

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES**

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

**In the Matter of**

**BEAR CREEK MINING CORPORATION**

**Claimant,**

**v.**

**THE REPUBLIC OF PERU**

**Respondent.**

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**CLAIMANT'S POST-HEARING BRIEF**

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**TABLE OF CONTENTS**

- I. BEAR CREEK COMPLIED WITH, AND EXCEEDED, ALL OF ITS COMMUNITY RELATIONS OBLIGATIONS ..... 1
  - A. THE APPLICABLE LEGAL FRAMEWORK GOVERNING COMMUNITY RELATIONS AT SANTA ANA ..... 1
  - B. BEAR CREEK COMPLIED WITH AND EXCEEDED THE REQUIREMENTS THAT GOVERN COMMUNITY RELATIONS..... 5
    - 1. Bear Creek’s Early Community Outreach Efforts ..... 5
    - 2. Bear Creek’s Citizen Participation Plan ..... 8
    - 3. The Public Hearing Presided over by the State ..... 13
    - 4. Bear Creek’s Continued Implementation of its Citizen Participation Plan ..... 16
  - C. PERU FAILED TO COMPLY WITH ITS OWN LEGAL OBLIGATIONS VIS-À-VIS THE COMMUNITIES..... 18
  - D. THE ABSENCE OF COMMUNITY SUPPORT HAS VERY LIMITED, IF ANY, CONSEQUENCES AS A MATTER OF LAW ..... 20
- II. BEAR CREEK MADE ALL REQUIRED DISCLOSURES IN ITS APPLICATION FOR A PUBLIC NECESSITY DECLARATION .....23
  - A. BEAR CREEK MADE ALL REQUIRED DISCLOSURES ..... 24
  - B. RESPONDENT’S ALLEGATION THAT BEAR CREEK FAILED TO DISCLOSE INFORMATION IN ITS SUPREME DECREE APPLICATION IS WRONG..... 26
  - C. GOOD FAITH MISTAKES AND MINOR ERRORS DO NOT DEPRIVE THE TRIBUNAL OF JURISDICTION OR ABSOLVE RESPONDENT FROM LIABILITY ..... 29
- III. SUPREME DECREE 032.....31
  - A. PERU DENIED BEAR CREEK DUE PROCESS IN ISSUING SUPREME DECREE 032..... 31
  - B. PERU PROFESSES TWO REASONS FOR ISSUING SUPREME DECREE 032, BUT CAN POINT TO NO SUPPORTING EVIDENCE ON WHICH IT RELIED ..... 36
  - C. NEITHER REASON PROFFERED BY PERU IS ALONE SUFFICIENT TO JUSTIFY SUPREME DECREE 032 ..... 38
    - 1. The Alleged Illegality of Claimant’s Acquisition of the Santa Ana Concessions Cannot Justify Supreme Decree 032..... 38
    - 2. The 2011 Social Protests Cannot Justify Supreme Decree 032 ..... 41
- IV. BEAR CREEK IS ENTITLED TO COMPENSATION AND DAMAGES .....43
  - A. DAMAGES OWED FOR LAWFUL EXPROPRIATION ..... 46

B.	DAMAGES OWED FOR UNLAWFUL EXPROPRIATION.....	52
C.	DAMAGES OWED FOR NON-EXPROPRIATION BREACHES OF THE FTA .....	54
D.	CONTRIBUTORY NEGLIGENCE.....	55
E.	SUMMARY OF BEAR CREEK’S DAMAGES .....	62
V.	REQUEST FOR RELIEF .....	64

Per Procedural Order No. 10, Claimant submits this Post-Hearing Brief.

**I. BEAR CREEK COMPLIED WITH, AND EXCEEDED, ALL OF ITS COMMUNITY RELATIONS OBLIGATIONS**

**A. THE APPLICABLE LEGAL FRAMEWORK GOVERNING COMMUNITY RELATIONS AT SANTA ANA**

- (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?*

1. When Bear Creek acquired the Santa Ana Concessions and began developing the Project, there was no provision under Peruvian law providing any standard by which either the State or local communities could grant a “social license” with respect to a particular mining project. Instead, Peru developed a “Citizen Participation Process,” whereby the State and the mining company share information about the relevant project with the local communities, who, in turn, communicate their concerns, if any, to the State and the company.

2. As Mr. Ramírez Delpino testified at the hearing,<sup>1</sup> and Peru confirmed,<sup>2</sup> Supreme Decree No. 028-2008, *i.e.*, the Regulation on Citizen Participation in the Mining Subsector (“Supreme Decree No. 028”), together with Ministerial Resolution No. 304-2008-MEM/DM Regulating the Citizen Participation Process in the Mining Subsector (“Resolution No. 304”), both governed the Citizen Participation Process.<sup>3</sup> Moreover, through the Citizen Participation Process, Supreme Decree No. 028 implemented and regulated the communities’ rights in the context of mining projects referenced in the Indigenous and Tribal Peoples Convention (“ILO

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<sup>1</sup> Mr. Ramírez Delpino served as head of the office of environmental affairs (*Dirección General de Asuntos Ambientales Mineros* or “DGAAM”) within the Ministry of Energy and Mines (“MINEM”) during the time Bear Creek implemented its community relations program.

<sup>2</sup> Respondent’s Rejoinder at ¶ 130.

<sup>3</sup> **Tr.** 1060:9-12, 1080:20-1081:1 (Ramírez Delpino).

Convention No. 169”).<sup>4</sup> Mr. Ramírez Delpino and Mr. Flury both confirmed at the hearing that this was their understanding as well.<sup>5</sup> In other words, Bear Creek was under no independent obligation to implement the provisions of ILO Convention No. 169 in its community relations program at Santa Ana. Therefore, as explained more fully below, Bear Creek followed—and complied with—the applicable Peruvian legal framework, and Peru approved, as evidenced by MINEM’s endorsement of Bear Creek’s Citizen Participation Plan (“PPC”).<sup>6</sup>

3. Supreme Decree No. 028 sets out the basic rules for citizen participation within the mineral resources industry.<sup>7</sup> It establishes that the State—and more specifically, DGAAM—is responsible for guiding, directing, and conducting the Citizen Participation Process.<sup>8</sup> For example, it is DGAAM that selects the most suitable citizen participation mechanisms among

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<sup>4</sup> **Exhibit R-159**, Regulation on Citizen Participation in the Mining Subsector, Supreme Decree No. 028-2008-EM (“Supreme Decree No. 028”), Art. 4 (“The right to consultation referred to in Convention 169 of the International Labor Organization on Indigenous and Tribal Populations in Independent Countries is exercised and implemented in the mining subsector through the citizen participation process regulated by these Regulations”).

<sup>5</sup> **Tr.** 1068:17-1069:4 (Ramírez Delpino) (“Q. So, you would agree with me, then, that as the legal provisions we have reviewed provide, the Government does have a duty to guarantee the right of consultation of the indigenous communities? Correct? A. Correct. The law says that it is guaranteed through the citizen-participation process. Q. And, in Peru, such right is guaranteed with the implementation, as you just said, of the PPC? A. Correct”); **Tr.** 1073:7-10 (Ramírez Delpino) (“[A]ccording to Peruvian legislation, it says or it is interpreted or it is considered – that is to say the citizen-participation process is considered consultation. That’s what Article 4 [of Supreme Decree No. 028] says”); **Tr.** 1159:1-7 (Flury) (“This provision expressly provides that the right to consultation, referred to in ILO Convention 169, is carried out and implemented in the Mining Subsector through the citizen-participation process regulated by this regulation.”) Dr. Flury explained that the incorporation of the ILO Convention No. 169’s right to consultation into Supreme Decree No. 028 accurately reflects the Peruvian legal framework when Bear Creek implemented its Citizen Participation Plan. Then, in 2011, Peru enacted a law that separated the citizen participation mechanisms from the right to consultation (**Tr.** 1222:1-13). He also remarked that neither the ILO Convention No. 169’s right to consultation nor any Peruvian legal provision granted local communities the right to veto mining activities or the decisions of Peruvian authorities regarding such activities (**Tr.** 1159:10-12).

<sup>6</sup> **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.

<sup>7</sup> **Exhibit R-159**, Supreme Decree No. 028, Art. 1 (“The purpose of these regulations is to regulate the responsible participation of all persons, natural or juridical, individually or collectively, in the processes for defining, applying measures, actions or decision-making by the competent authority relating to the sustainable use of mineral resources in the national territory”).

<sup>8</sup> **Exhibit R-159**, Supreme Decree No. 028, Art. 2.2 (“The Ministry of Energy and Mines, through the General Directorate for Environmental Mining Affairs [DGAAM], is the authority with competence to guide, direct and conduct citizen participation processes relating to mining activities of mid- and large-scale mining”).

those proposed by the mining company.<sup>9</sup> Likewise, MINEM is responsible for providing important information to the local communities regarding, *inter alia*, the scope of the mining company's concession, the extent of the company's environmental obligations, the content of the communities' rights throughout the process, etc.<sup>10</sup> Supreme Decree No. 028 also provides that it is the State's duty to guarantee the local communities' right to participate in the Citizen Participation Process.<sup>11</sup> Thus, for example, DGAAM must adopt the necessary measures to ensure the success of the citizen participation mechanisms that it has selected.<sup>12</sup>

4. Resolution No. 304 further develops the citizen participation mechanisms referenced in Supreme Decree No. 028 by identifying specific activities and criteria to guarantee the effectiveness of the local communities' participation rights.<sup>13</sup> It clearly defines the different

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<sup>9</sup> **Exhibit R-159**, Supreme Decree No. 028, Art. 7 (“The competent authority shall determine and select the most suitable citizen participation mechanisms in order to ensure the involved population’s right to citizen participation by taking into consideration the characteristics of said population and the specificities of the relevant mining project”).

<sup>10</sup> **Exhibit R-159**, Supreme Decree No. 028, Art. 12 (“The Ministry of Energy and Mines must promote or conduct activities that inform the populations in areas with mining concessions held by mid- or large-sized mining undertakings of the scope of the concession right granted by the State, the environmental obligations, current laws that regulate the activity, the rights and obligations of the populations involved, the activity’s stages, applicable technology, among other issues that would allow providing the population with certain, timely, and impartial information on the mining activity”).

<sup>11</sup> **Exhibit R-159**, Supreme Decree No. 028, Art. 3 (“It is the State’s responsibility to guarantee the right to citizen participation in the mining subsector by correctly applying these Regulations”).

<sup>12</sup> **Exhibit R-159**, Supreme Decree No. 028, Art. 17 (“The authority that directs, presides over or conducts the citizen participation process must adopt the necessary measures for the success of the citizen participation mechanisms”). *See also* **Tr.** 1066:19-21 (Ramírez Delpino) (“The Directorate [DGAAM] was responsible for approving the mechanisms and guaranteeing that the proposals were fulfilled”) (emphasis added); First Expert Report of Luis Rodríguez-Mariátegui at ¶ 136: “The authority has the specific responsibility to approve the citizen participation mechanisms and monitor compliance with the same during the evaluation and execution phases of the Project, including the holding of a public hearing and anything else that has been approved for the aforementioned stages.”

<sup>13</sup> **Exhibit R-153**, Ministerial Resolution No. 304-2008-MEM-DM Regulating the Citizen Participation Process in the Mining Subsector (“Resolution No. 304”), Art. 1 (“This Ministerial Resolution aims to develop the mechanisms of public participation referred to in the Regulation of Public Participation in the Mining Subsector, approved by Supreme Decree No. 028-2008-EM (hereinafter the “Regulation”), and the activities, deadlines, and specific criteria for the development of the participatory processes in each of the stages of the mining activity”). *See also* **Tr.** 1090:19-1091:2 (Ramírez Delpino).

citizen participation mechanisms,<sup>14</sup> and sets out the obligations of the State and of the mining company with respect to citizen participation at each stage of the mining project.<sup>15</sup>

5. The State enjoys a certain amount of discretion when fulfilling its obligations under Supreme Decree No. 028 and Resolution No. 304. For example, DGAAM may request additional information from the mining company in respect of the citizen participation mechanisms that it has proposed.<sup>16</sup> Mr. Ramírez Delpino confirmed that it may even reject citizen participation mechanisms if they are deemed unsuitable.<sup>17</sup> Similarly, DGAAM may call upon the mining company to hold additional workshops after the public hearing has taken place in order to address specific concerns or observations voiced by the local communities.<sup>18</sup>

6. In light of the above, to determine whether Bear Creek sufficiently reached out to the relevant communities to obtain a “social license,” the Tribunal should consider Peru’s own actions in reviewing the Citizen Participation Process for the Santa Ana Project. Respondent’s actions at the time included, *inter alia*, its approval of the specific citizen participation mechanisms proposed by Bear Creek in its PPC,<sup>19</sup> its approval of the delimitation of the Project’s Area of Influence,<sup>20</sup> and the fact that Peru never informed Bear Creek of any concern it may have

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<sup>14</sup> **Exhibit R-153**, Resolution No. 304, Art. 2.

<sup>15</sup> See **Exhibit R-153**, Resolution No. 304, Art. 3 (regarding citizen participation after the granting of the mining concession); Arts. 4-11 (regarding citizen participation during the exploration phase); Arts. 12-30 (regarding citizen participation during the exploitation phase); Arts. 31-33 (regarding citizen participation during the execution of the mining project); and Arts. 34-35 (regarding citizen participation during mine closure).

<sup>16</sup> See **Exhibit C-156**, ESIA Approval Chart; Claimant’s Reply at ¶ 84; and Claimant’s Opening Presentation at Slide 61.

<sup>17</sup> **Tr.** 1105:2-4 (Ramírez Delpino) (“Q. Certainly, DGAAM can reject a PPC or Executive Summary instead of approving it; correct? A. Certainly.”).

<sup>18</sup> **Exhibit R-153**, Resolution No. 304, Art. 26.4.

<sup>19</sup> **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011. See also Claimant’s Reply at ¶ 82.

<sup>20</sup> **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011, p. 4; and **Exhibit R-40**, DGAAM’s Observations to Bear Creek’s EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD, Apr. 19, 2011, p. 7.

had regarding community relations at Santa Ana.<sup>21</sup>

**B. BEAR CREEK COMPLIED WITH AND EXCEEDED THE REQUIREMENTS THAT GOVERN COMMUNITY RELATIONS**

*(a)iii. What actions were legally required of Claimant in seeking to obtain a Social License, and did the Claimant take these actions?*

7. Bear Creek is well aware that social support is fundamental to the successful execution of any mining project,<sup>22</sup> and as a result aimed to forge a respectful relationship with the local communities.<sup>23</sup> Claimant devoted considerable efforts and resources to develop and implement successful citizen participation mechanisms, through which it discussed the Project's scope and impact with the local communities. In doing so, Bear Creek not only complied with the requirements governing community relations, as Peru acknowledged, but exceeded them.

**1. Bear Creek's Early Community Outreach Efforts**

8. Bear Creek acquired the Santa Ana Concessions after the Peruvian government issued Supreme Decree No. 083 on November 29, 2007, declaring that Bear Creek's ownership of the concessions was a public necessity. Bear Creek informed the local communities that it was the new owner of the Santa Ana Project, as Mr. Ramírez Delpino testified at the hearing,<sup>24</sup> and conducted dozens of workshops, many more than were required under Resolution No. 304.<sup>25</sup>

<sup>21</sup> Tr. 571:8-12 (Antúnez de Mayolo) (“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>22</sup> Tr. 755:21-756:8 (McLeod-Seltzer).

<sup>23</sup> Antúnez de Mayolo Rebuttal Witness Statement at ¶ 65.

<sup>24</sup> Tr. 1074:21-1075:16 (Ramírez Delpino) (“So, in this case, there have been two owners: First, it was Ms. Villavicencio, who presented her Declaration of Environmental Impact – there were two declarations, I believe – and then she presented a Semi-Detailed Environmental Impact Study under her name, and as that was being carried out, there was a change in ownership. ... So, during the process, it is understood that the Company [Bear Creek] has to have explained that they have acquired that project and how they are in charge, and what's it going to be like, how are they going to carry out, what are the impacts going to be, and so on.”). In any event, Mr. Ramírez Delpino testified that communities cared more about a mining project's size than about the identity of its owners (Tr. 1075:17-1076:6).

<sup>25</sup> **Exhibit R-153**, Resolution No. 304, Art. 4; **Exhibit C-155**, Ausenco Vector, *Plan de Participación Ciudadana* (“PPC”), p. 3, Section 2.1; **Exhibit R-229**, 2010 Environmental Impact Assessment (PPC), Annex 2: Participatory Information Workshops 2007-2010, Dec. 23, 2010.



DGAAM expressly endorsed Bear Creek’s community relations program by approving three amendments to the ESIA for the exploration of the Santa Ana Project in 2008, 2009, and 2010.<sup>26</sup> Mr. Ramírez Delpino personally signed the 2009 and 2010 directorial resolutions,<sup>27</sup> noting that “Bear Creek got past all the steps of the exploration stage.”<sup>28</sup>

9. After completing the exploration works at Santa Ana, Bear Creek continued the Project’s development by starting the drafting process of the ESIA for the exploitation phase. Pursuant to Article 12 of Resolution No. 304, Bear Creek was required to conduct at least one participatory workshop before the preparation of the ESIA began.<sup>29</sup> Bear Creek exceeded this requirement by conducting five workshops.<sup>30</sup> Pursuant to Article 13 of Resolution No. 304, Bear Creek also was required to conduct at least one participatory workshop during the preparation of the ESIA.<sup>31</sup> Again, Bear Creek exceeded this requirement by conducting five workshops.<sup>32</sup> Mr. Ramírez Delpino confirmed this important fact at the hearing.<sup>33</sup> Yet, he also questioned the workshops’ effectiveness.<sup>34</sup> That allegation is meritless. At MINEM’s request, the Regional Directorate of Energy and Mines (“DREM”), or the local authorities at DREM’s direction,

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<sup>26</sup> **Exhibit R-36**, Directorial Resolution No. 216-2008-MEM/AAM Approving First Amendment to the EIA for Exploration for the Santa Ana Project, Sept. 5, 2008; **Exhibit R-37**, Directorial Resolution No. 310-2009-MEM/AAM Approving Second Amendment to the EIA for Exploration for the Santa Ana Project, Oct. 6, 2009, p. 13; and **Exhibit R-38**, Directorial Resolution No. 280-2010-MEM/AAM Approving Third Amendment to the EIA for Exploration for the Santa Ana Project, Sept. 8, 2010, p. 15.

<sup>27</sup> **Exhibit R-37**, Directorial Resolution No. 310-2009-MEM/AAM Approving Second Amendment to the EIA for Exploration for the Santa Ana Project, Oct. 6, 2009; and **Exhibit R-38**, Directorial Resolution No. 280-2010-MEM/AAM Approving Third Amendment to the EIA for Exploration for the Santa Ana Project, Sept. 8, 2010.

<sup>28</sup> **RWS-2**, Witness Statement of Felipe A. Ramírez Delpino, Oct. 6, 2015, ¶ 8.

<sup>29</sup> **Exhibit R-153**, Resolution No. 304, Art. 12. *See also* Claimant’s Closing Presentation at Slide 93.

<sup>30</sup> **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/ AD/KVS, Jan. 7, 2011, p. 2; **Exhibit C-155**, Ausenco Vector, PPC, Annex 2.4 “Taller de Apertura EIA 2009.”

<sup>31</sup> **Exhibit R-153**, Resolution No. 304, Art. 13. *See also* Claimant’s Closing Presentation at Slide 93.

<sup>32</sup> **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/ AD/KVS, Jan. 7, 2011, p. 2; **Exhibit C-155**, Ausenco Vector, PPC, Table 5.3, Meetings and Community Participation, p. 14.

<sup>33</sup> **Tr.** 1093:19-1094:1 (Ramírez Delpino) (“Q. But it is a fact, is it not, that Bear Creek exceeded the requirements under Ministerial Resolution 304 that requires conducting at least one workshop during the ESIA? A. That’s right.”).

<sup>34</sup> **Tr.** 1093:14-18 (Ramírez Delpino).

**chaired** these workshops.<sup>35</sup> Neither MINEM nor DREM ever informed Bear Creek of any concerns they may have had regarding the workshops.<sup>36</sup>

10. Bear Creek implemented other citizen participation mechanisms, in addition to these workshops, before and during the preparation of the ESIA. These included: (i) setting up an Office of Ongoing Services at the Santa Ana campsite, which would respond to any queries that the communities may have had regarding the Project;<sup>37</sup> and (ii) distributing informational material, in print and through the radio, to inform the communities about the scope and characteristics of the Santa Ana Project.<sup>38</sup> Bear Creek also 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>39</sup>

11. Furthermore, Bear Creek introduced a rotational work program, which employed, at its peak, over 100 community members.<sup>40</sup> In this arbitration, Peru criticized the program, describing it as “payoffs in the form of a handful of jobs, 100 jobs for a population of more than 32,000 in Huacullani and Kelluyo, which is about .3 percent.”<sup>41</sup> That criticism, however, is misguided. MINEM’s own Guide on Community Relations recommends that mining companies should be clear and realistic about job offers to avoid creating false expectations,<sup>42</sup> and to favor

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<sup>35</sup> See **Exhibit C-159**, Letter from F. Ramírez, MINEM, to V. Paredes, DREM, Oct. 28, 2010; **Exhibit R-230**, 2010 Environmental Impact Assessment (PPC), Annex 3: EIA Opening Workshop Minutes, Dec. 23, 2010; and **Exhibit R-231**, 2010 Environmental Impact Assessment (PPC), Annex 4: Information Workshop Minutes, Dec. 23, 2010. See also Claimant’s Closing Presentation at Slide 95.

<sup>36</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>37</sup> **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/ AD/KVS, Jan. 7, 2011, p. 1; **Exhibit C-155**, Ausenco Vector, PPC, p. 5, Section 2.3.2.

<sup>38</sup> **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/ AD/KVS, Jan. 7, 2011, p. 2; **Exhibit C-155**, Ausenco Vector, PPC, p. 6, Section 2.4.2.

<sup>39</sup> **Exhibit C-155**, Ausenco Vector, PPC, p. 6, Section 2.4.3.

<sup>40</sup> Swarthout Witness Statement at ¶ 40.

<sup>41</sup> **Tr.** 254:4-7 (Respondent’s Opening Statement).

<sup>42</sup> **Exhibit R-172**, Ministry of Energy and Mines of Peru, General Direction of Environmental Affairs, “Guide on

local hiring to avoid undesirable immigration and potential conflicts.<sup>43</sup> Since Santa Ana was a small project that would create a limited number of jobs, Bear Creek logically focused on the communities immediately surrounding the Project.<sup>44</sup> Thus, Bear Creek followed MINEM's recommendations to the letter when it designed and implemented its rotational work program.

## 2. Bear Creek's Citizen Participation Plan

12. Together with the extensive ESIA for the exploitation phase, Bear Creek also prepared an Executive Summary thereof, and a PPC. The PPC set out the citizen participation mechanisms that Claimant proposed to implement during the evaluation of the ESIA and during the execution of the Santa Ana Project itself. The PPC also delineated the Project's areas of direct and indirect influence. Bear Creek defined the Project's area of direct influence on the basis of two criteria: (i) the land on which the mine's components would be located; and (ii) the sectors that could be environmentally impacted due to the location of some project components.<sup>45</sup> Accordingly, the Project's area of direct influence included the Challacollo, Concepción de Ingenio, and Ancomarca communities, the Sacacani, Taypiña, and Huaylluma sectors (or *parcialidades*) in the Arconuma community, the Alto Aracachi area (or *fundo*) in the Alto Aracachi community, the San Pedro de Huacullani community council, and two privately-owned areas (or *fundos*), Carcarani and Morocucho.<sup>46</sup> The area of direct influence is delineated

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Community Relations," Jan. 1, 2001, p. 27: "Companies should be clear and precise regarding the amount of employment that they can offer, the qualifications required of the future staff, and the community contributions policy that the company is proposing. What the company shall not be offering should be clarified from the beginning to avoid future misunderstandings."

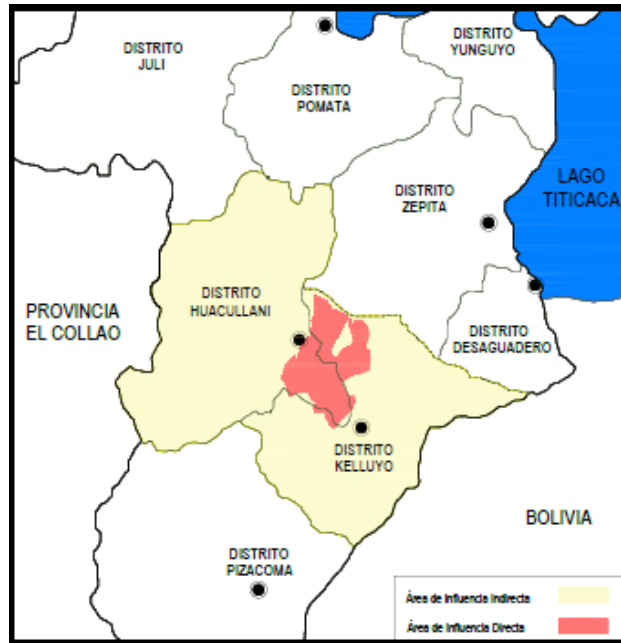
<sup>43</sup> **Exhibit R-172**, Ministry of Energy and Mines of Peru, General Direction of Environmental Affairs, "Guide on Community Relations," Jan. 1, 2001, p. 30: "In order not to encourage undesirable immigration, it is advisable to favor only the hiring of local labor for low-skilled jobs. It is advisable to arrive at agreements with the local population to avoid having outsiders invading the area and the project."

<sup>44</sup> Antúñez de Mayolo Rebuttal Witness Statement at ¶ 77.

<sup>45</sup> **Exhibit C-155**, Ausenco Vector, PPC, p. 2, Section 1.4.

<sup>46</sup> **Exhibit C-155**, Ausenco Vector, PPC, pp. 2-3, Section 1.4.1.





14. Pursuant to Supreme Decree No. 028, DGAAM was responsible for reviewing, in the first instance, both the executive summary and the PPC, and had the authority—and indeed the obligation—to make “observations or order any amendments or changes that may be required.”<sup>50</sup> On December 23, 2010, Bear Creek submitted to DGAAM its ESIA for the exploitation phase, along with the Executive Summary and the PPC.<sup>51</sup> By that date, Bear Creek had conducted over 130 workshops in a total of 18 communities within the direct and indirect areas of influence,<sup>52</sup> as well as meetings with national, regional, and local authorities, to

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(All) the district of Huacullani, the district of Kelluyo, province of Chucuito.”

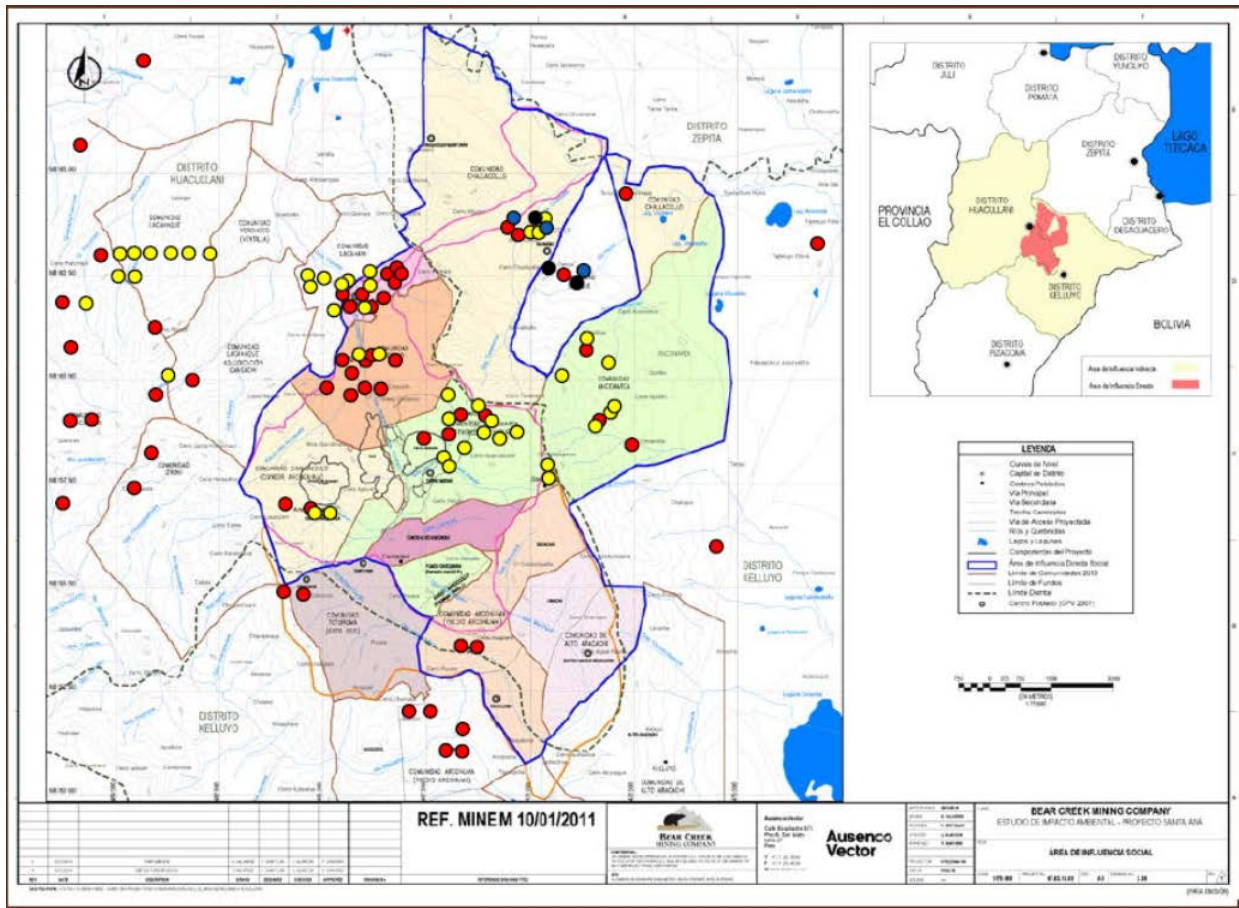
<sup>49</sup> **Exhibit C-155**, Ausenco Vector, PPC, Map 2.30, Maps of the Santa Ana Project’s Areas of Direct and Indirect Influence.

<sup>50</sup> **Exhibit R-159**, Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, Art. 14 (“The competent authority shall agree with the proposal and content of the Citizen Participation Plan for this stage and the Executive Summary, making observations or ordering any amendments or changes that may be required”).

<sup>51</sup> **Exhibit C-72**, Request from Bear Creek Mining Corporation to DGAAM for Approval of the ESIA, Dec. 23, 2010.

<sup>52</sup> See **Tr. 561:19-562:6** (Antúnez de Mayolo) (“Q. And outside of the area of 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

familiarize all stakeholders with the Santa Ana Project.<sup>53</sup> The map below reflects the locations of these workshops and meetings, as well as the years in which they were held.<sup>54</sup>



Workshops ● 2007 ● 2008 ● 2009 ● 2010

15. Also in December 2010, the Ministry of Environment’s Environmental Assessment and Monitoring Agency (“OEFA”) visited Santa Ana and reported that Bear Creek enjoyed a harmonious relationship with the communities.<sup>55</sup> Mr. Ramírez Delpino testified that

could have and, moreover, practically all the districts and the Puno region came from an economic benefit, which was going to come through the mining cannon and royalties in keeping with the economic and legal order of the Company and of Peru.”)

<sup>53</sup> **Exhibit R-229**, 2010 Environmental Impact Assessment (PPC), Annex 2: Participatory Information Workshops 2007-2010, Dec. 23, 2010; and **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011, p. 2. *See also* Claimant’s Closing Presentation at Slide 93.

<sup>54</sup> *See* Claimant’s Closing Presentation at Slide 99. Five workshops do not appear on this map as they took place outside of the map area.

<sup>55</sup> **Exhibit C-143**, OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011, at 4,

OEFA personnel are trained to interact with communities and interview their members.<sup>56</sup>

16. On January 7, 2011, DGAAM approved Bear Creek’s PPC and the Executive Summary of its ESIA for exploitation.<sup>57</sup> Mr. Ramírez Delpino testified that DGAAM could have rejected the Executive Summary or the PPC instead of approving either,<sup>58</sup> but that in this case, both documents complied with all applicable regulations, and DGAAM had raised no concerns.<sup>59</sup> Specifically, DGAAM determined that the citizen participation mechanisms that Bear Creek 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 6 of Supreme Decree No. 028.”<sup>60</sup> Mr. Ramírez Delpino testified that he agreed with DGAAM’s conclusion.<sup>61</sup> DGAAM’s endorsement of the PPC also signified its acceptance of the

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103-107: “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.” *See also Exhibit C-180*, OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011, p. 15: “In general, Bear Creek Mining Company’s Peruvian Branch, responsible for project execution, has a good relationship with the communities within the direct area of influence. It is worth noting that some people from the community of Concepción Ingenio do not seem to know that Decree No. 032-2011-EM exists, since some of them asked about the date of return of the Santa Ana Mining Project, and others expressed their hope for a prompt return”; and Claimant’s Closing Presentation at Slide 91.

<sup>56</sup> **Tr.** 1127:11-14 (Ramírez Delpino).

<sup>57</sup> **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.

<sup>58</sup> **Tr.** 1105:2-4 (Ramírez Delpino) (“Q. Certainly, DGAAM can reject a PPC or Executive Summary instead of approving it; correct? A. Certainly.”).

<sup>59</sup> **Tr.** 1106:9-12 (Ramírez Delpino) (“Q. And DGAAM concluded that Bear Creek’s PPC was prepared in accordance with Supreme Decree 028 and Ministerial Resolution 304? A. That’s right, correct.”); **Tr.** 1106:19-1107:1 (Ramírez Delpino) (“Q. And so, DGAAM reviewed the PPC and all of the attached annexes and found nothing wrong with them in terms of Bear Creek’s compliance with any applicable regulations, rules, et cetera? A. That’s correct.”); **Tr.** 1108:21-1109:15 (Ramírez Delpino) (“And certainly DGAAM can provide comments on the mechanisms proposed by the PPC or the contents of the Executive Summary? A. That is correct. Q. And if the issues raised by DGAAM with respect to the PPC or Executive Summary are not remedied within 10 business days, DGAAM will reject the submission of the entire EIA? A. That is correct. Q. But DGAAM made no such comments with regard to Bear Creek that had to be – nothing in Bear Creek’s ESIA summary, Executive Summary, or PPC, from the – from the DGAAM’s standpoint needed to be remedied within 10 business days? ... The Witness: That is correct.”).

<sup>60</sup> **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011, pp. 2-4, items 15.2 and 15.3 (emphasis added). *See also* Claimant’s Closing Presentation at Slide 86.

<sup>61</sup> **Tr.** 1110:19-1111:11 (Ramírez Delpino).

Santa Ana Project's areas of direct and indirect influence as proposed by Bear Creek.<sup>62</sup>

17. In addition to approving Bear Creek's PPC and the Executive Summary of its ESIA for exploitation, DGAAM outlined the next steps that Bear Creek had to take for the public hearing to occur.<sup>63</sup> These actions included distributing copies of Bear Creek's ESIA and the Executive Summary to the communities, local authorities, and regional government; advertising, through different means, the ESIA and the public participation mechanisms that Bear Creek would be implementing; and informing the communities that a public hearing regarding the Santa Ana Project would be taking place.<sup>64</sup> On January 21, 2011, Mr. Antúnez de Mayolo informed DGAAM that Bear Creek had complied with all requirements.<sup>65</sup> Mr. Ramírez Delpino confirmed at the hearing that this had been the case.<sup>66</sup> Bear Creek then proceeded to hold the public hearing, with DGAAM's authorization and support.

### 3. The Public Hearing Presided over by the State

18. The public hearing took place on February 23, 2011. It was chaired by Kristiam Veliz Soto, a MINEM attorney, who was assisted by Jesus Obed Alvarez Quispe, President of DREM.<sup>67</sup> A Special Prosecutor for Environmental Matters, Dr. Alejandro Tapia Gómez, also attended.<sup>68</sup> **By all contemporaneous accounts**, the public hearing was a success. MINEM even issued a press release after the public hearing indicating that the event had ended satisfactorily.<sup>69</sup>

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<sup>62</sup> **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011, p. 4; and **Exhibit R-40**, DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD, Apr. 19, 2011, p. 7.

<sup>63</sup> **Exhibit C-73**, MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011.

<sup>64</sup> **Exhibit C-73**, MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011.

<sup>65</sup> **Exhibit C-162**, Letter from Bear Creek to DGAAM, Jan. 21, 2011.

<sup>66</sup> **Tr.** 1091:3-8 (Ramírez Delpino) ("Q. And there's never been any allegation, assertion, that Bear Creek did not make its PPC or the Executive Summary of its ESIA available to community members, according to the regulations set forth in [Resolution] 304? A. No. I have not received any communication in that regard.").

<sup>67</sup> **Exhibit C-76**, Minutes of the Public hearing, Feb. 23, 2011.

<sup>68</sup> **Exhibit C-76**, Minutes of the Public hearing, Feb. 23, 2011.

<sup>69</sup> **Exhibit C-328**, MINEM Press Release, Mar. 2, 2011. MINEM also noted that the proceedings had been



Vice-Minister of Energy and Mines Fernando Gala wrote in his *aide-mémoire* that Bear Creek “had no problems when it held the public hearing for the [ESIA] of the Santa Ana project in Huacullani on February 23, 2011.”<sup>70</sup> At a meeting on May 17, 2011, Mr. Ramírez Delpino described “the harmonious development of the presentation of the environmental impact study.”<sup>71</sup> At the hearing in this arbitration, he 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 Bear Creek to hold additional workshops after the public hearing.<sup>72</sup> But DGAAM did not ask this of Bear Creek, precisely because the public hearing was successful.

19. Respondent repeatedly has sought to ignore the overwhelming, contemporaneous evidence establishing that the public hearing for the Santa Ana Project was a success. To explain why it had not included in the record the video recording of the public hearing, Peru alleged that it did not have a copy.<sup>73</sup> Yet, Mr. Ramírez Delpino admitted that he had a copy all along.<sup>74</sup> Peru also has failed to produce, as a witness in this case, a single person who attended the public

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translated into Aymara, and that the participants had been granted the opportunity to ask questions.

<sup>70</sup> **Exhibit R-10**, Aide Memoire, “Actions Done by the Executive Power Regarding Conflicts in the Puno Department,” Jul. 2011, p. 4.

<sup>71</sup> **Exhibit C-78**, Ricardo Uceda, “Puno: prueba de fuego,” Revista Poder 360°, Jun. 2011, p. 8/10: “Ramírez was saying that the population of Huacullani approved the Santa Ana project. He described the harmonious development of the presentation of the environmental impact study when the whistling and protests started up. “But you were there. You saw it. You too,” said Ramírez, speaking to Aduviri and the mayor of Desaguadero, Juan Carlos Aquino.”

<sup>72</sup> **Tr.** 1114:4-1115:10 (Ramírez Delpino) (“And so, this is kind of a schematic [referring to **Exhibit C-156**] showing that if, after the Public Hearing, DGAAM believes that additional information is required to be submitted to the communities or transmitted to the communities, then additional workshops can be required within 20 days? A. That is correct. Q. And that’s also set forth in Ministerial Resolution 304? A. Yes, that’s right. ... Q. And if DGAAM had felt that, as I said before, that so many people were concerned about whatever topic that DGAAM considered to be appropriate, it would have made Bear Creek do something? A. Certainly, other participation actions would have been necessary.”). See also **Exhibit R-153**, Resolution No. 304, Art. 26.4.

<sup>73</sup> **Tr.** 1906:11-12 (Respondent’s Closing Statement) (“I assure you, we wish we did have it, but a search of MINEM’s files did not produce it.”). See also Respondent’s Rejoinder at ¶ 207.

<sup>74</sup> **Tr.** 1123:22-1124:6 (Ramírez Delpino) (“Q. So, DGAAM received a copy of the video and it was in its files? A. Correct. Q. So, Peru’s statement that Peru does not have a copy of the video in its files is incorrect? A. I don’t know if they made that statement, but I have this document, yes.”).

hearing, let alone the government officials who presided over the hearing.

20. Instead, Respondent has elected to base its description of the public hearing on the expert reports submitted by Dr. Antonio Peña Jumpa, who did not attend the public hearing, and who did not disclose the names of the individuals he “interviewed,” the questions he asked, or the answers he supposedly received. Peru also relies on the written submissions of DHUMA, an *amicus curiae* in this proceeding whom Dr. Peña contacted as part of his research for his First Expert Report and who provided him with information, but whose representatives refused to appear as witnesses for Peru<sup>75</sup>—preventing Claimant’s counsel from cross-examining them—even though they attended the hearing in this arbitration. The Tribunal should give no weight to these biased, after-the-fact accounts of the public hearing, and should rely, instead, on the contemporaneous statements of Peru and of its own witnesses.

21. In any event, Dr. Peña’s and DHUMA’s baseless criticisms of the public hearing, which DHUMA reiterated in its September 29, 2016 letter to the Tribunal, are contradicted not only by MINEM itself, but also by Braulio Morales Choquecahua, Faustino Limatapa Musaja, and Sixto Vilcanqui Mamani, all former Huacullani community representatives who personally attended the public hearing. They confirmed the following: (i) the selected venue, the Huacullani Governor’s Office, was not too small, and Bear Creek erected giant canopies, with chairs, giant screens, and speakers to double the venue’s capacity; (ii) the Aymara translation was clear, the translator spoke the language well, and there were no complaints about this issue during or after the public hearing; (iii) every participant wishing to intervene during the public hearing was able to do so; (iv) a small group of community outsiders, not the 400 to 500 people DHUMA now alleges, participated in a march after the public hearing; and (v) no community

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<sup>75</sup> See Respondent’s Letter to the Tribunal re DHUMA Application, Jul. 7, 2016, footnote 12.

leader or member received bribes or gifts before, during or after the public hearing.<sup>76</sup>

#### 4. Bear Creek's Continued Implementation of its Citizen Participation Plan

22. After the public hearing, Bear Creek continued its community relations program. It regularly informed DGAAM of the community relations activities that it implemented,<sup>77</sup> as Mr. Ramírez Delpino confirmed at the hearing.<sup>78</sup> 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 PPC.<sup>79</sup>

23. Support for the Santa Ana Project among the local communities remained high. On March 23, 2011, the Huacullani communities publicly came out in favor of the Project.<sup>80</sup> On April 2, 2011, an extraordinary general assembly of the Concepción de Ingenio community approved a contract to sell their land to Bear Creek.<sup>81</sup> On April 4, 2011, Huacullani's *Primer Teniente Gobernador* wrote to the Puno Regional Council and to the President of the Puno

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<sup>76</sup> **Exhibit C-329**, Letter from Braulio Morales Choquechua and Faustino Limatapa Musaja, Aug. 8, 2016; **Exhibit C-331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016.

<sup>77</sup> **Exhibit C-187**, Letter from E. Antúnez, Bear Creek, to F. Ramírez Delpino, DGAAM, Feb. 1, 2011; **Exhibit C-188**, Letter from E. Antúnez, Bear Creek, to F. Ramírez Delpino, DGAAM, Mar. 1, 2011; **Exhibit C-189**, Letter from E. Antúnez, Bear Creek, to C. García, DGAAM, Apr. 1, 2011; and **Exhibit C-190**, Letter from E. Antúnez, Bear Creek, to F. Ramírez Delpino, DGAAM, May 3, 2011.

<sup>78</sup> **Tr.** 1111:12-16 (Ramírez Delpino) (“Q. Now, isn’t it a fact that Bear Creek kept you informed by way of letters after the approval of the PPC and the Executive Summary as to its continued efforts at implementation of its PPC? A. That is correct. Yes, they did communicate so.”).

<sup>79</sup> **Exhibit R-40**, DGAAM’s Observations to Bear Creek’s EIA for Exploitation, Apr. 19, 2011, pp. 2-6. *See also* **Tr.** 1124:19-1125:20 (Ramírez Delpino) (“Q. And if you then look on Page 4, 5, and 6, starting at (a), it shows that Bear Creek implemented “notices of Citizen Participation in written and radio media”? A. Yes, that’s correct. Q. And they also implemented “access for the population to the Executive Summaries and to the content of the environmental studies”? A. That is also correct. Q. And we saw (c), the “Audiencia Pública”? A. Yes. Q. And with respect to “Office of Permanent Information and Distribution of Informational Materials being implemented”? A. Correct. Q. So, the Company needed to still show it did some Guided Visits; correct? A. That is correct. Q. And then: “Presentation of contributions, comments, or observations to the competent authority also implemented”? A. Correct.”).

<sup>80</sup> **Exhibit C-184**, “Huacullani Communities Support Santa Ana Mining,” Correo Puno Prensa Peru, Mar. 23, 2011.

<sup>81</sup> **Exhibit C-186**, Act of the Extraordinary General Assembly of the Concepción de Ingenio Community, Apr. 2, 2011.

Regional Government, reiterating the District’s support of Bear Creek and Santa Ana.<sup>82</sup> It is not surprising, therefore, that senior Peruvian government officials, such as Clara García, principal legal advisor to the Minister of Energy and Mines, and Vice-Minister Gala, indicated in May 2011 that Bear Creek’s Santa Ana Project had a social license.<sup>83</sup>

24. Peru has attempted to undermine Bear Creek’s successful community relations program by arguing that Bear Creek caused the social protests that erupted in Puno in the spring of 2011, and that, therefore, Bear Creek cannot have had a “social license” for its Project. This is simply untrue. Bear Creek did not instigate the unrest.<sup>84</sup> As the First Specialized Constitutional Court of Lima expressly concluded, after considering all of the relevant evidence, “the violent demonstrations by anti-mining movements and their illicit attacks on public and private property in the Puno department” are not “attributable to actions or omissions by claimant Bear Creek.”<sup>85</sup>

25. Moreover, unlike opposition to other mining projects in Peru, such as Conga and Tía María, which targeted the mining companies themselves,<sup>86</sup> the protests in Puno were not aimed at any wrongdoing by Bear Creek. As Peruvian government officials acknowledged,

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<sup>82</sup> **Exhibit C-181**, Letter from the Primer Teniente Gobernador of the Huacullani District to J. Alvares, Puno Regional Council, Apr. 4, 2011; and **Exhibit C-182**, Letter from the Primer Teniente Gobernador of the Huacullani District to M. Rodriguez, President of the Puno Regional Government, Apr. 4, 2011.

<sup>83</sup> **Exhibit C-93**, “Community members demand a statement from the PCM,” La República, May 19, 2011: “[1] García Hidalgo stated that Santa Ana submitted its EIS [Environmental Impact Study] with all the requirements of the law, which implies that it has a social license”; and **Exhibit C-94**, “Anti-mining strike in Puno still unresolved,” La República, May 21, 2011: “The vice-minister reaffirmed that it is not feasible to nullify any concession, and even worse if it is registered in Public Records. He explained that the Santa Ana project complied with all the conditions required by law. He recalled that the company submitted its Environmental Impact Assessment, fulfilling all requirements required by Law. The project has a social license.”

<sup>84</sup> Peru attempts to manufacture a link to Bear Creek by pointing to the October 14, 2008, isolated incident at the Santa Ana campsite. However, this episode—which was the type of episode that was a common occurrence in mining projects in Peru (**Tr.** 443:13-16; 452:15-18 (Swarthout))—is wholly unrelated. No further incidents occurred at the Project site until the spring of 2011 (**Tr.** 275:8-10).

<sup>85</sup> **Exhibit C-6**, Amparo Decision No. 28 issued by the Lima First Constitutional Court, May 12, 2014, p. 18.

<sup>86</sup> **Tr.** 1213:6-16 (Flury) (“In your opinion, the social conflicts – conflicts in connection with Conga and Tía María, are those similar to what happened in the case of the social conflict that somehow involved the Santa Ana Project? A. I think that the confrontation that exists – that some litigation that exists at this time are different in nature. In Conga and Tía María, I dare say that the action is more towards the company than against the development brought about by mining activities.”).

these were politically-motivated protests driven by intransigent and nefarious leaders who rejected mining activities as a whole.<sup>87</sup> Even Respondent's expert, Dr. Peña, confirmed that political interests played a part in the social protests in Puno,<sup>88</sup> as did the State's own inaction.<sup>89</sup>

26. In conclusion, the evidence in the record categorically establishes that Claimant complied with, and even exceeded, its community relations obligations under Peruvian law in respect of the Santa Ana Project. Bear Creek's community relations program was a success, and Bear Creek enjoyed a harmonious relationship with the local communities. Contemporaneous documents in the record also show that Peru acknowledged these facts, while also demonstrating that Respondent failed to comply with its own legal obligations vis-à-vis the communities.

**C. PERU FAILED TO COMPLY WITH ITS OWN LEGAL OBLIGATIONS VIS-À-VIS THE COMMUNITIES**

*(a)iv. In the present case, what were the State authorities' responsibilities in relation to obtaining a Social License?*

27. As noted above, Supreme Decree No. 028 establishes that the State is responsible for guiding, directing, and conducting the Citizen Participation Process, and for ensuring that the local communities fully participate in the process.<sup>90</sup> But Mr. Ramírez Delpino's testimony at the hearing highlighted that Peru did not meet all of its obligations under Supreme Decree No. 028.

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<sup>87</sup> See **Exhibit C-236**, "The dialogue will prevail in Puno," May 27, 2011 ("In statements to the press, the President [Alan García] denounced the "electoral interests" that are behind the forceful measures taken in Puno against the mining concessions"); **Exhibit C-97**, Interview of Prime Minister Rosario Fernández, *Mira Quien Habla*, Willax TV, May 31, 2011, pp. 2-3 ("This is a mixed bag of issues, an obscure cocktail of interests, right? This is all mixed up, a mix between the agenda of a leader who, it seems to me, has very bad intentions, deceives people, and on the other hand the people who have their own economic interests in the matter, and finally some political passion that also transcends this situation, right?" [...] "People have a presence in places where agriculture is cherished, yet there is also the possibility of conducting mining [activities], and often times the people are not well-guided...one day they choose this, and the other they choose that, and then a nefarious leader emerges who takes advantage of the situation"); and **Exhibit C-95**, "Dialogue in Puno did not succeed due to intransigence of the leaders," MINEM Press Release, May 26, 2011.

<sup>88</sup> **Tr.** 1330:17-19 (Peña) ("We also have to add the political interests that existed. We cannot hide that. That was also part and parcel of the social process.").

<sup>89</sup> See *infra* at ¶¶ 28-29.

<sup>90</sup> See *supra* at ¶ 3.

For example, he acknowledged that DGAAM repeatedly declined to participate in the workshops that Bear Creek organized for the communities, leaving it to local authorities to attend.<sup>91</sup>

28. Peru was also responsible (at least partly) for the social conflict in Puno in 2011, as Dr. Peña admitted during his cross-examination.<sup>92</sup> When asked why his expert reports did not address this crucial part of the story, Dr. Peña responded that he had only focused on Bear Creek's alleged role.<sup>93</sup> Accordingly, the Tribunal should place no weight on Dr. Peña's expert reports, as they are biased and fail to analyze accurately—or at all—the State's involvement in the 2011 events in Puno, despite his having previously placed blame squarely on the State.<sup>94</sup>

29. It is also the case that the State's poor management of the conflict exacerbated the social unrest. Dr. Peña candidly admitted at the hearing that the Peruvian government's response to the protests was inefficient and/or deficient.<sup>95</sup> Vice-Minister Gala proved that very point when he testified that, although the central government was aware of the unrest in Puno, it only decided to intervene once "the problem escalated" and "had reached such a high level."<sup>96</sup> Peru

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<sup>91</sup> **Tr.** 1083:3-17 (Ramírez Delpino) ("Q. And so, if you turn the page, also part of C-157 is your response to Mr. Ríos advising that DGAAM would not participate because it had suspended field- and service-type activities to attend workshops with communities prior to the presentation of ESIA; correct? A. Yes, that is correct. Q. So, at some point prior to this, DGAAM did make field and service trips to attend workshops prior to the submission of EIAs because you said they were suspended. So, the DGAAM used to do it, but you're telling him "we're not doing it anymore"? A. Certainly, that occurred, we suspended the trips because we did not have the capacity to be present in all the Projects, in all the workshops."); **Tr.** 1089:9-19 (Ramírez Delpino) ("Q. And you advised Mr. Paredes that these informational workshops were required prior to submitting the ESIA? A. Yes, that's correct. Q. And, yet, DGAAM again decided not to participate in these meetings? Yes? A. Correct. It delegated its participation. Q. Even though Bear Creek asked DGAAM to participate? A. Yes.").

<sup>92</sup> **Tr.** 1316:21-1317:3 (Peña) ("Q. If I understood correctly, in your previous response, you said that the State was not excluded as one of the causes of the Puno conflict in 2011; is that correct? A. It's clear.").

<sup>93</sup> **Tr.** 1316:1-4 (Peña) ("The Reports that I produced are reports on the conflict. They're reports on what the whole process has been like. The State is not excluded from this whole conflict.").

<sup>94</sup> **Exhibit C-232**, Blog Posts of Antonio Alfonso Peña Jumpa.

<sup>95</sup> **Tr.** 1324:1-8 (Peña) ("Q. If I understand you correctly, you're explaining to me that there was a mechanism from the Central Government from before 2012 [to address social conflicts], and now that there is a different one. But, in your opinion, both mechanisms have been deficient or have been insufficient? A. Yes. We could use other adjectives, 'inefficient' or 'deficient.'").

<sup>96</sup> **Tr.** 787:5-16 (Gala) ("It's not that we did not know, is that **but we thought that this could be resolved at the regional level or at the lower levels of the Executive**, at the level of social management, where we have

itself acknowledged its own shortcomings in this regard. The Prime Minister's office issued a report in September 2014 that found that the 2011 social conflict in Puno illustrated the State's weakness and its failure to analyze and confront such problems.<sup>97</sup> The report adds that, until 2012, the Peruvian government had no conflict management policy.<sup>98</sup>

30. Thus, while Bear Creek exceeded its community relations obligations under Peruvian law in respect of the Santa Ana Project, Peru failed to comply with its own obligations, which contributed to causing the 2011 protests in Puno. The State's failure to address the issue quickly and effectively only aggravated the situation, to Bear Creek's detriment.

**D. THE ABSENCE OF COMMUNITY SUPPORT HAS VERY LIMITED, IF ANY, CONSEQUENCES AS A MATTER OF LAW**

*(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?*

31. As a matter of law, the absence of local support for a mining project does not vitiate or otherwise undermine the Peruvian State's grant of a declaration of public necessity. At most, a lack of community support entitles the Government to require the concession holder to undertake additional community outreach.

32. Under Peruvian law, to obtain a declaration of public necessity, the foreign investor must submit a petition detailing "the name of the investor, the description of the investments and the location of the rights to be acquired."<sup>99</sup> There are no additional

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several Directors in the Ministry and other Ministries that were handling the situation at that level. When the problem escalated, we realized that the matter was concerning, and that's when the Executive intended to take steps to solve it because it had reached such a high level, that the other levels, lower levels of the Government, had been unable to solve this problem.") (emphasis added).

<sup>97</sup> **Exhibit C-292**, *Diálogo Dos Años Después; Perú: Estado y Conflicto Social*, Oficina Nacional de Diálogo y Sostenibilidad, Sept. 2014, p. 8.

<sup>98</sup> **Exhibit C-292**, *Diálogo Dos Años Después; Perú: Estado y Conflicto Social*, Oficina Nacional de Diálogo y Sostenibilidad, Sept. 2014, p. 39.

<sup>99</sup> First Bullard Report, ¶ 133; Bullard 023.

requirements.<sup>100</sup> In granting or denying an application for a declaration of public necessity, the Government does not “incorporate factors linked to the social protest in the considerations of the public necessity. The acts of the Administration itself demonstrate that the only aspects to be considered are the promotion of private investment and external defense.”<sup>101</sup> Indeed, the Office of the Legal Advisor to the Ministry of Mines, Mr. Zegarra’s office, does not consult with local populations in affected areas prior to issuing a supreme decree,<sup>102</sup> again reinforcing that the support of local communities is not a consideration in granting a declaration of public necessity.

33. Once the State grants the declaration of public necessity to the foreign mining company and it acquires the proposed concessions, that foreign investor is indistinguishable from any national investor and enjoys all of the same rights.<sup>103</sup> Thus, the State cannot revoke unilaterally an authoritative supreme decree, divesting the foreign investor of any ownership or control over its investment, without due process or compensation, regardless of its rationale.<sup>104</sup>

34. As Professor Bullard has explained, “social discontent does not invalidate in any way the declaration of public necessity based on which S.D. 083-2007-EM was issued,”<sup>105</sup> and

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<sup>100</sup> First Bullard Report, ¶ 134 (“No other type of evidence or documentation is required with respect to factors other than the investment itself—clearly because the public necessity of the investment is presumed.”).

<sup>101</sup> First Bullard Report, ¶ 136; **Exhibit R-32**, Statement of Reasons Supporting Supreme Decree 083; **Tr.** 940:17-948:1 (Zegarra).

<sup>102</sup> **Tr.** 947:8-948:1, 949:3-12 (Zegarra) (“Q. To your knowledge, do you or the Directorate, the General Directorate of Mines, ask the communities in the area in which the Supreme Decree is contemplated, whether they want that project to be present there, back in 2007? A. I don’t have any knowledge of that. Q. But you, yourself, did not do that; correct? A. No. Q. You’re not aware of whether the Directorate of General Mines consulted those communities about the potential impact on their land that the Santa Ana Project may have; correct? A. No, I do not have knowledge of that. Q. And neither you nor your office conducted this kind of assessment or consultation, correct? A. Yes, we have not done it... Q. Are you aware of whether the Council of Ministers consults with the affected communities before authorizing a project or granting a Supreme Decree application? A. I’m not aware of that or I don’t have that knowledge... I don’t know if they do it or if they don’t do it.”).

<sup>103</sup> First Bullard Report, ¶ 10.

<sup>104</sup> **Tr.** 1229:20-1230:1, 1231:4-7 (Flury) (“A. ... Every expropriation under our legislation, regardless of the location or the site, requires legislation and corresponding compensation.”).

<sup>105</sup> First Bullard Report, ¶ 182. *Id.* ¶ 183 (“As previously stated, the public necessity of Article 71 is the promotion of foreign private investment whose sole limitation is the risk to external defense. The analysis of other factors,



there is no provision of Peruvian law that permits the State—regardless of its motives or reasons—to expropriate property on the basis of social unrest:

**[T]here is no special provision in the entire Peruvian legal system that authorizes the revocation of a concession or stripping someone from their property as a result of the population’s social dissatisfaction.** By doing so would imply that the social dissatisfaction or protests were grounds for expropriation, which would have no legal support in the Peruvian legal system.<sup>106</sup>

35. The Peruvian State and Respondent’s witnesses agree. President García stated that the protesters’ demands for the cancellation of all mining concessions in Puno were “irrational” requests and “constitutional nonsense” motivated by “electoral interests”;<sup>107</sup> Minister of Energy and Mines Pedro Sánchez said that the requests were “unconstitutional” and that they could not be legally implemented;<sup>108</sup> Vice-Minister Gala admitted that the petitions for the cancellation of concessions were “completely illegal and would bring serious contingencies to the country”;<sup>109</sup> Principal Legal Advisor to the Minister of Energy and Mines, Clara García, explained that “there is no legislation to cancel concessions” and “assured that the Santa Ana project was lawful”;<sup>110</sup> and Prime Minister Fernández confirmed that canceling the concessions in response to the social unrest—fomented by Walter Aduviri and the *Frente de Defensa de Recursos Naturales* (“FDRN”)—would be “the easiest way out” and would undermine “legal security.”<sup>111</sup> Peru’s witnesses also testified that the social protests were not sufficient grounds to justify the revocation of a declaration of public necessity, as discussed further below (**III.C.2**).

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such as social or environmental considerations does not enter into the concept’s specific content.”)

<sup>106</sup> First Bullard Report, ¶ 186 (emphasis added).

<sup>107</sup> **Exhibit C-236**, “The dialogue will prevail in Puno,” EL PERUANO, May 27, 2011.

<sup>108</sup> **Exhibit C-96**, “MEM: Executive still open to dialogue with the people of Puno,” RPP NOTICIAS, May 27, 2011.

<sup>109</sup> **Exhibit C-95**, “Dialogue in Puno did not succeed due to intransigence of the leaders,” MINEM Press Release, May 26, 2011. *See also* Tr. 864:14-17, 887:16-21 (Gala).

<sup>110</sup> **Exhibit C-93**, “Community members demand a statement from the PCM,” La República, May 19, 2011.

<sup>111</sup> **Exhibit C-97**, Interview of Prime Minister Rosario Fernández, Mira Quien Habla, Willax TV, May 31, 2011.

36. All of these statements demonstrate that the Government did not consider a lack of community support to be a valid reason to expropriate Bear Creek’s investment, and indeed, Peruvian law confirms that it is not.<sup>112</sup> This is further demonstrated by the case of the Chinese investor Zijin, whose project faced 90% community opposition but nonetheless proceeded, and was endorsed by the Government.<sup>113</sup> As Peru, its witnesses, and its conduct toward other foreign investors evidence, any lack of community support by itself is not a valid legal ground to invalidate a concession acquired on the basis of a declaration of public necessity.

37. Moreover, Supreme Decree No. 028—which implemented ILO Convention No. 169 at the time when Bear Creek had acquired the Santa Ana Concessions and developed its community relations program—provided in Article 4 that “[t]he consultation does not grant the populations the right to veto the mining activities or the authority’s decision.”<sup>114</sup> It follows that, as a matter of law, there are no consequences that result from an absence of support on the part of one or more relevant communities, or parts thereof, in relation to Supreme Decree 083. At most, such lack of support may prompt the State to require the investor to conduct additional community outreach, and conceivably may result in a delay in the project’s progress. However, it would not justify the expropriation of the investment without due process or compensation.

## II. BEAR CREEK MADE ALL REQUIRED DISCLOSURES IN ITS APPLICATION FOR A PUBLIC NECESSITY DECLARATION

*(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?*

38. As set forth in Claimant’s prior submissions, and in the expert reports of Dr.

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<sup>112</sup> First Bullard Report, ¶ 186.

<sup>113</sup> **Exhibit C-254**, 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.

<sup>114</sup> **Exhibit R-159**, Supreme Decree No. 028, Art. 4.

Bullard and Mr. Flury, Claimant made all required disclosures in its supreme decree application (A). Thus, Peru’s allegations that Bear Creek failed to disclose information have no merit (B). In all events, a good faith mistake or minor transgression does not deprive this Tribunal of jurisdiction, nor does it impact the Tribunal’s analysis on the merits and damages (C).

**A. BEAR CREEK MADE ALL REQUIRED DISCLOSURES**

39. In acquiring its investment at Santa Ana, Bear Creek followed the legal advice of preeminent Peruvian mining counsel; used an acquisition structure that other foreign investors have used successfully to acquire investments within 50 km of the Peruvian border; publicly and contemporaneously registered with the State all agreements related to its planned acquisition; disclosed all required information to the Government in its application for a declaration of public necessity; and provided all follow-up information the Government requested, promptly and to the Government’s satisfaction.<sup>115</sup>

40. It is undisputed that a key element of Bear Creek’s acquisition structure was always to obtain the required declaration of public necessity, and Bear Creek did not exercise its option to acquire the Santa Ana Concessions until after the State issued Supreme Decree 083. Indeed, as Mr. Swarthout testified, “had Bear Creek not obtained the Public Necessity [Declaration] or the Supreme Decree and not been able to exercise the option, I can assure you that Bear Creek would have terminated the Option Agreement[s with Ms. Villavicencio].”<sup>116</sup> Obtaining a valid Supreme Decree authorizing the investment was thus the *sine qua non* of Bear Creek’s investment, and notwithstanding Respondent’s hollow allegations, there can be no serious dispute that Bear Creek acted in good faith and always intended to, and in fact did,

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<sup>115</sup> Claimant’s Rejoinder on Jurisdiction, Section II; Tr. 359:5-8 (Swarthout) (“A. ... There were two alternatives that were described to us by our counsel, and this was the one that we chose as—based on their counsel, as being the less risky.”).

<sup>116</sup> Tr. 390:15-18 (Swarthout).

comply with Peruvian legal requirements for the acquisition of the Santa Ana Concessions.

41. Further, in its supreme decree application, Bear Creek disclosed all required information, and more. The Single Text of Administrative Procedures of the Ministry of Energy and Mines sets forth the disclosure requirements for a supreme decree application, and requires disclosure of “information on the investor, the properties to be acquired, the project to be pursued, and the time spans for the investment, among other things.”<sup>117</sup> Respondent cannot point to a single document that Bear Creek was required, but failed, to disclose.

42. Bear Creek’s application included, *inter alia*, a description of Bear Creek; a complete set of corporate documentation and certificate of good standing; two years of consolidated financial statements; a socio-economic impact assessment of the proposed exploration program; a cadastral map for the Santa Ana Concessions; a certificate of validity of the power of attorney for Ms. Villavicencio; copies of Ms. Villavicencio’s applications for the Karina 9A, 1, 2, 3, 5, 6, and 7 mining concessions; copies of INACC’s approval of Ms. Villavicencio’s petition for the Karina 9A, 1, 2, and 3 mining concessions; copies of the official registration of Ms. Villavicencio’s concession rights for Karina 9A, 1, 2, and 3; and copies of the registered Option Agreements for the Karina 9A, 1, 2, 3, 5, 6, and 7 mining concessions.<sup>118</sup> Bear Creek far exceeded the disclosure requirements imposed by Peruvian law, and the Government had all of the information it needed to consider Bear Creek’s application: it knew who the investor was that would develop the Santa Ana Concessions, where the concessions were, how

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<sup>117</sup> Second Bullard Report, ¶ 18; **Bullard 034**.

<sup>118</sup> **Exhibit C-17**, Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (*hereinafter*, “Supreme Decree Application”), pp. 2, 5-9 (description of Bear Creek), 13-23 (socio-economic impact assessment), 25-72, 82-83 (corporate documentation and certificate of good standing), 80 (copy of proof of registration of Ms. Villavicencio’s power of attorney), 84-85 (cadastral map), 87-163 (Ms. Villavicencio’s concession applications, including copies of checks showing that Bear Creek paid Ms. Villavicencio’s concession application fees for Karina 5, 6, and 7), 165-87 (copies of registered Option Agreements and proof of registration), 189-205 (consolidated financial statements).

the project would be developed, and in what time frame this was to occur. The Government also knew about Ms. Villavicencio and the Option Contracts with Bear Creek, as well as the fact that Bear Creek had granted her a power of attorney (*apoderada*) for certain banking matters.

43. Since Bear Creek submitted all required information, Peru has resorted to alleging baselessly that Bear Creek should have known intuitively to submit additional information, including an express statement that Ms. Villavicencio was Bear Creek's employee. Moreover, although not pled in any of Respondent's written submissions to date, mention was made during the hearing of a misstatement in Bear Creek's supreme decree application regarding its exploration activities.<sup>119</sup> However, as discussed below, neither factor can vitiate Claimant's investment, let alone impact the Tribunal's jurisdiction or Respondent's liability.

**B. RESPONDENT'S ALLEGATION THAT BEAR CREEK FAILED TO DISCLOSE INFORMATION IN ITS SUPREME DECREE APPLICATION IS WRONG**

44. Respondent's allegation that Bear Creek should have disclosed in its supreme decree application that Ms. Villavicencio was an employee of Bear Creek is not supported by law or practice. Neither the Single Text of Administrative Procedures of MINEM nor any other provision of Peruvian law requires a foreign investor applying for a declaration of public necessity to disclose its relationship to the individual from whom the investor intends to purchase the investment.<sup>120</sup> More importantly, Ms. Villavicencio was a registered employee of Bear Creek, and her power of attorney was registered with SUNARP.<sup>121</sup> Any information in the public registry is deemed to be public knowledge under Peruvian law.<sup>122</sup> Peru cannot seriously fault Bear Creek for failing to disclose information that was not required to be disclosed in the

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<sup>119</sup> Tr. 407:11-409:10 (Swarthout).

<sup>120</sup> Second Bullard Report, ¶¶ 12-21; Bullard 034.

<sup>121</sup> Claimant's Rejoinder, ¶¶ 60 (timeline); **Exhibit C-17**, Supreme Decree Application, p. 84.

<sup>122</sup> Claimant's Rejoinder, ¶¶ 23, 104; **REX-3**, Expert Report of Luis Rodríguez-Mariátegui Canny, Oct. 6, 2015, ¶ 19.

supreme decree application, and that was already public information, registered with Peru.

45. In any event, Bear Creek included in its application proof of the registration of Ms. Villavicencio’s power of attorney for Bear Creek, and if Peru had had any concerns regarding the relationship between Ms. Villavicencio and Bear Creek, it could, and would, have made further inquiries of Bear Creek as it did in relation to numerous other issues.<sup>123</sup> Bear Creek never sought to hide the fact that Ms. Villavicencio was its employee, and if the Government truly considered such information relevant to its consideration of a supreme decree application, it would require such disclosure expressly in the applicable regulations. But it does not. Indeed, it is manifest that Peru does not object to foreign investors acquiring investments from trusted persons and does not require this acquisition structure to be disclosed.<sup>124</sup> What is relevant to the State is not whether the investor intends to acquire the investment from a trusted Peruvian national, but rather whether there is a public necessity for the investment and whether it is likely to pose a risk to national security affecting the Peruvian border.

46. The second alleged non-disclosure—Bear Creek’s inadvertent, mistaken statement on page 7 of the application, that “to date, no explorations in the area of the Santa Ana Mining Project have been conducted”<sup>125</sup>—was raised for the first time at the hearing. Peru has never claimed that Bear Creek’s statement on page 7 of its application constituted a violation of Peruvian law, and it was not, and could not have been, fatal to Bear Creek’s application.

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<sup>123</sup> **Exhibit C-17**, Supreme Decree Application, p. 80; **Tr.** 1014:22-1015:16 (Zegarra) (“Q. And if there was something in the file that would raise questions, how would that be handled? A. Generally speaking, the General Directorate of Mining reviews the documents, and it can consult with the interested party in connection with any matter that may arise. In a matter of that type, I can’t think of any proceeding at this point in time, but, in general, for example, the Concessions [*sic*] are incorrectly stated, there’s missing information, there is information that is never clear, and a clarification is requested, things of that nature. Q. So, in those cases that you just mentioned, then, it would be—it would not be unusual for the Directorate to reach out to the applicant and ask for more information or ask for additional documents; is that correct? A. Correct. That would not be unusual.”).

<sup>124</sup> Claimant’s Rejoinder, ¶¶ 30-52.

<sup>125</sup> **Exhibit C-17**, Supreme Decree Application, p. 7.

47. First, as Mr. Swarthout testified, this mistake occurred because the first draft of the application was prepared by counsel months before the final version and, unfortunately, “this wasn’t caught in the update[.]”<sup>126</sup> It was, at most, an innocent mistake. Second, “in all of the exhibits and anexos that went with this application were numerous examples of our [Bear Creek’s] financial statements and other documents where we were—we clearly showed that we had or that exploration had taken place on the property.”<sup>127</sup> As Peru has confirmed time and again, applications for a declaration of public necessity are thoroughly vetted by several ministries,<sup>128</sup> and even a cursory review of Bear Creek’s application would have shown that some exploration had occurred. Had Peru been concerned with the discrepancy between Bear Creek’s statement on page 7 of the application and its financial statements, it could and would have contacted Bear Creek to clarify; indeed, this would be “common” practice.<sup>129</sup>

48. Third, Mr. Swarthout explained that, at this stage, “those were very, very preliminary basic initial exploration efforts[.]”<sup>130</sup> Between 2004 and 2005, Bear Creek undertook, on behalf of Ms. Villavicencio, only preliminary prospecting, which is not exploration, and does not require any authorization from Peru.<sup>131</sup> Article 71 of the Peruvian Constitution does not encompass exploration activities, and Article 13 of Legislative Decree 757

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<sup>126</sup> Tr. 408:8-13 (Swarthout).

<sup>127</sup> Tr. 408:14-18 (Swarthout).

<sup>128</sup> RWS-3, Zegarra First Witness Statement ¶ 6; Respondent’s Counter-Memorial, ¶ 29.

<sup>129</sup> Tr. 964:13-21 (Zegarra); Tr. 1015:11-16 (Zegarra).

<sup>130</sup> Tr. 404:12-15 (Swarthout).

<sup>131</sup> Tr. 406:6-12 (Swarthout) (“A. ... there were some rock-chip sampling and geologic mapping which is characterized as very, very preliminary and not even requiring a—any sort of permits from the Peruvian Government.”); Tr. 751:10-18 (McLeod-Seltzer) (“A. ... So, we were really doing what would be called R&D, if you were in the drug-company world. We were out there taking samples, trying to figure it out. So, this was all really, you know—we would go out and have a couple samplers and take 50-pound bags of rocks and take them and assay them and kind of scratch our head and look at maps and try to figure out how this all fit together. So, this was really early stage R&D prior to the time frame you mentioned.”).

only refers to productive activities and exploitation, not prospecting or exploration.<sup>132</sup> As Mr. Zegarra testified and Supreme Decree 014-92-EM states unambiguously, under Peruvian law, “[t]he search and prospection are free in all of the national territory.”<sup>133</sup>

49. In late 2006, preliminary exploration work began, but only after Ms. Villavicencio obtained an exploration permit from the Government, which MINEM approved knowing of Bear Creek’s involvement.<sup>134</sup> Peru thus knew that certain preliminary exploration activities had occurred with Bear Creek’s involvement prior to the issuance of Supreme Decree 083. But intensive exploration efforts did not begin until 2008, after Bear Creek had acquired the Santa Ana Concessions.<sup>135</sup> Moreover, MINEM approved the transfer of Ms. Villavicencio’s exploration permits to Bear Creek in 2008, knowing that Bear Creek had participated in the 2006-2007 exploration activities and after having approved the Supreme Decree application containing the “no explorations” language.<sup>136</sup> Respondent cannot credibly allege that, when it issued Supreme Decree 083, it was unaware that Bear Creek had been involved in exploration activities at Santa Ana.

**C. GOOD FAITH MISTAKES AND MINOR ERRORS DO NOT DEPRIVE THE TRIBUNAL OF JURISDICTION OR ABSOLVE RESPONDENT FROM LIABILITY**

50. In all events, assuming that Bear Creek had failed to disclose Ms. Villavicencio’s employment status or misstated the state of exploration activities, and that such conduct rose to

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<sup>132</sup> **Bullard 004**, Legislative Decree No. 757.

<sup>133</sup> **Bullard 031**; **Tr. 1755:6-10** (Claimant’s Closing Argument); **Tr. 965:12-17** (“The Mining Law provides that search and prospecting work do not need a mining concessions. In the mining industry, if one is allowed to do so, do walk a walk of land and collect rocks and take the rocks to a laboratory. We are talking about pre-preliminary stages during exploration.”).

<sup>134</sup> Claimant’s Reply Memorial, ¶¶ 31-34; **Exhibit C-287**, J. Karina Villavicencio’s Request for the Approval of Mining Exploration Category B Affidavit, June 9, 2006; **Exhibit C-139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006; **Exhibit C-140**, Informe No. 170-2006/MEM-AAM/EA, Jul. 10, 2006; and **Exhibit C-141**, Informe No. 265-2006/MEM-AAM/EA/RC, Oct. 12, 2006.

<sup>135</sup> **Tr. 402:13-14** (Swarthout).

<sup>136</sup> **Exhibit R-36**, Directorial Resolution No. 216-2008-MEM/AAM Approving First Amendment to the EIA for Exploration for the Santa Ana Project, Sept. 5, 2008.



the level of some “illegality” in the making of Bear Creek’s investment, it would not constitute a “serious” and “manifest” illegality required to undermine the Tribunal’s jurisdiction.<sup>137</sup>

51. To defeat the Tribunal’s jurisdiction, Respondent bears the burden of proving by clear and convincing evidence that Bear Creek committed fraud in its alleged failure to disclose information or its accidental misstatement.<sup>138</sup> It cannot meet this burden. If there was a failure to disclose or a misstatement in Claimant’s supreme decree application, it was the result of a good faith mistake, which would not defeat the Tribunal’s jurisdiction.<sup>139</sup> And even if this good faith mistake was unlawful, it was—at most—minor and does not rise to the level required to defeat the Tribunal’s jurisdiction.<sup>140</sup> Regarding the statement in the application on exploration, Respondent has not alleged that it constitutes a breach of Article 71, or that it forms part of the alleged fraudulent “scheme” based on which it raises its jurisdictional objection.

52. With respect to the merits, neither the alleged failure to disclose nor the alleged misstatement in Bear Creek’s application can absolve Respondent from liability for its breaches of the Treaty’s expropriation, fair and equitable treatment, full protection and security, and non-impairment through discriminatory or arbitrary measures provisions. Mr. Zegarra testified that if Bear Creek had expressly stated in its application that Ms. Villavicencio was its employee, then

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<sup>137</sup> **RLA-17**, *Mamidoil* Award, ¶¶ 481-82 (citing *Saba Fakes* Award, ¶ 119; *Alpha Projektholding* Award, ¶ 294; *Phoenix Action* Award, ¶ 104; *Tokios Tokeles* Decision on Jurisdiction, ¶ 86).

<sup>138</sup> Respondent’s Rejoinder, ¶ 364 (“Claimant illegally acquired the Santa Ana concessions through fraud and deceit[.]”); **RLA-87**, *Convia* Award, ¶ 420 (placing burden of proof on party alleging illegality); **CL-147**, *Wena Hotels* Award, ¶ 117 (same); **RLA-92**, *Kardassopoulos*, Decision on Jurisdiction, ¶ 229 (same); **CL-169**, *Liman Caspian* Award, ¶ 194 (same); **RLA-94**, *InterTrade* Award, ¶ 138 (placing burden of proof on party alleging illegality and adopting high standard of proof); **CL-85**, *Siag* Award, ¶¶ 325-26 (affirming that the standard of proof is clear and convincing evidence); **RLA-91**, *Fraport I*, ¶¶ 477, 479 (same); **RLA-21**, *Inceysa* Award, ¶ 244 (same); **RLA-24**, *Minnotte* Award, ¶ 133 (same).

<sup>139</sup> **RLA-91**, *Fraport* Award, ¶ 396.

<sup>140</sup> **RLA-17**, *Mamidoil* Award, ¶¶ 481-82 (citing *Saba Fakes* Award, ¶ 119; *Alpha Projektholding* Award, ¶ 294; *Phoenix Action* Award, ¶ 104; *Tokios Tokeles* Decision on Jurisdiction, ¶ 86).

“perhaps we [the Government] would have reviewed this.”<sup>141</sup> He also stated that if “something had emerged in the course of the review of the application,” “in a regular common procedure, the Ministry would have put forth an Observation,”<sup>142</sup> and the investor would have had an opportunity to respond. The alleged non-disclosure thus does not vitiate the investment or otherwise undermine it. Moreover, the alleged failure to disclose the employment relationship was—even on Respondent’s own case—insufficient to justify the revocation of Supreme Decree 083, let alone the complete lack of due process by which Peru effected this revocation.<sup>143</sup>

53. As for the statement concerning exploration, there is no basis to argue that it somehow relieves Respondent of liability, and indeed, Peru has never argued that this alleged misstatement provided a basis to revoke Supreme Decree 083. There is simply no causal link between the alleged misstatement and the Government’s decision to violate Bear Creek’s rights as an investor under the BIT.<sup>144</sup>

### **III. SUPREME DECREE 032**

54. Peru’s enactment of Supreme Decree 032 denied Bear Creek due process. Moreover, Peru’s *ex post facto* legal and factual acrobatics and revisionism aimed at justifying its unlawful expropriation of Bear Creek’s investment fail to achieve their goal.

#### **A. PERU DENIED BEAR CREEK DUE PROCESS IN ISSUING SUPREME DECREE 032**

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

55. Notwithstanding multiple rounds of briefing, witness statements, and expert reports, and notwithstanding seven days of hearing on the merits, the events surrounding the

<sup>141</sup> Tr. 921:13-15 (Zegarra) (emphasis added).

<sup>142</sup> Tr. 964:13-21 (Zegarra).

<sup>143</sup> See *infra* Section III.C.

<sup>144</sup> See *infra* Section IV.D, where Claimant shows that any alleged unlawful conduct on its part has no effect on damages.

enactment of Supreme Decree 032 remain, at best, murky, confused, and contradictory. But the light that Claimant was able to shed on these events through cross-examination of Respondent's witnesses proves irrefutably that Respondent's enactment of Supreme Decree 032 violated Claimant's due process rights.

56. According to Respondent's witnesses, Peru held a week of meetings in June 2011 with protesters who demanded cancellation of all concessions in southern Puno, including Bear Creek's Santa Ana Concessions.<sup>145</sup> At the time, as Vice-Minister Gala testified, there were approximately 500 concessions (including other foreign-owned concessions) in Puno, and the Government considered the protesters' demands unconstitutional and political strong-arm tactics.<sup>146</sup> Nevertheless, Peruvian officials met with the protesters without ever inviting Bear Creek, even though Claimant had requested, on numerous occasions, to join these meetings, and even though Bear Creek's investment was a primary discussion topic.<sup>147</sup>

57. On the last day of these meetings, around 9 or 10 pm on June 23, 2011, Aymara leaders, whom Messrs. Zegarra and Gala later claimed were in fact one Congressman, Yonhy Lescano, showed the meeting attendees "documents" allegedly evidencing that Ms. Villavicencio

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<sup>145</sup> **Tr.** 762:1-4 (Gala) ("A. The main demands of the protesters, what they were calling for, was cancellation of all mining concessions in the south of Puno, and mainly the Bear Creek Project."); **Tr.** 764:1-5 (Gala) ("A. Given that we were not able to reach an agreement in the City of Puno, the meetings continued in the City of Lima. With participation, indeed, of some Ministers, we held many meetings with the demonstrators in Lima from 17 June to 23 June."); **Tr.** 773:13-14 (Gala) ("A. Yes, they wanted the cancellation of all mining concessions in the south of Puno, mainly."); **Tr.** 922:15-923:3 (Zegarra) ("A. The representatives from Puno asked for the cancellation of all mining concessions in Puno, in particular those in connection with the Santa Ana Project. They asked for the oil contracts to be canceled, the oil contracts that were in the Puno area, in the area of the Lake Titicaca. Additionally, there were other protests or events that related to environmental pollution in other parts of Puno, in the north, and they were also asking for the cancellation of the Inambari Hydroelectrical Project.").

<sup>146</sup> *See supra* ¶ 35; **Tr.** 792:2-6; 795:16-796:9, 797:6-14, 849:8-11, 872:9-14 (Gala).

<sup>147</sup> **Tr.** 776:9-14 (Gala) ("Q. And, with respect to the meetings with the protesters, is it safe to say that, again, Bear Creek was not in attendance at the June meetings with the protesters? Or the leaders—I guess it was with the leaders of the protesters. A. No, they did not attend...").

was under the control of Bear Creek at the time the Government issued Supreme Decree 083.<sup>148</sup> Yet no one could recall what documents were shown, and the only “documents” Peru has ever come close to identifying are the Option Agreements; a document showing that Ms. Villavicencio was “a representative [of Bear Creek] or worked in administration, something like that;” and checks showing that Bear Creek paid Ms. Villavicencio’s concession application fees, all of which the Government had in its possession prior to enacting Supreme Decree 083.<sup>149</sup> Supposedly on the basis of these documents, which he never personally reviewed, Mr. Zegarra gave legal advice to the Government in the meeting room “to the side,” “very quickly,”<sup>150</sup> leading Peru to consider that there was a “**possible** constitutional violation.”<sup>151</sup>

58. At some time between 9 or 10 pm on June 23, 2011 and 1:30 am on June 24, 2011, the Government decided to expropriate Claimant’s investment through an authoritative supreme decree revoking Supreme Decree 083.<sup>152</sup> By 1:30 am on June 24, 2011, the decision

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<sup>148</sup> **Tr.** 810:20-811:1 (Gala) (“A. They showed me a document that she was a representative or worked in administration, something like that. She worked at Bear Creek, that she was under Bear Creek.”).

<sup>149</sup> **Tr.** 810:12-811:1 (Gala) (“A. Basically, it was this document showing that Ms. Villavicencio worked in Bear Creek, and I even recall that we were shown a check that was in the name of Bear Creek with which she had filed the mining petition. Q. Do you recall specifically what document you were shown that showed that Villavicencio worked at Bear Creek? A. They showed me a document that she was a representative or worked in administration, something like that. She worked at Bear Creek, that she was under Bear Creek.”). But both the proof of registration of Ms. Villavicencio’s power of attorney and the check with which Bear Creek paid for Ms. Villavicencio’s application were enclosed in Bear Creek’s supreme decree application, and thus were hardly new information the Government did not already have since December 2006. *See Exhibit C-17*, Supreme Decree Application, pp. 80 (copy of proof of registration of Ms. Villavicencio’s power of attorney), 146 (copy of check showing that Bear Creek paid Ms. Villavicencio’s concession application fee for Karina 5), 154 (copy of check stating that Bear Creek paid Ms. Villavicencio’s concession application fee for Karina 6), 162 (copy of check stating that Bear Creek paid Ms. Villavicencio’s concession application fee for Karina 7). Even in the Government’s lawsuit to invalidate the Santa Ana Concessions, it could not point to any “documents” other than documents that were either submitted with Bear Creek’s supreme decree application or were registered with SUNARP and thus deemed to be known under Peruvian law. **Exhibit C-112**, Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, Jul. 5, 2011.

<sup>150</sup> **Tr.** 978:19-980:8 (Zegarra).

<sup>151</sup> **RWS-5**, Second Gala Statement, ¶¶ 4, 5, 14, 19, 21, 23, 25, 27 (emphasis added); **Tr.** 769:15-19, 772:9-16, 846:5-8 (Gala); **Exhibit C-197**, *Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería*, Pontificia Universidad Católica del Perú, Nov. 18, 2013, p. 114; **RWS-7**, Zegarra Second Statement, ¶¶ 15, 18, 20, 21.

<sup>152</sup> **Tr.** 994:8-11 (Zegarra) (“Q. Okay. So, you testified earlier that the documents came to light around 9:00 or 10:00 p.m. on the 23<sup>rd</sup> of June? A. Exactly.”); **Exhibit C-176**, “*Yonhy Lescano: Concesión a la minera Santa*

was final.<sup>153</sup> Who proposed this measure and who ultimately made the decision remains unknown. All that is known is that allegedly, between 9 or 10 pm and 1:30 am, 15 to 19 Ministers on the Council of Ministers (i) were contacted somehow, possibly by email, possibly by someone knocking on their door, (ii) were awake and available to deliberate during this time, and (iii) without reviewing the underlying documents, agreed to revoke Supreme Decree 083, (iv) upon which the matter was escalated to the President of Peru who also signed off on the decision by 1:30 am.<sup>154</sup> By “1:00 or 2:00 in the morning,” according to Mr. Zegarra, the “first and last version” of Article 1 of Supreme Decree 032, which revoked Supreme Decree 083, was drafted by someone, who remains unidentified.<sup>155</sup> By the morning of Saturday, June 25, 2011, the Government published Supreme Decree 032, which does not contain any reasoning for its revocation of Supreme Decree 083 because “giving too many arguments for both of those seemed, to us [Peru], to be hazardous at the time.”<sup>156</sup>

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*Ana quedó sin efecto,*” RPP, Jun. 24, 2011 (Congressman Lescano announced at 1:33 am that the Santa Ana Concession was revoked).

<sup>153</sup> **Exhibit C-176**, “Yonhy Lescano: *Concesión a la minera Santa Ana quedó sin efecto,*” RPP, Jun. 24, 2011.

<sup>154</sup> **Tr.** 838:4-17 (Gala); **Tr.** 928:13-931:6 (Zegarra).

<sup>155</sup> **Tr.** 1025:11-19 (Zegarra) (“Q. ... What do you recall, if anything, about the process of drafting that provision [Article 1 of Supreme Decree 032, purporting to revoke Supreme Decree 083]? A. This was the first and last version that we had of that paragraph.... Q. When was that first and last version prepared? A. In the early hours of the morning, probably at 1:00 or 2:00 in the morning.”); **Tr.** 837:2-838:3 (Gala) (“Q. Who drafted Supreme Decree 032? A. Customarily, the drafting is done by the Office of Legal Advisors of the Ministry, the legal department of the Ministry. Q. César Zegarra’s office? A. Yes. He receives the instructions, which are general in nature, and then he deals with the particulars. ... Q. The question is, César Zegarra’s office or department, you’re testifying, would definitely have been involved in drafting Supreme Decree 032? A. The legal advise [*sic*] department must have participated definitely in the drafting of the SD 032.... [T]hey are the ones who drafted [Supreme Decree 032].”); **Tr.** 999:19-1001:2 (Zegarra) (“Q. Your Statements don’t tell us who prepared a first draft of Supreme Decree 032; correct? A. Correct. Q. Did you prepare a first draft of Supreme Decree 032? A. Not as far as I recall. Q. You weren’t instructed to prepare a first draft of Supreme Decree 032. A. Not as far as I recall. ... So, I don’t remember who came up with the first draft of the Decree, of Supreme Decree 032.”).

<sup>156</sup> **Tr.** 863:13-15 (Gala). *See also* **Tr.** 1003:15-1004:20 (Zegarra) (“Q. Again, it [Supreme Decree 032] says ‘new circumstances’ without explaining what those circumstances are; correct? A. Correct. It doesn’t explicitly state it. Q. It doesn’t make any reference to the documents that came to light on June 23, 2011; correct? A. Correct. Q. It doesn’t make any reference to the social protests specifically that were going on; correct?” A. Indeed, no mention is made. Nonetheless, the Council of Ministers, at the time that it made this decision, knew what the circumstances were in which the decisions were being made, and they also were familiar with the facts. ... Q.

59. Throughout the time the Government was debating expropriating Bear Creek’s investment, **no one within the Government** (i) took notes of these meetings, (ii) requested or conducted a thorough legal analysis of the alleged Article 71 violation, (iii) reviewed or conducted any inquiry into the authenticity of the “documents” that allegedly formed the basis of this monumental decision, (iv) bothered to photocopy or collect these important documents, or (v) contacted Bear Creek or Ms. Villavicencio to solicit their views or an explanation.<sup>157</sup> To this day, no one within the Government has requested or searched for these documents, or has prepared a written legal analysis of the State’s enactment of Supreme Decree 032.<sup>158</sup> In fact, counsel for Peru acknowledged in its opening statement that the documents had been lost, without providing any further explanation.<sup>159</sup>

60. The result of the Government’s scramble to appease the protesters, its rush to judgment, its—at best—sloppy process, and its complete lack of regard for the law is a supreme decree that eviscerated Bear Creek’s investment overnight, without any reasons, and without

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Right, So, the Council of Ministers and the Minister of Justice knew what the facts were, what the circumstances were, but they didn’t say so explicitly in Supreme Decree 032; correct? A. It’s not translated specifically, but they knew the circumstances and what the context was in which they were making the decision. ... Q. And if you’re not part of the Council of Ministers, you’re not privy to those convictions and discussions; correct? A. Correct.”).

<sup>157</sup> **Tr.** 777:14-778:8, 779:3-8, 794:12-20, 798:6-799:1, 824:8-825:4, 836:6-837:18 (Gala); **Tr.** 979:22-981:10, 990:10-991:7 (Zegarra); First Bullard Report, ¶¶ 196-97.

<sup>158</sup> **Tr.** 798:18-799:1 (Gala) (“Q. How about after the Supreme Decree [032]—how about after June 25th—were any written reports generated? A. As far as I can recall there weren’t. I suppose that the legal-advisor office of the Ministry produced some documents to put this to the courts, but I was no longer involved in those matters.”); **Tr.** 779:1-4 (Gala) (“Q. ... Has anyone tried to ask you for assistance to find these documents upon which this [Supreme Decree 032] was based? A. I repeat: It was not my role as Vice-Minister to collect documents[.]”); **Tr.** 1011:16-19 (Zegarra) (“Q. ... Is it your testimony that you did not make sure to secure a copy of these documents on which your recommendation, your legal advice was based? A. I never had the documents in my power.”); **Tr.** 990:10-13 (Zegarra) (Q. ... I wanted to confirm with you, did you ever write a legal opinion or some kind of written analysis addressing this issue on the 23<sup>rd</sup> of June? A. No.”); **Tr.** 990:15-991:7 (Zegarra) (“Q. And did there come a time after the 23<sup>rd</sup> of June where you did reduce that advice to writing? A. Once the Council of Ministers had made the decision, there was no need to come up with a written report. ... Q. But you did not prepare a written legal analysis after you gave that oral advice on June 23, 2011? A. That is correct.”).

<sup>159</sup> **Tr.** 232:8-11 (Respondent’s Opening Statement) (“Mr. Burnett complains that we don’t have the documents, and, frankly, we too wish we had the documents, but after diligent searches, they’re simply not in the Ministry’s files, five years after the fact.”).

giving Bear Creek any advance notice or an opportunity to be heard. As Mr. Zegarra affirmed, the absence of even one of these elements violates due process: To comply with due process, a decision regarding public necessity must be reasoned, it should be reasoned whether or not there is a finding of public necessity, and the State should give the reasons for its decision clearly.<sup>160</sup> Giving reasons, as Mr. Zegarra agreed, “is one of the guarantees of due process” and even a discretionary act of State must comply with the requirements of due process.<sup>161</sup> But as we know from the testimony of Vice-Minister Gala, the decision of the First Lima Constitutional Court, and Supreme Decree 032 itself, the Government chose not to comply with even this single element of due process.<sup>162</sup> There can be no doubt that the manner in which Peru adopted Supreme Decree 032 grossly violated basic elements of due process, and Peru’s own witnesses, including the legal advisor to MINEM,<sup>163</sup> and the Lima Constitutional Court confirmed this.<sup>164</sup>

**B. PERU PROFESSES TWO REASONS FOR ISSUING SUPREME DECREE 032, BUT CAN POINT TO NO SUPPORTING EVIDENCE ON WHICH IT RELIED**

*(c) What is the basis for the decision to issue Supreme Decree 032, and on what evidence did the State authorities rely?*

61. Peru claims that it issued Supreme Decree 032 for two reasons: Bear Creek’s possible constitutional violation of Article 71, and the social unrest. But Peru has yet to put

<sup>160</sup> Tr. 955:13-956:1 (Zegarra) (“A. And, in your view, a decision regarding public necessity should be reasoned; right? A. Correct just as a general one must be reasoned. Q. And it should be reasoned whether or not there is a finding of public necessity? A. Yes. And that the State should give the reasons for its decision clearly; correct? A. Yes, as a general rule, that’s what should happen.”).

<sup>161</sup> Tr. 956:2-22, 957:1-7 (Zegarra) (“Q. So, if a State is exercising its discretionary power to revoke a Public Necessity Declaration, it should give its reasons clearly; correct? A. Correct. Q. Because that’s what due process requires; correct? A. Correct.”).

<sup>162</sup> Tr. 863:13-15 (Gala); **Exhibit C-6**, Amparo Decision No. 28 issued by the Lima First Constitutional Court, May 12, 2014, pp. 20-21; Tr. 955:13-956:22, 957:1-7, 1003:15-1004:20 (Zegarra).

<sup>163</sup> Tr. 955:13-957:4 (Zegarra). *See also* Tr. 795:16-796:4 (Gala) (“Q. And, in the next paragraph [of your interview], 17, you state that: ‘We could not cancel the mining concessions that were already granted, unless there was a court order in that respect.’ And that was your view at that time? A. Yes, that was my view because under the premise of acting in the correct manner, it was assumed that all Concessions had been petitioned and obtained legally. Consequently, something that was obtained legally cannot be canceled administratively. It has to be canceled judicially.”).

<sup>164</sup> **Exhibit C-6**, Amparo Decision No. 28 issued by the Lima First Constitutional Court, May 12, 2014, pp. 20-21.

forward a coherent explanation of the evidence on which it relied to issue the decree.

62. **The possible Art. 71 violation.** Initially, in its Counter-Memorial and Vice-Minister Gala’s first witness statement, Peru claimed that during meetings held between the protesters and Government officials from June 17 to 23, 2011, Aymara leaders representing the “Southern front” presented documents to the State “indicating that Bear Creek had obtained the mining concessions in violation of Article 71[.]”<sup>165</sup> But Respondent and its witnesses failed to identify any specific documents and did not specify who presented these documents.

63. After Messrs. Swarthout and Antúnez de Mayolo pointed out in their respective witness statements that Vice-Minister Gala personally met with them on June 22, 2011, but did not indicate any reason for concern regarding the legality of Bear Creek’s investment, Vice-Minister Gala and Peru adjusted their position and claimed that the “protester representatives” (not “Aymara leaders”), and specifically Congressman Lescano, presented the relevant documents the very next day, on June 23, 2011, the last day of the meetings.<sup>166</sup> But the only specific documents Vice-Minister Gala identified were the Option Agreements.<sup>167</sup> Peru’s other witnesses failed to identify any specific documents at all.<sup>168</sup>

64. At the hearing, Vice-Minister Gala again failed to identify with specificity the documents that Congressman Lescano had allegedly presented, and he conceded that his contemporary *aide mémoire*—which is his best recollection of the events surrounding the enactment of Supreme Decree 032—did not contain any mention of the information he suddenly remembered, years later, in his second witness statement.<sup>169</sup> Mr. Zegarra, by contrast, denied

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<sup>165</sup> **RWS-1**, Gala First Statement, ¶¶ 33-38; Respondent’s Counter-Memorial ¶¶ 125-26.

<sup>166</sup> **RWS-5**, Gala Second Statement, ¶ 17; Respondent’s Rejoinder, ¶ 287.

<sup>167</sup> *Id.* at ¶ 17.

<sup>168</sup> **RWS-4**, Fernández Statement, ¶¶ 24, 28; **RWS-7**, Zegarra Second Statement, ¶ 20.

<sup>169</sup> **Tr.** 810:12-811:7 (Gala). The only documents Vice-Minister Gala could recall during the hearing were “this



ever having seen the mystery documents and confessed that he could not say, one way or the other, what documents they were.<sup>170</sup>

65. **The social protests.** With respect to the social protests, the only evidence on which Peru relies as the basis for its decision to issue Supreme Decree 032 is that the protesters, incited by Mr. Aduviri's misinformation, demanded the cancellation of all concessions in Southern Puno, among which were Bear Creek's Santa Ana Concessions.<sup>171</sup> For the reasons set forth further below, however, there is no causal link between the protests and Bear Creek.

**C. NEITHER REASON PROFFERED BY PERU IS ALONE SUFFICIENT TO JUSTIFY SUPREME DECREE 032**

*(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?*

66. Neither reason Respondent offers to justify its unlawful revocation of Supreme Decree 083 is alone sufficient (nor are they sufficient when considered together).<sup>172</sup>

**1. The Alleged Illegality of Claimant's Acquisition of the Santa Ana Concessions Cannot Justify Supreme Decree 032**

67. Aside from the incredulous circumstances under which Bear Creek's allegedly illegal acquisition of the Santa Ana Concessions came to light and the complete lack of due

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document showing that Ms. Villavicencio worked in Bear Creek, and I even recall that we were shown a check that was in the name of Bear Creek with which she had filed the mining petition... They showed me a document that she [Ms. Villavicencio] was a representative or worked in administration, something like that." **Tr.** 810:8-22 (Gala).

<sup>170</sup> **Tr.** 977:19-21 (Zegarra) ("Q. Now, Mr. Zegarra, did you personally look at these documents that were presented at the meeting? A. Not that I recall.").

<sup>171</sup> See Respondent's Rejoinder, Sections II.D.4 and II.E.2.

<sup>172</sup> In response to Professor Sands' question (**Tr.** 1918:12-14), the Peruvian government could have suspended the rights acquired under the authorization granted by Supreme Decree 083 instead of simply revoking the decree. That suspension would have been lawful only (i) in the context of a state of emergency or a state of siege, which the President of Peru must declare in accordance with Art. 137 of the Constitution (*see* Second Bullard Report, pp. 52-53) or (ii) under a law passed by Congress which temporarily suspends such rights for reasons of national security in accordance with Art. 72 of the Constitution (*see* Second Bullard Report, ¶ 139). In June 2011, the Peruvian President had not declared a state of emergency or a state of siege and Congress had not issued a law under Art. 72 of the Constitution, such that any suspension would have been unlawful.

process in Respondent’s enactment of Supreme Decree 032,<sup>173</sup> it is also clear that such illegality, assuming it occurred, could not alone justify Supreme Decree 032. First, at the time Respondent issued Supreme Decree 032—and to this day, it believed only that there was a **possible** constitutional violation.<sup>174</sup> During the hearing, Mr. Zegarra attempted to argue that the Council of Ministers somehow knew that there was an actual violation, but his statements are belied by his own sworn testimony, the testimony of Peru’s other officials, including Vice-Minister Gala, and the language of Supreme Decree 032, which speaks of circumstances that “would imply” the disappearance of legally required conditions for the issuance of Supreme Decree 083.<sup>175</sup> Second, even if Mr. Zegarra believed there was an actual constitutional violation, he based his opinion on unsubstantiated, unverified representations. He did not personally review or investigate the documents that allegedly evidenced the illegality, and he did not conduct a thorough legal analysis, either at the time or at any time thereafter.<sup>176</sup>

68. Third, Respondent itself obviously knew that, in order to confirm that there was indeed any illegality in the acquisition of the concessions, it needed to obtain a court judgment so holding.<sup>177</sup> Respondent, of course, did not have such a judgment when it issued Supreme Decree 032. Fourth, even if Bear Creek had acquired the Concessions illegally (which it did not), the Government clearly was willing to look past such a violation of the Constitution and to find a

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<sup>173</sup> See *supra* ¶¶ 56-60.

<sup>174</sup> **RWS-5**, Second Gala Statement, ¶¶ 4, 5, 14, 19, 21, 23, 25, 27; **Tr.** 769:15-19, 772:9-16, 846:5-8 (Gala); **Exhibit C-197**, *Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería*, Pontificia Universidad Católica del Perú, Nov. 18, 2013, p. 114; **RWS-7**, Zegarra Second Statement, ¶¶ 15, 18, 20, 21.

<sup>175</sup> **RWS-7**, Zegarra Second Statement, ¶¶ 15, 18, 20, 21; **RWS-5**, Second Gala Statement, ¶¶ 4, 5, 14, 19, 21, 23, 25, 27; **Tr.** 769:15-19, 772:9-16, 846:5-8 (Gala); **Exhibit C-5**, Supreme Decree No. 032-2011-EM, Jun. 25, 2011.

<sup>176</sup> **Tr.** 971:19-974:9, 977:19-21, 978:16-22 (Zegarra).

<sup>177</sup> **Tr.** 795:16-796:4 (Gala) (“Q. And, in the next paragraph [of your interview], 17, you state that: ‘We could not cancel the mining concessions that were already granted, unless there was a court order in that respect.’ And that was your view at that time? A. Yes, that was my view because under the premise of acting in the correct manner, it was assumed that all Concessions had been petitioned and obtained legally. Consequently, something that was obtained legally cannot be canceled administratively. It has to be canceled judicially.”).

way for the investment to proceed. As Vice-Minister Gala testified, if Peru were certain that “there won’t be social problems..., then I thought that the matter [of the alleged Article 71 breach] could be resolved. I’m not saying that the State is saying that it wasn’t illegal but, rather, that the matter could be resolved.”<sup>178</sup> Mr. Zegarra confirmed this position, stating that “if one were not in the context of a crisis, it would not be possible to have a revocation.”<sup>179</sup> Ms. McLeod-Seltzer testified that she attended meetings with Luis Castilla, the Minister of Economy and Finance, and Guillermo Shinno, the Vice-Minister of Mines, who both confirmed that the Santa Ana “problem” would be resolved, and both clearly indicated that they did not consider the alleged illegality as a necessary impediment to the investment proceeding.<sup>180</sup>

69. Had Peru believed that the allegedly illegal acquisition of the investment was sufficient ground to warrant the revocation of Supreme Decree 083, it would not have met with Bear Creek officials over 40 times following the issuance of Supreme Decree 032, and it would not have stated again and again, through various officials, that the situation could be resolved.<sup>181</sup> Nor would President Ollanta Humala have given Minister of Energy and Mines Jorge Merino full authority to resolve the matter, pursuant to which he gave Bear Creek a draft letter setting forth the terms of a settlement that Minister Merino told Claimant would be accepted by Peru.<sup>182</sup>

70. Further, as Professor Bullard stated,<sup>183</sup> even if there was a violation of Article 71, this should not have resulted in a revocation of Supreme Decree 083. The case of Zijin provides

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<sup>178</sup> Tr. 859:12-19 (Gala).

<sup>179</sup> Tr. 1003:2-5 (Zegarra).

<sup>180</sup> Tr. 721:14-723:3 (McLeod-Seltzer).

<sup>181</sup> Claimant’s Reply, ¶ 147; Antúnez de Mayolo Rebuttal Witness Statement, ¶¶ 61-63; Antúnez de Mayolo Witness Statement, ¶¶ 21, 25; and Swarthout Witness Statement, ¶ 58.

<sup>182</sup> Antúnez de Mayolo Witness Statement, ¶¶ 32-33; **Exhibit C-121**, 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.

<sup>183</sup> Second Bullard Report, ¶¶ 138-142.

a prime example of this. In Zijin’s case, the investor acquired the investment over a year prior to obtaining a declaration of public necessity, and during this time, the investment was already in operation.<sup>184</sup> But Zijin’s investment did not suffer any adverse consequences, although the Government knew of the situation and there was significant social opposition to the project itself.<sup>185</sup> Even Respondent’s expert, Dr. Rodriguez-Mariátegui, agreed with Claimant’s counsel when asked whether there were cases “not spelled out in this law or in the Constitution which could be the basis for an authorization [a supreme decree] coming a *posteriori*[.]”<sup>186</sup> This demonstrates that a violation of Article 71 does not justify expropriating the investor’s investment, and certainly not without due process or compensation.

## 2. The 2011 Social Protests Cannot Justify Supreme Decree 032

71. Similarly, the social protests alone do not justify the issuance of Supreme Decree 032. As outlined above, at the time of the social protests led by Mr. Aduviri and the FDRN, Peruvian Government officials proclaimed repeatedly and unanimously that the protesters’ demands for the cancelation of all mining concessions in Southern Puno, including the Santa Ana Concessions, were politically motivated, unconstitutional, and could not lawfully be granted.<sup>187</sup> Peru’s witnesses during the hearing further confirmed the insufficiency of the social

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<sup>184</sup> Claimant’s Reply, ¶¶ 47-53; Claimant’s Rejoinder, ¶¶ 35-38; **Exhibit C-204**, Supreme Decree 024-2008-DE, Dec. 27, 2008; **Exhibit C-205**, Monterrico Metals Plc’s Annual Report 2007 at 6, 54; **Exhibit C-206**, Archived Title of Entry N° C00011 of File N° 11352728 of the Corporate Registry of the Public Registry Office of Lima at 7-8; **Exhibit C-207**, “The new CEO of Monterrico had an audience with Peru’s minister of Energy & Mines,” Zijin Press Release, Jun. 11, 2007; **Exhibit C-208**, “China’s ambassador in Peru Gao Zhengyue investigated Majaz company,” Zijin Press Release, Jun. 11, 2007; **Exhibit C-254**, 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.

<sup>185</sup> *Id.*

<sup>186</sup> **Tr.** 1261:21-1262:7 (Rodriguez-Mariátegui) (“Q. So, there are some cases that are not spelled out in this law or in the Constitution which could be the basis for an authorization coming a *posteriori*? A. As I said before, in exceptional circumstances, and depending on a case-by-case analysis. Q. Those exceptional circumstances are not spelled out in any provisions? A. No, that is within the discretion of the State, the Government.”).

<sup>187</sup> *See supra* ¶ 35. *See also* **Exhibit C-92**, Press Release, Presidency of the Council of Ministers, “Prime Minister deems inadmissible roadblocks in Puno and requests that violent actions stop,” May 18, 2011; **Exhibit C-94**,

protests, by themselves, as a justification for Supreme Decree 032.<sup>188</sup> As Professor Bullard explained, there is no provision of Peruvian law that permits the State to revoke a concession or strip a person of property on the basis of the “population’s social dissatisfaction.”<sup>189</sup> And in any event, Bear Creek did not cause the protests. As the Lima First Constitutional Court held:

The known circumstances that would imply the disappearance of the legally required conditions for the issuance of Supreme Decree No. 083-2007-EM **do not pertain to causes attributable to actions or omissions by claimant Bear Creek** (the causes of were the violent demonstrations by anti-mining movements and their illicit attacks on public and private property in the Puno department).<sup>190</sup>

72. The protesters demanded the revocation of **all** mining concessions in Southern Puno, which included the Santa Ana Concessions, but this does not mean that Bear Creek **caused** the protests. To the contrary, the protests were politically motivated, and the Government’s lack of presence in southern Puno and its inadequate implementation of Supreme Decree 028, provided the necessary fuel to the flame.<sup>191</sup> In all events, as Professor Bullard has explained, “social discontent does not invalidate in any way the declaration of public necessity based on

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“Anti-mining strike in Puno still unresolved,” LA REPÚBLICA, May 21, 2011.

<sup>188</sup> **Tr.** 848:22-849:7 (Gala) (“Q. So, Mr. Gala, you’re stating here [in your interview] that the State had no reason to remove the Concessions from the Company until Yonhy Lescano presented these documents disclosing the issue related to the Santa Ana Concessions. Is that a fair reading of your answer to this question? A. Of course.”); **Tr.** 849:20-850:4 (Gala) (“Q. ... My question is, if these documents had not appeared, which the Government claims showed a violation of Article 71, the social protests alone would not have been a sufficient reason to revoke Supreme Decree 083. Isn’t that what you’re saying here? A. Correct.”); **Tr.** 1005:13-16 (Zegarra) (“Q. But isn’t it true that, in your view, if Bear Creek had acquired the Concessions appropriately, you would not have issued Supreme Decree 032? A. In a hypothetical, yes.”).

<sup>189</sup> First Bullard Report, ¶ 186.

<sup>190</sup> **Exhibit C-6**, Amparo Decision No. 28 issued by the Lima First Constitutional Court, May 12, 2014, p. 20 (emphasis added).

<sup>191</sup> **Tr.** 1317:4-13 (Peña) (“Q. And, for example, in your opinion, you say the scant presence of the State in the region contributed to the conflictive social situation? A. All of us are the State. The scant presence of the authorities of the Central Government is what cannot be hidden, but it’s not that there are no authorities. There are local authorities. So, the local authorities do fulfill a role on behalf of the State. But what is clear is that they’re very limited.”). Vice-Minister Gala explained some of these political motives during the hearing when he explained that Congressman Lescano “owed his election to the votes that came from the Department of Puno. Plus, a new election was coming up in Peru, so his participation in this event helped him get votes and helped the voters as well, and also helped his own future, and also his track record.” **Tr.** 887:12-18 (Gala).

which S.D. 083-2007-EM was issued”<sup>192</sup> In short, Bear Creek did not cause the social protests, but even if it had, the protests by themselves could not have justified Supreme Decree 032.

#### IV. BEAR CREEK IS ENTITLED TO COMPENSATION AND DAMAGES

73. Bear Creek has shown that Peru’s conduct is indefensible: Peru expropriated Bear Creek’s Santa Ana Project without compensation and did not afford Bear Creek fair and equitable treatment. Peru’s own witnesses admitted during the hearing that their decision to issue Supreme Decree 032 was made overnight,<sup>193</sup> based on mere suspicions,<sup>194</sup> without an investigation or legal basis to do so,<sup>195</sup> and without due process.<sup>196</sup> The Tribunal also reviewed documentary evidence showing that Supreme Decree 032 specifically targeted Bear Creek, and was issued in response to political demands considered by high-ranking officials as unconstitutional and extremist.<sup>197</sup> Finally, the parties’ metallurgical and damages experts testified as to the existence of vast mineral resources at Santa Ana and Corani.<sup>198</sup> Indeed, there is no question that Santa Ana is a valuable, mineral-rich property that Peru has re-appropriated

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<sup>192</sup> First Bullard Report, ¶ 182. *Id.* ¶ 183 (“As previously stated, the public necessity of Article 71 is the promotion of foreign private investment whose sole limitation is the risk to external defense. The analysis of other factors, such as social or environmental considerations does not enter into the concept’s specific content.”)

<sup>193</sup> *See e.g.*, **Tr.** 994:2-995:1 (Zegarra) (explaining that he was shown documents purporting to show a constitutional law violation around 10:00 p.m. on June 23, 2011. The issuance of Supreme Decree 32 was publicly announced at 1:30 a.m. June 24, 2011); **Exhibit C-176**, “Yonhy Lescano: Concesión a la minera Santa Ana quedó sin efecto,” RPP, Jun. 24, 2011.

<sup>194</sup> *See e.g.*, **Tr.** 981:15-17 (Zegarra) (admitting that he “personally did not review” documents purporting to show that Bear Creek incurred in a possible constitutional violation); **RWS-7**, Zegarra Second Statement, ¶ 18 (referring to a “possible” constitutional violation); **Tr.** 846:8-10 (Gala) (admitting that “the State had only indicia” of a constitutional violation).

<sup>195</sup> *Id.*

<sup>196</sup> *See supra* **Section III**.

<sup>197</sup> *See supra* ¶ 35.

<sup>198</sup> The experts disagree as to the tonnage and recoverability grade of those resources but not as to the existence. *See e.g.*, **Tr.** 1512:15-22 (SRK, N. Rigby)(explaining that when he ran a model with Brattle’s input parameters he obtained a higher tonnage than RPA’s Extended Life Case); **C-248**, SRK Consulting Report, National Instrument 43-101 Technical Report, Initial Resource Estimate for Corani Silver-Gold Exploration Project, March 31, 2006, p. 5 (SRK states in a report issued in 2006 prior to this litigation that “[t]he Corani Silver-Gold Project is a large tonnage, potentially bulk- mineable silver-lead resource that has the potential to expand, and to improve in resource classification with additional in-fill and step-out drilling. Bear Creek is actively pursuing this goal”); RPA’s Direct Presentation, Slides 19, 27, **Tr.** 1421:2-1423:21 (RPA, R. Lambert).

for itself without compensation to Bear Creek. Similarly, there is no question that the development of Corani has been significantly delayed and that its financing costs have been increased substantially as a direct result of Santa Ana’s expropriation.<sup>199</sup> Thus, the only question for the Tribunal is the amount of damages owed to Bear Creek due to Peru’s wrongful conduct.

74. Customary international law requires “full reparation” to “wipe out” all consequences of Peru’s unlawful acts and to restore Bear Creek to the financial position in which it would have been today in the absence of Peru’s unlawful acts.<sup>200</sup> In the circumstances of this case, the most appropriate form of “full reparation” is to award Bear Creek (1) the fair market value (“FMV”) of the expropriated Santa Ana Project, measured just prior to the expropriation and without any diminution in value resulting from pre-expropriation unlawful acts and public pronouncements of the imminent expropriation, and (2) additional damages to the Corani project resulting directly from Peru’s unlawful actions against Santa Ana. Bear Creek’s damages experts, Messrs. Rosen and Milburn of FTI, have conservatively calculated Santa Ana’s FMV on that date (*i.e.*, June 23, 2011) to be US\$ 224.2 million;<sup>201</sup> and conservatively estimated the direct impact on Corani to be US\$ 170.6 million.<sup>202</sup> FTI’s damages calculation is summarized below:

<b>Description (\$ millions)</b>	<b>Compensation</b>
Santa Ana Project - Damages	\$ 224.2
Pre-Award Interest	\$ 72.4
<b>Santa Ana Damages</b>	<b>\$ 296.6</b>
Corani Project - Reduction in Value	\$ 170.6
Pre-Award Interest	\$ 55.0
<b>Corani Reduction in Value</b>	<b>\$ 225.6</b>
<b>Total</b>	<b>\$ 522.2</b>

**FTI Expert Report, May 29, 2015 at ¶ 2.8, Figure 2; FTI Reply Report, Jan. 8, 2016 at Figure 1**

<sup>199</sup> See *e.g.*, Reply Report of FTI Consulting, Jan. 8, 2016 at p. 9-11, § 8; Tr. 717:4-17 (McLeod-Seltzer).

<sup>200</sup> Claimant’s Memorial on the Merits at ¶¶ 195-213; Tr. 141:12-142:6 (Claimant’s opening statement).

<sup>201</sup> Reply Report of FTI Consulting, Inc., Jan. 8, 2016, Figure 1.

<sup>202</sup> Reply Report of FTI Consulting, Inc., Jan. 8, 2016, Figure 1.

75. With respect to Santa Ana's FMV, the Tribunal need not rely only on FTI's valuation: the Tribunal has at its disposal seven reports prepared by seven different industry analysts, contemporaneous to the expropriation and outside the context of litigation.<sup>203</sup> These analysts gave Santa Ana an average value of US\$ 237.5 million.<sup>204</sup> Thus, the Tribunal need not wonder what a hypothetical willing buyer would have been prepared to pay for Santa Ana in mid-2011. The Tribunal can look at the analysts' reports and use them as a reliable source of information as any market participant would.<sup>205</sup> These reports show the reasonability of FTI's valuation of US\$ 224.2 million.

76. In complete disregard of international law, the Canada-Peru FTA ("FTA"), and the amount of value that Bear Creek created in Santa Ana, Peru continues to ask this Tribunal that it only award Bear Creek's sunk costs. Alternatively, and likely aware that sunk costs is not an appropriate measure of FMV, Peru belatedly asks this Tribunal to rely on its experts' modified version of the DCF method transparently designed to undervalue Santa Ana.<sup>206</sup> The Tribunal should reject Peru's damages approaches, which do not represent Santa Ana's FMV and wholly ignore damages to Corani.

77. In this post-hearing brief, Bear Creek will provide an overview of its damages case by responding to the Tribunal's questions regarding the monetary amounts due in the event that: **(A)** the Tribunal finds that a lawful expropriation took place; **(B)** the Tribunal finds that an unlawful expropriation took place; **(C)** the Tribunal finds that non-expropriation breaches of the FTA occurred; and **(D)** the Tribunal were to find that Claimant contributed to the social unrest

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<sup>203</sup> **REX-4**, Expert Valuation Report of Prof. Graham Davis and the Brattle Group, Oct. 6, 2015, Appendix A; Expert Report of FTI Consulting, Inc., May 29, 2015, ¶¶ 7.78-7.86, Figure 25.

<sup>204</sup> Expert Report of FTI Consulting, Inc., May 29, 2015, ¶¶ 7.78-7.86, Figure 25.

<sup>205</sup> **Tr.** 1567:6-14(FTI, H. Rosen).

<sup>206</sup> **REX-10**, Second Expert Valuation Report, the Brattle Group at ¶ 16 (stating that Brattle was "not asked" to implement its modern DCF method in its first report); Respondent's Rejoinder on the Merits and reply on Jurisdiction, Apr. 13, 2016 ¶¶ 617-618.



that occurred in the spring of 2011. Lastly, Bear Creek will summarize the damages it suffered due to Peru's wrongful conduct (E).

#### A. DAMAGES OWED FOR LAWFUL EXPROPRIATION

*(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?*

78. The Tribunal should award Claimant at least US\$ 296.6 million (which includes pre-award interest calculated up to March 2017) in the event it finds that Santa Ana was lawfully expropriated. The standard of compensation for a lawful expropriation is the amount equal to the FMV of the investment immediately before the expropriation took place, as required by Article 812 of the FTA.<sup>207</sup> The FTA also requires that compensation for a lawful expropriation be paid promptly and be adequate and effective.<sup>208</sup> Respondent "does not dispute that fair market value is the appropriate standard in this case."<sup>209</sup>

79. Although the FTA does not define FMV, Claimant's damages expert defines this concept 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>210</sup> This definition of FMV is noncontroversial between the parties.<sup>211</sup> International legal scholars and investment

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<sup>207</sup> **CL-1**, Chapter Eight of the Free Trade Agreement between Canada and the Republic of Peru signed May 29, 2008 and entered into force on August 1, 2009, Art. 812(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").

<sup>208</sup> *Id.* at 812(1) (establishing that one of the requirements for a lawful expropriation to take place is the payment of "prompt, adequate and effective compensation").

<sup>209</sup> Respondent's Rejoinder on the Merits and Reply on Jurisdiction, Apr. 13, 2016, ¶ 590.

<sup>210</sup> Expert Report of FTI Consulting Inc., May 29, 2015, ¶ 7.3.

<sup>211</sup> Respondent's Rejoinder on the Merits and Reply on Jurisdiction, Apr. 13, 2016, ¶¶ 590-594 (Respondent does not challenge Claimant's definition of FMV, rather the methodology to determine that FMV).

arbitration tribunals have endorsed FMV as the measure for “adequate and effective compensation.”<sup>212</sup> But this discussion is—at best—for scholarly purpose: the plain text of the FTA requires that compensation be equal to the investment’s FMV.

80. Accordingly, FTI calculated Santa Ana’s FMV to be US\$ 224.2 million.<sup>213</sup> FTI’s DCF valuation properly adjusts for risks inherent to the mining industry and to a mining project in Peru. For example, it adjusts for social-license risk through: (i) the discount rate, which includes a beta factor for the mining industry that tends to reduce value for risks unique to that sector, such as social-license risk; (ii) the country-risk premium for operating in Peru, which likewise accounts for factors relevant to social-license risks unique to Peru; and (iii) up-front and annual operating expenses for ongoing community relations efforts at Santa Ana.<sup>214</sup> This method values the company fairly, without taking into account “higher risks” of expropriation that should have never taken place absent Peru’s arbitrary decision to expropriate Santa Ana.

81. The Tribunal should reject Respondent’s contention that it should award only an amount equal to Bear Creek’s cost of investment in Santa Ana.<sup>215</sup> Amounts invested<sup>216</sup> and FMV are two distinct measures of damages. Respondent’s own expert, Brattle, explains that “the amount invested is ‘an alternative measure of damages’ ... The Project’s cost of investment is distinct from its FMV.”<sup>217</sup> In other words, the Tribunal cannot award FMV, which the FTA requires, through an award of only the cost of investment. Similarly, internationally-recognized

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<sup>212</sup> **CL-144**, James Crawford, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 225 (2002) (stating that “[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”). *See also* Claimant’s Memorial, May 29, 2015, ¶¶ 219-222.

<sup>213</sup> *See* Reply Report of FTI Consulting, Inc., Jan. 8, 2016, Figure 1.

<sup>214</sup> **Tr.** 1822:2-1823:19 (Claimant’s closing argument).

<sup>215</sup> Respondent’s Rejoinder on the Merits and reply on Jurisdiction, Apr. 13, 2016 ¶ 591.

<sup>216</sup> Also referred to as “cost approach,” “cost of investment” or “sunk costs.”

<sup>217</sup> **REX-10**, Second Expert Valuation Report of Prof. Graham Davis/Brattle Group, Apr. 13, 2016, ¶¶ 21, 31, 32.

mining valuation standards provide that mineral properties categorized as a “Development Property,” as Santa Ana was, should not be valued according to a cost approach.<sup>218</sup> Awarding compensation equivalent to amounts invested would require that the Tribunal willingly ignore the plain text of the FTA and the evidence provided in this arbitration, including Respondent’s own expert’s testimony.

82. Separately, the Tribunal should dismiss Peru’s attacks on Claimant’s use of the DCF method to derive Santa Ana’s FMV, and its blanket assertion that the Tribunal would be creating “new law” by applying it.<sup>219</sup> Case law submitted by both Claimant and Respondent establishes that: (i) awarding only amounts invested is not an appropriate measure of FMV,<sup>220</sup> and (ii) the DCF method is a reliable estimate of FMV.<sup>221</sup> This is especially true when dealing

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<sup>218</sup> **FTI-04**, CIMVAL, Standards and Guidelines (Final Version), Feb. 2003, Table 1.

<sup>219</sup> **Tr.** 1911:17-1912:13, 1963:16-1964:1 (Peru’s closing); **Tr.** 1796:4-1804:9 (Claimant’s closing).

<sup>220</sup> **RLA-60**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, May 20, 1992, ¶¶ 214-215 (“In the Tribunal’s view, however, it is incontestable that the Claimants’ investment had a value that exceeded their out-of-pocket expenses ... In these circumstances, the Tribunal cannot accept that the project did not have a value in excess of the Claimants’ out-of-pocket expenses”); **RLA-64**, *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, June 16, 2010, ¶¶ 13-73, 13-75 (“the Tribunal rejects the Non-DCF methods advanced by the Respondent. Neither the Asset Approach nor the Declared Tax Value Approach take any account of the Concessionaire’s most valuable intangible asset as at 24 June 2001, namely its future income stream reasonably anticipated from the Concession Agreement under its remaining ten-year term ... As regards the Respondent’s Expected Returns Approach, the Tribunal accepts the Claimants’ objection that it is wrong in principle to base such returns on the relatively small contributions made by the Claimants as the Concessionaire’s minority shareholders. The Tribunal does not consider that the value of the Claimants’ shares, on the facts of this case, bore any material relationship to the Concessionaire’s future returns (or profits): this was to be a lucrative investment for the Claimants, albeit subject to high risks. Moreover, this third approach by the Respondent also produces figures which are manifestly too low”); **CL-85**, *Waguieh Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶¶ 563, 576 (“In general terms, the Tribunal finds on the evidence that the Claimants have been permanently deprived of a valuable investment, and that the value of that investment exceeds by a considerable margin the sums actually expended by the Claimants”).

<sup>221</sup> **CL-184**, *Quiborax S.A. et al. v. Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015, ¶¶ 343-347; **RLA-61**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V054/2008, Final Award, Jun. 8, 2010 (“Al-Bahloul Award”), ¶¶ 74-75 (“[T]he Tribunal considers that under exceptional circumstances a DCF analysis might be appropriate where the investment project at issue had not started operation ... the application might be justified, *inter alia*, where the exploration of hydrocarbons is at issue. The determination of the future cash flow from the exploitation or hydrocarbon reserves need not depend on a past record or profitability. There are numerous hydrocarbon reserves around the world. And sufficient data allowing for future cash flow projections should be available to allow a DCF-calculation.”); **CL-38**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, Aug. 20, 2007

with mineral resources and when, like here, a claimant has been successful in proving the likelihood of lost profits—even in the absence of a genuine going concern.<sup>222</sup> Additionally, the DCF method is regularly applied to value properties within the mining industry.<sup>223</sup> As Ms. McLeod-Seltzer testified, the DCF method is the industry “gold standard” to value mineral properties.<sup>224</sup>

83. For example, the tribunal in *Gold Reserve v. Venezuela* (which also involved mining concessions) used the DCF method to determine the FMV of the claimant’s investment and used that method to determine the compensation owed the claimant after finding that Venezuela’s actions violated the fair and equitable treatment standard.<sup>225</sup> In particular, the *Gold Reserve* tribunal found that “the fact that the breach has resulted in the total deprivation of mining rights suggests that, under the principles of full reparation and wiping-out the consequences of the breach, a fair market value methodology is also appropriate.”<sup>226</sup> Further, the *Gold Reserve* tribunal used FMV even though the expropriation had taken place prior to the project’s construction and entry into production.<sup>227</sup> Both experts in that case submitted valuations using the DCF method.

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(“*Vivendi II* Award”), ¶¶ 8.3.4, 8.3.8, 8.3.10 (“The Tribunal also recognises that in an appropriate case, a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances ... As previously noted, the absence of a history of demonstrated profitability does not absolutely preclude the use of DCF valuation methodology”); **CL-63**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 (“*Gold Reserve* Award”), ¶ 690 (“Both valuation experts used the Discounted Cash Flow (‘DCF’) method as the primary method for assessing the quantum of damages payable if Claimant succeeded on liability”).

<sup>222</sup> **CL-38**, *Vivendi II* Award, ¶¶ 8.3.4, 8.3.8, 8.3.10; **RLA-61**, *Al-Bahloul* Award, ¶¶ 74-75; **CL-63**, *Gold Reserve* Award, ¶ 690.

<sup>223</sup> **BR-57**, Canadian Standards and Guidelines for Valuation of Mineral Properties –An Update, Oct. 18, 2011, Table 2 (stating that DCF is “the preferred method” to value properties).

<sup>224</sup> **Tr.** 732:13-733:4 (McLeod-Seltzer).

<sup>225</sup> **CL-63**, *Gold Reserve* Award, ¶ 674.

<sup>226</sup> *Id.* at ¶ 680.

<sup>227</sup> *Id.* at ¶¶ 403, 416.

84. Similarly, Peru’s measures here have resulted in the “total deprivation of [Bear Creek’s] mining rights” and Respondent’s expert agrees that the DCF method is appropriate to calculate the FMV of an investment.<sup>228</sup> Indeed, in its second report, Peru’s damages expert submitted its own valuation purporting to derive Santa Ana’s FMV through a “modern” DCF valuation. As Bear Creek explained during the hearing, this methodology—at least in its Brattle iteration—is essentially a market approach masquerading as an income approach.<sup>229</sup> The market approach is not an appropriate valuation method in this case because Bear Creek’s share value is not an accurate reflection of Santa Ana’s FMV. It ignores the fact that Santa Ana had completed pre-feasibility and definitive feasibility studies and had obtained US\$ 130 million in financing for construction of the mine which had been contracted to *Graña y Montero*, one of the most prominent construction firms in Latin America with extensive experience in building mines.

85. Specifically, Brattle’s modern DCF method starts from the presumption that Bear Creek’s Enterprise Value (*i.e.*, the market value of its shares plus its debt) is equal to the company’s FMV.<sup>230</sup> This presumption ignores the disconnect between the share price and the company value.<sup>231</sup> Moreover, this methodology arbitrarily assigns “risks” to the cash flows of Santa Ana and Corani to line them up with the stock-price valuation with which Brattle began.<sup>232</sup>

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<sup>228</sup> **REX-4**, Expert Valuation Report of Prof. Graham Davis and the Brattle Group, Oct. 6, 2015, ¶ 47.

<sup>229</sup> See **Tr.** 159:20-162:17 (Claimant’s Opening Statement).

<sup>230</sup> See **REX-4**, Expert Valuation Report of the Brattle Group at ¶ 19 (stating that “the enterprise value (EV), is directly observable and approximately equal to the combined FMV of Bear Creek’s two main projects, Corani and Santa Ana”); **REX-10**, Second Expert Valuation Report of the Brattle Group at § A(1) (stating that “[t]he [e]nterprise [v]alue of Bear Creek is [e]qual to the FMV of Bear Creek”); **Tr.** 1585:2-6 (FTI, H. Rosen) (stating that Brattle “start[s] their analysis strangely, with their conclusion, and their conclusion is that Fair Market Value is equal to Enterprise Value, and this theme permeates the rest of the First Report and all of the Second Report”).

<sup>231</sup> **Tr.** 1587:9-12 (FTI, H. Rosen) (explaining that “even in the literature ... there is discussion of how there’s a disconnect between the share price of a company and its Fair Market Value”).

<sup>232</sup> **Tr.** 1588:9-1589:15 (FTI, H. Rosen) (analyzing Brattle’s valuation and explaining that “[t]here is a disconnect between the price that the stock is trading at and [the] underlying value, Net Asset Value, okay? Brattle found the same thing, but rather than attribute that to a disconnect, they manufactured a risk adjustment ...”).

For example, Brattle assigns a “social-license risk” adjustment to Santa Ana of 27% or 80%, meaning that in Brattle’s model there is a 27% or 80% chance that Santa Ana will produce zero value.<sup>233</sup> In practice, this risk is nothing more than an adjustment created with hindsight information (since an expropriation actually took place and the project will produce zero value), tailor-made to undervalue Santa Ana.<sup>234</sup> Thus, the Tribunal should reject Brattle’s valuation.

86. Finally, it is common ground between the parties that Bear Creek is entitled to compound interest on any amounts awarded, and that the prevailing party may recover its arbitral costs and fees at the Tribunal’s discretion.<sup>235</sup> Bear Creek demonstrated that the appropriate interest rate to apply to this case is 5%, which accurately represents Peru’s cost of borrowing.<sup>236</sup>

87. To conclude, the Tribunal should award Claimant US \$296.6 million (including pre-award interest up to March 2017) as monetary compensation in the event it finds that Claimant’s investment in Santa Ana was lawfully expropriated. But the Tribunal cannot hold that Peru’s expropriation of Bear Creek’s investment was lawful. In order to do so, the Tribunal must find that Peru’s expropriation was carried out “for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.”<sup>237</sup> The absence of any one of these factors renders the expropriation unlawful. In the present case, not one is present.<sup>238</sup> Indeed, it cannot be disputed that Peru failed to comply

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<sup>233</sup> **Tr.** 1643:10-12 (Brattle, G. Davis) (stating that Brattle’s valuation model “infer[s] the market putting in a 30 to 80 percent probability of failure”); **Tr.** 1644:2-18 (FTI, H. Rosen, explaining that Brattle’s 80% risk is “not calculated”).

<sup>234</sup> In fact, as admitted by Brattle, if you remove the “social-license risk” Brattle injects into its valuation, Santa Ana’s valuation is 161 million. **Tr.** 1668:13-19, 1669:13-17 (Brattle, F. Dorobantu)

<sup>235</sup> See Claimant’s Memorial on the Merits, May 29, 2015 ¶¶ 247-255; Respondent’s Counter-Memorial on the Merits and Memorial on Jurisdiction, Oct. 6, 2015 ¶¶ 403, 406.

<sup>236</sup> See Claimant’s Reply Memorial at ¶¶ 489-502.

<sup>237</sup> **Exhibit C-1**, Canada-Peru FTA, Article 812.1.

<sup>238</sup> Claimant’s Reply, § IV.

with basic tenets of due process,<sup>239</sup> and that Peru did not pay any compensation to Bear Creek.<sup>240</sup>

## B. DAMAGES OWED FOR UNLAWFUL EXPROPRIATION

(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?

88. The Tribunal should award Claimant at least US\$ 522.2 million (which includes pre-award interest up to March 2017) as full reparation for Peru's unlawful expropriation of Santa Ana and additional damages to Corani. As the Tribunal is aware, the FTA is silent as to the standard of compensation for an unlawful expropriation. In these circumstances, customary international law fills the lacuna and provides a standard of "full reparation" to "wipe out" all the consequences of the unlawful act and restore the claimant to the position where it would have been today in the absence of the wrongful acts, as first set forth in the *Chorzów Factory* case.<sup>241</sup> The standard set by *Chorzów Factory* has been interpreted consistently by international tribunals as requiring a tribunal to award the higher of the value on the date of expropriation, plus interest, or the value on the date of the award (in either case, accompanied by further compensation for any additional loss not covered by the restitutionary monetary equivalent).<sup>242</sup>

89. Claimant has demonstrated that Peru's conduct constituted an unlawful expropriation.<sup>243</sup> As legal commentators have observed, it would be illogical for it to make "no

<sup>239</sup> See *supra* ¶¶ 55-60. See also **RLA-30**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002, pt. IV, ch. D, ¶ 7; **RLA-40**, *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, June 26, 2009, ¶ 501; **RLA-41**, *Tza Yap Shum* Award ¶ 174.

<sup>240</sup> Claimant's Reply, § IV.B; **CL-181**, Arnaud de Nanteuil, *Droit international de l'investissement* (Pedone, 2014) p. 346, ¶ 741: "Indiscutablement, une expropriation ne peut avoir lieu dans le respect de la licéité internationale sans qu'une compensation financière soit versée à l'investisseur qui en est l'objet" ("Unquestionably, an internationally lawful expropriation may not take place without financial compensation being provided to the expropriated investor"); **CL-31**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007, ¶ 273.

<sup>241</sup> See **CL-205**, *Chorzów* No. 17 Decision ¶ 47; see, also, Claimant's Memorial on the Merits at ¶¶ 195-213; **Tr.** 141:12-142:6. (Claimant's opening).

<sup>242</sup> Claimant's Memorial, ¶¶ 201-213.

<sup>243</sup> *Id at* ¶¶ 67-78; Claimant's Reply, ¶¶ 241-328; **Tr.** 87:11-14, 89:17-96:21, 99:9-121:15 (Claimant's opening); **Tr.** 1778:2-1780:11 (Claimant's closing).

difference whether the taking is lawful or unlawful and that the financial consequences will be the same in both cases.”<sup>244</sup> In this case, the standard of compensation for Peru’s illegal expropriation is full compensation, which aims to restore Bear Creek to the financial position in which it would be absent Peru’s illegal expropriation, namely the FMV of the expropriated Santa Ana Project, measured just prior to the expropriation and without any diminution in value resulting from pre-expropriation unlawful acts and public pronouncements of the imminent expropriation, plus additional damages to the Corani project resulting directly from Peru’s unlawful actions against Santa Ana.<sup>245</sup>

90. As Ms. McLeod-Seltzer summarized during the hearing, by the appropriate valuation date of June 23, 2011, Bear Creek had: i) a deposit, Santa Ana; and (ii) raised over 200% of the capital necessary to put that deposit into production.<sup>246</sup> Bear Creek would have used the money raised to put Santa Ana “into production, earn producer status, which gives you a higher multiple in the marketplace, and use the unencumbered cash flow from that asset to help finance our larger Project, Corani.”<sup>247</sup> Corani was closely linked to Santa Ana by design, and recognized as such by the market.<sup>248</sup> As documentary and witness evidence show, Bear Creek would have been able to continue operations and go into production even with potential delays caused by politically-motivated protests.<sup>249</sup> But Peru’s wrongful actions halted Bear Creek’s plan. In Ms. McLeod-Seltzer’s words, Peru “really pulled the rug out from under [Bear Creek]

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<sup>244</sup> Claimant’s Memorial, ¶¶ 201-213 and footnote 492.

<sup>245</sup> Tr. 142:13-143:8 (Claimant’s opening).

<sup>246</sup> Tr. 717:4-7 (McLeod-Seltzer).

<sup>247</sup> Tr. 717:4-17, 718:4-17 (McLeod-Seltzer). *See also*, A. Swarthout Rebuttal Witness Statement, Jan. 6, 2016, ¶¶ 43, 52.

<sup>248</sup> Tr. 524:11-15; 525:15-526:12 (Swarthout).

<sup>249</sup> *See* Tr. 145:19-173:6 (Claimant’s opening statement); FTI Reply Report, ¶¶ 7.33-7.34, 7.40-7.44 (explaining that “whereas Brattle asserts that [FTI’s] DCF analysis does not include potential delays for permitting and community opposition, RPA rejects this stating that the production schedule had considered and allowed for reasonable periods of time for these issues”).



in [its] plan to move the Company forward.”<sup>250</sup>

91. As explained in response to question e(i),<sup>251</sup> the Tribunal should rely on FTI’s valuation and Bear Creek is also entitled to compound interest of 5% on any amounts awarded, plus costs. In sum, the Tribunal should award at least US\$ 522.2 million (which includes pre-award interest up to March 2017) as full reparation for Peru’s unlawful expropriation of Santa Ana and the additional damages caused to Corani. To do otherwise would be to reward Peru’s wrongful conduct.

### C. DAMAGES OWED FOR NON-EXPROPRIATION BREACHES OF THE FTA

*(e) What are the monetary amounts that the Tribunal should award to the Claimant if it were to conclude that: iii. Respondent breached its obligations under the FTA for FET or other obligations under other provisions of the FTA?*

92. The Tribunal should award Claimant at least US\$ 522.2 million (which includes pre-award interest up to March 2017) as full reparation for Peru’s non-expropriation violations of the FTA. The FTA is silent as to the standard of compensation for non-expropriation breaches. In these circumstances, customary international law applies and provides a standard of “full reparation” to “wipe out” all consequences of the unlawful act.<sup>252</sup> Claimants echo the *Vivendi II* tribunal, which observed that “regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action.”<sup>253</sup> Here, and as explained in response to question e(ii),<sup>254</sup> “full compensation” to restore Bear Creek to the financial position in which it would have been absent Peru’s wrongful actions, is to award Bear Creek the FMV of Santa Ana, plus additional

<sup>250</sup> Tr. 717:4-17 (McLeod-Seltzer).

<sup>251</sup> See *supra* ¶¶ 78-87.

<sup>252</sup> CL-205, *Chorzów* No. 17 Decision p. 47; see also Claimant’s Memorial on the Merits at ¶¶ 223-231.

<sup>253</sup> CL-38, *Vivendi II* Award, ¶ 8.2.7.

<sup>254</sup> See *supra* ¶¶ 88-91.

compensation for damages to the Corani project.<sup>255</sup>

#### D. CONTRIBUTORY NEGLIGENCE

*(e) What are the monetary amounts that the Tribunal should award to the Claimant if it were to conclude that: 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?*

93. The theory of contributory fault cannot excuse or reduce Peru's liability for its wrongful breach of the FTA. As explained above,<sup>256</sup> Bear Creek did not cause the social unrest in Southern Puno, which resulted from the political machinations of various nefarious leaders,<sup>257</sup> and the lack of the State's presence in Southern Puno.<sup>258</sup> Notwithstanding, the Tribunal has asked what would happen if it were to find that Bear Creek contributed to the social unrest. Simply stated, nothing would change: the doctrine of contributory fault under international law requires that the party advocating for its application, presumably Respondent here, prove not merely contribution to the investor's harm, but the investor's **willful or negligent** conduct (or omission) that **materially and significantly contributed** to its harm, **directly causing it**.<sup>259</sup> None of these elements is present in this case.

94. Certain investment tribunals have analyzed the doctrine of contributory fault in

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<sup>255</sup> Tr. 142:13-143:8 (Claimant's opening statement).

<sup>256</sup> See *supra* ¶¶ 24-25.

<sup>257</sup> See e.g., **Exhibit C-197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013, Tr. 887:12-18 (Gala) (stating that Mr. Lescano "owed his election to the votes that came from the Department of Puno. Plus, a new election was coming up in Peru, and he wanted to continue being a congressperson, so his participation in this event helped him get votes and helped the voters as well, and also helped his own future, and also his track record").

<sup>258</sup> Tr. 550:18 (Swarthout).

<sup>259</sup> Art. 39 states that contributory negligence requires a showing of "*contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.*" **CL-30**, ILC Draft Articles, Art. 39 (emphasis added); **CL-198**, *Occidental Petroleum Corporation et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012 ("*Occidental Award*"), ¶¶ 665-670; **RL-18**, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, Jul. 18, 2014 ("*Yukos Award*"), ¶¶ 1595-1600; **CL-237**, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, Mar. 15, 2016 ("*Copper Mesa Award*"), ¶¶ 6.91-6.102; **CL-83**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 ("*MTD Award*"), ¶¶ 242-246.

cases where—unlike here—the respondent has advocated it expressly.<sup>260</sup> Within that context, tribunals have analyzed Article 39 of the ILC Draft Articles, which sets forth requirements for the doctrine to apply in international law. In so doing, these tribunals have taken a holistic approach to analyze whether the facts of the case warrant its application.<sup>261</sup> For example, the *Yukos*, *MTD* and *Occidental* tribunals uniformly held that “it is **not any contribution** by the injured party to the damage which it has suffered which will trigger a finding of contributory negligence. The contribution must be **material and significant**.”<sup>262</sup> Tribunals also note that there must be a sufficient causal link between the negligent or willful act or omission and the harm, as is required with any assessment of reparation in accordance with ILC Article 31.<sup>263</sup>

95. Accordingly, if Peru had asked this Tribunal to apply the doctrine (which it did not), Peru would have to show first that Bear Creek’s conduct was willful or negligent. The *Copper Mesa* award exemplifies the type of evidence and conduct necessary for such a finding. In that case, the tribunal found that the claimant directly contributed to poor community relations through an armed conflict **planned and sponsored by the claimant itself** (through its agents and/or employees). The evidence in that case included: (i) witness evidence—from both

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<sup>260</sup> See, generally, **CL-198**, *Occidental* Award; **RL-18**, *Yukos* Award; **CL-237**, *Copper Mesa* Award; **CL-72**, *Abengoa, S.A. and COFIDE, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, Apr. 18, 2013 (“*Abengoa* Award”); **CL-83**, *MTD* Award.

<sup>261</sup> **CL-198**, *Occidental* Award, ¶ 670. See also **CL-238**, *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 (“*MTD* Annulment Decision”), ¶ 101; **RL-18**, *Yukos* Award, ¶ 1600. Professor’s Crawford official commentary to Article 39 confirms that not every act or omission is relevant in this analysis, but rather, only acts and omissions “which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights” and which “materially contributed to the damage[.]” **CL-30**, ILC Draft Articles, Art. 39, Commentary (5), at 110. Professor Crawford further notes that “[t]he relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case[.]”

<sup>262</sup> **CL-198**, *Occidental* Award, ¶ 670 (emphasis added). See also **CL-238**, *MTD* Annulment Decision, ¶ 101; **RL-18**, *Yukos* Award, ¶ 1600.

<sup>263</sup> **RL-18**, *Yukos* Award, ¶¶ 1597-1600 (citing ILC Art. 31 and Official Commentary); **CL-198**, *Occidental* Award, ¶¶ 667-669 (relying on ILC Art. 31 in discussion of contributory negligence).

parties—showing a 2006 contract between the claimant and a private security company;<sup>264</sup> (ii) video footage of the claimant’s security company marching to the concession area armed with firearms, tear gas, bombs, and bullet-proof vests, and causing a violent confrontation with anti-mining protestors;<sup>265</sup> (iii) video footage of the claimant’s security company interfering with anti-mining protests and targeting certain anti-mining protestors;<sup>266</sup> (iv) documentary evidence showing a contract between the claimant and a community committee by which the claimant paid thousands of dollars to the committee members in exchange for their support for the project and neutralization of the opposition;<sup>267</sup> and (v) admissions by the claimant’s witnesses.<sup>268</sup>

96. Based on the above-described evidence, the *Copper Mesa* tribunal found that the respondent had met its burden of proving its allegations. Specifically, the tribunal concluded that, “by the acts of its agents in Ecuador, the Claimant [resorted] to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands.”<sup>269</sup> The tribunal thus held that Copper Mesa’s own acts were a contributing factor (in the amount of 30%) to the circumstances that then led to the cancellation of its mining concessions.<sup>270</sup>

97. Here, the evidence in the record shows that Bear Creek’s conduct was neither willful nor negligent. Bear Creek carried out over 130 community outreach workshops and implemented social programs to benefit the local communities, including providing training and

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<sup>264</sup> CL-237, *Copper Mesa* Award, ¶¶ 4.172, 4.179.

<sup>265</sup> CL-237, *Copper Mesa* Award, ¶¶ 4.214-4.230, 4.251, 4.286.

<sup>266</sup> CL-237, *Copper Mesa* Award, ¶¶ 4.173.

<sup>267</sup> CL-237, *Copper Mesa* Award, ¶¶ 4.105, 4.98.

<sup>268</sup> CL-237, *Copper Mesa* Award, ¶¶ 4.105; 4.179-80; 4.214; 4.286.

<sup>269</sup> CL-237, *Copper Mesa* Award, ¶ 6.99.

<sup>270</sup> CL-237, *Copper Mesa* Award, ¶ 6.100.

offering vaccination programs for animal and livestock (at no cost to the State).<sup>271</sup> More importantly, the record establishes irrefutably that Bear Creek—at a minimum—was responsive to concerns that were raised and took responsible, reasonable steps to address them. For example, on cross-examination, Mr. Swarthout was asked many questions about reports he allegedly received around August 2009 about a lack of confidence in Bear Creek by certain parts of the communities.<sup>272</sup> As the record shows, subsequent to receiving such reports, Bear Creek held at least 80 additional community workshops.<sup>273</sup>

98. Bear Creek also “turned specifically to a group of outside consultants, Social Sustainable Solutions, who had expertise in this area. Later we [Bear Creek] used Ausenco Vector[,]”<sup>274</sup> the leader in implementing mining projects successfully in Peru. In response to reports of alleged discontent in Kelluyo, Mr. Antúnez de Mayolo personally met with the mayor of Kelluyo to discuss the pressure the FDRN was exerting in the area and how to resolve it by seeking assistance from the Peruvian Government (assistance which came only once the situation in Southern Puno had escalated).<sup>275</sup> Regardless of whether Bear Creek’s community outreach programs were perfect, it is clear from the above that Bear Creek’s community outreach efforts were tireless and far exceeded its legal obligations.<sup>276</sup>

99. In short, as the Santa Ana Project progressed, Bear Creek followed its policy of conducting responsible community outreach, which MINEM endorsed through its approval of Bear Creek’s PPC, and “made adjustments in our [Bear Creek’s] strategies and approaches... We

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<sup>271</sup> **Tr.** 550:22-551:5 (Swarthout); **R-229**, 2010 Environmental Impact Assessment (PPC), Annex 2, Dec. 23, 2010; **C-0177**, Agreement between Condor Ancocahua and Bear Creek, May 23, 2009; **C-0178**, Agreement between Ancomarca and Bear Creek, Jul. 2, 2009; C-0180, OEFA Report re the Santa Ana Project, Dec. 31, 2011, p. 15

<sup>272</sup> **Tr.** 472:15-474:17 (Swarthout).

<sup>273</sup> **Exhibit C-155**, Ausenco Vector, PPC, Annex 2.

<sup>274</sup> **Tr.** 459:16-460:1 (Swarthout).

<sup>275</sup> **Tr.** 722:4-722:19 (Antúnez de Mayolo).

<sup>276</sup> *See supra* **Section I.B.**

did reach out and look at our—where we can improve.”<sup>277</sup> This is neither willful nor negligent conduct, and thus Respondent cannot satisfy even the first threshold requirement for establishing contributory negligence.

100. Considering the totality of circumstances as ILC Article 39 requires, Peru’s conduct stands in shocking contrast to Claimant’s. As Mr. Ramírez Delpino testified, although Bear Creek repeatedly attempted to secure the Peruvian Government’s involvement in the outreach process, DGAAM refused to participate in field and service trips prior to Bear Creek’s submission of its ESIA, and preferred to “delegate” these matters to regional authorities.<sup>278</sup> He also testified that DGAAM never informed Bear Creek of any shortcomings in its PPC; indeed, he testified that he did not consider there were any such shortcomings.<sup>279</sup> DGAAM, the very State entity that Mr. Ramírez Delpino agrees “is responsible for determining the most suitable Citizen Participation Plan,”<sup>280</sup> failed to participate in the process in any meaningful way.<sup>281</sup> There was a palpable “lack of the State presence” in Southern Puno.<sup>282</sup>

101. Respondent also has not established that Bear Creek’s community relations program materially and significantly contributed to the social unrest to such an extent that, “but for” Bear Creek’s allegedly negligent acts or omissions, the social unrest never would have occurred and Peru never would have issued SD 032. In fact, Peru’s own constitutional court found that Bear Creek was not in any way at fault for the social unrest in Southern Puno that allegedly caused the Government to enact SD 032 unlawfully and without due process.<sup>283</sup>

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<sup>277</sup> Tr. 460:15-19 (Swarthout).

<sup>278</sup> Tr. 1087:18-1090:11 (Ramírez Delpino).

<sup>279</sup> *Id.*

<sup>280</sup> Tr. 1083:20-1084:3 (Ramírez Delpino).

<sup>281</sup> Tr. 1101:3-1102:9 (Ramírez Delpino).

<sup>282</sup> Tr. 550:18 (Swarthout).

<sup>283</sup> **Exhibit C-6**, Amparo Decision No. 28 issued by the Lima First Constitutional Court, May 12, 2014, pp. 20-21.

102. The *Abengoa* case is highly instructive in this regard. In *Abengoa*, the respondent, Mexico, alleged that the claimant had failed to implement a timely, comprehensive social outreach program, had acted in bad faith, and concealed key information from the population, all of which had caused the social unrest that eventually led Mexico to expropriate the claimant's investment.<sup>284</sup> The *Abengoa* tribunal disagreed with the respondent and held that the claimant was not contributorily negligent because the social unrest was caused by the aggressive and deceitful actions of those who opposed the investment, not by the claimant's allegedly insufficient outreach efforts.<sup>285</sup> In reaching this decision, the tribunal determined that in order for the respondent to succeed in its claim for contributory negligence, it would need to establish that if a social outreach program had been implemented opportunely, the events that led to the expropriation never would have occurred.<sup>286</sup>

103. Respondent cannot meet this burden here. It is uncontested that the protesters, led by Mr. Aduviri, demanded (among other things) the cancelation of *all* concessions in Southern Puno, including Bear Creek's. Given that Bear Creek's investment was just one of hundreds of concessions to which the protesters objected, and given the political interests at play,<sup>287</sup> Respondent simply cannot establish that "but for" Bear Creek's outreach program, there never would have been any social unrest in the area.

104. But even if, notwithstanding the above, the Tribunal were to find that Bear Creek

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<sup>284</sup> **CL-72**, *Abengoa Award*, ¶ 660.

<sup>285</sup> **CL-72**, *Abengoa Award*, ¶ 672.

<sup>286</sup> **CL-72**, *Abengoa Award*, ¶¶ 670-71: "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 same [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>287</sup> See **Exhibit C-197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013.

acted negligently or willfully, in a manner that materially and significantly contributed and directly caused the social unrest (and the expropriation of Bear Creek’s investment), such a finding would have no effect on Respondent’s liability, but only on quantum. Cases like *MTD*,<sup>288</sup> *Occidental*,<sup>289</sup> *Yukos*,<sup>290</sup> and *Copper Mesa*<sup>291</sup> have recognized that a tribunal may, at most, only reduce a party’s damages upon a finding of contributory negligence.

105. In the present case, given the nature of the dispute and the Tribunal’s specific question regarding contribution to the social unrest, a finding of contributory negligence by the Tribunal would have to be based on Bear Creek’s government-approved community outreach efforts. The proper approach to determining how to account for Claimant’s alleged contribution to its harm in this context is to change the inputs in Claimant’s damages calculations to account for (i) the possibility of greater delays than those already accounted for and (ii) higher up-front costs to obtain the social license. Adopting this approach will ensure that any damages award will not be arbitrary, but will reflect the true situation in the “but for” scenario—if Bear Creek had contributed to the social unrest, it would have incurred additional time and costs to obtain the social license. Claimant’s experts discussed such an approach at length during the hearing and it was also addressed during closing arguments.<sup>292</sup>

106. For example, to reflect a one-year delay, the discount factor must be updated to push all cash flows out by one year, reducing the present value of all cash flows received over the life of the mine. FTI’s electronic model (BR-207) can be modified to incorporate the delay by adding 1 year to the dates in Row 52 (labeled “Middle of period”) of the “Schedule 1” tab; all

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<sup>288</sup> **CL-83**, *MTD* Award, ¶ 243.

<sup>289</sup> **CL-198**, *Occidental* Award, ¶¶ 680, 687.

<sup>290</sup> **RL-18**, *Yukos* Award, ¶ 1594.

<sup>291</sup> **CL-237**, *Copper Mesa* Award, ¶¶ 6.91-6.92.

<sup>292</sup> **Tr.** 1639:9-1640:20 (FTI, H. Rosen); **Tr.** 1852:8-1855:20 (Claimant’s closing statement).



cash flows are then received a year later than originally anticipated.

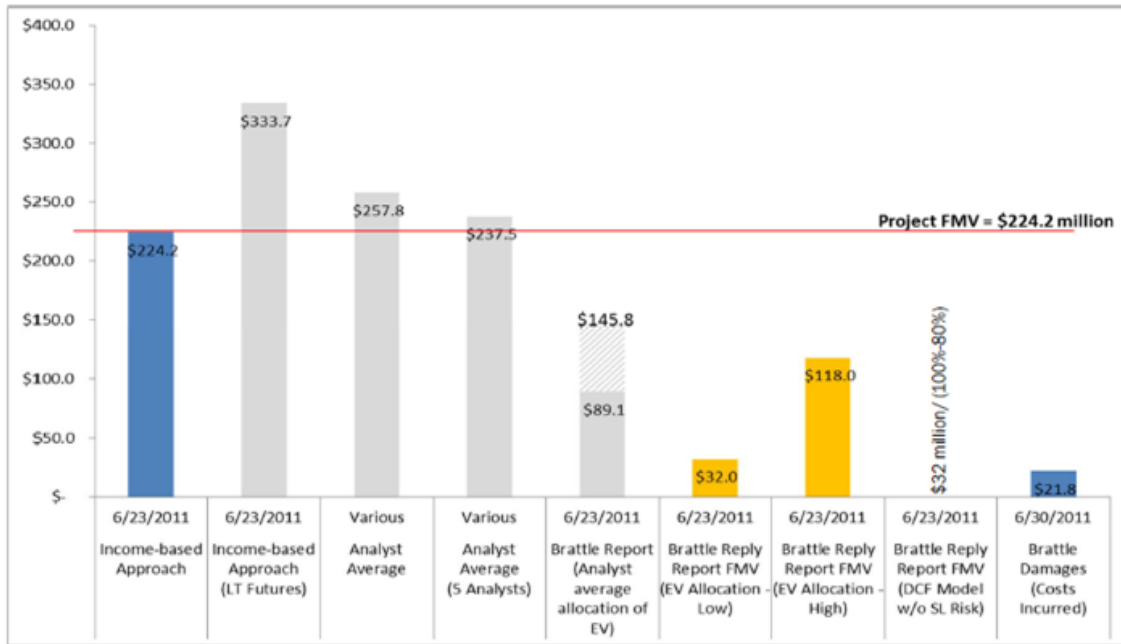
			12/31/2011	12/31/2012	12/31/2013	12/31/2014	12/31/2015	12/31/2016	12/31/2017	12/31/2018	12/31/2019	12/31/2020	12/31/2021	12/31/2022
51	End of period													
52	Middle of period		6/23/2011	9/26/2011	7/1/2012	7/1/2013	7/1/2014	7/1/2015	7/1/2016	7/1/2017	7/1/2018	7/1/2019	7/1/2020	7/1/2021
54	Production Royalty													
55	Net Smelter Return		\$ -	\$ -	\$ -	\$ 125,950	\$ 141,804	\$ 134,896	\$ 94,299	\$ 95,910	\$ 91,361	\$ 87,138	\$ 81,816	\$ 77,309
56		60,000	1.0%	\$ -	\$ -	\$ 600	\$ 600	\$ 600	\$ 600	\$ 600	\$ 600	\$ 600	\$ 600	\$ 600
57		120,000	2.0%	\$ -	\$ -	\$ 1,200	\$ 1,200	\$ 1,200	\$ 686	\$ 718	\$ 627	\$ 543	\$ 436	\$ 346
58			3.0%	\$ -	\$ -	\$ 179	\$ 654	\$ 447	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
59	Peruvian Production Royalty		\$ -	\$ -	\$ -	\$ 1,979	\$ 2,454	\$ 2,247	\$ 1,286	\$ 1,318	\$ 1,227	\$ 1,143	\$ 1,036	\$ 946
61	Tax Depreciation													
62	Opening Balances		\$ -	\$ -	\$ 11,329	\$ 72,485	\$ 58,439	\$ 52,631	\$ 42,520	\$ 34,298	\$ 32,803	\$ 26,513	\$ 21,404	\$ 17,331

The impact of this change reduces Santa Ana’s FMV from US\$ 224.2 million to US\$ 203.8 million. To account for increased upfront expenditures to obtain the social license, the Tribunal could account for an additional upfront amount of, say, several million dollars and subtract this sum from the total damages. Should the Tribunal so wish, Claimant would be happy to submit additional calculations and data to address any further questions the Tribunal may have.

**E. SUMMARY OF BEAR CREEK’S DAMAGES**

107. To conclude, Bear Creek has proven Peru’s wrongful conduct as well as Santa Ana’s FMV and damages to Corani. The preceding sections demonstrate that there is no basis to adjust any of FTI’s calculations of Santa Ana’s FMV. Indeed, the table below, which was

## Brattle's cost-based conclusion is unreasonable



Based on: FTI Reply Report, Figure 2, Figure 5

Brattle Reply Report, Table 2

Santa Ana Modern DCF Model (BR-229)

FTI Conclusion  
Brattle Damages Conclusion  
Brattle FMV Conclusion

Approaches considered, but not included.  
Acquisition premium added to share price approach.



16

presented as Slide 16 of FTI's direct presentation, shows that, if anything, FTI's calculations are conservative when compared to other indicators of value. It also demonstrates how unreasonable Brattle's valuation is, whether it be its belated "Modern-DCF" method or its original "sunk costs" valuation to which Peru still clings despite its own experts' disagreement that it represents FMV.

108. Similarly, the tribunal should compensate Bear Creek for the foreseeable negative impacts to the Corani project that resulted in a diminution of its value. Accordingly, the Tribunal should award Bear Creek at least US\$ 522.2 million (which includes pre-award interest up to March 2017) as full reparation for Peru's unlawful expropriation of Santa Ana and damages to Corani.

## V. REQUEST FOR RELIEF

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

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

December 21, 2016

Respectfully submitted,



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**KING & SPALDING LLP**  
**MIRANDA & AMADO**