BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bear Creek Mining Corporation
Claimant,

v.

Republic of Perú
Respondent.

Case No. ARB/14/21

Respondent's Second Post-Hearing Brief

February 15, 2017

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I. INTRODUCTION

1. As these proceedings draw to a close, one fact is clear and undeniable: Bear Creek failed to obtain a social license to operate at Santa Ana. Claimant's First Post-Hearing Brief ("First PHB") tried to ignore, and thereby escape, the inevitable consequences of the lack of community support for its project, which was at the root of the events of which Claimant complains. As directed by Procedural Order No. 10, this Second Post-Hearing Brief is responsive and focuses on rebutting the misrepresentations and misdirections in Claimant's First PHB, with a particular focus on the impact of Bear Creek's lack of a social license.[1]

II. ANSWERS TO THE TRIBUNAL'S QUESTIONS

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

1. Which National and International Legal Provisions Are Applicable to Informing That Standard? *and* Insofar as the State Authorities Have Any Discretion in This Regard, What Are the Limits?

2. A mining company obtains a social license if, and only if, the company and its project are in fact accepted by the relevant local communities. As Bear Creek's CEO Mr. Swarthout himself has explained,[2] the State does not, and cannot, grant a social license—only the communities can do that. In effect, this is not a legal question but a factual one: The only measure of whether a mining company has "sufficiently reached out to the relevant communities" is whether it has <u>obtained</u> a social license. Its efforts are sufficient if, and only if, as a factual matter the communities generally accept the mining project and the company.

3. However, Claimant's First PHB tried to shift the Tribunal's focus to a different

[1] Respondent continues to rely on and incorporate by reference all of its prior written and oral submissions.

[2] *See* Witness Statement of Andrew T. Swarthout, May 28, 2015 ("Swarthout First Witness Statement"), para. 40 n. 31 ("Social License does not refer to any formal authorization process but rather to the general acceptance of the project by the local communities"); *see also Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Transcript of Hearing, September 7-14, 2016 ("Transcr.") at 432:19-433:10 (Swarthout).

issue: the procedural requirements of Peruvian law, instead of the practical requirement to obtain a social license. On Claimant's theory, Peruvian law does not mandate a social license or anything more than a minimal set of procedural obligations, [3] and therefore, so long as the company ticked the boxes of those minimum procedures, Bear Creek had no need to obtain a social license and Peru had no right to take into account or respond to the vehement (even violent) social opposition to the Santa Ana Project. According to Bear Creek, its only obligation was to develop 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."[4]

4. That proposition shows Bear Creek's deep misunderstanding of its obligations to the local communities, of the need to obtain a social license, and of the role of the State and Peruvian law in that regard. The citizen participation process is nothing more than a means to seek the acceptance of the communities—it is indeed required by law, but compliance with that requirement is neither a guarantee of, nor a substitute for, actually obtaining a social license from the affected populations. For the latter, Bear Creek not only needed to educate the communities about the project, but also needed to understand their concerns, and—critically—to address those concerns in a manner satisfactory to the communities themselves. Bear Creek's position that its only obligation was to "share information," and that, having done so, it was entitled to proceed with its socially disruptive mining project regardless of community opposition, is untenable.

5. Moreover, multiple international authorities and instruments do explicitly recognize the right of local communities to be consulted—with the purpose of obtaining their

[3] *See* Claimant's First Post-Hearing Brief, December 21, 2016 ("Claimant's First Post-Hearing Brief"), para. 1.
[4] Claimant's First Post-Hearing Brief at para. 1.

consent, not just to "share information"—about mining projects that could affect their lands. And when natural resources are to be exploited by private companies, it is the companies that have to engage in a dialogue with the local communities to gain their approval and trust.

- The Free Trade Agreement between Canada and Perú ("FTA") itself recognizes the importance of corporate social responsibility.[5] In Article 810 of the FTA "[t]he Parties . . . remind those enterprises of the importance of incorporating [internationally recognized standards of corporate social responsibility] in their internal policies."[6] Bear Creek cannot be permitted to claim the protection of the FTA while also claiming that such standards of corporate social responsibility do not apply to it.

- In turn, international standards on social responsibility provide that companies have to work as closely and as extensively with the local communities as is necessary to gain their trust and acceptance; otherwise a mining project will never be successful.[7]

- Bear Creek's own government, Canada, has "[made] clear the Government's expectation that Canadian extractive sector companies reflect Canadian values in all their activities abroad."[8] For example, the Canadian government endorses the IFC's Performance Standards on Social and Environmental Sustainability.[9] Canada highlights that the "primary responsibility" for corporate social

[5] *See* Chapter Eight of the Free Trade Agreement between Canada and the Republic of Perú, May 29, 2008 ("Chapter 8 of the Free Trade Agreement between Canada and Perú"), Article 810 [Exhibit C-0001].

[6] Chapter 8 of the Free Trade Agreement between Canada and Perú at Article 810 [Exhibit C-0001].

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

[8] Government of Canada, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, November 14, 2014 at 1 [Exhibit R-180]; *see also* Government of Canada, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, March 2009, at 1 [Exhibit R-181].

[9] *See* Government of Canada, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, March 2009, at 5 [Exhibit R-181]. The IFC Performance Standards set expectations of conduct on: (i) social and environmental assessment and management systems; (ii) labor and working conditions; (iii) pollution prevention and abatement; (iv) community health, (v) safety and security; (vi) land acquisition and involuntary resettlement; (vii) biodiversity conservation and sustainable natural resource management; (viii) Indigenous Peoples; and (ix) Cultural Heritage.

responsibility rests on companies.[10]

- ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples provide that indigenous communities must be consulted in order to obtain their consent. They direct that consultations must be carried out "in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement[.]"[11]

6. In its First PHB, Claimant dismisses the relevance of these norms, including ILO Convention No. 169. Bear Creek takes the position that "Supreme Decree No. 028 [Perú's Regulation on Citizen Participation] implemented and regulated the communities' rights in the context of mining projects referenced in the [ILO Convention No. 169],"[12] and proposes that, so long as it complied with procedures required under that Decree, no other efforts can be expected of the company.[13] Bear Creek's approach is superficial and simply out of touch with reality as the international mining community—and the international human rights community—understands it. It is also incompatible with the testimony of Claimant's own witnesses and experts, who repeatedly acknowledged that without the support of the local communities, no mining project will ever be successful.[14]

7. In addition to disregarding international norms and standards of corporate social responsibility, Claimant also misrepresents the Peruvian legal framework on citizen participation and the role of the Peruvian State in it. Claimant contends that it "sufficiently reached out to the relevant communities" (i) because it claims to have complied with procedural regulations and (ii)

[10] *See* Government of Canada, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, March 2009, at 6 [Exhibit R-181].

[11] *See* International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), September 5, 1991 ("International Labour Organization, Convention 169"), Art. 6 (emphasis added) [Exhibit R-029]; *see also* United Nations Declaration on the Rights of Indigenous Peoples, September 13, 2007 ("UN Declaration on the Rights of Indigenous Peoples"), Art. 32 [Exhibit R-108].

[12] Claimant's First Post-Hearing Brief at para. 2.

[13] Claimant's First Post-Hearing Brief at para. 2.

[14] *See e.g.* Transcr. at 1497:15-19 (Clow).

because the Peruvian Government did not object to its Citizen Participation Plan.[15] Even if true, however, that would not be "sufficient" outreach—for the simple reason that Bear Creek never managed to obtain a social license.

8. At the time, the Peruvian legal framework was set by Supreme Decree No. 028, the "Regulation on Citizen Participation," and Ministerial Resolution No. 304 "Regulating Citizen Participation in the Mining Sector."[16] Bear Creek's characterization of these Regulations, which reads as if the Regulations provided obligations only for the State,[17] omits critical elements:

- The Regulation on Citizen Participation describes the role of both the State and the mining title holder (Bear Creek) in the citizen participation process.[18]
- The Regulation on Citizen Participation regulates a "responsible participation" process in order to "promote dialogue and build consensus."[19] According to the Regulation, the participation process is to be "public, dynamic and flexible."[20]
- Resolution 304 describes the specific mechanisms that may be used throughout a citizen participation process, but without making any guarantees as to their sufficiency.[21]
- MINEM's Guide on Community Relations advises on best practices for designing

[15] *See* Claimant's First Post-Hearing Brief at para. 6.

[16] *See* Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008 ("Regulation on Citizen Participation on the Mining Subsector") [Exhibit R-159]; Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM, June 24, 2008 ("Ministerial Resolution No. 304-2008-MEM-DM") [Exhibit R-153].

[17] *See* Claimant's First Post-Hearing Brief at paras. 3-4.

[18] For example, according to Article 5 of the Regulation, all participants in the citizen participation process (including the mining title holder) must respect: (i) the communities' right to participate in good faith, transparently and based on the veracity of information; (ii) the right to access information; (iii) the principle of respecting cultural diversity; (iv) the principle of non-discrimination; (v) the communities' right to monitor and enforce the mining title holder's obligations and promises on environmental and social matters; and (vi) the duty to maintain a continuous dialogue to "promote and maintain an adequate social relationship." *See* Regulation on Citizen Participation on the Mining Subsector at Art. 5 [Exhibit R-159].

[19] *See* Regulation on Citizen Participation on the Mining Subsector at Arts. 1, 3 [Exhibit R-159] (emphasis added).

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

[21] *See* Ministerial Resolution No. 304-2008-MEM-DM at Art.2 [Exhibit R-153].

and executing a citizen participation plan[22] which Bear Creek did not follow in its interactions with the communities, exacerbating the tensions in the region.[23]

9. Thus, Bear Creek's description of the process as consisting merely of one-way "shar[ing] information" is very far off the mark.[24] The objective of the citizen participation process is much more meaningful—it seeks to build true dialogue and consensus. And while Bear Creek may have shared information, it did not achieve dialogue, "promote and maintain an adequate social relationship," or "build consensus," as Peruvian law instructs.[25]

10. Nor can Bear Creek legitimately claim that Perú's review of the company's citizen participation plan, or the absence of DGAAM instructions to expand the plan, constitute proof of the plan's sufficiency to obtain a social license.[26] Perú reviews the design and confirms the execution of the citizen participation plan to ensure that it complies with the minimum requirements of the applicable legislation.[27] However, as will be discussed further in the next section, mere compliance—or the absence of objections to a plan—does not mean that a company has sufficiently reached out to affected communities. Bear Creek cannot contend that, so long as DGAAM did not request any additional outreach, the company can claim a social license and ask the Tribunal to turn a blind eye to the widespread opposition to its Project.

2. What Actions Were Legally Required of Claimant in Seeking to Obtain a Social License, and Did Claimant Take These Actions?

11. Claimant alleges that Bear Creek "devoted considerable efforts" to develop and implement citizen participation mechanisms and, in doing so, exceeded the minimum

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

[23] *See infra* at Section II.A.2.

[24] *See* Claimant's First Post-Hearing Brief at para. 1.

[25] *See* Regulation on Citizen Participation on the Mining Subsector at Arts. 1, 3, 5 [Exhibit R-159].

[26] *See* Claimant's First Post-Hearing Brief at para. 6.

[27] *See* Second Witness Statement of Felipe A. Ramírez Delpino, April 4, 2016, at para. 16 [Exhibit RWS-006].

requirements of Peruvian law.[28] Once again, however, that claim misses the point: whether or not the company met the formalistic requirements of the law—as to which, Claimant mischaracterizes its efforts in several respects (discussed below)—Bear Creek never achieved the law's objective: consensus and a social license from the affected communities. Moreover, Claimant ignores multiple warnings that the company received from the authorities and from the communities themselves that its efforts were failing.

(i) While Bear Creek congratulates itself for carrying out 5 participatory workshops when Article 12 of Regulation 304 requires only one,[29] it conveniently omits to mention that, at the workshops, the participants expressed serious concerns about the project and the "observations" recorded by the Government and company officials overseeing the workshops recommended more efforts to address community objections.[30] Whether Bear Creek held 1, 5, or even 100 workshops is of no consequence if, after those workshops, communities still had unaddressed concerns and opposed the project.

(ii) Bear Creek trumpets the fact that, in addition to workshops, it set up an Office of Ongoing Services and distributed materials on the project.[31] However, neither of these is a praiseworthy "extra" effort—both are mechanisms required under Peruvian law.[32]

(iii) Claimant suggests that DGAAM endorsed Bear Creek's community relations program by approving amendments to the company's exploration EIA between 2008-2010.[33] However, those approvals were not directed to the company's community relations.[34] Moreover, EIA approvals for minimally disruptive

[28] *See* Claimant's First Post-Hearing Brief at paras. 7, 9.

[29] *See* Claimant's First Post-Hearing Brief at para. 9.

[30] *See e.g.*, Ausenco Vector, *Plan de Participación Ciudadana* of Bear Creek, ("PPC"), at Annex 3 p. 2 ("Observations: . . . We recommend that the company carries out more workshops in all of the communities of the Huacullani District to avoid social conflicts"), Annex 3 at p. 25 ("Observations: . . . The community does not trust the company, they need more information and more workshops"), Annex 3 at p. 53 ("Observations: . . .The community does not trust and asks that the company complies with all of the agreements and compromises"), Annex 3 p. 70 ("Observations: . . .Workshops should be done by parts so that they are easier to understand") [Exhibit C-0155].

[31] *See* Claimant's First Post-Hearing Brief at para. 10.

[32] *See* Ministerial Resolution No. 304-2008-MEM-DM at Arts. 2, 8-9 [Exhibit R-153].

[33] *See* Claimant's First Post-Hearing Brief at para. 8.

[34] *See generally* Resolution Approving First Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 216-2008-MEM/AAM, September 5, 2008 [Exhibit R-036]; Resolution Approving Second Amendment to the EIA for Exploration for the Santa Ana Project, Directorial Resolution No. 310-2009-MEM/AAM, October 6, 2009 [Exhibit R-037]; Resolution Approving Third Amendment to the EIA for Exploration

exploration activities in 2008-2010 would have no bearing on whether the company had sufficient community outreach plans to deal with the vastly more extensive impact of its exploitation of the open-pit mining project in 2011 and beyond.

(iv) Bear Creek insists that its rotational work program was an appropriate form of community outreach.[35] It was not. As Professor Peña explained, the program was narrow, it ignored the Aymaras' social structure, and it created and exacerbated tensions among the communities.[36] While Bear Creek tries to hide behind the MINEM Guide on Community Relations' recommendation that mining companies avoid creating false expectations about job prospects,[37] Bear Creek made that exact mistake. In its first approach to the communities in 2004, Bear Creek claimed that it had the "capacity to invest millions" and to "give jobs"[38]—which of course created unfounded expectations. Bear Creek then exacerbated that mistake by apportioning the small number of jobs to a few localities without consulting the full Aymara community, generating hostility among them.[39]

(v) Bear Creek maintains, contrary to the evidence, that it reached out to and had excellent relations with all of the communities within the area of direct influence,[40] which it defines using a map that delineates 10 such communities.[41] Yet, Bear Creek's principal community relations mechanism, the jobs program, reached only 5 of those 10 communities.[42] Bear Creek had poor relationships with the remaining 5 communities in the area of direct influence. The Comunidad Alto de Aracachi, for example, flatly rejected the project, insisting that they

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for the Santa Ana Project, Directorial Resolution No. 280-2010-MEM/AAM, September 8, 2010 [Exhibit R-038]. These documents do make observations on social aspects of Bear Creek's EIA for exploration, but they are not intended to provide guidance or approve Bear Creek's community relations; instead they focus on verifying that Bear Creek is complying with the minimum requirements to inform the population.

[35] *See* Claimant's First Post-Hearing Brief at para. 11.

[36] *See* First Expert Report of Antonio Peña Jumpa, October 6, 2015, Section III.C. [Exhibit REX-002]; Transcr. at 1357:2-10, 1358:5-19 (Peña Jumpa).

[37] *See* Claimant's First Post-Hearing Brief at para. 11.

[38] *See* Meeting Minutes of the Public and Communal Authorities and the General Population of the District of Huacullani, May 18, 2004, at 3-5 [Exhibit R-421].

[39] *See* Transcr. at 1358:5-19 (Peña Jumpa).

[40] *See* Claimant's First Post-Hearing Brief at para. 12.

[41] *See* Claimant's First Post-Hearing Brief at para. 12 (Ausenco Vector, PPC, Map 2.30, Maps of the Santa Ana Project's Areas of Direct and Indirect Influence [Exhibit C-155] (delineating area of direct influence in blue to include Huacullani, Comunidad Ingenio, Comunidad Challacollo, Comunidad Ancomarca, Comunidad Condor de Aconcahua, Fundo Alto de Aracachi, Fundo Carcarani, Comunidad Totoroma, Comunidad Arconumi, and Comunidad de Alto de Aracachi).

[42] *See* Respondent's Rejoinder on the Merits and Reply on Jurisdiction, April 13, 2016 ("Respondent's Rejoinder on the Merits and Reply on Jurisdiction"), para. 189 (chart of Claimant's rotational job program for Huacullani, Challacollo, Condor de Aconcahua, Ancomarca, and Ingenio).

would "not give up one centimeter of [their] land to the company Santa Ana."[43]

(vi) Bear Creek boasts that it carried out workshops in communities other than the 5 favored communities, citing a map of the locations of its workshops.[44] But Bear Creek's own map indicates that it never carried out a single workshop in at least 3 of the communities in the area of direct influence (Fundo Alto de Aracachi, Comunidad Alto de Aracachi, Fundo Carcarani). It is particularly telling that Bear Creek carried out no workshops in the Comunidad Alto de Aracachi, which was especially active in the 2011 protests.[45]

(vii) Bear Creek continues to claim (incorrectly) that its February 2011 Public Hearing was a success.[46] Professor Peña's and DHUMA's contrary descriptions of the hearing are based on accounts of Aymaras (including DHUMA's members) who attended and personally witnessed the facts described.[47] Bear Creek's favorite evidence of the conduct of the hearing—letters it solicited in 2016 from three supporters of the Project[48]—have not passed the test of cross-examination and cannot be given weight. Bear Creek also complains that Respondent failed to produce the video of the hearing—despite the fact that Mr. Mayolo testified that Bear Creek in fact possesses the video today.[49] If the video supported Bear Creek's description of the hearing, Claimant surely would have produced it—but Claimant did not, and the Tribunal should draw inferences accordingly.

12. At the end of the day, Claimant's claim that Bear Creek's "community relations

[43] *See* Memorial submitted by Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP, March 10, 2011 ("Memorial submitted by Frente de Defensa No. 005"), second letter [Exhibit R-015]; Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Ministry of Mines, Memorial No. 0002- 2011- CO-FDRN-RSP, March 10, 2011 ("Memorial submitted by the Frente de Defensa No. 002"), second letter [Exhibit R-017]; Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to the President, Memorial No. 0001- 2011- CO-FDRN-RSP, March 9, 2011 ("Memorials submitted by the Frente de Defensa No. 001"), second letter [Exhibit R-016].

[44] *See* Claimant's First Post-Hearing Brief at para.14 (Claimant's Closing Presentation, Slide 99 showing workshops conducted in areas of direct and indirect influence).

[45] *See* Memorial submitted by Frente de Defensa No. 005, second letter [Exhibit R-015]; Memorial submitted by the Frente de Defensa No. 002, second letter [Exhibit R-017]; Memorials submitted by the Frente de Defensa No. 001, second letter [Exhibit R-016].

[46] *See* Claimant's First Post-Hearing Brief at para. 18.

[47] *See* Second Expert Report of Antonio Alfonso Peña Jumpa, April 13, 2016, para. 44 [Exhibit REX-008]; Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment-Puno and Mr. Carlos Lopez PHD (Non-Disputing Parties), June 9, 2016 ("DHUMA's *Amicus* Brief"), June 9, 2016, 5.

[48] *See* Claimant's First Post-Hearing Brief at para. 21; Letter from Braulio Morales Choquecahua and Faustino Limatapa Musaja, August 8, 2016 [Exhibit C-0329]; Letter from Sixto Vilcanqui Mamani, August 8, 2016 [Exhibit C-0331].

[49] *See* Transcr. 604:8-11, 604:18-19; 604:22-605:1 (Antunez de Mayolo) ("Q: In your Second Witness Statament just a moment ago, you said that evidence of the support of the people at the Hearing can be seen on the video recording of the Hearing, correct? . . . Q: Do you have a copy of this video Mr. Antunez de Mayolo? . . . A: . . . Of course, we have a copy. Yes, we do have one copy.")

program was a success"[50] borders on laughable in the face of the actual events that unfolded in the Puno region in 2011. Whether or not the company complied with the formalities of Peru's regulations on the citizen participation process, Bear Creek never obtained a social license—as evidenced by tens of thousands of protesters in the main cities of the region blocking trade and disrupting the lives of the region's inhabitants. There is simply no way to maintain that (in Mr. Swarthout's words[51]) Bear Creek had the "general acceptance" of the "relevant communities."

3. In the Present Case, What Were the State Authorities' Responsibilities in Relation to Obtaining a Social License?

13. As already discussed, it is the mining company that has to obtain a social license. The State is an independent facilitator, and in some respects supervisor, of the interactions between the communities and the company. The State's responsibility is to ensure that the communities are consulted by the mining companies, and to make sure that consultation mechanisms are in place and that those mechanisms accord with applicable regulations.[52] But, ultimately it is the company that must work closely with the communities and actually gain their acceptance.

14. Nevertheless, for the first time in its written submissions in this arbitration, Bear Creek's First PHB claims that the State provided inadequate guidance and support for the company's citizen participation process, and that those failings exacerbated the social unrest.[53] Those allegations are without merit; the Government was adequately involved and was not responsible for rescuing Bear Creek from its own failings. As just two examples, first, government officials from the regional mining department attended the company's workshops

[50] Claimant's First Post-Hearing Brief at para. 26.

[51] *See* Swarthout First Witness Statement at para. 40 n.31.

[52] *See e.g.* Respondent's First Post-Hearing Brief, December 21, 2016 ("Respdondent's First Post-Hearing Brief"), at para. 47.

[53] *See* Claimant's First Post-Hearing Brief at paras. 27-29.

and alerted the company that it needed to conduct more workshops because communities were worried about the Project's adverse impacts.[54] Second, the State tried to correct Bear Creek's misconceptions about its area of social influence—but Bear Creek ignored that guidance. [55] Moreover, Bear Creek has not pointed to any contemporaneous requests, prior to the eruption of the protests, for additional government support or complaints that the Government's involvement was insufficient; the claim is newly-minted.

15. Bear Creek's parallel (and equally novel) complaint that the State's management of the social unrest in Puno exacerbated the conflict is also meritless. The State faced an extreme situation, and dealt with the crisis as best it could. The conflict started at the regional level. To avoid escalating the conflict, the central government initially deferred to the regional government to interact with the protesters. Had the central government gotten involved at the outset, it would have only given the protesters more power. When the regional government then sought assistance, the highest levels of the national government responded immediately and initiated discussions with the protestors.[56] The conflict was grave, with the protesters refusing to relent

[54] *See* Ausenco Vector, PPC, Annex 3 at p. 2; *id.* Annex 3 at p. 25; *id.* Annex 3 at p. 53 [Exhibit C-155].

[55] In 2010, Bear Creek defined its area of social influence in its citizen participation plan and its EIA—but its definition was too broad and did not include critical elements to determine the communities with which it had to work. *See* Ausenco Vector, PPC, at pp. 2-3 [Exhibit C-0155]. In April 2011, MINEM issued its observations to Bear Creek's EIA. Observation 7 stated that Bear Creek's definition of the area of social influence was not adequate and that it needed to follow certain criteria. *See* DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD, April 19, 2011, Observation 7 [Exhibit R-040]. In its responses, Bear Creek did not address properly MINEM's concerns. *See* Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project, July 2011, Response to Observation 7 [Exhibit R-184].

[56] Transcr. 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 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.")

until their demands were met. The Government faced an extreme and truly difficult situation.[57] For Bear Creek to criticize the State's handling of the crisis situation, given that the company fomented the crisis with its tone-deaf community relations and then offered no solutions[58] and abandoned the area[59] once the crisis erupted, is galling and untenable.

4. 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?

16. Perú may not impose a mining project on a community that does not approve of it. As Respondent explained in its First PHB, the State has a range of options legally available to it to deal with such a situation, because the State cannot be expected to let a company forge ahead in the face of serious community opposition.[60] This was confirmed definitively by Claimant's own expert, Perú's former Minister of Mines Mr. Hans Flury, at the hearing: in a situation of social unrest against a project, the Government will freeze the process and will not issue a permit to proceed, because "that will be just like throwing wood onto the fire."[61] As Mr. Flury put it succinctly, "[n]o company will be able to develop activities if there are confrontations."[62] Claimant's mining expert Mr. Clow also agreed based on his own personal experience with

[57] *See* Witness Statement of Rosario del Pilar Fernández Figueroa, April 8, 2016 ("Fernández Witness Statement") at paras. 10-26 [Exhibit RWS-004].

[58] *See* Witness Statement of Luis Fernando Gala Soldevilla, October 6, 2015 ("Gala First Witness Statement"), at para. 41 ("[A]t no time during the protests did the company ever propose an actual and effective solution to the Administration for solving them.") [Exhibit RWS-001]; Transcr. 774:16-17 (Gala) ("Bear Creek did not offer—did not volunteer to be at the meetings").

[59] *See* "Santa Ana Mine Leaves Huacullani Because of Protests," *La Republica-Gran Sur* , May 8, 2011 [Exhibit R-428]; Bear Creek Press Release, May 8, 2011 [Exhibit R-429].

[60] *See* Respondent's First Post-Hearing Brief at paras. 51-60.

[61] Transcr. at 1234:12-22 (Flury) ("I believe that the procedure is such that, for its fulfillment and by presenting all of the required information, the State will follow the procedure to grant the necessary permit. Given social unrest, as we have seen or heard in this proceeding, we have seen that the Ministry freezes the process to allow time for Parties to solve the social unrest and then move forward. I do not think that a complete unrest situation would allow for the issuance of a permit because that will be just like throwing wood onto the fire.").

[62] Transcr. at 1225:7-14 (Flury) ("I think that there is a dual responsibility here. The State must explain the reasons of its interest in developing a certain activity, and the company is going to have to have mechanisms for rapprochement and acceptance by the community that is connected with this activity that it wants to develop. No company will be able to develop activities if there are confrontations.").

protests against a mining project in Peru: "[I]f the local people don't support it, if a project—if these issues can't be resolved, then nobody is going to make anybody move. And I firmly believe that, and I think any reasonable mining operator would."[63]

17. Bear Creek objects that there is no specific provision in the Peruvian legal system that authorizes the revocation of a concession because of social dissatisfaction.[64] Bear Creek's statement is misleading and beside the point. The State did not revoke Bear Creek's concessions; to do that, indeed, requires a judicial action (which the State pursued after it identified Bear Creek's constitutional violation). What it did here, which is one of many things that the State can lawfully do through executive action in the face of extensive social opposition, is to reconsider and revoke its own fully discretionary sovereign declaration of public necessity.

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

18. Bear Creek did not make all the required disclosures when it applied for the public necessity declaration in 2006. Bear Creek's omissions in its application were much more grave than "good faith mistake[s] or minor transgression[s]," which is how Claimant tries to dismiss them in its First PHB.[65] Bear Creek violated the Peruvian law (and international law) requirement to act in good faith and transparently when it filed its application without disclosing its pre-existing indirect ownership of the Santa Ana concessions through an employee and proxy of the company.[66] In doing so, Bear Creek misled the Council of Ministers into believing that the company did not already control the concessions and had not done any mining activities in

[63] Transcr. at 1497:15-19 (Clow) (emphasis added).
[64] *See* Claimant's First Post-Hearing Brief at para. 31.
[65] Claimant's First Post Hearing Brief at para. 38.
[66] *See* Respondent's First Post-Hearing Brief at paras. 62-73.

the area prior to its application.

19. ***Failures of Disclosure***: Bear Creek certainly did not disclose to the Government the fact that it already owned and controlled the Santa Ana concessions prior to making its December 2006 application. It did not disclose in full its relationship with and its control over Ms. Villavicencio, or that she was acting on Bear Creek's behalf under an agreement with Mr. Swarthout to acquire and safeguard the concessions for the company so that it could conduct exploration in the area prior to obtaining a public necessity decree.[67] Instead, Bear Creek misled the State by omission into believing that Ms. Villavicencio was an arms-length third party.

20. Then the company compounded that misdirection by describing falsely its pre-application activities in the Santa Ana project area. Although Bear Creek now tries to pass it off as a mere "mistake,"[68] it can hardly be a coincidence that, in the same application where the company was silent about the fact that it already controlled the Santa Ana concessions through Ms. Villavicencio, Bear Creek falsely stated that it had conducted no exploration at the Santa Ana site and that preliminary evaluation would be necessary going forward.[69] When confronted at the hearing, Mr. Swarthout tried to explain away this inconsistency by claiming that Bear Creek had only carried out "very, very preliminary basic initial exploration efforts."[70] But Bear Creek's activities were much more than that:

- 2004: In its 2004 Annual Report the company reported that "[a]mong the highlights of 2004, was the discovery by our geologists of the Santa Ana silver

[67] *See* Respondent's First Post-Hearing Brief at para 65.

[68] Claimant's First Post-Hearing Brief at para. 46.

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

[70] Transcr. 404:12-15 (Swarthout).

prospect which we were able to acquire 100% through staking. . . We firmly believe that Santa Ana will produce very exciting drilling results in 2005."[71] In addition, Bear Creek disclosed that it had done "Geologic mapping and a total of 446 samples from surface outcrops, shallow workings (up to 3 meters deep), and mine dumps have been collected from two zones of clay (± silica) alteration in strongly fractured Tertiary volcanics. . ." and that in 2005 it would do "[a]dditional sampling (including pitting and trenching) and geophysics (IP and ground magnetics) . . . ."[72] Bear Creek disclosed that "[p]rior to the fourth quarter 2004, expenditures had been minimal and were charged to 'Generative Exploration'."[73] By contrast, however, in the fourth quarter of 2004, the Company incurred expenditures of $60,877.[74]

- 2005: In its 2005 Annual Report the company reported that "[a] geophysical survey consisting of ground magnetics, induced polarization, and resistivity was completed in 2005 and defines an area of sulfide mineralization underlying the geochemical anomaly. . . . Drilling originally scheduled for 2005 was postponed to allow the completion of the claim titling process by the Ministry of Energy and Mines."[75] In 2005, the Company incurred expenditures of $104,337.[76]

- 2006: In June 2006, Ms. Villavicencio acquired title to most of the Santa Ana concessions and immediately applied for exploration permits. In the 2006 Annual report, Bear Creek reported expenditures on exploration of $687,612,[77] bringing the total for 2004-2006 to $852,826.

- 2007: Notably, Bear Creek's exploration activities accelerated from that point forward, and it spent approximately $2.7 million on exploration in 2007 prior to obtaining permission to own or control the concessions on November 28, 2007 (when the public necessity decree was issued).[78]

21. Contrary to Mr. Swarthout's attempted explanation, it is not possible that the company spent almost a million dollars only on "very, very preliminary basic initial exploration efforts" and that all its preliminary evaluation work was yet to come, as it told Peru in its

[71] Bear Creek Mining Corporation, 2004 Annual Report, April 15, 2005 ("Bear Creek Mining Corporation, 2004 Annual Report"), at 1 [Exhibit BR-04].

[72] Bear Creek Mining Corporation, 2004 Annual Report, at 2 [Exhibit BR-04].

[73] Bear Creek Mining Corporation, 2004 Annual Report at 10 [Exhibit BR-04].

[74] Bear Creek Mining Corporation, 2004 Annual Report, at 10 [Exhibit BR-04].

[75] Bear Creek Mining Corporation, 2005 Annual Report, May 11, 2006 ("Bear Creek Mining Corporation, 2005 Annual Report"), at 7 [Exhibit BR-05].

[76] Bear Creek Mining Corporation, 2005 Annual Report, at 13 [Exhibit BR-05].

[77] Bear Creek Mining Corporation, Consolidated Financial Statements 31 December 2006 and 2006, March 21, 2007, at 6 [Exhibit BR-06]. As Bear Creek applied for the public necessity declaration only in December 2006, the great majority if not all of its 2006 exploration expenditures would have occurred prior to the application.

[78] *See* Respondent's First Post-Hearing Brief at para. 107.

December 4, 2006 application. Claimant tries a different defense in its First PHB, claiming that Perú should have understood that that statement was false and ignored it, because "a cursory review of Bear Creek's application would have shown that some exploration had occurred."[79] But Perú cannot be held liable on the theory that it possibly could have discovered Bear Creek's misrepresentation. It is not the Government's responsibility to cross-check every piece of information for misrepresentations or to decide which portions of an application to believe and which to treat as false. An applicant is assumed—and required—to act in good faith and transparently and to provide correct and complete information. Here, Bear Creek misled Perú both by omission and by false statements when it applied for the public necessity declaration.

22. ***Consequences of Non-Disclosure:*** Because Bear Creek violated Peru's Constitution by holding the concessions prior to receiving a public necessity decree, and because it failed to disclose (and even concealed) that violation in its 2006 application, Bear Creek cannot be said to have made its investment lawfully. In turn, the Tribunal lacks jurisdiction over (or, at a minimum, should declare inadmissible) Claimant's claims based on an unlawful investment.

23. Bear Creek contends that, to defeat the Tribunal's jurisdiction, Respondent has to prove that Bear Creek committed fraud in its failure to disclose relevant information.[80] That is not correct. As Respondent has already discussed, international tribunals have not required a finding of fraud in order to deny treaty protection to unlawful investments.[81] Respondent has

[79] *See* Claimant's First Post-Hearing Brief at para. 47.

[80] *See* Claimant's First Post-Hearing Brief at para. 51.

[81] Tribunals finding that illegally-made investments should not be covered have used a variety of terms to describe the standard, and have *not* limited the rule to fraudulent acquisitions. *See, e.g., Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5, Award, April 15, 2009, at para. 102 ("investments that are made contrary to law") [Exhibit RLA-020]; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, at para. 123 ("deceitful conduct") [Exhibit RLA-022]; *Flughafen Zurich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, November 18, 2014, at para 132 ("serious violation of the legal system of the receiving State") [Exhibit CL-0112].

also shown that when an investor acts in bad faith at the time it acquired its investment—including, as here, by making misrepresentations to the Government in connection with the making of the investment—international tribunals have declined jurisdiction or declared the investor's claims inadmissible.[82]

24. Respondent does not even have to prove that Bear Creek acted in bad faith—it is sufficient to prove that Bear Creek's investment was unlawful. Thus, even if (contrary to the evidence) Bear Creek mistakenly thought that its scheme to circumvent Article 71 of the Constitution with Ms. Villavicencio was somehow permissible, that mistake cannot overcome the fact that the investment was, in fact, unlawfully made—and therefore is not protected by the FTA. Bear Creek violated Article 71 by indirectly acquiring and possessing the Santa Ana concessions in 2004-2007, and violated, at a minimum, Peruvian law's requirement of good faith by failing to disclose its existing control and activities to the Government in December 2006. That illegality was not a mere technicality or peripheral to the investment; it transgressed a fundamental Constitutional restriction directly governing investments by foreigners in Peru's sensitive border zone. Accordingly, the Tribunal should decline jurisdiction.[83]

C. QUESTIONS: WHAT WAS THE BASIS FOR THE DECISION TO ISSUE SUPREME DECREE NO. 032, AND ON WHAT EVIDENCE DID THE STATE AUTHORITIES RELY? *AND* WAS THE CLAIMANT DENIED DUE PROCESS IN THE PROCEDURE LEADING TO THE PROMULGATION OF SUPREME DECREE NO. 032, OR OTHERWISE?

25. Supreme Decree No. 032 was issued on the basis of (i) Bear Creek's illegal

[82] *See, e.g., Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, at paras. 139-140 [Exhibit CL-0104]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, at paras. 231-239 [Exhibit RLA-021].

[83] Bear Creek's nondisclosure also implicates the merits of its claims (*inter alia* because its lack of transparency contributed to the community mistrust of the company) and impacts its damages claims (*inter alia* because it should not be awarded any amounts invested unlawfully prior to obtaining a public necessity decree in November 2007). *See* Respondent's First Post-Hearing Brief at paras. 77, 107.

acquisition of the concessions and (ii) the severe, ongoing social conflict caused in material part by Bear Creek's failure to obtain a social license.[84] Bear Creek was not denied due process in the course of issuing Supreme Decree No. 32—the Government acted consistent with Peruvian law as to the process that was due, and reasonably in light of the extraordinary circumstances under which the decree was issued.[85]

26. In its First PHB, Claimant alleges that the manner in which Perú adopted Supreme Decree No. 032 "grossly violated basic elements of due process,"[86] based on its description of the events of June 23, 2011.[87] But its principal complaints—that the decision to repeal Supreme Decree No. 083 was taken within 12 hours, and that Bear Creek was not consulted during that decision-making process—do not constitute a violation of Claimant's due process rights.

27. In practical terms, the Government responded in an appropriate and expeditious manner to a crisis that was escalating quickly, risking lives in the Puno region. (Recall that, indeed, several protesters were killed the next day, before the violence could be quelled by news of the Government's new Decrees.[88]) Considering the extreme circumstances on June 23, 2011 both in Lima and in Puno, it would not have been possible to suspend the meetings with the hundreds of Aymara protest leaders and call Bear Creek for an explanation—and importantly, the State had no obligation to do so, even if circumstances had permitted it.

28. In legal terms, the Government's decision to repeal the public necessity decree was well within the broad, discretionary powers of the State. According to Peruvian law, the

[84] *See* Respondent's First Post-Hearing Brief at paras. 35-45, 88-90.
[85] *See* Respondent's First Post-Hearing Brief at paras. 116-120.
[86] *See* Claimant's First Post-Hearing Brief at para. 60
[87] *See* Claimant's First Post-Hearing Brief at paras. 55-59
[88] *See* "Juliaca: Six People Dead After Violence During Protests," *La Republica Newspaper*, June 25, 2011 [Exhibit R-050].

State has full discretion to issue or to repeal a public necessity decree.[89] That process is not an ordinary administrative action, which might involve notice and hearing rights. Instead, it is a discretionary exercise of sovereignty to be taken by the Council of Ministers under whatever procedure and based on whatever understanding of "public necessity" the Council deems appropriate. In this case, the State had evidence that Bear Creek had illegally acquired the mining concessions, and that the Santa Ana Project was no longer a public necessity due to the broad rejection of the Project causing massive and prolonged protests in the region.[90] The State lawfully repealed the public necessity declaration with the only process that was due (namely, a vote of the Council and publication of the Decree), in order to defuse the protests and allow the Peruvian courts to rule on the apparent constitutional violation. [91]

29. Notably, the State took only the action that was immediately necessary to address both circumstances (the apparent illegality and the Puno crisis): revocation of the declaration of public necessity. The State did not cancel or expropriate the Santa Ana concessions at the time it issued Supreme Decree No. 032—Bear Creek still owns the concessions today. Article 71 of the Constitution provides that in the event of a violation of its terms, the concessions will automatically revert to the State. Thus, after issuing Decree No. 032 the State initiated court proceedings to secure a Peruvian judicial determination—with ample due process, including full rights to be heard—whether Claimant indeed violated the Constitution. That proceeding is still pending, due principally to delays associated with Claimant's procedural objections and appeals.

30. In its First PHB, Claimant also complains that Perú unfairly targeted only the

[89] *See* First Expert Report of Francisco José Eguiguren Paraeli, October 6, 2015, at Section IV [Exhibit REX-001]; Expert Report of Jorge Danos Ordoñez, April 11, 2016, at Section IV.A [Exhibit REX-006].

[90] *See* Respondent's First Post-Hearing Brief at paras. 88-90.

[91] Second Expert Report of Francisco Eguiguren, March 31, 2016, at paras. 19-20, 23-30 [Exhibit REX-007].

Santa Ana Project.[92] Claimant contends that the 2011 protests called for the cancellation of all mining activity in the south of Puno, yet Claimant's project was unfairly singled out as some sort of sacrifice because (it claims) out of some 500 concessions in the south of Puno, only the Santa Ana Project was cancelled.[93] Bear Creek's allegations rest on an untenable distortion of the facts. First, the Santa Ana concessions were the only concessions in the south of Puno approaching the exploitation stage—all others were merely titled, without any move toward exploitation activities. Thus, they were not in a similar situation to the Santa Ana Project. Second, Supreme Decree No. 032 was not a stand-alone measure, and all other concessions in Puno were affected by other Decrees issued at or around the same time. As discussed at length in Respondent's submissions, the suite of Government measures *inter alia* imposed new community consultation and consent mechanisms that put a hold on all projects in the region, in addition to suspending the assessment of mining applications for a period of 3 years.[94] Even today, six years later, there are no mines operating in the south of Puno. Bear Creek was not singled out.

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

31. Perú lawfully issued Supreme Decree No. 032 on two grounds (*i.e.* Bear Creek's constitutional violation and the Puno crisis), but Perú could have done so on either ground alone.

32. ***Illegality of Bear Creek's Investment***: Claimant contends that the discovered

[92] *See* Claimant's First Post-Hearing Brief at para. 56.

[93] *See* Claimant's First Post-Hearing Brief at para. 56.

[94] *See* Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, October 6, 2015 ("Respondent's Counter-Memorial on the Merits"), at paras. 130-138; Respondent's Rejoinder on the Merits and Reply on Jurisdiction at paras. 262-267.

illegality of its investment, alone, could not have justified Supreme Decree 032.[95] Claimant complains that Perú based its decision on only a *possible* constitutional violation, that the evidence of that constitutional violation was unsubstantiated and unverified, and that the violation was not definitively established by a court prior to Supreme Decree No. 032.[96]

33. First, the Government's repeal of Supreme Decree No. 083 was properly grounded on the apparent constitutional violation. Prime Minister (and Minister of Justice) Fernández, whose testimony Claimant elected not to test at the hearing, explained that "there were objective elements to state that Bear Creek had acquired the mining concessions in violation of Article 71 of the Constitution [.]"[97] Prime Minister Fernández, Vice Minister Gala, and Dr. Zegarra all confirmed that they had a basis to believe that there had been a constitutional violation, and that it was within the State's discretionary power to repeal the public necessity declaration.[98] Having identified an apparent constitutional violation, it was entirely appropriate for the State to take immediate action through Decree No. 032 to respond to that serious offense and block the unlawfully obtained investment activity, while at the same time referring the matter to the courts for an actual adjudication of the constitutional violation and, if confirmed, revocation of the concessions. Contrary to Claimant's objection, a credible "possible" constitutional violation was an entirely sufficient basis on which to revoke Bear Creek's public necessity decree.

34. Second, the State based its decision on information that, in the circumstances, it

[95] *See* Claimant's First Post-Hearing Brief at para. 67.

[96] *See* Claimant's First Post-Hearing Brief at paras. 67-68.

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

[98] *See* Fernández Witness Statement at para. 24 [Exhibit RWS-004]; Second Witness Statement of Fernando Gala, April 4, 2016, at para. 17 [Exhibit RWS-005]; Transcr. at 764:10-20, 806:22-807:5 (Gala); Transcr. at 923:7-19 (Zegarra).

deemed to be sufficiently reliable. At the hearing, Mr. Zegarra explained that "[t]here was no time to conduct a detailed review. We were in the middle of a crisis, and the documents were deemed truthful in the light of how the facts had been presented at the time."[99] Government officials who saw the documents exercised their judgment and considered that the documents appeared authentic and supported Mr. Lescano's allegations. In the crisis situation prevailing at the time, there was no opportunity or time in the late hours of the day to call multiple agencies to verify that Ms. Villavicencio was a long-time employee of Bear Creek or to investigate the details of Bear Creek's control over her. In the difficult context it faced, the Government appropriately responded to the information made available to it. Moreover, even if Bear Creek had been asked, it could not have denied the veracity of the information received by the Government on June 23—because it all, indeed, proved to be true. This arbitration has confirmed the accuracy of that information about Bear Creek's control over Ms. Villavicencio and the concessions, and indeed has produced even more damning evidence of that proxy relationship than the Government had in hand in 2011.

35. Third, the Government had no obligation to obtain a court ruling that Bear Creek had illegally acquired the mining concessions prior to revoking the company's public necessity declaration. As discussed above, revocation of the public necessity decree is an entirely discretionary, high-level executive action; a court proceeding instead is appropriate (and has been pursued) for the distinct process of seeking the reversion of the concessions to the State.

36. ***Social Unrest in the Puno Region***: Claimant contends that the social conflict was not a sufficient basis, alone, for Supreme Decree No. 032 because Bear Creek did not cause the protests, which instead sought the cancellation of all mining concessions, and because social

[99] Transcr. 973:7-10 (Zegarra).

discontent is not a ground on which the Government may take property (by repealing a declaration of public necessity).[100] This, too, is a misleading answer to the Tribunal's question.

37. First, the protests were directly related to the Santa Ana Project. Contrary to Bear Creek's characterization, the protesters did not demand the revocation of all mining concessions which merely happened to encompass Santa Ana—the protesters specifically asked for the cancellation of the Santa Ana Project. That demand may well have had roots in generalized anti-mining sentiments, but it was fueled by Bear Creek's failure to build healthy relations with *all* of the affected communities and its failure to address the communities' serious environmental and social concerns to their satisfaction—in short, by its failure to obtain a social license. Bear Creek's project was at the heart of the Puno region's protests.

38. Second, a severe, disruptive social conflict like the one experienced in Puno is of course a reasonable basis on which to determine that the source of such conflict (the Santa Ana Project) is not a "public necessity." Indeed, after thousands of people blocked major cities as well as the border with Bolivia and violently attacked government offices in demand of the cancellation of the Santa Ana Project, it was no leap to conclude that the Project was not only not necessary, but that it was affirmatively harmful to the public welfare. The Council of Ministers was well within its rights, and entirely reasonable, in reaching that conclusion.

39. Claimant makes much of government officials' statements prior to June 23, 2011 resisting the protesters' demands, in order to claim that the State believed that the conflict alone was not a sufficient ground for a measure like Supreme Decree No. 032.[101] It is true that, up until Bear Creek's constitutional violation was revealed, officials were reluctant to repeal the

[100] *See* Claimant's First Post-Hearing Brief at paras. 71-72.

[101] *See* Claimant's First Post-Hearing Brief at para. 35.

public necessity declaration even in the face of the social conflict. But that position was not fixed or inviolate. Given the escalating social unrest in late June 2011, the Government could very well have changed course and repealed the public necessity declaration on that basis alone, even if it had not received information that Bear Creek had committed a constitutional violation.

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

1. The Claimant's Alleged Investment Was Lawfully Expropriated? *or* The Claimant's Alleged Investment Was Unlawfully Expropriated? *or* Respondent Breached Its Obligations Under the FTA for FET or Other Obligations Under Other Provisions of the FTA?

40. As has already been discussed at length, Bear Creek's failure to obtain a social license doomed Claimant's investment—independent of any act or omission by Respondent.[102] Thus, even in the unlikely event that the Tribunal finds that Respondent expropriated Claimant's investment (or otherwise breached the FTA), Claimant would not be entitled to damages.

41. If the Tribunal is nonetheless minded to award damages, the upper bound of any award would be the amount Claimant invested at Santa Ana.[103] It is well-established in investment treaty jurisprudence that it is inappropriate to value a non-producing asset using a discounted cash flow ("DCF") model. [104] In several written submissions and during the oral

[102] Respondent's First Post-Hearing Brief at para. 100.

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

[104] *Levitt v. Government of the Islamic Republic of Iran*, Award No. 297-209-1, April 22, 1987 14 Iran-U.S. C.T.R. 191, 209-10 [Exhibit RLA-059]; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case ARB/84/3, Award, May 20, 1992 ("*Southern Pacific*, Award"), at paras. 188-189 [Exhibit RLA-060]; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, June 8, 2010, at para. 71 [Exhibit RLA-061]; *Venezuela Holdings, B.V. Mobil Cerro Negro Holding, Ltd. Mobil Venezolana de Petroleos Holdings, Inc. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, October 9, 2014 ("*Venezuela Holdings*, Award"), at paras. 382-385 [Exhibit RLA-062]; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case ARB/98/4, Award, December 8, 2000 ("*Wena Hotels*, Award") at paras. 123-125 [Exhibit CL-0147]; *Siag and Veccchi v. Egypt*, ICSID Case No ARB/05/15, Award, June 1, 2009 ("*Siag*, Award") at paras. 566-570 [Exhibit RLA-063]; *Gemplus SA and others v. Mexico*, ICSID Case No ARB(AF)/04/3, Award, June 16, 2010 ("*Gemplus*, Award"), at paras. 13-70 to 13-72 [Exhibit RLA-064]; *Sola Tiles, Inc. v. Iran*, Award No. 298-317-1, April 22, 1987, 14 Iran-U.S. C.T.R. 224, at 240-242 [Exhibit RLA-065]; *Phelps Dodge Corp. v. Islamic*

hearing, Claimant repeatedly failed to refute or distinguish this jurisprudence, and was again unable to do so in its First PHB. Thus, given that Claimant never built, operated, or even received the necessary permits for the Santa Ana mine, the Tribunal cannot rely on Claimant's speculative DCF model. Instead, awarding damages based on Claimant's amounts invested is the only viable approach.

42. Undeterred, in its First PHB, Claimant clings to its argument that a DCF method is preferable to amounts invested. Claimant's focus is the notion that "awarding only amounts invested is not an appropriate measure of [fair market value]."[105] To support its position, Claimant cites *Gemplus v. Mexico*, *SPP v. Egypt*, and *Siag v. Egypt*. Claimant's decision to cite these awards is puzzling: each of these tribunals explicitly rejected DCF-based valuations for investments—like Santa Ana—with little or no operating history.[106]

43. Moreover, as Respondent has explained,[107] numerous tribunals have affirmed that amounts invested is the best proxy for the fair market value of an unbuilt project like Santa Ana:

- The *Metalclad v. Mexico* tribunal held that "discounted cash flow analysis is inappropriate in the present case because the [investment] was never operative and any award based on future profits would be wholly speculative."[108] The tribunal held that "fair market value is best arrived at in this case by reference to Metalclad's actual investment in the project."[109]

Republic of Iran, Award No. 217-99-2, March 19, 1986, 10 Iran-U.S. C.T.R., at para. 30 [Exhibit CLA-0051]; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000 ("*Metalclad*, Award"), at paras. 120-122 [Exhibit CL-0105]; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, July 7, 2011, at paras. 262-263 [Exhibit RLA-041]; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, June 21, 2011, at paras. 380-381 [Exhibit RLA-066].

[105] Claimant's First Post-Hearing Brief at para. 82.

[106] *Gemplus*, Award at paras. 13-70 to 13-72 [Exhibit RLA-064]; *Southern Pacific*, Award at para. 188 [Exhibit RLA-060]; *Siag*, Award at paras. 566-570 [Exhibit RLA-063].

[107] *See* Respondent's Rejoinder on the Merits and Reply on Jurisdiction at paras. 591 *et seq*.

[108] *Metalclad*, Award at para. 121 [Exhibit CL-0105].

[109] *Metalclad*, Award at paras. 120-122 (emphasis added) [Exhibit CL-0105].

- The *Mobil v. Venezuela* tribunal held similarly for a project "in a phase of development, which excludes the application of the DCF method in order to evaluate the market value of the Claimants' interests,"[110] that "the market value of the Claimants' interests in the [asset] must be established at the total of their investment in that Project."[111]

- Tribunals have even used amounts invested as a proxy for the fair market value of investments that did have a history of operations. The *Wena v. Egypt* tribunal held that an investment—including a hotel that had operated for a year-and-a-half—provided an "insufficiently solid base on which to found any profit … or for predicting growth or expansion of the investment made by Wena."[112] The tribunal held that "the proper calculation of the market value of the investment expropriated immediately before the expropriation is best arrived at, in this case, by reference to Wena's actual investments. . . ."[113]

44. Given this jurisprudence, the Tribunal should pay no mind to Claimant's "fair market value" argument. Tribunals routinely accept amounts invested as a proxy for fair market value in situations where, like here, the investment at issue has a brief or non-existent operational history. In a 2007 article, Professor Pryles explained the logic of this approach:

> [F]rom an economics perspective, [amounts invested] should produce a similar result to compensation calculated on this basis of future profits, unless the claimant argues that the project would have experienced exceptionally high or low profitability. And, if a claimant does claim it would have received unusually high profitability, its unproven track record gives incentive to avoid profits as the measure for assessing compensation.[114]

45. The Tribunal should follow this approach and award Claimant (at most) damages based on amounts invested. If the Tribunal were to hold otherwise, it would be turning its back on an established practice of compensation under international law.

46. Of note, in applying the amounts invested approach, the Tribunal cannot

[110] *Venezuela Holdings,* Award at paras. 85, 382 [Exhibit RLA-062].

[111] *Venezuela Holdings,* Award at para. 385 (emphasis added) [Exhibit RLA-062].

[112] *Wena Hotels,* Award at para. 124 (internal citations omitted) [Exhibit CL-0147].

[113] *Wena Hotels,* Award at para. 125 (emphasis added) (internal citations omitted) [Exhibit CL-0147]; *see also Vivendi* , Award, at para. 8.3.3 [Exhibit CL-0038].

[114] Michael Pryles, *Lost Profit and Capital Investment*, 1 WORLD ARBITRATION AND MEDIATION REVIEW, No. 1, 2007, at 9-10 (internal citation omitted) [Exhibit RLA-067].

compensate Claimant for the US $3,590,095 in expenditures that it made before the November 2007 public necessity decree gave Claimant a colorable right to operate at Santa Ana. Instead, the Tribunal should subtract that sum from Claimant's total investment, and consider the result—US $18,237,592—to be the upper limit of Claimant's recovery for expropriation (regardless of whether the expropriation is lawful or unlawful).

47. The Tribunal may need to reduce damages further still if it finds that Respondent committed only a breach of the FTA other than expropriation.[115] Such a finding would require a nuanced damages analysis specific to the breach, which may result in an award far lower than US $18,237,592. For instance, if the Tribunal were to hold that Respondent breached only due process, it would need to assess the specific damages tied to the due process violation alone. Claimant could—and arguably should— have provided these types of alternative calculations in answer to the Tribunal's question in its First PHB. Claimant did not do so.

2. 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?

48. Regarding contributory fault, in its First PHB, Respondent explained that any damages award must account for Claimant's contribution to the failure of its investment, including Claimant's use of an unlawful scheme to acquire its mining rights and its failure to obtain a social license to proceed.[116] If the Tribunal determines that these failures contributed to Claimant's damages, the Tribunal must reduce any award in proportion to that contribution.

49. The bulk of Claimant's answer to this question from the Tribunal was non-responsive. The Tribunal asked the Parties to assume contributory fault and then explain how

[115] Respondent's First Post-Hearing Brief at paras. 111 *et seq*.
[116] Respondent's First Post-Hearing Brief at paras. 114-115.

that finding would impact damages. Rather than focus on that issue, Claimant opined for six pages on the standard for contributory fault, and addressed the damages issue only briefly.[117] Before turning to the question the Tribunal actually asked, we are obliged to respond very briefly to the flawed standard for "contribution" that Claimant proposed: According to Claimant, to prove contributory fault, Respondent must demonstrate "not merely contribution" but also that Claimant's actions "directly caus[ed]" the harm at issue.[118] Claimant later clarifies that under its proposed test, Respondent must prove 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."[119] In other words, Claimant says that before the Tribunal can even consider contributory fault, Respondent must demonstrate that Bear Creek's acts and omissions were the dominant and essential—*i.e.*, the "but for"—cause of the harm.

50. The very cases that Claimant references prove that its standard is wrong. Of the handful of cases Claimant cites, three of the tribunals found the claimants 25% or 30% culpable and reduced damages accordingly.[120] A 25% or even a 30% contribution does not amount to a dominant—let alone a "but for"—cause of damages. Nonetheless, those tribunals recognized the claimants' contributions and reduced their awards. These cases make clear that the Tribunal should consider <u>any</u> contributory fault and reduce damages accordingly.

51. With respect to the quantum question that the Tribunal *did* ask, Claimant suggests

[117] Claimant's First Post-Hearing Brief at paras. 93 *et seq.*

[118] Claimant's First Post-Hearing Brief at para. 93.

[119] Claimant's First Post-Hearing Brief at para. 101.

[120] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, September 20, 2012 ("*Occidental*, Award"), at paras. 687, 825 [Exhibit CL-0198]; *Copper Mesa Mining Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-2, Award, March 15, 2016 ("*Copper Mesa*, Award"), at paras. 6.133, 7.30, 7.32, 10.7 [Exhibit CL-0237]; *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"), at paras. 245-246 [Exhibit CL-0083].

that the Tribunal could perhaps tinker with its DCF model to adjust for contributory fault. Claimant's specific proposal is to push back cash flows by one year to reflect project delays Claimant caused, and to subtract "say, several million dollars" from the damages to account for additional money Bear Creek should have spent to obtain a social license.[121]

52. Claimant's approach is fundamentally flawed. First, Claimant's method is only an option if the Tribunal adopts a DCF model, which, for the reasons already explained, it should not. Second, Claimant's approach does not reduce damages to account for Claimant's unlawful scheme to acquire rights at Santa Ana, which also contributed to the harm Claimant faced. Third, Claimant's approach assumes that if Claimant spent just a few million dollars more, it would have obtained a social license. But given Bear Creek's ineffectual community outreach efforts and lack of experience in taking projects to fruition, it is doubtful (at best) that spending some more money would have persuaded local communities to support the project. Indeed, if Bear Creek believed that it could have solved all of its community relations problems for a few million dollars, it surely would have spent that money at the time.

53. Of note, Claimant could not cite a single case where a tribunal adopted its approach. Indeed, the tribunals in each case that Claimant cited involving compensable contributory fault adopted Respondent's methodology, as shown below:[122]

Case Claimant Cites	Approach to Contributory Fault
Occidental Petroleum v. Ecuador	Tribunal held that "the Claimants have contributed to the extent of 25% to the prejudice which they suffered," thus "Claimants' damages should be reduced by a factor of 25% because of their own wrongful act. . ."[123]

[121] Claimant's First Post-Hearing Brief at paras. 105-106.

[122] In fact, in its First PHB, Respondent cited two of these same cases as support for *its* proposed approach to contributory fault. *See* Respondent's First Post-Hearing Brief at para. 114.

[123] *Occidental*, Award at paras. 687, 825 [Exhibit CL-0198].

Case Claimant Cites	Approach to Contributory Fault
Yukos v. Russia	Tribunal held that "Claimants have contributed to the extent of 25 percent to the prejudice which they suffered …. The resulting apportionment of responsibility as between Claimants and Respondent, namely 25 percent and 75 percent, is fair and reasonable. . . ."[124]
Copper Mesa v. Ecuador	Tribunal held that "owing to the Claimant's contributory negligence under international law, the Tribunal assesses the Claimant's contribution to its own injury at 30 per cent. . ." and therefore reduced the damages award by 30 percent.[125]
MTD v. Chile	Tribunal held that, based on "decisions that increased their risks … Claimants should bear part of the damages suffered and the Tribunal estimates that share to be 50%."[126]

54. These cases all support Respondent's approach, *i.e.*, that the Tribunal must reduce damages in proportion to Claimant's contribution to its injuries. Other tribunals concur.[127] The approach is fair, straightforward to apply, and widely accepted by investor-State tribunals.

III. CONCLUSION

55. For all of the foregoing reasons and those presented in Respondent's pleadings and at the hearing, Respondent respectfully reiterates that the claims should be dismissed for lack of jurisdiction or, in the alternative, for lack of merit.

Respectfully submitted,

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[124] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Award, July 18, 2014, at para. 1637 [Exhibit RLA-018].

[125] *Copper Mesa*, Award at paras. 6.133, 7.30, 7.32, 10.7 [Exhibit CL-0237].

[126] *MTD*, Award at paras. 242-243 [Exhibit CL-0083].

[127] *See Antoine Goetz and others v. Republic of Burundi [II]*, ICSID Case No. ARB/01/2, Award, June 21, 2012, para. 258 (reducing claimant's damages by one-third based on the claimants' "acts of negligence") [Exhibit RLA-098]; *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, December 19, 2013, at para. 1331 ("[I]n investment cases, Tribunals have reduced damages by a percentage reflecting the investor's role in the events leading to a loss.") [Exhibit CL-080].