

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Bear Creek Mining Corporation**

**v.**

**Republic of Perú**

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

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**AWARD**

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*Members of the Tribunal*

Prof. Karl-Heinz Böckstiegel, President of the Tribunal

Dr. Michael Pryles, Arbitrator

Prof. Philippe Sands QC, Arbitrator

*Secretary of the Tribunal*

Ms. Mercedes Cordido-Freytes de Kurowski

*Assistant to the Tribunal*

Dr. Katherine Simpson

***Date of Dispatch to the Parties: November 30, 2017***

## REPRESENTATION OF THE PARTIES

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## GLOSSARY OF DEFINED TERMS

Abbreviation	Full Term
¶ / ¶¶	paragraph / paragraphs
C-I	Claimant's Memorial on the Merits (May 29, 2015)
C-II	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction (Jan. 8, 2016)
C-III	Claimant's Rejoinder on Jurisdiction (May 26, 2016)
C.Costs-I	Claimant's Submission on Costs (Mar. 29, 2017)
C.Costs-II	Claimant's Comments on Respondent's Submission on Costs (Apr. 14, 2017)
C.Closing	Claimant's Closing Statement (Sept. 14, 2016)
C.Prov.M.-I	Claimant's Request for Provisional Measures (Jan. 9, 2015)
C.Prov.M.-II	Claimant's Observations to Peru's Response to the Request for Provisional Measures (Feb. 20, 2015)
CIMVAL	Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties
CPHB-I	Claimant's Post-Hearing Brief (Dec. 21, 2016)
CPHB-II	Claimant's Reply Post-Hearing Brief (Feb. 15, 2017)
CPP (or PPC)	Community Participation Plan
DGAAM	MINEM's General Directorate for Environmental Mining Affairs ( <i>Dirección General de Asuntos Ambientales Mineros</i> )
DREM	Regional Directorate of Energy and Mines
ESIA	Environmental and Social Impact Assessment / Environmental Impact Assessment
FET	Fair and Equitable Treatment
FDRN	Frente de Defensa de los Recursos Naturales de la Zona Sur de Puno
FMV	Fair Market Value
FPS	Full Protection and Security
FTA	Free Trade Agreement between Canada and the Republic of Peru
ILO	International Labour Organization
INACC	Peruvian national Register for Mineral Properties ( <i>Instituto Nacional de Concesiones y Catastro Minero</i> ) (now part of INGEMMET)
INGEMMET	MINEM's Geological, Mining, and Metallurgical Institute ( <i>Instituto Geológico, Minero y Metalúrgico</i> )
MINAG	Ministry of Agriculture
MINEM	Peru's Ministry of Energy and Mines ( <i>Ministerio de Energía y Mines</i> )
MST	international minimum standard of treatment
OEFA	Ministry of Environment's Environmental Assessment and Monitoring Agency
PO-#	Procedural Order No. #
R-I	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction (Oct. 6, 2015)
R-II	Respondent's Rejoinder on the Merits and Reply on Jurisdiction (Apr. 13, 2016)

R.Costs-I	Respondent's Submission on Costs (Mar. 29, 2017)
R.Costs-II	Respondent's Comments on Claimant's Submission on Costs (Apr. 14, 2017)
R.Prov.M.-I	Respondent's Response to Claimant's Request for Provisional Measures (Feb. 6, 2015)
R.Prov.M.-II	Respondent's Rejoinder on Claimant's Request for Provisional Measures (Mar. 6, 2015)
RfA	Claimant's Request for Arbitration (Aug. 11, 2014)
RPHB-I	Respondent's First Post-Hearing Brief (Dec. 21, 2016)
RPHB-II	Respondent's Second Post-Hearing Brief (Feb. 15, 2017)
SUNARP	Peruvian National Superintendent of Public Registries ( <i>Superintendencia Nacional de los Registros Públicos</i> )
UDM	Unreasonable or Discriminatory Measures

## DRAMATIS PERSONAE

Name	Position
Walter Aduviri	Founder of FDRN; Political Operative
Jesús Obed Alvarez	Puno's Regional Direction of Mines
Luis Miguel Castilla	Minister of Economy and Finance (Peru)
Felipe Antonio Ramírez Delpino	(former) Minister of Economy and Mines (Peru)
Alvaro Díaz	Vice President of Legal and General Counsel, Bear Creek Met with Mr. Mayolo and Minister Merino on Dec. 13, 2013
Juan Carlos Eguren	Congressman (Peru)
Rosario Fernández	Prime Minister of Peru (2011)
Michael Grau	Board Member, Bear Creek Partner, Estudio Grau
Clara García Hidalgo	Advisor to Minister of Energy and Mines
Ollanta Humala	President of Peru (2011 – 2016)
David Lowell	Member, Bear Creek Board of Directors
Pedro Martínez	Chairman of the Peruvia National Society for Mining, Oil and Energy
Elsiario Antúnez de Mayolo	Bear Creek's Chief Operational Officer
Eleodoro Mayorga	Then-Minister of Energy and Mines (2014)
Catherine McLeod-Seltzer	Member, Bear Creek Board of Directors
Jorge Merino	Minister of Energy and Mines (2011 – 2014)
Cesar Ríos	Geologist employed by Bear Creek
Mauricio Rodríguez	Regional President in Puno
Pedro Sánchez	Minister of Energy and Mines (2011)
Luis "Fernando Gala" Soldevilla	Peruvian Vice-Minister of Mines (2011)
Kristiam Veliz Soto	Attorney for DGAAM
Andrew Swarhout	President, CEO and Director of Bear Creek
Juan Luna Vilca	Governor of Huacullani
Jenny Karina "Villavicencio" Gardini	Employee of Claimant starting in 2002, conveyed concessions to Claimant based on Option Agreements
César Zegarra	Ministry of Energy and Mines

## I. INTRODUCTION

### A. THE DISPUTE AND THE PARTIES

1. The Parties' dispute concerns Claimant's alleged investments in Peru, including the Santa Ana silver mining project and the alleged associated legal and contractual rights. Claimant contends that Respondent has failed to afford Claimant's investment in Peru the protections set out in the Free Trade Agreement between Canada and the Republic of Peru ("FTA").<sup>1</sup> Respondent contests the Tribunal's jurisdiction and argues that Claimant's claims are unfounded on the merits.<sup>2</sup>
2. Claimant in this arbitration is Bear Creek Mining Corporation ("Bear Creek"), a company duly incorporated under the laws of Canada, with its headquarters located at 625 Howe Street, Suite 1050, Vancouver, British Columbia, Canada, V6C 2T5.
3. Respondent in this arbitration is the Republic of Peru ("Peru"), a sovereign state with an address for service as Dr. Ricardo Ampuero Llerena, President, Special Commission Representing the Republic of Peru in International Investment Disputes, Ministry of Economy and Finance of Peru, Jr. Cuzco 177, Lima, Peru.

### B. THE TRIBUNAL'S TERMINOLOGY AND REASONING

4. The Tribunal has sought to make a consistent use of terminology. This does not reflect the Tribunal's understanding of a particular issue or a propensity to the views of one or the other party. Likewise, the order in which sources or references are presented is not intended to reflect a particular source's value. Instead, effort has been made to list the arguments, in the Tribunal's view, in a logical fashion and to format the footnotes consistently so as to reference all relevant exhibits presented by the Parties.
5. The Tribunal has given careful consideration to the extensive factual and legal arguments presented by the Parties in their written and oral submissions. The Tribunal has also reviewed the submissions from *amicus curiae* and from the Government of Canada. The Tribunal does not consider it necessary

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<sup>1</sup> RfA ¶ 2.

<sup>2</sup> R.Prov.M.-I ¶ 18, n. 37; *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on Claimant's Request for Provisional Measures, Jan. 21, 2015 ¶¶ 124 – 125 [RLA-002].

to reiterate all such arguments, but rather addresses those arguments which it considers most relevant for its decisions. The Tribunal's reasons, without repeating all the arguments advanced by the Parties, address what the Tribunal considers to be the determinative factors required to decide on the requests of the Parties. The Tribunal considers, however, that a brief repetition of certain aspects of its conclusions in the context of particular issues is appropriate.

## **II. THE ARBITRAL TRIBUNAL**

6. On August 11, 2014, Claimant appointed Dr. Michael Pryles, a national of Australia, as arbitrator. He accepted this appointment on August 21, 2014. Dr. Pryles's contact details are as follows:

Dr. Michael Pryles  
Suite 304, 521 Toorak Road  
Toorak, Victoria 3142 Australia  
Phone: +613 8590 5642  
Email: [michael@michaelpryles.com](mailto:michael@michaelpryles.com)

7. On October 3, 2014, Respondent appointed Prof. Philippe Sands, a national of the United Kingdom and France, as arbitrator. He accepted this appointment on October 10, 2014. Prof. Sands's contact details are as follows:

Prof. Philippe Sands QC  
Matrix Chambers  
Griffin Building  
Gray's Inn  
London, WC1R 5LN  
United Kingdom  
Phone: +44 20 7404 3447  
Email: [philippesands@matrixlaw.co.uk](mailto:philippesands@matrixlaw.co.uk)

8. The Parties agreed on the appointment of Prof. Dr. Karl-Heinz Böckstiegel as the Presiding Arbitrator on December 1, 2014 and requested that ICSID, in accordance with ICSID Arbitration Rule 5(2), proceed to seek Prof. Böckstiegel's acceptance of this appointment. Prof. Böckstiegel accepted this appointment on December 3, 2014. Prof. Böckstiegel's contact details are as follows:

Prof. Dr. Karl-Heinz Böckstiegel  
Parkstr. 38  
D-51427 Bergisch Gladbach, Germany  
Tel.: +49 (0)2204 66268  
Fax: +49 (0)2204 21812  
Email: [kh@khboeckstiegel.com](mailto:kh@khboeckstiegel.com)

### **III. PROCEDURAL HISTORY**

9. On August 11, 2014, Claimant filed Claimant's Request for Arbitration ("RfA") with the Secretary-General of ICSID. ICSID transmitted the RfA to Respondent on August 13, 2014.
10. On August 15, 2014, ICSID requested that Claimant confirm, pursuant to ICSID Institution Rule 2(1)(f), that the necessary internal actions have been taken by Claimant to authorize the RfA. Claimant confirmed that it took the necessary internal action to authorize the filing of the RfA and submitted resolutions passed by Claimant's Board of Directors on July 18, 2014 and August 8, 2014 authorizing the filing of the RfA.
11. On August 18, 2014, ICSID registered the RfA.
12. The Tribunal was constituted on December 3, 2014. The Members of the Tribunal submitted their signed declarations in a timely manner in accordance with ICSID Arbitration Rule 6(2), and copies of the same were distributed to the Parties by the ICSID Secretariat on this date.
13. By letter of December 4, 2014, ICSID requested that each Party pay US\$ 200,000 to defray the initial costs of the proceeding. ICSID received Claimant's payment on December 16, 2014 and Respondent's payment on December 31, 2014.
14. On December 11, 2014 and in preparation of the First Session of the Arbitral Tribunal, the Tribunal Secretary, on behalf of the Tribunal, sent a Draft Agenda and Draft Procedural Order to the Parties.
15. On January 2, 2015, the Parties submitted their comments on the Draft Procedural Order, indicating items on which they agreed and their respective positions regarding the items on which they had not reached agreement.
16. On January 9, 2015, Claimant filed Claimant's Request for Provisional Measures with the Tribunal

("C.Prov.M.-I"). Therein, Claimant requested that the Tribunal issue interim measures ordering Respondent to stay the MINEM Lawsuit while this arbitration is pending.<sup>3</sup>

17. The First Session of the Arbitral Tribunal was held on January 12, 2015. An audio recording of the session was made and deposited in the archives of ICSID and distributed to the Members of the Tribunal and the Parties. The Parties confirmed that the Tribunal was properly constituted and that no party had any objection to the appointment of any Member of the Tribunal.
18. During this session, the President referred procedurally to Claimant's Request for Provisional Measures and invited the Parties to propose a procedural schedule. The Parties agreed that Respondent would file a response on February 6, 2015, and that this response would be followed by a second round of submissions, with Claimant's observations to be filed on February 20, 2015 and Respondent's rebuttal on March 6, 2015.
19. On January 14, 2015, the Tribunal Secretary, on behalf of the Tribunal, emailed the Parties the procedural schedule, as agreed by the Parties during the First Session.
20. On January 27, 2015, the Tribunal issued **Procedural Order No. 1 ("PO-1")**, which contains a summary of the Parties' discussions at the First Session. Annex 1 to PO-1 contains the procedural schedule for this arbitration.
21. On February 6, 2015, Respondent filed Respondent's Response to Claimant's Request for Provisional Measures ("R.Prov.M.-I"). Respondent requested that the Tribunal deny Claimant's request for provisional measures or, in the alternative, that *"the Tribunal expressly confirm that, if the issue of the questionable validity under Peruvian law of Claimant's acquisition of the concessions is presented to it as part of the Parties' jurisdictional or merits arguments, the Tribunal will hear and decide those issues."*<sup>4</sup>
22. On February 20, 2015, Claimant filed Claimant's Observations to Peru's Response to the Request for Provisional Measures ("C.Prov.M.-II"). Claimant repeated its earlier request for relief and made the further request that *"[i]f the Tribunal were to deny Bear Creek's request for provisional measures,*

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<sup>3</sup> C.Prov.M.-I ¶ 50.

<sup>4</sup> R.Prov.M.-I ¶ 53.

*Bear Creek requests the Tribunal to confirm that Bear Creek's continued defense against Peru's claims against Bear Creek in the MINEM Lawsuit before the Peruvian courts does not constitute a violation of the waiver requirements set forth in Article 823.1(e) of the Treaty.*"<sup>5</sup>

23. On February 27, 2015, Respondent filed English translations of exhibits R-001 – R-005.
24. On March 6, 2015, Respondent filed Respondent's Rejoinder on Claimant's Request for Provisional Measures ("R.Prov.M.-II"). Respondent repeated its earlier request for relief.<sup>6</sup>
25. On March 13, 2015, the Tribunal proposed the appointment of Katherine Simpson as Tribunal Assistant, pursuant to section 3.6 of PO-1. The Tribunal requested the Parties' comments by March 16, 2015.
26. On March 17, 2015, after receiving no objections from the Parties, the Tribunal appointed Dr. Simpson as Tribunal Assistant.
27. On March 27, 2015, pursuant to section 11.4 of PO-1, Respondent filed English translations of exhibits R-006 – R-009.
28. On April 19, 2015, the Tribunal issued **Procedural Order No. 2 Regarding Claimant's Request for Provisional Measures ("PO-2")**, making the following decision:

*XI. DISPOSITIF*

*Taking into account its considerations and conclusions above, the Tribunal decides:*

1. *Claimant's Request for Provisional Measures is denied.*
2. *Regarding Claimant's Alternative Request in case provisional measures are denied, the Tribunal confirms that Claimant's continued defense against Peru's claims against Bear Creek in the MINEM Lawsuit before the Peruvian courts does not constitute a violation of the waiver requirements set forth in Article 823.1(e) of the FTA.*
3. *Any decision regarding the costs caused by this procedure on provisional measures is deferred to a later stage of the proceedings.*

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<sup>5</sup> C.Prov.M-II ¶ 44.

<sup>6</sup> R.Prov.M-II ¶ 49.

29. On May 29, 2015, Claimant filed Claimant's Memorial on the Merits ("C-I") with the Tribunal.
30. On October 6, 2015, Respondent submitted Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction ("R-I") to the Tribunal.
31. On October 19, 2015, the Tribunal issued **Procedural Order No 3 Regarding the Designation and Protection of Confidential Information and the Preparation of Redacted Copies of Documents for Disclosure ("PO-3")**.
32. On October 27, 2015, Respondent submitted translations of witness statements, expert reports, selected factual exhibits and legal authorities to the Tribunal.
33. On October 27, 2015 and on November 3, 2015, respectively, Claimant and Respondent confirmed that neither requests that the Tribunal designate as confidential information any portion of the Main Documents submitted with C-I or R-I.
34. On December 21, 2015, Romain Champalaune of *Le Monde* newspaper requested permission to photograph the Hearing in September 2016. On December 23, 2015, the Tribunal invited the Parties to submit their views on Mr. Champalaune's request, by January 7, 2016. On December 23, 2015, Respondent requested an extension until January 14, 2016 to respond to Mr. Champalaune's request. Claimant consented to the requested extension.
35. On January 8, 2016, Claimant submitted Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction ("C-II") to the Tribunal.
36. On January 15, 2016, the Parties informed the Tribunal that they would prefer that the Tribunal decline Mr. Champalaune's request to photograph the proceedings. Immediately thereafter, the Tribunal informed Mr. Champalaune that it would be unable to accommodate his request.
37. On January 29, 2016, Claimant submitted English translations of certain pieces of evidence submitted with C-II.
38. On February 16, 2016, Respondent applied for the Tribunal's assistance in obtaining evidence it alleged to be critical to this case, namely, the testimony of Ms. Villavicencio. On the following day, the Tribunal invited Claimant to comment on Respondent's February 16, 2016 Application, by February 24, 2016.

39. On February 24, 2016, Claimant wrote to the Tribunal in response to Respondent's February 16, 2016 Application.
40. On February 28, 2016, Respondent wrote in response to Claimant's letter of February 24, 2016.
41. On February 29, 2016, the Tribunal invited Claimant to respond to Respondent's letter of February 24, 2016, by March 7, 2016.
42. On March 7, 2016, Claimant wrote in response to Respondent's letter of February 24, 2016.
43. On March 14, 2016, the Tribunal issued **Procedural Order No 4 Regarding Respondent's Application to Order Testimony by Ms. Villavicencio ("PO-4")**, making the following decision:

*VII. DISPOSITIF*

- A. Respondent's Application is dismissed.*
  - B. However, if after the final submissions on the merits there remain, as Respondent alleges, "gaps" in the evidence, they (together with any inferences that might be taken from them) may be taken into account by the Tribunal, having regard to the burden of proof which rests on the Claimant with regard to proving the facts of its claims on the merits.*
44. On March 18, 2016, Respondent wrote to the Tribunal to "*correct the record with respect to certain apparent misconceptions that are reflected in [PO-4].*" Respondent asked the Tribunal to take note of several points and reserved the right to revisit the issue of Ms. Villavicencio's testimony at a later date.
  45. On March 19, 2016, the Tribunal invited Claimant to submit any comments it might have on Respondent's letter of March 18, 2016, by March 25, 2016.
  46. On March 22, 2016, Claimant responded to Respondent's letter of March 18, 2016.
  47. On March 24, 2016, the Tribunal issued its Decision regarding PO-4. After taking note of the content of the Parties' submissions, the Tribunal saw no need to amend PO-4.
  48. On April 13, 2016, Respondent submitted Respondent's Rejoinder on the Merits and Reply on Jurisdiction ("R-II") to the Tribunal.

49. On April 20, 2016, Respondent provided corrections to certain exhibits included with R-II to the Tribunal.
50. On April 21, 2016, the Tribunal Secretary wrote to the Parties to request that the second advance payment be made by the Parties.
51. On April 28, 2016, the Tribunal Secretary acknowledged receipt of US\$ 299,975 from Claimant. The difference between the US\$ 300,000 requested and the total amount recorded by ICSID's financial services corresponds to the administrative charges applied by the financial institution that handled the transfer of funds.
52. On May 4, 2016, Respondent provided translations to some exhibits submitted with R-II.
53. On May 26, 2016, Claimant submitted its Rejoinder on Jurisdiction ("C-III") to the Tribunal.
54. On May 27, 2016, the Tribunal Secretary acknowledged receipt of US\$ 300,000 from Respondent as payment of its share of the second advance.
55. On May 27, 2016, Canada wrote to inform the Tribunal that it would file a non-disputing party submission on June 9, 2016, pursuant to Article 832 of the FTA and as contemplated by section 17 of PO-1.
56. On June 9, 2016, Canada filed its non-disputing party submission entitled "*Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement*" with the Tribunal.
57. On June 9, 2016, the Tribunal received an application to file a written submission as *amicus curiae* pursuant to Article 836 and Annex 836.1 of the FTA from the Columbia Center on Sustainable Investment ("CCSI"), together with the written submission.
58. On June 9, 2016, the Tribunal received an application for leave to submit a brief as non-disputing Parties (*amici curiae*) from the civil association Human Rights and Environment (*Asociación civil Derechos Humanos y Medio Ambiente*) ("DHUMA") of Puno, Peru and Dr. Carlos López PhD, Senior Legal Adviser to the International Commission of Jurists in Geneva, Switzerland. DHUMA and Dr. López submitted their brief on the same day. On June 10, 2016, DHUMA and Dr. López requested, and the Tribunal granted, an extension of the deadline for the filing of the English translation of the *amicus curiae* Application and Submission until June 17, 2016.

59. On June 14, 2016, the Tribunal communicated the following to the Parties:
1. *The Tribunal is in receipt of (i) the Non-Disputing Party submission of Canada; (ii) the application to submit an Amicus Curiae Submission by the Asociación civil Derechos Humanos y Medio Ambiente (“DHUMA”) and Mr. Carlos López-Hurtado; and (iii) the application to submit an Amicus Curiae Submission by the Columbia Center on Sustainable Investment (“CCSI”), all dated June 9, 2016.*
  2. *The Tribunal has granted DHUMA and Mr. López-Hurtado the opportunity to file the English translation of their application and submission until **Friday, June 17, 2016.***
  3. *On the basis of Art. 836 and Annex 836.1 of the Peru-Canada Free Trade Agreement (“FTA”), and in accordance with the Procedural Schedule attached to Procedural Order No. 1 (“PO 1”) of January 27, 2015 (the “Procedural Schedule”), the Parties are invited to submit their comments on the admissibility of the applications to submit an Amicus Curiae Submission by (i) DHUMA and Mr. López Hurtado and (ii) CCSI, by **July 7, 2016.***
  4. *The Tribunal will then decide on the admissibility of such applications by **July 21, 2016.***
  5. *If admitted, and in accordance with the Procedural Schedule, the Parties will be invited to submit their comments on the Amicus Curiae Submission(s) by **August 18, 2016.***
  6. *On the basis of Art. 832 of the FTA, and in accordance with the Procedural Schedule, the Parties are invited to submit their comments on the Non-Disputing Party submission of Canada by **August 18, 2016.***
60. On June 16, 2016, Claimant submitted English translations of the expert reports submitted with C-III.
61. On June 17, 2016, DHUMA and Dr. López filed the English translations of their application and submission.
62. On June 23, 2016, the Parties confirmed their agreement that the September 2016 Hearing be held in Washington, D.C.
63. On June 30, 2016, the Tribunal sent the Parties a draft Procedural Order regarding the details of the Hearing. The Tribunal informed the Parties that it would not be possible to extend the Hearing beyond September 14, 2016, due to a commitment of Co-Arbitrator Prof. Sands. The Tribunal proposed alternative Hearing dates to the Parties and invited the Parties to share their position on this matter by July 15, 2016.

64. On July 7, 2016, Claimant and Respondent, by separate letters, submitted comments on the admissibility of the submissions from CCSI and from DHUMA and Dr. López.
65. On July 8, 2016 and on July 11, 2016, Claimant and Respondent, by separate letters, commented on the changes to the Hearing schedule and made proposals.
66. On July 15, 2016, the Parties jointly requested an extension of the deadline to submit comments to the draft Procedural Order regarding the details of the Hearing. The Tribunal granted this extension on the same day.
67. On July 19, 2016, the Parties submitted their comments to the draft Procedural Order regarding the details of the Hearing.
68. On July 21, 2016, the Tribunal issued **Procedural Order No. 5 Regarding Association of Human Rights and Environment of Puno, Peru (“DHUMA”), and Dr. Carlos López PhD, Senior Legal Adviser to the International Commission of Jurists Application to File a Written Submission (“PO-5”)**; and **Procedural Order No. 6 Regarding the Application by the Columbia Center on Sustainable Investment (“CCSI”) to File a Written Submission (“PO-6”)**.
69. On July 22, 2016, the Parties consented to the publication of PO-5 and PO-6. On the same day, the Tribunal informed DHUMA and Mr. López of PO-5 and CCSI of PO-6.
70. On July 25, 2016, the Tribunal issued **Procedural Order No. 7 Regarding Details of the Hearing (“PO-7”)**.
71. On July 25, 2016, the Parties jointly requested an extension for confirming the public hearing modalities. The Tribunal granted the extension on the following day.
72. On July 26, 2016, Claimant requested that the Tribunal amend PO-7. On July 27, 2016, the Tribunal invited Respondent to respond to Claimant’s request.
73. On July 27, 2016, DHUMA wrote to the Tribunal to inform it that certain members of its organization will attend the Hearing.
74. On August 1, 2016, Respondent responded to Claimant’s request for the Tribunal to amend PO-7. By separate letter, Respondent consented to the publication of PO-7.

75. On August 3, 2016, CCSI wrote to the Tribunal in response to PO-6.
76. On August 3, 2016, the Parties each wrote to the Tribunal regarding the modalities of a public hearing.
77. On August 4, 2016, in response to Claimant's letter of July 26, 2016 and Respondent's Letter of August 1, 2016, the Tribunal concluded that it should provide the Parties greater flexibility in the presentation of their case and issued **Procedural Order No. 8. Regarding Details of the Hearing ("PO-8")**, which replaced PO-7. The Tribunal sent the Parties a draft procedural order outlining the proposed procedure following the Hearing and requested that the Parties make any changes to the notifications of the witnesses and experts they intend to examine at the Hearing, by August 18, 2016.
78. On August 18, 2016, the Parties submitted their agreed estimated schedule of witnesses to the Tribunal.
79. On August 18, 2016, each Party submitted its comments to the submission of Canada and the submission of DHUMA.
80. On August 18, 2016, Claimant submitted corrected exhibits and English translations of exhibits already on the record. Claimant also requested the Tribunal's authorization to add documents to the evidentiary record in anticipation of the Hearing.
81. On August 20, 2016, the Tribunal invited Respondent to respond to Claimant's request of August 18, 2016.
82. On August 23, 2016, Respondent submitted its comments to Claimant's letter of August 18, 2016. Respondent urged the Tribunal to reject Claimant's application to add 28 new documents to the record. Respondent did not object to the documents Claimant submitted in Appendix I to its submission, with the exception of proposed exhibits C-0299 and C-0300.
83. On August 24, 2016, Respondent wrote in connection with Claimant's August 18, 2016 Reply to the *amicus* submission of DHUMA and Dr. López. Respondent argued that Claimant violated the procedures by including two exhibits which Respondent argued constitute witness testimony.
84. On August 24, 2016, Dr. López requested access to the Parties' comments on the *amicus* submission. The Tribunal invited the Parties to simultaneously submit their comments on this request to the Tribunal by the following day.

85. On August 25, 2016, the Parties responded to Dr. López's request. Respondent commented that the Parties' comments on the *amicus* submissions should be made public. Claimant objected to Dr. López's request.
86. On August 25, 2016, the Tribunal issued **Procedural Order No. 9 Admissibility of New Documents ("PO-9")**.
87. On August 25, 2016, the Tribunal invited Claimant to respond to Respondent's letter of August 24, 2016.
88. On August 26, 2016, Claimant responded to Respondent's letter of August 24, 2016.
89. On August 29, 2016, the Tribunal decided to admit all of the exhibits enclosed by the Parties with their comments of August 18, 2016 to the *amicus* submissions, without exception. The Tribunal also decided to publish the comments to the *amicus* submissions. Finally, the Tribunal decided to inform Dr. López of this decision and to notify him that he is not entitled to make further submissions in this arbitration without prior approval of the Tribunal.
90. On August 30, 2016, ICSID invited the Government of Canada to attend the Hearing and provided the Hearing details to the Government of Canada. ICSID provided the Hearing attendance details to DHUMA the following day.
91. On September 1, 2016, the Government of Canada indicated that it would be unable to send a representative for the duration of the Hearing, but may call on representatives to attend as necessary.
92. On September 6, 2016, Respondent provided English translations of certain exhibits.
93. From September 7, 2016 to September 14, 2016, the Hearing on Jurisdiction, Admissibility, and the Merits ("Hearing") was held at the World Bank Headquarters, Washington D.C. The Hearing was transmitted by Livestream on the website of ICSID. The following attended the Hearing:

**LIST OF PARTICIPANTS**

<b>TRIBUNAL</b>	
Prof. Karl-Heinz Böckstiegel	President
Dr. Michael Pryles	Co-Arbitrator
Prof. Philippe Sands QC	Co-Arbitrator
<b>ICSID SECRETARIAT</b>	
Ms. Mercedes Cordido-Freytes de Kurowski	Secretary of the Tribunal
<b>ASSISTANT TO TRIBUNAL</b>	
Dr. Katherine Simpson	Assistant to the Tribunal
<b>CLAIMANT</b>	
Mr./Ms. First Name/ Last Name	Affiliation
<i>Counsel</i>	
Mr. Harry Burnett	King & Spalding, LLP
Ms. Caline Mouawad	King & Spalding, LLP
Mr. Craig Miles	King & Spalding, LLP
Mr. Cedric Soule	King & Spalding, LLP
Mr. Fernando Rodríguez-Cortina	King & Spalding, LLP
Ms. Jessica Beess und Chrostin	King & Spalding, LLP
Mr. Luis Alonso Navarro	King & Spalding, LLP
Ms. Eldy Quintanilla Roche	King & Spalding, LLP
Ms. Verónica García	King & Spalding, LLP
Ms. Mariah Young [Set-up]	King & Spalding, LLP
Mr. Bill Madero [Set-up]	King & Spalding, LLP
Mr. Mark Ford [Set-up]	King & Spalding, LLP
Mr. Luis Miranda	Miranda & Amado [Counsel from Peru]
Ms. Cristina Ferraro	Miranda & Amado [Counsel from Peru]
Mr. Stephen Brown	Immersion Legal Graphics
<i>Parties</i>	
Mr. Andrew Swarthout	Bear Creek Mining Corporation
Mr. Kevin Morano	Bear Creek Mining Corporation
Mr. Alvaro Díaz	Bear Creek Mining Corporation
<i>Witness(es)</i>	
Mr. Andrew Swarthout	Bear Creek Mining Corporation
Ms. Catherine McLeod-Seltzer	Bear Creek Mining Corporation

Mr. Elsiario Antúnez de Mayolo	Bear Creek Mining Corporation
<b>Expert(s)</b>	
Hans Flury	
Graham Clow	RPA
Richard Lambert	RPA
Ian Weir	RPA
Brenna Scholey	RPA
Howard Rosen	FTI Consulting
Chris Milburn	FTI Consulting
Alexander Lee	FTI Consulting
<b>RESPONDENT</b>	
<b>Mr./Ms. First Name/ Last Name</b>	<b>Affiliation</b>
<b>Counsel</b>	
Mr. Stanimir A. Alexandrov	Sidley Austin LLP
Ms. Marinn Carlson	Sidley Austin LLP
Ms. Jennifer Haworth McCandless	Sidley Austin LLP
Mr. Patrick Childress	Sidley Austin LLP
Ms. María Carolina Durán	Sidley Austin LLP
Mr. Michael Krantz	Sidley Austin LLP
Ms. Andrea Zumbado	Sidley Austin LLP
Mr. Juan Pazos Battistini	Navarro & Pazos Abogados
Mr. Ricardo Puccio Sala	Navarro & Pazos Abogados
<b>Parties</b>	
Dr. Ricardo Ampuero Llerena	President, Special Commission Representing the Republic of Perú in Investment Disputes
Dra. Mónica Guerreño Acevedo	Technical Secretary, Special Commission Representing the Republic of Perú in Investment Disputes
Ms. Cecilia Galarreta	Chargé d'Affaires <i>a.i.</i> , Embassy of Perú
Mr. Rafael Suárez	Minister Counselor, Embassy of Perú
Ms. Erika Lizardo	Counselor, Embassy of Perú
<b>Witness(es)</b>	
Mr. Luis Fernando Gala Soldevilla	(former) Ministry of Energy and Mines
Mr. Felipe Antonio Ramírez Delpino	(former) Ministry of Energy and Mines
Dr. César Zegarra	Ministry of Energy and Mines
<b>Expert(s)</b>	
Prof. Antonio Alfonso Peña Jumpa	Catholic University of Perú

Dr. Luis Rodríguez-Mariátegui Canny	Hernández & Cía
Prof. Graham A. Davis	Colorado School of Mines
Dr. Florin A. Dorobantu	Brattle Group
Mr. M. Alexis Maniatis	Brattle Group
Dr. Neal Rigby	SRK Consulting Inc.
Ms. Lisa Brown	SRK Consulting Inc.
<b><i>Support Team</i></b>	
Ms. Samantha Taylor	Sidley Austin LLP
Ms. Avery Archambo	Sidley Austin LLP
Mr. Arthur Staub	Sidley Austin LLP
<b>OBSERVERS</b>	
<b>Mr./Ms. First Name/ Last Name</b>	<b>Affiliation</b>
Mr. Cristóbal Yugra Villanueva	<i>Derechos Humanos y Medio Ambiente</i> (“DHUMA”)
Ms. Jacinta Yolanda Flores Montoro	DHUMA
Ms. Patricia Lee Ryan	DHUMA
<b>COURT REPORTERS</b>	
<b>Mr./Ms. First Name/ Last Name</b>	<b>Affiliation</b>
Mr. David Kasdan	English-Language Court Reporter
Ms. Dawn K. Larson	English-Language Court Reporter
Mr. Leandro Iezzi - D-R Esteno	Spanish-Language Court Reporter
Ms. Marta Rinaldi - D-R Esteno	Spanish-Language Editor
<b>INTERPRETERS</b>	
<b>Mr./Ms. First Name/ Last Name</b>	<b>Affiliation</b>
Ms. Silvia Colla	English-Spanish Interpreter
Mr. Daniel Giglio	English-Spanish Interpreter
Mr. Charles Roberts	English-Spanish Interpreter

94. On September 8, 2016, Claimant provided a courtesy translation of exhibit R-159.
95. On September 13, 2016, Respondents provided PDF copies of the presentations made by their experts Dr. Rodríguez-Mariátegui and Prof. Peña Jumba and Claimant provided a copy of the presentation made by its expert Dr. Flury.
96. On September 15, 2016, after consultation with the Parties, the Tribunal issued **Procedural Order**

**No. 10 on the Procedure Following the Hearing (“PO-10”)**, which included directions to the Parties to address the following questions in separate sections of their respective Post-Hearing Briefs:

- 2.1.4 *In separate sections of the brief, any comments the Parties have regarding the following questions of the Tribunal (which are without prejudice as to the final relevance given by the Tribunal to such questions and the comments received):*
- a) *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?*
    - i. *Which national and international legal provisions are applicable to informing that standard?*
    - ii. *Insofar as the State authorities have any discretion in this regard, what are the limits?*
    - iii. *What actions were legally required of Claimant in seeking to obtain a Social License, and did the Claimant take these actions?*
    - iv. *In the present case, what were the State authorities’ responsibilities in relation to obtaining a Social License?*
    - v. *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?*
  - b) *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?*
  - c) *What was the basis for the decision to issue Supreme Decree 032, and on what evidence did the State authorities rely?*
  - d) *Of the two reasons relied upon by Respondent for Decree 032, could that Decree also have been legally issued, if only one of the two reasons could be established:*
    - i. *only the alleged illegality of the Claimant’s Application?*
    - ii. *or only the unrest as it existed at that time?*
  - e) *What are the monetary amounts that the Tribunal should award to the Claimant if it were to conclude that:*
    - i. *the Claimant’s alleged investment was lawfully expropriated?*
    - ii. *the Claimant’s alleged investment was unlawfully expropriated?*
    - iii. *Respondent breached its obligations under the FTA for FET or other obligations under other provisions of the FTA?*
    - iv. *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?*

f) *Was the Claimant denied due process in the procedure leading to the promulgation of Supreme Decree 032, or otherwise?*

97. On September 29, 2016, DHUMA wrote to the Tribunal in response to the Hearing.
98. On November 2, 2016, the Parties submitted their agreed corrections to the Hearing transcripts. These were finalized by the Court Reporter, who issued new and revised final transcripts on November 4, 2016.
99. On November 22, 2016, Claimant wrote to the Tribunal, requesting leave from the Tribunal to file a new document with its Post-Hearing Brief, due December 21, 2016. The following day, the Tribunal invited Respondent to comment on Claimant's request by November 28, 2016. Respondent requested an extension until November 30, 2016 and Claimant stated that it had no objection. The Tribunal confirmed the extension on November 23, 2016.
100. On November 30, 2016, Respondent filed its observations on Claimant's request for admissibility of new evidence.
101. On December 5, 2016, the Tribunal issued its Decision on the admissibility of new evidence, declining to accept the new submission.
102. On December 21, 2016, the Parties simultaneously submitted their respective Post-Hearing Briefs to the Tribunal.
103. On December 23, 2016, Claimant wrote to the Tribunal objecting to Respondent's citation to and reliance upon nine new documents in its Post-Hearing Brief. Respondent submitted its comments on Claimant's objections on December 26, 2016.
104. On December 29, 2016, the Tribunal issued its Decision not to admit the nine new documents introduced by Respondent and to disregard these documents and the citations referring to them in Respondent's Post-Hearing Brief.
105. On February 15, 2017, the Parties simultaneously submitted their respective reply Post-Hearing Briefs to the Tribunal.
106. On March 29, 2017, the Parties simultaneously submitted their respective Submissions on Costs.

107. On April 12, 2017, the Tribunal Secretary wrote to the Parties to request a third advance payment from the Parties.
108. On April 13, 2017, the Tribunal Secretary acknowledged receipt of US\$ 124,975 from Claimant.
109. On April 14, 2017, the Parties simultaneously submitted their Reply Submissions on Costs.
110. On May 10, 2017, the Tribunal Secretary acknowledged receipt of US\$ 125,000.00 from Respondent.
111. On September 12, 2017, the Tribunal declared the proceeding closed in accordance with Rule 38(1) of the ICSID Arbitration Rules.

#### **IV. THE PARTIES' REQUESTS**

##### **A. CLAIMANT'S REQUESTS**

112. In its Request for Arbitration ("RfA"), Claimant requested that the Tribunal grant the following relief:
  - a. *Declare that Peru has violated the FTA and international law in connection with its treatment of Bear Creek and Bear Creek's investment;*
  - b. *Award Bear Creek full restitution or the monetary equivalent of all damages, including historical, moral, and consequential damages, it suffered due to Peru's breaches of its FTA obligations, in an amount to be determined based upon the evidence;*
  - c. *Order Peru to pay all costs and expenses of this arbitration, including ICSID's administrative fees, the fees and expenses of the Arbitral Tribunal, the fees and expenses of Bear Creek's legal representatives in respect of this arbitration, and any other costs of this arbitration;*
  - d. *Award Bear Creek pre-award and post-award compound interest on any restitutory or compensatory amounts until the date of full satisfaction of the Final Award, at a rate to be determined by the Tribunal in accordance with the FTA; and*
  - e. *Grant any other and further relief that it deems just and proper.*<sup>7</sup>

113. In Claimant's Memorial on the Merits ("C-I") and in Claimant's Reply Memorial ("C-II"), the Claimant made the following request:

*For the reasons stated herein, Claimant, Bear Creek, requests an award granting it the following relief:*

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<sup>7</sup> RfA ¶ 75.

- i. *A declaration that Peru has violated the FTA;*
- ii. *A declaration that Peru's actions and omissions at issue and those of its instrumentalities for which it is internationally responsible are unlawful, constitute a nationalization or expropriation without prompt, adequate and effective compensation, failed to treat Bear Creek's investments fairly and equitably and to afford full protection and security to Bear Creek's investments and impaired Bear Creek's investments through unreasonable and discriminatory measures;*
- iii. *An award to Bear Creek of the monetary equivalent of all damages caused to its investments represented by the FMV of the Santa Ana Project as of the day before Peru's unlawful expropriation and the resulting reduction in value of the Corani Project resulting from Peru's unlawful acts;*
- iv. *An award to Bear Creek for all costs of these proceedings, including attorney's fees; and*
- v. *Post-award interest on all of the foregoing amounts, compounded quarterly, until Peru pays in full.<sup>8</sup>*

114. In Claimant's Rejoinder on Jurisdiction ("C-III"), Claimant supplemented its request for relief, as follows:

*169. For the reasons stated herein and in Claimant's submissions to date, Bear Creek requests that the Tribunal dismiss in full Respondent's jurisdictional objections and award Bear Creek all of its related costs, including attorneys' fees. For the avoidance of doubt, Bear Creek incorporates by reference all relief requested in its prior submissions.<sup>9</sup>*

115. In Claimant's Post-Hearing Brief ("CPHB-I") and Claimant's Reply Post-Hearing Brief ("CPHB-II"), Claimant repeated the above requests for relief, as follows:

*For the reasons stated herein, Claimant, Bear Creek, requests an award granting it the following relief:*

- i. *A declaration that Peru has violated the FTA;*
- ii. *A declaration that Peru's actions and omissions at issue and those of its instrumentalities for which it is internationally responsible are unlawful, constitute a nationalization or expropriation without prompt, adequate and effective compensation, failed to treat Bear Creek's investments fairly and equitably and to afford full protection and security to Bear Creek's investments and impaired Bear Creek's investments through unreasonable and discriminatory measures;*
- iii. *An award to Bear Creek of the monetary equivalent of all damages caused to its investments represented by the FMV of the Santa Ana Project as of the day before*

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<sup>8</sup> C-I ¶ 256; C-II ¶ 503.

<sup>9</sup> C-III ¶ 169.

*Peru's unlawful expropriation and the resulting reduction in value of the Corani Project resulting from Peru's unlawful acts;*

- iv. An award dismissing all of Peru's jurisdictional objections;*
- v. An award to Bear Creek for all costs of these proceedings, including attorney's fees; and*
- vi. Post-award interest on all of the foregoing amounts, compounded quarterly, until Peru pays in full.<sup>10</sup>*

## **B. RESPONDENT'S REQUESTS**

116. In Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction ("R-I") and in Respondent's Rejoinder on the Merits and Reply on Jurisdiction ("R-II"), Respondent made the following request for relief:

*For the foregoing reasons, Respondent respectfully requests that the Tribunal dismiss all of Claimant's claims for want of jurisdiction, or, in the alternative, on their merits, and award Respondent the costs and fees, including attorneys' fees, it has incurred in this Arbitration.<sup>11</sup>*

117. In Respondent's Post-Hearing Brief ("RPHB-I") Respondent made the following request for relief:

*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.<sup>12</sup>*

118. In Respondent's Reply Post-Hearing Brief ("RPHB-II") Respondent reiterated that "*the claims should be dismissed for lack of jurisdiction or, in the alternative, for lack of merit.*"<sup>13</sup>

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<sup>10</sup> CPHB-I ¶ 109; CPHB-II ¶ 63.

<sup>11</sup> R-I ¶ 407; R-II ¶ 692.

<sup>12</sup> RPHB-I ¶ 121.

<sup>13</sup> RPHB-II ¶ 55.

## V. STATEMENT OF FACTS

### A. SUMMARY OF FACTS BASED ON THE PARTIES' SUBMISSIONS

119. The following summary of facts is based on the Parties' submissions and is without prejudice to the relevance of these facts for the decisions of the Tribunal. The characterization of many events described herein is in dispute and, accordingly, each Party's views are separately summarized.
120. On August 31, 1999, Claimant incorporated under the name 4271 Investments Ltd. in Canada.<sup>14</sup> It changed its name to EVEolution Ventures the following month.<sup>15</sup> In 2002, EVEolution Ventures Inc continued on to Canada where it became Bear Creek Mining Corporation ("Claimant").<sup>16</sup> In 2003, Claimant acquired Peru Exploration Ventures LLP – a company that was formed as a limited partnership in Arizona by senior geologists and mining executives led by Andrew T. Swarthout for the purpose of acquiring, exploring, developing, and selling mineral properties in Peru.<sup>17</sup> In 2004, Claimant continued to British Columbia, Canada, where it is domiciled and has since been in good standing.<sup>18</sup>
121. Ms. Jenny Karina Villavicencio Gardini ("*Ms. Villavicencio*") is a Peruvian national who has been registered as an employee of Claimant with the Peruvian Ministry of Labor since 2002.<sup>19</sup> She was a legal representative of Claimant for certain banking faculties beginning in May 2003.<sup>20</sup> Claimant

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<sup>14</sup> C-I ¶ 104; Bear Creek Mining Corporation Annual Information Form for year ended Dec. 1, 2013, Apr. 3, 2014 at 1 [C-0023].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; C-I ¶ 19; Press Release, Bear Creek Mining Corporation, TSX Venture Exchange, *EVEolution Ventures to acquire Peru Exploration Ventures LLP*, May 30, 2002 [C-0022]; Witness Statement of Andrew T. Swarthout (May 28, 2015) ("*Swarthout First Statement*") ¶¶ 10 – 11 [CWS-1].

<sup>17</sup> C-I ¶¶ 18, 104; Press Release, Bear Creek Mining Corporation, TSX Venture Exchange, *EVEolution Ventures to acquire Peru Exploration Ventures LLLP*, May 30, 2002 [C-0022]; Swarthout First Statement ¶¶ 10 [CWS-1].

<sup>18</sup> C-I ¶ 104; Certificates of Continuation and Good Standing for Bear Creek Mining Corporation [C-0008].

<sup>19</sup> C-III ¶ 60; Letter from A. Swarthout, Bear Creek, to Ministry of Labor and Social Welfare dated Jun. 16, 2002 requesting approval of the attached Fixed Term Labor Contract dated Jun. 2, 2002 [C-0283]; Fixed Term Labor Contract dated Jan. 2, 2003 [C-0284]; Letter from A. Swarthout, Bear Creek, to Ministry of Labor and Social Welfare dated Jul. 2, 2003 requesting approval of the attached Fixed Term Labor Contract dated Jul. 2, 2003 [C-0285]; Fixed Term Labor Contract dated Mar. 5, 2004 [C-0286].

<sup>20</sup> C-II ¶ 35; R-I ¶ 38; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) Annex VI at 80 [C-0017]; Commercial Companies Registry, Bear Creek Mining Company, Sucursal del Peru [R-003].

filed a fixed employee contract for Ms. Villavicencio with the Ministry of Labor on June 30, 2003.<sup>21</sup> SUNARP registered the Power of Attorney for Ms. Villavicencio as legal representative for Claimant in certain matters on August 21, 2003.<sup>22</sup>

122. In 2000, Apex Silver Mines Corporation requested a Public Necessity Decree for a series of border-zone concessions that Respondent believes to be the same as those later requested for the Santa Ana Project. At the time, the Peruvian military opined that the Santa Ana investment did not constitute a public necessity due to concerns of security and national defense.<sup>23</sup> The Parties dispute whether this denial was due to Apex being a Bolivian company.<sup>24</sup>
123. In 2004, Claimant became aware of the existence of potential silver ore deposits in Santa Ana, located within 50 kilometers of the border between Peru and Bolivia.<sup>25</sup>
124. Respondent regulates the activities of foreigners in border regions. Pursuant to Article 71 of the Peruvian Constitution, aliens are not permitted to “*acquire or possess under any title, directly or indirectly, mines, lands, woods, water, fuel or energy sources, whether it be individually or in partnership, under penalty of losing that so acquired right to the State.*”<sup>26</sup> A foreign national can only gain rights to natural resources in border regions when the foreign national makes a case to the Peruvian Government for a “*public necessity*”, which must be expressly determined by an executive decree approved by the Council of Ministers in accordance with the law.<sup>27</sup>

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<sup>21</sup> C-III ¶ 60; Letter from A. Swarouth, Bear Creek, to Ministry of Labor and Social Welfare dated Jul. 2, 2003 requesting approval of the attached Fixed Term Labor Contract dated Jul. 2, 2003 [C-0285].

<sup>22</sup> C-III ¶¶ 60, 84; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017].

<sup>23</sup> Tr. 1852 – 1853 (R. Closing); MINEM’s Decision Rejecting the Declaration of Public Necessity to ASC PERU LDC (Apex Silver Mines Corp.) (2001) [R-189].

<sup>24</sup> Tr. 1852 (R. Closing); 1957 (C. Response to Prof. Sands); 1964 (R. Response to Prof. Sands).

<sup>25</sup> RfA ¶ 11; C-I ¶ 20; R.Prov.M.-I ¶ 5; R-II ¶ 57; RPHB-II ¶ 20; Ausenco Vector, Feasibility Study-Santa Anna Project-Puno, Perú-NI 43-101 Technical Report (Oct. 21, 2010) p. 15 [C-0003]; Swarouth First Statement ¶ 15 [CWS-1]; Bear Creek Mining Corporation, 2004 Annual Report (Apr. 15, 2005) at 1, 2, 10 [BR-04].

<sup>26</sup> C-I ¶ 22; R.Prov.M.-I ¶ 6; R-I ¶ 208; Constitution of Peru (Dec. 29, 1993) Article 71 [R-001]; Political Constitution of Peru Enacted on 29th Dec., 1993, Official Edition and English Translation (“Constitution of Peru”), Art. 71 [C-0024].

<sup>27</sup> C-I ¶¶ 22 – 24; R.Prov.M.-I ¶ 6; R-I ¶ 208; Constitution of Peru (Dec. 29, 1993) Article 71 [R-001]; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017]; Constitution of Peru, Art. 71 [C-0024]; Political Constitution of Peru

125. The Parties dispute the effect of a foreign national’s application for a public necessity Supreme Decree. Claimant explains that mining rights in Peru are granted to those who first request them, thereby generating the risk that, by applying for the Supreme Decree, Claimant would alert Peruvian individuals and companies to the existence of potential mineral deposits, thereby enabling them to obtain the corresponding rights before Claimant.<sup>28</sup> Respondent, however, states that Claimant could have acquired the concessions by applying for them in its own name and then submitting the request for concessions, which would have paused the concession application until either Claimant obtained the public necessity decree or affirmatively abandoned its claim to the concessions. In doing so, Claimant would have maintained its priority *vis-à-vis* the concessions, but would have had to wait until the Article 71 Supreme Decree process had completed.<sup>29</sup>
126. Claimant states that, in order to maximize its chances of ultimately securing the mining rights related to these deposits, Claimant agreed with Ms. Villavicencio that she would secure these mineral rights while Claimant requested and until it obtained the authorization required under Article 71 of the Peruvian Constitution.<sup>30</sup> Respondent characterizes this as Claimant using Ms. Villavicencio to act as a front to hold the concessions for Claimant.<sup>31</sup>
127. The Parties dispute whether (1) Ms. Villavicencio claimed the Santa Ana concessions in her own individual capacity as a Peruvian citizen, (2) Claimant specifically disclosed the nature and extent of Ms. Villavicencio’s employment with Claimant when applying to the Government for the Supreme Decree required under Article 71 of the Peruvian Constitution, (3) the Option Agreements that

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Enacted on Jan. 18th, 1920, Art. 39 [C-0025]; Marcial Rubio Correa, Estudio de le Constitución Política de 1993 381 (Vol. 3, 1999) [C-0026]; Constitutional Debate – 1993, Comisión de Constitución y Reglamento, Vol. IV [C-0027]; Constitutional Court Decision, Exp. 04966-2008-PA/TC, Apr. 13, 2009 [C-0028]; Bullard First Report (“Bullard First Report”) ¶¶ 18.b, 85, 90, 93, 102, 113.i, 113.j [CEX-003]; Swarthout First Statement ¶ 16 [CWS-1].

<sup>28</sup> RfA ¶ 13; R.Prov.M.-I ¶ 7.

<sup>29</sup> R-II ¶ 75.

<sup>30</sup> *Id.* at ¶ 390; RfA ¶ 14; C-I ¶ 25; R.Prov.M.-II ¶ 7; R-I ¶ 213; First Session at 21:19 – 21:36 (“*Bear Creek agreed with Ms. Karina Villavicencio, a Peruvian national and employee of Bear Creek of Peru that she would secure these mineral rights while the company requested and until it obtained the authorization required under Article 71 of the Peruvian Constitution.*”); *Ministry of Energy and Mines v. Bear Creek Mining Co. Surcursal del Peru and Jenny Karina Villavicencio Gardini*, Complaint Against a Legal Act (“MINEM Lawsuit Complaint”) (Jul. 14, 2011) [R-002]; Swarthout First Statement ¶¶ 17 – 18 [CWS-1].

<sup>31</sup> R-II ¶ 390; Swarthout First Statement ¶ 18 [CWS-1].

Claimant entered into with Ms. Villavicencio are legal under Peruvian law and are common place within the Peruvian mining sector, and (4) whether, because the Option Agreements between Claimant and Ms. Villavicencio were registered with the public registry, Respondent knew that these Option Agreements were between Claimant and its employee.<sup>32</sup> The Parties also dispute whether Ms. Villavicencio was contractually or otherwise obligated to follow Claimant’s instructions with respect to the concessions.<sup>33</sup>

128. From May to November 2004, six mining petitions corresponding to the Santa Ana Project area were filed in the name of Ms. Villavicencio.<sup>34</sup> Thereafter, she entered into six Option Agreements with Claimant, giving Claimant the option to acquire the mining concessions if it successfully obtained all requisite authorizations to acquire them.<sup>35</sup> The Option Agreements – and later Claimant’s application for public necessity and the Transfer Agreements – were drafted by the law firm Estudio Grau. Dr.

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<sup>32</sup> C-Prov.M.-II ¶¶ 6 – 9; R.Prov.M.-II ¶ 8; Tr. 1748 – 1750 (C. Closing); Constitution of Peru (Dec. 29, 1993) Article 71 [R-001].

<sup>33</sup> C-III ¶ 12; R-II ¶ 60; Option Contract for the Transfer of Mineral Rights No. 3,512, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú (11/17/2004) [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 (9/5/2006) [R-007]; Second Expert Report of Alfredo Bullard González (Jan. 6, 2016) (“Bullard Second Report”) ¶¶ 20, 52 – 56, 60 [CEX-005]; Expert Report of Hans A. Flury (Jan. 5, 2016) (“Flury First Report”) ¶ 59 [CEX-006].

<sup>34</sup> RfA ¶ 14; C-I ¶ 28; C-III ¶ 60; R.Prov.M.-I ¶ 9; R-I ¶ 40; R-II ¶ 58; Tr. 1751 (C. Closing); Contracts for the Option to Transfer Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Nov. 17, 2004 and Dec. 5, 2004 [C-0016]; Application for the Attribution of Santa Ana Concessions, 9A, 1, 2, and 3 submitted by J. K. Villavicencio Gardini to INACC, May 26, 2004 [C-0029]; Application for the Attribution of Santa Ana Mining Concessions, 5, 6, and 7 submitted by J. K. Villavicencio Gardini to INACC, Nov. 29, 2004 [C-0030]; Directorial Resolution Granting KARINA 1 Mining Concession to Jenny Villavicencio, Directorial Resolution No. 1856-2006-INACC/J [R-276]; Directorial Resolution Granting KARINA 9A Mining Concession to Jenny Villavicencio, Directorial Resolution No. 2459-2006-INACC/J (6/13/2006) [R-277]; Directorial Resolution Granting KARINA 2 Mining Concession to Jenny Karina Villavicencio, Directorial Resolution No. 1854-2006-INACC/J [R-365]; Directorial Resolution Granting KARINA 3 Mining Concession to Jenny Karina Villavicencio, Directorial Resolution No. 1855-2006-INACC/J [R-366]; Presidential Resolution Granting KARINA 5 Mining Concession to Jenny Karina Villavicencio, Presidential Resolution No. 2868-2007-INGEMME/PCD/PM [R-367]; Presidential Resolution Granting KARINA 6 Mining Concession to Jenny Karina Villavicencio, Presidential Resolution No. 2976-2007-INGEMME/PCD/PM [R-368]; Presidential Resolution Granting KARINA 7 Mining Concession to Jenny Karina Villavicencio, Presidential Resolution No. 2977-2007-INGEMME/PCD/PM [R-369].

<sup>35</sup> RfA ¶¶ 14, 15; C.Prov.M.-II ¶ 10; C-I ¶¶ 15, 28; C-II ¶ 22; C-III ¶ 60; R-I ¶ 42; R-II ¶ 59 (*stating* Nov. 7, 2004); Contracts for the Option to Transfer Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Nov. 17, 2004 and Dec. 5, 2004 [C-0016]; Option Contract for the Transfer of Mineral Rights No. 3,512, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú (11/17/2004) [R-006].

Miguel Grau, a partner at Estudio Grau, is a member of Claimant's board.<sup>36</sup>

129. Claimant and Ms. Villavicencio recorded the Option Agreements with the Peruvian Public Registry in 2005.<sup>37</sup> Initially, the INACC cancelled the mining claims and Ms. Villavicencio appealed.<sup>38</sup> On June 28, 2005, the Option Agreements were submitted for registration to SUNARP.<sup>39</sup> In July 2005, SUNARP refused to register the November 17, 2004 Option Agreement, citing Article 71 of the Peruvian Constitution.<sup>40</sup> Claimant challenged this decision before the SUNARP Registry Tribunal.<sup>41</sup>
130. On November 7, 2005, the SUNARP Registry Tribunal decided that the Option Agreements could be recorded.<sup>42</sup> The Parties dispute the legal value of this event. Claimant states that SUNARP's administrative decision confirmed that the 2004 Option Agreements were valid under the Peruvian Constitution because they did not entail a transfer of legal rights until Claimant would decide to exercise its options under said agreements.<sup>43</sup> Respondent disputes the SUNARP Registry Tribunal's authority to create or affirm substantive rights and states that the SUNARP Registry Tribunal only has the authority to publicly register documents that meet certain technical requirements.<sup>44</sup> The Parties dispute whether the Option Agreements conferred indirect ownership rights.<sup>45</sup>

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<sup>36</sup> C-III ¶¶ 25, 28; R-II ¶ 114; Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 3, 2007 (signed by Estudio Grau associate) [C-0015]; Contracts for the Option to Transfer Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Nov. 17, 2004 and Dec. 5, 2004 (signed by Estudio Grau partner) [C-0016]; Bear Creek Mining Corporation List of Board of Directors, *available at* <http://www.bearcreekmining.com/s/directors.asp> (last visited Apr. 11, 2016) [R-380].

<sup>37</sup> RfA ¶ 14; C.Prov.M.-II ¶ 1.

<sup>38</sup> C-I ¶ 27; Resolution No. 2056, 2057 and 2058-2005-INACC/J Canceling Mining Claims, May 12, 2005 [C-0031]; Appeal Petition filed by J. K. Villavicencio Gardini with the Mining Council, Jun. 6, 2005 [C-0032].

<sup>39</sup> C-III ¶ 64.

<sup>40</sup> C-I ¶ 34; SUNARP Notice of Observation No. 2005-00041200, Jul. 5, 2005 [C-0039].

<sup>41</sup> C-I ¶ 35; Appeal to the Notice of Observation No. 2005-00041200 to the President of the 5th Chamber of the Registry Tribunal, Sept. 14, 2005 (Spanish) [C-0040].

<sup>42</sup> C.Prov.M.-II ¶ 11; R-I ¶ 48.

<sup>43</sup> C.Prov.M.-II ¶ 11.

<sup>44</sup> R-I ¶ 49; R-II ¶¶ 105, 106, 392; Expert Report of Luis Rodríguez-Mariátegui Canny (Oct. 6, 2015) ("Rodríguez-Mariátegui First Report") [REX-003]; Second Expert Report of Luis Rodríguez-Mariátegui Canny (Mar. 31, 2016) ("Rodríguez-Mariátegui Second Report") ¶¶ 33 – 40 [REX-009].

<sup>45</sup> C-II ¶ 199, C-III ¶ 12; R-II ¶ 47; Tr. 1748 – 1750 (C. Closing).

131. On December 22, 2005, SUNARP published the Registry Tribunal's November 7, 2005 decision in the Peruvian Gazette, *El Peruano*.<sup>46</sup>
132. On January 21, 2006, a new map that resized the Aymara Lupaca Reserved Zone was published.<sup>47</sup> On March 8, 2006, the INACC issued four reports confirming that the Karina 9A, 1, 2, and 3 concessions were not located within the protected region.<sup>48</sup> Directorial Resolutions granting Ms. Villavicencio the Karina 1, 2, and 3 concessions were issued on April 28, 2006.<sup>49</sup> The Directorial Resolution granting the Karina 9A concession to Ms. Villavicencio was issued on June 13, 2006.<sup>50</sup> The concessions to Ms. Villavicencio were registered later in 2006.<sup>51</sup>
133. On June 9, 2006, Ms. Villavicencio submitted a Declaration of Environmental Impact to MINEM seeking approval to begin exploration activities for one of the concessions. She explained that

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<sup>46</sup> C-I ¶ 38; C-II ¶¶ 198, 207; C-III ¶¶ 60, 104, 142; Resolution No. 193-2005-SUNARP-TR-A issued by the SUNARP Tribunal Registral, Nov. 7, 2005 § VII [C-0038].

<sup>47</sup> Directorial Resolution Granting KARINA 2 Mining Concession to Jenny Karina Villavicencio, Directorial Resolution No. 1854-2006-INACC/J [R-365]; Directorial Resolution Granting KARINA 3 Mining Concession to Jenny Karina Villavicencio, Directorial Resolution No. 1855-2006-INACC/J [R-366]; Presidential Resolution Granting KARINA 5 Mining Concession to Jenny Karina Villavicencio, Presidential Resolution No. 2868-2007-INGEMME/PCD/PM [R-367]; Presidential Resolution Granting KARINA 6 Mining Concession to Jenny Karina Villavicencio, Presidential Resolution No. 2976-2007-INGEMME/PCD/PM [R-368]; Presidential Resolution Granting KARINA 7 Mining Concession to Jenny Karina Villavicencio, Presidential Resolution No. 2977-2007-INGEMME/PCD/PM [R-369].

<sup>48</sup> C-III ¶¶ 14, 60, 142; Report No. 3129-2006-INACC-DGCM-UL for Karina 1 issued by INACC, Mar. 8, 2006 [C-0249]; Report No. 3129-2006-INACC-DGCM-UL for Karina 2 issued by INACC, Mar. 8, 2006 [C-0250]; Report No. 3127-2006-INACC-DGCM-UL for Karina 3 issued by INACC, Mar. 8, 2006 [C-0251]; Report No. 3111-2006-INACC-DGCM-UL for Karina 9A issued by INACC, Mar. 8, 2006 [C-0252]; Directorial Resolution Granting KARINA 2 Mining Concession to Jenny Karina Villavicencio, Directorial Resolution No. 1854-2006-INACC/J [R-365]; Directorial Resolution Granting KARINA 3 Mining Concession to Jenny Karina Villavicencio, Directorial Resolution No. 1855-2006-INACC/J [R-366].

<sup>49</sup> Directorial Resolution Granting KARINA 1 Mining Concession to Jenny Villavicencio, Directorial Resolution No. 1856-2006-INACC/J [R-276]; Directorial Resolution Granting KARINA 2 Mining Concession to Jenny Karina Villavicencio, Directorial Resolution No. 1854-2006-INACC/J [R-365]; Directorial Resolution Granting KARINA 3 Mining Concession to Jenny Karina Villavicencio, Directorial Resolution No. 1855-2006-INACC/J [R-366].

<sup>50</sup> R-II ¶ 58; RPHB-II ¶ 20; Directorial Resolution Granting KARINA 9A Mining Concession to Jenny Villavicencio, Directorial Resolution No. 2459-2006-INACC/J (6/13/2006) [R-277].

<sup>51</sup> C-I ¶ 27; C-III ¶¶ 60, 142; Notice of Registration of the Karina 2 and Karina 3 Concessions, Jul. 5, 2006 [C-0034]; Notice of Registration of the Karina 1 Concession, Aug. 8, 2006 [C-0035]; Notice of Registration of the Karina 5, Karina 6 and Karina 7 Concessions, Feb. 28, 2008 [C-0036]; Notice of Cancellation of Mineral Rights, Jun. 25, 2010 [C-0037]; SUNARP Notice of Registration of Mineral Rights, Aug. 9, 2006 [C-0041]; Notice of Registration of the Karina 9A mining concession to J. Karina Villavicencio, Sept. 26, 2006 [C-0288].

Claimant would be responsible for providing resources for exploratory works.<sup>52</sup>

134. On June 22, 2006, DGAAM reviewed Ms. Villavicencio's land use agreement with the Association of Agricultural Producers of El Condor de Aconcagua and noted that the authorization for the use of the land was signed by Claimant, a third party distinct from the owner of the mining rights, Ms. Villavicencio. DGAAM asked Ms. Villavicencio to obtain or update the authorization for use of surface land.<sup>53</sup>
135. On June 27, 2006, Claimant paid sub-surface mining fees to INGEMMET, on behalf of Ms. Villavicencio.<sup>54</sup>
136. On July 10, 2006, DGAAM, when reviewing Ms. Villavicencio's comments regarding Informe No. 157-2006/MEM-AAM/EA, acknowledged and accepted Ms. Villavicencio's explanation that the land use agreement with the Fundo Aconcagua was signed by Claimant on behalf of Ms. Villavicencio. Ms. Villavicencio informed DGAAM that she was going to sign the agreement herself before entering into operations.<sup>55</sup> The following day, DGAAM approved of Ms. Villavicencio's Declaration of Environmental Impact, granting Ms. Villavicencio the right to explore for mineral deposits.<sup>56</sup>
137. On September 25, 2006, Ms. Villavicencio applied to amend her exploration permit.<sup>57</sup>
138. On October 12 and 30, 2006, MINEM ordered Ms. Villavicencio to respond to remarks indicated in the Modification of the Affidavit of the Santa Ana Mining Exploration Project. MINEM also ordered

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<sup>52</sup> C-III ¶ 60; R-I ¶ 173; R-II ¶ 64; Informe No. 170-2006/MEM-AAM/EA, Jul. 10, 2006 [C-0140]; J. Karina Villavicencio's Request for the Approval of Mining Exploration Category B Affidavit, Jun. 9, 2006 [C-0287]; Resolution Approving Ms. Villavicencio's Sworn Declaration, Directorial Resolution No. 256-2006-MEM/AAM (7/11/2006) [R-034].

<sup>53</sup> C-III ¶¶ 14, 60; R-II ¶ 409; Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006 [C-0139]; Rodríguez-Mariátegui Second Report ¶¶ 65 – 66 [REX-009].

<sup>54</sup> C-III ¶¶ 60, 142; Letter from A. Swarouth and K. Villavicencio to Banco de Credito, Jun. 27, 2006 [C-0201]; Letter from D. Volkert and K. Villavicencio to Banco de Credito, Jun. 20, 2007 [C-0202].

<sup>55</sup> C-III ¶ 60; Informe No. 170-2006/MEM-AAM/EA, Jul. 10, 2006 [C-0140].

<sup>56</sup> R-I ¶ 173; Tr. 1755 (C. Closing); Informe No. 170-2006/MEM-AAM/EA, Jul. 10, 2006 [C-0140]; Resolution Approving Ms. Villavicencio's Sworn Declaration, Directorial Resolution No. 256-2006-MEM/AAM (7/11/2006) [R-034].

<sup>57</sup> Tr. 1755 (C. Closing).

Ms. Villavicencio to inform the holder of the concession.<sup>58</sup>

139. On November 3, 2006, SUNARP registered the Option Agreement dated December 5, 2004.<sup>59</sup>
140. On December 5, 2006, Claimant initiated the procedure to obtain the necessary mining rights for the Santa Ana Project. Claimant submitted an application to MINEM for a Declaration of Public Necessity and a Supreme Decree authorizing Claimant to purchase the Santa Ana Concessions from Ms. Villavicencio.<sup>60</sup> The 200-page public necessity application contained a 1-page public registry entry recording Ms. Villavicencio's role as Claimant's legal representative.<sup>61</sup> Claimant also submitted (1) copies of Ms. Villavicencio's applications for the Karina 9A, 1, 2, 3, 5, 6, and 7 mining concessions; (2) copies of INACC's approval of Ms. Villavicencio's petition for the Karina 9A, 1, 2, and 3 mining concessions and the official registration of Ms. Villavicencio's concession rights for the same; and (3) copies of the registered Option Agreements for the Karina 9A, 1, 2, 3, 5, 6, and 7 mining concessions.<sup>62</sup> A check from Claimant that Ms. Villavicencio filed with her mining petition and the INACC receipt in Claimant's name acknowledging Claimant's payment of the Concession Application Fee for Karina 7 were also submitted.<sup>63</sup>
141. On December 11, 2006, the Ministry approved Ms. Villavicencio's application to amend her exploration permit.<sup>64</sup>
142. On January 30, 2007, Ms. Villavicencio submitted an Environmental Impact Assessment ("ESIA")

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<sup>58</sup> Informe No. 265-2006/MEM-AAM/EA/RC, Oct. 12, 2006 [C-0141].

<sup>59</sup> C-III ¶¶ 60, 142; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017].

<sup>60</sup> C.Prov.M.-I ¶ 5; C.Prov.M.-II ¶ 2; RfA ¶ 16; C-I ¶ 39; C-II ¶¶ 18, 34, 207, 357; C-III ¶ 60; R-I ¶ 56; R-II ¶ 67; Tr. 1751 (C. Closing); Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 ¶ 6 [C-0006]; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017].

<sup>61</sup> C-II ¶ 357; R-II ¶ 390; Tr. 1773 (C. Closing).

<sup>62</sup> C-III ¶ 83; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) Annex VI at 80 – 81, Annex VIII at 86 *et seq.*, Annex IX at 165 – 183, Annex X at 185 – 186 [C-0017].

<sup>63</sup> Tr. 1773 – 1774 (C. Closing).

<sup>64</sup> *Id.* at 1755 – 1756 (C. Closing).

for the exploration stage for an additional 20 drilling platforms to DGAAM, in her own name.<sup>65</sup>

143. In the course of reviewing Claimant's application for a Supreme Decree, MINEM requested additional information regarding the location of the Project and the access roads, as well as documentation of Claimant's incorporation and nationality, from Claimant.<sup>66</sup> Claimant addressed MINEM's queries.<sup>67</sup>
144. On March 12, 2007, MINEM transmitted Claimant's application for a Supreme Decree to the Ministry of Defense for consideration.<sup>68</sup>
145. On June 20, 2007, Claimant paid sub-surface mining fees to INGEMMET on behalf of Ms. Villavicencio.<sup>69</sup>
146. Claimant explains that, on July 26, 2007, the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces voiced approval of the Santa Ana Project.<sup>70</sup>
147. On September 4, 2007, the DGAAM, through Executive Resolution No. 269-2007-MEM/AAM, approved the ESIA of the "Santa Ana" Mining Exploration Project – Category "C", which was presented by Ms. Villavicencio with the purpose of conducting mining exploration activities within the "Karina 9A" mining concession (code No. 01-01462-04).<sup>71</sup>
148. On September 26, 2007, the Vice-Minister Secretary General of External Relations rendered a

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<sup>65</sup> R-I ¶ 174; Agreements Between Bear Creek and Local Communities [R-043]; Rodríguez-Mariátegui First Report ¶ 36 [REX-003].

<sup>66</sup> C-I ¶ 40; C-II ¶¶ 36, 357; C-III ¶¶ 60, 63, 142; Letter from J.C. Pinto Najar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007 [C-0042].

<sup>67</sup> C-I ¶ 40; C-II ¶ 357; C-III ¶ 60; Letter from M. Grau Malachowski, Bear Creek, to MINEM, Feb. 26, 2007 [C-0043].

<sup>68</sup> C-II ¶ 358; Resolution issued by MINEM to the Ministry of Defense for the Authorization to Acquire Mineral Rights filed by Bear Creek Mining Company, Mar. 12, 2007 [C-0044].

<sup>69</sup> C-III ¶¶ 60, 142; Letter from D. Volkert and K. Villavicencio to Banco de Credito, Jun. 20, 2007 [C-0202].

<sup>70</sup> C-II ¶ 358; Letter from the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces to the Secretary General of the Ministry of Defense, Jul. 26, 2007 [C-0045].

<sup>71</sup> OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 [C-0143]; Resolution that Approved EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 269-2007-MEM/AAM [R-035].

favorable opinion on Claimant's application to MINEM. Provided that concerns regarding water and social and environmental matters were addressed, there were no objections to Claimant carrying out activities within the 50 km border zone.<sup>72</sup>

149. On November 29, 2007, Supreme Decree 083-2007 ("Supreme Decree 083") was enacted by the President and Council of Ministers of Peru, declaring that the Santa Ana Project was a public necessity and authorizing Claimant to acquire, own, and operate the corresponding mining concessions and to exercise any rights derived from the ownership.<sup>73</sup>
150. Thereafter, in the period during late 2007 and early 2008, Claimant gradually took steps to acquire title to the mining concessions over the Santa Ana Project.<sup>74</sup> On November 30, 2007, Claimant exercised its options in the Option Agreements for the Transfer of Mining Rights.<sup>75</sup> On December 3, 2007, Claimant acquired the Santa Ana Concessions from Ms. Villavicencio by executing two mineral rights transfer agreements ("Transfer Agreements"),<sup>76</sup> which were confirmed before a Notary on December 6, 2007<sup>77</sup> and were registered in the book of mineral rights on December 18, 2007.<sup>78</sup> After the Karina 5, 6, and 7 concessions were granted to Ms. Villavicencio by Presidential Resolution

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<sup>72</sup> C-I ¶ 41; C-II ¶ 358; Letter from the Vice-Minister Secretary General of External Relations to the Ministry of Mines, Sept. 26, 2007 [C-0046]; Opinion by Ministry of Foreign Affairs to the Ministry of Energy and Mines Regarding Bear Creek's Declaration of Public Necessity, OF.RE(VSG) No. 2-13-17/43 [R-047].

<sup>73</sup> C.Prov.M.-I ¶¶ 4 – 5; C.Prov.M.-II ¶ 10; RfA ¶ 17; C-I ¶¶ 3, 16, 42, 44 (published), 176; C-II ¶¶ 19, 37, 190, 198, 208, 359; C-III ¶¶ 60, 70, 142; CPHB-I ¶ 8; R-I ¶ 35; R-II ¶ 111; Tr. 1751 (C. Closing); Supreme Decree No. 083-2007-EM published on Nov. 29, 2007 [C-0004].

<sup>74</sup> RfA ¶ 17; C.Prov.M.-I ¶¶ 4 – 5; C.Prov.M.-II ¶ 10; R.Prov.M.-I ¶ 9.

<sup>75</sup> Tr. 1751 (C. Closing); Letter from M. Grau Malachowski, Bear Creek, to J. K. Villavicencio Gardini, Nov. 30, 2007 [C-0018]; OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 [C-0143].

<sup>76</sup> C-I ¶¶ 15 – 16, 43 – 44; C-II ¶¶ 21, 190, 208; C-III ¶¶ 60, 70, 82; Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 3, 2007 [C-0015]; Notarized Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 6, 2007 [C-0019].

<sup>77</sup> RfA ¶ 17; C-I ¶¶ 16, 109 (176); C.Prov.M.I ¶ 5 (*stating* that Claimant acquired the concessions on this date); Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 ¶ 8 [C-0006]; Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 3, 2007 [C-0015]; Notarized Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 6, 2007 [C-0019]; OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 [C-0143].

<sup>78</sup> Tr. 1751 (C. Closing); SUNARP Registration Notice of the Transfer Agreement for Santa Ana Concessions 9A, 1, 2 and 3, Feb. 1, 2008 [C-0020]; SUNARP Registration Notice of the Transfer Agreement for Santa Ana Concessions 5, 6 and 7, Feb. 28, 2008 [C-0021].

on December 14, 2007, INACC and/or INGEMMET registered Ms. Villavicencio's concessions on February 28, 2008.<sup>79</sup> On March 5, 2008, Claimant asked MINEM to change the holder of record to Claimant, as provided in a Resolution.<sup>80</sup> MINEM approved this name change request on March 13, 2008.

151. Claimant first announced results from drilling in Santa Ana on December 18, 2007.<sup>81</sup>
152. The Parties disagree about the nature of Claimant's relationship with communities that would be affected by the Santa Ana Project. Respondent states that, already in May 2008, Claimant knew of opposition to the Santa Ana Project among neighboring communities. At that time, Claimant's staff was threatened and attacked in the Kelluyo district when they tried to explain the company's environmental management.<sup>82</sup>
153. According to Respondent, on September 4, 2008, Claimant's employees were physically detained in the Ancomarca Community for at least four hours, in part of an effort to pressure Claimant into sharing the benefits of the Santa Ana Project with their community. Claimant's employees were threatened that something would happen on October 14, 2008.<sup>83</sup>
154. On September 5, 2008, the DGAAM, through Executive Resolution No. 216-2008-MEM/AA, approved a modification to the Environmental Evaluation of the Santa Ana Mining Project – Category

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<sup>79</sup> C-III ¶ 60; Presidential Resolution Granting KARINA 5 Mining Concession to Jenny Karina Villavicencio, Presidential Resolution No. 2868-2007-INGEMME/PCD/PM [R-367]; Presidential Resolution Granting KARINA 6 Mining Concession to Jenny Karina Villavicencio, Presidential Resolution No. 2976-2007-INGEMME/PCD/PM [R-368]; Presidential Resolution Granting KARINA 7 Mining Concession to Jenny Karina Villavicencio, Presidential Resolution No. 2977-2007-INGEMME/PCD/PM [R-369].

<sup>80</sup> OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 [C-0143].

<sup>81</sup> Press Release, Bear Creek Mining Corporation, *Bear Creek's Santa Ana Drilling Continues To Expand Silver Mineralization Including High-Grade Intercepts On The Perimeters Of The Open Footprint*, Dec. 18, 2007 [C-0049].

<sup>82</sup> R-II ¶¶ 138, 195; Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-342].

<sup>83</sup> R-II ¶ 196; Deposition of Miguel Angel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (Oct. 20, 2008) [R-324]; Deposition of Basiana Bravo Zamalloa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-338]; Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-342]; Deposition of Pedro Salomon Luna, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (Dec. 22, 2008) [R-372].

C. This was presented to Claimant to conduct mining exploration activities in Karina 9A and Karina 1.<sup>84</sup> In its closing argument, Claimant characterized this as MINEM “*agree[ing] to transfer Ms. Villavicencio’s Exploration Permits to Bear Creek after they acquired the Concessions.*”<sup>85</sup>

155. On October 14, 2008, members of the Kelluyo Community invaded Claimant’s campsite, ransacked several of Claimant’s offices and then set fire to the offices.<sup>86</sup> Claimant and Respondent differ in their description of events. According to Claimant, members of the Kelluyo Community invaded the campsite after participating in a local fair where alcohol had been served. They caused minimal damage and left valuables untouched, save for the theft of a pickup truck and several laptops.<sup>87</sup> Claimant filed a criminal complaint against Aymara leaders to address this theft.<sup>88</sup> Respondent states that the acts were a protest against the Santa Ana Project that culminated in looting and burning.<sup>89</sup> Respondent points out that, a few months later, Mr. Swarthout sent a letter to MINEM describing the

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<sup>84</sup> OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 [C-0143]; Resolution Approving First Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 216-2008-MEM/AAM [R-036].

<sup>85</sup> Tr. 1757 (C. Closing).

<sup>86</sup> C-II ¶ 75; R-I ¶ 88; R-II ¶¶ 181, 193; Office of the Ombudsman of Perú, Social Conflict Report No. 56 (10/31/2008) [R-049]; Expert Report of Antonio Alfonso Peña Jumpa (Oct. 6, 2015) (“Peña First Report”) ¶ 63 [REX-002].

<sup>87</sup> C-II ¶ 75; Rebuttal Witness Statement of Andrew T. Swarthout (Jan. 6, 2016) (“Swarthout Second Statement”) ¶¶ 35 – 37 [CWS-6].

<sup>88</sup> C-II ¶ 75; Resolution No. 468-2008-MP-2da-FPMCH-DESAGUADERO (10/17/2008) [R-051].

<sup>89</sup> R-I ¶ 88; R-II ¶¶ 181, 193; Office of the Ombudsman of Perú, Social Conflict Report No. 56 (10/31/2008) [R-049]; Resolution No. 468-2008-MP-2da-FPMCH-DESAGUADERO (10/17/2008) [R-051]; Letter from Bear Creek to the DGAAM on the 2008 Campsite Burning (Dec.11, 2008) [R-294]; Deposition of Miguel Angel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (Oct. 20, 2008) [R-324]; Deposition of Marco Antonio Maita Rodríguez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (Oct. 20, 2008) [R-331]; Deposition of Guillermo Jorge Ramos Ochoa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-337]; Deposition of Basiana Bravo Zamalloa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-338]; Deposition of Cesar Tapia Tumba, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-339]; Deposition of Julio Quino Saavedra, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-340]; Deposition of Miguel Ramos Fuentes, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-341]; Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-342]; Deposition of Rene Charles Tonconi Condori, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-343]; Deposition of Pedro Salomon Luna, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (Dec. 22, 2008) [R-372].

events of October 14, 2008 as an organized attack by at least 2,000 people.<sup>90</sup> At the Hearing, Respondent stated that this was a protest where 2,800 – 3,000 men, women, and children gathered in Huacullani to voice objections to the Santa Ana Project.<sup>91</sup> Respondent further explained that the Santa Ana Project was causing division and resentment among the communities, some of whom were to be involved in (and would benefit from) the Project, whereas others would not, with the consequence that those that received jobs were placated and those who received nothing were angry.<sup>92</sup> Respondent stated that, contrary to Mr. Swarthout’s testimony, the drill-core – Claimant’s most valuable asset – had indeed been emptied, damaged, and/or lost during the attack.<sup>93</sup>

156. On May 23, 2009, Claimant concluded an Agreement Renewal and Social Support Agreement with the Community of Condor Aconcagua (May 23, 2009 – May 22, 2010) for the surface use of lands corresponding to the Community of Condor Aconcagua.<sup>94</sup>
157. On May 26, 2009, Claimant published the April 2009 results of a positive Preliminary Economic Assessment (“PEA”), showing resources of 97.7 million ounces of silver and a net present value of US\$ 115 million, at then-current prices.<sup>95</sup>
158. On July 2, 2009, Claimant concluded an Agreement Renewal and Social Support Agreement with the Community of Ancomarca (July 2, 2009 – July 1, 2010), stating that the community supports the Santa Ana Project, and that Claimant commits to employing some members of the community and to undertake other social support actions.<sup>96</sup>

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<sup>90</sup> R-II ¶¶ 198 – 199; Letter from Bear Creek to the DGAAM on the 2008 Campsite Burning (Dec. 11, 2008) [R-294]; Second Expert Report of Antonio Alfonso Peña Jumpa (Apr. 13, 2016) (“Peña Second Report”) ¶ 38 [REX-008]; Swarthout Second Statement ¶ 35 [CWS-6].

<sup>91</sup> Tr. 1857 – 1859 (R. Closing).

<sup>92</sup> Tr. 1858 – 1859 (R. Closing); Tr. 1317 (Peña).

<sup>93</sup> Tr. 1902 – 1903 (R. Closing); Letter from Bear Creek to the DGAAM on the 2008 Campsite Burning (Dec. 11, 2008) [R-294].

<sup>94</sup> Agreement between Condor Aconcagua and Bear Creek, May 23, 2009 [C-0177].

<sup>95</sup> C-I ¶ 45; C-III ¶ 70; Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Positive Scoping Study and Updated Resource Estimate at Santa Ana Deposit*, Apr. 20, 2009 [C-0050]; Technical Report - Santa Ana Resource Update and Preliminary Economic Assessment, May 26, 2009 [C-0136]; Swarthout First Statement ¶ 32 [CWS-1].

<sup>96</sup> Agreement between Ancomarca and Bear Creek, Jul. 2, 2009 [C-0178].

159. In August 2009, Claimant conducted five opening workshops with a number of local communities, including the Huacullani, Ingenio, Challocolo, Condor de Acongua, and Ancomarca, with a view to introduce them to the Santa Ana Project. Each of these communities is in the District of Huacullani, where the Santa Ana Project is located.<sup>97</sup> In response to the Tribunal’s question “*In the present case, what were the State authorities’ responsibilities in relation to obtaining a Social License?*”<sup>98</sup>, Respondent stated that representatives of Puno’s environmental authorities accompanied Claimant to some workshops and warned that the community outreach actions were not effective.<sup>99</sup>
160. In its closing argument, Claimant stated that, on October 6, 2009, MINEM approved of its application to amend its exploration permit.<sup>100</sup>
161. In 2010, Claimant’s agreements to explore for silver with the Parcialidad de Condor Aconcagua and the Comunidad Ancomarca expired.<sup>101</sup> SUNARP registered the Termination of Mining Right for Karina 3.<sup>102</sup>
162. On September 2, 2010, Claimant held two participation workshops related to the preparation of the ESIA for the 60 KV power transmission line from the Pomata Substation to the Santa Ana Substation and other substations in Huacullani and in Pomata.<sup>103</sup>
163. According to Respondent, Claimant first reached out to explain the Santa Ana Project to the Kelluyo communities in October 2010.<sup>104</sup> Claimant states that it conducted informational workshops with local communities located in the District of Huacullani, including the Huacullani, Ingenio,

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<sup>97</sup> C-I ¶ 61; C-III ¶ 70; Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, Dec. 2010 [C-0071]; Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 [C-0161].

<sup>98</sup> PO-10 ¶ 2.1.4 (a)(iv).

<sup>99</sup> RPHB-I ¶ 49; Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek, Anexo 3 “Actas Taller de Apertura EIA” at 2, 25, 53, 70 [C-0155].

<sup>100</sup> Tr. 1757 (C. Closing).

<sup>101</sup> R-II ¶ 153.

<sup>102</sup> Notice of Cancellation of Mineral Rights, Jun. 25, 2010 [C-0037].

<sup>103</sup> Acta de Primer Taller Participativo, Línea de Transmisión, Huacullani, Sept. 2, 2010 [C-0193]; Acta de Primer Taller Participativo, Línea de Transmisión, Pomata, Sept. 2, 2010 [C-0194].

<sup>104</sup> R-II ¶ 192; Letters from Kelluyo to *Defensoría* Requesting Information on Santa Ana Project [R-347].

Challocolo, Condor de Aconcagua, and Ancomarca, in November 2010.<sup>105</sup> Claimant also conducted informational workshops with the Arconuma community, located in the Kelluyo District.<sup>106</sup>

164. On November 29, 2010, the Kelluyo District Government wrote to the Ombudsman, requesting that a mining workshop to explain the benefits and disadvantages of mining, in particular with regard to the Santa Ana Project be held on January 9, 2011.<sup>107</sup>
165. Inspection of the Santa Ana Project by the Ministry of Environment's Environmental Assessment and Monitoring Agency ("OEFA") showed that Claimant had not fulfilled the environmental commitments established in the Environmental Assessment of the Santa Ana Project, but that relations with the communities located around the Project area can be described as "*harmonious*."<sup>108</sup>
166. On December 13, 2010, Claimant invited the Ancomarca Community, the Condor Aconcagua Family Tribe, the Community of Challocollo, and the Country Community Concepcion Ingenio to hold discussions about the Santa Ana Project.<sup>109</sup>
167. On December 23, 2010, Claimant submitted its ESIA to the Peruvian Government.<sup>110</sup>
168. On January 7, 2011, MINEM approved the Community Participation Plan ("CPP") and Executive Summary of the ESIA, and instructed Claimant to implement community participation mechanisms for the evaluation of the ESIA.<sup>111</sup> On January 13, 2011, Claimant made a contract with the radio

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<sup>105</sup> C-I ¶ 61; Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, Dec. 2010 [C-0071].

<sup>106</sup> *Id.*

<sup>107</sup> Letters from Kelluyo to *Defensoría* Requesting Information on Santa Ana Project [R-347].

<sup>108</sup> C-II ¶ 67; C-III ¶ 70; OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 [C-0143].

<sup>109</sup> Letters from Bear Creek to Communities on Land Use Agreements [R-093].

<sup>110</sup> RfA ¶ 21; C.Prov.M.-II ¶ 4; C-I ¶ 62, C-II ¶¶ 81, 154, 182; C-III ¶ 70; CPHB-II ¶ 26 (*stating* that the CPP was submitted); R-I ¶¶ 171, 176; R-II ¶ 312; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 ¶ 10 [C-0006]; Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, Dec. 2010 [C-0071]; Request from Bear Creek Mining Corporation to DGAAM for Approval of the ESIA, Dec. 23, 2010 [C-0072]; Ausenco Vector, *Plan de Participación Ciudadana* ("PPC") de Bear Creek [C-0155]; Rebuttal Witness Statement of Elsiario Antúnez de Mayolo (Jan. 8, 2016) ("Antúnez de Mayolo Second Statement") ¶ 15 [CWS-7].

<sup>111</sup> RfA ¶ 21; C-I ¶¶ 4, 62, 137; C-II ¶¶ 70, 82, 154, 360; C-III ¶¶ 70, 148; CPHB-I ¶ 16; CPHB-II ¶ 26; C. Closing Slide 86; R-I ¶ 178; R-II ¶ 312; Tr. 1105 – 1111 (Ramírez Delpino); Amparo Decision No. 28, Lima First

station Wayra to broadcast 5 daily radio advertisements from January 19 – 28.<sup>112</sup> The following day, Claimant published the MINEM announcement, informing the public of the ESIA and announced that a public hearing on the ESIA would take place on February 23, 2011.<sup>113</sup> On January 21, 2011, Claimant wrote to DGAAM informing it that Claimant had complied with all of the requirements.<sup>114</sup> Claimant referenced these activities in its response to the Tribunal’s question of “*what actions were legally required of Claimant in seeking to obtain a Social License, and did the Claimant take these actions.*”<sup>115</sup>

169. MINEM conducted a final public hearing on the ESIA on February 23, 2011. The hearing lasted five hours and was attended by over 700 community members.<sup>116</sup> The Kelluyo communities were absent.<sup>117</sup> On February 23, 2011, the people of the Comunidad Campesina wrote to MINEM to reject the Santa Ana Project.<sup>118</sup>

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Constitutional Court in Case, May 12, 2014 ¶ 11 [C-0006]; MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011 [C-0073]; Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek [C-0155]; Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 [C-0161].

<sup>112</sup> Services Agreement entered into by Radio Wayra – Huacullani and Bear Creek Mining Company, Jan. 13, 2011 [C-0074].

<sup>113</sup> Notices by Bear Creek published in various newspapers inviting communities to participate in the public hearing on Feb. 23, 2011 [C-0075].

<sup>114</sup> C-II ¶ 87; C-III ¶ 70; CPHB-I ¶ 17; Tr. 1091:3-8 (Ramírez Delpino); Letter from Bear Creek to DGAAM, Jan. 21, 2011 [C-0162].

<sup>115</sup> PO-10 ¶ 2.1.4 (a)(iii).

<sup>116</sup> RfA ¶ 21; C-I ¶ 63; C-II ¶¶ 88, 100, 121; C-III ¶ 70; R-II ¶ 141; Tr. 607:18 – 608:3 (Mayolo); Tr. 1860 – 1863 (R. Closing); Press Release, Bear Creek Mining Corporation, *Bear Creek Awards EPCM Contract and Completes Milestone Public Hearing for Permit Process*, Feb. 28, 2011 [C-0062]; Minutes of the Public Hearing – Mineral Subsector No. 007-2011/MEM-AAM – Public Hearing for the ESIA of the “Santa Ana” Project, Feb. 23, 2011 [C-0076]; *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011, p. 8/10 [C-0078]; *Comunidades de Huacullani Apoyan a Minera Santa Ana*, Correo Puno Prensa Peru, Mar. 23, 2011 [C-0184]; MINEM, Press Release 093-2011, Mar. 2, 2011 [C-328]; Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016 [C-0329]; Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016 [C-0331]; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) [R-010]; List of Participants at the Public Hearing [R-055]; Letter from Kelluyo Community Inquiring about the Project [R-053]; Questions Raised at the Santa Ana Public Hearing [R-054]; Letters from Kelluyo District on Santa Ana's Public Hearing [R-304]; “Huacullani Population Rejects the Santa Ana Project,” *Noticias Ser* [R-417]; Witness Statement of Elsiario Antúnez de Mayolo (May 28, 2015) (“Antúnez de Mayolo First Statement”) ¶ 13 [CWS-2]; Antúnez de Mayolo Second Statement ¶¶ 24, 26 [CWS-7].

<sup>117</sup> Letter from Kelluyo Community Inquiring about the Project [R-053]; Letters from Kelluyo District on Santa Ana's Public Hearing [R-304].

<sup>118</sup> AA Letter from Desaguadero Community [R-411]; “Huacullani Population Rejects the Santa Ana Project,”

170. In March 2011, *Frente de Defensa de los Recursos Naturales de la Zona Sur de Puno* (“FDRN”), led by Walter Aduviri, was formed as an alliance of local communities.<sup>119</sup> FDRN prepared and submitted a draft ordinance to prohibit all mining activities in Puno, to the Regional Council of Puno.<sup>120</sup> FDRN wrote letters to the President, MINEM, and Congress, demanding a halt to Claimant’s activities.<sup>121</sup> These letters contained 300 signatures.<sup>122</sup> The Kelluyo Community wrote to the Provincial Environmental Inspector of Puno regarding their concerns about the impact of the Santa Ana Project on drinking water and 320 hectares of land.<sup>123</sup> The Kelluyo Community also wrote to the President of the Association of Engineers of Peru, requesting expert assistance regarding the ESIA for the Santa Ana Project.<sup>124</sup>
171. The Regional Council approved the draft ordinance to prohibit all mining activities in Puno on March 20, 2011. Regional President Rodríguez refused to sign it.<sup>125</sup> The FDRN warned that, unless Regional President Rodríguez signed the ordinance, massive protests would ensue.<sup>126</sup>
172. From March – June 2011, there were protests in the Department of Puno.<sup>127</sup> The Parties have submitted a mix of contemporaneous newspaper articles from this period, some reporting that the

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*Noticias Ser* [R-417].

<sup>119</sup> R-II ¶ 218; Tr. 1863 (R. Closing); Peña Second Report ¶ 46 [REX-008].

<sup>120</sup> R-I ¶ 101.

<sup>121</sup> C-II ¶¶ 100 – 101; Tr. 1863 (R. Closing); Memorial submitted by the Frente de Defensa and Kelluyo’s *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP [R-015]; Memorials submitted by the Frente de Defensa and Kelluyo’s *Comunidades Campesinas* to the President of Peru, Memorial No. 0001-2011-CO-FDRN-RSP [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 [R-017]; “Elimination of Mining Activities in Puno is Proposed”, *La República Newspaper South Edition* [R-057].

<sup>122</sup> Tr. 1863 (R. Closing).

<sup>123</sup> Letter from Kelluyo Community Inquiring about the Project [R-053]; Letters from Kelluyo District on Santa Ana's Public Hearing [R-304].

<sup>124</sup> *Id.*

<sup>125</sup> R-I ¶ 101; Human Rights and Environment Association, Chronology: Antimining Protests in the South Region-2011 [R-058]; Patricia Quiñones, CONCESSIONS, PARTICIPATION, AND CONFLICT IN PUNO. THE SANTA ANA CASE, THE LIMITS TO THE MINING EXPANSION IN PERU [R-117].

<sup>126</sup> C-I ¶¶ 65 – 66; *Comuneros dan plazo a presidente regional - firma ordenanza o lo revocan*, LA REPÚBLICA, Mar. 23, 2011 [C-0079].

<sup>127</sup> R-II ¶ 213.

communities supported mining, others reporting that the communities opposed mining.<sup>128</sup>

173. Respondent states that, on March 2, 2011, local community members met in Desaguadero to protest mining activities in southern Puno. They protested the negative environmental impacts of mining and specifically requested the cancellation of the Santa Ana Project.<sup>129</sup>
174. On March 22, 2011, 20,000 – 25,000 people from communities in the districts of Huacullani, Kelluyo, Zepita, Pizacoma, Pomata, Desaguadero, Ilave Yunguyo, and Puno gathered to discuss concerns related to mining activities.<sup>130</sup> FDRN organized a march in Puno to occur on March 30, 2011. Approximately 200 people gathered in the main square in the city of Puno to demand approval of the ordinance, and mining students protested in support of the mining concessions.<sup>131</sup> The Huacullani Communities did not take part in the protest.<sup>132</sup>
175. According to Claimant, in March 2011, the Governor of Huacullani, one of the districts of the Puno region, issued a statement repudiating the attitude of leaders from other districts causing unrest in the Huacullani jurisdiction where the Santa Ana Project is located.<sup>133</sup>
176. On April 19, 2011, there was a meeting between Claimant and Prime Minister Rosario Fernández, pursuant to Claimant’s April 8 request. Prime Minister Fernández expressed concern over the protests in the south of Puno. Claimant states that it offered assistance and that the Prime Minister assured

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<sup>128</sup> See e.g. R-II ¶ 222; “Huacullani Population Rejects the Santa Ana Project,” *Noticias Ser* [R-417]; *Huacullani en contra de marcha antiminera*, La República, Mar. 29, 2011 [C-0185].

<sup>129</sup> R-I ¶ 245.

<sup>130</sup> R-II ¶ 224; Press Release, Los Andes, *La Opinión Pública*, Mar. 23, 2011 [C-0081]; *Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, Mar. 29, 2011 [C-0083]; Peña Second Report ¶ 46 [REX-008].

<sup>131</sup> C-I ¶ 67; R-I ¶ 102; *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011 [C-0078]; *Universitarios de Puno se movilizaron a favor de las concesiones mineras*, Mar. 30, 2011 [C-0086]; Human Rights and Environment Association, Chronology: Antimining Protests in the South Region-2011 [R-058].

<sup>132</sup> C-II ¶ 98; *Alcalde del distrito de Huacullani ratificó que no participarán en la movilización de mañana*, ONDA AZUL, Mar. 29, 2011 [C-0082]; *Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, Mar. 29, 2011 [C-0083]; *Comunidades de Huacullani Apoyan a Minera Santa Ana*, Correo Puno Prensa Peru, Mar. 23, 2011 [C-0184]; *Huacullani en contra de marcha antiminera*, La República, Mar. 29, 2011 [C-0185]; Witness Statement of Fernando Gala (Oct. 6, 2015) (“Gala First Statement”) ¶¶ 24, 40 [RWS-1]; Witness Statement of Felipe A Ramírez Delpino (Oct. 6, 2015) (“Ramírez First Statement”) ¶ 13 [RWS-2].

<sup>133</sup> C-II ¶ 274; CPHB-I ¶ 23; Press Release, Los Andes, *La Opinión Pública*, Mar. 23, 2011 [C-0081]; *Comunidades de Huacullani Apoyan a Minera Santa Ana*, Correo Puno Prensa Peru, Mar. 23, 2011 [C-0184].

Claimant that Claimant's rights will be respected and the rule of law will be maintained.<sup>134</sup>

177. On April 19, 2011, the DGAAM and MINAG issued 196 observations identifying deficiencies in Claimant's ESIA.<sup>135</sup> In their respective responses to the Tribunal's question "*What actions were legally required of Claimant in seeking to obtain a Social License, and did the Claimant take these actions?*"<sup>136</sup>, the Parties disagreed about the effectiveness of Claimant's responses to these observations.<sup>137</sup>
178. On April 25, 2011, FDRN organized a 48-hour protest against mining projects in the Puno region. Protesters blocked the Desaguadero Bridge between Bolivia and Peru.<sup>138</sup>
179. Amid the 48-hour strike, the Regional President of Puno agreed to request that MINEM suspend the Santa Ana Project's activities and that a Regional Ordinance on mining activities be prepared. A roundtable discussion was deferred until May 9.<sup>139</sup> Respondent states that, while Claimant attempts to dismiss the April 26, 2011 letter as being not exclusively about Claimant, Mr. Swarthout did agree

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<sup>134</sup> C-II ¶ 121; C-III ¶ 70; Letter from M. A. Balestrini, Bear Creek, to Prime Minister Rosario Fernández, Apr. 8, 2011 [C-0170]; Antúnez de Mayolo Second Statement ¶ 48 [CWS-7].

<sup>135</sup> C-II ¶ 157; R-I ¶¶ 181, 188; R-II ¶ 312; CPHB-II ¶ 32; DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD [R-040]; Ministry of Agriculture, Observations to the Environmental Impact Study, Technical Opinion No. 016-11-AG-DVM-DGAA-DGA [R-041].

<sup>136</sup> PO-10 ¶ 2.1.4 (a)(iii.)

<sup>137</sup> CPHB-I ¶¶ 13, 18, 22, CPHB-II ¶¶ 32, 37; RPHB-I ¶ 39; R-II ¶ 137; Tr. 496:11 (Swarthout), 1124:19 – 1125:20 (Ramírez Delpino), 1863 – 1866 (R. Closing); Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) pp. 18-19 [C-0017]; DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD [R-40]; Bear Creek's Responses to Defense Committee's Observations to the Environmental Impact Study of the Santa Ana Project 23-24 [R-177]/[R-184]; 2010 Environmental Impact Assessment Annex L: Social Base Line 8, 10 – 11 [R-213]; 488-295 EIA Observations 04-19-2011, 30-31 [SRK-022].

<sup>138</sup> C-I ¶ 68; R-I ¶¶ 103, 245; R-II ¶ 225; *En Puno suspenden mesa de diálogo hasta el lunes 09 de mayo*, RADIO ONDA AZUL, Apr. 26, 2011 [C-0087]; *Pobladores cerrarán al frontera por el paro de los días 25 y 26 de abril*, Apr. 25, 2011 [C-0088]; Human Rights and Environment Association, Chronology: Antimining Protests in the South Region-2011 [R-058]; "Antimining Strike Generates Losses in the Tourism Sector in Puno," *La República Newspaper South Edition* [R-059]; Gala First Statement ¶ 23 [RWS-1].

<sup>139</sup> R-I ¶ 105, 245; R-II ¶ 226; RPHB-I ¶ 88; Tr. 1867 (R. Closing); *En Puno suspenden mesa de diálogo hasta el lunes 09 de mayo*, RADIO ONDA AZUL, Apr. 26, 2011 [C-0087]; Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR (4/26/2011) [R-018]; "1700 Mining Concessions," *La República Newspaper South Edition* [R-061].

that the letter mentioned no other company.<sup>140</sup>

180. On April 28, 2011, Mr. Rodríguez requested that MINEM suspend new and pending petitions for mining concessions in the Puno region. Mr. Rodríguez did not, however, request suspension of Claimant’s activities in Santa Ana.<sup>141</sup>
181. Respondent explains that, in May 2011, the Central Government became involved in trying to find a solution to the demands of the protestors and to stabilize the region.<sup>142</sup> On May 6, 2011, Vice-Minister of Mines Gala held a meeting with Regional President of Puno and explained that the Santa Ana Project could not begin operations because the ESIA was still being evaluated.<sup>143</sup> Three days later on May 9, 2011, a MINEM delegation was dispatched to Puno to explain the status of Claimant’s ESIA to local populations. Although 500 people attended this meeting, the meeting failed to alleviate populations’ concerns.<sup>144</sup>
182. On May 9, 2011, an indefinite strike started in the City of Desaguadero.<sup>145</sup> Respondent explains that this blocked several roads, including the Desaguadero Bridge between Peru and Bolivia.<sup>146</sup>

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<sup>140</sup> Tr. 1866 – 1868 (R. Closing); 654:5 – 655:4 (Mayolo); 504:1-20 (Swarthout); Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR (4/26/2011) [R-018].

<sup>141</sup> C-I ¶ 68; Letter No. 521-2011-GR-PUNO/PR from M. Rodríguez, Regional President of Puno, to P.E. Sánchez, Minister of Energy and Mines, Apr. 28, 2011 [C-0089].

<sup>142</sup> R-II ¶¶ 229, 245; Police Report from 2011 on Violence in Puno [R-306]; Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR (4/26/2011) [R-018].

<sup>143</sup> R-I ¶ 107; R-II ¶ 246; RPHB-I ¶ 88; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 4 [R-010]; MINEM, “Santa Ana Project May Not Do Any Mining Activities Because It Does Not Have the Environmental Permit” [R-019]; Gala First Statement ¶ 24 [RWS-1].

<sup>144</sup> R-I ¶ 108; R-II ¶ 247; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 5 [R-010]; MINEM, “Dialogue Is Initiated to Discuss Mining Activities in the Puno Region” [R-020]; Gala First Statement ¶ 23 [RWS-1]; Ramírez First Statement ¶ 29 [RWS-2].

<sup>145</sup> C-I ¶ 69; CPHB-II ¶ 40; R-I ¶¶ 109, 124, 245; “*Esperan que haya alguna víctima*,” EL COMERCIO, May 25, 2011 [C-0090]; *El aimarazo, a cuatro años de la huelga antiminera*, Diario Correo, May 26, 2014 [C-0237] (May 10); Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 4, 5 [R-010]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31 [R-048]; “Tension Due to Aymara Protests is Back,” *La República Newspaper South Edition* [R-062]; “Community Members Close Borders,” *La República Newspaper South Edition* [R-063]; “Protesters March towards Puno to Demand an Ordinance,” *La República Newspaper South Edition* [R-064]; Gala First Statement ¶ 25 [RWS-1].

<sup>146</sup> R-I ¶ 245; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31 [R-048]; “Community Members Close Borders,” *La República Newspaper South Edition* [R-063]; “Protesters

183. Respondent states that, on May 15, 2011, Prime Minister Fernández created a High Level Commission to travel to Puno to meet with protesters to seek a solution to the crisis. This commission met with protestors from May 16 – 17, 2011 and the meeting concluded with the signing of an “Acta.”<sup>147</sup> After the May 17, 2011 meeting, protesters submitted petitions for (1) cancellation of all mining and oil concessions in the South of Puno; (2) cancellation of the Santa Ana Project; (3) repeal of Supreme Decree 083; and (4) the protection of the Khapia Hill, a sacred place for the Aymaras.<sup>148</sup> On May 19, 2011, the High Level Commission comprised of Vice Ministers of Mines, Interior and Agriculture, and a representative of the Presidency of the Council of Ministers met with protestors. Officials announced two measures to address the protesters’ demands: a resolution declaring the Khapia Hill to be part of the nation’s cultural heritage, and the constitution of a multi-sectoral committee to study actions with respect to mining concessions. Protestors disagreed and insisted on cancellation of the Santa Ana Project.<sup>149</sup> The talks failed due to a lack of security.<sup>150</sup>
184. Claimant states that, on May 18, 2011, Prime Minister Fernández stated that the blockade of roads in the Puno region were unacceptable and linked to the political purposes of extreme organizations.<sup>151</sup>

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March towards Puno to Demand an Ordinance,” *La Republica Newspaper South Edition* [R-064].

<sup>147</sup> CPHB-I ¶ 18; R-I ¶¶ 110 – 111; R-II ¶¶ 248 – 249; RPHB-I ¶ 88; *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011p. 8/10 [C-0078]; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 5 [R-010]; MINEM, “High Level Commission from the Executive Power Travels to Puno to Initiate Dialogue” [R-021]; MINEM, “High Level Commission Continues Dialogue with Leaders and other Authorities Tomorrow in Puno” [R-065]; MINEM, “High Level Commission Continues Dialogue with Leaders and other Authorities Today in Puno” [R-066]; PCM Report on Puno Conflict, Report No. 05-2011-PCM/OGSS [R-418]; Gala First Statement ¶¶ 26, 27 [RWS-1]; Witness Statement of Rosario de Pilar Fernández Figueroa (Apr. 8, 2016) (“Fernández Statement”) ¶ 17 [RWS-4].

<sup>148</sup> R-I ¶ 111; R-II ¶ 249; Tr. 1868 (R. Closing); Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 5 [R-010]; Gala First Statement ¶ 27 [RWS-1].

<sup>149</sup> Tr. 1886 (R. Closing); R. Opening Slide 80.

<sup>150</sup> R-I ¶ 112; R-II ¶ 250 – 251; Tr. 1885 (R. Closing); Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 5 – 6 [R-010]; MINEM, “For Lack of Security Dialogue Between High Level Commission and Leaders Failed” [R-022]; Resolution Declaring Cultural Heritage, Vice-ministerial Resolution No. 589-2011-VM-PC-IC-MC [R-023]; Resolution Creating Multi-Sectorial Committee, Supreme Resolution No. 131-2011-PCM [R-024]; MINEM, “Vice-Minister of Mines Asks the Authorities of Puno to Promptly Name Representatives to the Multi-Sectorial Committee” [R-069]; Resolution that Authorizes Intervention of Armed Forces in Puno, Supreme Resolution No. 191-2011-DE [R-070]; PCM Report on Puno Conflict, Report No. 05-2011-PCM/OGSS [R-418].

<sup>151</sup> C-II ¶ 274; Press Release, Presidencia del Consejo de Ministros, *Premier califica de inadmisibles bloqueos de carreteras en Puno y pide deponer acciones violentas*, May 18, 2011 [C-0092].

185. Claimant states that, on May 19, 2011, its representatives, Messrs. Swarthout and Mayolo, met with Ms. Garcia of MINEM. Ms. Garcia confirmed that there were no legal grounds to rescind legally-granted concessions and that the Santa Ana Project strictly complied with applicable laws and regulations.<sup>152</sup>
186. On May 20, 2011, the High Level Commission again met with protesters. Mayors left the meeting in protest.<sup>153</sup> Vice-Minister of Mines Gala confirmed that it would be unconstitutional to annul mining concessions by means of a regional ordinance and that the proper way to do so would require a judicial procedure or a legislative bill. Vice-Minister Gala also announced that the Central Government is complying with the *Acta*, the proof of which is the Deputy Ministerial Decision declaring Khapia Hill to be part of the nation’s cultural heritage.<sup>154</sup>
187. Respondent explains that the meetings where the Government attempted to act as a mediator with the communities were public and that the Government did not prevent Claimant from attending. Attendees – including Vice-Minister Gala – however, faced a significant risk of violence.<sup>155</sup>
188. According to Respondent, on May 23, 2011, the Bi-National Authority of the Hydric System requested information about Claimant’s environmental management instruments from MINEM.<sup>156</sup> Also on May 23, 2011, 9,000 people arrived in Puno to protest the mining activities. The Ministry of Interior sent armed forces to help police maintain control.<sup>157</sup> By May 24, 2011, more than 15,000

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<sup>152</sup> C-I ¶ 70; C-II ¶ 26; C-III ¶¶ 70, 142; CPHB-I ¶ 23; *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011 [C-0093]; *Huelga antiminera en Puno sigue sin solución*, LA REPÚBLICA, May 21, 2011 [C-0094].

<sup>153</sup> R-I ¶ 112; *Huelga antiminera en Puno sigue sin solución*, LA REPÚBLICA, May 21, 2011 [C-0094]; PCM Report on Puno Conflict, Report No. 05-2011-PCM/OGSS [R-418].

<sup>154</sup> C-I ¶ 69; *Se rompió el diálogo con los Aymaras*, May 21, 2011 [C-0091]; *Huelga antiminera en Puno sigue sin solución*, LA REPÚBLICA, May 21, 2011 [C-0094]; *El aimarazo, a cuatro años de la huelga antiminera*, Diario Correo, May 26, 2014 [C-0237]; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 7 [R-010]; PCM Report on Puno Conflict, Report No. 05-2011-PCM/OGSS [R-418].

<sup>155</sup> Tr. 1869 – 1871 (R. Closing); Gala First Statement ¶ 29 [RWS-1].

<sup>156</sup> R-II ¶ 350, Bear Creek, Santa Ana Project Hydrology and Hydro-geology Feasibility Study [R-302]; Letter from Autonomous Bi-National Authority of the Hydric System that Includes the Titicaca Lake Desaguadero River, Poopo Lake, and the CoipasaSalt Lake, Letter No. 195/05/2011 [R-313].

<sup>157</sup> R-I ¶ 113; R-II ¶ 229; Tr. 1871 (R. Closing); MINEM, “Vice-Minister of Mines Asks the Authorities of Puno to Promptly Name Representatives to the Multi-Sectorial Committee” [R-069]; Resolution that Authorizes Intervention of Armed Forces in Puno, Supreme Resolution No. 191-2011-DE [R-070]; Police Report from 2011

people were protesting. A 15-day strike began on May 24, 2011.<sup>158</sup>

189. Respondent states that, by May 25, 2011, the protest in Puno had grown to 13,000 individuals. The magnitude and length of this protest led to food shortages and poor sanitation throughout the city and resulted in injuries.<sup>159</sup>
190. On May 25 – 26, 2011, the High Level Commission resumed the discussions that had been suspended on May 20, 2011.<sup>160</sup> Protests became violent and protesters looted government institutions and destroyed commercial establishments.<sup>161</sup> Respondent states that protesters threatened to sabotage the upcoming presidential elections.<sup>162</sup> The offices of the Tax and Customs Authority and the Comptroller in Puno were looted and burned.<sup>163</sup> Claimant states that the protests staged on May 26, 2011 targeted governmental offices that were investigating some of the leaders of the movement for

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on Violence in Puno [R-306].

<sup>158</sup> R-II ¶¶ 229, 253; Tr. 1871 (R. Closing); *El aimarazo, a cuatro años de la huelga antiminera*, Diario Correo, May 26, 2014 [C-0237]; Police Report from 2011 on Violence in Puno [R-306].

<sup>159</sup> R-I ¶ 245; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31 [R-048]; “Strike Affects Bolivian Exports,” *La República Newspaper South Edition* [R-071]; “Protesters are Open to Dialogue,” *La República Newspaper South Edition* [R-072].

<sup>160</sup> R-I ¶ 114; R-II ¶ 252; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 6 [R-010]; PCM Report on Puno Conflict, Report No. 05-2011-PCM/OGSS [R-418]; Gala First Statement ¶ 29 [RWS-1].

<sup>161</sup> R-I ¶ 245; R-II ¶ 229; C-I ¶ 71; Tr. 1872 (R. Closing); *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011 [C-0078]; *Interview of Prime Minister Rosario Fernandez*, Mira Quien Habla, Willax TV, May 31, 2011 [C-0097]; *El aimarazo, a cuatro años de la huelga antiminera*, Diario Correo, May 26, 2014 [C-0237]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31 [R-048]; Human Rights and Environment Association, *Chronology: Antimining Protests in the South Region-2011* p. 10 [R-058]; “Aymara Rage Is Out of Control in Puno,” *La República Newspaper South Edition* [R-073]; Police Report from 2011 on Violence in Puno [R-306].

<sup>162</sup> R-I ¶ 245; Human Rights and Environment Association, *Chronology: Antimining Protests in the South Region-2011* p. 15 [R-058].

<sup>163</sup> C-II ¶ 112; R-I ¶¶ 115, 245; R-II ¶¶ 229, 236, 253; *Interview of Prime Minister Rosario Fernandez*, Mira Quien Habla, Willax TV, May 31, 2011 [C-0097]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31 [R-048]; Human Rights and Environment Association, *Chronology: Antimining Protests in the South Region-2011* [R-058]; “Community Members Close Borders,” *La República Newspaper South Edition* [R-063]; “Protesters March towards Puno to Demand an Ordinance,” *La República Newspaper South Edition* [R-064]; “Strike Affects Bolivian Exports,” *La República Newspaper South Edition* [R-071]; “Aymara Rage Is Out of Control in Puno,” *La República Newspaper South Edition* [R-073]; “Protesters Threat To Reinitiate Protests,” *La República Newspaper South Edition* [R-078]; 2010 Environmental Impact Assessment Annex F: Landscape [R-207]; Police Report from 2011 on Violence in Puno [R-306]; Gala First Statement ¶¶ 25, 30 [RWS-1]; Peña Second Report ¶¶ 49 – 58 [REX-008].

acts unrelated to the Santa Ana Project (tax evasion and smuggling).<sup>164</sup>

191. On May 27, 2011, the Ombudsman's Office of Puno sent a letter to the Prime Minister requesting that she adopt immediate measures to protect the rights of the Puno populations and to allow presidential elections to occur.<sup>165</sup> On the same date, Minister of Energy and Mines Pedro Sánchez condemned the violence in Puno and confirmed that the request to annul mining concessions in the Puno area was unconstitutional. Vice-Minister Gala also publicly declared that it would not be feasible to cancel the concessions because it would affect legal security in the country.<sup>166</sup>
192. According to Respondent, there was a meeting at the offices of MINEM of local and regional authorities, the Minister of the Interior, the mayors of southern Puno, Puno's Regional President, the regional congressmen, the Chairman of the Council of Ministers, Dr. Rosario del Pilar Fernández Figueroa, and the Minister of Energy and Mines, Mr. Pedro Sánchez on May 28, 2011, during which the following decisions were adopted:
- (1) to broaden the scope of R.S. No. 131-2011-PCM, which organized the Multisector Commission in charge of studying and proposing actions with respect to the mining concessions in provinces of the department of Puno;
  - (2) to suspend the admission of Mining Concession Applications in the territory of the provinces of Chucuito, El Collao, Puno, and Yunguyo of the Department of Puno; and
  - (3) to suspend for 12 months the approval procedure of the ESIA of the Santa Ana Project.<sup>167</sup>
193. Supreme Resolution No 142-2011-PCM (concerning point (1)) and Supreme Decree 026-2011-EM

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<sup>164</sup> C-II ¶ 274; *Interview of Prime Minister Rosario Fernandez*, Mira Quien Habla, Willax TV, May 31, 2011 [C-0097].

<sup>165</sup> R-II ¶ 230; Letter from *Defensoría* to PCM on Conflict in Puno [R-307].

<sup>166</sup> C-I ¶ 73; C-III ¶ 70; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; *El aimarazo, a cuatro años de la huelga antiminera*, Diario Correo, May 26, 2014 [C-0237].

<sup>167</sup> R-I ¶ 116; R-II ¶ 257; DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [C-0098]; Aide Memoire "Actions Done by the Executive Power Regarding Conflicts in the Puno Department" (7/2011) p. 6 – 7 [R-010]; 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 [R-025]; Resolution that Extends the Scope of the Multi-Sectorial Committee, Resolution No. 142-2011-PCM [R-026]; PCM Report on Puno Conflict, Report No. 05-2011-PCM/OGSS [R-418]; Ramírez First Statement ¶¶ 30 – 34 [RWS-2]; Witness Statement of César Zegarra (Oct. 6, 2015) ("Zegarra First Statement") ¶ 19 [RWS-3].

(“Supreme Decree 026”) (concerning point (2)) were published on the following day.<sup>168</sup> On May 30, 2011, DGAAM issued Resolution 162-2011-MEM-AAN suspending the Santa Ana ESIA for 12 months.<sup>169</sup>

194. This was relevant to the Parties’ answers to the Tribunal’s questions, namely: “*what were the State authorities’ responsibilities in relation to obtaining a Social License?*”;<sup>170</sup> and “*What was the basis for the decision to issue Supreme Decree 032, and on what evidence did the State authorities rely?*”<sup>171</sup> According to Claimant, on May 30, 2011, MINEM directed Claimant to reconstruct its December 5, 2006 application for a declaration of public necessity and to send it to MINEM within three days.<sup>172</sup> Claimant states that it complied on June 3, 2011.<sup>173</sup>
195. On May 31, 2011 / June 1, 2011, protesters in the South announced that they would suspend the strike in order to allow elections to take place.<sup>174</sup> Claimant states that Mr. Aduviri of FDRN supported President Humala, who crucially needed votes from the Puno region, and that the two agreed to suspend the protests for one week in order to enable voters to go to the polls.<sup>175</sup> Strikes resumed one

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<sup>168</sup> R-I ¶ 132; R-II ¶¶ 257, 264; Tr. 1885 (R. Closing); 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 [R-025]; Resolution that Extends the Scope of the Multi-Sectorial Committee, Resolution No. 142-2011-PCM [R-026].

<sup>169</sup> RfA ¶ 23; C-I ¶¶ 2, 73, 178; C-II ¶¶ 123, 152, 275, 361, 396; C-III ¶ 70; CPHB-II ¶ 44; R-I ¶ 171; R-II ¶ 535; RPHB-I ¶ 88; Tr. 1872 (R. Closing); DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [C-0098]; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 8 [R-010]; Administrative Appeal for the Suspension of the EIA [R-308].

<sup>170</sup> PO-10 ¶ 2.1.4 (a)(iv).

<sup>171</sup> PO-10 ¶ 2.1.4 (c).

<sup>172</sup> C-II ¶¶ 129, 158; C-III ¶¶ 70, 95; MINEM Report No. 442-2011-MEM-DGM-DNM and Resolution No. 165-2011-MEM-DGM/V, May 30, 2011 [C-0174].

<sup>173</sup> C-II ¶ 129, C-III ¶ 70; Letter from E. Antúnez de Mayolo, Bear Creek, to the General Directorate of Mining, Jun. 3, 2011 [C-0175].

<sup>174</sup> C-I ¶ 76; C-II ¶ 275 (*stating* that the announcement was designed to prevent interference with voting in the run-off presidential election opposing Ollanta Humala to Keiko Fujimori); R-I ¶ 117; *Huelga de aymaras termina en “cuarto intermedio,”* LOS ANDES, Jun. 1, 2011 [C-0099]; *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011 [C-0078]; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 7 [R-010].

<sup>175</sup> C-I ¶ 76 *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011 [C-0078]; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096].

week later.<sup>176</sup>

196. On June 7, 2011, the Government of Bolivia issued a note of protest to the Peruvian Embassy in La Paz because the protests were obstructing transit between the two countries.<sup>177</sup>
197. According to Respondent, during the June 2011 protests in Puno, the National Police clashed with Aymara protesters in the northern part of the Department, at the airport in Julica. Six Peruvian citizens died in the ensuing conflict.<sup>178</sup>
198. According to Respondent, on June 14, 2011, a second front of protests opened in the Melgar Province in Puno. There, protesters claimed that mining activities had caused contamination and demanded cancellation of mining concessions in Melgar Province. In the South, the Aymara community sought cancellation of the mining concessions and repeal of Supreme Decree 083.<sup>179</sup>
199. On June 17, 2011, Claimant appealed Resolution 162-2011-MEM-AAN before the DGAAM.<sup>180</sup>
200. From June 17 – 23, 2011, the Prime Minister and other governmental officials met with representatives of the protesters in Lima. As part of its response to the Tribunal’s question (c) “*What was the basis for the decision to issue Supreme Decree 032, and on what evidence did the State authorities rely?*”<sup>181</sup> Respondent states that this is when Respondent first learned that Claimant had initially operated the Santa Ana Project through a Peruvian national. Respondent describes this as

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<sup>176</sup> C-I ¶ 77; C-II ¶ 275; R-II ¶ 260; *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011 [C-0078]; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *Volvió tensión con huela aimara*, LA REPÚBLICA, Jun. 9, 2011 [C-0100]; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 7 [R-010].

<sup>177</sup> R-I ¶¶ 119, 248; R-II ¶ 260; Tr. 1872 (R. Closing); Note of Protest from the Government of Bolivia (6/7/2011) [R-075].

<sup>178</sup> R-II ¶¶ 458, 460; Tr. 1873 (R. Closing); “Strike Results With 6 People Dead,” *La República Newspaper South Edition* [R-085].

<sup>179</sup> C-I ¶ 77; R-I ¶ 122; Tr. 1873 (R. Closing); *Aimaras de Puno marchan hasta el Congreso*, Jun. 14, 2011 [C-0101]; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) pp. 11 – 12 [R-010]; “Melgar Also Rejects Mining,” *La República Newspaper South Edition* [R-079]; Gala First Statement ¶¶ 8 – 10 [RWS-1].

<sup>180</sup> C-I ¶ 73; C-II ¶ 123; C-III ¶ 70; Letter from Bear Creek to the DGAAM, Jun. 17, 2011 [C-0166]; Administrative Appeal for the Suspension of the EIA [R-308]; Swarthout First Statement ¶ 48 [CWS-1].

<sup>181</sup> PO-10 ¶ 2.1.4 (c).

Claimant's acquisition of an indirect interest in Santa Ana, without authorization.<sup>182</sup> Claimant confirms that it operated the Santa Ana Project through a Peruvian national, but denies that this is wrongful and that this was the first that Respondent learned of this.<sup>183</sup> Claimant also denies that it indirectly acquired the Santa Ana Concessions when they were granted to Ms. Villavicencio.<sup>184</sup> Claimant further pointed out that, beyond the Option Agreements, the documents on which Respondent allegedly relied have yet to be presented.<sup>185</sup>

201. The indefinite strike ended on June 24, 2011, with Respondent announcing that the Government would publish 5 measures aimed at resolving the protests in Puno, including a Supreme Decree revoking Supreme Decree 083.<sup>186</sup> In response to the Tribunal's 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?*"<sup>187</sup>, Respondent states that, as of this

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<sup>182</sup> R-I ¶¶ 126, 145, 163, 247; RPHB-I ¶¶ 83 – 87; Tr. 231 – 232 (R. Opening); 413:2 – 8 (Swarthout); 764:10 – 20, 777:14 – 21, 794:6-11, 801:4 – 10, 806:22 – 807:5, 808:2-6 (Gala); 1875 – 1883 (R. Closing); 923, 938, 971 – 973, 988 (Zegarra); "Juliaca: Six People Dead After Violence During Protests" *La Republica Newspaper* (Jun. 25, 2011) [R-50]; Expert Report of Francisco José Eguiguren Praeli (Oct. 6, 2015) ("Eguiguren First Report") ¶ 90 [REX-001]; Gala First Statement ¶¶ 33, 35 [RWS-1]; Zegarra First Statement ¶ 26 [RWS-3]; Fernández Statement ¶ 24 [RWS-4]; Second Witness Statement of Fernando Gala (Apr. 4, 2016) ("Gala Second Statement") ¶¶ 16, 17, 20 [RWS-5]; Second Witness Statement of César Zegarra (Apr. 8, 2016) ("Zegarra Second Statement") ¶ 20 [RWS-7];

<sup>183</sup> C-III ¶¶ 70, 92; CPHB-I ¶¶ 24 – 26, 50 – 53, 71 – 73; CPHB-II ¶¶ 8 – 13; RPHB-I ¶¶ 61, 64, 66, 86; Tr. 1764:17 – 1771:1 (C. Closing); Slides 46-58 (C. Closing Powerpoint); Tr. 408, 413:2-8 (Swarthout); Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) pp. 80, 87-163, 165-87 [C-0017]; Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006 [C-0139]; Informe No. 170-2006/MEM-AAM/EA, Jul. 10, 2006 [C-0140]; Informe No. 265-2006/MEM-AAM/EA/RC, Oct. 12, 2006 [C-0141]; J. Karina Villavicencio's Request for the Approval of Mining Exploration Category B Affidavit, Jun. 9, 2006 [C-0287]; The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 35 (2001) (Updated 2008) [CL-0030]; Aide Memoire "Actions Done by the Executive Power Regarding Conflicts in the Puno Department" (7/2011) p. 12 [R-010]; Resolution Approving First Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 216-2008-MEM/AAM [R-036].

<sup>184</sup> CPHB-II ¶ 10; RPHB-I ¶ 64.

<sup>185</sup> CPHB-I ¶¶ 61 – 64; R-I ¶¶ 125 – 126; R-II ¶ 287; Tr. 810:8 – 811:7 (Gala); Tr. 977:19-21 (Zegarra); Gala First Statement ¶¶ 33 – 38 [RWS-1]; Fernández Statement ¶¶ 24, 28 [RWS-4]; Gala Second Statement ¶ 17 [RWS-5]; Zegarra Second Statement ¶ 20 [RWS-7].

<sup>186</sup> C-I ¶ 80; C-II ¶ 362 (*arguably stating* that there was no announcement regarding the repeal of Supreme Decree 83 on this date. *Compare* to damages arguments.); Aide Memoire "Actions Done by the Executive Power Regarding Conflicts in the Puno Department" (7/2011) p. 5 [R-010]; *Elaboran cinco normas legales que resuelven crisis en Puno*, Jun. 24, 2011 [C-0108].

<sup>187</sup> PO-10 ¶ 2.1.4 (a)(iv).

date, Claimant had secured none of the 99 agreements that would have been necessary for Claimant to complete the Project and that Claimant still needed approval for its ESIA.<sup>188</sup>

202. On June 24, 2011, Peru adopted Supreme Decree 032-2011-EM (“Supreme Decree 032”), revoking Supreme Decree 083 and the Peruvian executive’s finding of a public necessity, thereby eliminating the legal prerequisite for Claimant’s ownership of mineral concessions in the border region. Supreme Decree 032 was published on June 25, 2011.<sup>189</sup>
203. On June 25, 2011, Respondent enacted Supreme Decree 033-2011-EM (“Supreme Decree 033”), extending provisions of Supreme Decree 026, suspending new applications for mining concessions in the Puno Department for 36 months. For already granted mining concessions, MINEM would engage in a new round of consultations with communities, in accordance with the ILO Convention.<sup>190</sup> Respondent also enacted Supreme Decree 034-2011-EM (“Supreme Decree 034”), pursuant to which no future mining concessions in Puno will be authorized unless local communities have been previously consulted.<sup>191</sup>
204. Following these enactments, protests subsided on June 27, 2011.<sup>192</sup> On that date, Mr. Swarthout indicated that he did not see the Corani Project as being affected by the protests or the governmental measures.<sup>193</sup>
205. On June 28, 2011, the Ministry of Mines Attorney initiated a civil proceeding to declare ineffective

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<sup>188</sup> RPHB-I ¶ 53; Tr. 325:7 – 326:13 (R. Opening); .Tr. 1895 (R. Closing); Flury First Report ¶ 80 [CEX-006].

<sup>189</sup> RfA ¶ 24; C.Prov.M.-I ¶ 6; R.Prov.M.-I ¶ 12; C.Prov.M.-II ¶ 13 (on May 25, 2011); (*signing* on the 24<sup>th</sup>: C-I ¶ 135; R-II ¶ 242; C-III ¶ 70); C-II ¶ 362; CPHB-I ¶ 58; Tr. 1874 (R. Closing); Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005].

<sup>190</sup> C-II ¶ 183; R-II ¶¶ 264, 265; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 12 [R-010]; Supreme Decree on the Adjustments of Mining Petitions and Suspension of Admissions of Mining Petitions, Supreme Decree No. 033-2011-EM [R-011].

<sup>191</sup> C-II ¶ 183; R-II ¶ 265; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 8 [R-010]; Decree that Issues Provisions With Respect to Mining and Oil Activities in the Puno Department, Supreme Decree No. 034-2011-EM [R-027]; International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) Art. 15 [R-029]; Gala First Statement ¶ 36 [RWS-1].

<sup>192</sup> R-I ¶ 248; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) pp. 9, 16 [R-010].

<sup>193</sup> R-II ¶ 672; Transcript of Bear Creek Mining Corporation Special Call (6/27/2011) [R-186].

various legal acts that affect the State's interests.<sup>194</sup>

206. On July 5, 2011,<sup>195</sup> MINEM commenced a civil law suit against Claimant and Ms. Villavicencio before the Civil Court in Lima to invalidate three instruments: (1) the Option Agreements that Claimant and Ms. Villavicencio executed that ensured that Claimant would acquire the mining concessions from her, (2) the registration of those Option Agreements in the national public registry, and (3) the issuance of the mining concessions to Ms. Villavicencio.<sup>196</sup> Respondent alleges that Claimant's acquisition of mineral rights by use of a proxy to maneuver around the prohibition of a foreigner's direct or indirect acquisition of such mineral rights was in violation of Article 71 of the Peruvian Constitution.<sup>197</sup> If found to be illegally obtained, MINEM requested that the concessions be declared to have reverted back to the Peruvian State.<sup>198</sup>
207. On July 12, 2011, Claimant filed a constitutional action of *amparo*, seeking annulment of Supreme Decree 032.<sup>199</sup>
208. On September 6/7, 2011, Respondent adopted the Law on the Right to Prior Consultation to Indigenous Peoples, along with Supreme Decree 001-2012-MC. Respondent created the Official Database of Indigenous Peoples and published a Methodological Guide for Consultation to

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<sup>194</sup> R-I ¶ 160; Resolution that Orders Initiation of Legal Actions to Annul Legal Acts, Ministerial Resolution No. 289-2011-MEM/DM [R-028].

<sup>195</sup> C.Prov.M.-II ¶ 13 (three months after Supreme Decree 032); RfA ¶ 28 (on Aug. 25, 2011); R.Prov.M.-I ¶¶ 3, 10 (on Jul. 14, 2011); *Ministry of Energy and Mines v. Bear Creek Mining Co. Surcursal del Peru and Jenny Karina Villavicencio Gardini*, Complaint Against a Legal Act ("MINEM Lawsuit Complaint") (Jul. 14, 2011) [R-002].

<sup>196</sup> C-I ¶ 89; C-II ¶ 369; C-III ¶ 70; R.Prov.M.-I ¶ 10; R-I ¶ 252; Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, Jul. 5, 2011 [C-0112]; Decision 20 issued by the 28th Civil Court of Lima, Dec. 27, 2012 [C-0113]; *Ministry of Energy and Mines v. Bear Creek Mining Co. Surcursal del Peru and Jenny Karina Villavicencio Gardini*, Complaint Against a Legal Act ("MINEM Lawsuit Complaint") (Jul. 14, 2011) [R-002].

<sup>197</sup> R.Prov.M.-I ¶ 10; Tr. 1828 – 1829 (R. Closing); *Ministry of Energy and Mines v. Bear Creek Mining Co. Surcursal del Peru and Jenny Karina Villavicencio Gardini*, Complaint Against a Legal Act ("MINEM Lawsuit Complaint") (Jul. 14, 2011) [R-002].

<sup>198</sup> C-I ¶ 89, C-III ¶ 70; R.Prov.M.-I ¶ 10; Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, Jul. 5, 2011 [C-0112]; Constitution of Peru (Dec. 29, 1993) Article 71 [R-001]; *Ministry of Energy and Mines v. Bear Creek Mining Co. Surcursal del Peru and Jenny Karina Villavicencio Gardini*, Complaint Against a Legal Act ("MINEM Lawsuit Complaint") (Jul. 14, 2011) [R-002].

<sup>199</sup> RfA ¶ 26; C.Prov.M.-I ¶ 6; C-I ¶ 84; C-III ¶ 70; R.Prov.M.-I ¶ 12; R-I ¶ 152; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006].

Indigenous Peoples.<sup>200</sup> Respondent considered this relevant to its answer to the Tribunal’s questions “Of the two reasons relied upon by Respondent for Decree 032, could that Decree also have been legally issued, if only one of the two reasons could be established: (i) only the alleged illegality of the Claimant’s Application? (ii) or only the unrest as it existed at that time?”<sup>201</sup>

209. In November 2011, the OEFA found that the communities close to the Santa Ana Project continued to support Claimant and the Project.<sup>202</sup> In December 2011, OEFA also concluded that Claimant had illegally conducted exploration activities on community land between September and November 2010, without necessary surface rights.<sup>203</sup>
210. On December 27, 2012, the judge in the first instance dismissed all of MINEM’s claims against Claimant because MINEM had improperly combined administrative and civil claims.<sup>204</sup> MINEM appealed and, on June 17, 2013, the Superior Court decided to separate the claims and directed the first instance judge to proceed with MINEM’s civil claims.<sup>205</sup> Claimant appealed and, on August 6, 2013, the Supreme Court dismissed Claimant’s appeal.<sup>206</sup>
211. On November 18, 2013, Claimant filed a constitutional action of *amparo*, its second *amparo* action, against the Superior Court for a declaration that June 17, 2013 decision was unconstitutional.<sup>207</sup>
212. On December 13, 2013, Minister of Energy and Mines Jorge Merino handed Claimant a draft document that outlined the specific procedure that Claimant should follow to resolve this dispute.

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<sup>200</sup> RPHB-I ¶ 31; Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el Convenio 169, Ley No. 29785 del 7 de setiembre de 2011 [**Flury 028**].

<sup>201</sup> PO-10 ¶ 2.1.4 (d)(i) – (ii).

<sup>202</sup> C-II ¶ 79; C-III ¶ 70; OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 [**C-0143**]; Acta de Supervisión Ambiental, Nov. 25, 2011 [**C-0179**]; OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011 [**C-0180**].

<sup>203</sup> R-II ¶ 174; OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011 p. 16 [**C-0180**].

<sup>204</sup> RfA ¶ 30 (*stating* Feb. 5, 2013); C.Prov.M.-I ¶ 8; R.Prov.M.-I ¶ 11; Resolution 26 of the 28th Civil Court, File No. 13458-2011-0-1801-JR-CI-07 (May 19, 2014) [**R-004**].

<sup>205</sup> RfA ¶ 30; C.Prov.M.-I ¶ 8; R.Prov.M.-I ¶ 11; Resolution 26 of the 28th Civil Court, File No. 13458-2011-0-1801-JR-CI-07 (May 19, 2014) [**R-004**].

<sup>206</sup> RfA ¶ 31.

<sup>207</sup> *Id.*; R.Prov.M.-I ¶ 12.

The document provided that Claimant should request formal consultations with the Government to discuss (1) the issuance of a new Supreme Decree derogating from Article 1 of Supreme Decree 032 revoking Claimant's rights', (2) mutual termination of the MINEM Lawsuit and Claimant's *amparo*, and (3) the execution of a settlement agreement putting an end to the dispute.<sup>208</sup>

213. On May 12, 2014, the Lima First Constitutional Court issued a ruling vindicating Claimant's claims in its *amparo* action against Supreme Decree 032, finding that revocation of Supreme Decree 083 was unconstitutional. The Peruvian Government appealed this decision.<sup>209</sup> The Court concluded that the protests "*do not pertain to causes attributable to actions or omissions by Claimant.*"<sup>210</sup>
214. On May 19, 2014, the first instance judge decided to proceed with MINEM's claims relating to the transfer of the mining concessions to Claimant and the recording of such transfers in the Peruvian Public Registry ("MINEM Lawsuit").<sup>211</sup>
215. On August 11, 2014, Claimant filed voluntary dismissal writs, requesting that the court discontinue both *amparo* proceedings.<sup>212</sup> MINEM filed a writ on October 3, 2014 stating that Claimant's withdrawal of the *amparo* case related to Supreme Decree 032 was proof that Claimant considered that its constitutional rights had not been violated.<sup>213</sup> On October 23, 2014, Decision 33 declaring that the *amparo* proceedings had concluded was issued.<sup>214</sup>
216. Claimant argues that the manner in which it acquired its rights in the Santa Ana region is consistent

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<sup>208</sup> C-III ¶¶ 69, 70; Draft letter Remitted by Minister J. Merino to E. Antúnez de Mayolo outlining the Government's proposed steps to resolve Bear Creek's situation at Santa Ana, Dec. 11, 2013 [C-0121]; Antúnez de Mayolo First Statement ¶ 32 [CWS-2].

<sup>209</sup> RfA ¶ 27; C-I ¶¶ 10, 85; C-II ¶¶ 143, 198, 367; C-III ¶¶ 70, 144; R-I ¶ 152; Amparo Decision No. 28, Lima First Constitutional Court in Case (May 12, 2014) pp. 25 – 26 [C-0006].

<sup>210</sup> Tr. 1763 (C. Closing).

<sup>211</sup> C.Prov.M.-I ¶ 8 n. 3; R.Prov.M.-I ¶ 11; Resolution 26 of the 28th Civil Court, File No. 13458-2011-0-1801-JR-CI-07 (May 19, 2014) [R-004].

<sup>212</sup> C.Prov.M.-I ¶ 9; R.Prov.M.-I ¶ 12; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Voluntary dismissal writ filed by Bear Creek requesting the court to discontinue the *amparo* proceeding challenging the issuance of Supreme Decree 032-2011-EM, Aug. 11, 2014 [C-0009].

<sup>213</sup> C.Prov.M.-I ¶ 9; Writ filed by MINEM mischaracterizing the reasons for Bear Creek's dismissal, Oct. 3, 2014 [C-0010].

<sup>214</sup> C.Prov.M.-I ¶ 9; Decision 33 declaring the first *amparo* proceeding concluded, Oct. 23, 2014 [C-0011].

with Peruvian practice and is similar to the way that other foreign firms have proceeded.<sup>215</sup> Respondent disputes that these practices exist and that, if they do, that they constitute a source of law.<sup>216</sup>

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<sup>215</sup> C-III ¶¶ 30 – 59; Supreme Decree 024-2008-DE, Dec. 27, 2008 [C-0204]; Monterrico Metals Plc’s Annual Report 2007 [C-0205]; Archived Title of Entry N° C00011 of File N° 11352728 of the Corporate Registry of the Public Registry Office of Lima [C-0206]; *The new CEO of Monterrico had an audience with Peru’s minister of Energy & Mines*, The Zijin Consortium Press Release, Jun. 11, 2007 [C-0207]; *China’s ambassador in Peru Gao Zhengyue investigated Majaz company*, The Zijin Consortium Press Release, Jun. 11, 2007 [C-0208]; Copy of the file with the administrative procedure which led to Supreme Decree 024-2008-DE 3 – 8, 75 – 76, 98; Supreme Decree 021-2003-EM, Jun. 26, 2003 [C-0211]; INGEMMET Unique File for mining concession “Don José” N° 01-01751-00 2 – 5, 31 – 33, 39 – 40 [C-0212]; Supreme Decree 041-94-EM, Oct. 6, 1994 [C-0217]; Archived File of Entry N° 10 of File N° 01186245 of the Corporate Registry of the Public Registry Office of Arequipa [C-0218]; File 02002531 of the Corporate Registry of the Public Registry Office in Lima [C-0219]; Entry N° 4 of File N° 01186245 of the Corporate Registry of the Public Registry Office of Arequipa [C-0220]; INGEMMET Unique Files for mining concessions “La Solución” N° 14003327x01 [C-0221]; Archived File of Entry N° 001 of File N° 02021527 of the Corporate Registry of the Public Registry Office of Lima [C-0222]; INGEMMET Unique Files for mining concessions “Mojica 1” N° 01-02296-93 [C-0224]; Archived File of Entry N° 0010 of File N° 02021527 of the Corporate Registry of the Public Registry Office of Lima [C-0228]; Entry N° 1 of the File N° 03026941 of the Registry of Powers of Attorney granted by foreign companies of the Public Registry [C-0229]; Peruvian Congress, *Legality and Problems of the company Minera Maiaz in the Territories of the Segunda y Cajas, and Yanta Rural Communities in the Provinces of Huancabamba and Ayabaca in the Piura Region*, May 9, 2008 [C-0254]; Supreme Decree 010-2007-EM, Feb. 28, 2007 [C-0255]; INGEMMET Unique File for mining concessions “Molinetes 2004” No 03-00201-04 [C-0256]; Entry A00001 of File N° 11707970 of the Corporate Registry of the Public Registry Office in Lima [C-0257]; Archived File of Entry A00001 of File N° 11858626 of the Corporate Registry of the Public Registry Office in Lima [C-0258]; Supreme Decree 041-95-EM, Dec. 20, 1995 [C-0259]; Supreme Decree 024-97-EM, Nov. 13, 1997 [C-0261]; Peruvian National Tax Authority (SUNAT) Public Information of Legal Representatives of Minera Peñoles de Peru S.A [C-0270]; Entry C002 of File N° 40215 of the Mining Registry of the Public Registry Office in Lima [C-0271]; Entry C0001 of File N° 11580265 of the Corporate Registry of the Public Registry Office in Lima [C-0272]; INGEMMET Unique File for mining concession “Minaspampa 2” N° 01-01764-03 [C-0273]; INGEMMET Unique File for mining concession “Minaspampa 3” N° 01-01765-03 [C-0274]; INGEMMET Unique File for mining concession “Minaspampa 5” N° 01-01767-03 [C-0275]; INGEMMET Unique File for mining concession “Challaviento” N° 01-01745-03 [C-0276]; INGEMMET Unique File for mining concession “Challaviento 2” N° 01-003398-03 [C-0277]; Entry No 002 of File No 11079985 of the Mining Registry of Arequipa [C-0278]; Entry N° 002 of File N° 11079986 of the Mining Registry of Arequipa [C-0279]; Entry N° 002 of File N° 11079982 of the Mining Registry of Arequipa [C-0280]; INGEMMET Unique File for mining concession “Chapana” N° 01-00751-97 [C-0281]; Entry 0001 of File N° 4037 of the Corporate Registry of the Public Registry Office in Lima [C-0282]; Letter from A. Swarthout, Bear Creek, to Ministry of Labor and Social Welfare dated Jun. 16, 2002 requesting approval of the attached Fixed Term Labor Contract dated Jun. 2, 2002 [C-0283]; Texto Único de Procedimientos Administrativos del Ministerio de Energía y Minas [Bullard-034]; Decreto Supremo No. 042-2007-EM [Flury-017]; Decreto Supremo No. 060-2006-EM [Flury-021]; Flury First Report ¶¶ 38, 40 – 47 [CEX-006]; Expert Report of Hans A. Flury (May 25, 2016) (“Flury Second Report”) ¶¶ 14 – 18, 27 – 32, 37 – 39, 42 [CEX-009].

<sup>216</sup> R-II ¶¶ 36 – 39.

## B. SUMMARY OF FACTS PRESENTED BY AMICI AND PARTIES' RESPONSES

217. The following summary of facts is based on the *Amici* submissions and the Parties' responses thereto. It is presented without prejudice as to the relevance of these facts for the decisions of the Tribunal. For the avoidance of repetition, the Section above does not indicate where *Amici* agree with a Party that an event occurred – rather, this section only addresses “new” facts submitted by *Amici* and the Parties' responses to these. In addition, this section presents the Parties responses to the Tribunal's questions, as the Parties addressed them. Below, Claimant's arguments in relation to the Tribunal's question (a) “*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? (iii) What actions were legally required of Claimant in seeking to obtain a Social License, and did the Claimant take these actions?*”<sup>217</sup> are presented, as are Respondent's arguments in relation to the question “*Which national and international legal provisions are applicable to informing that standard?*”<sup>218</sup>

### 1. Summary of Facts Presented by DHUMA and Dr. López

218. *Amici's* summary of their first submission is best taken from their own words:

1. *[...] Bear Creek did not do what was necessary to understand the doubts, worries and anxieties and the Aymara culture and religiosity, and did not do the necessary to identify and assess the risks that their own operations could entail for the population and their rights over their lands and water. The company acted as if it were sufficient to promise benefits to some of the people and communities in the areas surrounding the project, to hold public meetings announcing their plans without needing to work closely with the communities, listening to their doubts and comments, explaining that the risks were minimal (if they truly were minimal), or that there would be benefits (if there really were). The actions that Bear Creek failed to carry out do not involve a simple strategy of community relations but correspond to international standards that Bear Creek should have known about and complied with but did not.*
2. *Based on their own sources, conversations with the population itself and databases, the Amici can affirm that the communities, particularly those not directly affected by the project, in the districts of Huacullani, Kelluyo, Zepita, Desaguadero, Pisacoma and others, believed that Bear Creek was not being transparent and sincere with them, and that it was doing everything possible to carry out its project without regard to the concerns or opinions of the population. In those circumstances the communities felt compelled to fight to preserve their territories,*

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<sup>217</sup> PO-10 ¶ 2.1.4 (a)(iii).

<sup>218</sup> *Id.* at ¶ 2.1.4 (a)(i).

*their land (the Pachamama) and their sources of water, all of them necessary for their lives. If Bear Creek had approached the situation differently, perhaps the situation would also have been different.*

3. *[...] Bear Creek did not obtain the social license to develop its project at the time and at present still does not have it. [...] there is no legitimacy, trust or consent of the parties. The conflict started due to a lack of transparency and misinformation on the part of Bear Creek (or Mrs. Villavicencio), a lack of respect for the peasant communities and respect for the rights of indigenous peoples. The population's frustration and anger only abated when the Santa Ana project was cancelled.*<sup>219</sup>

219. The districts of Huacullani and Kelluyo in the province of Chucuito are the two districts most directly affected by the Santa Ana Project. In Huacullani, 80.5% of the population is rural and 89.2% lives in poverty. In Kelluyo, 82% is rural and 79.4% lives in poverty. Approximately 80% of the population are native Aymara speakers and, although they state that they speak Spanish, they are not fluent in Spanish, especially with regard to professional or technical terms.<sup>220</sup> The peasant communities in the south of Puno are made up of people that ethnically and culturally belong to the Aymara group. Their principal economic activities are agriculture, fishing, and livestock farming. They are aware that mining has impacted these kinds of activities in other parts of Peru.<sup>221</sup>

220. In 2000, the province of Chucuito had no mining concessions. By 2011, it had 59. Thus, the province and population were not familiar with mining activities and did not have much information regarding mining. This unawareness and lack of information generated distrust and rejection of mining activities.<sup>222</sup>

221. The Santa Ana Project was the first mining project to be developed in the south of Chucuito. Although the Project began in 2002, the authorities in Huacullani first began to be aware of the Project in 2004, when Ms. Villavicencio held a meeting with the mayor of Huacullani to request support for the annulment or resizing of the Lupaca Reserve, for mining. Ms. Villavicencio introduced herself as the owner of the concession, but actually did not obtain the mining titles until 2006. The

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<sup>219</sup> Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment – Puno (“DHUMA”) and Dr. Lopez (Jun. 10, 2016) (Eng.), p. 17.

<sup>220</sup> *Id.* at p. 2 (citing Quiñones, Patricia, “Concesiones, participación y conflicto en Puno. El caso del proyecto minero Santa Ana”, in: Los límites de la expansión minera en el Perú, Servicio de Educación Rural- SER, 2013, p. 25 – 26).

<sup>221</sup> *Id.* at p. 3.

<sup>222</sup> *Id.*

information given in the meeting was misleading and confusing and Ms. Villavicencio never explained her relationship or intentions with Claimant. In 2008, most of the population knew about this and this provoked a widespread rejection of mining projects, especially the Santa Ana Project. Claimant failed to obtain the approval of the population for its then-current and future operations, and created distrust, misinformation, and conflict in the communities.<sup>223</sup> This led to the social protest in the Aymara peasant communities during 2011, one of the central demands of which was the repeal of Supreme Decree 083.<sup>224</sup>

222. Due to their ever-increasing fears and suspicions, a large number of people from peasant communities held a meeting on October 14, 2008 to speak with Claimant’s representatives about the Santa Ana Project. Claimant’s representatives did not attend the meeting, so those present decided to go to the Santa Ana mining camp. On the way there, their anger grew. This incursion ended with part of Claimant’s mining camp being burned and destroyed.<sup>225</sup>

223. In Aymara culture, the act of receiving a gift creates a moral obligation of reciprocity. A Lieutenant Governor remarked to DHUMA that Claimant’s staff “*had made personal invitations to communal authorities in their homes, offering them gifts such as bread and fruit*” and that these authorities were reciprocating by attending the presentation of the ESIA.<sup>226</sup>

224. On February 23, 2011, there was an information workshop on the ESIA, which DHUMA members attended. During the event, the population sought to clarify doubts about the Santa Ana Project. None of their doubts regarding social, environmental, or cultural impacts of the Project were dispelled. In addition, the building where the meeting was located was too small for many interested people to participate. Less than half of the number of people recorded actually attended. Participants were also turned off by having to register at the entrance and when doing so, receiving a gift bag containing a poncho and a cap with the company logo. Many did not understand the consequences or implications of registering. Hundreds of people were unable to participate and, thus, inhabitants protested and suggested that the workshop could be held in the main square in Huacullani so that they

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<sup>223</sup> *Id.* at p. 11.

<sup>224</sup> *Id.* at p. 3 – 4.

<sup>225</sup> *Id.* at p. 5 (*citing* police report in File No. 2009-0084-0-2104-JM-PE-01 of the First Mixed Jurisdiction Court of the Province of Chucuito).

<sup>226</sup> *Id.* at p. 5.

could participate. This request was denied.<sup>227</sup> It is estimated that between 400 and 500 people who could not participate inside at the meeting protested the Project outside, worried about contamination to land and water.<sup>228</sup>

225. The ESIA presentation was given in Spanish and used technical language. The translation into Aymara was poor. Claimant required that questions from participants be made in writing and in Spanish, which is not common practice in the Andean world, where daily communication is oral and in Aymara. This made it difficult for participants to express their views. When people did raise questions in oral form – questions related to contamination and to benefits from mining – the answers were highly technical and were poorly translated. During the hearing, many people expressed their distrust for the company. Although those present who opposed the Project were relatively quiet and did not interrupt the hearing or show their anger, it was clear that they were against the Project.<sup>229</sup>

226. The Aymara have a deep respect for mother earth (*Pachamama*) and it is their responsibility to protect her. Concerns regarding change to the natural landscape, the integrity of their territories, and the negative effects on their sanctuaries and culture could not be attended at the presentation. These concerns, however, were shared by other communities that form part of the districts of Kelluyo, Pisacoma, Desaguadero, Zepita, and others. The possibility that the mining Project – an open pit – would have an impact on water was a great concern. Peru is concerned about water scarcity and the Aymara population depends on water resources.<sup>230</sup>

227. Already in 2008 and 2011, a company was responsible for respecting all human rights and, as part of that responsibility, it had the obligation to obtain consent of the local population to its operations in order to ensure its own sustainability.<sup>231</sup> Claimant knew or should have known about these human rights standards, but either ignored them or failed to put them into practice.<sup>232</sup> The concept of a

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<sup>227</sup> *Id.* at p. 5 – 6.

<sup>228</sup> *Id.* at p. 7 – 8 (*citing* Brief addressed to Ministry of Energy and Mines, by the President of Lieutenant Governors of Kelluyo and another, dated 22 Mar. 2011).

<sup>229</sup> *Id.* at p. 6 – 7.

<sup>230</sup> *Id.* at p. 7 – 8 (*citing* Servindi 16 Jan. 2014).

<sup>231</sup> *Id.* at p. 12 (*citing* Protect Respect and Remedy: a Framework for Business and Human Rights on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc A/HRC/8/5, 7 Apr. 2008).

<sup>232</sup> *Id.* at p. 12 – 14.

“*social license*” is closely related to the responsibilities of business enterprises to respect human rights. For a social license to exist, there must be legitimacy, trust, and consent – none of which existed or exist with regard to the Santa Ana Project.<sup>233</sup>

228. As a result of the hearing on the ESIA, a number of communities decided to start a protest movement against mining in general and, particularly, against the Santa Ana Project.<sup>234</sup> The indigenous socio-environmental protest – the “*Amyarazo*” – began in March 2011. The Aymara population demanded repeal of Supreme Decree 083, application and respect for the right of prior consultation, and suspension of all mining concessions in southern Puno. Mr. Aduviri acted as a spokesman for the deep dissatisfaction and concern that already existed in the population due to information regarding other mining projects and the lack of information and transparency with regard to the Santa Ana Project. The protests took place away from the Santa Ana Project so that the protesters would be heard. DHUMA’s role in the protests was to promote peace and non-violence. The protests would not end until the Santa Ana Project was cancelled.<sup>235</sup>
229. Currently, 18 of the leaders that participated in the protests are under criminal investigation.<sup>236</sup>
230. After the Hearing and with the Tribunal’s permission, DHUMA wrote to the Tribunal in response to statements made by Claimant. DHUMA confirmed its *Amici* submission and offered to provide copies of supporting documents and objects – including the ponchos and caps received at Claimant’s 2011 public hearing – to the Tribunal. DHUMA conveyed the continuous and profound concern of the Comunidades Campesinas of Puno about the development of the Santa Ana Project and other mining projects in the Puno region, and the risk that those will contaminate the environment and threaten the existence and culture of indigenous communities.<sup>237</sup>

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<sup>233</sup> *Id.* at p. 16 (*citing* Morrison, John *The Social License: How to Keep your Organization Legitimate*. Palgrave Macmillan, 2014, p. 19).

<sup>234</sup> *Id.* at p. 8.

<sup>235</sup> *Id.* at p. 9 – 10.

<sup>236</sup> *Id.* at p. 11 (*citing* Second Preparatory Investigation Court, File N 682-2011).

<sup>237</sup> Letter submitted by DHUMA (Sept. 29, 2016).

## 2. Claimant's Response to *Amici* Submission and Tribunal's Question (a)

231. According to Claimant, DHUMA is a non-governmental organization that publicly expresses its radical anti-mining agenda, without reservation. Since DHUMA representatives have refused to appear as witnesses in these proceedings, Claimant will not have the opportunity to cross-examine them and the Tribunal will not have the opportunity to assess the veracity of their claims. The Tribunal should, therefore, not give any weight to the *Amicus* Submission.<sup>238</sup>
232. *Amici's* account of the events that took place surrounding the development of the Santa Ana Project does not represent the views and opinions of the Aymara people and does not reflect the truth of what actually occurred, as demonstrated by contemporaneous documentation and evidence. Claimant engaged in meaningful and extensive community relations programs and complied with its obligations under international and Peruvian law, as the Government of Peru confirmed at the time.<sup>239</sup>
233. Contrary to *Amici's* insinuation, Claimant did not bribe any members of the indigenous communities and did not offer gifts to create an obligation of reciprocity.<sup>240</sup>
234. *Amici's* description of the February 2011 public hearing is simply untrue and is at odds with the detailed testimony of Mr. de Mayolo, who attended the hearing. The hearing was held at the largest available locale. Respondent's list of participants shows that at least 729 community members attended. Claimant set up a canopied area with chairs, giant screens, and speakers, more than doubling the venue's capacity. This enabled people who were not registered to see and hear all of the presentations and questions. There was no contemporaneous indication that the venue was insufficient. The translation was provided by a well-known Aymara professional who had provided interpretation services in other workshops. There were no restrictions on questions being asked orally or in writing and questions were accepted in Spanish and Aymara, and were translated accordingly. DHUMA's claim that there were many cases in which certain individuals were not allowed to speak

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<sup>238</sup> Claimant's Reply to *Amici* (Aug. 18, 2016) ¶ 4; CPHB-I ¶ 20; R. Letter to Tribunal re DHUMA Application, Jul. 7, 2016; Dec. 22, 2012 entry in DHUMA Facebook account [C-0327].

<sup>239</sup> Claimant's Reply to *Amici* (Aug. 18, 2016) ¶¶ 12, 27; CPHB-I ¶ 21; Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016 [C-0329]; Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016 [C-0331].

<sup>240</sup> Claimant's Reply to *Amici* (Aug. 18, 2016) ¶ 11; CPHB-I ¶ 21; Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016 [C-0331].

or ask questions is unfounded and DHUMA has failed to indicate who has been prevented from speaking. It is unclear from where DHUMA has gathered its “facts” and it is unclear what basis DHUMA has for alleging that there was a deep feeling of dissatisfaction in most of the attendees at the public hearing. Claimant provided statements of other community members who were unaware of discontent. There is no support for DHUMA’s contention that there was a demonstration of 400 or 500 people following the hearing. Contemporaneous documentation issued by Respondent indicates the opposite – it confirms that the public hearing “ended satisfactorily.”<sup>241</sup>

235. Claimant is internationally recognized for its commitment to developing harmonious and respectful relations with the communities neighboring its projects. *Amici’s* account of the events surrounding the Government’s enactment of Supreme Decree 032 would have this Tribunal believe the opposite. Claimant engaged meaningfully with local communities and obtained their support for the Santa Ana Project.<sup>242</sup>
236. Even if *Amici’s* description of events was accurate, it implicates conduct of Respondent and not of Claimant. According to *Amici*, it was Respondent’s grant of a large number of mining concessions in the territories of the indigenous communities that triggered an anti-mining sentiment in the population of Puno. Even if *Amici’s* allegations regarding failed communication about the grant of mining concessions to Ms. Villavicencio or the issuance of Supreme Decree 083 were true, it would be evidence of Respondent’s failure. Respondent is responsible for informing its citizens of State decisions, acts of public administration, and their effects. If Respondent was required but failed to consult with local communities before granting rights over their lands, either by awarding the Santa Ana mining concessions to Ms. Villavicencio or by issuing Supreme Decree 083, and if Respondent failed to inform these communities after it granted these rights, then any resulting fallout from this

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<sup>241</sup> Claimant’s Reply to Amici (Aug. 18, 2016) ¶¶ 6 – 12; CPHB-I ¶ 21; Minutes of the Public Hearing – Mineral Subsector No. 007-2011/MEM-AAM – Public Hearing for the EIA of the “Santa Ana” Project, Feb. 23, 2011 [C-0076]; Ministry of Energy and Mines, Press Release 093-2011, Mar. 2, 2011 [C-0328]; Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016 [C-0329]; Letter from King & Spalding and Miranda & Amado, inviting Messrs. Morales and Limatapa to comment on the Amicus Submission, Aug. 3, 2016 [C-0330]; Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016 [C-0331]; List of Participants at the Public Hearing [R-055]; Antúnez de Mayolo First Statement ¶¶ 13 – 16 [CWS-2]; Antúnez de Mayolo Second Statement ¶¶ 23 – 32 [CWS-7].

<sup>242</sup> Claimant’s Reply to Amici (Aug. 18, 2016) ¶¶ 1, 2, 23; Bear Creek Mining Corporation, *Community Engagement* [C-067]; Bear Creek Mining Corporation, *Community Initiatives* [C-068]; 2013 MacCormick Social Responsibility Index [C-0230].

lack of communication and transparency falls on Respondent, not Claimant. Ms. Villavicencio followed the procedures set forth under Peruvian law for applying for the mining concessions, and Claimant followed the mandated procedures for obtaining a declaration of public necessity.<sup>243</sup>

237. The *Aymarazo* highlights the local population’s dissatisfaction with the Government, although *Amici* try to blame events on Claimant. Throughout, *Amici* repeat their position that the protests were intended to engage Peruvian authorities. On the *Amici*’s own account, the protests were spawned by the failures of Respondent and sought to attract Respondent’s attention. The political, anti-Government nature of the protests is also confirmed by the looting and burning of various public institutions in Puno on May 26, 2011. The political nature of these protests was confirmed by President Alan Garcia and Prime Minister Rosario Fernández.<sup>244</sup>

238. In response to the Tribunal’s question (a)<sup>245</sup>, Claimant explained that, when Claimant acquired the Santa Ana Concessions, there was no provision of Peruvian law providing any standard by which either the State or local communities could grant a “*social license*” with respect to a mining project. Respondent then developed a “*Citizen Participation Process*”, through which the State and the mining company share information about the Project with local communities who may then voice their concerns to the State and the company.<sup>246</sup> Respondent, through DGAAM, was responsible for guiding, directing, and conducting the Citizen Participation Process and for ensuring that the local communities fully participate in the process.<sup>247</sup> Claimant followed the applicable Peruvian legal framework and Respondent approved of its activities, as evidenced by MINEM’s endorsement of

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<sup>243</sup> Claimant’s Reply to Amici (Aug. 18, 2016) ¶¶ 13 – 15.

<sup>244</sup> *Id.* at ¶¶ 16 – 17; Interview of Prime Minister Rosario Fernandez, Mira Quien Habla, Willax TV, May 31, 2011 [C-0097]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; “Community Members Close Borders,” *La República Newspaper South Edition* [R-063]; “Protesters March towards Puno to Demand an Ordinance,” *La República Newspaper South Edition* [R-064]; “Strike Affects Bolivian Exports,” *La República Newspaper South Edition* [R-071]; “Aymara Rage Is Out of Control in Puno,” *La República Newspaper South Edition* [R-073]; “Protesters Threat To Reinitiate Protests,” *La República Newspaper South Edition* [R-078]; Gala First Statement ¶ 25 [RWS-1].

<sup>245</sup> PO-10 ¶ 2.1.4 (a), *supra* ¶ 96.

<sup>246</sup> CPHB-I ¶ 1.

<sup>247</sup> *Id.* at ¶¶ 3, 27; CPHB-II ¶ 25; Tr. 1066:19-21, 1083:3-17, 1089:9-19 (Ramírez Delpino); Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM Art. 1 [R-153]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 1, 2.2, 3, 7, 12, 17 [R-159].

Claimant's CPP and its approval of the delimitation of the Project's Area of Influence.<sup>248</sup> Respondent did not inform Claimant of any concern it may have had regarding community relations in Santa Ana.<sup>249</sup>

239. *Amici* have failed to identify any concrete violations of specific legal requirements or standards. *Amici's* blanket statement that Claimant failed to engage in a positive relationship with surrounding communities ignores Claimant's outreach programs and efforts, which Respondent approved and certified as being in compliance with applicable standards and legal requirements. Supreme Decree 028-2008-EM ("Supreme Decree 028") and Ministerial Resolution No. 304 regulate how Claimant was to develop and implement its CPP. Article 4 of Supreme Decree 028 incorporated ILO Convention No. 169. Respondent's DGAAM approved the Executive Summary of Claimant's ESIA and Claimant's CPP, by which Claimant proposed community participation mechanisms for continued interaction with local communities. Both were prepared in accordance with Peruvian mining regulations. Dissatisfaction with these processes is properly raised with Respondent, not Claimant.<sup>250</sup>
240. Supreme Decree 028, which regulates the citizen participation process, imposes responsibilities on the Government, not on the investor.<sup>251</sup> The State enjoys a certain amount of discretion when fulfilling its obligations under Supreme Decree 028 and Ministerial Resolution No. 304 and may

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<sup>248</sup> CPHB-I ¶ 2; Tr. 1060:9-12, 1068 – 1069, 1073, 1080:20 – 1081:1 (Ramírez Delpino); Tr. 1159, 1222 (Flury); Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 [C-0161]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 4 [R-159].

<sup>249</sup> CPHB-I ¶ 6; Tr. 571:8-12 (Mayolo); Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 [C-0161]; DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD p. 7 [R-040].

<sup>250</sup> Claimant's Reply to *Amici* (Aug. 18, 2016) ¶¶ 18 – 20, 23; CPHB-I ¶¶ 2 – 4, 27; CPHB-II ¶¶ 23 – 24; Tr. 1060:9-12, 1068 – 1069, 1073, 1080:20 – 1081:1, 1090 – 1091 (Ramírez Delpino); Tr. 1159, 1222 (Flury); Chapter Eight of the Free Trade Agreement between Canada and the Republic of Perú signed May 29, 2008 and entered into force on Aug. 1, 2009 ("Canada-Perú FTA") Art. 810 [C-0001]; Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, Dec. 2010 [C-0071]; MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011 [C-0073]; Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM Art. 2 – 35 [R-153]; Ausenco Vector, *Plan de Participación Ciudadana* ("PPC") de Bear Creek [C-0155]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 1, 2.2, 3, 4, 7, 12, 17 [R-159]; Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 [C-0161]; International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) Art. 2, 33(2)(b) [R-029]; Flury First Report ¶¶ 70 – 72 [CEX-006].

<sup>251</sup> CPHB-I ¶ 27, Tr. 1789 (C. Closing); Tr. 1066:19-21, 1083:3-17, 1089:9-19 (Ramírez Delpino).

request information, reject participation mechanisms it deems unsuitable, or demand that the company hold additional workshops.<sup>252</sup> In these proceedings, several witnesses testified that Respondent failed to meet the requirements of Supreme Decree 028. DGAAM refused to attend some of Claimant’s workshops, citing budgetary constraints. Mr. Flury’s view was that Respondent had abandoned Claimant, with the consequences that we see now. The scant presence of the State in the region contributed to the conflictive situation.<sup>253</sup>

241. ILO Convention 169 imposes direct obligations on states only. Contrary to Respondent’s arguments, a private company cannot “*fail to comply*” with ILO Convention 169 because it imposes no direct obligations on them. The Convention adopts principles on how community consultations should be undertaken, but does not impose an obligation of result. It does not grant communities veto power over a project. The only relevant inquiry is whether the consultations were conducted in good faith, adjusted to the circumstances of the Project and the affected community, and conducted with the objective of reaching agreement.<sup>254</sup>

242. Recognizing that social support is fundamental to the successful execution of a mining project, Claimant devoted considerable efforts and resources toward forging a respectful relationship with local communities and exceeded government requirements.<sup>255</sup> *Amici* fail to address that Claimant exceeded the requirements of domestic and international law, organizing five participatory workshops to introduce indigenous peoples to the Santa Ana Project before the preparation of the ESIA began and again during the preparation of the ESIA, where Ministerial Resolution No. 304 only requires one. From 2008 – 2011, Claimant held over 130 workshops in 18 communities to engage them with the Santa Ana Project and employed over 100 community members. Claimant regularly informed DGAAM of these activities and DGAAM visited the Project area to monitor Claimant’s relationship

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<sup>252</sup> CPHB-I ¶ 5; C. Opening Slide 61; Tr. 1105:2-4 (Ramírez Delpino); MINEM, Dirección General de Asunto Ambientales Mineros, Certificación Ambiental para Actividades de Explotación Mediana y Gran Minería [C-0156]; Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM Art. 26.4 [R-153].

<sup>253</sup> CPHB-I ¶¶ 27 – 28; Tr. 1066:19-21, 1083:3-17, 1089:9-19 (Ramírez Delpino); 1316 – 1317 (Peña); Tr. 1789 – 1791 (C. Closing); Blog Posts of Antonio Alfonso Peña Jumpa [C-0232].

<sup>254</sup> CPHB-II ¶¶ 19 – 22; RPHB-I ¶¶ 20, 21; International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) [R-029]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM [R-159].

<sup>255</sup> CPHB-I ¶ 7; Tr. 755 – 756 (McLeod-Seltzer); Antúnez de Mayolo Second Statement ¶ 65 [CWS-7].

with the communities.<sup>256</sup> Contrary to Mr. Ramírez Delpino’s statement, however, neither the Regional Directorate of Energy and Mines (“DREM”) nor MINEM ever informed Claimant of any concerns they may have had regarding the workshops.<sup>257</sup> Claimant’s other efforts included participative monitoring and school campaigns, setting up an Office of Ongoing Services at the Santa Ana campsite to field queries, and distributing informational materials – in print and through radio – to inform communities about the Santa Ana Project.<sup>258</sup> In response to Respondent’s allegation that Claimant was not upfront with communities about its role at the start of the Project, as Mr. Ramírez Delpino testified, communities care more about a mining project’s size than the identity of its owners.<sup>259</sup>

243. Claimant defined the areas of direct and indirect influence in its Executive Summary of the ESIA and sent this to DGAAM for review.<sup>260</sup> When Claimant submitted its ESIA for review on December 23, 2010, the OEFA reported that Claimant enjoyed a harmonious relationship with communities.<sup>261</sup> DGAAM approved the CPP and the Executive Summary of the ESIA on January 7, 2011, determining that the citizen participation mechanisms were “*appropriate to the particular characteristics of the mining activity area of influence [...]*.”<sup>262</sup> Critically, this means that Respondent determined that the

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<sup>256</sup> Claimant’s Reply to Amici (Aug. 18, 2016) ¶ 21; CPHB-I ¶¶ 8 – 9; CPHB-II ¶ 29; Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek [C-0155]; Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 [C-0161]; Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM [R-153]; Swarthout First Statement ¶ 40 [CWS-1]; Antúnez de Mayolo First Statement ¶ 7 [CWS-2]; Antúnez de Mayolo Second Statement ¶¶ 7, 82 [CWS-7].

<sup>257</sup> CPHB-I ¶ 9; Tr. 1090:4-7 (Ramírez Delpino).

<sup>258</sup> CPHB-I ¶ 10; Tr. 1785 – 1788 (C. Closing) (*stating* 130 Workshops); Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek [C-0155]; Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 [C-0161].

<sup>259</sup> CPHB-II ¶ 33; C-II ¶ 3; Tr. 1075 – 1076 (Ramírez Delpino).

<sup>260</sup> CPHB-I ¶¶ 12 – 14; CPHB-II ¶ 26; C. Closing Slide 93, 99; Request from Bear Creek Mining Corporation to DGAAM for Approval of the ESIA, Dec. 23, 2010 [C-0072]; Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek [C-0155]; Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 [C-0161]; DGAAM’s Observations to Bear Creek’s EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD p. 7 [R-040]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 14 [R-159]; 2010 Environmental Impact Assessment (PPC) Annex 2: Participatory Information Workshops 2007-2010 Annex 2 [R-229].

<sup>261</sup> CPHB-I ¶ 15; OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 at 4 [C-0143]; OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011 p. 15 [C-0180].

<sup>262</sup> CPHB-I ¶ 16; CPHB-II ¶ 26; C. Closing Slide 86; Tr. 1105 – 1111 (Ramírez Delpino); Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 [C-0161]; DGAAM’s Observations to Bear Creek’s EIA for

CPP complied with both Supreme Decree 028 and Ministerial Resolution No. 304.<sup>263</sup> Thereafter, DGAAM outlined the next steps that Claimant would need to undertake for a public hearing to occur. Claimant had complied with all requirements by January 21, 2011 and, with DGAAM's authorization and support, proceeded to hold the public hearing on February 23, 2011.<sup>264</sup> By all contemporaneous accounts, including from MINEM, the hearing was a success.<sup>265</sup> *Amici's* account contradicts Respondent's own contemporaneous documents and statements.<sup>266</sup> If DGAAM had believed that further information needed to be communicated to the communities to alleviate any concerns, it would have ordered Claimant to hold additional workshops after the hearing.<sup>267</sup> Since Respondent has failed to produce its video of the public hearing, the Tribunal should give no weight to the biased, after-the-fact accounts of the public hearing, including the reports submitted by Dr. Peña Jumpa, who did not attend the hearing.<sup>268</sup>

244. After the hearing, Claimant continued its community relations program and, on April 19, 2011, DGAAM noted that Claimant had implemented all of the citizen participation mechanisms that were to be carried out during the ESIA evaluation phase, as set forth in the CPP.<sup>269</sup> The local communities supported the Santa Ana Project. Claimant signed agreements with the communities, formalizing

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Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD p. 7 [R-040].

<sup>263</sup> CPHB-II ¶ 27.

<sup>264</sup> CPHB-I ¶ 17; Tr. 1091 (Ramírez Delpino); MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011 [C-0073]; Letter from Bear Creek to DGAAM, Jan. 21, 2011 [C-0162].

<sup>265</sup> CPHB-I ¶ 18; CPHB-II ¶ 35; Minutes of the Public hearing – Mineral Subsector No. 007-2011/MEM-AAM – Public Hearing for the ESIA of the “Santa Ana” Project, Feb. 23, 2011 [C-0076]; *Puno: prueba de fuego*, REVISTA PODER 360°, June 2011 pp. 8, 10 [C-0078]; Ministry of Energy and Mines, Press Release 093-2011, Mar. 2, 2011 [C-0328]; Letter from Braulio Morales Choquecacha and Faustino Limatapa Musaja, Aug. 8, 2016 [C-0329]; Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016 [C-0331]; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) p. 4 [R-010].

<sup>266</sup> CPHB-II ¶ 36; RPHB-I ¶¶ 8, 43.

<sup>267</sup> CPHB-I ¶ 18; CPHB-II ¶ 37; Tr. 1114 – 1115 (Ramírez Delpino); MINEM, Dirección General de Asunto Ambientales Mineros, Certificación Ambiental para Actividades de Explotación Mediana y Gran Minería [C-0156]; Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM Art. 26.4 [R-153].

<sup>268</sup> CPHB-I ¶¶ 19 – 21, 28; CPHB-II ¶ 34; R-II ¶ 207; Tr. 1337, 1441 (Peña); R. Ltr. to T. (Jul. 7, 2016); Tr. 1123 – 1124 (Ramírez Delpino); Tr. 1906 (R. Closing); Blog Posts of Antonio Alfonso Peña Jumpa [C-0232]; Letter from Braulio Morales Choquecacha and Faustino Limatapa Musaja, Aug. 8, 2016 [C-0329]; Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016 [C-0331]; Peña First Report ¶¶ 4 – 5 [REX-2].

<sup>269</sup> CPHB-I ¶ 22; CPHB-II ¶¶ 37; Tr. 1124 – 1125 (Ramírez Delpino); DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD pp. 2 – 6 [R-040].

their support and the company's commitment to (1) provide jobs, (2) assist communities in the development of sustainable projects, and (3) respect the indigenous people's way of life. Community members independently expressed their support for Claimant and the Santa Ana Project. In March 2011, representatives of the Huacullani District denounced FDRN protests and the March 20, 2011 ordinance purporting to prohibit all mining activities in the Department of Puno. Prior to Respondent's enactment of Supreme Decree 032, the Peruvian Government supervised and endorsed Claimant's community relations program for the Santa Ana Project every step of the way. Even after Respondent issued Supreme Decree 032, members of the communities asked OEFA about when the Santa Ana Project would return. Local authorities wrote to the Peruvian Government requesting the return of the Project. Community members maintain that Claimant's community relations programs were successful.<sup>270</sup>

245. In response to Respondent's allegation that Claimant only worked with 5 of the 26 communities that it had identified in its December 2006 Supreme Decree Application, Claimant states that it worked with 18 communities within the Project's direct and indirect areas of influence and held meetings with national, regional, and local authorities.<sup>271</sup>

246. In its closing argument, Claimant maintained that it had the social license to operate: (1) MINEM had

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<sup>270</sup> Claimant's Reply to Amici (Aug. 18, 2016) ¶¶ 23 – 26; CPHB-I ¶¶ 23; CPHB-II ¶¶ 30, 39; Bear Creek Mining Corporation, *Community Engagement* [C-067]; Bear Creek Mining Corporation, *Community Initiatives* [C-068]; *Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, Mar. 29, 2011 [C-0083]; Memorandum from Members of the Huacullani District to the Prime Minister of Perú, MINEM and Bear Creek Mining, *Memorial Por El Desarrollo y La Inclusión*, May 15, 2013 [C-0118]; Memorandum from Members of the Huacullani District to MINEM, *Reactivación del Proyecto Santa Ana*, Oct. 27, 2013 [C-0119]; Memorandum from Members of the Huacullani District to Prime Minister of Perú, MINEM and Bear Creek Mining, *Reiterativo Por El Desarrollo y La Inclusión*, Jan. 24, 2014 [C-0120]; Agreement between Condor Aconcagua and Bear Creek, May 23, 2009 [C-0177]; Acta de Supervisión Ambiental, Nov. 25, 2011 [C-0179]; OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011 [C-0180]; Letter from the Primer Teniente Gobernador of the Huacullani District to Juan José Alvares Delgado, Puno Regional Council, Apr. 4, 2011 [C-0181]; Letter from the Primer Teniente Gobernador of the Huacullani District to Mauricio Rodríguez Rodríguez, President of the Puno Regional Government, Apr. 4, 2011 [C-0182]; *Comunidades de Huacullani Apoyan a Minera Santa Ana*, Correo Puno Prensa Peru, Mar. 23, 2011 [C-0184]; *Huacullani en contra de marcha antiminera*, La República, Mar. 29, 2011 [C-0185]; Acta de Asamblea General Extraordinaria de la Comunidad Campesina de Concepción de Ingenio, Apr. 2, 2011 [C-0186]; 2013 MacCormick Social Responsibility Index [C-0230]; Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016 [C-0331].

<sup>271</sup> CPHB-II ¶¶ 31 – 32; CPHB-I ¶¶ 13 – 14; RPHB-I ¶ 39; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017]; DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD p. 7 [R-040]; Bullard Second Report ¶ 18 [CEX-005]; Texto Único de Procedimientos Administrativos del Ministerio de Energía y Minas [Bullard 034].

approved Claimant's CPP and the Executive Summary of its ESIA, (2) OEFA confirmed that the relationship was harmonious, (3) there were no problems with the Public Hearing, and (4) as of April 2011, there had been no protests against Claimant. Respondent had confirmed that Claimant was acting in accordance with Supreme Decree 028 and applicable law. Respondent could have ordered Claimant to conduct additional workshops but did not.<sup>272</sup> Respondent has a duty to guarantee the right of consultation of indigenous communities. Mr. Delpino's testimony confirmed that this right is guaranteed with the implementation of the CPP.<sup>273</sup> Claimant's Project was small and run-of-the-mill: while there would be a spike during construction of around 1,000 jobs, it was only going to create 157 permanent jobs in year 1 of operations and, over the life of the mine, only 141 jobs. Consistent with the manual from MINEM, Claimant thus concentrated their outreach near the communities closest to the Project and so as not to create false expectations for those further away.<sup>274</sup>

247. The Tribunal must view Claimant's social license to operate in light of the contemporaneous documentation.<sup>275</sup> The contemporaneous documentation shows that the protests were not against Claimant's activities, but were orchestrated for political reasons by Walter Aduviri, for the cancellation of all mining.<sup>276</sup>
248. As even the First Specialized Constitutional Court of Lima confirmed, Claimant did not instigate the unrest that erupted in spring of 2011. The protests were not aimed at any wrongdoing by Claimant. The protests were politically motivated who rejected mining activities as a whole.<sup>277</sup> Testimony

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<sup>272</sup> Tr. 1781 – 1784, 1794 – 1795 (C. Closing).

<sup>273</sup> *Id.* at 1785 (C. Closing).

<sup>274</sup> CPHB-I ¶¶ 11, 26; Tr. 1792 – 1793 (C. Closing); (Tr. 254 (R. Opening)); Swarthout Witness Statement ¶ 40 [CWS-1]; Mayolo Second Statement ¶ 77 [CWS-7]; Ministry of Energy and Mines of Peru, General Direction of Environmental Affairs, "Guide on Community Relations" pp. 27, 30 [R-172].

<sup>275</sup> CPHB-II ¶ 38; RPHB-I ¶ 16; *Huelga antiminera en Puno sigue sin solución*, LA REPÚBLICA, May 21, 2011 [C-0094].

<sup>276</sup> CPHB-II ¶¶ 40 – 42; Tr. 782 (Gala); Press Release, Presidencia del Consejo de Ministros, *Premier califica de inadmisibles bloqueos de carreteras en Puno y pide deponer acciones violentas*, May 18, 2011 [C-0092]; *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *Interview of Prime Minister Rosario Fernandez*, Mira Quien Habla, Willax TV, May 31, 2011 at 3:48 – 5:00, 5:34 – 7:38, 31:41 – 32:22 [C-0097]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; Aide Memoire "Actions Done by the Executive Power Regarding Conflicts in the Puno Department" (7/2011) p. 4 [R-010].

<sup>277</sup> CPHB-I ¶¶ 24 – 25; Tr. 275:8-10; Tr. 443, 452 (Swarthout); 1213:6-16 (Flury); 1330:17–19 (Peña); Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; *Diálogo no prosperó en Puno*

confirmed that Respondent's poor management of the conflict exacerbated the social unrest.<sup>278</sup>

249. Nevertheless, as a matter of law, the absence of local support for a mining project does not vitiate or otherwise undermine Respondent's grant of a declaration of public necessity. At most, a lack of support entitles the Government to require the concession holder to undertake additional community outreach.<sup>279</sup>
250. There is, however, a third option: if the Tribunal finds that Claimant did not have a social license, it can find that it was prevented from obtaining the same by Respondent's own wrongdoing. Respondent never gave Claimant a chance to continue its community outreach efforts to strengthen the social license it had already obtained, after the protests began. The suspension of Claimant's ESIA prevented Claimant from continuing to implement its community relations program in Santa Ana.<sup>280</sup>

### 3. Respondent's Response to *Amici* Submission and Tribunal's Question (a)

251. According to Respondent, the DHUMA Submission presents a new perspective on two central points of dispute: (1) whether Claimant caused or contributed to the social unrest that engulfed the Puno region and (2) whether Claimant lived up to international norms for interactions with indigenous communities. DHUMA is clear on both points: Claimant failed to obtain approval of the local

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*debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; *Interview of Prime Minister Rosario Fernandez*, Mira Quien Habla, Willax TV, May 31, 2011 pp. 2-3 [C-0097]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236].

<sup>278</sup> CPHB-I ¶¶ 28 – 30; Tr. 787:5-16 (Gala); Tr. 1316 – 1317:3, 1324:1-8 (Peña); *Diálogo Dos Años Después Peru: Estado y Conflicto Social*, Sept. 2014 pp. 8, 29 [C-0292]; Blog Posts of Antonio Alfonso Peña Jumpa [C-0232].

<sup>279</sup> CPHB-I ¶¶ 31 – 37; Tr. 864, 887 (Gala); Tr. 940 – 949 (Zegarra); Tr. 1229 – 1231 (Flury); *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011 [C-0093]; *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *Interview of Prime Minister Rosario Fernandez*, Mira Quien Habla, Willax TV, May 31, 2011 [C-0097]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; Peruvian Congress, *Legality and Problems of the company Minera Maiatz in the Territories of the Segunda y Cajas, and Yanta Rural Communities in the Provinces of Huancabamba and Ayabaca in the Piura Region*, May 9, 2008 [C-0254]; Bullard First Report ¶¶ 10, 133 – 136, 182 – 183 186 [CEX-003]; Supreme Decree 162-92-EF [Bullard 023]; Statement of Reasons for Supreme Decree No. 083 of 2007 [R-032]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM [R-159].

<sup>280</sup> CPHB-II ¶¶ 43 – 45; RPHB-I ¶ 15; DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [C-0098].

population for its current and future operations and, through its own actions, contributed to distrust, misinformation, and conflict in the communities.<sup>281</sup> The summary of Respondent's response to the DHUMA Submission is best taken from its own words:

*The DHUMA Submission, as a voice for the affected Aymara communities themselves, is a helpful resource for the Tribunal as it evaluates Claimant's conduct and its contributions to the events of 2011. DHUMA's Submission testifies directly to Claimant's insufficient social outreach and the dire consequences that that failure had for Claimant's Santa Ana project. From the beginning, Bear Creek's interactions with the communities have been defective, due to their myopic focus on delivering limited benefits to only those communities whose land Bear Creek needed to directly occupy for its project. Bear Creek ignored, or at the very least failed to address sufficiently, broadly held community concerns about environmental contamination and availability of scarce water resources. The DHUMA Submission makes it clear that Claimant failed to comply with international standards or to acquire the social license necessary to operate a large-scale mining project. DHUMA explains that the result of Claimant's conduct was that the Aymara communities rebelled violently against Bear Creek's presence in the Puno region. The DHUMA Submission is therefore a critical portion of the record before this Tribunal as it assesses Claimant's conduct.*<sup>282</sup>

252. As DHUMA explained, it has worked directly with the Aymara communities for nearly 30 years. DHUMA's daily interactions with the Aymara communities make it uniquely qualified to understand the communities' rejection of the Santa Ana Project, and place it in a position to explain this rejection to the Tribunal. DHUMA staff also participated in the February 2011 public hearing and DHUMA's President, Sister Patricia Ryan, was in the city of Puno during the 2011 protests and actively sought to keep the Aymara protests peaceful and non-violent.<sup>283</sup>

253. The DHUMA Submission shows that Claimant caused the social unrest in Puno when it failed to alleviate community concerns about environmental degradation. From the outset, Claimant created a climate of misinformation and distrust in various groups of the Aymara communities in the area. This is clear from DHUMA's description of a May 18, 2004 meeting between Ms. Villavicencio and Huacullani authorities to discuss re-sizing the Aymara Lupaca Reserve. This distrust and misinformation continued and, according to DHUMA, several communities were unaware until February 2008 that their territory would soon be occupied by a mining company. DHUMA confirms

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<sup>281</sup> Respondent's Comments to DHUMA Submission (Aug. 18, 2016) p. 1.

<sup>282</sup> *Id.* at p. 15; *see also* RPHB-I ¶¶ 6, 9.

<sup>283</sup> Respondent's Comments to DHUMA Submission (Aug. 18, 2016) p. 2 – 3; *see also* RPHB-I ¶ 6; Derechos Humanos y Medio Ambiente – Puno Website [R-438]; Maryknoll Sisters Website.

that after the acquisition became known in October 2008, members of the communities sought dialogue with Claimant's representatives. When these requests were ignored, community members travelled to the Santa Ana campsite where they threatened Claimant's employees and set fire to the campsite. The DHUMA Submission makes it clear that, from the outset, Claimant failed to assuage community concerns about the presence of a large-scale mine on community lands.<sup>284</sup>

254. The DHUMA Submission contradicts Claimant's assertion that it received overwhelming support during the February 2011 public hearing. DHUMA representatives attended this hearing and reject Claimant's assertion. DHUMA explains that many of the attendees were present only out of cultural and moral obligation. During the hearing, Claimant distributed a gift bag containing a hat and a poncho with the company's name on it to attendees, thereby generating a sense of obligation to stay and listen. DHUMA explains that the population was uneasy and worried about the development of the mining Project, and this unease manifested itself at the hearing. There were questions related to community concerns about environmental contamination, and linguistic barriers likely suppressed the number of questions asked. DHUMA's representatives who attended the meeting speak Aymara and witnessed attendees commenting about not trusting what the company was saying and voicing concern about harm. After the hearing, several communities wrote to regional and national authorities to express concerns about the public hearing and their opposition to the Santa Ana Project. The hearing apparently served as a catalyst for Aymara community action against the Santa Ana Project.<sup>285</sup> To the extent that Claimant argues that they have a video showing local support, such a

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<sup>284</sup> Respondent's Comments to DHUMA Submission (Aug. 18, 2016) p. 3 – 6; SUNARP Registration Notice of the Transfer Agreement for Santa Ana Concessions 9A, 1, 2 and 3, Feb. 1, 2008 [C-0020]; Letter from Bear Creek to Mr. Ramírez, May 11, 2011 [C-0172]; Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR (4/26/2011) [R-018]; Agreements Between Bear Creek and Local Communities [R-043]; Directorial Resolution Granting KARINA 1 Mining Concession to Jenny Villavicencio, Directorial Resolution No. 1856-2006-INACC/J [R-276]; Directorial Resolution Granting KARINA 9A Mining Concession to Jenny Villavicencio, Directorial Resolution No. 2459-2006-INACC/J (6/13/2006) [R-277]; Letter from Bear Creek to the DGAAM on the 2008 Campsite Burning (Dec. 11, 2008) [R-294]; Meeting Minutes of the Public and Communal Authorities and the General Population of the District of Huacullani [R-421]; Bear Creek Press Release [R-429]; Swarthout First Statement ¶¶ 17 – 18 [CWS-1]; Swarthout Second Statement ¶¶ 35 – 36 [CWS-6].

<sup>285</sup> DHUMA's Response 1-3; Respondent's Comments to DHUMA Submission (Aug. 18, 2016) pp. 7 – 10; RPHB-I ¶¶ 7 – 8; Tr. 589:2 – 595:14 (Mayolo); Letter from Braulio Morales Choquecacha and Faustino Limatapa Musaja, Aug. 8, 2016 [C-0329]; Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016 [C-0331]; Memorial submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP [R-015]; Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to the President of Peru, Memorial No. 0001-2011-CO-FDRN-RSP [R-016]; Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Minister of Energy and Mines, Memorial No. 0002- 2011-

video has not been entered into the record here.<sup>286</sup> Mr. de Mayolo’s testimony that he had not seen the gifts provided at the hearing is implausible.<sup>287</sup>

255. DHUMA confirms that the protests in 2011 were directly related to the Santa Ana Project. This is evident from the protestors’ demands, as well as from the protests not stopping until after Respondent issued Supreme Decree 032. The fact that the protests occurred in Puno and Desaguadero – the cities closest to the Santa Ana Project site – rather than on the site itself does not mean they were unrelated. DHUMA explains that the protests took place in the largest cities in order to capture the attention of the regional and national authorities for maximum impact. Mr. Aduviri was simply a spokesman for the communities’ broadly held anger for the Santa Ana Project – while he may have helped organize the community movement, he did not create it. The protests had broad community opposition to the Santa Ana Project as their foundation. DHUMA personnel experienced first-hand the severity of social conditions in Puno and describe these food and water shortages and how this unsustainable crisis in Puno was a critical reason for the Council of Ministers’ issuance of Supreme Decree 032.<sup>288</sup>
256. DHUMA and Dr. López are experts in public international law and international human rights, and DHUMA also works to put international human rights law into practice. DHUMA and Dr. López explain that Claimant failed to live up to international standards for community engagement and, as a result, Claimant failed to obtain the necessary social license for an extractive project of this nature. The internationally-accepted concept of the “*social license*” aligns closely with the requirements under Peruvian law. It is clear that Claimant failed to comply with internationally recognized norms, including the 2008 UN Framework and Guiding Principles and Convention 169 of the ILO. It was Claimant’s responsibility to address community concerns. It is irrelevant whether their concerns were based in sound scientific or technical evidence – it was Claimant’s job to educate and to correct

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CO-FDRN-RSP [R-017]; Letter from Kelluyo Community Inquiring about the Project [R-053]; Questions Raised at the Santa Ana Public Hearing [R-054]; 2010 Environmental Impact Assessment Citizen Participation Plan (“PPC”) [R-227]; Letters from Kelluyo District on Santa Ana’s Public Hearing [R-304]; Map of Distances of *Comunidades Campesinas* Population Centers to the Santa Ana Area of Influence [R-312]; AA Letter from Desaguadero Community [R-411]; Memorial from Kelluyo Authorities to the Minister of Energy and Mines (Mar. 18, 2011) [R-423].

<sup>286</sup> Tr. 1906 (R. Closing).

<sup>287</sup> *Id.* at 1905 (R. Closing).

<sup>288</sup> Respondent’s Comments to DHUMA Submission (Aug. 18, 2016) p. 10 – 11; Human Rights and Environment Association, Chronology: Antimining Protests in the South Region-2011 [R-058].

misimpressions, rather than simply dismiss them.<sup>289</sup>

257. In response to the Tribunal’s question (a)<sup>290</sup>, Respondent explained that, as Claimant has recognized, a company obtains the necessary social license if and only if it is generally accepted by the relevant communities. The sufficiency of a company’s efforts to obtain this license is not measured by the procedural steps it follows or the minimum legal requirements it fulfills; rather, the license must actually be obtained and maintained. The sufficiency of a company’s outreach is measured by the standard of success. It is not a question of discretion of the State.<sup>291</sup> Procedural steps – be it the carrying out of 130 workshops, organizing a rotational work program, or completion of other procedural steps cannot substitute for actually obtaining a social license.<sup>292</sup> Here, Claimant did not have “*general acceptance*” from the relevant communities – it did not have a social license.<sup>293</sup> Although Claimant tries to narrow the scope of “*relevant communities*”, its approach misunderstands the Aymara communities’ collective social organization.<sup>294</sup> The protestors were not outside agitators; they were community members who objected to Claimant’s presence in the area, to its Project, and

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<sup>289</sup> Respondent’s Comments to DHUMA Submission (Aug. 18, 2016) p. 11 – 15; International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) [R-029]; Questions Raised at the Santa Ana Public Hearing [R-054]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM [R-159]; Bear Creek Press Release [R-429]; United Nations Human Rights Council, Resolution 8/7 [R-430]; United Nations Human Rights Council, Document No. A/HRC/8/5, Protect, Respect and Remedy: A Framework for Business and Human Rights [R-431]; United Nations Human Rights Council, Document No. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework [R-432]; United Nations Human Rights Council, Resolution 17/4 [R-433]; International Organization of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, “Joint initial views of the International Organization of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights” [R-434]; International Council on Mining and Metals, “ICMM welcomes Ruggie report,” [R-435]; United Nations Declaration on the Rights of Indigenous Peoples [R-437].

<sup>290</sup> PO-10 ¶ 2.1.4 (a), *supra* ¶ 96.

<sup>291</sup> RPHB-I ¶¶ 10 – 15, 33 – 34; RPHB-II ¶ 2; Tr. 432 – 433 (Swarthout); Tr. 1064 – 1065, 1132 (Ramírez); 1294 – 1297, 1301 – 1302 (Peña); Swarthout First Statement ¶ 40 n. 31 [CWS-1]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 2.1 [R-159]; Davis and Franks, “Costs of Company-Community Conflict in the Extractive Sector,” Harvard Kennedy School of Government [R-272]; Business for Social Responsibility, “The Social License to Operate” 3 – 4 [R-273].

<sup>292</sup> RPHB-I ¶ 17; RPHB-II ¶ 3 – 4; C-II ¶ 73; CPHB-I ¶ 1; Antúnez de Mayolo Second Statement ¶ 14 [CWS-7].

<sup>293</sup> RPHB-I ¶ 16.

<sup>294</sup> *Id.*

to the effects that they feared the Project would have on their lives, lands, culture, and environment.<sup>295</sup>

258. Since the social license is a *de facto* acceptance of the Project, there are few legal standards that can be applied to it. None of the international or national instruments supplies a formula that guarantees that such a license will be obtained. Rather, some procedures are recommended.<sup>296</sup> ILO Convention 169 promotes a transparent, effective and integrated consultation process by giving communities the right to be consulted (Article 6), demanding that communities' cultural relationships with their land will be respected (Article 13), and stating that communities have the right to participate in the use, management, and conservation of the natural resources within their lands (Article 15). The UN Declaration on Indigenous Peoples, in particular Article 32, also speaks to the proper process for obtaining a social license and reinforces ILO Convention 169.<sup>297</sup> Pursuant to these, while the State must ensure that companies obtain free and informed consent from the affected communities, the company must do what is necessary to achieve that result.<sup>298</sup> Article 15 of ILO 169 obligates Respondent to specifically safeguard the communities' ability to make decisions about the resources on their lands, which Respondent did by requiring and monitoring the CPP process. The CPP process focuses on the quality of communication, ensuring that a company can only proceed with the consent of the communities. The CPP process is not a simple matter of ticking boxes or fulfilling certain

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<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at ¶¶ 18 – 19; R-II ¶¶ 124, 140 – 142; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 5 [R-159]; International Council on Mining and Metals, “Position Statement, Mining and Indigenous Peoples” 2, 3 [R-178]; International Council on Mining and Metals, “Good Practice Guides, Indigenous Peoples and Mining” 4 [R-179]; Government of Canada, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad 3-4 [R-180]; Government of Canada, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector 1 [R-181]; International Council on Mining and Metals Website, About Us, available at <http://www.icmm.com/about-us/about-us> [R-182].

<sup>297</sup> RPHB-I ¶¶ 20 – 22; International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) Art. 6, 13, 15.2 [R-029]; United Nations Declaration on the Rights of Indigenous Peoples [R-108]; Rodríguez-Mariátegui First Report ¶ 49 [REX-003].

<sup>298</sup> RPHB-I ¶ 23; RPHB-II ¶ 5; Canada-Perú FTA Art. 810 [C-0001]; International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) Art. 6 [R-029]; United Nations Declaration on the Rights of Indigenous Peoples Art. 32 [R-108]; Government of Canada, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad 1 [R-180]; Government of Canada, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector 1, 5, 6 [R-181]; Davis and Franks, “Costs of Company-Community Conflict in the Extractive Sector,” Harvard Kennedy School of Government 11 [R-272]; Business for Social Responsibility, “The Social License to Operate” 3-4 [R-273].

steps.<sup>299</sup>

259. Peruvian law incorporates the above described international standards and requires that a company undertake community outreach to build healthy relations with the communities. The legal requirements, such as in Legislative Resolution No. 26253 of 1993, do not dictate a strict or specific path for a company to seek a social license.<sup>300</sup> The citizen participation process for a mining project is covered by 2 principle legal norms: Supreme Decree 028 and Ministerial Resolution No. 304. These set out the necessary – but not sufficient – steps toward securing a social license.<sup>301</sup> In 2001, MINEM published a Guide advising on best practices for designing and executing a community outreach program to develop mining activities.<sup>302</sup> In 2011, Peru adopted the “Law on the Right to Prior Consultation to Indigenous Peoples, Recognized in Convention 169 of the International Labor Organization”, which adopted all of the recommendations of ILO Convention 169.<sup>303</sup> Finally, in addition to these procedures, the company must reach agreements with all land owners and possessors on the mine sites. Here, that would amount to 99 agreements.<sup>304</sup> That the DGAAM reviewed Claimant’s CPP and did not instruct Claimant to expand upon it is not proof of the plan’s sufficiency to obtain a social license.<sup>305</sup>

260. Merely meeting the formalistic requirements of the law is not an indication of meeting the law’s

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<sup>299</sup> Tr. 1888 – 2893 (R. Closing)

<sup>300</sup> RPHB-I ¶¶ 26 – 27; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 2.1, 3 [R-159]; Flury First Report ¶¶ 72 – 73 [CEX-006]; Rodríguez-Mariátegui First Report ¶ 49 [REX-003]; Rodríguez-Mariátegui Second Report ¶ 141 [REX-009].

<sup>301</sup> RPHB-I ¶¶ 28 – 29; RPHB-II ¶ 6; CPHB-I ¶ 2; Tr. 1497:15-19 (Clow); Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM Arts. 2, 20, 24 [R-153]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM 3, 5.6 [R-159]; General Law on the Environment, Law No. 28611 Art. 46 – 47 [R-285]; Ramírez Second Statement ¶ 17 [RWS-6]; Rodríguez-Mariátegui First Report ¶ 58 [REX-003].

<sup>302</sup> RPHB-I ¶¶ 30, 36; Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek Annex 2.1 [C-0155]; Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM Art. 12, 13 [R-153]; Ministry of Energy and Mines of Peru, General Direction of Environmental Affairs, “Guide on Community Relations” [R-172]; Rodríguez-Mariátegui First Report ¶¶ 53, 58 [REX-003]; Rodríguez-Mariátegui Second Report ¶ 142 [REX-009].

<sup>303</sup> RPHB-I ¶ 31; Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el Convenio 169, Ley No. 29785 del 7 de setiembre de 2011 [Flury 028].

<sup>304</sup> RPHB-I ¶ 32; R-II ¶ 330; Rodríguez-Mariátegui Second Report ¶¶ 109 – 111 [REX-009].

<sup>305</sup> RPHB-II ¶ 10; CPHB-I ¶ 6; Ramírez Second Statement ¶ 16 [RWS-6].

objective: consensus and a social license from the affected communities. Any bare minimum steps – such as the CPP, engaging in workshops, conducting a public hearing – exist in service of the consultation law’s objectives of promoting dialogue and consensus building. Here, while Claimant carried out consultations, they were not performed in a climate of mutual trust. Claimant was not upfront about its role or that of Ms. Villavicencio, leading communities to reject the Project in part because they did not trust the company.<sup>306</sup>

261. Claimant’s community outreach program did not include all relevant stakeholders and it ignored the Aymara communities’ collective decision-making process. Here, Claimant began by mis-defining the number of communities in its “*area of influence*”, contrary to the MINEM guidance.<sup>307</sup> In Observation 7, MINEM observed that the area of influence needed to be broadened. Claimant had failed to appreciate that the individual communities were indeed part of the collective Aymara community.<sup>308</sup> Claimant further disparaged members of the Kelluyo and other neighboring districts

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<sup>306</sup> RPHB-I ¶¶ 36 – 38; RPHB-II ¶¶ 8 – 9, 11; R-II ¶ 189; CPHB-I ¶¶ 1, 3 – 4, 7 – 12, 14, 18, 21; DHUMA Amicus Brief (Jun. 9, 2016) at 5; Tr. 378 – 382, 419 – 427 (Swarthout); Tr. 604 – 605 (Mayolo); Tr. 1357 – 1358, 1391 (Peña); Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek Annex 2.1, Annex 3 p. 2, 23, 25, 53, 70 [C-0155]; Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016 [C-0329]; Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016 [C-0331]; Memorial submitted by the Frente de Defensa and Kelluyo’s *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP [R-015]; Memorials submitted by the Frente de Defensa and Kelluyo’s *Comunidades Campesinas* to the President of Peru, Memorial No. 0001-2011-CO-FDRN-RSP [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 [R-017]; Resolution Approving First Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 216-2008-MEM/AAM [R-036]; Resolution Approving Second Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 310-2009-MEM/AAM [R-037]; Resolution Approving Third Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 280-2010-MEM/AAM [R-038]; Agreements Between Bear Creek and Local Communities [R-043]; Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM Art. 2, 8-9, 12, 13 [R-153]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 1, 2, 3, 5 [R-159]; Ministry of Energy and Mines of Peru, General Direction of Environmental Affairs, “Guide on Community Relations” [R-172]; Bear Creek’s Responses to DGAAM’s Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes) 25 [R-184]; Meeting Minutes of the Public and Communal Authorities and the General Population of the District of Huacullani [R-421]; Peña First Report [REX-002]; Rodríguez-Mariátegui First Report ¶ 58 [REX-003]; Peña Second Report ¶ 44 [REX-008].

<sup>307</sup> Tr. 1888 – 1893 (R. Closing); *compare* Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) pp. 18 – 19 [C-0017] to Tr. 586:7-9 (Mayolo) (*showing* discrepancy in number of communities in area of influence).

<sup>308</sup> Tr. 1893 – 1894 (R. Closing); DGAAM’s Observations to Bear Creek’s EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD [R-040].

as “outsiders” or “agitators.”<sup>309</sup> This created division and hostility among the communities when Claimant only offered jobs to some and not to others. This fueled protest in 2008 and this continued.<sup>310</sup> Further, Claimant did not provide all of the relevant information to the communities. Although Claimant carried out more than 130 workshops, this does not answer the question of whether Claimant addressed the communities’ concerns. Records indicate that more information and better ways to communicate that information were needed. Communication was also overly technical and poorly translated.<sup>311</sup> Claimant also failed to provide the necessary room in its schedule for the communities to decide whether to support the Project, in accordance with Aymaran decision-making.<sup>312</sup>

262. The State’s responsibility extends to ensuring that the affected communities are in fact consulted by private companies and to supervising those consultative processes to make sure that they are in place, are consistent with the legal minimum requirements set forth by the State, and that they are implemented by the company. The State has the neutral role of an independent facilitator.<sup>313</sup> Here, the State fulfilled its responsibilities, even going beyond simply reviewing consultation plans on paper and attending workshops. The Government warned Claimant that the outreach activities were not effective.<sup>314</sup> Claimant’s allegations that the Government was inadequately involved are without merit: the Government was adequately involved and was not responsible for rescuing Claimant from its own failings. In fact, where the State tried to correct Claimant’s misconceptions about its area of social influence, Claimant ignored that guidance. Claimant’s complaint that Respondent’s

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<sup>309</sup> Tr. 1891 (R. Closing).

<sup>310</sup> *Id.* at 1857 – 1858 (R. Closing); RPHB-I ¶¶ 39 – 41; Tr. 1301, 1334, 1358 (Peña); Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017]; Bear Creek’s Responses to DGAAM’s Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes) 23 – 24 [R-184]; 2010 Environmental Impact Assessment Annex L: Social Base Line 8, 10 – 11 [R-213]; 488-295 EIA Observations 04-19-2011 30-31 [SRK-022].

<sup>311</sup> RPHB-I ¶¶ 42 – 44; Tr. 1860 (R. Closing); Tr. 482 (Swarthout); Tr. 1389 (Peña); DHUMA Submission (Jun. 9, 2016) at 6-7; Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek 2, 25, 53, 70 [C-0155]; Peña Second Report ¶ 44(3) [REX-008].

<sup>312</sup> RPHB-I ¶ 44; Tr. 1389 (Peña).

<sup>313</sup> RPHB-I ¶¶ 46 – 47; RPHB-II ¶ 13; Tr. 1079:9-10 (Ramírez); Ramírez Second Statement ¶ 6 [RWS-6].

<sup>314</sup> RPHB-I ¶¶ 48 – 50; Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek pp. 2, 25, 53, 70 [C-0155]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 3 [R-159]; 488-295 EIA Observations 04-19-2011 [SRK-022].

management of the social unrest in Puno exacerbated the conflict is also meritless.<sup>315</sup>

263. There are two classes of consequences that follow from a company's lack of a social license: (1) those that are within the discretion of State authorities when faced with a situation where a mining project does not have a social license or (2) those under the FTA if the Tribunal finds that Claimant did not have a social license.<sup>316</sup> Regarding the first class, and as experts from both Parties confirmed, when a community or important stakeholders decides that it does not accept a mining project on their land, it cannot be imposed against the will of the people.<sup>317</sup> With respect to Claimant, it was also still required to reach agreements with 5 communities who owned the land and the 94 families who were in possession of it – if any of these 99 agreements were to fail (and Claimant had obtained 0 by the date of Supreme Decree 032), it would be fatal to the Project.<sup>318</sup> Other consequences are a matter of State discretion – the State can undertake its own outreach, require the company to carry out additional outreach, delay the approval of the ESIA or suspend the process altogether.<sup>319</sup> For a mining project within a border region, the State possesses a high degree of discretion under Article 71 of the Constitution. The State may reassess the public necessity of the project and rescind a prior public necessity decree, if necessary.<sup>320</sup> Although there is no specific provision in the Peruvian legal system that authorizes the revocation of a concession, this is beside the point: here, Respondent did not revoke Claimant's concessions. Here, Respondent acted to revoke its own fully discretionary

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<sup>315</sup> RPHB-II ¶¶ 14 – 15; CPHB-I ¶¶ 27 – 29; Tr. 774, 787 (Gala); Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek Annex 3 pp. 2, 25, 53 [C-0155]; DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD Observation 7 [R-040]; Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes) [R-184]; “Santa Ana Mine Leaves Huacullani Because of Protests” *La Republica-Gran Sur* [R-428]; Bear Creek Press Release [R-429]; Gala First Statement ¶ 41 [RWS-1]; Fernández Statement ¶¶ 10-26 [RWS-4].

<sup>316</sup> RPHB-I ¶ 51.

<sup>317</sup> RPHB-II ¶ 16; RPHB-I ¶¶ 51 – 60; Tr. 1225, 1234 (Flury); Tr. 1497 (Clow); Tr. 1902 – 1903 (R. Closing).

<sup>318</sup> RPHB-I ¶ 52 – 53; Tr. 325 – 326 (R. Opening); Tr. 1226 (Flury).

<sup>319</sup> RPHB-I ¶ 54 – 57; Tr. 1225 (Flury); DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 ¶ 2.1 [C-0098]; Law on the General Administrative Procedure, Law No. 27444 Art. 146.1 [R-104]; Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM Art. 35 [R-153]; Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 5 [R-159]; Ramírez Second Statement ¶¶ 17 – 18, 36 [RWS-6]; 488-295 EIA Observations 04-19-2011 [SRK-022]; Rodríguez-Mariátegui Second Report ¶ 74 [REX-009].

<sup>320</sup> RPHB-I ¶ 58; Danos Report ¶¶ 122 *et seq.* [REX-006].

sovereign declaration of public necessity.<sup>321</sup>

264. With respect to the consequences under the FTA, if the Tribunal finds that Claimant had no social license, it should find Claimant's claims inadmissible.<sup>322</sup> Likewise, no damages would have been able to accrue, given Claimant's errors in obtaining the social license.<sup>323</sup>

265. Witness testimony confirms that the Santa Ana Project could not have continued in the social atmosphere that erupted in the Puno Region in the first half of 2011. Regarding Dr. Flury's statement that it would have been reasonable to expect that Claimant's ESIA would be approved, Dr. Flury also admitted that his assumption did not account for the social unrest that – as Mr. de Mayolo admitted – accompanied the Project prevented Claimant from even completing studies that MINEM had requested in its observations to the ESIA.<sup>324</sup>

266. To claim that Claimant's community relations program was a success is wholly inconsistent with the actual events that unfolded in the Puno region in 2011.<sup>325</sup> There can 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 Project.<sup>326</sup>

## VI. APPLICABLE LAW

*FTA Article 837: Governing Law* provides:

1. *A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*<sup>327</sup>

267. Claimant argues that this dispute is governed by provisions of the FTA, as supplemented by international law. As is customary for international treaty disputes, the domestic legal orders of

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<sup>321</sup> RPHB-II ¶ 17; CPHB-I ¶ 31.

<sup>322</sup> RPHB-I ¶ 59.

<sup>323</sup> *Id.* at ¶ 60; Tr. 1226 (Flury); 1497 (Clow); SRK Second Report ¶ 29 [REX-011].

<sup>324</sup> Tr. 1896 – 1902 (R. Closing); Flury First Report para. 80 [CEX-006].

<sup>325</sup> RPHB-II ¶ 12; CPHB-I ¶ 26; Swarthout First Statement ¶ 40 n. 31 [CWS-1].

<sup>326</sup> RPHB-I ¶ 14; Tr. 1294 – 1297, 1301 – 1302 (Peña).

<sup>327</sup> Canada-Perú FTA [C-0001].

Respondent State and Canada do not govern this dispute and are not binding on the Tribunal.<sup>328</sup>

268. Respondent has not presented any arguments regarding the applicable law, but its arguments are consistent with the view that the dispute is governed by the provisions by the FTA and applicable rules of international law.<sup>329</sup> Respondent, however, denies all allegations not expressly admitted.<sup>330</sup>

269. The Tribunal agrees that Article 837 is applicable.

## VII. JURISDICTION OF THE TRIBUNAL

270. The Parties have submitted that the requirements for jurisdiction are set forth in Article 25 of the ICSID Convention and Chapter 8 of the FTA.<sup>331</sup> Article 25(1) and (2) of the ICSID Convention provides as follows:

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<sup>328</sup> C-I ¶¶ 116 – 119; Canada-Perú FTA [C-0001]; The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 35 (2001) (Updated 2008) [CL-0030]; *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, Jun. 27, 1990, 30 I.L.M. 580, (1991) [CL-0036]; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, Apr. 12, 2002 [CL-0037]; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 [CL-0038]; Vienna Convention on the Law of Treaties, May 23, 1969 Arts. 2(1)(a), 31((3)(c), 37 [CL-0039]; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 [CL-0040].

<sup>329</sup> R-II ¶¶ 5, 15 – 16.

<sup>330</sup> *Id.* at ¶ 36.

<sup>331</sup> RfA ¶¶ 41 – 65; C-I ¶¶ 102 – 115; R-I ¶¶ 198 *et seq.* (*contesting jurisdiction*), 221; Canada-Perú FTA Art. 824, 825, 847, Annex 824.1 [C-0001]; Notice of Intent to Submit a Claim to Arbitration under the Free Trade Agreement between Canada and the Republic of Perú (Feb. 3, 2014) [C-0007]; Certificates of Continuation and Good Standing for Bear Creek Mining Corporation (Sept. 17, 2013) [C-0008]; Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 3, 2007 [C-0015]; Bear Creek Mining Corporation Annual Information Form for year ended Dec. 1, 2013, Apr. 3, 2014 at 1 – 4 [C-0023]; Certificate of Good Standing *Bear Creek Exploration Company Ltd.*, May 1, 2015 [C-0128]; Central Securities Register *Bear Creek Exploration Company Ltd.*, May 1, 2015 [C-0129]; Registro de Personas Jurídicas – Libro de sociedades Mercantiles/Sucursales – Vigencia de Persona Jurídica *Bear Creek Mining Company, Sucursal del Peru*, Apr. 28, 2015 [C-0130]; Certificate of Good Standing *BCMC Corani Holdings Ltd.*, May 1, 2015 [C-0131]; Central Securities Register *BCMC Corani Holdings Ltd.*, May 1, 2015 [C-0132]; Certificate of Good Standing and Register of Members *Bear Creek (BVI) Limited*, Apr. 22, 2015 [C-0133]; Certificate of Good Standing and Register of Members *Corani Mining Limited*, Apr. 22, 2015 [C-0134]; Registro de Personas Jurídicas – Libro de sociedades Mercantiles/Sucursales – Vigencia de Persona Jurídica *Bear Creek Mining S.A.C.*, Apr. 28, 2015 [C-0135]; *Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 ¶ 205 [CL-0031]; *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, Mar. 3, 2010 ¶ 2 [CL-0032]; *BG Group Plc v. Argentine Republic*, UNCITRAL Award, Dec. 24, 2007 ¶¶ 125, 138 [CL-0033]; *GAMI Investments, Inc. v. Government of United Mexican States*, NAFTA UNCITRAL, Final Award, Nov. 15, 2004 ¶ 33 [CL-0034]; Abby Cohen Smutny, *State Responsibility and Attribution/When is a State*

*Chapter II*  
*Jurisdiction of the Centre*

*Article 25*

- (1) *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*
- (2) *“National of another Contracting State” means:*
  - (a) *any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and*
  - (b) *any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*<sup>332</sup>

271. The relevant sections of the FTA provide as follows:

**Article 816: Special Formalities and Information Requirements**

1. *Nothing in Article 803 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of covered investments, such as a requirement that investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.*
2. *Notwithstanding Articles 803 or 804, a Party may require an investor of the other Party, or its covered investments, to provide information concerning that*

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Responsible for the Acts of State Enterprises? ‘Emilio Agustín Maffezini v. The Kingdom of Spain’ in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 17 (Todd Weiler ed., Cameron May 2005) [CL-0035]; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005 ¶ 124 [RLA-010].

<sup>332</sup> ICSID Convention, Rules and Regulations, Report of the Executive Directors on the Convention, ICSID/15/Apr. 2006 [CL-0175].

*investment solely for informational or statistical purposes, provided that such requests are reasonable and not unduly burdensome. The Party shall protect any confidential information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.*

**Article 819: Claim by an Investor of a Party on Its Own Behalf**

1. *An investor of a Party may submit to arbitration under this Section a claim that the other Party has breached:*
  - (a) *an obligation under Section A, other than an obligation under paragraph 4 of Article 802, Articles 809, 810 or 816;*
  - (b) *an obligation under subparagraph 3(a) of Article 1305 (Competition Policy, Monopolies and State Enterprises - Designated Monopolies) or paragraph 2 of Article 1306 (Competition Policy, Monopolies and State Enterprises - State Enterprises), only to the extent that a designated monopoly or state enterprise has acted in a manner inconsistent with the Party's obligations under Section A, other than an obligation under paragraph 4 of Article 802, Articles 809, 810 or 816; or*
  - (c) *a legal stability agreement referred to in paragraph 2 of this Article, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.*

[...]

**Article 824: Submission of a Claim to Arbitration**

1. *Except as provided in Annex 824.1, a disputing investor who meets the conditions precedent in Article 823 may submit the claim to arbitration under:*
  - (a) *the ICSID Convention, provided that both the disputing Party and the Party of the disputing investor are parties to the Convention;*
  - (b) *the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the disputing investor, but not both, is a party to the ICSID Convention;*
  - (c) *the UNCITRAL Arbitration Rules; or*
  - (d) *any other body of rules approved by the Commission as available for arbitrations under this Section.*
2. *The Commission shall have the power to make rules supplementing the applicable arbitral rules and may amend any rules of its own making. Such rules shall be binding on a Tribunal established under this Section, and on individual arbitrators serving on such a Tribunal.*

3. *The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section, and supplemented by any rules adopted by the Commission under this Section.*

#### **Article 825: Consent to Arbitration**

1. *Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Section.*
2. *The consent given in paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:*
  - (a) *Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;*
  - (b) *Article II of the New York Convention for an agreement in writing; and*
  - (c) *Article I of the Inter-American Convention for an agreement.*

[...]

#### **Article 847: Definitions**

*For the purpose of this Chapter:*

**enterprise** means an enterprise as defined in Article 105 of Chapter One (Initial Provisions and General Definitions – Definitions of General Application) and a branch of any such entity;

**enterprise of a Party** means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there;

**investment** means:

- (a) *an enterprise;*

[...]

- (g) *real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and*

- (h) *interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under:*

- (i) *contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or [...]*

**investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;

**investor of a Party** means:

- (a) *in the case of Canada:*
  - (i) *Canada or a state enterprise of Canada, or*

- (ii) *a national or an enterprise of Canada, that seeks to make, is making or has made an investment; a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship; [...]*<sup>333</sup>

272. Claimant presents that its claims fall within ICSID jurisdiction and the competence of the Tribunal, in accordance with the ICSID Convention and the FTA. Claimant submits that this Tribunal is competent to decide the present dispute because (1) Claimant is a Canadian enterprise with protected investments in Respondent State, (2) the Parties have consented to arbitration of this dispute, and (3) all of the requirements under the FTA and the ICSID Convention for the submission of this dispute to arbitration have been fulfilled.<sup>334</sup>
273. Respondent submits that the Tribunal does not have jurisdiction over Claimant's claims.
274. The following sections summarize the Parties' arguments related to Respondent's objections to jurisdiction.

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<sup>333</sup> Canada-Perú FTA Art. 824, 825, 847, Annex 824.1 [C-0001].

<sup>334</sup> RfA ¶¶ 41 – 65; C-I ¶¶ 102 – 115; Canada-Perú FTA Art. 824, 825, 847, Annex 824.1 [C-0001]; Notice of Intent to Submit a Claim to Arbitration under the Free Trade Agreement between Canada and the Republic of Perú (Feb. 3, 2014) [C-0007]; Certificates of Continuation and Good Standing for Bear Creek Mining Corporation (Sept. 17, 2013) [C-0008]; Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 3, 2007 [C-0015]; Bear Creek Mining Corporation Annual Information Form for year ended Dec. 1, 2013, Apr. 3, 2014 at 1 – 4 [C-0023]; Certificate of Good Standing *Bear Creek Exploration Company Ltd.*, May 1, 2015 [C-0128]; Central Securities Register *Bear Creek Exploration Company Ltd.*, May 1, 2015 [C-0129]; Registro de Personas Jurídicas – Libro de sociedades Mercantiles/Sucursales – Vigencia de Persona Juridica *Bear Creek Mining Company, Sucursal del Peru*, Apr. 28, 2015 [C-0130]; Certificate of Good Standing *BCMC Corani Holdings Ltd.*, May 1, 2015 [C-0131]; Central Securities Register *BCMC Corani Holdings Ltd.*, May 1, 2015 [C-0132]; Certificate of Good Standing and Register of Members *Bear Creek (BVI) Limited*, Apr. 22, 2015 [C-0133]; Certificate of Good Standing and Register of Members *Corani Mining Limited*, Apr. 22, 2015 [C-0134]; Registro de Personas Jurídicas – Libro de sociedades Mercantiles/Sucursales – Vigencia de Persona Juridica *Bear Creek Mining S.A.C.*, Apr. 28, 2015 [C-0135]; *Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 ¶ 205 [CL-0031]; *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, Mar. 3, 2010 ¶ 2 [CL-0032]; *BG Group Plc v. Argentine Republic*, UNCITRAL Award, Dec. 24, 2007 ¶¶ 125, 138 [CL-0033]; *GAMI Investments, Inc. v. Government of United Mexican States*, NAFTA UNCITRAL, Final Award, Nov. 15, 2004 ¶ 33 [CL-0034]; Abby Cohen Smutny, State Responsibility and Attribution/When is a State Responsible for the Acts of State Enterprises? 'Emilio Agustín Maffezini v. The Kingdom of Spain' in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 17 (Todd Weiler ed., Cameron May 2005) [CL-0035]; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005 ¶ 124 [RLA-010].

## A. WHETHER AN INVESTMENT CONFERRING JURISDICTION ON THE TRIBUNAL EXISTS

### 1. Respondent's Arguments

275. Even if the Tribunal finds that it has jurisdiction over unlawful and bad-faith investments, Claimant's alleged investment is invalid under Peruvian law, which means that this Tribunal lacks jurisdiction as there is no investment upon which to base a Treaty claim. Concessions obtained in violation of Article 71 of the Constitution revert to the State. Claimant's scheme is presently being examined in a domestic court, and could result in Claimant being stripped of its concession rights entirely, as required by Article 71. The Tribunal need not wait for a decision from the Peruvian judiciary – rather, it may determine for itself that the Santa Ana acquisition violated Peruvian law.<sup>335</sup>
276. After the Hearing and in response to the Tribunal's questions "*(d) Of the two reasons relied upon by Respondent for Decree 032, could that Decree also have been legally issued, if only one of the two reasons could be established: (i) only the alleged illegality of the Claimant's Application? or only the unrest as it existed at that time?*" and "*(f) Was the Claimant denied due process in the procedure leading to the promulgation of Supreme Decree 032, or otherwise?*"<sup>336</sup> Respondent explained that the State has the discretionary right to reconsider and repeal earlier declarations of public necessity. A repeal does not take property away from the concession owner, rather it simply prevents the concession holder from using it during the ensuing court proceedings.<sup>337</sup> Here, Respondent discovered that (1) Claimant had violated the Constitution in obtaining the public necessity declaration and (2) that the premise that the Santa Ana Project would improve the public welfare of local communities was gravely mistaken. The elimination of either of these bases of support could

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<sup>335</sup> R-I ¶¶ 215 – 216; R-II ¶¶ 421 – 423; RPHB-I ¶ 94; Constitution of Peru, Art. 71, Art. 138 - 139 [R-001]; Executive Power Organic Law, Law No. 29158 [R-103]; Rodríguez-Mariátegui Second Report ¶ 15 [REX-009].

<sup>336</sup> PO-10 ¶ 2.1.4 (d), (f).

<sup>337</sup> RPHB-I ¶ 94; RPHB-II ¶¶ 28 – 29; Eguiguren First Report ¶ 70, Section IV [REX-001]; Danos Report Section IV.A [REX-006]; Eguiguren Second Report ¶¶ 19 -20, 23 – 30, 36 – 38 [REX-007].

have justified the decision to repeal the public necessity declaration.<sup>338</sup> Respondent only took the action that was immediately necessary to address both circumstances.<sup>339</sup>

## 2. Claimant's Arguments

277. No support whatsoever exists for Respondent's position. The FTA and the ICSID Convention are the relevant legal instruments that govern this Tribunal's jurisdiction, including the definition of "investment." Respondent's domestic law has no impact on the definition of "investment" for the purposes of obtaining protections under the FTA. Thus, Respondent's argument that this Tribunal should make a jurisdictional finding based on the legality of the Santa Ana investment as a matter of Peruvian law should be dismissed summarily.<sup>340</sup>
278. As Respondent is well aware, other tribunals have consistently rejected Respondent's argument that national law governs the definition of "investment." The tribunal in *Convial Callao et al. v. Peru* expressly rejected Peru's contention and applied the definition of "investment" contained in the relevant BIT and ICSID Convention, without reference to Peruvian law, to assess whether an investment existed within the meaning of that treaty.<sup>341</sup> The *Saba Fakes* tribunal expressly rejected the argument that an "illegal" investment or one not made in "good faith" did not fall within Article 25(1) of the ICSID Convention's definition of "investment."<sup>342</sup> Here, the FTA and the ICSID Convention are the relevant instruments to determine whether an investment exists. They are *lex*

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<sup>338</sup> R-I § 11.D; R-II § II.D.4; RPHB-I ¶¶ 95 – 98; Tr. 924:3-7 (Zegarra); Tr. 811:15-20 (Gala); Statement of Reasons for Supreme Decree No. 083 of 2007 at 2 [R-032]; Eguiguren First Report ¶ 33 [REX-001]; Fernández Witness Statement ¶¶ 24, 26 [RWS-4].

<sup>339</sup> RPHB-II ¶ 29.

<sup>340</sup> C-II ¶¶ 231, 232; C-III ¶¶ 154, 160; R-II ¶¶ 421 – 423; Canada-Perú FTA §§ 824 – 825, 847 [C-0001]; *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, Jun. 27, 1990, 30 I.L.M. 580, (1991) ¶ 54 [CL-0036]; Rudolf Dolzer and Christopher Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (Oxford University Press, 2nd ed. 2012) [CL-0168]; ICSID Convention, Regulations and Rules, Apr. 2006 [CL-0175]; *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, May 21, 2013 ¶¶ 372 – 373, 381 [RLA-087].

<sup>341</sup> C-III ¶ 155; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, Jul. 14, 2010 ¶ 112 [CL-0174]; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009 [RLA-020]; *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, May 21, 2013 ¶¶ 381 – 394 [RLA-087].

<sup>342</sup> C-III ¶ 156; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, Jul. 14, 2010 ¶ 114 [CL-0174].

*specialis* and prevail over any other source of law applicable to the dispute. This Tribunal should not look to Peruvian law, especially since the FTA does not require application of Peruvian law to the definition of “investment” and does not contain an express legality requirement. Importing such a requirement into the FTA and the ICSID Convention would do violence to both agreements.<sup>343</sup>

279. In any event, Respondent has failed to satisfy its burden of proving that there has been a violation of Peruvian law.<sup>344</sup> There can be no question that Claimant exercised its option lawfully under the Option Agreements only after it obtained Supreme Decree 083.<sup>345</sup> Respondent’s *ex post facto* branding of the acquisition of the Santa Ana concessions as “illegal” is nothing more than an attempt to avoid the consequences of its wrongful conduct.<sup>346</sup>
280. To the extent that Respondent argues that Claimant’s rights would revert to the State if a domestic court in Peru finds that Claimant’s acquisition of the Santa Ana concessions was unlawful, the Tribunal should note that this argument concedes Claimant’s ownership of the Santa Ana concessions, which are a protected investment under the FTA and the ICSID Convention.<sup>347</sup> The determination of illegality by a national court is not binding on an investment tribunal, which is under a duty to fulfill its independent mandate and to make its own assessment of facts and law.<sup>348</sup>
281. After the Hearing and in response to the Tribunal’s question (d) “*Of the two reasons relied upon by Respondent for Decree 032, could that Decree also have been legally issued, if only one of the two reasons could be established: (i) only the alleged illegality of the Claimant’s Application? or only the unrest as it existed at that time?*”, Claimant explained that, even if there was a violation of Article 71, this should not have resulted in a revocation of Supreme Decree 083. Even Respondent’s expert agreed that a violation of Article 71 does not justify expropriation, and certainly without due process or compensation.<sup>349</sup> Further, and also in response to the Tribunal’s question (b) “*Did the Claimant*

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<sup>343</sup> C-II ¶ 232; C-III ¶ 157.

<sup>344</sup> C-II ¶ 233; C-III ¶ 158.

<sup>345</sup> C-II ¶ 233.

<sup>346</sup> *Id.* at 234; Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013 [C-0197].

<sup>347</sup> C-III ¶ 159; R-II ¶¶ 421 – 423, R.Prov.M.-II ¶ 6.

<sup>348</sup> *Id.*

<sup>349</sup> PO-10 ¶ 2.1.4(d); CPHB-I ¶ 70; Second Bullard Report ¶¶ 138 – 142 [CEX-005] (*compare* case involving Zijin: Supreme Decree 024-2008-DE, Dec. 27, 2008 [C-0204]; Monterrico Metals Plc’s Annual Report 2007 [C-0205];

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?” Claimant argued that any alleged illegality was not one that was so serious or manifest as to undermine the Tribunal’s jurisdiction.<sup>350</sup>

### 3. The Tribunal’s Reasoning

282. Article 847 of the FTA provides an express and wide definition of the term “investment”, and it is mandatory to apply it in the present case. The Article provides as follows:

*investment means:*

(a) an enterprise;

[...]

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under:

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or [...]

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Archived Title of Entry N° C00011 of File N° 11352728 of the Corporate Registry of the Public Registry Office of Lima [C-0206]; *The new CEO of Monterrico had an audience with Peru’s minister of Energy & Mines*, The Zijin Consortium Press Release, Jun. 11, 2007 [C-0207]; *China’s ambassador in Peru Gao Zhengyue investigated Majaz company*, The Zijin Consortium Press Release, Jun. 11, 2007 [C-0208]; *Peruvian Congress, Legality and Problems of the company Minera Maiaz in the Territories of the Segunda y Cajas, and Yanta Rural Communities in the Provinces of Huancabamba and Ayabaca in the Piura Region*, May 9, 2008 [C-0254]; Tr. 1261:21 – 1262:7 (Rodríguez-Mariátegui).

<sup>350</sup> PO-10 ¶ 2.1.4(b); CPHB-I ¶¶ 50 – 51; R-II ¶ 364; *Waguhi Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, Jun. 1, 2009 ¶¶ 325 – 326 [CL-0085]; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 ILM 896 (2002) ¶ 117 [CL-0147]; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts), Jun. 22, 2010 ¶ 194 [CL-0169]; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, Mar. 30, 2015 ¶¶ 481 – 82 [RLA-017]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006 ¶ 244 [RLA-021]; *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, May 16, 2014 ¶ 133 [RLA-024]; *Convial Callao S.A. and CCI – Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, May 21, 2013 ¶ 420 [RLA-087]; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, ICSID Case No. ARB/03/25, Award, Aug. 16, 2007 ¶¶ 396, 477, 479 [RLA-091]; *Ioannis Kardassopolos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, Jul. 6, 2007 ¶ 229 [RLA-092]; *InterTrade Holding GmbH v. Czech Republic*, PCA Case No. 2009-12, Final Award, May 28, 2012 ¶ 138 [RLA-094].

283. As is undisputed, at the time of the alleged breach of the FTA by Supreme Decree 032 published 25 June 2011, Claimant held, by Supreme Decree 083, a declaration of public necessity expressly authorizing Claimant to acquire and possess concessions and rights over mines and supplementary resources, to acquire mining rights, and to engage in mining activities. It is also undisputed that, after the adoption of Supreme Decree 083 in 2007, Claimant acquired seven mining concessions and proceeded with a great number of activities in the local communities (though these were not sufficient in the view of Respondent). As reflected in both Parties' submissions on the calculation of damages, Respondent concedes that Claimant spent approximately USD \$18 million after November 2007.<sup>351</sup>
284. These governmental authorizations and the resulting costs incurred by Claimant must be considered as “*interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under: (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or [...]*.”
285. Accordingly, the Tribunal concludes that Claimant made “*investments*” within the meaning of the FTA, and that it is to be treated as an “*investor*.”

## **B. WHETHER CLAIMANT HELD THE RIGHTS ON WHICH IT BASES ITS CLAIM**

### **1. Respondent's Arguments**

286. This Tribunal lacks jurisdiction because Claimant does not own the investments upon which it bases its claim. Even if this Tribunal determines that Claimant lawfully obtained some rights at Santa Ana, Claimant never acquired the right to operate a “*mining project*” or a “*right to mine*”, upon which it bases its claim. At most, Claimant held an exclusive right to seek a right to mine and to pursue a mining project. Since Claimant cannot establish that it owned or controlled the right to mine at Santa Ana, the Tribunal cannot assert jurisdiction.<sup>352</sup>

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<sup>351</sup> RPHB-I ¶¶ 106 – 107.

<sup>352</sup> R-I ¶¶ 217, 220; R-II ¶¶ 424 – 425; *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award, Sept. 15, 2011 ¶ 328 [RLA-025]; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, Apr. 16, 2014 ¶¶ 171 – 173 [RLA-026].

287. Claimant bears the burden of proving ownership of the investments on which its claim is based.<sup>353</sup> Claimant, however, refers to its investment as a “*mining*” project. Claimant has never undertaken any “*mining*” in Santa Ana, nor has it ever had the right to do so. Claimant has never constructed or operated a mine in Peru or elsewhere – it is in the mineral exploration business and has put forward no evidence that it has the capabilities to build and operate a mine.<sup>354</sup>
288. Claimant never progressed beyond the earliest stages of the long and complex regulatory approval process for obtaining a mining permit.<sup>355</sup> Claimant’s obligation to apply for and obtain a host of permits and approvals before exploiting and extracting silver at Santa Ana is not seriously in dispute.<sup>356</sup> Claimant’s entire case presupposes an investment that includes the right to mine at both Santa Ana and Corani, and Claimant had no such right.<sup>357</sup> Claimant’s assertion that its ownership of the concessions grants it the right to “*explore and exploit mineral resources*” and “*use and enjoy ... products that are extracted*” is not correct. Claimant’s failure to establish that it held the rights upon which it bases its claim persists and is fatal to jurisdiction.<sup>358</sup>

## 2. Claimant’s Arguments

289. There are four reasons that this Tribunal should reject Respondent’s argument that the Tribunal lacks jurisdiction because Claimant purportedly never obtained the right to operate a mining project in Santa Ana. First, in investment law, it is uncontroversial that an investment typically consists of several interrelated economic activities that should not be viewed in isolation. In making its argument, Respondent seeks to limit and minimize the scope and nature of Claimant’s protected investment in Respondent State. This argument misconstrues and ignores (1) the finding of public necessity that expressly authorizes Claimant to acquire mining rights in the border region, (2)

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<sup>353</sup> R-I ¶ 218; *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award, Sept. 15, 2011 ¶ 328 [RLA-025]; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, Apr. 16, 2014 ¶¶ 171 – 173 [RLA-026].

<sup>354</sup> R-I ¶ 219.

<sup>355</sup> *Id.*

<sup>356</sup> R-II ¶ 426.

<sup>357</sup> R-I ¶ 221.

<sup>358</sup> *Id.*; R-II ¶¶ 426 – 427.

Claimant's acquisition of mining concessions comprising the Santa Ana Project and the Corani Project, (3) the years Claimant engaged in expensive exploration and development efforts in Respondent State, and that these efforts (4) resulted in the discovery of significant economic silver mineralization in the area. Respondent's attempt to focus on one single aspect of Claimant's investment, to the exclusion of the entirety of its investment should be rejected.<sup>359</sup>

290. Second, at all relevant times, Claimant held the rights on which it bases its claim. As Prof. Bullard explains, Claimant acquired the property rights over the mining concessions after it obtained the declaration of public necessity in compliance with Peruvian law, through valid option contracts. As confirmed by Peruvian mining law expert and former Minister of Energy and Mines, Hans Flury, the concessions entailed many rights, including the right to own exploit mineral concessions, which form the basis of its claim here.<sup>360</sup> Respondent conflates the existence of these rights with the need to obtain permits and licenses to build and operate a mine. However, Respondent has admitted in these proceedings that Claimant owned the mining concessions and mining rights in Respondent State, having explained that “*one possible outcome of the MINEM lawsuit was reversion of the mineral rights to Peru.*”<sup>361</sup> That rights were granted was also confirmed by the Lima First Constitutional Court.<sup>362</sup>
291. Respondent's argument ignores the statutory language, Respondent's own legal experts, and the facts of the case – each demonstrate that Claimant held an ascertainable set of rights that form the basis of this claim.<sup>363</sup> The Peruvian General Mining Act provides that concessions grant “[*the*] holder the right to explore and exploit the mineral resources.”<sup>364</sup> The Organic Law for Sustainable

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<sup>359</sup> C-II ¶¶ 235 – 236; C-III ¶¶ 166 – 167; Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 [C-0004]; Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 3, 2007 [C-0015]; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017].

<sup>360</sup> C-II ¶ 237; Organic Law for the Sustainable Use of Natural Resources, Law No. 26821 [R-142]; Ley de Promoción de Inversiones en el Sector Minero, Decreto Legislativo No. 708, de fecha 13 de noviembre de 1991 [Flury-002]; Supreme Decree 014-92-EM [Bullard-31].

<sup>361</sup> C-II ¶ 238; R.Prov.M.-II ¶ 30.

<sup>362</sup> C-II ¶ 238; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006].

<sup>363</sup> C-III ¶¶ 161 – 162.

<sup>364</sup> *Id.* at ¶ 163; Supreme Decree 014-92-EM [Bullard-31].

Development of Natural Resources states that “*the concession grants its holder the right to use and enjoyment of the natural resources granted*” and, consequently, the property of the fruits and products to be extracted.<sup>365</sup> The Parties’ experts are also in agreement that the holder of a concession has the exclusive right to explore for and produce the mineral resources in question.<sup>366</sup> Claimant does not dispute that there is a permitting process. But, the issue here is whether, by virtue of owning the concessions, Claimant owned the rights of exploration and exploitation within the concession areas. The answer to that question is yes. Respondent’s other expert, Mr. Jorge Danos Ordóñez, opines that Supreme Decree 083 granted Claimant the right to acquire property, which Claimant has explained at length that it lawfully did through exercise of the Option Agreements after issuance of Supreme Decree 083.<sup>367</sup>

292. Third, even if Claimant only had a mining exploration project, that would still be a protected investment because it falls within the FTA’s definition of investment.<sup>368</sup>
293. Fourth, under international law, a state cannot benefit from its own wrongdoing.<sup>369</sup> Here, Respondent cannot argue that Claimant had no right to mine, when it was Respondent’s own actions that thwarted the development of the Project and prevented Claimant from obtaining the requisite permits and authorizations.<sup>370</sup>
294. Respondent has cited the *Gallo* award for the general proposition that ownership or control of an investment is necessary to trigger the protections of a BIT. In that case, which is inapposite, claimant provided no written evidence showing the date on which he purportedly acquired an investment and the tribunal concluded that claimant had failed to prove the date on which he acquired ownership and

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<sup>365</sup> C-III ¶ 163; *The More Than 30 hours That Walter Aduviri Spent in Panamericana* [R-0124].

<sup>366</sup> C-III ¶ 164; Rodríguez-Mariátegui Second Report ¶¶ 2(a), 9, 11, 19, 21 [REX-009].

<sup>367</sup> *Id.* at ¶¶ 165, 167.

<sup>368</sup> C-II ¶ 239; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 116 [CL-0040]; *Phillips Petroleum Company Iran v. Islamic Republic of Iran, Iran-U.S. Claims Trib.*, Case No. 39, Chamber 2, Award No. 425-39-2, Jun. 29, 1989 ¶ 105 [CL-0049].

<sup>369</sup> C-II ¶ 240; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge University Press, 2006) ¶ 149 [CL-0176]; *Case Concerning The Factory at Chorzów* (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (Jul. 26, 1927) ¶ 87 [CL-0177].

<sup>370</sup> C-II ¶ 240; Flury First Report ¶ 113 [CEX-006].

control of the investment. Here, however, Claimant has submitted conclusive evidence of ownership, including written documentation and witness testimony.<sup>371</sup>

### 3. The Tribunal's Reasoning

295. Respondent argues that “[e]ven if the Tribunal somehow determines that Claimant lawfully obtained some set of rights at Santa Ana, Claimant never acquired the right to operate a “mining project” or a “right to mine,” upon which it bases its claims[.]”<sup>372</sup> But, Respondent concedes expressly that “[a]t most, [Claimant] held an exclusive right to seek a right to mine and to pursue a mining project.”<sup>373</sup> In the view of the Tribunal, the latter is sufficient to confirm the jurisdiction to the Tribunal.

296. Indeed, it is uncontroversial that an investment typically consists of several interrelated economic activities which, step by step, finally lead to the implementation of a project such as mining activity. As Claimant points out, the steps already obtained and completed were (1) the finding of public necessity that expressly authorized Claimant to acquire mining rights in the border region, (2) Claimant’s acquisition of mining concessions comprising the Santa Ana Project and the Corani Project, (3) the years Claimant engaged in expensive exploration and development efforts in Respondent State, and that these efforts (4) apparently resulted in the discovery of significant economic silver mineralization in the area.

297. There can be no doubt that these acts give rise to “*interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under: (i) [...] concessions, ...*”, within the meaning of Article 847 of the FTA. Though the relevant definition of investment must be drawn from the FTA, it should be noted that in the domestic law of Peru, the Peruvian Constitution (Article 66) and the General Mining Law (Article 10) both define concession rights as a “*right in rem*.”<sup>374</sup>

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<sup>371</sup> C-III ¶ 169.

<sup>372</sup> R-II ¶ 424.

<sup>373</sup> *Id.* at ¶ 425.

<sup>374</sup> Political Constitution of Peru Enacted on 29th December, 1993, Official Edition and English Translation, Art. 66 [C-0024]; Supreme Decree 014-92-EM [Bullard-31].

298. The Tribunal therefore concludes that Claimant held rights providing jurisdiction to the present Tribunal for the claims raised.

**C. THE LEGAL STANDARD: WHETHER LEGALITY OR GOOD FAITH IS A PREREQUISITE TO THE TRIBUNAL'S EXERCISE OF JURISDICTION**

**1. Respondent's Arguments**

299. Investment arbitration tribunals lack jurisdiction over claims that are based on investments made in violation of (1) domestic law or (2) the international law principle of good faith. Claimant's purported investment violates both. The *Inceysa* tribunal, cited by *Plama*, recognized that extending treaty protections to investments made in bad faith or in violation of domestic law would reward investors' misconduct, in violation of the principle of *nemo auditor propriam turpitudinem allegans* – no one can benefit from his or her own wrongdoing. It would be inappropriate for the Tribunal to grant jurisdiction because doing so would violate the international law principle that a claimant cannot benefit from its own wrongdoing.<sup>375</sup>

300. International consensus dictates that Claimant must establish the legality of its investment, or else it is not entitled to invoke the FTA's substantive protections.<sup>376</sup> *Phoenix Action's* discussion of the legality requirement has been cited with approval by at least seven other investment arbitration tribunals.<sup>377</sup>

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<sup>375</sup> R-I ¶¶ 199 – 204, 206; R-II ¶ 365; RPHB-I ¶ 75; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶¶ 138 – 146 [CL-0104]; *Flughafen Zürich A.G. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, Nov. 18, 2014 ¶ 132 [CL-0112]; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, Mar. 30, 2015 ¶¶ 372 – 373 [RLA-017]; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, Jul. 18, 2014 ¶ 1352 [RLA-018]; *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, Jul. 25, 2012 ¶ 383 [RLA-019]; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009 ¶¶ 101 – 106 [RLA-020]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006 ¶¶ 101 – 122, 231, 239 – 242 [RLA-021]; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, Jun. 18, 2010 ¶¶ 123 – 124 [RLA-022]; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, Jun. 6, 2012 ¶ 308 [RLA-023]; *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, May 16, 2014 ¶ 131 [RLA-024].

<sup>376</sup> *Id.*

<sup>377</sup> R-II ¶¶ 367; *Flughafen Zürich A.G. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, Nov. 18, 2014 ¶ 132 [CL-0112]; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, Mar. 30, 2015 ¶ 373 [RLA-017]; *Yukos Universal Limited (Isle of Man) v.*

*“The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. The fact that an investment is in violation of the laws of the host State can be manifest and will therefore allow the tribunal to deny its jurisdiction.”*<sup>378</sup>

301. The *Hamester* tribunal, in what Claimant dismisses as “*musings*” stated as follows:

*“An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State’s law (as elaborated, e.g. by the tribunal in Phoenix [Action]).”*<sup>379</sup>

302. The legality requirement does not arise out of a specific treaty provision, but rather out of the *corpus* of international law and persuasive international arbitration jurisprudence. It is, what the *Hamester* tribunal called a “*general principle [] that exist[s] independently of the specific language to this effect in the Treaty.*” Other tribunals have agreed, drawing from the goals of international investment protection as a whole.<sup>380</sup> These tribunals acknowledge a proposition that should be self-evident: a claimant that acquires its investment through some unlawful act that goes to the heart of the

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*Russian Federation*, PCA Case No. AA 227, Final Award, Jul. 18, 2014 [RLA-018]; *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, Jul. 25, 2012 ¶¶ 382 – 383 [RLA-019]; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, Jun. 6, 2012 ¶ 308 [RLA-023]; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award, Jul. 18, 2014 [RLA-084]; *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Final Award, Dec. 7, 2012 [RLA-086]; *Conviaf Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, May 21, 2013 [RLA-087]; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, Oct. 4, 2013 [RLA-088].

<sup>378</sup> R-II ¶ 367; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009 ¶¶ 100, 102 [RLA-020].

<sup>379</sup> R-II ¶ 368; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, Jun. 18, 2010 ¶ 123 [RLA-022].

<sup>380</sup> R-II ¶ 369; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, Dec. 15, 2014 ¶¶ 644 – 648 [CL-0075]; *Flughafen Zürich A.G. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, Nov. 18, 2014 ¶ 132 [CL-0112]; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 ILM 896 (2002) ¶ 111 [CL-0147]; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, Mar. 30, 2015 ¶ 372 [RLA-017]; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, Jul. 18, 2014 [RLA-018]; *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, Jul. 25, 2012 ¶ 383 [RLA-019]; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, Jun. 6, 2012 ¶ 308 [RLA-023]; *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, May 16, 2014 ¶ 131 [RLA-024]; *Société d’Investigation de Recherche et d’Exploitation Minière (SIREXM) v. Burkina Faso*, ICSID Case No. ARB/97/1, Award, Jan. 19, 2000 ¶ 6.33 [RLA-089].

investment cannot be rewarded with access to international dispute resolution mechanisms in defense of its unlawful investment.<sup>381</sup>

303. The *Mamidoil* tribunal drew a distinction between an investor that makes an investment only through illegal activity (as did Claimant here) and an investor who commits illegal acts related to the investment, after the investment has been made. In the latter situation, jurisdiction is not impacted. The *Mamidoil* tribunal cautioned that “a State cannot be expected to have consented to an arbitral dispute settlement mechanism for investments made in violation of its legislation.”<sup>382</sup> Similarly, the *Liman Caspian Oil v. Kazakhstan* tribunal concluded that it would not have jurisdiction over an investment made in violation of international public policy.<sup>383</sup>
304. The *Plama* Decision on Jurisdiction does not support Claimant’s position on the effect of an illegally acquired investment on jurisdiction.<sup>384</sup> The conclusion to apply from that decision – as well as from *Yukos* or *Khan Resources v. Mongolia* – is that, regardless of whether the Tribunal decides the case on grounds of jurisdiction or on grounds of inadmissibility, Claimant is not entitled to any of the substantive protections afforded by the FTA.<sup>385</sup> An analogous application of the *Malicorp* decision to Claimant’s claims would lead to the Tribunal to conclude that Respondent’s revocation of the public necessity declaration was justified by the discovery of Claimant’s misconduct.<sup>386</sup>
305. It strains credibility to suggest that Canada and Peru intended their FTA to protect unlawful investments. In this respect, Claimant has cited Article 816 of the FTA – a provision that has nothing to do with the international law principle requiring lawful investments. At most, Article 816 does

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<sup>381</sup> R-II ¶ 370; Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (Cambridge: Grotius Publications, 1987) 155 [RLA-047bis].

<sup>382</sup> R-II ¶ 375; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, Mar. 30, 2015 ¶ 494 [RLA-017].

<sup>383</sup> R-II ¶ 376; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts), Jun. 22, 2010 ¶ 194 [CL-0169].

<sup>384</sup> R-II ¶ 371.

<sup>385</sup> *Id.* at ¶¶ 371 – 373; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, Jul. 18, 2014 ¶¶ 1352 – 1352 [RLA-018]; *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, Jul. 25, 2012 ¶ 383 [RLA-019]; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶ 325(3) [CL-0104].

<sup>386</sup> R-II ¶ 374; *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, Feb. 7, 2011 ¶¶ 116, 119, 125 *et seq.*, 130 – 137, 142 – 143 [CL-0173].

nothing more than declare that, if one of the treaty parties were to create “*special formalities*” specifying how investments must be established in the host State, these rules would not give rise to a violation of the national treatment standard, unless they “*materially impair*” the protections otherwise afforded to investors in the FTA. Conceptually, Article 816 of the FTA is a carve-out to the FTA’s national treatment provision. Contrary to Claimant’s position, the language does not “*explicitly exclude*” the legality requirement from the FTA.<sup>387</sup>

306. In response to questions from Arbitrators Sands and Pryles about whether Claimant’s alleged failure reaches the threshold of seriousness so as to justify this Tribunal not to exercise jurisdiction, Respondent explained that first, the failure is the violation of Article 71 of the Constitution, where Claimant acquired the Concessions through a proxy or strawman. Second, in making this representation, Claimant also began lying to the local populations about who owned the land and who would provide the benefits – Claimant or Ms. Villavicencio. Claimant understood the seriousness of its statements to the communities and to the Government. As a matter of law, this was a constitutional violation, one which cannot be cured by a subsequent Public Necessity Decree. The breached constitutional provision is one that involves internal and external security and even prompted response from Bolivia.<sup>388</sup> Respondent does not see the Option Agreements as the core of the constitutional violation. Rather, from 2004 – 2007 and even assuming that the ownership was indirect rather than direct (due to Ms. Villavicencio’s position as Claimant’s employee), the entire scheme was in violation of the Constitution and this scheme went to the heart of the investment. Claimant spent millions of dollars that they would not have, had they been acting lawfully. This unlawful scheme robbed Respondent of the opportunity to exercise its sovereignty in terms of national security from 2004 – 2007. Although there is no evidence of a factual impact on national security here, that is likely because there was no assessment of the same, due to there being no application for a Public Necessity Decree from 2000 – 2006. In 2000, the Ministry of Defense found that the presence of foreign investors in that area would be a threat to Respondent’s national security. The grant of a Public Necessity Decree in 2007 does not cure the past violations, as one cannot know what the Government would have said in 2004, 2005, or 2006. When the Decree was granted, the Government

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<sup>387</sup> R-II ¶¶ 377 – 379; Free Trade Agreement Between Canada and the Republic of Perú (Excerpts) Art. 816 [R-390]; Chester Brown, *Commentaries on Selected Model Investment Treaties*, Oxford University Press (2013) 810 – 811 [CL-0179].

<sup>388</sup> Tr. 1926 – 1932 (R. Answer to Arbitrator Sands).

did not know about the constitutional violation. Evidence has been presented demonstrating that if the Government had known of the violation, the Public Necessity Decree would not have been granted.<sup>389</sup>

307. After the Hearing and in response to the Tribunal’s 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?*”<sup>390</sup>, Respondent indicated that it does not need to prove “*fraud*” in the strict legal sense of the term to show that the Tribunal does not have jurisdiction.<sup>391</sup> Respondent need not even prove that Claimant acted in bad faith – it is sufficient that Claimant’s investment was unlawful to deprive the Tribunal of jurisdiction.<sup>392</sup> Faced with investors acting in bad faith at the time they acquired their investments, in particular by making misrepresentations to the Government in connection with the making of that investment, international tribunals have declined jurisdiction or declared the investor’s claims inadmissible.<sup>393</sup> To deny Treaty protection on grounds of international public policy is entirely appropriate here. Having deprived Respondent of the right to admit or reject the investment, Claimant should not benefit from the status of a protected investor.<sup>394</sup>

## 2. Claimant’s Arguments

308. The FTA does not contain a legality or good faith requirement. Article 816 of the FTA suggests that the Contracting Parties agreed that the legality requirement would be excluded from the scope of the FTA. Article 816 identifies the legality requirement as a special formality that the host State is entitled to adopt if it so wishes. Thus, it is neither an express nor implied requirement under the

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<sup>389</sup> *Id.* at 1933 – 1940 (R. Answer to Arbitrator Pryles).

<sup>390</sup> PO-10 ¶ 2.1.4 (b).

<sup>391</sup> RPHB-I ¶ 74; RPHB-II ¶¶ 22; *Flughafen Zürich A.G. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, Nov. 18, 2014 at ¶ 132 [CL-0112]; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009 at ¶¶ 101, 102 [RLA-020]; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, Jun. 18, 2010 at ¶ 123 [RLA-022].

<sup>392</sup> RPHB-I ¶¶ 77, 107; RPHB-II ¶ 24.

<sup>393</sup> RPHB-II ¶ 23; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶¶ 139 – 140 [CL-0104]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006 ¶¶ 231 – 239 [RLA-021].

<sup>394</sup> RPHB-I ¶ 76; Tr. 1852 – 1855 (R. Closing).

FTA.<sup>395</sup>

309. Under international law, the Tribunal may not import a requirement that limits its jurisdiction when none is specified by the parties themselves. In *Flughafen Zurich*, *Hamester*, and *Phoenix Action*, the applicable BITs expressly and unambiguously required compliance with the host State’s law. Those tribunals’ musings on general requirements of international law are, therefore, *dicta*. *Hamester* and *Phoenix Action* also have been heavily criticized for their lacking reasoning on the question of illegality as a jurisdictional hurdle. Likewise, although the tribunal in *SAUR* opined on the existence of an implicit requirement of legality and good faith, it undertook no analysis to substantiate this opinion and, in any event, declined to find illegality. In *Inceysa*, the Tribunal expressly noted that it could only declare its incompetence to hear Inceysa’s complaint because the treaty parties had intended to limit their consent to arbitration only to investments made in accordance with the laws in force in each state party. The *Plama* tribunal did not find that the investor’s deliberate deception and active misrepresentations deprived the tribunal of jurisdiction. Rather, although the allegations of illegality raised questions on the merits, they did not affect respondent State’s consent to arbitration under the treaty. Similarly, the tribunal in *Malicorp* found that allegations of investor wrongdoing do not necessarily deprive the tribunal of jurisdiction and are better suited to an analysis on the merits. The doctrines of separability and competence-competence mandate that pleas of illegality be regarded as questions on the merits of an investor’s claim, rather than jurisdictional hurdles. In determining whether to consider the allegations as a matter of jurisdiction or merits, the *Minnotte* tribunal urged consideration of whether the alleged fraud is “*so manifest, and so closely connected to the facts (such as the making of an investment) which form the basis of a tribunal’s jurisdiction as to warrant a dismissal of claims in limine for want of jurisdiction.*” Facts matter, and it would be wrong to simply draw a legalistic conclusion without careful attention to the circumstances surrounding the alleged illegality. Accordingly, this Tribunal should consider Respondent’s allegations of fraud, deceit, and bad faith in the context of the merits of the claim.<sup>396</sup>

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<sup>395</sup> C-II ¶ 213; Peru – Bilateral Investment Treaties: Peru-Australia BIT §1, Peru-China BIT § 1, Peru-Switzerland BIT § 2(e) [CL-0079]; Rudolf Dolzer and Christopher Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (Oxford University Press, 2nd ed. 2012) 93 [CL-0168].

<sup>396</sup> C-II ¶¶ 212 – 215, 220 – 226; C-III ¶¶ 116 – 122; R-II ¶ 369; Peru – Bilateral Investment Treaties: Peru-Australia BIT § 1, Peru-China BIT § 1, Peru-Switzerland BIT § 2(e) [CL-0079]; *Anatolie Stati et al. v. Kazakhstan*, SCC Arbitration No. 116/2010, Award, Dec. 19, 2013 ¶ 812 [CL-0080]; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶¶ 78, 130, 133, 134, 143 [CL-0104]; *Flughafen*

310. None of the cases cited by Respondent has held that a tribunal lacked jurisdiction solely on the basis of a supposed implicit requirement that the investor's investment be made in good faith and in compliance with the host State's law. *Mamidoil*, for example, involved a treaty containing an express legality requirement, unlike the FTA in this case. The *Mamidoil* tribunal nonetheless found that it had jurisdiction over that claimant's claim, even though it found that investment to be tainted by procedural illegality. Likewise, the *Yukos* tribunal declined to decide whether alleged illegality operates as a bar to jurisdiction or as a bar to substantive protections. The *Khan Resources* tribunal deferred the question of whether that claimant had breached host State law to the merits.<sup>397</sup>
311. Case law also supports Claimant's position that a finding of fraud is required before treating illegality as preemptory. No tribunal has ever denied jurisdiction or declared inadmissible the entirety of a claimant's case where claimant did not act fraudulently or corruptly. Thus, it is practical to examine

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*Zürich A.G. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, Nov. 18, 2014 ¶ 131 [CL-0112]; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013 ¶ 376 [CL-0113]; Rudolf Dolzer and Christopher Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (Oxford University Press, 2nd ed. 2012) 93 [CL-0168]; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts), Jun. 22, 2010 ¶ 187 [CL-0169]; Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, ICSID Review (2014), pp. 1-32, 17, 22 – 23 [CL-0170]; Aloysius Llamzon and Anthony C. Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct* in Albert Jan van den Berg (ed), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18 (© Kluwer Law International; Kluwer Law International 2015) 498 [CL-0171]; *Plama Consortium v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005 ¶¶ 126 – 130, 228 – 230 [CL-0172]; *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, Feb. 7, 2011 ¶ 117 – 119 [CL-0173]; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, Mar. 30, 2015 ¶ 494 [RLA-017]; *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, Jul. 25, 2012 ¶ 411 [RLA-019]; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009 ¶¶ 104, 134 [RLA-020]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006 ¶¶ 192 – 196 [RLA-021]; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, Jun. 18, 2010 ¶ 126 [RLA-022]; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, Jun. 6, 2012 ¶¶ 308, 311 [RLA-023]; *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, May 16, 2014 ¶ 130, 132 [RLA-024]; *Convia Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, May 21, 2013 ¶¶ 409 – 411 [RLA-087]; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, ICSID Case No. ARB/03/25, Award, Aug. 16, 2007 ¶¶ 300, 333, 383 – 395, 402 [RLA-091]; *Ioannis Kardassopolos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, Jul. 6, 2007 ¶ 184 [RLA-092].

<sup>397</sup> C-II ¶¶ 216 – 218; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, Mar. 30, 2015 ¶¶ 292 – 294 [RLA-017]; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, Jul. 18, 2014 ¶ 1353 [RLA-018]; *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, Jul. 25, 2012 ¶ 385 [RLA-019].

the totality of Claimant's claims together with Respondent's illegality defense.<sup>398</sup>

312. There are at least three situations where a tribunal may assess the substance of a claimant's case, in spite of a breach of national law in the making of the investment: (1) where an investor's unlawful actions attend the making of an investment, and the host State's law provides that the illegality renders the investment voidable rather than void *ab initio*;<sup>399</sup> (2) where the allegedly unlawful conduct is minor, procedural, or a good faith mistake;<sup>400</sup> and (3) where a State's actions and representations to the investor create a legitimate expectation on the part of the investor that his investment will be protected.<sup>401</sup>
313. Regarding the first situation, absent fraud on the part of the investor, even an investment being considered void under national law would not deprive the tribunal of jurisdiction. *Liman Caspian Oil v. Kazakhstan*, where the tribunal distinguished between a transaction that was void or invalid, and a transaction which is merely voidable, casts serious doubt on the propriety of treating violations of national law as a jurisdictional issue *per se*.<sup>402</sup> In the present case, Article 71 of the Peruvian Constitution contemplates that rights obtained in contravention thereof revert to the State – they are not void *ab initio*, and the State must take affirmative action to re-acquire rights a putative investor unlawfully obtained. Claimant must, therefore, be held to have made a protected investment, and the

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<sup>398</sup> C-III ¶¶ 123 – 125; Ori Herstein, *A Normative Theory of the Clean Hands Defense*, 17 Legal Theory 171 (2011) [CL-0219].

<sup>399</sup> C-III ¶ 125.

<sup>400</sup> *Id.* at 131; Vienna Convention on the Law of Treaties, May 23, 1969 [CL-0039]; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶ 133 [CL-0104]; DW Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INTL. L. (1993) [CL-0220]; Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, RECEUIL DES COURS (1957) [CL-0221]; Bruno Simma and Christian Tams, *Reacting Against Treaty Breaches*, in THE OXFORD GUIDE TO TREATIES (2012) [CL-0222]; Thomas Franck, *On Proportionality of Countermeasures in International Law*, 102 AJIL 715 (2008) [CL-0223]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006 ¶¶ 236 – 237 [RLA-021]; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, Jun. 18, 2010 ¶¶ 135, 137 [RLA-022]; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, Oct. 4, 2013 ¶ 165 [RLA-088].

<sup>401</sup> C-III ¶ 135.

<sup>402</sup> *Id.* at ¶¶ 125 – 128; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts), Jun. 22, 2010 ¶¶ 181, 187 [CL-0169]; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, Mar. 30, 2015 ¶ 494 [RLA-017]; *Ioannis Kardassopolos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, Jul. 6, 2007 ¶¶ 184, 192 [RLA-092].

Tribunal may proceed to consider the merits of Claimant's claims. Following *Liman Caspian Oil*, even if a violation of Article 71 rendered a transaction void, an investment would nonetheless have been made and a case based on a violation of the FTA would fall within the jurisdiction of the Tribunal.<sup>403</sup>

314. Regarding the second situation, *Liman Caspian Oil* is also instructive as to what form of investor wrongdoing should be considered potentially jurisdictional in nature. There, the tribunal agreed that it does not have jurisdiction over investments made in violation of international public policy, including fraud and bribery, which must be proven by respondent. Thus, even if the Tribunal found that a violation of Article 71 had occurred, that alone would be insufficient: Respondent would need to demonstrate that Claimant knowingly and fraudulently misrepresented its relationship with Ms. Villavicencio. Respondent cannot meet this burden, given Claimant's transparent disclosure of the Option Agreements and its following of Estudio Grau's legal advice.<sup>404</sup>
315. Respondent's argument that good faith is an independent pre-requisite to jurisdiction under ICSID and international law is misguided. In each case on which Respondent relies, the tribunal found an independent basis of bad faith to support a finding that it lacked jurisdiction due to investor wrongdoing. If the Tribunal finds that Claimant acted in accordance with Peruvian law, Respondent's allegations of bad faith cannot defeat the Tribunal's jurisdiction.<sup>405</sup>
316. Finally, with regard to the third situation, as in the case *Kardassopoulos v. Georgia*, here, Respondent's actions and representations *vis-à-vis* Claimant created in Claimant the legitimate expectation that it had made a lawful investment that would be protected under the FTA in case of breach. This expectation stems from Respondent's own conduct and is entitled to treaty protection.<sup>406</sup>

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<sup>403</sup> C-III ¶¶ 128 – 129; Rodríguez-Mariátegui First Report ¶ 20 [REX-003]; Gala First Statement n. 19 [RWS-1].

<sup>404</sup> C-III ¶¶ 130, 134; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts), Jun. 22, 2010 ¶ 194 [CL-0169]; *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, May 16, 2014 ¶ 156 [RLA-024].

<sup>405</sup> C-II ¶¶ 227 – 230; Aloysius Llamzon and Anthony C. Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct* in Albert Jan van den Berg (ed), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18 (© Kluwer Law International; Kluwer Law International 2015) [CL-0171]; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, Jul. 14, 2010 ¶¶ 112 – 113 [CL-0174].

<sup>406</sup> C-III ¶¶ 135 – 137; *Ioannis Kardassopolos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, Jul.

317. The summary of Claimant’s arguments is best taken from its own words:

*[...] Respondent has built its entire jurisdictional objection on an erroneous assumption: that its allegations of illegality and fraud in the making of Bear Creek’s investment must necessarily deprive this Tribunal of jurisdiction or render Claimant’s claims inadmissible. The law is not binary, however, and it accords this Tribunal ample discretion to decide whether the nature of the alleged illegality merits outright dismissal or a weighing of any investor wrongdoing against the respondent State’s own violations of international law.<sup>407</sup>*

### **3. The Tribunal’s Reasoning**

318. As the Parties’ submissions show, the case law does not offer a clear basis regarding the standard to be applied to determine jurisdiction. This Tribunal considers that such determination should be made on the basis of conclusions that can be drawn from the applicable treaty.

319. In this context, the following wording of Article 816 of the FTA is of particular relevance: “*Nothing in Article 803 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of covered investments, such as a requirement that investments be legally constituted under the laws or regulations of the Party, [...].*” Thus, Article 816 identifies the legality requirement as a “*special formality*” that the host State is entitled to adopt if it so wishes. Since nowhere in the FTA or otherwise in the record is there an express or implied provision of law to the effect that Peru made use of this option, it can only be concluded that there is no jurisdictional requirement that Claimant’s investment was legally constituted under the laws of Peru.

320. The Tribunal agrees with Claimant that under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties. Indeed, the above considerations distinguish the FTA from the treaties applicable in *Flughafen Zurich*, *Hamester*, *Inceysa*, and *Phoenix Action*, which expressly required compliance with the host State’s law. In fact, the wording of the FTA provides further clarity, because not only does it not mention such a limit, but, by the wording cited above, provides that such a limit is considered a *formality* which would have to be expressly included to be effective. Here, no such formality was expressly included.

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6, 2007 ¶¶ 184, 192 [RLA-092].

<sup>407</sup> C-III ¶ 138.

321. In view of the above cited text, the words “*such as*” indicate that this would apply also to other limits to jurisdiction. Therefore, the Tribunal does not consider that the alleged good faith of the investor is a further condition under the FTA for the jurisdiction of the Tribunal.
322. As can be seen from case law, further considerations may be necessary in case of fraud by the investor. However, the Tribunal does not have to enter into the question of whether the relevant case law may support a finding that an investor’s fraud may exclude jurisdiction, since fraud by Claimant has not been alleged by Respondent, and the Tribunal indeed does not see evidence for fraud from the file.
323. The above conclusions make it unnecessary for the Tribunal to examine the Parties’ arguments or decide on (1) whether Claimant obtained the Concessions and made the investment in good faith and in accordance with Peruvian law and (2) whether Respondent is estopped from asserting illegality or bad faith<sup>408</sup> in the context of jurisdiction.
324. The above conclusion does not exclude the possible relevance of illegality or lack of good faith with respect to the merits.

## VIII. ADMISSIBILITY OF CLAIMANT’S CLAIMS

### A. RESPONDENT’S ARGUMENTS

325. Respondent’s arguments were also repeated in relation to its submissions on the Tribunal’s questions (a)(v) “*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?*” and (b) “*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?*”<sup>409</sup>
326. In the alternative, if the Tribunal finds that it has jurisdiction, it should dismiss this case as inadmissible, as all claims rest on an unlawfully obtained investment. As explained in Respondent’s arguments related to jurisdiction, Claimant’s very acquisition of the Santa Ana mineral concessions

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<sup>408</sup> Compare PO-10 ¶ 2.1.4 (b) and (d)(i).

<sup>409</sup> PO-10 ¶ 2.1.4 (a)(v) and (b).

violated Article 71 of the Constitution – a longstanding legal provision that is specifically directed at controlling natural resource investments by foreigners in the border zone.<sup>410</sup> To repeat from above, the conclusion that this Tribunal should take from the *Plama*, *Yukos*, and the *Khan Resources v. Mongolia* decisions is that, regardless of whether the Tribunal decides the case on grounds of jurisdiction or on grounds of inadmissibility, Claimant is not entitled to any of the substantive protections afforded by the FTA.<sup>411</sup>

327. The “*unclean hands*” doctrine has likewise been used to find a claimant’s claims to be inadmissible.<sup>412</sup> This Tribunal should not reward Claimant’s circumvention of Respondent’s Constitution with treaty protection – and, indeed, Claimant cannot point to a single case where a tribunal has found that an investor acquired its investment illegally or through bad faith and nevertheless found for that investor on the merits.<sup>413</sup>

328. Respondent urges the Tribunal to find Claimant’s claims inadmissible if it were to find that Claimant lacked a social license to build and operate the Santa Ana Project because it failed to comply with international standards when designing and executing its community outreach program.<sup>414</sup>

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<sup>410</sup> R-II ¶¶ 5, 362, 364, 365; RPHB-I ¶ 76; RPHB-II ¶ 22.

<sup>411</sup> R-II ¶¶ 371, 373, 398; RPHB-II ¶ 23; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶¶ 139 – 140 [CL-0104]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006 ¶¶ 231 – 239 [RLA-021].

<sup>412</sup> R-II ¶ 382; RPHB-II ¶ 23; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, Dec. 15, 2014 ¶¶ 644 – 648 [CL-0075]; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶¶ 139 – 140 [CL-0104]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006 ¶¶ 231 – 239 [RLA-021]; Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge: Grotius Publications, 1987) 156 [RLA-047bis].

<sup>413</sup> R-II ¶¶ 385, 387, 398; RPHB-I ¶ 75; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶¶ 139 – 141, 144 [CL-0104]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006 ¶¶ 223 – 224, 230 – 231, 242 [RLA-021].

<sup>414</sup> RPHB-I ¶ 59.

## B. CLAIMANT’S ARGUMENTS

329. The Tribunal should take the legality of the investment and good faith into account when adjudicating the merits of the case, without limiting itself to the analysis of the question of the admissibility of Claimant’s claims.<sup>415</sup> Claimant’s jurisdictional arguments are incorporated by reference.
330. Respondent assumes that in the face of illegality, the Tribunal must either dismiss on jurisdiction or on the grounds of inadmissibility.<sup>416</sup> Respondent has not, however, cited any case where a violation of national law without fraudulent intent results in the dismissal for lack of jurisdiction or for the inadmissibility of claims.<sup>417</sup>
331. There are situations where a tribunal may find illegality, yet nonetheless consider the substance of claimant’s case and reach a decision on the merits of the claim. A claim of illegality cannot become a “trump” in all instances, which would render an unlawful expropriation without redress.<sup>418</sup> Rather, a finding of fraud before illegality is treated as preemptory and is supported by case law.<sup>419</sup> In *Plama*, the investor was guilty of fraud and it was on that basis that the investor’s claims were inadmissible. The *Plama* tribunal did not state that a violation of national law, without fraud, bears the consequence of inadmissibility.<sup>420</sup>
332. In *Plama* and *Inceysa*, the tribunals found that, but for the unlawful conduct, the host State would not have permitted the investment. Where the allegedly unlawful conduct is minor, procedural, or a good faith error, the investor may still benefit from treaty protections and the tribunal may consider the substantive merits of the case. Only grave violations of national law which were decisive to the host State’s decision to allow the investment may justify a finding of inadmissibility. The issue, as explained by the *Minnotte* tribunal, is whether Respondent has proven that there was a fraud and/or

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<sup>415</sup> C-III ¶ 114.

<sup>416</sup> *Id.* at ¶ 122.

<sup>417</sup> *Id.* at ¶¶ 122, 123.

<sup>418</sup> *Id.* at ¶ 124.

<sup>419</sup> *Id.* at ¶ 125.

<sup>420</sup> *Id.* at ¶¶ 117, 132.

deception that was of such a kind as to disentitle claimant of treaty protection. The *Khan Resources* tribunal further noted that “*it would undermine the purpose and object of the Treaty to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.*” Here, Respondent enacted Supreme Decree 032 to impose sanctions available under local law upon Claimant. It forms the core of Claimant’s case on jurisdiction and the merits. It would undermine the object and purpose of the FTA to deny Claimant the right to make its case before this Tribunal based on the same alleged violations the existence of which Claimant seeks to dispute on the merits.<sup>421</sup>

### **C. THE TRIBUNAL’S REASONING**

333. As is frequently the case in investment disputes, the Parties’ arguments regarding admissibility overlap to a certain degree with those regarding jurisdiction. This is also the case with Respondent’s objection to admissibility.
334. Respondent bases its objection to admissibility on two main arguments: (1) that all claims rest on an unlawfully obtained investment and (2) that Claimant did not have a social license.
335. In this context, the Tribunal recalls its considerations and conclusions regarding jurisdiction. For the same reasons as discussed above for jurisdiction, an alleged illegality of the investment is not sufficient to deny admissibility, though it will have to be considered and may become relevant in the examination of the merits. Likewise, the relevance of a social license for Claimant will have to be considered in the merits and in the quantification of possible damages.

## **IX. THE MERITS**

### **A. WHETHER RESPONDENT EXPROPRIATED CLAIMANT’S INVESTMENT IN THE SANTA ANA CONCESSION**

336. The Parties have submitted that expropriation is addressed by Article 812 and Annex 812.1 of the FTA, submitted as Exhibits C-0001 and R-0390. The sections of these provisions are reproduced here for reference and convenience and without prejudice to their meaning or applicability:

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<sup>421</sup> *Id.* at ¶¶ 131 – 133; C-II ¶¶ 219, 220.

### **Article 812<sup>3</sup>: Expropriation**

1. *Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”), except for a public purpose<sup>4</sup>, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.*
2. *Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.*
3. *Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be payable in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until date of payment.*

[...]

*Footnote 3. For greater certainty, paragraph 1 of Article 812 shall be interpreted in accordance with Annex 812.1*

*Footnote 4. The term “public purpose” shall be interpreted in accordance with international law. It is not meant to create any inconsistency with the same or similar concepts in the domestic law of either Party.*

### **Annex 812.1 Indirect Expropriation**

*The Parties confirm their shared understanding that:*

- (a) *Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;*
- (b) *The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:*
  - (i) *the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,*
  - (ii) *the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations, and*
  - (iii) *the character of the measure or series of measures;*
- (c) *Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are*

*designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.*

337. Respondent has submitted that Chapter 22 of the FTA is also relevant:

**Article 2201: General Exceptions**

[...]

3. *For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:*
  - (a) *to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health;*
  - (b) *to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or*
  - (c) *for the conservation of living or non-living exhaustible natural resources.*

**1. Arguments from the Government of Canada and Party Responses**

338. The views of the Government of Canada are best taken from its own words:

3. *[...] An analysis of breach of Article 812 requires as a first step the identification of the investment alleged to have been expropriated. For there to be an expropriation, there must be a taking of fundamental ownership rights, either directly or indirectly, that causes a substantial deprivation of economic value of the investment.*
4. *In the case of an alleged indirect expropriation, Annex 812.1 provides guidance on how to distinguish between whether an indirect expropriation and bona fide regulation that does not amount to an expropriation. Whether a measure constitutes a nondiscriminatory, regulatory measure designed to protect public welfare – as opposed to an indirect expropriation – requires a case-by-case, fact based inquiry that considers various factors. The Parties have articulated certain of these factors in Annex 812.1 to guide the Tribunal, including the economic impact of the measure or series of measures, the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations, and the character of the measure or series of measures (for example if the measure is general in nature as opposed to targeting a particular investment). None of these factors will be determinative on its own. Together, they must be weighed along with any other relevant factors.*
5. *A State is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure designed and applied to*

*protect legitimate public welfare objectives. As the tribunal in Suez InterAgua v. Argentina stated, “in evaluating a claim of expropriation it is important to recognize a State’s legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation.”*

6. *A non-discriminatory measure that is designed to protect legitimate public welfare objectives does not constitute indirect expropriation except in rare circumstances where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.*<sup>422</sup>

339. Claimant states that it adopted and applied the same test with the same factors in its pleadings and has shown that Claimant’s claim against Respondent meets these factors. According to Claimant, Respondent has advocated for a more restrictive reading of the FTA – a reading that the text of the FTA does not support.<sup>423</sup>

340. Respondent explains that it agrees with Canada on the proper interpretation of Article 812 of the FTA. There is agreement between the Parties and with Canada on the relevance of Annex 812.1. The issue that was not resolved by Canada’s submission is the definition of “rare.” The Tribunal will need to rely on the Parties’ submissions – and its own interpretation – to determine whether Claimant’s arguments with respect to this definition are credible or even persuasive. Respondent maintains that it is not.<sup>424</sup>

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<sup>422</sup> Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement (Jun. 9, 2016) ¶¶ 3 – 6; *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Interim Award, 26 Jun. 2000, ¶ 102; *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America* (UNCITRAL) Award, 12 Jan. 2011, ¶ 148; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 357 [RLA-046]; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servicios Integrales del Agua SA v. The Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability, 30 Jul. 2010, ¶ 128 [CL-0102].

<sup>423</sup> Claimant’s Response to Canadian Submission (Aug. 18, 2016) ¶¶ 2 – 9; C-I §§ II, III, IV.A, ¶¶ 120 – 144; C-II §§ II.B, II.E, III.B-C, IV, ¶¶ 106 – 146, 248 – 253, 260 – 266; R-I § IV.A; R-II § IV.A; R-II ¶ 477; Canada-Perú FTA Art. 812.1 [C-0001]; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *Interview of Prime Minister Rosario Fernandez*, Mira Quien Habla, Willax TV, May 31, 2011 [C-0097]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236].

<sup>424</sup> Respondent’s Response to Canadian Submission (Aug. 18, 2016) pp. 1 – 3; C-II ¶¶ 246 – 247, 256 *et seq.*; R-II ¶¶ 253 – 254, Canada-Perú FTA Art. 832 [C-0001]; Vienna Convention on the Law of Treaties, May 23, 1969 Art. 31(3)(a) [CL-0039]; Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test?*, 30 NW. J. INT’ L. & BUS. 339 (2010) [CL-0178]; *Renco Group Inc. v. Republic of Perú*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, Jul. 15, 2016 ¶¶ 134, 156 [RLA-097].

## 2. Whether Supreme Decree 032 Effected an Indirect Expropriation

### (a) Claimant's Arguments

341. Supreme Decree 032 indirectly expropriated Claimant's investment in Santa Ana, in violation of Annex 812.1 of the FTA, which specifically defines "*indirect expropriation*."<sup>425</sup> Applying the tests from Annex 812.1 of the FTA, this Tribunal will find that, under Annex 812.1(b), Supreme Decree 032 constitutes an "*indirect expropriation*" and that, under Annex 812.1(c), it was "*so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith*."<sup>426</sup>

### (i) Arguments Related to Annex 812.1(b)

342. Starting with the "*case-by-case, fact based inquiry*" mandated by Annex 812.1(b) – which Respondent does not address – it is readily apparent that Supreme Decree 032 was expropriatory. Supreme Decree 032 had a substantial, adverse impact on the value of Claimant's investment. This, in the words of the *Tecmed* tribunal, is relevant in distinguishing between a regulatory measure and a *de facto* expropriation that deprives assets and rights of real substance. By reducing Claimant's investment to mining concessions to which Claimant no longer possessed clean title, Supreme Decree 032 rendered Claimant's investment worthless and incapable of sale. It also caused a US\$ 170.6 million reduction in the value for the Corani Project, which has always been linked to the Santa Ana Project.<sup>427</sup>

343. The second factor listed in Annex 812.1(b) is the extent to which the measure interferes with the investor's distinct, reasonable investment-backed expectations. Claimant purchased seven mining concessions on the basis of Supreme Decree 083. Claimant invested tens of millions of dollars in developing the Santa Ana Project and reasonably expected that Respondent would not interfere with

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<sup>425</sup> C-II ¶ 246; Canada-Perú FTA Art. 812(1) n.3; Annex 812.1 [C-0001].

<sup>426</sup> C-II ¶ 247; Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test?*, 30 NW. J. INT' L. & BUS. 339, 344, 364 (2010) [CL-0178].

<sup>427</sup> C-I ¶¶ 56, 244 C-II ¶¶ 247 – 250; R.Prov.M.-II ¶¶ 28, 30; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 115 [CL-0040]; Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test?*, 30 NW. J. INT' L. & BUS. 339, 344, 364 (2010) [CL-0178]; Swarthout First Statement ¶ 46 [CWS-1]; Bullard Second Report ¶ 131 [CEX-005].

Claimant's right to engage in mining activity for economic benefit arbitrarily, discriminatorily, and without due process of law. Claimant reasonably expected that the authorization granted in Supreme Decree 083 would last as long as Claimant did not pose an external threat to Respondent's national security. These expectations were shattered by Supreme Decree 032.<sup>428</sup>

344. The third factor listed in Annex 812.1(b) “takes account of the nature and character of the measure, including [...] ‘whether the interference with property can be characterized as a physical invasion by government or whether it is regulatory in nature, [...]’” That Supreme Decree 032 individually targets Claimant for political reasons is relevant under this third factor. Supreme Decree 032 did not arise from a public program and is not an abstract measure of general regulatory character. Rather, Supreme Decree 032 was issued when Respondent caved to electoral interests, outside of the legal process for administrative acts and in violation of Claimant's due process rights.<sup>429</sup>

**(ii) Arguments Related to Annex 812.1(c) and the Tribunal's Questions (c) and (f)**

345. Application of Annex 812.1(c) does not exonerate Respondent from liability for this indirect expropriation. Although Claimant need only prove one of the three elements of Annex 812.1(c) to prevail, Claimant has proven all three: Supreme Decree 032 (i) represents a “rare circumstance”, (ii) is discriminatory, and (iii) was not designed to protect public safety.<sup>430</sup>

346. The language of Annex 812.1(c) is broad and requires a case-by-case factual inquiry. Regarding the first element of “rare circumstances”, although Respondent acknowledges that the FTA does not define “rare circumstances”, Respondent seeks to set out an “elevated standard” that is not supported by the express text of the FTA or the Contracting Parties' intent to afford protections against expropriation, in order to stimulate investment. Annex 812.1(c) does not impose a high burden in proving that the circumstances were rare. Rather, Annex 812.1(c) is intended to reflect that ordinary regulatory measures will not lead to international liability, except in rare circumstances. “Rare” is

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<sup>428</sup> C-II ¶¶ 251 – 252; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 149 [CL-0040]; Swarthout First Statement ¶¶ 15, 26 – 29 [CWS-1]; Legislative Decree No. 757 [Bullard-04]; Bullard Second Report ¶¶ 28, 125, 140 [CEX-005].

<sup>429</sup> C-II ¶ 253; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; Chester Brown, *Commentaries on Selected Model Investment Treaties*, Oxford University Press (2013) [CL-0179]; Bullard Second Report ¶ 130 [CEX-005].

<sup>430</sup> C-II ¶¶ 254 – 255 (citing R-I ¶¶ 254 – 255).

commonly defined as something “*not occurring very often.*” Here, Supreme Decree 032 is no general regulatory measure: it is a targeted administrative decision. This type of decree is not a regular occurrence under Peruvian law, and the expert, Mr. Flury, is unaware of the Ministry of Mines ever issuing a similar decree.<sup>431</sup>

347. Contrary to Respondent’s argument, there is no part of the applicable legal standard that requires presuming that Respondent acted in good faith. Instead, Annex 812.1(c) requires proportionality between the impact of the measure and its purpose – and proportionality is wholly lacking in Supreme Decree 032. The severity of Supreme Decree 032 is beyond question: it permanently deprives Claimant of its ability to own and operate its lawfully-acquired mining concessions. The disproportionality between this and the stated goal of quelling political pressure and social protests is evident, and Respondent could have enacted a temporary measure instead. Indeed, when a non-discriminatory measure that is designed and applied to protect legitimate public welfare objectives is “*so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith*”, that constitutes an indirect expropriation.<sup>432</sup>

348. Supreme Decree 032 was discriminatory. It specifically and vindictively targeted only Claimant. No other mining company lost its right to own and operate its mining concessions to quell the social protests. Although other foreign investors have used similar structures to acquire mining concessions within 50 km of the Peruvian border, Respondent never challenged the way in which these investors acquired their concessions.<sup>433</sup> Again, Mr. Flury is not aware of MINEM ever issuing a similar

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<sup>431</sup> *Id.* at ¶¶ 255 – 259; R-I ¶¶ 224, 255; Canada-Perú FTA Preamble [C-0001]; OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011 [C-0180]; Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test?*, 30 NW. J. INT’ L. & BUS. 339, 363 – 365 (2010) [CL-0178]; Chester Brown, *Commentaries on Selected Model Investment Treaties*, Oxford University Press (2013) 791 [CL-0179]; Bullard Second Report ¶¶ 10, 115, 130 [CEX-005]; Flury First Report ¶ 64 [CEX-006].

<sup>432</sup> C-I ¶¶ 135 – 138; C-II ¶¶ 255, 260 – 263; R-I ¶¶ 255, 256; MEM: *Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; Alan García: *Hay oscuros intereses políticos en protestas en Puno*, La Republica.pe, Jun. 25, 2011 [C-0242]; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 122 [CL-0040]; *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006 ¶ 195 [CL-0089]; Anthony Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test?*, 30 NW. J. INT’ L. & BUS. 339, 365 (2010) [CL-0178]; Chester Brown, *Commentaries on Selected Model Investment Treaties*, Oxford University Press (2013) 791 [CL-0179]; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, Jul. 7, 2011 ¶¶ 125 – 126 [RLA-041]; Zegarra First Statement ¶ 26 [RWS-003].

<sup>433</sup> See e.g. C-II ¶ 46 – 65 (citing Supreme Decree 024-2008-DE, Dec. 27, 2008 [C-0204]; Monterrico Metals Plc’s Annual Report 2007 [C-0205]; Archived Title of Entry N° C00011 of File N° 11352728 of the Corporate Registry

decree.<sup>434</sup>

349. As Claimant's Witness, then-Minister of Mines Gala confirms, Supreme Decree 032 was not designed and applied to protect a legitimate public welfare objective. It was championed by Mr. Aduviri of the FDRN as part of his political platform. Respondent implemented Supreme Decree 032 in an effort to placate political pressure, which is not a legitimate public welfare objective. That Respondent adopted Supreme Decree 032 with other interconnected measures intended to address the full range of the protests is nothing more than a veiled attempt to legitimize the admittedly unconstitutional decree.<sup>435</sup> Even Respondent's government officials have stated that cancellation of the Santa Ana Mining Concession due to political protests was illegal and unconstitutional.<sup>436</sup> The Tribunal should

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of the Public Registry Office of Lima [C-0206]; *The new CEO of Monterrico had an audience with Peru's minister of Energy & Mines*, The Zijin Consortium Press Release, Jun. 11, 2007 [C-0207]; *China's ambassador in Peru Gao Zhengyue investigated Majaz company*, The Zijin Consortium Press Release, Jun. 11, 2007 [C-0208]; Copy of the file with the administrative procedure which led to Supreme Decree 024-2008-DE 3 – 8, 75 – 76, 98 [C-0209]; *President of Peru Alan Garcia: No reason not to succeed in project Rio Blanco*, The Zijin Consortium Press Release, Mar. 21, 2008 [C-0210]; Supreme Decree 021-2003-EM, Jun. 26, 2003 [C-0211]; INGEMMET Unique File for mining concession "Don José" N° 01-01751-00 2 – 5, 31 – 33, 39 – 40 [C-0212]; Archived File of Entry N° 8 of File N° 11564463 of the Corporate Registry of the Public Registry Office of Lima at 6 [C-0213]; Archived File of Entry C00001 of File 11564463 of the Corporate Registry of the Public Registry Office in Lima at 12 [C-0214]; Entry C00005 of File 11564463 of the Corporate Registry of the Public Registry Office in Lima at 3 [C-0215]; INGEMMET Unique Files for mining concessions "Don Miguel Alberto" N° 01-00059-01 [C-0216]; Supreme Decree 041-94-EM, Oct. 6, 1994 [C-0217]; Archived File of Entry N° 10 of File N° 01186245 of the Corporate Registry of the Public Registry Office of Arequipa [C-0218]; File 02002531 of the Corporate Registry of the Public Registry Office in Lima [C-0219]; Entry N° 4 of File N° 01186245 of the Corporate Registry of the Public Registry Office of Arequipa [C-0220]; INGEMMET Unique Files for mining concessions "La Solución" N° 14003327x01 [C-0221]; Archived File of Entry N° 001 of File N° 02021527 of the Corporate Registry of the Public Registry Office of Lima [C-0222]; Profile Rubio, Leguía & Normand: <http://rubio.pe/Nosotros>, <http://rubio.pe/Abogados/Details/7> [C-0223]; INGEMMET Unique Files for mining concessions "Mojica 1" N° 01-02296-93 [C-0224]; Memorial to Gale Curtis Knutsen, Geological Society of America Memorials, Dec. 1996 [C-0225]; File N° 02021527 of the Corporate Registry of the Public Registry Office of Lima 1, 3, 5, 8, 12 [C-0226]; Monterrico Metals Plc's 2002 Annual Report [C-0227]; Archived File of Entry N° 0010 of File N° 02021527 of the Corporate Registry of the Public Registry Office of Lima [C-0228]; Entry N° 1 of the File N° 03026941 of the Registry of Powers of Attorney granted by foreign companies of the Public Registry [C-0229].

<sup>434</sup> C-II ¶ 264; Art. 812.1(c) Canada-Perú FTA [C-0001]; Flury First Report ¶ 64 [CEX-006].

<sup>435</sup> C-I ¶¶ 130 – 138; C-II ¶¶ 137 – 140, 255, 264 – 266; R-I ¶¶ 130, 255; Tr. 1758 (C. Closing); Canada-Perú FTA Art. 812.1(c) [C-0001]; *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *Huelga de aymaras termina en "cuarto intermedio"*, LOS ANDES, Jun. 1, 2011 [C-0099]; *Yonhy Lescano: Concesión a la minera Santa Ana quedó sin efecto*, RPP, Jun. 24, 2011 [C-0176]; Flury First Report ¶ 64 [CEX-006].

<sup>436</sup> Tr. 1758 – 1763 (C. Closing).

also recall that the Constitutional Court of Lima found that the protests were not attributable to actions or omissions by Claimant.<sup>437</sup>

350. Even if Supreme Decree 032 were non-discriminatory and were appropriately designed and applied, the utter disregard for due process that enabled its issuance would still warrant this Tribunal's finding that Respondent indirectly expropriated Claimant's investment. Respondent was under a duty to protect both its citizens and foreign investors in its territory. Instead, it issued Supreme Decree 032, in violation of its Constitution, without due process, for political reasons. It is "*rare*" that a State will so blatantly and knowingly disregard its own legal framework, its international legal obligations, and all semblance of due process – and that should compel the Tribunal to find that Supreme Decree 032 constitutes an indirect expropriation.<sup>438</sup>
351. To the extent that Respondent has argued that Supreme Decree 032 was issued as part of a comprehensive set of good faith measures<sup>439</sup> and that other concessions were also impacted, Claimant notes that there is a material difference when concessions are not merely "*impacted*" but are "*taken*."<sup>440</sup> Testimony confirmed that no other concession owners permanently lost their mining rights as Claimant did.<sup>441</sup>
352. In its Post-Hearing Brief, in response to the Tribunal's question (f), "[w]as the Claimant denied due process in the procedure leading to the promulgation of Supreme Decree 032, or otherwise?"<sup>442</sup>, Claimant explained that Respondent enacted Supreme Decree 032 in violation of Claimant's due process rights. Although the Government considered the protesters' demands unconstitutional, officials met with protesters without Claimant, despite Claimant's repeated requests to join these

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<sup>437</sup> *Id.* at 1763 (C. Closing).

<sup>438</sup> C-II ¶¶ 255, 267 – 268; R-I ¶ 255; Canada-Perú FTA [C-0001]; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; *Huelga de aymaras termina en "cuarto intermedio"*, LOS ANDES, Jun. 1, 2011 [C-0099]; Acta de Supervisión Ambiental, Nov. 25, 2011 [CL-0179]; Bullard First Report ¶¶ 121, 122, 126, 165 [CEX-003].

<sup>439</sup> Tr. 340 (R. Opening).

<sup>440</sup> *Id.* at 1779 – 1780.

<sup>441</sup> *Id.* at 1780.

<sup>442</sup> PO-10 ¶ 2.1.4(f).

meetings.<sup>443</sup> Based on documents allegedly presented on the final days of meetings – documents which have not been produced in this hearing and which Claimant likewise never viewed or had the opportunity to respond to, Respondent considered that Claimant had engaged in a possible constitutional violation.<sup>444</sup> Within hours, the Government decided to expropriate Claimant’s investment. All that is known is that, between 9 or 10 p.m. on June 23, 2011 and 1:30 a.m. on June 24, 2011, 15 to 19 Ministers on the Council of Ministers were contacted and agreed to revoke Supreme Decree 083, in time for the President of Peru to sign the decision by 1:30 a.m.<sup>445</sup> No documentation of any debate related to the expropriation has been provided and Respondent claims that all documents have been lost.<sup>446</sup> Oral testimony showed an inconsistency in who drafted Supreme Decree 032, with Mr. Gala pointing to Mr. Zegarra as the drafter and Mr. Zegarra denying drafting the document, insisting instead that he only offered quick oral legal advice.<sup>447</sup>

353. To comply with due process requirements, even a discretionary act of State regarding public necessity must be reasoned.<sup>448</sup> Even Respondent’s witness, Vice-Minister Gala, explained that Respondent purposefully decided not to state reasons because it considered that doing so would be “*hazardous at the time.*”<sup>449</sup> Contrary to Respondent’s assertion, Supreme Decree 032 is neither clear nor reasoned.<sup>450</sup> Although Respondent tries to excuse lack of reasons and these due process violations

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<sup>443</sup> CPHB-I ¶¶ 55 – 56, 59; CPHB-II ¶ 1; Tr. 762:1 – 4, 764:1-5, 769:15-19, 772:9-16, 773:13-14, 776:9-14, 777:14 – 778:8, 779:1-8, 792:2-6, 794:12-20, 795:16 – 796:9, 797:6-14, 798:6-799:1, 810:12 – 811:1, 824:8 – 825:4, 836:6 – 838:3, 846:5-8, 849:8-11, 872:9-14 (Gala); 922:15 – 923:3, 978:19 – 981:10, 990:10 – 991:7, 994:8-11, 999:19 – 1001:2, 1025:11-19 (Zegarra); 1758 (C. Closing); Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013 p. 114 [C-0197]; Gala Second Statement ¶¶ 4, 5, 14, 19, 21, 23, 25, 27 [RWS-5]; Zegarra Second Statement ¶¶ 15, 18, 20, 21 [RWS-7].

<sup>444</sup> CPHB-I ¶ 57; Tr. 769:15-19, 772:9-16, 810:20 – 811:1, 846:5-8 (Gala); 978:19 – 980:8 (Zegarra); Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) pp. 80, 146, 154, 162 [C-0017]; Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, July 5, 2011 [C-0112]; Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013 p. 114 [C-0197]; Gala Second Statement ¶¶ 4, 5, 14, 19, 23, 25, 27 [RWS-5]; Zegarra Second Statement ¶¶ 15, 18, 20, 21 [RWS-7].

<sup>445</sup> CPHB-I ¶ 58; CPHB-II ¶ 1; Tr. 837:2 - 838:4-17 (Gala); Tr. 928:13 – 931:6, 944:8-11978:19 – 980:8-11, 1012:11-19 (Zegarra); “*Yonhy Lescano: Concesión a la minera Santa Ana quedó sin efecto,*” RPP, Jun. 24, 2011 [C-0176].

<sup>446</sup> CPHB-I ¶ 59; Tr. 232 (R. Opening); 777 – 779, 794, 798 – 799, 824 – 825, 836 – 837 (Gala); 979 – 981, 990 – 991, 1011 (Zegarra); First Bullard Report ¶¶ 196 – 197 [CEX-003].

<sup>447</sup> Tr. 1777 – 1778 (C. Closing).

<sup>448</sup> CPHB-I ¶ 60; CPHB-II ¶ 5; Tr. 955 – 957 (Zegarra).

<sup>449</sup> CPHB-II ¶ 7; Tr. 863:13 – 15 (Gala).

<sup>450</sup> CPHB-II ¶¶ 5 – 7; Tr. 1775 – 1777 (C. Closing); 863:13 – 15 (Gala); 956:2-22, 957:1-7, 1003:15 – 1004:20

by claiming that there was no time or reason to conduct extensive diligence, testimony shows that Respondent conducted none.<sup>451</sup> Respondent's failure to consult Claimant is a rank international law violation that cannot be excused by reference to domestic law.<sup>452</sup> Finally, even if the information Respondent received on June 23, 2011 was accurate, Respondent cannot benefit from its own unlawful conduct simply because the information was correct. Regardless, the facts presented in this arbitration do not support Respondent's bases for enacting Supreme Decree 032.<sup>453</sup>

354. In its Post-Hearing Brief, in response to the Tribunal's question (c), "[w]hat was the basis for the decision to issue Supreme Decree 032, and on what evidence did the State authorities rely?"<sup>454</sup>, Claimant explained that Respondent claims it issued Supreme Decree 032 for two reasons: Claimant's possible violation of Article 71 and the social unrest. No specific evidence has been put forward to support the first claim. The alleged documents put forward by Congressman Lescano have not been presented and their existence is not reflected in contemporaneous statements.<sup>455</sup> Claimant did not breach Peruvian law and, in all events, adequately disclosed its relationship to Ms. Villavicencio.<sup>456</sup> Respondent has failed to produce any evidence to support its position that Claimant

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(Zegarra); Supreme Decree No. 032-2011-EM adopted June 25, 2011 [C-0005].

<sup>451</sup> CPHB-II ¶ 2; RPHB-I ¶¶ 85 – 87; Tr. 977:19-21, 1011:16-19 (Zegarra).

<sup>452</sup> CPHB-II ¶ 3; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 [CL-0040].

<sup>453</sup> CPHB-II ¶¶ 4, 8; RPHB-I ¶ 86; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) pp. 83-94 [C-0017]; *Amco Asia Corp. v. Indonesia* (First Tribunal), ICSID Case No. ARB/81/1, Award on the Merits, Nov. 21, 1984, 24 I.L.M. 1022, 1038 (1985) ¶ 242 [CL-0137].

<sup>454</sup> PO-10 ¶ 2.1.4(c).

<sup>455</sup> CPHB-I ¶¶ 61 – 64; R-I ¶¶ 125 – 125; R-II ¶ 287; Tr. 810 – 811 (Gala); Tr. 977 (Zegarra); Gala First Statement ¶¶ 33 – 38 [RWS-1]; Fernández Statement ¶¶ 24, 28 [RWS-4]; Gala Second Statement ¶ 17 [RWS-5]; Zegarra Second Statement ¶ 20 [RWS-7].

<sup>456</sup> CPHB-II ¶¶ 8 – 13; CPHB-I ¶¶ 24 – 26, 50 – 53, 71 – 73; C-II ¶¶ 31 – 34 C. Closing pp. 46 – 58; RPHB-I ¶¶ 61, 64, 66, 86; Tr. 408, 413 (Swarthout); Tr. 964, 1015 (Zegarra); Tr. 1764 – 1771 (Claimant); Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) pp. 80, 87-163, 165-87 [C-0017]; Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006 [C-0139]; Informe No. 170-2006/MEM-AAM/EA, Jul. 10, 2006 [C-0140]; Informe No. 265-2006/MEM-AAM/EA/RC, Oct. 12, 2006 [C-0141]; J. Karina Villavicencio's Request for the Approval of Mining Exploration Category B Affidavit, Jun. 9, 2006 [C-0287]; Resolution Approving First Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 216-2008-MEM/AAM [R-036]; The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 35 (2001) (Updated 2008) Art. 4(1) [CL-0030].

was at fault for the social protests. The decision in *Cooper Mesa* provides guidance on the type of conduct that can indicate a causal link – there is no such evidence in the record in this arbitration.<sup>457</sup>

**(b) Respondent’s Arguments**

355. Annex 812.1 of the FTA expressly defines indirect expropriation as a measure that has “*an effect equivalent to direct expropriation without formal transfer of title.*” Supreme Decree 032 did not cancel or transfer ownership. Rather, it revoked the public necessity declaration that gave Claimant permission to acquire or possess the concessions. At most, Supreme Decree 032 effected an indirect expropriation because Claimant maintains title to the Santa Ana concessions.<sup>458</sup>

**(i) Arguments Related to Annex 812.1(b)**

356. Adding the second test under Annex 812.1(b) (which mandates a case-by-case inquiry into a measure’s economic impact, the extent of any interference with expectations, and the character of the measure) does not lower Claimant’s burden.<sup>459</sup>

357. Respondent’s position is that, under Annex 812.1 “*Claimant’s indirect expropriation claim will fail unless Claimant can prove that the enactment of Supreme Decree No. 032: (i) represents a ‘rare circumstance;’ (ii) is discriminatory; or (iii) was not designed to protect public safety.*”<sup>460</sup>

**(ii) Arguments Related to Annex 812.1(c) and the Tribunal’s Questions (c) and (f)**

358. Claimant is seeking to invent a lower standard of expropriation – one that ignores the transfer of title requirement. It argues that the *Quiborax* tribunal held that State action would need only “*have the*

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<sup>457</sup> CPHB-II ¶ 14; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, Mar. 15, 2016 ¶¶ 4.105, 4.173, 4.179 – 90, 4.214-230, 4.251, 4.286 [CL-0237].

<sup>458</sup> R-I ¶ 253; R-II ¶¶ 466 – 468; Canada-Perú FTA Annex 812.1 [C-0001]; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, Jul. 5, 2011 [C-0112]; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, Oct. 31, 2011 [CL-0095]; *Enron Corporation, Ponderosa Assets, L.P., v. Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007 [CL-0150]; Nigel Blackaby, Constantine Partasides, *et al.*, *Redfern and Hunter on International Arbitration*, Oxford University Press, 6th edition (2015) [CL-0183].

<sup>459</sup> R-II ¶ 477.

<sup>460</sup> Respondent’s Response to Canadian Submission (Aug. 18, 2016) p. 2.

*effect of transferring the title*” to amount to a direct expropriation.<sup>461</sup> In that case, and unlike the case here, the State expressly revoked claimant’s mining concessions by decree.<sup>462</sup> In *Quiborax*, there was a transfer of title and the tribunal held that “*for a direct expropriation to occur, there must be a forcible taking or transfer of title to the State that deprives the investor of its investment.*”<sup>463</sup>

359. Claimant is simply incorrect when it argues that Respondent expropriated the 2007 public necessity decree, which Claimant portrays as an “*essential component*” of its rights.<sup>464</sup> First, this is an argument for “*indirect*”, rather than direct expropriation. Second and more importantly – Supreme Decree 083 granted Claimant no specific mining rights. Instead, it granted Claimant permission to acquire mining concessions. The concessions – not the public necessity declaration in the Supreme Decree – allow Claimant to apply for permits and authorizations. Here, since Claimant still holds title to the concessions, no specific valuable rights have been transferred and Claimant has no claim for direct expropriation.<sup>465</sup>
360. Claimant’s indirect expropriation claim will fail because Claimant is unable to prove that Supreme Decree 032 meets any of the three required elements contained in Annex 812.1(c) of the FTA, namely that it (i) represents a rare circumstance, (ii) is discriminatory, or (iii) was not designed to protect legitimate public welfare objectives.<sup>466</sup> Supreme Decree 032 is a non-discriminatory measure, adopted absent “*rare circumstances*”, in order to further legitimate sovereign interests.<sup>467</sup>
361. First, Supreme Decree 032 does not represent a “*rare circumstance*” of indirect expropriation by a good faith government measure. This is a high threshold – and there is nothing “*rare*” about a

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<sup>461</sup> R-II ¶¶ 469 – 470 (citing C-II ¶ 316, quoting *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015 ¶ 229 [CL-0184]).

<sup>462</sup> R-II ¶ 471.

<sup>463</sup> *Id.* at ¶ 472; *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015 ¶¶ 228 – 229 [CL-0184].

<sup>464</sup> R-II ¶ 473; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶¶ 318 – 321 [CL-0091].

<sup>465</sup> R-II ¶¶ 473 – 475; Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, Jul. 5, 2011 [C-0112]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶¶ 318 – 321 [CL-0091].

<sup>466</sup> R-II ¶¶ 476 – 478; R-I ¶ 254; Canada-Perú FTA Annex 812.1(c) [C-0001].

<sup>467</sup> R-II ¶ 485.

sovereign State acting to protect its citizens.<sup>468</sup> A rare circumstance might include a showing of bad faith on the part of the State.<sup>469</sup> Although Claimant alleges bad faith, its allegations are baseless, especially in light of the legal standard, which presumes that the regulatory authority acts in good faith.<sup>470</sup> Respondent was not aware of the scope or details of the illegal scheme through which Claimant acquired the Santa Ana Concessions until June 2011, when protestors raised the issue with the Government.<sup>471</sup> Claimant's reading of the "*rare circumstances*" language is outlandish. Under Claimant's theory, any would-be claimant could pass the "*rare circumstances*" test simply by presenting a handful of facts that are unique to its case. This cannot be what the Contracting Parties intended when they agreed to the language in Annex 812.1(c) of the FTA and Claimant's argument must, therefore, be rejected.<sup>472</sup>

362. Second, Supreme Decree 032 is not discriminatory. Rather, Respondent took a specific action related to Santa Ana based on its unique circumstances, namely, its dubious acquisition and its status as a lightning rod for protest.<sup>473</sup> Although Claimant points out that no other mining company lost its right to own and operate mining concessions, Claimant does not identify a single comparable mining company that was the target of protests or that used a scheme similar to Claimant's to acquire concession rights. Unless and until Claimant can identify another mining company in similar circumstances, its discrimination argument merits no consideration.<sup>474</sup> The protests in southern Puno focused directly on the Santa Ana Project and, therefore, taking actions with respect to Santa Ana in particular was a rational regulatory choice. In any event, Respondent's actions in the mining sector

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<sup>468</sup> *Id.* at ¶ 479; R-I ¶ 255; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, Jul. 7, 2011 ¶ 125 [RLA-041]; *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, Sept. 3, 2013 ¶ 275 [RLA-049].

<sup>469</sup> R-I ¶¶ 253, 255; Canada-Perú FTA Annex 812.1(c) [C-0001]; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, Jul. 7, 2011 ¶ 125 [RLA-041].

<sup>470</sup> R-I ¶ 256; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, Jul. 7, 2011 ¶ 125 [RLA-041]; *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, Sept. 3, 2013 ¶ 275 [RLA-049].

<sup>471</sup> R-I ¶¶ 257 – 258; Gala First Statement ¶ 35 [RWS-1]; Zegarra First Statement ¶ 27 [RWS-3].

<sup>472</sup> R-II ¶¶ 480 – 481.

<sup>473</sup> *Id.* at ¶ 482.

<sup>474</sup> *Id.* at ¶¶ 482 – 483.

were not limited to Claimant. Respondent suspended all new mining projects in Puno for 36 months and required prior consultation for all projects in the region, including those not owned by foreigners.<sup>475</sup>

363. Third, Supreme Decree 032 addresses a legitimate public welfare objective – promoting public safety and safeguarding the integrity of Respondent’s constitutional and regulatory system for natural resources. The suggestion that Supreme Decree 032 was politically motivated is unsupported, illogical, and at odds with considerable witness testimony.<sup>476</sup>
364. Claimant is inviting the Tribunal to view the creation of Supreme Decree 032 “*through the clinical lens of five years’ hindsight, rather than appreciating the extraordinary situation which the government was faced with at the time.*”<sup>477</sup> At the time, Congressman Yohnny Lescana, who represents the Amayra population in South Puno, presented documentation showing Claimant’s unlawful scheme to a room full of protestors. The facts were deemed to be truthful at the time (and in hindsight, they also were). Claimant could have questioned former Prime Minister Rosario Fernández, who chaired the Council of Ministers and the Minister of Justice at the time, for more information about the deliberative process leading to Supreme Decree 032, but Claimant chose not to.<sup>478</sup>
365. In response to the Tribunal’s question (f) “*Was the Claimant denied due process in the procedure leading to the promulgation of Supreme Decree 032, or otherwise?*”<sup>479</sup>, Respondent explained that it complied with all procedural requirements when it issued Supreme Decree 032.<sup>480</sup> Claimant’s complaints that it was not consulted during the brief decision-making process did not violate Claimant’s due process rights.<sup>481</sup> The Council of Ministers has broad discretion to issue, reconsider,

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<sup>475</sup> R-I ¶ 259; Tr. 1885 – 1887 (R. Closing); Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR (4/26/2011) [R-018]; Gala First Statement ¶ 24 [RWS-1].

<sup>476</sup> R-I ¶¶ 260 – 262; R-II ¶ 484; DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [C-0098]; Gala First Statement ¶ 42 [RWS-1]; Zegarra First Statement ¶¶ 25 – 26 [RWS-3].

<sup>477</sup> Tr. 1874 – 1875 (R. Closing).

<sup>478</sup> Tr. 1875 – 1883 (R. Closing); Tr. 938, 988, 1039 (Zegarra).

<sup>479</sup> PO-10 ¶ 2.1.4(f).

<sup>480</sup> RPHB-I ¶ 116; RPHB-II ¶ 25.

<sup>481</sup> RPHB-II ¶ 26.

or rescind an order declaring a foreign investment to be a public necessity.<sup>482</sup> The Council of Ministers is not required to consult a private party potentially affected by such a Decree.<sup>483</sup> Here, the Government responded in an appropriate and expeditious manner to a crisis, taking only the action that was necessary to address the apparent illegality and the Puno crisis.<sup>484</sup> In light of the circumstances that existed when the Supreme Decree was issued, it would have been inappropriate and/or impossible for Respondent to have solicited Claimant’s views before issuing the Decree.<sup>485</sup> Even if Respondent had, the result would not have changed, as Claimant cannot deny the relevant facts that were the basis for the issuance of the Decree, namely that Claimant used its own employee to acquire the concessions that that it explored and was in *de facto* possession of the concessions through the employee.<sup>486</sup>

366. There were no halfway or less definitive measures available to the Council of Ministers, as a suspension of the Project had already been attempted and failed to calm the situation.<sup>487</sup> On the evening of June 23, 2011, the Government was in a state of necessity, in the Peruvian legal sense.<sup>488</sup> Respondent has not pleaded “*necessity*” in the sense of Article 25 of the ILC Articles because the issuance of a Public Necessity Decree is a discretionary act of Government, making it unnecessary to rely on the ILC Articles.<sup>489</sup> After issuing Supreme Decree 032, Respondent initiated court proceedings to secure judicial determination – with due process – of whether Claimant violated the constitution. That proceeding is still pending.<sup>490</sup> Although Claimant now claims that Supreme

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<sup>482</sup> RPHB-I ¶ 117; RPHB-II ¶ 28; § IV, Eguiguren First Report ¶¶ 63 – 64 [REX-001]; Danos Report § IV.A ¶¶ 2, 123 [REX-006]; Eguiguren Second Report ¶¶ 19 – 20, 23 – 30 [REX-007].

<sup>483</sup> RPHB-I ¶ 117; Eguiguren First Report ¶ 65 [REX-001].

<sup>484</sup> RPHB-II ¶¶ 27, 29; Tr. 1875 – 1883 (R. Closing); Tr. 938:10 – 11, 19 – 20 (Zegarra).

<sup>485</sup> RPHB-I ¶ 118; Tr. 1021:11 – 1022:5 (Zegarra); Gala First Statement ¶¶ 34 – 35 [RWS-1]; Fernández Statement ¶ 24 [RWS-4].

<sup>486</sup> RPHB-I ¶¶ 119 – 120.

<sup>487</sup> *Id.* at ¶ 118; Tr. 830:1 – 832:3 (Gala); Tr. 1883 – 1884 (R. Closing); Tr. 1916 – 1921 (R. Answer to Arbitrator Sands).

<sup>488</sup> Tr. 1921, 1923 (R. Answer to Arbitrator Sands).

<sup>489</sup> *Id.* at 1922 – 1924 (R. Answer to Arbitrator Sands).

<sup>490</sup> RPHB-II ¶ 29.

Decree 032 was an act of expropriation, they had already vacated the site and complete the required actions for approval of the ESIA.<sup>491</sup>

367. In its Post-Hearing Brief, in response to the Tribunal’s question (c), “[w]hat was the basis for the decision to issue Supreme Decree 032, and on what evidence did the State authorities rely?”<sup>492</sup>, Respondent explained that the decision to issue Supreme Decree 032 was based on (1) the discovery of Claimant’s unconstitutional possession of the Santa Ana concessions and (2) the social crisis and protests against the Santa Ana Project.<sup>493</sup> Regarding the first point, the Government learned during a meeting in Lima in June 2011 that Claimant had operated in the border region and possessed the concessions through proxy – Ms. Villavicencio – before it received its public necessity declaration, when an elected official presented documents proving the same.<sup>494</sup> Although Respondent no longer has the documents, their content is confirmed by witness testimony.<sup>495</sup> The information in the documents was accurate.<sup>496</sup> Regarding the second point, and given that the public was aware of the Constitutional violation, the Government could no longer sustain Claimant’s public necessity declaration. In substantial part, the source of the social crisis was community opposition to the Santa Ana Project.<sup>497</sup> Time was of the essence and it was clear that Claimant has lost all community

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<sup>491</sup> Tr. 1884 – 1885 (R. Closing)

<sup>492</sup> PO-10 ¶ 2.1.4(c).

<sup>493</sup> RPHB-I ¶ 79.

<sup>494</sup> *Id.* at ¶¶ 82 – 84; Tr. 801, 808 (Gala); Tr. 923 (Zegarra); “Juliaca: Six People Dead After Violence During Protests” *La Republica Newspaper* [R-050]; Gala Second Statement ¶ 20 [RWS-5]; Fernández Statement ¶ 24 [RWS-4]; Gala Second Statement ¶ 17 [RWS-5]; Zegarra Second Statement ¶ 20 [RWS-7].

<sup>495</sup> RPHB-I ¶¶ 83, 85, 86; Tr. 231 – 232 (R. Opening); Tr. 413:2-8 (Swarthout); Tr. 764, 777, 806 – 807 (Gala); Tr. 923, 971 – 973 (Zegarra); Gala Second Statement ¶ 20 [RWS-5]; Fernández Statement ¶ 24 [RWS-4]; Zegarra Second Statement ¶ 20 [RWS-7].

<sup>496</sup> RPHB-I ¶ 86; Tr. 413:2-8 (Swarthout).

<sup>497</sup> RPHB-I ¶¶ 87 – 89; Tr. 615 (Swarthout); Tr. 794 (Gala); Tr. 923 – 924 (Zegarra); DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [C-0098]; Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) 5 [R-010]; Memorial submitted by the Frente de Defensa and Kelluyo’s *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP [R-015]; Memorials submitted by the Frente de Defensa and Kelluyo’s *Comunidades Campesinas* to the President of Peru, Memorial No. 0001-2011-CO-FDRN-RSP [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 [R-017]; Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR (4/26/2011) [R-018]; Resolution Creating Multi-Sectorial Committee, Supreme Resolution No. 131-2011-PCM [R-024]; 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 [R-025]; Resolution that Extends the Scope of the Multi-Sectorial Committee, Resolution No. 142-2011-PCM [R-026]; Letter from Kelluyo Community

support.<sup>498</sup>

**(c) The Tribunal’s Reasoning**

368. At the beginning of its considerations, the Tribunal recalls that the FTA contains express provisions regarding indirect expropriation.

369. First, Article 812.1 of the FTA expressly includes indirect expropriation by the wording:

*Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”), except for a public purpose<sup>4</sup>, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.*

370. The footnotes included in Article 812.1 provide:

*Footnote 3. For greater certainty, paragraph 1 of Article 812 shall be interpreted in accordance with Annex 812.1*

*Footnote 4. The term “public purpose” shall be interpreted in accordance with international law. It is not meant to create any inconsistency with the same or similar concepts in the domestic law of either Party.*

371. Further, Annex 812.1 referred to in footnote 3 provides:

***Annex 812.1 Indirect Expropriation***

*The Parties confirm their shared understanding that:*

- (a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;*
- (b) The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:*
  - (i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse*

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Inquiring about the Project [R-053]; AA Letter from Desaguadero Community [R-411]; Memorial from Kelluyo Authorities to the Minister of Energy and Mines [R-423]; Gala First Statement ¶ 24, 33 [RWS-1]; Fernández Statement ¶¶ 24, 26 [RWS-4]; Gala Second Statement ¶ 16 [RWS-5].

<sup>498</sup> RPHB-I ¶¶ 89 – 90; Tr. 764 (Gala) Tr. 923 – 924 (Zegarra); Fernández Statement ¶ 26 [RWS-4].

*effect on the economic value of an investment does not establish that an indirect expropriation has occurred,*

(ii) *the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations, and*

(iii) *the character of the measure or series of measures;*

(c) *Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.*

372. With these provisions, the FTA contains more extensive and detailed definitions and rules than do most other BITs. Therefore, the Tribunal considers that its examination of whether Supreme Decree 032 was an indirect expropriation by Respondent must focus on these specific provisions, which are applicable in the present case.

373. Supreme Decree 032, in its Article 1, expressly derogates Supreme Decree 083 which, expressly:

- in its Article 1 declared that Claimant's private investment in mining activities "*is a public necessity*" as required under Article 71 of the Constitution of Peru,
- in its Article 2 authorized Claimant to acquire seven defined mining rights located in the Puno department,
- in its Article 3 ruled that Respondent's mining authority "*shall grant the authorizations*" for Claimant's mining activities listed in Article 2.

(i) **Examination of the "factors" provided by Annex 812.1 FTA**

374. The Tribunal will now examine whether these effects of Supreme Decree 032 fall under the "*factors*" that Annex 812.1 of the FTA mentions in its subsection (b) for the determination of whether a measure constitutes an indirect expropriation.

375. Applying the **first of these factors** mentioned in subsection (i), the Tribunal finds that there was an obvious "*economic impact*" of Supreme Decree 032 by revoking the above-mentioned authorizations of Supreme Decree 083, which deprived Claimant of all the major legal rights it had obtained and needed for the realization of its mining Project.

376. Applying the **second of these factors** mentioned in subsection (ii), the Tribunal finds that "*distinct, reasonable expectations*" which Claimant could base on the rulings in Supreme Decree 083 were

“*interfered with*[.]” As Claimant points out<sup>499</sup> and as is obvious to the Tribunal, Claimant relied on the express governmental authorization by Supreme Decree 083, when it exercised its options to acquire the Karina Mining Concessions in December 2007. Without these authorizations, Claimant could not have been expected to invest the amounts it undisputedly invested between 2007 and 2011.

377. Applying the **third of these factors** mentioned in subsection (iii), the Tribunal will hereafter examine in detail the “*character of the measure*” by considering the wording and reasoning provided in Supreme Decree 032 and the circumstances under which it was decided and issued.

**(ii) Summary of the Factual Circumstances leading to Supreme Decree 032**

378. As a first step, the Tribunal will now summarize the **factual** circumstances leading to Supreme Decree 032 as it evaluates and concludes from the evidence available from the file and from the Hearing.

379. Up to the meeting of June 23, 2011, all authorities speaking for Respondent had said that they considered the procedure adopted by Claimant and the authorizations granted to Claimant to be legal. Claimant’s application for the declaration of public necessity included the Option Agreements and disclosed Claimant’s relationship with Ms. Villavicencio. MINEM<sup>500</sup>, the Ministry of Defence<sup>501</sup>, and the Vice-Minister Secretary General of Foreign Affairs<sup>502</sup> all reviewed the application. After approximately one year of review, Supreme Decree 083 was issued. It expressly included the authorizations and rights mentioned above and was signed by the Constitutional President of Peru, the President of the Council of Ministers and Minister of Justice, the Minister of Defence, and the Minister of Energy and Mines.<sup>503</sup> Over a period of approximately three years thereafter, as will be addressed in some more detail later in this Award, Respondent supported Claimant’s Project in various ways. Respondent approved Claimant’s CPP and publicly acknowledged that revoking

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<sup>499</sup> C-II ¶ 208.

<sup>500</sup> Resolution issued by MINEM to the Ministry of Defense for the Authorization to Acquire Mineral Rights filed by Bear Creek Mining Company, Mar. 12, 2007 [C-0044].

<sup>501</sup> Letter from the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces to the Secretary General of the Ministry of Defense, Jul. 26, 2007 [C-0045].

<sup>502</sup> Letter from the Vice-Minister Secretary General of External Relations to the Ministry of Mines, Sept. 26, 2007 [C-0046].

<sup>503</sup> Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 [C-0004].

Supreme Decree 083 would be “*completely illegal*[.]”<sup>504</sup> Further, Respondent’s witness, Vice-Minister Gala, conceded in an interview that the social unrest in the Puno region was not a sufficient reason to derogate Supreme Decree 083.<sup>505</sup>

380. When from June 17 – 23, 2011, the Prime Minister and other government officials met with representatives of the protesters in Lima, these meetings and particularly the meeting of June 23, 2011 were undisputedly organized to deal with the social unrest. The Tribunal appreciates that, at that time, the Government was under strong political pressure and was urgently looking for steps that could be hoped to improve the situation. The Tribunal also finds it politically plausible that the Government did not invite Claimant to attend the meeting because such attendance might indeed have made the discussion at the meeting more difficult. From the evidence, it is clear that Respondent’s representatives as well as the other participants were desperately looking for a helpful decision, but had great difficulties in agreeing on one. Under these circumstances, when around 9 or 10 pm Congressman Lescano intervened and alleged that Claimant had illegally obtained Supreme Decree 083 by involving Ms. Villavicencio without disclosing that to Respondent, it seems that those at the meeting “*jumped*” on that reason in order to derogate Supreme Decree 083. Respondent alleges that Congressman Lescano presented new documents which for the first time showed this allegation. The testimony of Respondent’s witnesses Vice-Minister Gala and Mr. Zegarra provide some details of what occurred in this regard at the meeting on June 23, 2011.<sup>506</sup> Mr. Zegarra testified that, in his position as the Director of the Office of the Legal Advisor of the Ministry of Mines, he participated in the meeting as an observer and gave legal advice at the meeting. He also testified that the documents were reviewed “*very quickly*”<sup>507</sup> and that he did not recall “*exactly the sequence of events.*”<sup>508</sup>

381. Neither the nature of these documents nor the persons who examined them thereafter could be fully clarified at the Hearing. Respondent has not been able to produce such documents and has claimed that these were lost in the subsequent process. This is difficult to understand in view of the alleged

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<sup>504</sup> *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095].

<sup>505</sup> Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013 [C-0197].

<sup>506</sup> Tr. 762:1-4 (Gala), and 930 *et seq.* (Zegarra).

<sup>507</sup> Tr. 973:18 (Zegarra).

<sup>508</sup> Tr. 974:20 – 977 (Zegarra, questions and answers with Chairman Böckstiegel).

high relevance of the documents as a basis for an important decision of the Government, *i.e.* Supreme Decree 032. The Tribunal, therefore, concludes that Respondent has not fulfilled its burden of proof in this regard and it cannot rely on such documents.

382. It is undisputed that, after the alleged documents had been shown in the meeting around 9 or 10 pm on June 23, according to Respondent's witness Mr. Zegarra, by 1 or 2 in the morning, the first and final versions of Article 1 of Supreme Decree 032 (which derogated Supreme Decree 083) were drafted by a person he could not identify. He assumes, though he could not provide any details, that by 1:30 am, 15 to 19 ministers of the Council of Ministers could be reached, were contacted, approved the draft without seeing the alleged documents, and that the President of the Republic signed the Supreme Decree. Neither Mr. Gala nor Mr. Zegarra could provide any details of this process as it occurred during these hours of the night.<sup>509</sup>

383. It is undisputed that Claimant was not contacted and given an opportunity to comment before Supreme Decree 032 was issued.

### (iii) Legal Evaluation

384. Taking into account the above summary of the factual development until Supreme Decree 032 was issued, the Tribunal will now turn to the **legal evaluation**.

385. The Tribunal's Questions in section 2.1.4 (c) and (d) of PO-10 address the legal basis of Supreme Decree 032 and the Parties replied to these questions in their Post-Hearing Briefs.

386. Supreme Decree 032 expressly contains the following references regarding the evidence it relies on:

*In view of the documents submitted, Supreme Decree No. 083-2007-EM was issued;*

*Circumstances have been made known that would imply the disappearance of the legally required conditions for the issuance of the mentioned act;*

*[...]*

*As such, given the existence of these new circumstances, it is necessary to issue the corresponding act; [...]*

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<sup>509</sup> Tr. 863 (Gala) and 1019 – 1025 (Zegarra).

387. It is not quite clear whether this reference refers to the documents allegedly presented at the meeting of June 23, 2011. This seems probable in view of the references to “*Circumstances have been made known*” and “*these new circumstances.*” As the Tribunal concluded above, the existence and content of such documents has not been shown and the Tribunal, thus, cannot rely on them. Further, no other new documents have been presented by Respondent to which the above cited reference may be directed. Therefore, the Tribunal has to conclude that the above cited reference in Supreme Decree 032 to “*documents*” and “*circumstances*” provides no evidentiary justification for the Decree.

388. Further, Supreme Decree 032 provides expressly two legal reasons on which it relies:

- 1) the existence of the alleged “*new circumstances*” already addressed above.
- 2) “*Additionally, it was deemed pertinent to provide that the Executive Power, for the purpose of safeguarding the environmental and social conditions in the areas of the Huacullani and Kelluyo districts in the Chucuito province of the Puno department*”

389. As will be elaborated below, neither justification was sufficient to justify the derogation of Supreme Decree 083.

**(iv) Did Claimant’s Involvement of Ms. Villavicencio Justify the Derogation of Decree 083?**

390. The first reason, the “*new circumstances*”, relies on the allegedly newly discovered unconstitutionality of Supreme Decree 083 due to the involvement of Ms. Villavicencio.

391. As already mentioned above, the evidence provided by Respondent does not show that any new documents were produced at the meeting of June 23, 2011 which showed new circumstances. Accordingly, the Tribunal has to examine whether the existing file in this arbitration would justify the allegation of unconstitutionality.

392. In this context, it is helpful to recall the timetable of relevant events submitted by Claimant<sup>510</sup> and available from the file:

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<sup>510</sup> C-III pp. 30 – 34.

<b>2003</b>	Jenny Karina Villavicencio is registered as an employee of Bear Creek with the Peruvian Ministry of Labor. <sup>129</sup>
<b>August 21, 2003</b>	SUNARP registered the Power of Attorney for Ms. Villavicencio as legal representative of Bear Creek in certain matters. <sup>130</sup>
<b>May 26, 2004</b>	Ms. Villavicencio submitted an application to INACC to acquire four mining concessions (Karina 9A, 1, 2, and 3). <sup>131</sup>
<b>November 17, 2004</b>	Ms. Villavicencio and Bear Creek entered into an Option Agreement for the future transfer of the Karina 9A, 1, 2, and 3 mining concessions, should Bear Creek satisfy Peruvian legal requirements. <sup>132</sup>
<b>November 29, 2004</b>	Ms. Villavicencio submitted an application to INACC to acquire the Karina 5, 6, and 7 mining concessions. <sup>133</sup>
<b>December 5, 2004</b>	Ms. Villavicencio and Bear Creek entered into an Option Agreement for the future transfer of the Karina 5, 6, and 7 mining concessions, should Bear Creek satisfy Peruvian legal requirements. <sup>134</sup>
<b>June 28, 2005</b>	Ms. Villavicencio and Bear Creek requested that SUNARP register the November 17, 2004 Option Agreement covering the Karina 9A, 1, 2, and 3 mining concessions in order to put the public on notice of the agreements and their content. <sup>135</sup> Their request included

<sup>129</sup> Ms. Villavicencio was registered as an employee of Bear Creek with the Peruvian Ministry of Labor as far back as 2002 as well as when she applied for the mining concessions. See Exhibit C-0283, Letter from A. Swarouth, Bear Creek, to Ministry of Labor and Social Welfare dated June 16, 2002 requesting approval of the attached Fixed Term Labor Contract dated June 2, 2002; Exhibit C-0284, Fixed Term Labor Contract dated January 2, 2003; Exhibit C-0285, Letter from A. Swarouth, Bear Creek, to Ministry of Labor and Social Welfare dated July 2, 2003 requesting approval of the attached Fixed Term Labor Contract dated July 2, 2003; Exhibit C-0286, Fixed Term Labor Contract dated March 5, 2004.

<sup>130</sup> Exhibit C-0017, Supreme Decree Application at 84.

<sup>131</sup> Exhibit C-0029, Application for the Attribution of Santa Ana Concessions, 9A, 1, 2, and 3 submitted by J. Karina Villavicencio Gardini to INACC, May 26, 2004.

<sup>132</sup> Exhibit C-0016, Option Agreements.

<sup>133</sup> Exhibit C-0030, Application for the Attribution of Santa Ana Mining Concessions, 5, 6, and 7 submitted by J. Karina Villavicencio Gardini to INACC, Nov. 29, 2004.

<sup>134</sup> Exhibit C-0016, Option Agreements.

<sup>135</sup> Exhibit C-0039, SUNARP Notice of Observation No. 2005-00041200, July 5, 2005. As Respondent's expert Rodríguez-Mariátegui explains, the SUNARP Registry's "main duty is to provide the public with knowledge of the existence and contents of the transactions registered there... their primary purpose is that of providing public knowledge." REX-003, Rodríguez-Mariátegui First Report ¶ 19.

	copies of Ms. Villavicencio's petitions for the mining concessions. <sup>136</sup>
November 7, 2005	SUNARP issued a decision confirming that the Option Agreement did not transfer the ownership of the mining concessions from Ms. Villavicencio to Bear Creek and thus did not violate Article 71 of the Peruvian Constitution. <sup>137</sup>
December 22, 2005	SUNARP published its decision in the Official Gazette, which "puts others on notice." <sup>138</sup>
March 8, 2006	While Ms. Villavicencio's application for the concessions was pending before INACC, INACC—referencing the Option Agreement and its registration with SUNARP—issued four different reports confirming that the Karina 9A, 1, 2, and 3 mining concessions are not located within the protected Aymara Lupaca region, no title transferred upon mere signing of the Option Agreement, and Ms. Villavicencio's application process should continue. <sup>139</sup>
June 9, 2006	Ms. Villavicencio filed before MINEM an application Request for the Approval of Mining Exploration Category B Affidavit in which she declared her email to be <a href="mailto:bearcreek@speedy.com.pe">bearcreek@speedy.com.pe</a> . <sup>140</sup> Ms. Villavicencio also explicitly mentioned that Bear Creek would be responsible for providing certain resources for the exploratory works. <sup>141</sup>
June 22, 2006	MINEM's General Directorate for Environmental Mining Affairs (DGAAM) reviewed Ms. Villavicencio's land use agreement with the Association of Agricultural Producers of El Condór de Aconahua and noted that the authorization for the use of the land

<sup>136</sup> Exhibit C-0038, SUNARP Decision at 1-2 (listing documents Bear Creek and Ms. Villavicencio submitted to SUNARP, including *inter alia* the November 17, 2004 Option Agreement, the applicants' national identification certification, and certified copies of Ms. Villavicencio's petitions for the Karina 9A, 1, 2, and 3 mining concessions).

<sup>137</sup> Exhibit C-0038, SUNARP Decision.

<sup>138</sup> Respondent's Rejoinder ¶ 107; Exhibit C-0038, SUNARP Decision.

<sup>139</sup> Exhibit C-0249, Report No. 3129-2006-INACC-DGCM-UL for Karina 1 issued by INACC, Mar. 8, 2006; Exhibit C-0250, Report No. 3128-2006-INACC-DGCM-UL for Karina 2 issued by INACC, Mar. 8, 2006; Exhibit C-0251, Report No. 3127-2006-INACC-DGCM-UL for Karina 3 issued by INACC, Mar. 8, 2006; Exhibit C-0252, Report No. 3111-2006-INACC-DGCM-UL for Karina 9A issued by INACC, Mar. 8, 2006.

<sup>140</sup> Exhibit C-0287, J. Karina Villavicencio's Request for the Approval of Mining Exploration Category B Affidavit, June 9, 2006.

<sup>141</sup> *Id.*

	was signed by Bear Creek, a third party distinct from the owner of the mining rights, Ms. Villavicencio. <sup>142</sup> The DGAAM raised no concerns regarding Bear Creek's involvement and simply asked Ms. Villavicencio to obtain or update the authorization for use of the surface land. <sup>143</sup>
June 27, 2006	Bear Creek paid sub-surface mining fees to INGEMMET, on behalf of Ms. Villavicencio, and INGEMMET accepted these payments without raising any concerns. <sup>144</sup>
July 10, 2006	MINEM's General Directorate for Environmental Mining Affairs (DGAAM), when reviewing Ms. Villavicencio's comments regarding Informe No. 157-2006/MEM-AAM/EA, acknowledged and accepted Ms. Villavicencio's explanation that the land use agreement with the Fundo Ancocahua was signed by Bear Creek <i>on behalf of Ms. Villavicencio</i> who, in any event, informed DGAAM that she was going to sign the agreement herself before entering into operations. <sup>145</sup> Again, DGAAM raised no concerns regarding Bear Creek's involvement.
July 5, 2006	INGEMMET granted the Karina 2 and 3 mining concessions to Ms. Villavicencio. <sup>146</sup>
August 8, 2006	INGEMMET registered the Karina 1 mining concession to Ms. Villavicencio. <sup>147</sup>
August 9, 2006	SUNARP registered the Option Agreement dated November 17, 2004. <sup>148</sup>
September 19, 2006	Ms. Villavicencio and Bear Creek requested that SUNARP register the December 5, 2004 Option Agreement covering the Karina 5, 6, and 7 mining concessions in order to put the public on notice. <sup>149</sup>
September 26, 2006	INGEMMET registered the Karina 9A mining concessions to Ms. Villavicencio. <sup>150</sup>

<sup>142</sup> Exhibit C-0139, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006 at 5.

<sup>143</sup> *Id.* at 6.

<sup>144</sup> Exhibit C-0201, Letter from A. Swarouth and K. Villavicencio to Banco de Credito, June 27, 2006; Claimant's Reply ¶ 32.

<sup>145</sup> Exhibit C-0140, Informe No. 170-2006/MEM-AAM/EA, July 10, 2006 at 1.

<sup>146</sup> Exhibit C-0034, Notice of Registration of the Karina 2 and Karina 3 Concessions, July 5, 2006.

<sup>147</sup> Exhibit C-0035, Notice of Registration of the Karina 1 Concession, Aug. 8, 2006.

<sup>148</sup> Exhibit C-0041, SUNARP Notice of Registration of Mineral Rights, Aug. 9, 2006.

<sup>149</sup> Exhibit C-0017, Supreme Decree Application at 187.

<b>November 3, 2006</b>	SUNARP registered the Option Agreement dated December 5, 2004. <sup>151</sup>
<b>December 5, 2006</b>	Bear Creek applied for a declaration of public necessity, including in its application, <i>inter alia</i> , (i) the Option Agreements, (ii) proof of registration of the Option Agreements, (iii) copies of Ms. Villavicencio's applications for all of the Santa Ana Concessions, (iv) copies of Ms. Villavicencio's claims for mineral rights and proof of registration for the concessions that Ms. Villavicencio had obtained as of that date (Karina 9A, 1, 2, and 3), and (v) a 2003 notarized delegation of banking powers from Bear Creek to Ms. Villavicencio registered with SUNARP. <sup>152</sup>
<b>December 5, 2006 – November 29, 2007</b>	MINEM, the Ministry of Defense, and the Vice-Minister Secretary General of External Relations all reviewed and gave "careful consideration" <sup>153</sup> to Bear Creek's application over the course of almost a year. <sup>154</sup>
<b>February 8, 2007</b>	MINEM requested additional information regarding Bear Creek's application for a declaration of public necessity in respect of the location and access roads to the Santa Ana Project, as well as Bear Creek's incorporation and nationality. <sup>155</sup> In paragraph 4 of that letter, MINEM acknowledged the power of attorney that Bear Creek granted to Dr. Miguel Grau and that is included at the bottom of page 80 of Bear Creek's Supreme Decree Application. <sup>156</sup> At the top of this same page 80 appeared the power of attorney that Bear Creek granted to Ms. Villavicencio. <sup>157</sup>
<b>February 16, 2007</b>	Bear Creek addressed MINEM's request for additional information in connection with its request for a declaration of public necessity. <sup>158</sup>

<sup>150</sup> Exhibit C-0288, Notice of Registration of the Karina 9A Mining Concession to J. Karina Villavicencio, Sept. 26, 2006.

<sup>151</sup> Exhibit C-0017, Supreme Decree Application at 187.

<sup>152</sup> Exhibit C-0017, Supreme Decree Application.

<sup>153</sup> Respondent's Counter-Memorial ¶ 29; RWS-003, Witness Statement of César Zegarra, Oct. 6, 2015 at ¶¶ 6-7 ("Zegarra Witness Statement").

<sup>154</sup> Claimant's Reply ¶ 208.

<sup>155</sup> Exhibit C-0042, Letter from J.C. Pinto Najjar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007; Claimant's Reply ¶ 36.

<sup>156</sup> Exhibit C-0042, Letter from J.C. Pinto Najjar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007.

<sup>157</sup> Exhibit C-0017, Supreme Decree Application at 80.

<sup>158</sup> Exhibit C-0043, Letter from M. Grau Malachowski, Bear Creek, to MINEM, Feb. 26, 2007; Claimant's Reply ¶ 36.

<b>June 20, 2007</b>	Bear Creek paid sub-surface mining fees to INGEMMET, on behalf of Ms. Villavicencio. <sup>159</sup>
<b>November 29, 2007</b>	After a year-long review and consideration of Bear Creek's application by MINEM, the Ministry of Defense, and the Vice-Minister Secretary General of External Relations, over the course of almost a year, the Government enacted Supreme Decree 083, declaring that the development of the Santa Ana Concessions is a public necessity and approving Bear Creek's acquisition of the concessions. <sup>160</sup>
<b>December 3, 2007</b>	Bear Creek and Ms. Villavicencio executed the Transfer Agreements for the Santa Ana Concessions, which they confirmed before a notary. <sup>161</sup>
<b>February 1, 2008</b>	SUNARP registered the Transfer Agreement for the Karina 9A, 1, 2, and 3 concessions. <sup>162</sup>
<b>February 28, 2008</b>	INGEMMET registered the Karina 5, 6, and 7 mining concessions to Ms. Villavicencio. <sup>163</sup> SUNARP registered the Transfer Agreement for the Karina 5, 6, and 7 mining concessions. <sup>164</sup>

<sup>159</sup> Exhibit C-0202, Letter from D. Volkert and K. Villavicencio to Banco de Credito, June 20, 2007; Claimant's Reply ¶ 32.

<sup>160</sup> Exhibit C-0004, Supreme Decree 083-2007-EM adopted on Nov. 29, 2007.

<sup>161</sup> Exhibit C-0015, Transfer Agreements; Exhibit C-0019, Notarized Contracts for the Transfer of Mineral Rights between J. Karina Villavicencio Gardini and Bear Creek Mining Company, Sucrusal del Perú, Dec. 6, 2007; Claimant's Reply ¶ 19.

<sup>162</sup> Exhibit C-0020, SUNARP Registration Notice of Transfer Agreements for Santa Ana Concessions 9A, 1, 2, and 3, Feb. 1, 2008.

<sup>163</sup> Exhibit C-0036, Notice of Registration of the Karina 5, Karina 6, and Karina 7 Concessions, Feb. 28, 2008.

<sup>164</sup> Exhibit C-0021, SUNARP Registration Notice of Transfer Agreements for Santa Ana Concessions 5, 6, and 7, Feb. 28, 2008.

393. The public necessity approval by Supreme Decree 083 by the President of the Republic was granted on the basis of Claimant's Request for Authorization to Acquire Mining Rights Located at the Border Zone received by the MINEM on December 5, 2006.<sup>511</sup> The Application and its Annexes I to XI contained all of the details that were expressly required by the relevant legal provisions regarding the Santa Ana mining concessions, including documents confirming that Ms. Villavicencio was a Bear Creek representative (*apoderada*) and owned these concessions, and that Claimant had entered into Option Agreements with Ms. Villavicencio in November and December 2004, which provided that Claimant could acquire the concessions if a Declaration of Public Necessity was received from

<sup>511</sup> Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017].

Respondent. Copies of the documents regarding the Option Agreements were attached in Annexes VIII and IX of the Application. By letter dated February 8, 2008, MINEM confirmed having received the Application and requested further information. But, neither in that letter, nor later, did MINEM request any further information regarding or objecting to the involvement of Ms. Villavicencio.

394. After nearly one year of what Respondent itself characterizes as “*careful consideration by the government authorities*”<sup>512</sup>, on November 28, 2007 Respondent approved the Application by Supreme Decree 083 signed by the Constitutional President of Peru, the President of the Council of Ministers, the Minister of Energy and Mines, and the Minister of Defence. The Decree was published the following day and expressly gave the declaration of Public Necessity required under Article 71 of the Constitution and authorized Claimant to acquire the seven mining concessions. Thereafter, Ms. Villavicencio transferred to Claimant the concessions as was provided in the seven option agreements.<sup>513</sup> These transfer agreements were registered by SUNARP on February 1 and 28, 2008.<sup>514</sup>

395. From this evidence, it is clear that the involvement of Ms. Villavicencio was disclosed in the Application when it was examined by the various government authorities. Respondent does not deny having received this information, but claims that it was “*given in separate bits and pieces to separate entities or divisions within MINEM. No one official knew the full extent of Bear Creek’s relations and agreements with Ms. Villavicencio*”<sup>515</sup> and that “*only [...] a single piece of paper buried on page 83 of some 200 pages of the application showed that she was a legal representative of Bear Creek for limited matters – but not that she was an employee.*”<sup>516</sup> The Tribunal is not persuaded by these objections. Ms. Villavicencio had been registered as an employee of Bear Creek with the Peruvian Ministry of Labor since 2003. Also in 2003, SUNARP registered the Power of Attorney for Ms.

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<sup>512</sup> R-I ¶ 29.

<sup>513</sup> Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 3, 2007 [C-0015]; Notarized Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 6, 2007 [C-0019].

<sup>514</sup> SUNARP Registration Notice of the Transfer Agreement for Santa Ana Concessions 9A, 1, 2 and 3, Feb. 1, 2008 [C-0020]; SUNARP Registration Notice of the Transfer Agreement for Santa Ana Concessions 5, 6 and 7, Feb. 28, 2008 [C-0021].

<sup>515</sup> R-II ¶ 66.

<sup>516</sup> *Id.* at ¶ 68.

Villavicencio as legal representative of Claimant in certain matters. The Option Agreements submitted with the Application demonstrated that Ms. Villavicencio, a Peruvian citizen, was to transfer the concessions to Claimant, a foreign investor, once the Government had confirmed the public necessity in accordance with Article 71 of the Constitution. Respondent has not been able to point to any legal disclosure requirement disregarded by Ms. Villavicencio or by Claimant in its Application. Regardless, during the “*careful consideration by the government authorities*”<sup>517</sup> over a period of almost one year, the above mentioned available information regarding Ms. Villavicencio’s involvement could not be neglected by the government agencies involved in the process and at the very least should have been noted. The alleged oversight, if it existed, must be attributed to Respondent and not to Claimant. Therefore, the Tribunal does not see any reason why the process as conducted would make the Application or the resulting Supreme Decree 083 unconstitutional.

396. This conclusion is confirmed by the Decision of the First Specialized Constitutional Court of Lima of May 12, 2014.<sup>518</sup> Its dispositive has the following wording:

*DECLARE IN FORCE:*

1. *The acknowledgement of the private investment to be carried out by BEAR CREEK in the development of the Santa Ana mining project as a public necessity; and*
2. *The ownership of BEAR CREEK of the following mining rights located in the Puno department, in the border zone with Bolivia: i) KARINA 9A under code 01-01462-04; ii) KARINA 1 under code 01-01463-04; iii) KARINA 2 under code 01-01464-04; iv) KARINA 5 under code 01-03676-04; v) KARINA 6 under code 01-03678-04; and vi) KARINA 7 under code 01-03677-04.*

397. And in particular, its reasoning in section 11.3. expresses:

*In this case, claimant was granted mining rights for Karina 9A, Karina 1, Karina 2, Karina 3, Karina 5, Karina 6 and Karina 7 after complying with the legally required requirements to obtain the same within the fifty kilometers from the border, and (the investment) declared a public necessity which resulted in the investment of the Santa Ana project that bore the authorization of the General Director of Mining Environmental Matters [...]*

398. Respondent filed an appeal against the decision, but the appeal was not continued because Claimant withdrew its action upon commencing this ICSID arbitration. However, the present Tribunal considers this decision as relevant for its own examination. It serves at least as a confirmation by a

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<sup>517</sup> R-I ¶ 29.

<sup>518</sup> Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006].

court with special expertise and jurisdiction for the Constitution of Peru for the Tribunal's own conclusion that Supreme Decree 083 was not unconstitutional due to the application process of Claimant.

399. In conclusion, the Tribunal finds that the first reason given in Supreme Decree 032 and in Respondent's arguments, *i.e.* that Claimant had illegally obtained the public necessity declaration by Supreme Decree 083 through to the involvement of Ms. Villavicencio, is not valid.

(v) **Did the Social Unrest Justify the Derogation of Supreme Decree 083?**

400. The Tribunal will now examine the **second reason** given in Supreme Decree 032 and in Respondent's arguments, *i.e.* that the **social unrest** in the Puno department required the derogation of Supreme Decree 083.
401. It is undisputed that this social unrest existed and indeed that it was the reason for the meetings in Lima which ended by the decisions in the evening of June 23 and in the early morning of June 24, 2011. In this regard, the Tribunal recalls its summary of the factual situation above regarding the strong political pressure on Respondent at that time. The Tribunal appreciates that the Government was desperately searching for a solution that would solve the unrest. However, while it is politically plausible for a government to take any action which it hopes to produce such an effect, the issues for the present Tribunal are whether the unrest was caused by or can be attributed to Claimant and whether Respondents action depriving Claimant of the rights it had been granted by Supreme Decree 083 was legally justified.
402. In PO-10, the Tribunal requested that the Parties to reply to the following question at section 2.1.4. (a) (iii): *What actions were legally required of Claimant in seeking to obtain a Social License, and did the Claimant take these actions?* Further, in PO-10, the Tribunal requested that the Parties to reply to the following question 2.1.4.(a) (iv): *In the present case, what were the State authorities' responsibilities in relation to obtaining a Social License?*
403. In response to that first question, Claimant describes in detail the actions it undertook<sup>519</sup> and the Tribunal appreciates that its many efforts included a variety of actions of outreach to the local

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<sup>519</sup> CPHB-I pp. 5 – 18.

communities both on its own and in cooperation with Respondent's authorities. Respondent argues that these actions were not sufficient to fulfill the legal requirements.<sup>520</sup>

404. Indeed, the Tribunal considers that actions beyond those that Claimant undertook would have been possible and feasible.

405. The events in 2008 show that opposition to the Project was expressed clearly and repeatedly by certain sectors of the local community, and that opposition focused not only on the Project but also on the role of Claimant:

- May 4, 2008: one of Claimant's staff members was attacked and threatened in the Kelluyo District, in the course of efforts to explain the company's environmental management programme;<sup>521</sup>
- September 4, 2008: Claimant's employees were physically detained in the Ancomarca Community for several hours, as more support and extra services for local communities were demanded;<sup>522</sup>
- October 14, 2008: There was continued unrest, including looting and burning of a campsite of Claimant's. In the process, the Community Relations Manager at Santa Ana was forced to crawl and say (while being filmed) that "*the foreigners must leave and not return.*"<sup>523</sup> In the interview he also states that since he joined the company in 2004, there had always been opposition to Santa Ana from the leaders/groups that caused the disturbances in October 2008.<sup>524</sup>

406. Even though the concept of "*social license*" is not clearly defined in international law, all relevant international instruments are clear that consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities.<sup>525</sup> In its application for a public necessity declaration, Claimant listed 5 communities as falling within the Project's area of direct influence and 21 communities within the Project's indirect area of influence.<sup>526</sup> Claimant

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<sup>520</sup> RPHB-I pp. 20 – 25.

<sup>521</sup> Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) ¶ 8 [R-342].

<sup>522</sup> *Id.* at ¶ 6.

<sup>523</sup> *Id.* at ¶ 4.

<sup>524</sup> *Id.* at ¶ 6.

<sup>525</sup> United Nations Declaration on the Rights of Indigenous Peoples Art. 32 [R-108].

<sup>526</sup> Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017]; Map of Distances of *Comunidades Campesinas* Population Centers to the Santa Ana Area of Influence [R-312] (Map taken directly from Claimant's ESIA for

continuously emphasized – including at the Hearing – that it went far beyond the minimum requirements of Article 4 of Ministerial Resolution No. 304<sup>527</sup> by, amongst others, conducting over 130 community outreach workshops. Still, the question remains whether Claimant took the appropriate and necessary steps to engage all of the relevant and likely to be affected local communities, and whether its approach contributed significantly to the nature and extent of the opposition that followed. Relevant evidence includes, for example:

- Exhibit C-155: report on workshops held in 2009, it was recommended that more workshops be carried out to avoid social conflict,<sup>528</sup> as “*the community does not trust*” the company, due to a lack of information and workshops.<sup>529</sup>
- The jobs/rotational programme was implemented in a manner that purposely sought to benefit only those communities in close proximity to the Project, and appears to have been implemented as a means to compensate those local communities for land use rights. More distant communities, including those likely to be affected by water use and contamination, were not brought into the process and offered work or other forms of recompense.<sup>530</sup>

407. On the basis of the evidence it appears that support for the Project came from communities that were receiving some form of benefits (i.e. jobs, direct payments for land use, etc.) and that those communities that remained silent or objected were either not receiving benefits, were uninformed, or both.

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exploration. The map shows a number of communities in relation to the planned Santa Ana Project (blue) and shows which were consulted (green) and which ones were not (red)).

<sup>527</sup> Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM Art. 4 [R-153].

<sup>528</sup> Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek Annex 3 Actas Taller de Apertura EIA p. 2 [C-0155].

<sup>529</sup> *Id.* at pp. 25 and 53.

<sup>530</sup> See e.g. R-II ¶¶ 81 *et seq.*, Letter from the Primer Teniente Gobernador of the Huacullani District to Juan José Alvares Delgado, Puno Regional Council, Apr. 4, 2011 [C-0181]; Letter from the Primer Teniente Gobernador of the Huacullani District to Mauricio Rodríguez Rodríguez, President of the Puno Regional Government, Apr. 4, 2011 [C-0182]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31 p. 212 [R-048]; Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero (10/20/2008) [R-342]; Witness Statement of Elsiario Antunez de Mayolo (May 28, 2015) ¶ 7 [CWS-2]; Expert Report of Antonio Alfonso Peña Jumpa (Oct. 6, 2015) ¶¶ 57 – 58, 65, 69 – 70, 96 [REX 002].

408. While Claimant could have gone further in its outreach activities, the relevant question for the Tribunal is whether Respondent can claim that such further outreach was legally required and its absence caused or contributed to the social unrest, so as to justify Supreme Decree 032.

409. The Tribunal notes that, at least early in 2011, Respondent's authorities were aware of the community discontent as is shown in communications to Government authorities:

- October 2010: four months before the public hearing in February 2011, the Kelluyo District wrote to the office of the Ombudsman of Puno, informing them that they would hold a meeting on October 24, 2010, with “a mining company called *‘Proyecto Santa Ana’*” and requesting the presence of a Puno official to clarify the issue of mining. Another letter followed later in November 2010, indicating that another meeting would take place on January 9, 2011 and requesting that a mining activities workshop be conducted. In the letter, the community still referred to Claimant as “a mining company called *‘Proyecto Santa Ana’*”.<sup>531</sup> This appears to confirm that even at that late stage, a number of relevant communities were being contacted only for the first time, that the process of obtaining the necessary “social license” was far from complete, and that some communities were still unclear about who was driving the Project.
- March 2011: a memorial to the President, submitted by communities from Chucuito, El Collao, Puno and Yunguyo requesting (amongst others) that the EIA be cancelled, on grounds of fears of pollution:<sup>532</sup> “the permanent withdrawal of the Bear Creek Mining Company (Santa Ana Mining Project) and their removal from the area to prevent confrontations with the local residents that could later occur in all above-mentioned jurisdictions[]”,<sup>533</sup>
- March 11, 2011: letter from Kelluyo/Alto Aracachi Quluyo Community to Puno officials<sup>534</sup> stating that a certain public meeting was a closed-door meeting, which meant that not everyone could participate, that questions were not sufficiently addressed, and that Claimant had not previously offered information on developments;

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<sup>531</sup> Letters from Kelluyo to *Defensoría* Requesting Information on Santa Ana Project [R-347].

<sup>532</sup> Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to the President of Peru, Memorial No. 0001-2011-CO-FDRN-RSP [R-016].

<sup>533</sup> 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 [R-017] (dated March 10, 2011: same memorial as Exhibit R-016, but addressed to MINEM); Memorial submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP [R-015] (dated March 10, 2011: same memorial, but addressed to Congress).

<sup>534</sup> List of Participants at the Public Hearing [R-055]; Letter from Kelluyo Community Inquiring about the Project [R-053]; Letters from Kelluyo District on Santa Ana's Public Hearing [R-304].

- April 25, 2011: a previously threatened strike began in City of Desaguadero, after the Regional President refused to sign an ordinance prohibiting all mining activities in the south of Puno;
- April 26, 2011: Regional President of Puno asked the central Government to intervene by suspending the activities of the Santa Ana Project run by Claimant; the letter to Minister of Energy and Mines, referenced discontent and rejection in district of Kelluyo and reported concerns voiced by affected communities, which included lack of transparency and due consultation.<sup>535</sup>

410. For its legal evaluation, the Tribunal agrees with the *Abengoa* Award, in which the tribunal held: *“For the international responsibility of a State to be excluded or reduced based on the investor’s omission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal link between [the omission or fault] and the harm suffered. In other words, for the argument to succeed, there must be evidence that if a social communication program had been timely implemented since 2003, the 2009 and 2010 events that led to the loss of the Claimants’ investment would not have occurred.”*<sup>536</sup>

411. In the view of the Tribunal, Respondent has not been able to prove such a causal link between Claimant’s activity in relation to its Santa Ana Project and Supreme Decree 032. Rather, the evidence shows that Respondent’s various authorities involved in the procedure were aware of and did not object to Claimant’s outreach activities and, from the very beginning until before the meeting of June 2011, approved and often even endorsed these:

- At the Hearing, Claimant’s witness Antúnez de Mayolo testified: *“One last question: Prior to the enactment of Supreme Decree 032, did the Peruvian Government ever advise Bear Creek that the execution of its citizen-participation mechanisms was inadequate? A. Never. We were never told anything.”*<sup>537</sup>
- Claimant worked with MINEM, DREM, and health and education representatives of the Puno region to organize activities for the communities to improve their education and training.<sup>538</sup>

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<sup>535</sup> Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR (4/26/2011) [R-018].

<sup>536</sup> *Abengoa S.A. y Cofides S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, Apr. 18, 2013 ¶¶ 670 – 671 [CL-0072].

<sup>537</sup> Tr. 571:8-12.

<sup>538</sup> Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”) de Bear Creek p. 6 Section 2.4.3 [C-0155].

- At MINEM's request, DREM or the local authorities at DREM's direction, chaired the five workshops organized by Claimant.<sup>539</sup> As confirmed by Respondent's witness Ramírez Delpino, neither MINEM nor DREM ever informed Claimant of any concerns they may have had regarding the workshops.<sup>540</sup>
- Supreme Decree 028 provided that DGAAM was responsible for reviewing, in the first instance, both the executive summary and the CPP, and had the authority to make "*observations or order[] any amendments or changes that may be required.*"<sup>541</sup> By December 2010, Claimant had conducted over 130 workshops in a total of 18 communities within the direct and indirect areas of influence, as well as meetings with national, regional, and local authorities, to the district of Huacullani, the district of Kelluyo, province of Chucuito as confirmed by Respondent's witness Antúnez de Mayolo.<sup>542</sup> On December 23, 2010, Bear Creek submitted to DGAAM its ESIA for the exploitation phase, along with the Executive Summary and the CPP.<sup>543</sup>
- In December 2010, the OEFA visited Santa Ana and the OEFA Report No. 008-2010 expressly stated: "*Relations with the communities located around the Santa Ana Exploration Project area have not caused any kind of social conflict, in what can be construed as a very friendly relationship.*"<sup>544</sup>
- On January 7, 2011, DGAAM approved Claimant's CPP and the Executive Summary of its ESIA for exploitation.<sup>545</sup> Mr. Ramírez Delpino testified that DGAAM could have rejected the Executive Summary or the CPP instead of approving either, but that in this case, both documents complied with all applicable regulations, and DGAAM had raised no concerns.<sup>546</sup> In this context, the Tribunal

<sup>539</sup> Resolution Approving First Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 216-2008-MEM/AAM [R-036]; Resolution Approving Second Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 310-2009-MEM/AAM [R-037]; Resolution Approving Third Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 280-2010-MEM/AAM [R-038].

<sup>540</sup> Tr. 1090:4-7 (Ramírez Delpino) ("*Q. And you never told Bear Creek that these five workshops they proposed did not comply with applicable regulations, did you? A. Nothing was indicated, no.*").

<sup>541</sup> Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM Art. 14 [R-159].

<sup>542</sup> Tr. 561:19-562:6 (Antúnez de Mayolo) ("*Q. And outside of the area of direct influence, outside of this figure that is outlined in black, did Bear Creek conduct workshops in communities outside of the direct area of influence in the indirect area of influence? A. Correct. Outside of the area of direct impact and in these circles that appear here, we also held informational workshops, and also the minutes in the account of the workshops are set forth in the Citizen Participation Plan.*"); 706:1-8 (Antúnez de Mayolo) ("*In the indirect areas, we did the communication and we defined very clearly and honestly, we said that the benefits that the whole indirect area could have [...]*").

<sup>543</sup> Request from Bear Creek Mining Corporation to DGAAM for Approval of the ESIA, Dec. 23, 2010 [C-0072].

<sup>544</sup> OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 at 4 [C-0143]; see also OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011 [C-0180].

<sup>545</sup> Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 [C-0161].

<sup>546</sup> Tr. 1105:2-4 and 1106:9-12.

notes that DGAAM determined expressly that the citizen participation mechanisms that Claimant proposed to implement during the evaluation of the ESIA and during the execution of the mining project were “*appropriate to the particular characteristics of the mining activity area of influence, of the project and its magnitude and the relevant population in accordance with Article No. 6 of Supreme Decree No. 028[.]*”<sup>547</sup>

- In preparation of the Public Hearing, on January 21, 2011, Mr. Antúnez de Mayolo informed DGAAM that Claimant had complied with all requirements.<sup>548</sup>
- The public hearing took place on February 23, 2011. It was chaired by Kristiam Veliz Soto, a MINEM attorney, who was assisted by Jesús Obed Alvarez Quispe, President of DREM. A Special Prosecutor for Environmental Matters, Dr. Alejandro Tapia Gómez, also attended. By the contemporaneous accounts in the evidence, the public hearing was a success. MINEM even issued a press release after the public hearing indicating that the event had ended satisfactorily.<sup>549</sup> Respondent has alleged that the hearing was not satisfactory, but it has neither produced the video made of the hearing or produced evidence of any participant in the hearing.<sup>550</sup> Therefore, the Tribunal sees no sufficient evidence which would show that the conduct and results of the hearing would not comply with the legal requirements.
- Vice-Minister of Energy and Mines Fernando Gala wrote in his aide-memoire that Claimant “*had no problems when it held the public hearing for the [ESIA] of the Santa Ana project in Huacullani on February 23, 2011.*”<sup>551</sup>
- At a meeting on May 17, 2011, Mr. Ramírez Delpino described “*the harmonious development of the presentation of the environmental impact study.*”<sup>552</sup>
- At the Hearing in this arbitration, Mr. Ramírez Delpino confirmed that if DGAAM had believed that further information needed to be communicated to the local communities to clear up any misunderstanding or alleviate any concern, it would have ordered Claimant to hold additional workshops after the public hearing.<sup>553</sup>

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<sup>547</sup> Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011 at pp. 2 – 4, items 15.2 and 15.3 [C-0161].

<sup>548</sup> Letter from Bear Creek to DGAAM, Jan. 21, 2011 [C-0162].

<sup>549</sup> Minutes of the Public Hearing – Mineral Subsector No. 007-2011/MEM-AAM – Public Hearing for the ESIA of the “Santa Ana” Project, Feb. 23, 2011 [C-0076]; MINEM, Press Release 093-2011, Mar. 2, 2011 [C-328].

<sup>550</sup> RPHB-I pp. 20 – 28.

<sup>551</sup> Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department” (7/2011) [R-010].

<sup>552</sup> *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011 [C-0078].

<sup>553</sup> Tr. 1114-1115 (*referring to* MINEM, Dirección General de Asunto Ambientales Mineros, Certificación Ambiental para Actividades de Explotación Mediana y Gran Minería [C-0156]); ; *see also* Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM Art. 1 [R-153].

- In May 2011, Vice-Minister Gala publicly acknowledged that revoking Supreme Decree 083 would be “*completely illegal*[.]”<sup>554</sup>

412. The evidence summarized above shows that from the very beginning until the time before the meeting of June 23, 2011, all outreach activities by Claimant were known to Respondent’s authorities and were conducted with their approval, support, and endorsement, and that no objections were raised by the authorities in this context. While, as mentioned above, further actions by Claimant would have been feasible, on the basis of the continued coordination with and support by Respondent’s authorities, the Tribunal concludes that Claimant could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities. Respondent, after its continuous approval and support of Claimant’s conduct, cannot in hindsight claim that this conduct was contrary to the ILO Convention 169 or was insufficient, and caused or contributed to the social unrest in the region.

413. This conclusion is confirmed by the decision of First Constitutional Court of Lima which confirmed the validity of Supreme Decree 083 and, in particular, in its reasoning in the chapter titled *NINTH: Concerning the hindrance of the principle of legal security the following is set out*: expressed in subsection 5:

*The issuance of Supreme Decree No. 032-2011-EM that derogates the decree cited in the previous paragraph, as previously analyzed, does not impute responsibility whatsoever upon the claimant, rather it lacks proper reasoning, as it attributes its issuance to ‘circumstances that would imply the disappearance of the legally required conditions for the issuance of the mentioned act.’ Namely, it does not set out the circumstances (based on the publications one deduces that these would be the violent demonstrations and illicit attacks on public and private property in the Puno department) and, with respect to the disappearance of the conditions, the cited decree is drafted using an uncertain conditional [conjugation] ‘would imply’; therefore the issuance of Supreme Decree No. 032-2011-EM is an action by the State that is not found within the margins of reasonability and proportionality, required not to violate the principle of legal security. Given that, as mentioned, these circumstances are not attributable to the claimant, in which case, the issuance of a decree such as the one issued would be justifiable if it had been the claimant who committed or omitted actions that implied the disappearance of the required conditions and from the reading thereof one cannot observe in the cited decree any of these reasons. Namely, there is no justified purpose for bringing an action by the State to reverse the rights granted to BEAR CREEK MINING COMPANY SUCURUSAL DEL PERU, which were*

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<sup>554</sup> *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013 [C-0197].

*granted in fulfillment of the corresponding procedures and complying with the necessary requirements.*<sup>555</sup>

414. In view of the above considerations, the **Tribunal concludes** that also the **second reason** given in Supreme Decree 032, *i.e.* “*the purpose of safeguarding the environmental and social conditions*”, discussed by the Parties as “*social unrest*”, does not justify the derogation of Supreme Decree 083 and that, therefore, neither of the two reasons given in the Decree can be a basis for the derogation.

#### **(vi) Conclusion regarding the indirect expropriation**

415. From the above considerations, the Tribunal concludes that the three “factors” expressly provided in Annex 812.1(b) of the FTA for the identification of an indirect expropriation are fulfilled:

- in application of subsection (i), there is an “*economic impact*” as Supreme Decree 032 has an adverse effect on the economic value of Claimant’s investment,
- in application of subsection (ii), Supreme Decree 032 interferes with Claimant’s distinct, reasonable investment-backed expectations,
- in application of subsection (iii), the character of the measure did not justify the taking, because Supreme Decree 032 was based on reasons which have been found to be illegal according to Peruvian law and do not justify a breach of the FTA.

416. The Tribunal therefore concludes that Supreme Decree 032 was an indirect expropriation in the sense of Article 812 and Annex 812.1 of the FTA.

### **3. Whether Supreme Decree 032 Effected a Direct Expropriation**

#### **(a) Claimant’s Arguments**

417. Regardless of whether it is classified as a direct or an indirect expropriation, Supreme Decree 032 constitutes an illegal taking of property.<sup>556</sup> Supreme Decree 032 revoked Claimant’s right to acquire and own the Santa Ana concessions that Supreme Decree 083 embodied. Supreme Decree 083 was the *sine qua non* of the entire Santa Ana Project – and, as Prof. Bullard explains, it was an intrinsic and essential component of Claimant’s property right in the Santa Ana Project. Without Supreme Decree 083, Claimant is not permitted to conduct any activity in connection with the concessions.

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<sup>555</sup> Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006].

<sup>556</sup> C-II ¶ 242.

According to Respondent, Claimant has nothing more than an inoperative nominal title.<sup>557</sup> Respondent’s revocation of Supreme Decree 083 constitutes a forcible and unlawful taking of Claimant’s property, for which Respondent must compensate Claimant.<sup>558</sup> The legality of Respondent’s direct expropriation of Claimant’s investment must be measured against Article 812, and Claimant incorporates its arguments related to these legal requirements by reference.<sup>559</sup>

418. Respondent is incorrect when it argues that Claimant’s direct expropriation claim fails because “*direct expropriation requires transfer of title*” and Claimant retains title.<sup>560</sup> Supreme Decree 083, however, granted Claimant more than a mere “*right to apply for permission to develop and eventually operate a silver mine*”, as alleged by Respondent. It granted Claimant the right to acquire, own, and possess the Santa Ana concessions after making a finding that the Santa Ana Project constituted a public necessity. Respondent’s own official documents – including the Lima First Constitutional Court’s decision – confirm that Supreme Decree 083 granted Claimant a distinct set of rights to:

- “*[E]xplore and exploit mineral resources granted.*”
- “*[U]se and enjoyment of the natural resource granted and, consequently, the property of the fruits and products that are extracted.*”
- “*[A] right in rem ... consist[ing] of the sum of the attributes that this law recognizes in favor of the concessionaire.*”
- “*These rights are irrevocable provided the holder meets the obligations that this law or special legislation requires to maintain its validity.*”<sup>561</sup>

419. Supreme Decree 083, thus, is a fundamental component of Claimant’s property right.<sup>562</sup>

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<sup>557</sup> Tr. 1778 – 1779 (C. Closing).

<sup>558</sup> C-I ¶ 24, C-II ¶¶ 245, 312, 318 – 321; R.Prov.M.-II ¶ 28; R-I ¶ 27; Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 Art. 1 – 3 [C-0004]; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 [CL-0040]; Bullard First Report ¶¶ 165 – 166 [CEX-003]; Bullard Second Report ¶¶ 3.b, 10, 133 [CEX-005].

<sup>559</sup> C-II ¶ 328.

<sup>560</sup> C-I ¶ 123; C-II ¶ 312; R-I ¶¶ 250 – 251.

<sup>561</sup> C-II ¶ 322; R-II ¶ 226; Bullard Second Report ¶ 10 [CEX-005]; Supreme Decree 014-92-EM [Bullard-031] (updated); Ley de Promoción de Inversiones en el Sector Minero, Decreto Legislativo No. 708, de fecha 13 de noviembre de 1991 [Flury-002]; Organic Law for the Sustainable Use of Natural Resources, Law No. 26821 [R-0142].

<sup>562</sup> C-I ¶ 123; C-II ¶¶ 312 – 313, 322 – 324; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 [CL-0040]; *Enron Corporation, Ponderosa Assets, L.P., v.*

420. The tribunal in *Enron v. Argentina* recognized that direct expropriation requires the transfer of an essential component of property rights, and this is precisely what Supreme Decree 032 did when it revoked Claimant’s right to own the concessions. Accordingly, Supreme Decree 032 breaches the FTA’s prohibition on unlawful expropriation.<sup>563</sup>
421. The FTA does not define direct expropriation, but the concept is understood in international law as a “*forcible taking by the Government of tangible or intangible property*” an intent, reflected in a formal decree or act, to deprive the owner of property through transfer of title or seizure.<sup>564</sup> Other international tribunals have applied direct expropriation standards even where the measure at issue involves the revocation of a decree or the effect of transferring title to concessions to the State.<sup>565</sup>
422. Supreme Decree 032 openly, directly, and intentionally revoked Claimant’s right to acquire, possess, and operate the Concessions, rendering Claimant’s title, in Respondent’s words, “*inoperative.*”<sup>566</sup> Supreme Decree 032 permanently divested Claimant of its rights to the Santa Ana concessions and, thus, resulted in the entire Project shutting down.<sup>567</sup>
423. Finally, “*Supreme Decree 032 had the effect of transferring title of the mining concessions to Peru ...[As] Article 71 itself provides, the consequence of a foreigner’s having property within 50 kilometers of the border without having the required authorization is not only the impossibility of engaging in mining activity but also the complete forfeiture of the right to the State.*”<sup>568</sup> Due to

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*Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007 ¶ 243 [CL-0150]; Bullard Second Report ¶ 130 [CEX-005].

<sup>563</sup> C-II ¶ 313; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 [CL-0040]; *Enron Corporation, Ponderosa Assets, L.P., v. Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007 ¶ 243 [CL-0150]; Bullard Second Report ¶ 130 [CEX-005].

<sup>564</sup> C-II ¶ 314; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 113 [CL-0040]; Nigel Blackaby, Constantine Partasides, *et al.*, *Redfern and Hunter on International Arbitration*, Oxford University Press, 6th edition (2015) ¶ 8.81 [CL-0183].

<sup>565</sup> C-II ¶¶ 315 – 317; *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015 ¶¶ 200 – 201, 227 – 229, 233 [CL-0184].

<sup>566</sup> C-II ¶ 325 *citing* R.Prov.M.-II ¶ 28.

<sup>567</sup> C-I ¶ 56; C-II ¶ 326; Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 [C-0004]; Bullard Second Report ¶ 130 [CEX-005]; Swarthout First Statement ¶ 46 [CWS-1]; Swarthout Second Statement ¶¶ 43 – 58 [CWS-6].

<sup>568</sup> C-II ¶ 327; Bullard Second Report ¶ 131 [CEX-005].

Respondent's conduct, Claimant cannot even sell the right of ownership to third parties, since its property is unauthorized and has been declared illegal by the State.<sup>569</sup>

**(b) Respondent's Arguments**

424. As the *El Paso v. Argentina* tribunal clarified, a direct expropriation requires a transfer of title. Supreme Decree 032 involves no transfer of ownership – it merely revokes Supreme Decree 083, which authorized Claimant to acquire mining concessions. Claimant retains title to the Santa Ana concessions, albeit under the cloud of MINEM's lawsuit which, if successful, would revert the concessions to Respondent as Article 71 specifies. Claimant has not argued that the MINEM Lawsuit is an expropriatory act.<sup>570</sup>
425. An argument that the MINEM inefficacy proceeding is an expropriatory act would be untenable. First, the MINEM case is years away from resolution, and a claim based on a possible future deprivation is unripe. Second, MINEM is seeking annulment – *i.e.*, a ruling that Claimant did not lawfully receive the concession rights in the first place. Should MINEM prevail, the ruling would not take anything from Claimant, as it would declare Claimant never lawfully received the Santa Ana concessions. There can be no claim for expropriation of property that one never owned. Thus, neither the MINEM suit nor Supreme Decree 032 can amount to a direct expropriation.<sup>571</sup>
426. Even if the Tribunal were to determine that Supreme Decree 032 was expropriatory, Claimant's expropriation claim would nonetheless be limited to the rights it actually possessed, namely, the right to obtain the right to mine at the site. At the time of the alleged expropriation, Claimant had obtained none of the approvals necessary for the exploitation phase of the Project – it was in the early stages of applying for the regulatory approvals and land use agreements (from 4 affected communities and

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<sup>569</sup> *Id.*; R.Prov.M.-II ¶ 28.

<sup>570</sup> R-I ¶¶ 250 – 251; Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 [C-0004]; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, Oct. 31, 2011 ¶¶ 265 – 266 [CL-0095].

<sup>571</sup> R-I ¶ 252; Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, Jul. 5, 2011 [C-0112]; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, Oct. 31, 2011 ¶ 266 [CL-0095]; *Achmea B.V. v. The Slovak Republic [II]*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, May 2, 2014 ¶ 236 [RLA-045]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 328 [RLA-046]; *The Government of Kuwait v. The American Independent Oil Company (AMINOIL)*, Final Award, 21 I.L.M. 976, Mar. 24, 1982 p. 1026 [RLA-048].

more than 90 land possessors) that would be necessary to build and operate a mine. The regulatory path is difficult and most junior mining companies never progress beyond the regulatory approval phase. As other stalled mining projects in Peru illustrate, community opposition can thwart a project even when the mining company has an ESIA approval in hand.<sup>572</sup>

427. Respondent rejects Claimant’s argument that it “owned” the rights to “*Explore and exploit mineral resources granted*” and “*Use and enjoyment of the natural resource granted and, consequently, the property of the fruits and products that are extracted.*”<sup>573</sup> Claimant’s argument appears to be that, although it is not allowed to build or operate a mine and could not be sure of obtaining permission to do so even in the absence of Supreme Decree 032, Claimant nonetheless owns the right to do so. This position is based “*on tortured readings of obscure provisions of Peruvian law, is confused, confusing and illogical.*”<sup>574</sup>

428. Even if Claimant believed it held a contingent, future right, that would be of no help to Claimant. The *Generation Ukraine v. Ukraine* tribunal was clear claims based on a provisional future right are not cognizable. Claimant may only base its expropriation claim on rights that it held at the time of the alleged expropriation and, here, Claimant only held the exclusive right to attempt to obtain the right to mine at Santa Ana.<sup>575</sup>

### (c) The Tribunal’s Reasoning

429. The Tribunal has found above that Supreme Decree 032 constituted an indirect expropriation. Therefore, there is no need to examine whether it also constituted a direct expropriation. The Parties have not presented arguments related to the legal consequences of a finding of a direct expropriation, and such a finding indeed would not change or add to those that follow from an indirect expropriation.

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<sup>572</sup> R-I ¶¶ 225 – 226; R-II ¶¶ 486 – 488; Ramírez First Statement ¶ 2 [RWS-2]; Rodríguez-Mariátegui First Report ¶¶ 40, 47, 67, 107 – 108 [REX-003]; Expert Technical Report of SRK Consulting (Oct. 6, 2015) (“SRK First Report”) ¶¶ 90 – 92 [REX-005]; Rodríguez-Mariátegui Second Report ¶¶ 74, 111, 133 [REX-009].

<sup>573</sup> R-II ¶ 489.

<sup>574</sup> *Id.* at ¶ 490.

<sup>575</sup> *Id.* at ¶¶ 491 – 492; R-I ¶¶ 225 – 226; *Generation Ukraine Inc v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, Sept. 16, 2003 ¶ 6.2 [RLA-080].

#### 4. Whether Supreme Decree 032 was Lawful under Article 812 of the FTA

##### (a) Claimant's Arguments

430. The following discussion was also relevant to Claimant's answer to the Tribunal's question (e) "*What are the monetary amounts that the Tribunal should award to the Claimant if it were to conclude that: (i) the Claimant's alleged investment was lawfully expropriated?*"<sup>576</sup> Pursuant to Article 812 of the FTA, an expropriation can only be lawful if it is carried out for a public purpose, in accordance with due process of law, in a non-discriminatory manner, and upon payment of prompt, adequate, and effective compensation. None of these elements has been met here.<sup>577</sup>
431. Regarding the first element, an expropriation cannot be lawful unless it is taken for a "*public purpose*", interpreted in accordance with international law.<sup>578</sup> Respondent cannot determine unilaterally what public purpose means by reference to its own domestic legal order. The need for a public purpose or public interest to legitimize an expropriation has long been considered part of customary international law, and the requirement can be found in almost all investment agreements.<sup>579</sup> It is a genuine requirement, and the *ADC v. Hungary* tribunal cautioned against considering a "*mere reference to 'public interest'*" as sufficient evidence.<sup>580</sup> *British Petroleum v. Libya* concluded that an expropriation was unlawful because it had been adopted for purely extraneous political reasons and, hence, not for a public purpose. In *LETCO v. Liberia*, an ICSID tribunal found that the revocation of a concession was not for a public purpose because there was no stated policy that concessions could

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<sup>576</sup> PO-10 ¶ 2.1.4 (e).

<sup>577</sup> C-II § IV; CPHB-I ¶ 87.

<sup>578</sup> C-II ¶ 270; Canada-Perú FTA Art. 812.1, 812 fn. 4 [C-0001]; A. Reinisch, *STANDARDS OF INVESTMENT PROTECTION*, (Oxford University Press, 2008) 178 [CL-0055].

<sup>579</sup> C-I ¶¶ 130 – 132; Canada-Perú FTA [C-0001]; A. Reinisch, *STANDARDS OF INVESTMENT PROTECTION*, (Oxford University Press, 2008) 178 [CL-0055]; R. Dolzer & C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (Oxford University Press, 2008) 91 [CL-0056]; F.V. Garcia-Amador, *State Responsibility: Fourth Report by the Special Rapporteur on International Responsibility*, UN Doc. A/CN.4/119, (1959) II Y.B. Int'l. L. Comm'n. 1 (1960) ¶ 59 [CL-0057].

<sup>580</sup> C-I ¶ 134; C-II ¶ 271; *Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 ¶ 273 [CL-0031]; F.V. Garcia-Amador, *State Responsibility: Fourth Report by the Special Rapporteur on International Responsibility*, UN Doc. A/CN.4/119, (1959) II Y.B. Int'l. L. Comm'n. 1 (1960) ¶ 59 [CL-0057]; *BP Exploration Company (Libya) Ltd., v. Government of The Libyan Arab Republic*, Award, Aug. 1, 1974, 53 ILR 297, 329 [CL-0058]; *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 ¶ 432 [CL-0060]; Rudolf Dolzer and Christopher Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (Oxford University Press, 2nd ed. 2012) 115 [CL-0168].

be taken for the public good.<sup>581</sup> Here, Respondent cobbles together a series of events that appear to have the veneer of legitimate public purpose, so as to justify the issuance of Supreme Decree 032. Not one of Respondent’s *ex post facto* justifications for issuing Supreme Decree 032 – including (1) protecting health and safety of citizens, (2) preserving relations with neighboring states, and (3) protecting the integrity of Respondent’s constitutional process – was actually considered when Supreme Decree 032 was issued. Even Respondent admits that, it was not “*until a Congressman presented documents disclosing*” a purported non-compliance with Article 71 that Respondent found a reason to issue Supreme Decree 032. Thus, all of the important purposes that Respondent referenced for its issuance of Supreme Decree 032 are nothing more than *ex post facto* justifications that the Tribunal should disregard.<sup>582</sup>

432. As explained above, Supreme Decree 032 was taken to placate controversial political opposition led by Mr. Aduviri – not for a public purpose.<sup>583</sup> Notwithstanding the clear political nature of the protests, Respondent first responded by issuing a 12-month suspension of Claimant’s ESIA evaluation process in response. Mr. Aduviri announced a suspension of the indefinite strike until June 7, 2011, to prevent interference with voting in the run-off presidential election opposing Ollanta Humala to Keiko Fujimori. Mr. Aduviri continued to urge the Peruvian Government to revoke Supreme Decree 083 and, when he resumed the strikes on June 7, 2011, this directly led to the issuance of Supreme Decree

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<sup>581</sup> C-I ¶ 133; *LETCO v. Government of The Republic of Liberia*, Award, Mar. 31, 1986, 2 ICSID Reports (Cambridge University Press) [CL-0059].

<sup>582</sup> C-II ¶ 286; R-I ¶¶ 243, 247, 248; Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013 [C-0197]; Bullard First Report [CEX-003]; Bullard Second Report [CEX-005]; Flury First Report [CEX-006].

<sup>583</sup> C-II ¶¶ 272 – 274; C-I ¶¶ 2, 65 *et seq.* (*presenting* facts related to Mr. Aduviri), ¶¶ 130 – 140 (*presenting* arguments related to “public purpose”); *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011 [C-0078]; *Comuneros dan plazo a presidente regional - firma ordenanza o lo revocan*, LA REPÚBLICA, Mar. 23, 2011 [C-0079]; Press Release, Los Andes, *La Opinión Pública*, Mar. 23, 2011 [C-0081]; *Alcalde del distrito de Huacullani ratificó que no participarán en la movilización de mañana*, ONDA AZUL, Mar. 29, 2011 [C-0082]; *Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, Mar. 29, 2011 [C-0083]; Letter No. 521-2011-GR-PUNO/PR from M. Rodríguez, Regional President of Puno, to P.E. Sánchez, Minister of Energy and Mines, Apr. 28, 2011 [C-0089]; “*Esperan que haya alguna víctima*,” EL COMERCIO, May 25, 2011 [C-0090]; Press Release, Presidencia del Consejo de Ministros, *Premier califica de inadmisibles bloqueos de carreteras en Puno y pide deponer acciones violentas*, May 18, 2011 [C-0092]; *Interview of Prime Minister Rosario Fernandez*, Mira Quien Habla, Willax TV, May 31, 2011 [C-0097]; *Alan García: Hay oscuros intereses políticos en protestas en Puno*, La Republica.pe, Jun. 25, 2011 [C-0242]; Swarthout First Statement ¶ 47 [CWS-1]; Antúnez de Mayolo First Statement ¶ 16 [CWS-2]; Swarthout Second Statement ¶ 33 [CWS-6]; Antúnez de Mayolo Second Statement ¶ 31 [CWS-7].

032 on June 25, 2011.<sup>584</sup> The *Amparo* Decision makes it clear that Respondent did not enact Supreme Decree 032 for a public purpose, but rather that the Santa Ana Project remained a public necessity at all relevant times and that it did not cause any environmental issue or social unrest in the area. The violent demonstrations had nothing to do with Claimant’s actions or omissions. It is, thus, clear that no public purpose justifying the expropriation of Claimant’s rights over the Santa Ana Project existed when the Government issued Supreme Decree 032.<sup>585</sup>

433. According to Peruvian law, the property or possession rights granted to foreigners in border areas may be restricted only for reasons of national security.<sup>586</sup> Here, Supreme Decree 032 says nothing about (i) why mining in the border area no longer constitutes a public necessity, (ii) Respondent’s need to restore order throughout the region, or (iii) how the issuance of Supreme Decree 032 was a necessary and proportionate measure to achieve Respondent’s purported needs. Indeed, the vagueness of the document, as well as Respondent’s acknowledgement that no contemporaneous documents that could explain what could constitute “*new circumstances*” justifying the issuance of Supreme Decree 032 exist, demonstrate its lack of a legitimate public purpose. Here, Respondent is simply asking the Tribunal to deduce, based on media reports and *ex post facto* justifications, that the demonstrations led to the issuance of Supreme Decree 032. Respondent’s officials, however, have admitted that Respondent “*had no reason to remove the concession from the company.*”<sup>587</sup>

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<sup>584</sup> C-I ¶ 135; C-II ¶ 275; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011 [C-0078]; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [C-0098]; *Huelga de aymaras termina en “cuarto intermedio,”* LOS ANDES, Jun. 1, 2011 [C-0099]; *Volvió tensión con huela aimara*, LA REPÚBLICA, Jun. 9, 2011 [C-0100].

<sup>585</sup> C-I ¶¶ 136 – 138; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Letter from M. Grau Malachowski, Bear Creek, to J. K. Villavicencio Gardini, Nov. 30, 2007 [C-0018]; Notarized Contracts for the Transfer of Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 6, 2007 [C-0019]; SUNARP Registration Notice of the Transfer Agreement for Santa Ana Concessions 9A, 1, 2 and 3, Feb. 1, 2008 [C-0020]; MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011 [C-0073]; Bullard First Report ¶¶ 18.r, 136, 182, 183, 185 – 190 [CEX-003]; Antúnez de Mayolo First Statement ¶ 34 [CWS-2].

<sup>586</sup> C-II ¶ 276; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; Bullard Second Report ¶¶ 3(g), 41 [CEX-005].

<sup>587</sup> C-II ¶¶ 276 – 277; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; Letter from R. Wong, Secretary General of MEM, to E. Antúnez, Bear Creek Mining Company, Aug. 19, 2011 [C-0111];

434. Respondent’s legal framework does not authorize expropriations in order to avoid social conflict. Accordingly, the derogation of Supreme Decree 083 “*lacks proper reasoning*” and “*is not found within the margins of reasonability and proportionality required not to violate the principle of legal security.*”<sup>588</sup>
435. Claimant’s situation is similar to claimant’s in *Tecmed v. Mexico*, where claimant argued that respondent expropriated its investment by refusing to renew claimant’s authorization to operate a landfill. In examining whether respondent’s measures were reasonable, that tribunal stated that “*there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.*” In addition to finding that claimant’s operations did not “*pose a present or imminent risk to the ecological balance or to people’s health*”, the *Tecmed* tribunal found that it relevant that the protests did not have claimant’s behavior as their origin. Finding that there had been no serious urgent situation, crisis, need, or social emergency, the *Tecmed* tribunal found that opposition to the landfill and pressure on authorities were not sufficient justifications for the State to deprive claimant of its investment without compensation. This Tribunal could make the same finding here.<sup>589</sup>
436. Regarding the second element of Article 812, a lawful expropriation or nationalization of a protected investment must take place in accordance with due process of law.<sup>590</sup> Respondent’s silence on this issue confirms that Claimant simply was not afforded due process in connection with the issuance of

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Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013 [C-0197]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; Bullard Second Report ¶¶ 3(g), 41 [CEX-005].

<sup>588</sup> C-II ¶ 278; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Second Expert Report of Alfredo Bullard González ¶ 126(c) (Jan. 6, 2016) [CEX-005].

<sup>589</sup> C-II ¶¶ 279 – 284; C-I ¶¶ 2, 65 *et seq.* (describing political motivations for Supreme Decree 032); Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Bear Creek Mining Corporation, *Environmental Stewardship* [C-0069]; Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, Dec. 2010 [C-0071]; Letter from R. Wong, Secretary General of MEM, to E. Antúnez, Bear Creek Mining Company, Aug. 19, 2011 [C-0111]; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 [CL-0040]; *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 ¶ 432 [CL-0060]; Swarthout First Statement ¶ 50 [CWS-1]; Swarthout Second Statement ¶ 33 [CWS-6]; Antúnez de Mayolo Second Statement ¶ 31 [CWS-7].

<sup>590</sup> C-II ¶ 287.

Supreme Decree 032. Respondent failed to observe due process when enacting Supreme Decree 032 in five ways:

- (i) *Supreme Decree 032 was not the proper way to repeal Supreme Decree 083—an administrative act that could not be derogated—and rescind Bear Creek’s right to own mines and mining rights in Santa Ana;*
- (ii) *Supreme Decree 032 was not issued in the context of any defined legal procedure within MINEM;*
- (iii) *Bear Creek never received advance notice of Supreme Decree 032 or an opportunity to be heard;*
- (iv) *the Government did not provide any credible justification for Supreme Decree 032; and*
- (v) *Supreme Decree 032 violated the legal principles of legal security and prohibition of arbitrariness, as recognized by the Lima First Constitutional Court.<sup>591</sup>*

437. Respondent’s measures were disproportionate the public interest presumably protected. That other measures of general application were adopted at the same time only highlights Respondent’s political motivations in targeting Claimant. Respondent failed to allow these general measures to play out before singling out Respondent in its political game.<sup>592</sup>

438. Under Peruvian law, once rights or interests have been conferred on a private party, they cannot be modified or substituted for “*reasons of opportunity, merit or convenience.*” Since Claimant was not granted an opportunity to be heard before Supreme Decree 032 was issued, it constitutes a deviation of power, which contravenes the principles of legality and reasonability. Further, as confirmed in the *Amparo* decision, Supreme Decree 032 lacks proper reasoning and motivation and thus violates the principles of reasonability, proportionality and legal security – all parts of a broader principle of due process. Since it violates the legal principle of juridical certainty and proportionality, it violates the

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<sup>591</sup> *Id.* at 288 – 289; C-I ¶ 139; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Letter from E. Antúnez, Bear Creek, to F. Ramírez, DGAAM, Feb. 1, 2011 [C-0187]; *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 [CL-0060].

<sup>592</sup> C-II ¶ 285; R-I ¶ 246; *Comunidades de Huacullani dan luz verde a Proyecto minero Santa Ana*, EL GRAN SUR, LA REPÚBLICA, Mar. 18, 2011 [C-0077]; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *Huelga de aymaras termina en “cuarto intermedio,”* LOS ANDES, Jun. 1, 2011 [C-0099]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; *Alan García: Hay oscuros intereses políticos en protestas en Puno*, La Republica.pe, Jun. 25, 2011 [C-0242]; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 122 [CL-0040]; Swarhout First Statement ¶ 50 [CWS-1]; Antúnez de Mayolo First Statement ¶ 19 [CWS-2].

prohibition on arbitrariness. Accordingly, this Tribunal should find that Respondent acted arbitrarily and in violation of due process of law when it issued Supreme Decree 032, which expropriated Claimant's rights.<sup>593</sup>

439. Regarding the third element of Article 812 of the FTA, discriminatory measures are not lawful. Supreme Decree 032 targeted only Claimant and no other mining company lost its right to mine under Supreme Decree 032. Arguments related to discrimination are presented above and are incorporated here by reference.<sup>594</sup>
440. Regarding the final element of Article 812 of the FTA, Respondent's expropriatory measures were not taken against prompt, adequate, and effective compensation. Articles 812.2 and 812.3 provide conditions that such compensation must meet in order to be considered "*prompt, adequate, and effective.*" Pursuant to these, Respondent is required to pay, without delay, compensation to Claimant in the amount of the FMV of the Santa Ana Project, plus interest from the date of the expropriation until payment. It is undisputed that Respondent has not paid any form of compensation to Claimant and, therefore, Respondent's expropriation of the Santa Ana Project is an unlawful act under the FTA and international law.<sup>595</sup>

#### (b) Respondent's Arguments

441. Respondent has not presented any arguments in reference to Article 812 of the FTA, independently of its other arguments. Respondent denies all allegations not specifically admitted.<sup>596</sup>

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<sup>593</sup> C-I ¶¶ 141 – 144; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Bullard First Report ¶¶ 120, 124.b, 161, 178, 181, 196, 199 [CEX-003].

<sup>594</sup> C-II ¶ 264, *also citing* C-II ¶¶ 46 – 65; Canada-Perú FTA Art. 812.1(c) [C-0001]; Flury First Report ¶ 64 [CEX-006].

<sup>595</sup> C-I ¶¶ 127 – 129; C-II ¶ 269; Canada-Perú FTA [C-0001]; *Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 ¶ 273 [CL-0031]; Tali Levy, NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" 31 *Stan. J. Int'l L.* 423 (1995) [CL-0054]; Arnaud de Nanteuil, *Droit international de l'investissement* (Pedone, 2014) ¶¶ 741, 743 [CL-0181].

<sup>596</sup> R-II ¶ 36.

(c) **The Tribunal's Reasoning**

442. Article 812.1 of the FTA provides:

*Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.<sup>597</sup>*

443. The conditions set out in Article 812.1 are cumulative. By this wording, it is clear that if there is no due process of law or if there has not been payment of "*prompt, adequate and effective compensation*", a direct or indirect act of expropriation will violate the FTA.

444. The Tribunal has already indicated above its appreciation that Respondent did not invite Claimant to the meetings between June 20 and 23, 2011, on the basis that Claimant's attendance might have made the discussion with the groups organizing the social unrest more difficult and the Government was under strong political pressure to find an agreeable solution.

445. But the Tribunal has also described the rushed procedure during the meeting of June 23, 2011. On the basis of new documents allegedly presented between 9 and 10 p.m. –and which are said to have been lost thereafter so that they could not be produced by Respondent in this arbitration – after an examination by unidentified persons, according to Respondent by 1:30 a.m., between 15 and 19 Ministers of the Council of Ministers had been reached. Those Ministers were apparently contacted and then approved the draft without seeing the alleged documents. Thereafter, the President of the Republic signed the Supreme Decree. It is not disputed that no effort was made to contact Claimant in advance, and that Claimant was given no opportunity to comment before Supreme Decree 032 was issued.

446. As concluded above, the Supreme Decree 032 effected an indirect expropriation by revoking Supreme Decree 083. The Tribunal considers that, even in the face of the obvious political pressure to which the demonstrations and unrest gave rise, Claimant was entitled to be heard before such a fundamental decision was to be considered and taken. This is all the more so in circumstances in which the decision taken was expressly – in Supreme Decree 032 – based on allegedly unconstitutional conduct

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<sup>597</sup> Canada-Perú FTA Art. 812.1 [C-0001] (internal footnotes omitted).

by Claimant in the process of obtaining the rights granted by Supreme Decree 083. Respondent should have made an effort to contact and hear Claimant, even in the face of political pressure to come to an expeditious solution. The Tribunal has been presented with no evidence to explain why this could not have happened, and why it did not happen. It has also not been shown whether, rather than a derogation, a mere suspension of Claimant's rights, as it was shortly thereafter ordered by Supreme Decree 033, which suspended all other new mining concession requests in Puno, might have been sufficient to calm the social unrests. It is not this Tribunal's task to determine whether under Peruvian law such a procedure might have been legally possible for other reasons as those given in Supreme Decree 032. The Tribunal, however, has to apply Article 812.1 of the FTA, which expressly provides that an expropriation must be done in accordance with due process of law. The process of issuing Supreme Decree 032 does not comply with this requirement.

447. Therefore, the Tribunal concludes that Respondent is in breach of the FTA by issuing Supreme Decree 032 without granting Claimant due process of law.

448. Further, Article 812.1 of the FTA provides that an expropriation, in order to be lawful, must be effected in a non-discriminatory manner and on prompt, adequate and effective compensation. It is undisputed that Supreme Decree 032 did not provide for any compensation to Claimant. Therefore, also for this reason, the Decree is a breach of the FTA. In view of the above conclusions, it is not necessary for the Tribunal to examine whether it was also issued in a non-discriminatory manner, because such a finding would not change or add to the legal consequences of the measure.

449. In view of its above considerations, the Tribunal concludes that Supreme Decree 032 constituted an unlawful indirect expropriation, in violation of Article 812.1 of the FTA.

## **5. Whether Supreme Decree 032 was a Valid Exercise of Police Powers**

### **(a) Claimant's Arguments**

450. International arbitral tribunals have the jurisdiction – and the duty – to determine whether the measures issued violate international obligations.<sup>598</sup>

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<sup>598</sup> C-II ¶ 290.

451. Respondent's defense that Supreme Decree 032 was not expropriatory because it is a legitimate exercise of Respondent's police powers fails. The exercise of sovereign police powers is not a complete defense to expropriation under the FTA and, in any event, the State's police powers are not unlimited. A lawful expropriation under the FTA must comply with Article 812(1) of the FTA, which expressly circumscribes any exercise of Respondent's police powers to so-called regulatory conduct.<sup>599</sup> Supreme Decree 032 cannot be considered an appropriate exercise of police powers, as it was issued without notice to Claimant, in violation of Claimant's right of defense, and without payment of compensation and the application of due process.<sup>600</sup>
452. The police powers doctrine is not a generally applicable fixture of international investment arbitration that allows States to regulate without compensating property owners. Contrary to Respondent's arguments, the *Tecmed* tribunal acknowledged the existence of the police powers doctrine on the domestic plane and affirmed its duty to examine whether the measures there at issue violated the treaty or international law. That tribunal then interpreted the BIT and found that regulatory actions and measures will not be initially excluded from expropriatory acts.<sup>601</sup> To determine whether the sovereign powers doctrine has any role to play in the present analysis, the Tribunal must interpret and apply the FTA, which does not excuse expropriations resulting from the exercise of police powers.<sup>602</sup> Interpreting the FTA according to its ordinary meaning, as per Article 31(1) of the VCLT, there are four specific elements that must be met for an expropriation to be deemed lawful: the expropriation must be effected (i) for a public purpose, (ii) in accordance with due process of law, (iii) in a non-discriminatory manner and (iv) on prompt, adequate, and effective compensation. Regulatory actions are not excluded from the definition. Absent this express carve-out, the legality of Respondent's expropriation of Claimant's investment can only be assessed against these four elements. Since

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<sup>599</sup> *Id.* at ¶¶ 244, 308; Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013 [C-0197]; Bullard First Report ¶ 18(n) [CEX-003]; Bullard Second Report ¶ 3(c) [CEX-005].

<sup>600</sup> C-II ¶ 327; R-I ¶ 134 (*describing* protests relating to gold mining); R.Prov.M.-II ¶¶ 28, 30 (*stating* that it is not possible for Claimant to sell its property right to third parties); *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015 [CL-0184]; Bullard Second Report ¶¶ 111, 131 [CEX-005]; Swarthout First Statement ¶ 50 [CWS-1].

<sup>601</sup> C-II ¶¶ 291 – 293; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶¶ 119 – 122 [CL-0040]; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, Sept. 3, 2001 ¶ 198 [RLA-028].

<sup>602</sup> C-II ¶¶ 290, 294; Canada-Perú FTA Art. 812 [C-0001]; Vienna Convention on the Law of Treaties, May 23, 1969 Art. 31(1) [CL-0039].

Respondent failed to comply with these four requirements, it is liable for carrying out an unlawful expropriation.<sup>603</sup>

453. Respondent accepts that the police power has limits and does not enable States to regulate and expropriate with impunity. The cases cited by Respondent, including *Tza Yap Shum v. Peru* confirm that a State may only exercise its regulatory authority under certain conditions, including ensuring that a measure is proportional to its objective and observes due process.<sup>604</sup> The Lima First Constitutional Court, as well as other Peruvian authorities, has recognized that Supreme Decree 032 was an arbitrary measure, not proportional to its objective, and was issued without due process of law.<sup>605</sup> Even if this Tribunal were to analyze this case under the police powers doctrine, it should conclude that Supreme Decree 032 was not a legitimate exercise of Respondent’s police powers and it constitutes a breach of Respondent’s international obligations.<sup>606</sup>

454. Supreme Decree 032 is a specifically targeted measure designed to divest Claimant of its investment – and it, therefore, falls outside of the scope of the police powers doctrine.<sup>607</sup> The majority of cases upon which Respondent relies are inapposite, as they concern regulatory actions of general application. Here, the conduct at issue is a targeted decree directed at a single company.<sup>608</sup> Neither

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<sup>603</sup> *Id.*

<sup>604</sup> C-II ¶ 309; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶ 255 [CL-0091]; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002 ¶ 7 [RLA-030]; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), Jun. 26, 2009 ¶¶ 497 – 499 [RLA-040]; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, Jul. 7, 2011 ¶ 174 [RLA-041].

<sup>605</sup> C-II ¶ 310; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Press Release, Presidencia del Consejo de Ministros, *Premier califica de inadmisibles bloqueos de carreteras en Puno y pide deponer acciones violentas*, May 18, 2011 [C-0092]; MEM: *Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236].

<sup>606</sup> C-II ¶ 311.

<sup>607</sup> *Id.* at ¶¶ 137 – 140 (regarding “public purpose”), 295; C-I ¶¶ 130 – 138 (regarding “public purpose”); ; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 [CL-0091]; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002 ¶ 7 [RLA-030]; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, Dec. 16, 2002 ¶ 103 [RLA-031]; Bullard First Report ¶¶ 175 *et seq.* [CEX-003]; Bullard Second Report ¶¶ 10, 122, 127, 130, 135, 145 [CEX-005].

<sup>608</sup> C-I ¶¶ 130 – 138 (regarding “public purpose”); C-II ¶¶ 137 – 140 (regarding “public purpose”), 290, 295; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 [CL-0091]; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002 ¶ 7 [RLA-

the *Invesmart* nor the *Saluka* cases support Respondent’s position that the police powers exception can apply in cases concerning the revocation of permission granted to a single investor.<sup>609</sup> In *Invesmart*, where the revocation of Union Bank’s license was authorized by statute when a bank admittedly faced illiquidity and an inability to continue operating, the tribunal considered that the banking statute was “*a bona fide non-discriminatory regulation aimed at the general welfare.*”<sup>610</sup> It is in that context that the *Invesmart* tribunal stated that “*investment treaties were never intended to do away with their signatories’ right to regulate.*”<sup>611</sup>

455. In further contrast to *Invesmart*, neither Article 71 of the Constitution nor Supreme Decree 083 lays out the circumstances under which the revocation of Supreme Decree 083 would be permitted. Instead, Supreme Decree 032 only makes a vague assertion that “*circumstances have been made known that would imply the disappearance of the legally required conditions for the issuance of Supreme Decree 083.*” Supreme Decree 032 was not enacted to implement a legal framework that was set forth in Article 71 or even Supreme Decree 083. Respondent intentionally circumvented Peruvian law establishing procedural and substantive requirements to revoke the authorization granted by Supreme Decree 083 by labeling its decision a “*derogation*”, rather than an administrative act.<sup>612</sup> The context of the issuance of Supreme Decree 032 makes it clear that Respondent arbitrarily decided to deprive Claimant of its investment.<sup>613</sup> This is confirmed by statements of high ranking

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**030**]; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, Dec. 16, 2002 ¶ 103 [RLA-031]; Bullard First Report ¶¶ 175 *et seq.* [CEX-003]; Bullard Second Report ¶¶ 10, 122, 127, 130, 135, 145 [CEX-005].

<sup>609</sup> C-II ¶ 296.

<sup>610</sup> *Id.* at ¶¶ 298 – 299; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶ 264 [CL-0091]; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), Jun. 26, 2009 ¶¶ 496 – 498, 500, 504 [RLA-040].

<sup>611</sup> *Id.*

<sup>612</sup> C-II ¶¶ 300 – 301; Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 [C-0004]; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Constitution of Peru, Art. 71 [C-0024]; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), Jun. 26, 2009 ¶ 504 [RLA-040]; Bullard Second Report [CEX-005].

<sup>613</sup> C-II ¶ 302; C-I ¶¶ 130 – 138 (regarding “public purpose”), C-II ¶¶ 137 – 140 (regarding “public purpose”) Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011 [C-0093]; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶ 264 [CL-0091]; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), Jun. 26, 2009 ¶ 500 [RLA-040].

Peruvian officials at the time, including the President.<sup>614</sup> It, therefore, cannot be considered “*a bona fide non-discriminatory regulation aimed at general welfare.*”<sup>615</sup>

456. Respondent’s reliance on *Saluka* is likewise misplaced.<sup>616</sup> The *Saluka* tribunal, noting the lack of a bright line test within the treaty, examined the context and circumstances of the measure at issue to determine whether it was an expropriation, rather than a valid regulatory activity.<sup>617</sup> After reviewing the reasoned measure at issue, the tribunal commented that the decision was “*fully motivated*” and that it was confirmed by an administrative appellate board and by the City Court of Prague on two occasions.<sup>618</sup> Here, Supreme Decree 032 is not reasoned or “*well motivated.*” It is vague and provides no explanation as to what the alleged “*new circumstances*” that “*would imply the disappearance of the legally required conditions for the issuance of the mentioned act*” are. Since there is no legislation to cancel lawfully granted concessions, there is no factual or legal analysis whatsoever. A measure derogating Supreme Decree 083 would be inadmissible and unconstitutional. Supreme Decree 032 was condemned – not confirmed – by the Lima First Constitutional Court. Accordingly, the *Saluka* decision is of no assistance to Respondent – rather, it highlights the grave shortcomings of Supreme Decree 032.<sup>619</sup>

457. Regardless of what kind of deference Supreme Decree 032 may receive – be it a presumption of legitimacy or a “*margin of appreciation*” – this cannot mean that there is a prohibition of review of Respondent’s actions. Investment tribunals have found that a State, even in the exercise of its sovereign powers, must act in accordance with the rule of law. In this case, that requires – at minimum – the observance of due process and the adoption of non-discriminatory measures.<sup>620</sup>

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<sup>614</sup> *Id.*

<sup>615</sup> C-II ¶ 303; C-I ¶¶ 140 – 144 (regarding due process); *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), Jun. 26, 2009 ¶ 497 [RLA-040].

<sup>616</sup> C-II ¶ 304; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶¶ 263, 264, 270, 271, 274 [CL-0091].

<sup>617</sup> *Id.*

<sup>618</sup> *Id.*

<sup>619</sup> C-II ¶ 305; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011 [C-0093]; *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 [C-0096]; *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 [C-0236]; Bullard Second Report ¶ 142 [CEX-005].

<sup>620</sup> C-II ¶ 306; Canada-Perú FTA Art. 812 [C-0001]; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican*

458. As the tribunals in *Saluka* and *ADC v. Hungary* recognized, the sovereign powers doctrine is not unlimited.<sup>621</sup> Even where a State enjoys wide discretion, the State's discretion cannot be exercised arbitrarily. Even if Supreme Decree 032 were to fall within the scope of Respondent's police powers, there can be no doubt that Supreme Decree 032 was arbitrary, not proportional, and issued without regard for due process.<sup>622</sup>

**(b) Respondent's Arguments**

459. Claimant bears the burden to show that Respondent's regulatory actions were inconsistent with a legitimate exercise of police powers.<sup>623</sup>

460. Investment tribunals have repeatedly held that a State is not liable for takings that may result from legitimate exercises of a State's inherent power to regulate for the protection of safety and public order – the State's police powers.<sup>624</sup> The police powers doctrine is a fundamental tenet of international law that applies even in the absence of an express reference thereto in the relevant international instrument. As recognized as early as 1941 by Prof. Herz, the State's right to exercise its police power has been recognized by general international law.<sup>625</sup> Prof. Christie<sup>626</sup> explained that

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*States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 139 [CL-0040]; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, Feb. 12, 2015 ¶¶ 195 – 197 [CL-0182]; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002 ¶ 7 [RLA-030]; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), Jun. 26, 2009 [RLA-040]; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, Jul. 7, 2011 [RLA-041].

<sup>621</sup> C-II ¶ 307; *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 ¶¶ 423 – 424 [CL-0060]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶ 258 [CL-0091].

<sup>622</sup> *Id.*

<sup>623</sup> R-I ¶ 241; *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (Redacted), Feb. 14, 2012 ¶¶ 582 – 584 [RLA-044].

<sup>624</sup> R-I ¶ 227; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, Aug. 2, 2010 ¶ 266 [CL-0066]; *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, Dec. 27, 2010 ¶ 197 [CL-0096]; *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, Jul. 30, 2010 ¶ 128 [CL-0102]; *CME v. Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001 ¶ 603 [CL-0103]; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, Sept. 3, 2001 ¶ 198 [RLA-028]; *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, Jul. 17, 2006 ¶ 176(j) [RLA-029]; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002 ¶ 7 [RLA-030]; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, Dec. 16, 2002 ¶ 103 [RLA-031].

<sup>625</sup> R-I ¶ 227; John H. Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L L. 243 pp. 251 – 252 [RLA-032].

<sup>626</sup> R-I ¶ 229; G. C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L

a State’s reasons for a taking pursuant to the police powers doctrine need only be “*valid and bear some plausible relationship to the action taken*” and that “*no attempt may be made to search deeper to see whether the State was activated by some illicit motive.*” The academic literature also recognizes that the police powers doctrine allows the State to regulate for the common good without compensating impacted property owners.<sup>627</sup> Today, the doctrine is a fixture of international investment arbitration.<sup>628</sup> Claimant’s argument that this fundamental principle does not apply because the FTA contains no express carve-out ignores the scope and reach of the police powers doctrine, which provides an overarching exception for certain exercises of State action, beyond any carve-out that might appear in a treaty. The *Saluka* tribunal even affirmed the applicability of the police powers doctrine as a matter of customary international law. International tribunals have repeatedly confirmed that the police powers exception applies, regardless of whether an explicit treaty provision is present.<sup>629</sup> Such an approach is consistent with the VCLT, which requires that the interpretation of the FTA take into account “*any relevant rules of international law applicable in the relations between the parties.*”<sup>630</sup>

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L. 307 p. 338 [RLA-034].

<sup>627</sup> R-I ¶ 232; George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT’L L. 585 p. 609 [RLA-037]; Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. 1 22 [RLA-038]; J. Salacuse, *THE LAW OF INVESTMENT TREATIES* p. 56 [RLA-039].

<sup>628</sup> R-I ¶¶ 227 – 230; R-II ¶¶ 433 – 434; John H. Herz, *Expropriation of Foreign Property*, 35 AM. J. INT’L L. 243 [RLA-032]; L.B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT’L L. 515 [RLA-033].

<sup>629</sup> R-I ¶¶ 230 – 232; R-II ¶¶ 435 – 437; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 119 [CL-0040]; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, Aug. 2, 2010 ¶ 266 [CL-0066]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶¶ 254 – 255 [CL-0091]; *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, Dec. 27, 2010 ¶ 197 [CL-0096]; *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, Jul. 30, 2010 ¶ 128 [CL-0102], *CME v. Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001 ¶ 603 [CL-0103]; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, Sept. 3, 2001 ¶ 198 [RLA-028]; *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, Jul. 17, 2006 ¶ 176(j) [RLA-029]; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002 ¶ 7 [RLA-030]; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, Dec. 16, 2002 ¶ 103 [RLA-031]; George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT’L L. 585 p. 609 [RLA-037]; Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. 1 22 [RLA-038]; J. Salacuse, *THE LAW OF INVESTMENT TREATIES* p. 56 [RLA-039].

<sup>630</sup> R-II ¶ 438; Vienna Convention on the Law of Treaties, May 23, 1969 Art. 31(3)(c) [CL-0039]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶ 254 [CL-0091].

461. In support of its novel police powers theory, Claimant relies on *Tecmed* but states that the *Tecmed* tribunal considered a treaty without an express police powers carve-out and found that the police powers did not apply. Claimant misrepresents *Tecmed*, which confirmed that in addition to the provisions of a treaty, the tribunal must resolve a dispute by applying international law provisions. *Tecmed* considered whether the State action was expropriatory based on “*the principle that the State’s exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation.*” *Tecmed* does not support Claimant’s argument – it confirms the opposite.<sup>631</sup>
462. Even if this Tribunal were to find that the police powers defense only applies where a treaty expressly so states, Chapter 22 of the FTA contains a carve-out for measures that are necessary to protect human life or health. This is precisely the kind of explicit, textual exception that Claimant states is necessary for the police powers doctrine to apply.<sup>632</sup>
463. The police powers doctrine applies to regulation of general application, as well as to measures that enforce generally applicable statutes. Claimant’s argument that the police powers exception cannot apply to measures directed at specific investors has no legal or factual support – and the Tribunal should reject it for its lack of legal foundation. Nevertheless, it is worth noting that although Supreme Decree 032 had elements that were specific in application, it (1) enforced the generally applicable Article 71 of Peru’s Constitution and (2) provided that all mineral extraction in the districts of Puno would be prohibited under forthcoming regulations. It is unclear how the police powers exception would attach to Article 71 of the Constitution (as Claimant would admit), but not to Supreme Decree 032, a measure designed to uphold and enforce Article 71.<sup>633</sup>
464. Respondent’s position that the police powers doctrine applies to measures of specific application finds support in investment treaty jurisprudence. For example, in *Invesmart*, the tribunal held that the State’s cancellation of a single banking license was a non-expropriatory, regulatory act, based on “*the customary international law notion that a deprivation can be justified if it results from the*

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<sup>631</sup> R-II ¶¶ 439 – 441; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶¶ 116, 118 – 122 [CL-0040].

<sup>632</sup> R-II ¶¶ 442 – 443; Free Trade Agreement Between Canada and the Republic of Perú (Excerpts) Art. 2201.3 [R-390].

<sup>633</sup> R-II ¶¶ 444 – 446; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005].

*exercise of regulatory actions aimed at the maintenance of public order.*” It is clear that the *Invesmart* tribunal applied the police powers doctrine to the specific license revocation and concluded that the State did not expropriate the investment.<sup>634</sup>

465. To the extent that Claimant tries to distinguish *Invesmart* on the basis that the legal framework under which Supreme Decree 032 was issued is not comparable to the legal framework of that case, it is worth noting that the *Invesmart* tribunal focused only on the regulators’ specific decision. *Invesmart* did not turn on an analysis of the national legal framework and, therefore, Claimant’s suggested distinction is irrelevant.<sup>635</sup>
466. In *Saluka*, the tribunal found that a regulatory action against a single bank constituted substantial deprivation, but that no compensation was due. Even if it were true that the procedures followed in *Saluka* were more transparent than those followed by Respondent in revoking Claimant’s public necessity declaration, that is wholly irrelevant to Claimant’s argument that the police powers exception does not apply. The *Saluka* tribunal found that the measure that applied specifically to that claimant was lawful. Thus, even if Supreme Decree 032 could be characterized as a specific regulatory act, Claimant has failed to provide any basis to exclude specific regulatory acts from the ambit of the police powers exception.<sup>636</sup>
467. The police powers doctrine affords a margin of appreciation to the State’s sovereign choices. Accordingly, Respondent’s decision to enact Supreme Decree 032 should be granted a “*presumption of legitimacy*” or a “*margin of appreciation.*” The propriety of such deference is evidence in these circumstances, where the Constitution confers upon the State’s highest Executive body the discretion to assess questions of “*public necessity*” in light of external and internal national security interests.<sup>637</sup>

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<sup>634</sup> R-I ¶¶ 233 – 235; R-II ¶¶ 447 – 449; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), Jun. 26, 2009 ¶¶ 498, 501, 504, 520 [RLA-040].

<sup>635</sup> R-II ¶¶ 450 – 451; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), Jun. 26, 2009 ¶ 520 [RLA-040].

<sup>636</sup> R-I ¶¶ 236 – 237; R-II ¶¶ 452 – 454; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶¶ 275 – 276 [CL-0091].

<sup>637</sup> R-I ¶¶ 238 – 239; R-II ¶ 455; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), Jun. 26, 2009 ¶ 484 [RLA-040]; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, Jul. 7, 2011 ¶ 95 [RLA-041]; *S.D. Myers Inc. v. The Government of Canada*, UNCITRAL First Partial Award, Nov. 13, 2000 ¶ 261 [RLA-043].

468. The *S.D. Myers* tribunal recognized the “high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.” In *Levy v. Perú*, the tribunal agreed that “it is unacceptable for an Arbitral Tribunal to ‘step into the shoes’ of any [State] organ and to ‘second-guess’ its actions.” Claimant, however, is asking this Tribunal to step in the shoes of Peruvian authorities – a task beyond the Tribunal’s mandate. Claimant’s so-called constitutional law expert argues that Respondent should have instead “imposed order through the intercession of the National Police.” Not only is this after-the-fact second-guessing rejected in international law, it demonstrates a lack of understanding of the policy decisions that Peruvian authorities faced and a lack of consideration of Respondent’s historic use of its National Police, which has escalated conflicts and led to increasing injuries and deaths.<sup>638</sup> Claimant’s suggestion that Respondent should have issued a temporary measure is misleading: Respondent issued temporary measures, including the 1-year suspension the DGAAM’s review of Claimant’s ESIA and the 1-year suspension of the granting of mining concessions in the Puno area via Supreme Decree 026. These failed to quell the protests. The protests continued until the Government enacted Supreme Decree 032.<sup>639</sup> It is inappropriate for Claimant to suggest that Respondent should have relied on temporary measures only, especially considering that Claimant challenged the temporary suspension of its ESIA in Peruvian administrative courts and continues to challenge the same today as a breach of the FET protections of the FTA.<sup>640</sup>

469. The police powers doctrine applies because Respondent issued Supreme Decree 032 (1) to protect its citizens in the face of months of violent protests that threatened their health and safety and

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<sup>638</sup> R-I ¶¶ 239 – 240; R-II ¶¶ 456 – 458, 462; Canada-Perú FTA Art. 2201(3), 2202 [C-0001]; “Strike Results With 6 People Dead,” *La República Newspaper South Edition (Spanish)* [R-085]; “Tia Maria’s Environmental Study Approval Causes Reaction in Perú,” *Americaeconomica* [R-333]; “Tia Maria, The Long Conflict for the South,” *La República* [R-334]; “Protests in Perú Against Copper Mine Project Leaves One Dead,” *The Wall Street Journal* [R-335]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶¶ 273, 284 [CL-0091]; *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, Nov. 30, 2012 ¶ 8.35 [CL-0092]; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, Jul. 7, 2011 ¶ 95 [RLA-041]; *Renée Rose Levy de Levi v. The Republic of Peru*, ICSID Case No. ARB/10/17, Award, Feb. 26, 2014 ¶ 161 [RLA-042]; *S.D. Myers Inc. v. The Government of Canada*, UNCITRAL First Partial Award, Nov. 13, 2000 ¶ 263 [RLA-043]; Bullard First Report ¶¶ 6 – 15 [CEX-003].

<sup>639</sup> R-II ¶¶ 459 – 460; DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [C-0098]; 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 [R-025]; “Strike Results With 6 People Dead,” *La República Newspaper South Edition* [R-085]; Zegarra First Statement ¶¶ 23 – 26 [RWS-3]; Gala Second Statement ¶ 6 [RWS-5].

<sup>640</sup> R-II ¶ 461; Letter from Bear Creek to the DGAAM, Jun. 17, 2011 [C-0166].

destabilized the international border and (2) to safeguard the integrity of its Constitution and Respondent's sovereignty over natural resources. The issuance of Supreme Decree 032 was necessary to maintain international comity with Bolivia. These are legitimate justifications for the invocation of the State's police powers, and the Tribunal should reject Claimant's expropriation claim. Respondent's sovereign, discretionary choice deserves deference under international law. Claimant's position that Supreme Decree 032 was adopted merely to placate a small political minority led by Mr. Aduviri is simply nonsense. Supreme Decree 032 was issued by an outgoing Government with only one month remaining in office. Claimant has not explained what political gain an outgoing Government could have received from enacting the decree.<sup>641</sup>

470. It must be recalled that Claimant, as a mining company, was at least in part responsible for the social unrest, as it is responsible for establishing and maintaining positive relationships with surrounding communities. Claimant's favoring some groups over others created tension that manifested itself in violent ways, including a 2008 attack on Claimant's office and camp. Public opposition to the Santa Ana Project grew and came to a violent head between March and June 2011. Faced with escalating violence, increasingly widespread protests, and mounting threats to public safety, Respondent took the appropriate actions. These included not only Supreme Decree 032, but also Supreme Decree 033, which suspended all new mining concession requests in Puno. Respondent's interventions were effective in stopping the protests, strikes, and violence that had paralyzed the region.<sup>642</sup>

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<sup>641</sup> R-I ¶¶ 242 – 244, 247 – 249; R-II ¶¶ 428, 431, 432, 463 – 465, 493; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017]; Office of the Ombudsman of Perú, Social Conflict Report No. 56 (10/31/2008) [R-049]; Resolution No. 468-2008-MP-2da-FPMCH-DESAGUADERO (10/17/2008) [R-051]; Note of Protest from the Government of Bolivia (6/7/2011) [R-075]; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), Jun. 26, 2009 [RLA-040].

<sup>642</sup> R-I ¶¶ 244 – 246; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) [C-0017]; Aide Memoire "Actions Done by the Executive Power Regarding Conflicts in the Puno Department" (7/2011) p. 5 [R-010]; Supreme Decree on the Adjustments of Mining Petitions and Suspension of Admissions of Mining Petitions, Supreme Decree No. 033-2011-EM [R-011]; Memorial submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP [R-015]; 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 [R-017]; Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR (4/26/2011) [R-018]; MINEM, "For Lack of Security Dialogue Between High Level Commission and Leaders Failed" [R-022]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31 [R-048]; Office of the Ombudsman of Perú, Social Conflict Report No. 56 (10/31/2008) [R-049]; Resolution No. 468-2008-MP-2da-FPMCH-DESAGUADERO (10/17/2008) [R-051]; "Elimination of Mining Activities in Puno is Proposed", *La República Newspaper South Edition* [R-057]; Human

(c) **The Tribunal’s Reasoning**

471. In the present context, the Tribunal has taken note of the comments received from the Government of Canada quoted above, particularly: “*A State is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure designed and applied to protect legitimate public welfare objectives.*”<sup>643</sup> And: “*A non-discriminatory measure that is designed to protect legitimate public welfare objectives does not constitute indirect expropriation except in rare circumstances where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.*”<sup>644</sup> The Tribunal does not disagree with this general evaluation, but considers that it must be taken into account in the context of the specific provisions provided in the FTA.

472. Article 2201.1 of the FTA provides for the following “Exceptions”:

3. *For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:*
  - (a) *to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health;*
  - (b) *to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or*
  - (c) *the conservation of living or non-living exhaustible natural resources.*

473. The Tribunal considers that already the title of Article 2201 “*General Exceptions*” shows that otherwise Chapter Eight (investment) remains applicable including its Articles 812 and, by the express footnote to the title of Article 812, as well as Article 812.1. Further, the list is not introduced

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Rights and Environment Association, Chronology: Antimining Protests in the South Region-2011 [R-058]; “Antimining Strike Generates Losses in the Tourism Sector in Puno,” *La República Newspaper South Edition* [R-059]; “1700 Mining Concessions,” *La República Newspaper South Edition* [R-061]; “Tension Due to Aymara Protests is Back,” *La República Newspaper South Edition* [R-062]; “Community Members Close Borders,” *La República Newspaper South Edition* [R-063]; “Protesters March towards Puno to Demand an Ordinance,” *La República Newspaper South Edition* [R-064]; “Protesters are Open to Dialogue,” *La República Newspaper South Edition* [R-072]; “Aymara Rage Is Out of Control in Puno,” *La República Newspaper South Edition* [R-073]; Gala First Statement ¶¶ 23, 25 [RWS-1].

<sup>643</sup> Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement (Jun. 9, 2016) ¶ 5.

<sup>644</sup> *Id.* at ¶ 6.

by any wording (e.g. “*such as*”) which could be understood that it is only exemplary. It must therefore be understood to be an exclusive list. Also in substance, in view of the very detailed provisions of the FTA regarding expropriation (Article 812 and Annex 812.1) and regarding exceptions in Article 2201 expressly designated to “Chapter Eight (Investment)”, the interpretation of the FTA must lead to the conclusion that no other exceptions from general international law or otherwise can be considered applicable in this case.

474. There is, thus, no need to enter into the discussion between the Parties regarding the jurisprudence concerning any police power exception for measures addressed to investments.

475. Even if, in view of the social unrest existing at the time one was to interpret Supreme Decree 032 as falling under the above cited exception by Article 2201 as protecting human life or health, the Tribunal takes particular note of the fact that Supreme Decree 032 makes no mention of such a protection being the justification for the Decree. Rather, Supreme Decree 032 refers expressly only to “*circumstances*” and “*new circumstances*” which allegedly have been made known at the meeting of June 23, 2011, and to social unrest. As found above, neither of the two reasons relied upon in this context justify Respondent’s derogation of Supreme Decree 083 and of the rights awarded to Claimant therein, and Respondent cannot claim the social unrest to have been caused or contributed to by Claimant.

476. It could be argued that Supreme Decree 032, which addresses only the investment of Claimant by derogating Supreme Decree 083, is not covered by Article 2201 because it may qualify for the express exception from the Exception as an “*arbitrary and unjustifiable discrimination between investments or between investments[.]*” But indeed, there was a provision in the Decree which, at least for the future, envisaged more general application:

*Supplementary Provision*

*Sole.— Provide that, under responsibility, in a term no greater than sixty (60) calendar days, provisions are to be enacted for the purpose of prohibiting mining activities in the areas of the Huacullani and Kelluyo districts in the Chucuito province of the Puno department.*<sup>645</sup>

477. Further, the Tribunal notes that Respondent issued not only Supreme Decree 032, but also Supreme Decree 033, which suspended all new mining concession requests in Puno, and that Respondent’s

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<sup>645</sup> Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005].

interventions seem to have been effective in stopping the protests, strikes, and violence that had paralyzed the region. However, even if these two Decrees together would have to be considered as justified by the exception in Article 2201 of the FTA, Respondent does not explain the other reasons found above to be in breach of Article 812 of the FTA: Respondent has not explained that it was not possible to hear Claimant before issuing Supreme Decree 032 and that the exception also justified the breach of the due process obligation in Article 812 of the FTA. And, since the exception in Article 2201 does not offer any waiver from the obligation in Article 812 to compensate for the expropriation, Respondent has also failed to explain why it was necessary for the protection of human life not to offer compensation to Claimant for the derogation of Supreme Decree 083.

478. The Tribunal therefore concludes that, irrespective of a possible applicability of the Exception in Article 2201 of the FTA, two of the breaches of Article 812 of the FTA found above remain and thus Supreme Decree 032 must be considered a breach of the FTA.

#### **B. WHETHER RESPONDENT AFFORDED CLAIMANT FAIR AND EQUITABLE TREATMENT**

479. The sections of the FTA that are referenced by the Parties are reproduced here for reference and convenience and without prejudice to their meaning or applicability:

##### ***Article 105: Definitions of General Application***

*For purposes of this Agreement, unless otherwise specified:*

*[...]*

*measure includes any law, regulation, procedure, requirement or practice;*

##### ***Article 804<sup>2</sup>: Most-Favoured-Nation Treatment***

- 1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.*
- 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.*
- 3. For greater certainty, the treatment accorded by a Party under this Article means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a non-Party.*

[Footnote 2: Article 804 shall be interpreted in accordance with Annex 804.1]

**Article 805: Minimum Standard of Treatment**

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
2. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

**Article 808: Reservations and Exceptions**

1. Articles 803, 804, 806 and 807 do not apply to:
  - (a)# any existing non-conforming measure that is maintained by
    - (i)# a national government, as set out in its Schedule to Annex I, or
    - (ii)# a sub-national government;
  - (b)# the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
  - (c)# an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 803, 804, 806 and 807.
2. Articles 803, 804, 806 and 807 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out in its schedule to Annex II.

[...]

**Annex 804.1 Most-Favoured-Nation Treatment**

For greater clarity, treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments” referred to in paragraphs 1 and 2 of Article 804 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international treaties or trade agreements.

*Annex II to Peru-Canada FTA, Peru's First Reservation*<sup>646</sup>

[...]

*Peru reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.*

[...]

**1. Whether Respondent Afforded Claimant Fair and Equitable Treatment as Required by the FTA**

**(a) The Scope of Protection Offered by the International Minimum Standard of Treatment (“MST”)**

**(i) The Government of Canada**

480. Article 805 does not require treatment in addition to or beyond the MST. To establish the content of the MST, one must turn to customary international law. The burden of proving a rule of customary international law under Article 805 rests with the party invoking that provision, who must prove that a specific rule regarding the treatment of the investor or its investment has crystallized into widespread and consistent State practice flowing from a sense of legal obligation. The decisions and awards of international courts and tribunal do not constitute instances of State practice, but are relevant to the extent that they include an examination of State practice and *opinio juris*. In the words of the tribunal in *Cargill v. Mexico*, these awards “do not create customary international law but rather, at most, reflect [it].”<sup>647</sup>

**(ii) Claimant's Arguments**

481. The Parties agree that, pursuant to Article 805 of the FTA, Respondent was obligated to accord Claimant and its investment FET in accordance with the MST. The Parties disagree on the proper

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<sup>646</sup> Annex II to Peru-Canada FTA, Peru's First Reservation [R-056].

<sup>647</sup> Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement (Jun. 9, 2016) ¶¶ 7 – 10; *Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (Judgement of 27 Aug. 1952) [RLA-058]; *Asylum Case (Colombia v. Peru)*, 1950 ICJ 266, p. 276 (Judgement of 20 Nov. 1950); *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands/Denmark)*, 1969 ICJ 3, ¶ 74 (Judgement of 20 Feb. 1969); *Cargill, Incorporated v. United Mexican States*, (ICSID Case No. ARB(AF)/05/2) Award, 18 Sept. 2009, ¶ 277 [RLA-053].

interpretation and application of that standard.<sup>648</sup> Article 805 is similar to Article 1105(1) of the North American Free Trade Agreement (“NAFTA”) and Article 10.5(1) of the Dominican Republic – Central America Free Trade Agreement (“DR-CAFTA”). The content of the MST evolves over time and investment treaty case law provides a good indication of the current standards of investment protection under the MST.<sup>649</sup>

482. The Tribunal should agree that the MST includes substantive and procedural protections. The MST, thus, protects investors from State conduct that is arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory, involves a lack of due process leading to an outcome which offends juridical propriety, or contravenes an investor’s legitimate expectations. This general standard was elaborated by the *Waste Management II* tribunal and has been recognized by the recent *Bilcon v. Canada* and *Teco v. Guatemala* tribunals as particularly influential. It is less burdensome than *Neer* and contains no requirement that the challenged conduct reach the level of “shocking” or “outrageous” behavior, though it holds that “a basic obligation of the State under Article 1105(1) [NAFTA] is to act in good faith and form, and not deliberately set out to destroy or frustrate the investment by improper means.” The MST standard grants a number of procedural rights to investors, including the right to access to courts, the right to unbiased hearings, the right to participate in hearings, and the right to a judgment in accordance with the law of the State within a reasonable time. Respondent has violated each of these standards.<sup>650</sup>

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<sup>648</sup> C-I ¶ 145; C-II ¶ 329.

<sup>649</sup> C-I ¶ 146; North American Free Trade Agreement, Art. 1105(1) [CL-0061]; Dominican Republic – Central America Free Trade Agreement, Art. 10.5(1) [CL-0062]; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶ 567 [CL-0063]; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, Jun. 29, 2012 ¶ 218 [CL-0064]; *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, Jun. 12, 2012 ¶ 245 [CL-0065]; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, Aug. 2, 2010 ¶ 122 [CL-0066]; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003 ¶ 179 [CL-0067]; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002 ¶ 123 [CL-0068].

<sup>650</sup> C-I ¶¶ 147 – 151; C-II ¶¶ 330, 351 – 356; *GAMI Investments, Inc. v. Government of United Mexican States*, NAFTA UNCITRAL, Final Award, Nov. 15, 2004 ¶ 95 [CL-0034]; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, Jun. 29, 2012 ¶ 219 [CL-0064]; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004 ¶¶ 98 – 99, 138 [CL-0069]; *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, Dec. 19, 2013 ¶¶ 454 – 456 [CL-0070]; *William Ralph Clayton et al. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, Mar. 17, 2015 ¶¶ 442 – 444 [CL-0071]; *Abengoa S.A. y Cofides S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, Apr. 18, 2013 ¶¶ 642 – 643 [CL-0072].

483. Respondent wants this Tribunal to apply a draconian, restrictive – and highly unfair and inequitable – MST standard of “*shocking*” or “*egregious*” conduct from the *Neer* case. The Tribunal, however should see this for what it is: an admission that Respondent violated the MST and an attempt to escape liability through a regression of MST that would empty it of any real meaning.<sup>651</sup>
484. Respondent’s position that *Neer* articulated any conception of the MST is flawed, as both case law and scholarship reject the proposition that the *Neer* standard was ever an accurate statement of MST. Even if it had generated an accurate statement of MST when it was decided in 1926, the standard has evolved since then. The facts of *Neer* bear no relationship to the protection of foreign investment. Rather, the issue in that case was whether a denial of justice had occurred. Far from reflecting the MST, *Neer* is relevant only in cases of failure to arrest and punish private actors of crimes against aliens. It may at most provide a statement of the customary international law understanding of denial of justice in 1926. In its decision, the *Neer* tribunal stated that “*the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize the insufficiency.*” The *Neer* tribunal never intended to lay down a precise formula for determining when a State’s conduct is internationally unacceptable. Leading scholars have considered that *Neer* and its progeny cannot be construed as a reflection of the MST under customary international law. It analyzed neither State practice nor *opinio juris* and the entirety of its reasoning and decision spans three pages.<sup>652</sup>

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<sup>651</sup> C-II ¶ 331.

<sup>652</sup> *Id.* at ¶¶ 335 – 339; The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 35 (2001) (Updated 2008) [CL-0030]; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003 ¶¶ 179 – 181 [CL-0067]; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002 ¶¶ 114 – 115, 123 – 125 [CL-0068]; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004 ¶ 93 [CL-0069]; *Pope & Talbot, Inc. v. Canada*, UNCITRAL (NAFTA), Award on Damages, May 31, 2002 ¶¶ 58 – 66 [CL-0151]; W. Michael Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, ICSID REV., Vol. 30, No. 3 (2015) pp. 616 – 634 [CL-0185]; Judge Stephen M. Schwebel, *Is Neer Far From Equitable?*, International Arbitration Club, London (May 5, 2011) [CL-0186]; Jan Paulsson & Georgios Petrochilos, *Neer-ly Mised?*, FOREIGN INV. L. J. Vol. 22, No. 2, pp. 242-257 (2007) ¶¶ 247 – 252 [CL-0187]; *Merrill & Ring Forestry L.P. v. Government of Canada*, Award, Mar. 31, 2010 ¶¶ 207 – 208 [CL-0188]; *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), 4 RIAA 60 [RLA-051].

485. Article 805 of the FTA establishes the relationship between FET and MST. It does not reference the *Neer* standard at all, and there is no language that stabilizes the legal framework of MST by fixing it to the time of *Neer* (1926). Instead, Article 805 refers to the “*customary international law*” MST. Customary international law has evolved since 1926 and will continue to do so. Tribunals applying the FTA are, thus, obliged to apply the “*contemporary*” content of the MST, as reflected in customary international law gleaned from, among others, the decisions of investment treaty tribunals applying the MST.<sup>653</sup>
486. Even if *Neer* was once an accurate statement of MST, the overwhelming majority of tribunals and scholars agree that MST today is not what it was 90 years ago, as customary international law is an evolving body of law. For example, the tribunal in *Mondev v. USA* – on the basis of State practice and *opinio juris* as distilled from a survey of arbitral decisions, BITs, and many treaties of friendship and commerce – analyzed MST in the context of a NAFTA claim and rejected the idea that MST today is the same as the standard articulated in *Neer*. The tribunal in *ADF Group v. U.S.* agreed and relied on *Mondev*. In *ADF*, the Government of Canada – a Contracting Party – submitted in that proceeding that the MST has evolved since *Neer*, though it is still a high threshold. Based on its thorough analysis of State practice, decisions and commentary on MST under NAFTA and other international law authorities, the *Merrill & Ring* tribunal concluded that MST is broader today than the standard defined in *Neer* and its progeny – and other tribunals, scholars, and practitioners agree.<sup>654</sup>

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<sup>653</sup> C-I ¶ 146; C-II ¶¶ 332 – 334; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶ 567 [CL-0063]; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, Jun. 29, 2012 ¶ 218 [CL-0064]; *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, Jun. 12, 2012 ¶ 245 [CL-0065]; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, Aug. 2, 2010 ¶ 122 [CL-0066]; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003 ¶¶ 179, 184 [CL-0067]; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002 ¶¶ 119, 123 [CL-0068]; W. Michael Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, ICSID REV., Vol. 30, No. 3 (2015) pp. 616 – 634 [CL-0185]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 601 [RLA-046]; *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), 4 RIAA 60 60 – 61 [RLA-051].

<sup>654</sup> C-II ¶¶ 340 – 344, 349; *GAMI Investments, Inc. v. Government of United Mexican States*, NAFTA UNCITRAL, Final Award, Nov. 15, 2004 ¶ 95 [CL-0034]; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003 ¶ 179 [CL-0067]; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002 ¶¶ 114 – 116, 123, 125 [CL-0068]; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004 ¶ 93 [CL-0069]; *Pope & Talbot, Inc. v. Canada*, UNCITRAL (NAFTA), Award on Damages, May 31, 2002 ¶¶ 58 – 66 [CL-0151]; W. Michael Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, ICSID REV., Vol. 30, No. 3 (2015) pp. 620 – 625 [CL-0185]; Judge Stephen M.

487. Even the cases upon which Respondent relies, including *Thunderbird* and *Cargill*, recognize that MST has evolved since *Neer*. The *Thunderbird* award affirmed the holding of *Waste Management II* on the point that, when analyzing the MST standard of FET, an investor’s legitimate expectations are important. The *Cargill* award even noted that the FET standard in thousands of treaties may raise international expectations about what constitutes good governance and quoted *ADF* and *Mondev* with approval. Indeed, the *Cargill* tribunal’s understanding of MST is far more aligned with Claimant’s position than with Respondent’s.<sup>655</sup>
488. Respondent relies on the outlier case, *Glamis*, for the proposition that the *Neer* articulation of the MST still supplies the accurate level of scrutiny. Even on its own terms, however, the *Glamis* endorsement of the *Neer* level of scrutiny was tempered by that tribunal’s acknowledgement that notions of the circumstances that constitute “outrageous” conduct have changed markedly since *Neer*. In any event, *Glamis* cannot revive the *Neer* standard. In the most recent investment treaty award that analyzed MST, *Bilcoin v. Canada*, the tribunal noted that NAFTA tribunals have moved away from the position expressed in *Glamis* and toward a view that the MST has evolved towards greater protection for investors.<sup>656</sup>
489. The contemporary MST includes a broader set of protections than *Neer*. Although Respondent argues that its actions must reach the level of “shocking” or “egregious” and must be indicative of “willful neglect” or “bad faith” to constitute a breach, the MST offers significantly more protections than Respondent claims. For example, tribunals today unanimously reject the “bad faith” requirement alleged by Respondent as a prerequisite for finding a breach of MST.<sup>657</sup>

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Schwebel, *Is Neer Far From Equitable?*, International Arbitration Club, London (May 5, 2011) [CL-0186]; Jan Paulsson & Georgios Petrochilos, *Neer-ly Mised?*, FOREIGN INV. L. J. Vol. 22, No. 2, pp. 242 – 257 (2007) [CL-0187]; *Merrill & Ring Forestry L.P. v. Government of Canada*, Award, Mar. 31, 2010 ¶¶ 207 – 208, 213 [CL-0188]; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Second Submission of Canada Pursuant to NAFTA Article 1128, Jul. 19, 2002 ¶ 33 [CL-0189].

<sup>655</sup> C-I ¶¶ 152 – 153; C-II ¶¶ 345 – 346; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Final Award, Jan. 26, 2006 ¶¶ 147, 194 [CL-0073]; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009 ¶¶ 276, 281 – 282 [RLA-053].

<sup>656</sup> C-II ¶ 347; W. Michael Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, ICSID REV., Vol. 30, No. 3 (2015) pp. 616 – 634 [CL-0185]; *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, Mar. 17, 2015 ¶¶ 434 – 435 [CL-0190]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 613 [RLA-046].

<sup>657</sup> C-II ¶¶ 350, 355; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9,

490. Claimant’s and Canada’s reading of Article 805 of the FTA are largely consistent with one another. Both agree that arbitral awards may reflect customary international law and Claimant relied on such awards – especially *Waste Management II* – to inform its discussion of the MST. Claimant explains that, “[r]egarding the content of MST, Canada submits that customary international law does not recognize a general duty of transparency or an obligation to protect the investor’s legitimate expectations. In other arbitrations, Canada has clarified its position, stating that transparency and legitimate expectations are not standalone rights entitled to protection, but may be considered in the overall analysis of alleged MST breaches.” This stands in contrast to Respondent’s position, where legitimate expectations and transparency are irrelevant. MST, however, protects against a complete lack of transparency, and an investor’s legitimate expectations are relevant to assess a breach of MST.<sup>658</sup>

### (iii) Respondent’s Arguments

491. In Article 805 of the FTA, the Contracting Parties agreed to guarantee FET up to – and not beyond – the MST. The MST represents a low bar for States, but a high hurdle for would-be claimants. As explained by Prof. Borchard and confirmed by the *Al Tamimi v. Oman* tribunal, MST sets up an absolute floor of treatment, which ensures that State action does not “fall below a civilized standard.” Tribunals take a deferential approach when assessing State action under the MST, and the principle of deference to a State’s sovereign choices should guide this Tribunal’s analysis.<sup>659</sup>

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2003 ¶ 180 [CL-0067]; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002 ¶ 116 [CL-0068]; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004 ¶¶ 116, 138 [CL-0069]; *The Loewen Group et al. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, Jun. 26, 2003 ¶¶ 57 – 58 [CL-0118]; *Merrill & Ring Forestry L.P. v. Government of Canada*, Award, Mar. 31, 2010 ¶¶ 208, 213 [CL-0188].

<sup>658</sup> Claimant’s Response to Canadian Submission (Aug. 18, 2016) ¶¶ 10 – 12; (citing C-II §§ V.A, V.B.; ¶¶ 329, 332 – 375; R-II ¶¶ 525 – 526, 528; *GAMI Investments, Inc. v. Government of United Mexican States*, NAFTA UNCITRAL, Final Award, Nov. 15, 2004 ¶ 101 [CL-0034]; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004 ¶¶ 89 – 99 [CL-0069]; *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, Dec. 19, 2013 ¶¶ 454 – 455 [CL-0070]; *Merrill & Ring Forestry L.P. v. Government of Canada*, Award, Mar. 31, 2010 ¶ 171 [CL-0188]; *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, Mar. 17, 2015 ¶¶ 401, 427 [CL-0190]; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, Mar. 24, 2016 ¶ 501 [CL-0236]; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009 ¶ 10 [RLA-053]).

<sup>659</sup> R-I ¶¶ 264 – 268; R-II ¶ 497 – 499; Canada-Perú FTA Art. 805 [C-0001]; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Final Award, Jan. 26, 2006 ¶ 127 [CL-0073]; *The Loewen Group et al. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, Jun. 26, 2003 ¶ 132 [CL-0118];

492. *Neer* represents the historical root of MST, which subsequent tribunals have adopted and interpreted. While this Tribunal is not bound to follow *Neer* to the letter, it should be cognizant of *Neer*'s place as the foundation of modern MST – a foundation from which recent arbitral awards have not strayed.<sup>660</sup> *Neer* has been invoked by an array of investment tribunals. This collective jurisprudence – including cases like *Thunderbird v. Mexico* (2006), *Glamis Gold* (2009) and even cases outside of the NAFTA context, like *Genin v. Estonia* represents modern MST and establishes two points: (1) *Neer* remains relevant to modern MST analysis and (2) the threshold for finding a violation of MST remains high.<sup>661</sup>
493. To clarify – it has not been Respondent's position that the Tribunal may only consider *Neer*, rather, that *Neer* remains relevant. Under *Neer*, establishing a breach of MST requires action that amounts to “an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily

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*S.D. Myers Inc. v. The Government of Canada*, UNCITRAL First Partial Award, Nov. 13, 2000 ¶¶ 259, 261 [RLA-043]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 615 [RLA-046]; Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51 (1939) [RLA-050]; *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), 4 RIAA 60, 61 – 62 [RLA-051]; Jan Paulsson and Georgios Petrochilos: —*Neer-ly Mised?*, ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL (Fall 2007) [RLA-052]; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009 ¶ 296 [RLA-053]; *Alex Genin, Eastern Credit Limited, Inc. as A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, Jun. 25, 2001 ¶ 367 [RLA-054]; *Adel A Hamadi Al Tamini v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, Oct. 27, 2015 ¶¶ 382 – 383 [RLA-076].

<sup>660</sup> R-I ¶¶ 270 – 274; R-II ¶ 507; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Final Award, Jan. 26, 2006 ¶ 194 [CL-0073]; *The Loewen Group et al. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, Jun. 26, 2003 ¶ 132 [CL-0118]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶¶ 614, 616 [RLA-046]; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009 ¶ 296 [RLA-053]; *Alex Genin, Eastern Credit Limited, Inc. as A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, Jun. 25, 2001 ¶ 367 [RLA-054]; *Adel A Hamadi Al Tamini v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, Oct. 27, 2015 ¶ 390 [RLA-076].

<sup>661</sup> R-II ¶¶ 504 – 506, 545; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Final Award, Jan. 26, 2006 ¶ 194 [CL-0073]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 616 [RLA-046]; *Alex Genin, Eastern Credit Limited, Inc. as A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, Jun. 25, 2001 ¶¶ 1 – 3, 316 – 317, 365, 372 – 373 [RLA-054].

recognize its insufficiency.”<sup>662</sup> Respondent has never claimed that bad faith is required to substantiate a MST breach. It is sufficient, but not required, to demonstrate a breach of the MST.<sup>663</sup>

494. Claimant attempts to lower the bar to prove a breach of MST, arguing for a so-called “contemporary” minimum standard. The cases cited, however, support Respondent’s position that MST presents a high hurdle for claimants.<sup>664</sup> For example, *Waste Management II* (2004) does not support Claimant’s argument. By using adjective modifiers that evidence a strict standard, like “grossly”, “manifest”, and “complete”, the *Waste Management II* tribunal recognized that claimants alleging violations of the MST face a high burden. That tribunal dismissed claimant’s FET claims, reasoning that the evidence presented did not support the conclusion that respondent acted in a “wholly” arbitrary or “grossly unfair” manner. The other cases cited by Claimant recognized that claimants alleging a breach of the MST face a high burden.<sup>665</sup>

495. If the Tribunal is persuaded by Claimant’s argument that “newer is better” and the Tribunal should give greater weight to more recent awards, the Tribunal could consider further cases not cited by Claimant. For example, *Mobil v. Canada* (2012) held that the MST standard is “set [...] at a level which protects against egregious behavior.”<sup>666</sup> The strong language used in the *Al Tamimi v. Oman* (2015) and in *Cargill v. Mexico* (2009) support Respondent’s core arguments that (1) the strict *Neer*

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<sup>662</sup> R-I ¶¶ 269 – 270; R-II ¶¶ 500, 503; *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), 4 RIAA 60, 61 – 62 [RLA-051]; Jan Paulsson and Georgios Petrochilos: —*Neer-ly Mised?*, ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL (Fall 2007) 242 – 257 [RLA-052].

<sup>663</sup> R-I ¶ 263; R-II ¶ 509.

<sup>664</sup> R-II ¶¶ 501 – 502, 508.

<sup>665</sup> *Id.* at 511 – 514; R-I ¶¶ 275 – 278; *GAMI Investments, Inc. v. Government of United Mexican States*, NAFTA UNCITRAL, Final Award, Nov. 15, 2004 ¶ 97 [CL-0034]; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002 ¶ 127 [CL-0068]; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004 ¶¶ 98, 109, 115 [CL-0069]; *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, Dec. 19, 2013 ¶ 454 [CL-0070]; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Final Award, Jan. 26, 2006 ¶ 194 [CL-0073]; *Merrill & Ring Forestry L.P. v. Government of Canada*, Award, Mar. 31, 2010 ¶¶ 200, 213 [CL-0188]; *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, Mar. 17, 2015 ¶¶ 427, 443 [CL-0190]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 614 [RLA-046].

<sup>666</sup> R-II ¶¶ 515 – 516; *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012 ¶ 153 [RLA-077].

standard remains the foundation of MST jurisprudence and (2) this standard places a high burden on claimants. Claimant has not and cannot meet this elevated standard.<sup>667</sup>

496. To demonstrate a breach of Article 805 of the FTA, Claimant must identify a specific rule of customary international law that Respondent violated. Establishment of a rule of customary international law requires a showing of (1) a concordant practice of a number of States acquiesced in by others; and (2) a conception that this practice is required by or consistent with prevailing law (*opinio juris*). The burden is on Claimant to prove the existence of a rule of customary international law, and Claimant's failure to identify such a rule persists to date. Absent a specific rule of customary international law governing a specific type of conduct, States are free to regulate as they deem appropriate.<sup>668</sup>

497. In a footnote, Claimant stated that "*MST is the specific rule of international law governing the Parties' conduct*" and alleged that Respondent could not support its position that "*proof of 'specific rules' beyond the content of MST is required.*"<sup>669</sup> Respondent is not asking that Claimant prove anything beyond the content of the customary international law MST. Rather, Respondent highlights that Claimant has not proven the content of the MST, as is Claimant's burden.<sup>670</sup> Prior arbitral decisions cannot be used to prove customary international law norms. Claimant's allusions to general MST and its recitations of arbitral case law are insufficient to (1) identify a specific rule of customary international law and (2) to prove that State practice and *opinio juris* have converged to elevate that

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<sup>667</sup> R-II ¶ 517 – 520; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 61 [RLA-046]; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009 ¶ 284 [RLA-053]; *Adel A Hamadi Al Tamini v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, Oct. 27, 2015 ¶ 390 [RLA-076].

<sup>668</sup> R-I ¶¶ 279 – 281; R-II ¶¶ 521 – 522; Canada-Peru FTA Art. 805 [C-0001]; *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, Jun. 27, 1990, 30 I.L.M. 580, (1991) ¶¶ 67 – 77 [CL-0036]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 602 [RLA-046]; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009 ¶¶ 273, 274 [RLA-053]; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* (Merits), I.C.J. REP. 14 (1986) ¶ 207 [RLA-055]; *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, Feb. 21, 1997 ¶ 6.06 [RLA-056]; *S.S. Lotus (Fr. v. Turkey)*, 1927 P.C.I.J. (SER. A) No. 10, 18 – 19 [RLA-057]; *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (Judgment), Aug. 27, 1952 [RLA-058].

<sup>669</sup> R-II ¶ 523.

<sup>670</sup> *Id.* at ¶¶ 523 – 524.

rule into the canon of customary international law. Since Claimant has failed to do so, its claim must fail.<sup>671</sup>

498. Respondent agrees entirely with Canada’s position that Article 805 guarantees investors treatment in accordance with the MST and that, in order to establish the content of the MST, Claimant must prove a specific rule of customary international law. Vague allusions to the MST are insufficient: Claimant must identify and substantiate the existence (*via* State practice) of a “*specific*” rule under customary international law, and then prove that the State violated that rule. Respondent agrees with Canada that the decisions and awards of tribunals do not constitute instances of State practice for the purpose of providing the existence of a customary norm. There are several points of agreement between Claimant, Canada, and Respondent, and several points where Claimant disagrees with Canada and Respondent. Respondent submits that the common understandings of the Contracting Parties to the FTA – backed as they are by international law precedent – must prevail.<sup>672</sup>

**(b) Whether Respondent’s Treatment of Claimant and Its Investment Has Breached the MST**

**(i) Claimant’s Arguments**

499. Respondent’s conduct toward Claimant and its investment fall short of the MST. Respondent failed to respect Claimant’s legitimate expectations, failed to treat Claimant’s investment transparently, and failed to act in good faith with respect to Claimant’s investment.<sup>673</sup> The Tribunal must view Respondent’s conduct in the full context of the Parties’ relationship, starting with (1) their extensive environmental and socio-economic assessments and negotiations at the beginning of the Project, (2)

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<sup>671</sup> *Id.* at 525 – 527; R-I ¶ 275; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 605 [RLA-046]; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009 ¶ 277 [RLA-053]; Robert Cryer, *Of Custom, Treaties, Scholars, and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239 (2006) [RLA-078]; Mohamed Shahabuddeen, PRECEDENT IN THE WORLD COURT [RLA-079].

<sup>672</sup> Respondent’s Response to Canadian Submission (Aug. 18, 2016) pp. 3 – 4; C-I ¶¶ 146 – 153; C-II ¶¶ 187, 329 – 355; R-I ¶¶ 279 – 280; R-II ¶¶ 521 *et seq.*; *S.S. Lotus (Fr. v. Turkey)*, 1927 P.C.I.J. (SER. A) No. 10 18 – 19 [RLA-057].

<sup>673</sup> C-I ¶¶ 176 – 181, n. 449 (*noting* Claimant’s reservation of rights to assert a claim for denial of justice in connection with Respondent’s pursuit of the MINEM Lawsuit); Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) Annex VI [C-0017].

Claimant's December 5, 2006 request for a Supreme Decree, (3) Respondent's nearly year-long thorough review of Claimant's request during a lengthy application process involving multiple governmental agencies, including the Ministry of Defense, (4) Claimant's prompt cooperation with all aspects of the application process, and (5) Respondent's issuance of Supreme Decree 083 declaring the Santa Ana Project a public necessity and authorizing Claimant to acquire the Santa Ana concessions and to proceed with the Santa Ana Project.<sup>674</sup>

500. Respondent's detailed analysis of the Santa Ana Project and its subsequent issuance of Supreme Decree 083 were specific assurances that gave rise to Claimant's legitimate expectation that it would be permitted to mine the Santa Ana concession and that, should any dispute regarding the Concession arise, due process would be followed to resolve any such dispute, in accordance with applicable laws.<sup>675</sup> In reliance on Supreme Decree 083 and Respondent's earlier confirmations that Claimant was proceeding in accordance with Peruvian law, Claimant "*invested tens of millions of dollars in Peru, conducted an extensive exploration program for the Santa Ana Project, developed and executed a detailed Feasibility Study, undertook the ESIA, produced the PPC (which DGAAM approved along with the ESIA's Exclusive [sic] Summary), and implemented substantial community relationship programs, which the Government confirmed to be sufficient.*"<sup>676</sup>

501. In spite of this, on May 30, 2011, the Government suddenly, arbitrarily, and unfairly suspended Claimant's ESIA process, in clear violation of the applicable legal framework and against Claimant's legitimately held expectations.<sup>677</sup> Less than one month later, on June 24, 2011, Prime Minister announced that the Government would publish measures to resolve unrelated protests in the Puno

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<sup>674</sup> *Id.* at ¶¶ 176, 180; C-II ¶¶ 357 – 359; Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 [C-0004]; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) Annex II – XI [C-0017]; Letter from J.C. Pinto Najar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007 [C-0042]; Resolution issued by MINEM to the Ministry of Defense for the Authorization to Acquire Mineral Rights filed by Bear Creek Mining Company, Mar. 12, 2007 [C-0044]; Letter from the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces to the Secretary General of the Ministry of Defense, Jul. 26, 2007 [C-0045]; Letter from the Vice-Minister Secretary General of External Relations to the Ministry of Mines, Sept. 26, 2007 [C-0046].

<sup>675</sup> C-II ¶ 359; Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 [C-0004].

<sup>676</sup> C-I ¶ 177; C-II ¶ 360; *see also* Tr. 1781 (C. Closing); Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 [C-0004]; MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011 [C-0073]; *Se rompió el diálogo con los Aymaras*, May 21, 2011 [C-0091].

<sup>677</sup> C-II ¶ 361; Flury First Report ¶ 81 [CEX-006].

area. On the following day, without notice or opportunity for Claimant to be heard, MINEM issued Supreme Decree 032, revoking Supreme Decree 083 and expropriating Claimant's investment.<sup>678</sup> Supreme Decree 032 provided no explanation for the Government's decision to reverse Supreme Decree 083. This overnight revocation stands in stark contrast to the months of detailed assessment and vetting that Respondent required Claimant to undergo to obtain approval for the Santa Ana Project. The revocation was also a manifest violation of Peruvian law and, as expert Mr. Flury and the Lima First Constitutional Court confirm, evidence "a complete lack of transparency and candour in an administrative process." This is what *Waste Management II* stated would constitute a violation of MST and demonstrate a violation of Claimant's legitimate expectations. That the revocation was accomplished without notice to Claimant and without providing reasons to Claimant is a serious and self-evident due process and fair treatment violation.<sup>679</sup>

502. The governmental measures at issue in *Waste Management II* fell far below the level of egregiousness exhibited by Respondent's conduct in this case. Unlike in that case, Respondent did not simply fail to respect contractual obligations or to adequately enforce a city ordinance. Here, Respondent violated national and international law by unjustifiably, arbitrarily, and grossly unfairly revoking Claimant's rights to operate the concessions without affording Claimant basic due process rights, such as notice or an opportunity to be heard, even though there was no change in circumstances.<sup>680</sup> Likewise, *Thunderbird* is not factually analogous, as that tribunal found that Thunderbird was given

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<sup>678</sup> C-II ¶ 362; *Elaboran cinco normas legales que resuelven crisis en Puno*, Jun. 24, 2011 [C-0108].

<sup>679</sup> C-I ¶¶ 161, 178 – 179; C-II ¶¶ 363 – 364; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Memorandum from Members of the Huacullani District to the Prime Minister of Perú, MINEM and Bear Creek Mining, *Memorial Por El Desarrollo y La Inclusión*, May 15, 2013 [C-0118]; Memorandum from Members of the Huacullani District to MINEM, *Reactivación del Proyecto Santa Ana*, Oct. 27, 2013 [C-0119]; Memorandum from Members of the Huacullani District to Prime Minister of Perú, MINEM and Bear Creek Mining, *Reiterativo Por El Desarrollo y La Inclusión*, Jan. 24, 2014 [C-0120]; R. Dolzer & C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (Oxford University Press, 2008) 145 [CL-0056]; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004 ¶¶ 98 – 99 [CL-0069]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009 ¶ 181 [CL-0077]; *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/08, Award, Sept. 11, 2007 ¶ 331 [CL-0093]; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010 ¶ 264 [CL-0094]; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, Oct. 31, 2011 ¶ 357 [CL-0095]; Bullard First Report ¶ 18 [CEX-003]; Bullard Second Report ¶¶ 3, 114, 120 – 122 [CEX-005]; Flury First Report ¶¶ 66 – 68 [CEX-006]; Antúnez de Mayolo First Statement ¶ 28 [CWS-2]; Antúnez de Mayolo Second Statement ¶¶ 19, 21 [CWS-7].

<sup>680</sup> C-II ¶ 373.

a full opportunity to be heard and had made use of this opportunity. By contrast, Claimant was not informed of the Government's intent to revoke Supreme Decree 083 and it was not given an opportunity to be heard. In *Thunderbird*, the Mexican authorities' decision was 31 pages long and contained detailed reasoning. Here, Supreme Decree 032 only contains one sentence that circumstances have changed, and MINEM was unable to produce any evidence that the decision was grounded in reasoning or an assessment. Thus, comparisons with *Thunderbird* actually serve to support Claimant's position that Respondent violated the MST.<sup>681</sup>

503. The facts before this Tribunal are similar to those assessed by the *Metalclad* tribunal. Immediately after revoking Supreme Decree 083 without notice, Respondent filed a lawsuit to attempt to formally annul Claimant's concessions. These facts alone would sustain a finding of a violation of the MST. In addition, insofar as reasons were provided, Respondent's only justification for its arbitrary act was that circumstances had allegedly changed. In response to Claimant's request for documents related to the issuance of Supreme Decree 032, however, Respondent, through MINEM, responded that no such documents existed. This inability to produce records to demonstrate an analysis of the circumstances underlying the revocation of Supreme Decree 083 confirms the arbitrary nature of the Government's act, and its lack of respect for due process *vis-à-vis* Claimant. Respondent's own court, the Lima First Constitutional Court, agreed. This confirms the *ex post facto* nature of the justifications that Respondent purports to advance today, namely (1) that politically motivated protests 135 km north of Santa Ana justified the revocation of Supreme Decree 083 and (2) that Claimant allegedly acquired its investment in Santa Ana unlawfully and in bad faith. Respondent only began advancing its argument with respect to (2) after it had unlawfully expropriated Claimant's investment and, as explained, it lacks any basis in fact or law.<sup>682</sup>

504. Respondent's attempts to annul Claimant's concessions by having MINEM file a civil action against Claimant on July 5, 2011, where it is challenging the acquisition of the investment that the Government approved of with full knowledge of all relevant facts, is another manifestation of

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<sup>681</sup> *Id.* at ¶¶ 374 – 375; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Final Award, Jan. 26, 2006 ¶ 198 [CL-0073].

<sup>682</sup> C-II ¶¶ 365 – 368; Supreme Decree No. 032-2011-EM adopted Jun. 25, 2011 [C-0005]; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Letter from R. Wong, Secretary General of MEM, to E. Antúnez, Bear Creek Mining Company, Aug. 19, 2011 [C-0111]; Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, Jul. 5, 2011 [C-0112]; *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 ¶¶ 90 – 94, 101 [CL-0105]; Antúnez de Mayolo Second Statement ¶¶ 48, 49, 62 [CWS-7].

Respondent’s violation of the MST. Similar facts led the *Bilcon v. Canada* tribunal to find a violation of the MST. That tribunal held that the investor had a legitimate expectation that its Project would be assessed on the merits in accordance with the Canadian legal standard, not “community core values” – a factor not noted in the applicable law as a basis for denying the application to mine. The facts of the present case are far more egregious than those in *Bilcon*. Unlike in *Bilcon*, Claimant in this matter had no opportunity to be heard prior to the overnight revocation of its mining rights. Respondent’s arbitrary and unlawful conduct toward Claimant lacks even a pretense of FET and observance of basic due process rights, and constitutes a breach of Respondent’s MST obligations.<sup>683</sup>

505. Even if the *Neer* standard were an accurate statement of the MST, Respondent’s actions would constitute a breach thereof. Here, the Government itself is the party that mistreated the investor’s rights in violation of its national and international legal obligations. As explained above, Respondent’s actions following the expropriation – the 2011 MINEM Lawsuit – further demonstrate that it was acting in bad faith.<sup>684</sup>

#### (ii) Respondent’s Arguments

506. Even if Claimant had identified and proven the existence of customary international law rules protecting legitimate expectations and guaranteeing non-arbitrary treatment, Claimant has not proven an FET violation under the MST. In the words of *Al Tamimi v. Oman*, Respondent’s actions were in no way “egregious” or “flagrant.”<sup>685</sup> Far from “outrageous” or “shocking”, Respondent’s action with respect to Santa Ana were rational, non-discriminatory measures taken to protect public safety and

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<sup>683</sup> C-II ¶¶ 369 – 372; Draft letter Remitted by Minister J. Merino to E. Antúnez de Mayolo outlining the Government’s proposed steps to resolve Bear Creek’s situation at Santa Ana, Dec. 11, 2013 [C-0121]; Letter from E. Antúnez de Mayolo, Bear Creek, to J. Merino, Minister of Energy and Mines, and D. Figallo, Minister of Justice, Dec. 17, 2013 [C-0122]; *Gobierno busca evitar demanda millonaria de minera canadiense*, DIARIO EXPRESO, Nov. 29, 2013 [C-0123]; *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, Mar. 17, 2015 ¶¶ 7 – 25, 447 – 454 [CL-0190]; Swarthout First Statement ¶¶ 54 – 56, 58 [CWS-1]; Antúnez de Mayolo First Statement ¶¶ 23 – 33 [CWS-2]; Antúnez de Mayolo Second Statement ¶¶ 61 – 63 [CWS-7].

<sup>684</sup> C-II ¶¶ 376 – 380; *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; Judge Stephen M. Schwebel, *Is Neer Far From Equitable?*, International Arbitration Club, London (May 5, 2011) [CL-0186]; *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), 4 RIAA 60 – 61 [RLA-051].

<sup>685</sup> R-II ¶ 528; *Adel A Hamadi Al Tamini v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, Oct. 27, 2015 ¶ 390 [RLA-076].

the integrity of its regulatory regime for natural resources.<sup>686</sup> There was nothing unfair or inequitable about the measures Respondent enacted – Claimant was treated fairly and equitably and in accordance with Claimant’s legitimate expectations.<sup>687</sup>

507. Claimant correctly points out that the Tribunal’s FET analysis will hinge largely on Claimant’s legitimate expectations.<sup>688</sup> The *National Grid v. Argentina* tribunal concluded that the protection of a claimant’s legitimate expectations was subject to two qualifications: (1) an investor should not be shielded from ordinary business risk and (2) the investor’s expectations must have been reasonable and legitimate in the context in which the investment was made.<sup>689</sup> Respondent’s actions did not violate any legitimate expectation that Claimant may have had. First, Claimant’s alleged expectation that it “*would be permitted to mine*” has no reasonable foundation. Given the illegal manner with which Claimant obtained its rights in Santa Ana, Claimant had no reasonable or legitimate basis to expect Respondent to honor the investment indefinitely. Rather, it should have expected Respondent to rescind its rights once it uncovered Claimant’s scheme to circumvent Respondent’s constitutional restrictions on border zone investments. Second, Claimant had no basis to assume that its special permission to hold concession rights in Peru’s border zone was perpetual or could not be revisited under dramatically changed circumstances. Supreme Decree 083 was premised on a “*public necessity*” and Claimant should have known that, if Respondent’s national interest was threatened under changed circumstances, the Government could revoke the Decree, as it did. Third, Claimant’s alleged certainty that it would be “*permitted to mine*” ignores the ordinary business risks associated with the mining sector. Before Respondent could even consider permitting Claimant to mine, Claimant had to clear regulatory, legal, and social hurdles – the likes of which stall many mining projects in this phase of development.<sup>690</sup>

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<sup>686</sup> R-I ¶ 282.

<sup>687</sup> *Id.* at ¶ 283; R-II ¶¶ 528 – 529, 538, 546.

<sup>688</sup> R-I ¶ 284; C-I ¶¶ 177, 181.

<sup>689</sup> R-II ¶ 530; *National Grid v. Argentina*, UNCITRAL, Award, Nov. 3, 2008 ¶ 175 [CL-0081]; *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006 ¶ 130 [CL-0089]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶ 304 [CL-0091].

<sup>690</sup> R-I ¶¶ 284 – 285, 287; R-II ¶¶ 530 – 534; Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 [C-0004]; *National Grid v. Argentina*, UNCITRAL, Award, Nov. 3, 2008 ¶ 175 [CL-0081]; *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006 ¶ 130 [CL-0089]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶ 304 [CL-0091].

508. Claimant also argues that Respondent’s temporary suspension of the review of Claimant’s ESIA in May 2011 violated its legitimate expectations. It did not violate any reasonable expectation, and the legitimate expectations doctrine does not shield investors from ordinary business risks. Claimant knew or should have known that the regulatory process for mining projects is complex and prone to delay, especially where indigenous populations are involved. The ESIA review was suspended temporarily in the face of paralyzing social protests against the Santa Ana Project, out of concern that the hostile circumstances would affect the integrity of the review process. The suspension was in Claimant’s interest because a grant of the ESIA would have started a ticking clock on the Project – during a time when Claimant had no hope of obtaining the necessary social license from the communities to proceed with it.<sup>691</sup>
509. Claimant attempts to argue that the protests had nothing to do with its actual operations but were rather general, anti-mining protests. The testimony and the documents presented at the Hearing, however, show that Santa Ana was a central focus of the protests. The protests were genuine and based on the legitimate concerns of the population. Simply put: the population did not trust Claimant and was anxious about the possible impact of the Project on their lands.<sup>692</sup>
510. Respondent agrees that Claimant had a legitimate expectation that “*should any dispute regarding the Concession arise in the future, due process would be followed to resolve any such dispute in accordance with applicable laws.*” Claimant has failed to explain how this expectation was thwarted. Both the ESIA suspension and the issuance of Supreme Decree 032 were carried out in accordance with Peruvian law. Claimant “(i) pursued challenges against the government’s actions in Peruvian courts; (ii) has never alleged any impropriety in those proceedings; and (iii) is not pursuing a denial of justice claim in this arbitration”, and (iv) relies on the analysis of the Peruvian courts repeatedly in its submissions to this Tribunal. It is difficult to see how Claimant’s expectations regarding dispute resolution have been frustrated.<sup>693</sup>

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<sup>691</sup> R-I ¶¶ 286 – 287; R-II ¶¶ 535 – 536; *National Grid v. Argentina*, UNCITRAL, Award, Nov. 3, 2008 ¶ 175 [CL-0081]; Rodríguez-Mariátegui First Report ¶¶ 63, 107 *et seq.* [REX-003]; Rodríguez-Mariátegui Second Report [REX-009]; Second Witness Statement of Felipe A Ramírez Delpino (Apr. 4, 2016) (Corrected) (“Ramírez Second Statement”) ¶¶ 42 – 46 [RWS-6].

<sup>692</sup> Tr. 1855 – 1857 (R. Closing).

<sup>693</sup> R-II ¶ 537; C-II ¶ 367.

511. Respondent’s actions were not arbitrary. Claimant appears to base its claim of arbitrariness on alleged procedural shortcomings. Such claims under the MST face a high burden. According to *Cargill*, an “arbitrary” procedure breaches the MST when it constitutes an “unexpected and shocking repudiation of a policy’s very purpose”, “grossly subvert[s] a domestic law or policy; [...] or involves an utter lack of due process so as to offend judicial propriety.” While Respondent recognizes that Claimant might have appreciated advanced notice and an opportunity to be heard, that preference does not entitle Claimant to those courtesies as a matter of customary international law.<sup>694</sup>
512. The *Metalclad* award did not turn on a finding of arbitrariness. *Metalclad* is a case about legitimate expectations and focused on claimant’s expectations derived from Mexico’s assurance that the investor needed no further permits to operate its landfill. Those expectations were frustrated when, after construction was nearly complete, the local municipality denied a subsequent permit and prevented the Project from moving forward. *Metalclad* did not turn on procedural inadequacies or arbitrariness. Likewise, *Bilcon v. Canada* is about legitimate expectations and not about inadequate notice or a lack of an opportunity to be heard.<sup>695</sup>
513. Although neither *Metalclad* nor *Bilcon* is particularly relevant, it is noteworthy that each concerned public hearings, during which it would be customary for the applicants to appear, present their project, and engage in discussion. Here, however, there was no public forum that Claimant could have joined to contest the issuance of Supreme Decree 032. It is unclear what specific “due process” Claimant was denied. Claimant cannot have expected to be a participant in the discretionary, high-level deliberations at the Council of Ministers that were aimed at debating options for quelling the protests. Claimant has also provided no benchmark for the notice it was supposed to have received. Absent any legal support for its due process argument, Claimant’s arbitrariness claim cannot stand.<sup>696</sup>
514. The procedural facts of this case are similar to those examined in *Genin v. Estonia*, where respondent revoked the Estonian Innovation Bank’s license. Like Claimant here, the Estonian Innovation Bank

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<sup>694</sup> R-II ¶¶ 539 – 540; Canada-Perú FTA Art. 2202(3) and 2202 [C-0001]; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009 ¶ 296 [RLA-053].

<sup>695</sup> R-II ¶¶ 541 – 542; *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 ¶¶ 85 – 91 [CL-0105]; *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, Mar. 17, 2015 ¶¶ 447 – 454 [CL-0190]; J. Salacuse, THE LAW OF INVESTMENT TREATIES 238 [RLA-039bis].

<sup>696</sup> R-II ¶¶ 543 – 544.

received no notice of the revocation, no invitation to attend the Government session discussing the revocation, and no chance to challenge the decision prior to the revocation's issuance. That tribunal disagreed that this violated the MST. Like claimant in *Genin*, Claimant cannot prove facts sufficient to meet the elevated burden for demonstrating unfair or inequitable treatment under the MST.<sup>697</sup>

## 2. Whether Respondent Afforded Claimant Fair and Equitable Treatment Under An Autonomous Standard

### (a) The Government of Canada

515. Customary international law does not contain an obligation to protect an investor's legitimate expectations. Likewise, customary international law does not contain a general duty of transparency or a prohibition against nationality-based discrimination.<sup>698</sup>

516. In addition, “[d]ecisions interpreting an autonomous fair and equitable treatment standard, in other words, one that is not qualified by customary international law, do not create or reflect customary international law. As the tribunal in *Glamis Gold v. United States* held, arbitral tribunals applying ‘autonomous standard[s] provide[ ] no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom.’ Such awards are therefore not relevant to ascertaining the content of the customary international law minimum standard of treatment for the purposes of Article 805 of the FTA because they apply a different standard based on the treaty practice of States that have extended investor protection beyond what is required by customary international law.”<sup>699</sup>

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<sup>697</sup> R-I ¶¶ 288 – 291; R-II ¶ 545; *Alex Genin, Eastern Credit Limited, Inc. as A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, Jun. 25, 2001 ¶¶ 1 – 3, 316 – 317, 363 – 365, 372 – 373 [RLA-054].

<sup>698</sup> Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement (Jun. 9, 2016) ¶ 12; *Windstream Energy, LLC v. Canada* (UNCITRAL) Canada's Reply to the 1128 Submissions of the United States and Mexico, 29 Jan. 2016, ¶¶ 33-36; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 Sept. 2009, ¶ 294 [RLA-053]; *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 Mar. 2010, ¶ 231; *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug. 2005, Part IV, Chapter C, ¶¶ 14-16.

<sup>699</sup> Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement (Jun. 9, 2016) ¶ 11; *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 Jun. 2009, ¶ 608 [RLA-046].

(b) Claimant's Arguments

517. Since Respondent's actions toward Claimant have been so outrageous, the Tribunal need not reach the question of whether Claimant is entitled to protection under the more general and less stringent form of FET, known as the "autonomous" FET standard. Apart from the MST that Respondent is obliged to accord Claimant under the FTA, Respondent is obliged to accord Claimant autonomous FET protections by operation of the MFN Clause of the FTA, contained in Article 804. Respondent has committed to treating Canadian investors and investments in a manner no less favorable than investors and investments from third States. In at least twenty-three other investment treaties to which it is a party, Respondent accords investors FET available under the autonomous standard – *i.e.*, without any treaty-imposed equivalence of the protection the MST. Claimant is entitled to import those protections through the MFN Clause. Accordingly, through Article 804 of the FTA, Claimant imports the FET standard that is provided in Art 2(2) of the Peru-United Kingdom BIT: "*Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment.*"<sup>700</sup>

518. While the Parties agree that the MFN Clause may be used to import more favorable protections, the Parties disagree as to the *corpus* of treaties from which Claimant may import such protections. Contrary to Respondent's arguments, the terms of the FTA do not prevent the application of the MFN Clause to pre-existing treaties. Accordingly, Claimant may import such more favorable substantive protections from pre-existing treaties, including the autonomous FET.<sup>701</sup>

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<sup>700</sup> C-I ¶¶ 154 – 156; C-II ¶¶ 381 – 383; Canada-Perú FTA Art. 804 [C-0001]; R. Dolzer & C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (Oxford University Press, 2008) 211 [CL-0056]; *Sr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, Jun. 19, 2009 ¶ 196 [CL-0074]; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, Dec. 15, 2014 ¶ 555 [CL-0075]; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010 ¶ 125 n. 16 [CL-0076]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009 ¶ 167 [CL-0077]; *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, Jul. 29, 2008 ¶ 575 [CL-0078]; Peru – Bilateral Investment Treaties [CL-0079].

<sup>701</sup> C-II ¶ 383; *Sr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, Jun. 19, 2009 ¶ 196 [CL-0074]; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, Dec. 15, 2014 ¶ 555 [CL-0075]; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010 ¶ 125 n. 16 [CL-0076]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009 ¶ 167 [CL-0077]; *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, Jul. 29, 2008 ¶ 575 [CL-0078].

519. The starting point of the analysis is the text of the MFN Clause. Interpreting this text in good faith in accordance with the ordinary meaning to be given to its terms in their context in light of their object and purpose, as required by Article 31(1) of the VCLT, it is apparent that Article 804 permits covered investors and investments to benefit from more favorable treatment that is afforded to investors and investments from other States.<sup>702</sup> The express limitation to the MFN Clause in the corresponding Annex 804.1 clarifies only that the MFN treatment does not extend to dispute resolution mechanisms. The clarification is silent about MFN treatment not encompassing substantive standards of treatment, such as the FET standard. As such, no limit is imposed.<sup>703</sup>
520. Respondent’s argument that it “*reserved the right to accord investors from Canada ‘differential treatment’*”, such that the MFN Clause cannot be used to import more favorable treatment standards from pre-existing treaties hinges on Respondent’s “*Peru’s First Reservation.*” Respondent, however, misrepresents this reservation’s reach and its role in the FTA. The reservation to the MFN Clause in Article 808 concern only existing and future non-conforming measures that either Canada or Peru may have, may maintain, or may adopt. The text of Article 808 does not contain a reservation or other limitation to the MFN Clause as it concerns important more favorable standards of treatment. As Respondent understands, the terms “*measure*” and “*treatment*” are conceptually distinct. In the Canada-Peru BIT, Respondent’s reservations under the MFN Clause therein contained clearly referred to the standards of treatment contained in pre-existing international agreements. This demonstrates that the two Contracting States knew how to use clear and unequivocal language to limit the scope of the MFN Clause as it applies to more favorable “*treatment*”, as opposed to “*measures.*” The deliberate absence of such language in the FTA confirms that no such limitation exists. Accordingly, there is nothing in the FTA that prevents Claimant from relying on the MFN Clause to avail itself of more favorable standards of treatment afforded to other investors and investments in pre-existing treaties.<sup>704</sup>

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<sup>702</sup> C-II ¶¶ 384 – 385; Canada-Perú FTA [C-0001]; Vienna Convention on the Law of Treaties, May 23, 1969 Art. 31(1), (2) [CL-0039].

<sup>703</sup> C-II ¶¶ 386 – 387; Canada-Perú FTA Annex 804.1 [C-0001].

<sup>704</sup> C-II ¶¶ 388 – 392; Canada-Perú FTA Annex 808(1), (2) [C-0001]; Agreement Between Canada and The Republic of Peru for the Promotion and Protection of Investments (“Canada-Peru BIT”) [C-0247]; Canada-Peru Free Trade Agreement – Annex I: Reservations for Existing Measures and Liberalization Commitments (Sept. 11, 2013) [CL-0191]; Canada-Peru Free Trade Agreement – Annex I: Schedule of Peru (Jul. 31, 2015 and Schedule of Canada (Sept. 11, 2013) [CL-0192]; Canada-Peru Free Trade Agreement – Annex II: Reservations for Future Measures

521. Because the MFN Clause extends to standards of treatment, Claimant may use the MFN Clause to import the autonomous FET that is not linked to the MST. The autonomous FET requires that Respondent (1) protect Claimant’s legitimate expectations, (2) treat Claimant’s investment transparently, (3) guarantee Claimant procedural propriety and due process, and (4) not deny justice to Claimant or its investment. The autonomous FET standard also protects Claimant from State conduct that (1) falls short of good faith, (2) breaches the State’s contractual obligations, (3) is disproportionate, (4) constitutes coercion or harassment, or (5) violates the State’s obligation to “*do*

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(Sept. 11, 2013) [**CL-0193**]; Canada-Peru Free Trade Agreement – Annex II: Schedule of Peru (Dated Sept. 11, 2013 and Schedule of Canada (Sept. 29, 2013) [**CL-0194**].

*no harm.*”<sup>705</sup> The FET is inherently flexible and applicable to both acts and omissions.<sup>706</sup>

<sup>705</sup> C-I ¶¶ 157 – 158; C-II ¶¶ 393 – 395; *Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 ¶ 290 [CL-0031]; *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, Mar. 3, 2010 ¶ 440 [CL-0032]; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, Apr. 12, 2002 ¶ 143 [CL-0037]; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶¶ 154, 162 [CL-0040]; C. Dugan & D. Wallace et al., *INVESTOR-STATE ARBITRATION* (Oxford University Press, 2008) 523 [CL-0041]; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶ 570, 572 [CL-0063]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009 ¶ 178 [CL-0077]; *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, Jul. 29, 2008 ¶ 609 [CL-0078]; *Anatolie Stati et al. v. Kazakhstan*, SCC Arbitration No. 116/2010, Award, Dec. 19, 2013 ¶ 943 [CL-0080]; *National Grid v. Argentina*, UNCITRAL, Award, Nov. 3, 2008 ¶ 168 [CL-0081]; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, Jul. 14, 2006 ¶ 360 [CL-0082]; *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 ¶ 113 [CL-0083]; *Swisslion v. FYR Macedonia*, ICSID Case No. ARB/09/16, Award, Jul. 6, 2012 ¶ 273 [CL-0084]; *Waguih Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, Jun. 1, 2009 ¶ 450 – 455 [CL-0085]; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, Dec. 1, 2011 ¶¶ 314, 316 [CL-0086]; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, Nov. 8, 2010 ¶ 420 [CL-0087]; *PSEG Global v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007 ¶ 240 [CL-0088]; *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006 ¶¶ 127, 128 [CL-0089]; *Eureko v. Poland, Ad hoc*, Partial Award, Aug. 19, 2005 ¶ 235 [CL-0090]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶ 308 [CL-0091]; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010 ¶ 284 [CL-0094]; *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, Dec. 27, 2010 ¶ 338 [CL-0096]; *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, Nov. 12, 2010 ¶ 301 [CL-0101]; *Bosh International et al. v. Ukraine*, ICSID Case No. ARB/08/11, Award, Oct. 25, 2012 ¶ 212 [CL-0106]; *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, Jul. 24, 2008 ¶ 602 [CL-0107]; *Jan Oostergetel et al. v. Slovak Republic*, UNCITRAL, Final Award, Apr. 23, 2012 ¶ 227 [CL-0110]; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, Mar. 10, 2015 ¶ 523 [CL-0111]; *Flughafen Zürich A.G. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, Nov. 18, 2014 ¶ 376 [CL-0112]; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013 ¶ 438 [CL-0113]; *Jan de Nul N.V. et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, Nov. 6, 2008 ¶ 188 [CL-0114]; W. Michael Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, ICSID REV., Vol. 30, No. 3 (2015) pp. 616-634 [CL-0185]; UNCTAD, *Fair and Equitable Treatment*, UNCTAD/ITE/IIT/11 (Vol. III) (1999) [CL-0195]; Ioana Tudor, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 153 (2008) [CL-0196]; *SGS Société Générale De Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, Feb. 12, 2010 ¶ 146 [CL-0197]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012 ¶¶ 404 – 454 [CL-0198]; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, Oct. 31, 2012 [CL-0199]; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Wolters Kluwer Law & Business 2009) [CL-0200]; *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, Feb. 6, 2008 [CL-0201]; *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, Jul. 1, 2004 ¶ 185 [RLA-005].

<sup>706</sup> C-I ¶ 158; *Waguih Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, Jun. 1, 2009 ¶ 450 [CL-0085].

522. The FET standard encompasses the legitimate expectations of investors regarding the key terms of their investment and the stability of the host State’s legal and business framework. The case *Tecmed v. Mexico* is considered to be the seminal decision on FET and *Saluka v. Czech Republic* found that legitimate expectations forms the dominant element of FET. Investment case law identifies several situations where host State conduct gives rise to an investor’s legitimate expectations. An example of where tribunals agree that an expectation is “legitimate” where the host State has assumed a specific legal obligation for the future. The *Suez v. Argentina* tribunal emphasized the importance of the investor’s reliance on the stability of the host State’s business or legal environment as an element to legitimate expectations. Once legitimate expectations are found to exist, host State conduct to the contrary constitutes a breach of the FET. Bad faith on the part of the host State, however, is not required. Recently, the *Gold Reserve v. Venezuela* tribunal held that changes in a government’s mining sector policy did not excuse conduct in violation of the FET – rather, politically-driven policy changes violate the FET. Thus, it cannot be disputed that State conduct violates the FET if it eviscerates the arrangements in reliance upon which the foreign investor was induced to invest.<sup>707</sup>

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<sup>707</sup> C-I ¶¶ 159 – 166; *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, Mar. 3, 2010 ¶ 440 [CL-0032]; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 154 [CL-0040]; R. Dolzer & C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (Oxford University Press, 2008) 145 [CL-0056]; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶¶ 570, 572, 607, 609 [CL-0063]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009 ¶ 181 [CL-0077]; *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, Jul. 29, 2008 ¶ 609 [CL-0078]; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, Dec. 1, 2011 ¶ 316 [CL-0086]; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, Nov. 8, 2010 ¶ 420 [CL-0087]; *PSEG Global v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007 ¶ 240 [CL-0088]; *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006 ¶¶ 125, 127 [CL-0089]; *Eureko v. Poland, Ad hoc*, Partial Award, Aug. 19, 2005 ¶ 235 [CL-0090]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶¶ 301 – 302, 329 [CL-0091]; *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, Nov. 30, 2012 ¶¶ 7.75, 7.78 [CL-0092]; *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/08, Award, Sept. 11, 2007 ¶ 331 [CL-0093]; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010 ¶ 264 [CL-0094]; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, Oct. 31, 2011 ¶¶ 357, 375 [CL-0095]; *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, Dec. 27, 2010 ¶ 117 [CL-0096]; Rudolf Dolzer, *Fair and Equitable Treatment: Today’s Contours*, 12 SANTA CLARA J. INT’L L. at 17, 24 – 25 [CL-0097]; *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12, Award, Jun. 7, 2012 ¶ 159 [CL-0098]; *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 18, 2008 ¶ 340 [CL-0099]; *Micula v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013 ¶ 528 [CL-0100]; *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, Nov. 12, 2010 ¶ 285 [CL-0101]; *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, Jul. 30, 2010 ¶¶ 207 – 208 [CL-0102]; *CME v. Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001 ¶ 611 [CL-0103]; *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, Jul.

523. The FET also requires Respondent to treat investments transparently – *i.e.*, without administrative ambiguity or opacity. Transparency is often linked to the investor’s legitimate expectations, and it also means that the legal framework for the investor’s operations must be readily apparent.<sup>708</sup>
524. The FET also requires Respondent to act in good faith. The principle of good faith is recognized as a general principle of law under Article 38 of the Statute of the International Court of Justice. Numerous tribunals have confirmed that it is a fundamental aspect of the FET standard. Bad faith, however, is not required for a finding of a breach of the FET standard.<sup>709</sup>
525. The FET includes the obligation not to deny justice. For a denial of justice claim under the FET standard to be successful, a claimant must prove that the act(s) performed by a State organ in relation to the administration of justice are as improper and discreditable as to constitute unfair and inequitable

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1, 2004 ¶¶ 180 – 192 [RLA-005].¶

<sup>708</sup> C-I ¶¶ 167 – 169; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 154 [CL-0040]; C. Dugan & D. Wallace et al., *INVESTOR-STATE ARBITRATION* (Oxford University Press, 2008) 519 [CL-0041]; R. Dolzer & C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (Oxford University Press, 2008) 149 [CL-0056]; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶ 570 [CL-0063]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009 ¶ 178 [CL-0077]; *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, Jul. 29, 2008 ¶ 609 [CL-0078]; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, Dec. 1, 2011 ¶ 314 [CL-0086]; *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006 ¶ 128 [CL-0089]; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010 ¶ 284 [CL-0094]; *Micula v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013 ¶¶ 864, 869 – 870 [CL-0100]; *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, Nov. 12, 2010 ¶ 285 [CL-0101]; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶ 178 [CL-0104]; *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 ¶ 76 [CL-0105]; *Bosh International et al. v. Ukraine*, ICSID Case No. ARB/08/11, Award, Oct. 25, 2012 ¶ 212 [CL-0106]; *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, Jul. 24, 2008 ¶ 602 [CL-0107].

<sup>709</sup> C-I ¶¶ 170 – 172; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, Jul. 14, 2006 ¶ 372 [CL-0082]; *Waguih Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, Jun. 1, 2009 ¶ 450 [CL-0085]; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, Dec. 1, 2011 ¶ 314 [CL-0086]; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, Oct. 31, 2011 ¶ 357 [CL-0095]; Rudolf Dolzer, *Fair and Equitable Treatment: Today’s Contours*, 12 SANTA CLARA J. INT’L L. at 16 – 17 [CL-0097]; *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, Nov. 12, 2010 ¶ 301 [CL-0101]; *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, Jul. 24, 2008 ¶ 602 [CL-0107]; Statute of the International Court of Justice, Art. 38(1) [CL-0108]; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, Sept. 28, 2007 ¶¶ 298 – 299 [CL-0109]; *Jan Oostergetel et al. v. Slovak Republic*, UNCITRAL, Final Award, Apr. 23, 2012 ¶ 227 [CL-0110].

treatment. A claimant must also show that it has exhausted local remedies, unless there is no effective remedy or no reasonable prospect of success.<sup>710</sup>

526. Claimant states that Respondent breached the FET standard (and, so far as they overlap, the MST) by:

- *Arbitrarily and unwarrantedly suspending Claimant's ESIA process at Santa Ana on May 30, 2011;*
- *Failing to provide Claimant an opportunity to appeal the Government's decision to suspend Bear Creek's ESIA process;*
- *Non-transparently revoking Supreme Decree 083 overnight through its issuance of Supreme Decree 032, without giving Bear Creek notice or an opportunity to be heard;*
- *Unjustifiably expropriating Bear Creek's investment through the issuance of Supreme Decree 032;*
- *Failing to provide Claimant notice or an opportunity to be heard prior to the Government's expropriation of Bear Creek's investment through Supreme Decree 032;*
- *Failing to provide Claimant an opportunity to appeal the Government's decision to expropriate Bear Creek's investment;*
- *Failing to provide any meaningful reasoning underlying its unilateral and unexpected revocation of Supreme Decree 083, which came after Claimant had already spent three-and-a-half years developing and investing millions of US dollars in the Santa Ana Project in reliance on Supreme Decree 083 and the Government's representations and encouragements*

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<sup>710</sup> C-I ¶¶ 173 – 175; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002 ¶ 127 [CL-0068]; *Waguih Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, Jun. 1, 2009 ¶¶ 454 – 455 [CL-0085]; *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 18, 2008 ¶¶ 399 – 400 [CL-0099]; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, Mar. 10, 2015 ¶¶ 523, 526 – 527 [CL-0111]; *Flughafen Zürich A.G. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, Nov. 18, 2014 ¶ 376 [CL-0112]; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013 ¶¶ 438, 445 [CL-0113]; *Jan de Nul N.V. et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, Nov. 6, 2008 ¶¶ 188, 258 [CL-0114]; Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(4) INT'L & COMP. L. QLY 867 at 3 – 4 [CL-0115]; *Robert Azinian et al. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, Nov. 1, 1999 ¶¶ 102 – 103 [CL-0116]; *Iberdrola Energia S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, Aug. 17, 2012 ¶ 444 [CL-0117]; *The Loewen Group et al. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, Jun. 26, 2003 ¶ 132 [CL-0118]; Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (Cambridge University Press, 2005) 111 [CL-0119]; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, Jun. 30, 2009 ¶ 182 [CL-0120].

- *Frustrating Claimant’s legitimate expectation that it would own and operate the Santa Ana Project;*
- *Expropriating Claimant’s investment without paying Claimant any compensation; and*
- *Unjustifiably attempting to annul Bear Creek’s concessions by having MINEM file a civil action against Bear Creek.*<sup>711</sup>

527. In addition, Respondent’s actions toward Claimant have violated Respondent’s obligation under the autonomous FET standard to act in good faith and to do no harm. “*Good faith*” is understood as the Government’s obligation to “*act in a consistent manner free from ambiguity and totally transparently.*” As explained, Respondent’s arbitrary expropriation of Claimant’s investment without due process and in full knowledge that it was acting unlawfully breaches this standard. Similarly, Respondent’s attempt to avoid answering for its unlawful actions by baselessly accusing Claimant of acquiring its investments in an irregular manner and attempting to annul the concessions through MINEM’s civil action amount to bad faith. Claimant faced a similar situation to that in the *Bayindir* case – the supposed justifications that Respondent has offered for its unlawful conduct only mask the true motivation – the Government’s political interest in expropriating Claimant’s investment. Such bad faith is a clear violation of the FET.<sup>712</sup>

528. Respondent also breached the requirement under the autonomous FET to “*do no harm*”, defined in *Vivendi II*. It is indisputable that Respondent attempted to “*disparage and undercut a concession*” by issuing Supreme Decree 032 under the conditions listed in *Vivendi II*.<sup>713</sup> Thus, through its deliberate acts and omissions, Respondent manifestly failed to treat Claimant fairly and equitably, resulting in the evisceration of Claimant’s investment.<sup>714</sup>

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<sup>711</sup> C-I ¶¶ 161, 176 – 180; C-II ¶¶ 395 – 396; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (UPDATE submitted with C-III) Annex VI [C-0017].

<sup>712</sup> C-II ¶¶ 397 – 399; *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTERIO DE ENERGÍA Y MINAS, May 26, 2011 [C-0095]; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 154 [CL-0040]; Rudolf Dolzer and Christopher Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (Oxford University Press, 2nd ed. 2012) 156 [CL-0168]; *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, Nov. 14, 2005 ¶¶ 242 – 243, 250 [CL-0202].

<sup>713</sup> C-II ¶ 400; *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, Nov. 14, 2005 ¶ 250 [CL-0202].

<sup>714</sup> C-II ¶ 401.

(c) **Respondent's Arguments**

529. Claimant cannot import an autonomous FET standard because (i) the FTA excludes pre-existing treaties from the scope of its MFN Clause and (ii) importing an autonomous FET standard would conflict with the express will of the Contracting Parties. Claimant's shift in its emphasis and arguments demonstrates that it recognizes that the MST, and not an autonomous FET, applies to this dispute.<sup>715</sup>
530. Autonomous FET standards only appear in treaties that Respondent signed prior to the FTA, and Respondent exempted pre-existing treaty obligations from the scope of FTA's MFN Clause. Through its reservation, Respondent excludes "*measure[s] that accord[] differential treatment*" under (2) "*any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of [the FTA].*" The FTA defines "*measures*" as "*any law, regulation, procedure, requirement or practice.*" Through its reservation, Respondent reserved the right to accord investors from Canada "*differential treatment*" as compared to investors from other countries who are subject to pre-existing treaties. Claimant's semantic argument regarding the use of the term "*treatment*" has highlighted a distinction without a difference. Any treatment that Respondent might provide is necessarily directly tied to a "*measure*" – i.e., a "*law, regulation, procedure, requirement or practice*" that accords treatment. Respondent specifically carved out this type of "*measure that accords treatment*" from the FTA's MFN Clause. Accordingly, Respondent's reservation excludes the requirement to provide or the practice of providing an autonomous standard of FET under a pre-existing BIT. Claimant cannot leverage the MFN Clause to import an autonomous FET standard from a treaty that pre-dates the 2009 FTA.<sup>716</sup>
531. Importing an autonomous FET standard would conflict with the will of the Contracting Parties. When the Parties negotiated the FTA, they specifically and purposefully agreed in Article 805 to limit their FET obligations to the MST, and this choice was consistent with a broader change in Respondent's treaty practice that began after 2000. If successful, Claimant's argument would render meaningless a clear and deliberate shift in Respondent's treaty practice. Claimant has not attempted to challenge

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<sup>715</sup> R-II ¶¶ 547 – 548.

<sup>716</sup> *Id.* at ¶¶ 549 – 551; R-I ¶¶ 292 – 297; Canada-Perú FTA Art. 804 [C-0001]; Annex II to Peru-Canada FTA, Peru's First Reservation [R-056]; UNCTAD List of Bilateral Investment Treaties to which Peru is a Party [R-088]; Free Trade Agreement Between Canada and the Republic of Perú (Excerpts) [R-390].

the fact that the Contracting Parties intended, as stated in Article 805, to guarantee FET only up to the MST under international law. This Tribunal must enforce the will of the Contracting Parties and reject Claimant's attempt to import a more favorable standard.<sup>717</sup>

532. Claimant's position is at odds with statements the Canadian Government issued during its FTA negotiations with Respondent. Canada was clear that the investment chapter in the FTA would be consistent with the BIT. Respondent understands that both the BIT and the FTA exclude the importation of more favorable standards from pre-existing treaties, even though each provision uses different language. The two texts are consistent with one another – it would be highly unlikely that the treaty parties would fundamentally reverse their positions in the 11 months in between signing the BIT and the later FTA. Furthermore, it would also be inconsistent with the practice of most other States at the time that previous agreements would not be excluded, in that BIT and FTA parties typically work to tighten limitations on MFN Clauses, not loosen them.<sup>718</sup> Canada also shares Respondent's understanding that an MFN Clause cannot alter a treaty's explicit FET standard. This is clear from Canada's interpretation of its FET obligations under NAFTA. By invoking the MST, Canada and its NAFTA Co-signatories clarified that the FET standard in NAFTA is equivalent to the FET standard in the FTA.<sup>719</sup> Later, Ms. Kinnear, then of the Canadian Government's Trade Law Division, confirmed that a claimant cannot invoke NAFTA's MFN Clause to circumvent the parties' express limitation of their FET obligations to the MST. Canada made its position clear: once contracting parties define the scope of a treaty's FET protection, a claimant cannot expand those protections by invoking an MFN Clause. This Tribunal must give effect to this interpretation and reject Claimant's attempt to import an autonomous FET standard.<sup>720</sup>

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<sup>717</sup> R-I ¶¶ 298 – 301; R-II ¶¶ 559 – 562; UNCTAD List of Bilateral Investment Treaties to which Peru is a Party [R-088]; NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, Art. B(3) [R-131]; Letter from Meg Kinnear, General Counsel, Trade Law Division, Canada, to *Pope & Talbot* Tribunal [R-132].

<sup>718</sup> R-I ¶ 295; R-II ¶¶ 552 – 558; Canada-Peru FTA Art. 804 [C-0001]; Agreement Between Canada and The Republic of Peru for the Promotion and Protection of Investments (“Canada-Peru BIT”) Art. 9(3) and Annex III(1) [C-0247]; Annex II to Peru-Canada FTA, Peru's First Reservation [R-056]; An FTA with the Andean Community countries of Colombia and Peru: Qualitative Economic Analysis, Jun. 2007 [R-298]; Canada – Andean Community Free Trade Negotiations, Initial Environmental Assessment Report, Jan. 2008 [R-299]; Free Trade Agreement Between Canada and the Republic of Peru (Excerpts) Art. 105 [R-390].

<sup>719</sup> R-I ¶¶ 301 – 302; NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, Art. B(3) [R-131].

<sup>720</sup> R-I ¶¶ 303 – 304; Letter from Meg Kinnear, General Counsel, Trade Law Division, Canada, to *Pope & Talbot*

### 3. The Tribunal's Reasoning

533. The Tribunal has found above that Supreme Decree 032 constituted an unlawful indirect expropriation. Therefore, there is no need to examine whether it also constituted a breach of a duty to afford Claimant fair and equitable treatment. The Parties have not presented arguments related to the legal consequences of such a finding, and such a finding indeed would not change or add to those that follow from an unlawful indirect expropriation.

#### C. WHETHER RESPONDENT AFFORDED CLAIMANT FULL PROTECTION AND SECURITY (“FPS”)

534. The sections of the FTA that are referenced by the Parties are reproduced here for reference and convenience and without prejudice to their meaning or applicability:

##### *Article 804<sup>2</sup>: Most-Favoured-Nation Treatment*

1. *Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.*
2. *Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.*
3. *For greater certainty, the treatment accorded by a Party under this Article means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a non-Party.*

*[Footnote 2: Article 804 shall be interpreted in accordance with Annex 804.1]*

##### *Article 805: Minimum Standard of Treatment*

1. *Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.*
2. *The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*

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Tribunal [R-132].

3. *A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*

## 1. Claimant's Arguments

535. The MFN Clause contained in Article 804 of the FTA permits Claimant to benefit from other substantive standards of treatment that Respondent offers investors under other international treaties to which it is a party. Respondent has entered into at least seven BITs where it promises to afford covered investors and investments full protection and security (“FPS”) – the standalone standard of treatment that is not linked to the customary international law MST. Through Article 804 of the FTA, Claimant is entitled to the FPS standard provided in Article 2(2) of the Peru-United Kingdom BIT: “*Investments of nationals or companies in each Contracting Party [...] shall enjoy full protection and security in the territory of the other Contracting Party.*”<sup>721</sup>
536. FPS requires Respondent to take every reasonable measure necessary to protect and ensure the legal and physical security of the investments made by a protected investor in its territory. FPS protects investors and their investments from physical threats, as well as from unjustified administrative and legal action taken by a government that injure the legal rights of the investor or investment. The *Siemens v. Argentina* tribunal defined legal security as “*the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.*” While the FPS imposes an obligation of vigilance and due diligence upon the government, there is no requirement to show malice or negligence to establish a breach of the FPS.<sup>722</sup>

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<sup>721</sup> C-I ¶¶ 154 – 155, 182 – 183; C-II ¶ 402; Canada-Perú FTA [C-0001]; Peru – Bilateral Investment Treaties: (Bilateral investment treaties to which Peru is a party and that grant full protection and security: Peru-Czech Republic, Art. 2(2); Peru-Denmark, Art. 3(1); Peru-France, Art. 5(1); Peru-Germany, Art. 4(1); Peru-Malaysia, Art. 2(2); Peru-Netherlands, Art. 3(2); and Peru-United Kingdom, Art. 2(2)) [CL-0079]; Treaty Between The United States of America And The Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment [CL-0121].

<sup>722</sup> C-I ¶ 186, C-II ¶¶ 402 – 404; *Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 ¶ 303 [CL-0031]; *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, Jun. 27, 1990, 30 I.L.M. 580, (1991) ¶ 77 [CL-0036]; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, Jul. 14, 2006 ¶¶ 406 – 408 [CL-0082]; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, Dec. 1, 2011 ¶ 321 [CL-0086]; *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, Nov. 12, 2010 ¶ 263 [CL-0101]; *CME v. Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001 ¶ 613 [CL-0103]; *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, Jul. 24, 2008 ¶¶ 729 – 730 [CL-0107]; *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989 ¶¶ 109 -111 [CL-0122]; *Am. Mfg. & Trading, Inc.*

537. By declaring the Santa Ana Project a public necessity and enacting Supreme Decree 083, Respondent agreed to provide Claimant’s investment the legal security with which a Peruvian Supreme Decree is imbued. As Prof. Bullard explains, allowing the Government to change its decision on a public necessity declaration on reasons of mere political convenience would contravene the principle of legal security. Respondent breached the FPS when it expropriated Claimant’s investment by enacting Supreme Decree 032.<sup>723</sup>
538. While Respondent has the power to revoke a previously issued Supreme Decree, it must do so in accordance with Peruvian law. As Prof. Bullard explains, such a limitation to property rights must respect the grounds set forth in Article 203.2 of Law 27444 and must not be in response to the authorities’ reasons of opportunity, merit, or convenience. As Prof. Bullard and the Lima First Constitutional Court have confirmed, there is no reasonable motive for Supreme Decree 032: Claimant’s rights have been violated by this “*clearly arbitrary act; all the more so, because upon its issuance, the Claimant was not provided with the opportunity to accredit that the circumstances relating to its assumed obligations had not been neglected.*”<sup>724</sup> Even assuming for the sake of argument that Respondent had a valid reason to revoke Supreme Decree 083, this arbitrary revocation through unlawful processes is not a “*reasonable measure of prevention [that] a well-administered government could be expected to exercise under similar circumstances*”, as required by the FPS standard.<sup>725</sup> Respondent’s attempt to annul Claimant’s concessions through MINEM’s 2011 civil action is another illustration of its violation of the FPS standard.<sup>726</sup>

## 2. Respondent’s Arguments

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*v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, Feb. 21, 1997 ¶¶ 6.05 – 6.08 [RLA-056].

<sup>723</sup> C-I ¶¶ 177, 187; C-II ¶ 405; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Bullard Second Report ¶¶ 163 – 165 [CEX-005].

<sup>724</sup> C-II ¶ 407; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Bullard First Report ¶¶ 124(b) [CEX-003].

<sup>725</sup> C-I ¶¶ 177, 187; C-II ¶¶ 406 – 408; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, Jun. 27, 1990, 30 I.L.M. 580, (1991) ¶ 77 [CL-0036].

<sup>726</sup> C-I ¶¶ 177, 187; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006].

539. Claimant's FPS claim is baseless because (i) Claimant cannot use the FTA's MFN Clause to import a more favorable, autonomous FPS standard and (ii) the FTA's FPS provision does not guarantee legal security.<sup>727</sup>
540. For the same reasons as provided in Respondent's arguments concerning the FET, Claimant cannot import an autonomous FPS standard because the FTA excludes pre-existing obligations from the scope of its MFN Clause. Each of the agreements referenced by Claimant was signed and entered into force before the FTA went into force on August 1, 2009. The 10 investment agreements that Respondent signed after the FTA entered into force do not help Claimant because each agreement, like Article 805 of the FTA, limits FPS to the MST.<sup>728</sup>
541. To assert a breach of the MST for FPS, Claimant must identify and substantiate a rule of customary international law that Respondent allegedly violated, demonstrating (i) a concordant practice of a number of States acquiesced in by others and (ii) a conception that the practice is required by or consistent with prevailing law (*opinio juris*). Claimant has failed to make such a showing and has not cited a single case analyzing the FPS under the MST. As Claimant has failed to meet its burden, its claim fails.<sup>729</sup>

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<sup>727</sup> R-I ¶ 306; R-II ¶ 564.

<sup>728</sup> R-I ¶¶ 307 – 308; R-II ¶¶ 565 – 566; Annex II to Peru-Canada FTA, Peru's First Reservation [R-056]; UNCTAD List of Bilateral Investment Treaties to which Peru is a Party [R-088]; Free Trade Agreement between Peru and the European Free Trade Association States, signed on Jul. 14, 2010 [R-090]; Free Trade Agreement Between Peru and Korea, signed on Nov. 14, 2010, Chapter 9 Art. 9.5 [R-092]; Free Trade Agreement Between Peru and Mexico, signed on Apr. 6, 2011, Chapter 11 Art. 11(6) [R-101]; Free Trade Agreement Between Peru and Costa Rica, signed on May 21, 2011, Chapter 12 Art. 12.4 [R-125]; Free Trade Agreement Between Peru and Panama, signed on May 25, 2011, Chapter 12 Art. 12.4 [R-126]; Free Trade Agreement Between Peru and Japan, signed on May 31, 2011 [R-127]; Free Trade Agreement Between Peru and Guatemala, signed on Jun. 12, 2011, Chapter 12 Art. 12.4 [R-128]; Free Trade Agreement Between Peru, Colombia and the EU, signed on Jun. 26, 2012 [R-129]; Additional Protocol to the Pacific Alliance Framework Agreement, signed on Feb. 10, 2014, Chapter 10 Art. 10.6 [R-130].

<sup>729</sup> R-I ¶¶ 309 – 312; R-II ¶¶ 567 – 570; Canada-Peru FTA Art. 805(1) [C-0001]; *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, Jun. 27, 1990, 30 I.L.M. 580, (1991) ¶¶ 67 – 77 [CL-0036]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, Jun. 8, 2009 ¶ 602 [RLA-046]; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* (Merits), I.C.J. REP. 14 (1986) ¶ 207 [RLA-055]; *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, Feb. 21, 1997 ¶ 6.06 [RLA-056]; *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (Judgment), Aug. 27, 1952 [RLA-058].

542. It is by no means clear that an autonomous FPS standard would embrace Claimant’s claims of “*legal security*” against government changes in the application of the law, even if Claimant could import one. Although some tribunals have considered such an expansion of the FPS, many – including *Gold Reserve* and *Suez v. Argentina* – have rejected such innovation, finding instead that the FPS relates to physical harm. Claimant has not alleged that Respondent failed to protect the physical integrity of its Peruvian assets and, accordingly, the FPS claim must fail.<sup>730</sup>

543. Even if the Tribunal were to take the novel step of finding a customary international law rule guaranteeing legal security, it would not find a FPS violation, as Claimant has not been deprived of legal security. Supreme Decree 032 was a reflection of the same broad discretionary authority under which Supreme Decree 083 was issued, and Claimant had no claim to “*security*” under Peruvian law that a discretionary determination could never be revisited. What’s more, Claimant acquired its alleged rights to the Santa Ana concessions illegally. Respondent does not have any obligation to provide legal security to unlawful investments.<sup>731</sup>

### **3. The Tribunal’s Reasoning**

544. The Tribunal has found above that Supreme Decree 032 constituted an unlawful indirect expropriation. Therefore, there is no need to examine whether it also constituted a breach of a duty to afford Claimant full protection and security. The Parties have not presented arguments related to the legal consequences of such finding, and such a finding indeed would not change or add to those that follow from an unlawful indirect expropriation.

#### **D. WHETHER RESPONDENT COMPLIED WITH ANY DUTY TO AFFORD CLAIMANT PROTECTION AGAINST UNREASONABLE OR DISCRIMINATORY MEASURES (“UDM”)**

545. The sections of the FTA that are referenced by the Parties are reproduced here for reference and convenience and without prejudice to their meaning or applicability:

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<sup>730</sup> R-I ¶ 312; R-II ¶¶ 571 – 572; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶ 622 [CL-0063]; *PSEG Global v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007 ¶ 258 [CL-0088]; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ¶¶ 483 – 484 [CL-0091]; *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, Jul. 30, 2010 ¶ 167 [CL-0102].

<sup>731</sup> R-I ¶ 313; R-II ¶ 573.

### **Article 804<sup>2</sup>: Most-Favoured-Nation Treatment**

1. *Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.*
2. *Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.*
3. *For greater certainty, the treatment accorded by a Party under this Article means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a non-Party.*

*[Footnote 2: Article 804 shall be interpreted in accordance with Annex 804.1]*

#### **1. Claimant's Arguments**

546. Respondent is party to at least fourteen international agreements where it promises covered investors and investments protection against UDM. By means of the MFN Clause contained in Article 804 of the FTA, Claimant is entitled to the protection against UDM that is provided at Article 2(2) of the Peru-United Kingdom BIT: “*Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.*” Respondent has breached this substantive protection.<sup>732</sup>
547. Protection against UDM is generally understood to mean that the State must afford protection against any measure that, in the words of the oft cited *EDF v. Romania* award “*inflicts damage on the investor without serving any apparent legitimate purpose; a measure that is not based on legal standards but on discretion, prejudice or personal preference; a measure taken for reasons that are different from those put forward by the decision maker; or a measure taken in willful disregard of due process and*

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<sup>732</sup> C-I ¶¶ 154 – 155, 182, 184, 185; C-II ¶ 402; Peru – Bilateral Investment Treaties: (Peru-Argentina, Art. 2(3); Peru-Bolivia, Art. 3(1); Peru-Cuba, Art. 3(1); Peru-Denmark, Art. 3(1); Peru-Ecuador, Art. 3(1); Peru-Finland, Art. 2(2); Peru-Germany, Art. 2(2); Peru-Italy, Art. 2(3); Peru-Netherlands, Art. 3(1); Peru-Paraguay, Art. 4(1); Peru-Spain, Art. 3(1); Peru-Sweden, Art. 2(2); Peru-Switzerland, Art. 3(1); Peru-United Kingdom, Art. 2(2); and Peru-Venezuela, Art. 3(1)) [CL-0079]; Treaty Between The United States of America And The Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment [CL-0121].

*proper procedure.*”<sup>733</sup> Violation of any one of these facets of protection against UDM would suffice to show that Respondent violated the FTA. Respondent violated all of them.<sup>734</sup> With regard to unreasonable measures, the *AES v. Hungary* tribunal explained that the measure must be reasonable, having a correlation between the State’s public policy objective and the measure adopted to achieve it. In respect of discriminatory measures, the *Ulysseas v. Ecuador* tribunal noted that two similar situations would be treated differently – discriminatory intent is not required.<sup>735</sup>

548. Prof. Bullard and the First Lima Constitutional Court agree that Respondent’s overnight expropriation of Claimant’s investment, through illegitimate processes and without notice, the opportunity to be heard, or an appeal, inflicted damage on Claimant that served no legitimate purpose.<sup>736</sup> Prof. Bullard found that this action was “grounded on reasons of opportunity, merit or convenience”, and the Lima First Constitutional Court held that insofar as Supreme Decree 032 pertained to Claimant’s investment, it was arbitrary and in violation of Peruvian Law.<sup>737</sup> Not only did these actions inflict damage without an apparent legitimate purpose but, by extension, Respondent’s actions in violation of Peruvian law are “not based on legal standards but on discretion, prejudice or personal preferences” and were “taken for reasons that are different from those put forward by the decision maker[.]” to the extent Supreme Decree 032 and Peruvian Government offered any reasons at all.<sup>738</sup>

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<sup>733</sup> C-II ¶ 409; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010 ¶ 262 [CL-0094]; *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12, Award, Jun. 7, 2012 ¶ 157 [CL-0098]; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, Oct. 8, 2009 ¶ 303 [CL-0124].

<sup>734</sup> *Id.*

<sup>735</sup> C-I ¶¶ 188 – 190; *Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 ¶ 321 [CL-0031]; *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, Jun. 12, 2012 ¶ 293 [CL-0065]; *National Grid v. Argentina*, UNCITRAL, Award, Nov. 3, 2008 ¶ 197 [CL-0081]; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, Jul. 14, 2006 ¶ 391 [CL-0082]; *Waguih Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, Jun. 1, 2009 ¶ 457 [CL-0085]; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010 ¶¶ 260, 262 [CL-0094]; *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12, Award, Jun. 7, 2012 ¶ 157 [CL-0098]; *AES Summit Generation Limited et al. v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, Sept. 23, 2010 ¶¶ 10.3.2, 10.3.9 [CL-0123]; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, Oct. 8, 2009 ¶ 303 [CL-0124]; *Antoine Goetz et al. v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, Feb. 10, 1999 ¶ 121 [CL-0125]; *Eastern Sugar B.V. v. The Czech Republic*, UNCITRAL, SCC Case No. 088/2004, Partial Award, Mar. 27, 2007 ¶ 338 [CL-0126].

<sup>736</sup> C-II ¶ 410; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Bullard First Report ¶ 178 [CEX-003].

<sup>737</sup> *Id.*

<sup>738</sup> *Id.*

The alleged “*circumstances implying that the legally required conditions for the enactment of Supreme Decree 083 no longer exist*” have never been explained to Claimant.<sup>739</sup>

549. It is indisputable that Respondent’s expropriation of Claimant’s investment without notice or the opportunity to be heard was in willful disregard of due process and proper procedure. Accordingly, this Tribunal should find that Respondent breached its obligations under the FTA to afford Claimant and its investment protection against arbitrary and discriminatory measures.<sup>740</sup>

550. In addition, Supreme Decree 032 was unreasonable because it, rather than serve a legitimate public purpose, “*had the effect of depriving local communities and Peru as a whole of much-needed revenue and opportunities*”, and “*was decided for the purpose of appropriating at no cost a world-class mining project.*”<sup>741</sup>

551. The enactment of Supreme Decree 032 and MINEM’s 2011 initiation of its civil action impaired the management, maintenance, use, enjoyment or disposal of Claimant’s investment in Peru and were discriminatory. Claimant’s arrangement with Ms. Villavicencio to acquire the concessions *via* Option Agreements is a common arrangement in Peru’s mining sector, used to avoid interference by others while obtaining the authorization to acquire title as mandated by Article 71 of the Constitution. Respondent has not targeted any other investor that acquired mining rights in frontier areas in a comparable way. Claimant has been the sole focus of Respondent’s breaches of international law.<sup>742</sup>

## **2. Respondent’s Arguments**

552. The FTA does not contain a stand-alone UDM clause, and Claimant cannot manufacture such protection by invoking the MFN Clause. First, the MFN Clause does not apply to protections in treaties signed before the FTA entered into force on August 1, 2009. Each of the treaties Claimant relies upon for its UDM claim went into force before that date.<sup>743</sup> None of the investment agreements

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<sup>739</sup> C-I ¶ 191.

<sup>740</sup> C-II ¶ 411.

<sup>741</sup> C-I ¶ 191.

<sup>742</sup> *Id.* at ¶¶ 192 – 193.

<sup>743</sup> R-I ¶ 314; R-II ¶ 574; UNCTAD List of Bilateral Investment Treaties to which Peru is a Party [**R-088**].

that Respondent entered into after the FTA went into force includes a UDM provision.<sup>744</sup> Claimant has not refuted these points and, accordingly, its UDM claim must fail.<sup>745</sup>

### **3. The Tribunal's Reasoning**

553. The Tribunal has found above that Supreme Decree 032 constituted an unlawful indirect expropriation. Therefore, there is no need to examine whether it also constituted a breach of a duty to afford Claimant protection against unreasonable or discriminatory measures. The Parties have not presented arguments related to the legal consequences of such finding, and such a finding indeed would not change or add to those that follow from an unlawful indirect expropriation.

#### **E. ARGUMENTS RELATED TO CONTRIBUTORY FAULT AND LIABILITY**

554. The following arguments were made in response to the Tribunal's questions during the Hearing and to the following question contained in PO-10:

*(e) (iv) 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?*<sup>746</sup>

#### **1. Claimant's Arguments**

555. The theory of contributory fault cannot excuse or reduce Respondent's liability for its breach of the FTA, as Claimant did not cause the social unrest in Southern Puno. Nonetheless, if the Tribunal were to find that Claimant had contributed to the social unrest, the doctrine of contributory fault under international law requires that the party advocating for its application demonstrate – in addition to

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<sup>744</sup> R-I ¶ 315; R-II ¶ 575; Free Trade Agreement between Peru and the European Free Trade Association States, signed on Jul. 14, 2010 [R-090]; Free Trade Agreement Between Peru and Korea, signed on Nov. 14, 2010 [R-092]; Free Trade Agreement Between Peru and Mexico, signed on Apr. 6, 2011 [R-101]; Free Trade Agreement Between Peru and Costa Rica, signed on May 21, 2011 [R-125]; Free Trade Agreement Between Peru and Panama, signed on May 25, 2011 [R-126]; Free Trade Agreement Between Peru and Japan, signed on May 31, 2011 [R-127]; Free Trade Agreement Between Peru and Guatemala, signed on Jun. 12, 2011 [R-128]; Free Trade Agreement Between Peru, Colombia and the EU, signed on Jun. 26, 2012 [R-129]; Additional Protocol to the Pacific Alliance Framework Agreement, signed on Feb. 10, 2014 [R-130].

<sup>745</sup> R-II ¶ 576.

<sup>746</sup> PO-10 ¶ 2.1.4 (e)(iv).

contribution to the investor's harm – that the investor's willful or negligent conduct or omission materially and significantly contributed to its harm, directly causing it. There must also be a sufficient causal link between the negligent or willful act or omission and the harm, in accordance with ILC Article 31. Respondent cannot meet its burden of proof for such a finding.<sup>747</sup>

556. Here, Claimant carried out over 130 community outreach workshops and implemented social programs to benefit the local communities. The record demonstrates that Claimant was responsive to concerns that were raised and took reasonable steps to address them.<sup>748</sup> Claimant worked with outside consultants who were leaders in implementing mining projects in Peru and benefitted from their expertise.<sup>749</sup> As the Project progressed, Claimant conducted responsible community outreach, which MINEM endorsed through its approval of Claimant's CPP.<sup>750</sup>
557. In contrast to Claimant's activities, Respondent's DGAAM – the agency responsible for determining the most suitable CPP – refused to participate in field and service trips prior to Claimant's submission of the ESIA and instead delegated the matter to regional authorities. Testimony also confirmed that the DGAAM never informed Claimant of any shortcomings in the CPP.<sup>751</sup>

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<sup>747</sup> CPHB-I ¶¶ 93 – 96, compare CPHB-I ¶ 95 (showing how respondent in the *Copper Mesa* case demonstrated that claimant's contribution to poor community relations through an armed conflict that was planned and sponsored by claimant itself); CPHB-II ¶ 62; Tr. 550 (Swarthout); 887 (Gala); Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013 [C-0197]; The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 35 (2001) (Updated 2008) 110 [CL-0030]; *Abengoa S.A. y Cofides S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, Apr. 18, 2013 [CL-0072]; *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 ¶¶ 242 – 246 [CL-0083]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012 ¶¶ 667 – 670 [CL-0198]; generally *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, Mar. 15, 2016 [CL-0237]; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, Mar. 21, 2007 ¶ 101 [CL-0238]; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, Jul. 18, 2014 ¶¶ 1595 – 1600 [RLA-018].

<sup>748</sup> CPHB-I ¶ 97; Tr. 472 – 474, 550 – 551 (Swarthout); Ausenco Vector, *Plan de Participación Ciudadana* ("PPC") de Bear Creek, Información de Talleres Participativos 2007-2010 Annex 2 [C-0155]; Agreement between Condor Aconcagua and Bear Creek, May 23, 2009 [C-0177]; Agreement between Ancomarca and Bear Creek, Jul. 2, 2009 [C-0178]; 2010 Environmental Impact Assessment (PPC) Annex 2: Participatory Information Workshops 2007-2010 [R-229].

<sup>749</sup> CPHB-I ¶ 98; Tr. 459 – 460 (Swarthout); 722 (Antúnez de Mayolo).

<sup>750</sup> CPHB-I ¶ 99; Tr. 460 (Swarthout).

<sup>751</sup> CPHB-I ¶ 100; Tr. 550 (Swarthout); 1083 – 1084, 1087 – 1090, 1101 – 1102 (Ramírez Delpino).

558. Respondent has not established that Claimant’s community relations program materially and significantly contributed to the social unrest, such that, “*but for*” Claimant’s alleged negligent acts or omissions, the unrest would never have occurred and Respondent would not have issued Supreme Decree 032. Even Respondent’s Constitutional Court found that Claimant was not at fault for the social unrest in Southern Puno.<sup>752</sup> Given that protestors demanded cancellation of all concessions of all holders, Respondent cannot establish that “*but for*” Claimant’s outreach program, there would never have been social unrest in the area.<sup>753</sup> Given the totality of the circumstances, Respondent let events get out of control and did not try to mediate, failing in its responsibilities under Supreme Decree 028 and its implementing Ministerial Resolution No. 304.<sup>754</sup> In particular, Respondent failed in its Supreme Decree 028 obligations to “*guide, direct, and conduct citizen-participation processes, promote or conduct, together with the owner of the Mining Rights, activities to inform the populations involved.*”<sup>755</sup> That did not happen – the State abandoned the investor, with the consequences we have seen.<sup>756</sup>
559. Even if the Tribunal finds that, nonetheless, Claimant acted in a manner that materially and significantly contributed to and directly caused the social unrest and the expropriation of Claimant’s investment, such a finding would have no effect on liability – only on quantum.<sup>757</sup>

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<sup>752</sup> CPHB-I ¶¶ 101, 102 (*compare to Abengoa case*, where the Tribunal held that the social unrest was caused by the aggressive and deceitful actions of those who opposed the investment, and not by claimant’s allegedly insufficient outreach efforts. To succeed in a claim for contributory negligence, Respondent would need to establish that if a social outreach program had happened opportunistically, the events that led to the expropriation would not have occurred. *See Abengoa S.A. y Cofides S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, Apr. 18, 2013 ¶¶ 660, 670 – 672 [CL-0072]; CPHB-II ¶ 62; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 pp. 20-21 [C-0006].

<sup>753</sup> CPHB-I ¶ 103.

<sup>754</sup> Tr. 1967 – 1968 (C. Response).

<sup>755</sup> Tr. 1975 (C. Response).

<sup>756</sup> *Id.* at 1976 (C. Response).

<sup>757</sup> CPHB-I ¶ 104; *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 ¶ 243 [CL-0083]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012 ¶¶ 680, 687 [CL-0198]; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, Mar. 15, 2016 ¶¶ 6.91 – 6.92 [CL-0237]; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, Jul. 18, 2014 ¶ 1594 [RLA-018].

## 2. Respondent's Arguments

560. The social unrest was a direct consequence of Claimant's conduct.<sup>758</sup>
561. Claimant's failure to make a full and candid representation in the application of December 2006 would impact liability. The revocation of the Supreme Decree 083 on June 23-24, 2011 was based on (1) the protest that made it impossible to maintain that Decree and (2) the misrepresentations that were announced publicly in the meeting between the Aymaras, MINEM, and other members of the Government. Supreme Decree 032 was not adopted on a whim – it was a consequence of Claimant's misrepresentations.<sup>759</sup> There can be no liability because the withdrawal was not arbitrary – rather, it was the only reasonable thing that the Government could do in the circumstances.<sup>760</sup> There are also serious consequences for Claimant's misrepresentations to the communities.<sup>761</sup> Claimant's witness, Mr. Swarthout, confirmed in oral testimony that there was confusion as to who would be responsible for providing what to the affected populations.<sup>762</sup>
562. Claimant's contribution is relevant in respect to its legitimate expectations: Article 71 is an exception and a foreign investor cannot have a legitimate expectation that the exception will be maintained if the investor does not act in accordance with either the Constitution or in compliance with the terms of the Public Necessity Decree. If the investor does not obtain the social license or comply with its other obligations, it cannot have the legitimate expectation that the rights granted under Article 71 of the Constitution will remain.<sup>763</sup>
563. Respondent does not deny that it had a role to play pursuant to Supreme Decree 028 – rather, the Parties disagree as to the role that Peruvian authorities had to play. Respondent believes that its role was to approve mechanisms and processes or to approve the path through which the Company could obtain the trust and confidence of the communities. Approval of a CPP, however, is not approval of how it was implemented. Implementation is in the company's sphere of responsibilities. Local

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<sup>758</sup> RPHB-I ¶ 114.

<sup>759</sup> Tr. 1941 – 1945 (R. exchange with Arbitrator Sands).

<sup>760</sup> *Id.* at 1945 (R. Exchange with Arbitrator Sands).

<sup>761</sup> *Id.* at 1945 – 1947 (R. Exchange with Arbitrator Sands).

<sup>762</sup> *Id.* at 1965 – 1966 (R. Exchange with Arbitrator Sands) (*citing* Tr. 436 – 437 (Swarthout)).

<sup>763</sup> *Id.* at 1948 – 1949 (R. Exchange with Arbitrator Sands).

authorities were heavily involved in assisting Claimant. While there must be cooperation between the authorities, the issue is not whether the population trusts the Government: the issue is whether the population trusts the particular investor and the particular project. The company must explain its Project to the communities and earn their trust.<sup>764</sup>

564. The cases cited by Claimant show that the Tribunal should consider any contributory fault – not merely “*but for*” causation – and should reduce damages accordingly.<sup>765</sup>

### 3. The Tribunal’s Reasoning

565. The Parties disagree regarding their respective roles and obligations in the outreach to the local communities and the application of Supreme Decree 028.<sup>766</sup>

566. Respondent concedes that “[*its*] role was to approve mechanisms and processes or to approve the path through which the Company [could] obtain the trust and confidence of the communities.”<sup>767</sup> But Respondent qualifies that role, explaining that approval of a CPP is not approval of how it was implemented. Implementation is in the company’s sphere of responsibilities. Local authorities were heavily involved in assisting Claimant.<sup>768</sup>

567. It is recalled that, when the Tribunal examined the outreach activities of Claimant in more detail, the conclusion above was:

Regarding the involvement of Ms. Villavicencio: *in a “careful consideration by the government authorities” over a period of almost one year, the above mentioned available information regarding Ms. Villavicencio’s involvement could not be neglected by the government agencies involved in the process and at the very least should have been noted.*

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<sup>764</sup> *Id.* at 1968 – 1974 (R. Exchange with Arbitrator Pryles).

<sup>765</sup> RPHB-II ¶¶ 50, 53 – 54; *Anatolie Stati et al. v. Kazakhstan*, SCC Arbitration No. 116/2010, Award, Dec. 19, 2013 ¶ 1331 [CL-0080]; *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 ¶¶ 245 – 246 [CL-0083]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012 ¶¶ 687, 825 [CL-0198]; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, Mar. 15, 2016 ¶¶ 6.133, 7.30, 7.32, 10.7 [CL-0237]; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, Jul. 18, 2014 ¶ 1637 [RLA-018]; *Antione Goetz and others v. Republic of Burundi [II]*, ICSID Case No. ARB/01/2, Award ¶ 258 [RLA-098].

<sup>766</sup> Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM [R-159].

<sup>767</sup> Tr. 1970 (R. Exchange with Arbitrator Pryles).

<sup>768</sup> *Id.* at 1970 – 1973 (R. Exchange with Arbitrator Pryles).

*The alleged oversight, if it existed, must be attributed to Respondent and not to Claimant. Therefore, the Tribunal does not see any reason why the process as conducted would make the Application or the resulting Supreme Decree 083 unconstitutional.*

*And regarding Claimant's outreach activities: "The evidence summarized above shows clearly that from the very beginning until the time before the meeting of June 23, 2011 all outreach activities by Claimant were known to Respondent's authorities and were conducted with their approval, support, and endorsement, and that no objections were raised by the authorities in this context. While, as mentioned above, further actions by Claimant would have been feasible, on the basis of the continued coordination with and support by Respondent's authorities, the Tribunal concludes that Claimant could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities and that Respondent, after its continuous approval and support with Claimant's conduct, cannot in hindsight claim that this conduct was contrary to the ILO Convention 169 or was insufficient, and caused or contributed to the social unrest in the region."*

568. As correctly pointed out by Claimant<sup>769</sup>, Respondent has the burden of proof that its breaches of the FTA, which the Tribunal found in its considerations above in this Award, were to some extent caused by Claimant. In view of the above cited conclusions of the Tribunal, Respondent has not met that burden.

569. Therefore, the Tribunal concludes that there was no contributory fault and liability of Claimant.

## **X. DAMAGES**

570. The Tribunal's question in section 2.1.4 (e) of PO-10 was as follows:

*What are the monetary amounts that the Tribunal should award to the Claimant if it were to conclude that:*

- i. the Claimant's alleged investment was lawfully expropriated?*
- ii. the Claimant's alleged investment was unlawfully expropriated?*
- iii. Respondent breached its obligations under the FTA for FET or other obligations under other provisions of the FTA?*
- iv. 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?<sup>770</sup>*

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<sup>769</sup> CPHB-I ¶¶ 93 – 96.

<sup>770</sup> PO-10 ¶ 2.1.4 (e)(i) – (iii).

571. The relevant sections of the FTA provide as follows:

**Article 812<sup>3</sup>: Expropriation**

1. *Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”), except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.*
2. *Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.*
3. *Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be payable in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until date of payment.*

**A. THE STANDARD OF COMPENSATION / WHETHER COMPENSATION IS LIMITED TO AMOUNTS INVESTED / ANSWERS TO TRIBUNAL’S QUESTIONS (E)(I) – (IV)**

**1. Claimant’s Arguments**

572. Claimant requests that the Tribunal award Claimant at least US\$ 296.6 million if it finds that Santa Ana was lawfully expropriated. If the Tribunal finds another Treaty breach or an unlawful expropriation, the Tribunal should award at least US\$ 522.2 million.<sup>771</sup>

573. Claimant is entitled to the monetary equivalent of the investments unlawfully taken by Respondent.<sup>772</sup> To determine the compensation that Respondent owes to Claimant, the Tribunal should first look to any *lex specialis* in the FTA and, in the absence of *lex specialis*, to the rules of customary international law. For a lawful expropriation, the *lex specialis* is contained in Article 812 of the FTA. For an

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<sup>771</sup> CPHB-I ¶¶ 78, 88.

<sup>772</sup> C-I ¶ 195; The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 35 (2001) (Updated 2008) Art. 31 [CL-0030].

unlawful expropriation or any other breach, the FTA is silent and customary international law fills the *lacuna*.<sup>773</sup>

574. Claimant’s argument with respect to the application of the customary international law standard contained in the *Chorzów Factory* case is best taken from its own words:

*Peru must be ordered to pay the full reparation, that is, in the words of the Chorzów Factory case, a sum which would “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” Article 31 of the ILC Articles explains that this covers “any damage, whether material or moral” caused by the unlawful expropriation. This would include not only damage caused to Bear Creek concerning the Santa Ana Project itself, but also damages for losses sustained with respect to the Corani Project, which resulted from Peru’s expropriation of the Santa Ana Project and other FTA violations. Article 36 of the ILC Articles, in turn, provides that these damages must “cover any financially assessable damage including loss of profits insofar as it is established.”*<sup>774</sup>

575. Pursuant to *Chorzów Factory*, tribunals are required to award the higher of the value on the date of the expropriation plus interest, or the value on the date of the award. This accords with the principle of law that a wrongdoer should not benefit from the wrongdoing. To award otherwise would nonsensibly reward unlawful conduct.<sup>775</sup>

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<sup>773</sup> C-I ¶¶ 127 – 129, 198 – 200, 223 – 231; CPHB-I ¶¶ 88, 92; CPHB-II ¶ 59; Tr. 141 – 142 (C. Opening); *Amoco International Finance Corp. v. Islamic Republic of Iran, Iran-U.S. Claims Trib*, Case No. 56, Chamber 3, Award No. 310-56-3, Partial Award, Jul. 14, 1987, 27 I.L.M. 1314 (1988) ¶¶ 112, 189, 193 – 199 [CL-0053]; *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 ¶¶ 481, 483 [CL-0060]; *Case Concerning The Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13, 1928) p. 47 [CL-0205].

<sup>774</sup> C-I ¶ 197; *see also* C-I ¶¶ 195 – 196, 202 – 205; The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 35 (2001) (Updated 2008) Art. 31, 36 [CL-0030]; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ¶ 8.2.5 [CL-0038]; *Amoco International Finance Corp. v. Islamic Republic of Iran, Iran-U.S. Claims Trib*, Case No. 56, Chamber 3, Award No. 310-56-3, Partial Award, Jul. 14, 1987, 27 I.L.M. 1314 (1988) ¶¶ 191 – 193 [CL-0053]; *ADC Affiliate Limited, et. al. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 ¶¶ 493, 497 [CL-0060]; *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, Jul. 29, 2008 ¶ 792 [CL-0078].

<sup>775</sup> C-I ¶¶ 201, 205 – 210; *Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 ¶¶ 351 – 353 [CL-0031]; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ¶ 8.2.5 [CL-0038]; *Amoco International Finance Corp. v. Islamic Republic of Iran, Iran-U.S. Claims Trib*, Case No. 56, Chamber 3, Award No. 310-56-3, Partial Award, Jul. 14, 1987, 27 I.L.M. 1314 (1988) ¶ 18 n. 22 [CL-0053]; *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 ¶¶ 495 – 499, 518 [CL-0060]; *Case Concerning the Factory at Chorzów* (Ger. v. Pol.), Judgment, Sept. 13, 1928 (“*Chorzów Factory Case*”), 1928 P.C.I.J. (ser. A), No. 17 (Sept. 13) 43 – 44 [CL-0127]; William C. Lieblich, *Determinations by International Tribunals for the Economic Value*

576. Furthermore, it is consistent with the principle stated in *Chorzów* that the compensation due to a claimant in respect of the unlawful taking should not be limited to “*the value of the undertaking at the moment of dispossession plus interest, since such a limitation could place the claimant in a position more favorable than if the State had complied with its legal obligations.*”<sup>776</sup> For unlawful expropriations, the focus is on the subjective “*financial situation the injured person would be in if the unlawful act had not been committed.*” For lawful expropriations – unlike here – the focus is on the objective “*value of the property concerned.*” The compensation difference for lawful versus unlawful expropriations is intuitive and generally accepted.<sup>777</sup>

577. Since Respondent has committed an unlawful expropriation, the standard of compensation is full compensation, aiming to restore Claimant to the financial position it would have occupied but for Respondent’s unlawful expropriation.<sup>778</sup> The evidence shows that Claimant would have been able to continue operations and move into production, even with the potential delays caused by protests.<sup>779</sup> Also, and relation to the Tribunal’s question (d) “*Of the two reasons relied upon by Respondent for Decree 032, could that Decree also have been legally issued, if only one of the two reasons could be established: (i) only the alleged illegality of the Claimant’s Application?*”, Claimant argued that, with respect to its non-expropriation claims, the evidence shows that (1) Claimant did not violate Peruvian law and (2) even if it had, Respondent would have excused the violation, had Claimant been given the opportunity to address the accusation.<sup>780</sup> The State is not permitted to violate international law with impunity simply because it ends up being correct about the reasons underlying a violation: a

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*of Expropriated Enterprises*, 7(1) J. Int’l. Arb. 37 (1990) n. 36 [CL-0128].

<sup>776</sup> C-I ¶ 210.

<sup>777</sup> *Id.* at ¶¶ 211 – 213; *SEDCO, Inc. and National Iranian Oil Company*, Interlocutory Award No. ITL 55-129-3 (28 Oct. 1985) (“*SEDCO Interlocutory Award*”), reprinted in 9 IRAN-U.S. C.T.R 248 and Award No. 309-129-3 (Jul. 7 1987), reprinted in 15 IRAN-U.S. C.T.R 23) 180, 189, 205, n.40 [CL-0052]; *Chorzów Factory Case* 40 [CL-0127]; I. Marboe, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* 34 (Oxford University Press 2009) 34 – 36, 68 [CL-0130]; D. W. Bowett, *State Contracts with Aliens*, 59 Brit. Y.B. Int’l. L. 47, 61 (1988) [CL-0131]; Ignaz Seidl-Hohenveldern, *L’évaluation des dommages dans les arbitrages transnationaux*, 33 *Annuaire Français de Droit International* 7, 12 (1987) [CL-0132].

<sup>778</sup> CPHB-I ¶ 89.

<sup>779</sup> *Id.* at ¶ 90; Tr. 145 – 173 (C. Opening); FTI Second Report ¶¶ 7.33 – 7.34, 7.40 – 7.44 [CEX-004].

<sup>780</sup> PO-10 ¶ 2.1.4 (d)(i); CPHB-I ¶¶ 69 – 70; CPHB-II ¶ 60; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 [C-0006]; Supreme Decree No. 083-2007-EM and Statement of Legal Reasons ¶ 62 [Bullard 02].

State action that lacks due process engages the State's international liability, regardless of whether the measure may have been justified on the merits.<sup>781</sup>

578. Even if the expropriation of Claimant's assets had been lawful, Claimant would nonetheless be entitled to prompt, adequate, and effective compensation, in accordance with Article 812 of the FTA. Article 812 of the FTA elaborates the standards of "just and effective" and "prompt, adequate and effective", but fails to define the term "fair market value" ("FMV").<sup>782</sup> The customary international legal standard for compensation for expropriation is "full" compensation. In *CME*, the tribunal observed that the aim of such provisions in BITs is to assure "that when a State takes foreign property, full compensation must be paid."<sup>783</sup> This interpretation is supported by other tribunals, which observed that "full" compensation refers to "prompt, adequate and effective" compensation.<sup>784</sup>

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<sup>781</sup> CPHB-II ¶ 61; *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, Jul. 29, 2008 ¶¶ 615 – 619 [CL-0078]; *Amco Asia Corp. v. Indonesia* (First Tribunal), ICSID Case No. ARB/81/1, Award on the Merits, Nov. 21, 1984, 24 I.L.M. 1022, 1038 (1985) ¶¶ 198 – 199, 202 – 203 [CL-0137].

<sup>782</sup> C-I ¶¶ 214 – 217; Canada-Perú FTA Art. 812(1) – (3) [C-0001]; FTI Expert Report (May 29, 2015) ("FTI First Report") ¶ 7-3 [CEX-001].

<sup>783</sup> *CME Czech Republic B.V. v. Czech Republic*, Final Award, Mar. 14, 2003 [CL-0133].

<sup>784</sup> C-I ¶¶ 218 – 222; CPHB-I ¶¶ 78 – 79; Canada-Perú FTA Art. 812(1) [C-0001]; *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, Jun. 27, 1990, 30 I.L.M. 580, (1991) ¶ 577 [CL-0036]; *Tippetts, Abbott, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2 (Jun. 29 1984), reprinted in 6 IRAN-U.S. C.T.R. 219 4 [CL-0050]; *SEDCO Interlocutory Award* 634 [CL-0052]; *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 ¶ 122 [CL-0105]; *CME Czech Republic B.V. v. Czech Republic*, Final Award, Mar. 14, 2003 ¶ 497 [CL-0133]; *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Second Partial Award, Oct. 21, 2002 ("S.D. Myers Second Partial Award") Chapter VI at 59 [CL-0134]; World Bank, "Guidelines on the Treatment of Foreign Direct Investment" reprinted in 7 ICSID Review – Foreign Investment Law Journal (1992) 303 [CL-0135]; *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Damages and Costs, Jun. 20, 1990, 95 I.L.R. 210-211 (1994) [CL-0136]; *Amco Asia Corp. v. Indonesia* (First Tribunal), ICSID Case No. ARB/81/1, Award on the Merits, Nov. 21, 1984, 24 I.L.M. 1022, 1038 (1985) ¶¶ 280, 1038 [CL-0137]; *Amco Asia Corp. v. Indonesia* (Resubmission), ICSID Case No. ARB/81/1, Award, May 31, 1990 ¶ 267 [CL-0138]; John A. Westberg, *Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal*, 5(2) ICSID Rev.– Foreign Inv. L.J. 256, 280-82 (1990) [CL-0139]; John A. Westberg, *Applicable Law, Expropriatory Takings and Compensation in Cases of Expropriation*; ICSID and Iran-United States Claims Tribunal Case Law Compared, 8(1) ICSID Rev.– Foreign Inv. L.J. 1, 16-18 (1993) [CL-0140]; *American Int'l. Group, Inc. v. Iran*, Iran-U.S. Claims Tribunal Case No. 2, Award No. 93-2-3, Dec. 19, 1983, 4 Iran-U.S. Cl. Trib. Rep. 96 (1983) [CL-0141]; Peter Schaufelberger, LA PROTECTION JURIDIQUE DES INVESTISSEMENTS INTERNATIONAUX DANS LES PAYS EN DEVELOPPEMENT 85 (1993) [CL-0142]; Brice M. Clagett, *Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal*, in 4 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 31, 71-79 (Richard B. Lillich ed., University of Virginia 1987) [CL-0143]; James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 225 (2002) [CL-0144]; *Starrett Housing Corp. v. Iran*, Iran-U.S. Claims Tribunal Case No. 24, Interlocutory Award No.

Claimant's expert defines FMV as "*the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms-length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.*"<sup>785</sup> This definition is non-controversial between the Parties<sup>786</sup> and Respondent "*does not dispute that fair market value is the appropriate standard in this case.*"<sup>787</sup> The cases submitted by both Parties establish that (1) awarding amounts invested is not an appropriate measure of FMV and (2) the DCF method provides a reliable estimate of FMV, especially given that this is a mineral property/project.<sup>788</sup>

579. The FTA makes no exception for investments that the State believes would have ultimately been unsuccessful.<sup>789</sup> Even if it could be said that there was a "*lack of social license*" (which Claimant disputes), there is always a possibility that local opposition may impact a project. This possibility is accounted for in the FMV. A hypothetical purchaser of the Santa Ana Project would have obtained the social license had it been provided an opportunity to invest the time and money to do so. Respondent's conduct, however, prevented the natural progression of the Santa Ana Project.<sup>790</sup>

580. In the unlikely event that this Tribunal finds that Respondent did not expropriate Claimant's investment, the Tribunal must still award compensation to Claimant because Respondent violated one or more of the other substantive protections of the FTA. Such actions are akin to unlawful

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ITL32-24-1, Dec. 19, 1983, 23 I.L.M. 1090 (1984) [CL-0145].

<sup>785</sup> CPHB-I ¶ 79; FTI First Report ¶ 7.3, fn. 210 [CEX-001].

<sup>786</sup> CPHB-I ¶ 79; R-II ¶¶ 590 – 594.

<sup>787</sup> CPHB-I ¶ 78; R-II ¶ 590.

<sup>788</sup> CPHB-I ¶¶ 82; Tr. 732 – 733 (McLeod-Seltzer); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ¶¶ 8.3.4, 8.3.8, 8.3.10 [CL-0038]; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶ 690 [CL-0063]; *Waguih Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, Jun. 1, 2009 ¶¶ 563, 576 [CL-0085]; *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015 ¶¶ 343 – 347 [CL-0184]; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, May 20, 1992 ¶¶ 214 – 215 [RLA-060]; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, Jun. 8, 2010 ¶¶ 74 – 75 [RLA-061]; *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, Jun. 16, 2010 ¶¶ 13-73 – 13-75 [RLA-064]; *Sociedad Minera El Brocal S.A.A., Financial Statements as of December 31, 2011*, February 3, 2012 Table 2 [BR-57].

<sup>789</sup> CPHB-II ¶ 48; Tr. 1798 (C. Closing).

<sup>790</sup> CPHB-II ¶ 49; Tr. 757:3-15 (McLeod-Seltzer).

expropriation and ought to be compensated on the same basis of the same principles.<sup>791</sup> The *Vivendi II* tribunal observed that this is a generally accepted basis for compensation.<sup>792</sup> The quantification of full compensation for non-expropriatory violations will vary from case to case.<sup>793</sup> There is, however, an emerging trend toward basing such damages on the FMV standard, plus historical or discrete losses, when applicable.<sup>794</sup> Notably, the *Gold Reserve v. Venezuela* tribunal held that compensation due should reflect the seriousness of the violation.<sup>795</sup>

581. Since “[1] the practices employed to assess mineral resources and reserves are well-established; [2] the time and costs required to develop and process the minerals can be estimated with a reasonable degree of precision; [3] detailed capital estimates on Santa Ana had been conducted; and [4] well-developed international markets exist for the processed or semi-processed metal products that will absorb a project’s entire production immediately”, mining and other extractive projects are different from non-extractive business and can be valued using a DCF methodology, even pre-production.<sup>796</sup> Investment tribunals, including *Gold Reserve*, *Quiborax*, *Al-Bahloul*, and *Vivendi II* have acknowledged that the DCF method can be a reliable estimate of FMV even in the absence of a fully-operational business.<sup>797</sup> If a purchaser would have used DCF to value Santa Ana on the expropriation date – regardless of its stage of development or history of profitability – then no basis exists under the FTA for the Tribunal not to use such a valuation here.<sup>798</sup> CIMVAL, the internationally-accepted

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<sup>791</sup> C-I ¶¶ 176 – 181, 186 – 193, 223 – 224, 231; CPHB-I ¶ 92; CPHB-II ¶ 59; *Chorzów Factory Case* [CL-0127].

<sup>792</sup> C-I ¶ 225; CPHB-I ¶ 92; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ¶ 8.2.7 [CL-0038].

<sup>793</sup> C-I ¶ 226; *S.D. Myers* Second Partial Award ¶ 309 [CL-0134].

<sup>794</sup> C-I ¶¶ 227 – 229; *National Grid v. Argentina*, UNCITRAL, Award, Nov. 3, 2008 ¶¶ 269 – 270, 296 [CL-0081]; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, Jul. 14, 2006 ¶¶ 424, 429 – 430 [CL-0082]; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005 ¶ 410 [RLA-010].

<sup>795</sup> C-I ¶ 230; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶¶ 615, 680 [CL-0063].

<sup>796</sup> C-II ¶ 419; CPHB-II ¶ 50; FTI First Report ¶¶ 6.3, 7.12, 7.14 – 7.17 [CEX-001]; CIMVAL Table 1 [FTI-04]; *Sociedad Minera El Brocal S.A.A., Financial Statements as of December 31, 2011*, February 3, 2012. [BR-57].

<sup>797</sup> CPHB-II ¶ 50; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ¶¶ 8.3.4, 8.3.8, 8.3.10 [CL-0038]; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶¶ 830 – 831 [CL-0063]; *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015 ¶¶ 343 – 347 [CL-0184]; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, Jun. 8, 2010 ¶¶ 74 – 75 [RLA-061].

<sup>798</sup> C-II ¶ 419; FTI First Report ¶¶ 6.3, 7.12, 7.14 – 7.17 [CEX-001].

valuation standards specific to the valuation of mineral properties, expressly endorsed income-based valuation approaches (like DCF) for assets classified as “*Development Properties*”, which is the case of Santa Ana.<sup>799</sup>

582. Respondent ignores investment treaty cases where tribunals have endorsed DCF for early-stage projects. In *Vivendi v. Argentina*, although the tribunal rejected claimant’s DCF model, it nonetheless explained how such a model could be accepted in circumstances like Claimant’s.<sup>800</sup> That tribunal stated that “*a claimant might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.*” That tribunal noted that an absence of a history of profitability does not absolutely preclude the use of DCF methodology. To overcome a lack of history of profitability, a claimant would need to produce convincing evidence of its ability to produce profits in the particular circumstances it faced. Such evidence could include experience (of its own or of experts) or corporate records that establish on the balance of probabilities it would have produced profits from the concession in the face of the risks involved.<sup>801</sup>

583. According to PwC, the mining sector is one where tribunals can and should be willing to accept DCF for new ventures because the mining sector is one that is considered less speculative or uncertain than, for example, a new tech start-up with an unproven business model. In *Gold Reserve v. Venezuela*, the tribunal applied a DCF valuation, awarding US\$ 713 million for two mining concessions that had never entered production at the time of their wrongful revocation. There, Venezuela accepted that DCF is an appropriate and valid tool to measure the FMV.<sup>802</sup> Both experts submitted valuations using the DCF method, even though the expropriation occurred prior to the

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<sup>799</sup> *Id.*, CPHB-I ¶ 81; CIMVAL Table 1 [FTI-04].

<sup>800</sup> Tr. 1802 – 1803 (C. Closing).

<sup>801</sup> C-II ¶ 421; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ¶¶ 8.3.4., 8.3.8, 8.3.10 [CL-0038].

<sup>802</sup> C-II ¶ 422; CPHB-II ¶ 51; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶¶ 830, 831 [CL-0063]; PwC, “2015 International Arbitration damages research” 8 [C-0243]; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶ 690 [CL-0063]; John Y. Gotanda, *Recovering Lost Profits in International Disputes*, 36 G’TOWN J. INT’L LAW 61 (2004) 111 [CL-0203].

Project's construction and entry into production.<sup>803</sup> Here, the experts have also agreed that DCF is appropriate.<sup>804</sup> Like the tribunal in *Gold Reserve*, this Tribunal has sufficient data to prefer the DCF model over any other method, enabling the Tribunal to determine Claimant's hypothetical cash flows, but for Respondent's unlawful action.<sup>805</sup> At the Hearing, Claimant was unaware of any further case where the DCF methodology has been used for another project that reached a level of development similar to the Santa Ana Project.<sup>806</sup>

584. The *Siag* and *Al-Bahloul* tribunals recognized that awarding sunk costs would be inadequate and that a DCF or Market Approach would be more appropriate in some circumstances.<sup>807</sup> As in *Siag*, the value of the investment greatly exceeds the sums actually expended by Claimants. There, like here, claimants submitted a DCF model and a Comparable Transactions Model. Although that tribunal rejected the DCF approach, the value awarded was nonetheless consistent with the DCF Approach. In *Al-Bahoul*, although the tribunal did not use the DCF method, the tribunal did say that it might be appropriate when the investment had not started operation but sufficient data allowing for future cash-flow projections was available. This case has such projections.<sup>808</sup> *SPP v. Egypt* and *Gemplus v. Mexico* rejected the cost-based approach.<sup>809</sup> In *Gemplus v. Mexico*, the tribunal rejected non-DCF methods because they failed to take account of the most valuable asset: future income streams that were reasonably anticipated, and these were not reflected in the share price. While the *Gemplus* tribunal rejected a pure DCF approach, it applied a modified form of the income-based approach.<sup>810</sup>

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<sup>803</sup> CPHB-I ¶ 83; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶¶ 403, 416, 680 [CL-0063].

<sup>804</sup> Tr. 1804 (C. Closing).

<sup>805</sup> CPHB-II ¶ 52; RPA Presentation, Slide 17; Tr. 1438 – 1443 (RPA); Tr. 1607:10-15 (FTI); Ausenco Vector, Revised Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report, Update to the Oct. 21, 2010 Technical Report, Apr. 1, 2011 § 1.11 [C-0061].

<sup>806</sup> Tr. 1962 – 1964 (C. Exchange with Arbitrator Sands).

<sup>807</sup> *Id.* at 1798 (C. Closing).

<sup>808</sup> *Id.* at 1798 – 1801 (C. Closing).

<sup>809</sup> *Id.* at 1798 – 1799 (C. Closing).

<sup>810</sup> *Id.* at 1801 – 1802 (C. Closing).

In *SPP v. Egypt*, the tribunal noted that it was “*incontestable*” that Claimant’s investment had a value that exceeded its out-of-pocket costs.<sup>811</sup>

585. Claimant is not claiming for its roughly US\$ 2 – 3 million expenditures prior to the issuance of Supreme Decree 083. Nonetheless, these activities were not unlawful, as prospection activity does not require permits.<sup>812</sup>

586. Awarding Claimant only its sunk investment is manifestly inappropriate and inadequate. As the Parties experts agreed, an award of amounts invested is distinct from FMV – the Tribunal cannot award FMV as required by the FTA through an award of the cost of investment.<sup>813</sup> According to the CIMVAL standards, which require either the Income or Market Approach,<sup>814</sup> a cost-based approach is not appropriate for Development Properties like Santa Ana, nor is it consistent with the valuation principles set forth in *Chorzów Factory*. Such an award would incorrectly imply that the investment was made risk-free and with no expected return. The analysis shows that Respondent’s cost-based approach would award Claimant less than 25% of Santa Ana’s value, allowing Respondent to unjustly capture the increase in value of the Santa Ana Project that Claimant created.<sup>815</sup> The cost-based methodology should be rejected in favor of FTI’s DCF.<sup>816</sup>

587. Respondent’s counsel misunderstands the concept of “*going concern*”, which is “*a business enterprise that is expected to continue operations for the foreseeable future.*”<sup>817</sup> In response to Respondent’s statement that Claimant’s analysts are not independent, Claimant highlighted that there is an ethical wall inside investment banks that separates analysts from the investment banking side of the entity. Respondent’s experts relied on the analysts’ reports in their own reports. Canada is a well regulated country with regulations for analysts and a well-developed securities market. Analysts are

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<sup>811</sup> *Id.* at 1802 (C. Closing).

<sup>812</sup> *Id.* at 1950 – 1951 (C. Exchange with Arbitrator Sands).

<sup>813</sup> *Id.*; CPHB-I ¶ 81; CPHB-II ¶ 57; Brattle Second Report ¶¶ 21, 31, 32 [REX-010].

<sup>814</sup> Tr. 1812 (C. Closing).

<sup>815</sup> C-II ¶ 423; FTI First Report ¶¶ 7.10 – 7.17; 4.3, 5.10 – 5.11, 5.15 – 5.16 [CEX-001]; Expert Valuation Report of Prof. Graham Davis and The Brattle Group (Oct. 6, 2015) (“Brattle First Report”) Table 3 & 4 [REX-004].

<sup>816</sup> *Id.*, CPHB-II ¶ 57; Brattle Second Report ¶¶ 21, 31, 32 [REX-010].

<sup>817</sup> Tr. 1805 (C. Closing).

required to be independent and to disclose any relationships with the company they are analyzing.<sup>818</sup> As confirmed in *Gold Reserve*, analysts' reports are "useful references to ensure that the compensation awarded is reasonable."<sup>819</sup> Each analyst presented a Net Asset Value for Santa Ana as of the date of the Report.<sup>820</sup> There are seven independent, contemporaneous, third-party non-litigation valuations of the very asset that the Tribunal is being asked to value, and they are in agreement with FTI's DCF.<sup>821</sup>

## 2. Respondent's Arguments

588. Respondent initially argued that the Tribunal, if it awards anything, should award Claimant its amounts invested for Santa Ana: US\$ 21,827,687.<sup>822</sup> In its Post-Hearing Brief, Respondent amended this, arguing that regardless of whether the Tribunal determines that there was a lawful or unlawful expropriation or a non-expropriatory Treaty breach, the Tribunal should award Claimant no more than US\$ 18,237,592: the amount Claimant invested after the public necessity declaration.<sup>823</sup> This amount should be reduced, depending on the breach. For a non-expropriatory breach – like Claimant's alleged FET violation – there can be no damages, as the facts upon which Supreme Decree 032 was based were true.<sup>824</sup> Non-expropriatory breaches require individualized damages analyses and none have been provided to date.<sup>825</sup>

589. Respondent does not dispute that the FMV is the appropriate standard of compensation in this case. This issue is how one can approximate FMV for a project like Santa Ana – a project that never (1) advanced beyond project planning, (2) received the requisite permits, (3) obtained a social license and community support, (4) proceeded to construction, or (5) operated profitably. These are all

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<sup>818</sup> *Id.* at 1807 – 1810 (C. Closing).

<sup>819</sup> *Id.* at 1810 (C. Closing).

<sup>820</sup> *Id.* at 1811 (C. Closing).

<sup>821</sup> *Id.* at 1812 (C. Closing).

<sup>822</sup> R-I ¶ 331; R-II ¶ 594; Brattle First Report ¶ 39 [REX-004]; Brattle Second Report ¶ 248 [REX-010].

<sup>823</sup> RPHB-I ¶¶ 110 – 111.

<sup>824</sup> *Id.* at ¶¶ 112 – 113.

<sup>825</sup> *Id.* at ¶ 113; RPHB-II ¶ 47.

features that make any measure other than the value of amounts invested highly speculative.<sup>826</sup> Even assuming that the Tribunal finds that Respondent’s measures breached the FTA, witness testimony demonstrated that the lack of social license alone would have led to the Santa Ana Project’s failure.<sup>827</sup>

590. According to longstanding international law precedent, calculating damages using an income-based method – like FTI’s DCF approach – is too speculative and, therefore, inappropriate, for an asset that is not a “going concern” or that lacks a history of profitability.<sup>828</sup> In *Wena v. Egypt*, that tribunal noted that a hotel that had been in operation for a year-and-a-half had an insufficient basis for predicting growth or expansion of the investment. That tribunal held that “the proper calculation of market value of the investment expropriated immediately before the expropriation is best arrived at, in this case, by reference to Wena’s actual investments.”<sup>829</sup> In *PSEG v. Turkey*, where claimant’s future income was established in contracts, the tribunal rejected income based approaches and awarded damages based on the amount claimant had invested.<sup>830</sup> This jurisprudence cannot be

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<sup>826</sup> R-I ¶ 326; R-II ¶ 590.

<sup>827</sup> RPHB-I ¶¶ 100, 101; RPHB-II ¶ 40.

<sup>828</sup> R-I ¶¶ 321, 325 – 328; R-II ¶ 583; RPHB-I ¶¶ 101 – 102; RPHB-II ¶¶ 41, 43 – 45; Slide 90 (R. Opening); Tr. 165:9 (C. Opening); Tr. 1911 (R. Closing); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ¶ 8.3.3 [CL-0038]; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 186 [CL-0040]; *Phelps Dodge Corp. and Overseas Private Investment Corp. and The Islamic Republic of Iran*, Award No. 217-99-2 (Mar. 19 1986), reprinted in 10 IRAN-US. C.T.R 121 ¶ 30 [CL-0051]; *PSEG Global v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007 [CL-0088]; *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 ¶¶ 120 – 122 [CL-0105]; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 ILM 896 (2002) ¶¶ 123 – 125 [CL-0147]; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, Jul. 7, 2011 ¶¶ 262 – 263 [RLA-041]; *Levitt v. Iran*, Award No. 297-209-1, 14 Iran-U.S. C.T.R. 191, Apr. 22, 1987 ¶¶ 56 – 58, 209 – 210 [RLA-059]; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, May 20, 1992 ¶¶ 188 – 189 [RLA-060]; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, Jun. 8, 2010 ¶ 71 [RLA-061]; *Venezuela Holdings, B.V. Mobil Cerro Negro Holding, Ltd. Mobil Venezolana de Petroleos Holdings, Inc. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, Oct. 9, 2014 ¶¶ 382 – 385 [RLA-062]; *Siag and Vecchi v. Egypt*, ICSID case No ARB/05/15, Award, Jun. 1, 2009 ¶¶ 566 – 570 [RLA-063]; *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, Jun. 16, 2010 ¶¶ 13-70 – 13-72 [RLA-064]; *Sola Tiles, Inc. v. Iran*, Award No. 298-317-1, 14 Iran-U.S. C.T.R. 224, Apr. 22, 1987 ¶¶ 60 – 64 [RLA-065]; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, Jun. 21, 2011 ¶¶ 380 – 381 [RLA-066]; Michael Pryles, “Lost Profit and Capital Investment,” WORLD ARBITRATION AND MEDIATION REVIEW (WAMR) -2007 Vol. 1 No. 1, 9 – 10 [RLA-067].

<sup>829</sup> R-II ¶ 593; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 ILM 896 (2002) ¶¶ 124 – 125 [CL-0147].

<sup>830</sup> R-I ¶ 324.

dismissed as a “*small sample*”<sup>831</sup> or as “*not a meaningful source of law*.”<sup>832</sup> In speculative situations, the proper way to compensate an injured claimant is to award it the amount it invested in the asset, making it whole on its out-of-pocket losses.<sup>833</sup> These decisions reveal the untenable nature of Claimant’s claim: if multi-year profitable business histories are insufficient to support a DCF analysis, then the unapproved, incomplete business plans upon which Claimant relies cannot support an income based valuation.<sup>834</sup> Awarding the sunk costs for the FMV of a still-on-paper project like Santa Ana is supported by numerous tribunals, including *Metalclad v. Mexico* and *Mobil v. Venezuela*.<sup>835</sup> To be clear: no Investor-State Tribunal has ever awarded damages based on a DCF model for a non-producing asset.<sup>836</sup>

591. Neither of the cases that Claimant cites – *Vivendi II v. Argentina* and *Gold Reserve v. Venezuela* – supports the proposition that a DCF analysis is the preferable method of valuing a pre-revenue project.<sup>837</sup> *Vivendi II* unambiguously rejected the use of the DCF method to value the early-stage asset at issue in that case and awarded damages based on claimants’ amounts invested, due to the speculative nature of assumptions and projections. That case, however, involved a far more predictable asset than Claimant’s non-existent silver mines: a water services utility that had been in operation for over two years under a 30-year concession contract.<sup>838</sup>
592. Unlike the case at hand, in *Gold Reserve v. Venezuela*, both parties used the DCF method for assessing the quantum of damages and agreed on the DCF model used. That tribunal merely applied the agreed-

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<sup>831</sup> R-II ¶ 584; C-II ¶ 421.

<sup>832</sup> RPHB-I ¶ 102; Tr. 165:9 (C. Opening).

<sup>833</sup> R-I ¶ 321; *PSEG Global v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007 ¶ 304 [CL-0088].

<sup>834</sup> R-I ¶¶ 329 – 331; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶¶ 186, 195, 201 [CL-0040]; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 ILM 896 (2002) ¶¶ 124 – 125 [CL-0147].

<sup>835</sup> R-I ¶¶ 321 – 323; R-II ¶¶ 591 – 592; *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 ¶¶ 120 – 122 [CL-0105]; *Venezuela Holdings, B.V. Mobil Cerro Negro Holding, Ltd. Mobil Venezolana de Petroleos Holdings, Inc. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, Oct. 9, 2014 ¶¶ 85, 382, 385 [RLA-062]; Michael Pryles, “*Lost Profit and Capital Investment*,” WORLD ARBITRATION AND MEDIATION REVIEW (WAMR) -2007 Vol. 1 No. 1 [RLA-067].

<sup>836</sup> RPHB-II ¶¶ 43 – 45; Tr. 1911 (R. Closing).

<sup>837</sup> R-II ¶¶ 584, 589.

<sup>838</sup> *Id.* at ¶¶ 585 – 586; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 (Vivendi II) ¶¶ 4.5.5, 8.3.3, 8.3.11, 8.3.13, 8.3.20 [CL-0038].

upon valuation method. As to the question of why Venezuela accepted the DCF method, a close reading of the award reveals that Venezuela likely agreed to the DCF approach because the cash flow analysis that its expert put forward produced a negative valuation. Thus, Venezuela’s support of the DCF analysis in that case was a strategic choice to reduce its liability, not a principled decision rooted in a belief that the DCF valuation is appropriate for assets with no history of profitable operation. *Gold Reserve* is, therefore, irrelevant to the question of whether a DCF analysis is preferable to awarding amounts invested for a non-producing asset like the hypothetical mines here.<sup>839</sup> Finally, Claimant’s citation of *Gemplus v. Mexico*, *SPP v. Egypt*, and *Siag v. Egypt* is puzzling, as each of these tribunals explicitly rejected DCF-based valuations for investments with little or no operating history – like Santa Ana.<sup>840</sup>

593. Assuming for the sake of argument that the Tribunal finds any basis for liability at all, this Tribunal should reject DCF analysis and instead adopt the amounts invested approach, which rests on a concrete and observable benchmark, rather than assumption, estimation, and speculation.<sup>841</sup> The reference to FMV in the FTA should not impact the Tribunal’s analysis, as most of the cases analyzed described “*amounts invested*” as a measure of “*market value*” under Treaty provisions analogous to Article 812 of the FTA.<sup>842</sup>
594. The Tribunal should not compensate Claimant for any expenditures made prior to November 2007 – the date at which Claimant obtained a right to operate at Santa Ana.<sup>843</sup> Before 2007, Claimant invested US\$ 852,826 at Santa Ana and an additional US\$ 2,986,112 during 2007. 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

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<sup>839</sup> R-II ¶¶ 587 – 588; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ¶¶ 690, 830 [CL-0063].

<sup>840</sup> RPHB-II ¶ 42; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, May 20, 1992 ¶ 188 [RLA-060]; *Siag and Vecchi v. Egypt*, ICSID case No ARB/05/15, Award, Jun. 1, 2009 ¶¶ 566 – 570 [RLA-063]; *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, Jun. 16, 2010 ¶¶ 13-70 – 13-72 [RLA-064].

<sup>841</sup> R-II ¶¶ 639 – 643; Michael Pyles, “*Lost Profit and Capital Investment*,” WORLD ARBITRATION AND MEDIATION REVIEW (WAMR) -2007 Vol. 1 No. 1 [RLA-067].

<sup>842</sup> R-I ¶ 331; R-II ¶ 594; Brattle First Report ¶ 39 [REX-004]; Brattle Second Report ¶ 248 [REX-010].

<sup>843</sup> RPHB-I ¶ 106.

of Claimant's expenditures prior to the issuance of the declaration. Thus, the Tribunal should consider US\$ 18,237,592 (Claimant's total US\$ 21,827,687 expenditure, minus US\$ 3,590,095 for pre-Decree expenditures) to be the upper limit of Claimant's potential recovery.<sup>844</sup>

### 3. The Tribunal's Reasoning

595. The Tribunal recalls that it found above that Respondent is liable for an unlawful indirect expropriation. The FTA does not provide any rules regarding the damages to be awarded in case of such a breach of the FTA. Accordingly, the standard provided under general international law is applicable. The Tribunal notes that Article 812.2 of the FTA provides a specific provision on compensation in respect of a lawful expropriation:

*Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.*

596. Both Parties agree and have argued in this context to use the FMV to quantify the damages that should be awarded in case the Tribunal finds –as it has – that there was an unlawful expropriation.<sup>845</sup> Since damages for an unlawful expropriation should at least be as much as the compensation for a lawful expropriation, in view of the joint approach by both Parties and the guidance provided by Article 812.2 of the FTA, the Tribunal agrees that the standard of FMV can be an appropriate method of quantification in the present case.

597. The Parties appear to agree with the definition of FMV provided by Claimant's expert as "*the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical*

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<sup>844</sup> *Id.* at ¶ 107; RPHB-II ¶ 46; Slide 29 (R. Closing); Bear Creek Mining Corporation, 2004 Annual Report (Apr. 15, 2005) [BR-04]; Bear Creek Mining Corporation, 2005 Annual Report, May 11, 2006 [BR-05]; Bear Creek Mining Corporation, Consolidated Financial Statements 31 December 2006 and 2005, March 20, 2007 [BR-06]; Bear Creek Mining Corporation, Consolidated Financial Statements 31 December 2007 and 2006, March 28, 2008 [BR-07]; Bear Creek Mining Corporation, Consolidated Financial Statements 31 December 2008 and 2007, March 17, 2009 [BR-08]; Bear Creek Mining Corporation, Consolidated Financial Statements 31 December 2009 and 2008, March 29, 2010 [BR-09]; Bear Creek Mining Corporation, Consolidated Financial Statements 31 December 2010 and 2009, March 18, 2011 [BR-10]; Bear Creek Mining Corporation Interim Consolidated Financial Statements, Second Quarter ended June 30, 2011, August 15, 2011 [BR-12].

<sup>845</sup> C-I ¶¶ 214 – 217; R-I ¶ 325; R-II ¶ 590.

*willing and able buyer and a hypothetical willing and able seller, acting at arms-length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.*”<sup>846</sup> The Tribunal sees no reason to adopt a different approach. However, the Parties disagree as to whether, in order to meet that definition in the present case, the calculation should rely on the amounts invested or, alternatively, on the potential profitability of the investment as calculated by the DCF method.

598. The jurisprudence on which the Parties rely does not provide a general rule in this respect, although it does emphasize the need to have regard to specific factual situation of each particular case. With this in mind, the Tribunal considers it appropriate to focus on whether, having regard to the factual circumstances of this case, a willing buyer might have been found who would have paid a price calculated by the DCF method, as Claimant alleges. The Tribunal considers that Claimant has the burden of proof with regard to damages it alleges.
599. The Tribunal is not persuaded that Claimant has provided sufficient evidence in support of its claim that a hypothetical purchaser of the Santa Ana Project would have been able to obtain the necessary social license to be able to proceed with the Project, if it had been provided an opportunity to invest the necessary time and resources. Given the extent of the opposition, and the reasons for it, the Tribunal doubts that the Project could, in the short term at least, be considered to be viable by the time Supreme Decree 032 was adopted.
600. The Tribunal notes that the Santa Ana Project was still at an early stage and that it had not received many of the government approvals and environmental permits it needed to proceed. On the basis of the evidence before it, the Tribunal concludes that there was little prospect for the Project to obtain the necessary social license to allow it to proceed to operation, even assuming it had received all necessary environmental and other permits. The Tribunal notes that no similar projects operated in the same area, and there was no evidence to support a track record of successful operation or profitability in the future.
601. Claimant points out that in investment treaty cases some tribunals have endorsed DCF for early-stage projects. In this context, Claimant refers to *Vivendi v. Argentina*, in which, although the tribunal

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<sup>846</sup> CPHB-I ¶ 79; FTI First Report ¶ 7.3 [CEX-001]; R-II ¶ 590.

rejected the DCF model, it nonetheless explained how such a model could be accepted in appropriate circumstances.<sup>847</sup> That tribunal noted that an absence of a history of profitability does not absolutely preclude the use of DCF methodology, but clarified the necessity that “*claimants might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.*”<sup>848</sup> In the present case, Claimant concedes that to overcome a lack of history of profitability, it would need to produce convincing evidence of its ability to produce profits in the particular circumstances it faced. Such evidence could include experience (of its own or of experts) or corporate records that establish on the balance of probabilities it would have produced profits from the concession in the face of the risks involved.<sup>849</sup>

602. In the view of the Tribunal, such convincing evidence has not been produced by Claimant. Beyond the above-mentioned uncertainties regarding the realization of the Project, the Tribunal notes that, in view of the widespread social unrest related to the Project, Respondent not only issued Supreme Decree 032, but, right after on June 25, 2011, also issued a general suspension of admissions of mining petitions for the Department of Puno by Supreme Decree 033<sup>850</sup> for a period of 36 months and later continued that suspension by Supreme Decree 021-2014.<sup>851</sup>

603. A realization and assurance of the profitability of Claimant’s Santa Ana Project could therefore not be expected in the foreseeable future, if at all. Thus, Claimant has not fulfilled the test introduced by Claimant itself by its reference to *Vivendi*, as it has not been “*able to establish clearly that an investment, such as a concession, would have been profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.*”<sup>852</sup>

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<sup>847</sup> Tr. 1802 – 1803 (C. Closing).

<sup>848</sup> *Id.* at 1803 (C. Closing).

<sup>849</sup> C-II ¶ 421; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ¶¶ 8.3.4., 8.3.8, 8.3.10 [CL-0038].

<sup>850</sup> Supreme Decree on the Adjustments of Mining Petitions and Suspension of Admissions of Mining Petitions, Supreme Decree No. 033-2011-EM [R-011].

<sup>851</sup> Decree that Extends the Suspension of Admissions of Mining Petitions, Supreme Decree No. 021-2014-EM [R-140].

<sup>852</sup> Tr. 1803 (C. Closing).

604. In view of the above considerations, the Tribunal concludes that the calculation of Claimant's damages in the present case cannot be carried out by reference to the potential expected profitability of the Santa Ana Project and the DCF method. The Project remained too speculative and uncertain to allow such a method to be utilized. Instead, the Tribunal concludes that the measure of damages should be made by reference to the amounts actually invested by Claimant.

**B. ARGUMENTS RELATED TO THE DCF ANALYSIS / CLAIMANT'S DAMAGES ANALYSIS  
RELATED TO THE SANTA ANA PROJECT**

**1. Claimant's Arguments**

605. Claimant's experts, Messrs. Rosen and Milburn of FTI, determined Santa Ana's FMV value to be **US\$ 224.2 million** on June 23, 2011 or, under the alternative long-term commodities price, **US\$ 333.7 million**.<sup>853</sup>

**(a) The Valuation Date**

606. Pursuant to Article 812(2) of the FTA, compensation for expropriation "*shall be equivalent to the fair market value of the expropriated investments immediately before the expropriation took place.*"<sup>854</sup> The most straightforward and objective way of excluding the effects of the June 24, 2011 public announcement is to value Santa Ana on June 23, 2011 as FTI has done.<sup>855</sup>

607. By insisting that June 24, 2011 should be the valuation date without proposing any method to exclude the effects of the expropriation announcement, Respondent and its expert add confusion to what should be straightforward and noncontroversial: the State may not benefit from any reduction in value resulting from prior knowledge of the expropriation before it was formalized.<sup>856</sup> By arguing that the valuation date must be June 24, 2011, Brattle seeks to pretend that a 1% drop in the price of

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<sup>853</sup> C-I ¶¶ 239 – 240, C-II ¶¶ 428 – 429; CPHB-I ¶¶ 74, 80; CPHB-II ¶ 54; FTI First Report ¶¶ 7.27, 7.45 – 7.47, 7.53, 7.54, 7.57 Fig. 28 [CEX-001]; Reply Report of FTI Consulting (Jan. 8, 2016) ("FTI Second Report") ¶¶ 2.8 – 2.10, Figure 1 [CEX-004].

<sup>854</sup> Tr. 1797 (C. Closing).

<sup>855</sup> C-II ¶ 426.

<sup>856</sup> *Id.* at ¶ 425; Kenneth J. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (Oxford Univ. Press 2009) [CL-0204].

silver would account for the dramatic drop (nearly 25%) in Claimant’s share price by the end of the day on June 24, as the market quickly processed the announcement of the imminent expropriation decree.<sup>857</sup>

**(b) FTI’s DCF Valuation**

608. FTI is a world-recognized leader in the field of forensic accounting and damages valuation. FTI’s experts relied in part on the expert report prepared by RPA, widely recognized as the specialty firm of choice for resource and reserve work, which has performed valuations of more than one thousand mineral exploration properties over its nearly 30 years of existence.<sup>858</sup> RPA reviewed and assessed the reasonableness of the cost assumption used in connection with the Santa Ana Project.<sup>859</sup> RPA concluded that an appropriate economic analysis of Santa Ana can be conducted using the detailed information in the Revised Feasibility Study and available data.<sup>860</sup> To calculate the compensation due to Claimant for Respondent’s breaches of the FTA, FTI and RPA used the DCF methodology, which is widely used as a measure of damages in investment treaty arbitration.<sup>861</sup> The DCF methodology utilizes forecasted future cash flows and discounts them to a present date by applying a risk adjusted discount rate.<sup>862</sup>
609. FTI calculated the FMV of the Santa Ana Project as of June 23, 2011 based on a cash flow model provided by RPA. While the RPA “*Revised Base Case*” model only included reserves, FTI calculated the FMV of the Santa Ana Project based on the RPA “*Extended Life Case*”, which included both reserves and resources and is therefore consistent with CIMVAL’s requirement of inclusion of resources in valuation models.<sup>863</sup> RPA’s extended life of mine case increases the life of the mine from 11 to 24 years and includes additional “*mineable Resources*”, bringing the total volume of ore

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<sup>857</sup> C-II ¶ 424; Brattle First Report ¶ 46 [REX-004].

<sup>858</sup> C-I ¶ 233; FTI First Report ¶¶ 1.5, 1.7 [CEX-001]; RPA First Report 4-1, § 18 [CEX-002].

<sup>859</sup> C-I ¶ 234; RPA First Report §§ 6 – 10 [CEX-002].

<sup>860</sup> C-I ¶ 237; FTI First Report ¶ 7.19 [CEX-001]; RPA First Report 3-1 [CEX-002].

<sup>861</sup> C-I ¶ 236; FTI First Report ¶¶ 6.3, 7.18 [CEX-001].

<sup>862</sup> *Id.*

<sup>863</sup> C-II ¶ 427; FTI First Report ¶ 2.7 [CEX-001].

to be processed to 81.3 million tonnes containing 107.3 million ounces of silver.<sup>864</sup> FTI applied silver futures contract prices from 2013 – 2015 in the DCF analysis because futures prices represent actual market-based prices for the sale of silver during those years through December 31, 2015. From 2016 onward, FTI applied a long-term price estimate of US\$ 22.21 per ounce (in 2011 dollars) based on a PwC survey of how metal prices would be determined by industry participants in evaluating mining projects.<sup>865</sup> As Claimant explains:

428. *FTI forecasted short-term commodities prices based on the futures curve on June 23, 2011. FTI based long-term commodities prices on indicators upon which market participants relied, according to a survey of silver miners. FTI also provided an alternative long-term price methodology based on the latest available futures curve as of June 23, 2011. The discount rate that FTI applied was a weighted average cost of capital (“WACC”) developed under a capital asset pricing model (“CAPM”) approach, resulting in a discount rate of 10.0%.*<sup>866</sup>

610. FTI’s analysis is reasonable. FTI used alternative valuation methodologies to check the reasonableness of its damages calculation using the DCF methodology. FTI analyzed Claimant’s share price data over the period leading up to the Valuation Date and reports of analysts covering Claimant. Claimant’s share price declined by 48% more than market indicators over the period immediately prior to and after the issuance of Supreme Decree 032 (US\$ 260.9 million). FTI considers that this decline in value was incurred as a result of Respondent’s unlawful actions.<sup>867</sup>

611. SRK was incorrect in all of its criticism of RPA’s analysis.<sup>868</sup> RPA has made no adjustment to its cost estimates and, in turn, FTA has made no adjustments to its DCF model. The Tribunal should disregard the criticisms of Respondent and its experts as unfounded.<sup>869</sup> For example, the 35% reduction in operating costs in the RPA Report reflects a change in cost that occurred between the Feasibility Study and the Feasibility Study Update, from 5.36 to 4.20.<sup>870</sup> As neither Brattle nor

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<sup>864</sup> C-I ¶ 238; FTI First Report ¶ 4-32 [CEX-001]; RPA First Report 14-3 [CEX-002].

<sup>865</sup> C-I ¶ 239; FTI First Report ¶¶ 7.27, 7.45 – 7.47, 7.53 [CEX-001].

<sup>866</sup> C-II ¶¶ 428 – 429 (bold added); FTI Second Report ¶¶ 2.8 – 2.10 [CEX-004].

<sup>867</sup> C-I ¶ 241; FTI First Report ¶¶ 7.67, 7.78, 7.82, 7.84 – 7.86 [CEX-001].

<sup>868</sup> C-II ¶ 430.

<sup>869</sup> *Id.* at ¶ 448.

<sup>870</sup> Tr. 1813 – 1814 (C. Closing).

Respondent will dispute, FTI's silver price projection results in a lower valuation than does Brattle's.<sup>871</sup>

612. SRK misconstrues and misapplies cut-off grade concepts. There are two types of cut-off grade: the "breakeven" cutoff grade (*i.e.*, the external or mine cut-off grade) and the "internal or mill" cutoff grade. The breakeven cutoff grade is the amount of revenue-bearing material that will cover the cost of mining, processing side administrative costs, and off-site transport and smelting and refining costs. The "internal or mill" cutoff grade, "*applies when a tonne of material needs to be moved from an open pit in order to access material above the breakeven cutoff grade.*" The internal or mill cutoff grade only applies once mining costs are covered and, thus, excludes mining costs. Contrary to SRK's argument that the breakeven cutoff grades should be used to report mineral resources and reserves, RPA confirms that the accepted practice in the mining industry is to first estimate the volume of material that can be mined and processed at the breakeven cutoff grade and then to report mineral resources and reserves from within that volume at the internal or milling cutoff grade. Since SRK's comments regarding the use of cutoff grades in determining mineral resources and mineral reserves are founded in practice that are not used or accepted in the industry, RPA made no adjustment to its calculation of the Santa Ana resources and reserves.<sup>872</sup> In closing, Claimant noted that the cutoff grade is largely irrelevant because in the Extended Life case that is used for valuation, it is ultimately the same tonnage of ore production.<sup>873</sup>

613. RPA states that SRK has provided no evidence to support its claim that the silver recovery factor (a measure of the amount of metal contained in the ore that generates revenue) should be adjusted from 75% to 70% from the estimated silver recovery in the updated Feasibility Study.<sup>874</sup> The available data does not justify holding the recovery rate at 70%. RPA provides detailed explanation of this in

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<sup>871</sup> *Id.* at 1815 – 1816 (C. Closing).

<sup>872</sup> C-II ¶¶ 430 – 431, 434 – 438; Brattle First Report ¶ 100 [REX-004]; RPA, Response Report on the Santa Ana Project and Corani Project, Puno Peru (Jan. 6, 2016) ("RPA Second Report") ¶¶ 32 – 36, 52 – 59, 65 – 79, 124 [CEX-007].

<sup>873</sup> Tr. 1814 – 1815 (C. Closing).

<sup>874</sup> C-II ¶¶ 439 – 440; SRK First Report ¶ 83 [REX-005]; RPA Second Report ¶¶ 97 – 103 [CEX-007].

its report and concludes that the estimated silver recovery recommendation of 75% should be maintained.<sup>875</sup>

614. The Santa Ana permitting, construction, and ramp up schedules are reasonable. RPA/FTI assume that construction would have commenced in 2011 and entered production by the end of 2012. This includes nine months for Respondent to review the ESIA and an additional six months to procure permits, which exceeds the 6 to 12 months that SRK mentions. Regarding the social unrest, while it is true that Respondent has experienced opposition to a number of mining projects, a number have also proceeded without delays. RPA also points to projects in Peru of similar magnitude that achieved a production schedule in line with Claimant's.<sup>876</sup>
615. In response to SRK's criticism of Claimant's construction and ramp up schedule for Santa Ana, RPA explained that "*it is totally incorrect to compare the detailed Gantt chart for Corani, which is a milling operation, with the production schedule for Santa Ana, which is a simple heap leaching operation because '[m]illing operations are much more complicated processing circuits that contain a number of larger, more expensive, and more intricate unit operations such as crushing, grinding, flotation, leaching, thickening, filtration, and tailings storage requirements.'*"<sup>877</sup> RPA reviewed the contractor quotes by San Martin – who has operated in Peru for 23 years and has worked in high altitudes – and those quotes incorporate allowances for the remote location and the altitude (overall rate of US\$ 1.68/t).<sup>878</sup>
616. SRK's recommended operation cost of US\$ 2.50 per tonne mined, rather than RPA's US\$ 2.10, was justified only with SRK's suggestion that higher altitudes would lead to higher costs and lower labor and equipment productivity. As indicated above, however, San Martin is aware of production costs

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<sup>875</sup> *Id.*

<sup>876</sup> C-II ¶¶ 441 – 442; RPA Second Report ¶¶ 113 – 118 [CEX-007], RPA First Report Figure 5 – 6; Table 13-1 [CEX-002].

<sup>877</sup> C-II ¶¶ 443 – 445; SRK First Report ¶¶ 91 – 92 [REX-005]; RPA Second Report ¶¶ 8 – 9, 85, 87 – 88, 122 [CEX-007].

<sup>878</sup> C-II ¶ 444; RPA Second Report ¶¶ 85 – 88 [CEX-007].

on a project at high altitudes and quoted those rates regarding Santa Ana accordingly. RPA, thus, makes no adjustment to its operating cost assumptions.<sup>879</sup>

617. Regarding capital costs, although Brattle argues that they were understated, Respondent's technical experts at SRK made no such criticism. In response, Claimant states that "*FTI offers a number of reasons why Brattle's proposed increase in capital costs should be rejected.*"<sup>880</sup>
618. As in any mining project, a hypothetical FMV purchaser would account for the risk that local opposition may delay or prevent the full development of a project.<sup>881</sup> Respondent's argument that a "*social license risk*" of 27 or 80% should be imposed on the Santa Ana Project undervalues Santa Ana.<sup>882</sup> If a 27 or 80% social license risk were truly justified it would be reflected in the contemporaneous evidence. Instead, Respondent's proposed adjustment is created with hindsight information.<sup>883</sup> FTI's DCF valuation properly adjusts for risks inherent to the mining industry and adjusts for social license risk through (1) the discount rate, (2) the country risk premium for operating in Peru, and (3) up-front annual operating expenses for community relations efforts at Santa Ana.<sup>884</sup>
619. In its Post-Hearing Brief, Claimant explained that the Tribunal can test the reasonableness of FTI's valuation by cross-referencing seven independent evaluations made by market analysts outside of the arbitration – an approach that the *Gold Reserve* tribunal adopted.<sup>885</sup>

**(c) Arguments Related to Brattle's "Modern" DCF Valuation**

620. Brattle fails to identify what its "*modern*" DCF would entail and provides no alternative valuation under this method. Brattle merely cites a few papers where the "*modern*" DCF is mentioned – one

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<sup>879</sup> C-II ¶ 446; SRK First Report ¶ 80 [REX-005]; RPA Second Report ¶¶ 86 – 89 [CEX-007].

<sup>880</sup> C-II ¶ 447; Brattle First Report ¶ 101 [REX-004]; FTI Second Report ¶¶ 7.35 – 7.39 [CEX-004].

<sup>881</sup> CPHB-II ¶ 49; Tr. 757:3-15 (McLeod Seltzer).

<sup>882</sup> CPHB-II ¶ 53.

<sup>883</sup> CPHB-I ¶ 85; Tr. 1668 – 1669 (Brattle, F. Dorobantu).

<sup>884</sup> CPHB-I ¶ 80; Tr. 1822 – 1823 (C. Closing).

<sup>885</sup> CPHB-II ¶ 54; BMO, "June 1, 2011 Report" ¶¶ 7.82 – 7.83 [FTI-53]; Raymond James, "June 2, 2011 Report" [FTI-54]; Paradigm, "June 8, 2011 Report" [FTI-55]; Canaccord, "June 7, 2011 Report" [FTI-56]; Scotia, "May 31, 2011 Report" [FTI-57]; Haywood, "March 17, 2011 Report" [FTI-58]; Cormark, "January 20, 2011 Report" [FTI-59].

of which, from CIMVAL, notes that it is not widely used or understood, but it is gaining in acceptance. According to FTI, no analyst appears to have valued Santa Ana using a “modern” DCF. Despite Brattle’s preference for the “modern” DCF, it has used a standard DCF in every published award where it has acted as an expert. FTI concludes that, while it may have relevance for other purposes, the “modern” DCF is inappropriate in the context of determining the FMV of a mineral project.<sup>886</sup>

621. The only concrete suggestion Brattle makes is that FTI should have used multiple discount rates for each different cash flow and each year, albeit without suggesting what the discount rates should be. FTI concludes that “*the preponderance of additional assumptions necessary to apply a multiple discount rate approach would only serve to provide an illusion of a level of precision that does not exist,*” and FTI has not seen evidence that this actually is done in practice. FTI concluded that Brattle’s suggested changes to FTI’s DCF methodology would not improve the reliability of the resulting calculation of Santa Ana’s FMV.<sup>887</sup>

#### (d) Arguments Related to Brattle’s Stock-Price Analysis

622. In its initial report, FTI reviewed Claimant’s share price as part of its market-based approach analysis, but concluded that the share price as of the Valuation Date does not provide a reliable measure of the FMV of the underlying Santa Ana or Corani projects. On any given day, the share price would reflect investor sentiment for a block of shares, not for the underlying assets. Furthermore, it is also common for insiders and institutional investors to make long-term investments in shares of a junior mining company and to hold the shares and not trade them on an active basis, such that it is most common to see trading activity in shares of junior being made up of retail investors.<sup>888</sup> In contrast, the market for buyers for 100% of Claimant’s shares would predominantly consist of larger mining companies who would be willing to pay a premium for the mining properties due to their lower cost of capital. According to Mergerstat data, at the Valuation Date, acquisition *premia* averaging 63.7% over trading

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<sup>886</sup> C-II ¶ 432; *Vito G. Gallo v. Canada*, Counter Memorial Jun. 29, 2010 [C-0244]; *Venezuela Holdings, B.V. Mobil Cerro Negro Holding, Ltd. Mobil Venezolana de Petroleos Holdings, Inc. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, Oct. 9, 2014 ¶ 308 [RLA-062]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, Nov. 21, 2007 ¶ 506 [RLA-069]; FTI Second Report ¶¶ 7.10 – 7.12, 7.20 [CEX-004].

<sup>887</sup> C-II ¶ 433; Brattle First Report ¶ 92 [REX-004]; FTI Second Report ¶ 7.24 [CEX-004].

<sup>888</sup> C-II ¶ 449; FTI First Report ¶ 7.68 – 7.70 [CEX-001]; FTI Second Report ¶¶ 6.1 – 6.48, 6.5 [CEX-004].

prices were being paid for mining companies, due to the efficiency of the larger firm's capital or some other synergy that can uniquely be enjoyed by the buyer. FTI's calculation of the intrinsic value of Santa Ana employed a discount rate of typical buyers of these types of assets and, thus, included this premium.<sup>889</sup>

623. On the Valuation Date, Claimant's Projects were undervalued, due to noise in the marketplace relating to political issues and anti-mining protests in Peru. From the date of the ESIA suspension to the first trading date after expropriation, Claimant's share price dropped by 56.5%, compared to a 7.3% and 9.8% decline in the price of silver and the S&P/TSX Global Mining Index, respectively. This is equivalent to a decrease in enterprise value of US\$ 260.9 million. In the "but for" analysis of damages, Santa Ana is built and, therefore, these issues must be ignored to restore Claimant to the economic position it would have been in absent Respondent's breaches.<sup>890</sup>
624. In its Post-Hearing Brief, Claimant explained that Brattle's "modern" DCF is essentially a Market Approach masquerading as an Income Approach. A Market Approach, however, is not an appropriate valuation method because Claimant's share value is not an accurate reflection of Santa Ana's FMV and it ignores Claimant's acquisition of US\$ 130 million in financing.<sup>891</sup> Even when companies are consensually acquiring one another, they do not rely on share price on that date – neither offeror nor target company bases its price assessment on a share price, but rather forms a committee to perform an evaluation.<sup>892</sup>
625. Brattle's valuation begins with the erroneous conclusion that the stock price equals FMV and works backwards to justify that conclusion,<sup>893</sup> which is how they arrive at this 27 or 80% social license risk adjustment range.<sup>894</sup> The Harvard study on which they rely is unreliable, counting suspended projects as failures and likely counts expropriated projects as failures, too – creating a failure rate of 30 –

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<sup>889</sup> C-II ¶ 450; FTI First Report ¶¶ 7.18 – 7.57 [CEX-001]; FTI Second Report ¶¶ 6.22 – 6.25 [CEX-004].

<sup>890</sup> C-II ¶ 451; FTI First Report ¶¶ 7.77 – 7.78 [CEX-001]; FTI Second Report ¶¶ 6.26, 6.54 [CEX-004].

<sup>891</sup> CPHB-I ¶ 84; Tr. 1816 (C. Closing); Brattle First Report ¶ 47 [REX-004].

<sup>892</sup> Tr. 1817 – 1818 (C. Closing).

<sup>893</sup> CPHB-I ¶ 85; Tr. 1668 – 1669 (Brattle, F. Dorobantu), 1818 (C. Closing).

<sup>894</sup> Tr. 1819 (C. Closing).

43%.<sup>895</sup> FTI's DCF Model is preferable and accounts for these risks in the discount rate and the country risk premium.

626. FTI reviewed seven analysts' contemporaneous views on Claimant's share price and the net asset value of the Santa Ana Project before the expropriation and concluded that the Project had a net asset value of US\$ 257.8 million on average (US\$ 237.5 million if one removes the highest and lowest analyst conclusions). These values support FTI's DCF and stand in marked contrast to Brattle's cost-based and stock-price analyses, as well as its adjusted DCF.<sup>896</sup> Further adjustments can be made on the Tribunal's demand.<sup>897</sup>

**(e) The Impact of a Finding of Contributory Negligence and/or Fault (Tribunal's Question (e)(iv))**

627. The following arguments were presented in response to Members of the Tribunal's questions during the Hearing, and in response to the Tribunal's question "*What are the monetary amounts that the Tribunal should award to the Claimant 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*" contained at section (e) of PO-10.<sup>898</sup> Relevant answers to the Tribunal's questions regarding "*the monetary amounts that the Tribunal should award to the Claimant if it were to conclude that (i) the Claimant's alleged investment was lawfully expropriated*"<sup>899</sup> and whether Supreme Decree 032 could have been legally issued if "*the alleged illegality of Claimant's Application*" could be established, are included for ease of reference.<sup>900</sup>

628. To determine how to account for Claimant's alleged contribution to its harm, the inputs to Claimant's damages calculations would need to be changed to account for (1) the possibility of even greater

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<sup>895</sup> *Id.* at 1819 – 1820 (C. Closing).

<sup>896</sup> C-I ¶ 241; C-II ¶ 452; FTI First Report ¶¶ 7.67, 7.78, 7.82, 7.84 – 7.86, Appendix 8 [CEX-001].

<sup>897</sup> Tr. 1820 – 1823 (C. Closing).

<sup>898</sup> PO-10 ¶ 2.1.4 (e)(iv).

<sup>899</sup> *Id.* at ¶ 2.1.4 (e)(i).

<sup>900</sup> *Id.* at ¶ 2.1.4 (d)(i).

delays and (2) higher up-front costs to obtain a social license.<sup>901</sup> The impact of a one year delay would reduce Santa Ana’s value from US\$ 224.2 to US\$ 203.8 million. To account for increased expenditures to obtain the social license, the Tribunal could subtract those assumed additional costs from the total damages.<sup>902</sup> FTI’s valuation provides the Tribunal the flexibility to make adjustments as it finds necessary.<sup>903</sup> Claimant is willing to provide further calculations as necessary.<sup>904</sup>

629. Arbitrator Sands asked how the Tribunal should treat a situation where there was drilling – not the mere hammering of rocks as suggested by Claimant– occurring at the site, assuming that such activity was impermissible and was not disclosed by Claimant in its December 2006 Public Decree of Necessity Application.<sup>905</sup> In response, Claimant stated that – considering the totality of the Application – “*one could draw the conclusion that something doesn’t seem quite right here.*”<sup>906</sup> According to Mr. Zegarra, the Government could have requested more information to correct a good faith error.<sup>907</sup> In any event, Article 71 would not have applied to “*exploration*” but rather only to “*exploitation*” or production.<sup>908</sup> After Arbitrator Sands pointed out that page 28 of the relevant Application expressly stated that “*to date, no explorations in the area of the Santa Ana Mining Project have been conducted*”, even though nearly US\$ 1 million of exploration work had been completed,<sup>909</sup> Claimant explained that it was advised by top mining counsel in Peru in preparing the application.<sup>910</sup> In any event, the issuance of Supreme Decree 032 was an extreme response.<sup>911</sup> Even Respondent’s expert agreed that a violation of Article 71 does not justify expropriation, and certainly without due process or compensation.<sup>912</sup>

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<sup>901</sup> CPHB-I ¶ 105.

<sup>902</sup> *Id.* at ¶ 106.

<sup>903</sup> *Id.* at ¶¶ 105 – 106; CPHB-II ¶ 56.

<sup>904</sup> CPHB-I ¶ 106.

<sup>905</sup> Tr. 1952 – 1953 (Question by Arbitrator Sands).

<sup>906</sup> *Id.* at 1953 (C. Exchange with Arbitrator Sands).

<sup>907</sup> *Id.* at 1954 (C. Exchange with Arbitrator Sands).

<sup>908</sup> *Id.* at 1955 (C. Exchange with Arbitrator Sands).

<sup>909</sup> *Id.* at 1955 (C. Exchange with Arbitrator Sands).

<sup>910</sup> *Id.* at 1955 – 1956 (C. Exchange with Arbitrator Sands).

<sup>911</sup> *Id.* at 1956 – 1957 (C. Exchange with Arbitrator Sands).

<sup>912</sup> CPHB-I ¶ 70; Second Bullard Report ¶¶ 138 – 142 [CEX-005] (*compare* case involving Zijin: Supreme Decree

630. Arbitrator Sands then asked, assuming that the difficulties faced by the Project could have been caused by Claimant's lack of candor as to who was in charge of the Project, what legal impact would that have on the Tribunal's need to address issues of jurisdiction, merits, and quantum. Rejecting the factual premise, Claimant stated that, although that issue arose in *Copper Mesa* and Claimant did not believe it should affect either liability or quantum, if it were to have an effect, it would be on a sliding scale based on the seriousness of the purported wrongdoing.<sup>913</sup>
631. Claimant noted that a finding of contributory negligence would need to be based on Claimant's government-approved community outreach.<sup>914</sup>

## 2. Respondent's Arguments

632. Respondent's expert, Brattle, valued the Santa Ana Project at **US\$ 54 million** in the base case and **US\$ 70 million** in the extended life case, after correcting FTI's inputs.<sup>915</sup> Using its modern DCF model, Brattle calculated Santa Ana's value as of June 23, 2011 as ranging from **US\$ 32 – US\$ 119 million** and on May 27, 2011 as ranging from **US\$ 40 million to US\$ 113 million**.<sup>916</sup>
633. The Tribunal has been presented with 3 options for valuing the Santa Ana asset: (1) FTI's simple DCF analysis, (2) Brattle's modern DCF analysis, and (3) the sunk costs. The Tribunal should reject FTI's simple DCF analysis as unreliable, methodologically weak, and based on false pretenses. While Brattle's modern DCF analysis is more reliable and transparent than FTI's, the DCF method is still inappropriate. This analysis, although an improvement upon FTI's simple DCF, further confirms that

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024-2008-DE, Dec. 27, 2008 [C-0204]; Monterrico Metals Plc's Annual Report 2007 [C-0205]; Archived Title of Entry N° C00011 of File N° 11352728 of the Corporate Registry of the Public Registry Office of Lima [C-0206]; *The new CEO of Monterrico had an audience with Peru's minister of Energy & Mines*, The Zijin Consortium Press Release, Jun. 11, 2007 [C-0207]; *China's ambassador in Peru Gao Zhengyue investigated Majaz company*, The Zijin Consortium Press Release, Jun. 11, 2007 [C-0208]; Peruvian Congress, *Legality and Problems of the company Minera Maiaz in the Territories of the Segunda y Cajas, and Yanta Rural Communities in the Provinces of Huancabamba and Ayabaca in the Piura Region*, May 9, 2008 [C-0254]; Tr. 1261:21 – 1262:7 (Rodríguez-Mariátegui).

<sup>913</sup> Tr. 1958 – 1962 (C. Exchange with Arbitrator Sands).

<sup>914</sup> CPHB-I ¶ 105.

<sup>915</sup> R-I ¶ 350; Brattle First Report ¶ 105, Table 6 [REX-004].

<sup>916</sup> R-II ¶ 621; Brattle Second Report ¶¶ 121, 123, Tables 2, 3 [REX-010].

DCF analysis is unsuited for a non-producing asset. This Tribunal should, therefore, reject the use of DCF valuation for this non-producing asset.<sup>917</sup>

**(a) The Valuation Date**

634. Respondent has not presented any arguments related specifically to the Valuation Date, but denies all allegations not expressly admitted.<sup>918</sup>

635. However, the Tribunal notes that, in its Memorials, Respondent treats the Valuation Date as either June 23, 2011 (assuming Supreme Decree 032 is unlawful) or May 27, 2011 (assuming ESIA delay unlawful).<sup>919</sup>

**(b) FTI's DCF Valuation**

636. FTI's simple DCF methodology is imprecise and unreliable because it fails to capture differences in the risk of separate cash flows – including pivotal inputs like metal prices and mining costs – and assumes simply and unrealistically that all cash flows “become exponentially riskier over time.”<sup>920</sup> FTI uses the discount rate to account for project uncertainty and subsumes all risks into a single, blunt “risk premium component of the discount rate”, regardless of their impact or probabilities. As Brattle

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<sup>917</sup> R-II ¶¶ 618, 629; RPHB-I ¶ 101; RPHB-II ¶ 41; see also *Phelps Dodge Corp. and Overseas Private Investment Corp. and The Islamic Republic of Iran*, Award No. 217-99-2 (Mar. 19 1986), reprinted in 10 IRAN-US. C.T.R. 121 ¶ 30 [CLA-0051]; *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 ¶¶ 120 – 122 [CL-0105]; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 ILM 896 (2002) ¶¶ 123 – 125 [CL-0147]; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, Jul. 7, 2011 ¶¶ 262 – 263 [RLA-041]; *Levitt v. Iran*, Award No. 297-209-1, 14 Iran-U.S. C.T.R. 191, Apr. 22, 1987 ¶¶ 209 – 210 [RLA-059]; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, May 20, 1992 ¶¶ 188 – 189 [RLA-060]; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, Jun. 8, 2010 ¶ 71 [RLA-061]; *Venezuela Holdings, B.V. Mobil Cerro Negro Holding, Ltd. Mobil Venezolana de Petroleos Holdings, Inc. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, Oct. 9, 2014 ¶¶ 382 – 382 [RLA-062]; *Siag and Vecchi v. Egypt*, ICSID case No ARB/05/15, Award, Jun. 1, 2009 ¶¶ 566 – 570 [RLA-063]; *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, Jun. 16, 2010 ¶¶ 13-70 – 13-72 [RLA-064]; *Sola Tiles, Inc. v. Iran*, Award No. 298-317-1, 14 Iran-U.S. C.T.R. 224, Apr. 22, 1987 240 – 242 [RLA-065]; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, Jun. 21, 2011 ¶¶ 380 – 381 [RLA-066].

<sup>918</sup> R-II ¶ 36.

<sup>919</sup> See R-I ¶¶ 362 – 364; R-II ¶ 632.

<sup>920</sup> R-I ¶¶ 333, 337; R-II ¶¶ 596 – 597; Brattle First Report ¶¶ 88 – 89, 91 [REX-004].

explains, FTI's approach to DCF analysis was vulnerable to large swings in valuation from minor tweaks in the applied discount rate.<sup>921</sup>

637. FTI's approach relies on estimated technical inputs – including operating costs and metal recovery rates – as opposed to actual technical inputs that would have been available, had Santa Ana ever reached production. FTI relies entirely on estimates adopted from RPA that contain further inaccuracies in key technical inputs that further inflate Claimant's claims and render FTI's simple DCF analysis even more inaccurate and unreliable. Most saliently, these inputs are (1) overstated mineral reserves and resources, (2) understated mining costs, (3) overly ambitious production timelines, and (4) overstated silver prices.<sup>922</sup> Without endorsing FTI's DCF approach, Brattle re-ran FTI's model with proper, corrected values for (1) a "*base case*" considering only mineral reserves and (2) an "*extended life case*" considering mineral reserves and mineral resources. Correcting just the flawed parameters, FTI's Santa Ana damages estimate drops from US\$ 191 million to **US\$ 54 million** in the base case and from US\$ 224 million to **US\$ 70 million** in the extended life case.<sup>923</sup> These numbers, however, do not account for any risk to the Santa Ana Project due to community opposition.<sup>924</sup> This failure to account for social unrest is another reason the Tribunal should reject FTI's DCF valuation.<sup>925</sup> Mr. Milburn's suggestion that a line item for \$200,000 per year in the annual cash flows might represent the social-license risk should be rejected.<sup>926</sup>
638. At a lower cut-off grade – the level of a mineral in an ore body below which it is not economically viable to mine and process the ore – more of a site's ore deposits will appear to be economic to mine, and the mine will be reported as having larger-than-appropriate reserves.<sup>927</sup> SRK confirmed that Claimant's adoption of RPA's inputs and inappropriate cut-off grades leads it to improperly inflate

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<sup>921</sup> R-I ¶ 335; R-II ¶ 597; Brattle First Report ¶¶ 88 – 89, 91 [REX-004].

<sup>922</sup> R-I ¶ 338; R-II ¶¶ 599 – 600; Brattle First Report § II(D)(2) [REX-004]; SRK First Report ¶¶ 8 *et seq.* [REX-005]; Brattle Second Report § II.E [REX-010].

<sup>923</sup> R-II ¶ 601; Brattle First Report Tables 1 & 6 [REX-004].

<sup>924</sup> R-II ¶ 617; RPHB-I ¶ 101; Brattle Second Report Tables 1 & 6 [REX-010].

<sup>925</sup> RPHB-I ¶¶ 103 – 105; Tr. 1908 – 1910 (R. Closing); Tr. 1637:9-20, 1704 – 1705 (Exchange between Chairman Böckstiegel and FTI).

<sup>926</sup> Tr. 1909 (R. Closing).

<sup>927</sup> R-II ¶ 603; SRK First Report ¶ 33 [REX-005]; Second Expert Technical Mining Report of SRK Consulting (Apr. 13, 2016) ("SRK Second Report") ¶¶ 10 – 14 [REX-011].

reserve and resource estimates.<sup>928</sup> RPA applied an inappropriately low cut-off grade of 17.5 grams of silver per metric ton for reserves and 14 grams for resources. It would have been more appropriate to have a breakeven cut-off grade of 30 grams per metric ton and an internal/milling cutoff grade of 27 grams per metric ton, as was applied in Claimant's 2011 Feasibility Study for Santa Ana. Using the lower cut-off grade, the base case reserves are inflated by 24%, *i.e.* from the 37 million metric tons stated in Claimant's 2011 Feasibility Study to 46 million metric tons claimed in RPA's reports. From that inflated base, RPA generated an even more speculative extended life case, with mineral potential of 81 million metric tons. SRK confirms that RPA made errors in both the nature of the cut-off grade applied and the quantum of the cut-off grade, as a result of using inflated silver prices and unrealistic silver metallurgical recoveries. This resulted in a gross overstatement of resources and reserves in both the base case and the extended life case.<sup>929</sup> FTI's incorporation of these figures into its DCF valuation inflated its estimate.<sup>930</sup>

639. The mining cost projections that RPA recommended and that Claimant adopted are unrealistically low. SRK noted that RPA's analysis overlooked Claimant's plan to use a contract miner at Santa Ana – one that would have to charge the costs actually incurred in order to generate a profit.<sup>931</sup> Furthermore, Santa Ana is more than 4000 meters above sea level in the remote high Andes. This extreme environment can lead to health problems for workers and mechanical equipment failure which result in lower labor and equipment productivity and, therefore, higher operating costs.<sup>932</sup> SRK maintains its recommended increase in the projected mining costs from US\$ 2.10 per tonne of material to US\$ 2.50 per tonne of material. This estimate falls below an estimate prepared by Infomine – an independent organization that provides data on the mining industry.<sup>933</sup>

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<sup>928</sup> R-I ¶ 340; R-II ¶¶ 602 – 603; SRK First Report §§ 4, 6, ¶¶ 33, 67 [REX-005]; SRK Second Report § 2.1, ¶¶ 18, 20-21 [REX-011].

<sup>929</sup> R-I ¶ 341; R-II ¶ 604; Ausenco Vector, Revised Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report, Update to the Oct. 21, 2010 Technical Report, Apr. 1, 2011 [C-0061]; SRK First Report ¶¶ 67, 70, 74, 79 [REX-005]; SRK Second Report ¶¶ 18, 20 – 21, 27, 31, 40 [REX-011].

<sup>930</sup> R-II ¶ 605; Brattle First Report ¶¶ 100, 128 [REX-004].

<sup>931</sup> R-I ¶ 342; R-II ¶ 607; SRK First Report ¶¶ 79 – 80 [REX-005]; SRK Second Report ¶¶ 28 *et seq.* [REX-011].

<sup>932</sup> R-I ¶ 343; R-II ¶ 608; SRK First Report ¶ 80 [REX-005]; SRK Second Report ¶ 28 [REX-011].

<sup>933</sup> R-II ¶ 609; SRK First Report ¶ 80 [REX-005]; SRK Second Report ¶ 28 [REX-011].

640. Brattle asked SRK to prepare a mine plan that was consistent with RPA’s intent to support an “*extended case*” – *i.e.*, one that values some of the less certain mineral resources in addition to the more certain mineral reserves – with SRK’s recommended technical parameters for mine planning and Brattle’s silver price projections. Using this adjusted extended case in FTI’s DCF model reduced FTI’s extended life case from US\$ 224 million to US\$ 178 million and the base case from US\$ 191 million to US\$ 166 million.<sup>934</sup>
641. Brattle also includes a 14% increase in capital costs that corrects (using empirical studies of mining cost overruns) for the tendency within the industry to significantly understate project costs in mining feasibility studies. Brattle rejects FTI’s objection to this adjustment noting, *inter alia*, that the Chairman of RPA, Mr. Graham Clow, shares Brattle’s view that feasibility studies typically underestimate capital costs (in his estimate, by 20-25%).<sup>935</sup> This adjustment further reduces the value of the extended case from US\$ 178 million to US\$ 170 million and the base case value from US\$ 166 million to US\$ 158 million.<sup>936</sup>
642. Brattle, SRK, and Respondent’s Peruvian mining law expert all agree that FTI’s DCF analysis adopts an unrealistic and overly aggressive production timeline that failed to account for delays due to (1) permitting, (2) social unrest and protests, and (3) operational issues and construction problems.<sup>937</sup> SRK reaffirms that permitting delays are to be expected. As of June 2011, Claimant had obtained none of the necessary land use agreements with communities or land holders and still needed to receive approximately 40 permits and approvals before proceeding to production. Approval of these permits and approvals was not automatic or assured. It would have been difficult or impossible to begin production in the fourth quarter of 2012, as stated.<sup>938</sup>

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<sup>934</sup> R-I ¶ 344; R-II ¶¶ 605 – 606; Brattle First Report ¶¶ 100, 128, Table 1 [REX-004].

<sup>935</sup> R-II ¶ 610; Brattle First Report ¶ 101 [REX-004]; Brattle Second Report ¶¶ 219 – 223 [REX-010].

<sup>936</sup> R-I ¶ 345; Brattle First Report ¶ 101, Table 10 [REX-004].

<sup>937</sup> R-I ¶ 346; R-II ¶ 611; Rodríguez-Mariátegui First Report ¶¶ 107 – 108 [REX-003]; Brattle First Report § II(D)(2)(b) [REX-004]; SRK First Report § 6.10 [REX-005]; RPA First Report § 13 [CEX-002].

<sup>938</sup> R-I ¶ 347; R-II ¶ 612; Rodríguez-Mariátegui First Report ¶¶ 40, 67, 106 – 108 [REX-003]; Brattle First Report § II(D)(2)(b) [REX-004]; SRK First Report ¶ 90 [REX-005]; Rodríguez-Mariátegui Second Report ¶ 133 [REX-009]; SRK Second Report § 2.7 [REX-011].

643. Other mining projects that faced social unrest experienced delays averaging four years. FTI ignored the potential impact of social unrest, pursuant to an unsupportable legal instruction to attribute social unrest to the Government. Community opposition arises independently of the Government and, as other stalled projects in Peru have shown, community opposition can thwart a mining project even when it received permits.<sup>939</sup> Given the long history of popular uprisings against the mining industry in Peru and that Santa Ana was already the target of protests, it is implausible to assume away social opposition.<sup>940</sup> Social unrest was the biggest challenge facing the Project and it is nowhere to be found in RPA's or FTI's calculations.<sup>941</sup>
644. Operational difficulties, such as staff recruitment in a remote region or construction problems would cause further delays.<sup>942</sup> Accordingly, Brattle extended FTI's preproduction timeline by four years. This further lowers the value of Santa Ana under FTI's model.<sup>943</sup> Factoring this additional delay into FTI's DCF model further lowers the value of Santa Ana to US\$ 54 million in the base case and to US\$ 70 million in the extended life case.<sup>944</sup>
645. FTI embraces silver pricing models that exaggerate forward looking process. In FTI's first pricing method, FTI projects prices by combining commodity futures prices with projections of silver spot prices – Brattle explains that this is inconsistent with finance principles.<sup>945</sup> FTI's flawed pricing leads to absurd results. FTI's projected silver price for 2015 is US\$ 30.78 per ounce. For 2016, FTI abandons futures pricing and adopts pricing based on forecasted price projections, dropping the price to US\$ 22.21 per ounce. This dramatic one year drop does not reflect any anticipated drop in prices – it results solely from the inconsistent methodology FTI adopts.<sup>946</sup> In FTI's second pricing method, FTI isolates the last available silver futures price as of the date of valuation and holds that price constant in perpetuity. FTI fails to adjust its discount rate to account for this self-evidently imprecise

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<sup>939</sup> R-I ¶ 348; R-II ¶ 613; Brattle First Report ¶ 105 [REX-004]; FTI Second Report ¶ 6.51 [CEX-004].

<sup>940</sup> R-II ¶ 614; Peña First Report ¶¶ 96 *et seq.* [REX-002]; Brattle First Report ¶ 105 [REX-004]; SRK First Report ¶ 90 [REX-005]; Brattle Second Report ¶ 226 [REX-010]; FTI Second Report ¶ 7.42 [CEX-004].

<sup>941</sup> Tr. 1910 – 1911 (R. Closing).

<sup>942</sup> R-I ¶ 349; R-II ¶ 615; SRK First Report ¶ 92 [REX-005].

<sup>943</sup> R-I ¶¶ 349 – 350; R-II ¶ 616; Brattle First Report ¶ 105, Table 6 [REX-004]; SRK First Report ¶ 92 [REX-005].

<sup>944</sup> R-I ¶ 350; Brattle First Report ¶ 105, Table 6 [REX-004].

<sup>945</sup> R-I ¶ 351; Brattle First Report ¶ 116 [REX-004].

<sup>946</sup> R-I ¶ 352; FTI First Report Figure 21 [CEX-001].

approach, even though the use of futures prices accounts for pricing risks that FTI purports to include in its discount rate.<sup>947</sup> Both pricing methods are inaccurate and inappropriate.

646. Brattle did not perform an independent silver price projection, but the April 2011 Updated Feasibility Study for Santa Ana used a silver price of US\$ 13 per ounce – far lower than both of FTI’s projections. The adoption of US\$ 13 per ounce must have reflected Claimant’s and its consultant’s view of silver prices going forward.<sup>948</sup>

**(c) Arguments Related to Brattle’s Modern (“*real options*”) DCF Model**

647. Brattle’s modern (“*real options*”) DCF analysis, properly calibrated with Claimant’s value established in the stock market, demonstrates that FTI has drastically overvalued Santa Ana.<sup>949</sup> The modern DCF approach removes much of the inherent volatility and imprecision of FTI’s model.<sup>950</sup> Each cash flow item receives its own discount for risk and these individual cash flows are used to produce an overall project valuation. The modern approach is well suited for mining projects because clear market indicators exist for many of the key individual cash flow streams.<sup>951</sup>

648. Brattle’s modern (“*real options*”) DCF identifies and corrects for risks to cash flows that FTI’s simple DCF analysis cannot detect. First, Brattle’s approach takes advantage of market inputs to forecast cashflows and transparently quantify risks that might impact those cash flows. Second, Brattle’s approach is calibrated to consider the FMV of the asset as measured by reference to Claimant’s enterprise value (share price).<sup>952</sup> Calibration using the share price is essential to incorporate the substantial and enduring “*social license*” risk on Santa Ana’s value. FTI ignores this risk altogether, leading it to overvalue Santa Ana.<sup>953</sup>

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<sup>947</sup> R-I ¶ 353; Brattle First Report ¶ 119 [REX-004]; SRK First Report ¶ 78 [REX-005].

<sup>948</sup> R-I ¶ 354; SRK First Report ¶ 78 [REX-005].

<sup>949</sup> R-I ¶ 356; R-II ¶¶ 596, 598; Brattle First Report ¶ 90 [REX-004]; Brattle Second Report § II.B [REX-010].

<sup>950</sup> R-I ¶ 336; Brattle First Report ¶¶ 92 *et seq.* [REX-004].

<sup>951</sup> *Id.*

<sup>952</sup> R-II ¶ 618.

<sup>953</sup> *Id.* at ¶¶ 619 – 620; Brattle Second Report ¶¶ 71, 113, 115, 119 – 121, Table 2 [REX-010].

649. Since Claimant’s share price reflects the value of both Santa Ana and Corani, Brattle valued Corani as well. Regarding Corani, SRK and Brattle uncovered a technical risk related to metallurgy that could render the Corani Project infeasible or reduce its market value.<sup>954</sup> Taking these values, Brattle calculated Santa Ana’s value as of June 23, 2011 as ranging from **US\$ 32 – US\$ 119 million** and on May 27, 2011 as ranging from **US\$ 40 million to US\$ 113 million**.<sup>955</sup> When combined with the value of Corani, these values – although a broad range – are consistent with Claimant’s share price.<sup>956</sup>
650. Brattle has refuted each of FTI’s arguments against the modern DCF approach.<sup>957</sup> CIMVAL – the preeminent professional organization in the field of mineral valuation – recognizes the modern DCF approach as a primary valuation method. FTI claims to conduct its valuation consistently with its standards and guidelines, making FTI’s suggestion that the modern DCF approach can be ignored nonsensical.<sup>958</sup> Modern DCF methodology is mainstream in academic circles and in valuations by large mining companies and royalty companies.<sup>959</sup> FTI’s criticism of the alleged “*subjectivity*” of the modern DCF approach is invalid, as the modern approach requires fewer assumptions than FTI’s model and Brattle’s analysis replaced FTI’s assumptions about metal prices and the Project discount rate with market-based forecasts of the same.<sup>960</sup> Some of FTI’s criticisms, however, apply to all income-based approaches, including FTI’s own DCF model. Imprecision exists in any cash flow based valuation, and these imprecisions only intensify when valuing an asset with no history of operational cash flows, significant but unquantified social license risk, or where the share price includes other values – here, like Santa Ana and Corani.<sup>961</sup>

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<sup>954</sup> R-II ¶ 623; Brattle Second Report ¶ 116 [REX-010].

<sup>955</sup> R-II 621; Brattle Second Report ¶¶ 121, 123, Table 2, 3 [REX-010].

<sup>956</sup> R-II ¶ 622.

<sup>957</sup> *Id.* at ¶ 624; FTI Second Report ¶ 7.11 – 7.14, 7.16 [CEX-004].

<sup>958</sup> R-II ¶ 625; Brattle Second Report § II.B., ¶¶ 85, 88 [REX-010].

<sup>959</sup> R-II ¶ 626; Brattle Second Report ¶¶ 91, 95 [REX-010].

<sup>960</sup> R-II ¶ 627; Brattle Second Report ¶ 104 [REX-010].

<sup>961</sup> R-II ¶ 628; Brattle Second Report ¶ 104 [REX-010].

(d) Arguments Related to Brattle’s Stock Analysis

651. Stock analysis further confirms that FTI has drastically overvalued Santa Ana.<sup>962</sup> Brattle presented a market-based benchmark valuation based on Claimant’s enterprise value (calculated as Claimant’s share price – a direct measure of the combined FMV of all of the company’s assets – multiplied by the number of outstanding shares on the day in question) multiplied by the percentage of Claimant’s total value attributable to Santa Ana alone.<sup>963</sup> The only uncertainty is the apportionment of value between Claimant’s two assets, Santa Ana and Corani.<sup>964</sup> Brattle adopted the same estimates that FTI used to value Corani, *i.e.*, that it accounted for on average 19.2% of Claimant’s total market value.<sup>965</sup> Using the average of the analyst allocations, the Santa Ana portion of Claimant’s total value corresponded to **US\$ 89.1 million** on June 23, 2011 (where Claimant’s enterprise value was US\$ 464 million) and **US\$ 104.3 million** on May 27, 2011 (where Claimant’s enterprise value was US\$ 543.5 million).<sup>966</sup>
652. FTI tries to explain the more than US\$ 130 million disconnect between its US\$ 224.2 million valuation and the average US\$ 89.1 million benchmark based on Claimant’s stock price by arguing that the market-analysis fails to account for the “*acquisition premium*.”<sup>967</sup> This criticism is meritless. When acquisitions occur at a premium, it reflects perceived synergies created through the sale. Not only do these not materialize in every sale, but Brattle noted and Prof. Damodaran agrees, the possibility of a synergistic acquisition is already reflected in Claimant’s share price, because a buyer of the shares would stand to benefit from an acquisition at a premium.<sup>968</sup> The application of acquisition premiums to any valuation based on share price is controversial among valuation professionals and must take specific circumstances of the valuation target into account. FTI, however, has used the average acquisition premium in other mining transactions.<sup>969</sup> In doing so, FTI has

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<sup>962</sup> R-II ¶¶ 596, 633.

<sup>963</sup> R-II ¶¶ 630 – 631; Brattle First Report ¶ 51 [REX-004].

<sup>964</sup> R-II ¶ 631; Brattle First Report ¶ 51 [REX-004].

<sup>965</sup> R-I ¶ 360; Brattle First Report ¶¶ 56, 61 – 62 [REX-004]; FTI First Report ¶ 8.8 [CEX-001].

<sup>966</sup> R-I ¶¶ 361 – 366; R-II ¶ 632; Brattle First Report ¶ 58, Tables 3 & 4 [REX-004]; FTI First Report ¶ 10.1 [CEX-001].

<sup>967</sup> R-II ¶ 634; FTI Second Report ¶ 4.3(i) [CEX-004].

<sup>968</sup> R-II ¶¶ 635 – 636; Brattle Second Report ¶¶ 49, 55 [REX-010]; FTI First Report Appendix 4 [CEX-001].

<sup>969</sup> R-II ¶ 637; Brattle Second Report ¶¶ 49, 58 [REX-010].

assigned a value to Santa Ana that is about 250% higher than the global market thought it was worth.<sup>970</sup>

**(e) The Impact of a Finding of Contributory Negligence and/or Fault (Tribunal’s Question (e)(iv))**

653. The following arguments were presented in response to Members of the Tribunal’s questions during the Hearing, and in response to the Tribunal’s question “*What are the monetary amounts that the Tribunal should award to the Claimant 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*” contained at section (e) of PO-10.<sup>971</sup>
654. If the Tribunal agrees that the social unrest was a direct consequence of Claimant’s conduct – including Claimant’s unlawful scheme to acquire rights and its failure to win the support of local communities – it should not award damages at all.<sup>972</sup> Alternatively, if the Tribunal concludes that Claimant’s conduct contributed to Claimant’s damages, the Tribunal must reduce any award in proportion to that contribution.<sup>973</sup> The cases cited by Claimant demonstrate that the Tribunal may consider any contributory fault – not just “*but for*” harm – and may reduce damages accordingly.<sup>974</sup>

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<sup>970</sup> R-II ¶ 638.

<sup>971</sup> PO-10 ¶ 2.1.4 (e)(iv).

<sup>972</sup> RPHB-I ¶¶ 100, 114, RPHB-II ¶ 40; *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 ¶¶ 242 – 243 [CL-0083].

<sup>973</sup> RPHB-II ¶¶ 48, 53, 54; *Anatolie Stati et al. v. Kazakhstan*, SCC Arbitration No. 116/2010, Award, Dec. 19, 2013 ¶ 1331 [CL-0080]; *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 ¶¶ 242 – 243 [CL-0083]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012 ¶ 687, 825 [CL-0198]; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, Mar. 15, 2016 ¶¶ 6.113, 7.30, 7.32, 10.7 [CL-0237]; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, Jul. 18, 2014 ¶ 1637 [RLA-018]; *Antione Goetz and others v. Republic of Burundi [II]*, ICSID Case No. ARB/01/2, Award ¶ 258 [RLA-098].

<sup>974</sup> RPHB-II ¶¶ 49 – 50; *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 ¶¶ 242 – 243 [CL-0083]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012 ¶¶ 687, 825 [CL-0198]; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, Mar. 15, 2016 ¶¶ 6.113, 7.30, 7.32, 10.7 [CL-0237].

655. Claimant's suggestion that the Tribunal could simply tinker with the DCF model or simply subtract money from the damages calculation to account for contributory negligence or harm is fundamentally flawed.<sup>975</sup> First, it is only an option if the Tribunal adopts a DCF model, which it should not.<sup>976</sup> Second, Claimant's approach does not reduce damages to account for Claimant's unlawful scheme to acquire rights at Santa Ana, which contributed to the harm Claimant faced. Third, Claimant's approach assumes that if Claimant spent just a few million dollars more, it would have obtained a social license.<sup>977</sup> If Claimant could have solved its community relations problems for simply a few million dollars, it is unclear why it failed to do so at the time.<sup>978</sup>

### **3. The Tribunal's Reasoning**

656. The Tribunal recalls that it has concluded that it is not possible in the present case to calculate the damages by relying on the expected profitability and the DCF method. Having so concluded, the Tribunal will not address the Parties' discussions related to the DCF method for its conclusions on damages. Rather, this Award will focus on the value of what Claimant actually invested.

657. In this context, the Tribunal notes that those members of the indigenous population that opposed the Santa Ana Project have achieved their wishes: the Project is well and truly at an end. However, this does not relieve Respondent from paying reasonable and appropriate damages for its breach of the FTA. The Project was supported by the Government until the end when the Government panicked and arbitrarily put it at an end. The Government purportedly acted on a document, the existence of which could not be shown. The Government did not put its concerns to or otherwise hear Claimant. However, neither the FTA nor general international law provides an option to award punitive damages. Therefore, the only further option to calculate damages, as the DCF method cannot be applied, is the one also discussed by the Parties, *i.e.* the costs invested by Claimant. The Tribunal considers that this is indeed the appropriate method to calculate damages in the present case.

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<sup>975</sup> RPHB-II ¶ 51.

<sup>976</sup> *Id.* at ¶ 52.

<sup>977</sup> *Id.*

<sup>978</sup> *Id.*

658. It appears to be undisputed that Claimant invested a total of US\$ 21,827,687 for the Santa Ana Project as shown by the following table in the First Brattle Report (Exhibit REX-004) on page 62 using the sources cited from Claimant as follows:

**Table 7: Santa Ana Investment Costs (US\$)**

	Total 2004-2011Q2
[1] Drilling	7,994,832
[2] Salaries and consulting	7,404,312
[3] Assaying and sampling	750,537
[4] Travel	1,878,520
[5] Supplies and general	2,302,516
[6] Acquisition and claim fees (Maintenance costs)	508,149
[7] Geophysics	57,407
[8] Total Exploration Costs	20,896,273
[9] Capitalized Costs (Land Acquisition)	931,414
[10] Cumulative Asset Retirement Obligations	-
[11] Total Cost of Investments	21,827,687

Sources:

Sources: Bear Creek Mining Corp., 2004 Annual Report (BR-04), p. 19; Bear Creek Mining Corp., 2005 Annual Report (BR-05), p. 23; Bear Creek Mining Corp., Consolidated Financial Statements 31 December 2006 and 2005 (BR-06), p. 6; Bear Creek Mining Corp., Consolidated Financial Statements 31 December 2007 and 2006 (BR-07), pp. 6, 13; Bear Creek Mining Corp., Consolidated Financial Statements 31 December 2008 and 2007 (BR-08), pp. 6, 20; Bear Creek Mining Corp., Consolidated Financial Statements 31 December 2009 and 2008 (BR-09), pp. 15, 27; Bear Creek Mining Corp., Consolidated Financial Statements 31 December 2010 and 2009 (BR-10), pp. 13, 21; Bear Creek Mining Corp., Interim Consolidated Financial Statements, Six Months Ended June 30, 2011 and 2010 (BR-12), pp. 10, 12.

Notes:

All expenses and costs are annual data, except for "Cumulative Asset Retirement Obligations," which is reported as a cumulative balance.

2011 Q2 numbers are rounded to the nearest thousand.

The line item "salaries and consulting" is split into "salaries and consulting" and "engineering and consulting" in the 2009 and 2010 annual reports and in the 2011Q2 report.

The line item "supplies and general" is split into "supplies and general" and "community relations" in the 2010 annual report.

[8]: Sum of [1] through [7]; expensed as operating expense every year.

[11]: Sum of [8] through [10].

659. Respondent initially argued that the Tribunal, if it awards anything, should award Claimant these US\$ 21,827,687 as the amounts Claimant invested for Santa Ana.<sup>979</sup> In its Post-Hearing Brief, however, Respondent adopted a different approach, arguing that regardless of whether the Tribunal determines that there was a lawful or unlawful expropriation or a non-expropriatory treaty breach, the Tribunal should award Claimant no more than US\$ 18,237,592 as the amount Claimant invested after the issuance of Supreme Decree 083.
660. The Tribunal notes that Claimant is not claiming for its expenditures prior to the issuance of Supreme Decree 083.<sup>980</sup> In that respect, the Tribunal accepts the calculation presented by Respondent that these expenditures amount to US\$ 3,590,095.<sup>981</sup> Therefore, the remaining amount of the above total of US\$ 21,827,687, *i.e.* US\$ 18,237,592 is now undisputed between the Parties.
661. The Tribunal sees no reason not to accept this amount and therefore concludes that Claimant's expenditures after the issuance of Supreme Decree 083 and up to the issuance of Supreme Decree 032 amounted to US\$ 18,237,592.
662. Though the Parties have conducted their discussion of contributory negligence or fault with focus on the DCF method, this aspect could also to be considered with regard to the calculation method accepted by the Tribunal relying on the value of the actual investment.
663. There is a disagreement between the members of the Tribunal in this regard. Co-Arbitrator Prof. Sands, while agreeing that Respondent breached the FTA and is liable, as discussed in his Dissenting Opinion, concludes that the assessment of damages should be reduced. The majority of the Tribunal feels it cannot agree and shortly comments on the major arguments on which our colleague Sands relies.
664. *First*, as Prof. Sands concedes, the ILO Convention 169 imposes direct obligations only on States. Contrary to Respondent's arguments, private companies cannot "*fail to comply*" with ILO Convention 169 because it imposes no direct obligations on them. The Convention adopts principles on how community consultations should be undertaken, but does not impose an obligation of result. It does not grant communities veto power over a project. The relevant examination is whether the

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<sup>979</sup> R-II ¶ 594.

<sup>980</sup> Tr. 1950 – 1951 (C. Exchange with Arbitrator Sands).

<sup>981</sup> RPHB-I pp. 58 – 59.

consultations were conducted in good faith, adjusted to the circumstances of the Project and the affected community, and conducted with the objective of reaching agreement. As concluded above in this Award, Claimant has not breached that expectation.

665. Second, the majority cannot agree with Prof. Sands's evaluation of the evidence. Regarding the involvement of Ms. Villavicencio, the Tribunal recalls its conclusion above in this Award: *"In conclusion, the Tribunal finds that the first reason given in Supreme Decree 032 and in Respondent's arguments, i.e. that Claimant had illegally obtained the public necessity declaration by Supreme Decree 083 through the involvement of Ms. Villavicencio, is not valid."*
666. Third, regarding particularly the testimony of Respondent's expert witness Prof. Peña Jumba on which Prof. Sands heavily relies and which he accepts, while discarding Claimant's witnesses and experts as having limited knowledge and expertise, the majority recalls its conclusion above in this Award: *"The evidence summarized above shows that from the very beginning until the time before the meeting of June 23, 2011, all outreach activities by Claimant were known to Respondent's authorities and were conducted with their approval, support, and endorsement, and that no objections were raised by the authorities in this context. While, as mentioned above, further actions by Claimant would have been feasible, on the basis of the continued coordination with and support by Respondent's authorities, the Tribunal concludes that Claimant could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities. Respondent, after its continuous approval and support of Claimant's conduct, cannot in hindsight claim that this conduct was contrary to the ILO Convention 169 or was insufficient, and caused or contributed to the social unrest in the region."* The indigenous communities, irrespective whether they were in favor of or against the Project, are not respondent party in this arbitration. Rather, the State of Peru and its Government are Respondent and it is their conduct which the Tribunal has to decide upon.
667. In this context, the Tribunal recalls its conclusions above when considering contributory fault and liability: *"Respondent has the burden of proof that its breaches of the FTA, which the Tribunal found in its considerations above in this Award, were to some extent caused by Claimant. In view of the above cited conclusions of the Tribunal, Respondent has not met that burden. Therefore, the Tribunal concludes that there was no contributory fault and liability of Claimant."*

668. For the above reasons, the Tribunal concludes that the above damages amount of US\$ 18,237,592 is not to be reduced due to contributory fault or liability of Claimant.

### C. Compensation For the Corani Project and the Tribunal's Question (e)(ii)

669. Many of the arguments summarized below were also repeated in response to the Tribunal's question:

e) *What are the monetary amounts that the Tribunal should award to the Claimant if it were to conclude that:*

*[...]*

ii. *the Claimant's alleged investment was unlawfully expropriated?*<sup>982</sup>

#### 1. Claimant's Arguments

670. FTI calculated the reduction in value of Corani immediately following the expropriation date in a range from **US\$ 59.6 million** (deducting the full FMV of Santa Ana Project) to **US\$ 276.3** (without ascribing any value to the Santa Ana Project).<sup>983</sup> FTI quantified the reduction in value of Corani resulting from Respondent's taking of Santa Ana at **US\$ 170.6 million** (19.2%).<sup>984</sup>

671. Respondent's expropriation of Santa Ana and other FTA violations caused substantial additional damage to Claimant by irretrievably hindering the development of the Corani Project.<sup>985</sup> The harm and causation are self-evident: immediately following Respondent's suspension of the Santa Ana ESIA and immediately following the expropriation, Claimant's enterprise value plummeted, as a direct result. Mr. Swarthout unambiguously explains that these actions precluded Claimant from obtaining financing for the Corani Project and, "*unless [Claimant] receives compensation in this arbitration for Peru's taking of Santa Ana*", Claimant will not be able to finance Corani.<sup>986</sup> His testimony confirms the basic economics that the increased cost of capital implies that future expansion projects will not be economically viable. The company's future cash flows are much less

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<sup>982</sup> PO-10 ¶ 2.1.4 (e)(i) – (iii).

<sup>983</sup> C-I ¶ 244; FTI First Report ¶¶ 8.11 – 8.12, Fig. 27 [CEX-001].

<sup>984</sup> CPHB-I ¶ 74; FTI Second Report Figure 1 [CEX-004].

<sup>985</sup> C-II ¶ 453; CPHB-I ¶¶ 73, 89; CPHB-II ¶ 46; Tr. 1823 (C. Closing), 142 – 143 (C. Opening), 717:4-17 (McLeod-Seltzer); FTI Second Report pp. 9-11, § 8 [CEX-004].

<sup>986</sup> C-II ¶ 469; Swarthout Second Statement ¶¶ 44 – 45 [CWS-6].

valuable, in that they are discounted more heavily. This leads to a loss in value.<sup>987</sup> FTI established a causal link between the additional cost of financing and the increased risk-profile of the Project and the decrease in Corani's value. The losses asserted by Claimant are based on an undisputed decrease in Claimant's enterprise value between the last day of trading prior to the ESIA suspension and the first day of trading following the announcement of Supreme Decree 032.<sup>988</sup> Respondent acknowledges that this decrease in Claimant's enterprise value was caused by its actions, though it characterized this damage as not "*lasting*."<sup>989</sup> Four and a half years later, however, Claimant's share price sits close to its historical low and the Corani Project remains undeveloped, due to lack of financing and the Project's increased risk profile.<sup>990</sup> Regardless of future events, Claimant will not be able to recover this loss.<sup>991</sup>

672. Under international law, legal causation is satisfied if the losses sustained are a normal, foreseeable, or proximate consequence of the unlawful conduct. Here, the chain of causation follows two steps, which Claimant has established on the balance of probabilities:

- a) *As a consequence of Peru's expropriation of Santa Ana, Claimant has to raise more money at a higher financing rate, while having fewer options than if it retained control of the Santa Ana project; the Corani project has become riskier to develop; and the development of Corani has been delayed, leading to a permanent loss of income for the period of delay*
- b) *These events caused a direct, normal and foreseeable financial loss to Bear Creek measured by FTI as the decrease in Bear Creek's enterprise value between the last trading day prior to the ESIA suspension and the first trading day after the expropriation's announcement.*<sup>992</sup>

673. Claimant's position is supported by case law in other instances where Investor-State tribunals have grappled with causation issues. For example, in *Inmaris Perestoika v. Ukraine*, the tribunal found

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<sup>987</sup> C-II ¶¶ 467 – 471; CPHB-I ¶ 90; Tr. 717 – 718 (McLeod-Seltzer); Swarthout Second Statement ¶¶ 43 – 45, 52 [CWS-6]; Herfried Wöss et al., *Damages in International Arbitration Under Complex Long-Term Contracts*. (Oxford University Press 2014) [CL-0212].

<sup>988</sup> C-II ¶ 472; R-I ¶ 373.

<sup>989</sup> C-II ¶¶ 457, 472; R-I ¶ 373.

<sup>990</sup> C-II ¶ 454.

<sup>991</sup> *Id.* at ¶¶ 457 – 458.

<sup>992</sup> C-II ¶¶ 473 – 474; Sergey Ripinsky with Kevin Williams, *Damages in International Investment Law* (British Institute of International Comparative Law 2008) [CL-0213].

that the wrongful ban that prevented the ship from leaving Ukrainian territorial waters and the ensuing lack of revenue was a proximate or foreseeable cause of claimants' bankruptcy in Germany. Following steps in a chain of causation, that tribunal awarded lost profits for the additional ten years of operation that would have followed had claimants not gone into bankruptcy.<sup>993</sup> *Lemire v. Ukraine* is also instructive. There, the tribunal recognized the uncertainty and the assumptions in the causation chain and awarded damages because, to do otherwise, would reward Ukraine for its unlawful conduct. This Tribunal need not go as far as the *Inmaris* or *Lemire* tribunals were willing to go in order to find a causal link between Respondent's conduct and Claimant's Corani damages. Respondent's arguments on causation are unsupported and must be rejected.<sup>994</sup>

674. Losses are compensable under the full reparation standard, as stated by the PCIJ in *Chorzów*. Pursuant to *Chorzów* and as reflected in Article 36 of the ILC Articles, compensation should include both (1) the monetary equivalent of restitution and (2) additional damages for loss sustained that would not otherwise be covered by restitution or its monetary equivalent. Corani falls under this second category.<sup>995</sup> Applying this principle, various investment tribunals have awarded damages in addition to compensation for expropriated assets. In *Sedco v. NIOC*, the Iran-U.S. Claims Tribunal awarded compensation for the replacement value of the expropriated old rigs, as well as other losses in the form of lost income not generated due to the expropriation. In *Vivendi II*, the tribunal awarded compensation for full destruction of value, as well as additional losses that included cost of sponsored debt and management fees. Tribunals have also awarded compensation for the additional cost of financing sustained as a result of a State's wrongful conduct.<sup>996</sup>

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<sup>993</sup> C-II ¶¶ 475 – 476; *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, Mar. 1, 2012 ¶¶ 236 – 237, 381 – 382 [CL-0214].

<sup>994</sup> C-II ¶¶ 477 – 480; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010 ¶ 451 [CL-0094]; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, Mar. 28, 2011 ¶¶ 123, 135, 158, 169, 171, 244 [C-0215].

<sup>995</sup> C-II ¶¶ 459 – 460, 462; The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 35 (2001) (Updated 2008) Art. 36(1) [CL-0030]; *Case Concerning The Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13, 1928) ¶¶ 47 – 49 [CL-0205].

<sup>996</sup> C-II ¶ 461; *SEDCO* Interlocutory Award [CL-0052].

675. The second corollary that follows from the full reparation standard is that the amount of damages need not be proven with absolute certainty for the losses to be compensable. Under *Chorzów* and as confirmed recently in *Vivendi II*, the test is the balance of probabilities.<sup>997</sup>
676. Any difficulty in assessing Corani’s damages is the result of Respondent’s breaches of the FTA. This Tribunal should not punish Claimant by allowing Respondent to benefit from this wrongful conduct. Rather, Claimant refers the Tribunal to the tribunal’s decision in *Gemplus & Talsud v. Mexico* and states that assessing damages attributable to Corani is a complex exercise that involves estimation and approximation. The damages could not be more real and are compensable under international law.<sup>998</sup>
677. Respondent’s allegation that FTI’s quantum methodology “*produces an absurdly broad range of damages estimates*” is unfounded. FTI’s calculations are based on real, undisputed market event: the change in value before the ESIA suspension until after the expropriation, amounting to US\$ 307.2 million. The conservative range provided by FTI reflects an allocation of enterprise value that the market could have placed on Santa Ana on May 27, 2011, prior to the ESIA suspension.<sup>999</sup>
678. The source of damage to the value of Corani lies in the cost of capital that is available to Claimant to develop the mine, as well as the associated delay. Without the development of Santa Ana, the sources of capital that will be available to develop Corani, if any, will come from the issuance of equity of a much smaller company with a lower market capitalization. The resulting dilution to investors and the cost of this equity will undoubtedly exceed the cost of capital that would have been available had

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<sup>997</sup> C-II ¶¶ 463 – 464; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ¶ 8.3.16 [CL-0038]; *American Int’l. Group, Inc. v. Iran*, Iran-U.S. Claims Tribunal Case No. 2, Award No. 93-2-3, Dec. 19, 1983, 4 Iran-U.S. Cl. Trib. Rep. 96 (1983) [CL-0141]; *Case Concerning The Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13, 1928) ¶ 47 [CL-0205]; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Award, Apr. 9, 2015 ¶ 30 [CL-0206]; *Payne v. Iran*, Case No. 335, Award No. 245–335–2, Aug. 8, 1986, 12 Iran-U.S. C.T.R. 3 ¶¶ 35 – 37 [CL-0210].

<sup>998</sup> C-II ¶¶ 465 – 466; *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, Jun. 16, 2010 ¶¶ 13-91, 13-92, 13-99 [RLA-064].

<sup>999</sup> C-II ¶ 455; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ¶ 8.3.16 [CL-0038]; FTI First Report ¶ 8.11 [CEX-001]; FTI Second Report ¶¶ 2.4, 6.36, 6.50, 8.7 – 8.12, 8.49 [CEX-004].

Santa Ana been allowed to proceed as anticipated. The damage to Corani is tangible, has been experienced, and is permanent.<sup>1000</sup>

679. FTI was unable to prepare a DCF analysis for Corani because it would require subjective assumptions that would not support an objective opinion on damages. Claimant explains that “*while [Claimant’s] share price does not provide a reliable measure of FMV of the underlying assets (both Santa Ana and Corani), and understates the adverse effect on the value of Corani of [Respondent’s] actions against Santa Ana, FTI concludes that the only available objective measure of the change in perceived value to Corani is the change in the price of [Claimant’s] shares at the Valuation Date.*”<sup>1001</sup>

680. FTI calculated the reduction in value of Corani immediately following the expropriation date in a range from **US\$ 59.6 million** (deducting the full FMV of Santa Ana Project) to **US\$ 276.3** (without ascribing any value to the Santa Ana Project).<sup>1002</sup> FTI quantified the reduction in value of Corani resulting from Respondent’s taking of Santa Ana at **US\$ 170.6 million**. This is the point estimate for FTI’s damages conclusion because FTI did not believe that the market would have priced the full Santa Ana FMV into Claimant’s share price at the time. Thus, FTI deducted 19.2% for value attributable to Santa Ana (representing the average net asset value, which ranged from 9.1% to 32.2%) and adjusted for the 7.3% decline in the S&P/TSX Global Mining Index over the referenced period. FTI also deducted the full enterprise value attributable to Corani on June 27, 2011, which FTI equated to the retained value of Corani following the expropriation.<sup>1003</sup> This method likely understates the effect of the damages on the value of Corani substantially. The consensus of independent industry analysts placed a value of approximately US\$ 1.1 billion on Corani. Given the share price at the current time, the diminution appears to be in excess of FTI’s calculation of damages. Although Claimant’s share price understates the FMV of Corani, and hence the observed decrease in Claimant’s enterprise value after the expropriation will also understate the damages to Corani, the calculation in the FTI Report provides the best estimate with the information available.<sup>1004</sup>

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<sup>1000</sup> C-II ¶ 481; FTI Second Report ¶¶ 8.2 – 8.3 [CEX-004].

<sup>1001</sup> C-II ¶ 482; FTI Second Report ¶¶ 8.3 – 8.5 [CEX-004].

<sup>1002</sup> C-I ¶ 244; FTI First Report ¶¶ 8.11 – 8.12, Fig. 27 [CEX-001].

<sup>1003</sup> C-I ¶¶ 242 – 243; C-II ¶¶ 483 – 484; FTI First Report ¶¶ 8.4 – 8.11, fn. 126 Fig. 27 [CEX-001]; FTI Second Report ¶ 8.6 [CEX-004].

<sup>1004</sup> C-II ¶ 485; FTI First Report ¶ 8.8 [CEX-001]; FTI Second Report ¶ 8.9 [CEX-004].

681. FTI addresses Brattle's concerns in its second report.<sup>1005</sup> Brattle's assertion that Claimant has not experienced an increase in financing costs to date is hollow, especially in light of Mr. Swarthout's testimony. Common sense dictates that the loss of Santa Ana made Corani more difficult to finance and this financing difficulty has caused the Project to be delayed. The delay was not the result of a managerial decision due to technical factors or market conditions, nor did it result in a net benefit, as Brattle argues. Technical optimization studies were clearly contemplated and were independent of market conditions.<sup>1006</sup>
682. The market has recognized that Claimant's ability to raise the nearly US\$ 700 million needed to develop Corani has been permanently diminished and has accordingly reduced its view of the value of the Corani Project. The events in Santa Ana also increased Corani's risk profile beyond the threat of Corani itself being expropriated. FTI noted that Brattle agrees that an increased risk profile would reduce Corani's value.<sup>1007</sup>
683. FTI was not inconsistent in using the more reliable and precise DCF method to determine the FMV of Santa Ana on the one hand, and then using the change in Claimant's share price to estimate the permanent damage to Corani caused by the alleged breaches on the other. Since the alleged wrongful actions themselves have caused the uncertainty that forced FTI to use a less precise approach to measure the damages to Corani, it would not be proper to ignore the permanent and ongoing damages to Corani merely due to the inherent difficulties in estimating its quantum.<sup>1008</sup>
684. RPA's conclusion that the Corani Feasibility Study work was thorough and diligent remains unchanged. Corani is one of the ten largest silver deposits in the world and it is beyond doubt that it is a world-class mining project. While the valuation date for expropriation of Santa Ana is June 23, 2011, there is no requirement under the FTA that damages must have the same valuation date. The 2015 Final Feasibility Study demonstrates that the information that existed in 2011 is and was valid. Contrary to SRK's statement, the 2011 Feasibility Study incorporated allowances for Corani's remote location and altitude. The projected metallurgical recoveries contained in the 2011 Feasibility Study

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<sup>1005</sup> C-II ¶ 486; FTI Second Report ¶¶ 8.15 – 8.27 [CEX-004].

<sup>1006</sup> C-II ¶¶ 487 – 490; Swarthout Second Statement ¶¶ 43 – 46, 53 [CWS-6]; Brattle First Report ¶¶ 140, 146 [REX-004].

<sup>1007</sup> C-II ¶¶ 491 – 492; FTI Second Report ¶¶ 8.35 – 8.39 [CEX-004]; Swarthout Second Statement ¶ 55 [CWS-6].

<sup>1008</sup> C-II ¶ 493; Tr. 1824 – 1825 (C. Closing).

are not overstated. Claimant has completed work to support silver recovery estimates at 70%, rather than 55% as SRK asserts. SRK's claims with regard to scheduling and construction are speculative and without warrant, especially since Corani's Project schedule of 17 months from ESIA preparation and permitting is five months longer than the 12 months suggested by SRK.<sup>1009</sup>

## 2. Respondent's Arguments

685. Throughout, Claimant's request for Corani damages has been a "throw away" claim, designed to inflate damages in the hopes that the Tribunal would split the difference and arrive at a higher midpoint.<sup>1010</sup> Claimant's claim for Corani damages rests on the assumption that the Santa Ana measure reduced Corani's market value in three ways: (1) by increasing financing costs by requiring Claimant to obtain more outside investment, (2) by delaying development of Corani, and (3) by increasing the market's perception of risk associated with the Corani Project.<sup>1011</sup> Claimant's Corani claim must fail because Claimant cannot prove the fundamental elements of its claim – *i.e.*, (1) that it suffered enduring harm to its Corani investment and (2) that a sufficiently direct and proximate link exists between the measures Respondent took *vis-à-vis* Santa Ana and the alleged Corani damages.<sup>1012</sup>
686. Claimant's entire case for the existence of damages to Corani rests on an insufficient factual foundation: Mr. Swarthout's self-serving witness testimony – testimony that is contradicted by Mr. Swarthout's contemporaneous statements.<sup>1013</sup> The key tenants of Mr. Swarthout's uncorroborated testimony are that Respondent's actions regarding Santa Ana (1) made it difficult for Claimant to finance Corani, (2) delayed development of Corani, and (3) increased investor's perception of risk

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<sup>1009</sup> C-II ¶¶ 494 – 497; CPHB-I ¶ 73; RPA Direct Presentation Sl. 19, 27; Tr. 1421:2 – 1423:21 (RPA, R. Lambert); 1512:15-22 (SRK, N. Rigby); FTI Second Report ¶¶ 8.30, Figure 9 [CEX-004]; Amparo Decision No. 28, Lima First Constitutional Court in Case, May 12, 2014 ¶ 8 [C-0006]; Bear Creek Mining Corporation & SRK Consulting, *National Instrument 43-101 Technical Report, Corani Silver-Gold Exploration Project Department of Puno*, Oct. 12, 2005 [C-0245]; M3 Engineering & Technology Corp., 2015, *Optimized and Final Feasibility Study Corani Project*, Puno, Peru, prepared for Bear Creek Mining Corporation, May 30, 2015 [C-0246]; Bear Creek Mining Corporation & SRK Consulting, *National Instrument 43-101 Technical Report, Initial Resource Estimate for Corani Silver-Gold Exploration Project, Department of Puno*, Mar. 31, 2006 p. 5 [C-0248]; RPA Second Report ¶¶ 148, 152, 170, 195 – 196 [CEX-007]; RPA First Report 16-4, 16-5 [CEX-002].

<sup>1010</sup> R-I ¶¶ 367 – 368, 401; R-II ¶ 687.

<sup>1011</sup> R-I ¶ 369; FTI First Report ¶ 8.1 [CEX-001].

<sup>1012</sup> R-I ¶ 369; R-II ¶ 644; RPHB-I ¶ 109; Tr. 502:21 – 526:12 (Swarthout).

<sup>1013</sup> R-II ¶¶ 645 – 646, 667; Swarthout Second Statement ¶¶ 45, 58 [CWS-6].

regarding Corani. First, if these allegations were true, one would expect additional supporting, substantiating documentation would have been submitted. Mr. Swarthout was and remains obligated under Canadian securities regulations to disclose material information to investors – including any negative impact that Supreme Decree 032 might have had on the Corani Project.<sup>1014</sup> Although it would have been in Claimant’s interest to submit such documentation, none has been provided.<sup>1015</sup> Second, from June 2011 – September 2015, Mr. Swarthout made repeated public statements that contradict his witness testimony. He repeated that Santa Ana events had not interfered with Corani’s advancement or timeline. Either Mr. Swarthout and Claimant violated Canadian securities regulations by hiding massive Corani-related losses in 2011, or they are asserting baseless claims before this Tribunal. The Tribunal cannot put any faith in Mr. Swarthout’s credibility in the face of this inconsistency.<sup>1016</sup>

687. Further, even if the Tribunal were to accept his testimony, issues that relate only to Claimant – like difficulties financing the Corani Project – cannot decrease the FMV of Corani.<sup>1017</sup> Markets value an asset at its most profitable use in the hands of the most efficient owner.<sup>1018</sup> If Claimant faced financing difficulties at Corani, this would not lower Corani’s market value if another mining company could have bought and developed the site without these financial problems. Brattle explains that a robust market exists for mining properties similar to Corani. Claimant can, therefore, mitigate any financing-related damages by selling Corani at fair market price to a buyer who is able to finance the Project. After all, if Corani indeed lost value because of Claimant’s inability to finance Corani in light of its Santa Ana experience, it would be within Claimant’s fiduciary duty to its shareholders to

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<sup>1014</sup> R-I ¶ 380; M3 Engineering, Corani Project Form NI 43-101F1 Technical Report Feasibility Study, Dec. 2011 [C-0066]; TSX Venture Corporate Finance Manual (excerpts) §§ 2.1, 3.1 [R-187]; Bear Creek Mining 2011 Annual Report [R-188].

<sup>1015</sup> R-II ¶¶ 668 – 669; Swarthout First Statement ¶ 46 [CWS-1]; Swarthout Second Statement ¶¶ 43 – 45, 52 [CWS-6]; Brattle Second Report ¶ 256 [REX-010]; FTI Second Report ¶¶ 8.16 – 8.19 [CEX-004].

<sup>1016</sup> R-I ¶¶ 379 – 381; R-II ¶¶ 670 – 674; RPHB-I ¶ 109; Tr. 502:21 – 526:12 (Swarthout); M3 Engineering, Corani Project Form NI 43-101F1 Technical Report Feasibility Study, Dec. 2011 [C-0066]; Transcript of Bear Creek Mining Corporation Special Call (6/27/2011) pp. 3, 7 [R-186]; TSX Venture Corporate Finance Manual (excerpts) [R-187]; Bear Creek Mining 2011 Annual Report [R-188]; Daily Gold Podcast, *available at* <https://www.youtube.com/watch?v=d7Ik3MnrzjY> (at 5:31) [R-383]; Andrew Swarthout, “Speech before the Precious Metals Summit Conference,” [R-384]; Bear Creek Mining Corp, “Special Call,” May 14, 2014 [BR-134]; Swarthout First Statement ¶ 46 [CWS-1], Swarthout Second Statement ¶¶ 45, 48 [CWS-6].

<sup>1017</sup> R-II ¶ 675.

<sup>1018</sup> *Id.*, R-I ¶¶ 376 – 377; Brattle First Report ¶ 154 [REX-004].

sell the asset for its FMV.<sup>1019</sup> Contrary to Claimant’s mitigation argument, the FTA does not compensate in accordance with an investor’s alleged “*intentions*” and “*strategies*” – it provides compensation in accordance with losses in market value, which do not turn on one owner’s plans.<sup>1020</sup>

688. Contrary to Claimant’s argument, Corani would not be sold at a “*fire sale*”, depressed price.<sup>1021</sup> As Brattle notes and FTI overlooks, a forced sale occurs when the seller has no time to adequately assess the market. Here, Claimant has had adequate liquidity to conduct business for more than four years since the issuance of Supreme Decree 032, during which time it has continued to develop Corani and during which time it would have had sufficient opportunity to conduct an orderly and value-maximizing sale.<sup>1022</sup>

689. Claimant’s Corani claim fails because Claimant has not proven that Respondent’s actions regarding Santa Ana caused any lasting damage to Corani’s market value or an increased perception of market risk.<sup>1023</sup> As the tribunal in *Rompetrol v. Romania* observed, the purpose of a damages award is to “*make good in monetary terms some enduring alteration for the worse in the economic, financial or commercial position of the foreign investor which can be traced, in a sufficiently direct and proximate way, to the host State’s unlawful course of action.*”<sup>1024</sup> Here, Claimant has not proven any enduring harm. Claimant’s decline in stock price in the wake of Supreme Decree 032 was nothing more than a temporary dip, after which Claimant’s share price quickly rebounded. This quick rebound makes sense, given that Respondent enacted Supreme Decree 032 for reasons inapplicable to Corani, which was not the target of violent protests and had not been illegally acquired.<sup>1025</sup> Claimant asks that the Tribunal consider Claimant’s low share price of today as being caused by Claimant’s depressed share price immediately following Supreme Decree 032. Claimant ignores the five years of history occurring in between – in particular, that Claimant’s share price was higher on July 21, 2011 than it

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<sup>1019</sup> R-I ¶ 378; R-II ¶¶ 675 – 676; Brattle First Report ¶ 155 [REX-004].

<sup>1020</sup> R-II ¶ 677; Swarthout Second Statement ¶ 50 [CWS-6].

<sup>1021</sup> R-II ¶ 678; *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, Jan. 28, 2016 ¶¶ 564 – 565 [RLA-096].

<sup>1022</sup> *Id.*

<sup>1023</sup> R-II ¶ 646.

<sup>1024</sup> R-II ¶ 648; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013 ¶ 287 [RLA-068].

<sup>1025</sup> R-II ¶¶ 649 – 652; Brattle First Report Figure 6 [REX-004].

was before Supreme Decree 032 was issued. Thus, if today were July 21, 2011, following Claimant’s argument, Claimant would be paying Respondent for its “good fortune” caused by Supreme Decree 032.<sup>1026</sup>

690. Brattle explains that the true driver of the poor performance of Claimant’s stock price was the general downturn in the global mining sector.<sup>1027</sup> An additional factor affecting Claimant’s stock price may be the market’s perception of risks to the viability of the Corani Project. Brattle explains that it may not even be possible to produce lead and zinc ore at Corani that is sufficiently concentrated to undergo metallurgical processing. Without marketable lead and zinc concentrates at Corani, it will not be possible to produce silver at Corani, as the latter depends on the former.<sup>1028</sup> Claimant failed to resolve this issue – it told the market in 2009 and 2011 that the risk existed and could only be eliminated by successful metallurgical testing, but then Claimant declined to conduct those tests in the following 4 years or even in its 2015 Updated Feasibility Study. The market likely anticipates that Claimant expects that the results would be negative. Thus, the market is aware of the unresolved, fundamental risk to the Corani Project’s viability and has discounted Claimant’s stock price accordingly.<sup>1029</sup> This tribunal should decline Claimant’s invitation to hold Respondent liable for deteriorating market conditions in the global metals sector or the market’s declining confidence in Corani’s technical feasibility.<sup>1030</sup>

691. Claimant’s Corani claim also fails because Claimant has not proven that the actions regarding Santa Ana were direct and proximate causes of its alleged Corani damages.<sup>1031</sup> Claimant does not deny that

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<sup>1026</sup> R-I ¶¶ 371 – 373, 387 – 389; R-II ¶ 652; FTI First Report ¶¶ 8.2, 8.5 [CEX-001]; Brattle First Report ¶¶ 160 *et seq.*, 170, 174, Figure 6, § III(B)(2) [REX-004]; Swarhout First Statement ¶ 46 [CWS-1].

<sup>1027</sup> R-II ¶ 653; Brattle Second Report ¶ 278 [REX-010].

<sup>1028</sup> R-II ¶¶ 654 – 655; Brattle Second Report ¶¶ 186 – 189 [REX-010]; SRK Second Report ¶¶ 70 – 73, 100 [REX-011].

<sup>1029</sup> *Id.*

<sup>1030</sup> R-II ¶ 656.

<sup>1031</sup> *Id.* at ¶¶ 646, 657, 658; *S.D. Myers Inc. v. The Government of Canada*, UNCITRAL First Partial Award, Nov. 13, 2000 ¶ 316 [RLA-043]; *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, Jun. 16, 2010 ¶ 11(8) [RLA-064]; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013 ¶¶ 190, 287 [RLA-068]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, Nov. 21, 2007 ¶ 282 [RLA-069]; Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW p. 135 [RLA-071]; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, Jul. 24, 2008 ¶ 779 [RLA-075].

it carries the burden of proof on causation, but instead cites a string of inapposite cases that do not address the situation where, as here, claimant requested and received damages for one project and for an entirely separate, second endeavor.<sup>1032</sup> In *Sedco v. NIOC*, that tribunal awarded income related to the expropriated asset – not damages from the allegedly expropriated asset and a separate, second asset, as Claimant proposes here.<sup>1033</sup> Likewise, in Claimant’s *Suez v. Argentina*, the tribunal only awarded damages related to the asset that was directly impacted by the measures.<sup>1034</sup> In *Inmaris v. Ukraine*, the tribunal’s ruling was a statement in the obvious: impounding a company’s only asset causes that company to go bankrupt. That claimant was not requesting damages related to a separate project and, thus, the case is not helpful to Claimant.<sup>1035</sup> Finally, Claimant cites *Lemire v. Ukraine*, where the tribunal held that if the tendering process had been proper, claimant would have received certain radio frequencies, enabling claimant to create successful radio stations. In order for *Lemire* to be helpful to Claimant, the tribunal would have had to have awarded claimant damages for additional radio stations that claimant might have hoped to develop using the profits from the successful operation of the initial stations. *Lemire*, accordingly, does not advance Claimant’s case.<sup>1036</sup>

692. *Metalclad v. Argentina* is comparable to the present case. There, claimant sought FMV of the asset directly impacted by the measures at issue, as well as additional damages for supposed impacts to its other business ventures. The *Metalclad* tribunal rejected the additional damages claim, holding that the causal relationship between breach and damage was too remote.<sup>1037</sup> Likewise, the Corani claim turns on an allegedly causal relationship that, by any objective measure, is remote and uncertain. The Tribunal should accept the wisdom of the *Metalclad* tribunal and reject Claimant’s Corani damages claim.<sup>1038</sup>

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<sup>1032</sup> R-II ¶ 659.

<sup>1033</sup> *Id.* at ¶ 660; *SEDCO Interlocutory Award* ¶¶ 78 – 87 [CL-0052].

<sup>1034</sup> R-II ¶ 661; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Award, Apr. 9, 2015 ¶¶ 59 *et seq.*, 71 *et seq.*, 87 *et seq.* [CL-0206].

<sup>1035</sup> R-II ¶ 662; *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, Mar. 1, 2012 ¶¶ 236 – 237 [CL-0214].

<sup>1036</sup> R-II ¶¶ 663 – 664; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, Mar. 28, 2011 ¶¶ 173 – 179 [CL-0215].

<sup>1037</sup> R-II ¶ 665; *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 ¶ 115 [CL-0105].

<sup>1038</sup> R-II ¶ 666.

693. Claimant’s quantum analysis of Corani damages is inflated and internally inconsistent.<sup>1039</sup> Even if Claimant could have used Santa Ana cash flows to pay part of the US\$ 574 million up-front capital costs, the Santa Ana cash flows could have covered only a fraction of those expenses. If one assumes that Claimant was able to generate all of the free cash flows it projected for Santa Ana, and that Claimant devoted all of that free cash to Corani, it would take more than 8 years of operations at Santa Ana to finance Corani’s initial capital needs. Thus, Claimant would have nonetheless needed to attract substantial outside funding to develop Corani.<sup>1040</sup> Supreme Decree 032 enabled Claimant to avoid spending US\$ 71 million in construction costs, as it did not build the Santa Ana mine. This amount exceeds the free cash flow that Claimant projected from the first year of production at Santa Ana, freeing those funds to be deployed at Corani. Brattle notes that the majority of the US\$ 71 million has been used by Claimant for purposes other than Santa Ana and that thus, contrary to Mr. Swarthout’s statement, the terms of the equity offering did not prevent Claimant from using the proceeds for other purposes, such as advancing Corani.<sup>1041</sup>
694. Brattle explains that it is not more costly to finance a project with outside funds than with internal funds. To argue otherwise conflicts with basic economic principles – while borrowing has explicit costs, using internal funds is also costly because of opportunity costs.<sup>1042</sup>
695. Since Claimant has failed to prove causation, Respondent has not addressed Claimant’s Corani damages calculation in depth.<sup>1043</sup> There is, however, one glaring inconsistency in FTI’s valuation approaches: FTI adopts a stock-market based method for valuing the alleged damages to Corani, in direct contradiction with its methodology for valuing Santa Ana. There, “*FTI refuses to calibrate its DCF results to align them with reality, i.e., the actual market value of Santa Ana as reflected in Bear Creek’s share price.*” FTI discredits the value of share price data when applied to Santa Ana and at one point even states that the “*share price does not provide a reliable measure of the FMV of either*

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<sup>1039</sup> *Id.* at ¶¶ 647, 679.

<sup>1040</sup> R-I ¶ 383; R-II ¶ 680; Ausenco Vector, Revised Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report, Update to the Oct. 21, 2010 Technical Report, Apr. 1, 2011 [C-0061].

<sup>1041</sup> R-I ¶ 384; R-II ¶ 681; Ausenco Vector, Revised Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report, Update to the Oct. 21, 2010 Technical Report, Apr. 1, 2011 [C-0061]; Swarthout Second Statement ¶ 54 [CWS-6]; Brattle First Report ¶ 159 [REX-004]; Brattle Second Report ¶ 262 [REX-010].

<sup>1042</sup> R-I ¶ 385; R-II ¶¶ 682 – 683; Brattle First Report ¶ 156 [REX-004]; Brattle Second Report ¶ 258 [REX-010].

<sup>1043</sup> R-I ¶ 390; R-II ¶ 685.

*Santa Ana or Corani.*” Yet, FTI bases its US\$ 170 million Corani damages estimate entirely on changes in share price.<sup>1044</sup> This inconsistency has not yet been resolved.

696. FTI has estimated the Corani damages to range from US\$ 59.6 million to US\$ 267.3 million. First, FTI took Claimant’s enterprise value on May 27, 2011 and subtracts the market value of Santa Ana (calculated in 3 different ways), to arrive at the remainder as an estimated market value for Corani as of May 27, 2011. Second, FTI project this estimated value forward to June 27, 2011 using a stock market index to arrive at the estimated “*but for*” value of Corani on June 27, 2011. Third, FTI subtracts from this “*but for*” number the actual value of Claimant on June 27, 2011 – which in theory no longer included Santa Ana – to arrive at the loss of value for Corani.<sup>1045</sup> The key error and internal inconsistency lies in the first step of this analysis. Applying a higher value for Santa Ana yields a lower valuation and lower potential damages for Corani, and vice versa. When Claimant applies its preferred US\$ 224.2 million Santa Ana DCF valuation to its Corani damages calculation, it reaches an estimated value for Corani of US\$ 59.2 million.<sup>1046</sup> When Claimant uses analysis reports that suggest that Santa Ana only accounted for 19.2 % of Claimant’s total enterprise value, it arrives at figures valuing Santa Ana at US\$ 104.3 million – half of FTI’s estimate based on its DCF calculations – and tripling the Corani damages estimate to US\$ 170.6 million.<sup>1047</sup> FTI further suggested that the market may have considered that Santa Ana had zero value – thereby producing a damages estimate for Corani of US\$ 267.3 million – a number that is five times higher than FTI’s estimate for Corani when applying its own Santa Ana valuation.<sup>1048</sup>

697. In its closing argument, Respondent pointed out that Claimant introduced new testimony at the Hearing. Confronted with the fact that Claimant had never disclosed to the market that it suffered losses at Corani, Mr. Swarthout claimed that he told unnamed stock analysts during an undated phone call that actions at Santa Ana harmed Corani. If it was true that this connection was felt at the time, surely the Tribunal would have learned of this phone call prior to the Hearing.<sup>1049</sup>

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<sup>1044</sup> R-II ¶ 686; FTI Second Report ¶¶ 8.6 *et seq* [CEX-004].

<sup>1045</sup> R-I ¶¶ 391 – 392; FTI First Report at ¶ 8.5 [CEX-001].

<sup>1046</sup> R-I ¶¶ 393 – 397; Brattle First Report ¶¶ 176 *et seq.* [REX-004]; FTI First Report Figure 27 [CEX-001].

<sup>1047</sup> R-I ¶ 398; FTI First Report Figure 27 [CEX-001].

<sup>1048</sup> R-I ¶¶ 399 – 401; FTI First Report Figure 27 [CEX-001].

<sup>1049</sup> Tr. 1904 (R. Closing).

### 3. The Tribunal's Reasoning

698. As is undisputed, Claimant has the burden of proving not only the alleged damages to the Corani Project, but also for the requisite causal link between Respondent's breach of the FTA regarding the Santa Ana Project and the alleged damages to the Corani Project.

699. In this regard, Claimant argues that in the present case the following two steps provide the required chain of causation:

- a) *As a consequence of Peru's expropriation of Santa Ana, Claimant has to raise more money at a higher financing rate, while having fewer options than if it retained control of the Santa Ana project; the Corani project has become riskier to develop; and the development of Corani has been delayed, leading to a permanent loss of income for the period of delay;*
- b) *These events caused a direct, normal and foreseeable financial loss to Bear Creek measured by FTI as the decrease in Bear Creek's enterprise value between the last trading day prior to the ESIA suspension and the first trading day after the expropriation's announcement.*<sup>1050</sup>

700. Respondent denies such causal link and points out that Brattle explains that the true driver of the poor performance of Claimant's stock price was the general downturn in the global mining sector, and that an additional factor affecting Claimant's stock price may be the market's perception of risks to the viability of the Corani Project.<sup>1051</sup>

701. In the evidence before it, the Tribunal takes note of several aspects of the conduct of Claimant by reference to the testimony of its witness, Mr. Swarthout:

- 1) In 2011, Mr. Swarthout and Claimant, in its Interim Financial Statement and its Annual Report, did not include or otherwise inform its investors regarding any loss in the Corani Project due to what happened to its Santa Ana Project.<sup>1052</sup>

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<sup>1050</sup> C-II ¶¶ 473 – 474; Sergey Ripinsky with Kevin Williams, *Damages in International Investment Law* (British Institute of International Comparative Law 2008) [CL-0213].

<sup>1051</sup> R-II ¶¶ 653 – 654; Brattle Second Report ¶ 278 [REX-010].

<sup>1052</sup> *Bear Creek Mining Corporation Interim Consolidated Financial Statements, Second Quarter ended June 30, 2011*, August 15, 2011 [BR-12]; *Bear Creek Mining 2011 Annual Report* [R-188]; Tr. 507 – 511 (*confirming* exhibits BR-12 and R-188).

- 2) After protests subsided on June 27, 2011, Mr. Swarthout indicated that he did not see the Corani Project as being affected by the protests or the governmental measures.<sup>1053</sup>
- 3) In his 2<sup>nd</sup> Witness Statement, Mr. Swarthout testifies that clearly there were significant losses in the Corani Project due to what happened to the Santa Ana Project.<sup>1054</sup>
- 4) In reply to a question regarding the fact that Claimant had not disclosed to the market that it suffered losses at Corani, Mr. Swarthout claimed that he told unnamed stock analysts during an undated phone call that actions at Santa Ana harmed Corani.<sup>1055</sup>

702. The Tribunal considers Mr. Swarthout's testimony to be contradictory and not providing adequate proof of causation for any losses in the Corani Project due to Respondent's breach of the FTA with regard to the Santa Ana Project.

703. Further, the Tribunal has been unable to find any compelling evidence before it in the FTI expert reports as regards the required causation. Therefore, there is no need to examine the submissions by Claimant or FTI regarding the quantification of any loss to the Corani Project.

704. Since Claimant has failed to provide sufficient proof of causation of any losses in the Corani Project due to Respondent's breach of the FTA with regard to the Santa Ana Project, the Tribunal concludes that the claim must be dismissed.

## **XI. INTEREST**

### **A. CLAIMANT'S ARGUMENTS**

705. Claimant requests an award of post-award interest, until the date Respondent pays in full, at the highest possible lawful rate, such as Respondent's borrowing rate. Respondent's failure to pay compensation to Claimant is effectively a loan to Respondent. Hence, Claimant should be

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<sup>1053</sup> Tr. 516 – 518 (Swarthout); Transcript of Bear Creek Mining Corporation Special Call (6/27/2011) [R-186].

<sup>1054</sup> Swarthout Second Statement ¶¶ 43 – 58 [CWS-6].

<sup>1055</sup> Tr. 524 – 526 (Swarthout).

compensated like any other lender to Respondent during this period and should receive interest at a rate equivalent to Respondent's external cost of debt financing from private lenders.<sup>1056</sup>

706. International law – as confirmed by decisions of investment arbitration tribunals – recognizes that compound interest is the generally accepted standard in international investment arbitrations.<sup>1057</sup> Several reasons have been suggested for requiring an award of compound interest, including that it aids in making the injured claimant whole, prevents unjust enrichment, and promotes and efficiency.<sup>1058</sup>
707. The Parties do not dispute that Claimant is entitled to compound interest on any amounts awarded. The Parties dispute the rate at which such interest would be calculated.<sup>1059</sup>

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<sup>1056</sup> C-I ¶ 247.

<sup>1057</sup> *Id.* at ¶¶ 248 – 253; Siemens Award ¶ 399 [CL-0031]; Middle East Cement Award ¶ 174 [CL-0037]; Vivendi II Award ¶ 9.2.6 [CL-0038]; Tecmed Award ¶ 196 [CL-0040]; ADC Award ¶ 522 [CL-0060]; Azurix Award ¶ 440 [CL-0082]; MTD Award ¶ 251 [CL-0083]; PSEG Award ¶ 348 [CL-0088]; Metalclad Award ¶ 128 [CL-0105]; S.D. Myers Second Partial Award ¶ 307 [CL-134]; *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, Feb. 17, 2000, 15 ICSID Rev.–Foreign Inv. L.J. 169 (2000) (“Santa Elena Award”) ¶¶ 104, 101 [CL-0146]; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 ILM 896 (2002) (“Wena Award”) ¶ 129 [CL-0147]; *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, Jul. 25, 2007, ¶ 103 [CL-148]; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, Nov. 13, 2000, ¶ 96 [CL-0149]; *Enron Corporation, Ponderosa Assets, L.P., v. Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶¶ 451-52 [CL-0150]; *Pope & Talbot, Inc. v. Canada*, UNCITRAL (NAFTA), Award on Damages, May 31, 2002, ¶¶ 89-90 [CL-151]; John Y. Gotanda, A Study of Interest 4 (Villanova University School of Law Working Paper Series, Working Paper No. 83, 2007) (“Gotanda, A Study of Interest”) at 4 [CL-0152]; John Y. Gotanda, Compound Interest in International Disputes, 34 Law & Pol’y Int’l. Bus. 393, 397-98 (2003) (“Gotanda, Compound Interest”) at 397 [CL-0153]; F.A. Mann, Compound Interest as an Item of Damage in International Law, 21 U.C. Davis L. Rev. 577, 585 (1987-88) [CL-0154]; Jeffrey Colón & Michael Knoll, Prejudgment Interest In International Arbitration, 4(6) Transnat’l. Disp. Mgmt. 10 (2007) at 8 [CL-0155]; CMS Award ¶ 471 [RLA-010].

<sup>1058</sup> C-I ¶¶ 253 – 255; *Starrett Housing Corp. v. Iran*, Iran-U.S. Claims Tribunal Case No. 24, Interlocutory Award No. ITL32-24-1, Dec. 19, 1983, 23 I.L.M. 1090 (1984) [CL-145]; John Y. Gotanda, A Study of Interest 4 (Villanova University School of Law Working Paper Series, Working Paper No. 83, 2007) (“Gotanda, A Study of Interest”) at 4, 31 [CL-0152]; John Y. Gotanda, Compound Interest in International Disputes, 34 Law & Pol’y Int’l. Bus. 393, 397-98 (2003) (“Gotanda, Compound Interest”) at 397 [CL-0153]; F.A. Mann, Compound Interest as an Item of Damage in International Law, 21 U.C. Davis L. Rev. 577, 581 – 582, 585 (1987-88) [CL-0154]; Jeffrey Colón & Michael Knoll, Prejudgment Interest In International Arbitration, 4(6) Transnat’l. Disp. Mgmt. 10 (2007) at 8, 10 [CL-0155]; Natasha Affolder, Awarding Compound Interest In International Arbitration, 12 Am. Rev. Int’l. Arb. 45, 80 (2001) [CL-0156].

<sup>1059</sup> C-II ¶ 498.

708. The FTA requires that interest be based on a commercial rate.<sup>1060</sup> Thus, the Tribunal should reject Respondent’s argument that interest should be at the borrowing rate of 0.65% or the risk-free rate of 0.16%, because neither is commercial. The risk-free rate is not a commercial rate because Respondent could not borrow and Claimant would not lend at that rate.<sup>1061</sup> Respondent’s proposed borrowing rate – derived from adding to the interest rate on a one-month US Treasury bill to the sovereign spread on Peruvian certificates of deposit with a one-year maturity – does not accurately represent Respondent’s cost of borrowing.<sup>1062</sup> The Peruvian Ministry of Economics and Finance calculates the country’s emerging market bond index spread to be 2.0% and its coupon rates and bond rates on US\$-denominated debt were 9.9% and 6.0%, respectively.<sup>1063</sup> FTI, however, concludes that Respondent’s likely borrowing rate was in the range of 5.1% (the weighted yield to maturity at the expropriation date) and 5.6% (the coupon rate of the most recently issued bond). Accordingly, the Tribunal should reject Brattle’s proposed rate of 0.65% and adopt FTI’s conservative rate of 5%.<sup>1064</sup>

709. Based on the DCF calculation, the Santa Ana Project has a FMV of US\$ 224.2 million on the valuation date, before interest. With pre-award interest of US\$ 72.4 million calculated at 5.0% per annum, compounded annually up to an estimated date of award (March 15, 2017), the FMV of Santa Ana is US\$ 296.2 million.<sup>1065</sup>

## **B. RESPONDENT’S ARGUMENTS**

710. In principle, Respondent agrees with Claimant that the appropriate interest rate is “*a rate equivalent to Peru’s external cost of debt financing from private lenders.*”<sup>1066</sup> Brattle has calculated the appropriate interest rate using the average spread for Respondent’s sovereign credit default swaps, plus a risk-free rate adjustment. Using this, Brattle arrived at an interest rate of 0.72% annually.<sup>1067</sup>

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<sup>1060</sup> *Id.* at ¶ 499.

<sup>1061</sup> *Id.* at ¶¶ 498 – 499.

<sup>1062</sup> *Id.* at ¶ 500; Second FTI Expert Report ¶ 9.8, Figure 12 [CEX-004].

<sup>1063</sup> *Id.*

<sup>1064</sup> C-II ¶ 501; Tr. 1824 – 1825 (C. Closing); Second FTI Expert Report ¶ 9.9 [CEX-004].

<sup>1065</sup> C-I ¶ 240; CPHB-I ¶ 91; FTI First Report Fig. 28 [CEX-001].

<sup>1066</sup> R-I ¶ 402 – 403; R-II ¶ 688; C-I ¶ 247.

<sup>1067</sup> R-II ¶ 690; R-I ¶ 405; Brattle Report ¶ 196 [REX-004]; Brattle Second Report at ¶ 289 [REX-010].

711. Claimant initially applied a rate of 5%, the interest rate for domestic court judgments, as the appropriate rate of interest in this case.<sup>1068</sup> In its later submission, Claimant argued that its 5% rate is correct because it is a reflection of Claimant’s cost of borrowing.<sup>1069</sup> Claimant’s proposed 5% rate, however, is not equivalent to and is in no way indicative of Respondent’s external cost of debt.<sup>1070</sup> Using Claimant’s cost of borrowing is inconsistent with Claimant’s theory of interest (which is based on Respondent’s cost of borrowing) and with Claimant’s instruction to FTI to use a Peruvian Central Bank reference rate.<sup>1071</sup>

### C. THE TRIBUNAL’S REASONING

712. Article 812.3 of the FTA provides: “*Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be payable in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until date of payment.*”

713. Respondent agrees with Claimant that the appropriate commercially reasonable interest rate is “*a rate equivalent to Peru’s external cost of debt financing from private lenders.*”<sup>1072</sup>

714. However, the Parties disagree regarding the calculation of this rate. The Tribunal is not persuaded by Respondent’s argument that interest should be at the borrowing rate of 0.65% per annum or the risk-free rate of 0.16% per annum. Neither of these rates are commercial, because Respondent could not borrow and Claimant would not lend at that rate. Claimant correctly points out that the Peruvian Ministry of Economics and Finance calculates the country’s emerging market bond index spread to be 2.0% per annum and its coupon rates and bond rates on US\$-denominated debt were 9.9% and 6.0% per annum, respectively.<sup>1073</sup> FTI, however, concludes that Respondent’s likely borrowing rate was in the range of 5.1% (the weighted yield to maturity at the expropriation date) and 5.6% (the

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<sup>1068</sup> R-I ¶ 404; FTI First Report at ¶ 9.3 [CEX-001].

<sup>1069</sup> R-II ¶ 689; C-II ¶¶ 500 – 501; Brattle Second Report ¶ 295 [REX-010].

<sup>1070</sup> R-II ¶ 688; R-I ¶ 404; FTI First Report at ¶ 9.3 [CEX-001].

<sup>1071</sup> R-II ¶ 689; C-II ¶¶ 500 – 501; Brattle Second Report ¶ 295 [REX-010].

<sup>1072</sup> R-I ¶¶ 402 – 403; R-II ¶ 688; C-I ¶ 247.

<sup>1073</sup> C-II ¶ 500; Second FTI Expert Report ¶ 9.8, Figure 12 [CEX-004].

coupon rate of the most recently issued bond) per annum. In view of this, the Tribunal agrees that FTI's conservative rate of 5% per annum<sup>1074</sup> is most appropriate in the present case.

715. The Tribunal also accepts that compound interest is generally accepted in the practice of investment arbitration for any damages awarded.<sup>1075</sup>

716. In conclusion, the Tribunal finds that, on the amount of damages awarded, compound interest at a rate of 5% per annum, compounding quarterly, is to be paid by Respondent from the date that Supreme Decree 032 was published, *i.e.* June 25, 2011, until date of payment.

## **XII. COSTS**

717. Since the filing of their costs submissions, ICSID has requested further deposits from the Parties, and these increase the Parties' costs. The total costs deposits requested by ICSID amount to US\$ 1,249,925.00. Of these, the final calculation of the total of the arbitration costs amount to US\$ 1,122,460.54.

### **A. CLAIMANT'S ARGUMENTS**

718. Claimant requests that the Tribunal award it all of its costs and expenses associated with this arbitration, including attorneys' fees. But for Respondent's breach of its obligations under the FTA, Claimant would not have incurred these arbitration costs. Thus, in order to place Claimant in the same position it would have been in the absence of Respondent's breaches, Claimant should be awarded all costs, expenses, and attorneys' fees incurred herein.<sup>1076</sup>

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<sup>1074</sup> Second FTI Expert Report ¶ 9.9 [CEX-004].

<sup>1075</sup> *Siemens Award* ¶ 399 [CL-0031]; *Middle East Cement Award* ¶ 174 [CL-0037]; *Vivendi II Award* ¶ 9.2.6 [CL-0038]; *Tecmed Award* ¶ 196 [CL-0040]; *ADC Award* ¶ 522 [CL-0060]; *Azurix Award* ¶ 440 [CL-0082]; *MTD Award* ¶ 251 [CL-0083]; *PSEG Award* ¶ 348 [CL-0088]; *Metalclad Award* ¶ 128 [CL-0105]; *S.D. Myers Second Partial Award* ¶ 307 [CL-134]; *Santa Elena Award* ¶¶ 104, 101 [CL-0146]; *Wena Award* ¶ 129 [CL-0147]; *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, Jul. 25, 2007, ¶ 103 [CL-148]; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, Nov. 13, 2000, ¶ 96 [CL-0149]; *Enron Corporation, Ponderosa Assets, L.P., v. Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶¶ 451-52 [CL-0150]; *Pope & Talbot, Inc. v. Canada*, UNCITRAL (NAFTA), Award on Damages, May 31, 2002, ¶¶ 89-90 [CL-151]; *CMS Award* ¶ 471 [RLA-010].

<sup>1076</sup> C-I ¶ 246; C-II ¶ 502; C.Costs-II ¶¶ 3 – 7.

719. A full costs award is appropriate, given the reasonableness of Claimant’s costs.<sup>1077</sup> Claimant’s costs were necessary for the proper conduct of this case and are reasonable and appropriate given its complex circumstances and duration, as well as the damage that Respondent’s violations of the FTA caused to Claimant’s investment.<sup>1078</sup> Claimant also presented its case efficiently by (1) forgoing a document exchange and production phase, (2) agreeing not to bifurcate proceedings, (3) deciding – in accordance with the Tribunal’s suggestion – not to call some witnesses for cross examination, and (4) agreeing to a procedure to expedite the examination of the legal, mining, and quantum experts.<sup>1079</sup>
720. Each Party’s costs are similar, the difference between the two results from the fact that Claimant worked with counsel to build a case and evidentiary record for this proceeding against Respondent. Claimant also submitted two more pleadings as compared to Respondent.<sup>1080</sup>
721. In its Statement of Costs, Claimant claimed the following costs, totaling **US\$ 7,923,121.85**, plus an additional “Holdback Amount” of US\$1,909,030.90 as of 29 March 2017, would be due to King & Spalding if damages awarded to Bear Creek were to exceed US\$50 million:

CATEGORY		AMOUNT (IN US\$)
<b>Legal Fees and Expenses</b>		
•	King & Spalding <i>Fees</i>	US\$ 4,522,814.44
	<i>Expenses</i> (including, inter alia, travel, hearing expenses, translation services, copies, etc.)	US\$ 430,819.54
•	Miranda & Amado <i>Fees and expenses</i>	US\$ 944,142.90
•	Estudio Grau <i>Fees and expenses</i>	US\$ 15,146.74
•	DuMoulin Black <i>Fees and Expenses</i>	US\$ 9,912.87
<b>Experts’ Fees and Expenses</b>		

<sup>1077</sup> C.Costs-II ¶¶ 1, 8 – 9, 12.

<sup>1078</sup> *Id.* at ¶ 8.

<sup>1079</sup> *Id.* at ¶ 10.

<sup>1080</sup> *Id.* at ¶¶ 11 – 12.

•	FTI	US\$ 798,788.35
•	RPA	US\$ 399,171.18
•	Alfredo Bullard	US\$ 136,833.41
•	Hans Flury	US\$ 87,734.40
<b>Witnesses' Expenses</b>		
•	Andy Swarthout	US\$ 22,129.90
•	Elsiario Antúnez de Mayolo	US\$ 18,014.14
•	Catherine McLeod-Seltzer	US\$ 3,138.47
<b>Claimant's Additional Expenses</b>		
•	Travel expenses of Mr. Kevin Morano, Director of Bear Creek, in connection with the preparation of Claimant's submissions and the hearing	US\$ 5,771.09
•	Travel expenses of Dr. Alvaro Díaz, General Counsel of Bear Creek, in connection with the preparation of Claimant's submissions and the hearing	US\$ 3,704.42
<b>Claimant's share of the Tribunal's and ICSID's Fees and Expenses</b>		US\$ 525,000
<b>TOTAL</b>		<b>US\$ 7,923,121.85</b>

722. Respondent is not entitled to a recovery of its costs in this case because it cannot prevail on the merits.<sup>1081</sup>

#### **B. RESPONDENT'S ARGUMENTS**

723. Investment arbitration tribunals have awarded costs and fees to respondent States that faced unmeritorious claims.<sup>1082</sup> Since Claimant has failed to demonstrate why this Tribunal should not

<sup>1081</sup> *Id.* at ¶ 13.

<sup>1082</sup> R-I ¶ 406, R-II ¶ 691; *Iberdrola Energia S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, Aug. 17, 2012, paras. 515-516 [CL-0117]; *Burimi SRL and Eagle Games S.H.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, May 29, 2013, paras. 162-164 [RLA-073]; *RSM Production Corporation and others v. Grenada [III]*, ICSID Case No. ARB/10/6, Award, Dec. 10, 2010, para. 8.3.4 [RLA-074].

dismiss the claim, the Tribunal should order Claimant to pay the costs and fees (including attorneys’ fees) that Respondent has incurred in defending against Claimant’s allegations.<sup>1083</sup> That Claimant – a junior mining company that has never produced an ounce of silver in Peru – is seeking more than half a billion dollars is outlandish.<sup>1084</sup> Even if Claimant’s claims are to succeed, it would be inappropriate to award costs and fees against Respondent, which has acted in good faith and to the best of its abilities at all times, both at the time of the events in dispute and in this arbitration.<sup>1085</sup>

724. Respondent has been put to a heavy burden to defend against Claimant’s claims, and should be awarded its costs and fees in the event that Claimant’s claims fail in whole or in part.<sup>1086</sup>

725. In its Statement of Costs, Respondent claimed the following costs, totaling **US\$ 6,357,384.05**:

CATEGORY		AMOUNT (IN US\$)
<b>Legal Fees and Expenses</b>		
•	Sidley Austin, LLP, Washington, D.C. <i>Fees and expenses</i> (including travel and translations)	US\$ 4,191,588.94
•	Estudio Navarro, Ferrero & Pazos <i>Fees and expenses</i>	US\$ 226,352.22
<b>Experts’ Fees and Expenses</b>		
•	Dr. Neal Rigby (SRK Consulting)	US\$ 279,000.00
•	Prof. Graham Davis & Florin Dorobantu (The Brattle Group)	US\$ 880,000.00
•	Dr. Francisco Eguiguren Praeli	US\$ 30,000.00
•	Prof. Antonio Peña Jumpa	US\$ 124,379.93
•	Dr. Luis Rodríguez-Mariátegui	US\$ 75,000.00
•	Dr. Jorge Danos Ordóñez	US\$ 30,000.00
<b>Republic of Peru</b>		

<sup>1083</sup> R-I ¶ 406; R-II ¶ 691.

<sup>1084</sup> R.Costs-II.

<sup>1085</sup> *Id.*

<sup>1086</sup> *Id.*

•	Travel expenses for Government representatives to travel to Washington, D.C. for September 2016 preparation and hearing	US\$ 12,192.96
•	Travel expenses for Government witnesses to travel to Washington, D.C. for September 2016 hearing	US\$ 8,870.00
<b>Costs Payable Through ICSID</b>		US\$ 500,000
<b>TOTAL</b>		<b>US\$ 6,357,384.05</b>

726. Claimant’s costs and expenses are high in several respects, which confirms the inappropriateness of requiring Respondent to pay them. For example, Claimant’s international counsel ran up additional fees and expenses that exceeded those of Respondent by more than US\$ 2.2 million. In addition, Claimant paid its local Peruvian counsel three times as much as did Respondent. Claimant should not be permitted to look to Respondent to mitigate its own overspending.<sup>1087</sup>

### C. THE TRIBUNAL’S REASONING

727. The FTA provides in Article 841.1: “*Where a Tribunal makes a final award against the disputing Party, the Tribunal may award, separately or in combination, only: [...] The Tribunal may also award costs in accordance with the applicable arbitration rules.*”

728. The applicable arbitration rules are Article 61(2) of the ICSID Convention and Rule 47(1)(j) of the ICSID Arbitration Rules. They allow the Tribunal a degree of discretion.<sup>1088</sup>

729. The Tribunal will first address the question of how the arbitration costs shall be apportioned between the Parties, because the evaluation of the amounts claimed by a party will only be relevant insofar as the Tribunal finds that a party has to reimburse to the other party some of the costs that party incurred.

730. In this context, the Tribunal takes into account the following. While Claimant lost its request for provisional measures, Claimant has prevailed regarding jurisdiction, liability, and damages in the sum of US\$ 18,237,592. Claimant, however, had claimed damages of an amount of “*at least US\$ 522.2*

<sup>1087</sup> *Id.*

<sup>1088</sup> *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, December 17, 2015, ¶ 598 [CL-0239]; *Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 1001 [CL-0240].

million.” Thus, it only prevailed regarding about 3% of its total claim by value. However, regarding the arbitration costs involved, it has to be noted that this considerable difference is only due to two factors: (1) with respect to the Santa Ana Claim, the Tribunal has not accepted the DCF method of calculation, and (2) the Corani Claim has been dismissed in its entirety. As the submissions of the Parties, the conduct of the hearing, and this Award show, these two issues caused only a very small portion of the work, costs, and time for the Parties and the Tribunal in this procedure. The vast majority of the arbitration costs were caused by the issues on which Respondent did not prevail, and in particular the violation of the FTA by the circumstances in which Supreme Decree 032 was adopted.

731. In view of the above considerations, using its discretion for cost decisions in awarding costs, the Tribunal considers that Respondent should bear its own costs and reimburse Claimant for 75% of the reasonable costs it incurred.

732. Now, the Tribunal will address the question whether or to which extent the arbitration costs claimed by Claimant must be considered reasonable.

733. In this regard, Respondent, in its 2<sup>nd</sup> Cost Submission, has argued as follows:

*Respondent also notes that Claimant's costs and expenses are high in several respects that would confirm the inappropriateness of requiring Respondent to pay any portion of them. While Claimant (properly) claims only the portion of its international counsel's fees actually paid by the company (\$4.5 million), Claimant's international counsel apparently ran up actual fees and expenses that exceeded those of Respondent by more than \$2.2 million. Likewise, Claimant paid its local Peruvian counsel some three times as much as did Respondent. Claimant should not be permitted to look to Respondent to mitigate its own overspending. [internal footnotes omitted]*

734. The Tribunal is not persuaded by these objections. The higher fees and expenses for Claimant’s international counsel are not unreasonable, in particular since they had to research and deal with the factual and legal situations of considerable complexity, while Respondent could provide its counsel with such information by using its own resources in its own country. For the same reason, it is understandable that Claimant had to rely to a greater extent on and pay more for its Peruvian counsel.

Further, as Claimant points out,<sup>1089</sup> it drafted and submitted two more memorials, *i.e.* the Request for Arbitration and the Rejoinder on Jurisdiction, that Respondent did not need to prepare.

735. The Tribunal therefore considers that the arbitration costs claimed by Claimant are reasonable for the case at hand.

736. In conclusion, the Tribunal finds that Respondent has to bear its own costs of arbitration, and has to reimburse 75% of the arbitration costs requested by Claimant, *i.e.* **US\$ 5,986,183.29**.

737. The rate of interest found above to be applicable for the damages awarded also has to be applied to this payment for arbitration costs, however only from the date this amount is due, *i.e.* from the date of this Award.

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<sup>1089</sup> C-Costs II ¶ 11.

### **XIII. DISPOSITIF**

738. For the reasons above, the Tribunal decides as follows:

- 1. The Tribunal has jurisdiction over the claims raised.**
- 2. Respondent shall pay to Claimant damages amounting to US\$ 18,237,592.**
- 3. Respondent shall bear its own costs of arbitration and shall reimburse Claimant 75% of Claimant's arbitration costs, *i.e.* US\$ 5,986,183.29**
- 4. Respondent shall pay, on the above amount of damages awarded, *i.e.* US\$ 18,237,592, compound interest at a rate of 5% from the date of publication of Supreme Decree 032, *i.e.* June 25, 2011, until date of payment.**
- 5. Respondent shall pay, on the above amount of arbitration costs awarded, *i.e.* 5,986,183.29, compound interest at a rate of 5% from the date of this Award.**
- 6. All other claims are dismissed.**

[signed]

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Dr. Michael Pryles  
Arbitrator

Date: 10 Nov. 2017

[signed]

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Prof. Philippe Sands QC  
Arbitrator

Date: 6 Nov. 2017  
Subject to the attached partial dissenting  
opinion

[signed]

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Prof. Karl-Heinz Böckstiegel  
President of the Tribunal

Date: November 20, 2017

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES**

In the arbitration proceeding between

**BEAR CREEK MINING CORPORATION**

Claimant

and

**REPUBLIC OF PERU**

Respondent

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

**PARTIAL DISSENTING OPINION**

**PROFESSOR PHILIPPE SANDS QC**

1. In certain respects this might be described as a straightforward case. An investor – the Claimant, Bear Creek Mining Corporation – decided that it wished to mine silver ore deposits located in an area of Peru known as Santa Ana in the Puno department. In accordance with Article 71 of the Peruvian Constitution, this location, which is within 50 kilometres of the border between Peru and Bolivia, meant that the Claimant was obliged to obtain – along with a multitude of other permitting requirements – a “public necessity” Decree granted to it by the Peruvian Council of Ministers. In November 2007, the Council of Ministers proceeded to adopt Supreme Decree 083-2007, declaring the Santa Ana Project to be a public necessity. This authorised the Claimant to acquire seven mining rights in the Santa Ana area of Puno. Three years and six

months later, in June 2011, the Council of Ministers adopted Supreme Decree 032-2011-EM. This revoked Supreme Decree 083-2007 and the finding of “public necessity”, ending the Claimant’s right to operate its Santa Ana concessions. In between those two dates – November 2007 and June 2011 – there were protests and considerable social unrest in the Puno department. As set out below, I am clear that the protests and unrests were caused in part by the Santa Ana Project.

2. I am very largely in agreement with the conclusions of the Tribunal, to the effect that, within the meaning of the Free Trade Agreement between Canada and Peru (FTA): the Claimant made an investment; the Tribunal has jurisdiction over the claim; and there is no bar to the exercise by the Tribunal of such jurisdiction (admissibility). I also agree with the conclusion that the effect of Supreme Decree 032-2011 was to expropriate by indirect means the right of the Claimant to operate the Santa Ana concessions, and that this occurred in violation of Article 812 of the FTA. In my view, the circumstances which the Peruvian government faced – massive and growing social unrest caused in part by the Santa Ana Project – left it with no option but to act in some way to protect the well-being of its citizens; however, other and less draconian options were available to the Council of Ministers, including the suspension of Decree 083-2007, rather than revocation. There is no evidence before the Tribunal that these other options were explored or assessed, properly or even at all. The circumstances in which Supreme Decree 032-2011 was adopted – in particular the failure to give the Claimant a right to be heard before its adoption – also gave rise, in my view, to a violation of Article 805, being a violation of the obligation to offer “fair and equitable treatment”. I understand, however, the Tribunal’s conclusion that “*the Parties have not presented arguments related to the legal consequences of such a finding, and such a finding indeed would not change or add to those that follow from an unlawful indirect expropriation*”.<sup>1</sup>
3. I also agree with the Majority that the consequence of the violation of Article 812 of the FTA entitles the Claimant to be awarded a measure of compensation, and with the general approach taken to the assessment of that compensation. In particular, I fully concur – given the Project’s speculative and unlikely prospects in face of serious social unrest, the manifest failure to obtain

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<sup>1</sup> Award, para. 533.

a “social license”, and the many environmental and other regulatory authorisations yet to be obtained – with the conclusion set out in the Award that “*the calculation of Claimant’s damages in the present case cannot be carried out by reference to the potential expected profitability of the Santa Ana Project and the DCF method*”.<sup>2</sup> In the circumstances, the proper measure of damages is to be assessed by reference to the Claimant’s actual investment in the Project after November 27, 2007.<sup>3</sup>

4. I disagree, however, with the Majority’s assessment of the amount of damages that are due, in application of this approach, and in particular the failure to reduce that amount by reason of the fault of the Claimant in contributing to the unrest.<sup>4</sup> Whilst I agree that it is for the Respondent to establish any contributory fault, my assessment of the evidence before the Tribunal is that the Respondent has clearly established the Claimant’s contributory responsibility, by reason of its acts and omissions, to the social unrest that left the Peruvian government in the predicament it faced, and the need to do something reasonable and lawful to protect public well-being. I set out my reasons in this Partial Dissent.
  
5. A central issue in the facts argued before the Tribunal concerned the circumstances of the collapse of the Santa Ana Project – a matter of fact – and the legal standard to be applied – a matter of law. As to the latter, as noted by the Tribunal, the *Abengoa* award offers the legal standard to be applied. On this approach, the Tribunal is called on to assess whether “*events that led to the loss of the Claimants’ investment would not have occurred*” if “*a social communication program had been timely implemented*”.<sup>5</sup> I am not persuaded by the conclusion reached at paragraph 411 of the Award in this case. On the basis of the evidence before us I have difficulty in understanding how it could be concluded, as the Majority does, that there was no connection – or partially causal relationship – between the manner in which the Claimant conducted itself and the circumstances that gave rise, firstly, to the disruption of the Santa Ana Project, and then to its premature demise as a consequence of Supreme Decree 032- 2011.

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<sup>2</sup> Award, para. 604.

<sup>3</sup> Claimant invested a total of US\$ 21,827,687. However, as part of this investment occurred before Claimant legally obtained the concessions on 27 November 2007, when Supreme Decree 083 was issued. The final amount thus invested by Claimant equals US\$ 18,237,592. See Award, paras. 658 ff.

<sup>4</sup> Award, para. 668.

<sup>5</sup> Award, para. 410 citing ICSID Case No. ARB(AF)/09/2, *Abengoa S.A. y Cofides S.A. v. United Mexican States*, Award (18 April 2013).

6. In reaching a contrary view to my colleagues, I rely on the totality of the evidence that was put before us by the Parties, and in particular the extensive testimony of numerous witnesses and experts. For the reasons set out below, in my view this evidence clearly shows that the Claimant's acts and omissions, in the period before 2008, during 2008, thereafter, and right up until May 2011, contributed in material ways to the events that unfolded and then led to the Project's collapse. In particular, the Project collapsed because of the investor's inability to obtain a "social license", the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it, whether directly or indirectly. It is blindingly obvious that the viability and success of a project such as this, located in the community of the Aymara peoples, a group of interconnected communities, was necessarily dependent on local support. In this regard, the Project can hardly be said to have got off to a good start, with the Claimant making use of a degree of subterfuge, by obtaining permits in the name of one of its own lowly employees – Ms Villavicencio, a Peruvian national – which it, as a foreign corporation, was not at the time authorised or lawfully entitled to obtain. If nothing else, the absence of transparency at that early stage of the Project can only have contributed to an undermining of the conditions necessary to build trust over the longer term. The discontent that followed, expressed by many members of the affected local communities, was foreseeable.
  
7. In this regard it is helpful that the Parties broadly agree that the investment was made in an area in which the rights of numerous indigenous communities – under national and international law – were fully engaged. Of particular relevance are the rules set forth in ILO Convention 169 (Indigenous and Tribal Peoples Convention), which was applicable to the territory of Peru after it became a Party on February 2<sup>nd</sup>, 1994. The Preamble to the Convention, which was adopted in 1989, recognizes "*the aspirations of [indigenous and tribal] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live*", and calls attention to "*the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding*". This preambular language offers encouragement to any investor to take into account as fully as possible the aspirations of indigenous and tribal peoples. Establishing conditions of transparency and trust are a vital pre-requisite for the success of a

project, which involves a corporation arriving from a faraway place to pursue an investment in the lands of indigenous and tribal peoples.

8. Article 1 provides that the Convention “*applies to*” certain “*tribal peoples*” and “*peoples ... who are regarded as indigenous*”. There can be no doubt that it is applicable to the Aymara peoples in respect of the activities proposed by the Santa Ana Project. No serious argument to the contrary was made.

9. Article 13(1) of the Convention provides that:

*“In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”*

Article 15 then provides:

*“1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.*

*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.”*

As noted, there is no dispute between the Parties that the Convention is applicable to the indigenous peoples situated in the area of the Santa Ana Project.<sup>6</sup> It is the case, of course, that the obligation to implement the Convention is one that falls on States,<sup>7</sup> by implementing the

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<sup>6</sup> See for example, Claimant’s Post Hearing Brief I (21 December 2016), para. 1 ff.; Respondent’s Counter-Memorial on the Merits and Memorial on Jurisdiction (6 October 2015), para. 62 ff.

<sup>7</sup> CEACR Observation on Bolivia 2005/76th Session: “... the obligation to ensure that consultations are held in a manner consistent with the requirements established in the Convention is an obligation to be discharged by governments, not by private individuals or companies.”

Convention through national laws. In the case of Peru, ILO Convention 169 was approved and implemented in 1993 through Legislative Resolution No. 26253.

10. Yet the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them. In *Urbaser v Argentina*, the Tribunal noted that human rights relating to dignity and adequate housing and living conditions “*are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.*”<sup>8</sup> The *Urbaser* Tribunal further noted that the BIT being applied in that case “*has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights*”,<sup>9</sup> and that Article 42(1) of the ICSID Convention together with the governing law clause of that BIT (Article X(5)) provided that that “*Tribunal shall apply the law of the host State and such rules of international law as may be applicable.*”<sup>10</sup>

11. The same considerations apply in the present case in relation to the requirements of ILO Convention 169, and in particular its Article 15 on consultation requirements. Article 837 of the Canada Peru FTA, on Governing Law, provides that this Tribunal “*shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*”. ILO Convention 169 is a rule of international law applicable to the territory of Peru. This Tribunal is entitled to take the Convention into account in determining whether the Claimant carried out its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner, having regard to all relevant legal requirements, including the implementing Peruvian legislation.

12. The relevance and applicability of Convention 169 was accepted by the Respondent.<sup>11</sup> As for the Claimant, its Chief Operation Officer, Mr Elsiario Antunez de Mayolo, testified that the Convention was “*mentioned ... as part of the Environmental Impact Assessment and also with*

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<sup>8</sup> ICSID Case No. ARB/07/26, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic*, Award (8 December 2016), para. 1199.

<sup>9</sup> *ibid.*, para. 1200.

<sup>10</sup> *ibid.*, para. 1202.

<sup>11</sup> See for example Respondent’s Counter-Memorial on the Merits and Memorial on Jurisdiction (6 October 2015), paras. 62, 135.

*the consultants.*”<sup>12</sup> Counsel for the Claimant accepted that the Convention had been “*incorporated into*” domestic law, including the right of the indigenous peoples to consultation under the Convention.<sup>13</sup> Whether by means of the domestic law of Peru or otherwise, the relevance of the Convention has been recognised by both Parties. Yet when I asked Mr Antunez de Mayolo whether he was familiar with what Article 15 of the Convention said, or had ever seen it, he replied: “*no.*”<sup>14</sup> This, in my view, indicates that the Claimant had, at best, a semi-detached relationship to the vital rights set forth in this part of the Convention. It was not as fully prepared for the making of an investment in the lands of the communities of indigenous peoples – the peoples concerned by the project it was embarked upon – as it should have been.

13. Article 15 recognises various rights “*of the peoples concerned*”. These rights include: (1) to “*participate in the use, management and conservation*” of resources “*pertaining to their lands*”; (2) to be consulted “*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*”; and (3) “*wherever possible [to] participate in the benefits of such activities, and [to] receive fair compensation for any damages which they may sustain as a result of such activities.*” It is noteworthy that the Convention connects the right to be consulted with the right to participate in the benefits. It also to be noted that when Article 15 refers to “*these peoples*” it means all of “*the peoples concerned*”, not just some of them.

14. The question therefore arises whether the rights of all “*the peoples concerned*” by the Santa Ana Project were given sufficient effect, as required by the Convention and the implementing domestic law. That raises, as a first issue, who “*the peoples concerned*” were, and as a second step, whether the rights of all these peoples, including in particular the right to be consulted, were given sufficient recognition.

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<sup>12</sup> Transcript at 611:16-21.

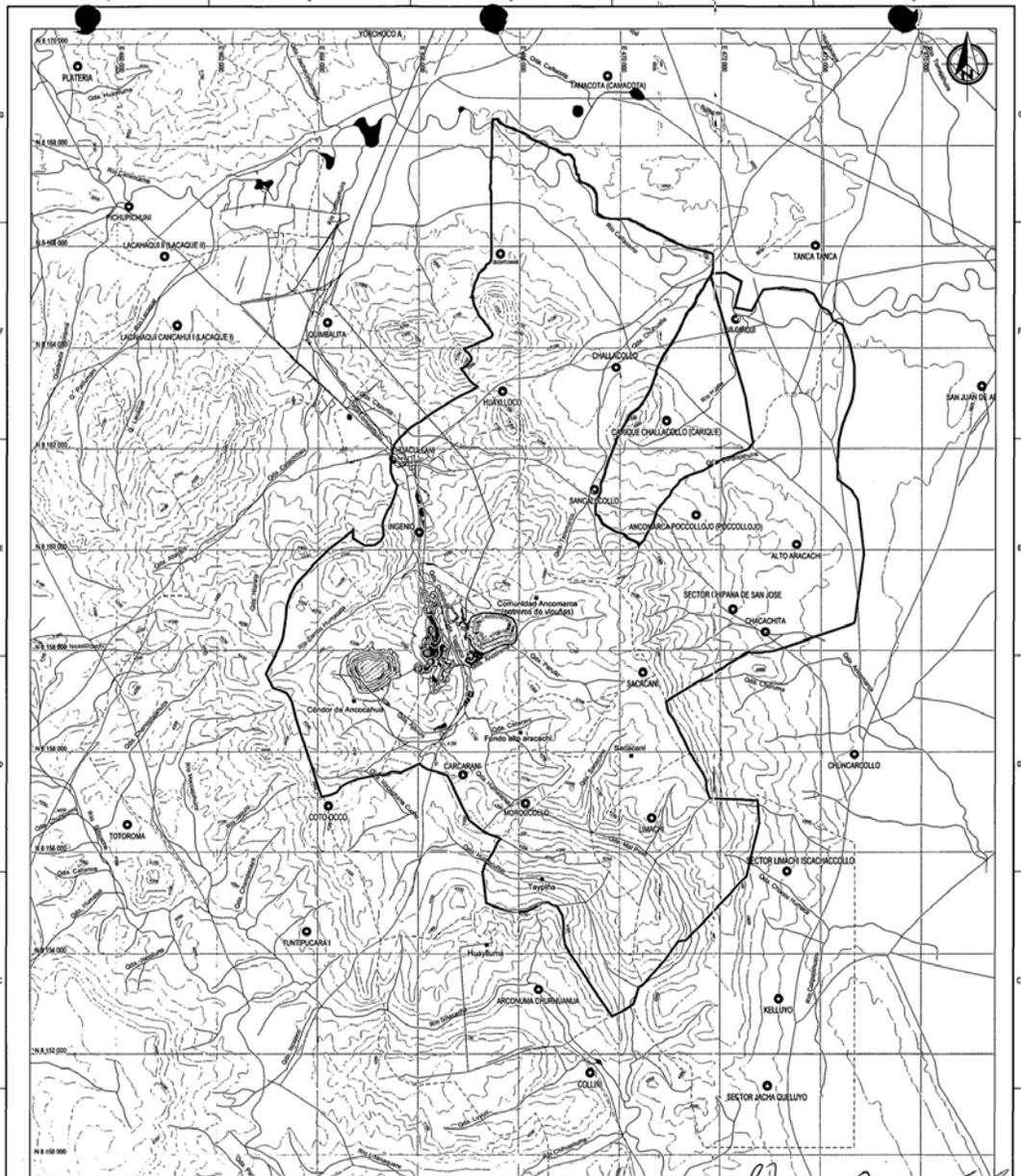
<sup>13</sup> Transcript at 625:6-20 (Mr Burnett).

<sup>14</sup> Transcript at. 612:3-6.

15. The evidence before us included a map contained in the Claimant's Environmental Impact Assessment (EIA). This showed, within a continuous line marked on the map, the geographic area to be exploited under the Project, and the area directly affected.<sup>15</sup>

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<sup>15</sup> Exhibit R-398.



**LEYENDA**

- CENTRO POBLADO
- PARCIALIDAD
- CURVAS DE NIVEL
- ÁREA DE INFLUENCIA DIRECTA SOCIAL
- CURSOS DE AGUA EXISTENTE
- INSTALACIONES PROPUESTAS
- ▨ CANTERA DE MATERIAL DE PRESTAMO
- - - LÍMITE DE COMUNIDADES 2010
- CAMINO PRINCIPAL
- TROCHA CARROZABLE

**DISTANCIAS DEL CENTRO DEL PROYECTO A LOS CENTROS POBLADOS**

CENTRO POBLADO	DISTANCIA (Metros)
Vicacani	8123.36
Quimacana	7153.11
Challacollo	5874.49
Sancaycollo	3772.79
Huaylloco	4496.84
Ingenio	1687.27
Popolocco	5274.98
Chacachita	6311.03
Parcialidad Sacacani en la CC Arconuma	3876.52
Parcialidad Yagalla en la CC Arconuma	5616.20
Parcialidad Huaylluma en la CC Arconuma	6633.88
Fundo Alto Aracachi en la CC Alto Aracachi	2683.62
Huacacani	3214.56
Fundo Caracani	3237.57
Fundo Moroccollo	4100.11
Districto Kelluyo	11330.36
Districto exilia	29613.41

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N°	FECHA	REVISOR	PROYECTOR	ELABORADOR	APROBADO	PLAZO
1	09/2010					
2						
3						

**REF. MINEM 10/01/2011**  
**REF. Informe N°399-2011-MEM-AAM**  
 Respuesta a la Obs. 3

**BEAR CREEK MINING COMPANY**  
 ESTUDIO DE IMPACTO AMBIENTAL - PROYECTO SANTA ANA

**DISTANCIAS DE CENTROS POBLADOS AL PROYECTO**

DISTRICTO	PROYECTO	DISTANCIA	PLAZO
EL ALCA	07.02.13.03	2.30 A	

PARA REVISIÓN

MEM - DGAAM 2308

16. The map identifies a number of communities originally believed by the Claimant to fall within the Project's area of direct influence. These might be said to be "*the peoples concerned*". These communities ethnically and culturally belong to the Aymara group. They are indigenous peoples, who mostly engage in "*agriculture, small-scale fishing and livestock farming*",<sup>16</sup> activities that are closely connected to the land they inhabit. Moreover, for them this land "*is not only a geographical space but represents a spiritual bond for the communities*", including as "*the 'guardian mountains' [Apus], which represent extremely important spiritual sanctuaries for all the population in the area.*"<sup>17</sup>
17. During the written pleadings, this map was modified by the Respondent to mark in green all those communities that had members employed by Claimant in one of its rotational work programmes. The members of other communities were not involved in any form of employment scheme related to the Santa Ana Project. These communities, said to be opposed to the Santa Ana Project, were marked in red on this map.<sup>18</sup>

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<sup>16</sup> Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment – Puno ("DHUMA") and Dr. Lopez (10 June 2016) (Eng.), p. 3.

<sup>17</sup> *ibid.*, p. 7.

<sup>18</sup> Exhibit R-312.



18. It is apparent that the total number of communities marked in red is significant. These communities are not only amongst those that might be affected – whether directly or indirectly – by certain negative aspects of the Project, but also those that would not benefit from it in economic terms. The map appears to show that different communities were treated in a different way, and that all groups within Claimant’s own identified area of influence – whether direct or indirect – were not treated in the same manner.
19. There was ample evidence before the Tribunal that the communities who began to protest in 2008 (and in later years, including 2011) tended to be those marked in red on this second map. This suggests a correlation between the two factors, and would appear to offer a possible explanation for the adverse responses – of certain communities – to the Santa Ana Project, and the role of the Claimant. The fact that Claimant did not – on the evidence before the Tribunal – take real or sufficient steps to address those concerns and grievances, and to engage the trust of *all* potentially affected communities, appears to have contributed, at least in part, to some of the population’s general discontent with the Santa Ana Project, ultimately crystallising in the spring 2011 protests. The evidence before the Tribunal shows that the Claimant was put on notice as early as 2008 that numerous communities (marked in red) had strong objections, yet the evidence before the Tribunal made clear – to me at least – that it failed to take active – or, in some instances, any – steps to address the concerns of those communities.
20. One of the expert witnesses who appeared before the Tribunal, on behalf of the Respondent, was Professor Antonio Alfonso Peña Jumpa. He is a Professor at the Pontificia University of Peru. He holds degrees in law and in anthropology, including a doctorate from Leuven University in Belgium. He provided a clear summary of his two expert reports, and was then cross-examined by the Claimant. I found him to be an expert witness of obvious independence, who was persuasive and credible. No one of equivalent weight was put up against him. His testimony was clear, understated, balanced, focused and – in respect of its impact on me – significant.
21. Shown a copy of the map showing the communities marked in red and green, Professor Peña Jumpa told the Tribunal that the communities and *parcialidad* shown in green squares were “*beneficiaries*” of the Santa Ana Project (Challacollo, Huacullani, Ingenio, Ancomarca and

Condor Ancocahua),<sup>19</sup> in the sense that they got jobs from it. He added that “[t]he others, ones in red, can also be identified as communities or parcialidades”. They included Yorohoco, Arconuma, Churhuanua, Totoroma, Sacacani, Carique Challacollo and San Juan (connected with another community), and all of these were “communities or parcialidades that are part of the zone” affected by the Project.<sup>20</sup> Despite being, as he put it, “fully connected” to the area touched by the Project, these communities did not receive jobs related to it.<sup>21</sup> All of these communities, in red and in green as marked on the map, were, in his view, “peoples concerned to the natural resources pertaining to their lands” within the meaning of Article 15 of the Convention,<sup>22</sup> and thus entitled to “participate in the benefits of [the investor’s] activities”, as Article 15 of the Convention requires. These views were not seriously challenged by Claimant in cross-examination, or contradicted by other evidence before the Tribunal.

22. As regards consultation, and the claim that the workshops and *talleres* might be sufficient to win over these communities, Professor Peña noted that even amongst those communities that had been given jobs “there was a lot of opposition”.<sup>23</sup> As he put it, “many members of Challacollo, which supposedly is one of the communities that is favored [by the Project], came out against.”<sup>24</sup> This testimony was not denied in cross-examination.

23. The differences between the Parties on this point concerned, rather, whether all the markings on the map were to be treated as “communities”. Questioned by a member of the Tribunal, the Claimant’s President and Chief Executive, Mr Andrew Swarthout, asserted that:

*“the towns in these little red circles are not communities. They are actually, at least some of them I – I can't say all of them, but it looks like most of them are actually what I would describe as little ranch clusters that belong to a community ... these belong to communities that we did, in fact, have talleres and workshops and consultations with, so many, if not all, of these. My colleague, Elsiario Antunez de Mayolo can better address this particular map because he has a lot more granularity in the field, but I can say that many of these do not*

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<sup>19</sup> Transcript at 1304:1-5.

<sup>20</sup> Transcript at 1304:17-21.

<sup>21</sup> Transcript at 1307:7-22.

<sup>22</sup> Transcript at 1383:18-1384:5.

<sup>23</sup> Transcript at 1308:8-13.

<sup>24</sup> Transcript at 1308:20-22.

*constitute communities and, in fact, belong to communities that were in our community consult list, and we can establish that we've actually included all of these.”*<sup>25</sup>

24. Mr Antunez de Mayolo told the Tribunal that the red circles on the map represented “*groupings of housing units or small population centers that are within the communities*”, that “[*t*]hey are not communities but, rather, clusters of houses.”<sup>26</sup> He also stated that these “*clusters*” were included in workshops with the four or five communities that made up the area of direct influence,<sup>27</sup> and that the Claimant had held “*informational workshops*” for communities outside the area of direct impact.<sup>28</sup> Yet on cross-examination Mr Antunez de Mayolo accepted that there were four communities in the Project’s area of direct influence,<sup>29</sup> and a further 32 communities in the area of indirect influence (14 in the Kelluyo District and 18 in the Huacullani District).<sup>30</sup> Mr Antunez de Mayolo also stated that he had not been aware of opposition to the Project before he started work in April 2010, but learned of it soon after;<sup>31</sup> and he confirmed that it was “*likely*” communities in the direct area who had employment in the exploration phase would be the ones “*most supportive of the project*”<sup>32</sup> (with the obvious implication that he accepted that others would oppose), but that even these supportive communities “*had concerns in connection with the Projects.*”<sup>33</sup> He stated too that he did not speak Aymara, the language of the communities concerned.<sup>34</sup>

25. By contrast to the apparently limited knowledge or expertise of the Claimant’s witnesses and experts on matters Aymara, Professor Peña Jumpa offered assistance that I found to be on point, reliable and balanced. In summarising his reports, he explained that the Aymara community, which was pre-Inca and had been in this southern area of Peru for “*a long time*”,<sup>35</sup> had a significant relationship to the earth (Pachama in Aymara) which provides them with natural

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<sup>25</sup> Transcript at 542:20-543:16.

<sup>26</sup> Transcript at 560:13-17.

<sup>27</sup> Transcript at 560:19-561:2.

<sup>28</sup> Transcript at 561:19- 562:6.

<sup>29</sup> Transcript at 573:19-574:2.

<sup>30</sup> Transcript at 574:9-11.

<sup>31</sup> Transcript at 576:16- 577:10.

<sup>32</sup> Transcript at 580:3-9.

<sup>33</sup> Transcript at 585:20-586:5.

<sup>34</sup> Transcript at 575:9-11.

<sup>35</sup> Transcript at 1289:14-18.

resources, and the mountains (Apus) which provide them with protection.<sup>36</sup> The Santa Ana Project was located in an area known as Chucuito. It included several districts, of which two – Huacullani and Kelluyo – were “*very important*”.<sup>37</sup> He stated that the Santa Ana Project “*is exactly on the border between both Districts*” but that it also goes beyond these two districts with regard to its effects, which reach into “*adjacent areas such as Pisacoma ... and ... Desaguadero*”, both of which became “*deeply involved in this conflict*”, along with other areas (Zepita, Pomata and Juli).<sup>38</sup>

26. On the limitations of the Claimant’s outreach activities he stated without equivocation, on the basis of interviews he had conducted, that:

*“Bear Creek only worked with four communities and one Parcialidad in the area linked to the Mining Area. These four are Concepción de Ingenio, Challacollo, Ancomarca, and the urban community of Huacullani, and in addition, Condor Ancocahua is the Parcialidad. But the Company excluded ten communities identified by the mining company itself that were part of their area of influence and they were excluded as well as 12 communities from Kelluyo also located inside the area of influence that we see on the sketch.”*<sup>39</sup>

For this reason, he concluded that:

*“Bear Creek's activities were not enough to obtain the communities' understanding and acceptance”.*<sup>40</sup>

27. The effect of exclusion was significant:

*“the members of the excluded communities began to protest against the Santa Ana Project. And these protests were part of a process ... [which] entailed four stages: The looting and burning of the camp in 2008, the Public Hearing in 2011, the organized opposition later on after the Public Hearing, and the social explosion in the upcoming days and weeks.”*<sup>41</sup>

28. Moreover, in his view on the basis of the materials he had reviewed, even before the looting and burning in 2008:

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<sup>36</sup> Transcript at 1290:10-17.

<sup>37</sup> Transcript at 1292:6-7.

<sup>38</sup> Transcript at 1292:7-21.

<sup>39</sup> Transcript at 1293:11-22.

<sup>40</sup> Transcript at 1294:9-11.

<sup>41</sup> Transcript at 1294:13-20.

*“Bear Creek knew that the neighboring communities opposed the Project ... [they] knew of the protests in advance ... they had all this information, even a month in advance.”*<sup>42</sup>

In his opinion the 2008 protest *“was not an isolated terrorist act”*<sup>43</sup>, and it was *“not true”* that it was an act carried out by outside forces.<sup>44</sup> The protesters came from the Huacullani and Kelluyo districts, and others: *“Only a small group from Huacullani supported the Project. Most of the members of the communities were against it, and that's why they participated in this act.”*<sup>45</sup>

29. The Claimant then withdrew temporarily from the Project, returning with what they said was *“a new strategy”*.<sup>46</sup> On Professor Peña’s view, however,

*“there was no new strategy, they continued to work with the same communities and the conflict just deepened.”*<sup>47</sup>

In other words, the evidence before the Tribunal made clear that the Claimant failed to take the lessons from a significant, early instance of protest.

30. The next stage commenced with the public hearing held on February 23<sup>rd</sup>, 2011. Professor Peña accepted that *“a large number of members of the community participated”*, but based on interviews he concluded that *“some were forced to go to offer tacit approval, but the great majority of the members showed discomfort and discontent with the Project.”*<sup>48</sup> One major problem with the meeting was that it was held in Spanish, not in Aymara.<sup>49</sup> The evidence shows that at that meeting the affected population had *“serious concerns”*.<sup>50</sup>

31. Thereafter,

*“[i]n March 2011, members of the Kelluyo, Huacullani, Desaguadero, Pisacoma, Zepita communities, among others met multiple times to organize the opposition and to call for the cancellation of the Santa Ana Project.”*<sup>51</sup>

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<sup>42</sup> Transcript at 1294:21-1295:1.

<sup>43</sup> Transcript at 1295:22.

<sup>44</sup> Transcript at 1296:6-8.

<sup>45</sup> Transcript at 1296:11-14.

<sup>46</sup> Transcript at 1296:15-18.

<sup>47</sup> Transcript at 1296:19-21.

<sup>48</sup> Transcript at 1297:12-15.

<sup>49</sup> Transcript at 1297:16-1298:3.

<sup>50</sup> Transcript at 1298:4-6.

<sup>51</sup> Transcript at 1298:9-13.

Many complaints were made to public authorities, but “[t]here was no response by the local or regional Governments”<sup>52</sup> This led to a “social explosion”, starting with local protests in Huacullani in March 2011, which moved on to Desaguadero and Juli in April 2011, with the blockage of an international highway and closure of the bridge connecting Bolivia to Peru. A 48-hour regional strike followed, which offered “a serious warning” given the widespread participation, and then “the death of a protester from Kelluyo, [which] worsened the situation amongst the community members.”<sup>53</sup> Thereafter,

*“Protests spread to cities with larger populations, they moved on to Juli, that was the capital of the Province [...] finally, we see the third phase, that is the radicalization of protests, protests at the Juliaca Airport ... [a]nd the Aymara protests took place in Lima.”*<sup>54</sup>

32. The narrative is a compelling one, fully supported by the totality of evidence that is available to the Tribunal. Finally, Professor Peña offered his conclusion as to the investor’s appreciation of the situation it faced:

*“That 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. If Bear Creek had understood how to work properly with the communities – with the Aymara communities, the social conflict would not have reached crisis levels as we saw in the region.”*

He adds:

*“If the mining activities had not been halted, the protests would have continued.”*<sup>55</sup>

33. In summary, it is apparent from his testimony, which is not really contradicted by the Claimant, that the investor’s outreach programme was inadequate: it failed to involve all the potentially affected communities, offering jobs only to some and engaging in consultations which were uneven and insufficient across the totality of communities. What should the Claimant have done? Professor Peña says the Claimant should have dealt with communities as a collective: “rather than focus on the communities that were close to the mining field ... they should have

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<sup>52</sup> Transcript at 1298:21-22.

<sup>53</sup> Transcript at 1299:3-22.

<sup>54</sup> Transcript at 1300:5-1301:7.

<sup>55</sup> Transcript at 1301:12-1302:2.

*included the other communities that they felt were affected.”*<sup>56</sup> He hazards the opinion that “*had they discussed with the entire collective [of communities] and reached an agreement, it is quite likely that the answer ... would have been different.*”<sup>57</sup> Equally, he argues, a more equal distribution of jobs, and a different approach to their being offered, would have had positive consequences:

*“The communities are interrelated. They are organized by district and province. There is a federation of comunidades campesinas in the South, and 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.’”*<sup>58</sup>

34. The lesson seems now to have been learned by the Claimant, but too late. During the hearing Mr Swarthout confirmed that in the later Corani Project the company had drawn a bigger radius for its consultations, now extending for over 50 kilometres, so as to “*solidify a social license in a much bigger radius than normally we would feel that we should do.*”<sup>59</sup> I understood this as accepting, in effect, the force of Professor Peña’s approach.

35. For my part, I was convinced by Professor Peña’s testimony. I waited for an attack on its central core, but none came. On the basis of it, and the totality of the evidence before the Tribunal, it is clear that the Claimant did not do all it could have done to engage with all the affected communities, especially after the initial protests in 2008. That evidence also makes clear that the Claimant failed to acknowledge that those events were motivated, in significant part, by the fact that certain affected (or potentially affected) communities had serious concerns with the Project because of its potential environmental risks, and because they felt themselves to be excluded from its benefits. The Claimant failed to draw the obvious and necessary conclusions from the early indications of opposition in 2008, in particular the need to improve its community outreach and relations.

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<sup>56</sup> Transcript at 1357:5-8.

<sup>57</sup> Transcript at 1357:8-10.

<sup>58</sup> Transcript at 1358:11-19.

<sup>59</sup> Transcript at 539:3-13.

36. This conclusion is confirmed by the helpful *amicus curiae* submission of DHUMA. This contended that Claimant’s failure to engage in proper community relations contributed to the losses it suffered, noting also that members of certain communities felt unable to participate in the public meeting in February 2011, as there was only limited space available.<sup>60</sup> In its Reply to the *amicus*, the Claimant criticised DHUMA’s written submissions, *inter alia*, for being biased and unsubstantiated,<sup>61</sup> and it described DHUMA as representing a “*radical anti-mining position*”.<sup>62</sup> Claimant is of course entitled not to share the policies or objectives of DHUMA, but given its investment in a project located thousands of miles from its home, in an area populated by local communities who are recognised by ILO Convention 169 and other rules of international law as having legitimate interests in the use of their lands, it may want to reflect on its approach to such interests. As an international investor the Claimant has legitimate interests and rights under international law; local communities of indigenous and tribal peoples also have rights under international law, and these are not lesser rights. In my view, DHUMA assisted the Tribunal “*by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.*”<sup>63</sup> Its participation in these proceedings was helpful and polite at all times, and added to perceptions of the legitimacy of ICSID proceedings of this kind.

37. As regards the role of the Respondent, it too has legitimate interests and rights, including respect for the rights of the Claimant under the Canada-Peru FTA. By the means in which Decree 032-2011 was adopted, and perhaps also for the failure to respond effectively to the complaints received in 2011, as noted by Professor Peña, it bears a significant share of the responsibilities. It may be the function of a State or its central government to deliver a domestic law framework that ensures that a consultation process and outcomes are consistent with Article 15 of ILO Convention 169, but it is not their function to hold an investor’s hand and deliver a “social license” out of those processes. It is for the investor to obtain the “social license”, and in this case it was unable to do so largely because of its own failures. The Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license.

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<sup>60</sup> Amicus Curiae Brief, p. 6.

<sup>61</sup> Claimant’s Reply to Amici (18 August 2016), p. 2.

<sup>62</sup> *ibid.*

<sup>63</sup> ICSID Rules of Procedure for Arbitration Proceedings, Rule 37(2).

38. The Claimant's contribution to the events that led to Supreme Decree 032-2011-EM being adopted has implications for the amount of damages to be awarded. As set out in the Award,<sup>64</sup> by the time Supreme Decree 032 was adopted the prospects for the Santa Ana Project were already dismal, if indeed they continued to exist at all. Many environmental and other permits were still to be granted, and the nature and extent of the opposition made it clear that there was no real possibility of the Project soon obtaining the necessary "social license". For this reason, the proper measure of damages for the unlawful effects of Supreme Decree 032 is, as the Award makes clear, to be assessed by reference to the financial contribution made to the Project.
39. That financial contribution amounted to US\$ 18,237,592. I conclude that the Claimant's contribution was significant and material, and that its responsibilities are no less than those of the government. For this reason I would reduce the measure of damages by one half, to US\$ 9,118,796.
40. This has consequences on the allocation of the costs of this arbitration. As I have laid out in this Dissenting Opinion, I am of the view that the actions of the Claimant and Respondent have contributed to the demise of the Project. It is for this reason that I do not share the Majority's reasoning at paragraphs 730-736 of the Award. Instead, I believe that the costs of these proceedings should be split equally between the Parties.
41. The only other point I wish to make concerns the legitimate right of a Party to the Canada-Peru FTA "*to regulate and to exercise its police power in the interests of public welfare*",<sup>65</sup> a point made by Canada in its submission.<sup>66</sup> The Majority has ruled at paragraph 473 that Article 2201.1 of the FTA, which provides for a list of exceptions that fall within a State's legitimate exercise of its police powers, is exhaustive. I do not disagree with this analysis, but wish to make clear that my support for this conclusion is without prejudice to the application of Article 25 of the ILC Articles on State Responsibility, which deals with acts of Necessity. As the Annulment Committees in *CMS* and *Sempra* made clear, the operation of a *lex specialis* in a

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<sup>64</sup> Award, paras. 155- 202.

<sup>65</sup> ICSID Case No. ARB/03/17, *Suez InterAgua v The Argentine Republic*, Decision on Liability (30 July 2010), para. 128.

<sup>66</sup> Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement (9 June 2016), para. 5.

BIT does not have the effect (unless the BIT explicitly provides otherwise) of precluding the operation of Article 25, which continues to function as a “*secondary rule of international law*” operating even when an exception under the *lex specialis* is not available.<sup>67</sup> In the present case, the conditions of Article 25 are not met because the act in question – the revocation of Supreme Decree 083-2007 – was not “*the only way for [Peru] to safeguard an essential interest against a grave and imminent peril*”. As noted above, and in the Award, other options were available, including suspension of Decree 83-2007. Nevertheless, whatever the requirements of the FTA, the possibility of having recourse to Article 25, as a rule precluding wrongfulness, is not excluded by the FTA.

Professor Philippe Sands QC, Arbitrator

12 September 2017

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<sup>67</sup> ICSID Case No. ARB/01/8, *CMS Gas Transmission Company v The Argentine Republic*, Annulment Decision (25 September 2007), paras. 133-134; ICSID Case No. ARB/02/16, *Sempra Energy International v The Argentine Republic*, Annulment Decision (29 June 2010), paras. 203- 204 & 208-209.



[signed]

Professor Philippe Sands QC, Arbitrator

12 September 2017