BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bear Creek Mining Corporation
Claimant,

v.

Republic of Perú
Respondent.

Case No. ARB/14/21

Respondent's First Post-Hearing Brief

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I. INTRODUCTION

1. From the beginning of this arbitration, Claimant has tried to paint an impossibly rosy picture of Bear Creek as having experience in mining, excellent relations with local communities impacted by the Santa Ana Project, and expectations of making hundreds of millions of dollars—if only Perú had not repealed the declaration of public necessity for the Santa Ana Project. However, September's hearing laid bare the fantastical nature of Claimant's story, which did not withstand scrutiny. What crystallized instead was that Bear Creek has mostly itself to blame for the failure of the Santa Ana Project, due to its unlawful shortcuts in making its investment and its failure to build healthy relationships with the local communities.

2. The hearing also highlighted Respondent's extensive evidence demonstrating that Supreme Decree No. 032 was a reasonable and fair measure in face of a dramatic situation that jeopardized Puno's peace and security. The hearing confirmed that Claimant acquired its concessions for the Santa Ana Project through an illegal proxy scheme that circumvented a constitutional restriction on foreign mining activity in the border region, Article 71; that Claimant failed to earn the social license it needed to construct and operate a large-scale, open-pit silver mine on the lands of indigenous communities, resulting in violent protests by those communities; and that even if Supreme Decree No. 032 had not been issued, Bear Creek's claim that it would have been able to successfully build and operate the Santa Ana Project is entirely speculative, given the local communities' opposition.

3. That last point bears repeating: even if Respondent never took either of the measures challenged by Claimant in this case—if the Environmental Impact Assessment ("EIA") review were not suspended, if Supreme Decree No. 032 were never issued—the Santa Ana Project faced a very high risk of failure. Multiple witnesses confirmed that mining projects

across Perú have been paralyzed by social unrest and protests.[1] And in the face of opposition like the region-wide, paralyzing, violent protests in the Puno region in 2011—without a social license—a mining project simply cannot proceed.

4. Claimant's own experts provided the most vivid confirmation of that fact of life. The former Minister of Energy of Perú, Mr. Hans Flury, testified:

> I believe that the procedure is such that, for its fulfillment and by presenting all of the required information, the State will follow the procedure to grant the necessary permit. Given social unrest, as we have seen or heard in this proceeding, we have seen that the Ministry freezes the process to allow time for Parties to solve the social unrest and then move forward.
>
> *I do not think that a complete unrest situation would allow for the issuance of a permit because that will be just like throwing wood onto the fire. . .*[2]

Mr. Flury also stated without reservation that "*[n]o company will be able to develop activities if there are confrontations*."[3] Mr. Graham Clow, Claimant's technical expert, agreed, based on his own personal experiences with a stalled mining project in Perú (the since-abandoned Tambogrande project). In his words, "if the local people don't support it, if a project--if these issues can't be resolved, then nobody is going to make anybody move. And I firmly believe that, *and I think any reasonable mining operator would*."[4] Claimant would nevertheless like this Tribunal to assume "what [no] reasonable mining operator would"—that its Project, unlike

[1] *See Bear Creek Mining Corporation v. Republic of Perú,* ICSID Case No. 14/21, Transcript of Hearing, September 8-14, 2016 ("Transcr."), at 1226:9-17 (Flury) ("There is no possibility of imposing a project, and for that project to be successful"); Transcr. at 1497:15-19 (Clow) ("if a project--if these issues can't be resolved, then nobody is going to make anybody move. And I firmly believe that, and I think any reasonable mining operator would."); *see also* SRK Second Expert Report, April 13, 2016, at para. 29 [Exhibit REX-011].

[2] Transcr. at 1234:12-22 (Flury) (emphasis added).

[3] Transcr. at 1225:13-14 (Flury).

[4] Transcr. at 1497:15-19 (Clow) (emphasis added).

others in Perú, would have proceeded to completion despite the vigorous opposition of the Aymara communities of Puno, if only Supreme Decree No. 032 had not been issued.

5. In this Post Hearing Brief, Respondent will focus on addressing the Tribunal's questions. In doing so, Respondent will highlight aspects of the hearing with a particular focus on the ways in which Claimant's own witnesses and experts undermined their claims and supported Respondent's defenses. Of course, Respondent will not attempt to restate its defenses in full or summarize every aspect of the hearing that supported those defenses. Rather, Respondent relies on and incorporates by reference its prior written and oral submissions. In Section II below, Respondent comments on DHUMA's Response Submission, and in Section III, Respondent addresses, in order, the Tribunal's questions set out in Procedural Order No. 10.

II. RESPONDENT'S COMMENTS ON THE DHUMA SUBMISSION

6. DHUMA's written submissions in this arbitration provide a unique and crucial perspective on Bear Creek's relations with the local communities. In its *amicus* brief, DHUMA explained that (i) Bear Creek contributed to the social unrest that engulfed the Puno region with its poor community outreach, and (ii) Bear Creek failed to live up to established international norms for interactions with local, indigenous communities. Moreover, those observations come from not a mere interested observer, but from individuals—including native Aymara speakers with regular, in-person interactions with the affected communities—who personally witnessed and participated in many of the events in question.[5] Thus, DHUMA provides an independent and unique perspective on Bear Creek's actions that contributed to the dramatic situation in Puno.

[5] *See* DHUMA's Response (*amicus curiae*) in compliance with the Tribunal's order dated September 10, 2016, September 29, 2016 ("DHUMA's Response"), at 1.

7. Claimant has nevertheless tried to undermine DHUMA's observations, including before the hearing (relying on letters that it solicited from three former community authorities,[6] —which Respondent did not have a chance to test through cross-examination) and at the hearing itself (through Mr. Antunez de Mayolo's testimony[7]). With respect to the February 2011 public hearing, for example, Mr. Antunez de Mayolo claimed that the event was a success, the Aymaras understood the technical explanations and the translation was adequate (even though he is not an Aymara speaker),[8] he did not recall the company distributing any ponchos or caps to the attendees, and only a small segment of the population rejected the project.[9]

8. In Respondent's view, DHUMA's September 29, 2016 Response has effectively rebutted each of Claimant's efforts to rewrite history. DHUMA stands by its recounting of events that members of the organization attended and personally witnessed,[10] including the fact that the public hearing was fraught with problems and evidence of Bear Creek's poor community relations strategies.[11] Even on relatively minor points where Bear Creek has tried to sow confusion—like whether Bear Creek distributed company logo materials (ponchos and caps) at the hearing—the DHUMA response is simple and effective: they attended the hearing, they received the items, and they still have those items in their possession today.[12] Likewise, on more meaningful points, DHUMA again confirms, based on personal interactions with fellow Aymara attendees at the hearing, that many of the Aymaras present at the public hearing rejected the

[6] *See* Letter from Mr. Morales to Messrs. Miranda y Amado and King & Spalding, August 8, 2016 [Exhibit C-329]; Letter from Sixto Vilcanqui Mamani to Messrs. Miranda y Amado and King & Spalding, August 8, 2016 [Exhibit C-331].

[7] *See* Transcr. at 589:2-595:14 (Antunez de Mayolo).

[8] *See* Transcr. at 595:2-14 (Antunez de Mayolo).

[9] *See* Transcr. at 589:2-6 (Antunez de Mayolo).

[10] *See* DHUMA's Response at 1.

[11] *See* DHUMA's Response at 2-3.

[12] *See* DHUMA's Response at 2.

Project and were gravely concerned about the effects it could have on their lives.[13] That observation is of course corroborated both by the protests that occurred outside and after the hearing and by multiple letters that community members wrote to public authorities complaining about the Santa Ana Project.[14] Relatedly, DHUMA also confirms that, in their opinion as native Aymara speakers, the translation at the public hearing was inadequate and incomplete.[15] That observation by DHUMA, in turn, is corroborated by the many questions posed by hearing attendees that show a lack of understanding of the company's explanations of the alleged benefits of the Project and of potential environmental impacts.[16]

9. DHUMA's submissions in this proceeding have given a voice to the affected local communities themselves. The observations of Sister Patricia Ryan and her Aymara colleagues deserve this Tribunal's careful attention, as they help to explain how Bear Creek's failures in its interactions with the Aymara communities led to frustration, opposition, and ultimately, broad-based demonstrations against the Project. DHUMA's submissions confirm, without a doubt, that Claimant did not have a social license to build or operate its Project. The DHUMA Response Submission is therefore a critical portion of the record before this Tribunal as it assesses Claimant's conduct.

[13] *See* DHUMA's Response at 2-3.

[14] *See, e.g.,* Letter from Kelluyo Community Inquiring about the Project, March 11, 2011 [Exhibit R-053]; Memorial from Kelluyo Authorities to the Minister of Energy and Mines, March 18, 2011 (rejecting the Santa Ana Project) [Exhibit R-423].

[15] *See* DHUMA's Response at 2.

[16] *See* Questions Raised at the Santa Ana Public Hearing, February 23, 2011 [Exhibit R-054]. *See also* Respondent's Rejoinder on the Merits and Reply on Jurisdiction, April 13, 2016 ("Respondent's Rejoinder on the Merits"), at para. 210.

III. ANSWERS TO THE TRIBUNAL'S QUESTIONS

A. QUESTION: WHAT IS THE STANDARD BY WHICH THE TRIBUNAL IS TO DETERMINE WHETHER CLAIMANT SUFFICIENTLY REACHED OUT TO THE RELEVANT COMMUNITIES NEEDED TO OBTAIN A SOCIAL LICENSE?

10. The term "social license" is widely recognized in the mining industry. Bear Creek itself, through its CEO, Mr. Andrew Swarthout, defines it as follows:

> [A] social license does not refer to any formal authorization process but rather to the general acceptance of the project by the relevant communities, which can only be achieved through open and detailed discussions with community members and representatives and a genuine effort by the mining company to address any questions or concerns that may arise in that context.[17]

11. Therefore, based on Mr. Swarthout's own definition, a company obtains the necessary social license if, and only if, it is generally accepted by the relevant communities. Much attention—in international fora and instruments, in Peruvian law, and indeed in this proceeding (at least in Claimant's arguments)—is focused on the procedures and processes that companies are advised to follow in the course of their efforts to obtain such general acceptance. Clearly, a company's efforts will not be sufficient if they ignore such procedures or fail to comply with minimum legal requirements for outreach and consultation. For example, seeking "general acceptance of the project" undoubtedly requires, as Mr. Swarthout says, "open and detailed" communications, as well as consultations carried out transparently and in good faith with the relevant communities—meaning all of the communities that the mining project would affect, directly or indirectly, environmentally or socially.[18] But those are only necessary, and not sufficient, parts of the process of obtaining a social license.

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[17] Witness Statement of Andrew T. Swarthout, May 28, 2015 ("Swarthout First Witness Statement"), para. 40, n. 31; *see also* Transcr. at 432:19-433:10 (Swarthout).

[18] *See* Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008, at Art. 2.1 [Exhibit R-159].

12. The *sufficiency* of a company's efforts to obtain a social license is not measured by the procedural steps that it follows or the minimum legal requirements that it fulfills. To answer directly the Tribunal's question: A company can only be deemed to have "sufficiently reached out to the relevant communities needed to obtain a social license" if it does, in fact, *obtain* (and maintain) a social license. If a company or its mining project is not accepted by the communities, then it does not have social license and the project cannot proceed—as a practical matter, and in several respects as a legal matter as well (as discussed below).[19] The standard by which the sufficiency of the company's outreach necessarily is measured is the standard of success—by whether the company does or does not achieve a social license, or general acceptance, from the relevant communities.

13. In other words, a company has to work however closely and extensively with the local communities as is necessary to gain their trust and eventually their acceptance. A company will have sufficiently reached out to the communities if the communities reach a consensus to accept the mining project and the company. Similarly, a company will not have sufficiently reached out to the relevant communities if they, or significant portions of them, have serious unanswered concerns about it, reject the project, or call for its cancellation. Having conducted 10, 100, or 1,000 workshops in the communities is of little consequence if, notwithstanding those workshops, the company does not succeed in addressing the communities' concerns in a way that is satisfactory to them (not to the company). Likewise, if outreach is conducted only in a subset

[19] *See* Davis and Franks, "Costs of Company-Community Conflict in the Extractive Sector," Harvard University Kennedy School of Government, 2014 ("Davis and Franks, *Costs of Company-Community Conflict*"), at 11 ("There is a growing recognition within the extractive sector of the importance of a 'social license to operate.'") [Exhibit R-272]; Business for Social Responsibility, "The Social License to Operate," 2003, at 3 ("[G]aining a social license to operate is now essential for global companies. Companies open themselves up to great risk if they do not achieve constructive engagement.") [Exhibit R-273]; *Id.* at 3-4 ("[W]here there was well-organized, significant opposition to a mining project, no matter their country or political stripe and no matter the prevailing laws, politicians were reluctant to go against it.") [Exhibit R-273].

of communities, leaving aside other communities that would also be affected (even if only indirectly) by the mining project,[20] the outreach will be insufficient to obtain the necessary social license. A mining company has to reach out as often and in as many places and in as many ways to all stakeholders as may be needed to ensure that it does gain general acceptance from the local communities.

14. To set the standard at any point short of success would permit a company to "go through the motions," fulfill minimum requirements, and then sit back and claim that because it has completed the necessary procedures it is therefore *entitled* to see its project proceed—even if, as here, those procedural steps fail completely and massive social opposition to the project erupts. To the contrary, there could be no clearer sign that a company has not carried out sufficient outreach to acquire the required social license than tens of thousands of persons from affected communities gathering and protesting against the mining project.[21]

15. In effect, Claimant asks this Tribunal to hold either (i) that Bear Creek did have the necessary social license to develop the Santa Ana Project, which would require the Tribunal to willfully ignore months of paralyzing protests against the Project by tens of thousands of people in the Puno region, or (ii) that Bear Creek did not need to successfully obtain a social license, so long as it carried out requisite procedural steps. The Tribunal would have to agree with one of those propositions in order to hold that Claimant's outreach was "sufficient" and that Perú was not entitled to take the social crisis into account when assessing, *inter alia*, the public necessity of the Santa Ana Project. Of course, neither proposition is tenable.

[20] As Mr. Ramírez, the Director General of MINEM that oversees the execution of the citizen participation process, testified the number of workshops is not the crucial aspect: "[i]t is not the quantity of activities, rather, the quality of the communication." Transcr. at 1132:6-7 (Ramírez).

[21] *See* Transcr. at 1294:9-1297:15, 1301:12-1302:2 (Peña Jumpa).

16. First, Bear Creek obviously did not have "general acceptance" from the relevant communities—it did not have a social license. The many months of strenuous and even violent protests against the Project and against mining in Puno more generally are inescapable proof of that failure. To circumvent that problem, Claimant tries, in vain, to claim that it had good relations with the local communities—by inappropriately narrowing the scope of what it labels the "relevant communities." But as Professor Peña explained, that approach fundamentally misunderstood the Aymara communities' collective social organization, under which the handful of "benefitting" communities with which Bear Creek dealt could not act in isolation or against the collective will of all the other surrounding communities that opposed the Project.[22] Also according to Claimant, and even less plausibly, the protestors were outside agitators and the protests had no relation to the Santa Ana Project.[23] But Claimant cannot escape the fact that tens of thousands of Aymaras left their small communities (within the areas of both direct and indirect influence of the mining project[24]) for months to go to the main cities in the Puno region to demand the cancellation of the Project. These were not outside agitators; they were community members who objected to Bear Creek's presence in the area, to its Project, and to the effects that they feared the Project would have on their lives, their lands, their culture, and their environment.[25]

[22] *See* Expert Report of Antonio Alfonso Peña Jumpa, October 6, 2015 ("Peña Jumpa First Report"), at paras. 26-27 [Exhibit REX-002]; Second Expert Report of Antonio Alfonso Peña Jumpa, April 13, 2016 ("Peña Jumpa Second Report"), at para. 40 [Exhibit REX-008]; Transcr. at 1293:11-1294:12, 1387:18-1392:8 (Peña Jumpa). Prof. Peña explains that the company had to work in good faith and transparently with the communities as a collective.

[23] *See* Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, January 8, 2016 ("Claimant's Reply") at para. 98.

[24] Peña Jumpa First Report at para. 90 [Exhibit REX-002]; Peña Jumpa Second Report at para. 47 [Exhibit REX-008]; Transcr. at 1297:2-15 (Peña Jumpa).

[25] *See* Peña Jumpa Second Report at paras. 3, 54 [Exhibit REX-008].

17. Second, Bear Creek's completion of various procedural steps cannot substitute for actually obtaining a social license. Claimant insists that it carried out some 130 workshops with local communities, and that it organized a rotational work program.[26] Claimant therefore claims that it complied with Peruvian law and that to expect it to go beyond the legal requirements is an "absurd take on community relations."[27] However, what Bear Creek derides as "absurd" is in fact what is expected of mining companies, as the international and national standards and instruments discussed next illustrate.

1. Sub-Question: Which National and International Legal Provisions Are Applicable to Informing That Standard?

18. As the Tribunal well understands, a social license is not a statutory or regulatory authorization that can be granted by a government. It is the communities' *de facto* acceptance of the project. Because it is not a legal license to be granted or denied by the State, there are few "legal standards" that can be applied to it. Thus, international and national instruments focus on the importance of states and companies engaging in dialogue with the communities and provide for general principles to guide this dialogue. However, none of these instruments supplies a set formula that will guarantee that a social license will be obtained, or suggests that a company will be excused from needing to obtain a social license so long as it complies with the general principles or recommended procedures.

a. International Instruments

19. At least three key international instruments and guidelines provide that indigenous communities have the right to be consulted on the development of mining activities on their

[26] *See* Claimant's Reply at para. 73; Rebuttal Statement of Elsiario Antunez de Mayolo, January 8, 2016, at para. 14.
[27] Claimant's Reply at para. 68; *see also* Transcr. at 49:14-22 (Claimant's Opening); Claimant's Reply at para. 105.

lands.[28]

20. First, the most important instrument is, of course, ILO Convention No. 169 on Indigenous and Tribal Peoples ("ILO Convention 169"), which Perú has ratified.[29] Three provisions are particularly relevant for this case:

- Communities have a right to be consulted – Article 6: Consultations shall be with "all the peoples concerned, through appropriate procedures . . . [carried out] in good faith, in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."[30]
- Communities' cultural relationships with their land shall be respected – Article 13: The term "land" includes the "concept of territories, which covers the environment of the areas which the peoples concerned occupy or otherwise use."[31] According to the ILO Guide to the Convention No. 169, territory for indigenous peoples is not only a geographical space, but it may also represent a spiritual bond for the communities.[32] The ILO Guide clarifies that "[t]o most indigenous peoples the territory has a sacred or spiritual meaning, which reaches far beyond the productive and economic aspect of the land."[33] Thus, the consultation process of Article 6 must consider the effects that the mining project will have on these territories. It is not only a matter of protecting the area where the communities live, but a matter of safeguarding their way of life (*i.e.*, their sacred places, their lands used to raise cattle or grow crops, their water resources).

[28] Respondent has discussed additional international sources of guidance in its written submissions; all of them agree on the need for good faith consultations and for the company to take whatever steps are necessary to secure community acceptance. *See* Respondent's Rejoinder on the Merits at paras. 124, 140-142; *see also* International Council on Mining and Metals, "Position Statement, Mining and Indigenous Peoples," May 2008, at 2, 3 [Exhibit R-178]; International Council on Mining and Metals, "Good Practice Guides, Indigenous Peoples and Mining," 2010, at 4 [Exhibit R-179]; Government of Canada, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, November 14, 2014, at 3-4 [Exhibit R-180]; Government of Canada, Building the Canadian Advantage, A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, March 2009, at 1 [Exhibit R-181]; International Council on Mining and Metals Website, About Us, *available at* http://www.icmm.com/about-us/about-us [Exhibit R-182]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008 ("Regulation on Citizen Participation on the Mining Subsector"), at Art. 5 [Exhibit R-159].

[29] *See* International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), September 5, 1991 ("International Labour Organization, Convention 169") [Exhibit R-029]. Perú ratified the Convention in 1994, and was one of the first countries to do so.

[30] International Labour Organization, Convention 169, Art. 6 [Exhibit R-029].

[31] International Labour Organization, Convention 169, Art. 13 [Exhibit R-029].

[32] *See* International Labour Organization, Indigenous & Tribal Peoples' Rights In Practice – A Guide To ILO Convention No. 169 ("ILO Guide"), at 91 *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_106474.pdf (last visited December 20, 2016).

[33] ILO Guide at 91 *see supra note* 33.

- Communities have a right to "participate in the use, management and conservation of the natural resources located within their lands" – Article 15: In the case of mineral resources located under (*i.e.*, within) the communities' lands, the government shall maintain procedures to consult the concerned communities.[34] As it will be explained in the next section, Peruvian law provides a company must plan for and undertake a community relation process to build consensus with the affected communities.[35]

21. Thus, ILO Convention 169 promotes a transparent, effective and integrated consultation process. According to the ILO's Practice Guide to apply the Convention's provisions, community consultations should: (i) take place in a climate of mutual trust; (ii) include all the stakeholders; (iii) endeavor to reach an agreement, conducting genuine and constructive negotiations and complying with the agreements; (iv) be carried out in a way that can be fully understood by the local communities and ensure that indigenous peoples have all relevant information; and (v) allow sufficient time for the indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions.[36] Bear Creek failed to comply with each of these requirements, as it will be explained in answering the Tribunal's Question A.3 below.

22. Second, the United Nations Declaration on Indigenous Peoples ("UN Declaration") also speaks to the proper process for obtaining a social license.[37] The UN Declaration reinforces ILO Convention 169 and describes the consent that should be obtained

[34] *See* International Labour Organization, Convention 169, Art. 15.2 ("In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.") [Exhibit R-029].

[35] *See* Expert Report of Luis Rodríguez-Mariátegui Canny, October 6, 2015 ("Rodríguez-Mariátegui First Report"), at para. 49 [Exhibit REX-003].

[36] *See* ILO Guide at 62 *see supra note* 33.

[37] *See* United Nations Declaration on the Rights of Indigenous Peoples, September 13, 2007 ("UN Declaration on the Rights of Indigenous Peoples") [Exhibit R-108]. Perú approved the UN Declaration in 2007.

after carrying out good faith consultations—namely, free, informed, and prior consent. In particular, Article 32 provides:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to *obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[38]

23. Therefore, consultations are to be made with the purpose of obtaining consent from the relevant indigenous communities—here, the Aymaras. As a matter of international law, it is States that are obliged to ensure that consent is obtained from affected local indigenous communities. At the same time and more importantly for the present case, the UN Guidelines on Indigenous Peoples Issues recognize that private companies are increasingly undertaking extractive activities, and thus, that the State has "the responsibility to hold private companies accountable."[39] While it is incumbent upon the State to ensure that companies do obtain free and informed consent from affected communities, it is necessarily incumbent on the companies to do what is necessary to achieve that result. In other words, a State must ensure that the

[38] United Nations Declaration on the Rights of Indigenous Peoples at Art. 32 [Exhibit R-108] (emphasis added).

[39] United Nations Development Group, Guidelines on Indigenous Peoples Issues, HR/P/PT/16, 2009 ("UN Guidelines"), at 23 *available at* http://www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf (last visited December 15, 2016). The UN Guidelines explain the broad normative, policy and operational framework for implementing an integral approach to the development and protection of indigenous peoples. Thus, the UN Guidelines provide guidance on how to interpret and implement the provisions set out in the ILO Convention 169 and the UN Declaration on Indigenous Communities. *See Id.* at 2.

communities have in fact consented and should not permit a project to go forward if consent has not been obtained—but the yeoman's work of achieving that consent can and logically should fall to the private company that wishes to move the project forward.

24. The UN Guidelines on Indigenous Peoples Issues also shed light on the meaning of "free and informed consent." The consultation process is key to obtaining such consent. This process should: (i) not be coercive or intimidating; (ii) be free from manipulation; (iii) be carried out sufficiently in advance of any commencement of activities and be respectful of the time requirements of indigenous consultation processes; (iv) provide information about at least the nature, size, duration, locality, and assessment of the project's impacts, and about the personnel likely to be involved in the execution of the project, among other issues.[40] Bear Creek's consultation process failed to comply with several of these requirements, as will be discussed in Section III.A.3 below.

25. Third, the International Finance Corporation Good Practices Note on "Addressing the Social Dimensions of Private Sector Projects" is an international instrument on which Claimant itself acknowledges it is appropriate to rely. The IFC Good Practice Note provides guidance on how to identify, asses, and manage social issues related to a mining project.[41] In particular, the Note provides guidance on how to determine the areas or persons to which the company needs to reach out: The area of influence—and thus the area for company outreach—should include all areas where the project has "potential social, bio-physical, economic and

[40] UN Guidelines at 30 *see supra note* 40.

[41] *See* International Finance Corporation, A Good Practice Note on "Addressing the Social Dimensions of Private Sector Projects," December 2003 ("IFC Good Practice Note") *available at* http://www.ifc.org/wps/wcm/connect/f4bbeb004885580fbeccfe6a6515bb18/SocialGPN.pdf?MOD=AJPERES&CACHEID=f4bbeb004885580fbeccfe6a6515bb18 (last visited December 19, 2016).

cultural impacts."[42] Bear Creek cited the IFC Good Practice Note in its Citizen Participation Plan. [43] However, a closer look at its program shows that Bear Creek failed to adequately delimit its area of influence, and failed to work with all of the communities within that properly defined area of influence, as also discussed in Section III.A.3.

b. National Legal Provisions

26. Peruvian law requires that a company must undertake a community outreach program to build healthy relations with the communities within the area of influence of a mining project, [44] which includes the communities where the project may cause an environmental or social impact.[45] Claimant would have this Tribunal believe that Claimant's only legal obligation is to inform the communities of the Project.[46] However, contrary to Claimant's assertions, a mining company is required to engage in a good faith effort to promote dialogue and build consensus, much like under international law it has to consult to obtain consent.[47] This is much more than simply holding X number of workshops or providing brochures to the communities. Peruvian law requires the mining company to address the communities' concerns and incorporate their needs into the project plan, and in doing so Perú's regulations set a guide and the minimum steps the mining company is required to take in designing and executing a community participation plan.

[42] IFC Good Practice Note at 4-5 *see supra note* 40.

[43] *See* 2010 Environmental Impact Assessment Annex L: Social Base Line, December 23, 2010, at 2 [Exhibit R-213].

[44] *See* Rodríguez-Mariátegui First Report at para. 49 [Exhibit REX-003].

[45] *See* Regulation on Citizen Participation on the Mining Subsector at Art. 2.1 [Exhibit R-159].

[46] *See* Expert Report of Hans A. Flury, January 5, 2016 ("Flury First Report"), at paras. 72-73.

[47] *See* Regulation on Citizen Participation on the Mining Subsector at Art. 3 [Exhibit R-159].

27. Peruvian law incorporates the international standards just described.[48] In particular, Perú initially incorporated the ILO Convention 169 into its legal system through Legislative Resolution No. 26253 in 1993.[49] In accordance with its international obligations, Perú has adopted rules and regulations to guide the population and project developers in the process of building consensus with the communities. Logically, the legal requirements are stated in broad and general terms, and do not dictate a strict or specific path for a company to seek a social license because each project, company, and community is different.

28. The citizen participation process for a mining project is governed by two principal legal norms in Perú: the Supreme Decree on Citizen Participation – Supreme Decree No. 028-2008-EM,[50] and MINEM's Ministerial Resolution on Citizen Participation – Ministerial Resolution No. 304-2008-MEM/DM.[51] The Supreme Decree sets out the principles and the minimum conditions that govern a citizen participation plan. It directs that community relations should be built on principles of good faith, transparency, veracity, flexibility and a continuous dialogue.[52] The citizen participation process' goals are (i) to provide "timely and adequate

[48] *See* Rodríguez-Mariátegui First Report at para. 49 [Exhibit REX-003]; Second Expert Report of Luis Rodríguez-Mariátegui Canny, March 31, 2016 ("Rodríguez-Mariátegui Second Report"), at para. 141 [Exhibit REX-009].

[49] As a Party to the Convention, Perú has a supervised and monitored implementation process through a regular examination of reports and provision of comments by the Committee of Experts on the Application of Conventions and Recommendations ("CEACR"). *See* International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *available at* http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--ja/index.htm (last visited November 25, 2016).

[50] *See* Regulation on Citizen Participation on the Mining Subsector [Exhibit R-159].

[51] *See* Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM, June 24, 2008 ("Ministerial Resolution No. 304-2008-MEM-DM") [Exhibit R-153].

[52] *See* General Law on the Environment, Law No. 28611, October 13, 2005, at Arts. 46-47 [Exhibit R-285]; Regulation on Citizen Participation on the Mining Subsector at Considerations and Art. 5.6 [Exhibit R-159].

information"; (ii) to "promote dialogue and build consensus"; and (iii) to address citizens' concerns and observations with respect to the proposed mining activity.[53]

29. The Ministerial Resolution sets out the required procedural steps to be completed in the citizen participation process, in furtherance of the goals of the Supreme Decree. As Respondent has previously explained, these are minimum requirements that do not guarantee a social license. They are necessary, but not sufficient, steps toward trying to secure a social license. At a minimum, the company must, for example:

- present to the Ministry of Energy and Mines ("MINEM") for approval a Citizen Participation Plan that outlines anticipated social outreach measures,[54]
- provide the community with workshops and information (through the radio, brochures, and any other media that is necessary) about the project,[55]
- conduct at least one Public Hearing to allow the communities the opportunity to ask questions and learn about the anticipated impacts of the project,[56] and
- comply with all promises contained in an approved Citizen Participation Plan.[57]

30. In addition to these regulations, in 2001, MINEM published a Guide advising on best practices for designing and executing a community outreach program to develop mining activities.[58] Notably, the Guide encourages mining companies to design a program that involves all of the communities that could be affected by the project—not only those that are direct neighbors of the project. The Guide also warns about the risks of building a relation with

[53] Regulation on Citizen Participation on the Mining Subsector at Art. 3 [Exhibit R-159].

[54] *See* Ministerial Resolution No. 304-2008-MEM-DM at Arts. 14-15 [Exhibit R-153]; *see also* Rodríguez-Mariátegui First Report at para. 53 [Exhibit REX-003].

[55] *See* Ministerial Resolution No. 304-2008-MEM-DM at Arts. 2, 20 [Exhibit R-153].

[56] *See* Ministerial Resolution No. 304-2008-MEM-DM at Art. 24 [Exhibit R-153]; *see also* Rodríguez-Mariátegui First Report at para. 58 [Exhibit REX-003].

[57] *See* Second Witness Statement of Felipe A. Ramírez Delpino, April 4, 2016 ("Ramírez Second Witness Statement"), at para. 17 [Exhibit RWS-006].

[58] *See* Ministry of Energy and Mines of Perú, General Direction of Environmental Affairs, Guide on Community Relations, January 1, 2001 ("MINEM, Guide on Community Relations") [Exhibit R-172].

communities based on promises the company cannot keep.[59] Both points are sound advice that Bear Creek obviously did not heed when it overpromised to directly affected communities and offered little to nothing to their less directly affected, but still affected, neighbors.

31. Perú has continued to adopt and refine laws and regulations to guarantee a robust consultation process and to guide companies toward conducting effective consultations.[60] In September 2011, Perú adopted the "Law on the Right to Prior Consultation to Indigenous Peoples, Recognized in Convention 169 of the International Labor Organization."[61] This instrument adopted all of the recommendations of ILO Convention No. 169 with respect to consultation of local communities within the area of influence of a mining project, and reiterated all of the minimum requirements for consultation processes that were already established under the regulations just described above.[62]

32. In addition to requiring compliance with citizen participation procedures, Peruvian law ties other steps in the approval process to the consent of affected communities. Most notably, the company must reach agreements with all land owners and possessors on the mine site—some 99 agreements with Aymara communities and individuals, in the case of the

[59] *See* MINEM, Guide on Community Relations at 36 [Exhibit R-172]*; see also* Rodríguez-Mariátegui Second Report at para. 142 [Exhibit REX-009]; Respondent's Rejoinder on the Merits at para. 132.

[60] *See* Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, reconocido en el Convenio 169, Ley No. 29785, September 7, 2011 [Exhibit Flury 028]. (Perú adopted the Law on the Right to Prior Consultation to Indigenous Peoples, along with the Supreme Decree No. 001-2012-MC, created the Official Database of Indigenous Peoples and published a Methodological Guide for Consultation to Indigenous Peoples).

[61] *See* Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, reconocido en el Convenio 169, Ley No. 29785, September 6, 2011 [Exhibit Flury 028].

[62] *See generally* Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, reconocido en el Convenio 169, Ley No. 29785, September 6, 2011 [Exhibit Flury 028].

Santa Ana Project—in order to obtain most of the permits, licenses and certificates required to build and operate the Santa Ana Project.[63] Bear Creek had no such consent.[64]

33. In sum, Peruvian law establishes minimum requirements for the procedural steps that must be taken to consult with affected communities, but compliance with those minimum requirements is not a measure of the *sufficiency* of Claimant's efforts to obtain community acceptance. As Felipe Ramírez testified, Peruvian law specifies only the processes by which the company, with the oversight of DGAAM, should work to obtain the social license.[65] It remains the company's responsibility to deploy those processes successfully in order to obtain a social license. The company is the one that must interact and build a relationship with the communities in the hopes of eventually obtaining the communities' acceptance.

2. Sub-Question: Insofar as the State Authorities Have Any Discretion in This Regard, What Are the Limits?

34. We understand this question to be asking about potential limits that might exist on a State's discretion to determine whether outreach to relevant local communities by a mining company has been sufficient. As discussed in Section III.A above, the standard by which the sufficiency of a company's outreach necessarily is measured is the standard of success—by whether the company does or does not achieve a social license, or general acceptance, from the relevant communities. It is not a question of the discretion of the State. Whether the company's actions are sufficient or not is a factual, or practical question, rather that a legal one. If the opposition of local communities prevents the project from proceeding, then the company, self-evidently, has not done enough to obtain the social license.

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[63] *See, e.g.*, Respondent's Rejoinder on the Merits at para. 330; Rodríguez-Mariátegui Second Report at paras. 109-111 [Exhibit REX-009].

[64] *See, e.g.*, Respondent's Rejoinder on the Merits at paras. 331-334.

[65] *See* Transcr. at 1064:20-1065:5 (Ramírez).

3. Sub-Question: What Actions Were Legally Required of Claimant in Seeking to Obtain a Social License, and Did the Claimant Take These Actions?

35. As analyzed in Section III.A.1 above, Perú has adopted international norms and national regulations in order to establish a general, broad path, which mining companies can tailor to meet the needs of their specific projects, and on which the companies can navigate the complex process of obtaining a social license. All these regulations, seen as a whole, set out the principles and the minimum procedural requirements with which the company has to comply in its process of reaching out to the communities.

36. Claimant prefers the Tribunal to focus on the minimum legal requirements, according to which the company must (1), present to MINEM for approval a Citizen Participation Plan that outlines anticipated social outreach measures;[66] (2) provide relevant communities with workshops and information about the potential project;[67] and (3) conduct at least one Public Hearing to allow the communities to have an opportunity to ask questions and learn about the anticipated impacts of the project.[68] On Claimant's view, because it carried out these steps and even exceeded the statutorily required minimum number of workshops,[69] it did all that was legally required of it—and that, according to Claimant, should be the end of the story, even if Bear Creek never obtained or even came close to obtaining a social license from the Aymara communities.

37. But that is an untenably narrow focus. The bare minimum steps above exist in service of the consultation law's more broadly stated objectives, including "promoting dialogue

[66] *See* Rodríguez-Mariátegui First Report at para. 53 [Exhibit REX-003].
[67] *See* Ministerial Resolution No. 304-2008-MEM-DM at Arts. 12, 13 [Exhibit R-153].
[68] *See* Rodríguez-Mariátegui First Report at para. 58 [Exhibit REX-003].
[69] *See* Ausenco Vector, Plan de Participación Ciudadana ("PPC") of Bear Creek at Annex 2.1 [Exhibit C-0155].

and consensus building."[70] Moreover, that approach ignores all of the international and national norms and guidance about how a company should conduct its social outreach if it wishes to obtain a social license—and ignores the fact that Bear Creek's community outreach efforts failed to follow virtually every one of those guidelines.

38. To illustrate, Bear Creek's failures in this regard can be readily measured against the ILO Practice Guide's five primary recommendations for community consultations—all five of which Bear Creek ignored.[71] *First*, the consultations were not carried out in a climate of mutual trust. For example, Bear Creek was not upfront with the local communities even at the beginning of the Project about Bear Creek's role and that of Ms. Villavicencio. As the Tribunal will recall, Respondent discussed at the hearing two pre-2007 documents in which Bear Creek's representatives and/or officers represented to the communities that Bear Creek was the record owner of the Santa Ana concessions when at the time they were held in the name of Ms. Villavicencio.[72] Record evidence confirms that the affected communities rejected the project at least in part because they did not trust the company.[73] As Professor Peña explained, when asked about what could have happened differently to have made this project a success:

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[70] Regulation on Citizen Participation on the Mining Subsector at Art. 3 [Exhibit R-159].

[71] *See* para. 21 *supra.* According to the ILO, the consultations should: (i) take place in a climate of mutual trust; (ii) including all the stakeholders; (iii) endeavor to reach an agreement; (iv) be carried out in a way that can be fully understood by the local communities and ensure that indigenous peoples have all relevant information; and (v) allow sufficient time for the indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions. *See* ILO Guide at 30 *see supra note* 33.

[72] *See* Transcr. 378:16-382:15, 419:1-427:8 (Swarthout), discussing Meeting Minutes of the Public and Communal Authorities and the General Population of the District of Huacullani, May 18, 2004 [Exhibit R-421] and Agreements Between Bear Creek and Local Communities, May 2006 (2006 Land Use Agreement), at Preamble and Clause 2 [Exhibit R-043].

[73] *See* PPC, Anexo 3 Actas de Apertura EIA at 23, 53, 70 [Exhibit C-155]; *see also* Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at 25 [Exhibit R-184]. In 2009 and 2010, the company carried out surveys of public perceptions about mining—and significantly, it limited those surveys to only the five communities with which the company was working directly—that is, the communities that Claimant says embraced the Santa Ana Project. In those surveys, 55% of respondents had a "regular" ("passable") opinion of mining and 23.2% considered it bad.

> if you ask me what the Company should do, first, you need to establish a relationship with them, and that relationship involves transparency as stated in ILO Convention 169. We need transparency and good faith. So, if the approach is done through another party, another person, and negotiations are starting, for example as happened in this case, that is not transparent. When the community members learn of that, they have serious doubts about the company. They are not going to accept the company.[74]

39. *Second*, Bear Creek's community outreach program did not include all the relevant stakeholders, and, perhaps most problematically, it ignored the Aymara communities' collective decision making processes. The IFC Practice Guide identifies 16 types of possible impacts of a project for purposes of identifying the communities that will be affected by the project.[75] Bear Creek considered only two factors (location of the physical site and possible environmental impact) to identify its area of direct influence[76]—and as a result worked with only 5 out of the 26 communities that the company itself had identified in 2006.[77] Its analysis was even more superficial with respect to the area of indirect influence: using the sole criterion of where its royalties and tax payments would flow, Bear Creek identified the whole Region of Puno and the Provinces of Chucuito, Huacullani and the District of Kelluyo as the Santa Ana Project's area of indirect influence. [78] When DGAAM objected to that approach, Bear Creek did not explain or change the unhelpful way it delineated the indirectly affected areas; instead, it attempted to justify using recipients of mining royalties as a sufficient proxy for identifying

[74] *See* Transcr. at 1391:5-15 (Peña Jumpa).

[75] *See* IFC Good Practice Note at 10-13 *see supra note* 42.

[76] *See* 2010 Environmental Impact Assessment Annex L: Social Base Line at 8 [Exhibit R-213].

[77] *See* Request from Bear Creek to MINEM Soliciting Authorization to Acquire Mining Rights Located in the Border Area, December 4, 2006, at 18-19 [Exhibit C-017].

[78] *See* 2010 Environmental Impact Assessment Annex L: Social Base Line at 10-11 [Exhibit R-213].

indirectly affected communities and concluding that the whole of the Department of Puno was the indirectly affected community.[79]

40. Bear Creek did not understand the importance of the Aymaras' community organization and collective decision making processes for the purpose of identifying the right stakeholders who needed to be consulted. The IFC Practice Guide advises that "local knowledge can help identify solutions or alternatives that may not be evident to the project sponsor."[80] As Professor Peña testified: "Bear Creek, did not understand the Aymaras and they did not understand their communal relations. Despite opposition to the Project, Bear Creek continued using the same strategy that led to division amongst the communities."[81] Bear Creek tried to single out and buy off the most directly affected communities with promises of jobs—but ignored the fact that individual Aymara communities cannot act and make decisions on their own—they have a high sense of cohesiveness and community with other neighboring Aymara communities.[82] Professor Peña identified the fallacy of Bear Creek's approach when asked about the way that even a small number of available jobs should have been distributed:

> [w]ell, still the communities are not understood. The communities are interrelated. They are organized by district and province. There is a federation of 13 *comunidades campesinas* in the South, and

[79] Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at 23-24 [Exhibit R-184]. Bear Creek also notes other criteria that it allegedly used to identify the area of indirect influence, namely the use of water resources and potential for employment at Santa Ana, but it did not use that information to specifically identify which communities may have concerns about water resources or lack of access to employment. It is clear that Bear Creek failed to heed the DGAAM's observation that "In particular, the Indirect Influence Area focuses on the identification of interest groups and authorities, institutions, non-governmental agencies, unions, social organizations, etc., which are not associated with the direct effects of technical, social, economic, environmental and/or cultural activities generated by the Project, but which have a positive or negative influence on the interest groups and populations there, or which utilize the geographic spaces of the [Direct Influence Area]." DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/ WAL/JCV/CMC/JST/KVS/AD, April 19, 2011("DGAAM's Observations to EIA"), at 30-31 [Exhibit SRK-022]. *See also* Respondent's Rejoinder on the Merits at para. 137.

[80] IFC Good Practice Note at 15 *see supra note* 42.

[81] *See* Transcr. at 1301:13-17 (Peña Jumpa).

[82] *See* Transcr. at 1334:5-12 (Peña Jumpa).

> there is a federation in each of the districts. And you need to talk to the federations and say, 'This is a small project. It will focus here. We need your support so that we can distribute only 120, 150, 200 jobs. This is what we have available, and I'd like to coordinate with you how to best distribute them.'[83]

41. A better understanding of the Aymaras and a more sophisticated approach to identifying the Project's areas of influence, would have led Bear Creek down a very different path of community relations.

42. *Third*, Bear Creek did not provide all relevant information to the communities. For example, Bear Creek did conduct workshops, but the records of those workshops repeatedly reveal a need for more information and for different and better ways to communicate that information.[84] Local government authorities made observations that more outreach was required because: (i) the communities did not trust the company and there was a risk of social conflict;[85] (ii) the company needed to provide more information to the communities;[86] (iii) they had to show their willingness to comply with all the agreements and commitments;[87] and (iv) their communication was not effective because they needed to split presentations into parts so that the community members could better digest them.[88]

43. *Fourth*, the information provided by Bear Creek was not fully understood by the communities. According to independent Aymara speakers who were in attendance, Bear Creek communicated at the public hearing at a too-technical level and through poor translation,[89]

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[83] Transcr. at 1358:10-19 (Peña Jumpa).

[84] *See* PPC, Anexo 3 Actas de Apertura EIA at 25 [Exhibit C-155].

[85] *See* PPC, Anexo 3 Actas de Apertura EIA at 2 [Exhibit C-155].

[86] *See* PPC, Anexo 3 Actas de Apertura EIA at 25 [Exhibit C-155].

[87] *See* PPC, Anexo 3 Actas de Apertura EIA at 53 [Exhibit C-155].

[88] *See* PPC, Anexo 3 Actas de Apertura EIA at 70 [Exhibit C-155].

[89] *Amicus Curiae* Brief Submitted by the Association of Human Rights and the Environment – Puno and Mr. Carlos López, PhD (Non-Disputing Parties), June 9, 2016 ("DHUMA Submission"), at 6-7.

meaning that many in attendance did not understand what the company was attempting to communicate.[90]

44. *Fifth*, sufficient time was not given to allow the communities to engage their own decision-making processes. Due to its lack of understanding about how the Aymaras made their decisions, Bear Creek failed to provide the necessary room in its schedule for the communities to decide whether to support the project. As Professor Peña also explained: "If the community says no, it's best to wait. It's best to wait and to ask for another meeting once time has gone by and the conditions exist that are able to convince these communities. Otherwise, I think what's going to happen is what we've known happened out of these events."[91]

45. Bear Creek's reliance on complying with only the procedural requirements of the law and its failure to follow international and national guidance on best practices resulted in inadequate social outreach—and no social license for the Santa Ana Project.

4. Sub-Question: In the Present Case, What Were the State Authorities' Responsibilities in Relation to Obtaining a Social License?

46. As a threshold matter, it is important to clarify that the Peruvian State is *not* responsible for obtaining a social license on behalf of, or for the benefit of, companies pursuing extractive projects. Rather, it is the private companies—in this case, Bear Creek—that are obliged to do that. Nor is the State responsible for setting the companies' strategy or ensuring the effectiveness of their efforts to obtain a social license.

47. Instead, the State's responsibility under Peruvian law extends to ensuring that affected communities are in fact consulted by the private companies, and to supervising those

[90] *See* DHUMA Submission at 6; DHUMA Response at 2; Peña Second Expert Report at para. 44(3) [Exhibit REX-008].

[91] Transcr. at 1389:1-6 (Peña Jumpa).

consultative processes to make sure that they are in place, that they are consistent with the legal minimum requirements set forth by the State, and that they are in fact implemented by the company.[92] In all of this, the State plays the role of an independent facilitator. Felipe Ramírez, former Director General of DGAAM, explained at the hearing that the State has a "neutral role" with respect to consultation processes carried out by mining companies. Indeed, when he was asked about complaints that the State does not try to assist companies to obtain the support of affected communities, he responded, "[t]hat is correct. It assumes an impartial attitude."[93] The State's role is not to help companies overcome community opposition any more than it is to help communities resist companies' projects. To be sure, the State can explain its own views on the benefits and risks of a given project, but it is neither a promoter of projects nor a proponent of the communities' views on projects.

48. In the present case, there is no question that the State fulfilled its responsibilities. First, Peruvian law requires good faith efforts to address community concerns and incorporate community needs into the company's operational plan—"promoting dialogue and consensus building."[94] DGAAM ensured that Bear Creek had in place plans to try to achieve that goal, and that those plans at the very least incorporated the legal minimum procedural requirements. DGAAM also provided advice, in the form of observations to the EIA, about their concerns with Bear Creek's proposals—such as a warning that Bear Creek had taken a too-simplistic approach to identifying the Project's area of indirect influence.[95]

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[92] *See* Ramírez Second Witness Statement at para. 6 [Exhibit RWS-006].

[93] Transcr. at 1079:9-10 (Ramírez).

[94] Regulation on Citizen Participation on the Mining Subsector at Art. 3 [Exhibit R-159].

[95] *See* DGAAM's Observations to EIA at Observation No. 7 ("For delimitation of the AII, mention is made of the entire province, department and region of Puno, and states the following: "the criterion used refers to the financial resources which may be generated in the wake of mineral production in the form of taxes and mining royalties, will be returned to the district, the province, the department and the region where mining resources are produced. The

49. Second, local and central authorities went beyond simply reviewing consultation plans on paper. For example, representatives of the Puno region's environmental authority accompanied Bear Creek to a series of workshops in the South of Puno in August 2009. In those workshops, Bear Creek's consultants Ausenco Vector made several presentations to the local communities. However, as the minutes for the workshops show, the government warned the company that the community outreach actions they were undertaking were not effective. For example:

- In a workshop held on August 7, 2009 in Huacullani, the government official who monitored the workshop noted that the company needed to conduct more workshops in all the communities of the Huacullani District in order to avoid social conflicts.[96]
- In a workshop held on August 8, 2009 in Challacollo, the government official who monitored the workshop observed that the community did not trust the company, and, therefore, he recommended that more information and more workshops be provided.[97]
- In a workshop held on August 9, 2009 in Ancomarca, the government official attending the meeting noted that "the community does not trust" the company. The recommendation, therefore, was for the company to hold another workshop.[98]
- In a workshop held on August 13, 2009 in Huacullani, regional authorities who attended the meeting noted that community members had not well understood the

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revenue taxes and royalties are insufficient criterion to consider the region as an Area of Indirect Influence (AII). Indicate other criteria in order to include both the province of Chuchito, and the department and region of Puno in the Indirect Influence Area in relation to the Project, criteria more specific such as the Administrative Political Criterion, the criterion of interest groups, and the social criterion. Likewise, in the Area of Indirect Influence, there is mention of the districts of Huacullani, the district of Kelluyo, the province of Chuchito and the Puno region. *However, for delimitation of the Indirect Influence Area, the criteria mentioned should be taken into account, and in accordance with these, it may be found that in the Area of Indirect Influence, there may also exist some specific communities. In particular, the Indirect Influence Area focuses on the identification of interest groups and authorities, institutions, non-governmental agencies, unions, social organizations, etc., which are not associated with the direct effects of technical, social, economic, environmental and/or cultural activities generated by the Project, but which have a positive or negative influence on the interest groups and populations there, or which utilize the geographic spaces of the AISD.* In order to delimit the Areas of Social Influence, it is necessary to take into account the project activity indicators – Environmental Indicators.") (emphasis added) [Exhibit SRK-022].

[96] *See* PPC, Anexo 3 Actas de Apertura EIA at 2 [Exhibit C-155].

[97] *See* PPC, Anexo 3 Actas de Apertura EIA at 25 [Exhibit C-155].

[98] *See* PPC, Anexo 3 Actas de Apertura EIA at 53 [Exhibit C-155].

company presentations and suggested that, in the future, the presentations should cover fewer topics so that the topics could be better understood.[99]

50. The State shows companies like Bear Creek the paths they may follow to consult with communities and try to obtain a social license, and ensures that the companies embark upon those paths. However, it is up to the companies to travel their paths successfully. Notwithstanding the State's guidance and even direct assistance, Bear Creek failed to obtain the social license it needed to carry out the Santa Ana Project.

5. Sub-Question: As a Matter of Law, What Are the Consequences That Follow From an Absence of Support on the Part of One or More Relevant Communities, or Parts Thereof, in Relation to This Investment?

51. It appears to Respondent that two different types of consequences may be encompassed by this question: either (i) what actions (consequences) are legally within the discretion of the State authorities when faced with a situation where a mining project does not have social license; or (ii) what are the consequences under the FTA if the Tribunal finds that Claimant did not have a social license. Respondent will address each in turn.

52. With respect to potential consequences as a matter of Peruvian law, the State has a range of options legally available to it to deal with such a situation. However, it is worth noting first what the State *cannot* do: it cannot, and it will not, impose a project on communities that reject it. As a matter of law, to do so would be contrary to ILO Convention 169. As a matter of practice, in that circumstance a project simply cannot move forward. Claimant's own expert, Mr. Flury, bluntly explained it at the hearing: "There is no possibility of imposing a project, and for that project to be successful . . . ."[100]

[99] *See* PPC, Anexo 3 Actas de Apertura EIA at 70 [Exhibit C-155].

[100] Transcr. at 1226:13-15 (Flury).

53. Some legal consequences follow automatically if the Project cannot obtain community consent. Respondent has explained that a mining project cannot obtain most of the permits required for building and operating the mine, and cannot lawfully proceed to operation unless and until it first secures the consent of *all* owners and possessors of the lands on which the project will be built. In Bear Creek's case, this meant reaching agreements with 5 communities who owned the land and 94 individuals or families who were in possession of the land – a total of 99 agreements, of which Bear Creek had exactly zero finalized as of the date of Supreme Decree No. 032.[101] Thus, opposition to the Santa Ana Project from any one of those 99 entities and persons would be legally fatal to the Project; Bear Creek could only have proceeded with the express consent of all of them.

54. Other legal consequences of a company's failure to obtain a social license are a matter of State discretion. For example, in the face of social turmoil and opposition, the State can require the company to carry out additional social outreach processes—additional workshops, public hearings, etc.—under its Citizen Participation Plan.[102] The State can, of course, also undertake its own outreach efforts to better understand, and potentially try to resolve the communities' concerns. Perú did just that in 2011, with the appointment of the High-Level Commission and multiple meetings with protesters and their representatives. The State may well take both tracks in parallel. When asked what the State should do when faced with community rejection of a project, Claimant's own expert Mr. Flury stated:

> I think that there is a dual responsibility here. The State must explain the reasons of its interest in developing a certain activity, and the company is going to have to have mechanisms for

[101] *See* Transcr. at 325:7-326:13 (Respondent's Opening).

[102] *See* Ministerial Resolution No. 304-2008-MEM-DM at Art. 35 [Exhibit R-153]; Regulation on Citizen Participation on the Mining Subsector at Art. 5 [Exhibit R-159]; *see also* Ramírez Second Witness Statement at paras. 17-18 [Exhibit RWS-006].

> rapprochement and acceptance by the community that is connected with this activity that it wants to develop. No company will be able to develop activities if there are confrontations.[103]

55. Community opposition can impact the prospects for a Project to obtain approval of its EIA, which is a legal requirement for almost all further steps in the permitting process toward exploitation of the Project.[104] At one level, if community opposition prevents the company from carrying out its Citizen Participation Plan, DGAAM will issue observations about the company's failure to comply with the Plan—as it did here, asking for proof that Bear Creek had carried out required "guided visits," which the company was unable to do during the social unrest.[105] Such observations will delay, and can even block, DGAAM's approval of a company's EIA.

56. At another level, the State has the discretion and power to suspend the EIA evaluation process altogether. Under Peruvian law, the State may adopt any provisional measure (*e.g.*, suspension of review process), if it considers that there "exists the possibility that without adopting [the preventative suspension] the efficacy of the resolution to be emitted is at risk" (*e.g.*, approval of an EIA under a situation of social unrest).[106] In this case, DGAAM used that authority to suspend the review of Bear Creek's EIA in May 2011.[107] Suspending an EIA evaluation process gives time for tempers to cool and tensions to ease, in the hopes that at a later, calmer time the EIA analysis can continue—although that hope went unfulfilled in this case, because the social opposition to the Santa Ana Project was simply too strong.

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[103] Transcr. at 1225:7-14 (Flury).

[104] *See* Rodríguez-Mariátegui Second Expert Report at para. 74 [Exhibit REX-009].

[105] *See* DGAAM's Observations to EIA at Observation No. 155 [Exhibit SRK-022]; Ramírez Second Witness Statement at para. 36 [Exhibit RWS-006].

[106] General Administrative Procedure Law, Law No 27444, at Art. 146.1 [Exhibit R-104].

[107] *See* DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011, at para. 2.1 explaining the legal basis of Bear Creek's EIA suspension [Exhibit C-098].

57. As an aside, recent events in the United States confirm that Perú is far from alone in using processes of suspension and reconsideration to address social opposition to such projects. The United States has faced a similar situation to the 2011 Puno protests with the Dakota Access Pipeline project in North Dakota. The Standing Rock Sioux Tribe protested against the construction of a pipeline, which protesters said will threaten the environment and destroy Native American burial sites, prayer sites, and culturally significant artifacts. Protesters also cited concerns about environmental risks, including risks of water contamination.[108] Protests have extended nationwide, traffic has been blocked and hundreds have been arrested.[109] In the face of those serious protests, the U.S. government suspended temporarily the construction of a part of the Dakota Access Pipeline[110] and said that it was looking for ways to reroute the pipeline.[111] More recently, a federal agency rejected an easement for the construction of the pipeline and called for more study.[112] The analogies to the Bear Creek situation are obvious: Facing serious social conflict, the government met with protesters in order to listen to their concerns and try to reach an agreement. In the face of continued opposition, the government elected to suspend a project in order to calm the situation, engage in further discussions, and later make a decision on whether the project will continue.

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[108] *See* "Dakota Access Pipeline: Police remove protesters; scores arrested," *CNN,* October 27, 2016, available at http://www.cnn.com/2016/10/27/us/dakota-access-pipeline-protests/ (last visited November 25, 2016).

[109] *See* "Nationwide protests against Dakota oil pipeline as builder seeks key OK," *CBS,* November 16, 2016, available at http://www.cbsnews.com/news/nationwide-protests-against-dakota-oil-pipeline-as-builder-seeks-key-ok/ (last visited November 25, 2016).

[110] *See* "U.S Suspends Construction on Part of North Dakota Pipeline," *The New York Times*, September 9, 2016, available at http://www.nytimes.com/2016/09/10/us/judge-approves-construction-of-oil-pipeline-in-north-dakota.html?_r=0 (last visited November 25, 2016).

[111] *See* "Government seeks new path for controversial oil pipeline," *The Washington Post*, November 2, 2016, https://www.washingtonpost.com/lifestyle/kidspost/government-seeks-new-path-for-controversial-oil-pipeline/2016/11/02/e0502936-9baa-11e6-b3c9-f662adaa0048_story.html (last visited November 25, 2016).

[112] *See* "Army Corps ruling is a big win for foes of Dakota Access Pipeline" *The Washington Post*, December 5, 2016, https://www.washingtonpost.com/news/energy-environment/wp/2016/12/04/army-will-deny-easement-halting-work-on-dakota-access-pipeline/?utm_term=.736f710acddb (last visited December 19, 2016).

58. Finally, of course, if the mining project is located within the border region of Perú, the State possesses a high degree of discretion under Article 71 of the Constitution. In the face of heavy community opposition, the Council of Ministers has the power to (re)assess the public necessity of the project and rescind a prior public necessity decree, if that step is deemed necessary.[113]

59. With respect to consequences for Claimant's claims under the FTA, if the Tribunal were to find—as it should—that Bear Creek had no social license to build and operate the Santa Ana Project because it failed to comply with international standards, the Tribunal should find Claimant's claims inadmissible. As discussed in Section III.A.3 above, Bear Creek failed to comply with international standards when designing and executing its community outreach program, causing tensions in the region, and ultimately causing, or the very at least substantially contributing to, violent protests that caused serious damage in the Puno region.

60. In addition, if Claimant failed to secure the necessary social license, Respondent should not be liable for Claimant's inability to move the project forward. As Claimant's own witnesses and experts have stated plainly, without a social license, a project simply cannot move forward.[114] Thus, even if Respondent had not suspended the EIA review or issued Supreme Decree No. 032, Claimant would not have been able to proceed with the project, as a result, at least in part, of its own mistakes and resulting lack of a social license. It likewise follows that no damages should accrue to Claimant from Respondent's actions if the project would have failed in any event without a social license.

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[113] *See, e.g.* Expert Report of Jorge Danos Ordóñez, April 11, 2016 ("Danos Report"), at paras. 112 *et.seq.* [Exhibit REX-006].

[114] *See* Transcr. at 1226:9-17 (Flury); Transcr. at 1497:15- 19 (Clow); *see also* SRK Second Expert Report, April 13, 2016, at para. 29 [Exhibit REX-011].

B. QUESTION: DID THE CLAIMANT MAKE ALL REQUIRED DISCLOSURES IN MAKING ITS APPLICATION FOR A PUBLIC NECESSITY DECREE? IF NOT, WHAT ARE THE CONSEQUENCES FOR THIS CASE, INCLUDING FOR THE JURISDICTION OF THE TRIBUNAL?

61. Bear Creek violated Article 71 of the Peruvian Constitution when it used a Peruvian citizen, Ms. Villavicencio, as a false front to acquire and control the Santa Ana concessions before obtaining a public necessity declaration from the Council of Ministers.[115] Although Claimant now insists that this scheme complied with Peruvian law,[116] Bear Creek evidently was not sufficiently confident of that legal position to transparently and fully disclose its arrangements in its application for a public necessity decree. The only "disclosures" that Claimant now claims to have made consisted of scraps of information sprinkled in documents and scattered across the government, which, even if officials had had cause to try to find and connect them, would not have revealed the key facts of Bear Creek's complete control of Ms. Villavicencio and her actions with respect to the Project. Worse yet, in addition to failing to disclose transparently its pre-2007 arrangements to apply for and hold the concessions prior to obtaining the public necessity decree, Bear Creek made misrepresentations to the government about its activities on the Project site as of the date of its application. Thus, Supreme Decree No. 083 (granting Bear Creek a public necessity declaration), was issued in the dark—without knowledge of Bear Creek's violation of the Constitution or of the scope of its operations in the border zone prior to that date.

[115] *See* Respondent's Counter-Memorial on the Merits at Section II.B; Respondent's Rejoinder at Section II.B; Transcr. at 182:21-236:10 (Respondent's Opening).

[116] *See, e.g.*, Claimant's Reply at paras. 21-38; Transcr. at 1748:6-19 (Claimant's Closing).

1. Bear Creek Did Not Make All Required Disclosures When Applying for the Public Necessity Declaration

62. Peruvian law requires Bear Creek to act in good faith and transparently in interacting with the government on administrative matters,[117] and the government properly assumes that an applicant before it is acting in good faith.[118] According to Claimant, in contrast, it had to comply only with minimum requirements set out in MINEM's compilation of administrative procedures (the "TUPA") to apply for and obtain a declaration of public necessity.[119] The MINEM TUPA does indeed include the procedure to apply for a public necessity declaration.[120]

63. But even assuming *arguendo* that Bear Creek complied with the TUPA's formal and procedural requirements (which is not the case, as noted below), Claimant disregards the fact that, according to the TUPA, the applicable regulations for this procedure are Article 71 of the Peruvian Constitution, Article 13 of the Framework Law on Private Investment, Legislative Decree No. 757, and Articles 32 and 33 of the Regulation to Provide Guarantees to Private Investment, Supreme Decree No. 162-92.[121] None of these provisions validate Bear Creek's scheme to acquire the Santa Ana Concessions through Ms. Villavicencio, and Article 71 of the Constitution in fact prohibits it explicitly, by prohibiting "indirect" acquisition or possession of mining rights in the border zone without a public necessity declaration.[122] Bear Creek cannot be

[117] *See* Law No. 27444, General Law of Administrative Procedures, Art. IV (1.8) [Exhibit BULLARD 005]; Danos Report at para. 109 [Exhibit REX-006].

[118] *See* Second Witness Statement of César Zegarra, April 8, 2016 ("Zegarra Second Witness Statement"), at para. 21 [Exhibit RWS-007].

[119] *See* Claimant's Reply at para. 40.

[120] *See* MINEM's TUPA, Procedure No. 53 [Exhibit BULLARD 0034].

[121] *See* MINEM's TUPA, Procedure No. 53 [Exhibit BULLARD 0034].

[122] Constitution of Perú, December 29, 1993 ("Constitution of Perú"), at Art. 71 ("[W]ithin a distance of fifty kilometers from the borders, aliens may not acquire or possess, directly or indirectly under any title, mines, land, woods, water, fuel or energy sources, whether it be individually or in partnership, under penalty of losing that so

deemed to have complied with these requirements if it engaged in, and failed to disclose, a violation of the underlying legal norms.

64. Neither did Bear Creek comply with even the procedural requirements for its application. Article 33 of the Regulation Providing Guarantees for Private Investment, Supreme Decree No. 162-92, specifies that the application for a public necessity declaration must be presented according to the format contained in Annex III of that same Decree.[123] Annex III asks the investor to provide detailed information about the applicant and the property that will be acquired.[124] Annex III provides a format for disclosing indirect and direct acquisitions. For an indirect acquisition, the foreign investor has to explain the relation with the person or company acquiring the property.[125] *This* is the form that Bear Creek should have completed—disclosing fully its relationship with Ms. Villavicencio and its plans for an indirect acquisition of the Santa Ana mineral rights—*at the time that Ms. Villavicencio was applying for and acquiring the concessions in 2004-2006*. Instead, in 2006, Bear Creek made no mention of its prior indirect acquisition and instead filled out the portion of the form claiming that it would make a direct acquisition of the concessions from Ms. Villavicencio, as if she were an unrelated, arms-length third party who just happened to be in possession of them.

65. After the hearing, there can be no question that Bear Creek deliberately and knowingly entered into the scheme with Ms. Villavicencio in order to avoid Article 71's requirement of a public necessity declaration until such time as Bear Creek decided it was convenient to apply for that declaration, and that it configured the scheme to secure its complete

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acquired right to the State. This restriction may be waived in case of public necessity expressly determined by an executive decree approved by the Council of Ministers in accordance with the law.") [Exhibit R-001].

[123] *See* Supreme Decree No. 162-92 at Art. 33 [Exhibit BULLARD 023].

[124] *See* Supreme Decree No. 162-92 at Annex III [Exhibit BULLARD 023].

[125] *See* Supreme Decree No. 162-92 at Annex III [Exhibit BULLARD 023].

control over the concessions even before and after they had been granted to Ms. Villavicencio. In light of what was confirmed at the hearing, it of course comes as no surprise that Bear Creek did not disclose that information to the Council of Ministers in its 2006 application. The company would hardly have been eager to disclose, for example, that:

- Mr. Swarthout knew about Article 71's requirements[126] but nevertheless arranged the scheme with Ms. Villavicencio based, he claims, on oral legal advice that he never even considered obtaining in writing.[127] It is hard to imagine a serious mining company taking such a risk on such a flimsy foundation.
- Mr. Swarthout needed a "trustworthy" person—which has to mean a person in his full control—for this scheme, in order to ensure, for example, that the person would not sell the concessions to a third person[128]—otherwise the strategy would have served no purpose. Mr. Swarthout was confident that Ms. Villavicencio was the right "trustworthy" person for that task.[129]
- Ms. Villavicencio was a young secretary/office administrator at Bear Creek and had (limited) legal powers to represent the company.[130]
- The arrangements were initially discussed with Ms. Villavicencio by Mr. Cesar Rios, whom Mr. Swarthout describes as an "exploration geologist employed by [Bear Creek] to identify opportunities for [the company] in the field"[131]—in other words, someone whose very function at Bear Creek was to find potential ore deposits in which the company could invest, and could explore and exploit. There can be no doubt that the purpose of the scheme was to allow Bear Creek to pursue just such exploration activities on its own account.
- Mr. Swarthout personally met with Ms. Villavicencio to discuss the details of their agreement and Ms. Villavicencio's role in the acquisition of the mining concessions—a meeting disclosed for the first time only at the hearing.[132]
- Ms. Villavicencio was aware that she was lending her name to apply for the concessions, but that at all times she would not have the power to make any material decisions on the concessions, such as who to hire to do the exploration or the promises that could be made to the local communities.[133]

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[126] *See* Transcr. at 357:17-358:9 (Swarthout).

[127] *See* Transcr. at 365:2-6 (Swarthout).

[128] *See* Transcr. at 359:9-362:13 (Swarthout).

[129] *See* Transcr. at 361:1-6 (Swarthout).

[130] *See* Transcr. at 367:22-368:2 (Swarthout); Commercial Companies Registry, Bear Creek Mining Company, Sucursal del Perú, at A004 [Exhibit R-003].

[131] Transcr. at 365:21-366:1(Swarthout).

[132] *See* Transcr. at 369:9-13, 370:1-371:5 (Swarthout).

[133] *See* Transcr. at 412:17-413:1 (Swarthout).

- Ms. Villavicencio did not have the experience to take any of these decisions, and she did not have the resources to fund any of these activities.[134] Ms. Villavicencio never spent a single cent (or sol) on the Project.
- Ms. Villavicencio was paid nothing for restricting her ability to sell the concessions to anyone other than Bear Creek (entering into the option contracts), and was paid US $14,000 only when Bear Creek exercised the options.[135] An arms-length third party would not have proceeded on those terms.
- Bear Creek believed that it was imperative to keep its interests in Santa Ana a secret purportedly because they were worried that a third party would jump in front of the line,[136] an alleged concern that Respondent has shown to be false.[137]

66. One consequence of the scheme was that, not only did Bear Creek not make full disclosures to the government, but Bear Creek also wound up having to make misrepresentations in its public necessity application. As was discussed at the hearing, Bear Creek claimed in the public necessity application that it had conducted no exploration at Santa Ana and that preliminary exploration was going to be necessary going forward.[138] But Bear Creek's own financial statements reveal that the company had already spent more than US $3 million in exploration costs at Santa Ana *before* obtaining the public necessity declaration.[139] Logically, Bear Creek could not disclose to MINEM that it had carried out any exploration in the area because that would have been tantamount to an admission that the company had controlled the

[134] *See* Transcr. at 412:17-413:1, 415:8-14 (Swarthout); *see also* Fixed Term Labor Contract, January 2, 2003 [Exhibit C-284]; Fixed Labor Term Contract, March 5, 2004 [Exhibit C-286].

[135] *See* Option Contract for the Transfer of Mineral Rights No. 3,512, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, November 17, 2004, at Clause 2.2 [Exhibit R-006]; Option Contract for the Transfer of Mineral Rights No. 4,383, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, September 5, 2006, at Clause 2.2 [Exhibit R-007]; Respondent's Rejoinder on the Merits at para. 60.

[136] *See* Flury First Report at paras. 46-47.

[137] *See* First Witness Statement of César Zegarra, October 6, 2015, at paras. 8-10 [Exhibit RWS-003]; Rodríguez-Mariátegui Second Report at paras. 23-25 [Exhibit REX-009].

[138] *See* Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, December 4, 2006 at 7 ("Considering that to date, no explorations in the area of the Santa Ana Mining Project have been conducted, it will be necessary to do a preliminary evaluation, which will take place once the mining rights object of this request have been acquired, with prior authorization that must be issued by the Peruvian State.") [Exhibit C-0017].

[139] *See* Transcr. at 1842:14-1845:15 (Respondent's Closing). Bear Creek describes exploration activity in the Santa Ana area between 2004-2006. *See* Bear Creek Mining Corporation, 2004 Annual Report, at 2 [Exhibit BR-04]; Bear Creek Mining Corporation, 2005 Annual Report, at 7 [Exhibit BR-05]; Bear Creek Mining Corporation, 2006 Annual Report, at 6, 10-11 [Exhibit BR-06].

concessions since 2004. As Dr. Rodríguez-Mariátegui has explained, a concession holder is the only one that may carry out exploration activities in a concession area.[140] Bear Creek evidently wanted to avoid the Council of Ministers realizing that Bear Creek had already been present and operating in the restricted border zone area for years.

67. Claimant's defense to its omissions and misrepresentations in its public necessity application is to argue (i) that the government should have been aware that Ms. Villavicencio acted as a front for Bear Creek's indirect acquisition of the concessions because Perú already had all of the information needed to draw that conclusion, or (ii) in a novel theory advanced for the very first time in Claimant's *closing* argument,[141] that a public necessity declaration was not required in any event prior to the company reaching the exploitation stage of the project. Both defenses fail.

68. For the first defense, Claimant tries to focus on the trees (or the shrubs) in the hopes that the Tribunal will overlook the forest. It tries to focus narrowly on the individual elements of the Villavicencio scheme in an effort to show that each individual aspect may be legal, in a vacuum. Claimant argues, for example, that option contracts can be a legal way to obtain mining concessions in the border region,[142] and that making a contract with one's own employee is not forbidden under Peruvian law.[143] These are red herrings; they are not issues in dispute. It is the *entirety* of the scheme that shows Bear Creek's indirect acquisition and possession of the concessions—it is all of the following, in combination: (i) the use of option contracts; (ii) the fact that Bear Creek did not even pay for the options; (iii) the fact that the

[140] *See* Rodríguez-Mariátegui Second Report at para. 69 [Exhibit REX-009].

[141] *See* Transcr. at 1954:8-1955:4 (Claimant's Closing).

[142] *See, e.g.*, Claimant's Rejoinder on Jurisdiction, May 26, 2016 ("Claimant's Rejoinder on Jurisdiction"), at paras. 16-17.

[143] *See, e.g.*, Claimant's Rejoinder on Jurisdiction at para. 17.

options were in place before Ms. Villavicencio acquired the concessions; (iv) the fact that Ms. Villavicencio was an employee beholden to Bear Creek; (v) the fact that Bear Creek represented itself as the owner of the concessions in a contract with a third party and acted accordingly; (vi) the fact that Bear Creek paid all the costs including Ms. Villavicencio's concession royalty fees due to the government; or (vii) the fact that Bear Creek saw no need to specify contractual arrangements that true third parties would demand. These elements together establish Bear Creek's *de facto* or indirect ownership and control of the border zone concessions during the 2004-2007 window, in violation of Article 71.

69. With respect to its own disclosures, Claimant tries the opposite approach: pointing to widely scattered facts allegedly disclosed to different offices or ministries at different times in scattered pages in different documents, and tries to claim from them that the Council of Ministers "knew" about the entirety of the Villavicencio scheme when it declared Santa Ana a public necessity. Claimant submitted a chart with its Rejoinder on Jurisdiction allegedly showing all the moments in which the government received information about Bear Creek's scheme, and from which it allegedly should have been aware of the strategy at the time the Council of Ministers approved Supreme Decree No. 083.[144] At the hearing, Claimant made the same claims again that it disclosed information about the Villavicencio scheme to the government.

70. But there is one glaring and fatal omission in Bear Creek's tale: Claimant does *not* claim that all of those pieces of information, much less a transparent explanation of them, were disclosed *in the public necessity application* itself. Although Bear Creek claims to have provided all of the relevant information to the government, it somehow forgot to provide all of this information to MINEM at the time it applied for a public necessity declaration. And it is

[144] *See* Claimant's Rejoinder on Jurisdiction at para. 60.

undisputed that Bear Creek never disclosed to the government, in any form, that it had an oral agreement with Ms. Villavicencio according to which she would apply for the concessions and secure them only nominally in her name but in reality on behalf of, and under the control of, Bear Creek. As Respondent explained at the hearing, "to make that case as a factual matter, Bear Creek would have to prove that those making the decision in 2007—Perú's Council of Ministers—both knew of and understood the significance of the facts of the constitutional violation, and then consciously decided to excuse it."[145] Bear Creek has not come anywhere near making that case.

71. For a second defense to its unlawful pre-2007 possession of the concessions, Claimant reached for a defense that was so novel that even Claimant had not thought of it prior to its closing argument: Claimant suggested that, notwithstanding Article 71's flat prohibition on any acquisition or possession of border zone mineral rights without a public necessity declaration, Bear Creek actually had no need of a declaration from the Council of Ministers until the moment that it wished to proceed to exploitation of such rights.[146] To claim that only exploitation requires a public necessity decree, Claimant points to Article 13.2 of Legislative Decree No. 757, the law that regulates matters related to private investment in Perú, including foreign investment in border regions, which states:

> The competent sectoral authorities shall grant concessions and other forms of authorization for the exploitation of natural resources located within fifty kilometers of the country's borders in favor of foreign natural or juridical persons who so request, following compliance with applicable legal provisions and then of

[145] Transcr. at 1846:3-8 (Respondent's Closing).

[146] *See* Transcr. at 1954:8-1955:4 (Claimant's Closing).

> verifying that the supreme resolution referred to in the previous paragraph has been issued.[147]

72. On a textual reading alone it is clear that this statement does not intend to restrict the public necessity declaration only to exploitation activities. Instead, it is simply an accurate statement of sequencing—exploitation permissions are only available after a public necessity declaration has been obtained. Moreover, an article of a law cannot purport to amend the Constitution, and Article 71 of the Constitution states that "aliens may not acquire or possess, directly or indirectly under any title" property rights in the border zone, without any suggestion that that prohibition extends only to exploitation activities and that acquisition and possession for other reasons are permitted.

73. In sum, Bear Creek violated of the Peruvian law requirement of good faith when it completed a public necessity application in 2007 without disclosing its existing indirect ownership and possession of the Santa Ana concessions and, instead, leading the Council of Ministers to believe that it would acquire those concessions only in the future as well as misleading the Council about its US $3 million in pre-application activities on the site. None of Claimant's attempts to defend or excuse that non-disclosure survive scrutiny.

2. Bear Creek's Failure to Disclose Has Implications for Jurisdiction, the Merits, and Damages

74. The inadequacy of Bear Creek's disclosures in its 2007 public necessity application serves, first, as additional grounds for dismissing Claimant's claims for lack of jurisdiction. As Respondent has explained at some length in its submissions,[148] an illegally acquired investment is not entitled to protection under the Perú-Canada FTA. Here, Bear Creek

[147] Legislative Decree No. 757, Article 13.2 [Exhibit BULLARD 004].

[148] *See* Respondent's Counter-Memorial on the Merits at Sections III.A-B; Respondent's Rejoinder on the Merits at Sections III.A-E.

violated Article 71 by indirectly acquiring and possessing the Santa Ana concessions in 2004-2007, and violated, at a minimum, Peruvian law's requirement of good faith by failing to disclose its existing control and activities to the government in 2007. Likewise, investments made in bad faith are not protected by international investment treaties. Claimant argues that it has not committed fraud and thus that its investment is protected. However, Perú does not need to prove "fraud" in the strict legal sense of the term to show that the Tribunal does not have jurisdiction in this case.[149]

75. Claimant's lack of disclosure and even misrepresentations in its public necessity application, in and of themselves, constitute additional grounds to decline jurisdiction or declare the claims inadmissible. Investment tribunals have held that misrepresentations made at the time of acquiring an investment not only may violate national law, but also applicable rules and principles of international law.[150] The tribunal in *Plama v. Bulgaria* held that "[t]he principle of good faith encompasses, inter alia, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment."[151] Along similar lines, the *Inceysa* tribunal found that the principle of good faith comprised the "absence of deceit and artifice during the negotiation and execution of instruments

[149] Tribunals finding that illegally made investments should not be covered have used a variety of terms to describe the standard, and have *not* limited the rule to fraudulent acquisitions. *See, e.g., Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5, Award, April 15, 2009, at para. 101 ("investments that are made contrary to law") [Exhibit RLA-020]; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, at para. 123 ("deceitful conduct") [Exhibit RLA-022]; *Flughafen Zurich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/19, Award, November 18, 2014, at para 132 ("serious violation of the law of the receiving State") [Exhibit CL-112]. Claimant's actions fall well within this range.

[150] *See, e.g., Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008 ("*Plama v. Bulagria*"), at paras. 139-141 [Exhibit CL-104].

[151] *Plama v. Bulagria* at para. 144 [Exhibit CL-104].

that gave rise to the investment."[152] The *Plama* tribunal also held that such misconduct would violate principles of "international public policy" and the principle that "nobody can benefit form his own wrong."[153]

76. To deny treaty protection on those grounds here is entirely appropriate, because Claimant's lack of transparency—either in 2004, when it should have sought a decree for its indirect acquisition scheme, or in 2007, when it failed to disclose its true circumstances—deprived Respondent of the opportunity to exercise its right to determine, on the basis of full information, whether or not Perú wished to admit Claimant and its investment into the border zone at all. With full information and at the appropriate time, the Council might (or might not) have reached a different decision. Having deprived Respondent of that right to admit or reject its investment, Claimant should not benefit from the status of a protected investor.

77. Second, Bear Creek's failure to disclose its true circumstances in 2007 undermines its claims and bolsters Perú's defenses on the merits. The lack of disclosure in 2007 obviously set the stage for the Council of Ministers' decision to revoke its public necessity declaration in 2011, when officials learned that Bear Creek had concealed its unconstitutional scheme and violated Article 71 in 2004-2007. The Government's response to Bear Creek's concealed constitutional violation was reasonable, fair, and equitable. The lack of disclosure in 2007 and earlier also did damage by fomenting mistrust among the affected communities of Puno, who were variously told that Santa Ana was Ms. Villavicencio's or Bear Creek's project (even in the same document[154]), and who came to view the company as not trustworthy or

[152] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, at para. 231 [Exhibit RLA-021].

[153] *Plama v. Bulagria* at paras. 141-143 (citing the *Inceysa* award at para. 242) [Exhibit CL-104].

[154] *See* 2006 Land Use Agreement at Preamble and Clause 2 [Exhibit R-043].

transparent.[155] Bear Creek thereby contributed to its own problems in obtaining a social license. That lack of social license, of course, was a second basis for Respondent's decision that the Santa Ana Project no longer constituted a public necessity.

78. Finally, Bear Creek's contribution to the problems in Puno, such as through its non-disclosure, impairs its claim for damages even if the Tribunal were to find liability, as discussed below in Section III.E.4.

C. QUESTION: WHAT WAS THE BASIS FOR THE DECISION TO ISSUE SUPREME DECREE NO. 032, AND ON WHAT EVIDENCE DID THE STATE AUTHORITIES RELY?

79. As has been discussed, Supreme Decree No. 032 revoked the declaration of public necessity for the Santa Ana Project based on two coinciding circumstances: (i) the discovery of Bear Creek's unconstitutional 2004-2007 possession of the Santa Ana concessions; and (ii) the social crisis and protests against the Santa Ana Project that paralyzed the Puno region.

80. Claimant alleges that these reasons identified by Respondent are merely *post-hoc* justifications for the measures taken,[156] accusing Perú of a "cover-up"[157] to hide the government's decision to "placate political pressure"[158] from an upstart opposition politician in a remote corner of the country.[159] That is simply not the case, as will be discussed below, and moreover, Claimant's theory makes no sense. With just weeks left in its term, the outgoing administration had no possible motivation to yield to, and indeed even to boost the political influence of, a politician from the opposition party.

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[155] *See* Transcr. at 1391:1-9 (Peña Jumpa); Peña Second Expert Report at para. 16 [Exhibit REX-008].
[156] *See* Claimant's Reply at para. 71.
[157] *See* Claimant's Reply at para. 20.
[158] *See* Claimant's Reply at para. 265.
[159] *See generally* Claimant's Reply at paras. 273-275.

81. The Decree itself explains that it was issued because "circumstances have been made known that would imply the disappearance of the legally required conditions" for the public necessity decree.[160] That is, circumstances had changed in the four years since the Council of Ministers had originally made a public necessity finding for the Santa Ana Project. The Decree also states that the government needed to act "for the purpose of safeguarding the environmental and social conditions in the areas of the Huacullani and Kelluyo districts,"[161] making it clear that government acted, in part, because of the social unrest in the region at the time. And it states that "[i]t is the State's duty to ensure that the granting of rights for the sustainable exploitation of natural resources is conducted in harmony with the Nation's interest, the common good and within the limits and principles established by law."[162] With the discovery of Bear Creek's violation of "the limits and principles established by law" (namely, Article 71 of the Constitution), that State duty led to revocation of the public necessity declaration. The text of the Decree itself, therefore, disproves Claimant's theory.[163]

82. The evidence upon which the government relied in reaching its decision to issue Supreme Decree No. 032 is discussed next below.

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[160] *See* Supreme Decree No. 032-2011-EM, June 25, 2011, at Arts. 1-3 and Complementary Provision [Exhibit C-0005].

[161] *See* Supreme Decree No. 032-2011-EM, June 25, 2011, at Art. 1 [Exhibit C-0005].

[162] *See* Supreme Decree No. 032-2011-EM, June 25, 2011, at Considerations [Exhibit C-0005].

[163] Supreme Decree No. 032 was only a part of the government's holistic response to the Aymara uprising in Puno. *See* Supreme Decree No. 033 at Arts. 1-2 [Exhibit R-011]; Decree that Issues Provisions With Respect to Mining and Oil Activities in the Puno Department, Supreme Decree No. 034-2011-EM, June 25, 2011, at Art. 1 [Exhibit R-027]; Decree that Declares the Recovery of the Ramis River, a National Interest and an Environmental Priority, Emergency Decree No. 028-2011, June 17, 2011, at Art. 1 [Exhibit R-013]; Decree that Complements Emergency Decree No. 028 of 2011, Supreme Decree No. 035-2011-EM, June 26, 2011, at Art. 2 [Exhibit R-014]; *see also* Respondent's Rejoinder on the Merits at paras. 263- 267. These measures remedied past environmental harms, expanded the ban on mining concessions to larger parts of the Puno region for three years, and implemented more stringent prior consultation requirements before future or in-progress mining projects could operate in Puno.

1. Evidence Supporting the State's Decision to Issue Supreme Decree No. 032 Because of Bear Creek's Illegal Possession of the Santa Ana Concessions

83. Until June 2011, the government operated on the good faith presumption that Bear Creek had disclosed all necessary information in its public necessity application and that Bear Creek had acquired its mining concessions in accordance with law, only after Decree No. 083 was issued. That understanding changed when, during meetings in Lima in June 2011 to try to find a solution to the growing social unrest in the Puno region, the government learned for the first time that Claimant had operated in the border region and possessed the concessions — through its proxy Ms. Villavicencio—*before* it received its public necessity declaration.[164] This is confirmed by witness testimony of three government officials, including Prime Minister Rosario Fernández, whom Claimant chose not to call to the hearing for cross-examination.

84. On June 23, 2011, during a meeting in Lima at which high-level government officials attended, an elected representative of the Puno region presented documents showing that Bear Creek had been the indirect owner of the Santa Ana concessions since 2004.[165] As former Prime Minister Fernández, who was present at the meetings, testified, "[o]n the last day of meetings, in the presence of a significant number of participants, Congressman Yohnny Lescano also . . . produced, in the middle of the discussions, documents which he used to argue that the authorization granted to Bear Creek was unlawful."[166] Prime Minister Fernández also explained that Mr. Lescano "stated that the company had violated the Constitution and the

[164] *See* First Witness Statement of Rosario Fernández, April 8, 2016 ("Fernández Witness Statement"), at para. 24 [Exhibit RWS-004]; Zegarra Second Witness Statement at para. 20 [Exhibit RWS-007]; Second Witness Statement of Fernando Gala, April 4, 2016 ("Gala Second Witness Statement"), at para. 20 [Exhibit RWS-005].

[165] *See* Fernández Witness Statement at para. 24 [Exhibit RWS-004]; Gala Second Witness Statement at para. 17 [Exhibit RWS-005]; Zegarra Second Witness Statement at para. 20 [Exhibit RWS-007]; Transcr. at 801:4-10, 808:2-6 (Gala); Transcr. at 923:7-19 (Zegarra).

[166] Fernández Witness Statement at para. 24 [Exhibit RWS-004].

Law."[167] Given the intense environment in which Congressman Lescano revealed that information, in a crowded auditorium after 5 days of negotiations, it caused a turmoil among the Aymara representatives. [168] The government had to act urgently lest the crisis get further out of hand. (In fact, the next day—the same day that the Decree was formally adopted, June 24—six people were killed in violent protests in the Puno region.[169])

85. As Respondent explained at the hearing, it does not now possess the documents that were presented on June 23, 2011.[170] However, the documents were reviewed by Respondent's witnesses at the time and, according to those witnesses, the documents appeared to be legitimate.[171]

- Prime Minister Rosario Fernandez, whose testimony remains unchallenged, testified that the documents showed that Bear Creek had been carrying out activities in the region through a Peruvian national, Ms. Karina Villavicencio. She also explained that, on that basis, the government had objective criteria to determine that there had been a violation of the Constitution.[172]
- Vice-Minister Gala confirmed at the hearing his explanation in his witness statement that "documents [] indicated that there was a relationship between Ms. Jenny Karina Villavicencio and the Bear Creek company. They showed us the option contracts between the parties for the acquisition of the mining concessions; they told us that they believed that Ms. Jenny Karina Villavicencio was an employee and legal representative of the company and, generally speaking, the community representatives led us to understand that the company had been present in the area long before the declaration of public necessity was approved."[173]

[167] Fernández Witness Statement at para. 24 [Exhibit RWS-004].

[168] *See* Fernández Witness Statement at para. 24 [Exhibit RWS-004].

[169] "Juliaca: Six People Dead After Violence During Protests," *La Republica Newspaper,* June 25, 2011 [Exhibit R-050].

[170] *See* Transcr. at 231:2-232:18 (Respondent's Opening).

[171] *See* Transcr. at 971:11-973:20 (Zegarra).

[172] *See* Fernández Witness Statement at para. 24 [Exhibit RWS-004].

[173] *See* Gala Second Witness Statement at para. 17 [Exhibit RWS-005]; *see also* Transcr. at 764:10-20, 777:14-21, 806:22-807:5 (Gala).

- Mr. Zegarra, who also saw the documents at the meetings in Lima, explained at the hearing that the documents were deemed truthful, and that the decision to issue Supreme Decree No. 032 was made on that basis.[174]

86. And, in fact, the information that the witnesses recall obtaining from those documents turned out to be entirely accurate. As became abundantly clear at the hearing that Bear Creek was well aware that it was undertaking a "false front" scheme – *i.e.*, that it was enlisting Ms. Villavicencio to act solely as the proxy for Bear Creek during the period in which Bear Creek had not yet obtained its public necessity declaration. In fact, Mr. Swarthout, Bear Creek's Chief Executive Officer, acknowledged repeatedly in cross-examination during the hearing that she had no independent role in or even knowledge of the Project's development.[175]

87. Notwithstanding the fact that the documents Mr. Lescano showed high-level government officials in Lima on June 23, 2011 apparently were not preserved at the time, or at least cannot be found in the Ministry's files now (5 years later), there is sufficient evidence on the record to establish that Respondent learned on that date that Claimant had illegally acquired its mining concessions. The officials had no reason to doubt the authenticity of those documents, nor (given the crisis and violence in Puno) time to conduct extensive due diligence on them—and that judgment proved correct, because the information the witnesses recall learning from the documents was, in fact, accurate: Ms. Villavicencio *was* a Bear Creek employee fully under the company's control at all times, used only as a false front for Bear Creek's unlawful control of the border zone concessions without a public necessity decree. The information before the Council of Ministers constituted sufficient evidence in the circumstances to identify the probable constitutional violation by Bear Creek. As such, Respondent was fully justified in issuing

[174] *See* Transcr. at 923:7-19 (Zegarra).

[175] *See* Transcr. at 413:2-8 (Swarthout).

Supreme Decree No. 032 repealing Bear Creek's public necessity declaration on that basis, particularly in the urgent circumstances of late June 2011.

2. Evidence Supporting the State's Decision to Issue Supreme Decree No. 032 Because of the Social Unrest Over the Santa Ana Project

88. Even a casual review of the facts that took place across the Puno region between March and June 2011 leaves no doubt that Bear Creek and its Santa Ana Project were at the heart of the protests and that, as a result, the government could not sustain Bear Creek's public necessity declaration any longer. Respondent refers the Tribunal to its written submissions and its oral pleadings for a detailed description of the facts. Here, Respondent summarizes evidence of the social crisis' source, in substantial part, in community opposition to Bear Creek's Santa Ana Project, which in turn justified the State's issuance of Supreme Decree No. 032 on the basis that the Project could no longer be deemed a public necessity.

- March-April 2011: The Aymara protestors sent multiple letters to different authorities calling for the cancellation of the Santa Ana Project and complaining about Bear Creek.[176] The protestors first raised their concerns about Santa Ana with the regional government of Puno—demanding that the Regional President cancel the Santa Ana Project and all other mining concessions in the south Puno region.[177]

[176] *See* AA Letter from Desaguadero Community, February 23, 2011 [Exhibit R-411]; *see also* Memorial submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP, March 10, 2011 [Exhibit R-015]; Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to the President of Perú, Memorial No. 0001-2011-CO-FDRN-RSP, March 9, 2011 [Exhibit R-016]; Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Minister of Energy and Mines, Memorial No. 0002- 2011-CO-FDRN-RSP, March 10, 2011 [Exhibit R-017]; Letter from Kelluyo Community Inquiring about the Project, March 11, 2011 [Exhibit R-053]; Letter from Kelluyo Community Rejecting the Santa Ana Project, Letter No. 520-2011-GR-PUNO/PR, March 18, 2011 [Exhibit R-423]; Letter from the Regional President of Puno to the Minister of Energy and Mines, April 26, 2011, 1 [Exhibit R-018]. The Regional President states that "reactions to said activities have intensified in the districts of Kelluyo, Pisacoma, Zepita, Desaguadero, and other districts in the Southern Zone of the Puno Region, resulting in a series of demonstrations and public mobilizations in opposition to the activities of [Bear Creek]." At the hearing, Respondent asked Mr. Swarthout, Bear Creek's CEO, if these letters show rejection of the Project. Mr. Swarthout had no choice, but to agree. *See* Transcr. at 615:1-9 (Swarthout).

[177] *See* Respondent's Counter-Memorial on the Merits at para. 101.

- April 26, 2011: The Regional President wrote to the MINEM on the second day of a large-scale protest in Desaguadero to request intervention.[178] In the letter, the Regional President specifically identified Bear Creek's Santa Ana Project as the root of the social unrest, and called for the suspension of the Santa Ana Project.[179]

- May 6, 2011: Mr. Fernando Gala, then the Vice Minister of MINEM, and other MINEM representatives met with the Regional President in Lima to discuss community demands, including their demand for the cancellation of the Santa Ana Project.[180]

- May 16-26, 2011: As the protestors' attitude grew more violent, Prime Minister Rosario Fernández created a High Level Commission to travel to Puno and meet with the Aymara leaders. Each meeting was held at great risk to the members' personal safety.[181] At these meetings, the Commissioners heard the protestors' demands, including for the cancellation of the Santa Ana Project, and submitted proposals to convince the protestors to lift the strike.

- May 28, 2011-May 30, 2011: Prime Minister Fernández summoned the Regional President and the leaders of the Aymara communities to Lima for more discussions. This time, the government negotiated a cooling down period by enacting a series of measures in response to Aymara concerns[182]: The Santa Ana Project continued to be part of the discussions, as the protestors called for the cancellation of the Project.

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[178] *See* Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GRPUNO/PR, April 26, 2011, at 1 ("The particular case is the one referring to the startup of exploration activities of the Santa Ana Mining Project belonging to Bear Creek Mining Company, located in the district of Huacullani, province of Chucuito. Reactions to said activities have intensified in the districts of Kelluyo, Pisacoma, Zepita Desaguadero, and other districts of the couther zone of the Puno region, resulting in a series of demonstrations and public mobilizations in opposition to the activities of that company . . . .") [Exhibit R-018].

[179] *See* Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GRPUNO/PR, April 26, 2011, at 1 [Exhibit R-018].

[180] *See* First Witness Statement of Fernando Gala, October 6, 2015("Gala First Witness Statement"), at para. 24 [Exhibit RWS-001].

[181] *See* Aide Memoire "Actions Done by the Executive Power Regarding Conflicts in the Puno Department," July 2011 ("Aide Memoire 2011"), at 5 [Exhibit R-010]. The second and third sessions had to be held at the army headquarters in Juliaca because of the increasingly dire conditions in Puno; the third meeting, which began on day 16 of the general strike with 15,000 protestors occupying the city of Puno, ended early because of threats to the lives of the Commission members. *See Id.* at 5 [Exhibit R-010].

[182] The measures were the following: (i) Decree Suspending Admissions of New Mining Requests in the Provinces of Chucuito, El Collao, Puno and Yunguyo in the Puno Department, Supreme Decree No. 026-2011-EM, May 29, 2011, which suspended the admission of any new requests for mining concessions in the south of Puno for 12 months [Exhibit R-025]; (ii) Directorial Resolution No. 162, which suspended MINEM's process for reviewing Santa Ana's EIA for one year to restore calm to the region DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011[Exhibit C-0098]; and (iii) Supreme Resolution No. 131 and No. 142, which created and then increased the authority of a multi-sectorial committee made up of central government and regional representatives tasked with addressing concerns related to mining concessions in the south of Puno. *See* Resolution Creating Multi-Sectorial committee, Supreme Resolution No. 131-2011-PCM, May 21, 2011 [Exhibit R-024]; Resolution that Extends the Scope of the Multi-Sectorial Committee, Resolution No. 142-2011-PCM, May 29, 2011 [Exhibit R-026].

- May 30, 2011- EIA suspension: On May 30, 2011, DGAAM suspended its review of Bear Creek's Environmental Impact Statement ("EIA"). It did so after carefully taking into account the social unrest in Puno at the time.[183] DGAAM described in its internal memorandum of the same date the "social upheaval, violence, and instability" in Puno which necessitated the suspension. The Santa Ana Project was at the heart of this social upheaval.
- June 17-23, 2011: In June, 2011, Prime Minister Fernández called representatives of the protesters to meetings in Lima,[184] which were held at the MINEM's headquarters from June 17-23, 2011, while protests continued unabated and even escalated in the Puno region.[185] At those meetings, the community representatives reiterated their opposition to the Santa Ana Project.[186]

89. As Perú's witnesses described at the hearing, and as the Prime Minister's uncontested testimony states, by late June 2011 every day that passed without a solution, meant risking more lives, the integrity of the people in Puno, and the economic stability of the Region.[187] By June 23, 2011, it was clear that Bear Creek had lost any type of support from the communities, and the protests would only have gotten worst if the government did not repeal the company's public necessity declaration.[188]

90. Based on the above, it is clear that from March through June of 2011, the Peruvian government faced a serious and escalating crises in the Puno Region based, in significant part, on widespread opposition to Bear Creek's activities in the southern part of Puno. In order to quell the social unrest that was continuing to escalate, the government issued Supreme Decree No. 032, which it was fully justified to do in light of the extreme circumstances at the time.

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[183] *See* DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [Exhibit C-098].

[184] *See* Fernández Witness Statement at para. 24 [Exhibit RWS-004]; Gala First Witness Statement at para. 33 [Exhibit RWS-001]

[185] *See* Gala Second Witness Statement at para. 16 [Exhibit RWS-005]; Transcr. at 794:6-11 (Gala).

[186] *See, e.g.,* Fernández Witness Statement at para. 24 [Exhibit RWS-004].

[187] *See* Fernández Witness Statement at para. 26 [Exhibit RWS-004]; Transcr. at 923:20-924:7 (Zegarra).

[188] *See* Transcr. at 764:1-20 (Gala); Transcr. at 923:20-924:7 (Zegarra).

D. QUESTION: OF THE TWO REASONS RELIED UPON BY RESPONDENT FOR DECREE NO. 032, COULD THAT DECREE ALSO HAVE BEEN LEGALLY ISSUED, IF ONLY ONE OF THE TWO REASONS COULD BE ESTABLISHED: (1) ONLY THE ALLEGED ILLEGALITY OF THE CLAIMANT'S APPLICATION? OR (2) ONLY THE UNREST AS IT EXISTED AT THAT TIME?

91. Supreme Decree No. 032 revoked the declaration of public necessity for the Santa Ana Project based on two circumstances that came to a head at the same time: (i) the discovery of Bear Creek's unlawful 2004-2007 possession of the Santa Ana concessions; and (ii) the protests and social crisis in Puno. It is simply unknowable whether the Council of Ministers would or would not have taken the exact same action if faced with only one of those circumstances. But it is clear that, if it had wished to do so, the government was entitled under Peruvian law to repeal the declaration of public necessity on the basis of either one of these events standing alone.

92. As Respondent's experts explained in their written testimony, the Council of Ministers has full discretion to revisit and repeal a public necessity declaration if, for example, the premises that support it cease to exist.[189] "Public necessity" is not a static state—it can exist at one time and not at another. The government may reach different conclusions about the public necessity of the very same project at different points in time—as indeed, the Council of Ministers had *already done once before* at the Santa Ana site, having rejected a public necessity application there for APEX Silver in 2001,[190] and then granted a public necessity declaration for

[189] *See* Expert Report of Francisco Eguiguren Paraeli, October 6, 2015 ("Eguiguren First Report"), at Section IV [Exhibit REX-001]; Danos Report at Section IV.A [Exhibit REX-006].

[190] *See* MINEM's Decision Rejecting the Declaration of Public Necessity to ASC PERÚ LDC (Apex Silver Mines Corp.), January 2001 [Exhibit R-189]. At the hearing, Claimant's counsel tried to explain away Perú's denial of APEX Silver's application by stating that APEX has a "huge operation in Bolivia" and that he "could see the Peruvian Government being concerned that this was a Bolivian company" (*See* Transcr. at 1957:3-13 (Claimant's Closing)). However, counsel's speculation about facts not on the record is not supported anywhere in the government's decision rejecting APEX's application or the military Joint Chiefs' report opposing the application, which in fact identifies APEX as a company registered under Cayman Island laws. In any case, what is most relevant for present purposes is the fact that the government denied a public necessity application in 2001 for the

Bear Creek in 2007.[191] In this case, two premises that had justified the issuance of the public necessity declaration in 2007 ceased to exist in 2011, and Respondent was justified in revoking its earlier declaration on either ground. We analyze each of those premises in turn below.

93. First, the Council of Ministers had understood that Bear Creek would acquire the concessions only after receiving the 2007 public necessity declaration.[192] As discussed below, this was revealed not to be true—Bear Creek had already applied for and obtained them through Ms. Villavicencio years earlier.

94. Article 71 of the 1993 Peruvian Constitution states explicitly that if a foreigner owns or possess mineral rights within the border zone *without* first obtaining the appropriate authorization (*i.e.*, public necessity declaration through a Supreme Decree), then the property or concessions will automatically revert to the State.[193] In other words, if it is established that a mining concession was obtained in violation of Article 71, the mining concession will revert automatically to the State. Such a reversion typically will be carried out through court proceedings—as through MINEM's now-pending litigation against Bear Creek to nullify the transfer by which the company received the concessions.[194] But even before or absent of any such court proceedings, the State has the discretionary right to reconsider and repeal its earlier

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same area as the Santa Ana concessions, and could well have done the same in 2004 had it been presented with Bear Creek's application at the time the company actually started its activity there.

[191] *See* Supreme Decree No. 083-2007-EM adopted November 29, 2007 [Exhibit C-004].

[192] *See* Request from Bear Creek to MINEM Soliciting Authorization to Acquire Mining Rights Located in the Border Area, December 4, 2006, at 2 [Exhibit C-017].

[193] *See* Constitution of Perú at Art. 71 [Exhibit R-001].

[194] *See* Rodriguez Second Report at para. 15 [Exhibit REX-009]; *see also* Constitution of Perú at Arts. 138-139 (the Peruvian Constitution provides that the Judicial Branch is the one in charge of administering justice in Perú) [Exhibit R-001]; Executive Power Organic Law, Law No. 29158, December 20, 2007, Preliminary Title (The Organic Law of Perú's Executive Power provides the *principio de legalidad*, according to which the State official may only act within the scope of powers that the law has granted them.) [Exhibit R-103]. Thus, provided that the Constitution, does not provide that MINEM may declare the reversion of the concessions to the State, it is the Peruvian courts, as entities in charge of administering justice, that are the ones in charge of declaring the reversion. *See also* Resolution that Order Initiation of Legal Actions to Annul Legal Acts, Ministerial Resolution No. 289-2011-MEM/DM [Exhibit R-028].

declaration of public necessity.[195] Repealing the public necessity declaration does not take the property away from the concession owner; it simply prevents the holder of the concession from using it, including to carry out exploratory or exploitation work on the mines, while the court proceedings ensue.[196]

95. In this case, Respondent discovered on the day Decree No. 032 was issued that the Santa Ana concessions had been illegally obtained—that is, the concessions were acquired by an individual (Ms. Villavicencio) controlled by a foreign entity (Bear Creek) before the declaration of public necessity was issued.[197] This fact alone provided a legally sufficient basis for Respondent to issue Supreme Decree No. 032 revoking its earlier public necessity declaration, in light of the evidence indicating (correctly) that a Constitutional violation had been concealed from the government at the time the declaration was granted.

96. Second, the Council of Ministers had declared the Santa Ana Project to be a public necessity in 2007 based on the premise that the Project would improve the public welfare of the local communities.[198] That premise, too, turned out to be gravely mistaken. Instead, a social crisis developed in Puno around Bear Creek and its Santa Ana Project. Between March and June 2011, Puno experienced an increasing situation of instability and even violence triggered by Bear Creek's attempts to move the Santa Ana Project towards construction and exploitation. This created a flashpoint in the South of Puno that tapped into a strong anti-mining

[195] *See* Eguiguren First Report at para. 70 [Exhibit REX-001].

[196] *See* Second Expert Report of Francisco Eguiguren Paraeli, March 31, 2016 ("Eguiguren Second Report"), at paras. 36-38 [Exhibit REX-007].

[197] *See* Fernández Witness Statement at para. 24 [Exhibit RWS-004].

[198] *See* Statement of Reasons for Decree No. 083 of 2007, at 2 [Exhibit R-032]; Eguiguren First Report at para. 33 [Exhibit REX-001].

sentiment in the South and then across all of the Puno region.[199] In particular, as Mr. Zegarra testified at the hearing, in June, the protests had reached a point where citizens in the Puno region risked their lives if they came out in the streets.[200]

97. When a company's presence in the border zone contributes to a chaotic and damaging situation marked by violence and even loss of life, like the one experienced in Puno in 2011, it is entirely reasonable and appropriate to conclude, as the Council of Ministers did, that the company's project is no longer a public necessity.[201] Instead of improving the welfare of the citizens of Puno, the Santa Ana Project created strife and even economic paralysis in the region. The Peruvian government had a constitutional duty to ensure peace and stability in the region, particularly given its proximity to the Bolivian border,[202] and the Council of Ministers determined that the best way to secure stability and peace in the region was to declare that circumstances had changed and that the Santa Ana Project was no longer a public necessity.

98. In sum, at least two different bases that had supported the public necessity declaration in 2007 had been eliminated by June 2011. The government could have acted if either premise behind the initial declaration was undermined—either change of circumstances, standing alone, could reasonably have led the Council of Ministers to conclude that the Santa Ana Project no longer qualified as a public necessity. In actual fact, the two changes coincided, only reinforcing the validity of the Council of Ministers' public necessity reassessment. But the

[199] *See* Respondent's Rejoinder on the Merits at Section II.D.4; Respondent's Counter-Memorial on the Merits at Section II.D.

[200] *See* Transcr. at 924:3-7 (Zegarra); *see also generally* Fernández Witness Statement at para. 26 [Exhibit RWS-004].

[201] *See* Transcr. at 811:15-20 (Gala).

[202] *See* Fernández Witness Statement at para. 26 [Exhibit RWS-004].

Council of Ministers would have acted within its discretion to repeal the public necessity declaration on either ground alone.

E. QUESTION: WHAT ARE THE MONETARY AMOUNTS THAT THE TRIBUNAL SHOULD AWARD TO THE CLAIMANT IF IT WERE TO CONCLUDE THAT:

1. Sub-Question: The Claimant's Alleged Investment Was Lawfully Expropriated?

—and—

2. Sub-Question: The Claimant's Alleged Investment Was Unlawfully Expropriated?

99. Before addressing the consequences for Claimant's damages claim if the Tribunal were to find an expropriation that was either lawful or unlawful, Respondent will discuss briefly the appropriate methodological approach to those claims.

100. As a threshold matter, Respondent notes that *no* damages should accrue given that Claimant's lack of a social license would, in all likelihood, have prevented the Santa Ana Project from proceeding in any event. That is, given the clear testimony from Claimant's own witnesses that projects without community approval cannot proceed, the lack of a social license—and not Respondent's measures—would be the cause of the Project's failure. Respondent should not face any damages award if its measures were not the cause of Santa Ana's failure, even assuming *arguendo* that the Tribunal were to find those measures to have breached the FTA.

101. If the Tribunal nevertheless determines that a compensable expropriation occurred, it will have two options: (i) calculate damages using Claimant's DCF model; or (ii) award damages based on the amounts Claimant invested at Santa Ana. The first option—adopting Claimant's forward-looking DCF analysis—is inappropriate for two principal reasons. First, international jurisprudence is consistent that a DCF analysis is unsuitable for valuing an

asset that is not a "going concern" or that lacks a history of profitability.[203] Second, as became clear at the hearing, Claimant's DCF valuation fails to account in any meaningful way for the very real risk that, even absent the government measures at issue in this arbitration, social unrest—the lack of a social license—would have derailed the Santa Ana Project anyway.

102. Regarding the relevant jurisprudence, the Tribunal is by now very familiar with Respondent's collection of 13 cases reciting the longstanding investment law principle that a DCF analysis is not appropriate for a non-producing asset.[204] Unable to distinguish this jurisprudence, at the Hearing counsel for Claimant sought to dismiss these cases—decided by some of the most prominent jurists in the world—as "not a meaningful source of law."[205] To the contrary, however, the case law is clear, persuasive, abundant, and unanimous: a discounted cash flow valuation is unsuitable for a non-producing asset. It follows that, if the Tribunal proceeds to award Claimant the DCF-based damages it seeks, the Tribunal will be turning its back on a bedrock rule of valuation in investment treaty arbitration.

103. The second reason the Tribunal should reject Claimant's DCF-based valuation is that it fails to account for perhaps the single biggest risk to the Santa Ana Project: social unrest. President Böckstiegel's first question to Claimant's quantum experts put this issue into sharp focus:

> you say because Santa Ana was so small the social-license risk was not real. I have the impression from the many discussions we have had during this Hearing that, be it small or large, it was quite an unrest there … All we are interested in is, of course, was there social-license risk with Santa Ana? … And my second question

[203] *See* Respondent's Counter-Memorial on the Merits, paras. 321 *et seq.*; Respondent's Rejoinder on the Merits and Reply on Jurisdiction, paras. 583 *et seq.*

[204] *See* Respondent's Opening Presentation at slide 90 (listing cases); Respondent's Counter-Memorial on the Merits at para. 321 (same).

[205] Transcr. 165:9 (Claimant's Opening).

> would be to both—to all of you: Can you help us in quantifying it?[206]

104. Claimant's experts could offer no such help. In fact, Mr. Rosen acknowledged that FTI's analysis did not incorporate project-specific social license risk. Counsel for Respondent asked Mr. Rosen to confirm that:

> there were no Project-specific social license risks incorporated into your model. You suggested there might be places where you could tweak cash flows if you wanted to attempt to do that, but that you did not incorporate any Project-specific social license risks. Did I understand that correctly?
>
> (Mr. Rosen) I think that's a fair representation, yes.[207]

105. This failure to consider a major, potentially fatal project risk substantially inflates Claimant's damages estimate, and renders its entire analysis unreliable. This alone is a sufficient basis to reject Claimant's DCF valuation.

106. With the DCF approach off the table, the Tribunal should turn to the only other damages calculation the Parties have offered: amounts invested. The Parties have not disputed that the total amount Claimant invested at Santa Ana is US $21,827,687.[208] The Tribunal should not, however, compensate Claimant for any expenditures it made *before* the November 2007 public necessity decree gave Claimant a colorable right to operate at Santa Ana.

107. At the hearing, in response to a question from Professor Sands, Respondent presented evidence demonstrating that Claimant initiated exploration activities at Santa Ana as early as 2004. Claimant invested a total of US $852,826 at Santa Ana before 2007, and an

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[206] Transcr. 1637:9-20 (President Böckstiegel).

[207] *See* Transcr. 1704:7-15 (Rosen). Mr. Rosen's colleague Mr. Milburn noted that FTI had deducted US $200,000 from the annual cash flows for "community development." Transcr. 1704:19-1705:9 (Milburn).

[208] *See* Respondent's Counter-Memorial at para. 331 (citing First Brattle Report at para. 39 [Exhibit REX-004]).

additional US $2,986,112 during 2007.[209] However, Claimant did not receive a public necessity declaration until November 27, 2007. Thus, Claimant spent almost US $3.8 million at Santa Ana before it had any right to do so. When calculating amounts invested, the Tribunal cannot recognize these expenditures. Unfortunately, the documents on the record do not allow for a precise calculation of the amount invested at Santa Ana before the issuance of the public necessity declaration. That being so, Respondent submits that US $3,590,095 (corresponding to 11/12 of what was spent in 2007, as a proxy for expenditures through November 27, 2007, plus US $852,826 prior to 2007) is an appropriate estimate of Bear Creek's expenditures prior to the issuance of the declaration. Thus, the Tribunal should consider US $18,237,592 (Claimant's US $21,827,687 total investment minus US $3,590,095 for pre-Decree expenditures) to be the upper limit of Claimant's potential recovery for expropriation.

108. The Tribunal's post-Hearing questions also suggested that the Tribunal hoped to receive submissions regarding any distinctions between damages for lawful versus unlawful expropriation. Investor-State tribunals have recognized two such differences; however, as set out below, neither of these impacts the damages analysis in this case. First, some tribunals have held that for unlawful expropriations, the proper valuation date is the date of the award or the date of the expropriation, whichever results in higher damages. Those tribunals posit that for lawful expropriations, on the other hand, the date of expropriation is the only appropriate valuation date.[210] In the present matter, this distinction is irrelevant. Claimants have submitted no evidence suggesting that their investment expenditures at Santa Ana continued after the alleged expropriation. Thus, the amount Claimant invested as of the expropriation date is equal to the

[209] *See* Slide 29 of Respondent's Closing Presentation (citing Exhibits BR-04, BR-05, BR-06, BR-07, BR-08, BR-09, BR-10 and BR-12).

[210] *See, e.g.*, *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, paras. 496-497 [Exhibit CL-0060]

amount Claimant will have invested on the date of the award. It follows that the choice of valuation date is not relevant.

109. The second distinction that some tribunals have recognized is the proposition that illegal expropriations entitle the investor to certain "consequential damages" apart from the value of the expropriated enterprise.[211] In the context of this case, Claimant will no doubt propose that such consequential damages could include, in theory, losses related to Claimant's Corani project. However, as Respondent explained in its pleadings and demonstrated beyond any doubt at the hearing, Claimant has failed to show: (i) that Respondent's actions regarding the Santa Ana Project directly and proximately harmed its interests at Corani; and (ii) that it suffered any lasting damages vis-à-vis Corani.[212] To the contrary, Claimant's representatives, in particular, Mr. Swarthout, made multiple public statements affirmatively proclaiming that the Corani Project was *not* affected by the events surrounding the Santa Ana Project.[213] Advancing the Corani claim here, in direct contradiction to those statements, undermines Claimant's and Mr. Swarthout's credibility.

110. In light of the above, the maximum appropriate quantum of damages for a lawful or unlawful expropriation is the amount Claimant invested *after* the issuance of the public necessity decree, *i.e.*, US $18,237,592. (As discussed in Section III.E.4 below, however, that amount requires further reduction in light of Claimant's contributions to its own damages.)

[211] *See, e.g., Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007, para. 352 [Exhibit CL-0031].

[212] *See* Respondent's Counter-Memorial on the Merits at paras. 370 *et seq.*; Respondent's Rejoinder on the Merits and Reply on Jurisdiction at paras. 648 *et seq.*

[213] *See* Transcr. at 502:21-526:12 (Swarthout).

3. Sub-Question: Respondent Breached Its Obligations Under the FTA for FET or Other Obligations Under Other Provisions of the FTA?

111. If the Tribunal were to find that Respondent committed a non-expropriatory breach of the FTA, Claimant's maximum possible recovery would still equal its amounts invested after the issuance of the public necessity declaration, *i.e.*, US $18,237,592. However, the Tribunal should reduce this figure, or potentially eliminate it altogether, depending on the breach.

112. To give just one example (also discussed in Section III.F below), one of Claimant's FET claims is that Respondent did not provide due process, because Claimant had no opportunity to be heard before the revocation of the public necessity declaration.[214] If the Tribunal were to find that to be a due process violation, the Tribunal should award only damages that flowed specifically from that due process breach. In this case, those damages are non-existent. Even if Claimant had been afforded an opportunity for some sort of a hearing before the Council of Ministers, for example, nothing it could have said would have altered the grounds upon which the revocation occurred. The facts on which the Council of Ministers based Supreme Decree No. 032 without such a hearing—namely, that Ms. Villavicencio was a Bear Creek employee under its control, and thus a Peruvian "front" for the company's unsanctioned activities in the border zone in 2004-2007—were all, in fact, true. Claimant would not have been able to deny them, any more than it could have denied the existence of a severe social crisis in the Puno region. The government's decision would have been the same, and thus, the claimed due process violation did not generate any damages.

113. The example above illustrates the fact that non-expropriatory breaches require

[214] *See, e.g.*, Claimant's Reply on the Merits at para. 141.

nuanced, individualized damages analyses. To date, however, Claimant and its experts have not undertaken this task. Any such analyses in the future could only decrease Claimant's damages.

4. Sub-Question: If The Tribunal Was To Find That the Claimant Had Contributed to the Social Unrest That Occurred in the Spring of 2011 – by Act or Omission – How Should Such a Contribution Be Taken into Account in Determining Matters of Liability and/or Quantum?

114. Any damages award must take into account Claimant's contribution to the events that unfolded, including its adoption of an unlawful (and at the very least, surreptitious and nontransparent) scheme to acquire mining rights, and its abject failure to win the support of the local communities. Claimant did not just contribute to the social unrest; the social unrest was a direct consequence of Claimant's conduct. If the Tribunal agrees, it should not award any damages at all. To the extent the Tribunal finds that Claimant's conduct contributed to the social unrest that it alleges caused it harm (but was not the principal cause), the Tribunal must reduce Claimant's damages in proportion to that contribution. Put simply, if the Tribunal thinks Claimant was 75% at fault, it must reduce damages by 75%. This was the approach adopted in *MTD v. Chile*, where the tribunal held that "regardless of the treatment given by Chile," the claimants "had made decisions that increased their risks in the transaction and for which they bear responsibility."[215] The *MTD* tribunal concluded that "the Claimants should bear part of the damages suffered and the Tribunal estimates that share to be 50%."[216]

115. Like the claimants in *MTD*, Claimant in this case made a series of decisions that increased the riskiness of its investment. For the sake of brevity, we will highlight just two.

[215] *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, at para. 242 [Exhibit CL-0083].

[216] *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, at para. 243 [Exhibit CL-0083]; *see also Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012, para. 687 (finding that "as a result of their material and significant wrongful act, the Claimants have contributed to the extent of 25% to the prejudice which they suffered…. The resulting apportionment of responsibility as between the Claimants and the Respondent, to wit 25% and 75%, is fair and reasonable in the circumstances of the present case.") [CL-0198].

First, Claimant acquired its mining rights at Santa Ana—the foundation of its investment and the basis of its claims before this Tribunal—by circumventing and violating the Peruvian Constitution. Next, Claimant abused those mining rights by recklessly advancing the project before acquiring the necessary social license from the local communities. These two mistakes triggered the very government actions about which Claimant now complains. If the Tribunal reaches a damages analysis, it must reduce the award to reflect Claimant's substantial culpability in forcing the government measures at issue.

F. QUESTION: WAS THE CLAIMANT DENIED DUE PROCESS IN THE PROCEDURE LEADING TO THE PROMULGATION OF SUPREME DECREE NO. 032, OR OTHERWISE?

116. Claimant contends that Supreme Decree No. 032 was adopted without due process, including in particular an opportunity for Claimant to be heard before the Decree was issued. Those allegations are without merit—Claimant was not denied due process and Respondent complied with all procedural requirements when it issued Supreme Decree No. 032.

117. A Supreme Decree is the highest ranking rule that the Executive Branch can issue. Just as the Council of Ministers has virtually unfettered discretion when deciding whether to issue a Supreme Decree declaring a foreign investment to be a public necessity, it has the same broad discretion to reconsider or rescind such an order.[217] A Supreme Decree pursuant to Article 71 of the Peruvian Constitution is not an ordinary administrative act with, *e.g.*, requirements for notice or limits on its revocation. In particular, there is no requirement that Perú's Council of Ministers consult a private party potentially affected by the Decree before issuing it.[218] Thus,

[217] *See* Eguiguren First Report at paras. 63-64 [Exhibit REX-001]; Danos Expert Report at paras. 2, 123 [Exhibit REX-006].

[218] *See* Eguiguren First Report at para. 65 [Exhibit REX-001].

although Claimants might prefer to have been consulted by the Executive Branch before the Decree was issued, under Peruvian law the government was under no obligation to do so.

118. Second, considering the circumstances that existed when the Supreme Decree was issued, it would not have been appropriate or even possible for the government to have reached out to Claimants for their views before issuing the Decree. Claimant's due process complaint ignores the extraordinary circumstances under which Supreme Decree No. 032 was issued. In late June 2011, Respondent was faced with a dramatic and escalating situation. With each passing day, the conflict reached new levels of crisis and decisions had to be made quickly to avoid further harm and even loss of life. The day the Council decided to issue the Decree, June 23, 2011, was the culmination of many days of meetings in Lima with dozens of Aymara representatives of the protesters. Those meetings were tense and contentious[219]—it would have been gravely counterproductive for Bear Creek to be present, much like, as Mr. Gala explained, it would have been even physically dangerous for Bear Creek to have attended various meetings that the Government had earlier held with protesters in Puno.[220] Nor was it practical to halt negotiations with the protesters mid-stream for consultations or for confirmatory research at the Ministry of Labor in the overnight hours, as Mr. Zegarra confirmed.[221] And in light of the social crisis, there were no halfway or less definitive measures available to the Council of Ministers; a suspension of the Project had already been tried (with the suspension of the EIA review) and had failed.[222]

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[219] *See* Fernández Witness Statement at para. 24 [Exhibit RWS-004]; Gala First Witness Statement at paras. 34-35 [Exhibit RWS-001].

[220] *See* Transcr. at 882:6-20 (Gala).

[221] *See* Transcr. at 1021:11-1022:5 (Zegarra).

[222] *See* Transcr. at 830:1-832:3 (Gala) ("I remembered that we had tried to suspend the EIA, and the suspension of the EIA implied that there wouldn't be a project, and in spite of that, we suggested that. We suspended the EIA, but the Aymara community did not accept that proposal.").

119. And finally, in any event, it is not clear what Claimant's response would have been even if it had had an opportunity to present its views. This is because Claimant cannot deny the relevant facts that were the basis for the issuance of the Decree:

- Bear Creek used its own employee, a person under its control, to acquire concessions on its behalf; and
- Bear Creek explored the concessions and was in *de facto* possession of the concessions through that employee, prior to obtaining a public necessity declaration.

120. Although Claimant disputes the legal significance of those facts, the Council of Ministers made its own judgment on that legal question and came to its own conclusion—namely, that there was a likely violation of the Constitution.[223] It is difficult to imagine, therefore, how any intervention by Claimant could have altered Respondent's decision making.

IV. CONCLUSION

121. For all of the foregoing reasons and those presented in Respondent's pleadings and at the hearing, Respondent respectfully reiterates its requests (i) that the Tribunal dismiss Claimant's claims for lack of jurisdiction; or, in the event that the Tribunal were to find jurisdiction, (ii) that the Tribunal dismiss Claimant's claims for lack of merit. Respondent also requests an award of its costs, including counsel fees, that have been incurred in these proceedings.

Respectfully submitted,

Stanimir A. Alexandrov
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[223] There was no requirement to obtain a formal legal opinion prior to issuing the Decree; moreover, the proposed Decree was reviewed and approved by the Minister of Justice herself, Prime Minister Fernández, in addition to Mr. Zegarra, the Ministry's principal legal advisor.