

ANNEX

BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES

Bear Creek Mining Corporation

(Claimant)

v

Republic of Peru

(Respondent)

ISCID Case No. ARB/14/21

AMICUS CURIAE BRIEF SUBMITTED BY THE ASSOCIATION OF HUMAN RIGHTS  
AND THE ENVIRONMENT - PUNO AND MR CARLOS LOPEZ PHD  
(NON-DISPUTING PARTIES)

CONTENTS

Introduction.....	1
I. The granting of ownership of mining rights and the relations with peasant communities.....	3
II. Declaration of public need of the Santa Ana mining project and its implementation....	4
III. Presentation of the Environmental Impact Assessment.....	5
IV. Indigenous socio-environmental protest: the “Aymarazo”.....	8
V. Bear Creek and its failure to obtain social consent in Puno.....	11
V.I. The duty of the company to carry out a process of due diligence and obtain social license .....	12
VI. Conclusion .....	17

Introduction

The peasant communities and general population of Puno have experienced, since the beginning of this century, an increasing presence of mining projects in the territories where they live. During the 2000s, the Peruvian state granted a large number of mining concessions in the territories of Aymara and Quechua (indigenous peoples) peasant communities in the Department of Puno. In 2011, these mining concessions occupied approximately 96,437.23 Km<sup>2</sup> of the territory in Puno, with Puno thus becoming the department with the second largest number of mining licenses at a national level.<sup>1</sup> This increase in the presence of mining in the department and region of Puno has led to an important movement of rejection

by the population in Puno, which fears the negative impact of mining activities on the environment, the waters, land and livestock, which are their main means of sustenance. The case of the Santa Ana project and the Bear Creek company is a clear example of how the population's rejection and general concern regarding the negative impacts of mining, together with Bear Creek's poor management of the project and its relations with the communities, were the direct causes of the social conflict that took place in the south of the department of Puno in 2011 and led to the events which are the matter of the arbitration proceedings between Bear Creek and the Peruvian state.

The *Amici*, on the basis of their own observations and experience of the events as well as their expertise in human rights issues, community relations and corporate social responsibility, state that Bear Creek did not manage the Santa Ana project and its relations with local communities (most of which are peasant and indigenous), in accordance with prevailing international standards at the time. This misconduct contributed substantially to the events, the subsequent legislative measures that brought the Santa Ana project to an end, and the damage that Bear Creek itself may have suffered (and which it alleges in the present arbitration).

*Amici* present in a detailed manner the background, the development of the events related to the processes of information and citizen participation that Bear Creek carried out, and social conflict in March 2011. *Amici* also develops the international standards in human rights issues and corporate social responsibility: the right of indigenous peoples to free and informed prior consultation, the responsibility of the company to respect human rights and conduct itself with due diligence with the aim of obtaining local consent and social license to operate. *Amici* maintain that the social protest was directly related to the opposition to the Santa Ana project and that Bear Creek erred in its strategy of relations with the communities as a result of which, instead of achieving consent and participation, it produced opposition and confrontation among the communities themselves.

The *Amici* present information on the events from the point of view of the Aymara Peasant Communities (indigenous peoples) as they consider it important that the Arbitral Tribunal should be aware of the perspective of those involved in the social movement regarding the Santa Ana project. The *Amici* present the concerns of the population with regard to the social, cultural and environmental impact that would occur if the Santa Ana mining project were developed, and explain why the social protest known as "aymarazo" took place in March 2011 in the department of Puno.

The districts of Huacullani and Kelluyo in the province of Chucuito, in the southernmost part of the department of Puno, are the two districts most affected by the Santa Ana project. In the district of Huacullani, 80.5 percent of the population is rural and 89.2 percent of the population live in poverty. In the district of Kelluyo, 82 percent of the population is rural and 79.4 percent live in poverty.<sup>2</sup> Approximately 80 percent of the population are native Aymara speakers, and although a similar percentage state that they speak Spanish, they are not fluent in Spanish, especially with regard to professional or technical terms.

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<sup>1</sup> See, Quiñones, Patricia, "Concesiones, participación y conflicto en Puno. El caso del proyecto minero Santa Ana", in: Los límites de la expansión minera en el Perú, Servicio de Educación Rural- SER, 2013, p. 32-33

<sup>2</sup> Quiñones, *ibid.* p. 25-26

The province of Chucuito has seen a radical increase in the number of mining concessions in the space of a decade: from no concessions up to 2000 to 59 in 2011, the year in which the event in dispute occurred. Thus, a province and population that were not familiar with mining activities in their territory and did not have much information regarding the processes involved in mining, became the centre of unprecedented interest in mining exploration. The population's unawareness, the lack of information and transparency on the procedures and the newness of the whole business set the context for increasing distrust and rejection of mining activities.

The Santa Ana project was the first mining project to be developed in the south of the department, in the province of Chucuito. However, the concept, authorization, development and methods have never been fully understood by the local population. Although it appears that the project started in 2002, it was only in 2004 that some of the authorities of the district of Huacullani began to be aware that there were plans to develop mining projects in their territories. In 2008, most of the population in the south of the department of Puno (which includes the provinces of Chucuito, El Collao, Yunguyo and Puno) knew about this, a fact that provoked widespread rejection of mining projects, and especially of the Santa Ana project.

The general rejection of extractive mining activities led to social protest in the Aymara peasant communities during 2011, with one of the central demands being the repeal of Supreme Decree No. 083 – 2007 – EM that declared the Santa Ana mining project was a national priority. Later, the government issued Supreme Decree No. 032 – 2011 – EM, on June 24, 2011, which repealed the first decree.

#### I. The granting of ownership of mining rights and the relations with peasant communities

Historically the peasant communities in the south of the department of Puno<sup>3</sup> are made up of people that ethnically and culturally belong to the Aymara group. The principal economic activity of these communities are agriculture, small-scale fishing and livestock farming. Although there have not been mining activities in this area and the population is not familiar with these types of activities, they know about the impacts this activity has had in the territory of the communities in other parts of the department of Puno and the country.

During 2004, the Aymara communities of Huacullani heard about the mining project in their territory for the first time. On 18 May 2004, Yenny Karina Villavicencio Gardini<sup>4</sup>, requested and held a meeting with the mayor of the municipality of the district of Huacullani and community authorities<sup>5</sup>. The aim of the meeting was to request support for the annulment or resizing of the “Lupaca Reserve”<sup>6</sup> in which were located the plots of land that were going to be explored with a view to possibly starting mining activities in this territory. The information

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<sup>3</sup> Province of Chucuito, area in which the “Santa Ana” mining project is located, specifically in the district of Huacullani in this province.

<sup>4</sup> The person who first obtained the ownership of the mining concessions “Karina 9A, Karina 1 and Karina 2” was Mrs. Karina Villavicencio Gardini in 2006. She subsequently transferred them to Bear Creek Mining Corporation.

given in this meeting was confusing and misleading. At this meeting, Yenny Karina Villavicencio Gardini introduced herself as the owner of the concession (she stated that she already had the concession titles of Karina 9A, Karina 1 and Karina 2, which would all subsequently form part of the Santa Ana mining project). In fact, she only started the procedures for the concession request on 26 May 2004, and obtained the mining concession titles on 26 April 2006.

That year Bear Creek and Yenny Karina Villavicencio Gardini signed an option contract for the transference of the concession request, which would later be ratified.

*Amici* points out to the Arbitral Tribunal that during the initial procedures for the development of the Santa Ana mining project, the local population did not have full knowledge about the real situation and the implications of the mining concessions that had already been obtained and/or would be obtained or of the final beneficiaries of the ownership of these mining rights (in this case Bear Creek). These facts contributed to the creation of a climate of misinformation and distrust in various groups of the Aymara communities in the area (District of Huacullani).

## II. Declaration of public need of the Santa Ana mining project and its implementation

On 28 November 2007 Supreme Decree 083 – 2007 – EM was issued, declaring that private investment in mining activities in the area was of public need, and authorizing the Peru branch of Bear Creek mining company (Santa Ana mining project, located in the district of Huacullani in the province of Chucuito in the department of Puno) to obtain mining rights within 50 kilometres of the border area.

As has been mentioned above, the owner of the concession rights (Yenny Villavicencio) had already entered into a contractual obligation with Bear Creek, to transfer the ownership of the mining concessions that are part of Santa Ana mining project. However, it was necessary that the resizing of the Aymara Lupaca Reserve Area should be achieved and that Bear Creek should obtain the declaration of Public Need of the project in order for them to develop it directly.

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<sup>5</sup> This is recorded in the minutes of the “Agreement of political and communal authorities and general population of the district of Huacullani”, dated 18 May 2004.

<sup>6</sup> The Aymara Lupaca Reserve Area was established through Supreme Decree No. 002-96-AG, and resized by Supreme Decree No. 003-2006-AG, covering an area of two hundred and fifty eight thousand and four hundred fifty-two hectares with three thousand seven hundred square metres (258 452,37 ha.), located in the districts of Santa Rosa, Pisacoma, Huacullani and Capaso in the provinces of El Collao and Chucuito, department of Puno, with the general objective of preserving the biological diversity of the area through the sustainable use of the resources of wild flora and fauna, contributing to the socioeconomic development of the populations which inhabit it.

<sup>7</sup> On 28 April 2006 the mining concession title “KARINA 1” was issued through Management Ruling No. 1856 – 2006 – INACC/J, Management Ruling No. 1854 – 2006 – INACC/J which granted the mining concession title “KARINA 2” and on 13 June the mining concession title “KARINA 9A” was issued through Management Ruling No. 2459 – 2006 – INACC/J.

Thanks to Supreme Decree No. 083-2007, Yenny Karina Villavicencio Gardini and the Peru branch of Bear Creek Mining Company could enter into a transfer contract, in accordance with the option of transference, which was recorded on 28 February 2008, with the registration of mining rights over the following plots: Karina 9<sup>a</sup>, Karina 1, and Karina 2.

These facts were never explained to the peasant communities and population in the area who only heard through third parties and through the news in the Official Gazette El Peruano that rights had been granted over their lands. This contributed to increase the population's suspicions and fears regarding the real intentions of Bear Creek in the development of this mining project and the lack of transparency in the first procedures and meetings with communal authorities in the area. Few people knew that the interests of Bear Creek lay behind Mrs. Yenny Karina Villavicencio Gardini's initial approach.

Owing to these ever-increasing fears and suspicions, a large number of people from peasant communities in the area held a meeting on 14 October 2008 in the main square of the district of Huacullani. Their aim was to seek dialogue with representatives of Bear Creek in order to express their concerns and uncertainties regarding the Santa Ana mining project. In view of the fact that representatives of Bear Creek did not attend the meeting, those present decided to go to the Santa Ana mining camp. On the way there, and given the lack of dialogue, their frustration and anger grew. This incursion ended with part of the mining camp being burnt and destroyed<sup>8</sup>, leading to the legal investigation of several inhabitants of the area, which was subsequently closed.

These events show that the initial approaches and firsts contacts of Mrs. Villavicencio and Bear Creek with the population and local authorities lacked transparency and information that could be understood by the rural Aymara population. This resulted in an increasing rejection of the Santa Ana mining project by the majority of inhabitants of the district of Huacullani, Kelluyo and others.

### III. Presentation of the Environmental Impact Assessment

As part of the implementation of the Santa Ana mining project, on 23 February 2011 there was an information workshop on the Environmental and Social Impact Assessment of the project, held on the premises of the local government Huacullani (Municipal Theatre).

Several members of the members of the Amicus Asociación por los derechos humanos y el medio ambiente, DHUMA (Association for human rights and the environment) of Puno participated in this event, out of personal and professional interest. On the way to the district of Huacullani, they had a conversation with a Lieutenant Governor of one of the neighbouring communities who was also going to the same meeting. This local authority remarked that "staff from the mining company had made personal invitations to communal authorities in their homes, offering them gifts such as bread and fruit." In Aymara culture, the act of receiving a gift creates a moral obligation of reciprocity, which in this case, consisted in attending the presentation of the Environmental Impact Assessment.

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<sup>8</sup> The facts are specified in the police report and the public prosecutor's investigation in File No. 2009 – 0084 – 0 – 2104 – JM – PE – 01 of the First Mixed Jurisdiction Court of the Province of Chucuito.

The population was very uneasy and worried about the development of the Santa Ana mining project. It was clear that Bear Creek did not have a transparent relationship with the communities and that it had not done enough work with the communities to gain their approval of the presence of the company in the area. Mr. Antunez de Mayolo, representative of Bear Creek, alleges that the hearing was successful and was carried out peacefully, demonstrating that the majority supported the Santa Ana project.<sup>9</sup> *Amici* rejects this affirmation.

During the event, the population sought to clarify their doubts about the mining project, regarding the social, environmental and cultural impacts that would occur if the mining project were to be developed. These doubts were not dispelled.

With regard to the participation of the population, it was noted that many of the members of the communities that gathered in the main square in the district of Huacullani felt that they did not have access to the meeting and could not participate, as the building was too small for the number of people who wanted to attend. This meant that hundreds of people could not go into the premises of the municipal theatre and participate, contrary to what was stated in the Newsletter published by Bear Creek, which indicated that there had been massive attendance<sup>10</sup> or what had been recorded, by the Regional Office of Energy and Mines<sup>11</sup>. We can affirm that less than half the number of people recorded attended this event.

In view of this, many inhabitants protested and suggested that the workshop should be held in the main square in Huacullani, so that all of them could participate. This request was not granted.

Those that attended the hearing had to register at the entrance, and when doing so received as a gift a bag that contained a poncho and a cap with the company logo. The inhabitants were also frightened about the implications of their presence at the meeting as they had had to register their personal details on a list at the entrance and they were afraid that these documents could later be used as proof of their acceptance of and agreement with the Santa Ana mining project. Due to this, a large number of people, many more than those registered at the event, did not take part in the presentation of the Environmental Impact Assessment.

At the start of the hearing, the presenter gave a general outline of the project. The presentation of the Environmental Impact Assessment was in Spanish and using technical language. There was an Aymara translator at the hearing but the translation was very complicated and difficult to follow owing to the number of technical terms involved. It is highly unlikely that all the population understood everything that was being said, taking into account that the population in the area are Aymara speakers and have little school education. The translation was not adequate; it was bad, which meant that the explanations could not be understood due to the technical terms employed. The hearing was recorded and filmed by the workers of the company. Also, the moderator requested that the questions of the participants regarding the project be made in writing and in Spanish, which is not common practice in the Andean world

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<sup>9</sup> See First Witness Statement of Elsiario Antunez de Mayolo, 28 May 2015 (“Primera Declaración de Antunez de Mayolo”), paras. 13-16; Second Statement of Antunez de Mayolo, paras. 24-32.

<sup>10</sup> “Dialogando” –Newsletter of the Santa Ana Project of March 2011. Published by Bear Creek in the daily “Correo”, on 24 April 2011. It states that more than one thousand five hundred people attended.

<sup>11</sup> Public Hearing minutes, subsector of Mining No. 007-2011/MEM-AAM. Public Hearing on the EIA of the “Santa Ana” mining project in which it states that 729 people attended.

where daily communication is oral and in Aymara. This situation limited the participation of the population and made it difficult for them to express their points of view on the Environmental Impact Assessment.

After the presentation, the opportunity was given for people to present their questions, in written and oral form. Several people posed questions. However, there were cases in which certain people were not allowed to speak. The majority of questions were related to the possible contamination that the mining activities would produce and on the benefits the population could receive. There were several professionals of the company to answer these questions but the answers were very technical and the translation into Aymara was very bad.

During the hearing, several people commented that they did not trust what the company was saying and that in fact the project would profoundly affect them in a negative way. There was a deep feeling of dissatisfaction among the majority of those who attended. Although those present who opposed the project were relatively quiet, did not interrupt the hearing or show their anger, it was clear they were against the project.

The area in which the execution of the Santa Ana mining project was planned is part of the territories of Aymara peasant communities (indigenous peoples). These communities have deep cultural and social ties<sup>12</sup> with their natural surroundings, their land and natural resources. The territory is not only a geographical space but represents a spiritual bond for the communities. Owing to this, one of the issues of greatest concern was the risk posed by mining activities for the “guardian mountains”, which represent extremely important spiritual sanctuaries for all the population in the area.

The concerns regarding the change to the natural landscape, the integrity of their territories, the negative effects on their sanctuaries and culture, could not be attended the day of the presentation of the Environmental Impact Assessment due to the limitations involved, as described in the request Mr. Benjamin Choque Cori, president of the Lieutenant Governors of Kelluyo, to the Public Prosecutor for the Environment of Puno on 11 March 2011.<sup>13</sup>

These concerns regarding the earth, water and culture were not limited to the affected communities in the district of Huacullani but were also shared by other communities that form part of the districts of Kelluyo, Pisacoma, Desaguadero, Zepita and others.

With regard to the impact on the environment, the presentation of the Environmental Impact Assessment generated a number of questions, especially related to water. For example, the president of the lieutenant governors of the district of Kelluyo stated the following in a brief: “the environmental impact assessment of the “Santa Ana” mine is not complete and neither is what they state true that it is not going to affect the environment. If we read through what the Santa Ana mining company has presented, it is incomplete regarding the existence of small settlements, as well as the wild fauna, which would be in process of extinction”<sup>14</sup>.

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<sup>12</sup> <http://bdpi.cultura.gob.pe/pueblo/aimara>

<sup>13</sup> Request presented by Mr. Benjamin Choque Cori, addressed to the Provincial Public Prosecutor for Environmental Matters in Puno. It requests visual inspection in the territory affected by the mining concessions “KARINA I and KARINA II”. Dated 11 March 2011.

<sup>14</sup> Brief addressed to the Ministry of Energy and Mines, by the President of Lieutenant Governors of Kelluyo and another, dated 22 March 2011.

The possibility that the mining project be open pit created concern due to the effects it would have on the water. As stated in a document addressed to the President of the Republic: “the Santa Ana mining company in Huacullani, when the exploitation stage starts, will directly affect the rivers of Callacami, the Mal Paso river, the Arenales river and its adjacent rivers, Mauri Grande and Mauri Chico; and consequently the binational Desaguadero river and our sacred lake Titicaca”. It is also pointed out that this project is located at the headwaters<sup>15</sup> and that the negative impacts would reach indigenous communities in Bolivia. Finally, it should be remembered that Tyndall Centre for Climate Change Research in England has stated that Peru is the third most vulnerable country in the world to the climate crisis due to its location on the planet. Water is a central issue in this environmental problem. In 40 years’ time Peru will only have 60 percent of the water it currently has.<sup>16</sup>

The plan to employ underground waters to develop the mining project also generated concern as this would affect the level of both underground and surface waters and springs and in consequence the flora and fauna and biodiversity of the area.

All this would place the subsistence of the peasant communities in the area at risk owing to the fact that the Aymara population is poor, and their main economic activities involve agriculture and livestock farming and their lives depend on water resources. Any contamination would seriously affect their subsistence. Even if the risk of contamination were small, it is perceived as a very grave danger to their way of life. The Aymara have deep respect for mother earth (pachamama) and it is their responsibility to protect her.

At the end of this event, the people who could not go into the building carried out a peaceful protest in the area surrounding the main square, denouncing the restrictions to their participation and rejecting the activity. While the hearing was in process, many people stayed outside protesting against the project. These people expressed their concern regarding the presence of mining activities in the area. Members of the communities were very worried that their lands had been given over to be destroyed, without them having been consulted. It is estimated that there were between 400 and 500 people in the square protesting against the project, worried about the possible contamination of their lands and water.

As a result of this hearing, a number of communities decided to start a protest movement against mining in general, and particularly against the Santa Ana mining project. The community members wanted their lands to be respected, that they should not be handed over to unknown companies and that their subsistence resources should not be contaminated. This led to the start of protests, which regrettably resulted in a deep social crisis in the region of Puno.

#### IV. Indigenous socio-environmental protest: the “Aymarazo”.

The protest movement started at the beginning of March. The Aymara population demanded the repeal of Supreme Decree 083-2007 which had approved the Santa Ana mining project, the application and respect for the right of prior consultation, the suspension of all mining concessions in the southern area of Puno and especially of those that directly

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<sup>15</sup> Brief No. 0001-2011-CO-FDRN-RSP, addressed to the President of the Republic, Dr. Alan García Pérez. Dated 2011.

<sup>16</sup> Servindi 16 January 2014.



affected Apu Khapia. The protests were noisy in order to capture the attention of the authorities and they decided to carry out blockades in Desaguadero, and later decided to march to the city of Puno. It is a mistake to maintain that the protests had nothing to do with the Santa Ana project because they did not occur in the districts where the project was located, but in other towns. The protests were directly related to the project and took place in the city of Puno, capital of the region, because the protesters sought to be heard and capture attention in order to be attended by the authorities.

In response to the concerns generated by the presentation of the environmental impact assessment and due to the fact that the population's calls went unheard, several meetings were convened in communities such as Yoroco, in the districts of Desaguadero, Juli and others and demonstrations were organized that paralyzed all the southern area of Puno. The demonstrations were mainly concentrated in the town of Desaguadero in the south of the department and in the city of Puno itself. The aim was to capture the authorities' attention. Desaguadero is the most important border town with Bolivia and Puno is the capital of the department. With both cities blockaded, business and everyday life were disrupted for over a month and the region's stability deteriorated. The protesters marched shouting "Water yes, Mining no".

The president of amicus DHUMA- Puno, formed part of a coordinating committee in a coalition (Coordinating Committee of the "Collective for Dignity and Social Peace") that tried to promote peace and non-violence on both sides of the conflict. The committee confirmed that the large majority of protests were peaceful, but it was feared that they might become violent or that agents provocateurs might generate violence. Thousands of people from all the communities invaded the city and it was feared that there might be confrontations with the communities. Fortunately, the demonstrations were carried out peacefully. However, as time passed, the demonstrators became more frustrated and angrier and the shortage of water and food affected the whole city. The Aymara would not be satisfied until they had been assured that their lands would be protected from mining and the Santa Ana project would be cancelled.

In the end, the government announced a regulation to protect Khapia hill and the suspension of the approval of new mining concessions. The protestors celebrated their victory but were not completely satisfied. They suspended the demonstrations for the national elections but these started again to demand that all mining projects, including Santa Ana, be cancelled.

*Amici* emphasizes that the Aymara population had carried out all possible actions including administrative procedures such as memorials, demands, draft laws<sup>17</sup>, project profiles and others, through the regional government of Puno and the central government. These actions were unsuccessful and the population therefore decided to begin protest actions. Their statement of demands listed the following points<sup>18</sup>:

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<sup>17</sup> On 26 May 2011 the draft law to repeal Supreme Decree 083 – 2007 – EM, was presented by more than 20 members of congress, including congress member Yonhy Lescano Ancieta. This draft law was not passed.

<sup>18</sup> These points on the statement of demands were based on the infringement of the right to "Prior Consultation" and the enforceability of ILO Convention No. 169. As an international human rights treaty, Convention No. 169 is binding upon Peru since 1995. The Peruvian Constitutional Court has repeatedly stated that ILO Convention No. 169 is valid as stated in Judgment 00025 – 2009 – PI, on its legal basis 23: "The

1. The suspension of mining concessions granted in the south of the department of Puno, in the provinces of Chucuito, el Collao, Yunguyo and Puno.
2. The annulment of Supreme Decree No. 083 – 2007 – EM, which declared the Santa Ana mining project to be a national necessity.
3. The annulment of the mining concessions granted over “Khapia”<sup>19</sup> hill.

There were protests at different times and in different places, the most important ones being:

1. On 6 April 2011, people from the province of Chucuito-Juli (Huacullani, Kelluyo, Desaguadero, Zepita, Pisacoma, and Pomata) went to the city of Juli for a meeting with the Regional President, Mauricio Rodríguez. However, the regional authority did not attend the meeting. A 48-hour strike against the regional government was announced for 25 and 26 April.
2. The first strike against mining concessions began on 25 and 26 April 2011. Entry to the district of Desaguadero was completely blocked by the population who hoped to establish dialogue with the regional government authorities.
3. On 7 May the regional government of Puno declared that the region of Puno was an area free from mining concession, through Regional Ordinance No. 005– 2011.
4. On 8 May 2011 Bear Creek announced that it was withdrawing its Santa Ana mining project, through a public press statement in La República newspaper<sup>20</sup>.
5. On 20 May, a meeting had been planned between the multisectorial commission of the executive power and delegations from the communities. This meeting was cancelled because members of the executive alleged that conditions were not appropriate for holding this meeting.
6. With these measures, and without having been listened to, on 23 May 2011, approximately 15,000 Aymara people arrived in the city of Puno on a “Sacrifice March”, coming not only from the district of Huacullani, but from all the districts of the provinces of Chucuito, el Collao, Yunguyo and Puno. The protests were against mining in general but as the Santa Ana project was the only one to start the exploitation process in the south of the department of Puno, from the beginning the protests focused on the cancellation of the Santa Ana project. The communities did not want mining.

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enforceability of the Right to Consultation is linked with the coming into force in our legal system of ILO Convention No. 169. This Convention was adopted through Legislative Resolution No. 26253, ratified on 17 January 1994 and communicated to the ILO through the deposit of ratifications 2 February 1994. And in agreement with what is established Article 38. 3 of the Convention, it came into force twelve months after the date on which its ratification has been registered. That is, as from 2 February 1995, ILO Convention No. 169 is binding on our country’.

The mining concessions that affect the indigenous peoples, who were not consulted and that were granted after the entry into force of ILO Convention 169 would be invalid.

<sup>19</sup> Very important spiritual sanctuary for different peasant communities (indigenous peoples) in Peru and Bolivia and main source of water.

<sup>20</sup> Published in La República newspaper on 8 May 2011.

7. Finally, as a result of all these demands and protests, during the approximately 45 days of protest, Supreme Decree No. 032 – 2011 – EM was issued on 24 June 2011, repealing Supreme Decree No. 083 – 2007 – EM which had declared the Santa Ana mining project to be of national interest. The social protests came to an end with this new supreme decree.

Several leaders of the protests that occurred in 2011 have had legal problems. Currently (2016) 18 leaders that participated in the protests are under criminal investigation. The public prosecutor's accusation alleges crimes of: A) obstructing the functioning of Public Services, B) disturbance and C) aggravated extortion. The prosecutor is calling for the maximum punishment of 28 years' imprisonment and 7 million soles solidarity reparation.<sup>21</sup>

#### V. Bear Creek and its failure to obtain social consent in Puno

*Amici* maintains, and respectfully requests the Arbitral Tribunal to take into account that Bear Creek not only did not obtain the approval of the population for its current and future operations, but also contributed through its own actions to create distrust, misinformation and conflict in the communities, which in the end went against the company's interests. This also contributed to the emergence of social conflict ("aymarazo") which occurred in 2011 in Puno.

Social responsibility norms for businesses regarding human rights issues and respect for the environment have developed substantially in recent years, especially since 2008. At present, the assessment of a company's conduct – whatever type or size – cannot ignore the company's performance in relation to universal human rights and environmental standards.

The Free Trade Agreement between Peru and Canada<sup>22</sup> refers to these international standards with regard to social corporate responsibility. The importance of the application of these standards on the part of companies is emphasized in Chapter 8, Article 810 of the Agreement.<sup>23</sup>

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<sup>21</sup> The case is in process at the Second Preparatory Investigation Court, File N° 682 – 2011. On page 13 of the prosecutor's accusation of prosecutor Juan Bautista Monzón Mamani, in the section on precedents, reference is made to: 1. "on 29 November 2007, through supreme decree No. 083 – 2007 – EM, the Presidency of the Republic, in light of the mining request named Santa Ana Mining Project, requested by the international company Bear Creek Mining Company Peru, declared the investment to be of public need (...)". 3. "situation that produced an immediate response on the part of the population of the areas surrounding the lands included in the mining concession (Kelluyo, Pizacoma, and part of Huacullani), who in protest (...) held constant meetings of the population with the lieutenant governors, leaders, local authorities and population in general (...)".

<sup>22</sup> Free Trade Agreement between Canada and the Republic of Peru, signed on 29 May 2008 and ratified through Supreme Decree No. 044-2009-RE, published in El Peruano Official Gazette on 31 July 2009. It was executed through Supreme Decree No. 013-2009-MINCETUR, published in El Peruano Official Gazette on 1 August 2009. Date of entry into force: 1 August 2009.

<sup>23</sup> "Article 810: Corporate Social Responsibility

Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These

## V.I. The duty of the company to carry out a process of due diligence and obtain social license

According to international standards that prevailed at the time of the events, that is to say, between 2008 and 2011, there already existed a universal norm adopted by the international community that the company did not respect. These international standards stipulate that it is the responsibility of the company to respect all human rights, and as part of that responsibility, it has the obligation to carry out a process of human rights due diligence in a permanent and dynamic way with the aim of obtaining the consent of the local population to its operations and thus ensure its own sustainability.

In June 2008, the Human Rights Council, the principal inter-governmental body within the United Nations system on issues of human rights, unanimously adopted<sup>24</sup> the conceptual framework “Protect, Respect and Remedy”, drawn up by the Special Representative of the Secretary-General, Prof. John Ruggie.<sup>25</sup> This report and the resolution adopted by the Council, establishes that “States have the duty to protect all human rights from abuses by, or involving, transnational corporations and other business enterprises, the corporate responsibility to respect all human rights, and the need for access to effective remedies”. Subsequently, in 2011, the Human Rights Council unanimously endorsed the "Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, drawn up by the Special Representative of the General-Secretary on issues of human rights and transnational corporations and other business enterprises.<sup>26</sup> These Guiding Principles develop the fundamental principles that are already contained within the Framework of Principles adopted in 2008.

In his 2008 report, the Special Representative of the Secretary-General (SRSG) indicates that the corporate responsibility to respect all human rights is a core responsibility, additional to its duty to respect national laws and also independent of the obligations of the States. The scope of “corporate responsibility to respect” human rights is defined by

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principles address issues such as labour, the environment, human rights, community relations, and anti-corruption. The Parties remind those enterprises of the importance of incorporating such social corporate responsibility standards in their internal policies.”

<sup>24</sup> Resolution 8/7, Human Rights Council, 18 June 2008

<sup>25</sup> Protect Respect and Remedy: a Framework for Business and Human Rights on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/8/5, 7 April 2008

<sup>26</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31. The Human Rights Council adopted the Guiding Principles in its resolution 17/4, of 16 June 2011

social expectations “as part of what is sometimes called a company’s social license to operate”.<sup>27</sup>

To demonstrate their respect for human rights, companies should carry out a process of due diligence. This concept “describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.”<sup>28</sup>

The large organizations which represented international business welcomed the Framework proposed by SRSG and requested the Human Rights Council to endorse it. With regard to corporate responsibility to respect human rights, the business community indicated that it agreed to this and remarked that businesses should comply with international principles even in the absence of national legislation on the issue.<sup>29</sup>

The International Council of Mining and Metals also welcomed the 2008 Ruggie Report.<sup>30</sup> It can thus be said that organizations that represent the business world and the mining industry, which includes the parent company or other investors in Bear Creek Peru, have accepted and supported the standards of conduct that commits them to respect human rights and carry out a process of due diligence on human rights issues to prevent their infringement and mitigate or remedy possible damages that could be produced.

The Guiding Principles on business and human rights, under the title “Human Rights due diligence” defines the parameters of this process, which owing to its importance, is quoted below:

“17. In order to identify, prevent, mitigate and account for how they address their adverse human right impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

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<sup>27</sup> Framework, Note 23, paragraph 55

<sup>28</sup> Ibid. paragraph 56

<sup>29</sup> “The IOE, ICC and BIAC have been unequivocal in saying that all companies must comply with the law, even if it is not enforced, and that they should respect the principles of relevant international instruments where national law is absent. We also welcome the call to carry out due diligence in relation to human rights as a useful and practical part of the framework.” International Organization of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, “Joint initial views of the International Organization of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights”, May 2008, available on: <http://business-humanrights.org/sites/default/files/reports-and-materials/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf>

<sup>30</sup> ICMM welcomes Ruggie report, <http://www.icmm.com/page/8331/icmm-welcomes-ruggie-report> (accessed 6 June 2016)

- a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.”

In due diligence in human rights issues the risks to be assessed are not risks for the business enterprise, as in a normal process of due diligence, but the risks that the business enterprise's entail for the human rights of the populations where the enterprise operates or plans to operate. The commentary that follows Principle 17 indicate that this process can be included within broader enterprise risk-management systems, provided that “it goes beyond simply identifying and managing material risks to the company itself, to include risks to right-holders.” Likewise, human rights due diligence should be initiated as early as possible in the development of a new activity or relationship “given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.”

Guiding Principles 18 to 21 define the components of the process of due diligence: these include the identification of risks or negative impacts of its operations and remedy or repair for these negative impacts, and also include incorporating the information into the business enterprise's plan and operations and its external communications in the form of reports or others. It must be emphasized that the process of identification or assessment of any real or potential adverse human rights impacts must include “meaningful consultation with potentially affected groups and other relevant stakeholders” (Principle 18) and that the business enterprises must take into account the national, local and social context where they are operating. These include ethnic tensions and the scarcity of critical resources like water and so on.<sup>31</sup>

From the above, *Amici* deduce that Bear Creek knew or should have known about the international standards officially adopted in 2008 through the implementation of the Protect, Respect and Remedy framework and that it ignored them or failed to put them into practice. These international standards already existed before that date as the United Nations Global Compact refers to corporate responsibility to respect human rights. The Guiding Principles develop the fundamental principles already recognized in the 2008 Framework and it cannot

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<sup>31</sup> Business enterprises and human rights: towards the operationalization of the Protect, Respect and Remedy Framework of the Report of the Special Representative of the General-Secretary on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Doc UN A/HRC/11/13, 22 April 2009, paragraph 49

be said that these principles were in force only since 2011, the year in which the Guiding Principles were adopted.<sup>32</sup>

In addition to this, Canada and Peru, which form part of the United Nations and have approved both the 2008 framework as well as the Guiding Principles, should have demanded that Bear Creek respect and implement them in order to prevent the risks and negative impacts on human rights in the region of Puno. In the opinion of *Amici*, these omissions led to the grave events that are already known about.

Secondly, the events indicate that there was a risk of affectation to the rights of the local population and the peasant communities of indigenous origin that live in the area, and that Bear Creek did not detect this, or if it did, did nothing to prevent it. This resulted in a series of negative consequences for everybody involved. The responsibility to respect human rights encompasses the full range of existing human rights. An important part of these rights concern the rights of indigenous peoples, which have been recognized in Convention 169 of the International Labour Organization and in the United Nations Declaration on the Rights of Indigenous Peoples. The latter recognizes that “Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.” (Art. 12). Likewise, the Declaration recognizes that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”, “to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.” (Art. 26)<sup>33</sup>

Bear Creek ignored these rights and did not take steps to respect them or prevent the potential infringement of these rights. As has already been stated, the rural populations, the large majority of which are of Aymara origin, had doubts and fears regarding the possible damaging effects of mining on their land, water, livestock and sacred sites. The lack of information and transparency on the part of the company and the Peruvian state meant that these fears turned into mistrust and rejection, which at times became violent.

The population’s opposition to mining projects was real and sincere, and the protests that occurred in the first half of 2011 were not simply orchestrated by Mr. Walter Aduviri for his own political benefit or out of political ambition.<sup>34</sup> Mr. Aduviri simply acted as spokesman for a deep dissatisfaction and concern that already existed in the population due to information regarding other mining projects and the lack of information and transparency with regard to the Santa Ana project. The communities were very worried about the possible contamination of their lands and water, which is scarce in the region, and the impact on their sacred sites (such as the Apu Khapia and Lake Titicaca). When the communities found out

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<sup>32</sup> Prof Ruggie, author of the Guiding Principles, points out that “the Guiding Principles do not include any other principles that have not already been included in the 2008 Protect, Respect and Remedy Framework”. Remarks at OECD Investment Committee Prof John Ruggie, Paris, 4 October 2010

<sup>33</sup> Declaration of the United Nations on the Rights of Indigenous Peoples, [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf)

<sup>34</sup> Reply of the claimant, paragraph 112.

that concession rights had been granted on what they considered to be their lands, for possible mining projects that would contaminate the region, without prior consultation with the owners and the communities, there was much frustration and anger.

The concept of “social license” is closely related to the responsibilities of business enterprises to respect human rights and the due diligence in human rights issues. A renowned expert on the matter defines social license as “the sum of expectations between an organisation and relevant social groups (usually represented by other organisations) in relation to a specific activity or set of activities.”<sup>35</sup> In order for social license to exist the following preconditions must be met:

- “All the organizations – those involved in both the activity and representing the social groups affected – perceive both each other and the activity itself to be of sufficient legitimate interest to proceed,
- There is sufficient trust between all the relevant organizations,
- The organizations representing affected social groups have consented to the activity.”<sup>36</sup>

The above highlights three key elements for our analysis: legitimacy, trust and consent. It is clear that none of these three elements of social license existed nor exist with regard to the Santa Ana project.

Bear Creek did not make the necessary efforts, in accordance with international standards, to understand the population’s culture, religion, social organization and aspirations. On the contrary, it behaved as if only the legal state license mattered, and all the relations with the communities were no more than a simple formality they had to comply with to obtain permission for exploitation. The population’s concerns may or may not have had a scientific basis or been based on technical information on the type of exploitation, the methods employed and the probable effects on the environment. In fact, that is not very important. What is important is that there were doubts, worries and anxieties and Bear Creek did not do what was necessary to understand and address them. It often did the opposite, deepening the mistrust, frustration and rejection to its presence in the area.

The elements and analyses developed above are relevant for the interpretation and application of Article 810 of the Free Trade Agreement between Canada and Peru, and the standards of fair and equitable treatment (Article 805) and of protection against expropriation and nationalization (Article 812.1).

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<sup>35</sup> Morrison, John *The social License: How to Keep your Organization Legitimate*. Palgrave Macmillan, 2014, p. 19

<sup>36</sup> *Ibid.*



## VI. Conclusion

*Amici* respectfully puts forward to the Arbitral Tribunal the following conclusions, based on the analysis presented above.

1. With regard to the Santa Ana project, Bear Creek did not do what was necessary to understand the doubts, worries and anxieties and the Aymara culture and religiosity, and did not do the necessary to identify and assess the risks that their own operations could entail for the population and their rights over their lands and water. The company acted as if it were sufficient to promise benefits to some of the people and communities in the areas surrounding the project, to hold public meetings announcing their plans without needing to work closely with the communities, listening to their doubts and comments, explaining that the risks were minimal (if they truly were minimal), or that there would be benefits (if there really were). The actions that Bear Creek failed to carry out do not involve a simple strategy of community relations but correspond to international standards that Bear Creek should have known about and complied with but did not.
  2. Based on their own sources, conversations with the population itself and databases, the *Amici* can affirm that the communities, particularly those not directly affected by the project, in the districts of Huacullani, Kelluyo, Zepita, Desaguadero, Pisacoma and others, believed that Bear Creek was not being transparent and sincere with them, and that it was doing everything possible to carry out its project without regard to the concerns or opinions of the population. In those circumstances the communities felt compelled to fight to preserve their territories, their land (the Pachamama) and their sources of water, all of them necessary for their lives. If Bear Creek had approached the situation differently, perhaps the situation would also have been different.
  3. In view of all the above, Bear Creek did not obtain the social license to develop its project at the time and at present still does not have it. In this case, there is no legitimacy, trust or consent of the parties. The conflict started due to a lack of transparency and misinformation on the part of Bear Creek (or Mrs. Villavicencio), a lack of respect for the peasant communities and respect for the rights of indigenous peoples. The population's frustration and anger only abated when the Santa Ana project was cancelled.
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