INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

BEAR CREEK MINING CORPORATION

Claimant

and

REPUBLIC OF PERU

Respondent

(ICSID Case No. ARB/14/21)

PARTIAL DISSENTING OPINION
PROFESSOR PHILIPPE SANDS QC

1. In certain respects this might be described as a straightforward case. An investor – the Claimant, Bear Creek Mining Corporation – decided that it wished to mine silver ore deposits located in an area of Peru known as Santa Ana in the Puno department. In accordance with Article 71 of the Peruvian Constitution, this location, which is within 50 kilometres of the border between Peru and Bolivia, meant that the Claimant was obliged to obtain – along with a multitude of other permitting requirements – a "public necessity" Decree granted to it by the Peruvian Council of Ministers. In November 2007, the Council of Ministers proceeded to adopt Supreme Decree 083-2007, declaring the Santa Ana Project to be a public necessity. This authorised the Claimant to acquire seven mining rights in the Santa Ana area of Puno. Three years and six

months later, in June 2011, the Council of Ministers adopted Supreme Decree 032-2011-EM. This revoked Supreme Decree 083-2007 and the finding of "public necessity", ending the Claimant's right to operate its Santa Ana concessions. In between those two dates – November 2007 and June 2011 – there were protests and considerable social unrest in the Puno department. As set out below, I am clear that the protests and unrests were caused in part by the Santa Ana Project.

2. I am very largely in agreement with the conclusions of the Tribunal, to the effect that, within the meaning of the Free Trade Agreement between Canada and Peru (FTA): the Claimant made an investment; the Tribunal has jurisdiction over the claim; and there is no bar to the exercise by the Tribunal of such jurisdiction (admissibility). I also agree with the conclusion that the effect of Supreme Decree 032-2011 was to expropriate by indirect means the right of the Claimant to operate the Santa Ana concessions, and that this occurred in violation of Article 812 of the FTA. In my view, the circumstances which the Peruvian government faced – massive and growing social unrest caused in part by the Santa Ana Project – left it with no option but to act in some way to protect the well-being of its citizens; however, other and less draconian options were available to the Council of Ministers, including the suspension of Decree 083-2007, rather than revocation. There is no evidence before the Tribunal that these other options were explored or assessed, properly or even at all. The circumstances in which Supreme Decree 032-2011 was adopted – in particular the failure to give the Claimant a right to be heard before its adoption – also gave rise, in my view, to a violation of Article 805, being a violation of the obligation to offer "fair and equitable treatment". I understand, however, the Tribunal's conclusion that "*the Parties have not presented arguments related to the legal consequences of such a finding, and such a finding indeed would not change or add to those that follow from an unlawful indirect expropriation*".[1]

3. I also agree with the Majority that the consequence of the violation of Article 812 of the FTA entitles the Claimant to be awarded a measure of compensation, and with the general approach taken to the assessment of that compensation. In particular, I fully concur – given the Project's speculative and unlikely prospects in face of serious social unrest, the manifest failure to obtain

[1] Award, para. 533.

a "social license", and the many environmental and other regulatory authorisations yet to be obtained – with the conclusion set out in the Award that "*the calculation of Claimant's damages in the present case cannot be carried out by reference to the potential expected profitability of the Santa Ana Project and the DCF method*".[2] In the circumstances, the proper measure of damages is to be assessed by reference to the Claimant's actual investment in the Project after November 27, 2007.[3]

4. I disagree, however, with the Majority's assessment of the amount of damages that are due, in application of this approach, and in particular the failure to reduce that amount by reason of the fault of the Claimant in contributing to the unrest.[4] Whilst I agree that it is for the Respondent to establish any contributory fault, my assessment of the evidence before the Tribunal is that the Respondent has clearly established the Claimant's contributory responsibility, by reason of its acts and omissions, to the social unrest that left the Peruvian government in the predicament it faced, and the need to do something reasonable and lawful to protect public well-being. I set out my reasons in this Partial Dissent.

5. A central issue in the facts argued before the Tribunal concerned the circumstances of the collapse of the Santa Ana Project – a matter of fact – and the legal standard to be applied – a matter of law. As to the latter, as noted by the Tribunal, the *Abengoa* award offers the legal standard to be applied. On this approach, the Tribunal is called on to assess whether "*events that led to the loss of the Claimants' investment would not have occurred*" if "*a social communication program had been timely implemented*".[5] I am not persuaded by the conclusion reached at paragraph 411 of the Award in this case. On the basis of the evidence before us I have difficulty in understanding how it could be concluded, as the Majority does, that there was no connection – or partially causal relationship – between the manner in which the Claimant conducted itself and the circumstances that gave rise, firstly, to the disruption of the Santa Ana Project, and then to its premature demise as a consequence of Supreme Decree 032- 2011.

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[2] Award, para. 604.
[3] Claimant invested a total of US$ 21,827,687. However, as part of this investment occurred before Claimant legally obtained the concessions on 27 November 2007, when Supreme Decree 083 was issued. The final amount thus invested by Claimant equals US$ 18,237,592. See Award, paras. 658 ff.
[4] Award, para. 668.
[5] Award, para. 410 citing ICSID Case No. ARB(AF)/09/2, *Abengoa S.A. y Cofides S.A. v. United Mexican States*, Award (18 April 2013).

6. In reaching a contrary view to my colleagues, I rely on the totality of the evidence that was put before us by the Parties, and in particular the extensive testimony of numerous witnesses and experts. For the reasons set out below, in my view this evidence clearly shows that the Claimant's acts and omissions, in the period before 2008, during 2008, thereafter, and right up until May 2011, contributed in material ways to the events that unfolded and then led to the Project's collapse. In particular, the Project collapsed because of the investor's inability to obtain a "social license", the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it, whether directly or indirectly. It is blindingly obvious that the viability and success of a project such as this, located in the community of the Aymara peoples, a group of interconnected communities, was necessarily dependent on local support. In this regard, the Project can hardly be said to have got off to a good start, with the Claimant making use of a degree of subterfuge, by obtaining permits in the name of one of its own lowly employees – Ms Villavicencio, a Peruvian national – which it, as a foreign corporation, was not at the time authorised or lawfully entitled to obtain. If nothing else, the absence of transparency at that early stage of the Project can only have contributed to an undermining of the conditions necessary to build trust over the longer term. The discontent that followed, expressed by many members of the affected local communities, was foreseeable.

7. In this regard it is helpful that the Parties broadly agree that the investment was made in an area in which the rights of numerous indigenous communities – under national and international law – were fully engaged. Of particular relevance are the rules set forth in ILO Convention 169 (Indigenous and Tribal Peoples Convention), which was applicable to the territory of Peru after it became a Party on February 2nd, 1994. The Preamble to the Convention, which was adopted in 1989, recognizes "*the aspirations of [indigenous and tribal] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live*", and calls attention to "*the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding*". This preambular language offers encouragement to any investor to take into account as fully as possible the aspirations of indigenous and tribal peoples. Establishing conditions of transparency and trust are a vital pre-requisite for the success of a

project, which involves a corporation arriving from a faraway place to pursue an investment in the lands of indigenous and tribal peoples.

8. Article 1 provides that the Convention "*applies to*" certain "*tribal peoples*" and "*peoples ... who are regarded as indigenous*". There can be no doubt that it is applicable to the Aymara peoples in respect of the activities proposed by the Santa Ana Project. No serious argument to the contrary was made.

9. Article 13(1) of the Convention provides that:

> "*In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship*."

Article 15 then provides:

> "*1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.*
>
> *2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities*."

As noted, there is no dispute between the Parties that the Convention is applicable to the indigenous peoples situated in the area of the Santa Ana Project.[6] It is the case, of course, that the obligation to implement the Convention is one that falls on States,[7] by implementing the

[6] See for example, Claimant's Post Hearing Brief I (21 December 2016), para. 1 ff.; Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction (6 October 2015), para. 62 ff.

[7] CEACR Observation on Bolivia 2005/76th Session: "… the obligation to ensure that consultations are held in a manner consistent with the requirements established in the Convention is an obligation to be discharged by governments, not by private individuals or companies."

Convention through national laws. In the case of Peru, ILO Convention 169 was approved and implemented in 1993 through Legislative Resolution No. 26253.

10. Yet the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them. In *Urbaser v Argentina*, the Tribunal noted that human rights relating to dignity and adequate housing and living conditions "*are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights*."[8] The *Urbaser* Tribunal further noted that the BIT being applied in that case "*has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights*",[9] and that Article 42(1) of the ICSID Convention together with the governing law clause of that BIT (Article X(5)) provided that that "*Tribunal shall apply the law of the host State "and such rules of international law as may be applicable*."[10]

11. The same considerations apply in the present case in relation to the requirements of ILO Convention 169, and in particular its Article 15 on consultation requirements. Article 837 of the Canada Peru FTA, on Governing Law, provides that this Tribunal "*shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*". ILO Convention 169 is a rule of international law applicable to the territory of Peru. This Tribunal is entitled to take the Convention into account in determining whether the Claimant carried out its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner, having regard to all relevant legal requirements, including the implementing Peruvian legislation.

12. The relevance and applicability of Convention 169 was accepted by the Respondent.[11] As for the Claimant, its Chief Operation Officer, Mr Elsiario Antunez de Mayolo, testified that the Convention was "*mentioned ... as part of the Environmental Impact Assessment and also with*

[8] ICSID Case No. ARB/07/26, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic,* Award (8 December 2016), para. 1199.
[9] ibid., para. 1200.
[10] ibid., para. 1202.
[11] See for example Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction (6 October 2015), paras. 62, 135.

the consultants." [12] Counsel for the Claimant accepted that the Convention had been "*incorporated into*" domestic law, including the right of the indigenous peoples to consultation under the Convention.[13] Whether by means of the domestic law of Peru or otherwise, the relevance of the Convention has been recognised by both Parties. Yet when I asked Mr Antunez de Mayolo whether he was familiar with what Article 15 of the Convention said, or had ever seen it, he replied: "*no*."[14] This, in my view, indicates that the Claimant had, at best, a semi-detached relationship to the vital rights set forth in this part of the Convention. It was not as fully prepared for the making of an investment in the lands of the communities of indigenous peoples – the peoples concerned by the project it was embarked upon – as it should have been.

13. Article 15 recognises various rights "*of the peoples concerned*". These rights include: (1) to "*participate in the use, management and conservation" of resources "pertaining to their lands*"; (2) to be consulted "*with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands*"; and (3) "*wherever possible [to] participate in the benefits of such activities, and [to] receive fair compensation for any damages which they may sustain as a result of such activities.*" It is noteworthy that the Convention connects the right to be consulted with the right to participate in the benefits. It also to be noted that when Article 15 refers to "*these peoples*" it means all of "*the peoples concerned*", not just some of them.

14. The question therefore arises whether the rights of all "*the peoples concerned*" by the Santa Ana Project were given sufficient effect, as required by the Convention and the implementing domestic law. That raises, as a first issue, who "the peoples concerned" were, and as a second step, whether the rights of all these peoples, including in particular the right to be consulted, were given sufficient recognition.

[12] Transcript at 611:16-21.
[13] Transcript at 625:6-20 (Mr Burnett).
[14] Transcript at. 612:3-6.

15. The evidence before us included a map contained in the Claimant's Environmental Impact Assessment (EIA). This showed, within a continuous line marked on the map, the geographic area to be exploited under the Project, and the area directly affected.[15]

[15] Exhibit R-398.

LEYENDA

- CENTRO POBLADO
- PARCIALIDAD
- CURVAS DE NIVEL
- ÁREA DE INFLUENCIA DIRECTA SOCIAL
- CURSOS DE AGUA EXISTENTE
- INSTALACIONES PROPUESTAS
- CANTERA DE MATERIAL DE PRESTAMO
- LÍMITE DE COMUNIDADES 2010
- CAMINO PRINCIPAL
- TROCHA CARROZABLE

DISTANCIAS DEL CENTRO DEL PROYECTO A LOS CENTROS POBLADOS

CENTRO POBLADO	DISTANCIA (Metros)
Vilcanqui	8123.36
Quenturani	7153.11
Challacollo	5874.49
Sancaycollo	3772.79
Huaylloco	4495.84
Ingenio	1687.07
Pojollocco	5274.98
Chacachita	6311.03
Parcialidad Sacacani en la CC Arconuma	3876.52
Parcialidad Taypiña en la CC Arconuma	5616.20
Parcialidad Huaylluma en la CC Arconuma	6633.68
Fundo Alto Aracachi en la CC Alto Aracachi	2683.62
Huacullani	3214.36
Fundo Carcarani	3237.57
Fundo Moroccollo	4100.11
Distrito Kelluyo	11330.36
Distrito zepita	29613.41

CARLOS ERNESTO HUAMAN EGOAVIL
INGENIERO CIVIL
C.I.P. 40834

750 0 375 750 1500 3000
(EN METROS)
1:75,000

BEAR CREEK MINING COMPANY

Ausenco Vector
Calle Esquilache 371
Piso 6, San Isidro
Lima 27
Perú

MEM - DGAAM
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REV.	FECHA	DESCRIPCIÓN	DIBUJADO	DISEÑADO	REVISADO	APROBADO	PLANO Nº	REFERENCIA DE PLANOS
0	29/12/2010	PARA EMISIÓN	E.VALVERDE	F.SANTILLAN	C.HUAMÁN	T.SANFORD		

REF. MINEM 10/01/2011

REF. Informe N°399-2011-MEM-AAM
Respuesta a la Obs. 3

CLIENTE: BEAR CREEK MINING COMPANY
ESTUDIO DE IMPACTO AMBIENTAL - PROYECTO SANTA ANA

PLANO: DISTANCIAS DE CENTROS POBLADOS AL PROYECTO

DIBUJADO: E. VALVERDE · DISEÑADO: F. SANTILLAN · REVISADO: C.HUAMÁN · APROBADO: T.SANFORD · DATUM: PSAD56

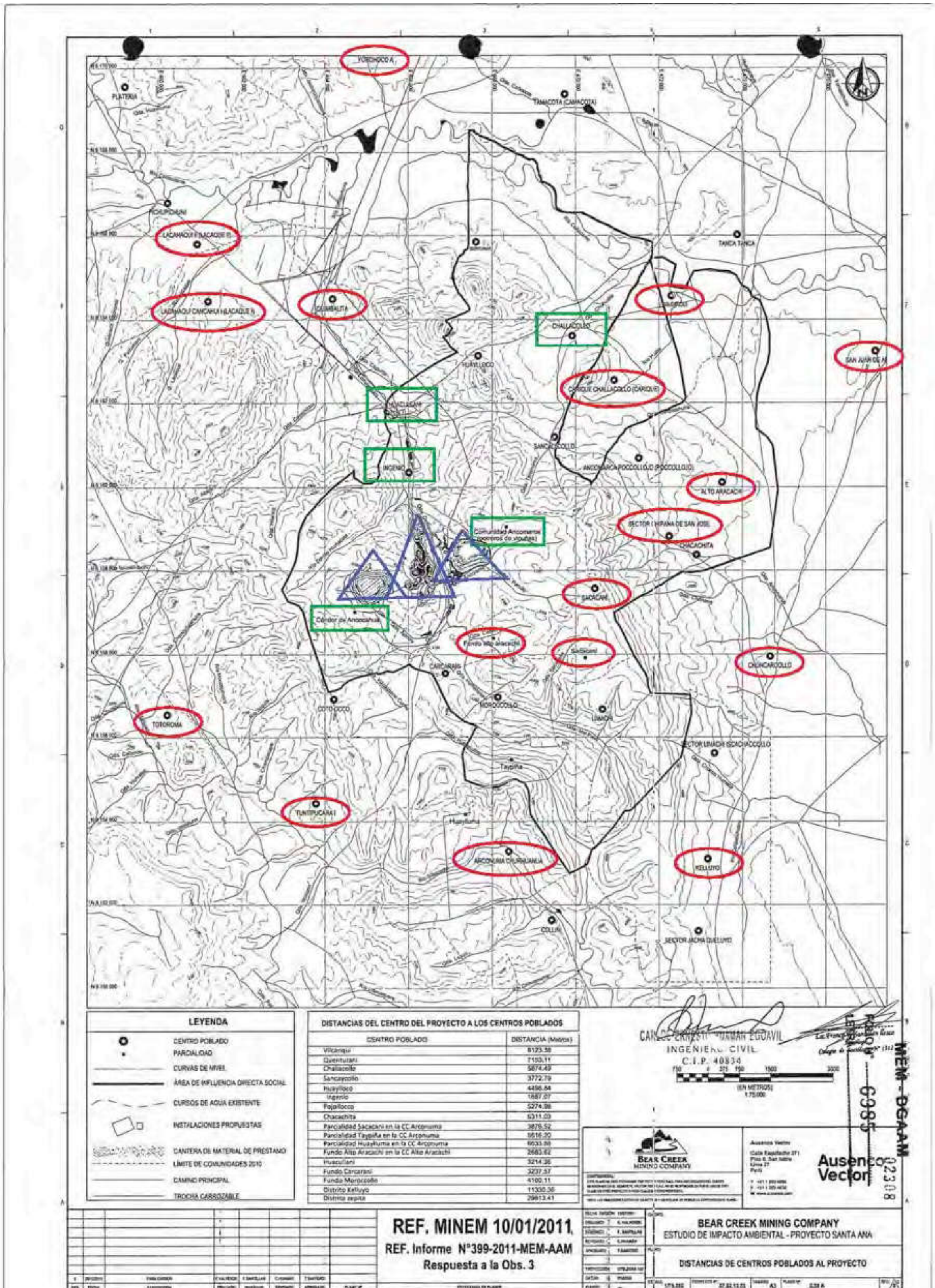
ESCALA: 1/75,000 · PROYECTO Nº: 07.82.13.03 · TAMAÑO: A3 · PLANO Nº: 2.30 A

PARA REVISIÓN

16. The map identifies a number of communities originally believed by the Claimant to fall within the Project's area of direct influence. These might be said to be "*the peoples concerned*". These communities ethnically and culturally belong to the Aymara group. They are indigenous peoples, who mostly engage in "*agriculture, small-scale fishing and livestock farming*",[16] activities that are closely connected to the land they inhabit. Moreover, for them this land "*is not only a geographical space but represents a spiritual bond for the communities*", including as "*the 'guardian mountains' [Apus], which represent extremely important spiritual sanctuaries for all the population in the area*."[17]

17. During the written pleadings, this map was modified by the Respondent to mark in green all those communities that had members employed by Claimant in one of its rotational work programmes. The members of other communities were not involved in any form of employment scheme related to the Santa Ana Project. These communities, said to be opposed to the Santa Ana Project, were marked in red on this map.[18]

[16] Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment – Puno ("DHUMA") and Dr. Lopez (10 June 2016) (Eng.), p. 3.
[17] ibid., p. 7.
[18] Exhibit R-312.


TOROHOCO A
PLATERIA
TAMACOTA (CAMACOTA)
TANCA TANCA
CHALLACOLLO
CARIQUE CHALLACOLLO (CARIQUE)
HUAYLLOCO
INGENIO
SANCAYCOLLO
ALTO ARACACHI
SECTOR I HIPANA DE SAN JOSE
CHACACHITA
Comunidad Ancomarca (obreros de vicuñas)
SACACANI
Condor de Ancocahua
Fundo Alto Aracachi
CARCARANI
CHUNCARCOLLO
MOROCCOLLO
COTO COTO
TOTOROMA
SECTOR LIMACHI ISCACHACCOLLO
Taypiña
TUNTIPUCARA I
Huayllurna
ARCONUMA CPUJHUANCA
KELLUYO
COLLIN
SECTOR JACHA QUELUYO
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18. It is apparent that the total number of communities marked in red is significant. These communities are not only amongst those that might be affected – whether directly or indirectly – by certain negative aspects of the Project, but also those that would not benefit from it in economic terms. The map appears to show that different communities were treated in a different way, and that all groups within Claimant's own identified area of influence – whether direct or indirect – were not treated in the same manner.

19. There was ample evidence before the Tribunal that the communities who began to protest in 2008 (and in later years, including 2011) tended to be those marked in red on this second map. This suggests a correlation between the two factors, and would appear to offer a possible explanation for the adverse responses – of certain communities – to the Santa Ana Project, and the role of the Claimant. The fact that Claimant did not – on the evidence before the Tribunal – take real or sufficient steps to address those concerns and grievances, and to engage the trust of *all* potentially affected communities, appears to have contributed, at least in part, to some of the population's general discontent with the Santa Ana Project, ultimately crystallising in the spring 2011 protests. The evidence before the Tribunal shows that the Claimant was put on notice as early as 2008 that numerous communities (marked in red) had strong objections, yet the evidence before the Tribunal made clear – to me at least – that it failed to take active – or, in some instances, any – steps to address the concerns of those communities.

20. One of the expert witnesses who appeared before the Tribunal, on behalf of the Respondent, was Professor Antonio Alfonso Peña Jumpa. He is a Professor at the Pontificia University of Peru. He holds degrees in law and in anthropology, including a doctorate from Leuven University in Belgium. He provided a clear summary of his two expert reports, and was then cross-examined by the Claimant. I found him to be an expert witness of obvious independence, who was persuasive and credible. No one of equivalent weight was put up against him. His testimony was clear, understated, balanced, focused and – in respect of its impact on me – significant.

21. Shown a copy of the map showing the communities marked in red and green, Professor Peña Jumpa told the Tribunal that the communities and *parcialidad* shown in green squares were "*beneficiarie*s" of the Santa Ana Project (Challacollo, Huacullani, Ingenio, Ancomarca and

Condor Ancocahua),[19] in the sense that they got jobs from it. He added that "*[t]he others, ones in red, can also be identified as communities or parcialidades*". They included Yorohoco, Arconuma, Churhuanua, Totoroma, Sacacani, Carique Challacollo and San Juan (connected with another community), and all of these were "*communities or parcialidades that are part of the zone*" affected by the Project.[20] Despite being, as he put it, "*fully connected*" to the area touched by the Project, these communities did not receive jobs related to it.[21] All of these communities, in red and in green as marked on the map, were, in his view, "*peoples concerned to the natural resources pertaining to their lands*" within the meaning of Article 15 of the Convention,[22] and thus entitled to "*participate in the benefits of [the investor's] activities*", as Article 15 of the Convention requires. These views were not seriously challenged by Claimant in cross-examination, or contradicted by other evidence before the Tribunal.

22. As regards consultation, and the claim that the workshops and *talleres* might be sufficient to win over these communities, Professor Peña noted that even amongst those communities that had been given jobs "*there was a lot of opposition*".[23] As he put it, "*many members of Challacollo, which supposedly is one of the communities that is favored [by the Project], came out against*."[24] This testimony was not dented in cross-examination.

23. The differences between the Parties on this point concerned, rather, whether all the markings on the map were to be treated as "*communities*". Questioned by a member of the Tribunal, the Claimant's President and Chief Executive, Mr Andrew Swarthout, asserted that:

> "*the towns in these little red circles are not communities. They are actually, at least some of them I – I can't say all of them, but it looks like most of them are actually what I would describe as little ranch clusters that belong to a community … these belong to communities that we did, in fact, have talleres and workshops and consultations with, so many, if not all, of these. My colleague, Elsiario Antunez de Mayolo can better address this particular map because he has a lot more granularity in the field, but I can say that many of these do not*

[19] Transcript at 1304:1-5.
[20] Transcript at 1304:17-21.
[21] Transcript at 1307:7-22.
[22] Transcript at 1383:18-1384:5.
[23] Transcript at 1308:8-13.
[24] Transcript at 1308:20-22.

constitute communities and, in fact, belong to communities that were in our community consult list, and we can establish that we've actually included all of these."[25]

24. Mr Antunez de Mayolo told the Tribunal that the red circles on the map represented "*groupings of housing units or small population centers that are within the communities*", that "*[t]hey are not communities but, rather, clusters of houses*."[26] He also stated that these "*clusters*" were included in workshops with the four or five communities that made up the area of direct influence,[27] and that the Claimant had held "informational workshops" for communities outside the area of direct impact.[28] Yet on cross-examination Mr Antunez de Mayolo accepted that there were four communities in the Project's area of direct influence,[29] and a further 32 communities in the area of indirect influence (14 in the Kelluyo District and 18 in the Huacullani District).[30] Mr Antunez de Mayolo also stated that he had not been aware of opposition to the Project before he started work in April 2010, but learned of it soon after;[31] and he confirmed that it was "*likely*" communities in the direct area who had employment in the exploration phase would be the ones "*most supportive of the project*"[32] (with the obvious implication that he accepted that others would oppose), but that even these supportive communities "*had concerns in connection with the Projects*."[33] He stated too that he did not speak Aymara, the language of the communities concerned.[34]

25. By contrast to the apparently limited knowledge or expertise of the Claimant's witnesses and experts on matters Aymara, Professor Peña Jumpa offered assistance that I found to be on point, reliable and balanced. In summarising his reports, he explained that the Aymara community, which was pre-Inca and had been in this southern area of Peru for "*a long time*",[35] had a significant relationship to the earth (Pachama in Aymara) which provides them with natural

[25] Transcript at 542:20-543:16.
[26] Transcript at 560:13-17.
[27] Transcript at 560:19-561:2.
[28] Transcript at 561:19- 562:6.
[29] Transcript at 573:19-574:2.
[30] Transcript at 574:9-11.
[31] Transcript at 576:16- 577:10.
[32] Transcript at 580:3-9.
[33] Transcript at 585:20-586:5.
[34] Transcript at 575:9-11.
[35] Transcript at 1289:14-18.

resources, and the mountains (Apus) which provide them with protection.[36] The Santa Ana Project was located in an area known as Chucuito. It included several districts, of which two – Huacullani and Kelluyo – were "*very important*".[37] He stated that the Santa Ana Project "*is exactly on the border between both Districts*" but that it also goes beyond these two districts with regard to its effects, which reach into "*adjacent areas such as Pisacoma ... and ... Desaguadero*", both of which became "*deeply involved in this conflict*", along with other areas (Zepita, Pomata and Juli).[38]

26. On the limitations of the Claimant's outreach activities he stated without equivocation, on the basis of interviews he had conducted, that:

> "*Bear Creek only worked with four communities and one Parcialidad in the area linked to the Mining Area. These four are Concepción de Ingenio, Challacollo, Ancomarca, and the urban community of Huacullani, and in addition, Condor Ancocahua is the Parcialidad. But the Company excluded ten communities identified by the mining company itself that were part of their area of influence and they were excluded as well as 12 communities from Kelluyo also located inside the area of influence that we see on the sketch.*"[39]

For this reason, he concluded that:

> "*Bear Creek's activities were not enough to obtain the communities' understanding and acceptance*".[40]

27. The effect of exclusion was significant:

> "*the members of the excluded communities began to protest against the Santa Ana Project. And these protests were part of a process ... [which] entailed four stages: The looting and burning of the camp in 2008, the Public Hearing in 2011, the organized opposition later on after the Public Hearing, and the social explosion in the upcoming days and weeks*."[41]

28. Moreover, in his view on the basis of the materials he had reviewed, even before the looting and burning in 2008:

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[36] Transcript at 1290:10-17.
[37] Transcript at 1292:6-7.
[38] Transcript at 1292:7-21.
[39] Transcript at 1293:11-22.
[40] Transcript at 1294:9-11.
[41] Transcript at 1294:13-20.

"*Bear Creek knew that the neighboring communities opposed the Project ... [they] knew of the protests in advance ... they had all this information, even a month in advance.*"[42]

In his opinion the 2008 protest "*was not an isolated terrorist act*"[43], and it was "*not true*" that it was an act carried out by outside forces.[44] The protesters came from the Huacullani and Kelluyo districts, and others: "*Only a small group from Huacullani supported the Project. Most of the members of the communities were against it, and that's why they participated in this act.*"[45]

29. The Claimant then withdrew temporarily from the Project, returning with what they said was "*a new strategy*".[46] On Professor Peña's view, however,

"*there was no new strategy, they continued to work with the same communities and the conflict just deepened.*"[47]

In other words, the evidence before the Tribunal made clear that the Claimant failed to take the lessons from a significant, early instance of protest.

30. The next stage commenced with the public hearing held on February 23rd, 2011. Professor Peña accepted that "*a large number of members of the community participated*", but based on interviews he concluded that "*some were forced to go to offer tacit approval, but the great majority of the members showed discomfort and discontent with the Project.*"[48] One major problem with the meeting was that it was held in Spanish, not in Aymara.[49] The evidence shows that at that meeting the affected population had "*serious concerns*".[50]

31. Thereafter,

"*[i]n March 2011, members of the Kelluyo, Huacullani, Desaguadero, Pisacoma, Zepita communities, among others met multiple times to organize the opposition and to call for the cancellation of the Santa Ana Project.*"[51]

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[42] Transcript at 1294:21-1295:1.
[43] Transcript at 1295:22.
[44] Transcript at 1296:6-8.
[45] Transcript at 1296:11-14.
[46] Transcript at 1296:15-18.
[47] Transcript at 1296:19-21.
[48] Transcript at 1297:12-15.
[49] Transcript at 1297:16-1298:3.
[50] Transcript at 1298:4-6.
[51] Transcript at 1298:9-13.

Many complaints were made to public authorities, but "*[t]here was no response by the local or regional Governments*"[52] This led to a "*social explosion*", starting with local protests in Huacullani in March 2011, which moved on to Desaguadero and Juli in April 2011, with the blockage of an international highway and closure of the bridge connecting Bolivia to Peru. A 48-hour regional strike followed, which offered "*a serious warning*" given the widespread participation, and then "*the death of a protester from Kelluyo, [which] worsened the situation amongst the community members*."[53] Thereafter,

> "*Protests spread to cities with larger populations, they moved on to Juli, that was the capital of the Province […] finally, we see the third phase, that is the radicalization of protests, protests at the Juliaca Airport … [a]nd the Aymara protests took place in Lima.*"[54]

32. The narrative is a compelling one, fully supported by the totality of evidence that is available to the Tribunal. Finally, Professor Peña offered his conclusion as to the investor's appreciation of the situation it faced:

> "*That Bear Creek, did not understand the Aymaras and they did not understand their communal relations. Despite opposition to the Project, Bear Creek continued using the same strategy that led to division amongst the communities. If Bear Creek had understood how to work properly with the communities – with the Aymara communities, the social conflict would not have reached crisis levels as we saw in the region.* "

He adds:

> "*If the mining activities had not been halted, the protests would have continued.*"[55]

33. In summary, it is apparent from his testimony, which is not really contradicted by the Claimant, that the investor's outreach programme was inadequate: it failed to involve all the potentially affected communities, offering jobs only to some and engaging in consultations which were uneven and insufficient across the totality of communities. What should the Claimant have done? Professor Peña says the Claimant should have dealt with communities as a collective: "*rather than focus on the communities that were close to the mining field … they should have*

[52] Transcript at 1298:21-22.
[53] Transcript at 1299:3-22.
[54] Transcript at 1300:5-1301:7.
[55] Transcript at 1301:12-1302:2.

included the other communities that they felt were affected."[56] He hazards the opinion that "*had they discussed with the entire collective [of communities] and reached an agreement, it is quite likely that the answer ... would have been different*."[57] Equally, he argues, a more equal distribution of jobs, and a different approach to their being offered, would have had positive consequences:

> "*The communities are interrelated. They are organized by district and province. There is a federation of comunidades campesinas in the South, and there is a federation in each of the districts. And you need to talk to the federations and say, 'This is a small project. It will focus here. We need your support so that we can distribute only 120, 150, 200 jobs. This is what we have available, and I'd like to coordinate with you how to best distribute them.*'"[58]

34. The lesson seems now to have been learned by the Claimant, but too late. During the hearing Mr Swarthout confirmed that in the later Corani Project the company had drawn a bigger radius for its consultations, now extending for over 50 kilometres, so as to "*solidify a social license in a much bigger radius than normally we would feel that we should do*."[59] I understood this as accepting, in effect, the force of Professor Penã's approach.

35. For my part, I was convinced by Professor Peña's testimony. I waited for an attack on its central core, but none came. On the basis of it, and the totality of the evidence before the Tribunal, it is clear that the Claimant did not do all it could have done to engage with all the affected communities, especially after the initial protests in 2008. That evidence also makes clear that the Claimant failed to acknowledge that those events were motivated, in significant part, by the fact that certain affected (or potentially affected) communities had serious concerns with the Project because of its potential environmental risks, and because they felt themselves to be excluded from its benefits. The Claimant failed to draw the obvious and necessary conclusions from the early indications of opposition in 2008, in particular the need to improve its community outreach and relations.

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[56] Transcript at 1357:5-8.
[57] Transcript at 1357:8-10.
[58] Transcript at 1358:11-19.
[59] Transcript at 539:3-13.

36. This conclusion is confirmed by the helpful *amicus curiae* submission of DHUMA. This contended that Claimant's failure to engage in proper community relations contributed to the losses it suffered, noting also that members of certain communities felt unable to participate in the public meeting in February 2011, as there was only limited space available.[60] In its Reply to the *amicus*, the Claimant criticised DHUMA's written submissions, *inter alia*, for being biased and unsubstantiated,[61] and it described DHUMA as representing a "*radical anti-mining position*".[62] Claimant is of course entitled not to share the policies or objectives of DHUMA, but given its investment in a project located thousands of miles from its home, in an area populated by local communities who are recognised by ILO Convention 169 and other rules of international law as having legitimate interests in the use of their lands, it may want to reflect on its approach to such interests. As an international investor the Claimant has legitimate interests and rights under international law; local communities of indigenous and tribal peoples also have rights under international law, and these are not lesser rights. In my view, DHUMA assisted the Tribunal "*by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties*."[63] Its participation in these proceedings was helpful and polite at all times, and added to perceptions of the legitimacy of ICSID proceedings of this kind.

37. As regards the role of the Respondent, it too has legitimate interests and rights, including respect for the rights of the Claimant under the Canada-Peru FTA. By the means in which Decree 032-2011 was adopted, and perhaps also for the failure to respond effectively to the complaints received in 2011, as noted by Professor Peña, it bears a significant share of the responsibilities. It may be the function of a State or its central government to deliver a domestic law framework that ensures that a consultation process and outcomes are consistent with Article 15 of ILO Convention 169, but it is not their function to hold an investor's hand and deliver a "social license" out of those processes. It is for the investor to obtain the "social license", and in this case it was unable to do so largely because of its own failures. The Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license.

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[60] Amicus Curiae Brief, p. 6.
[61] Claimant's Reply to Amici (18 August 2016), p. 2.
[62] ibid.
[63] ICSID Rules of Procedure for Arbitration Proceedings, Rule 37(2).

38. The Claimant's contribution to the events that led to Supreme Decree 032-2011-EM being adopted has implications for the amount of damages to be awarded. As set out in the Award,[64] by the time Supreme Decree 032 was adopted the prospects for the Santa Ana Project were already dismal, if indeed they continued to exist at all. Many environmental and other permits were still to be granted, and the nature and extent of the opposition made it clear that there was no real possibility of the Project soon obtaining the necessary "social license". For this reason, the proper measure of damages for the unlawful effects of Supreme Decree 032 is, as the Award makes clear, to be assessed by reference to the financial contribution made to the Project.

39. That financial contribution amounted to US$ 18,237,592. I conclude that the Claimant's contribution was significant and material, and that its responsibilities are no less than those of the government. For this reason I would reduce the measure of damages by one half, to US$ 9,118,796.

40. This has consequences on the allocation of the costs of this arbitration. As I have laid out in this Dissenting Opinion, I am of the view that the actions of the Claimant and Respondent have contributed to the demise of the Project. It is for this reason that I do not share the Majority's reasoning at paragraphs 730-736 of the Award. Instead, I believe that the costs of these proceedings should be split equally between the Parties.

41. The only other point I wish to make concerns the legitimate right of a Party to the Canada-Peru FTA "*to regulate and to exercise its police power in the interests of public welfare*",[65] a point made by Canada in its submission.[66] The Majority has ruled at paragraph 473 that Article 2201.1 of the FTA, which provides for a list of exceptions that fall within a State's legitimate exercise of its police powers, is exhaustive. I do not disagree with this analysis, but wish to make clear that my support for this conclusion is without prejudice to the application of Article 25 of the ILC Articles on State Responsibility, which deals with acts of Necessity. As the Annulment Committees in *CMS* and *Sempra* made clear, the operation of a *lex specialis* in a

[64] Award, paras. 155- 202.
[65] ICSID Case No. ARB/03/17, *Suez InterAgua v The Argentine Republic*, Decision on Liability (30 July 2010), para. 128.
[66] Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement (9 June 2016), para. 5.

BIT does not have the effect (unless the BIT explicitly provides otherwise) of precluding the operation of Article 25, which continues to function as a "*secondary rule of international law*" operating even when an exception under the *lex specialis* is not available.[67] In the present case, the conditions of Article 25 are not met because the act in question – the revocation of Supreme Decree 083-2007 – was not "*the only way for [Peru] to safeguard an essential interest against a grave and imminent peril*". As noted above, and in the Award, other options were available, including suspension of Decree 83-2007. Nevertheless, whatever the requirements of the FTA, the possibility of having recourse to Article 25, as a rule precluding wrongfulness, is not excluded by the FTA.

Professor Philippe Sands QC, Arbitrator

12 September 2017

[67] ICSID Case No. ARB/01/8, *CMS Gas Transmission Company v The Argentine Republic*, Annulment Decision (25 September 2007), paras. 133-134; ICSID Case No. ARB/02/16, *Sempra Energy International v The Argentine Republic*, Annulment Decision (29 June 2010), paras. 203- 204 & 208-209.

[signed]

Professor Philippe Sands QC, Arbitrator

12 September 2017