

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bear Creek Mining Corporation

v.

Republic of Peru

(ICSID Case No. ARB/14/21)

Procedural Order No. 2

Regarding Claimant's Request for Provisional Measures

Members of the Tribunal

Prof. Karl-Heinz Böckstiegel, President of the Tribunal

Dr. Michael Pryles, Arbitrator

Prof. Philippe Sands, QC, Arbitrator

Secretary of the Tribunal

Ms. Mercedes Cordido-Freytes de Kurowski

Assistant to the Tribunal

Ms. Katherine Simpson

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GLOSSARY OF DEFINED TERMS

| Abbreviation | Full Term |
|---------------------|---|
| C.Prov.M.-I | Claimant's Request for Provisional Measures (January 9, 2015) |
| C.Prov.M.-II | Claimant's Observations to Peru's Response to the Request for Provisional Measures (February 20, 2015) |
| ESIA | Environmental and Social Impact Assessment |
| FTA | Free Trade Agreement between Canada and the Republic of Peru |
| ICJ | International Court of Justice |
| ICSID Convention | Convention on the Settlement of Disputes between States and Nationals of Other States, October 14, 1996 |
| MINEM | Peru's Ministerio de Energía y Mines (Ministry of Energy and Mines) |
| PCIJ | Permanent Court of International Justice |
| PO-1 | Procedural Order No. 1 (January 27, 2015) |
| R.Prov.M.-I | Respondent's Response to Claimant's Request for Provisional Measures (February 6, 2015) |
| R.Prov.M.-II | Respondent's Rejoinder on Claimant's Request for Provisional Measures (March 6, 2015) |
| RfA | Claimant's Request for Arbitration (August 11, 2014) |
| SUNARP | Peruvian Superintendencia Nacional de los Registros Públicos (National Superintendent of Public Registries) |

I. INTRODUCTION

1. The Claimant in this arbitration is Bear Creek Mining Corporation (“Bear Creek”), a company incorporated under the laws of Canada, with its headquarters located at 625 Howe Street, Suite 1050, Vancouver, British Columbia, Canada, V6C 2T5. The Claimant is represented in these proceedings by:

Mr. Henry G. Burnett, King & Spalding LLP
Mr. Roberto J. Aguirre-Luzi, King & Spalding LLP
Ms. Caline Mouawad, King & Spalding LLP
Mr. Fernando Rodriguez-Cortina, King & Spalding LLP
Mr. Louis-Alexis Bret, King & Spalding LLP
Ms. Margrete Stevens, King & Spalding LLP
Alberto Delgado Venegas, Miranda & Amado Abogados
Cristina Ferraro Delgado, Miranda & Amado Abogados

2. The Respondent in this arbitration is the Republic of Peru (“Peru”), a sovereign state with an address for service as Dr. Carlos José Valderrama Bernal, President, Special Commission Representing the Republic of Peru in International Investment Disputes, Ministry of Economy and Finance of Peru, Jirón Lampa 277 – Fifth Floor, Lima, Peru. The Respondent is represented in these proceedings by:

Mr. Stanimir A. Alexandrov, Sidley Austin LLP
Ms. Marinn Carlson, Sidley Austin LLP
Ms. Jennifer Haworth McCandless, Sidley Austin LLP
Ms. María Carolina Durán, Sidley Austin LLP
Dr. Juan Pazos Battistini, Estudio Navarro, Ferrero & Pazos Abogados
Mr. Ricardo Puccio Sala, Estudio Navarro, Ferrero & Pazos Abogados

3. The Parties’ dispute concerns Claimant’s alleged investments in Peru, including the Santa Ana silver mining project and the alleged associated legal and contractual rights. The Claimant contends that Respondent has failed to afford Claimant’s alleged investment in Peru the protections guaranteed in the Free Trade Agreement between Canada and the Republic of Peru (“FTA”).¹ The Respondent contests the Tribunal’s jurisdiction and argues that the Claimant’s claims are unfounded on the merits.²

¹ RfA para. 2.

² R.Prov.M.-I para. 18, note 37.

II. PROCEDURAL HISTORY RELATED TO CLAIMANT'S APPLICATION FOR PROVISIONAL MEASURES

4. On January 9, 2015, Claimant filed Claimant's Request for Provisional Measures with the Tribunal ("C.Prov.M.-I").
5. The First Session of the Arbitral Tribunal was held on January 12, 2015. During this session, the President referred procedurally to Claimant's Request for Provisional Measures and invited the Parties to propose a procedural schedule. The Parties agreed that Respondent would file a response on February 6, 2015, and that this response would be followed by a second round of submissions, with Claimant's observations to be filed on February 20, 2015 and Respondent's rebuttal on March 6, 2015.
6. On January 14, 2015, the Tribunal Secretary, on behalf of the Tribunal, emailed the Parties the procedural schedule, as agreed by the Parties during the First Session.
7. On January 27, 2015, the Tribunal issued Procedural Order No. 1 ("PO-1"), which contains a summary of the Parties' discussions at the First Session related to the procedural aspects of Claimant's Request for Provisional Measures.
8. On February 6, 2015, Respondent filed Respondent's Response to Claimant's Request for Provisional Measures ("R.Prov.M.-I").
9. On February 20, 2015, Claimant filed Claimant's Observations to Peru's Response to the Request for Provisional Measures ("C.Prov.M.-II").
10. On March 6, 2015, Respondent filed Respondent's Rejoinder on Claimant's Request for Provisional Measures ("R.Prov.M.-II").
11. On March 27, 2015, pursuant to section 11.4 of PO-1, Respondent filed English translations of its exhibits R-006 to R-009.

III. THE PARTIES' REQUESTS

A. THE CLAIMANT'S REQUESTS

12. In its Request for Arbitration, Claimant requested that the Tribunal grant the following relief:
 - a. Declare that Peru has violated the FTA and international law in connection with its treatment of Bear Creek and Bear Creek's investment;

- b. Award Bear Creek full restitution or the monetary equivalent of all damages, including historical, moral, and consequential damages, it suffered due to Peru's breaches of its FTA obligations, in an amount to be determined based upon the evidence;
 - c. Order Peru to pay all costs and expenses of this arbitration, including ICSID's administrative fees, the fees and expenses of the Arbitral Tribunal, the fees and expenses of Bear Creek's legal representatives in respect of this arbitration, and any other costs of this arbitration;
 - d. Award Bear Creek pre-award and post-award compound interest on any restitutory or compensatory amounts until the date of full satisfaction of the Final Award, at a rate to be determined by the Tribunal in accordance with the FTA; and
 - e. Grant any other and further relief that it deems just and proper.³
13. In Claimant's Request for Provisional Measures and in Claimant's Observations to Peru's Response to the Request for Provisional Measures, the Claimant made the following request:
- [...] Claimant Bear Creek respectfully requests that the Tribunal issue interim measures ordering Peru to stay the MINEM Lawsuit while this arbitration is pending.⁴
14. In Claimant's Observations to Peru's Response to the Request for Provisional Measures, the Claimant made the following additional request:
- [...] If the Tribunal were to deny Bear Creek's request for provisional measures, Bear Creek requests the Tribunal to confirm that Bear Creek's continued defense against Peru's claims against Bear Creek in the MINEM Lawsuit before the Peruvian courts does not constitute a violation of the waiver requirements set forth in Article 823.1(e) of the Treaty.⁵
15. In both filings, Claimant reserved the right to seek additional interim relief.⁶

B. THE RESPONDENT'S REQUESTS

16. For the Republic of Peru, this case concerns the state's sovereign discretion over whether to allow foreign nationals to exploit resources in its border regions. Preliminarily, Respondent asserts that it will challenge Claimant's claims on a number of grounds, including jurisdiction, liability, and damages. Respondent may object to jurisdiction on the basis that: (1) the rights Claimant claims were not lawfully acquired, and (2) even assuming such rights were lawfully

³ RfA para. 75.

⁴ C.Prov.M.-I para. 50; C.Prov.M.-II para. 44.

⁵ C.Prov.M.-II para. 44.

⁶ C.Prov.M.-I para. 50; C.Prov.M.-II para. 44.

acquired, the Claimant's rights did not include exploitation, as well as exploration rights, undermining the extent of an alleged expropriation. On the merits, Respondent intends to submit arguments on public necessity, and on Claimant's activities in Peru, including its adherence to international human rights and corporate social responsibility standards. Respondent will contest Claimant's damages calculation. Respondent reserved the right to submit additional arguments.⁷

17. In Respondent's Response to Claimant's Request for Provisional Measures and reiterated in Respondent's Rejoinder on Provisional Measures, the Respondent has requested the Tribunal to:

[...] deny Claimant's request for provisional measures. In the alternative, if the Tribunal decides to grant Claimant's request, Respondent respectfully requests that the Tribunal expressly confirm that, if the issue of the questionable validity under Peruvian law of Claimant's acquisition of the concessions is presented to it as part of the parties' jurisdictional or merits arguments, the Tribunal will hear and decide those issues [of Peruvian domestic law].⁸

IV. INTRODUCTION TO THE TRIBUNAL'S CONSIDERATIONS

18. The Tribunal has considered the extensive factual and legal arguments presented by the Parties in their written submissions. The Tribunal's use of one Party's terms as opposed to another's is not to be taken as a reflection of the Tribunal's legal interpretation of an issue – rather, effort has been made to use consistent terminology throughout this Procedural Order to facilitate understanding. Below, the Tribunal discusses the arguments of the Parties that it considers most relevant for its decisions. The Tribunal's reasoning addresses what the Tribunal considers to be determinative factors in deciding the disputed issues and, accordingly, the relief sought by the Parties. The Tribunal considers, however, that for purposes of clarity, a brief repetition of certain aspects of its conclusions in the context of particular issues may be necessary or appropriate.

19. Article 840 of the FTA provides:

Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in

⁷ Tribunal's First Session, January 12, 2015, 25:34 – 40:40.

⁸ R. Prov.M.-I para. 53; R. Prov.M.-II para. 49 (adding bracketed text).

Article 819 or 820. For purposes of this paragraph, an order includes a recommendation.

20. Further, Article 47 of the ICSID Convention provides:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

21. The Tribunal considers that, in accordance with general principles, the Claimant has the burden of proving that the conditions to order the requested provisional measures are fulfilled. As a preliminary observation, the Tribunal points out that the present case has two characteristics which, in combination, make it different from most other cases in which decisions on requests for provisional measures were decided. First, Claimant does not yet have ongoing factual investment activities to protect through provisional measures. Second, Art. 841 of the FTA gives a priority to awarding only monetary damages. Both characteristics combine to establish a high threshold for the provisional measures requested by Claimant, who has the burden of proof that the conditions for ordering provisional measures are fulfilled.

22. The Tribunal's considerations and conclusions in this Order are reached solely in relation to the Request for Provisional Measures. They are entirely without prejudice to the later phases of this procedure regarding issues of jurisdiction and, to the extent the case reaches that stage, the merits.

V. STATEMENT OF FACTS RELATED TO THE PROVISIONAL MEASURES SOUGHT

23. The following factual submissions are summarized below, without prejudice to the Parties' further arguments in this matter.

24. Claimant learned of the existence of potential silver ore deposits in Santa Ana, located 30 kilometers from the border between Peru and Bolivia, in 2004.⁹ Respondent regulates the activities of foreigners in border regions in accordance with Art. 71 of the Peruvian Constitution, which states that aliens are not permitted to "acquire or possess under any title, directly or indirectly, mines, lands, woods, water, fuel or energy sources, whether it be individually or in partnership, under penalty of losing that so acquired right to the State", within a distance of 50 kilometers from the border.¹⁰ A foreign national can only gain rights to natural

⁹ RfA para. 11; R.Prov.M.-I para. 5.

¹⁰ R.Prov.M.-I para. 6.

resources in border regions where the foreign national makes a case to the Peruvian government for a “public necessity”, which must be expressly determined by an executive decree approved by the Council of Ministers in accordance with the law.¹¹ Claimant explains that mining rights in Peru are granted to those who first request them, thereby generating the risk that, by applying for the Supreme Decree, Claimant would alert Peruvian individuals and companies of the mineral deposits, thereby enabling them to obtain the corresponding rights before Claimant.¹² In order to maximize its chances of ultimately securing the mining rights related to these deposits, Claimant agreed with Ms. Jenny Karina Villavicencio Gardini (“Ms. Villavicencio”), a Peruvian national and employee of Claimant, that she would secure these mineral rights while Claimant requested and until it obtained the authorization required under Art. 71 of the Peruvian Constitution.¹³

25. From May to November 2004, Ms. Villavicencio filed six mining petitions corresponding to the project area, in her own name.¹⁴ Thereafter, on November 17, 2004 and on September 5, 2006, Ms. Villavicencio entered into six Option Agreements with Claimant, giving Claimant the option to acquire the mining concessions if it successfully obtained all requisite authorizations to acquire them.¹⁵
26. Claimant and Ms. Villavicencio recorded the option agreements with the Peruvian Public Registry in 2005.¹⁶ On November 7, 2005, SUNARP rendered an administrative decision confirming that the 2004 Option Agreements were valid under the Peruvian Constitution because they did not entail a transfer of legal rights until Claimant would decide to exercise its options under said agreements.¹⁷
27. On December 5, 2006, Claimant initiated the procedure to obtain the necessary mining rights for the Santa Ana Project.¹⁸ On November 29, 2007, Supreme Decree 083-2007 (“Supreme

¹¹ R.Prov.M.-I para. 6.

¹² R.Prov.M.-I para. 7, RfA para. 13.

¹³ RfA para. 14; R.Prov.M.-I para. 7, First Session at 21:19 – 21:36 (“Bear Creek agreed with Ms. Karina Villavicencio, a Peruvian national and employee of Bear Creek of Peru that she would secure these mineral rights while the company requested and until it obtained the authorization required under Article 71 of the Peruvian Constitution.”); R.Prov.M.-II para. 7.

¹⁴ RfA para. 14; R.Prov.M.-I para. 9.

¹⁵ RfA para. 14, 15.

¹⁶ RfA para. 14; C.Prov.M.-II para. 1.

¹⁷ C.Prov.M.-II para. 11.

¹⁸ C.Prov.M.-I para. 5; C.Prov.M.-II para. 2; RfA para. 16.

- Decree 083”) was enacted by the President and Council of Ministers of Peru. This authorized Bear Creek to acquire, own, and operate the corresponding mining concessions (the “Karina Mining Concessions”) and to exercise rights derived from the ownership.¹⁹ Thereafter, in late 2007 or early 2008, Claimant acquired title to the mining concessions over the Santa Ana Project.²⁰
28. The Parties dispute a number of issues, including whether: (1) Ms. Villavicencio claimed the Santa Ana concessions in her own individual capacity as a Peruvian citizen, (2) Claimant specifically disclosed the nature and extent to Ms. Villavicencio’s employment when applying to the Government for the Supreme Decree required under Art. 71 of the Peruvian Constitution, (3) the option agreements that Claimant entered into with Ms. Villavicencio are legal under Peruvian law and are common place within the Peruvian mining sector, and (4) whether, because the option contracts between Claimant and Ms. Villavicencio were registered with the public registry, Peru knew that these option agreements were between Claimant and its employee.²¹
29. On December 23, 2010, Claimant submitted its Environmental and Social Impact Assessment (“ESIA”) to the Peruvian Government.²² On January 7, 2011, MINEM approved the Community Participation Plan and Executive Summary of the ESIA, and instructed Claimant to implement community participation mechanisms for the evaluation of the ESIA. MINEM conducted a final public hearing on the ESIA on February 23, 2011.²³
30. On June 1, 2011, Respondent ordered a 12-month suspension of the ESIA process for Santa Ana. Shortly thereafter, on June 25, 2011, Peru enacted Supreme Decree 032-2011-EM (“Supreme Decree 032”), reversing Supreme Decree 083 and the Peruvian executive’s prior finding of a public necessity, thereby eliminating the legal prerequisite for Claimant’s ownership of mineral concessions in the border region.²⁴
31. On July 12, 2011, Claimant filed a constitutional action of *amparo*, seeking annulment of

¹⁹ C.Prov.M.-I para. 4, 5; C.Prov.M.-II para. 10; RfA para. 17.

²⁰ C.Prov.M.-I para. 4, 5; C.Prov.M.-II para. 1, 10; RfA para. 17; R.Prov.M.-I para. 9.

²¹ R.Prov.M.-II para. 8; C-Prov.M.-II para. 6 – 9.

²² C.Prov.M.-II para. 4; RfA para. 21.

²³ RfA para. 21.

²⁴ RfA para. 23; C.Prov.M.-I para. 6; R.Prov.M.-I para. 12; C.Prov.M.-II para. 113 (on May 25, 2011).

Supreme Decree 032.²⁵

32. Thereafter, in the summer of 2011²⁶, MINEM filed a civil action against Claimant and Ms. Villavicencio to invalidate three instruments: (1) the option contracts that Claimant and Ms. Villavicencio executed that ensured that Claimant would acquire the mining concessions from her, (2) the registration of those option contracts in the national public registry, and (3) the issuance of the mining concessions to Ms. Villavicencio.²⁷ Respondent alleges that Claimant's acquisition of mineral rights by use of a proxy to maneuver around the prohibition of a foreigner's direct or indirect acquisition of such mineral rights was in violation of Art. 71 of the Peruvian Constitution.²⁸ If found to be illegally obtained, MINEM requested that the concessions be declared as having reverted back to the Peruvian state.²⁹
33. On December 27, 2012, the judge in the first instance dismissed all of MINEM's claims against Claimant because MINEM had improperly combined administrative and civil claims.³⁰ MINEM appealed and, on June 17, 2013, the Superior Court decided to separate the claims and directed the first instance judge to proceed with MINEM's civil claims.³¹ Claimant appealed and, on August 6, 2013, the Supreme Court dismissed Claimant's appeal.³²
34. On November 18, 2013, Claimant filed a constitutional action of *amparo*, its second *amparo* action, against the Superior Court for a declaration that June 17, 2013 decision was unconstitutional.³³
35. On May 12, 2014, the Lima First Constitutional Court issued a ruling vindicating Claimant's claims in its *amparo* action against Supreme Decree 032. The Peruvian Government appealed this decision.³⁴
36. On May 19, 2014, the first instance judge decided to proceed with MINEM's claims relating to

²⁵ C.Prov.M.-I para. 6; R.Prov.M.-I para. 12; RfA para. 26.

²⁶ R.Prov.M.-I para. 3, 10 (on July 14, 2011); C.Prov.M.-II para. 13 (three months after Supreme Decree 032); RfA para. 28 (on August 25, 2011).

²⁷ R.Prov.M.-I para. 10.

²⁸ R.Prov.M.-I para. 10.

²⁹ R.Prov.M.-I para. 10.

³⁰ C.Prov.M.-I para. 8; R.Prov.M.-I para. 11; RfA para. 30 (stating Feb. 5, 2013).

³¹ C.Prov.M.-I para. 8; RfA para. 30; R.Prov.M.-I para. 11.

³² RfA para. 31.

³³ R.Prov.M.-I para. 12; RfA para. 31.

³⁴ RfA para. 27.

the transfer of the mining concessions to Bear Creek and the recording of such transfers in the Peruvian Public Registry (“MINEM Lawsuit”).³⁵

37. On August 11, 2014, Claimant filed voluntary dismissal writs, requesting that the court discontinue both *amparo* proceedings.³⁶ MINEM filed a writ on October 3, 2014 stating that Claimant’s withdrawal of the *amparo* case related to Supreme Decree 032 was proof that Claimant considered that its constitutional rights had not actually been violated.³⁷ On October 23, 2014, Decision 33 was adopted, declaring that the *amparo* proceedings had concluded.³⁸

VI. TRIBUNAL’S AUTHORITY TO GRANT PROVISIONAL MEASURES REQUESTED BY CLAIMANT

A. THE CLAIMANT’S POSITION

38. Article 47 of the ICSID Convention empowers the Tribunal to issue provisional measures. Claimant invokes the writings of Prof. Schreuer to the effect that numerous arbitral awards, including those in *Maffezini*, *Pey Casado*, *Tokios Tokelés*, *Occidental*, and *Biwater Gauff* cases, have developed a doctrine under which provisional measures have a binding effect on parties. Accordingly, there can be no doubt that this Tribunal has the authority to order interim measures against Respondent while this arbitration is pending. This is said to be consistent with Art. 840 of the FTA.³⁹
39. There is nothing in Art. 840 of the FTA preventing this Tribunal from issuing the requested provisional measures. While Art. 840 of the FTA limits the Tribunal’s power to order certain kinds of interim relief, these limitations are not relevant to the present request. First, the limitations do not apply to an ICSID tribunal. Second, Claimant’s requested measures do not fall within the limitations of Art. 840 of the FTA, as Claimant’s requested relief is the temporary suspension of a concurrent, parallel local court proceeding during the pendency of this arbitration. These proceedings do not themselves constitute a measure alleged to constitute

³⁵ C.Prov.M.-I para. 8; R.Prov.M.-I para. 11.

³⁶ C.Prov.M.-I para. 9; R.Prov.M.-I para. 12.

³⁷ C.Prov.M.-I para. 9.

³⁸ C.Prov.M.-I para. 9.

³⁹ C.Prov.M.-I para. 14 – 16.

a breach of the FTA, but are merely further evidence of the Government's attack on Claimant's legal rights.⁴⁰

40. There is nothing extraordinary about Claimant's request. In consenting to arbitrate investment disputes, Respondent accepted that a tribunal may order provisional measures, even in a situation that could entail some interference with sovereign powers. This Tribunal, like the *Himpurna* tribunal, should not shirk from its duty to issue appropriate provisional measures. The state's decision to pursue civil litigation is not analogous to the sovereign authority exercised in criminal prosecutions and the Tribunal should not afford this state decision the same deference (which, in any event, is not an unfettered right).⁴¹

B. THE RESPONDENT'S POSITION

41. Respondent does not dispute the Tribunal's authority, under Art. 47 of the ICSID Convention, to recommend provisional measures, but argues that neither of the two requirements, i.e. that (1) the measures must be necessary to preserve an existing right and (2) the measures must be urgently needed to achieve that purpose, have been met in this case.⁴²
42. While the Tribunal's powers to issue provisional measures may be wide in scope, the Tribunal must exercise considerable caution before issuing provisional measures, which as the *Maffezini* and *Occidental* tribunals have found, are in and of themselves extraordinary.⁴³ The Tribunal should exercise caution where issues of State sovereignty are implicated. The same concerns related to the preservation of the state's sovereign rights, as expressed by the *PNG* and *Quiborax* tribunals in relation to criminal cases, are equally applicable to the present matter concerning the MINEM Lawsuit. The MINEM Lawsuit seeks to implement and enforce Peru's national laws within its territory, and Peru's right to investigate potential violations of its Constitution is a part of Peru's sovereignty.⁴⁴ Peru's national sovereignty is equally at issue when Peru is upholding its Constitution, as when it is prosecuting a criminal offense.
43. Respondent's pursuance of the MINEM Lawsuit is independent of this arbitration. Unlike the *Lao Holdings* and *Quiborax* cases, where the respective tribunals found that criminal

⁴⁰ C.Prov.M.-I para. 17 – 19.

⁴¹ C.Prov.M.-II para. 14 – 17.

⁴² R.Prov.M.-I para. 2, 14, 17.

⁴³ R.Prov.M.-I para. 15.

⁴⁴ R.Prov.M.-I para. 15 – 17.

prosecutions were used to advance the arbitration, the MINEM Lawsuit was filed three years before Claimant filed this arbitration. The MINEM Lawsuit is a good faith exercise of state sovereignty.⁴⁵

C. THE TRIBUNAL

44. As undisputed between the Parties, the Tribunal is in principle entitled to order provisional measures. The Tribunal, hereafter, examines whether the conditions for ordering the provisional measures requested by Claimant are satisfied.

VII. WHETHER CLAIMANT SATISFIES THE THREE REQUIREMENTS FOR PROVISIONAL MEASURES

45. The Parties agree that the Claimant must meet three pre-requisites in order for the Tribunal to issue provisional measures. Claimant must demonstrate that there exists: (A) a *prima facie* jurisdiction of the Tribunal; (B) a threat of substantial or irreparable harm or prejudice to the property or rights capable of being protected by the Tribunal; and (C) urgency or imminence of said harm or prejudice.⁴⁶ Each is elaborated, below.

A. THE TRIBUNAL HAS *PRIMA FACIE* JURISDICTION OVER CLAIMANT'S CLAIMS

1. The Claimant's Position

46. The Tribunal has *prima facie* jurisdiction over the present dispute because (1) Claimant has satisfied the FTA's conditions precedent to submit a claim to arbitration, including Art. 823(1) and 819 of the FTA; (2) under Art. 825 of the FTA, Respondent consented to submit disputes to ICSID arbitration; and (3) Claimant's claims fall within the requirements for ICSID jurisdiction. Accordingly, Claimant has established *prima facie* the jurisdiction of the Tribunal over the present dispute.⁴⁷

2. The Respondent's Position

47. While tribunals require the requesting party to show a *prima facie* jurisdiction before issuing provisional measures, this is a relatively undemanding requirement and Respondent does not

⁴⁵ R.Prov.M.-II para. 14 – 17.

⁴⁶ C.Prov.M.-I para. 20; R.Prov.M.-I para. 18, note 37.

⁴⁷ C.Prov.M.-I para. 21 – 27.

challenge whether Claimant has met this low threshold. Nevertheless, there are serious jurisdictional questions in this case and Respondent reserves the right to advance these jurisdictional objections in accordance with the ICSID Arbitration Rules and PO-1. Any determination or decision related to the provisional measures sought by Claimant cannot prejudice the merits of future jurisdictional objections.⁴⁸

3. The Tribunal

48. As the Parties do not dispute, and the Tribunal is equally satisfied, there is a *prima facie* jurisdiction in the present proceedings. This conclusion is without prejudice to the examination in the jurisdictional phase of this procedure.

B. WHETHER CLAIMANT HAS PROVEN THAT THE REQUESTED PROVISIONAL MEASURES ARE NECESSARY TO PRESERVE AN EXISTING RIGHT

49. The Parties present arguments on four issues related to Claimant's alleged entitlement to the requested provisional measures: (1) whether Peru's prosecution of the MINEM Lawsuit risks prejudicing Claimant's rights in this arbitration; (2) whether the MINEM Lawsuit threatens the *status quo*; (3) whether the MINEM Lawsuit poses a threat of irreparable harm that cannot be compensated by money damages; and (4) whether the MINEM Lawsuit exacerbates the dispute. The arguments put forward by each Party are summarized briefly, below.

1. Whether Peru's Prosecution of the MINEM Lawsuit Risks Prejudicing Bear Creek's Rights in this Arbitration

(a) The Claimant's Position

50. Claimant has asserted four rights that merit protection pending the outcome of this arbitration: (1) the right to have ICSID arbitration be the exclusive remedy for the dispute, (2) the right to have its dispute decided by the international tribunal, (3) the right to prevent legal rights that are subject of the arbitration from being impaired or eviscerated prior to a final determination by the tribunal, and (4) the right to proceed through arbitration without having the dispute aggravated, exacerbated, or extended by the other party.⁴⁹

51. In order to protect a party's right to ICSID arbitration as an exclusive remedy, ICSID tribunals,

⁴⁸ R.Prov.M.-I para. 18, note 37.

⁴⁹ C.Prov.M.-II para. 21.

including those in *MINE v. Guinea*, *SGS v. Pakistan*, *Tokios Tokelés*, *CSOB v. Slovak Republic*, *Holiday Inns v. Morocco*, and *Perenco v. Ecuador* have ordered respondent states to stay domestic proceedings concerning issues at stake in the respective arbitrations. These cases confirm that Claimant has a right to have ICSID arbitration be the exclusive remedy of its dispute with Peru and that the Tribunal has the power and duty to preserve its jurisdiction by issuing the requested provisional measures. That the MINEM Lawsuit and the ICSID proceedings are separate is not determinative. Instead, the issue for purposes of Art. 26 of the ICSID Convention is whether the parallel proceedings deal with the same subject matter of the ICSID dispute. Here, there can be no doubt that, while the legal issues are not identical to those before this Tribunal, the MINEM Lawsuit relates broadly to the same subject matter of the arbitration, namely, Claimant's rights over the Santa Ana Project. Claimant has a protectable right to prevent its legal rights that are subject of this arbitration from being impaired or eviscerated prior to a final determination by this Tribunal. Adjudication of the MINEM Lawsuit by the Civil Court would be tantamount to a substantial modification or effective termination of Claimant's right to ICSID arbitration as an exclusive remedy. If that Court rules on the validity of Claimant's mining rights during the pendency of this arbitration, Claimant could be denied effective relief in these proceedings, especially if the Tribunal were to order restitution of the Santa Ana Project in its final award. This is exactly the kind of problem that Art. 26 of the ICSID Convention seeks to avoid. International courts and tribunals, such as the PCIJ in the *In re Electricity Company* case and the *CSOB* tribunal, have ordered states to suspend domestic proceedings where those proceedings could impair rights that could result from the court's decision. Allowing the Peruvian court to order that title over the Santa Ana Concessions revert back to the State while this arbitration is pending would eviscerate and impair Bear Creek's rights prior to a final determination by this Tribunal.⁵⁰

52. The FTA does not require investors to exhaust local remedies before gaining access to international arbitration, and the Parties consent to ICSID arbitration to the exclusion of any other remedy, including litigation before Peruvian courts. Accordingly, Claimant waived its right to continue participating in its two *amparo* proceedings in connection with Supreme Decree 032 and the MINEM Lawsuit.⁵¹

⁵⁰ C.Prov.M.-I para. 34 – 42; C.Prov.M.-II para. 22 – 23.

⁵¹ C.Prov.M.-I para. 31 – 33.

(b) The Respondent's Position

53. Article 26 of the ICSID Convention means that claims brought before an ICSID tribunal cannot be heard in any other forum. The MINEM Lawsuit does not implicate Art. 26 of the ICSID Convention and cannot prejudice Claimant's rights in this arbitration because the MINEM Lawsuit encompasses a dispute that is factually, legally, and temporally distinct from the matters raised before this Tribunal. The MINEM Lawsuit is about Claimant's 2004 – 2007 acquisitions of rights and not the 2011 Decree that Claimant challenges in this arbitration. The MINEM Lawsuit involves, exclusively, Peruvian domestic law. The MINEM Lawsuit will not determine whether the 2011 Decree violated the FTA. Accordingly, there can be no concern about Claimant's right to an exclusive remedy through ICSID arbitration, the right to have its dispute decided by an international tribunal, or the right to prevent impairment of its legal rights prior to this Tribunal's final decision.⁵²
54. Claimant, while admitting that the disputes are separate, argues that this fact is not determinative and that the subject matter of this arbitration relates to the subject matter of the MINEM Lawsuit. While some tribunals have considered whether parallel proceedings relate to the same subject matter as the ICSID arbitration, the cases cited by Claimant are distinguishable on the facts from this matter. Those decisions show only that provisional measures are appropriate where the domestic proceeding would impinge on the tribunal's ability to decide the factual and legal issues relevant to the arbitration. This conflict, however, is not present where, as here, the substantive issues to be decided in the domestic proceeding and in the international arbitration encompass different factual bases and different legal regimes. For example, in *Quiborax*, the tribunal found that criminal proceedings brought by Bolivia against claimants' employees did not threaten the exclusivity of the arbitration, even though the disputes were related and involved the same investment and the same actors. The *Perenco* tribunal found that the ongoing domestic proceeding, where the state sought the same outcome in the domestic courts as would result from implementation of the measures that the claimant challenged in the arbitration, violated claimant's rights under Art. 26 of the ICSID Convention. This is not the case in the present proceedings. In *Tokios Tokelés*, the tribunal forbade the state from litigating in courts the same dispute brought before the tribunal. That tribunal, however, refused to grant the claimant's request to enjoin the state from pursuing a wider range of domestic procedures including criminal proceedings and tax investigations. The *Tokios Tokelés* tribunal refused to order provisional measures against the tax investigation and further found that provisional

⁵² R. Prov.M.-I para. 20, 22, 23, 27; R.Prov.M.-II para. 19(i), 24, 26.

measures related to the criminal proceedings were unwarranted, as they would not preserve Claimant's right to have that proceeding be the exclusive remedy of the dispute. Thus, the *Tokios Tokelés* tribunal rejected its claimant's attempt to obtain extensive provisional measures beyond those directly concerning the alleged treaty breach.⁵³

55. Even using Claimant's proposed "related to" standard, Claimant has nonetheless failed to show that the MINEM Lawsuit damages the rights that it asserts – namely, its right to have this Tribunal decide its claims to the exclusion of other fora or decision makers. This Tribunal can still decide all of the substantive issues pertinent to the arbitration, regardless of whether the MINEM Lawsuit proceeds. There is no risk of incompatible rulings. While the Peruvian court's determination of whether, as a matter of Peruvian law, Claimant properly acquired the concession rights in the first place is a critical piece of information for this Tribunal's assessment of its jurisdiction to hear the case, it is one that will not deprive the Tribunal of its power to decide on its jurisdiction. Claimant has also agreed that this Tribunal can decide Claimant's claims without making a determination as to whether the 2004 Option Agreements were valid and properly registered under Peruvian law.⁵⁴
56. The right of an exclusive ICSID remedy under Art. 26 of the ICSID Convention is limited by the scope of the parties' consent to ICSID arbitration. In the FTA, Peru consented to the ICSID arbitration of claims for breach of the FTA's protections. Peru has not consented to ICSID arbitration of any dispute arising out of an investment. Peru's consent to arbitration cannot be extended to require Peru to resolve legal claims that are different from the FTA breach.⁵⁵
57. Finally, the Tribunal should reject Claimant's argument that Respondent is required to withdraw the MINEM Lawsuit because Claimant has withdrawn its *amparo* actions. Claimant withdrew its *amparo* actions – at the appellate stage – because it was required to do so under the FTA in order to launch this arbitration. The MINEM Lawsuit is not a proceeding with respect to the alleged FTA breach, and there is no reciprocal obligation in the FTA for the respondent state to withdraw any proceedings.⁵⁶

⁵³ R.Prov.M.-I para. 24 – 26; R.Prov.M.-II para. 22.

⁵⁴ R.Prov.M.-II para. 23, 25.

⁵⁵ R.Prov.M.-I para. 28.

⁵⁶ R.Prov.M.-I para. 29.

(c) The Tribunal

58. The subject of the MINEM Lawsuit is the validity of Claimant's acquisitions during the period 2004 to 2007 of rights and it exclusively relates to matters of Peruvian domestic law. Claimant concedes that the legal issues are not identical to those before this Tribunal. The Tribunal agrees with Claimant that the MINEM Lawsuit relates broadly to the same subject matter of the arbitration, namely, Claimant's rights over the Santa Ana Project. However, as Claimant concedes, the Peruvian Courts' ruling on the concession rights and a decision in the MINEM Lawsuit would not be binding on this Tribunal. Though findings of the Peruvian courts in the MINEM Lawsuit may have to be taken into account for any later findings of the present Tribunal on the merits, they will not be (and cannot be) as such dispositive of the legal and factual matters that arise in the present proceedings. These concern the determination of whether Peru has violated the international law standards of the FTA by its treatment of Claimant and Claimant's alleged investment and, particularly, by Supreme Decree 032.

2. Whether the MINEM Lawsuit Threatens the *Status Quo*

(a) The Claimant's Position

59. Although Claimant may not have ongoing operations (due to Supreme Decree 032), it continues to hold title to the concessions. If successful in this arbitration and if it obtains restitution of Supreme Decree 083, Claimant will be poised to commence operations in short order. If the MINEM Lawsuit proceeds, it could result in a decision nullifying Claimant's mineral rights prior to a final award in this arbitration. These rights would then revert to the state and could be obtained by any Peruvian individual or corporation. This would upset the *status quo* – i.e., Claimant's current holding of the concessions. Claimant's right to acquire, own, and operate the Santa Ana Project pursuant to Supreme Decree 083 and Claimant's title over the concessions are at issue in this arbitration and those rights must be preserved during these proceedings.⁵⁷

60. Respondent does not dispute the Tribunal's power to order provisional measures to maintain the *status quo*. But, Respondent's limitation of this right to situations necessary to "prevent the destruction of an ongoing investment" or to halt the seizure of the claimant's assets, has no legal foundation. Tribunals have issued provisional measures to preserve the *status quo* in a variety of fact-specific circumstances, even in cases where the claimant no longer had ongoing

⁵⁷ C.Prov.M.-I para. 44; C.Prov.M.-II para. 26 – 28.

operations. In *Chevron v. Ecuador*, in response to concerns that a domestic court would enter a judgment that would be final and enforceable pending the outcome of the arbitration, the tribunal issued an Order for Interim Measures directing the parties to maintain the *status quo* and to refrain from conduct likely to impair or adversely affect the tribunal's ability to fairly address any issue raised by the parties before that tribunal. Here, if Respondent were to nullify Claimant's rights – although not binding on this Tribunal – that would upset the *status quo* and make it difficult to Claimant to recover its rights in the Santa Ana Project, as it seeks to in this arbitration.⁵⁸

61. Claimant does not seek to improve its situation by preventing the Peruvian Court from ruling on the concession rights and notes that a decision in the MINEM Lawsuit would not be binding on this Tribunal. Claimant is merely seeking to preserve the *status quo* as of today, namely, Claimant's title-holding of these concessions.⁵⁹

(b) The Respondent's Position

62. Claimant's rights are not prejudiced because the MINEM Lawsuit does not threaten to alter the *status quo* of the Santa Ana Project. Claimant does not possess a clean title to the Santa Ana concessions and its characterization of the *status quo* as its "title-holding of these concessions" is inaccurate. Rather than preserve the *status quo*, Claimant is attempting to use the provisional measures to improve its own situation by preventing a possible ruling that could confirm that Claimant did not lawfully acquire its (now impaired) title. Although Claimant may possess a nominal title to the Santa Ana concessions, the paper title is inoperative as a result of Supreme Decree 032. Accordingly, at present, Claimant lacks the constitutionally required authorizations to acquire or possess the border-zone mining concessions that are the subject of this arbitration. Claimant, therefore, will not be able to lawfully do anything with the title to the concessions unless and until the Peruvian State reinstates the finding of public necessity and approves Claimant's ownership of the mining rights through another Supreme Decree issued by Peru's Council of Ministers. Possible outcomes of the MINEM Lawsuit – whether the reversion of mineral rights to Peru or a ruling that the concession rights were illegally acquired – cannot upset the current status of the Parties in this arbitration.⁶⁰

63. Claimant has, however, already argued that it has lost the rights to the Santa Ana Project and

⁵⁸ C.Prov.M.-I para. 42; C.Prov.M.-II para. 24 – 25.

⁵⁹ C.Prov.M.-II para. 28 – 29.

⁶⁰ R.Prov.M.-I para. 30; R.Prov.M.-II para. 27, 28, 30, 31.

that it seeks restitution of these property rights. This Tribunal cannot entertain Claimant's inconsistent positions that – on its substantive claims – it has lost rights, but – for the purposes of provisional measures – it has regained its property right to the concessions.⁶¹

64. Tribunals have issued provisional measures to preserve the *status quo* by preventing the destruction of an ongoing investment or by halting an extensive seizure of claimant's assets. No such scenario exists here and there is no ongoing activity of any kind. Instead, Claimant's situation is similar to that of the claimant in *Quiborax*, where the tribunal found that, with the concessions already revoked, the claimant no longer had activities or an ongoing investment to protect through provisional measures. In addition, Claimant's situation is similar to the facts in *Phoenix Action*, where the claimant sought provisional measures against civil proceedings that would otherwise have determined the ownership of lands that were at issue in the arbitration. There, the tribunal found that claimant's ownership of the properties at issue was under dispute. That tribunal refused to give the claimant the sought provisional measures, since that would give claimant more rights than it ever possessed or had title to claim. Such measures would not maintain the *status quo* but would instead effect a fundamental change, improving the claimant's situation. Here, under the *status quo*, Claimant is legally barred from holding or exercising any border-zone concession rights, regardless of the outcome of the MINEM Lawsuit.⁶²

(c) The Tribunal

65. It is undisputed that Claimant does not have ongoing operations for its alleged investment. The Tribunal further recalls that, as Claimant concedes, whatever authority a decision in the MINEM Lawsuit might have, it would not be binding on this Tribunal. The situation here is similar to that which pertained in the *Phoenix Action* and *Quiborax* cases. Irrespective of the outcome of the MINEM Lawsuit, Claimant will not be able to do anything lawfully with the title to the concessions unless and until the Peruvian State reinstates the finding of public necessity and approves Claimant's ownership of the mining rights through another Supreme Decree issued by Peru's Council of Ministers. This latter issue is before the present Tribunal. Therefore, the MINEM Lawsuit does not as such threaten the *status quo* of the present arbitral proceedings.

⁶¹ R.Prov.M.-II para. 29.

⁶² R.Prov.M.-I para. 31 – 34; R.Prov.M.-II para. 31 – 32.

3. Whether the MINEM Lawsuit Poses a Threat of Irreparable or Substantial Harm that Cannot be Compensated by Money Damages

(a) The Claimant's Position

66. Respondent's position that Claimant faces no threat of irreparable harm for which the Tribunal would be unable to order adequate monetary compensation misinterprets the irreparable harm requirement and improperly restricts its meaning. Interim measures are meant to prevent "substantial" or "irreparable" harm. These terms are flexible in international law and do not require that the injury complained of be not remediable by an award of damages. Substantial harm may still exist even where a party has a right of recourse to damages. The PNG tribunal confirmed that the term "irreparable" is understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally irreparable in the narrow, common law sense of the term. Substantial harm, even if not irreparable, is generally sufficient to satisfy the element of the standard for granting provisional measures. It is also sufficient to show that there is a material risk that serious harm will occur, not that it is certain to occur.⁶³
67. The *CEMEX*, *Occidental*, and *Plama* decisions on which Respondent relies to promote its narrow reading of "irreparable" harm do not support Respondent's position. In each of those cases, the claimant either exclusively sought monetary damages or conceded that its damages would be compensable by money, which is not the case here. Here, Claimant has the right to seek restitution as a remedy and has done so in the RfA. This right is entitled to protection, and Art. 841 of the FTA empowers the Tribunal to award restitution. That Peru may ultimately elect to pay damages instead does not change Claimant's right to seek and be awarded restitution or the Tribunal's power to award it. Restitution is not a foreclosed remedy as a matter of law. Nor should it become a *de facto* foreclosed remedy. If the MINEM Lawsuit continues, it could result in a court decision depriving Claimant of title over the concessions, making Claimant unable to seek restitution of the Santa Ana Project in the form of a Supreme Decree reinstating the declaration of public necessity contained in Supreme Decree 083 because Respondent by way of a private lawsuit would have taken away the underlying mineral rights.⁶⁴
68. Respondent's argument that restitution would be inappropriate, unlikely, or a grave intrusion on Peru's sovereignty invites the Tribunal to pre-judge the merits of Claimant's case before any briefing or hearing on the issues. It is precisely this type of prejudgment that is inappropriate in

⁶³ C.Prov.M.-II para. 31.

⁶⁴ C.Prov.M.-II para. 32 – 34.

the context of examining a provisional measures request.⁶⁵

(b) The Respondent's Position

69. The irreparable harm standard prevails in treaty jurisprudence. While tribunals diverge on whether the standard requires that the alleged harm must be incapable of being compensated by monetary damages, or merely that the harm will be inadequately compensated by monetary damages (as Respondent argues), each approach requires that the Tribunal determine whether money damages are possible and appropriate compensation. If money damages are possible and appropriate, provisional measures are unlikely to be necessary. All of the cases cited by Claimant, including *Paushok* and *PNG*, support this position. Claimant has not identified any right at issue whose loss could not be compensated through a damages award. Accordingly, Claimant cannot demonstrate the irreparable harm required for a provisional measures recommendation.⁶⁶
70. Claimant's main concern appears to be that, if the MINEM Lawsuit decides against Claimant with a holding that Claimant illegally obtained the concessions that form the basis of its alleged investment, then the Tribunal will be unable to award restitution or compensation. In effect, however, the FTA has already determined that money damages are an adequate remedy for whatever harms the investor may suffer. While the Tribunal may propose restitution, Art. 841 of the FTA mandates that the respondent state may always choose to pay monetary damages in lieu of restitution. Claimant's insistence that restitution should not be foreclosed flies in the face of the terms of the FTA. In any event, restitution is an exceedingly rare remedy – it is intrusive and as unlikely as this Tribunal ordering Peru to issue a Supreme Decree finding Claimant's concession to be a public necessity (an extreme and unusual remedy, if granted by this Tribunal). Claimant cannot base its request for provisional measures on such a tenuous and hypothetical possibility. Claimant cannot prove that damages would be an inadequate remedy for the harm that would allegedly be caused absent the provisional measures.⁶⁷
71. Claimant is incorrect to allege that this Tribunal cannot reach a conclusion on the adequacy of money damages now – the Tribunal can and should do so in order to determine the

⁶⁵ C.Prov.M.-II para. 35.

⁶⁶ R.Prov.M.-I para. 38; R.Prov.M.-II para. 34 – 35.

⁶⁷ R.Prov.M.-I para. 35 – 37; R.Prov.M.-II para. 37.

appropriateness of provisional measures.⁶⁸

(c) The Tribunal

72. It is undisputed that Claimant presently has no ongoing factual investment activities. It follows that, factually, no irreparable or substantial harm can be caused to the alleged investment by the MINEM Lawsuit. Regarding the Claimant's legal position, however, Art. 841 of the FTA has to be taken into account. It provides that the Respondent state may always choose to pay monetary damages in lieu of restitution. Claimant's insistence that restitution should not be foreclosed would not be enforceable even if it were to be recognized by the present Tribunal. However, the compensation by money damages, if awarded by the present Tribunal, cannot be threatened by the MINEM Lawsuit, irrespective of the outcome of that lawsuit.

4. Whether the MINEM Lawsuit Exacerbates the Dispute

(a) The Claimant's Position

73. As recognized by the PCIJ in the *Electricity Company* case, there is a principle that is universally accepted by international tribunals that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and any action which might aggravate or extend the dispute. Allowing the MINEM Lawsuit to proceed exacerbates this dispute and aggravates Claimant's losses and prejudice sustained as a result of Peru's breaches of the FTA. An adverse ruling in the MINEM Lawsuit could result in the nullification of Claimant's mineral rights in the Santa Ana Project, which could entail adverse consequences for Claimant, including criminal proceedings, as well as the impairment of development of Claimant's larger Corani Project, also located in Peru. Claimant's arguments regarding the *status quo*, the election of this Tribunal as having exclusive jurisdiction over this dispute, are incorporated by reference.⁶⁹
74. Respondent's narrow view about protections against exacerbation of a dispute – limiting it to issues that make the resolution to the dispute by the Tribunal more difficult – is unwarranted. Tribunals usually refer to the non-exacerbation of the dispute in the same breath as the procedural integrity of an arbitration proceeding and the right to an effective final award. The *Tokios Tokelés* tribunal noted that disputing parties must refrain from measures capable of

⁶⁸ R.Prov.M.-II para. 33, 36.

⁶⁹ C.Prov.M.-I para. 43 – 45.

having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision. The *City Oriente* tribunal issued interim measures against Ecuador targeted at “prohibiting any action that affects disputed rights, aggravates the dispute, frustrates the effectiveness of the award or entails having either party take justice into their own hands.” The MINEM Lawsuit exacerbates the dispute because it threatens the effectiveness of the Tribunal’s ultimate award in this arbitration. If the Tribunal were to rule in Claimant’s favor and order restitution of the Supreme Decree, that award could not be effective if Claimant’s title over the concessions has reverted back to the State as a result of the MINEM Lawsuit.⁷⁰

(b) The Respondent’s Position

75. The kind of “aggravation” that tribunals contemplate when considering provisional measures is that which makes resolution of the dispute by the Tribunal more difficult. Nothing in the MINEM Lawsuit makes resolution of the dispute before the Tribunal more difficult because Claimant will still be able to present all of its claims for breach of the FTA. Respondent’s arguments with regard to restitution, presented above, are incorporated by reference.⁷¹
76. As a threshold matter, at least one Tribunal has reasoned that the mere aggravation of a dispute, while a factor that may be considered in whether to recommend provisional measures, cannot be the sole basis for such a recommendation. Even if the Tribunal were to find that the MINEM Lawsuit threatened to aggravate the dispute (which it does not), the Tribunal should not order provisional measures unless it is also satisfied that the irreparable harm and urgency elements are also met. Respondent’s arguments that these elements are not met are incorporated by reference.⁷²
77. Claimant appears to argue that the MINEM Lawsuit could make it more difficult for Claimant to prove that it acquired a valid, legal investment in Peru for the purpose of satisfying the jurisdictional requirements of the FTA and the ICSID Convention. Making Claimant’s case easier, however, is not the purpose of provisional measures. As stated above, provisional measures should not be issued in order to improve the situation of Claimant before rendering the Tribunal’s award. If Claimant acquired the mineral concessions through improper means, then preventing Peru from pulling back the veil from Claimant’s deception cannot be an appropriate basis for issuing provisional measures. If the MINEM Lawsuit determines that Claimant did not

⁷⁰ C.Prov.M.-II para. 36 – 37.

⁷¹ R.Prov.M.-I para. 41; R.Prov.M.-II para. 38 – 39.

⁷² R.Prov.M.-I para. 39 – 40.

lawfully acquire or own its claimed investment, and if the Tribunal on that basis concludes that it lacks jurisdiction, then Claimant would have had no right to present its claims to this Tribunal in the first place. Provisional measures should not be issued on the premise of protecting Claimant against a potential determination that it has no rights before this Tribunal.⁷³

(c) The Tribunal

78. Taking into account the Tribunal's considerations and conclusions in the previous sections above, the MINEM Lawsuit cannot be said to exacerbate the present dispute. This is because Claimant has no ongoing factual investment activities, and because Claimant will still be able to present and the Tribunal will still be able to decide all of the claims for breach of the FTA, irrespective of the outcome of the MINEM lawsuit

5. Whether the requested Provisional Measures are Urgent Because of a Risk of Imminent Harm to Bear Creek

(a) The Claimant's Position

79. Respondent does not dispute that the requirement of urgency is met, as stated by the ICJ and tribunals such as that in *City Oriente*, "if the action that is allegedly prejudicial to the rights of either Party is likely to be taken before the final decision of the tribunal is given."⁷⁴ Respondent, however, argues that the measures are non-urgent because the impending ruling in the MINEM Lawsuit is on Claimant's procedural defenses, a merits decision is nowhere near imminent, and it is unclear how a procedural ruling could have any effect on Claimant's rights for this arbitration. Respondent's arguments are incorrect. First, Respondent's attempt to distinguish between procedural and merits rulings presents a false dichotomy. The relevant question is whether the Civil Court of Lima could render a decision in the MINEM Lawsuit at any time before the Tribunal renders a final award in this case. Respondent does not contest that this risk exists. Accordingly, the urgency requirement has been met, irrespective of the nature of the forthcoming ruling. That the MINEM Lawsuit has been pending since July 2011 does not change this. The Court's decision on Claimant's procedural defenses directly affects the Tribunal's exclusive jurisdiction over the present dispute. This is especially so since Claimant abandoned its *amparo* actions, which were a major defense in the MINEM Lawsuit.

⁷³ R.Prov.M.-I para. 42 – 43.

⁷⁴ C.Prov.M.-I para. 47; C.Prov.M.-II para. 38.

Allowing the MINEM Lawsuit to continue while the arbitration is pending would unfairly prejudice Claimant's fundamental rights.⁷⁵

6. The Respondent's Position

80. The need for provisional measures is urgent if the action that is allegedly prejudicial to the rights of either party is likely to be taken before the final decision of the tribunal.⁷⁶ Claimant has failed to prove the requisite urgency that it faces an imminent harm. Although the MINEM Lawsuit is currently pending and could render a decision at any time, this case has winded through various levels of the Peruvian court system since 2011 and is still only considering Claimant's threshold procedural arguments. The timing of procedural defenses is not the relevant inquiry for a showing of imminent harm. It is unclear how rulings on Claimant's procedural defenses could have any effect on Claimant's rights for the purposes of this arbitration. If the court upholds any of these defenses, the MINEM Lawsuit could come to an end, subject to appeal. If the court rejects those defenses, the proceedings will proceed to the merits. Any court decision on the substantive issues would likely remain outstanding for some time. Claimant has not presented any evidence that the domestic court is on the verge of making a substantive ruling in the MINEM Lawsuit. Without more and since Claimant's case falls short of this necessary element, Claimant has not shown any level of urgency that tribunals require before awarding provisional measures.⁷⁷

7. The Tribunal

81. Again, taking into account the Tribunal's considerations and conclusions in the previous sections above, since Claimant has no ongoing factual investment activities, and since Claimant will still be able to present and the Tribunal will still be able to decide all of the claims for breach of the FTA, irrespective of the outcome of the MINEM lawsuit, the Tribunal sees no urgency for the requested provisional measures.

VIII. CLAIMANT'S ALTERNATIVE REQUEST, IF PROVISIONAL MEASURES ARE DENIED

⁷⁵ C.Prov.M.-I para. 46 – 48; C.Prov.M.-II para. 38 – 39.

⁷⁶ R.Prov.M.-I para. 44.

⁷⁷ R.Prov.M.-I para. 44 – 46; R.Prov.M.-II para. 40 – 42.

A. THE CLAIMANT'S POSITION

82. In Claimant's Observations to Peru's Response to the Request for Provisional Measures, the Claimant made the following additional request:

[...] If the Tribunal were to deny Bear Creek's request for provisional measures, Bear Creek requests the Tribunal to confirm that Bear Creek's continued defense against Peru's claims against Bear Creek in the MINEM Lawsuit before the Peruvian courts does not constitute a violation of the waiver requirements set forth in Article 823.1(e) of the Treaty.⁷⁸

83. While Claimant presented no arguments in relation to this request, it explained that, in connection with the filing of this arbitration, pursuant to Art. 823.1(e) of the FTA, Claimant waived its right to initiate or continue any local proceedings with respect to measures that are alleged to be a breach of Art. 819 of the FTA. Accordingly, Claimant requested the Peruvian courts discontinue the proceedings in the two constitutional actions of *amparo* that Claimant had commenced.⁷⁹ Among these, Claimant waived its right to continue participating in the MINEM Lawsuit.⁸⁰
84. Arguing that the continued prosecution of the MINEM Lawsuit prejudices Claimant, Claimant submitted that requiring Claimant to pursue its claims in ICSID while defending itself in parallel litigation in Peru with respect to matters it believes to be directly at issue in this arbitration (after having withdrawn its two *amparo* actions) would, in addition to threatening the Tribunal's jurisdiction, require Claimant to devote substantial time and resources to defending itself, while at the same time pursuing its claims under the FTA and international law in this proceeding.⁸¹ Claimant also stated that "Bear Creek cannot be expected to defend itself in Peruvian Courts after voluntarily withdrawing its *amparos* in connection with these proceedings and thus abandoning a major defense in this respect."⁸²

B. THE RESPONDENT'S POSITION

85. Respondent did not present any arguments directly related to Claimant's alternate request for relief. Respondent did state that Claimant's analogy between the MINEM Lawsuit and the two *amparo* actions, where Claimant suggests that since it withdrew its actions, Peru should be

⁷⁸ C.Prov.M.-II para. 44.

⁷⁹ C.Prov.M.-I para. 9, 23.

⁸⁰ RfA para. 54.

⁸¹ C.Prov.M.-I para. 12.

⁸² C.Prov.M.-I para. 48.

required to stay the MINEM Lawsuit, is incorrect. The disputes are patently different – the MINEM Lawsuit is a Peruvian civil action that addresses Claimant’s actions in 2004 – 2007, whereas the present dispute involves Respondent’s 2011 decision to issue Supreme Decree 032.⁸³

86. Article 821.3(e) of the FTA requires a disputing investor to “waive their right to initiate or continue before any administrative tribunal or court under the law of either party ... any proceedings with respect to the measure of the disputing Party that is alleged to be in breach...”⁸⁴ Claimant’s *amparo* action challenging the constitutionality of Supreme Decree 032 was a “proceeding with respect to the measure of Peru that is alleged to be in breach” of the FTA. But, even setting aside the fact that the MINEM Lawsuit is not a “proceeding with respect to” Supreme Decree 032 – the dispositive fact is that there is no reciprocal obligation in the FTA for a respondent state to withdraw any proceedings.⁸⁵

C. THE TRIBUNAL

87. The Tribunal notes that neither Party has submitted arguments directly addressing this Alternative Request. The above summary of certain submissions by the Parties can be considered as being of relevance to this Request. As the Request has been submitted to the Tribunal as an alternative request and as the alternative condition given by Claimant, i.e. a denial of provisional measures, is fulfilled, it has to be decided by the Tribunal.
88. Since the Parties had an opportunity in two rounds of submissions to present arguments directly addressing the Alternative Request and did not do so, and since no factual issues disputed between the Parties are relevant for the examination of the Request, the Tribunal considers that it can decide the legal questions involved without having to refer back to the Parties.
89. Art. 823.1(e) FTA provides:

A disputing investor may submit a claim to arbitration under Article 819 only if:

- (e) both the disputing investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 820, except for proceedings for injunctive, declaratory or other

⁸³ R.Prov.M.-I para. 13.

⁸⁴ R.Prov.M.-I para. 29.

⁸⁵ R.Prov.M.-I para. 29.

extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

90. In its above considerations in earlier sections of this Order regarding Claimant's primary Request for provisional measures, the Tribunal has concluded that:

- the legal issues in the MINEM Lawsuit are not identical to those before this Tribunal; and
- though findings of the Peruvian courts in the MINEM Lawsuit may have to be taken into account for any later findings of the present Tribunal on the merits, they cannot be dispositive of the legal and factual matters that arise in the present proceedings, namely the determination of whether Peru has violated the international law standards of the FTA by its treatment of Claimant and Claimant's alleged investment and, particularly, by Supreme Decree 032.

91. In view of these conclusions, the Tribunal considers that Art. 823.1(e) FTA is not applicable, since the condition is not fulfilled that "any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 820" are at stake in the MINEM Lawsuit before the courts of Peru.

92. Therefore, the Tribunal concludes that Claimant's continued defense against Peru's claims against Bear Creek in the MINEM Lawsuit before the Peruvian courts does not constitute a violation of the waiver requirements set forth in Article 823.1(e) of the FTA.⁸⁶

IX. RESPONDENT'S ALTERNATIVE REQUEST, IF PROVISIONAL MEASURES ARE GRANTED

A. THE RESPONDENT'S POSITION

93. For the case that the Tribunal grants the provisional measures, Respondent has submitted the following alternative request:

[...] In the alternative, if the Tribunal decides to grant Claimant's request, Respondent respectfully requests that the Tribunal expressly confirm that, if the issue of the questionable validity under Peruvian law of Claimant's acquisition of the concessions is presented to it as part of the parties' jurisdictional or merits arguments, the Tribunal will hear and decide those issues of Peruvian domestic law.⁸⁷

⁸⁶ C.Prov.M.-II para. 44.

⁸⁷ R.Prov.M.-II para. 49.

94. Claimant attempts to foreclose any review of the legality of its acquisition of the Santa Ana concessions by, on the one hand, asking for the Tribunal to stay those proceedings and, on the other hand, asserting that the Tribunal need not rule on Peru's allegations in the MINEM Lawsuit. That the potentially unlawful manner in which Claimant acquired its alleged investment is an issue before this Tribunal is, however, inescapable. If the MINEM Lawsuit proceeds, the Tribunal may have the benefit of a Peruvian court ruling in assessing this issue. If the provisional measures are granted, the Tribunal will need to decide the issue without that guidance. At present, however, it appears that Claimant is seeking to preclude the Tribunal from reaching this issue, thus using the requested provisional measures to improperly improve its own case. As Claimant has already attempted to inaccurately convince the Tribunal that it is prevailing in the MINEM Lawsuit and that the Tribunal should draw inferences in Claimant's favor about the validity of the MINEM claims, Claimant could likewise attempt to seek an advantage in this arbitration by claiming that, inasmuch as the Santa Ana concessions had not been declared invalid by Peruvian courts, they should be deemed valid. In light of these concerns, Respondent insists that if the Tribunal temporarily enjoins the MINEM Lawsuit pending the outcome of this arbitration, the Tribunal will need to hear arguments and decide under Peruvian law whether Claimant lawfully acquired the Santa Ana concessions or whether, instead, its scheme violated the Peruvian Constitution.⁸⁸
95. Claimant wants the Tribunal to suspend that lawsuit but, at the same time, persuade the Tribunal that the legality of the acquisition of the alleged investment is not a matter for the Tribunal to decide. Under Claimant's argumentation, no one would decide on the lawfulness of Claimant's alleged investment. Claimant's arguments are inherently contradictory. On the one hand, Claimant argues that the MINEM Lawsuit is so intertwined with this arbitration that it must be suspended because otherwise it would be an obstacle to this Tribunal deciding the Treaty claims. On the other hand, Claimant argues that the Tribunal should not decide the questions posed in the MINEM Lawsuit. Both cannot be correct: either the MINEM Lawsuit deals with issues that the Tribunal needs to address itself, or it does not. Respondent's arguments, however, are consistent. First, the Tribunal does not need to suspend the MINEM Lawsuit to maintain its ability to hear the Treaty claims (the MINEM Lawsuit does not concern Treaty claims). Second, the Tribunal must decide as part of this arbitration whether Claimant lawfully acquired the Santa Ana concessions, and that determination may be informed by the judgment of the Peruvian courts in the MINEM Lawsuit, if that lawsuit reaches the merits. Claimant's

⁸⁸ R.Prov.M.-I para. 48 – 52; R.Prov.M.-II para. 43, 45 – 46.

request for provisional measures is evidently driven by the concern that the acquisition of the alleged investment may be deemed illegal.⁸⁹

96. There is no question of this Tribunal deciding the MINEM Lawsuit, as a counterclaim or otherwise. Respondent has never sought to include the MINEM claims as counterclaims. But, if the Tribunal orders the suspension of the MINEM Lawsuit, it will fall entirely on the Tribunal to decide the legality of Claimant's proxy acquisition of the Santa Ana concessions. This determination will be important for the assessment of the Tribunal's jurisdiction.⁹⁰

B. THE CLAIMANT'S POSITION

97. Peru has sought to dissuade the Tribunal from issuing interim measures by insisting that, if it were to order such measures, the Tribunal should pledge to hear arguments on and decide for itself the key issues of Peruvian law that are presented in the MINEM Lawsuit. The Tribunal certainly need not do that. First, the Tribunal does not need to rule on Peru's allegations in the MINEM Lawsuit in order to determine whether Claimant's investments in Santa Ana are protected under the FTA. In the MINEM Lawsuit, Respondent attacks the validity and registration of the 2004 Option Agreements in 2004 and 2005. This Tribunal, however, is tasked with deciding whether Respondent's 2011 Supreme Decree 032 revoking Claimant's authorization to exploit the Santa Ana concessions breached the FTA and international law. The Tribunal can decide this issue without making a determination as to whether the 2004 Option Agreements were valid and properly registered under Peruvian law. While Peru can raise similar factual arguments before the Tribunal and the Peruvian civil court, it is improper to suggest that the Tribunal must decide MINEM's civil claims.⁹¹
98. Furthermore, by requiring that the Tribunal pledge to decide the claims in the MINEM Lawsuit, Peru also seeks to limit Claimant's right to have the Tribunal determine whether the MINEM Lawsuit constitutes a governmental measure taken in breach of the FTA. The Tribunal, in pledging to decide MINEM's claim, would in effect become a party to and judge of the measure, the legality of which is at issue in this arbitration.⁹² The MINEM claims, in any event, are outside the scope of the Tribunal's jurisdiction. Under the FTA, Claimant and Peru only consented to arbitrate claims relating to whether the Government's measures violate the Treaty

⁸⁹ R.Prov.M.-II para. 47 – 48.

⁹⁰ R.Prov.M.-I para. 50; R.Prov.M.-II para. 44 – 45.

⁹¹ C.Prov.M.-II para. 40 – 41.

⁹² C.Prov.M.-II para. 42.

and international law. There has been no consent for the Tribunal to decide Peruvian civil law claims. If the Tribunal were to hear MINEM's civil claims, Respondent would need to raise these as counterclaims. These would, however, be improper, given that that the Parties have not consented to the arbitration of domestic civil claims.⁹³

C. THE TRIBUNAL

99. Since the Tribunal, in the earlier sections of this Order above, has concluded that the request for provisional measures is to be denied, there is no need to decide on this alternative relief sought by the Respondent.

X. COSTS

100. In their submissions related to the provisional measures, the Parties presented no arguments regarding who would bear the costs of this portion of the procedure. Likewise, the Tribunal sees no need to deal with the cost issue at this time. However, the Parties may submit comments regarding the costs caused by this procedure on provisional measures at a later stage of the present procedure, before the Tribunal decides on the costs of arbitration.

XI. DISPOSITIF

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

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

⁹³ C.Prov.M.-II para. 42.

On behalf of the Tribunal

[signed]

Karl-Heinz Böckstiegel
President of Tribunal
Date: April 19, 2015