's prohibition against unlawful expropriation.

314. Although the Canada-Peru FTA does not define what constitutes a direct expropriation, this concept is understood in international law as a "forcible taking by the Government of tangible or intangible property"[870] and "an open, deliberate and unequivocal intent, as reflected in a formal law or decree or physical act, to deprive the owner of his or her property through the transfer of title or outright seizure."[871]

315. International tribunals have used direct expropriation standards even in cases where the measure at issue involves the revocation of a decree granting a concession. In *Quiborax v. Bolivia*, the tribunal concluded that "a State measure constitutes expropriation under the Treaty if (i) the measure deprives the investor of its investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine."[872] The tribunal first analyzed this last prong, namely whether the revocation of the concession was

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867 **CL-0150**, *Enron Corporation, Ponderosa Assets, L.P., v. Argentina,* ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶ 243. Although the Annulment Committee partially annulled the award, the *Enron* tribunal's findings on expropriation survived in their entirety.

868 **CL-0040**, *Tecmed* Award ¶ 113.

869 Second Bullard Expert Report ¶ 130.

870 **CL-0040**, *Tecmed* Award ¶ 113.

871 **CL-0183**, Nigel Blackaby, Constantine Partasides, *et al., Redfern and Hunter on International Arbitration*, Oxford University Press ¶ 8.81, 6th edition (2015).

872 **CL-0184**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015 ¶ 200 (*hereinafter*, "*Quiborax* Award").

justified under a police powers doctrine. The tribunal found that Bolivia had failed to give notice to the claimant that it was conducting an audit of its operations, thus the claimant could not participate or provide information to Bolivia (contrary to Bolivia's assertions that the claimant had failed to respond to requests for information). Additionally, the tribunal held that the revocation of an environmental license "seemed to respond to pressure of the local community rather than breaches of the law by" the claimant.[873] Finally, the tribunal also found that "the revocation of the Claimants' concessions did not comply with minimum standards of due process, whether under international law or Bolivian law."[874] Thus, "the Revocation Decree was not a legitimate exercise of Bolivia's police powers."[875]

316. The *Quiborax* tribunal next analyzed whether the revocation decree deprived the claimant of its investment and found in the affirmative since "the Revocation Decree had the effect of transferring the title of [claimant's] mining concessions to the State."[876] Lastly, the Tribunal determined that the revocation had permanent effects because the Claimant was forced to return the concessions to Bolivia and "never again exploited those concessions."[877]

317. Similarly here, as detailed in **Section IV.F.3** and **4**, Supreme Decree 032 forcibly, openly, and deliberately transferred (or had the effect of transferring) Bear Creek's property rights, thereby permanently depriving Bear Creek of its investment, in breach of the Canada-Peru FTA.

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873 *Id.*

874 *Id.* ¶ 221.

875 *Id.* ¶ 227.

876 *Id.* ¶¶ 228-229 (emphasis added).

877 *Id.* ¶ 233.

### 1. Supreme Decree 083 Constitutes an Essential Component of Bear Creek's Property Rights

318. It is uncontroverted that Supreme Decree 083 granted Bear Creek the right to acquire seven specific mining concessions in the Santa Ana Project area.[878] Article 1 of Supreme Decree 083 declared it a public necessity for Bear Creek "to acquire and possess concessions and rights over mines and supplementary resources" within 50 kilometers of the southern Peruvian border, as listed in Article 2.[879] Article 2, in turn, authorized Bear Creek "to acquire seven (7) mining rights, located in the Puno department, in the border zone with Bolivia," namely the Santa Ana Concessions.[880] Supreme Decree 083 also contemplated that the Peruvian mining authority would issue additional authorizations to Bear Creek for mining activities in the concession areas.[881]

319. Supreme Decree 083 thus granted Bear Creek "the constitutionally required authorizations that are needed 'to acquire or possess' the border-zone mining concessions that are the subject of this arbitration."[882] Without Supreme Decree 083—*i.e.*, without the express right that Peru granted to Bear Creek to acquire the seven mining concessions in the Santa Ana area—Bear Creek could not have acquired title to the Santa Ana Concessions in the first place, and today, Bear Creek is not permitted to conduct any activity in connection with these

878 As explained by Professor Bullard, Supreme Decree 083 "is a specific and concrete legal instrument, enabling BEAR CREEK to acquire mining rights in the zone of the border with Bolivia … this authorization integrates itself as part of the property right so that the subsequently acquired property is an authentic property … The authorization act is, therefore, a specific act with particular and specifically defined effects: it integrates the property as a component thereof." First Bullard Expert Report ¶¶ 165-166.

879 **Exhibit C-0004**, Supreme Decree No. 083-2007-EM, Nov. 29, 2007, Art. 1.

880 *Id.,* Art. 2.

881 *Id.*, Art. 3.

882 Respondent's Rejoinder on Provisional Measures ¶ 28.

Concessions.[883] The right granted to Bear Creek under Supreme Decree 083 was the *sine qua non* of the entire Santa Ana Project: without it, Bear Creek could not—and cannot today—own or develop the Santa Ana Project. Peru itself stressed that Supreme Decree 083 "included: (1) the finding of 'public necessity,' that is required for foreign ownership of mineral concessions in the border region and (2) the express authorization for Claimant to acquire mining rights in the border region."[884] Indeed, Bear Creek's "right of ownership is a fundamental right autonomous of the acts through which it was created, recognized in the Constitution as a subjective right."[885]

320. As explained by Professor Bullard, the "authorization [granted by Supreme Decree 083] integrates itself as part of the property right so that the subsequently acquired property is an authentic property, with all the attributes [property] provides, equivalent to the property of any national … The authorization act is, therefore, a specific act with particular and specifically defined effects: it integrates the property as a component thereof."[886] In other words, the authorization granted via Supreme Decree 083 "is a material requirement needed to create property,"[887] without which "BEAR CREEK has completely lost its right" and "can no longer hold property over" the concessions.[888]

321. Accordingly, in light of the above, there can be no doubt that Supreme Decree 083 was an "essential component" of Bear Creek's property rights in the Santa Ana Project and that, as a result of Supreme Decree 032 which revoked Supreme Decree 083, Bear Creek—in

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883 As the Parties have explained, Supreme Decree 083 was a condition precedent for Bear Creek to own and operate the mines at issue. *See, e.g.,* Claimant's Memorial ¶ 24; Respondent's Counter-Memorial ¶ 27.

884 Respondent's Rejoinder on Provisional Measures ¶ 28 (emphasis added).

885 Second Bullard Expert Report ¶ 3.b.

886 *Id.* ¶ 10.

887 *Id.* ¶ 133.

888 *Id.*

Respondent's own words—"will not be able lawfully to do anything with the 'title to the concessions' that it claims."[889]

### 2. Supreme Decree 083 Granted Bear Creek Specific Mining Rights

322. In its Counter-Memorial, Peru seeks to limit and minimize the right that Supreme Decree 083 granted to Bear Creek (and that Supreme Decree 032 revoked) to a "right to apply for permission to develop and eventually operate a silver mine – not a right to mine at Santa Ana."[890] Peru's contention grossly misconstrues the text of Supreme Decree 083, however. As demonstrated above, Supreme Decree 083 gave Bear Creek the right to own the seven mining concessions listed in its Article 2. Bear Creek then proceeded to acquire the seven mining concessions thereby perfecting its property rights.[891] To own a mining concession under Peruvian law means to own the right to:

- "[E]xplore and exploit mineral resources granted."[892]
- "[U]se and enjoyment of the natural resource granted and, consequently, the property of the fruits and products that are extracted."[893]
- "[A] right in rem … consist[ing] of the sum of the attributes that this law recognizes in favor of the concessionaire.[894]
- These rights "are irrevocable provided the holder meets the obligations that this law or special legislation requires to maintain its validity.[895]

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889 Respondent's Rejoinder on Provisional Measures ¶ 28.

890 Respondent's Counter-Memorial ¶ 226 (emphasis in original).

891 Second Bullard Expert Report ¶ 10 (explaining that "[t]his authorization integrates itself as part of the property right so that the subsequently acquired property is an authentic property, with all the attributes [property] provides, equivalent to the property of any national).

892 **Bullard Exhibit 031**, Decreto Supremo No. 014-92-EM, Ley General de Minería, Art. 9, **Flury Exhibit 002**, Ley de Promoción de Inversiones en el Sector Minero, Decreto Legislativo No. 708, Nov. 13, 1991, Art. 20.

893 **Exhibit R-142**, Organic Law for the Sustainable Use of Natural Resources, Law No. 26821 ("Law Bi, 26821"), Article 23, Jun. 25, 1997.

894 **Bullard Exhibit 031**, Decreto Supremo No. 014-92-EM, Ley General de Minería, Art. 10.

Accordingly, Bear Creek held much more than a "right to apply for permission." Bear Creek had a distinct set of rights, including the right to own and exploit the mineral concessions it lawfully acquired.

323. Peru's own official documents confirm that Supreme Decree 083 granted Bear Creek specific mining rights. In resolving Bear Creek's *amparo* request against Supreme Decree 032, the Lima First Constitutional Court repeatedly referred to Bear Creek's "rights" as having been created by Supreme Decree 083. For example, the Court found that "there is no justified purpose for bringing an action by the State to reverse the rights granted to [Bear Creek]."[896] Similarly, the Court held that "there is no imputation whatsoever attributable to the claimant that allows the derogation of the supreme decree under which the mining rights of Karina 9A, Karina 1, Karina 2, Karina 3, Karina 5, Karina 6 and Karina 7 were granted."[897]

324. For Peru to argue now that Supreme Decree 083 only gave Bear Creek the right to apply for mining permits is disingenuous. Supreme Decree 083 granted Bear Creek specific mining rights that are protected from unlawful expropriation under the Canada-Peru FTA.

### 3. Supreme Decree 032 Openly and Unequivocally Revoked Bear Creek's Rights to Own, Operate, or Benefit from the Concessions

325. Supreme Decree 032 openly, directly, and intentionally took away Bear Creek's right to acquire, possess, and operate the Concessions, such that Bear Creek's title to the Concessions is now—in Peru's own words—an "inoperative" "paper title" with which Bear

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[895] *Id*.

[896] **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014, Ninth Whereas (emphasis added).

[897] *Id.* (emphasis added).

Creek can "not [] lawfully [] do anything."[898] There can be no doubt that Supreme Decree 032 struck at the fundamental core of Bear Creek's property rights.

326. The text of Supreme Decree 032 proves that it is "an open and deliberate" act to "forcibly take," without compensation, Bear Creek's fundamental right to acquire, own, and operate seven specific mining concessions.[899] Put differently, Supreme Decree 083 gave Bear Creek the right to own the Santa Ana Concessions, and Supreme Decree 032 took that right away:

> "In the absence of that authorization, which is a material requirement needed to create property, BEAR CREEK has completely lost its right. The fact that it must wait until the process commenced by the MEM concludes for the concessions to formally revert to the State in no way changes the fact that, without the authorization required by the Constitution, BEAR CREEK can no longer be the owner thereof."[900]

Without the right to own the Santa Ana Concessions—which was the premise to Bear Creek's exercise of its option under the Option Agreements, acquisition of the Concessions, and substantial investments in the Project—Bear Creek's Santa Ana Project came to a grinding halt. Supreme Decree 032 permanently divested Bear Creek of its right to acquire, own, and operate the Santa Ana Concessions, which resulted in the entire project shutting down (and adversely impacted Bear Creek's ability to pursue the Corani Project as well).[901] Such actions unmistakably constitute a direct expropriation.

327. As Claimant explained in Section E above, Supreme Decree 032 cannot be considered an appropriate exercise of police powers: it was issued without notice to Bear Creek,

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898 Respondent's Rejoinder on Provisional Measures ¶ 28.

899 **Exhibit C-0004**, Supreme Decree No. 083-2007-EM, Nov. 29, 2007, Articles 1-2.

900 Second Bullard Expert Report ¶ 130.

901 Swarthout Witness Statement ¶ 46; Swarthout Rebuttal Witness Statement ¶¶ 43-58; Claimant's Memorial ¶ 56.

in violation of Bear Creek's "right of defense," and without "payment of a compensation and the application of due process."[902] Additionally, Supreme Decree 032, "seemed to respond to pressure of the local community rather than breaches of the law"[903] or Bear Creek's own mining activities.[904] As to the effect of Supreme Decree 032 and as explained by Peru, Bear Creek no longer has "clean title"[905] to the mining concessions and today Bear Creek can "not [] lawfully [] do anything"[906] with them. In other words, Supreme Decree 032 had the effect of transferring title of the mining concessions to Peru. This transfer or deprivation has been permanent. In short, Supreme Decree 032 "deprived from [Bear Creek] its entire property. This, because, as Article 71 itself provides, the consequence of a foreigner's having property within 50 kilometers of the border without having the required authorization is not only the impossibility of engaging in mining activity but also the complete forfeiture of the right to the State."[907] It follows that today and due to Peru's conduct, "there is not even the possibility of BEAR CREEK being able to sell its right of ownership to third parties, since its property is unauthorized and has been declared illegal by the State."[908]

#### 4. Supreme Decree 032 Constitutes An Unlawful Direct Expropriation

328. Finally, the legality of Peru's direct expropriation of Bear Creek's investment must be measured against the requirements set forth in Article 812, namely it must be deemed

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902 Second Bullard Expert Report ¶ 111.

903 **CL-0184**, *Quiborax* Award ¶ 220; *see supra* ¶¶137-140; 270 *et seq*.

904 *See* Swarthout Witness Statement ¶ 50; Respondent's Counter-Memorial ¶ 134 (discussing "the third front of protests about the contamination of the Ramis River basin" and how Peru issued two emergency decrees "[c]onsidering that most of the gold mining in the area was illegal").

905 Respondent's Rejoinder on Provisional Measures ¶ 30. In other words, "there is not even the possibility that BEAR CREEK could sell its property right to third parties, since its property is unauthorized and has been declared illegal by the State." Second Bullard Expert Report ¶ 131.

906 Respondent's Rejoinder on Provisional Measures ¶ 28.

907 Second Bullard Expert Report ¶ 131.

908 Second Bullard Expert Report ¶ 131.

unlawful except if it was "for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation"[909] As detailed in Section IV of this Reply Memorial, Supreme Decree 032 constituted an unlawful expropriation of Bear Creek's investment because it was not issued for a public purpose, in accordance with due process of law, in a non-discriminatory manner, or against compensation as required by Article 812 of the Canada-Peru FTA.

## V. PERU FAILED TO ACCORD CLAIMANT AND ITS INVESTMENT FAIR AND EQUITABLE TREATMENT

### A. PERU FAILED TO ACCORD CLAIMANT AND ITS INVESTMENT THE MINIMUM STANDARD OF TREATMENT UNDER INTERNATIONAL LAW

329. Claimant and Respondent agree that Peru's obligation to accord Bear Creek and its investment fair and equitable treatment includes, at the very least, treatment in accordance with the customary international law minimum standard of treatment ("MST"), as required by Article 805 of the Canada-Peru FTA.[910] But the Parties disagree on the proper interpretation and application of that standard. Respondent appears to advocate applying the minimum standard of treatment as articulated in *Neer v. Mexico* in 1926,[911] a highly untenable position that even Respondent's own authorities do not support. Rather, MST is—in keeping with the dynamic nature of customary international law itself—an evolving standard that did not calcify at the time of the *Neer* decision almost 90 years ago (**Section V.A.1**).[912]

330. The contemporary minimum standard of treatment protects investors and their investments against State conduct that is arbitrary, grossly unfair, unjust, discriminatory, lacking

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909 **Exhibit C-0001**, Canada-Peru FTA, Article 812.1.

910 Claimant's Memorial, ¶ 146; Respondent's Counter-Memorial, ¶ 263.

911 **RLA-051**, *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926) (*hereinafter*, "*Neer v. Mexico*"), 4 RIAA 60, 61-62.

912 Claimant's Memorial, ¶ 146 and n.392.

due process, or in violation of the investor's legitimate expectations (**Section V.A.2**).[913] Peru has breached MST as articulated by the overwhelming majority of investment treaty awards (**Section V.A.3**). And even under Peru's indefensibly restrictive reading of MST, Peru's actions violate the standard (**Section V.A.4**).

331. At its core, Respondent would have this Tribunal undo a century of progressive development in customary international law concerning the minimum treatment of foreign investors and their investments, and instead, apply a draconian, reactive—and highly *un*fair and *in*equitable—standard of "shocking" or "egregious" conduct. Respondent's position on MST is disquieting, and Claimant submits that it should be seen for what it is: an admission that Peru indeed violated the minimum standard of treatment to which Claimant was entitled, and an attempt to escape liability through a regression of MST that would empty it of any real meaning.

### 1. MST Has Evolved Since *Neer*

332. Claimant's and Respondent's respective appreciations of MST fundamentally diverge. It thus bears reiterating, at the outset, how the Canada-Peru FTA establishes the relationship between fair and equitable treatment and MST. Article 805 of the Canada-Peru FTA states, in relevant part:

> 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.

[913] *Id.* ¶¶ 146-153.

333. In its Counter-Memorial, Respondent argues that, to establish a violation of MST, Claimant must show that "Respondent's actions reached the level of 'shocking' or 'egregious,' or were indicative of 'willful neglect' or 'bad faith.'"[914] Although Respondent avoids stating in clear terms its apparent position that the Tribunal must apply the *Neer* standard, the test Respondent advocates is unmistakably a restatement of *Neer's* requirement that the State's conduct "amount 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."[915]

334. Article 805(2) does not reference *Neer* at all, however. There is no language in that provision that stabilizes the legal framework of MST by fixing the standard to the time of *Neer*, *i.e.*, MST as of the year 1926. Instead, Article 805(2) refers to the *customary* international law minimum standard of treatment. Customary international law on MST has been evolving since well before Peru and Canada entered into the FTA, and will continue to do so.[916] Tribunals applying the Canada-Peru FTA are thus obliged to apply the *contemporary* content of MST, as reflected in customary international law gleaned from, among others, the decisions of investment treaty tribunals applying MST discussed in the succeeding sections.

335. Given this, Respondent's position is untenable for at least two reasons. First, Respondent's very premise that *Neer* articulated any conception of a minimum standard of

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914 Respondent's Counter-Memorial ¶ 263.

915 **RLA-051**, *Neer v. Mexico* at 60, 61. *See* **RLA-046**, *Glamis Gold, Ltd. V. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 601 (*hereinafter*, "*Glamis* Award") (interpreting the *Neer* Standard to require proof of conduct that is "egregious," "outrageous," or "shocking").

916 *See* **CL-0185**, Michael W. Reisman, *Canute Confronts the Tide*, ICSID REV. (Fall 2015) 30 (3): 616-634, 625, (*hereinafter, "*Reisman") *citing* Hollin Dickerson, *Minimum Standards, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 23 ("[a]s a principle of customary international law, the content of the standard [MST of aliens] will continue to develop and change over time … The content of the standard will likely continue to be created through the dispute settlement process, including through ICSID, which is committed to establishing a rule of law in the area of foreign investment.") (*hereinafter*, "Reisman").

treatment is flawed: both case law and scholarship on the matter reject the proposition that the *Neer* standard was ever an accurate statement of MST.[917] Second, even granting that *Neer* was an accurate articulation of MST when it was decided in the 1920s, that standard has evolved significantly since then, as confirmed again by the overwhelming weight of case law and scholarship on the matter.[918]

336. First, the facts of *Neer* bear no relationship to the protection of foreign investment; the issue was whether a denial of justice had occurred. In *Neer*, the United States espoused the claim of the widow and daughter of Paul Neer, a U.S. citizen who was killed in Mexico, against the Government of Mexico.[919] The claim involved Mexico's alleged "unwarrantable lack of diligence … or intelligent investigation in prosecuting the culprits…"[920] The party responsible for the underlying unlawful act was a band of armed men not alleged to be acting under the control or at the instigation of the Government of Mexico.

337. The United States-Mexico General Claims Commission treated the *Neer* claim as a question of denial of justice[921] and rejected the United States' position, stating that "the

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917 **CL-0186**, Judge Stephen M. Schwebel, *Is Neer Far From Equitable*?, International Arbitration Club, London, May 5, 2011, (*hereinafter*, "Schwebel"); **CL-0185**, Reisman, *supra* n. 917; **CL-0187**, Jan Paulsson & Georgios Petrochilos, *Neer-ly Misled?*, FOREIGN INV. L. J. Vol. 22, No. 2, at 242-257 (2007) (*hereinafter*, "Paulsson & Petrochilos"); **CL-0068**, *Mondev International Ltd. V. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002 (*hereinafter* "*Mondev* Award") ¶ 115.

918 **CL-0068**, *Mondev* Award ¶ 123-25; **CL-0067**, *ADF* Award ¶ 179; **CL-0188**, *Merrill & Ring Forestry L.P. v. Government of Canada*, Award, Mar. 31, 2010, ¶¶ 207-8 (*hereinafter*, "*Merrill & Ring* Award"); **CL-0151**, *Pope & Talbot*, *Inc. v. Canada*, UNCITRAL (NAFTA), Award on Damages, May 31, 2002 ¶¶ 58-66 (*hereinafter*, "*Pope & Talbot* Award"); **CL-0069**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 (*hereinafter* "*Waste Management II* Award") ¶ 93; **CL-0034**, *GAMI Investments, Inc. v. Government of United Mexican States*, (NAFTA/UNCITRAL), Final Award, November 15, 2004, ¶ 95 (*hereinafter* "*GAMI* Award"); **CL-0187**, Paulsson & Petrochilos, *supra* n. 918 at 247-252; **CL-0186**, Schwebel; **CL-0185**, Reisman, *supra* n. 917 at 620-621.

919 *See generally* **RLA-051**, *Neer v. Mexico.*

920 *Id.* at 61.

921 *Id.* at 61; **CL-0186**, Schwebel, *supra* n. 918 at 1 ("The Commission treated the allegations at issue as a claim of denial of justice. It referred to articles by John Bassett Moore and by De Lapradelle and Politis on denial of justice."); **CL-0187**, Paulsson & Petrochilos, *supra* n. 918 at 243 ("The *Neer* criterion of "outrage, … bad faith,

treatment of an alien, in order to constitute an international delinquency, should amount 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 the insufficiency."[922] The Claims Commission stated explicitly that it did not intend to lay down a "precise formula" for determining when a State's conduct falls below the level of internationally acceptable conduct.[923]

338. Leading scholars who have analyzed *Neer* and its progeny in detail question whether *Neer* could even be construed as a reflection of MST under customary international law.[924] The Claims Commission in *Neer* analyzed neither state practice nor *opinio juris*, and the entirety of its reasoning and decision spans three pages.[925] Moreover, the facts of *Neer* are very different from that of an investor whose investment has been treated inequitably or unfairly by a foreign government.

339. The standards that apply to a State's duty to protect the physical security of foreigners from the acts of private third-parties are different from those that apply when the relevant conduct at issue is the treatment of foreign investment by the State itself.[926] With respect to its own treatment of a foreign national's investment, it is uncontroversial that the State is responsible for attributable acts of private parties.[927] Far from reflecting the customary

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… willful neglect of duty" and glaring "insufficiency of governmental action" applied only to what the Commission regarded as denial of justice claims.").

922 **RLA-051**, *Neer v. Mexico* at 60, 61.

923 *Id.* at 61.

924 *See generally* **CL-0186**, Schwebel, *supra* n. 918; **CL-0185**, Reisman, s*upra* n. 917; **CL-0187**, Paulsson & Petrochilos, *supra* n 918; **CL-0068**, *Mondev* Award ¶ 115; **CL-0067**, *ADF* Award ¶¶ 180-81.

925 **RLA-051**, *Neer v. Mexico*.

926 *See* **CL-0068**, *Mondev* Award ¶¶ 114-115; **CL-0185**, Reisman, *supra* n. 917, at 626.

927 *See generally* **CL-0030**, The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.

international law minimum standard of treatment, "*Neer* is relevant only in cases of failure to arrest and punish private actors of crimes against aliens."[928] If anything, *Neer* may at most (if at all) provide a statement of the customary international law understanding of denial of justice in 1926;[929] it is not a reflection of MST.

340. Regardless of whether *Neer* ever was an accurate statement of MST, the overwhelming majority of tribunals and scholars agrees that MST today is not what it was almost 90 years ago, as customary international law is an evolving body of law. According to Professor Reisman, "[a]s part of customary international law and especially as an evaluation rule, MST is nomodynamic and, thus, an evolving concept, capable of changing as State practice and *opinio juris* change."[930]

341. The eminent tribunal in *Mondev v. USA* analyzed MST in the context of a NAFTA claim. That tribunal considered and firmly rejected the idea that MST today is the same as the standard articulated in *Neer.* The *Mondev* tribunal conducted the survey Respondent effectively asks this Tribunal to undertake,[931] considering that customary international law and its content are shaped by arbitral decisions, over 2,000 (now about 3,000) bilateral investment treaties, and many treaties of friendship and commerce.[932] On the basis of State practice and *opinio juris* as distilled from these sources, the tribunal stated unequivocally that "the content of

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928 **CL-0187**, Paulsson & Petrochilos, *supra* n. 918, at 247.

929 **CL-0185**, Reisman, *supra* n. 917 at 632; **CL-0187**, Paulsson & Petrochilos, *supra* n. 918, at 243.

930 **CL-0185**, Reisman, *supra* n. 917 at 625.

931 Respondent asserts that Bear Creek's fair and equitable treatment claim fails because "it has not identified a specific rule of customary international law that Respondent allegedly breached." Respondent's Counter-Memorial on the Merits, ¶ 279. To demonstrate a "specific rule of customary international law governing a specific type of conduct," Respondent claims that Bear Creek must prove State practice and *opinio juris*. *Id.* at ¶¶ 280-281. Respondent's position is untenable, however. MST is the specific rule of international law governing the Parties' conduct and Peru points to no authority that can support its position that proof of "specific rules" beyond the content of MST is required.

932 **CL-0068**, *Mondev* Award ¶ 125.

the minimum standard today cannot be limited to the content of customary international law as recognized in arbitration decisions in the 1920s."[933]

342. Similarly, the NAFTA tribunal in *ADF Group v. U.S.* held that customary international law does not project a "static photograph of the minimum standard of treatment of aliens as it stood in 1927 [sic] ... for both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development."[934] The *ADF* tribunal cited *Mondev* with approval and relied on it in assessing the evolving nature of customary international law.

343. At least one of the Contracting Parties to the Canada-Peru FTA agrees that MST is an evolving standard. In its second NAFTA Article 1128 submission in *ADF*, the Government of Canada concurred that MST has evolved since *Neer*.[935] Canada stated that its position had "never been that the customary international law regarding the treatment of aliens was frozen in amber at the time of the *Neer* decision."[936] While Canada maintained that MST imposed on the claimants a high threshold for proving a violation thereof, it agreed that what is shocking in 2015

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933 **CL-0068**, *Mondev* Award ¶ 123. *See also id.* ¶ 116 ("Secondly, *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms--had they been current at the time--might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."). The *Mondev* tribunal also doubted that *Neer* ever was an accurate statement of MST. *Id.* ¶¶ 114-116.

934 **CL-0067**, *ADF* Award ¶ 179.

935 **CL-0189**, *ADF Group Inc., v. United States of America*, ICSID Case No. ARB(AF)/00/1, Second Submission of Canada Pursuant to NAFTA Article 1128, July 19, 2002 ¶ 33.

936 *Id*. (internal quotation marks omitted).

may differ from what was shocking in the 1920s and that customary international law is an evolving body of law.[937]

344. The tribunal in *Merrill & Ring* also analyzed State practice, decisions, and commentary on MST under NAFTA and other international law authorities, and concluded that these authorities evidence an undeniable "trend towards liberalization of the standard applicable to the treatment of business trade and investments" which "continued unabated over several decades and has yet not stopped."[938] Based on its thorough analysis, the *Merrill & Ring* tribunal concluded that MST today is broader than the standard defined in *Neer* and its progeny.[939] Other investment treaty arbitral tribunals, scholars and practitioners agree with this position.[940]

345. Notably, even the authorities on which Respondent relies acknowledge that the *Neer* standard is not an accurate statement of MST as a matter of contemporary international law. Respondent cites *Thunderbird* for the proposition that the minimum standard imposes a very high threshold upon investors.[941] But the *Thunderbird* tribunal also acknowledged that "[t]he content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law."[942] The *Thunderbird* tribunal did not impose a burden as high as the *Neer* standard Respondent advocates.

346. Respondent next relies on *Cargill*, but *Cargill* also supports Claimant's position that MST has evolved since *Neer*. That tribunal acknowledged and agreed that MST had

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937 *Id*.

938 **CL-0188**, *Merrill & Ring* Award, ¶¶ 207-208, 213.

939 *Id.* ¶ 213.

940 *See, e.g.*, **CL-0151**, *Pope & Talbot* Award ¶¶ 58-66; **CL-0069**, *Waste Management II* Award ¶ 93; **CL-0034**, *GAMI* Award ¶ 95; **CL-0187**, Paulsson & Petrochilos, *supra* n. 918, at 247-252; **CL-0186**, Schwebel, *supra* n. 918, at 3-6; **CL-0185**, Reisman at 620-621.

941 Respondent's Counter-Memorial ¶¶ 267, 270.

942 **CL-0073**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Final Award, Jan. 26, 2006 ¶ 194 (*hereinafter* "*Thunderbird* Award").

evolved considerably from *Neer:* "tribunals agree, for instance, that the customary international law minimum standard of treatment is dynamic and therefore evolves with the rights of individuals under international law."[943] The *Cargill* tribunal recognized that the inclusion of the FET standard in thousands of treaties may raise international expectations as to what constitutes good governance[944] and proceeded to quote *ADF* and *Mondev* with approval,[945] stating: "the idea of what is the minimum treatment a country must afford to aliens is arising in new situations simply not present at the time of the *Neer* award which dealt with the alleged failure to properly investigate the murder of a foreigner."[946] Contrary to Respondent's assertions, the *Cargill* tribunal's understanding of what MST entails is aligned far more closely with Claimant's position, than with Respondent's.

347. Peru relies particularly on *Glamis* for the proposition that the *Neer* articulation of the minimum standard of treatment still supplies the accurate level of scrutiny.[947] Respondent neglects to mention that *Glamis* is very much an outlier case, having come under severe criticism by leading jurists and eminent tribunals for its unduly narrow reading of MST and for internal contradictions and inconsistencies in the tribunal's reasoning.[948] Moreover, even on its own terms, *Glamis'* endorsement of the *Neer* level of scrutiny (though not the precise test) was

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943 **RLA-053**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009, ¶ 281 (*hereinafter*, "*Cargill* Award").

944 *Id.* ¶ 276.

945 *Id*.

946 *Id*. ¶ 282.

947 Respondent's Counter-Memorial ¶ 272.

948 **CL-0185**, Reisman, *supra* n. 917, at 630-633 ("paradoxically by *Glamis'* own standards [on the investor having to 'prove' that a change in custom has occurred], *Neer* is not even evidence of customary international law with respect to the protection of the individual. … Thus, it is impossible to say on what basis the *Glamis* Tribunal pronounced that 'the fundamentals of the *Neer* standard thus still apply today."); **CL-0190**, *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, Mar. 17, 2015 ¶¶ 434-435 (*hereinafter*, "*Bilcon* Award").

tempered considerably by that tribunal's acknowledgment that notions of what circumstances constitute "outrageous" conduct have changed markedly in the years since *Neer*.[949]

348. At any rate, *Glamis* cannot revive the *Neer* standard any more than King Canute could stop the tides, to adopt a vivid metaphor recently used in the "debate" (to the extent there even is one) on the content of MST.[950] In the most recent investment treaty award that analyzed MST, *Bilcon v. Canada*—a case that is particularly persuasive given that it also concerned a mining concession and has facts similar to the present case (*see infra* Section V.A.3)—the tribunal chaired by Judge Bruno Simma noted that "NAFTA tribunals have [ ] tended to move away from the position more recently expressed in *Glamis*, and rather move towards the view that the international minimum standard has evolved over the years towards greater protection for investors."[951]

349. As is clear from this survey of authorities, the *Neer* standard Respondent advocates is no longer an accurate statement of MST, if it ever was, and "[a]s a principle of customary international law, the content of the standard [MST] will continue to develop and change over time…"[952]

### 2. The Contemporary International Minimum Standard of Treatment Includes a Broader Set of Protections Than *Neer*

350. Respondent argues that its actions must reach the level of "shocking" or "egregious," and must be indicative of "willful neglect" or "bad faith" in order to breach MST.[953]

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949 **RLA-0046**, *Glamis* Award, ¶ 613 ("Similarly, this Tribunal holds that the *Neer* standard, when applied with current sentiments and to modern situations, may find shocking and egregious events not considered to reach this level in the past.").

950 **CL-0185**, Reisman, *supra* n. 917, at 1.

951 **CL-0190** *Bilcon* Award ¶ 435.

952 **CL-0185**, Reisman at 625 (*citing* Hollin Dickerson, *Minimum Standards* in Max Planck Encyclopedia of Public International Law ¶ 23).

953 Respondent's Counter-Memorial ¶ 263.

This is not an accurate statement of MST, as explained above (*see supra* Section V.A.1). Rather, MST today offers *greater* protections than *Neer*.[954] MST offers significantly more protections to investors than Respondent claims. At the very least, tribunals today unanimously reject the "bad faith" requirement,[955] which Peru alleges is a prerequisite for finding a breach of MST.[956]

351. In *Waste Management II*, the NAFTA tribunal chaired by Professor (now ICJ Judge) Crawford undertook a review of cases applying MST and concluded that "despite certain differences of emphasis," a general standard for MST "is emerging."[957] The recent *Bilcon v. Canada* tribunal recognized that "[t]he formulation of the 'general standard" for MST by the *Waste Management II* award "is particularly influential, [as] a number of other tribunals have applied its formulation of the international minimum standard based on its reading of NAFTA authorities."[958] That formulation thus bears emphasis:

> 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. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

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954 **CL-0068**, *Mondev* Award ¶ 117; **CL-0188**, *Merrill & Ring* Award ¶ 213; **CL-0069**, *Waste Management II* Award ¶¶ 98-99; **CL-0190**, *Bilcon* Award ¶ 427.

955 **CL-0068**, *Mondev* Award ¶ 116 ("… a State may treat foreign investment unfairly or inequitably without necessarily acting in bad faith").

956 Respondent's Counter-Memorial ¶ 269.

957 **CL-0069**, *Waste Management II* Award ¶ 98**.**

958 **CL-0190**, *Bilcon Aw*ard ¶ 442**.**

> Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.[959]

352. Under this general standard, a State's conduct breaches MST if it 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[.]"[960] This threshold is not nearly as burdensome as *Neer.* Indeed, in *Bilcon,* the tribunal clarified that the *Waste Management II* standard (adopted also in other cases) contained "no requirement … that the challenged conduct reaches the level of shocking or outrageous behaviour."[961]

353. On the specific relationship between MST and "reasonably relied on representations by the host State," the *Waste Management II* tribunal explained that "it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[962] In other words, MST extends to the protection of an investor's legitimate expectations.[963] The most relevant and recent case law on MST has relied repeatedly on *Waste Management II* on this matter,[964] and Respondent points to no authority to contradict this.

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959 **CL-0069**, *Waste Management II* Award ¶¶ 98-99 (emphasis added).

960 *Id.* ¶ 98.

961 **CL-0190**, *Bilcon* Award, ¶ 444.

962 **CL-0069**, *Waste Management II* Award ¶ 98.

963 *Id*. *See also* **CL-0073**, *Thunderbird* Award ¶ 147 ("Having considered recent investment case law and the good faith principle of international customary law, the concept of legitimate expectations relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.").

964 *See, e.g.*, **CL-0190**, *Bilcon* Award ¶ 427 ("The Tribunal in the present case is guided by theses earlier cases, particularly the formulation of the international minimum standard by the *Waste Management* Tribunal."); **CL-0070**, *Teco v. Guatemala*, ICSID Case No. ARB/10/17, Award, Dec. 19, 2013 (*hereinafter* "*Teco* Award") ¶¶ 454-455; **CL-0034**, *GAMI* Award ¶¶ 101 et seq.; **CL-0188**, *Merrill & Ring* Award ¶¶ 208, 213.

354. MST also grants a number of procedural rights to foreign investors, including access to courts, the right to unbiased hearings, the right to participate in hearings, and the right to a judgment in accordance with the law of the State within a reasonable time.[965] MST thus includes both substantive and procedural protections. As the *Bilcon* tribunal put it in its interpretation of MST in the (identical) NAFTA context:

> The formulation [of MST] also recognizes the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach.[966]

355. At a minimum, Respondent's assertion that "bad faith" is required to prove a breach of MST is in contravention of virtually unanimous authority. The *Mondev* tribunal held that "a State may treat foreign investment unfairly and inequitably," in violation of MST, "without necessarily acting in bad faith."[967] The tribunals in *ADF*,[968] *Merrill & Ring*,[969] and *Loewen*,[970] among others, all agreed that bad faith is no longer a required element for establishing a breach of MST. Similarly, the *Waste Management II* tribunal held that it was a basic obligation of the State under MST to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.[971] In other words, bad faith is not required, but its existence is—as the *Glamis* tribunal noted—"conclusive evidence" of a breach

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965 **CL-0185**, Reisman, *supra* n. 917, at 624.

966 **CL-0190**, *Bilcon* Award ¶ 444.

967 **CL-0069**, *Waste Management II* Award ¶ 116.

968 **CL-0067**, *ADF* Award ¶ 180.

969 **CL-0188**, *Merrill & Ring* Award ¶¶ 208, 213 ("Conduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA Tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention.").

970 **CL-0118**, *The Loewen Group et al. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, Jun. 26, 2003, ¶¶ 57-58.

971 **CL-0069**, *Waste Management II* Award ¶ 138.

of MST. Indeed, even *Glamis*, the outlier and most narrow contemporary interpretation of MST, acknowledged that proof of "bad faith" is not a prerequisite for finding a violation of the minimum standard of treatment.[972]

356. In sum, MST protects investors from State conduct that is arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory, involves a lack of due process leading to an outcome which offends judicial propriety or contravenes the investor's legitimate expectations. A breach of any one of these standards of treatment is sufficient to trigger a violation of MST—Claimant need not prove that Respondent's actions violated each of these standards of treatment. Regrettably, however, as explained in the following section, the facts of this case establish that Peru has violated *every single one* of these standards.

### 3. Peru's Treatment of Claimant and Its Investment Has Breached the Minimum Standard of Treatment

357. Peru's conduct vis-à-vis Bear Creek and its investment falls far short of the minimum standard of treatment. Peru's mistreatment of Bear Creek in 2011 must be viewed in the full context of the parties' relationship, starting with their extensive environmental and socio-economic assessments and negotiations at the outset of the project. On December 5, 2006, Bear Creek submitted a request to MINEM for a supreme decree that would authorize Bear Creek to acquire mining rights in the border area at Santa Ana.[973] In compliance with local laws and the demands of the Government, Claimant underwent a lengthy application process. As part of this process, Bear Creek submitted to the Government the following:

- a complete description of the mining rights at issue;

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[972] *Id.* ¶ 616 ("The Tribunal notes that one aspect of evolution from *Neer* that is generally agreed upon is that bad faith is not required to find a violation of the fair and equitable treatment standard, but its presence is conclusive evidence of such. Thus, an act that is egregious or shocking may also evidence bad faith, but such bad faith is not necessary for the finding of a violation.").

[973] **Exhibit C-0017**, Supreme Decree Application, Annex IX.

- a detailed description of its programmed investments in the area;
- an assessment of the socio-economic impact of the proposed project;
- a complete set of corporate documentation and certificates of good standing for Bear Creek;
- a complete set of documentation for Bear Creek Peru and its corporate representatives;
- a detailed cadastral map for the concession area;
- copies of Ms. Villavicencio's claims for mineral rights and proof of registration for Santa Ana;
- copies of the Santa Ana Option Agreements;
- proof of registration of those agreements; and
- consolidated financial statements for two years prior to the application.[974]

When MINEM wrote to Bear Creek requesting additional information on the project, Bear Creek promptly responded, providing the requested information to the satisfaction of the Government.[975]

358. MINEM undertook a detailed assessment of the project over the course of several months and eventually transmitted the application to the Ministry of Defense for consideration.[976] The Ministry of Defense conducted its own review of the project and on July 26, 2007, the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces voiced

[974] *Id.* at Annex II-XI.

[975] **Exhibit C-0042**, Letter from J.C. Pinto Najar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007; **Exhibit C-0043**, Letter from M. Grau Malachowski, Bear Creek, to MINEM, Feb. 26, 2007.

[976] **Exhibit C-0044**, Resolution issued by MINEM to the Ministry of Defense for the Authorization to Acquire Mineral Rights filed by Bear Creek Mining Company, Mar. 12, 2007.

approval of the project.[977] Two months later, on September 26, 2007, the Vice-minister Secretary General of External Relations also rendered a favorable opinion on Bear Creek's application to MINEM.[978]

359. Following almost a year of internal assessments and reviews of the proposed project, on November 29, 2007, the Government issued Supreme Decree 083 declaring the Santa Ana Project a public necessity and authorizing Bear Creek to acquire the Santa Ana Concessions and proceed with the Santa Ana Project.[979] Respondent itself emphasizes the thoroughness of its review of applications for supreme decrees under Article 71,[980] and the Government's detailed analysis of the project over the course of a year and its subsequent issuance of Supreme Decree 083 were specific assurances that gave rise to Claimant's legitimate expectation that it would be permitted to mine the Santa Ana Concession and that, should any dispute regarding the Concession arise in the future, due process would be followed to resolve any such dispute in accordance with applicable laws.

360. Over the following years, in reliance on Supreme Decree 083 and the Government's repeated representations and encouragements,[981] Bear Creek invested tens of millions of U.S. dollars in Peru, conducted an extensive exploration program for the Santa Ana Project, developed and executed a detailed Feasibility Study, undertook the ESIA, produced the PPC (which DGAAM approved along with the ESIA's Exclusive Summary), and implemented

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977 **Exhibit C-0045**, Letter from the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces to the Secretary General of the Ministry of Defense, Jul. 26, 2007.

978 **Exhibit C-0046**, Letter from the Vice-minister Secretary General of External Relations to the Ministry of Mines, Sept. 26, 2007.

979 **Exhibit C-0004**, Supreme Decree No. 083-2007-EM, Nov. 29, 2007.

980 Respondent's Counter-Memorial ¶ 29.

981 *See, e.g.,* **Exhibit C-0004**, Supreme Decree No. 083-2007-EM, Nov. 29, 2007; **Exhibit C-0091**, *Se rompió el diálogo con las Aymaras*, May 21, 2011.

substantial community relationship programs, which the Government confirmed to be sufficient.[982]

361. In spite of the Government's actions and representations approving the Santa Ana Project, and in spite of the local community's general approval thereof, on May 30, 2011, the Government suddenly, arbitrarily, and unfairly suspended Bear Creek's ESIA process at Santa Ana in clear violation of the applicable legal framework,[983] and against Claimant's legitimately held expectations.

362. Less than a month later, on Friday June 24, 2011, Prime Minister Fernandez announced that the Government would publish various measures aimed at resolving certain unrelated protests in the Puno area.[984] On the very next day, Saturday June 25, 2011, without notice or an opportunity for Bear Creek to be heard, MINEM issued Supreme Decree 032, revoking Supreme Decree 083 and expropriating Bear Creek's investment.

363. Supreme Decree 032 does not provide any explanation for the Government's decision to reverse the declaration of public necessity—which the Government had issued initially after many months of analysis—on which Bear Creek had relied in acquiring and investing in the Santa Ana Project.[985] The overnight revocation of Supreme Decree 083 and the "process" through which it took place stand in stark contrast to the months of detailed assessment and vetting the Government required Bear Creek to undergo in order to obtain approval for the Santa Ana Project. The revocation was also a manifest violation of Peruvian

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982 **Exhibit C-0073**, MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011.

983 Flury Expert Report ¶ 81.

984 **Exhibit C-0108**, *Elaboran cinco normas legales que resuelven crisis en Puno*, Jun. 24, 2011.

985 **Exhibit C-0005**, Supreme Decree No. 032-2011-EM, Jun. 25, 2011.

law, as detailed by Professor Bullard,[986] Peruvian mining law expert and former Minister of Energy and Mines Hans Flury,[987] and the Lima First Constitutional Court.[988] Peru's actions evidence "a complete lack of transparency and candour in an administrative process[,]"[989] which the *Waste Management II* tribunal stated would constitute a violation of MST, and demonstrate a clear violation of Claimant's legitimate expectations.

364. Apart from constituting a violation of Claimant's legitimate expectations, the Government's abrupt revocation of Supreme Decree 083 was an arbitrary act that is grossly unfair and unjust because, among other things, it expropriated Bear Creek's multi-million dollar investment without notice or an opportunity to be heard. After Bear Creek had invested millions of dollars to proceed with the Santa Ana Project, as instructed and approved by the Government, the Government suddenly reversed its position that the Santa Ana Project was a public necessity even though Bear Creek had complied with all of the Government's conditions, including its very own review and approval of Bear Creek's PPC, and even though the local population was in favor of the project.[990] Critically, Peru's revocation was done without notice to Claimant and

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986 *See, e.g.,* First Bullard Expert Report ¶ 18; Second Bullard Expert Report ¶¶ 3, 114, 120-122.

987 Flury Expert Report ¶ 66, 68.

988 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014. (emphasis supplied)

989 **CL-0069**, *Waste Management II* Award ¶¶ 98-99.

990 Antunez Witness Statement ¶ 28; Antunez Rebuttal Witness Statement ¶¶ 19, 21; **Exhibit C-0118**, Memorandum from Members of the Huacullani District to the Prime Minister of Peru, MINEM, and Bear Creek Mining, *Memorial Por El Desarollo y La Inclución*, May 15, 2013 (affirming the local community's support for the Santa Ana Project and explaining that the communities and authorities of Huacullani did not understand the Government's reason for suspending the project since Bear Creek had provided the community with social programs, activities, workshops and a public hearing); **Exhibit C-0119**, Memorandum from Members of the Huacullani District to MINEM, *Reactivación del Proyecto Santa Ana*, Oct. 27, 2013 (requesting MINEM to allow the Santa Ana Project to resume); **Exhibit C-0120**, Memorandum from Members of the Huacullani District to Prime Minister of Peru, MINEM and Bear Creek Mining, *Reiterativo Por El Desarollo y La Inclusión*, Jan. 24, 2014 (reiterating the community's request that MINEM allow Bear Creek to return to Santa Ana).

without providing any reasons to Claimant or an opportunity to be heard, a serious and self-evident due process and fair treatment violation.

365. In *Metalclad*, a Municipality of Mexico denied Metalclad's application for a permit to construct a landfill after the federal government had represented to Metalclad that it could and should begin construction.[991] The Municipality denied the application "at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear." [992] Moreover, immediately after denying Metalclad's permit, the Municipality filed an administrative complaint challenging Metalclad's federal permit.[993] The *Metalclad* tribunal "infer[red] from this that the Municipality lacked confidence in its right to deny permission for the landfill[.]"[994] On this basis, the *Metalclad* tribunal found a violation of MST.[995] The facts before this Tribunal are substantially similar: Peru revoked Supreme Decree 083 without giving Bear Creek notice or an opportunity to be heard, and immediately thereafter, the Government filed a lawsuit to attempt to formally annul Bear Creek's concessions.[996] These facts alone are sufficient to find a violation of MST.

366. But in addition, insofar as any reasons were provided at all, the Government's only professed justification for its arbitrary act was that circumstances had (allegedly) changed.[997] When Bear Creek requested a copy of all public records connected with the issuance of Supreme Decree 032 to determine what could possibly constitute "new circumstances"

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991 **CL-0105**, *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 200, ¶ 90 (*hereinafter*, "*Metalclad* Award").

992 *Id.* ¶ 91.

993 *Id.* ¶ 94.

994 *Id.*

995 *Id.* ¶ 101.

996 **Exhibit C-0112**, Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, July 5, 2011.

997 **Exhibit C-0005**, Supreme Decree No. 032-2011-EM, Jun. 25, 2011.

justifying the expropriation of its investments, MINEM responded that no such documents or records existed.[998] The Government's inability to produce any records to demonstrate an elementary – let alone thorough – analysis of the circumstances underlying the revocation of Supreme Decree 083 confirms the arbitrary nature of the Government's act and its utter lack of respect for due process vis-à-vis Bear Creek.

367. Remarkably, Peru's own courts agreed: after three years of proceedings and numerous interlocutory appeals filed by the Government, the Lima First Constitutional Court held that:

> In this case, there is no reasonable motive in Supreme Decree No. 032-2011-EM, this principle [of legal security] has been violated by this **clearly arbitrary act**; all the more so, because upon its issuance, the claimant was not provided with the opportunity to accredit that the circumstances relating to its assumed obligations had not been neglected. As such, it can be verified that the cited supreme decree violates the principle of the prohibition of arbitrariness, given that, as observed therein, there is no imputation whatsoever attributable to the claimant that allows the derogation of the supreme decree under which the mining rights of Karina 9A, Karina 1, Karina 2, Karina 3, Karina 5, Karina 6, and Karina 7 were granted.[999]

368. Peru's inability to offer Bear Creek a legitimate explanation as to what the new circumstances were that allegedly justified the revocation of Supreme Decree 083 underscores the *ex post facto* nature of the justifications that Peru purports to advance today, in this arbitration. First, Peru argues that protests in Puno, approximately 135 kilometers north of Santa Ana, justified its revocation of Supreme Decree 083. However, those protests were politically

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998 **Exhibit C-0111**, Letter from R. Wong, Secretary General of MEM, to E. Antunez, Bear Creek Mining Company, Aug. 19, 2011. The only document MINEM could provide was a one-page *exposición de motivos*, which simply paraphrased the language of Supreme Decree 032 without any meaningful discussion or justification.

999 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014. (emphasis supplied).

motivated, which President Garcia, Minister Fernandez and other Peruvian Ministers publicly acknowledged at the time.[1000] Perhaps realizing that its first argument is untenable, Peru next argues that Bear Creek acquired its investment in Santa Ana unlawfully and in bad faith. But as explained above, Bear Creek acquired its investment in accordance with Peruvian[1001] and international law, in a transparent manner, in good faith and after obtaining authorization from the Government to do so.[1002] Peru began advancing its argument on the alleged illegality of Bear Creek's investment only after it had already unlawfully expropriated Bear Creek's investment. Its argument lacks any basis in facts or law.

369. Peru's attempt to annul Bear Creek's concessions by having MINEM file a civil action against Bear Creek on July 5, 2011 is another manifestation of Peru's violation of the minimum standard of treatment it owes Bear Creek. In this civil action, Peru is challenging the acquisition of the investment, which the Government itself approved with full knowledge of all relevant facts, including the Option Agreements and Ms. Villavicencio's role.[1003] Peru's knowledge that it has no legitimate reason for expropriating Bear Creek's investment, and that its conduct violated its international legal obligations, is confirmed by the numerous public statements of government officials and the meetings with Bear Creek executives during which the Government vowed to resolve the situation.[1004]

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[1000] *See supra* ¶¶ 112-119; Antunez Rebuttal Witness Statement of ¶¶ 48, 49, 62.

[1001] As explained in Section II.B.3. Bear Creek used a commonly used structure, also used by other foreign investors whose acquisitions were never challenged, nor were they ever deprived of their rights by the Government.

[1002] *See supra* Section I.A.

[1003] *Id*.

[1004] Swarthout Witness Statement ¶¶ 54-56, 58; Antunez Witness Statement ¶¶ 23-33; Antunez Rebuttal Witness Statement ¶¶ 61-63; **Exhibit C-0121**, Draft Letter by J. Merino, Minister of Energy and Mines, to E. Antunez de Mayolo, Bear Creek, outlining the Government's proposed steps to resolve Bear Creek's situation at Santa Ana; **Exhibit C-0122**, Letter from E. Antunez de Mayolo to J. Merino and D. Figallo, Minister of Justice, Dec. 17, 2013; **Exhibit C-0123**, *Gobierno busca evitar demanda millonaria de minera canadiense*, DIARIO EXPRESO.

370. Similar facts recently led the *Bilcon v. Canada* NAFTA tribunal under similar treaty language to find that a violation of MST had occurred. In that case, a U.S. mining company undertook years of project planning and millions of U.S. dollars in investments in environmental and social impact studies to obtain permission from the federal Canadian and local Nova Scotia authorities to develop and operate the White Point Quarry. Following a lengthy hearing, Canada denied Bilcon's application to operate the mine on the basis that it would conflict with community core values, a factor not noted in the applicable law as a basis for denying an application to mine.[1005]

371. The *Bilcon* tribunal held that the investor had a legitimate expectation that its project would be assessed on the merits of environmental soundness in accordance with the Canadian legal standard. Bilcon had invested significant sums to obtain and present an environmental impact statement in reliance on specific encouragements by Canada. Although Bilcon was permitted to participate in a hearing regarding the issuance of the mining permit, the tribunal found that Bilcon was not afforded an opportunity to present its case meaningfully and it was not on notice that "community core values" were a relevant factor in deciding whether Bilcon could proceed with the project.[1006] On the basis of these findings, the *Bilcon* tribunal held that Canada violated MST.

372. The facts of the present case are far more egregious than those presented in *Bilcon*. As in *Bilcon*, the investor in this case spent millions of U.S. dollars in reliance on the Government's representations to obtain environmental assessment studies and to engage in community programs to obtain the support of the local communities. However, unlike *Bilcon*, Bear Creek had no opportunity to be heard prior to the revocation of its mining rights, and it was

[1005] **CL-0190**, *Bilcon* Award ¶¶ 7-25.

[1006] *Id.* ¶¶ 447-454.

given no prior notice before the Government decided to issue Supreme Decree 032 overnight. Peru's arbitrary and unlawful conduct toward Bear Creek lacks even a pretense of fair and equitable treatment and observance of basic due process rights, and constitutes a breach of Peru's MST obligations.

373. Curiously, Peru attempts to argue that it did not violate MST in this case, because Claimant relies in part on the articulation of the MST standard in *Waste Management II* and the tribunal in that case did not find a breach of MST.[1007] However, the governmental measures at issue in *Waste Management II* fell far below the level of egregiousness exhibited by Peru's conduct in this case. The tribunal in *Waste Management II* held on the facts that Mexico failed to respect certain contractual obligations toward Waste Management, inadequately enforced a city ordinance, and attempted to enforce a performance bond in a problematic manner,[1008] but in the tribunal's view, this did not amount to a violation of MST. Unlike Mexico, however, Peru did not simply fail to respect contractual obligations or inadequately enforce a city ordinance. Peru violated national and international law by unjustifiably, arbitrarily and grossly unfairly revoking Bear Creek's rights to operate the Concessions without affording Bear Creek basic due process rights, such as notice or an opportunity to be heard.[1009] This is far more serious than the inadequate enforcement of a city ordinance, which was at issue in *Waste Management II*. Peru's Supreme Decree 032 unlawfully revoked rights to develop a *specific* project the Government previously found to be a public necessity, even though there was no change in circumstances to justify this change of policy, no period of assessment and evaluation, and no change in the measure of support the local community evidenced for the Santa Ana Project.

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[1007] Respondent's Counter-Memorial ¶ 277.

[1008] *Id.*

[1009] *See supra* Section II.E.

374. Finally, Peru relies on *Thunderbird v. Mexico*, which held that "a gross denial of justice was necessary for State action to fall below international standards,"[1010] to argue that its own actions do not rise to the required level. But, as with *Waste Management II, Thunderbird* is not factually analogous: the claimant in that case alleged that Mexico had denied it a gaming license in violation of Mexico's NAFTA obligations. The tribunal found that Mexico had not violated the international minimum standard of treatment in denying the investor Thunderbird a license to operate gaming machines, in part because:

> Thunderbird was given a full opportunity to be heard and to present evidence at the Administrative Hearing [regarding the gaming license], and [] it made use of this opportunity. The Tribunal does not find anything reproachable about the Administrative Order. The 31-page document appears in the Tribunal's view, to be adequately detailed and reasoned; it reviews the evidence presented by Thunderbird at the hearing; and discusses at length the legal grounds on which SEGOB based its determination that the EDM machines were prohibited gambling equipment.[1011]

375. The facts and findings of *Thunderbird* stand in marked contrast to the present case. Thunderbird was given a full opportunity to be heard at an administrative hearing; here, Bear Creek was not even informed of the Government's intent to revoke Supreme Decree 083, let alone given an opportunity to be heard. There, the Mexican authorities' decision denying Thunderbird a gaming license was 31 pages long and contained detailed reasoning underlying the decision; here, Supreme Decree 032 contained one sentence stating that circumstances had changed, and MINEM was unable to produce any evidence that the decision was grounded in any reasoning or assessment. Thus, comparisons with *Thunderbird* actually serve to support Bear Creek's position that Peru violated the minimum standard of treatment.

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[1010] Respondent's Counter-Memorial ¶ 278.

[1011] **CL-0073**, *Thunderbird* Award ¶ 198 (emphasis added).

### 4. Even if the *Neer* Standard Were an Accurate Statement of MST, Peru's Actions Would Constitute a Breach Thereof

376. The immediately preceding section demonstrates that Peru has violated the minimum standard of treatment it owes Claimant and its investment, consistent with the customary international law MST that is applicable under the Canada-Peru FTA. As discussed above, Respondent's insistence on a strict application of the *Neer* standard is manifestly erroneous, a-historical, and dangerous.[1012] But, even assuming for the sake of argument that *Neer* articulates the applicable international minimum standard of treatment, Peru's conduct would still be in breach of that standard.

377. With very sparse analysis, the *Neer* tribunal held that the Mexican authorities' failure to investigate and diligently prosecute the murder of an American citizen nonetheless did not rise to the level of "outrage," "bad faith," or "willful neglect of duty."[1013]

378. The present case does not concern the failure of a government to diligently investigate and prosecute a crime committed by a third party. No question of attribution is at issue. Rather, the Government is itself, unquestionably, the party that mistreated the investor's rights in violation of its national and international legal obligations. Expropriating an investor's assets arbitrarily without even the pretense of due process, without notice or hearing, easily meets the "outrageous" and "willful neglect of duty" standards.

379. Peru's actions following the expropriation further demonstrate that it was acting in bad faith. As discussed in detail earlier, the Government clearly understood that it had taken

[1012] *See, supra* at ¶¶ 329-349. *See also* **CL-0186**, Schwebel, *supra* n. 918, at 4 ("Why should [*Neer*'s] terse, barely reasoned opinion – which examines no State practice at all – be the fount of customary international law as respects what is an international delinquency, while the judgments of contemporary international tribunals do not influence the content of customary international law in that regard?").

[1013] **RLA-051**, *Neer v. Mexico* at 60-61.

Bear Creek's Santa Ana Concessions unlawfully.[1014] Its attempt to avoid answering for its unlawful actions by accusing Bear Creek of obtaining its investments invalidly as well as attempting to annul the concessions through MINEM's civil action, amount to bad faith. As discussed *supra*, these accusations have no basis whatsoever.[1015]

380. Thus, even under Respondent's unduly restrictive interpretation of the minimum standard, Peru's actions are in violation of its international law obligations.

### B. PERU FAILED TO ACCORD CLAIMANT AND ITS INVESTMENT FAIR AND EQUITABLE TREATMENT UNDER AN AUTONOMOUS STANDARD

381. At this point, Claimant submits that Peru's violations of the international minimum standard of treatment easily meet any conceivable standard that the Tribunal may apply—the contemporary MST standard, certainly, as well as the *Neer* standard—so outrageous and unconscionable has Peru's conduct vis-à-vis Bear Creek been. Thus, the Tribunal need not reach the question of whether Claimant is entitled to protection under a more general, and less stringent, form of fair and equitable treatment, commonly known as the "autonomous" fair and equitable treatment standard ("FET").

382. But even if this Tribunal were to somehow find that Peru did not violate the international minimum standard of treatment, Peru would *still* have violated its fair and equitable treatment obligations towards Bear Creek. Apart from the minimum standard of treatment under customary international law that Peru is obliged to accord to Claimant under the Canada-Peru FTA, Peru is also obliged to accord Claimant autonomous FET protections by operation of the most-favored nation clause of the FTA (Article 804 or the "MFN Clause"). As detailed in

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[1014] *See, e.g.*, **Exhibit C-0095**, *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTRO DE ENERGÍA Y MINAS, May 26, 2011 (Gala admitting in May 2011 that derogating from Supreme Decree 083 would be "completely ilegal"). *See supra* Section II.F.

[1015] *See supra* ¶ 369.

Claimant's Memorial on the Merits, Peru committed to treat Canadian investors and investments in a manner no less favorable than investors and investments from third States.[1016] In at least twenty-three other investment treaties to which it is a party, Peru accords investors fair and equitable treatment available under the autonomous standard—that is, fair and equitable treatment *without* any treaty-imposed equivalence of that protection to MST—and Claimant is entitled to import those protections through the MFN Clause.[1017]

383. Peru does not dispute that the MFN clause in the Canada-Peru FTA may be used to import more favorable protections available under other treaties to which Peru is a party.[1018] This is thus common ground between the Parties. Where the Parties disagree is only with respect to the corpus of treaties from which an investor may import such protections through the MFN Clause. Peru alleges that the Canada-Peru FTA "expressly excludes the importation of FET standards from other treaties" that predate the FTA and that, since none of the treaties into which it has entered since the Canada-Peru FTA affords autonomous FET protections, there is no favorable treatment that may be imported by operation of the MFN Clause.[1019] However, as detailed in **Section V.B.1** below, the terms of the Canada-Peru FTA do not prevent the application of the MFN Clause to pre-existing treaties. Accordingly, Bear Creek is entitled to

[1016] Claimant's Memorial at ¶¶ 154-181.

[1017] *Id.* ¶ 156 and n.404.

[1018] Respondent's Counter-Memorial ¶¶ 292-295. Numerous investment tribunals have imported substantive protections from other treaties by operation of the MFN provision. *See*, *e.g.*, **CL-0075**, *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, December 15, 2014, ¶ 555; **CL-0076**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010, ¶ 125, n.16; **CL-0077**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009 *(hereinafter*, "*Bayindir* Award"), ¶ 167; and **CL-0078**, *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, Jul. 29, 2008 ("*Rumeli* Award"), ¶ 575; **CL-0074**, *Sr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, Jun. 19, 2009, ¶ 196.

[1019] Respondent's Counter-Memorial ¶ 292.

import more favorable substantive protections from pre-existing treaties, including the autonomous fair and equitable treatment standard which Peru has breached (**Section V.B.2**).

### 1. The MFN Clause Permits the Importation of More Favorable Standards of Treatment from Pre-Existing Treaties

384. Article 31(1) of the Vienna Convention states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[1020] Article 31(2) clarifies that "context" includes, *inter alia*, the text, preamble, and annexes of the relevant treaty.[1021]

385. The starting point of the analysis is thus the text of the MFN Clause. Article 804 of the Canada-Peru FTA provides, in relevant part, that:

> 1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.[1022]

Article 804 thus permits covered investors and investments to benefit from more favorable treatment that is afforded to investors and investments from other States.

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[1020] **CL-0039**, Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(1) (emphasis added).

[1021] *Id.* at Art. 31(2).

[1022] **Exhibit C-0001**, Canada-Peru FTA, Article 804 (emphasis added).

386. Peru and Canada included an express limitation to this MFN Clause in the corresponding Annex 804.1, which clarifies that MFN treatment does not extend to dispute resolution mechanisms that other treaties may offer to covered investors or investments:

> For greater clarity, treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments" referred to in paragraphs 1 and 2 of Article 804 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international treaties or trade agreements.[1023]

This is an explicit rejection of a significant strand of investment treaty case law allowing for the importation of arbitral consent via the MFN clause. But this clarification says nothing about MFN treatment not encompassing substantive standards of treatment, such as the FET standard.

387. Thus, Annex 804.1 does not impose any limit on the reach of the MFN Clause to substantive treatment protections contained in other treaties. This comports with the Parties' common position that the MFN Clause of the FTA may be used to import more favorable standards of treatment from other treaties.

388. Peru argues, however, that it "reserved the right to accord investors from Canada 'differential treatment'" as compared to investors from other countries who may benefit from broader protections in pre-existing treaties,[1024] such that the MFN Clause cannot be used to import more favorable treatment standards from such pre-existing treaties. Peru's entire argument hangs on the first paragraph of what Peru designates as "Peru's First Reservation" contained in Annex II, Schedule of Peru,[1025] which reads:

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[1023] *Id*., Annex 804.1 (emphasis added).

[1024] Respondent's Counter-Memorial ¶¶ 292-304.

[1025] *Id.* ¶¶ 293-294; n.500.

> 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.

By quoting this language completely out of context, however, Peru misrepresents its reach and its role within the Canada-Peru FTA.

389. Reference to Annex II can be found in Article 808 of the FTA, which is entitled "Reservations and Exceptions." Article 808 contains four subsections, the first two of which are relevant to the present analysis. Article 808(1) details reservations to the MFN Clause (among other provisions) with respect to "any existing non-conforming measure," and its continuation, renewal, or amendment, as set out in the Schedules to Annex I of the Canada-Peru FTA.[1026] Annex I, in turn, is entitled "Reservations for Existing Measures and Liberalization Commitments" and appends two Schedules, one for Canada and one for Peru.[1027] Article 808(2)

[1026] **Exhibit C-0001,** Canada-Peru FTA, Article 808(1).

[1027] In Annex I, Canada and Peru set out their respective reservations regarding existing non-conforming measures. *See* **CL-0191**, Canada-Peru FTA – Annex I: Reservations for Existing Measures and Liberalization Commitments (Sept. 11, 2013). Each reservation details the affected sector, the specific sub-sector, the industry classification, the type of reservation, the measure, and a description thereof. Examples of Peru's reserved "measures" include specific Peruvian laws providing that, *inter alia;*

- only a Peruvian national by birth may supply notary services (Decreta Ley N° 26002, Diario Oficial El Peruano del 27 de diciembre de 1992, Ley del Notariado, Articulo 5 (modificado por Ley N° 26742) y articulo 10 (modificado por Ley N° 27094));
- a foreign circus may stay in Peru with its original cast for a maximum of 90 days (Ley No. 28131, Diario Oficial "El Peruano" del 18 de diciembre de 2003, Ley del Artista, Interprete y Ejecutante, articulo 26);
- at least one bullfighter of Peruvian nationality must participate in any bullfighting event and at least one apprentice bullfighter of Peruvian nationality must participate in fights involving young bulls (Ley No 28131, Diario Oficial "El Peruano" del 18 de diciembre de 2003, Ley del Artista, Interprete y Ejecutante, articulo 28);
- only Peruvian citizens may register in the Registry of Port Workers (Ley No 27866, Diario Oficial "El Peruano" del 16 de noviembre de 2002, Ley del Trabajo Portuario, articulos 3 y 7), and so forth.

Each reservation in Annex I concerns a discrete, specific law or regulation that the State can adopt or maintain. Annex II uses the same terminology and achieves the same object as Annex I, except that it applies to future measures rather than existing measures. *See* **CL-0192**, Canada-Peru FTA – Annex I: Schedule of Peru and Schedule of Canada.

adds to this list of reservations "any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out in [the Party's] schedule to Annex II."[1028] Annex II is entitled "Reservations for Future Measures" and also appends two Schedules, one for Canada and one for Peru.[1029]

390. These reservations to the MFN Clause in Article 808 thus concern existing and future non-conforming measures that either Canada or Peru may have, may maintain, or may adopt. The text of Article 808 does not contain a reservation or other limitation to the MFN Clause as it concerns importing more favorable substantive standards of treatment.

391. This is by no means a mere semantic distinction. Peru understands fully the import of the term "measure" and how conceptually distinct it is from "treatment." The absence of any language in Article 808 of the FTA limiting the application of the MFN Clause to more favorable treatment in pre-existing treaties stands in stark contrast to the language contained in another international (and contemporaneous) agreement between Canada and Peru—the Canada-Peru BIT—which Canada and Peru signed on November 14, 2006, and which entered into force on June 20, 2007. This earlier agreement contains a provision (Article 9) that is also entitled "Reservations and Exceptions"[1030] and is analogous to Article 808 of the FTA. Article 9, like

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[1028] **Exhibit C-0001,** Canada-Peru FTA, Article 808(2).

[1029] Although Peru only submitted its own Schedule, Annex II has a cover note that labels Annex II as "Reservations for Future Measures" as set forth in the Parties' respective Schedules. As that cover note makes clear, Annex II sets forth the "reservations taken by [a] Party with respect to specific sectors, sub-sectors or activities for which it may maintain existing, or adopt new or more restrictive measures that do not conform with obligations imposed by," *inter alia*, the MFN Clause. Annex II requires Canada and Peru to detail the affected sector, the specific sub-sector, the industry classification, the type of reservation, and a description thereof. Examples of Peru's reservations for future non-conforming measures include measures that, *inter alia*, accord preferences to disadvantaged minorities and ethnic groups, or relate to artisanal fishing, cultural related activities, or Peruvian handicrafts. In fact, the remaining text of Peru's First Reservation relates to measures that accord differential treatment in aviation, fisheries, or maritime matters. *See* **CL-0193**, Canada-Peru FTA – Annex II: Reservations of Future Measures; **CL-0194**, Canada-Peru FTA – Annex II: Schedule of Peru.

[1030] **Exhibit C-0247**, Agreement Between Canada and The Republic of Peru for the Promotion and Protection of Investments ("Canada-Peru BIT"), Article 9**.**

Article 808 of the FTA, sets forth reservations to the MFN Clause as regards existing and future non-conforming measures, also referring to analogous Annexes I and II of the BIT. But Article 9 contains an additional, express provision that "Article 4 [MFN] shall not apply to treatment accorded by a Party pursuant to agreements, or with respect to sectors, set out in Annex III,"[1031] which is a stand-alone annex entitled "Exceptions from Most-Favoured-Nation Treatment." Annex III, in turn, reinforces that the MFN Clause "shall not apply to treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement."[1032] This is clear and unequivocal language—confirmed in the text of the BIT as well as in a clearly-labeled separate Annex III—that Canada and Peru did not want the MFN Clause in their earlier agreement (the BIT) to extend to more favorable standards of treatment contained in pre-existing international agreements. But neither this language nor the separate Annex III clearly labeled "Exceptions from Most-Favoured-Nation Treatment" appears anywhere in the Canada-Peru FTA.

392. As seen from the Canada-Peru BIT, the two States know how to use clear and unequivocal language to limit the scope of the MFN Clause as it applies to more favorable treatment—as opposed to measures—contained in pre-existing treaties, when they intend such a limitation. The deliberate absence of that language and of an "Annex III" in the Canada-Peru FTA confirms that no such limitation exists. Accordingly, there is nothing in the Canada-Peru FTA that prevents Claimant from relying on the MFN Clause to avail itself of more favorable standards of treatment afforded to other investors and investments in pre-existing treaties.[1033]

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[1031] *Id.,* Article 9(3) (emphasis added).

[1032] *Id.*, Annex III(1) (emphasis added).

[1033] Notwithstanding that the Canada-Peru FTA does not prevent the application of the MFN Clause to pre-existing treaties, Peru argues that importing an autonomous FET standard would contravene the Contracting Parties' intent. Respondent's Counter-Memorial ¶¶ 298-304. In advancing this argument, Peru relies on its alleged shift

### 2. Claimant is Entitled to All Protections Available Under the Autonomous FET Standard

393. Because the MFN Clause in the Canada-Peru FTA extends to standards of treatment contained in other Peruvian international agreements (whether pre- or post-FTA), Claimant may use the MFN Clause at Article 804 to import the autonomous standard of fair and equitable treatment that is not linked to the customary international law minimum standard of treatment.

394. Autonomous FET and MST are not the same. As the UNCTAD Secretariat concluded in its detailed study of FET:

> Fair and equitable treatment is not synonymous with the international minimum standard. Both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination, and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate [only] the international minimum standard for foreign investors. Where the fair and equitable standard is invoked the central issue remains simply whether the actions in question are in all circumstances fair and equitable or unfair and inequitable.[1034]

395. The content of fair and equitable treatment thus cannot be stated definitively in the abstract as it depends on an analysis of the totality of the circumstances surrounding the dispute at issue.[1035] The autonomous FET standard requires that Peru protect Claimant's

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in treaty practice from incorporating the autonomous FET standard to preferring the customary international law minimum standard of treatment, and claims that Canada shares Peru's understanding in this regard. However, if this were indeed the Contracting Parties' intent, they did not communicate such intent clearly in the FTA. In contrast to the language used in the Canada-Peru BIT, the FTA does not exclude the application of the MFN Clause to "treatment" accorded under pre-existing treaties, thereby opening the door to other standards of treatment such as the autonomous FET standard.

[1034] **CL-0195**, UNCTAD, *Fair and Equitable Treatment*, UNCTAD/ITE/IIT/11 (Vol. III) (1999) at 40.

[1035] *Id. See also* **CL-0196**, Ioana Tudor, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT Ch. 3 (2008) (declining to define FET with specificity because, as a *standard*, it should not be given a fixed and unchanging content, and instead should be flexible to respond to the near-infinite ways in which treatment can be unfair and inequitable); **CL-0185**, Reisman, *supra* n. 917, at 623

legitimate expectations,[1036] treat Claimant's investment transparently,[1037] guarantee Claimant procedural propriety and due process,[1038] and not deny justice to Claimant or its investment.[1039] Autonomous FET also protects Claimant from State conduct that falls short of good faith,[1040] breaches the State's contractual obligations,[1041] is disproportionate,[1042] constitutes coercion or harassment,[1043] or violates the State's obligation to "do no harm."[1044] Of these, the FET

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(stating that FET is not a "verification rule" but an "evaluation rule," which necessarily is general in nature and relies on the discretion of the applier of the principle).

[1036] *See*, *e.g.*, **CL-0063**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014, ¶ 572 (*hereinafter*, *Gold Reserve* Award"); **CL-0086**, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, Dec. 1, 2011, ¶ 316 (*hereinafter* "*Spyridon* Award"); **CL-0087**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, Nov. 8, 2010, ¶ 420; **CL-0032**, *Kardassopoulos* Award, ¶ 440; **CL-0078**, *Rumeli* Award, ¶ 609; **CL-0088**, *PSEG Global v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007, ¶ 240; **CL-0089**, *LG&E* Decision on Liability, ¶ 127; **CL-0090**, *Eureko v. Poland*, *Ad hoc*, Partial Award, Aug. 19, 2005, ¶ 235; **RLA-005**, *Occidental Exploration and Production Company v. Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, Jul. 1, 2004, ¶ 185.

[1037] *See*, *e.g.*, **CL-0063**, *Gold Reserve* Award, ¶ 570; **CL-0106**, *Bosh International et al. v. Ukraine*, ICSID Case No. ARB/08/11, Award, Oct. 25, 2012, ¶ 212; **CL-0086**, *Spyridon* Award, ¶ 314; **CL-0094**, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Mar. 28, 2011, ¶ 284; **CL-0077**, *Bayindir* Award, ¶ 178; **CL-0078**, *Rumeli* Award, ¶ 609; **CL-0107**, *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, Jul. 24, 2008, (*hereinafter*, "*Biwater* Award") ¶ 602; **CL-0089**, *LG&E* Decision on Liability ¶ 128; **CL-0040**, *Tecmed* Award ¶ 154.

[1038] *See, e.g.,* **CL-0040**, *Tecmed* Award ¶ 162; **CL-0037**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, Apr. 12, 2002 ¶ 143; **CL-0085**, *Waguih Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009 ¶¶ 451-5 (*hereinafter*, "*Siag* Award").

[1039] *See*, *e.g.*, **CL-0111**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, Mar. 10, 2015, ¶ 523; **CL-0112**, *Flughafen* Award, ¶ 376; **CL-0113**, *Franck Charles* Award ¶ 438; **CL-0114**, *Jan de Nul N.V. et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, Nov. 6, 2008, ¶ 188.

[1040] *See*, *e.g.*, **CL-0110**, *Jan Oostergetel et al. v. Slovak Republic*, UNCITRAL, Final Award, Apr. 23, 2012, ¶ 227; **CL-0086**, *Spyridon* Award, ¶ 314; **CL-0101**, *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, Nov. 12, 2010, ¶ 301 (*hereinafter*, "*Frontier* Award"); **CL-0085**, *Siag* Award, ¶ 450.

[1041] *See, e.g.,* **CL-0197**, *SGS Société Générale De Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, Feb. 12, 2010, ¶ 146.

[1042] *See, e.g.*, **CL-0198**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012, ¶¶ 404-454; **CL-0199**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, Oct. 31, 2012 (citing *Tecmed*, *Azurix*, and *LG&E*).

[1043] *See, e.g.*, **CL-0041**, C.F. Dugan, D. Wallace, Jr., N. Rubins & B. Sabahi, Investor-State Arbitration 523 (Oxford 2008); **CL-0200**, A. Newcombe & Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 294 (Wolters Kluwer Law & Business 2009); **CL-0096**, *Total v. Argentina*, Decision on Liability ¶ 338; **CL-0201**, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, Feb. 6, 2008 ¶ 179; **CL-0091**, *Saluka* Award ¶ 308.

protections of good faith and "do no harm" are of particular relevance in the present context, as discussed further below.

396. Respondent has not challenged Claimant's statement of the autonomous FET standard, and Claimant therefore rests on its previous submission.[1045] But, to summarize briefly, Claimant submits that Peru breached the autonomous FET standard, *inter alia*, by:

- Arbitrarily and unwarrantedly suspending Claimant's ESIA process at Santa Ana on May 30, 2011;
- Failing to provide Claimant an opportunity to appeal the Government's decision to suspend Bear Creek's ESIA process;
- Non-transparently revoking Supreme Decree 083 overnight through its issuance of Supreme Decree 032, without giving Bear Creek notice or an opportunity to be heard;
- Unjustifiably expropriating Bear Creek's investment through the issuance of Supreme Decree 032;
- Failing to provide Claimant notice or an opportunity to be heard prior to the Government's expropriation of Bear Creek's investment through Supreme Decree 032;
- Failing to provide Claimant an opportunity to appeal the Government's decision to expropriate Bear Creek's investment;
- Failing to provide any meaningful reasoning underlying its unilateral and unexpected revocation of Supreme Decree 083, which came after Claimant had already spent three-and-a-half years developing and investing millions of US dollars in the Santa Ana Project in reliance on Supreme Decree 083 and the Government's representations and encouragements;
- Frustrating Claimant's legitimate expectation that it would own and operate the Santa Ana Project;

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[1044] *See, e.g.,* **CL-0038**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.v. Argentina,* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007, ¶ 7.4.39 *(hereinafter "Vivendi I* Award").

[1045] Claimant's Memorial ¶¶ 154-181.

- Expropriating Claimant's investment without paying Claimant any compensation; and

- Unjustifiably attempting to annul Bear Creek's concessions by having MINEM file a civil action against Bear Creek.

397. These actions violate MST and, by extension, also constitute violations of autonomous FET, insofar as MST and FET protections overlap. In addition, Respondent's actions toward Bear Creek and its investment violate Peru's obligation under the autonomous FET standard to act in good faith and to do no harm.

398. Good faith is understood as the government's obligation to "act in a consistent manner free from ambiguity and totally transparently[,]"[1046] and imposes on the State "the obligation not to inflict damage upon an investment purposefully."[1047] Peru's arbitrary expropriation of Bear Creek's investment, without compensation, notice, opportunity to be heard or appeal, in full knowledge that it was acting unlawfully[1048] constitutes inconsistent and non-transparent conduct that purposefully harmed Bear Creek in breach of Peru's obligation to act in good faith vis-à-vis Claimant and its investment. Similarly, Peru's attempt to avoid answering for its unlawful actions by accusing Claimant of acquiring its investments in an irregular manner as well as attempting to annul the concessions through MINEM's civil action, amount to bad faith. As discussed *supra*, these accusations have no basis whatsoever.[1049]

399. In *Bayindir*, the claimant asserted that its expulsion was based, *inter alia,* on bad faith because the reasons the respondent Government gave for the expulsion did not correspond

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[1046] *See, e.g.*, **CL-0040**, *Tecmed* Award ¶ 154.

[1047] **CL-0168**, Rudolf Dolzer and Christopher Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 156 (Oxford University Press, 2nd ed. 2012).

[1048] **Exhibit C-0095**, *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTRO DE ENERGÍA Y MINAS, May 26, 2011.

[1049] *See supra* ¶ 369.

to the Government's actual motivation.[1050] In its Decision on Jurisdiction, the tribunal stated that such "allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT."[1051] Claimant faced a similar situation in the present case. The supposed justifications Peru offers for its unlawful conduct mask the Government's actual motivation – its political interest in expropriating Bear Creek's investment. Such bad faith conduct is a clear violation of the fair and equitable treatment standard.

400. Moreover, Respondent breached the requirement under autonomous FET to "do no harm." In defining "do no harm," the *Vivendi II* tribunal stated that "[u]nder the fair and equitable standard, there is no doubt about a government's obligation not to disparage and undercut a concession (a "do no harm" standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation."[1052] It is indisputable that Peru has attempted to "disparage and undercut a concession" by issuing Supreme Decree 032 under the conditions described above. Peru thereby harmed Bear Creek's investment in violation of the autonomous FET protection requiring Peru to "do no harm."

401. Accordingly, by virtue of the autonomous FET standard that Peru is obligated to accord to Bear Creek and its investment through the MFN Clause of the Canada-Peru FTA, Respondent is in breach of the FTA. Through these deliberate acts and omissions, Peru manifestly has failed to treat Claimant fairly and equitably, resulting in the evisceration of Bear Creek's investment.

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[1050] **CL-0202**, *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, Nov. 14, 2005, ¶¶ 242-43**.**

[1051] *Id.* ¶ 250.

[1052] **CL-0038**, *Vivendi I* Award ¶ 7.4.39.

## VI. PERU FAILED TO AFFORD CLAIMANT AND ITS INVESTMENT FULL PROTECTION AND SECURITY AND PROTECTION AGAINST UNREASONABLE OR DISCRIMINATORY MEASURES

402. In addition to the autonomous FET standard, the MFN Clause of the Canada-Peru FTA permits Bear Creek to benefit from other substantive standards of treatment Peru offers investors under other international treaties to which Peru is a party.[1053] Peru has entered into at least seven bilateral investment treaties pursuant to which it promises to afford covered investors and investments full protection and security ("FPS").[1054] Peru is party to at least fourteen international agreements under which it promises covered investors and investments protection against unreasonable or discriminatory measures.[1055] By means of the MFN Clause of the Canada-Peru FTA, Claimant is entitled to FPS and protection against unreasonable or discriminatory measures as that protection is found in those treaties. By its actions and omissions, Peru has breached both of these substantive protections.

403. FPS requires that Peru take every reasonable measure necessary to protect and ensure the legal and physical security of the investments made by a protected investor in its territory.[1056] More specifically, case law and commentators generally agree that the full protection and security standard imposes an obligation of vigilance and due diligence upon the

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[1053] *See disc. supra* Section V.B.1.

[1054] **CL-0079**, Bilateral investment treaties to which Peru is a party and that grant full protection and security: Peru-Czech Republic, Art. 2(2); Peru-Denmark, Art. 3(1); Peru-France, Art. 5(1); Peru-Germany, Art. 4(1); Peru-Malaysia, Art. 2(2); Peru-Netherlands, Art. 3(2); and Peru-United Kingdom, Art. 2(2).

[1055] **CL-0079**, Bilateral investment treaties to which Peru is a party and that grant protection against unreasonable or discriminatory measures: Peru-Argentina, Art. 2(3); Peru-Bolivia, Art. 3(1); Peru-Cuba, Art. 3(1); Peru-Denmark, Art. 3(1); Peru-Ecuador, Art. 3(1); Peru-Finland, Art. 2(2); Peru-Germany, Art. 2(2); Peru-Italy, Art. 2(3); Peru-Netherlands, Art. 3(1); Peru-Paraguay, Art. 4(1); Peru-Spain, Art. 3(1); Peru-Sweden, Art. 2(2); Peru-Switzerland, Art. 3(1); Peru-United Kingdom, Art. 2(2); and Peru-Venezuela, Art. 3(1).

[1056] *See*, *e.g.*, **CL-0086**, *Spyridon* Award, ¶ 321; **CL-0101**, *Frontier* Award, ¶ 263; **CL-0107**, *Biwater* Award, ¶¶ 729-730; **CL-0031**, *Siemens* Award, ¶ 303; **CL-0082**, *Azurix* Award ¶ 408; **CL-0103**, *CME* Partial Award, ¶ 613; **CL-0122**, *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15 ¶¶ 109-111.

government.[1057] Due diligence is understood to be "nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."[1058] There is no requirement to show malice or even negligence to establish a breach of FPS.[1059]

404. FPS thus protects investors and their investments from physical threats as well as from unjustified administrative and legal actions taken by a government (or by its subdivisions) that injured the legal rights of the investor or its investment, regardless of any nefarious intent behind the State's action.[1060] As the tribunal in *CME v. Czech Republic* held:

> The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.[1061]

405. By enacting Supreme Decree 083, which stated that the Santa Ana Project was a public necessity and which permitted Bear Creek to exercise its option agreement and to mine at Santa Ana, Peru agreed to provide Bear Creek's investment the legal security with which a Peruvian Supreme Decree is imbued. As Professor Bullard explains, allowing the Government to change its decision on a public necessity declaration on reasons of mere political convenience

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[1057] *See, e.g.*, **RLA-056**, *American Mfg. & Trading v. Zaire*, Award ¶ 6.05-6.08; **CL-0036**, *AAPL v. Sri Lanka*, Award ¶ 77.

[1058] **CL-0036**, *AAPL* Award ¶ 77.

[1059] *Id.* (citing C.F. Amerasinghe, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 281-82 (Oxford 1967); F.V. Garcia-Amador, THE CHANGING LAW OF INTERNATIONAL CLAIMS, Vol. I 115, 118 (1987); M. Bedjaoui, *Responsibility of States: Fault and Strict Liability*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. 10 at 359 (North-Holland 1987); K. Zemanek, *Responsibility of States: General Principles*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. 10 at 362 (1987)).

[1060] *See, e.g.*, **CL-0082**, *Azurix* Award ¶ 406-408; **CL-0103**, *CME* Partial Award ¶ 613.

[1061] **CL-0103**, *CME* Partial Award ¶ 613

would contravene the principle of legal security.[1062] Peru failed to provide such protection and security when it unjustifiably expropriated Bear Creek's investment by enacting Supreme Decree 032.

406. As Professor Bullard explained, the Peruvian State has the power to revoke previously issued Supreme Decrees, but must necessarily exercise that power in accordance with Peruvian law, which Peru failed to do:

407. While the revocation of previously conferred prerogatives is allowed, such limitation to property rights must respect those grounds legally set forth in Article 203.2 of Law 27444 and must not be in response to the authorities' reasons of opportunity, merit or convenience.[1063] Professor Bullard confirmed what the Lima First Constitutional Court already decided on its own, namely that because "[i]n this case, there is no reasonable motive in Supreme Decree No. 032-2011-EM, this principle [of legal security] has been violated by this clearly arbitrary act; all the more so, because upon its issuance, the claimant was not provided with the opportunity to accredit that the circumstances relating to its assumed obligations had not been neglected."[1064]

408. Far from taking every reasonable measure necessary to protect and ensure the legal and physical security of Claimant and its investment, Respondent subjected Claimant to the unlawful expropriation of its investment through governmental action. Even assuming for argument's sake that Respondent was correct and it had valid reason to revoke Supreme Decree 083, arbitrary revocation of the decree through unlawful processes is not a "reasonable

[1062] Second Bullard Expert Report ¶¶ 163-165.

[1063] First Bullard Expert Report ¶ 124(b).

[1064] **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014. (emphasis supplied); Second Bullard Expert Report ¶ 3(h), 111, 121.

measure[s] of prevention which a well-administered government could be expected to exercise under similar circumstances[.]"[1065]

409. In addition to breaching FPS, Peru also failed to afford Claimant and its investment protection against unreasonable and discriminatory measures. This treaty protection is generally understood to mean that the State must afford protection against any measure that "inflicts damage on the investor without serving any apparent legitimate purpose" or is "not based on legal standards but on discretion, prejudice or personal preferences;" "taken for reasons that are different from those put forward by the decision maker;" or "taken in willful disregard of due process and proper procedure."[1066] Violation of any one of these facets of protection against unreasonable and discriminatory measures would suffice to show that Peru violated the FTA, but in fact, Peru violated all of them.

410. Peru's expropriation of Bear Creek's investment, overnight, through illegitimate processes, without notice, opportunity to be heard, or an appeal, undoubtedly inflicted damage on Bear Creek and did not serve any legitimate purpose. On this, Professor Bullard and the First Lima Constitutional Court again agree. Professor Bullard noted in his report that Peru's "lack of justification is sufficient to conclude that the revocation [of Supreme Decree 083] is not framed within any of the exhaustive grounds of Article 203.2 of Law 27444, but rather is grounded on reasons of opportunity, merit or convenience."[1067] The Lima First Constitutional Court similarly held that the Government's enactment of Supreme Decree 032, insofar as it pertained to the

[1065] **CL-0036**, *AAPL*, Award ¶ 77.

[1066] **CL-0124**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, Oct. 8, 2009, ¶303. *See also* **CL-0098**, *Toto* Award, ¶ 157; **CL-0094**, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Mar. 28, 2011, ¶ 262.

[1067] First Bullard Expert Report ¶ 178 (internal quotation marks omitted).

expropriation of Bear Creek's investment, was arbitrary and in violation of Peruvian law.[1068] Peru's actions thus inflicted damage on Bear Creek "without serving any apparent legitimate purpose." By extension, Peru's actions in violation of Peruvian law are "not based on legal standards but on discretion, prejudice or personal preferences" and were "taken for reasons that are different from those put forward by the decision maker[,]" to the extent Supreme Decree 032 and Peruvian Government offered any reasons at all.

411. Finally, it is indisputable that Peru's expropriation of Bear Creek's investment without notice to Bear Creek or an opportunity to be heard is in "willful disregard of due process and proper procedure." For these reasons, among others, Peru has breached its obligations under the Canada-Peru FTA to afford Claimant and its investment protection against arbitrary and discriminatory measures.

## VII. DAMAGES

### A. INTRODUCTION

412. Bear Creek's damages claim is straightforward. As Bear Creek explained in its Memorial, customary international law requires "full reparation" to "wipe out" all the consequences of Peru's unlawful acts and restore Bear Creek to the financial position where it would have been today in the absence of Peru's unlawful acts. Bear Creek further explained that, in the circumstances of this case, the most appropriate form of "full reparation" is to award Bear Creek (1) the fair market value ("FMV") of the expropriated Santa Ana concession, measured just prior to the expropriation and without any diminution in value resulting from pre-expropriation unlawful acts and public pronouncements of the imminent expropriation, and (2)

[1068] **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014. (emphasis supplied).

additional damages to the Corani project resulting directly from Peru's unlawful actions against Santa Ana.

413. Unable to meaningfully defend its unlawful expropriation and its clear obligation to pay full reparation, Peru's response is to make an extensive legal and technical attack on Bear Creek's straightforward damages claim. Peru disputes its obligation to pay FMV as real market participants would do (*i.e.*, by looking to the income-generating potential of the Santa Ana concession), instead claiming that it need only reimburse Bear Creek's actual costs incurred in developing the expropriated concession—a woefully inadequate remedy that bears no resemblance to the FMV of the vast mineral resources that Peru has re-appropriated for itself. Paying only the costs incurred in exploration and development of the expropriated concession ignores all of the risks overcome, and value created, by Bear Creek. Peru also suggests that it can profit from the market's negative reaction to the imminent Santa Ana expropriation—a position that is flatly contrary to the language and purpose of the FTA, which require (as do common sense and basic fairness) that value be measured by excluding the effects of any such pre-expropriation events.

414. Peru also argues that Bear Creek's claim for damages suffered by the Corani project as a direct result of the Santa Ana expropriation is a "throwaway claim" that is not compensable. This is manifestly false, as the "full reparation" principle requires that compensation wipe out <u>all</u> the harmful financial effects of Peru's unlawful acts—and it is indisputable that Peru's unlawful acts with respect to Santa Ana as well as its expropriation has had direct and irreversible negative financial consequences on the Corani project by, among other things, increasing financing costs, or eliminating the ability to finance the project, and

delaying its commencement for at least five years, thereby depriving Bear Creek of value that can never be recovered.

415. On the technical front, Peru's experts at Brattle launch an attack on FTI's use of a standard discounted cash flow ("DCF") model to value Santa Ana's income-generating potential, instead arguing for the use of a "modern" DCF that separately discounts each individual line of cash flow. This is surprising, as it appears Brattle has never before used the "modern" DCF approach in any of the numerous investment treaty arbitrations in which it has acted as expert. Peru and its experts also argue that FTI's DCF suffers from flawed technical inputs (some of which were provided by Bear Creek's technical experts, RPA), such as allegedly overstated resources and reserves, overstated silver recovery rates, understated mining costs, and setting unrealistic permitting, construction and production schedules. As briefly summarized below but explained more fully in their accompanying rebuttal reports, FTI and RPA have carefully considered these criticisms of Peru's experts but have made no material changes to their conclusions.

416. At the end of the day, its bluster aside, Peru cannot dispute that it expropriated a concession containing vast quantities of proven resources and reserves of precious metals with certain and substantial income-generating potential to Bear Creek, and that this expropriation and its other unlawful acts leading up to the expropriation also had direct and significant negative knock-on effects on Bear Creek's investment in Corani. The FTA and international law require Peru to make full reparation to Bear Creek for this harm. Bear Creek through its experts has conservatively estimated its losses as follows:

| Description ($ millions) | Compensation |
|---|---|
| Santa Ana Project - Damages | $ 224.2 |
| Pre-Award Interest | $ 72.4 |
| **Santa Ana Damages** | **$ 296.6** |
| | |
| Corani Project - Reduction in Value | $ 170.6 |
| Pre-Award Interest | $ 55.0 |
| **Corani Reduction in Value** | **$ 225.6** |
| | |
| **Total** | **$ 522.2** |

(Summary of FTI Report Damages Conclusion)[1069]

417. The remainder of this section is structured as follows: (1) **Section B** responds to Peru's erroneous contention that it need only reimburse Bear Creek's actual costs incurred rather than pay Santa Ana's FMV on a DCF basis; (2) **Section C** responds briefly to the confusing argument of Peru's experts regarding the date of valuation and the effects of pre-expropriation announcements; (3) **Section D** responds to Peru's technical criticisms of Bear Creek's DCF valuation of Santa Ana; (4) **Section E** addresses Peru's groundless rejection of Bear Creek's damages claim for Corani; and (5) **Section F** concludes with very brief comments on interest and costs.

### B. SANTA ANA REPARATIONS ARE NOT LIMITED TO AMOUNTS INVESTED

418. Relying on a relatively small sample of investment treaty case law, Peru argues that a DCF valuation can never be used for an asset like Santa Ana that is not yet in production, or indeed any asset that does not yet have a demonstrated history of long-term profitability.[1070]

[1069] Reply Report of FTI Consulting, Jan. 8, 2016, Figure 1 (*hereinafter* "Second Expert FTI Report"). *See also* Expert Report of FTI Consulting, Inc., May 29, 2015, Figure 2 (*hereinafter*, "First FTI Expert Report").

[1070] Respondent's Counter-Memorial ¶¶ 321-331.

Instead, says Peru, Bear Creek should be awarded at most its sunk investment costs in Santa Ana of about US$ 22 million.[1071] Peru grossly overstates its case.

419. To begin with, the relevant standard under the FTA is "fair market value." If a hypothetical purchaser would have used a DCF to value Santa Ana on the expropriation date—irrespective of its stage of development or history of profitability—then no basis exists under the plain language of the FTA for this Tribunal not to use such a valuation here. And indeed, FTI explained in its first report that real market participants do use DCF to value assets like Santa Ana. CIMVAL, the internationally-accepted valuation standards specific to the valuation of mineral properties, expressly endorse income-based valuation approaches (like DCF) for assets classified as "Development Properties," which is the case of Santa Ana.[1072] This is because the practices employed to assess mineral resources and reserves are well-established; the time and costs required to develop and process the minerals can be estimated with a reasonable degree of precision; detailed capital estimates on Santa Ana had been conducted; and well-developed international markets exist for the processed or semi-processed metal products that will absorb a project's entire production immediately.[1073] For these very reasons, mining and other extractive projects are different from non-extractive businesses and can therefore be valued using a DCF methodology even though they have not yet entered production.[1074]

420. Peru does not respond to these points at all. Instead, it resorts dogmatically to citing a subset of cases from other industries where select tribunals have declined to use DCF—

[1071] *Id.* ¶ 331.

[1072] First FTI Expert Report ¶¶ 7.12, 7.14-7.17.

[1073] First FTI Expert Report ¶ 6.3.

[1074] *Id.*

as if case law could overcome the use of the term "fair market value" in the FTA and the mining industry's express endorsement and use of DCF to measure it for projects like Santa Ana.

421. Moreover, Peru conveniently fails to mention investment treaty cases where tribunals have endorsed DCF for early-stage projects. For example, in *Vivendi v. Argentina*, the Tribunal rejected the claimant's DCF model but explained how such a model could be accepted in circumstances that perfectly describe Bear Creek's case:

> The Tribunal also recognises that in an appropriate case, a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.
>
> * * * *
>
> As previously noted, the absence of a history of demonstrated profitability does not absolutely preclude the use of DCF valuation methodology. But to overcome the hurdle of its absence, a claimant must lead convincing evidence of its ability to produce profits in the particular circumstances it faced. . . .
>
> A claimant which cannot rely on a record of demonstrated profitability requires to present a thoroughly prepared record of its (or others) successes, based on firsthand experience (its own or that of qualified experts) or corporate records which establish on the balance of the probabilities it would have produced profits from the concession in question in the face of the particular risks involved, other than those of Treaty violation.[1075]

422. Further, in a recent survey of damages awards, PwC emphasized the mining sector as one in which tribunals can and should be willing to accept DCF for new ventures: "The

[1075] **CL-0038**, *Vivendi I* Award ¶¶ 8.3.4, 8.3.8, 8.3.10 (italicized emphasis in original).

DCF method has been accepted by Tribunals as a means of valuing a new venture where there is an established market, for example for ventures related to the oil, gas and mining industries. In simple terms, this is because a natural resources company with proven reserves may be considered less speculative or uncertain than, for example, a new tech start-up with an unproven business model."[1076] To take just one example, in the recent *Gold Reserve v. Venezuela* case, the Tribunal applied a DCF valuation to award US $713 million for two mining concessions that had never entered production at the time of their wrongful revocation. Indeed, in that case, unlike Peru here, Venezuela accepted the reality that DCF is a perfectly appropriate and valid tool to measure the FMV of such a project.[1077] This Tribunal should not hesitate to do the same.

423. And while DCF is undoubtedly a correct approach in this case, it bears repeating that awarding Bear Creek only its sunk investment, as Peru proposes (and which Brattle uncritically follows), is manifestly inappropriate and inadequate. For one, according to the CIMVAL standards, a cost-based approach to value is not appropriate for Development Properties like Santa Ana, nor is it consistent with the valuation principles set forth in *Chorzow Factory*.[1078] Second, awarding Bear Creek only its sunk costs would imply (incorrectly) that the investment was made risk-free and with no expected return.[1079] At the same time, FTI notes it

[1076] **Exhibit C-0243**, PwC, "2015 International Arbitration damages research," at 8, *available at* https://www.pwc.com/sg/en/publications/assets/international-arbitation-damages-research-2015.pdf (last visited Dec, 30, 2015) (emphasis added). Even before this recent trend in case law, noted academics and arbitrators were critical of the reluctance of tribunals to embrace forward-looking valuations for new ventures. For example, Prof. John Y. Gotanda argued that application of this conservative approach "should [not] limit a legitimate claim for lost profits. To do so would leave the injured party less than whole, fail to achieve the goal of full compensation, and provide a windfall to the wrongdoer." **CL-0203**, John Y. Gotanda, *Recovering Lost Profits in International Disputes*, 36 G'TOWN J. INT'L LAW 61, 111 (2004).

[1077] *See* **CL-0063**, *Gold Reserve* Award, ¶ 690 (*"*Both valuation experts used the Discounted Cash Flow ('DCF') method as the primary method for assessing the quantum of damages payable if Claimant succeeded on liability.").

[1078] First FTI Expert Report ¶¶ 7.10-7.17; Second FTI Expert Report ¶¶ 5.10-5.11.

[1079] Second FTI Expert Report ¶¶ 5.15 – 5.16.

would allow Peru to unjustly capture the increase in the value of the Santa Ana project created by Bear Creek:

> From an economic perspective, the repayment of the amounts invested by the Claimant would imply that the investment was made risk-free with no potential of return. The reimbursement of costs would ignore the risks overcome by the Claimant in taking the Project from a property with potential targets, but no identified resources, to the discovery and definition of Mineral Reserves. Conversely, an award of the Claimant's investment cost would effectively allow the Respondent to unjustly capture the increase in the value of the Santa Ana project created by the Claimant, by paying a fraction of its actual FMV. [1080]

Finally, even though, as addressed below, Brattle incorrectly applies a stock-price analysis that significantly undervalues Santa Ana, that analysis shows that Peru's cost-based approach would award Bear Creek less than one-fourth of Santa Ana's value based on Brattle's flawed and undervalued stock-price analysis at either US $104.3 as of May 27, 2011, immediately prior to the suspension of the Santa Ana ESIA, or $89.1 million as of June 23, 2011, the Valuation Date.[1081] That is reason alone to discard the cost-based methodology in favor of FTI's DCF.

### C. THE SELECTED VALUATION DATE MUST EXCLUDE THE EFFECTS OF ANY PRE-EXPROPRIATION ANNOUNCEMENTS

424. Peru's expert, Brattle, argues that the valuation date must be June 24, 2011, because this is the day immediately preceding the formal expropriation decree of June 25, 2011.[1082] Despite acknowledging that the expropriation decree was announced on June 24, 2011, Brattle criticizes FTI's use of June 23, 2011, as the valuation date because this "ignores the one-

[1080] Second FTI Expert Report ¶ 5.16.

[1081] Second FTI Expert Report ¶ 4.3; **REX-004**, Brattle Report Table 3 (calculating Santa Ana's FMV as of May 27, 2011 between US $49.5 million and US $175.0 million, with an average FMV of US $104.3 million); Table 4 (calculating Santa Ana's FMV as of the Valuation Dates as between US $42.2 million and US $149.4 million, with an average of $89.1 million).

[1082] **REX-004**, Expert Report of The Brattle Group, Oct. 6, 2015, ¶¶ 43-44 (*hereinafter*, "Brattle Expert Report").

day change in Santa Ana's FMV that was due to market factors other than prior knowledge of the alleged expropriation."[1083] Brattle fails to recognize that the same "criticism" applies to its proposed use of June 24 as the valuation date for a June 25 decree, and in any event it makes no attempt to identify what these "other" factors might be, other than noting a 1% drop in silver prices[1084]—as if this immaterial event played any role in the dramatic drop (almost 20%) in Bear Creek's share price by the end of the day on June 24, as the market quickly processed the announcement of the imminent expropriation decree.

425. By insisting that June 24 be the valuation date while not proposing any methodology to exclude the effects of the expropriation announcement, Peru and its experts add confusion to what should be a straightforward and non-controversial proposition: the State may not benefit from any reduction in value resulting from prior knowledge of the expropriation before it was formalized. Prof. Vandevelde, a leading authority on the U.S. BIT program, explains the rationale behind this principle:

> The calculation of the value of the expropriated investment, as noted above, is to be made as of the date of expropriation. Consistent with the purpose of that requirement, the calculation must disregard any reduction in value caused by the expropriating government's actions in carrying out the expropriation or by public knowledge of the expropriation. In essence, the property is valued as if the expropriation had not occurred.
>
> One purpose of this requirement is to prevent the expropriating government from driving down the value of a company prior to expropriating it so that the government thereby can reduce the amount of compensation owed to the former owner. Although this requirement has been regarded by the U.S. government as implicit in the prompt, adequate, and effective formulation, Article III(1) makes it explicit. The 1983 model specifies that the "calculation of such compensation shall not reflect

[1083] *Id.* ¶ 46.

[1084] *Id.* ¶ 46 n.17.

> any reduction in such fair market value due to either prior public notice or announcement of the expropriatory action, or the occurrence of the events that constituted or resulted in the expropriatory action."[1085]

426. The FTA adopts this principle expressly in Article 812(2), which states that compensation for expropriation "shall be equivalent to the fair market value of the expropriated investments immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier." While Peru and Brattle acknowledge this provision, they fail to apply it. In truth, the most straightforward and objective way of excluding the effects of the June 24 public announcement is to value Santa Ana on June 23, as FTI has done. This Tribunal should not hesitate to do the same.

## D. PERU'S CRITICISMS OF FTI'S DCF VALUATION OF SANTA ANA ARE UNFOUNDED

### 1. Overview

427. As noted, FTI calculated the FMV of the Santa Ana Project as of June 23, 2011. The calculation was based on a cash flow model provided to FTI by RPA. As FTI explained, while the RPA "Revised Base Case" model only included reserves, CIMVAL requires the inclusion of resources in valuation models for mineral properties; accordingly, FTI calculated the FMV of the Santa Ana Project based on the RPA "Extended Life Case", as it included both reserves and resources.[1086]

[1085] **CL-0204**, Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 471-472 (2009) (footnotes omitted).

[1086] Second FTI Expert Report ¶ 2.7.

428. FTI forecasted short-term commodities prices based on the futures curve on June 23, 2011.[1087] FTI based long-term commodities prices on indicators upon which market participants relied, according to a survey of silver miners.[1088] FTI also provided an alternative long-term price methodology based on the latest available futures curve as of June 23, 2011.[1089] The discount rate that FTI applied was a weighted average cost of capital ("WACC") developed under a capital asset pricing model ("CAPM") approach, resulting in a discount rate of 10.0%.[1090]

429. Using this methodology, FTI determined Santa Ana's FMV to be US$ 224.2 million.[1091] Under the alternative long-term commodities price, Santa Ana's value increases to US$ 333.7 million.[1092]

430. Peru's experts offer several critiques of FTI's DCF for Santa Ana. First, Brattle criticizes FTI's use of a "standard" DCF, arguing instead for the superiority of the so-called "modern" DCF. Next, Brattle, aided by SRK's technical report, argues that FTI's DCF (based on certain inputs in RPA's model) suffers from allegedly overstated resources and reserves, overstated silver recovery rates, understated mining costs, and unreasonable permitting, construction and production expectations. Finally, Brattle uses a stock-price analysis in an attempt to show that FTI's DCF overstates the value of Santa Ana relative to its proportionate share of the market value of Bear Creek's stock.

[1087] Second FTI Expert Report ¶ 2.8.

[1088] Second FTI Expert Report ¶ 2.8.

[1089] Second FTI Expert Report ¶ 2.8-2.10.

[1090] Second FTI Expert Report ¶ 2.9.

[1091] Second FTI Expert Report ¶ 2.10.

[1092] Second FTI Expert Report ¶ 2.10.

431. Bear Creek will address briefly each of these criticisms in turn. In short, none has merit, and neither FTI nor RPA makes any adjustment to its respective original opinions.

### 2. Brattle's Proposed "Modern" DCF Is Unsupportable

432. Brattle criticizes FTI's use of a standard DCF (despite the fact that, according to CIMVAL, standard DCF is "[v]ery widely used" and "[g]enerally accepted in Canada as the preferred method"[1093]) and suggests that a "modern" DCF is more appropriate. Brattle, however, fails to identify what its "modern" DCF would entail, as it provides no alternative valuation under this method. It merely cites to a few papers where the "modern" DCF is mentioned. One of the papers is CIMVAL, which notes that it is "[n]ot widely used and not widely understood" albeit "gaining in acceptance."[1094] According to FTI, no analyst appears to have valued Santa Ana using a "modern" DCF.[1095] Indeed, despite Brattle's ostensible preference for the "modern" DCF, Claimant has surveyed the available published awards where Brattle has acted as an expert witness on damages, and it appears that in every case in which Brattle proffered a DCF, it used a standard DCF and not the "modern" DCF that it espouses here.[1096] FTI concludes that "although the methodology may have relevance as a tool for management to anticipate and evaluate potential future outcomes or alternative investments, or in the context of NI 43-101 where the focus is on deciding whether to proceed or not (although in our experience it also appears rarely

[1093] Second FTI Expert Report ¶ 7.9.

[1094] Second FTI Expert Report ¶ 7.10-7.11

[1095] Second FTI Expert Report ¶ 7.12.

[1096] **Exhibit C-0244**, *Vito G. Gallo v. Canada,* Counter Memorial June 29, 2010 ¶ 506 (using "[d]iscounted cash flow analyses that incorporate reasonable assumptions about these risks"); **Exhibit RLA-069**, *Archer Daniels Midland Company et al. v. The United Mexican States*, Award, Nov. 21, 2007 ¶¶ 231, 259 (proposing to calculate claimant's damages according to a lost profits scenario including actual and the projected future lost profits); **RLA-062**, *Venezuela Holdings, B.V. et al. v. The Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award, Oct. 9, 2014 ¶ 308 (using the DCF method to analyze Claimants' lost interests for one of the expropriated assets).

to be used for that purpose), it is inappropriate in the context of determining the FMV of a mineral project."[1097]

433. In any event, as Brattle offers no alternative valuation under this method, its passing criticism is of no value to the Tribunal in assessing damages, and serves merely to distract. The only concrete suggestion Brattle makes is that FTI should have used multiple discount rates for each different cash flow (*e.g.*, silver revenue, gold revenue, mining costs, *etc.*) and each different year.[1098] Here again, however, Brattle makes no concrete suggestions as to what the discount rates should be. FTI concludes that "the preponderance of additional assumptions necessary to apply a multiple discount rate approach would only serve to provide an illusion of a level of precision that does not exist," and FTI ha[s] not seen evidence that this actually is done in practice. Therefore, in our view Brattle's suggested changes to our DCF methodology would not improve the reliability of the resulting calculation of Santa Ana's FMV."[1099]

### 3. SRK's Criticisms of RPA's DCF Inputs Are Meritless

434. SRK argues, among other things, that RPA includes erroneous cut-off grade estimates that result in overstatement of reserves, leading to an overstatement in Santa Ana's total project life.[1100] SRK also claims that RPA's levels of silver recovery are overstated, mining costs are too low and that Santa Ana's permitting, construction and ramp-up schedules are unreasonable. SRK is wrong on all counts, as explained by RPA, at length, and in detail.

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[1097] Second FTI Expert Report ¶ 7.20.

[1098] **REX-004**, Brattle Expert Report ¶ 92.

[1099] Second FTI Expert Report ¶ 7.24.

[1100] **REX-004**, Brattle Expert Report ¶ 100.

*a. SRK Misconstrues and Misapplies Cut-Off Grade Concepts Throughout*

435. Regarding the cut-off grade, RPA concludes that SRK has confused and misunderstood CIM Best Practice Guidelines and has made comments "founded in practices that are not used or accepted in the industry."[1101] RPA explains that there are two types of cut-off grade, namely the "breakeven" cutoff grade and the "internal or mill" cut-off grade.[1102]

436. RPA explains that "breakeven" cut-off grade, sometimes called "external or mine" cut-off grade, is that amount of revenue-bearing material that will cover the cost of mining, processing, site administrative costs, and off-site transport and smelting and refining costs.[1103] "Internal or mill" cutoff grade, on the other hand, "applies when a tonne of material needs to be moved from an open pit in order to access material above the breakeven cut-off grade. In this instance, since mining costs are already covered, the material only needs enough revenue generation to cover the cost of processing, site administrative costs, and off-site transport and smelting and refining costs (i.e., excluding mining costs)."[1104]

437. Throughout its report, SRK states that breakeven cut-off grades should be used to report mineral resources and reserves. RPA, however, confirms that accepted practice in the mining industry is to first estimate the volume of material that can be mined and processed at a breakeven cut-off grade (based on all costs, including mining costs) and then report mineral resources and reserves from within that volume at the internal or milling cut-off grade (based on

[1101] Second RPA Expert Report ¶¶ 36; 79; 124.

[1102] Second RPA Expert Report ¶¶ 32-35; 52-59.

[1103] Second RPA Expert Report ¶ 55.

[1104] Second RPA Expert Report ¶ 56.

all costs, excluding mining costs).[1105] Thus, RPA concludes that SRK is "fundamentally incorrect" when it claims that breakeven cut-off grades should be used to report mineral resources and mineral reserves.[1106]

438. As explained in detail by RPA,[1107] because SRK's comments regarding the use of cut-off grades in determining Mineral Resources and Mineral Reserves are founded in practices that are not used or accepted in the industry, RPA made no adjustment to its calculation of the Santa Ana resources and reserves.

*b. RPA's Metallurgical Recovery Is Correct*

439. SRK claims that the silver recovery factor, which is a measure of the amount of metal contained in the ore that generates revenue, should be adjusted downwards from 75% to 70% from the estimated silver recovery in the updated Feasibility Study.[1108] RPA states that SRK has provided no evidence of this, that "there is no 'industry rule of thumb that column test results need to be factored downwards,'" and that "it is just as likely that actual recovery will be higher and not lower, especially on permanent leach pads that stack ore in multiple lifts."[1109] RPA concludes that the available data does not justify holding the recovery rate at 70% and describes the column leach testing that was conducted, the relationship between particle size and silver extraction, the leach curve used as a basis for the Feasibility Study and the correlation between silver grade and extraction.[1110]

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[1105] Second RPA Expert Report ¶ 58.

[1106] Second RPA Expert Report ¶ 59.

[1107] Second RPA Expert Report ¶¶ 65-79.

[1108] **REX-005**, SRK Report ¶ 83.

[1109] Second RPA Expert Report ¶ 97.

[1110] Second RPA Expert Report ¶¶ 97-102 (including Figures 5-2, 5-3, 5-4, 5-5).

440. After its detailed explanation, RPA concludes that "SRK's assumptions for reducing the silver recovery for the Santa Ana Project are flawed and recommends that the estimated silver recovery recommended in the FSU (i.e., 75%) should be maintained."[1111]

*c. The Santa Ana Permitting, Construction and Ramp-up Schedules Are Reasonable*

441. With respect to the production schedule, RPA/FTI assume that construction would have commenced in 2011 and production by the end of 2012. Peru and its experts criticize this schedule as too aggressive, pointing to delays resulting from the permitting process and social unrest. They also argue that the ramp-up schedule is too optimistic. As already noted above, RPA rejects these criticisms.[1112] Regarding permitting and social unrest, RPA observes:

> The Project Execution schedule included in the Santa Ana [Updated Feasibility Study] (Table 5-3) includes nine months for the Peruvian government to review the ESIA and an additional six months to procure construction and operating permits, which actually exceeds the 6 months to 12 months that SRK mentions. While it is true that Peru has experienced opposition to a number of mining projects, it is also true that a number of mining projects have been allowed to proceed without delays, such as Rio Alto's La Arena Project and Hudbay's Constancia Project (the latter located 330 km NW from Santa Ana).[1113]

442. RPA also points to projects in Peru of similar magnitude that achieved a production schedule in line with Bear Creek's.[1114]

443. Peru's technical expert SRK, opines that Bear Creek's construction and ramp up schedule for Santa Ana was too simplistic in comparison to the project and construction start-up

[1111] Second RPA Expert Report ¶ 103.

[1112] *See also supra* ¶¶ 172, 181.

[1113] Second RPA Expert Report ¶ 114; *see* RPA First Expert Report Table 13-1.

[1114] Second RPA Expert Report ¶¶ 113-118, Figure 5-6.

presented in the Gantt Chart in the 2015 Corani Feasibility Study and that permitting delays, difficulty in logistics due to Santa Ana's location in the high Andes, and an increase in leach cycle time could lengthen first silver production "by at least one year from that presented in the FSU."[1115]

444. In response, RPA concludes that Bear Creek's construction and ramp-up schedule was actually conservative and that "it is totally incorrect to compare the detailed Gantt chart for Corani, which is a milling operation, with the production schedule for Santa Ana, which is a simple heap leaching operation"[1116] because "[m]illing operations are much more complicated processing circuits that contain a number of larger, more expensive, and more intricate unit operations such as crushing, grinding, flotation, leaching, thickening, filtration, and tailings storage requirements."[1117] RPA also notes that it reviewed the contractor quotes by San Martin General Contracting and concludes that the quotes $130/t (for mining of waste) and $1.99/t (for mining ore), for an overall rate of $1.68/t incorporate allowances for the remote location and altitude.[1118] RPA draws this conclusion based on the fact that San Martin has been operating in Peru for 23 years and has been working on a variety of remote projects at high altitudes, including: (i) Gold Fields Limited's La Cima Project located in Cajamarca at 3,890 MASL (with altitude and production rates similar to Santa Ana); and (ii) in the Santa Barbara de Carhuacayan district in the Province of Yauli, at 4,700 MASL.[1119]

[1115] **REX-005**, SRK Report ¶¶ 91-92.

[1116] Second RPA Expert Report ¶ 122.

[1117] Second RPA Expert Report ¶ 122.

[1118] Second RPA Expert Report ¶¶ 85, 88.

[1119] Second RPA Expert Report ¶ 87.

445. Thus, RPA does not change its opinion that the Santa Ana permitting schedules and project execution plan, including construction and production schedules, are reasonable.[1120]

*d. Mining Costs Are Not Understated*

446. SRK *recommends* that an operating cost of $2.50 per ton mined, rather than RPA's $2.10, be adopted as a result of Mr. Rigby's belief that the high altitude and associated labor challenges were not sufficiently considered in the Feasibility Study.[1121] RPA responds, however, that "SRK did not provide any justification for its recommendation of an operating cost of 'closer to $2.50', only suggesting that higher altitudes would lead to higher costs as a result of lower labour and equipment productivity."[1122] However, as previously discussed, RPA confirms, among other things, that the costs in the FSU are based on contractor quotes from a contractor with significant experience working at high altitudes and that it would be fair to assume that the contractor is aware of production costs on a project at high altitudes and quoted those rates regarding Santa Ana accordingly.[1123] As a result, RPA makes no adjustment to its operating cost assumptions.

447. Regarding capital costs, Brattle argues that the Feasibility Study likely understated them, citing a paper authored by Prof. Davis (one of the authors of the Brattle Report) that found that costs in bankable feasibility studies for mining projects underestimated capital costs on an average of 14%.[1124] Importantly, however, Peru's technical experts at SRK make no such criticism of the capital costs estimate. That alone is reason enough for the

[1120] *See* Second RPA Expert Report ¶¶ 8-9.

[1121] **REX-005**, SRK Report ¶ 80.

[1122] Second RPA Expert Report ¶ 86.

[1123] Second RPA Expert Report ¶¶ 87-89.

[1124] **REX-004**, Brattle Expert Report ¶ 101.

Tribunal to reject Brattle's conjecture. For the avoidance of doubt, FTI offers a number of additional reasons why Brattle's proposed increase in capital costs should be rejected.[1125]

448. In sum, RPA has made no adjustment to its cost estimates. In turn, FTI has made no such adjustments to its DCF model. Here again, the criticisms of Peru and its experts are unfounded and should be discarded.

#### 4. Brattle's Stock-Price Analysis Is Unreliable and Flawed

449. Brattle devotes the bulk of its report to a stock-price analysis that attempts to show that FTI's DCF overstates the value of Santa Ana relative to its proportionate share of the market value of Bear Creek's stock. Importantly, in its initial report, FTI did review Bear Creek's share price as part of its market-based approach analysis but concluded that the share price as of the Valuation Date does not provide a reliable measure of FMV of the underlying Santa Ana or Corani projects.[1126] In addition to the reasons set forth in the FTI Report,[1127] FTI further explains that the share price on a given day would reflect investor sentiment for a block of shares, and not for the underlying assets.[1128] In addition, it is common for insiders and institutional investors to make long-term investments in shares of a junior mining company, and to hold the shares and not trade them on an active basis, such that it is most common to see trading activity in shares of juniors being made up of retail investors.[1129]

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[1125] Second FTI Expert Report ¶¶ 7.35-7.39.

[1126] First FTI Expert Report ¶ 7.69. The Second FTI Expert Report contains an extensive further explanation of why share prices can be inappropriate measures of underlying asset value, both in general and in the specific circumstances of this case. *See e.g.,* Second FTI Expert Report ¶¶ 6.1-6.40.

[1127] First FTI Expert Report ¶¶ 7.68-7.70

[1128] Second FTI Expert Report ¶¶ 6.41-6.48; 6.5.

[1129] Second FTI Expert Report ¶ 6.42.

450. In contrast, the market for buyers for 100% of Bear Creek's shares would predominantly consist of larger mining companies who would be willing to pay a premium for the mining properties (or all the shares of Bear Creek) due to their lower cost of capital.[1130] According to Mergerstat data, at the Valuation Date, acquisition premia averaging 63.7% over trading prices were being paid for mining companies, which is primarily due to the efficiency of the larger firm's capital or some other "synergy" that can uniquely be enjoyed by the buyer.[1131] In the calculation of the intrinsic value of Santa Ana, FTI used the underlying cash flows to calculate the net present value, employing a discount rate of typical buyers of these types of assets.[1132] Thus, the value calculated in this manner would be expected to include this premium.[1133]

451. Also contributing to the difference between share price and FMV of the underlying assets at the Valuation Date, as noted by analysts, is undervaluation of the Company's projects at the Valuation Date due to noise in the marketplace relating to political issues and anti-mining protests in Peru.[1134] In fact, from the date of the ESIA suspension to the first trading date after the expropriation, Bear Creek's share price dropped by 56.5%, compared to a 7.3% and 9.8% decline in the price of silver and the S&P/TSX Global Mining Index, respectively.[1135] This is equivalent to an abnormal decrease in enterprise value of US$ 260.9 million.[1136] However, in the "but for" analysis of damages, Santa Ana is assumed to be built

[1130] Second FTI Expert Report ¶ 6.22.

[1131] Second FTI Expert Report ¶ 6.24.

[1132] First FTI Expert Report ¶¶ 7.18-7.57.

[1133] Second FTI Expert Report ¶¶ 6.22-6.25.

[1134] Second FTI Expert Report ¶ 6.26.

[1135] First FTI Expert Report ¶ 7.77.

[1136] First FTI Expert Report ¶ 7.78.

(absent Peru's FTA breaches) and thus such issues are assumed to be resolved by the time the project reaches production, such that they are appropriately ignored for the purpose of calculating the damages required to restore Bear Creek to the economic position it would have been in absent Peru's breaches.[1137]

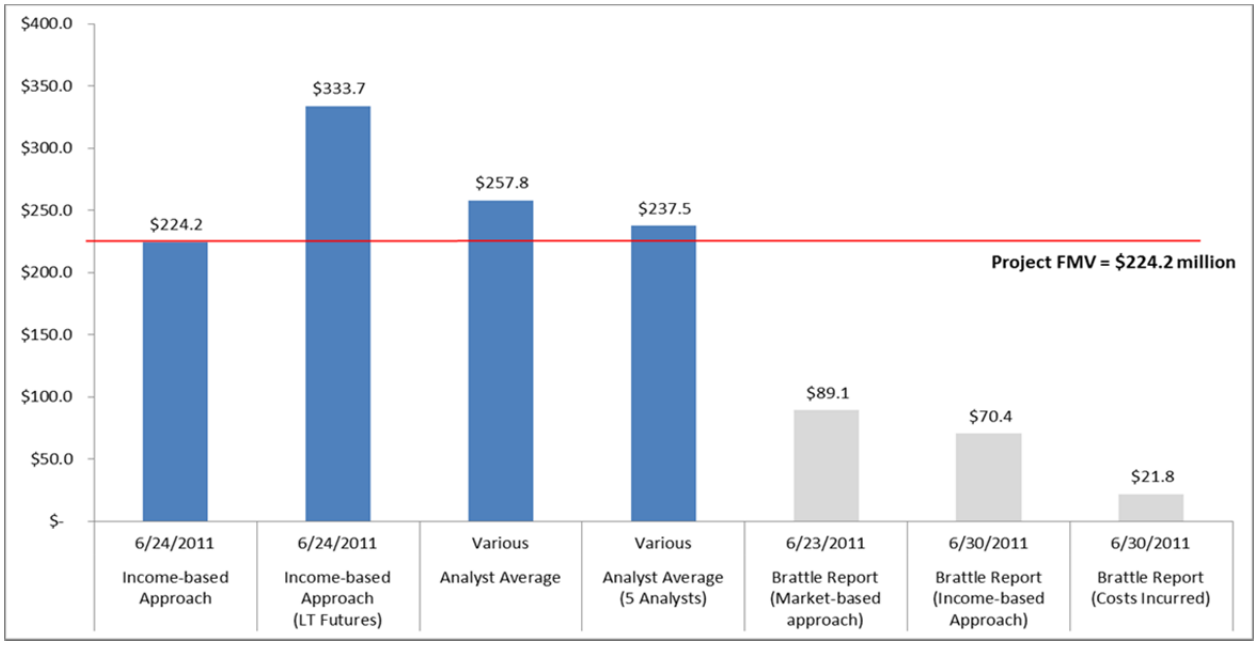
452. FTI also reviewed various analysts' reports for their contemporaneous views on Bear Creek's share price and the net asset value of the Santa Ana project before the expropriation.[1138] The seven analysts that FTI reviewed concluded that the project had a net asset value of approximately US$ 257.8 million on average (US$ 237.5 million if one removes the highest and lowest analyst conclusions).[1139] As shown in the table below, these valuations gel nicely with FTI's DCF valuation and stand in marked contrast to Brattle's cost-based and stock-price analyses (as well as Brattle's adjusted version of FTI's DCF, based on the adjustments already discussed above but which RPA and FTI reject). The Tribunal could scarcely ask for better support for FTI's DCF.

[1137] Second FTI Expert Report ¶ 6.54.

[1138] First FTI Expert Report Appendix 8.

[1139] First FTI Expert Report ¶ 7.82.

**Summary of Indicators of Santa Ana's Fair Market Value**




*Source:* Second FTI Expert Report, Figure 2

## E. PERU MUST COMPENSATE BEAR CREEK FOR THE DAMAGES TO THE CORANI PROJECT

### 1. Overview

453. As mentioned above, Peru's expropriation of Santa Ana and other FTA violations also caused substantial additional damages to Bear Creek by irretrievably hindering the development of the Corani Project. While Peru seeks to summarily discredit Bear Creek's Corani damages claim, its criticisms are of little substance and no import. Peru's objections can be summarized as follows: (1) there is no "lasting damage;"[1140] (2) causation between breach and loss is lacking;[1141] and (3) Bear Creek's quantification of the Corani damages is "inflated and internally inconsistent."[1142]

[1140] Respondent's Counter-Memorial ¶¶ 370-74.

[1141] Respondent's Counter-Memorial ¶¶ 369, 375-89.

[1142] Respondent's Counter-Memorial ¶¶ 369, 390-401.

454. Bear Creek addresses these objections in turn below, but in brief they are wrong for the following reasons. *First*, both harm and causation are self-evident in this case. Immediately after Peru's suspension of the Santa Ana ESIA and immediately following the expropriation of Santa Ana, Bear Creek's enterprise value plummeted. The drop in Bear Creek's enterprise value was a direct result of the governmental measures against Santa Ana, as Peru itself acknowledges.[1143] And four and half years and counting after Peru's expropriation of Santa Ana, Bear Creek's share price sits close to its historical low and the Corani project remains undeveloped due to lack of financing and the project's increased risk-profile. Thus, Peru's contention that Bear Creek suffered no lasting damage in relation to Corani is indefensible.

455. *Second*, Peru's allegation that FTI's quantum methodology "produces an absurdly broad range of damages estimates" is unfounded.[1144] There is no requirement under international law that the amount of damages be certain for liability to engage; as tribunals have noted, assessing damages in complex disputes as the present one is "not an exact science."[1145] Further, and importantly, lack of absolute certainty makes the Corani damages neither less real nor non-compensable. Peru also ignores that FTI's estimated damages are based on a real, undisputed market event: the change in value before the ESIA Suspension (May 27, 2011) through to after the expropriation (US $307.2 million).[1146] This provides the Tribunal with a damages estimate almost solely based on hard market data contemporaneous to the wrongful conduct. Here, the decrease in Bear Creek's enterprise value is provided as a proxy for the monetary damages

[1143] Respondent's Counter-Memorial ¶ 373.

[1144] Respondent's Counter-Memorial ¶ 393.

[1145] **CL-0038**, *Vivendi I Award* ¶ 8.3.16.

[1146] First FTI Expert Report ¶ 8.11; Second FTI Expert Report ¶¶ 2.4, 6.36, 6.50.

suffered by Bear Creek in relation to Corani.[1147] The range provided by FTI (US$ 59.6 million, US$ 170.6 million and US$ 267.3 million) simply reflects an allocation of the enterprise value that the market could have placed on Santa Ana on May 27, 2011, prior to the ESIA suspension.[1148] Further, this methodology is not only reasonable but also conservative. As FTI explains, "[a]lthough imperfect, we believe that this is the best available estimate of the actual loss in value suffered by [Bear Creek] as a result of the alleged breaches of the Treaty perpetrated by the Respondent. As a result, our methodology may understate the potential damage to Bear Creek [in relation to Corani]."[1149] Despite its hasty criticisms, Peru provides no alternative methodology to quantify the Corani damages, and takes the ludicrous position that no harm occurred, a conclusion that defies both the evidence and common sense.

456. Bear Creek's further response to Peru's objections is set forth below as follows: the Corani losses are compensable (**Section** 2); Peru caused those losses (**Section** 3); and Peru's criticisms of FTI's quantum analysis are unfounded (**Section** 4).

### 2. The Corani Losses Are Compensable

457. Peru argues that the Corani losses are non-compensable because Bear Creek suffered no "lasting damage."[1150] To begin with, the statement constitutes an admission that Bear Creek suffered damages—although according to Peru they are not "lasting." But in addition, Peru's assertion is based on a misguided interpretation of Bear Creek's claimed loss. Peru conflates the distinction between the existence of a compensable loss—*i.e.*, whether injury occurred—and the quantification of that loss in monetary terms—*i.e.*, how to determine the

[1147] Second FTI Expert Report ¶ 8.49.

[1148] First FTI Expert Report ¶¶ 8.7-8.12.

[1149] Second FTI Expert Report ¶ 8.49.

[1150] Respondent's Counter-Memorial ¶¶ 370 ff.

quantum of damages. The former is a pre-condition of liability and is addressed in this section; the latter is a quantum issue for the Tribunal to determine on the basis of the evidence put before it by the parties, and is addressed later below.[1151]

458. As explained, the harm suffered by Bear Creek in relation to the Corani project is straightforward. The expropriation of the Santa Ana project directly caused the delay of Corani's development, and substantially increased its financing costs and the project's risk-profile. This harm is real and irrefutable. As a result, and as evidence of the harm, Bear Creek's stock price decreased dramatically as stock market investors immediately incorporated these factors into the value they placed on Corani. To this date, the Corani project remains undeveloped and Bear Creek has not been able to obtain financing for it. Regardless of future events, Bear Creek will not be able to recover this loss. Thus, Peru's contention that Bear Creek suffered no Corani-related losses is simply wrong.

459. As explained above, these losses are compensable under the full reparation standard.[1152] Two principal corollaries follow from it. *First*, compensation should include both the monetary equivalent of restitution and additional damages for loss sustained that would not otherwise be covered by restitution or its monetary equivalent.[1153] Bear Creek's Corani damages fall under the latter category, *i.e.*, they are additional damages not captured by the FMV of Santa Ana. As the PCIJ put it in *Chorzów*, the expropriating State is under an obligation:

> [T]o restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place

[1151] *See infra* Section VII.E.4.

[1152] *See* Claimant's Memorial ¶¶ 197, 222, 231; *see supra* ¶ 412.

[1153] **CL-0205**, *Case Concerning The Factory at Chorzów (Germ. v. Pol.)*, Judgment, Sept. 13, 1928, 1928 P.C.I.J. (Ser. A) No. 17 ¶ 47 (*hereinafter* "*Chorzów No. 17 Decision*").

> of restitution which has become impossible. To this obligation, in virtue of the general principles of international law, *must be added that of compensating loss sustained as the result of the seizure*.[1154]

The PCIJ went on to specify that compensable "additional damages" could include losses caused to other factories operated by the German company beyond the expropriated factory.[1155] That is also the case here: the expropriation of Santa Ana negatively impacted the value of its sister-project, Corani.

460. The principle that damages not covered by restitution or its monetary equivalent must be compensated is also enshrined in the ILC Articles. Art. 36(1) provides: "The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, *insofar as such damage is not made good by restitution*."[1156]

461. Various investment tribunals have applied this principle and awarded damages in addition to compensation for expropriated assets. In *Sedco v. NIOC,* the Iran-U.S. Claims Tribunal awarded compensation for the replacement value of expropriated oil rigs but also for other losses in the form of lost income not generated due to the expropriation.[1157] Likewise, the *Vivendi II v. Argentina* Tribunal awarded compensation for full destruction of value under a DCF valuation but also additional losses that included cost of sponsored debt and management

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[1154] **CL-0205**, *Chorzów No. 17 Decision* ¶ 47-48.

[1155] **CL-0205**, *Chorzów No. 17 Decision* ¶ 49. The Court reserved its judgment on total compensation to a later judgment, pending further expert evidence ("the Court will consider later whether such damage must be taken into account in fixing the amount of compensation;" *id.* ¶ 49). The claim eventually settled.

[1156] **CL-0030**, The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ILC Articles, Article 36(1).

[1157] **CL-0052**, *SEDCO, Inc. v. National Iranian Oil Company*, Award No. 309-129-3, July 7, 1987, reprinted in 15 IRAN-U.S. C.T.R 23, at ¶¶ 78 ff.

fees.[1158] Tribunals have also awarded compensation for the additional cost of financing sustained as a result of a State's wrongful conduct.[1159]

462. In short, it is beyond debate that the additional damages not covered by the restitutionary equivalent are compensable under international law. Thus, Peru must compensate Bear Creek for its Corani losses, in addition to the FMV of Santa Ana.

463. The second corollary that follows from the full reparation standard is that the amount of damages need not be proven with absolute certainty for the losses to be compensable. Going back to the *Chorzów* case again, the PCIJ explained that the expropriating State is under an obligation to "*as far as possible*, wipe out all the consequences of the illegal act and re-establish the situation which would, *in all probability*, have existed if that act had not been committed."[1160] The test is, thus, the balance of probabilities; not absolute certainty. Recently, the Tribunal in *Vivendi II v. Argentina* confirmed that "international law does not demand absolute certainty in valuing the damages sustained by the Claimants" and cited the above passage in *Chorzów* in support.[1161]

464. Other tribunals have reached similar findings. The Iran-U.S. Claims Tribunal noted in various instances both the need and appropriateness of international tribunals to

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[1158] **CL-0206**, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Award, Apr. 9, 2015 at ¶¶ 59 ff., 71 ff., and 87 ff (*hereinafter* "*Vivendi II* Award").

[1159] *See* **CL-0207**, *Uiterwyk Corp., et al. v. The Government of the Islamic Republic of Iran, et al.*, Award No. 375-381-1 (July 6, 1988) ¶ 117, *reprinted in* 19 Iran-U.S. C.T.R. 107, 140; **CL-0208**, *Watkins-Johnsons Co., et al. v. Islamic Republic of Iran, et al.*, Award No. 429-370-1 (July 28, 1989) ¶¶ 114-17, *reprinted in* 22 Iran-U.S. C.T.R. 218, 250-1; **CL-0209**, *General Electric Co. v. The Government of the Islamic Republic of Iran, et al.*, Award No. 507-386-1 (Mar. 15, 1991) ¶¶ 67-9, reprinted in 26 Iran-U.S. C.T.R. 252.

[1160] **CL-0205**, *Chorzów No. 17 Decision* ¶ 47 (emphasis added).

[1161] **CL-0206**, *Vivendi II* Award ¶ 30.

approximate or estimate the quantum of damages to be awarded.[1162] In *Southern Pacific Properties v. Egypt*, the Tribunal held that "it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred."[1163] The *Vivendi I v. Argentina* Tribunal affirmed the same principle, concluding that "the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science."[1164]

465. Finally, it bears mention that any difficulty in assessing Corani's damages is the result of Peru's breaches of the FTA. Thus, Bear Creek should not be punished for it, nor should Peru benefit from its own wrongful conduct. The *Gemplus & Talsud v. Mexico* Tribunal explained the point as follows:

> Applying international law to the present case, the Tribunal is influenced by two related factors. First, the Tribunal rejects any argument that because the quantification of loss or damage (…) is uncertain or difficult, that the Claimants should be treated in this case as having failed to prove an essential element of their claims in respect of lost future profits. (…)
>
> Second, the Tribunal is mindful of the fact that the Claimant's evidential difficulties in proving their claim for loss of future profits are directly caused by the breaches of the BITs by the Respondent responsible for such loss. (…)

[1162] *See* **CL-0141**, *American International Group, Inc. et al. v. The Islamic Republic of Iran and Central Insurance of Iran* (Bimeh Markazi Iran) (Case No. 2) (Award No. 93–2–3, December 19 1983), 11; and **CL-0210**, *Payne v. Iran* (Case No. 335) (Award No. 245–335–2, August 8, 1986), 12 Iran–U.S. C.T.R. 3, ¶¶ 35–37.

[1163] **CL-0211**, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award on the Merits (May 20, 1992), ICSID Rev. — FILJ 1993, 328 ff., 389.

[1164] **CL-0038**, *Vivendi I Award* ¶ 8.3.16.

> This is not therefore a case where the burden of proof lay exclusively on the Claimants: and, in the Tribunal's view, it was also for the Respondent to prove the contrary.[1165]

466. In a word, while assessing the amount of losses attributable to Corani is a complex exercise that requires estimation and approximation, Bear Creek's Corani damages could not be more real and thus, they are compensable under international law.

### 3. Peru Caused the Losses to the Corani Project

467. Peru argues that Bear Creek has failed to establish a causal link between Peru's unlawful conduct and the alleged harm.[1166] But while Peru hastily asserts that causation is lacking, it offers no analysis of the applicable causation test. Bear Creek responds first to Peru's flawed arguments on "factual" causation and subsequently addresses "legal" causation.

468. Peru argues that Bear Creek failed to demonstrate that the expropriation of Santa Ana hindered the development of Corani by increasing both Bear Creek's financing costs[1167] and the market's perception of Corani's risk-profile.[1168] Peru's arguments are disingenuous and self-serving, and, more importantly, they ignore the evidence on record.

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[1165] **RLA-064**, *Talsud S.A. v. The United Mexican States*, Case No. ARB(AF0/04/04, Award, June 16, 2010 ¶¶ 13-91, 13-92, 13-99.

[1166] Respondent's Counter-Memorial ¶¶ 375-89.

[1167] Respondent's Counter-Memorial ¶ 379.

[1168] Respondent's Counter-Memorial ¶¶ 375, 387.

469. Mr. Swarthout explains the impact of Peru's conduct on the Corani project as follows:

> [I]t was impossible to raise financing for a project of Corani's magnitude until the ESIA was finally approved – especially in light of how Peru acted at Santa Ana. While the Santa Ana capital requirement were fully financed at the time Peru took away Santa Ana on June 25, 2011, this was not possible for Corani, which involved substantially higher upfront capital investments (...)
>
> At this time there is little doubt in my mind that Bear Creek's financing of Corani cannot move forward unless Bear Creek receives compensation in this arbitration for Peru's taking of Santa Ana.[1169]

470. Mr. Swarthout's testimony is unambiguous: Peru's suspension of Bear Creek's ESIA followed by the expropriation of Santa Ana precluded Bear Creek from obtaining financing for the Corani project, and absent payment of FMV, Bear Creek will not be able to develop Corani.

471. But Peru's position is also at odds with basic economics. It is basic economics that increased cost of capital "naturally implies that future expansion projects [will] not be economically viable, and that the company's future cash flows are much less valuable (i.e., are discounted much more heavily). All this leads to a loss in value."[1170] That is precisely what happened here: Mr. Swarthout's testimony confirms it, and both the decrease in Bear Creek's enterprise value between the ESIA suspension and the expropriation and the still-undeveloped status of the Corani project further attest it. In a word, Peru's lack of causation argument is unsupportable.

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[1169] Swarthout Rebuttal Witness Statement ¶¶ 44-45.

[1170] **CL-0212**, Herfried Wöss et al., DAMAGES IN INTERNATIONAL ARBITRATION UNDER COMPLEX LONG-TERM CONTRACTS ¶ 6.96 (2014).

472. Peru further argues that Bear Creek has failed to establish a causal link between the additional cost of financing and the increased risk-profile of the project, on the one hand, and the decrease in Corani's value, on the other.[1171] But this is precisely the exercise that FTI conducted in its computation of the Corani damages. The losses asserted by Bear Creek are based on an undisputed decrease in Bear Creek's enterprise value between the last trading day prior to the ESIA suspension and the first trading date after the announcement of the expropriation pursuant to Supreme Decree No. 032. Peru itself acknowledges that this decrease in Bear Creek's enterprise value was caused by its actions when it states that "Claimant's share price did, of course, drop following the issuance of Supreme Decree No. 032."[1172] This statement alone suffices to discredit Peru's baseless objection.

473. As to legal causation, Peru fails to mention the legal test that would apply to its purported causation analysis. Under international law, legal causation is satisfied if the losses sustained are a normal, foreseeable or proximate consequence of the unlawful conduct.[1173] Here, the chain of causation leading to Bear Creek's losses in relation to the Corani project comprises two steps:

a) As a consequence of Peru's expropriation of Santa Ana, Claimant has to raise more money at a higher financing rate, while having fewer options than if it retained control of the Santa Ana project; the Corani project has become riskier to develop; and the development of Corani has been delayed, leading to a permanent loss of income for the period of delay

b) These events caused a direct, normal and foreseeable financial loss to Bear Creek measured by FTI as the decrease in Bear Creek's

[1171] Respondent's Counter-Memorial ¶¶ 373.

[1172] Respondent's Counter-Memorial ¶¶ 373.

[1173] **CL-0213**, Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW 135 (2008).

> enterprise value between the last trading day prior to the ESIA suspension and the first trading day after the expropriation's announcement.

474. It is Bear Creek's case that these two steps in the chain of causation have been established on the balance of the probabilities. The burden rests with Peru to prove the contrary or that other events intervened in this chain of causation, neither of which Peru has done.

475. Bear Creek's position is supported by case law in other instances where investor-State tribunals have dealt at length with causation issues. The *Inmaris Perestoika v. Ukraine*[1174] award is one such example. The German claimants and instrumentalities of the Ukrainian Government jointly operated a ship, which for part of the year was used to train cadets for Ukraine's national fishery fleet and for the remaining part of the year was used to market sailing tours and other onboard events outside of the territorial waters of Ukraine. In 2006, the Government of Ukraine imposed a ban preventing the ship from leaving Ukrainian territorial waters.[1175] The *Inmaris* Tribunal found that the claimants suffered compensable damages from their inability to operate the ship outside of Ukrainian territorial waters, and that the ensuing lack of revenues was the proximate or foreseeable cause of claimants' bankruptcy in Germany.[1176] The *Inmaris* Tribunal, chaired by Peru's lead counsel in this arbitration, Mr. Stanimir Alexandrov, explained its causation reasoning as follows:

> Respondent has presented arguments that its acts did not cause the harm in question under a standard that considers either whether the acts were a "proximate" cause of the harm or whether the harm was a "foreseeable" result of the acts. The Tribunal finds that the action taken by Respondent

[1174] **CL-0214**, *Inmaris Perestroika Sailing Maritime Services v. Ukraine*, ICSID Case No. ARB/08/8, Award, Mar. 1, 2012 (*hereinafter* "*Inmaris v. Ukraine* Award").

[1175] **CL-0214**, *Inmaris v. Ukraine* Award ¶ 236-237.

[1176] **CL-0214**, *Inmaris v. Ukraine* Award ¶ 381-382.

> in ordering that the ship not leave the territorial waters of Ukraine caused the harm to Claimants under either standard discussed by Respondent. As a direct result of that instruction, Claimants had to cancel the 2006 sailing season. (…) The ban was wrongful and should never have been imposed. As it remained in place beyond the start of the 2006 season, Claimants did what was necessary to cancel the bookings. The ban remained in force for a year, and, at that point, the damage to Claimants became irreversible.
>
> In addition, the cancellation of the sailing season (…) led to Claimants' insolvency and the other damages discussed in further detail below. While Respondent has argued that its actions did not cause Claimants' insolvency, or that Claimants initiated insolvency proceedings prematurely, it is clear to the Tribunal that Claimants had little choice in taking the action they did. The indefinite postponement or cancellation of the sailing season had immediate effects on Claimants' business, and they had to take urgent steps to address their outstanding debt obligations.[1177]

The Tribunal awarded lost profits for the additional ten years of operation that would have followed had the claimants not gone into bankruptcy.[1178]

476. The *Inmaris* Tribunal's reasoning illustrates the various steps in the chain of causation that the Tribunal established, all the way from an administrative ban in Ukraine to a bankruptcy in Germany.

477. The *Lemire v. Ukraine* decision is also instructive.[1179] In that case, the claimant, who operated radio frequency licenses in Ukraine, had submitted applications for a substantial additional number of licenses in public tender processes.[1180] The Tribunal found that Ukraine had assigned the radio frequencies arbitrarily and without transparency, resulting in a violation of

[1177] **CL-0214**, *Inmaris v. Ukraine* Award ¶¶ 381-382.

[1178] **CL-0214**, *Inmaris v. Ukraine* Award ¶¶ 412 ff.

[1179] **CL-0215**, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, Mar. 28, 2011 (*hereinafter* "*Lemire v. Ukraine* Award").

[1180] **CL-0215**, *Lemire v. Ukraine* Award ¶¶ 123, 135, 158.

the FET standard.[1181] But the *Lemire* Tribunal found itself between a rock and hard place to establish causation and quantify damages. The *Lemire* Tribunal explained this difficulty as follows:

> Given the characteristics of the Ukrainian process for the awarding of licences, it is impossible to establish, with total certainty, how specific tenders would have been awarded if the National Council had not violated the FET standard. The best that the Tribunal can expect Claimant to prove is that through a line of natural sequences it is probable – and not simply possible – that Gala would have been awarded the frequencies under tender. If it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.[1182]

478. The *Lemire* Tribunal concluded that, in order to succeed in its claim, the claimant needed to prove the following two steps in the chain of causation. First, that "if the tenders had hypothetically been decided in a fair and equitable manner, and Claimant had participated in them, he (and not some of the other participants) would have won the disputed frequencies."[1183] Second, "with these frequencies, Mr. Lemire would have been able to grow Gala Radio into the broadcasting company he had planned: a FM national broadcaster, for music format, plus a second AM channel, for talk radio."[1184] The uncertainty and assumptions in the causation chain are apparent and were acknowledged by the *Lemire* Tribunal, although the alternative would be to deny compensation to the claimant and reward Ukraine for its unlawful conduct. The *Lemire* Tribunal found that causation was established and went on to compensate the claimant by assessing damages as the difference in value between the worth of Lemire's company had he

[1181] **CL-0094**, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Mar. 28, 2011 at ¶ 451.

[1182] **CL-0215**, *Lemire v. Ukraine* Award ¶ 169 (emphasis added).

[1183] **CL-0215**, *Lemire v. Ukraine* Award ¶ 171.

[1184] **CL-0215**, *Lemire v. Ukraine* Award ¶ 171.

succeeded in obtaining the radio frequencies he pursued, and the actual worth of the company as a result of Ukraine's measures.[1185]

479. In the instant case, this Tribunal need not go nearly as far as either the *Inmaris* or the *Lemire* Tribunals were willing to go in order to find a causal link between Peru's conduct and Bear Creek's Corani damages. To be sure, the impact on Corani followed directly and immediately from Peru's expropriation of Santa Ana; further, the causal link between Santa Ana's expropriation and the damages to the Corani project is far more straightforward and foreseeable than the ban to the ship and the bankruptcy proceeding in *Inmaris*, or the hypothetical award of radio frequencies and the rise of a national radio broadcaster in *Lemire*.

480. In conclusion, Peru's lack of causation arguments are unsupported both factually and legally, and therefore they must be rejected.

#### 4. Peru's Criticisms of FTI's Quantum Analysis of Corani Are Unfounded

481. The source of damage to the value of Corani lies in the cost of capital that is available to Bear Creek to develop the mine as well as the associated delay. As described below by Bear Creek's CEO Andy Swarthout, Corani was to be financed by (1) the cash flows from Santa Ana and (2) the availability of debt financing that can be raised by the operators of an active mine (*i.e.*, Santa Ana). In the absence of the development of Santa Ana, Bear Creek will not have access to these sources of capital. Further, the sources of capital that will be available to develop Corani (if available at all) will come from the issuance of equity of a much smaller company with a much lower market capitalization.[1186] The resulting dilution to investors, and

[1185] *Id.* ¶ 244.

[1186] Second FTI Expert Report ¶ 8.2.

the cost of this equity will undoubtedly exceed the cost of capital that would have been available had Santa Ana been allowed to proceed as anticipated. Thus the damage to Corani is tangible, has been experienced, and is permanent.[1187]

482. FTI explains that it was not able to prepare a similar DCF analysis for Corani as was prepared for Santa Ana because, due to Corani's relative development stage, it would require subjective assumptions that would not support an objective opinion on damages.[1188] While Bear Creek's share price does not provide a reliable measure of FMV of the underlying assets (both Santa Ana and Corani), and understates the adverse effect on the value of Corani of Peru's actions against Santa Ana, FTI concludes that the only available objective measure of the change in perceived value to Corani is the change in the price of BCM's shares as at the Valuation Date.[1189]

483. To that end, FTI quantified the reduction in value of Corani resulting from Peru's taking of the Santa Ana project at US $170.6 million. FTI estimated the value of Corani with reference to Bear Creek's EV under a "but for" scenario based on the assumption that absent the alleged actions of Peru, Bear Creek's share price would have followed the decline in the S&P/TSX Global mining index from May 27, 2011 (immediately prior to Peru's suspension of Bear Creek's ESIA) to June 27, 2011 (the first trading day after Peru issued Supreme Decree 032).[1190] FTI produced three different reduction calculations as shown in the table below.

[1187] Second FTI Expert Report ¶ 8.3.

[1188] Second FTI Expert Report ¶ 8.4-8.5.

[1189] Second FTI Expert Report ¶ 8.5.

[1190] First FTI Expert Report ¶¶ 8.5, 8.6; Second FTI Expert Report ¶¶ 8.6.

| 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** |

*Source*: First FTI Expert Report, Figure 27; Second FTI Expert Report, Figure 8.

484. FTI selected US $170.6 million as a point estimate for purposes of its damages conclusion because FTI did not believe the market would have priced the full Santa Ana FMV into Bear Creek's share price at that time. Therefore, FTI deducted 19.2% for value attributable to Santa Ana, which represents the average of the proportionate NAV of Santa Ana relative to the NAV of Corani per the analysts at the time, further adjusted for the 7.3% decline in the S&P/TSX Global Mining Index over the referenced period, and deducted the full EV attributable to Corani on June 27, 2011, which FTI equated to the retained value of Corani following the expropriation.[1191] This methodology estimated the reduction in value Bear Creek would have faced, and did face, immediately and permanently.

485. It is likely that this method of measuring damages understates the effect on the value of Corani substantially. The consensus of independent industry analysts placed a value of approximately US$ 1.1 billion on Corani.[1192] Given the share price at the current time, the diminution appears to be significantly in excess of FTI's calculation of damage.[1193] Although BCM's share price understates the FMV of Corani, and hence the observed decrease in the BCM

[1191] First FTI Expert Report ¶¶ 8.6-8.11, f.n. 126.

[1192] First FTI Expert Report ¶ 8.8.

[1193] Second FTI Expert Report ¶ 8.9.

EV after the expropriation will also understate the damages to Corani, the calculation in the FTI Report provides the best estimate with the information available at the time of writing.

486. In its Second Report, FTI exhaustively addresses Brattle's comments related to FTI's Corani damage calculation valuation based upon delay in the development of Corani, increased financing requirements and Corani's overall increased risk profile.[1194] Brattle seeks to downplay the fact that Peru's expropriation of Santa Ana damaged the value of Corani and Bear Creek's share price. Brattle's efforts fail.

487. For example, Brattle's assertion that Bear Creek has not experienced an increase in financing costs to date rings hollow. As Bear Creek's CEO testifies:

> However, it was impossible to raise financing for a project of Corani's magnitude until the ESIA was finally approved – especially in light of how Peru acted at Santa Ana. While the Santa Ana capital requirements were fully financed at the time Peru took away Santa Ana on June 25, 2011, this was not possible for Corani, which involved substantially higher upfront capital investments. Despite Peru's actions against Santa Ana, we decided to keep moving forward with the Corani Feasibility Study and ESIA process, because we believed that the Peruvian government would be dealing with us in good faith and that, as Government officials had repeatedly told us, it would return Santa Ana to Bear Creek.[1195]

488. With respect to Peru's assertion that the relevant cost of capital is based solely on Corani's risk profile, Mr. Swarthout testifies: "Peru suggests that lenders and the markets view the financing of the Corani Project solely on the basis of the risks related to the Corani Project itself. To decouple Corani from Santa Ana when discussing cost of capital is naïve and unrealistic."[1196]

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[1194] Second FTI Expert Report ¶¶ 8.15-8.27.

[1195] Swarthout Rebuttal Witness Statement ¶ 44.

[1196] Swarthout Rebuttal Witness Statement ¶ 53.

489. Common sense dictates that the loss of Santa Ana has not only made Corani substantially more difficult to finance, but this increased financing difficulty has caused the project to be delayed in general. As Mr. Swarthout explains: "Contrary to what Peru and its experts assert, Bear Creek's financing efforts for Corani have, in fact, been delayed and continue to be delayed as a result of Peru's taking of Santa Ana. This is because Bear Creek's strategic plan was to bring the Santa Ana Project into production first, in order to help finance the development of Corani."[1197] Nor was the delay at Corani a result of a managerial decision due to technical factors or markets conditions, nor did the delay result in a net benefit as Brattle argues.[1198] To the contrary, technical optimization studies were clearly contemplated and were independent of market conditions.[1199]

490. FTI therefore concludes: "Corani's development has been delayed due to the financing difficulties created by the loss of Santa Ana. As noted above, Brattle concedes that this delay has been realized. The fact that Brattle fails to acknowledge that losing Santa Ana's free cash flows also contributed to this delay defies explanation."[1200] The ability to finance Corani has been impaired because the market recognizes that the Company's plan to use cash flow from Santa Ana has been taken away and the remaining value of Corani has been diminished due to the vastly increased difficulty in financing the development of Corani.

491. It is one thing to seek several hundred million dollars of financing for a project when a company has a market capitalization that is equal to the financing required, but quite

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[1197] Swarthout Rebuttal Witness Statement ¶ 43.

[1198] **REX-004,** Brattle Report ¶¶ 140, 146.

[1199] Swarthout Rebuttal Witness Statement ¶¶ 45-46.

[1200] Second FTI Expert Report ¶ 8.27.

another than when the market capitalization is reduced to less than half the capital required to build the project. The market has recognized that Bear Creek's ability to raise the nearly US $700 million needed to develop Corani has been permanently diminished and has accordingly reduced its view of the value of the Corani project. It is also obvious that the suspension of the ESIA for the Santa Ana project and the expropriation of Santa Ana, especially in the manner in which Peru did it, increased Corani's risk profile beyond the mere threat of Corani itself being expropriated. It is simply not reasonable to suggest that the taking of Santa Ana has not caused delays at Corani and impacted the market's perception of Corani, located 350 kilometers away from Santa Ana in the Puno Department. As FTI notes, Brattle agrees that an increased risk profile would reduce Corani's value.[1201]

492. As FTI notes, Mr. Swarthout summarizes the issue succinctly:

> Peru spends a lot of time describing how Corani was otherwise unaffected, but it repeatedly misses the main point, namely the clear existence of the financial dependence of Corani on Santa Ana. Investors understandably conclude that Peru can act as capriciously at Corani [as] it did at Santa Ana under any political pressure, especially since both projects are located in the same region.[1202]

493. Despite Brattle's allegation to the contrary, FTI was not inconsistent in using the more reliable and precise DCF method as it was available to determine the FMV of Santa Ana (rather than the BCM share price which for a number of fundamental reasons does not provide a reliable measure of FMV for the underlying assets) and then using the change in BCM's share price to estimate the permanent damage to Corani caused by the alleged breaches. Since the alleged wrongful actions themselves have caused the uncertainty that forced FTI to use a less

[1201] Second FTI Report ¶ 8.35.

[1202] Second FTI Expert Report ¶ 8.39; Swarthout Rebuttal Statement ¶ 55.

precise approach to measure the damages to Corani, it would not be proper to ignore the permanent and ongoing damages to Corani merely due to the inherent difficulties in estimating its quantum.

### 5. RPA's Conclusion that Corani Feasibility Study Work Was Thorough and Diligent Remains Unchanged

494. Corani is one of the ten largest silver deposits in the world.[1203] There is simply no doubt that Corani, which completed its first 43-101 technical report in 2005[1204] and completed a Technical Report Feasibility Study in 2011[1205] and an Final Feasibility Study in 2015,[1206] is a world-class mining project. While the valuation date for the expropriation of Santa Ana is June 23, 2011 as per the FTA, there is no requirement under the FTA that knock on damages, of the type suffered by Corani, must have the same valuation date. In any event, FTI does calculate the damage to Corani based on the decrease in EV from May 27, 2011 to June 27, 2011. Nor is information contained in the 2015 Final Feasibility Study FS irrelevant as it demonstrates that the information that existed in 2011 is, and was, valid.

495. While SRK throws whatever it thinks it can against the wall with regard to Corani, nothing sticks. RPA confirms that it completed a thorough review of the 2015 Corani Feasibility Study Mineral Resource Estimate and was able to confirm both tonnage and grade.[1207] In addition, with respect to mining costs, RPA explains that, despite SRK's claim to the contrary,

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[1203] Second FTI Expert Report ¶ 8.30, Figure 9.

[1204] **Exhibit C-245,** Bear Creek Mining Corporation & SRK Consulting, *National Instrument 43-101 Technical Report, Corani Silver-Gold Exploration Project, Department of Puno*, October 12, 2005.

[1205] **Exhibit C-006**, M3 Engineering & Technology Corp., 2011, Corani Project, Form NI 41-101-F1 Technical Report Feasibility Study, Puno, Peru, prepared for Bear Creek Mining Corporation December, 2011.

[1206] **C-246**, M3 Engineering & Technology Corp., 2015, Optimized and Final Feasibility Study Corani Project, Puno, Peru, prepared for Bear Creek Mining Corporation, May 30, 2015.

[1207] Second RPA Expert Report ¶ 148; *see* RPA First Expert Report at 16-4.

the Corani 2011 Feasibility Study did, in fact, incorporate allowances for Corani's remote location and altitude.[1208]

496. RPA also explains that the projected metallurgical recoveries projected by the 2011 Feasibility Study are not overstated and that SRK simply selected data that gives it the result it desires, *i.e.*, lower estimates for lead and silver recoveries, without demonstrating any legitimate basis for such conclusion.[1209] Similarly, RPA explains, in detail, that the work has been completed by Bear Creek to support silver recovery estimates at 70% instead of 55% as SRK asserts.[1210] RPA is of the opinion that "the work that has been completed to support the 2015 Corani OFS, which estimates metal recovery on a block by block basis, using the most modern methods available, is much more accurate than the empirical guesses that SRK proposes."[1211] SRK also claims, without reference to specific circumstances, that Corani may face delays in its permitting schedule and construction and ramp up schedules. This is, as RPA notes, speculative without warrant, especially in light of the fact that Corani's project schedule of 17 months from ESIA preparation/review and permitting is five months *longer* than the 12 months suggested by SRK.[1212]

497. Accordingly, RPA concludes that the Corani feasibility studies provide a reasonable representation of the project as planned and that the inputs used to develop the geology, metallurgy and mining were carried out in a thorough and diligent manner.

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[1208] Second RPA Expert Report ¶ 152; *see* RPA First Expert Report at 16-5.

[1209] Second RPA Expert Report ¶ 170.

[1210] Second RPA Expert Report ¶ 195.

[1211] Second RPA Expert Report ¶ 195.

[1212] Second RPA Expert Report ¶ 196.

### F. INTEREST AND COSTS

498. The parties do not dispute that Bear Creek is entitled to compound interest on any amounts awarded, and that the prevailing party may recover the entirety of its arbitral costs and fees at the Tribunal's discretion. Regarding interest, Peru also agrees with the principle that it may be calculated based on Peru's borrowing rate, but it disputes FTI's calculation of 5%, proposing instead (through Brattle) a borrowing rate of 0.65% or a risk-free rate of 0.16%.

499. Regarding the risk-free rate, the Tribunal should immediately discard it because the FTA requires that interest be based on a commercial rate. The risk-free rate, however, is not a commercial rate because Peru could not borrow, and Bear Creek would not lend, at this interest rate.[1213]

500. Regarding Peru's borrowing rate, Brattle derives it from adding to the interest rate on a one-month US Treasury bill the sovereign spread on Peruvian certificates of deposit with a one-year maturity. As FTI explains, however, this does not accurately represent Peru's cost of borrowing. This is evidenced by the fact that the Peruvian Ministry of Economics and Finance calculates the country's emerging market bond index ("EMBI") spread to be 2.0%, and its coupon rates and bond yields on USD-denominated debt were 9.9% and 6.0%, respectively.[1214]

501. From its research, FTI concludes that Peru's borrowing rate was likely in a range of 5.1% (the weighted yield to maturity at the expropriation date) and 5.6% (the coupon rate of

[1213] Second FTI Expert Report ¶ 9.0, 9.14.

[1214] Second FTI Expert Report ¶ 9.8, Figure 12.

the most recently issued bond).[1215] Consequently, the Tribunal should reject Brattle's proposed rate of 0.65% and adopt FTI's conservative rate of 5%.

502. With respect to costs, Bear Creek will submit its full cost submission at an appropriate stage at the conclusion of this proceeding. Bear Creek reiterates that as the expected prevailing party, it should recover the entirety of its costs.

## VIII. REQUEST FOR RELIEF

503. For the reasons stated herein, Claimant, Bear Creek, requests an award granting it the following relief:

i. A declaration that Peru has violated the FTA;

ii. A declaration that Peru's actions and omission at issue and those of its instrumentalities for which it is internationally responsible are unlawful, constitute a nationalization or expropriation without prompt, adequate and effective compensation, failed to treat Bear Creek's investments fairly and equitably and to afford full protection and security to Bear Creek's investments and impaired Bear Creek's investments through unreasonable and discriminatory measures;

iii. An award to Bear Creek of the monetary equivalent of all damages caused to its investments represented by the FMV of the Santa Ana Project as of the day before Peru's unlawful expropriation and the resulting reduction in value of the Corani Project resulting from Peru's unlawful acts;

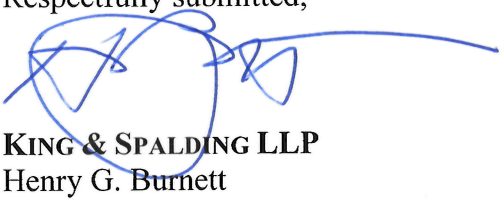
iv. An award to Bear Creek for all costs of these proceedings, including attorney's fees; and

[1215] Second FTI Expert Report ¶ 9.9.

v. Post-award interest on all of the foregoing amounts, compounded quarterly, until Peru pays in full.

January 8, 2016

Respectfully submitted,



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